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WEIGHING THE CONSTITUTIONALITY OF STATE IMMIGRATION VERIFICATION LAWS IN THE WAKE OF *ARIZONA V. UNITED STATES*

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In the wake of *Arizona v. United States*, it is settled that state immigration verification laws like Section 2(B)[1] are facially constitutional.[2] At the same time, the Supreme Court did not foreclose that Section 2(B) could be preempted in terms of its application, nor did the Court shield the law from subsequent civil rights litigation.[3] Thus, the question moving forward is "under what circumstances, if any, can Section 2(B) be held unconstitutional?" The question is important not only for unlawful immigration impacted states like Arizona, but to a number of states that have enacted similar laws.[4] In each case, the law requires state officials to verify the immigration status of persons during lawful police stops or when arrested. The purpose of these laws is simple and straight forward—to assist the federal government in the enforcement of federal immigration law through a theory dubbed "attrition through enforcement."[5]

From the very outset, opponents proclaimed these laws unconstitutional on the grounds that they will lead to a myriad of civil rights violations and impede on United States foreign affairs.[6] Opponents used law review arti-

1 ARIZ. REV. STAT. ANN. § 11-1051(B) (Supp. 2010) (requires every "law enforcement official or agency" to make a "reasonable attempt" at verifying an alien's immigration status where a "reasonable suspicion" arises that the alien is unlawfully present).

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

3 *Id.* at 2510 ("This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.").

4 *See* MO. REV. STAT. § 577.680 (2010); UTAH CODE ANN. § 76-9-1003(B) (2011); IND. CODE. § 11-10-1-2(a)(4) (2012); Illegal Immigration Reform and Enforcement Act of 2011. H.B. 87, Article 5(b) (Ga. 2011); An Act Relating to Illegal Immigration, H.B. 56, §12(a) (Ala. 2011).

5 *See* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 153 (2008).

6 For some different scholarly approaches arguing that these verification laws are unconstitutional exercises of state power, *see* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FL. STATE UNIV. L. REV. 965 (2004); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 UNIV. CINN. L. REV. 1373 (2006); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U.

cles,[7] news outlets,[8] and the Internet[9] to convince the American public and the courts that the laws facially endorse unconstitutional racial profiling. And to their disappointment,[10] not one Supreme Court Justice found that Section 2(B) was facially unconstitutional in this regard.[11]

The survival of Section 2(B) to a facial challenge comes as no surprise to those familiar with the ins and outs of constitutional precedent, federal immigration law, and preemption doctrine.[12] In past decisions, the Supreme Court has stated an officer's inquiry into immigration status is not a violation of the Fourth Amendment.[13] Furthermore, there is precedent stipulating that race may be considered as a factor in raising a reasonable suspicion

CHI. LEGAL F. 27 (2007). *See also generally* Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994). For a rebuttal to these approaches, *see* Patrick J. Charles, *Recentering Foreign Affairs Preemption in Arizona v. United States: Federal Plenary Power, the Spheres of Government, and the Constitutionality of S.B. 1070*, 60 CLEV. ST. L. REV. 133 (2012) [hereinafter *Recentering Foreign Affairs Preemption*]; David Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 145-51 (2013).

7 *See* Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. 1 (2012); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012); Keith Cunningham-Parameter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 AM. U. MODERN AM. 42 (2011); David A. Selden, Julie A. Pace, Heidi Nunn-Gilman, *Placing S.B. 1070 and Racial Profiling Into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523 (2011); Jennifer M. Chacon, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010); Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro, and Marc L. Miller, *A Legal Labyrinth: Issues Raised By Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

8 *See, e.g.*, Christina Boomer, *State Law Professor Claims SB 1070 'Expressly Authorizes Racial Profiling'*, ABC15.COM (July 26, 2010), www.abc15.com/dpp/news/state/state-law-professor-claims-sb1070-'expressly-authorizes-racial-profiling'.

9 *See* Kevin Johnson, *Response to Arizona v. United States symposium contributors*, SCOTUSBLOG (July 19, 2011, 10:53 AM), http://www.scotusblog.com/2011/07/response-to-arizona-v-united-states-symposium-contributors/ / (stating state enforcement will increase racial profiling, which would impose a discriminatory burden not contemplated by Congress); Marjorie Cohn, *Arizona Legalizes Racial Profiling*, JURIST (Apr. 27, 2010), http://jurist.law.pitt.edu/forumy/2010/04/arizona-legalizes-racial-profiling.php.

10 *See* Lucas Guttentag, *Strong on Theory While Profiling Ignored*, SCOTUSBLOG (June 25, 2012, 7:03 PM), http://www.scotusblog.com/2012/06/online-symposium-strong-on-theory-while-profiling-ignored/; Kevin Johnson, *The Debate Over Immigration Reform Is Not Over Until It's Over*, SCOTUSBLOG (June 25, 2012, 8:14 PM), http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over/; Roberto Clintli Rodriguez, *Racial Profiling in Arizona: SB 1070 2(b) and Not to Be*, TRUTHOUT (June 29, 2012, 1:11 PM), http://truthout.org/news/item/10071-arizonas-sb-1070-2b-and-not-to-be.

11 Arizona, 132 S. Ct. at 2507–11; *id.* at 2511–12- (Scalia, J., concurring in part and dissenting in part); *id.* at 2522–23 (Thomas, J., concurring in part and dissenting in part); *id.* at 2524–30 (Alito, J., concurring in part and dissenting in part); *See also* David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41, 44–45 (2012).

12 *See, e.g.*, Charles, *Recentering Foreign Affairs Preemption ,supra* note 6, at 158.

13 *See* Muehler v. Mena, 544 U.S. 93, 95 (2005); *see also* Brian R. Gallini & Elizabeth L. Young, *Car Stops, Borders, and Racial Profiling: The Hunt for Undocumented (Illegal?) Immigrants in Border Towns*, 89 NEB. L. REV. 709, 731–32 (2011) (discussing the constitutionality of immigration verification in the constraints of the Fourth Amendment). *But see* Santos v. Frederick County Board of Commissioners, 2013 U.S. App. LEXIS 16335, at 26 (4th Cir. 2013) ("absent express direction or authorization by federal statute or federal officials, state and local law enforcement officials may not detain or arrest an individual solely based on suspected civil violations of federal immigration law.").

that a person is unlawfully present.[14] Then there are the federal statutes that require Immigration Customs and Enforcement (ICE) to respond to any state and local inquiries regarding immigration status.[15] When one applies these legal facts to the text of Section 2(B), it would have been a complete reversal of precedent and contrary to congressional intent if the law had not survived a facial preemption challenge.[16] Still, the survival of Section 2(B) is not a *carte blanche* for state officials to detain persons suspected of being unlawfully present.[17] The Court majority was rather clear on this point, stating, "[d]etaining individuals *solely* to verify their immigration status would raise constitutional concerns."[18] It is here, that the Court majority provided a hypothetical roadmap of "what to" and "what not to" do. On the one hand, the majority found nothing wrong with the verification of immigration status for lawful detentions so long as the state is within the bounds of "federal direction and supervision."[19] On the other, immigration verifications cannot result in "prolonged detention" as to violate the Fourth Amendment.[20] Unfortunately, no further guidance was provided, leaving it to the lower courts to determine whether Section 2(B) and similar state immigration verification laws are being enforced within the four corners of the Constitution.[21]

14 *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (holding that "[i]n all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling"); Whren v. United States, 517 U.S. 806, 813 (1996) (stating that race can be a factor used to articulate "reasonable suspicion," but race can not be used as a pretext); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006, 1023, 1075 (2010) (arguing against the precedent that stipulates that race may be used as a factor in raising reasonable suspicion); Kathleen Kim, *Perspectives on Immigration Reform*, 44 LOY. L.A. L. REV. 1323, 1326 (2011) (arguing that the U.S. Supreme Court has effectively authorized racial profiling in law enforcement).

