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IGNORING THE LESSONS OF HISTORY: HOW THE "OPEN BORDERS" MYTH LED TO REPEATED PATTERNS IN STATE AND LOCAL IMMIGRATION CONTROL

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Abstract

No doubt local efforts to control immigration are on the rise. Arizona's Senate Bill 1070 is the most well-known example of this trend, though other examples exist as well. Most existing criticism attacks such efforts as violating the supposed "exclusive" federal control of the immigration sphere Yet, such arguments, in part, are based upon a myth that the United States historically had "open borders" with no immigration regulation. Instead, significant local controls existed prior to the first federal immigration legislation in 1870. Despite some scholarly efforts to debunk the myth of "open borders," it pervades and persists.

Local immigration controls exist in various forms, including laws criminalizing illegal immigration status and penalizing businesses, as well as cooperative arrangements between local and federal governments. By contrast, many local governments also offer "sanctuary" to unauthorized immigrants. History reveals similar patterns in local efforts to deal with immigration. In fact, historically such controls were considered primarily a matter of state and local power. Such historical laws were largely ineffectual and often racially/ethnically discriminatory, though.

Yet, as the old adage goes, if we ignore history, we are doomed to repeat it. And, we are doing just that. This Article will examine our historical local immigration laws and how the persistence of the "open borders" myth led us to ignore and repeat the patterns of some of these laws. The United

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States Supreme Court recent decision in Arizona v. United States offered an opportunity for the Court to remember history and learn the lessons it has to teach. Yet, only Justice Scalia's dissent acknowledged this history and its impact on the issues before the Court. Apparently, some of these lessons must still be learned.

Introduction

Those who ignore history are doomed to repeat it.[2]

Although some disagree about the actual original wording and the source of this expression,[3] few would challenge the truth of this familiar adage.[4] In fact, the premise behind these words is often viewed as a rationale for the study of history and a practical justification for requiring history as a course in our public primary and secondary schools.

When it comes to state/local immigration controls in the United States, we are in the midst of proving this adage true once more. Despite the perception that the federal government has exclusive control in the area of immigration, history tells us a different story. Before the federal government began comprehensive immigration controls, numerous laws existed at the state and local levels. In fact, some amount of state/local immigration regulation and enforcement existed throughout our history. Thus, to some extent, more recent efforts by local governments to control immigration are not as new as one might think. In light of this history and the perceived failures of federal immigration controls, these state and local immigration laws should come as no real surprise.

Yet, we have reacted with surprise to state/local efforts to enforce immigration laws. Why? Essentially, as explained more fully herein, the myth[5] of "open borders" led us to ignore our true immigration history, including

2 Although this expression might be the most familiar version of this adage, many contend that the adage derives from a slightly different quote – "Those who cannot remember the past are condemned to repeat it" – which comes from GEORGE SANTAYANA, THE LIFE OF REASON 82 (1905-1906). In turn, Santayana's quote is similar to Edmund Burke's (1729-1797) statement, "Those who don't know history are destined to repeat it." Seeing as this expression has many variants and paraphrases, it is possible that this more familiar version is simply an amalgamation of these variants.

3 *See supra* note 2.

4 *But see* Phil B., *Those Who Ignore History are Condemned to Repeat It,* PHIL FOR HUMAN., http://www.philforhumanity.com/Those_Who_Ignore_History_are_Doomed_to_Repeat_It (last visited Apr. 4, 2014) (challenging the premise of this adage).

5 Seeing as others have written about myths in the area of immigration, immigration law and policy may be particularly susceptible to the perils of mythology. *See, e.g.*, David A. Martin, *Eight Myths about Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 527 (2006-2007) (examining myths that prevent potentially useful immigration reforms); *see also generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH (2003).

the lessons of the reign of state/local controls have to teach us, and we are repeating some of our past mistakes as a result. This Article examines this myth of open borders and how it led to repeated patterns, as well as mistakes, in state and local immigration control.

Part I examines the myth of open borders and how it pervades and persists. Part II examines some of our historical state and local immigration laws, including laws that more indirectly affected immigration. Part III discusses the more recent state/local immigration enactments, and Part IV explores the lessons from history we have failed to heed.

I. The Open Borders Myth

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shores.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door![6]

We all probably recognize these immortal words inscribed on the Statute of Liberty. Many may also accept that these words represent more of an ideal of our immigrant history than a reality. After all, the federal government began enforcing restrictions on the immigration of indigents before Emma Lazarus even wrote this poem.[7]

Yet, this poem also embodies a mythology that persists and prevents a more realistic appreciation of our immigration heritage. Essentially, the permeating and persistent myth is that the United States had "open borders" until the federal government began controlling immigration in 1875. This myth led us to the legal conclusion that immigration is an exclusive federal power[8] and that this is just the way it has always been.[9]

As a result, we perceive the recent trend in state and local government efforts to control immigration as new,[10] surprising, and obviously unconsti-

6 EMMA LAZARUS, THE NEW COLOSSUS (1883).

7 *See* Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214; *see also* DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 1 (1987) (observing exclusion on grounds likely to become a public charge had already begun at the time Emma Lazarus wrote the New Colossus); JOHNSON, *supra* note 5 (challenging, as the title suggests, the "huddled masses" contention within Emma Lazarus's poem).

8 As the Supreme Court states in *De Canas v. Bica*, 424 U.S. 351, 354 (1976), the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *See also* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 322 (2012) (referring to the exclusivity view as the "conventional wisdom" of the last century).

9 *But see* Johnson, *supra* note 8, at 322 (qualifying this exclusivity view as "near exclusivity" and suggesting its reach may be limited to since the late 19th century).

10 *See* Johnson, *supra* note 8, at 322 (referring to state/local government immigration controls as a

tutional. Yet, an open-eyed examination of our immigration history reveals the mythology of the open borders idea.[11] Moreover, it also reveals lessons that appeared to have gone unheeded.

Gerald Neuman attempted to shatter the "open borders" myth in a ground-breaking article examining and categorizing significant pre-1875 immigration restrictions.[12] In his article, Neuman observes, not only the existence of the open borders myth, but the substantial support among immigration scholars and the judiciary that cause it to persist. For example, Justice Blackmun's opinion in *Kleindienst v. Mandel* claims that "[u]ntil 1875 alien migration to the United States was unrestricted,"[13] and the leading treatise, by Gordon & Mailman, reinforces the notion that "the first one hundred years of our national existence was a period of generally unimpeded immigration. . . . The gates were open and unguarded and most were free to come."[14]

Of particular significance here, though, Neuman's article outlines numerous state and local government immigration regulations – especially those enacted along the east coast of the United States and the major ports of New York and Boston – which Neuman refers to as the "Lost Century of American Immigration Law."[15] Yet, Neuman's article pre-dates most of the recent trends in state/local immigration controls, and it provides only limited exploration of the western states and other local immigration controls examined in this Article.[16] Moreover, Neuman examines the implications of this history on the role of judicial review over immigration and birth right citizenship – not the implications of this history on the more recent increase in state/local immigration enforcement.[17] Accordingly, Neuman's

"relatively new phenomenon").

11 Although this Article does challenge, as myth, the "exclusivity" of federal immigration power, it does not dispute the principle of federal primacy or the need for some amount of uniformity in immigration measures. In fact, the need for federal primacy and uniformity are lessons history teaches us, as explained further throughout this Article.

12 *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1840 (1993) [hereinafter *The Lost Century*]; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19-43 (1996) [hereinafter *Strangers*] (examining the open borders myth and the reality of substantial state/local immigration control).

13 Kleindienst v. Mandel, 408 U.S. 753, 761 (1972); Neuman, *The Lost Century, supra* note 12, at 1835.

14 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 2.02 (rev. ed. 1993); *see also* Neuman, *The Lost Century, supra* note 12, at 1835 (slightly misquoting Gordon & Mailman by omitting the term "generally" in front of "unimpeded immigration" and replacing "most were free" with "all were free").

15 *See* Neuman, *The Lost Century, supra* note 12, at 1833.

16 *See id.* at 1841 (acknowledging that "the illustrations are drawn largely from the states of the Atlantic Coast").

17 *See id.* at 1896-99.

article leaves open the question of how such historical roots can and should influence our current debate over the proper role of state and local governments in immigration enforcement. In fact, Neuman calls for further examination of these historical roots.[18] This Article is, in part, an answer to that call.

Despite Neuman's ground-breaking challenge to the "open borders" myth, it persists. Few immigration law scholars have answered Neuman's call, and those that have answered his call to further research and analyze our historical immigration laws have focused on narrow categories and implications of these pre-1875 laws rather than targeting the larger lessons that should influence the current trend in state and local immigration controls.[19] Some scholars, in fact, reference Neuman's work, but seem to marginalize or misunderstand it. For example, Stephen Legomsky's casebook on immigration law relegates Neuman's article to a footnote to Gordon & Mailman's claim of "open borders."[20] Moreover, Gabriel Chin, though citing Neuman's article in support of his acknowledgement of historical state regulation of immigration, claims that "once the newcomer had successfully landed, he or she was in," and that "there was no deportation."[21] Yet, Neuman's article provides numerous examples of state and local immigration laws that resulted in deportations, regardless of any assertions to the contrary.[22]

Although numerous scholars have examined this new trend in state/local immigration control, the focus has been on Arizona S.B. 1070[23] and/or the issues of pre-emption[24] and profiling.[25] To the extent that historical roots

18 *See id.* at 1840 (stating that one of the purposes of the article is "to encourage further work by others in the same field"); *id.* at 1901 ("Recovering the lost century of American immigration law is a substantial task, which this article can only begin.").

19 *See generally, e.g.*, Bert C. Buzan & George M. Dery III, *California's Resurrection of the Poor Laws: Proposition 187, Preemption, and the Peeling Back of the Hollow Onion of Immigration Law*, 10 GEO. IMMIGR. L.J. 141 (1996) (examining the history of the Poor Laws as a form of immigration control and the Proposition 187 – a 1994 ballot initiative aimed at creating local controls on unauthorized immigration).

20 *See* STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIQUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 14 n.3 (5th ed. 2009).

21 Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7(David A. Martin & Peter H. Schuk eds, 2005).

22 *See* Neuman, *The Lost Century*, *supra* note 12, at 1842-43 (providing examples of state laws requiring removal of immigrants from the state and/or the United States).

23 *See, e.g.*, Gabriel J. Chin, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010) (discussing Arizona S.B. 1070).

24 *See, e.g.*, Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331 (2011) (concluding that state criminal trespass laws to penalize unauthorized immigration are preempted by federal law); Maria Marulanda, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321 (2010) (examining preemption analysis as used in litigation challenging Hazelton's immigration controls and Arizona's business license law).

are referenced, they are referenced more in passing than as the focus of a scholarly analysis.[26]

Moreover, the effect of the open borders myth and its resulting federal exclusivity myth persists within the courts as well. Although Justice Scalia's recent dissent in the *Arizona* case acknowledged this mythology and cited to some of the more accurate historical roots of state/local immigration controls,[27] the majority opinion was based upon the premise of broad, "undoubted" federal powers without any reference to the actual history of such laws prior to 1875.[28] Accordingly, examination of this history, the lessons it teaches about state/local immigration controls, and its impact of a proper distribution of state and federal power remains significant.

II. Historical State/Local Immigration Controls

Contrary to the perception of "open borders" that persists among immigration scholars and the judiciary, numerous examples of pre-1875 immigration regulations exist. Most significantly for purposes of this Article, state and local governments played the lead role in such immigration controls. As previously discussed, Neuman provides multiple examples of the immigration laws existing along the east coast. Yet, such controls also existed in the western states and territories – particularly in California and San Francisco. Although some comparisons can be made between the eastern and western immigration controls, distinctions also can be made. Accordingly, some conclusions can be drawn from regional patterns that bear relevance to the current trend in state and local immigration controls.

