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By Lisa Sandoval[1]

"The differences of race added greatly to the difficulties of the situation . . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people . . . saw . . . great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration." – *Chae Chan Ping v. United States*, 1889[2]

Introduction

Immigration from Mexico should be curtailed because it threatens the United States by eroding Anglo-Protestant culture. This thesis is advanced in *Who are We? The Challenges to America's National Identity*[3] by Samuel Huntington, one of the most widely cited political scientists on international relations.[4] Huntington warns that Hispanic immigration to the United States threatens to transform the nation into "a country of two languages, two cultures, and two peoples."[5] The current immigration debate in the United States shows that many people support Huntington's proposition, as evidenced in Arizona Senate Bill 1070 (SB 1070).[6] Signed into law on April 23, 2010, SB 1070 is aimed at identifying and deporting "illegal immigrants."[7]

In an attempt to facilitate this mission, the law requires local law enforcement officials to stop and demand identification from anyone they "reasonably suspect" is in the country illegally.[8] This of course begs the question, what gives rise to "reasonable suspicion"? What does it mean to "look illegal"? For that matter, what does it mean to look "American"? The answers to these questions reveal the troubling marriage between race and immigration law. However, the underlying racism fueling SB 1070 does not represent a new trend. In fact, U.S. immigration law uses racial difference as an indicator of non-belonging and thus reifies notions of racial inferiority.

Ian Haney Lopez, a prominent critical race scholar, argues that the law not only reflects but constructs social prejudice.[9] The law thus becomes an instrument in constructing and reinforcing racial subordination.[10] In this paper, I explore how immigration law, in particular, constructs notions of racial inferiority by associating racial difference with noncitizen, or "illegal", immigration status. Within the immigration law framework, racially different noncitizens are pitted against a seemingly homogenous group of "American" citizens.

As Jennifer Gordon and R.A. Lenhardt point out, citizenship has been used to refer to a whole host of different ideas, including nationality, forms of political participation, and entitlement to certain rights.[11] I use citizenship to refer to the entitlement to belong. Within this definition of citizenship, belonging encompasses both cultural and racial belonging in a nation. I recognize that in practice citizenship does not always grant automatic belonging in society. Instead, I believe that citizenship is used by those in power to determine who is worthy of belonging, which history has revealed is a determination that largely turns on race.

As Gordon and Lenhardt also discuss, by defining inclusion, citizenship also defines exclusion.[12] I argue that immigration law historically relied on citizenship to exclude noncitizens, who have been deemed unable to assimilate due to their race. In order to gain legal status as a citizen—in order to belong—

the noncitizen must assimilate to the citizen, who was legally defined as white until 1952.[13] Based on this history, immigration law today continues to use racial difference as an indicator of non-belonging, reifying notions of racial inferiority in the process.

Kevin Johnson believes racism is visible in immigration law because society transfers its racism toward domestic minorities to noncitizens.[14] While overt racism toward minority citizens is much more controversial, racism towards noncitizens can be masked by facially neutral gripes about noncitizens' failure to assimilate, frustration over linguistic barriers, or intolerance of "criminals"[15] who have broken immigration laws. Johnson's transference theory helps explain why immigration laws continue to justify a focus on racial difference to support race neutral policies like protecting national security and preserving American culture.[16] The result of this kind of immigration law and policy is what Mae M. Ngai titles "alien citizenship." As she explains, an "alien citizen" is a U.S. Citizen "by virtue of her birth in the United States but whose citizenship is suspect, if not denied, on account of the racialized identity of her immigrant ancestry."[17]

I argue that SB 1070 provides a contemporary example of the way immigration law constructs racial difference as an indicator of non-belonging, reifying notions of racial inferiority. Specifically, SB 1070 overtly attempts to exclude unwanted immigrants and does so by mandating racial profiling. Arizona's new law illustrates Johnson's theory of transference as well as Ngai's concept of "alien citizenship." SB 1070 results from the evolution of this nation's immigration laws. Particularly important in shaping SB 1070 is the plenary power doctrine, which currently affords the political branches unfettered discretion in regulating immigration. As a result of this broad discretion, noncitizens are stripped of important constitutional rights under federal immigration law. SB 1070 employs a similar type of constitutional rights-stripping.

Section One of this paper highlights four moments in history that illustrate the way immigration law constructs race. Section Two discusses which constitutional protections are denied to noncitizens in the immigration context. Section Three illustrates how constitutional rights-stripping of noncitizens leads to increases in racial profiling, both within and outside of the immigration context. Section Four argues that SB 1070 is a product of this nation's historical racism towards immigrants. This section frames SB 1070 within Johnson's transference theory and Ngai's idea of alien citizenship. Finally, Section Five provides recommendations for dismantling the underlying racism present in immigration law.

Section One: A History of Racism in Immigration Law

Perhaps more alarming than SB 1070's express sanction of racial profiling is the consistent theme of racism present in the history of immigration law. The evolution of U.S. immigration law demonstrates the political and judicial branches' repeated use of race to deny different groups citizenship status. This trend illustrates Gordon and Lenhardt's theory that citizenship defines exclusion, not merely inclusion. While immigration law has changed over time, what remains the same are notions of racial inferiority associated with noncitizens. The history of U.S. immigration law reveals many instances of race being used to signify non-belonging, but I focus on four moments: 1) *Dred Scott v. Sandford*,[18] 2) *Chae Chan Ping v. United States*[19] (the Chinese Exclusion Act case), 3) the "naturalization cases," and 4) the Mexican Repatriation and Operation Wetback.

Dred Scott Sets the Stage

Immigration to the United States is a phenomenon that traces to the founding of the nation.[20] While immigration was largely unregulated during roughly the first 100 years of the United States' existence, by 1882 the Chinese Exclusion Act ("the Act") was one of the first major attempts at controlling the flow of people into the country.[21] The legal precedent established in *Chae Chan Ping v. United States*,[22] a case arising from the Act, created the legal framework for immigration law in the United States. However, it is important to understand how *Dred Scott v. Sandford,* decided thirty-three years earlier, set the stage for *Chae Chan Ping* by first characterizing citizenship in terms of racial belonging and assimilability.