15 8 U.S.C. § 1357(g)(10)(B) (2012); 8 U.S.C. § 1373(c) (2012). ICE is proud of its cooperation with state and local law enforcement agencies in this area. *See Law Enforcement Support Center*, IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/lesc/. *See also* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 127 (2014) ("The strongest signs of such permission [to verify immigration status] are federal laws that outline a state or local role. Key is section 1373(c) of title 8 of the United States Code, which requires the federal government to respond to state or local requests to check any individual's citizenship or immigration status.").

16 *See* Arizona, 132 S. Ct. at 2509–10. A number of lower federal courts disagreed and preempted the state immigration verification laws under a myriad of preemption theories. *See* United States v. Arizona, 641 F.3d 339, 349, 352 (9th Cir. 2011); Georgia Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317, 1330, 1332, 1335–36 (N.D. Ga.2011); United States v. South Carolina, 840 F. Supp. 2d 898, 914 (D. S.C.2011).

17 Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 718 (2013) (stating the Supreme Court's ruling on 2(B) does not permit states to "engage in anti-unauthorized-immigrant rulemaking when such action intrudes upon the federal government's plenary power to determine 'immigration' law.").

18 Arizona, 132 S. Ct. at 2509 (emphasis added).

19 *Id.*

20 *Id.*

21 It is worth noting that a number of circuit court decisions have provided precedent addressing this point. *See* Estrada v. Rhode Island, 594 F. 3d 56, 63–65 (1st Cir. 2010); United States v. Vasquez-

And then there is the racial profiling question—can state immigration verification laws be found unconstitutional on racial profiling grounds? As Rick Su astutely points outs, the potential for racial profiling in state immigration verification laws like Section 2(B) is "real and worrisome," but nothing in them "directly encourages, authorizes, or otherwise expands [the] practice."[22] In fact, of the five states that maintain lawful stop immigration verification laws (*see* Chart I), not one permits racial profiling. Each law requires state officials to adhere to the constitutional search, seizure, and detention protections embodied by both the Fourth Amendment and the respective state constitutional provision.[23] Thus, unless precedent is severely altered to eliminate race and immigration status as a factor for raising a reasonable suspicion, state immigration verification laws must be presumed a constitutional exercise of state authority.[24]

CHART I

PROMINENT STATE IMMIGRATION VERIFICATION LAWS APPLICABLE TO LAWFUL STOPS

State	*Immigration Verification Provision*	*Ancillary Burden Protections Provided by Law*
Alabama	Upon any lawful stop, detention, or arrest made by a state, county, or municipal law enforcement officer of this state in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reason-	A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer any of the following: (1) A valid, unexpired Alabama driver's license. (2) A valid, unexpired Alabama nondriver identification card. . .(4) Any valid United States federal or state

Alvarez, 176 F.3d 1294, 1297–98 (10th Cir. 1999); Gonzalez v. Peoria, 722 F. 2d 468, 474, 476 (9th Cir. 1983), *overruled on other grounds*; Hodgers-Durgin v. De La Vina, 199 F. 3d 1037, 1043–44 (9th Cir. 1999).

22 Rick Su, *Arizona's New Immigration Law*, 109 MICH L. REV. FIRST IMPRESSIONS 76, 77 (2010).

23 MO. REV. STAT. § 577.680 (2010); UTAH CODE ANN. § 76-9-1003(B) (2011); IND. CODE. § 11-10-1-2(a)(4) (2012); Illegal Immigration Reform and Enforcement Act of 2011. H.B. 87, Article 5(b) (Ga. 2011); An Act Relating to Illegal Immigration, H.B. 56, §12(a) (Ala. 2011).

24 Arizona, 132 S. Ct. at 2516 (Scalia, J., concurring in part and dissenting in part) ("And I know of no reason why a protracted detention that does not violate the Fourth Amendment would contradict or conflict with any federal immigration law.").

	able attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation. Such determination shall be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) and relying upon any verification provided by the federal government. . .A law enforcement official or agency of this state or a county, city, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution and the Constitution of Alabama of 1901.	government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance. (5) A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States. (6) A foreign passport issued by a visa waiver country with the corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the United States Department of Homeland Security indicating the bearer's admission to the United States.
Arizona	For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state. . . where reasonable suspicion exists that the person is an alien who and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration sta-	A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following: 1. A valid Arizona driver license. 2. A valid Arizona nonoperating identification license. . .4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

	tus shall be verified with the federal government pursuant to 8 United States code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.	
Georgia	During any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect's immigration status when the suspect is unable to provide [proof]. . .A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and the United States.	[Proof of immigration status is met] when the suspect is able to provide one of the following: (1) A secure and verifiable document as define in Code Section 5-36-2; (2) A valid Georgia driver's license; (3) A valid Georgia identification card issued by the Department of Driver Services; (4) if the entity requires proof of legal presence in the United State before issuance, any valid driver's license from a state or district of the United States or any valid identification document issue by the United States federal government; (5) A document used in compliance with paragraph (2) of subsection (a) of Code Section 40-5-21; or Other information as to the suspect's identity that is sufficient to allow the peace officer to independently identify the suspect.
South	If a law enforcement officer of	If the person provides the of-

Carolina	this State or a political subdivision of this State lawfully stops, detains, investigates, or arrests a person for a criminal offense, and during the commission of the stop, detention, investigation, or arrest the officer has reasonable suspicion to believe that the person is unlawfully present in the United States, the officer shall make a reasonable effort, when practicable, to determine whether the person is lawfully present in the United States, unless the determination would hinder or obstruct an investigation. . . A law enforcement officer may not attempt to make an independent judgment of a person's lawful presence in the United States. A law enforcement officer may not consider race, color, or national origin in implementing this section, except to the extent permitted by the United States or South Carolina Constitution. This section must be implemented in a manner that is consistent with federal laws regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of United States citizens.	ficer with a valid form of any of the following picture identifications, the person is presumed to be lawfully present in the United States: (a) a driver's license or picture identification issued by the South Carolina Department of Motor Vehicles; (b) a driver's license or picture identification issued by another state; (c) a picture identification issued by the United States, including a passport or military identification; or (d) a tribal picture identification.
Utah	Any law enforcement officer who, acting in the enforcement of any state law or local ordinance, conducts any lawful stop, detention, or arrest of	A person is presumed to be lawfully present in the United States for the purposes of this part if the person provides one of the following documents to

	a person. . .and the person is unable to provide to the law enforcement officer a document listed in Subsection 76-9-1004(1) and the officer is otherwise unable to verify the identity of the person, the officer. . . shall request verification of the citizenship or the immigration status of the person under 8 U.S.C. Sec. 1373(c). . . A law enforcement officer may not consider race, color, or national origin in implementing this section, except to the extent permitted by the constitutions of the United States and this state.	the law enforcement officer, unless the law enforcement officer has a reasonable suspicion that the document is false or identifies a person other than the person providing the document: (a) a valid Utah driver license issued on or after January 1, 2010; (b) a valid Utah identification card issued under Section 53-3-804 and issued on or after January 1, 2010; (c) a valid tribal enrollment card or other valid form of tribal membership identification that includes photo identification; (d) a valid identification document. . .A person is presumed to be a citizen or national of the United States for purposes of this part if the person makes a statement or affirmation to the law enforcement officer that the person is a United States citizen or national, unless the officer has a reasonable suspicion that the statement or affirmation is false.