A. Race & National Origin Restrictions

Many of our initial federal immigration controls were race and national

25 *See, e.g.*, David A. Selden, *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) (examining the racial profiling problems with the original version of Arizona S.B. 1070); Frank Melone et al., *Arizona S.B. 1070: Arizona 1070: Straw-Man Law Enforcement*, 14 HARV. LATINO L. REV. 23 (2011) (examining the racial elements and risk of profiling in Arizona S.B. 1070).

26 *See, e.g.*, Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L. J. 1673, 1681 (2011) (briefly referring to the "lost century" of immigration law as outlined by Neuman's *The Lost Century* article); Mark S. Grube, *Preemption of Local Regulations Beyond* Lozano v. City of Hazelton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 403 (2010).

27 *See* Arizona v. United States, 132 S. Ct. 2492, 2512 (Scalia, J., dissenting) ("Notwithstanding '[t]he myth of an era of unrestricted immigration' in the first 100 years of the Republic, the States enacted numerous laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and (in Southern States) freed blacks.") (citing Neuman, *The Lost Century*, *supra* note 12, at 1835, 1841-80).

28 *See id.* at 2497.

origin based restrictions. In particular, some of the first federal immigration controls targeted Chinese immigrants.[29] Similar to our initial federal immigration controls, many of the pre-1875 state/local controls explicitly restricted immigration based on race and national origin. These immigration controls were direct restrictions on the entry and movement of individuals based upon their race, national origin, and ethnicity. Such restrictions fell into two main categories: 1) restrictions on entry and movement of Chinese immigrants; and 2) restrictions on entry and movement of former slaves and free blacks.[30]

Even before the federal Chinese Exclusion Acts of 1882 and 1884, state and local laws attempted to prevent the immigration of Chinese. For example, in 1855 California passed "An Act to Discourage the Immigration to This State of Persons Who Cannot Become Citizens" in an attempt to prevent Chinese immigration. After the law was held unconstitutional, California passed "An Act to Prevent the Further Immigration of Chinese or Mongolians to This State." Although this law, too, was declared unconstitutional, California and the City of San Francisco did not relent, but instead simply reoriented such laws to target Chinese customs,[31] businesses, labor,[32] and persons for strict and unequal treatment.[33] Many of these laws were designed to prevent the equal competition of Chinese laborers with other laborers and, perhaps, to encourage their return to China.

Also targeted by state and local governments was the entry and movement of former slaves and free blacks into and among the many territories of the United States. Many so-called "free states" actually also had state laws, and even constitutions, prohibiting the entry of all individuals of the

29 *See* INS v. St. Cyr, 533 U.S. 289, 305 (2001) (marking the beginning of federal immigration control with the 1875 passage of the Page Law, Act of Mar. 3, 1875, 18 Stat. 477, regulating the entry of Asian, "coolie," laborers and women for purposes of prostitution); Chinese Exclusion Act, Act of May 6, 1882, ch. 126, 22 Stat. 58; Page Law, Act of Mar. 3, 1875; Chinese Exclusion Act of 1884, Act of July 5, 1884, ch. 220, 23 Stat. 115, 118.

30 Despite its potential to be seen as racially or culturally insensitive, this Article uses the term "free blacks," instead of "freed blacks," "former slaves," "free(d) African-Americans," or some other term for several reasons. First, the term "free blacks" is the one used in the applicable historical references. Additionally, the restrictions applied to persons based on race, regardless of whether they were former slaves or never enslaved. Thus, the terms "freed blacks" or "former slaves" are not accurate. Because the restrictions discussed also applied to persons based on race, regardless of their nationality, the term "African-Americans" is not accurate either.

31 *See* 1871 S.F. ORD. 22 (prohibiting use of firecrackers), 1875 S.F. GEN. ORD. 24 (prohibiting the use of ceremonial gongs); 1876 S.F. GEN. ORD. 13 (commonly referred to as the "Queue Ordinance," required the shaving off of queues worn by Chinese men); *but see* Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.D. Cal. 1879) (invalidating the Queue Ordinance on equal protection grounds).

32 *See infra* Part II.D (discussing business, labor, and taxes targeting Chinese immigrants).

33 *See* People v. Hall, 4 Cal. 399, 403-05 (1854) (interpreting 1849-1850 Cal. Stat. 230, which prohibited Native Americans from testifying in cases against whites, to apply to the Chinese as well; yet, the legislature abrogated this ruling in 1873 when it repealed all testimony laws); OR. CONST. of 1857, art. II, § 6 (declaring that "[n]o Negro, Chinaman, or Mulatto shall have the right of suffrage").

African race into their states.[34] For example, the Oregon Constitution of 1857, although prohibiting slavery and involuntary servitude,[35] also prohibited the entry or presence of any "negro or mulatto" not already residing in the State at the time of its adoption.[36] Moreover, most free black residents were required to register and prove both their free status and their right to residence within the state. In turn, such documentation was regularly demanded of free blacks under threat of expulsion.[37]

By contrast, though, some "free states" did permit the entry of former slaves, granting them freedom upon entry.[38] This recognition created tension between slave and free states, eventually leading Congress to pass the Fugitive Slave Act of 1793.[39] In response to this legislation, several free states enacted "personal liberty laws," providing procedural and other protections to fugitive slaves within their borders. Such laws prohibited the removal of newly emancipated slaves without due process of law and criminalized, under kidnapping laws, such removal.[40] Pennsylvania's personal liberty laws were challenged in *Prigg v. Pennsylvania*[41] when a slave catcher was convicted for attempting to remove and return a runaway slave to Maryland without state court approval. Although the Supreme Court declared Pennsylvania's personal liberty laws[42] unconstitutional in *Prigg*, it did acknowledge a state's right to refuse to use its own resources to aid in the return of fugitive slaves,[43] as well as the state's police power to exclude or remove fugitive slaves from its borders.[44]

In addition to preventing the free movement of non-whites within the United States, some local governments prohibited even foreign free blacks from entering the United States. For example, Charleston, South Carolina,

34 *See* Act of Feb. 12, 1853, § 3, 1853 Ill. Gen. Laws 354; Act of June 18, 1852, ch. 74, § 1, 1852 IND. REV. STAT. 375; Act of Feb. 5, 1851, ch. 72, § 1, 1850-51 Iowa Acts 172.

35 OR. CONST. of 1857, art. I, § 34.

36 *Id.* at § 35.

37 *See* Neuman, *The Lost Century, supra* note 12, at 1871 & n.248.

38 *See generally* Neuman, *The Lost Century, supra* note 12, at 1879-80; PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981) (discussing free states' treatment of fugitive slaves entering their territories).

39 Fugitive Slave Act of 1793, ch. 51, 1 Stat. 302.

40 THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, 219-222 (The Johns Hopkins Univ. Press 1974) (providing examples of personal liberty laws in Vermont, New Hampshire, Maine, Massachusetts, Connecticut, Rhode Island, New Jersey, New York, and Pennsylvania).

41 41 U.S. 539 (1842).

42 *See id.* at 546-52 (providing relevant portions of Pennsylvania's March 29, 1788 amendment to An Act for Gradual Abolition of Slavery and its March 25, 1826 personal liberty law).

43 *See id.* at 622. It is this remaining power that led Congress to pass the Fugitive Slave Act of 1850, which was part of the Compromise of 1850, thereby requiring the Northern states to cooperate with the enforcement of the Act. *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

44 *See Prigg*, 41 U.S. at 625.

required the jailing of any black seamen while their vessels were in its port,[45] and similarly, other Southern ports prohibited the entry, or otherwise required the "quarantine," of free black seamen on ships docked in their ports.[46]

B. Poor Laws

Another significant category of pre-1875 state and local government immigration controls is the use of poor laws to control the entry and presence of immigrants into and among the United States. As Neuman contends, "[i]n neither the eighteenth century nor the nineteenth century did American law concede the right of the poor to geographic mobility."[47] Thus, despite the assertions on the Statute of Liberty, our nation did not welcome the poor.[48] Instead, our founders brought with them the Old English poor laws, thereby empowering local governments to exclude and/or remove indigents before they became legally settled in their communities.[49]

Although several states and the federal government used poor laws to regulate immigration,[50] their use in the two major eastern ports of Boston and New York City serve as perfect illustrations for purposes of this Article. Many similarities existed between Massachusetts and New York's poor laws during this pre-1875 era. For example, both states began with poor laws derived from their English traditional roots and both states amended their laws to target vessels bringing paupers into their ports through use of bonds or "head taxes."[51] Similarly, both states attempted systems to remove indigents from the state or returning them abroad, as well as substituting those systems with workhouses.[52]

Yet, despite such similarities in the "letter" of these laws, these states had quite different perspectives on immigration. Strong nativist sentiment in Massachusetts influenced its enforcement of its poor laws.[53] Moreover,

45 *See* Act of Dec. 21, 1822, ch. 3, § 3, 1822-23 S.C. Acts 12; *see also* Neuman, *The Lost Century*, *supra* note 12, at 1873-74.

46 *See, e.g.*, Act of Jan. 9, 1841, ch. 15, §§ 21-24, 1840-41 Ala. Acts 19; Act of Dec. 26, 1826, § 5, 1826 Ga. Laws 161, 162; Act of Mar. 16, 1842, No. 123, § 1; 1842 La. Acts 123.

47 Neuman, *The Lost Century, supra* note 12, at 1846.

48 *See, e.g.*, ARTICLES OF CONFEDERATION OF 1781, art. IV (excluding "paupers" from enjoying the same privileges and immunities of citizens).

49 *See* Neuman, *The Lost Century, supra* note 12, at 1846.

50 *See* Neuman, *The Lost Century, supra* note 12, at 1857-59 (examining poor laws in other states and the federal response).

51 *See* Neuman, *The Lost Century, supra* note 12, at 1849-56.

52 *See* Neuman, *The Lost Century, supra* note 12, at 1852-54.

53 *See* Neuman, *The Lost Century, supra* note 12, at 1852 (addressing nativist sentiment in Massachusetts).

the famine in Ireland exacerbated the already high levels of indigent immigrants arriving in Boston. Taken together, the nativist perspective and the intense levels of impoverished Irish immigrants lead to pervasive Anti-Irish sentiment within Massachusetts.[54] By contrast, the New York officials took a more welcoming and inclusive approach to immigration. In particular, representatives of immigrant communities were included on the governing boards and the government performed more social services for impoverished immigrants, including expressly and affirmatively assisting them in finding work.[55]

Unlike the facially neutral bonds and taxes used by the eastern locals to discourage vessel captains from transporting the impoverished and to defray the expenses associated with indigent immigrants, California enacted a tax specifically applicable to Chinese immigrants.[56] Also unlike the eastern states' poor laws, the motives behind taxes levied against vessels landing Chinese immigrants did not originally appear to be based upon a fear of impoverished Chinese burdening state and local citizens. Instead, it appears that such legislation originally was fueled, in part, by fear of competing with Chinese labor – known at the time for working longer hours, for lower wages, and enduring lower working standards and living conditions.[57] Not until about 1870, after completion of the transcontinental railroad and the return of thousands of railroad workers to San Francisco, did the prospect of unemployed Chinese laborers enter the equation.[58] In any event, the California Supreme Court invalidated this law as well.[59] Yet, state and local lawmakers efforts to discourage Chinese immigration were still not quashed.[60]

In the end, the poor laws proved ineffective in preventing indigent immigration.[61] Moreover, such laws often are associated with the perception that state regulation of immigration is unconstitutional because they served

54 *See* Neuman, *The Lost Century, supra* note 12, at 1851-52 (discussing how nativist sentiment and high levels of Irish immigration influenced use of the poor laws to control immigration); OSCAR HANDLIN, BOSTON'S IMMIGRANTS, 45-52, 242 (rev. ed. 1979); *see also* JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 39, 94-95, 103-04 & n.55 (1990) (providing a correlation between nativists in the 1850s and efforts in Massachusetts to curb immigration).