In *Dred Scott v. Sandford*[23] the United States Supreme Court held that African Americans, even those born free, were not U.S. Citizens.[24] The Court denied Dred Scott the ability to sue in federal

court because it deemed that he was not a citizen of the United States.[25] The Supreme Court turned to race to determine whether the original framers intended to include slaves within the meaning of the Constitution.[26] The Court presented exhaustive evidence of racial animosity towards African Americans in order to *justify* not granting them citizenship status under the Constitution:

> We refer to these historical facts for the purpose of showing the *fixed opinions concerning that race*, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them . . . .[27]

whether the original framers intended to include slaves within the meaning of the Constitution

While this case holds great meaning for many reasons beyond the scope of this paper, it is also significant because the Court expressly characterized citizenship in terms of racial belonging. Thus, the Court focused on Scott's racial difference as a reason why he did not belong to the nation in the form of a citizen. Although this decision was later overturned by the Fourteenth Amendment,[28] its characterization of noncitizens as racially different "others" set the jurisprudential stage for the Chinese Exclusions Act case.

Chinese Exclusion and the Plenary Power Doctrine

Chae Chan Ping set forth the plenary power doctrine, allowing the political branches unfettered power to regulate immigration. This discretionary and far reaching power was justified in the name of "protecting" the nation from the danger posed by racially different foreign nationals. The holdings of this case and the reasoning of the Court have set the framework of immigration law enforcement until present day. The Court's reasoning focused on the Chinese's racial difference as the reason why they failed to assimilate and the threat they posed by that failure.[29]

On May 8, 1882, Congress passed the Chinese Exclusion Act, which allowed the Executive branch to exclude Chinese nationals from entering the United States.[30] Under the Act, Chinese nationals already living in the United States needed to obtain a certificate of reentry if they left the country and wanted to return.[31] Chae Chan Ping was a Chinese-born laborer living in California during the California Gold Rush, which lasted from approximately 1848 to 1855.[32] Before leaving the country to visit China, Ping obtained a certificate of reentry, as required by the Act.[33] However, during his absence from the country, Congress amended the Act to ban reentry of Chinese, including those who had obtained a certificate to do so.[34] Ping was barred from entering the country and challenged his exclusion, which the Court upheld.[35]

Justice Field, writing for a unanimous court, pointed to the Chinese laborers' race as the underlying reason why they could not assimilate to U.S. culture:

> The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living.[36]

The analysis then seamlessly transitioned into the danger that the Chinese posed due to the increase in their population:

> As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there

accordingly petitioned earnestly for protective legislation.[37]

It is clear that the Court based the racial difference of the Chinese on their inability to assimilate, which posed a "threat" to the people of the United States. Justice Field paints a picture of "others" overtaking the nation.[38] In the eyes of the Court, as well as those of Congress, the increased presence of the Chinese—a group viewed as so racially different that they could not blend in with their surrounding population—was something from which the people of the United States needed protection. It is through this framework of non-belonging and danger that the Court not only justifies, but promotes the exclusion of the Chinese. This logic is further evidenced when the Court declares:

> If…the government of the United States, through its legislative department, considers the presence of foreigners of a *different race* in this country, who will *not assimilate* with us, to be *dangerous to its peace and security*, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[39]

Chae Chan Ping built on the notion in *Dred Scott* of racial difference as creating a barrier to assimilation. The Court in both cases views an inability to assimilate due to racial difference as the ultimate marker of non-belonging. Going a step further, the Court in *Chae Chan Ping* characterizes the racial difference of noncitizens as a threat to the nation, which justifies the political branches in taking whatever measures they deem appropriate in regulating immigration.[40] The result of this rationale is the plenary power doctrine, which ultimately leads to constitutional rights-stripping of noncitizens.

The Naturalization Process: Determining Whiteness

The "naturalization cases" refer to the set of cases in which immigrants argued that they should be allowed to naturalize under the provisions of the Naturalization Act of 1790 that extended citizenship to "free white persons" and, after the Fourteenth Amendment, "aliens of African nativity and . . . persons of African descent."[41] In these cases courts determined whether a particular group could meet the prerequisite of being white in order to naturalize. The cases focused on race as an indicator of whether immigrants could assimilate into U.S. culture, which was another way of determining if they belonged and were thus worthy of citizenship status. The race-based requirement to naturalize was not lifted until 1952 with the passage of the McCarran-Walter Act.[42]

The Court's reasoning focused on the Chinese's racial difference as the reason why they failed to assimilate and the threat they posed by that failure.

It is worth noting that as a reaction to *Dred Scott* and Reconstruction efforts to rectify gross inequalities, the Naturalization Act of 1790 was amended to include "aliens of African nativity and persons of African descent."[43] As a result of this amendment, a black-white dichotomy of races within the naturalization system was created. The fact that all naturalization cases consisted of courts determining whether a particular group could be considered white indicates that the black-white dichotomy was in fact a racial hierarchy in which whites were the dominate group to which noncitizens must conform. As such, white was further constructed as the superior race to which immigrants should assimilate if they were to enjoy the full benefits of U.S. citizenship.

For instance, *In re Halladjian*, Judge Lowell in the Massachusetts Circuit Court granted citizenship to four Armenians by relying on the popular usage of the term "free white person."[44] The judge turned to late eighteenth-century census documents that described the inhabitants of the former colonies.[45] Judge Lowell reasoned that since the censuses expressly mentioned "Indians, Chinese, and Japanese," the term white was used as a "catch-all word to include everybody else."[46] While recognizing that "there is no European or white race," Judge Lowell nonetheless allowed the notion of whiteness to continue as a prerequisite to naturalizing. He granted the Armenians citizenship based on the fact they could conceivably fall under the catch all description of whiteness since their race was not explicitly mentioned in the censuses.[47]

However, in *Ozawa* the Supreme Court denied a Japanese man citizenship because he was deemed as falling outside the Caucasian race and thus could not be granted citizenship.[48] The Court rejected a color test to define whiteness and instead relied on the meaning of Caucasian as "a zone of *more or less debatable ground* outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship."[49] Like the Massachusetts Court, the Supreme Court raised doubt about the concreteness of the meaning of the term "white" or "Caucasian" but nonetheless chose to advance the notion of whiteness as a requisite of citizenship.[50]

In *United States v. Bhagat Singh Thind*,[51] an Indian national contested the denial of his citizenship application. The Supreme Court held that "upper class Hindus" could not be classified as white and were therefore barred from naturalizing.[52] The Court conceded that trying to define whiteness through biology or reference to Caucasian ancestry was elusive and not scientifically sound.[53] However, the Court nonetheless connected whiteness with the ability to assimilate by rationalizing that Europeans were white because they could "merge into the mass of our population and lose the distinctive hallmarks of their European origin."[54] Within this definition of white, assimilation did not mean merely adjusting to "American culture" but instead losing one's identity to blend in with the white majority.[55] Hindus were denied white status precisely because they "would retain indefinitely the clear evidence of their ancestry."[56]