Still, this does not mean that state immigration verification laws are completely saved from preemption. As this Article sets forth to discuss, the Court majority was correct to leave the question unsettled,[25] for once state immigration verification laws are put into force, there remains the question of whether the laws can be enforced objectively as to not impose

[25] *Id.* at 2510 ("The nature and timing of this case counsel caution in evaluating the validity of § 2(B).").

ancillary burdens on aliens lawfully present.[26] Providing an answer to this question first requires an examination of each state law's text and structure. If the law's text does not impose ancillary burdens and serves the purpose of deterring unlawful immigration, it is constitutionally permissible. Conversely, if the law does impose ancillary burdens outside of what federal law already prescribes, it is preempted. Surviving the first step does not end the inquiry. Although the text of the law proves to be constitutionally objective, it does not preclude that there is sufficient evidence that the law is being subjectively enforced. In other words, if there is sufficient evidence that state officials are enforcing the law disproportionately based on race, ethnicity or country of origin, the law cannot be enforced objectively, and is therefore unconstitutional.

I. THE CONSTITUTIONALITY OF STATE IMMIGRATION VERIFICATION LAWS UNDER TRADITIONAL PREEMPTION DOCTRINE

Since its first immigration preemption case in 1837, the Supreme Court has consistently held that state authority over immigration is limited to its historic police powers, or when the state regulation works in accordance with federal policy as to not impede or impose new conditions on lawful residence.[27] Meanwhile, any state regulation that may affect or disrupt the federal scheme concerning the entrance, expulsion, removal or conditions of residence is preempted because it impedes on United States' foreign policy objectives.[28]

26 *See* Charles, *Recentering Foreign Affairs Preemption, supra* note 6, at 156 (discussing that the Section 2(B) could be susceptible to foreign affairs preemption).

27 New York v. Miln, 36 U.S. 102, 137–38 (1837) ("whilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power: subject, only, say the Court, of the state must yield to the law of congress. The Court must be understood, of course, as meaning that the law of congress is passed upon a subject within its sphere of power.").

28 *Id.* at 142–43. *See also* Hines v. Davidowitz, 312. U.S. 52, 65–67 (1941) ("Legal imposition of distinct, unusual and extraordinary burdens and obligation upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one. Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs...And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."); DeCanas v. Bica, 424 U.S. 351, 358 n.6 (1976) ("State laws which impose discriminatory burdens upon the entrance or residence of *aliens lawfully within* the United States conflict with this constitutionally derived federal power to regulate immigration, and have ac-

On their face, state immigration verification laws like Section 2(B) do not violate these overlying principles under either express or implied preemption doctrines.[29] Beginning with express preemption, there is nothing in the federal immigration scheme that expressly prohibits state and local law enforcement from inquiring about immigration status. In fact, the federal immigration scheme, particularly 8 U.S.C §§ 1357(g) (10) and 1373(c), makes it unlawful for any state or locality to prohibit the transmission of immigration data as a means "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present."[30] Thus, the Supreme Court was correct to hold the federal scheme "leaves room for a policy requiring state officials to contact ICE as a routine matter."[31]

In terms of implied preemption, there are two doctrines—conflict preemption and obstacle preemption. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility,"[32] and obstacle preemption takes place when state laws "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[33] The reason that obstacle preemption is a non-issue rests on the fact that both the federal immigration scheme and state verification immigration laws serve the same objective of detecting and deterring unlawful immigration.[34] Put another way, to trigger obstacle preemption would have required a finding that the federal scheme does not seek to identify, detain, and remove unlawful immigrants. The text and history of the federal immigration laws cannot conceivably support such a conclusion.

Implied preemption analysis, however, was not so easily satisfied. On the one hand, when the constitutionality of Section 2(B) was before the Ninth Circuit Court of Appeals, the three judge panel was correct to ques-

cordingly been held invalid.") (emphasis added).

29 Arizona, 132 S. Ct. at 376–79.

30 8 U.S.C. § 1357(g)(10)(B) (2012); 8 U.S.C. § 1373(c) (2012).

31 Arizona, 132 S. Ct. at 377.

32 Wyeth v. Levine, 555 U.S. 555, 589 (2009) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

33 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

34 The Eighth Circuit Court of Appeals recently made an important distinction between state laws that deter or prevent unlawful immigration and those that regulate the entry, exit, and residence of immigrants as a whole:

"Laws designed to deter, or even prohibit, unlawfully present aliens from residing within *a particular locality* are not tantamount to immigration laws establishing who may enter or remain in the country. Indeed, Plaintiffs' expansive notion of constitutional and field preemption is contrary to decisions of the Supreme Court expressly recognizing that a State may enact an otherwise valid law[7] that deters unlawfully present aliens from residing within the State, notwithstanding the federal government's exclusive power in controlling the nation's borders." Keller v. City of Fremont, 791 F.3d 931, 941(8th Cir. 2013).

tion the states compelling law enforcement to verify immigration status during lawful stops.[35] A cursory reading of 8 U.S.C. § 1357(g) shows that Congress established a system for state and local law enforcement officials to enforce immigration law—the 287(g) program.

By entering into an agreement with the Attorney General, the state or locality's officials would "be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."[36] Thus, one may argue that any verification of immigration status at the state level, absent a federal agreement to do so, conflicts with Congress's purpose of establishing a system for states and political subdivisions to enforce federal immigration law.

On the other hand, the Ninth Circuit's reading of 8 U.S.C. § 1357(g) faltered in that it is nonsensical. Reading the statute in its entirety, not piecemeal, indicates the 287(g) program makes state and local officials the near equivalent of federal immigration officials.[37] In other words, political subdivisions that enter into the 287(g) program may enforce portions of federal immigration law when in contact with an unlawfully present immigrant, often without the express direction of a federal official.[38] Indeed, the 287(g) program places the state or local officials under the "direction and supervision of the Attorney General,"[39] but this does not preclude state and local officials from making independent immigration decisions when necessary.

This understanding of congressional purposes and objectives for the 287(g) program is supported by the text of 8 U.S.C. § 1357(g)(1). For an official to be "qualified to perform a function of an immigration officer in relation to the *investigation*, apprehension, or detention of aliens" is to have some *independent* authority to act.[40] In contrast, 8 U.S.C. § 1357(g)(10) does not grant state and local officials any discretionary authority. It merely authorizes communication with federal officials by requiring "cooperat[ion] with the Attorney General in the *identification*, apprehension, detention, or removal of aliens not lawfully present in the United States."[41] There is a substantial difference between having federal *investigatory* authority, and *cooperating* with the Attorney General to identify unlawfully present aliens. The former is quasi-independent authority under the color of federal law, and the latter requires the full cooperation and assistance of

35 United States v. Arizona, 641 F.3d 339, 352–53 (9th Cir. 2011).
36 8 U.S.C. § 1357(g)(1) (2012).
37 *Id.* at § 1357(g)(2)–(3), (8).
38 *See* Gallini & Young, *supra* note 13, at 73031.
39 8 U.S.C. § 1357(g)(3).
40 *Id.* § 1357(g)(1) (emphasis added).
41 *Id.* § 1357(g)(10) (emphasis added).

the federal authorities.