55 *See* Neuman, *The Lost Century, supra* note 12, at 1856 (discussing how more immigrant inclusive attitudes in New York City influenced use of its poor laws).

56 *See* Act of April 28, 1855, ch. 153, § 1, 1855 Cal. Stat. 194 (requiring shipping company payment of $50 per Chinese immigrant landed in California).

57 *See* WILLIAM J. COURTNEY, SAN FRANCISCO ANTI-CHINESE ORDINANCES, 1850-1900 13 (1956) (discussing the fears of white laborers facing Chinese labor competition).

58 *See id.* at 46.

59 *See* People v. Downer, 7 Cal. 169, 171 (1857).

60 *See infra* notes 70, 72-83 and accompanying text (referencing other laws targeting Chinese immigrants).

61 *See* Neuman, *The Lost Century, supra* note 12, at 1848, 1884-85.

as the source of major Supreme Court cases examining state efforts to control immigration.[62]

C. Quarantines

In the pre-1875 era of immigration control, state and local governments also restricted the entry and movement of persons who were exposed to, or showed signs of, illness. Persons with exposure to disease were subject to quarantines and, at times, returned to their point of origin.[63] Notably, though, many state quarantine policies applied equally to a state's citizens as it did to citizens of other states or foreign states.[64]

Recognizing the long standing state power to quarantine, the federal government avoided interference and resisted calls for greater federal involvement. A bill offered in Congress in 1796, proposing a federal system to take over state quarantines, failed by a substantial majority.[65] In its place, Congress granted the President the power to order federal customs agents to assist state officials with their quarantine programs.[66] This harmonious system of state regulation and federal cooperation lasted for nearly a century and enjoyed recognition by the United States Supreme Court.[67] In fact, even after Congress enacted a federal quarantine system, it made state relinquishment and transfers voluntary.[68] As a result, a dual system of quarantine lasted until the last state, New York, surrendered its quarantine powers in 1921,[69] providing a powerful example of state/local and federal cooperation – albeit the opposite direction as generally seen in modern cooperative immigration efforts.

62 *See, e.g.*, Henderson v. Mayor of New York, 92 U.S. 259 (1876); Smith v. Turner, 48 U.S. (7 How.) 283 (1849); New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); *see also* Neuman, *The Lost Century*, *supra* note 12, at 1848, 1885-90 (discussing perceptions on the unconstitutionality of state poor laws as a form of immigration regulation).

63 *See, e.g.*, Act of June 22, 1797, ch. 16, § 2, 1797 Mass. Acts 130, 130-31; Act of March 27, 1794, ch. 53, § 2, 1794 N.Y. Laws 525, 526; *see also Smith*, 48 U.S. at 35. .The City of San Francisco also used its health and quarantine powers to target Chinese immigrants.. In the early 1860's, believing that Chinese immigrants were responsible for the smallpox epidemic in the City, the City subjected all vessels arriving from China to special quarantines and inspections. *See* S.F. MUNI. REP., 1871-72, 563-66 (1872).

64 Neuman, *The Lost Century*, *supra* note 12, at 1860-61.

65 *See* 5 ANNALS OF CONG. 1227, 1347-59 (1796) (defeating the measure 46 to 23); *see also* Neuman, *The Lost Century*, *supra* note 12, at 864 (discussing this proposal).

66 *See* Act of May 27, 1796, ch. 31, 1 Stat. 474.

67 *See* Act of Feb. 25, 1799, ch. 12, 1 Stat. 619 (reaffirming cooperative effort system); Gibbons v. Ogden, 22 U.S. 1, 203, 205-06 (1824) (recognizing state power to regulate quarantines); *see also* Louisiana v. Texas, 176 U.S. 1, 21 (1900); Patterson v. Kentucky, 97 U.S. 501, 505-06 (1879); R.R. Co. v. Husen, 95 U.S. 465, 472 (1878).

68 *See* Neuman, *The Lost Century*, *supra* note 12, at 1865.

69 *See* Neuman, *The Lost Century*, *supra* note 12, at 1865.

D. Labor/Business Regulations and Taxes

Although state and local efforts to directly control the entry and presence of immigrants from China were declared unconstitutional, many local governments – particularly in the western states and territories – simply reoriented their immigration controls to target Chinese businesses, labor, and land ownership.[70] Some of these local laws also targeted Japanese immigrants for unequal treatment.[71]

These modified immigration controls included both laws expressly directed at persons of Chinese descent, as well as facially neutral regulations that targeted Chinese business practices and customs. Such laws were most prevalent in the State of California and the City of San Francisco.[72]

An example of California legislation directed at immigrant labor, but not expressly directed at the Chinese or any other specific nationality, includes the 1850 California law requiring foreign miners to obtain a license in order to work in the mines.[73] Later that same year, in *People v. Naglee*, the California Supreme Court rejected a challenge to the law's constitutionality.[74] Most notably, the court held that the legislation was not in conflict with any United States' treaty because it was not directed at persons of any particular nationality[75] – essentially it was "facially neutral." Yet, perhaps revealing its true motive, the California legislature promulgated the statute's 1853 amendment, which increased the licensing fee to $4.00 a month, in the Chinese language.[76] In addition to accepting the law due to its facial neutrality, the court emphasized the substantial taxing and licensing power of the state over persons within its jurisdiction – even when the state chooses only to exercise such powers over a specific part of that population.[77] In fact, the court reinforces the idea that part of the state's sovereign power includes "the power to prescribe the conditions on which aliens may enjoy a residence within, and protections of, the State."[78] Despite the California court's recognition of the legality of this statute, the law was re-

70 *See generally* Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853-1889*, 12 U. PUGET SOUND L. REV. 197 (1988-1989) (examining local legislation restricting Chinese and Japanese land ownership).

71 *See generally id.*; *cf.* Daniel P. Johnson, *Anti-Japanese Legislation in Oregon, 1917-1923*, 97 OR. HIST. Q. 176 (1996).

72 *See generally* COURTNEY, *supra* note 57.

73 *See* Act of Apr. 13, 1850, ch. 97, § 1, 1850 Cal. Stat. 221.

74 *See generally* People v. Naglee, 1 Cal. 232 (1850).

75 *See id.* at 244.

76 *See* 1853 Cal. Stat. 63, 82; *see also* COURTNEY, *supra* note 57, at 5.

77 *See Naglee*, 1 Cal. at 237-244 (distinguishing the *Passenger Cases* because those dealt with foreigners still on board vessels and not landed within the state's jurisdiction).

78 *Id.* at 243.

pealed in 1851 for non-enforcement.[79]

Yet, California did not stop there. Instead, it proceeded with legislation directly aimed at Chinese immigrants. Among the California legislation expressly directed at Chinese immigrants, "An Act to Protect Free White Labor Against Chinese Coolie Labor, and Discourage the Immigration of Chinese into the State of California" passed in 1862.[80] It imposed taxes on Chinese laborers and on anyone who employed them. Before the year was out, though, the California Supreme Court invalidated this Act as conflicting with the federal government's power to regulate commerce with foreign powers.[81] Yet, in case any doubt remained, the California legislature – by the Act's title – made its intent clear. It intended to stop the flow of Chinese immigration into the State of California.

Perhaps the most significant business restrictions enacted in San Francisco from 1873 to 1883 were the "laundry ordinances." For example, one such ordinance instituted a tax of only $8 per year on laundries using horse-drawn vehicles, but taxing those with no vehicles $60 per year.[82] Although arguably facially neutral, it was well-known at the time that the Chinese did not use horse-drawn carriages to deliver laundry.[83]

This history of substantial, multi-faceted state immigration controls runs contrary to the idea of "open borders." Moreover, it challenges the related perception of exclusive federal immigration power, revealing it as more myth than reality.[84] Historically, as Justice Scalia's recent dissent recognizes, 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."[85] For example, Justice Scalia points out that the disputes regarding the Alien Sedition Acts "involved a debate over whether, under the Constitution, the States had exclusive authority to enact such immigration laws."[86] Although the federal government's inherent authority to control immigration is no longer seriously debated,[87] the historical perspective of undoubt-

79 *See* Act of Mar. 14, 1851, ch. 108, 1851 Cal. Stat. 424.

80 *See* Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462; *see also* Act of Apr.. 28, 1800, ch. 316, 1860 Cal. Stat. 307 (entitled "An Act for the Protection of Fisheries," requiring Chinese and Mongolians to pay a licensing fee in order to take fish from California waters).

81 *See generally* Lin Sing v. Washburn, 20 Cal. 534 (1862).

82 *See* COURTNEY, *supra* note 57, at 57 (discussing the 1873 Laundry Ordinance – vetoed by Mayor Alvord); *see also* 1876 Gen. Ord. 87.

83 *See* COURTNEY, *supra* note 57, at 57.

84 *See supra* note 11 (conceding the need for federal primacy and uniformity in the area of immigration regulation).

85 *Arizona*, 132 S. Ct. at 2513 (2012) (Scalia, J., dissenting).

86 *Id.* at 2512.

87 *See id.* at 2514 (accepting the federal government's inherent power over immigration, as well as the potential for preemption when state action conflicts).

ed state powers should be considered in determining the proper role of the states in the immigration realm today.

III. Existing And Recent State/Local Immigration Controls

State and local government efforts to regulate immigration and immigrants are on the rise.[88] These efforts take various forms. First, state and local governments have long cooperated with federal government efforts to enforce the federal immigration laws. Second, by contrast, state and local laws designed to provide "sanctuary" and protection from federal officials have existed for several decades. Third, most widely publicized and perhaps most controversial, are those laws creating state crimes for those present in the state without proper legal status in the United States. Fourth, less well known laws include those designed to regulate employment authorization and to penalize businesses for employing unauthorized immigrants. In addition to these general categories, state and local governments also have attempted a number of different miscellaneous ways to regulate immigration.[89]

A. Federal/State Cooperation

State and local government law enforcement agencies have long cooperated with federal authorities in federal efforts to enforce its immigration laws.[90] These federal/state cooperative efforts include informal cooperative traditions, as well as formal initiatives and programs. Kris Kobach, a leading scholar in state/local immigration controls and author of Arizona S.B. 1070, refers to such cooperation as the "Quintessential Force Multiplier," arguing that local authorities have inherent power to enforce the federal immigration laws.[91]

88 *See* Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485 (2011) (examining various local immigration regulations); Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing off Steam or Settling Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 296-97, 340-43 (2009) (providing summaries of recent state/local immigration regulations).

89 *See, e.g.*, Arizona Dream Act Coalition v. Brewer, 2014 WL 3029759 (9th Cir. July 7, 2014) (dealing with equal protection challenge to law denying driver's licenses to non-citizens).

90 *See generally* Adam Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31 (contending that outside the area of immigration that there is nothing remarkable about state/local governments enforcing federal law and examining the reasons for the departure from this basic principle in the *Arizona* case).

91 *See generally* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005). Justice Scalia's recent dissent in *Arizona*, too, points to the inherent authority of a sovereign to controls migration. According to Justice Scalia, this is the source of both state and federal immigration powers. *See Arizona*, 132 S. Ct. at 2511-16 (Scalia, J., dissenting).