Mexican Repatriation and Operation Wetback: History Repeats Itself

During the Great Depression, President Hoover authorized the removal of Mexican nationals, although more than half of those removed turned out to be U.S. Citizens.[57] Due to the economic downturn, the repatriation was intended to ensure that only "true Americans" held jobs in the United States.[58] To assist in the round-up, all over the nation police raided public spaces, including churches, and forced people of Mexican ancestry onto trains and buses headed for the U.S.-Mexico border.[59] By the end of the decade-long deportation campaign, deemed "repatriation," an estimated one million people of Mexican ancestry were removed from the country.[60]

History repeated itself in 1954—just two years after race requirements were removed from the naturalization system. Congress passed Operation Wetback, intended to deport Mexican "wetbacks," a term legitimately used in mainstream discourse to refer to illegal Mexican immigrants.[61] Operation Wetback went hand-in-hand with the Bracero Program set up by the United States to import temporary Mexican agricultural workers in order to address labor shortages due to World War II.[62] While the United States welcomed the *labor* of Mexican nationals through the Bracero program, it simultaneously rejected the presence of Mexican nationals beyond their capacity as laborers. Hence, Operation Wetback was intended to address the increase in illegal immigration that had grown alongside the Bracero Program.[63]

Under the program, undocumented Mexican nationals and Mexican nationals who were legally present under the Bracero Program were indistinguishable.[64] Therefore, Operation Wetback's main mission of deporting "illegal" Mexican immigrants served more as a cover to remove all Mexican nationals deemed a threat to society. As evidenced by the title of the deportation campaign, once again racial difference fueled the exclusion of immigrants who were deemed harmful to society. Under Operation Wetback, more than one million people were deported. [65] Like the Mexican Repatriation, many deportees were U.S. citizens.[66]

Section Two: Extra-constitutionality of Immigration Law

The evolution of immigration law since *Chae Chan Ping* illustrates that, as a result of the plenary power doctrine, fundamental constitutional protections are applied in a highly restrictive manner in the immigration context. Challenging government action that regulates immigration is very difficult since the plenary power doctrine also ensures that courts provide deference to the political branches regarding immigration laws.[67] Without a check on this unfettered discretion, the political branches are able to abuse their power, as evidenced in federal immigration laws that strip constitutional rights from noncitizens and promote racial profiling.

Noncitizens are described as not being punished by deportation but merely regulated.[68] Therefore, immigration proceedings are characterized as civil rather than criminal.[69] As a consequence, many of the constitutional protections afforded to criminal defendants are stripped from noncitizens undergoing deportation proceedings. For instance, noncitizens who undergo immigration proceedings are not afforded many basic constitutional rights under Article I of the Constitution, the Fourth Amendment, the Fifth Amendment, and the Sixth Amendment. Specifically, immigration regulations can be applied retroactively, in violation of the Ex Post Facto Clause of Article I, section 9 of the United States Constitution.[70] In addition, the Fourth Amendment remedy for suppression of evidence obtained in an illegal search or seizure is applied in a very limited fashion to noncitizens.[71] Noncitizens do not enjoy a presumption of innocence[72] and they receive no Fifth Amendment protection regarding the right to remain silent; silence can be used against them.[73] Noncitizens are also not afforded the Sixth Amendment guarantees to an impartial jury, a speedy trial, and right to counsel.[74] Furthermore, the rules of evidence do not apply to immigration proceedings[75] and the government may use secret evidence against noncitizens.[76] The constitutional rights stripping of noncitizens made possible by the plenary power doctrine, makes immigration law immune from many standard constitutional protections. As a result, police action that would otherwise be unconstitutional is considered legal when executed in the immigration context. A prime example is the widespread use of racial profiling to regulate immigration.

Section Three: Using Race to Identify Noncitizens

Current Supreme Court precedent allows for the use of racial profiling in immigration enforcement.[77] Amnesty International defines racial profiling as:

> [T]he targeting of individuals and groups by law enforcement officials, even partially, on the basis of race, ethnicity, national origin, or religion, except where there is trustworthy information, relevant to the locality and timeframe, that links persons belonging to one of the aforementioned groups to an identified criminal incident or scheme.[78]

Based on this definition, the legal use of racial profiling within the immigration context suggests that race *becomes* "trustworthy information" regarding a person's likelihood of being unlawfully present in the country. Current immigration case law demonstrates this correlation.

Under *Brignoni-Ponce*, the Court established the legal use of racial profiling as a tool to enforce immigration law.[79] Specifically, "Mexican-appearance" in conjunction with other articulable facts was described as creating the reasonable suspicion necessary to stop someone under the Fourth Amendment. In *Brignoni-Ponce*, the Border Patrol had set up a checkpoint in San Clemente, California.[80] One evening, while the checkpoint was closed due to bad weather, Border Patrol officers observed traffic from their vehicle parked on the side of the highway.[81] They stopped respondent's car, stating that the respondent's Mexican-looking appearance was their only basis for doing so.[82] Although the Court found that Mexican appearance alone is not a sufficient reason for stopping a person, it can be used in conjunction with other factors.[83]

Brignoni-Ponce is a pivotal case because it validated the use of racial stereotypes to define "Mexican appearance" and connected race with the likelihood of illegal conduct. The Court took the government at its word that trained officers can detect "the characteristic appearance" of people who live in Mexico based on "such factors as the mode of dress and haircut."[84] In no way did the Court challenge this allegation. In fact, "mode of dress and haircut" are merely examples of what immigration officers use to detect someone from Mexico. Immigration officials may be explicitly using race and accents as factors, but the Court makes no inquiry into this. By not challenging the government's assertion, the Court effectively allowed the government to decide what it means to "look Mexican."

The Court goes a step further by correlating "Mexican appearance" with the likelihood of being unlawfully present in the United States. In the Court's words, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to

make Mexican appearance a relevant factor."[85] The Court concluded its opinion by stating the Fourth Amendment requires that when a person is stopped there must be at least "reasonable suspicion" that the person is an "alien."[86] In reaching its holding, the Court allowed the notion of "Mexican appearance" based on racial stereotypes to create suspicion of illegal activity. *Brignoni-Ponce* remains the law and therefore, in the context of immigration regulation, "looking Mexican" carries a presumption of illegality.