Therefore, there can be no implied preemption to state immigration verification laws that require full cooperation with federal authorities. Unless state or local officials are compelled to make *independent* determinations of an individual's immigration status, the law is a constitutional exercise of state authority. Here again, the Supreme Court agreed. The *Arizona* majority held that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision."[42] The question the Court refused to answer, however, is whether Section 2(B) and other state immigration verification laws will be enforced in a manner that does not cooperate with federal authorities, for the Court felt there remains "a basic uncertainty about what the laws mean and how it will be enforced."[43]

It is for this reason that the interpretation and application of text becomes crucial to the constitutionality of state immigration verification laws. Fortunately, for its proponents, the overwhelming majority of state immigration verification laws require a federal determination of immigration status before the person may be detained by state officials. For instance, Utah's Code requires any verification of immigration status to be submitted to the Department of Homeland Security in accordance with 8 U.S.C. § 1373(c).[44] In such cases, immigration verifications can only take place by Utah law enforcement officials when a "reasonable suspicion" is present in accordance with the United States and Utah Constitutions.[45]

Georgia's H.B. 87 similarly requires that state officials check the immigration status of suspected unlawful aliens in accordance with 8 U.S.C. § 1373(c), but stipulates a higher "probable cause" standard instead of mere "reasonable suspicion."[46] Moreover, Georgia's verification law prohibits the use of "race, color, or national origin" for the officer to articulate the necessary probable cause.[47]

Even Alabama's controversial[48] H.B. 56 is not a freewheeling exercise of state police authority. The law requires both a "reasonable suspicion" of unlawful status and cooperation with the federal immigration scheme:

42 Arizona, 132 S. Ct. at 377.

43 *Id.* at 378.

44 UTAH CODE § 76-9-1003(1)(a)(i) (2012).

45 *Id.* §§ 76-9-1003(2)(a)–(b) (2012).

46 Illegal Immigration Reform and Enforcement Act of 2011. H.B. 87, Art. 5(b) (Ga. 2011).

47 *Id.*, Art. 5(d).

48 *See, e.g.*, Keith Rushing, *Alabama's HB56 Shows Racism Still Part of State Culture*, THE HUFFINGTON POST (Oct. 4, 2011), http://www.huffingtonpost.com/keith-rushing/alabamas-immigration-law_b_992801.html (improperly claiming Alabama's immigration verification law "requires" racial profiling).

Upon any lawful stop, detention, or arrest made by a state, county, or municipal law enforcement officer of this state in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation. Such determination shall be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) and relying upon any verification provided by the federal government.[49]

Of course, state immigration verification laws are not limited in application to lawful stops. A number of states require the verification of all persons booked and jailed. These laws serve the purpose of assisting in the enforcement of federal immigration law by identifying unlawful aliens that have already been charged with a violation of state law. Such laws are less susceptible to traditional preemption doctrine because the verification is less likely to intrude into the federal sphere or raise Fourth Amendment concerns. In other words, these laws (a) do not regulate immigration law within the federal sphere, (b) fall within a state's sphere of criminal law without undermining the federal scheme, and (c) do not impose discriminatory burdens given the verification takes place after a person is charged with a state crime.[50] However, as with state laws compelling officials to verify immigration status during lawful stops, the constitutionality of these laws requires the verification to be in accordance with the federal authorities (*see* Chart II for summary).[51] Any federally independent decision must be preempted as inconsistent with congressional intent.

CHART II

THREE LEVELS OF PREEMPTION ANALYSIS SUMMARY

	Lawful Stop Verification	*Criminal Verification*
Express Preemption	No, federal immigration	No, federal immigration

49 An Act Relating to Illegal Immigration, H.B. 56, §12(a) (Ala. 2011).

50 These factors are important in terms of preemption doctrine. *See* . Charles, *Recentering Foreign Affairs Preemption, supra* note 6, at 157.

51 Indiana's Code provides a constitutionally objective example in this regard. Section 11-10-1-2(a)(4) requires all "committed criminal offender[s]" to have their immigration status checked in accordance with 8 U.S.C. § 1373(c). INDIANA CODE § 11-10-1-2(a)(4) (2012).

	law does not expressly prohibit the states from passing immigration verification laws.	law does not expressly prohibit the states from passing immigration verification laws.
Obstacle Preemption	No, the federal immigration scheme and state verification laws both seek to detect and deter unlawful immigration.	No, the federal immigration scheme and state verification laws both seek to detect and deter unlawful immigration.
Conflict Preemption	No, so long as law requires federal identification of immigration status in accordance with federal law.	No, so long as law requires federal identification of immigration status in accordance with federal law.

II. THE CONSTITUTIONALITY OF STATE IMMIGRATION VERIFICATION LAWS UNDER FOREIGN AFFAIRS PREEMPTION

In addition to traditional express and implied preemption doctrines there is a third tier of preemption that I have referred to in a previous writing as foreign affairs preemption.[52] It stipulates that state or local immigration laws will be preempted if they (1) regulate a facet of immigration policy solely within the federal sphere of government,[53] (2) regulate immigration outside the traditional state or local government's sphere or in a manner that undermines the federal scheme,[54] or (3) if the laws impose discriminatory burdens on the alien class as a whole—lawful and unlawful.[55]

This three-part inquiry is consistent with the intent behind ratifying the Constitution to ensure a "more perfect Union."[56] The founding generation

52 Charles, *Recentering Foreign Affairs Preemption*, *supra* note 6, at 145.

53 *See* Miln, 36 U.S. at 132–139; Hines , 312 U.S. at 62–63; DeCanas, 424 U.S. at 354–55; Plyer, 457 U.S. at225; Toll, 458 U.S. at 11.

54 *See* Hines, 312 U.S. at 66; DeCanas, 424 U.S. at 356–62; Plyer, 457 U.S. at 225; Toll, 458 U.S. at 14–17.

55 *See* Hines, 312 U.S. at 69; DeCanas, 424 U.S. at 358 n.6; Plyer, 457 U.S. at 219 n.19; Toll, 458 U.S. at 13. For a three-part approach to foreign affairs preemption generally, to include immigration preemption issues, *see* Harold G. Maier, *Preemption of State Law, A Recommended Analysis*, 83 A.J.I.L. 832 (1989) ("a court must (1) determine whether the state law falls within the realm of acceptable state authority; (2) determine whether the state act in question touches on matters relating to foreign affairs; and (3) balance the value of achieving a nationally uniform position against the value of giving effect to the local decision making on the question involved, to arrive at a decision that accurately reflects the appropriate roles of the states and the nation in regulating the subject matter concerned.").