Perhaps the most frequently applied example of federal/state cooperation stems from the correlation of state criminal convictions and an immigrant's "deportability" under federal immigration laws. Because even a lawful immigrant becomes deportable once convicted of certain crimes,[92] including state criminal convictions,[93] federal immigration authorities have an interest in the status of immigrants convicted of such state crimes. Often, state and local law enforcement officials will cooperate with the federal government by notifying the federal immigration authorities of their criminal proceedings and convictions against noncitizens.

A long line of case law also evidences state and local law enforcement officials' direct efforts to assist in enforcing federal immigration laws through use of their general police powers. Examples include local law enforcement officers requiring identification and "green cards" and making direct arrests, as well as detaining individuals suspected of being in violation of the federal immigration laws.[94] In fact, in its recent decision in the *Arizona* case, the Supreme Court acknowledged that "consultation between federal and state officials is an important feature of the immigration system."[95] Yet, in that case, the Court still held that federal law preempted some of the provisions of Arizona S.B. 1070.[96]

92 *See* 8 U.S.C. § 1227(a)(2) (classifying "deportable aliens" to include those convicted of crimes, including crimes involving moral turpitude, aggravated felonies, and controlled substances).

93 *See, e.g.*, 8 U.S.C. §§ 1101(a)(48)(A) (defining "conviction" in general terms), 1227(a)(2)(B)(1) (applying deportability based upon a controlled substance offense to "any law or regulation of a State, the United States, or a foreign country" that falls otherwise under the Controlled Substances Act); Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013) (recognizing that deportability applies to both state and federal convictions); Cano v. U.S. Att'y Gen., 702 F.3d 1052 (11th Cir. 2013) (holding deportable an alien convicted under Florida state law of a crime involving moral turpitude).

94 *See, e.g.*, United States v. Favela-Favela, 41 F. App'x 185 (10th Cir. 2002) (involving a Clinton, Oklahoma police officer questioning and detaining a driver and his passengers under suspicion of violating immigration laws); United States v. Rodriguez-Arreola, 270 F.3d 611, 613 (8th Cir. 2001) (involving a South Dakota state trooper questioning and detaining a driver and passenger due to suspicion of unlawful immigration status); United States v. Santana-Garcia, 264 F.3d 1188 (10th Cir. 2001) (involving a Utah state trooper detaining a driver and passenger under suspicion of illegal immigration status, but later discovering evidence of drugs in the vehicle); United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999) (involving an Edmond, Oklahoma, police officer's arrest of an individual solely because the individual was an immigrant without legal status); Lynch v. Cannatella, 810 F.2d 1368 (5th Cir. 1987) (involving the detention of sixteen Jamaican stowaways by the Port of New Orleans Harbor Police due to suspicion that the stowaways were in violation of federal immigration laws); United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984) (involving a Kansas highway patrol officer's inquiry about a driver's "green card" status, as well as the identity and status of six passengers in the bed of the truck, and detention of the driver and occupants as suspected violators of federal immigration law); Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) (authorizing a City of Peoria policy that instructed city officers to arrest and detain aliens suspected of illegally reentering the United States in violation of 8 U.S.C. § 1325).

95 *Arizona*, 132 S. Ct. at 2508.

96 *See id.* at 2503 (dealing with section 3); *id.* at 2505 (dealing with section 5(C)); *id.* at 2507 (dealing with section 6); *see also* Cox, *supra* note 90 (explaining how the *Arizona* decision represents an exception to the basic principle allowing "enforcement redundancy"). The Court only rejected the injunction against section 2(B) of Arizona S.B. 1070, Ariz. Rev. Stat. Ann. §11-1051(B) (West 2012),

In addition to these less structured and more informal cooperative efforts, several more formal initiatives and programs have further encouraged state and local government cooperation with federal immigration authorities. To facilitate existing local law enforcement agencies that have apprehended individuals suspected of being without legal immigration status, the federal government created the Law Enforcement Support Center (LESC) in Williston, Vermont. The LESC fields hundreds of thousands of inquiries from state and local law enforcement officers every year. In fact, in FY 2005, the LESC dealt with over 500,000 requests for information and assistance from state and local government officers.[97] Similarly, in 1998, Congress created "Quick Response Teams" to assist state and local law enforcement officers making immigration arrests.[98]

Of particular significance, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress created a mechanism for delegating federal immigration enforcement powers directly to state and local governments. Under section 287(g) of the INA, the Attorney General has the power to enter into written agreements with local governments to empower law enforcement officers to "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."[99] Also in 1996, Congress authorized the Attorney General to provide federal funding to state and local governments assisting in the apprehension and detention of immigration law violators.[100] In the recent *Arizona* case, the Supreme Court pointed to these formal cooperation agreements as a proper means for state immigration enforcement.[101] In fact, the Court's nearly exclusive focus on such formal forms of cooperation implies that it views less formal cooperation, even if duplicative or parallel, to be preempted.

Perhaps most widely known, though, were the formal cooperative programs and systems announced after the terrorist attacks of 9/11.[102] Included among these systems were the National Security Entry-Exit Registration System and the Absconder Initiative — both of which coordinated with the National Crime Information Center database to provide local police officers with access to information on so-called "high risk" violators of immigra-

which requires immigration status checks. *See Arizona,* 132 S. Ct. at 2507-2510.

97 Kobach, *supra* note 91, at 204 & n.150.

98 Kobach, *supra* note 91, at 204 & n.151.

99 8 U.S.C. § 1357(g)(1) (2012).

100 8 U.S.C. § 1103(a)(9) (2012).

101 *See Arizona,* 132 S. Ct. at 2506.

102 *See generally* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) (examining the post 9/11 immigration laws designed to encourage and, in some cases require, state/local cooperation).

tion law. Because four of the five 9/11 hijackers who were stopped by local authorities before the attacks were also in violation of the immigration laws, the thought behind such programs was a belief that had such information been available to local law enforcement prior to the attacks of September 11, 2001, we might have prevented those attacks from happening.[103]

Even portions of the recent laws in Alabama and Arizona have been characterized as "cooperative" federal/state efforts. For example, the Alabama law requires that state officials cooperate with federal officials to enforce immigration laws and encourages the Attorney General to enter into formal agreements with the federal government.[104] Notably, the United States did not challenge these provisions in its action against Alabama H.B. 56.[105] Yet, other more controversial examples of arguably cooperative portions of Alabama's new immigration law include section 12(a), which requires police to make reasonable efforts to determine the immigration status of persons stopped, arrested, or detained,[106] and section 18, which requires a determination of citizenship of any person driving without a license.[107] The main difference between these provisions and the types of cooperative actions upheld in numerous cases is that, due to such laws, cooperation is no longer discretionary – it is mandatory.[108] In fact, in the initial challenge to these provisions, the district court refused to enjoin either provision as preempted by federal law because they merely make mandatory previous practices that under federal law were discretionary.[109] Notably, although the Supreme Court affirmed the injunction against most of the challenged provisions of Arizona S.B. 1070, it refused to sustain the injunction against section 2(B) – a provision dealing with immigration status

103 Kobach, *supra* note 91, at 187; *see also* Jennifer Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582-86 (2010) (providing a thorough discussion of various formal and informal forms of cooperation between the federal government and state/local governments).

104 *See* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, §§ 4-6; H.B. 56 §§ 4-6 (Ala. 2011); *see also* Scott A. Gray, Note, *Federalism's Tug of War: Alabama's Immigration Law and the Scope of State Power in Immigration*, 64 ALA. L. REV. 155, 157 (2012) (discussing these cooperation provisions).

105 *See* Gray, *supra* note 104, at 157 n.10-11 & accompanying text.

106 *See* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, § 12(a); H.B. 56 § 12(a) (Ala. 2011); *see also* H.B. 497, 2011 Gen. Sess., (Utah 2011) (requiring officers conducting lawful stops to inquire about immigration status). For further discussion of the courts' reaction to such status check provisions, *see infra* notes 110, 144-46, 167 and accompanying text.

107 Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, § 18; H.B. 56 § 18 (Ala. 2011).

108 *See supra* note 94 (providing numerous cases upholding state/local law enforcement's efforts to cooperate with federal immigration authorities).

109 United States v. Alabama, 813 F. Supp. 2d 1282, 1293 (N.D. Ala. 2011).

checks.[110]

B. Sanctuary States and Cities

In sharp contrast to federal/state cooperative programs, some state and local governments have chosen to expressly refuse cooperation with federal immigration enforcement efforts by offering their territory as a type of "sanctuary"[111] to unauthorized immigrants.[112] In most instances, these sanctuary programs prohibit or limit law enforcement from taking certain actions against individuals whose only violation of the law is not having legal immigration status in the United States. One rationale behind such laws and policies is a concern that immigrants will not seek the assistance of, or provide cooperation with, local government officials due to fear of coming to the attention of immigration officials. As a result, immigrants become particularly vulnerable to victimization.[113]

One of the first examples of such a sanctuary policy was the City of Los Angeles. In 1979, Los Angeles adopted a policy founded upon the position that "undocumented alien status in itself is not a matter for police action," and prohibiting its police officers from initiating action "with the objective of discovering the alien status of a person."[114] Notably, unlike many other local governments, Los Angeles's policy also forbids officers from arresting persons in violation of a federal *criminal* law for illegal re-entry under 18 U.S.C. § 1325.[115]

About a decade later, on the opposite coast, New York City followed suit. During Ed Koch's tenure as Mayor of New York City, he issued an executive order limiting city officials' power to share information with federal immigration authorities – particularly prohibiting sharing of the immigration status of any victim of crime.[116] Yet, Executive Order 124 did not go as far as Los Angeles, because it still required city officials to cooperate with federal authorities investigating immigrants for violating criminal

110 *See Arizona*, 132 S. Ct. at 2507-10.

111 Some commentators dispute the use of the term "sanctuary" to describe state/local laws limiting or preventing state/local officials from cooperating or sharing information about immigrants with the federal immigration authorities.

112 *See* Pham, *supra* note 102, at 1381 (discussing state/local "sanctuary" policies); *see also* Johnson, *supra* note 8, at 325 n.50 (citing numerous articles analyzing "sanctuary" policies of state/local governments).

113 *See, e.g.*, Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006).

114 Office of the Chief of Police of the L.A. Police Dep't, Special Order No. 40 (Nov. 27, 1979), *available at* http://keepstuff.homestead.com/Spec40orig.html.

115 *See id.*

116 *See* New York City Executive Order No. 124 (August 7, 1989), *available at* http://www.nycourts.gov/library/queens/PDF_files/Orders/ord124.pdf.

laws.[117]

The State of Oregon is an example of a state with an expressed sanctuary law. Oregon State law prohibits any of its agencies, as well as any political subdivision, from using "moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws."[118]

In the face of numerous sanctuary policies throughout the United States, Congress enacted legislation expressly prohibiting such sanctuary policies. Enacted as part of IIRIRA, 8 U.S.C. § 1373, bars government entities and officials from prohibiting the maintaining and sharing of information on citizenship or immigration status of an individual – whether "lawful or unlawful."[119]

In an effort to protect its sanctuary policy from this legislation, New York City filed suit soon after section 1373's enactment, challenging the constitutionality of such legislation. The Second Circuit, however, held the federal legislation facially constitutional.[120] The City responded by revoking Executive Order 124 and replacing it with a more moderate approach to protecting immigrants and providing them with access to city services.[121]

Yet, other sanctuary cities and states, including the State of Oregon, continue their policies with little or no revisions following the 1996 federal legislation prohibiting such sanctuary laws and policies.[122] San Francisco – another major city with a significant immigrant community – also has a sanctuary policy. Recently, in fact, San Francisco officials suggested that it would refuse to detain unauthorized immigrants convicted of minor crimes in order to protect them from federal immigration authorities.[123] Perhaps the lack of interest by either the Bush or Obama administrations in chal-

117 *See id.*

118 OREGON REV. STAT, § 181.850 (2014).

119 *See* 8 U.S.C. § 1373 (2012); *see also* 8 U.S.C. § 1644 (2012) (providing a similar provision as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996); s*ee also* S. REP. NO. 104-249, at 19-20 (1996) (explaining the intent behind such provisions was to assure "cooperative efforts between all levels of government" in enforcement of the immigration laws).