The correlation between race and illegal conduct has been extended to target other ethnic groups in the context of the War on Terror. In *Farag*, the Government cited *Brignoni-Ponce* to allow air transportation officials to consider "Arab appearance" as a relevant factor when stopping air passengers because all of the 9-11 hijackers were "Middle Eastern males."[87] Even though the Court rejected the Government's argument, it did reaffirm and distinguish the use of race in *Brignoni-Ponce* since that case was formally within the context of immigration enforcement.[88]

Even though in *Farag* the Court rejected "Arab appearance" as a relevant factor when stopping air passengers, the government need only turn to its official national security policy to consider race. Federal national security policy recognizes that racial profiling, in certain contexts, is considered legal:

> In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity *except to the extent permitted by the Constitution and laws of the United States*.[89]

Based on the precedent set forth in *Brignoni-Ponce*, it is likely that the government may target different ethnicities in its national security efforts until a case comes before the court forbidding specific uses of ethnic appearance, such as "Arab appearance." With the increase of local officials obtaining the ability to conduct immigration enforcement,[90] after *Brignoni-Ponce*, racial profiling will continue to be widely used under the guise of immigration enforcement.

Using racial profiling as a valid immigration enforcement tool allows racial stereotypes to gain more social currency, both within and outside of the immigration context. When immigration law allows race to indicate a valid suspicion of illegal presence, race *becomes* a factor that generally indicates illegal activity. Furthermore, racial profiling of noncitizens inevitably affects citizens of the same race. This means that U.S. citizens who happen to the same race as targeted noncitizens will be subject to the same racialized standards of reasonable suspicion. Countless examples of this reality include the deportation of U.S. citizens based on "looking illegal."[91] Additionally, racial profiling techniques used by local law enforcement officials under 287(g) are likely to bleed over into standard law enforcement efforts.

Section Four: SB 1070

SB 1070 explicitly states that the policy behind the law is "attrition through enforcement,"[92] or exclusion of "unlawful aliens" by making their lives so difficult that they voluntarily choose to leave the country rather than being subject to deportation.[93] As the law's author, Arizona Senator Russell Pearce, states "Arizona has made it clear through our policies that illegal immigrants are not welcome, and they are self-deporting from the state."[94] SB 1070 creates new immigration crimes and *mandates* that law enforcement officials determine the immigration status of a person when "reasonable suspicion" exists that she is "an alien who is unlawfully present in the United States."[95] In fact, the law allows Arizona citizens to sue officials or agencies they believe are not enforcing immigration law to the full extent permissible under federal law.[96]

In many ways SB 1070 is the modern incarnation of *Chae Chan Ping* because it explicitly attempts to exclude an immigrant community based on the alleged threat that that community poses to U.S. citizens. In the process of excluding, SB 1070, like *Chae Chan Ping*, reifies notions of racial inferiority by using race as an indicator of non-belonging. In *Chae Chan Ping*, race was a barrier to assimilation and thus justified excluding the Chinese. Under SB 1070, racial profiling is used to identify potential "illegal immigrants" who "are not welcome" in

Arizona. As a result, many critics have referred to SB 1070 as the "breathing while brown" law.[97] The mandated determination of immigration status based on "reasonable suspicion" is akin to mandated racial profiling of mainly Hispanic immigrants. This reality is confirmed by Arizona's failure to articulate on what grounds *other than race* law enforcement officials will base their reasonable suspicion that a person is unlawfully present. Arizona Congressmen have fumbled as they describe factors other than race that create reasonable suspicion of unlawful presence: attire, accents, grooming, and shoes.[98] It appears that SB 1070 attempts to codify *Brignoni-Ponce* and mandate that "Mexican appearance" be used in enforcing immigration—despite politicians claiming that race will not serve as a factor.

However disturbing the law's explicit focus on race, what is more problematic is that the current legal battle over the law is focused on notions of preemption: whether Arizona's law conflicts with federal immigration enforcement. While other legal arguments regarding equal protection have been advanced to overturn SB 1070,[99] preemption remains the strongest threat to the law. This suggests that the true legal battle is over who gets to do the excluding and racial profiling: the federal government or the states? Recognizing that federal immigration law is nearly if not equally as troubling as SB 1070, I focus on the Arizona law given its explicit representation of Johnson's notion of transference and Ngai's theory of alien citizenship. In light of this, the popular support SB 1070 has received across the nation suggests that immigration law continues to be a powerful vehicle of racial subordination.

Criminalizing Immigrants as Transference

SB 1070 creates new immigration crimes, further criminalizing the immigrant community. Kevin Johnson advances the theory of transference, which occurs when society transfers its racism towards minority citizens to noncitizens.[100] As Johnson explains, "immigration status, combined with race, ma[kes] such treatment more socially acceptable and legally defensible."[101] Johnson traces transference, as it applies in the immigration context, to the psychological theory that feelings toward one group of people are refocused on another.[102] As a result of transference, Johnson believes that a society's treatment of noncitizens of color reveals its feelings toward citizens of color.[103] Thus, Johnson describes differential treatment of citizens and noncitizens as a "magic mirror" that reveals "how dominant society might treat domestic minorities if legal constraints were abrogated."[104] Not only does Johnson's theory help explain why immigration law has historically treated noncitizens as racially inferior, it also explains how immigration law implicates all citizens of color regardless of citizenship—even though citizenship continues to serve as a tool to exclude noncitizens on the basis of race. SB 1070 is, therefore, a grave warning sign for all citizens of color in Arizona.

Unlike federal law, SB 1070 makes it a state crime for an "unauthorized alien" to apply for a job or to solicit work publically.[105] The latter crime would affect mainly Mexican day laborers who congregate in certain areas of town where people come to solicit work.[106] A related crime includes knowingly transporting a person who is unlawfully present in the country.[107] Many of these new crimes come with mandatory jail times.[108] Additionally, SB 1070 makes not carrying immigration papers a crime.[109] In order to enforce these new criminal laws, SB 1070 allows law enforcement officials to ask for proof of citizenship during a "legal stop, detention, or arrest," which can include questioning people who are victims of crimes themselves or stopped for offenses like traffic violations or loitering.[110] If a lawfully present noncitizen[111] is stopped and does not have proper immigration papers, he or she will be subject to arrest and a fee of $500 for a first time violation.[112] The penalties associated with not carrying one's papers makes life difficult for all noncitizens, suggesting that all immigrants in Arizona are unwelcome—not just those who are undocumented.