56 U.S. CONST. pmbl.

understood that any powers touching upon immigration, foreign affairs, naturalization, and citizenship must be centralized with the federal government as to prevent foreign embarrassments at the state level.[57] A number of commentators are indeed correct to point out that there is no mention of "immigration," "aliens," or "immigrants" in the Constitution's text,[58] but the law of nations unquestionably vested immigration powers, *i.e.* entry, settlement, expulsion, and conditions of settlement, with the nation state, not its subcomponents.[59]

This is what makes Justice Antonin Scalia's opinion in *Arizona v. United States* so puzzling. Scalia asserts that "after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration, but *no doubt* about the power of the States to do so."[60] The historical record does not support this conclusion, for the Constitution was ratified to prevent the states from causing foreign embarrassments and controversies, not to enable them to do so. In the words of then Chief Justice John Jay before a grand jury after the adoption of the Constitution, "We had become a nation—as such we were responsible to others for the observance of the *law of nations*; and as our *national concerns* were to be regulated by *national laws*, national tribunals became necessary for the interpretation and execution of them both."[61]

In the late eighteenth century, the law of nations included every country's right to legislate over foreigners.[62] As John Marshall once stated at oral argument, every nation has the "right to legislate over foreigners," and

57 *See* Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective*, 15 TEX. REV. L. & POL. 61, 92–101 (2010)[hereinafter *The Plenary Power Doctrine*]; Charles, *Recentering Foreign Affairs Preemption*, *supra* note 6, at 152. The need for federal supremacy over citizenship was affirmed by the Fourteenth Amendment, which overruled Dred Scott v. Sandford, 60 U.S. 393 (1857). *See* Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211, 229, 236 (2012) [hereinafter *Decoding the Fourteenth Amendment's Citizenship Clause*].

58 For some prominent articles that ignored the rich history of the plenary power doctrine in our constitutional jurisprudence *see generally* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and it Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE. L.J. 545 (1990); Gabriel J. Chin, *Is There Really a Plenary Power Doctrine?: A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L. REV. 257 (2000).

59 *See* Charles, *The Plenary Power Doctrine*, *supra* note 55, at 92–118.

60 Arizona, 132 S. Ct. at 2513 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

61 JOHN JAY, CHARGE TO THE GRAND JURY OF ULSTER COUNTY (1777) AND CHARGE TO THE GRAND JURIES (1790), *available at* http://johnjayinstitute.org/resources/publications (emphasis added).

62 *See, e.g.*, EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS §§ 213, 218 (1797).

this power "goes to the rights of all kinds."[63] Marshall was not the only prominent member of the founding generation to come to this conclusion. Associate Justice William Cushing,[64] Associate Justice James Iredell,[65] Pennsylvania Judge Alexander Addison,[66] James Madison,[67] and Alexander Hamilton,[68] all provide historical guideposts illustrating that immigration was an issue of national concern in accordance with the Constitution and law of nations.

A 1793 charge to the grand jury by John Jay only further illuminates this point. Jay stated the "laws of the United States" fell under "three heads or descriptions":

> 1st. All treaties made under the authority of the United States.
> 2d. The laws of nations.
> 3d. The constitution and statutes of the United States.[69]

Jay defined the law of nations as consisting of "those laws by which nations are bound to regulate their conduct towards one another" and "those duties, as well as rights, which spring in relation from nation to nation."[70] Relying on the influential writings of Emer De Vattel,[71] Jay discussed the interrelation between immigration, allegiance, and national sovereignty as follows:

> The respect which every nation owes to itself imposes a duty on its government to cause all its laws to be respected

63 James Iredell, *Middle Circuit, 1793, Virginia* 10 (1793) (unpublished journal of oral arguments, on file with the Library of Congress Rare Books Division, Washington, D.C.).

64 *See* The Honorable Judge Cushing, *A Charge Delivered to the Federal Grand Jury for the District of Virginia, on the 23d Nov. 1798: By the Honorable Judge Cushing, published by request of the Grand Jury*, THE EASTERN HERALD AND GAZETTE OF MAINE, January 21, 1799, Vol. XV.

65 CLAYPOOLE'S DAILY ADVERTISER (Philadelphia, PA), May 16, 1799, at 2, cols. 3–4.

66 *See* ALEXANDER ADDISON, ON THE ALIEN ACT: A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 11 (John Colerick ed., 1799); ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 21 (Philadelphia, 1800). For the importance of Alexander Addison in American constitutional jurisprudence, *see* Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529, 529–50 (2010).

67 For a summary of James Madison's views, *see* Charles, *The Plenary Power Doctrine*, *supra* note 55, at 100-1, 107, 116.

68 *See* 25 THE PAPERS OF ALEXANDER HAMILTON 491–95 (Harold C. Syrett ed., 1977) (discussing the national politics of admitting foreigners into the United States).

69 THE CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793, at 2, col. 1.

70 *Id.* at col. 1.

71 The writings of Vattel were highly influential on the founding generation's view of international law. *See* Charles, *The Plenary Power Doctrine*, *supra* note 55, at 85–89, 108.

> and obeyed; and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, than that all strangers admitted into a country are, during their residence, subject to the laws of it; and if they violate the laws, they are to be punished according to the laws. . .to maintain order and safety. [72]

In sum, once we combine the historical record with the long line of Supreme Court precedent affirming federal plenary authority over immigration,[73] it is difficult to ascertain how anyone can conclude the states maintain inherent authority over immigration.[74] This is not to say that the states do not retain any authority over their respective borders through their respective political institutions or tailoring state privileges and immunities to attract or deter immigrants.[75] These areas of law are unquestionably a matter of state sovereignty, which can be politically tailored to attract or deter immigrants into respective jurisdictions.[76] However, to claim that the states maintain some form of concurrent or inherent supplementary immigration power would be to take a step back to the problematic Articles of Confederation.[77]

Now when examining the constitutionality of state immigration verification laws within the constraints of this history and foreign affairs preemption three questions must be raised. First, do these laws regulate a facet of immigration policy solely within the federal sphere of government? Second, do the laws regulate immigration outside the traditional state or local government's sphere or in a manner that undermines the federal scheme?

72 FRANCIS WHARTON, STATE TRIALS OF UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS (1849).

73 *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889); Ekiu v. United States, 142 U.S. 651, 659 (1892); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); United States v. Wong Kim Ark, 169 U.S. 649, 672 (1897); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 289-90 (1904); Bridges v. Wixon, 326 U.S. 135, 153 (1945); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952); Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999); Zadvydas v. Davis, 533 U.S. 678. 695–96 (2001); Negusie v. Holder, 555 U.S. 511, 516–17 (2009).

74 *See, e.g.*, Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005).

75 U.S. CONST. art IV, § 2, cl. 1. For a legal analysis of state powers over representation and excluding alien classes, *see* Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. 35, 41–45 (2011).

76 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1799–1800 (1833).

77 *See, e.g., id.* § 1098; WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 79 (1825); ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 197 (Clyde N. Wilson fwd., 1999).

Lastly, do the laws impose any discriminatory burdens on the alien class as a whole?

The answer to the first and second questions must be answered in the negative. As discussed earlier in the expressed and implied preemption analyses,[78] federal law expressly permits state officials "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present."[79] Part of this *cooperation* includes the identification of unlawfully present aliens in accordance with federal law.[80] So long as state immigration verification laws do not compel officials to enforce immigration law without federal direction, the laws cannot be foreign affairs preempted, for they do not regulate immigration outside the traditional state or local government's sphere nor in a manner that undermines the federal scheme.