120 City of New York v. United States, 179 F.3d 29 (2d Cir. 1999).

121 City of New York, Executive Order No. 34 (May, 2003), *available at* http://www.nyc.gov/html/imm/downloads/pdf/eo-34.pdf.

122 *See* Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 736 (2013) (recognizing nearly 70 different jurisdictions with "sanctuary" policies); *but see* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, §§ 4-6; H.B. 56 §§ 4-6 (Ala. 2011) (requiring state officials' cooperation with federal officials and encouraging formal cooperation agreements).

123 *San Francisco to Stop Detaining Arrested Immigrants for Deportation*, FOX NEWS (May, 07 2011), http://www.foxnews.com/politics/2011/05/07/san-francisco-stop-detaining-arrested-immigrants-deportation/.

lenging such "don't ask" sanctuary policies explains their continuation.[124] In fact, the increase in state/local pro-enforcement measures, such as Arizona S.B. 1070, may actually be motivating other jurisdictions to respond by creating "sanctuary" policies.[125]

C. Criminalizing Unauthorized Immigrant Status and Actions

Perhaps the most controversial and newest trend in state/local immigration efforts is legislation creating state crimes for immigration violations. Although arguably duplicative of federal crimes, such legislation goes beyond being merely "cooperative" because it creates state crimes for what are usually considered violations of federal law. In fact, many of these statutes go further than federal law because they criminalize what federal law treats as mere civil violations of law.[126]

Under section 5(C) of Arizona S.B. 1070, it is a misdemeanor for an alien without work authorization to apply for work within the state.[127] Moreover, section 3 of Arizona S.B. 1070 makes it a state crime to fail to complete and carry alien registration documentation.[128]

Yet, before implementation, both of these provisions of Arizona's law were enjoined by the lower federal courts.[129] Then, in *Arizona v. United States*, the Supreme Court affirmed the injunction against both these provisions, holding them preempted by federal law.[130]

With regard to section 5(C), which criminalizes the pursuit of unauthorized employment in the State, the Court determined that it raised conflict preemption problems because it "enacts a state criminal prohibition where no federal counterpart exists."[131] As the Court explained, when Congress

124 *See* Elias, *supra* note 122, at 742 & n.252-53 (discussing position taken by Bush and Obama administrations as accepting of such "sanctuary" policies).

125 *See* Elias, *supra* note 122, at 739-40 (contending that pro-enforcement measures are motivating some other jurisdictions to respond by creating sanctuary provisions and giving the City of Chicago as one particular example).

126 *See* Margaret Stock, *Arizona v. United States: The Tail Wagging the Dog on Regulating Immigration Enforcement,* SCOTUSBLOG (July 14, 2011, 4:00 pm), http://www.scotusblog.com/2011/07/arizona-v-united-states-the-tail-wagging-the-dog-on-regulating-immigration-enforcement/.

127 ARIZ. REV. STAT. ANN. § 13-2928(C) (2010). This provision was enjoined by the federal court. *See* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010); *aff'd,* 641 F.3d 339, 344 (9th Cir. 2011); *see also* 132 S. Ct. 2492, 2510-11 (affirming the 9th Circuit's decision enjoining section 5(c)).

128 ARIZ. REV. STAT. ANN. § 13-1509(A) (2010).

129 United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd,* 641 F.3d 339, 344 (9th Cir. 2011). In fact, originally, the United States moved to enjoin Arizona S.B. 1070 in its entirety, but the district court only enjoined sections 2(B), 3, 5(C), and 6. *Id.*

130 *Arizona,* 132 S. Ct. at 2502 (regarding § 3), 2505 (regarding §5(C)).

131 *Id.* at 2503.

enacted the Immigration Reform and Control Act of 1986 (IRCA), it chose to impose criminal penalties only on employers of unauthorized immigrants – not on those unauthorized immigrants who seek or obtain employment. Instead, Congress limited sanctions against unauthorized employees to civil penalties.[132] As a result, the Court held that federal law preempts section 5(C)'s criminalization of the pursuit of unauthorized employment.[133]

Section 3's provision creating a state misdemeanor for failure to carry an alien registration document was held preempted by federal law based on field preemption.[134] According to the Court, although this state offense does have a parallel under federal law,[135] the federal law was so complete and comprehensive that it left no room for even comparable or parallel state laws like Arizona 1070's section 3.[136]

Similar to sections 3 and 5 (C) of Arizona S.B. 1070, under the Alabama law, it is a misdemeanor for aliens within the state to not be in possession of immigration documents[137] or to seek unauthorized work within the state.[138] In light of the Supreme Court's decision in the Arizona case, both of these provisions of the Alabama law are preempted.[139]

Yet, the Alabama and Georgia laws also criminalize other actions taken by unauthorized immigrants. Both the Alabama and Georgia laws make it a crime to conceal, harbor, or shield an undocumented alien or transport such aliens into Alabama.[140] The Alabama law also makes it a felony for an

132 *See id.* at 2504 (citing 8 U.S.C. §§ 1255(c)(2), (c)(8) (2012) (rendering aliens, who accept unauthorized employment, ineligible for adjustment of status), and 8 U.S.C. § 1227(a)(1)(C)(i) (2012) (making aliens removable from the country for engaging in unauthorized employment)). In fact, as the Court noted, Congress considered, but rejected, proposals to make unauthorized employment a criminal offense. *See id.* (citing 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis); Hearings before the Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., pt. 3 (statement of Rep. Rodino, the eventual sponsor on IRCA in the House of Representatives)).

133 *Id.* at 2505.

134 *See id.* at 2502 (defining field preemption as one in which "states may not enter, in any respect, an area the Federal Government has reserved for itself").

135 *See id.* (citing 8 U.S.C. § 1304 (requiring aliens to register and carry proof of registration)).

136 *See id.* (relying on Hines v. Davidowitz, 312 U.S. 52 (1941)).

137 Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, § 10; H.B. 56 § 10 (Ala. 2011).

138 Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, at § 11(a).

139 *See* United States v. Alabama, 691 F.3d 1269, 1280 (11th Cir. 2012) (following reasoning in *Arizona* in holding sections 10 and 11(a), as well as others preempted by federal law); *cert. denied*, 133 S. Ct. 2022 (2013).

140 Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, § 13; The Illegal Immigration Reform and Enforcement Act of 2011, § 7, O.C.G.A. §§ 16-11-200(b), 201(b), 202(b). Arizona S.B. 1070 also contains provisions criminalizing the transportation or protection of unauthorized immigrants within section 5. Ariz. Rev. Stat. §13-2929. .Yet, because the district court refused to enjoin these provisions during the initial stages of the *Arizona* case, 703 F.Supp.2d at 986, 1008, these provisions fell off the radar until they were renewed as part of the *Valle del Sol* litigation resumed after the *Arizona* decision was rendered. *See infra* notes 146, 170, 192 and accompanying text (discussing the *Valle del Sol* litigation). .As a result, the Alabama and Georgia provisions prohibiting

undocumented alien to enter into a business transaction with any political subdivision of the state by seeking certain licenses.[141]

Like Arizona S.B. 1070, significant portions of Alabama H.B. 56 and Georgia H.B. 87 were enjoined by the lower federal courts.[142] Once the Supreme Court decided the *Arizona* case, attention returned to the Eleventh Circuit's review of the injunctions against sections of the Alabama and Georgia laws.[143] Following the Supreme Court's reasoning in *Arizona*, the Eleventh Circuit held several of the challenged provisions of Alabama H.B. 56 and Georgia H.B. 87 – especially most of those that created new state immigration crimes – preempted by federal law.[144] Yet, the Eleventh Circuit rejected the pre-enforcement challenge to, and preliminary injunction of, Alabama's law making it a felony for an unauthorized immigrant to seek certain state licenses.[145]

transportation and protection of unauthorized immigrants took the lead in challenging such state/local laws, and this explains why they are presented more prominently than their Arizona counterparts within this portion of the Article.

141 *See* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535§ 30.

142 *See* United States v. Alabama, 813 F. Supp. 2d 1282, 1311-19, 1331-32 (D. Ala. 2011), *aff'd, in part and rev'd in part*, 443 F. App'x. 411, 420 (11th Cir. 2011); Georgia Latino Alliance for Human Rights v. Deal, 793 F.Supp. 2d 1317 (N.D. Ga. 2011). Originally, the United States challenged ten of the provisions of Alabama H.B. 56. *Alabama*, 813 F. Supp. 2d at 1292-93 (discussing each of the challenged provisions). Although the district court only enjoined four of these ten challenged provisions, some of others were enjoined during the course of litigation. *See* Hispanic Interest Coal. Of Ala. V. Bentley, No. 11-1435, 2012 WL 3553613, at *6-7 (11th Cir. 2012) (discussing the history of the litigation against Alabama H.B. 56); *see also* Gray, *supra* note 104, at 160. Some provisions of Arizona S.B. 1070, Alabama H.B. 56, and Georgia H.B. 87 remain in effect and subject to continued challenges. *See, e.g.*, *infra* notes 144-46, 156-57, 167-68, 192 (discussing provisions that remain in effect and the subject of continued litigation).

143 *See After Arizona, Eyes Turn to Fate of Alabama Immigration Law*, FOX NEWS LATINO (June 28, 2012), http://latino.foxnews.com/latino/politics/2012/06/28/after-arizona-all-eyes-are-on-fate-alabama-immigration-law/.

144 *See* Georgia Latino Alliance for Human Rights v. Gov. of Georgia, 691 F.3d 1250, 1263-67 (11th Cir. 2012); *Alabama*, 691 F.3d at 1280, 1282-83. In particular, the Eleventh Circuit held that federal law preempted the state laws criminalizing an immigrant's lack of legal documentation, the protecting and transporting of unauthorized immigrants, and the pursuit of unauthorized employment. *GLAHR*, 691 F.3d at 1263-67 (regarding the three provisions of § 7 that criminalized the protection and transportation of unauthorized immigrants); *Alabama*, 691 F.3d at 1282 (regarding §10 that criminalized immigrants for lacking legal immigration documents), 1282-83 (regarding §11(a) that criminalized the pursuit of unauthorized employment), 1285-87 (regarding §13 that criminalized protection and transportation of unauthorized immigrants). Yet, using similar reasoning as used in *Arizona*, the Eleventh Circuit rejected challenges to both Alabama's and Georgia's status check provisions. *See infra* note 167 and accompanying text (discussing the implications of the preservation of these status check (aka "Show Me Your Papers "provisions); *see also* Utah Coalition of La Raza v. Herbert, 2014 WL 2765195 (D. Utah, July 18, 2014) (holding Utah state provisions creating state immigration crimes preempted by federal law, but upholding a Utah state status check provision).