In 2006, Hispanics accounted for 29.1% of Arizona's total population.[113] This figure is approximately twice as high as the Hispanic population in the rest of the United States, which was 14.8% the same year.[114] The Pew Hispanic Center estimates that in 2006, 6.9% to 7.7% of the State's total population was undocumented.[115] These figures suggest that the percentage of undocumented people in Arizona as of 2006 was not overwhelmingly large. However, these figures also suggest that the increase in Hispanics in Arizona was substantial. Applying Johnson's theory of transference, it appears that Arizona's perception of being "invaded" by "illegals"[116] indicates an

underlying fear of a general increase in the Hispanic population as a whole. In fact, the Pew Hispanic Center found that while the native- and foreign-born Hispanic population grew substantially from 2000 to 2006, so did the non-Hispanic population.[117] On a percentage basis, "Hispanics have contributed no more to population growth in Arizona than they have to the growth of the U.S. population."[118]

If the Hispanic population grew at a similar rate as the non-Hispanic population, Johnson's transference theory indicates that Arizona's fear of "illegal immigration" is based on the fear of a general increase of the Hispanic population, despite the fact that in 2006, the figure of undocumented people was at most 7.7%. In other words, Arizona's "crackdown" on the "invasion" of Hispanic "illegals" is not only inaccurate, but indicates that fear of an increase in the Hispanic population has translated into a fear of an increase in noncitizens. As Johnson points out, it is much more socially acceptable to target noncitizens of color than it is to target citizens of color.[119] As a result, Arizona's "crackdown" maintains popular support in the state because society has equated Hispanics with illegal immigration.

Due to an increase in the Hispanic population, even though this increase did not outmatch the growth of the non-Hispanic population, Arizona has transferred its general fear of Hispanics to noncitizens by over criminalizing immigrants. Samuel Huntington's disapproval of Hispanic immigration is mirrored in SB 1070. This fear and racial animosity results in the nation's toughest immigration law.

Reasonable Suspicion as Mandated Racial Profiling: Recreating the Mexican "Illegal Alien"

Particularly troubling is SB 1070's mandate to determine immigration status based on "reasonable suspicion" that a person is unlawfully present in the United States.[120] This mandate leads to increased racial profiling. As federal law demonstrates, using Mexican appearance as a factor in determining immigration status is lawful.[121] However, federal law indicates that using race *may* be permitted, whereas SB 1070's requirement that immigration law must be enforced "to the *full extent* that federal law permits" suggests that race *must* be used as a factor. SB 1070 states that race must not be the "sole" factor in determining immigration status, suggesting that it is indeed a central factor.[122]

This increased racial profiling highlights what Mae M. Ngai describes as alien citizenship. Ngai describes the alien citizen as "an American citizen by virtue of her birth in the United States but whose citizenship is suspect, if not denied on account of the racialized identity of her immigrant ancestry."[123] Ngai argues that non-white groups are deemed immutable, "making [their] nationality a kind of racial trait."[124] As a result, non-white groups obtain a permanent foreignness that leads to a nullification of U.S. citizenship.[125] SB 1070's mandated racial profiling creates a similar type of permanent foreignness as Hispanics, regardless of citizenship status, become susceptible to being stopped and asked to prove their legal status by producing their papers. No limit exists on the amount of times a person may be stopped, leading to the possibility that one must constantly prove his belonging. As a result, Hispanics carry a strong presumption of foreignness under SB 1070. As Ngai states, "[r]acism thus creates a problem of misrecognition for the citizen of . . . Latino descent . . . ."[126]

To be clear, Ngai believes that alien citizenship is a form of rights nullification that has existed throughout history, specifically exemplified by the territorial removal of one million Mexicans during the Great Depression (more than half of whom were U.S. Citizens) and the internment of 120,000 Japanese Americans during World War II (two-thirds of whom were U.S. Citizens).[127] Ngai traces the creation of Mexican "illegal alien" to the Jim Crow segregation of Mexicans in the southwest who were stripped of belonging.[128] I argue that SB 1070 serves as the rebirth of the Mexican "illegal alien."

Public Reaction to SB 1070

If immigration law is a "helpful gauge for measuring this nation's racial sensibilities"[129] as Kevin Johnson suggests, what does the nation's reaction to SB 1070 indicate? A survey conducted on October 31, 2010 revealed that fifty percent of Arizona voters believe that SB 1070 has positively affected the state's image (this figure is up from forty-one percent in May of 2010).[130] The same survey also revealed that sixty-one percent of the state's voters still favor the new

immigration law.[131] In fact, Governor Jan Brewer, who signed SB 1070 into law, easily won reelection in the 2010 mid-term elections.[132]

On a national level, civil rights groups have certainly voiced strong disapproval of SB 1070.[133] Litigation intended to overturn the law has also been somewhat successful.[134] However, since SB 1070 was signed into law on April 23, 2010, twenty-two states have introduced legislation modeled on the new law.[135] These "copycat" laws suggest support for SB 1070 by much of the country. In fact, during the 2010 mid-term elections, SB 1070 served as a major platform issue to *gain* political support. As Politico reported, in order to win votes, Republican candidates had to explicitly state their support for the law.[136] Furthermore, the day after the injunction on the law, "59 percent of American voters wanted an Arizona-style law in their state, while only 32 percent did not."[137] States with high Hispanic populations show support for an Arizona-style law above the national average. For instance, sixty-two percent of Texas voters favor a law similar to Arizona's and sixty percent of Colorado voters agree.[138]

The plenary power doctrine set forth in *Chae Chan Ping* has led to federal immigration law that strips noncitizens of crucial constitutional protections. This reality has set the stage for state laws like SB 1070 that represent states' frustration with federal enforcement. Johnson's notion of transference is evidenced when states like Arizona with large Hispanic populations develop animosity towards their immigrant populations and show frustration over the federal government not taking full advantage of the plenary power it has over immigration enforcement. While SB 1070 represents the modern incarnation of *Chae Chan Ping*, the history of U.S. immigration law suggests that Arizona's attempts at exclusion based on racial difference should come as no surprise. The type of alien citizenship that exists for many in Arizona is likely to spread as national support for SB 1070 remains strong and states continue to introduce copycat laws.

Section Five: Recommendations

I recognize that the thesis driving the arguments in my paper is unpleasant: U.S. immigration law uses racial difference as an indicator of non-belonging and thus reifies notions of racial inferiority. However, this truth is undeniable in light of the evolution of immigration law from *Chae Chan Ping* to SB 1070. Historically, immigration regulation in the United States has explicitly relied on race and notions of racial inferiority to deny people citizenship status. Under current immigration law, Supreme Court precedent allows for "Mexican appearance" to serve as a factor in determining a person's immigration status. Most recently, national support for SB 1070, a law that in practice mandates racial profiling, represents the nation's support for excluding racially different noncitizens. In the United States, it is far too easy to exercise racism under the guise of immigration enforcement.

This grim reality can only be altered by public education efforts that bring to light this nation's historic and contemporary racist treatment of immigrants. Additionally, civil rights and immigrants' rights organizations must argue that racial discrimination in the immigration context deserves strict scrutiny—the plenary power doctrine should not trump the Supreme Court's practice of applying strict scrutiny *whenever* fundamental rights are implicated.