This brings us to the third and last question: "Do state immigration verification laws impose any discriminatory burdens on the alien class as a whole?" There is no question that a number of immigration professors and advocates have denounced the general verification of immigration status, except when necessary, as an immoral practice that can lead to racial profiling.[81] As politically viable as this argument may be, it detracts from the objective constitutionality inquiry.

In particular, such meshing of political preference with constitutional analysis fails in that it is *not* the law of the land, either through the text and purpose of the Constitution or Supreme Court precedent. With the exception of a child's right to access public education,[82] it remains a part of our jurisprudence that unlawful immigrants are not a constitutionally protected class, nor do they maintain any privacy rights to prevent detection.[83] Even if one applies this same political argument to lawful aliens, it expressly conflicts with the constitutionally recognized principle that aliens may be subject to legal conditions as the basis of their settlement. One of these conditions is "[e]very alien, eighteen years of age and over, shall at all times carry. . .any certificate of alien registration or alien registration re-

78 *See supra* Part I, at 7–11.

79 8 U.S.C. § 1357(g)(10)(B).

80 8 U.S.C. § 1373(c).

81 *See* sources cited *supra* note 7 (listing articles in which the author advocates that the laws lead to racial profiling).

82 *See* Plyer v. Doe, 457 U.S. 202 (1982).

83 *See* De Canas, 424 U.S. at 358 n.6 ("State laws which impose discriminatory burdens upon the entrance or residence of *aliens lawfully within* the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.") (emphasis added) (quoting Takashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948)); *see also* Toll v. Moreno, 458 U.S. 1, 12–13 (1982) (stating the question turns on whether the law discriminates against "lawfully admitted" aliens in a manner not contemplated by Congress).

ceipt card issued[.]"[84] The United States is not alone nor was it the first nation to require personal subjection as a condition of settlement.[85] The submission of an alien to the host country as the tacit condition of entry and settlement is a legal principle that is not only part of our Anglo-American tradition,[86] but is an international norm.[87] Not to mention, the approval to maintain one's presence in a host country does not end at the port of embarkation. It is within the sovereign power of each nation to check the identity or immigration status of foreigners they come into lawful contact with.

While the verification of immigration status may serve the legal purpose of deterring unlawful immigration, there remains the question of whether the laws can be enforced without the "indiscriminate and repeated interception and interrogation [of aliens] by public officials" as to impose "unusual and extraordinary burdens" not contemplated by Congress.[88] A myriad of racial profiling concerns are presented. Perhaps aliens who do not speak English will be profiled, and persistently burdened to confirm proof of immigration status. Perhaps persons of a particular color, race, or ethnicity will experience additional questioning beyond what others experience, even if they speak fluent English. The racial profiling possibilities are endless if one seriously gives pause to consider.

Unfortunately, the potential for racial profiling is prevalent in most laws should the respective law enforcement agency seek, plan, or conspire to do so.[89] This is something that no law can eliminate regardless of how carefully drafted.[90] It is a behavioral choice that can only be deterred through education, training, and legal consequences. Still, for the purpose of objectivity, it is worth weighing the evidentiary claims that state immigration enforcement encourages unconstitutional racial profiling.

One common argument is that state verification laws require "law enforcement officers to stop *everyone* whom they have a 'reasonable suspi-

84 8 U.S.C. § 1304(e) (2012).

85 See Thomas Ehrlich, Passports, 19 STAN. L. REV. 129 (1966) (detailing the history of United States and international passport controls).

86 See Charles, *The Plenary Power Doctrine*, *supra* note 55, at 68–119 (giving a historical overview of Anglo-American immigration law, including the principle of submission).

87 See Charles, *Decoding the Fourteenth Amendment's Citizenship Clause*, *supra* note 55, at , 237–45 (discussing the doctrines of allegiance and personal subjection).

88 Hines, 312 U.S. at 65–66.

89 For some scholarship in this area, *see* Abraham Abramovsky and Jonathan I. Edelstein, Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared, 63 ALB. L. REV. 725 (2000); Ira Glasser, American Drug Laws: The New Jim Crow, 63 ALB. L. REV. 703 (2000); Phyllis W. Beck and Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 TEMPLE L. REV. 597 (1999).

90 It can be minimized, but not eliminated. *See* Jeff Dominitz, *How Do the Laws of Probability Constrain Legislative and Judicial Efforts to Stop Racial Profiling*, 5 AM. LAW ECON. REV. 412 (2003).

cion' to believe is an undocumented immigrant and arrest them if they fail to produce their papers."[91] It is what Marjorie Cohen refers to as criminalizing "walking while brown,"[92] but this is a complete misreading of statutory text. At no point do *any* of the state verification laws *require* officials to "stop everyone" as Cohen contends. Instead, the laws stipulate the conditions that must arise to verify immigration status during lawful stops and encounters, *i.e.* lack of identification and other factors.[93] As a counterpoint to this racial profiling argument, it has been asserted that the state laws provide more protection than current federal guidelines, thus any racial profiling concerns are overstated.[94] A number of immigration law professors respectfully disagree. They assert it is the acquiescence of race as a consideration that will ultimately lead to unconstitutional racial profiling.[95]

Here again, this is nothing more than speculation. The potential for racial profiling in state immigration verification laws is indeed "real and worrisome," but nothing in them "directly encourages, authorizes, or otherwise expands [the] practice."[96] Certainly more legislative protections could deter the potential for racial profiling, such as requiring law enforcement agencies to track the law's implementation. This would provide the data necessary to hold state law enforcement agencies accountable and tailor the law's enforcement accordingly. However, until immigration verification data is accumulated, all anyone can do is speculate that the laws will result into a myriad of civil rights violations.

It should be noted here that even before state immigration verification laws were enacted, verification of immigration status was already taking place accordance with 8 U.S.C. § 1357(g)(10). In these instances, state and local law enforcement were not required to verify immigration status in accordance with state law. The officer maintained individual discretion in contacting Immigration and Customs Enforcement (ICE).[97] And despite

91 Cohn, *Arizona Legalizes Racial Profiling*, *supra* note 9.

92 *Id. See also* lRushing, *supra* note 46, ("It's obvious that police will make these judgments of who to investigate based on appearance, including skin color.").

93 For a recent example as to how state law enforcement officials may constitutionally determine whether to inquire about immigration status, see United States v. Ovando-Garzo, 2014 U.S. App. LEXIS 10062 (8th Cir. 2014) (upholding the state law enforcement official's inquiry into the passenger's immigration status).

94 Hans Von Spakovsky, *The Arizona Immigration Law: Racial Discrimination Prohibited*, THE HERITAGE FOUNDATION (October 1, 2010), *available at* http://www.heritage.org/research/reports/2010/10/the-arizona-immigration-law-racial-discrimination-prohibited.

95 Chin, et al, *supra* note 7, at 65–72 ; Kevin R. Johnson, *A Case of Color-Blindness: The Racially Disparate Impacts of Arizonas SB 1070 and the Failure of Comprehensive Immigration Reform*, 1 ARIZ. ST. L.J. SOCIAL JUSTICE 1, 17–21 (2011).