145 *See Alabama*, 691 F.3d at 1298-1301 (refusing to enjoin as preempted § 30, as amended and limited to specific state licenses). Unlike the other criminal provisions of Alabama's law and those held preempted in *Arizona*, which ran afoul of IRCA, Alabama's licensing crime did not implicate IRCA. *See id.* Instead, the United States argued that this Alabama provision conflicted with the REAL ID Act and the Welfare Reform Act. Yet, the Eleventh Circuit held that because the REAL ID Act does not regulate licenses and, unlike IRCA's evidence that Congress did not intend to criminalize unauthorized employment, the Welfare Reform Act does not demonstrate a "considered judgment" that criminalizing

Following the Court's decision in Arizona, other litigation challenging Arizona S.B. 1070 also resumed. Among its other challenges, the *Valle del Sol* litigation[146] resumed its challenge to Arizona section 13-2929[147] criminalization of the transportation and protection of unauthorized immigrants. Following the reasoning used by the Eleventh Circuit in GLAHR and the Supreme Court in Arizona, the lower courts also enjoin this part of Arizona 1070.[148]

D. Business Regulations and Penalties

The less well known Arizona immigration law is the Legal Arizona Workers Act of 2007 – a provision targeting businesses that employ unauthorized immigrants.[149] In addition to requiring the use of the federal E-Verify system, which is only optional under federal law, the Arizona law subjects businesses violating the law to a possible loss of their business licenses in Arizona.[150]

Yet, even before Arizona enacted its employer sanction law, a similar measure had already passed in Hazelton, Pennsylvania,[151] and other states had also enacted similar measures.[152] In its original review of *Lozano v. City of Hazelton*, the Third Circuit held that federal law preempted the em-

licensure was contrary to federal policy and objectives. *See id.* Thus, the Alabama provision only represented "'a hypothetical or potential conflict'" insufficient to support preemption. *Id.* at 1301.

146 The "*Valle del Sol* litigation" includes the litigation challenging Arizona's provisions prohibiting day laborer solicitation on First Amendment grounds, *see* Friendly v. Whiting, 846 F. Supp. 2d 1053 (2012), *aff'd*,, Valle del Sol v. Whiting, 709 F.3d 808 (9th Cir. 2013) (enjoining enforcement of provisions prohibiting day laborer solicitation as violating the First Amendment because of their content specific nature), litigation continuing to challenge other provisions of Arizona S.B. 1070, including sections 2(B) and 5, on Fourth and Fourteenth Amendment, and Supremacy grounds. *See* Valle del Sol v. Whiting, 2012 WL 8021265 (D. Ariz., Sept. 5, 2012), *aff'd*,, 732 F.3d 1006 (9th Cir. 2013) (following the reasoning and holdings in *Arizona* in enjoining Ariz. Rev. Stat. §13-2929 (part of Arizona S.B. 1070, section 5), as preempted, but refusing to enjoin section 2(B) until it has taken effect and evidences illegality), and litigation against Kris Kobach – Arizona S.B. 1070's author and the claimed architect of modern state/local immigration control, *see* Valle del Sol v. Kobach, 2:14-MC-00219 (D. Kansas).

147 These provisions are contained within Arizona S.B. 1070, § 5.

148 Valle del Sol, Inc. v. Whiting, 2012 WL 80212 (D. Ariz., Sep. 5, 2012), *aff'd*, 732 F.3d 1006, 1022-29 (9th Cir. 2013) (affirming the injunction of § 13-2929, as not only preempted by federal law, but also void for vagueness), *cert. denied*, 134 S.Ct. 1876 (2014).

149 *See* ARIZ. REV. STAT. ANN., tit. 23, ch. 2, §§ 23-211 to -212 (LexisNexis 2007).

150 *Id.*

151 *See* Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance, §§ 4(3)-(4), §§ 4(6)-(7) (Sept. 21, 2006) (providing an employer sanction ordinance, which could result in the loss of an employer's business license if the employer is caught with illegal immigrant workers); *see also*, Hazleton, Pa., Ordinance 2006-13, Establishing a Registration Program for Residential Rental Properties in Hazleton, PA, §7(b), §10(b) (Aug 15, 2006) (preventing the leasing of rental property to unauthorized immigrants, also providing sanctions); *see also* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 84-92 (examining the Hazleton ordinance and the role of local government in cooperative federalism and immigration).

152 *See, e.g.*, COLO. REV. STAT. § 8-17.5-102 (2008); *see also* MISS. CODE ANN. § 71-11-3(7)(e) (Supp. 2010); MO. REV. STAT. §§ 285-525, 285-535(3)-(5), 285-535(8)-(9) (2005 Cum. Supp.).

ployer sanction provisions of Hazelton's ordinance, allowing suspension of business privileges.[153] Yet, in *Chamber of Commerce v. Whiting*, the United States Supreme Court upheld the Arizona law as a valid use of state power over "licensing."[154] In light of its holding in *Whiting*, the Court granted certiorari and vacated the Third Circuit's decision in *Lozano*.[155] Although *Whiting* undermined or foreclosed much of the Third Circuit's original reasoning, it still held that federal law preempts the Hazelton, Pennsylvania ordinances.[156]

Notably, the Arizona law provides an employer sanction – suspension or revocation of the state business license – that the federal government is powerless to invoke. Accordingly, at least in the context of more exclusive state police power – such as licensing – the Supreme Court seems to accept state regulation of immigration. Likewise, the Eleventh Circuit, post-*Arizona*, rejected the pre-enforcement challenge to Alabama H.B. 56, section 30, that makes it a felony to enter into certain business relationships with political subdivisions of the state by seeking certain licenses.[157] Thus, it appears that the courts are more tolerant of state regulation of immigrants' licenses.[158]

E. Lessons From History

The historical predecessors for our existing and recently enacted state and local immigration controls carry with them lessons. Some of these lessons appeared to have been learned from these historical roots, but others

153 *See* 620 F.3d 170, 210-218 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

154 *See* 131 S. Ct. 2968, 1972-86 (2011).

155 *See id.* at 2958 (2011); *but see* Rachel Feller, *Preempting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices,"* 84 WASH. L. REV. 289 (2009).

156 *See* Lozano v. Hazelton, 724 F.3d 297, 304-09 (3rd Cir. 2013), *cert denied*, 134 S. Ct. 1491 (2014). Specifically, the Third Circuit explained that federal law preempted Hazelton's employment ordinances because these ordinances applied to a larger scope of actions and activities than IRCA, including independent contractors and other casual employees. *See id.* at 306-07. In contrast, the Arizona law at issue in *Whiting*, unlike the Hazelton ordinance, "'closely track[ed]'" the material provisions of IRCA. *See id.* at 308. Although the Arizona law, too, covered independent contractors, that addition was part of the 2008 amendments to the law and, thus, was not a part of the *Whiting* suit. *See id.* (citing *Whiting*, 131 S. Ct. at 1986 n.10; Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008)). By the time the Third Circuit revisited its decision in *Lozano*, the Supreme Court had not only decided *Whiting*, but also the *Arizona* case. *See id.* As a result, the Third Circuit also considered and followed the reasoning the Supreme Court used in holding Arizona S.B. 1070, section 5(B), preempted. *See id.* at 309 (citing *Arizona*, 132 S. Ct. at 2404-05).

157 *See Alabama*, 691 F.3d at 1298-1301 (refusing to affirm the injunction of Alabama H.B. 56, § 30, against preemption and other pre-enforcement challenges); *see also supra* note 145 (discussing in more detail the 11th Circuit's reasoning).

158 *Cf.* Hispanic Taco Vendors of Wash. V. City of Pasco, 994 F.2d 676, 677 (9th Cir. 1993) (rejecting challenge to a local law requiring licensing taco truck and other street vendors).

have gone largely ignored. As the old adage goes, if we ignore history, we are doomed to repeat it. Thus, rather than simply repeating our past mistakes in the area of state and local immigration controls, let us recognize what history can teach us.

Among the lessons lawmakers have learned, the existing and recent state/local laws are facially neutral. As discussed, many historical state/local immigration regulations expressly applied to specific races and/or national origins.[159] Although the laws target their measures at immigrants – particularly unauthorized immigrants – they do not expressly target immigrants of specific races or national origins.

Yet, before we congratulate our local lawmakers for their progress,[160] let us not forget that even the facially neutral state and local immigration controls often were motivated by racist/nativist sentiment and also indirectly targeted immigrants with particular national origins. As a result, these facially neutral laws did not assure equality. So, for example, facially neutral poor laws in Massachusetts were impacted by nativist and Anti-Irish sentiments. While similar laws in New York were less harshly and more equally applied. Likewise, despite the existence of some facially neutral measures in California and San Francisco, their Anti-Chinese motives were often apparent. As the court states in *Ho Ah Kow v. Nunan*,

> when an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that sect, race or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation.[161]

If we consider the lessons history teaches us, the facial neutrality of these more recent state/local immigration laws do not assure equality. Instead, we must look behind the "curtain" to see what motivated the laws, how they operate, and whether particular races or national origins are the "targets" for enforcement.[162] As Kevin R. Johnson recently observed, "immi-

159 *See supra* Part I-A.

160 Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT 237, 240 (2010) (recognizing that despite the changes in racial classification in immigration laws, it is "too early to celebrate their disappearance").

161 Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879).

162 *See* Chacón, *supra* note 103, at 1602 (comparing the racial impact of the facially neutral "War on Drugs" with the potential impact on Latina/os of facially neutral immigration laws – especially because in the "public mind" unauthorized immigration attaches to those of Mexican heritage and other

gration laws readily provide color-blind, facially neutral proxies that are often conveniently employed by groups that, among other things, seek to target persons of particular races and classes, specifically working class Latina/os, for immigration investigation, enforcement, and prosecution."[163] Applying this principle to Arizona's recent immigration measures, the nativist sentiments coupled with the large percentage of immigrants of Hispanic descent makes its attempts to control immigration particularly susceptible to abuses.[164] Moreover, when states like Georgia and Alabama enter the local immigration enforcement business, their history as slave states and their history of resistance to federal powers cannot simply be ignored.[165]

The statutes criminalizing the failure to carry immigration documents and demanding law enforcement officials check the immigration status of all persons stopped, regardless of any suspicion of the person being an unauthorized immigrant, can easily lead to harassment.[166] These document demand statutes bear some resemblance to the frequent demands made of free blacks to produce their registration documents and, thus, can lead to similar harassment. Although the Supreme Court held Arizona S.B. 1070's criminal document carrying requirements preempted by federal law, it refused to enjoin section 2(B)'s immigration status checks for arrestees.[167] Notably, though, the Court rejected the challenge to section 2(B)'s status checks in large part because of the pre-enforcement nature of the suit, seeing some of the challenges as premature.[168] Yet, had the Court been more

Latinos).

163 Johnson, *supra* note 8, at 315.

164 *See* Melendres v. Arpaio, 989 F.Supp. 2d 822, 846 (D. Ariz., May 24, 2013) (dealing the policies of Maricopa County, Arizona, Sheriff's Office that permit deputies' use of race and Hispanic appearance as a factor in making certain law enforcement decisions).

165 *See generally* Lisa Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009) (examining the impact of state/local immigration controls on relatively new immigrant communities in the rural South).

166 *See supra* notes 106-07, 110, 134-37 and accompanying text (discussing Arizona and Alabama document demand laws); *supra* note 37 and accompanying text (discussing use of registration statutes to harass free blacks).

167 *See Arizona*, 132 S. Ct. at 2507-10 (rejecting the injunction of S.B. 1070, § 2(B), Ariz. Rev. Stat. Ann. §11-1051(B) (West 2012)); *see also Utah Coalition of La Raza*, 2014 WL 2765195 (rejecting preemption and Fourth Amendment challenges against similar status check provision under Utah state law); *Alabama*, 691 F.3d at 1282-85 (rejecting preemption challenge to status check provision under Alabama state law); *GLAHR*, 691 F.3d at 1267-68 (rejecting preemption challenge to status check provision under Georgia state law).