Public Education

Franklin D. Roosevelt's inspiring words are used by immigrants' rights advocates across the nation, "Remember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists."[139] However, racist immigration laws and policies throughout our nation's history reveal that society has not been quick to remember that all U.S. citizens are "descended from immigrants." If people have reflected on their immigrant past, then they are quick to forget since it is difficult to detect empathy and tolerance in our nation's immigration laws. In fact, the Senate recently blocked the DREAM Act, a bill intended to put undocumented immigrant students on a path to citizenship.[140]

I am someone who has dedicated the past seven years to learning about immigration to the United States, as well as global migration patterns. Only until I entered law school did I learn of the problematic use of race within this nations' immigration jurisprudence. It appears that our nation's racist treatment of immigrants is a secret

history to which most U.S. citizens have not been exposed. In fact, one of the most famous symbols of our country is the melting pot, which many people believe represents the idea that all people, regardless of race, religion, or culture, achieve harmony within the United States. However, the "melting pot," is a metaphor that describes the process of assimilation in order to achieve homogeneity in society.[141] The play by Israel Zangwill, *The Melting Pot,*[142] popularized the term. As our nation's naturalization laws until 1952 show, that "melting pot" never included people of color since being American also meant being white.

Education textbooks must include more information about moments like the Mexican Repatriation, Operation Wetback, and other shameful moments in immigration history. A 2006 survey of nine American history textbooks found that only one dedicated more than half a page to the Mexican Repatriation.[143] In fact, as future generations learn of the 9-11 terrorist attacks through textbooks, they should also learn about the rise in hate crimes against Muslim Americans and the deportation of 315,000 "alien absconders" selectively applied to Muslims, Arabs and South Asians shortly after 9-11.[144] However, before parents can promote exposing their children to immigration history in the United States, they too must learn of this secret past. Only by exposing the general public to this nation's historic treatment of immigrants will people begin to see through the illusion of race-neutral immigration laws.

Breaking Myths and Humanizing the Immigrant Experience

In order to dismantle fear campaigns created around the alleged threats that immigrants pose, additional public education campaigns are needed to break the myths that permeate the public's perception of immigration.[145] While doing so, these campaigns should humanize the immigrant experience by revealing statistics regarding mixed status families.

For instance, MALDEF's *Truth in Immigration* campaign should serve as a model campaign for other organizations. Through this campaign, MALDEF rebuts statistical and legal inaccuracies regarding immigration.[146] For instance, many people criticize undocumented immigrants as making a choice to enter the country illegally in violation of this nation's laws. However, MALDEF counters that notion by pointing out that more than 2 million immigrants come to this country as minor children.[147] On a related note, mixed status families exist throughout the United States, making it difficult to draw lines based on citizenship that dictate who belongs and who does not.[148] These realities must become public knowledge in order to combat fear campaigns that dehumanize immigrants.

Litigation

Under current constitutional law, every time a fundamental right is implicated, a law must pass strict scrutiny.[149] This standard requires that a law be narrowly tailored to meet a compelling interest.[150] However, all immigration statutes, due to the plenary power afforded the federal government in regulating immigration, receive judicial deference.[151] Furthermore, the standard set forth in *Fiallo* states that even when fundamental rights that normally receive strict scrutiny, such as marriage, are at issue in the immigration context, deferential treatment still applies.[152] However, Justice Marshall's dissent, joined by Justice Brennan, should give civil rights attorneys a stepping stone to make legal arguments that immigration statutes should not always receive deferential treatment. Justice Marshall states:

> [T]he Court appears to hold that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws. Since I cannot agree that Congress has license to deny fundamental rights to citizens according to the most disfavored criteria simply because the Immigration and Nationality Act is involved, I dissent.[153]

While Justice Marshall limits his criticism to discrimination in the immigration context that affects citizens, his dissent does promote the idea that immigration statutes should not always receive deferential treatment when fundamental rights are implicated. Cases brought by U.S. citizens who have been wrongfully deported could advance Justice Marshall's stance. This argument can eventually be expanded to noncitizens by civil rights attorneys advocating the position that when fundamental

rights, such as being free from racial discrimination, are implicated, the Supreme Court should never apply deferential review, regardless of the plaintiff's citizenship status.

A particularly compelling argument to incorporate is that the Fourteenth Amendment does not restrict equal protection and due process to citizens since "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws."[154] The notion that people present in the United States are entitled to equal protection regardless of citizenship status was supported in *Plyer v. Doe*.[155] New legal arguments that attempt to extend the Court's rationale in *Plyer v. Doe* must be advanced.

While the government may argue that national security is a compelling interest that allows for its unfettered discretion in regulating immigration, civil rights groups should argue that the Supreme Court must take a more nuanced approach to immigration and not treat it solely within the context of the War on Terror. Additionally, civil rights groups must also argue that using racial profiling is not a narrowly tailored means of achieving compelling interests related to national security.

Achieving more than deferential review of immigration statutes that discriminate, or lead to discrimination, is surely an uphill battle, but these legal arguments must be made. Perhaps justices will continue to dissent and provide even more fodder to civil rights attorneys making new legal arguments for stricter review of immigration statutes.

Conclusion

SB 1070 exemplifies immigration laws' reliance on race as an indicator of non-belonging. In the process, notions of racial inferiority abound as Hispanics become indistinguishable from "unwelcome illegal immigrants." SB 1070's mandate to identify noncitizens who do not belong is executed through racial profiling. Johnson would likely agree that Arizonans who support the law and recently reelected the governor who signed SB 1070 into law have transferred their racial animosity towards Hispanics to noncitizens. Ngai would likely agree that the consequences of this transference results in a state of alien citizenship for Hispanics whose citizenship has been made suspect by the law.

SB 1070 results from a long history of racist immigration law and policy in the United States. In particular, the plenary power doctrine developed in *Chae Chan Ping* has facilitated the creation of laws like SB 1070 that claim to merely mirror federal immigration law, which deprives noncitizens of vital constitutional protections. The central debate surrounding SB 1070 has become, *who* gets to do the excluding of noncitizens: the states or the federal government?

The only way racism can become divorced from immigration law is to expose the general public to this nation's history of racism towards immigrants. Humanizing the immigrant experience is also important in order to question the idea that citizenship is the ultimate marker of belonging. Furthermore, society must look into Johnson's "magic mirror" and realize that its treatment of immigrants of color reflects how it views citizens of color. On the legal front, civil rights and immigrants' rights organizations must continue to fight the hard battle of gaining more than deferential review of immigration statutes. Only when these goals are accomplished will laws like SB 1070 lose public support.

Endnotes

1 Lisa Sandoval is a second year student at American University Washington College of Law.

2 Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

3 *See generally* Samuel Huntington, Who are We? The Challenges to America's National Identity (2004).