96 Su, *Arizona's New Immigration Law*, *supra* note 21, at 77.

97 ICE is proud of its cooperation with state and local law enforcement agencies in this area. *See*

this already existent enforcement at the state and federal levels, there has yet to be a study affirmatively linking immigration verification with racial profiling.

This includes lawful vehicular stops, which are statistically monitored by most states. Certainly, immigration rights groups and liberal immigration law professors may continue to claim otherwise, but their evidentiary links are tenuous and built on personal suspicions rather than hard data.[98] According to the United States Bureau of Justice statistics, national traffic stops are being conducted nearly proportionate to race; white (8.4%), black (8.8%), and Hispanic (9.1%).[99] In other words, the potential for persons to be questioned about their immigration status during vehicular stops is not disproportionate according to race. This does not negate that there may be certain police districts or officials that intentionally profile based on race, but there is no substantiated evidence this will be the result of state immigration enforcement as a whole.[100]

A study by the reputable Chief Justice Earl Warren Institute on Race,

Law Enforcement Support Center, IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/lesc/. *See also Arizona*, 132 S. Ct. at 2526 (Alito, J., concurring in part and dissenting in part).

98 There are numerous claims, but no studies. *See* Laura W. Murphy, *The Three Faces of Racial Profiling: The ACLU Connects the Dots*, AMERICAN CIVIL LIBERTIES UNION BLOG OF RIGHTS (Oct. 18, 2011), *available at* http://www.aclu.org/blog/racial-justice/three-faces-racial-profiling-aclu-connects-dots; *Faces of Racial Profiling: A Report From Communities Across America*, RIGHTS WORKING GROUP (October), *available at* http://www.rightsworkinggroup.org/sites/default/files/ReportText.pdf; *Briefing Guide to Secure Communities*, CENTER FOR CONSTITUTIONAL RIGHTS, NAT'L DAY LABORER ORG. NETWORK AND CARDOZO SCHOOL OF LAW IMMIGRATION JUSTICE CLINIC (August 2, 2010), *available at http://ccrjustice.org/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf.* There are also studies claiming federal immigration and border patrol officials unconstitutionally engage in racial profiling. However, the studies lack the sufficient data points to prove their racial profiling claims. *See The Growing Human Rights Crisis Along Washington's Northern Border*, ONE AMERICAN AND UNIV. OF WASHINGTON CTR. FOR HUMAN RIGHTS (Apr. 17, 2012), *available at* https://www.weareoneamerica.org/sites/weareoneamerica.org/files/EXECSUMM_northernborder-FINAL.pdf (claiming racial profiling exists along the Washington state and Canada border through personal interviews, but without any substantive statistics or data points); *Justice Derailed: What Raids on New York's Trains and Buses Reveal about Border Patrol's Interior Enforcement Practices*, N.Y. CIVIL LIBERTIES UNION, NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, AND FAMILIES FOR FREEDOM (November 2011), *available at* http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf (admitting the bias that the study denounces the verification of immigration status as a violation of privacy and Fourth Amendment rights, and then claims racial profiling without providing enough substantive statistics or data points other than to the percentage of arrests based upon complexion).

99 *Traffic Stops*, BUREAU OF JUSTICE STATISTICS, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=702 (last updated Feb. 4, 2012).

100 A similar fear spread with the implementation of employer sanctions when Congress was debating the 1986 Immigration Reform and Control Act. It was feared that employers would discriminate, causing hardships on persons of Hispanic background. However, those fears were nothing more than that. The law did not result in racial profiling. For a legislative history, *see* Brief for Amicus Curiae Immigration Reform Law Institute Supporting Respondents, at 21-28, Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115).

Ethnicity & Diversity has provided the most detailed data set asserting otherwise.[101] The study examined ICE's Criminal Alien Program (CAP) in Irving, Texas from September 2006 to November 2007. The CAP seeks to target the deportation of criminal aliens booked or processed in state and local jails.[102] Although the CAP is designed to target deportable aliens with criminal histories, the study convincingly shows that aliens with civil immigration violations were deported at a substantially higher rate than criminal aliens.[103] It is from this conclusion that the study infers cooperation with ICE led the Irving Police Department to *engage* in racial profiling.[104]

A general glance at the study's tables and data seems to support this stance. Yet a closer look at the evidence reveals the conclusions are mere inferences that lack sufficient data points. For instance, the study argues that racial profiling is proven by two data sets. The first is a chart tracking the overall arrests of persons according to race. Excluding the month of July 2007, the percentage of arrests according to race remained consistent with census data. If anything, the data shows that persons of white complexion were arrested at a higher rate than Hispanics when they constituted 7% less of the population total.[105] July 2007 was arguably the only month in which Hispanics were arrested consistently with census data according to race.

The second data set is much more problematic. Upon the implementation of the CAP, the chart indicates that the arrests of Hispanics for Class-C misdemeanors rose exponentially before tailing off.[106] Because arrests for Class-C misdemeanors are at the discretion of the officer, the study concludes that race proved instrumental in that discretion. What the study fails to take into account is the two additional data sets necessary to make this connection: (a) data on the nature of the misdemeanor and (b) data on

101 Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY (Sept. 2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

102 *Criminal Alien Program*, IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/criminal-alien-program/.

103 Gardner & Kohli, *supra* note 97, at 7.

104 *See id.* at 1, 4, 8. The Chief Justice Earl Warren Institute has published a separate report that also makes the claim that federal-state cooperation through Secure Communities leads to racial profiling. AARTI KOHLI, PETER L. MARKOWITZ, & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS, 3, October 2011, *available at* http://www.law.berkeley.edu/files/Secure_COMMUNITIES_by_the_Numbers.pdf. Their claim is based upon the percentage of Latinos located and deported through the program—ninety-three percent. *Id.* at 5. However, the study gives no empirical proof that Latinos are being targeted.

105 Gardner & Kohli, *supra* note 97, at 5.

106 *See id.* at 5. The tailoring off could be the result of institutional policy changes or that unlawful immigrants began to migrate elsewhere in fear of deportation. The study does not provide any evidence to prove either conclusion.

whether Class-C misdemeanors rose as a whole.

The nature of the misdemeanor is rather important. A general comparison of the increase in Hispanic traffic arrests with the overall Hispanic arrests during the same period reveals that the July 2007 rise was almost solely the result of traffic violations.[107] It is likely that these arrests were the result of driving without a valid license (a Class-C misdemeanor in Texas), lack of insurance or valid immigration papers, and other potential factors that would lead a reasonably prudent officer to inquire about immigration status. It would be upon this inquiry and checking with ICE about issuing a detainer that the officer likely made an arrest. Circumstances like this *do not* indicate racial profiling, but the active enforcement of federal immigration law at the state level. The two are very distinct in terms of constitutionality. The former (deliberate racial profiling) is unconstitutional, and the latter (enforcing the law and cooperating with federal authorities) is constitutional.

It must be noted, however, the circumstances of the vehicular stops mentioned above are merely speculation. The study never sought to answer this all important question, nor did it track data of vehicular stops as a whole. Thus, many questions are left unanswered in order to affirmatively link racial profiling with state and local immigration enforcement. Did vehicular stops rise upon the implementation of the CAP? Did the racial composition of vehicular stops rise or change dramatically? Did the arresting officer first arrest the person and contact ICE later or did the officer contact ICE after a reasonable suspicion of unlawful status?