168 *Arizona*, 132 S. Ct. at 2510 (refusing to foreclose future, post-enforcement challenges to section 2(B)'s status checks); *see also Alabama*, 691 F.3d at 1283-85 (noting premature nature of the pre-enforcement challenge of section 12(a) of the Alabama law and leaving its status check provision open to future challenges); *GLAHR*, 691 F.3d at 1267-1268 (noting the premature nature of the challenge of section 8 of Georgia H.B. 87 and leaving open future challenges to status check provision). The Court also demonstrated greater comfort with section 2(B)'s status checks because it prohibits consideration of "'race, color, or national origin . . . except to the extent permitted by the United States [and] Arizona

focused on 2(B)'s similarity to its historical roots in the document demand laws, it might have better appreciated this section's potential to lead to harassment and ethnic profiling.[169] Unfortunately, this is another lesson we might have to learn again instead of learning from history.[170]

Arizona's restrictions on day laborer solicitation provide an additional example of facially neutral legislation that strongly suggests ethnic/racial motivations and impact. The Ninth Circuit recently affirmed an injunction against these restrictions as contrary to the First Amendment, due in part to their content based nature.[171] Although Arizona argued that traffic safety, as substantial state interest, provided a content-neutral purpose justifying the restrictions, the Ninth Circuit gave this justification little credence. After all, the stated purpose of Arizona S.B. 1070's provision is "attrition through enforcement," not traffic control or safety.[172] Thus, if the purpose of prohibiting day laborer solicitation is to diminish the presence of unauthorized immigration, it follows that these provisions target day laborers

Constitution[s].'" *Arizona,* at 2507-08; *GLAHR,* 691 F.3d at 1267-68 (noting that Georgia status check provision similarly prohibited the use of race, color, or national origin).

[169] *See* Jennifer M. Chacón, *Transformation of Immigration Federalism,* 21 Wm. & Mary Bill Rts. J. 577, 580 (2012) (contending that preserving Arizona S.B. 1070 § 2(B) will have "inevitable discriminatory effects"). Yet, because *Arizona* raised strictly a pre-enforcement preemption challenge to sections of Arizona S.B. 1070 – not Fourth or Fourteenth Amendment, ethnic profiling, or as applied challenges – it may not have been the appropriate case for the Court to consider the impact of the historical roots of the status checks within the document demand laws. *See Arizona,* 132 S. Ct. at 2509-10; *see also id.* at 2516 (Scalia, J., dissenting) (recognizing that "the Government claims that § 2(B) is pre-empted by federal immigration law, not that anyone's Fourth Amendment rights have been violated"); Transcript of Oral Argument, at 33-34, Arizona v. United States (No. 11-182), *available at* http://www.supremecourt.gov/oral_arguments_transcripts/11-182.pdf (revealing that when faced with pointed questions by Chief Justice Roberts, including "[n]o point of your argument has to do with racial or ethnic profiling, does it?", the United States conceded); *but see* Chacón, *supra,* at 579 (contending that ethnic profiling was "an important reason why the law was preempted, not a separate set of concerns that needed to wait for an as-applied challenge").

[170] *See Melendres,* 989 F.Supp. 2d at 846 (holding unconstitutional the policies of Maricopa County, Arizona, detaining suspected unauthorized immigrants despite the preservation of S.B. 1070, section 2(B)'s status checks); *see also* Chacón, *supra* note 169, at 615 (explaining how the *Melendres* litigation evidences what is at stake by the *Arizona* Court's preservation of § 2(B)). After the Court's decision in *Arizona,* the challenges to section 2(B) resumed as part of the *Valle del Sol* litigation, as well. *See* Valle del Sol v. Whiting, 2012 WL 8021265 (D. Ariz., Sept. 5, 2012), *aff'd,* 732 F.3d 1006, 1014 (9th Cir. 2013) (denying the request to preliminarily enjoin section 2(B), in light of *Arizona,* until that section has taken effect); *see also* Chacón, *supra* note 169, at 580-81 (asserting that *Arizona* Court's preservation of section 2(B) will encourage continued sub-federal immigration enforcement efforts); Elias, *supra* note 122, at 750 (contending that after the *Arizona* case, state/local jurisdictions interested in enforcement-oriented laws simply restyled or considered enacting laws similar to Arizona S.B 1070, section 2(B)).

[171] Valle del Sol v. Whiting, 709 F.3d 808, 819-20 (9th Cir. 2013) (affirming district court injunction of Arizona S.B. 1070, sections 5(A) –(B), Ariz. Rev. Stat. § 13-2928(A)-(B), which prohibit hiring day laborers and seeking employment as a day laborer through street solicitation).

[172] As the Ninth Circuit observed, section 1 of Arizona S.B. 1070 provides that the "'intent of [S.B. 1070] is to make attrition through enforcement the public policy of all state and local governments in Arizona.'" *Id.* at 815. Accordingly, "this clear and unambiguous expression of purpose contradicts" the state's litigation position that traffic safety, a content-neutral and substantial government purpose, justifies the legislation. *Id.* at 819.

because the legislators believe day laborers are more likely to be unauthorized immigrants.[173] Combined with Arizona's substantial Latina/o population,[174] as well as the State's history, the impact of such restrictions is likely to fall disproportionally on this population and this strongly suggests racial/ethnic motives.[175]

Moreover, the racist roots of so many of these state and local immigration efforts should serve as a warning to local governments of how closely connected the two can be and how careful legislators need to be when enacting and enforcing such measures. In the same way state legislators might be leery of legislation with roots in the Jim Crow era, state and local lawmakers should be mindful of the racist roots of our immigration laws.[176]

By contrast, the fact that some states and localities with the most racially discriminatory immigration histories now offer some level of "sanctuary" to immigrants perhaps teaches us something as well. For example, the City of San Francisco, which had some of the most racist local immigration controls, is now a sanctuary city. Similarly, the State of Oregon went from a constitutional rejection to the entry of blacks, including free blacks, to embodying statewide sanctuary policies and laws. Perhaps, these jurisdictions learned the lessons of history better because they hit closer to home, and their tolerance and compassion stem from a desire to atone for their past mistakes.

Moreover, differences in respective political power within certain local governments can impact the manner in which those governments exercise their immigration control powers. For example, the governing board in New York included representatives from the immigrant communities. As a result, New York benefitted from a more socially supportive and effective immigration system than its nativist counterpart in Massachusetts. Similarly, the government of New Mexico has resisted entering the state immigra-

173 As stated by the provisions' principal sponsor, Arizona State Representative John Kavanagh, "'[a] large number of these people are illegal immigrants and this is the way they get work, and this work is one of the anchors that keep them in the country.'" *Id.* at 815, 820 (quoting the representative and explaining how this legislative history revealed not only hostility toward day laborers, but also undermined the state's litigation position that traffic safety was the purpose of the legislation).

174 Nearly one-third of Arizona's population is Hispanic or Latino. *See* U.S. Census Quick Facts (Arizona), *available at* http://quickfacts.census.gov/qfd/states/04000.html; *see also* Johnson, *supra* note 8, at 328 (observing how the significant proportion of Latina/os in Arizona impacts immigration reform within the State).

175 *See, e.g.*, Johnson, *supra* note 8, at 332-33 (discussing Arizona's history, demographics, and other considerations that suggest its immigration regulations are likely to disparately impact Latina/os).

176 *See generally* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010) (comparing state/local immigration controls to the Jim Crow laws); *see also* Johnson, *supra* note 8, at 320 n.23 (citing numerous scholarly analysis of the racist roots of our country's immigration laws).

tion enforcement business despite the fact that it, like Arizona, shares a border with Mexico and deals with problems associated with unauthorized immigration.[177] This difference in approach may be due, in part, to greater representation of different ethnic groups within New Mexico's government and community organizations.[178]

These historical predecessors also reveal lessons about the proper balance between federal and local government immigration controls and the potential for harmonious cooperative programs. Seeing as the quarantine systems operated for nearly a century as an example of cooperation between the state and federal government, this example can serve as a model for current cooperative efforts to deal with immigration. Similarly, it appears that the courts give some latitude to state and local government immigration controls when they can be viewed as cooperative or when, as with Arizona's business licensing law, they arguably fall within the state's more exclusive police powers. Yet, even those provisions that are arguably duplicative of federal immigration measures, like section 3 of Arizona S.B. 1070, can be preempted by such federal laws. In light of these recent cases, local governments interested in playing a greater role should increase their efforts to coordinate and cooperate with federal authorities.[179] In fact, the Court's focus on the formal INA 287(g) agreements as a means for proper state and federal cooperation suggests that other, informal types of duplicative efforts will run afoul of the Supremacy Clause.[180]

By contrast, we find historical roots to current state and local government sanctuary policies too. Current sanctuary governments, contrary to cooperative systems, refuse to cooperate with federal immigration authorities in certain circumstances. Their historical roots are found in the free states personal liberty laws – those laws that provided procedural and other protections to fugitive slaves within their jurisdiction. Due to this similarity, the federal statutory response, making many sanctuary policies a violation of federal law, and the courts' endorsement of such federal legislation,

177 *See infra* note 189, and accompanying text (explaining Arizona's argument that by focusing federal resources on California and Texas, the federal government is funneling illegal immigration to other border states).

178 *See* Randal C. Archibold, *Side By Side, but Divided Over Immigration*, N.Y. TIMES (May 11, 2010), *available at* http://www.nytimes.com/2010/05/12/us/12newmexico.html?pagewanted=all (attributing greater political power within New Mexico to the difference in approach).

179 Alabama H.B. 56, sections 4-6, provide examples of state laws requiring and encouraging local cooperation with federal authorities. *See supra* note 104 and accompanying text (discussing these cooperative provisions of Alabama H.B. 56).

180 This limited role for state governments undermines the argument that "states as laboratories" might have in the area of immigration. As Professor Cunningham-Parmeter argues, because the state is limited to simply enforcing federal laws, no meaningful "experimentation" can be conducted. *See generally* Cunningham-Parmeter, *supra* note 26, at 1691-92.

should have come as no surprise. After all, Congress enacted the Fugitive Slave Act of 1793, and later strengthened those measures in 1850, as a response to the personal liberty laws of some of the free states and their willingness to provide sanctuary to fugitive slaves within their jurisdictions. Even the window left open in *Prigg* for states to simply refuse to cooperate with federal enforcement of the Fugitive Slave Act of 1793 was eradicated by the Fugitive Slave Act of 1850, which was part of the Compromise of 1850, and required the Northern States to cooperate with its enforcement. Accordingly, Congress and the courts reacted much the same way to sanctuary for fugitive slaves as they have reacted to sanctuary for unauthorized immigrants.[181]

Moreover, the recent administrations' interpretation of "don't ask" sanctuary policies as not preempted by federal law will not protect such laws from actions taken by future administrations. As the Arizona Court reasoned, the scope of "federal law" for preemption purposes includes executive discretion.[182] As Adam Cox contends, "the [*Arizona* Court's] approach elevates every act of prosecutorial discretion by an executive branch official to the status of supreme law for purposes of preemption analysis." [183] As a result, as administrations change, so, too, may discretionary interpretations and enforcement decisions. Thus, because a new administration could change positions on the preemption of sanctuary laws, the lessons to be learned from the historical roots of these more recent sanctuary laws remain relevant.

Where state and local government powers over immigration seem the highest is in the area of business regulation and taxation. As the Supreme Court recently recognized in *Chamber of Commerce v. Whiting*,[184] regulation of businesses within the state is a traditional state police power. Here, the state often holds powers that the federal government does not. Similarly, the historical state and local immigration controls targeting licensing and taxation received court approval – at least to the extent that such regu-

181 *Cf.* Chacón, *supra* note 169, at 616-17 (discussing the Obama Administration's Secure Communities Program – another program requiring state/local cooperation with federal immigration officials – and how attempts by some localities to opt out have been unsuccessful); *but see generally* Elias, *supra* note 122 (contending that the *Arizona* decision marks not the end of "immigration federalism," but instead paves the way for a "new direction" of more inclusionary immigration measures).