4 *See* Godfrey Hodgson, *Obituary, Samuel Huntington: US Political Scientist who Foresaw Future Conflict Arising from a Clash of Cultures*, The Guardian (Jan. 1, 2009), http://www.guardian.co.uk/world/2009/jan/01/obituary-samuel-huntington (describing Samuel Huntington as an authority in international relations).

5 Huntington, *supra* note 2, at 256.

6 S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf.

[7] Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. Times (Apr. 23, 2010), http://www.nytimes.com/2010/04/24/us/politics/24immig.html.

[8] Ariz. S.B. 1070.

[9] *See* Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 Fordham L. Rev. 2493, 2505 n.40 (2006-2007) (discussing Ian Haney Lopez's work as a critical race theory scholar).

[10] *Id.*

[11] *Id.* at 2500.

[12] *See id.* at 2493 n.1 (quoting T. Alexander Aleinikoff, *CitizenshipTalk: A Revisionist Narrative,* 69 Fordham L. Rev. 1689, 1692 (2001) ("By defining insiders, the concept of citizenship necessarily [also] defines outsiders . . . .")).

[13] McCarran-Walter Act, 8 U.S.C. § 1422 (1952).

[14] Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 Ind. L.J., 1111, 1116 (1998).

[15] *See* 8 U.S.C. § 1326 (stating that unlawful presence is only a crime when a person has previously been formally removed or if she previously departed the United States while a removal order was outstanding).

[16] *See* Fouad Ajami, *Samuel Huntington's Warning*, Wall St. J. (Dec. 30, 2008), http://online.wsj.com/article/SB123060172023141417.html (quoting Samuel Huntington defending his book as an "argument for the importance of Anglo-Protestant culture, not for the importance of Anglo-Protestant people.").

[17] Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 Fordham L. Rev. 2521, 2521 (2006-2007).

[18] *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1856).

[19] *See generally* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[20] *See* Sara Mayeux, *What We Talk About When We Talk About Immigration (Part I)*, Atlantic (July 28, 2010, 9:45 AM), http://www.theatlantic.com/national/archive/2010/07/what-we-talk-about-when-we-talk-about-immigration-part-i/60523/ (discussing European immigration flows into the United States that occurred early in the nation's history).

[21] *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641 (2005) (describing the Page Law Act of 1875 that banned prostitutes from China as the first restrictive federal immigration statute and an important predecessor to the Chinese Exclusion Act).

[22] *Chae Chan Ping*, 130 U.S. at 582.

[23] *Dred Scott*, 60 U.S. at 410.

[24] *Id.* at 469.

[25] *Id.* at 420.

[26] *Id.*

[27] *Id.* at 409 (emphasis added).

[28] *See* U.S. Const. amend. XIV (declaring that all persons born within the United States are citizens of the United States).

[29] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[30] Act of May 6, 1882, ch. 126, 22 Stat. 58.

[31] *Id.*

[32] *See* Lary M. Dilsaver, *After the Gold Rush*, 75 Geographical Rev. 1, 2 (1985) (discussing Gold Rush settlement patterns from 1848 to 1855).

[33] *Chae Chan Ping*, 130 U.S. at 581.

[34] *Id.*

[35] *Id.* at 611.

[36] *Id.* at 595.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 606-07 (emphasis added).

[40] *Id.*

[41] *See* Act of July 14, 1870, ch. 255, 16 Stat. 254 (extending naturalization to "aliens of African nativity and to persons of African descent," which was incorporated in the amendatory statute approved July 14, 1870).

[42] McCarran-Walter Act, 8 U.S.C. § 1422 (1952).

[43] Act of July 14, 1870.

[44] In re Halladjian, 174 F. 834, 845 (C.C.D. Mass. 1909).

[45] *Id.* at 842.

[46] *Id.*

[47] *Id.* at 845.

[48] Takao Ozawa v. United States, 260 U.S. 178, 198 (1922).

[49] *Id.* (emphasis added).

[50] *Id.*

[51] United States v. Bhagat Singh Thind, 261 U.S. 204, 206 (1923).

[52] *Id.* at 215.

[53] *Id.* at 208-09.

[54] *Id.* at 215.

[55] *Id.*

[56] *Id.*

[57] Francisco Balderrama & Raymond Rodriguez, Decade of Betrayal 122 (1995); *see* Kevin R. Johnson, *Forgotten Repatriation*, 26 Pace L. Rev. 1, 2 (2005) (discussing that during repatriation both citizens and noncitizens were removed).

[58] Johnson, *supra* note 56, at 2.

[59] *Id.* at 5.

[60] Balderamma & Rodriguez, *supra* note 56, at 122.

[61] Kelly Lytle Hernandez, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. Hist. Q. 421, 427 (2006); David Reimers, *History of Recent Immigration Regulation*, 136 Proc. Am. Phil. Soc'y 176, 180 (1992).

[62] Hernandez, *supra* note 60, at 423.

[63] *Id.* at 427.

[64] Reimers, *supra* note 60, at 180.

[65] Hernandez, *supra* note 60, at 443.

[66] Juan F. Perea, *"Am I an American or Not?"*, *in* Immigration and Citizenship in the Twenty-first Century 49, 59 (Noah M. J. Pickus ed., 1998).

[67] *See* Fiallo v. Bell, 430 U.S. 787, 805 (1977) (explaining that judicial deference must be applied to Congress' broad power in determining "which classes of aliens may lawfully enter the country").

[68] *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1890, 1895 (1999-2000); *see also* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Cal. L. Rev. 1259, 1330 (2004) (explaining that noncitizens are treated as regulated not punished).

[69] *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."). Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

[70] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 593-96 (1952) (holding that retroactive application of the Alien Registration Act of 1940 is valid due to the inapplicability of Ex Post Facto Clause in immigration proceedings).

[71] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that, absent egregious circumstances, the exclusionary rule does not apply to evidence derived from an arrest made by an INS officer).

[72] *See* 8 U.S.C. § 1229a (c)(2)(B) (2003) (describing that once the government has established a noncitizen's alienage in deportation proceedings, she bears the burden of proving that she is lawfully present in the United States pursuant to her prior admission).

[73] *See, e.g.*, Bustos-Torres v. INS, 898 F.2d 1053, 1056-57 (5th Cir. 1990) (holding that Miranda warnings are not required in deportation proceedings).

[74] *See* 8 U.S.C. § 1362 (2000) (stating that noncitizens do not have a constitutional nor a statutory right to government-provided counsel); *see also* United States v. Torres-Sanchez, 68 F.3d 227, 230-31 (8th Cir. 1995) (holding that the government's failure to provide counsel only amounts to a due process violation if the absence results in fundamental unfairness or prejudice); Argiz v. United States Immigration, 704 F.2d 384, 387 (7th Cir. 1983) (per curiam) (holding speedy trial guarantee does not apply to deportation hearings since they are civil rather than criminal).