The lack of sufficient data points on vehicular stops also applies to lawful stops or investigations for breaches of the peace and drunken behavior.[108] Did the lawful stops increase as a result of the CAP or did the officers merely become aware that they could legally cooperate with federal authorities? The answer to this question is significant, for the officers may have been unaware of their ability to cooperate with ICE, unfamiliar with detecting fraudulent immigration documents, and other immigration enforcement procedures before partnering with ICE.

Overall, the study does not prove what it contends—*i.e.* racial profiling increases when state and local law enforcement cooperate with ICE. The only conclusion that the study supports is ICE deports more unlawful aliens for civil violations than criminal activity. Its authors believe this should not be the case because it is inconsistent with congressional intent in instituting the CAP. However, the federal immigration scheme as a whole al-

107 *Compare id.* at 5 (Figure 1), *with id.* at 6 (Figure 3).
108 *See id.* at 5.

lows for the deportation of *any* unlawful immigrant, not just criminal immigrants. In fact, it is more reasonable to argue that if ICE did not act it would violate the executive branch's duty to enforce the law as prescribed by Congress.[109]

Naturally, this does not dispel that state immigration verification laws *may* lead to ancillary burdens not contemplated by Congress such as the repeated interception and detention of lawfully present aliens or unconstitutional racial profiling.[110] If either of these scenarios should present themselves the respective state immigration verification law is preempted. However, the evidentiary foundation necessary to prove such unconstitutional ancillary burdens must be clear and convincing, not a plausible conclusion based upon the manipulation of evidence.[111] As was seen in the case of the Justice Earl Warren Institute on Race, Ethnicity & Diversity report, it is rather easy for analysts to manipulate data to support a desired conclusion. It is for this reason that the data points must be intimately related and connected as to prove the verification of immigration status results in unconstitutional violations across the board.[112]

There will indeed be instances where individual persons are improperly detained or racially profiled. There will also be instances where a respective city, town, or county improperly enforces the law as to impose uncon-

109 Certainly, as the federal immigration scheme is currently constituted, it is within the President and ICE's discretion to set enforcement priorities. It is at ICE'S discretion to set enforcement priorities. Arizona, 132 S. Ct. at 2499. *See also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.").. It is also within the purview of the executive branch to not enforce unconstitutional laws. *See* Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008). However, it is another thing to not enforce constitutional laws as enacted by Congress.

110 Elias, *The New Immigration Federalism*, *supra* note __, at 730 (state immigration verification laws "appear set to survive in the short-term, although under the new framework of immigration federalism the long-term viability of such laws is questionable, at best."); Kerry Abrams, *Essay: Plenary Power Preemption*, 99 VA. L. REV. 217, 630 (2013) ("the 'papers please' provision might be constitutional if it is interpreted as (1) simply asking for papers and (2) checking identity quickly without any unnecessary detention.").

111 For a discussion on the difference between "disparate impact" and "disparate treatment" in analyzing racial profiling, see Nicola Persico and David A. Castleman, *Detecting Bias: Using Statistical Evidence to Establish Intentional Discrimination in Racial Profiling Cases*, 2005 U. CHI. LEGAL F. 217 (2005). For a discussion on the ambiguity of racial profiling evidence as applied to drug crimes, see R. Richard Banks, *Beyond Racial Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003).

112 *See* Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263 (2008) (arguing that there needs to be a strong statistical association between stops/searches and racial profiling). For a counter argument, see David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 243 (2001) ("if African Americans or Latinos say that they have been the victims of racial profiling, we should not ask for conclusive proof in the strictest statistical sense; rather, if they can present some credible evidence beyond anecdotes, some statistics that indicate that we may, indeed, have a problem, the burden should then shift to the public institution").

stitutional ancillary burdens. In such cases, however, it is not the law that is unconstitutional, but the enforcement. And in such cases, the legal redress is civil rights litigation against the respective offenders, not the preemption of the law itself. To be clear, there is a strong legal distinction between a law that imposes unconstitutional ancillary burdens and individuals that choose to impose unconstitutional ancillary burdens, such as racial profiling, based upon a poor reading and application of the law.

III. CONCLUSION—THE CONSTITUTIONALITY OF STATE IMMIGRATION VERIFICATION LAWS MOVING FORWARD

While the Supreme Court majority did not foreclose the future preemption of state immigration verification laws like Arizona's S.B. 1070 Section 2(B), it is unlikely that it or any similar state immigration verification laws will be. Preemption requires either a showing of federally independent verification by the respective state or clear and convincing evidence that the laws impose unconstitutional ancillary burdens on lawfully present aliens.

To date, neither of these scenarios presents itself, at least not yet. In fact, despite a facial challenge being brought forth to every state immigration verification law, in every case, the presiding federal court has upheld the law as constitutionally permissible.[113] But like the Supreme Court in *Arizona v. United States*, these federal courts did not foreclose the possibility of preemption on equal protection or racial profiling grounds.[114] Still, it will be rather difficult for opponents to prove state immigration verifications laws encourage or endorse unconstitutional racial profiling.[115] A close examination of the laws reveals that the practice is expressly denounced, and not encouraged. Of course, this author is not naïve to believe racial profiling will not rear its ugly head. The potential for racial profiling presents itself in the enforcement of any law, not just state immigration verification laws.

And as the laws continue to be challenged by opponents, the lower

113 Utah Coalition of La Raza v. Herbert, Case No. 2: 11-cv-401 CW, at 8-9 (D.C. Utah 2014); Georgia Latino Alliance for Human Rights v. Georgia, 691 F.3d 1250, 1267-68 (11th Cir. 2012); United States v. Alabama, 691 F.3d 1269, 1283-84 (11th Cir. 2012); United States v. South Carolina, 906 F. Supp. 2d 463, 470-71 (D.C. S.C. 2012).

114 *See supra* note 113.

115 This is not to say civil rights and immigration rights organizations will not try. *See, e.g.*, Carli Brosseau, "ACLU Files Lawsuit Precursor to SB 1070," ARIZONA DAILY STAR (November 13, 2013), *available at* http://azstarnet.com/news/local/border/aclu-files-lawsuit-precursor-in-sb-challenge-case/article_24900305-4cd5-5edb-a408-81a7aa70ea9f.html.

courts will come to find that Justice Samuel Alito's concurrence provides most of the answers they seek. Alito could not foresee how removable aliens can be located and reported if state officials do not have the authority to inquire.[116] In other words, the ability for state officials to inquire was not what "ultimately matters" in terms of preemption. What matters is "whether to act once the person's status is known," and so long as the *discretion to act* is controlled and administered by the federal government, the state laws must be upheld as constitutional.[117]

Alito is also correct to point out that "nothing on the face of the law suggest that it will be enforced in a way that violations the Fourth Amendment or any other provision of the Constitution."[118] Indeed, Alito did not foreclose there would be "occasions on which sensitive Fourth Amendment issues will crop up," but if state immigration verification laws are "properly implemented" they "should not lead to federal constitutional violations[.]"[119] The only question moving forward is whether the laws will be adhered to by those required to enforce them.

116 Arizona, 132 S. Ct. at 2526(Alito, J., concurring in part and dissenting in part).
117 *Id.*
118 *Id.* at 2527.
119 *Id.* at 2529.