182 *See Arizona*, 132 S. Ct. at 2503, 2506 (incorporating executive discretion as within the scope of federal law for preemption purposes).

183 Cox, *supra* note 90, at 33. Professor Cox also argues that the inclusion of executive discretion is "not limited just to an isolated passage," but "is the analytical thread that ties together the entire opinion." *Id.* at 51.

184 131 S.Ct. 1968 (2011). *Cf. Alabama*, 691 F.3d at 1298-1301 (refusing to enjoin Alabama H.B. 56's restrictions on business and other licenses); *supra* note 145 (discussing the reasoning for this part of the 11th Cir. decision in the Alabama case).

lations were facially neutral.[185] For example and for similar reasons, the California Supreme Court affirmed the legality of the foreign mining license laws.[186] Accordingly, the historical roots and the current laws support a limited role for state and local immigration control through business regulation laws.

With the exception of cooperative programs and measures involving business regulation or taxation, the historical roots of state and local immigration controls suggest their ineffectiveness and unconstitutionality. Considering their strong racial undertones, it seems hardly worth the costs to state/local governments.

Yet, the lessons of history can benefit more than simply our state and local lawmakers. These historical immigration controls carry some lessons for federal legislators as well. When the federal government fails to effectively control immigration, the state and local governments will try to fill the gaps. Arizona lawmakers consider its immigration problems, in part, due to federal policies and lax enforcement by federal authorities.[187] As Justice Scalia points out in his recent dissent in the *Arizona* case, "[t]he State's whole complaint – the reason [1070] was passed and this case has arisen – is that the citizens of Arizona believe federal priorities are too lax."[188] As Arizona argued, by focusing federal resources on the California and Texas borders, the federal government has essentially pushed illegal immigration from the Mexican border into Arizona.[189] And, the impact on Arizona is not merely theoretical, but instead is quite tangible. According to the statistics cited,[190] Arizona deals with a disproportionate share of unauthorized immigration and associated crime.[191] In light of these problems, Arizona is unlikely to give up its efforts at immigration controls – even after the Supreme Court's recent decision.[192] After all, another lesson of his-

185 *But see supra* note 156 (discussing how the 3rd Cir. reaffirmed its injunction against similar provisions in Hazelton, Pennsylvania ordinances because they materially departed from IRCA).

186 *See* People v. Naglee, 1 Cal. 232, 242-244 (1850).

187 *But see* Johnson, *supra* note 8 at 321 (disputing the "lax enforcement" argument because the "Obama administration arguably has emphasized enforcement over almost all else").

188 *Arizona*, 132 S. Ct. at 2517 (Scalia, J., dissenting).

189 *See id.* at 2520-21 (quoting Brief for Petitioners, at 2-3); *see also* Johnson, *supra* note 8, at 326-27 (discussing how the increase in enforcement in Texas and San Diego pushed unauthorized immigration, and its related problems, to the southern border of Arizona).

190 *See id.* at 2500 (noting that unauthorized immigrants account for almost six percent of the population and are reportedly "responsible for a disproportionate share of serious crime").

191 *See id.* at 2521 (quoting the Petitioner's brief, stating, "over the past decade, over a third of the Nation's illegal border crossings occurred in Arizona"); *id.* at 2522 ("Arizona bears the brunt of the country's illegal immigration problems."); *see also* Johnson, *supra* note 8, at 321 (acknowledging that some state/local enforcement actions are motivated by "more legitimate grievances over ... the unequal distribution of the costs and benefits of immigration between the federal and state and local governments").

192 *See generally Melendres*, 989 F.Supp. 2d at 846 (demonstrating how at least Maricopa County,

tory was the persistence of the California legislature, even after numerous court decisions invalidated its immigration control efforts. Justice Scalia's dissent asks: "Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?" History suggests the answer is no – or not so quickly.

Moreover, the federal government has not spoken with one voice on the proper role of state officials in the overall immigration system.[193] As previously addressed, historically, the federal government largely relinquished this power and role to the states and localities. At other times, the federal government has accepted and even invited state and local cooperation.[194] Examples include informal, discretionary law enforcement cooperation, and more formal programs, like INA section 287. At other times, like the Fugitive Slave Act of 1850 and post 9/11 responses, the federal government has essentially ordered state and local governments to assist it in enforcing immigration laws.[195]

Furthermore, by raising court challenges to current state immigration laws, the federal government also treats the states as mere meddlers. In fact, the federal government's preemption arguments claim that immigration enforcement is its job, thereby suggesting it has the power and the means to deal with the matter. Yet, the Executive's recently announced program to defer enforcement of an estimated 1.4 million unauthorized immigrants under the age of 30, as a means of reprioritizing its scarce resources, undermines this suggestion.[196] More recently, the immigration cri-

Arizona, continued to pursue local immigration enforcement after the Supreme Court's decision in the *Arizona* case); *see supra* note 146 (discussing the *Valle del Sol* litigation and demonstrating that the State of Arizona continues to press its state immigration control efforts). The State of Arizona is not alone, either. Other state and local governments continue to pursue their own immigration measures. *See* Villa at Parkside Partners v. City of Farmers Branch, Tx, 726 F.3d 524 (5th Cir., July 22, 2013); Keller v. City of Fremont, Neb., 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014); *see also* Chacón, *supra* note 169, at 581, 582 (contending that the *Arizona* Court, by preserving section 2(B), actually "green lighted" state/local governments considering their own immigration control legislation because what appears to be a limited concession "actually ceded significant powers to sub-federal entities"); Elias, *supra* note 122 (contending that rather than marking the end to "immigration federalism," the *Arizona* decision marks a "new direction" of more immigrant inclusionary laws).

193 *Cf.* Johnson, *supra* note 8, at 322 (observing how the courts have been inconsistent with regard to the respective roles of the state/local and federal governments).

194 *See supra* Part III.A (discussing cooperation between federal and state/local authorities).

195 *See* Pham, *supra* note 102, at 1374.

196 *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., dissenting) (discussing the President's "deferred action" program); *see Arizona Gov. Issues Executive Order Limits New Immigration Policy,* ALA. PUBLIC RADIO (Aug. 15, 2008), *available at* http://www.apr.org/post/arizona-gov-issues-executive-order-limits-new-immigration-policy (showing that Arizona is unlikely to give up its efforts to control immigration since the Governor of Arizona announced that unauthorized immigrants given deferred status under President Obama's program will still be deemed unauthorized and, therefore, ineligible for state health benefits); *but see* Cox, *supra* note 90, at 57 (challenging the contention that such deferred action was motivated by limited federal resources, but instead arguing that it was motivated by more normative goals, like keeping talented and bright young people in the United States).

sis created by thousands of unaccompanied minors crossing into the United States suggests that federal officials are not prepared to deal with all immigration-related problems.[197] Regardless of whether the federal government is fully equipped to deal with immigration, these mixed messages undermine progress toward comprehensive immigration reform.

Finally, history also teaches us that immigration control implicates foreign relations matters. For example, when the State of South Carolina and the City of Charleston required the jailing of free black seamen on foreign vessels, in violation of United States' treaties, these local immigration controls implicated foreign affairs.[198] To make matters worse, when foreign diplomats were unable to resolve treaty disputes with the United States federal officials, they began bypassing federal diplomats and going directly to the officials of the State of South Carolina and the City of Charleston.[199] Not only did federal diplomatic ineptness cause the United States embarrassment, it also likely diminished the United States federal government in the eyes of foreign governments.[200] Similarly, the California and San Francisco immigration laws expressly targeting Chinese immigrants created conflicts with treaties between the United States and China – particularly the Burlingame Treaty.[201] Such conflicts served as the primary basis for invalidating some of these Anti-Chinese immigration measures. Notably, concerns over state criminalization of unauthorized immigration status impacting and conflicting with the federal foreign affairs powers served as a basis for the Supreme Court's recent decision to affirm portions of the injunction against some provisions of Arizona S.B. 1070.[202]

197 *See, e.g., Obama Asks for $3.7 Billion to Aid Border,* nytimes.com (July 8, 2014), *available at* http://www.nytimes.com/2014/07/09/us/obama-seeks-billions-for-children-immigration-crisis.html?_r=0 (reporting on President Obama's request for $3.7 billion in funding to deal with the flood of unaccompanied minors entering the United States). U.S. Senator Marco Rubio claims that this immigration crisis exposes "as fallacy" the Obama administration's assertions that "the border has never been more secure than it is now." *See id.* Some blame President Obama for this crisis, contending that the lax enforcement and deferred action policies of the Obama administration encouraged more children to illegally cross the border. *See, e.g., id.* (quoting U.S. Representative John Carter as saying "[t]he [P]resident caused this self-inflicted crisis on the border by refusing to enforce the law ... And, now he is requesting a $3.7 billion bailout from taxpayers to rectify his mistakes"); *Immigration Reform's Open Invitation to Children,* nytimes.com (June 21, 2014, Op-Ed), *available at* http://www.nytimes.com/2014/06/22/opinion/sunday/ross-douthat-immigration-reforms-open-invitation-to-children-.html (drawing a correlation between Obama administration's policy to permit deferred action for children to the current influx of unaccompanied minors crossing the border).

198 *See supra* notes 45-46 and accompanying text (discussing state and local laws preventing the landing and requiring the detention of free black seaman).

199 Neuman, *The Lost Century, supra* note 12, at 1874-77.

200 *Cf.* Chy Long v. Freeman, 92 U.S. 275, 280 (1875) (recognizing that because of the foreign relations implications of immigration law, state immigration regulation creates the potential for a state to "embroil us in disastrous quarrels with other nations").

201 The Burlingame Treaty was the popular name for the Convention of 1868, and it permitted unrestricted immigration of Chinese laborers. *See,* COURTNEY, *supra* note 57, at 10-11.

202 *See Arizona,* 132 S. Ct. at 2498-99; *see also* United States v. Arizona, 641 F.3d 339, 352-54,

Conclusion

As the old adage goes, if we ignore history, we are doomed to repeat it. Yet, because the "open borders" myth is so pervasive and persistent, it has prevented a full appreciation of our history of state and local immigration controls, and the lessons that history can teach us.

And the lessons of history are significant. In light of the racial roots of our immigration history, state and local governments should tread lightly into this area and honestly examine their motives, as well as consider the potential for such laws to disparately impact particular races and ethnicities. Moreover, the strong foreign affairs implications of immigration regulation further mark a danger zone. Accordingly, especially in our increasingly global community, history reveals good reason for federal dominance in the realm of immigration.

Yet, history also supports a role for state and local governments to contribute to effective and meaningful immigration reform. In particular, where state police powers reign supreme and federal remedies are limited – as is true in the area of business licensing – state and local legislation can play a critical role in the immigration mission. Moreover, our historical and current immigration systems provide examples of effective immigration regulation through cooperation between the federal government and state/local officials. Real federal/state cooperation may be the first step to true comprehensive immigration reform.

Despite the Supreme Court's recent decision in *Arizona v. United States*, holding three of the provisions of Arizona S.B. 1070 preempted by federal law, the lessons of history remain important. In fact, history teaches us that states do not give up efforts to control immigration so lightly anyway. The continued efforts of state/local governments to enact, enforce, and defend immigration-related laws even after the *Arizona* decision reflects that this historical lesson is accurate. Thus, even if the Court's majority appears to have ignored history and perpetuated the "open borders" and federal exclusivity myths, state and local governments should heed the lessons of history. Before moving ahead, take a look back.

360 (9th Cir. 2011).