[75] *See* Matter of D-, 20 I.&N. Dec. (BIA) 827, 831 (1994) (per curiam) (holding the rules of evidence generally do not apply in immigration proceedings).

[76] *See generally* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.). *See also Immigration Law Denies Access to Justice*, National Immigration Forum (Jan. 8, 2002), http://www.immigrationforum.org/research/display/immigration-laws-deny-access-to-justice/.

[77] *See* United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975) (stating through dicta that Mexican appearance may be considered in whether reasonable suspicion exists to stop a person). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (holding that "Hispanic appearance" in areas with high Hispanic populations is not a relevant factor in deciding "whether reasonable suspicion exists to support an investigatory stop").

[78] Amnesty International, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States* i, v (2004), *available at* http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf.

[79] *Brignoni-Ponce*, 422 U.S. at 874.

[80] *Id.*

[81] *Id.* at 875.

[82] *Id.*

[83] *Id.* at 887.

[84] *Id.* at 885.

[85] *Id.* at 886-87.

[86] *Id.* at 873.

[87] Farag v. United States, 587 F. Supp. 2d 436, 460 (E.D.N.Y. 2008) (arguing that "Arab appearance" is a relevant factor in determining reasonable suspicion because all people "who participated in the 9/11 terrorist attacks were Middle Eastern males . . . and the United States continues to face a very real threat of domestic terrorism from Islamic terrorists").

[88] *Id.* at 464 ("To the Court's knowledge, no court has ever marshaled statistics to conclude that racial or ethnic appearance is correlated with, and thus probative of, any type of criminal conduct *other than* immigration violations.").

[89] U.S. Dep't of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

[90] Immigration and Naturalization Act § 287(g) (enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and now codified at 8 U.S.C. § 1357(g) (allowing local law enforcement to undertake immigration enforcement duties)).

[91] *See* Susanne Gamboa, *Basic Rights are Void in Immigration Cases*, Ariz. Daily Star (Apr. 14, 2009, 12:00 AM), http://azstarnet.com/news/national/article_e9f3d671-8b14-5824-83f0-10b927c1c646.html (explaining that U.S. Citizen faced immigration deportation proceedings until his mother intervened during trial); *see also* Sam Ritchie, *ICE Deports Non-Spanish Speaking American Citizen to Mexico,* A.C.L.U. Blog of Rts. (Oct. 13, 2010, 6:04 PM), http://www.aclu.org/blog/immigrants-rights/ice-deports-non-spanish-speaking-american-citizen-mexico (describing ICE's knowing deportation of a mentally challenged U.S. Citizen). Adam Liptak, *Family Fight, Border Patrol Raid, Baby Deported*, N.Y. Times (September 20, 2010), http://www.nytimes.com/2010/09/21/us/21bar.html?_r=1 (describing deportation of U.S. citizen child who was deported along with her noncitizen mother).

[92] S.B. 1070, 49th Leg., 2d Reg. Sess., § 1 (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf.

[93] *Attrition through Enforcement*, Numbers USA, http://www.numbersusa.com/content/enforcement/attrition-through-enforcement.html (last visited Nov. 25, 2010) (stating that attrition through enforcement is an alternative to deportation because when immigrants' lives are made extremely difficult, they will choose to leave on their own).

[94] Russell Pearce, *Arizona Still in Win Column*, Politico (Aug. 6, 2010, 2:36 PM), http://www.politico.com/news/stories/0810/40764.html#ixzz12vodMj8Y.

[95] Ariz. S.B. 1070, at 1.

[96] *Id.* at 2.

[97] Mike Littwin, *Looking for Immigrants, Losing all Perspective*, Denver Post (Apr. 24, 2010), http://www.denverpost.com/headlines/ci_14953237.

[98] *See Brian Bilbray, GOP Rep., Claims Clothes Identify Illegal Immigrants*, Huffington Post (Apr. 22, 2010), http://www.huffingtonpost.com/2010/04/22/brian-bilbray-gop-rep-cla_n_547710.html; *see also Do Republican Hardliners on Immigration Have a Shoe Fetish?*, Hispanic Vista, http://www.hispanicvista.com/HVC/Columnist/HVC/Opinion/Guest_Columns/072010_GOP_Hardliners_immigrants&shoes.htm (last visited Nov. 28, 2010).

[99] *See* Julianne Hing, *Defeating SB 1070 in Court: The Next Steps*, Colorlines (Apr. 27, 2010, 4:49 PM), http://colorlines.com/archives/2010/04/heres_what_the_legal_challenge_to_sb_1070_might_look_like.html (arguing that SB 1070 could be defeated by claiming that people suffer a Fourth Amendment violation due to unlawful detention based on racial profiling); *see also Arizona SB 1070, Legal Challenges and Economic Realities*, American Immigration Council, Legal Action Center, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/arizona-sb-1070%E2%80%8E-legal-challenges-and-economic-realities (last visited Nov. 30, 2010) (reporting that plaintiffs are bringing First Amendment claim against SB 1070, as well as Due Process and Equal Protection claims).

[100] Johnson, *supra* note 13, at 1116.

[101] *Id.* at 1123.

[102] *Id.* at 1155.

[103] *Id.* at 1114.

[104] *Id.*

[105] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf.

[106] *See* Daniel Gonzalez, *With New Immigration Law and Arizona's Slow Economy, Laborers See Work Drying Up*, Az Republic (Aug. 9, 2010,

12:00 AM), http://www.azcentral.com/news/articles/2010/08/09/20100809day-laborers-no-work-immigration-law.html (describing that day laborers in Arizona are mainly undocumented Mexican immigrants).

[107] Ariz. S.B. 1070, at 6.

[108] *Id.* at 3.

[109] *Id.* at 1.

[110] *Id.* at 5; *see also* Jess Henig & Viveca Novak, *Arizona's 'Papers Please' Law*, FACTCHECK.ORG (June 3, 2010), http://www.factcheck.org/2010/06/arizonas-papers-please-law/ (stating that law enforcement may ask for proof of citizenship even when a person is a victim of a crime).

[111] 8 U.S.C.A. § 1641 (West) (describing various noncitizen statuses that are considered lawful in the United States); *see also* 8 U.S.C.A. § 1254a (West) (describing that noncitizens may receive temporary protected status and gain lawful presence in the United States).

[112] Ariz. S.B. 1070, at 3.

[113] *Arizona: Population and Labor Force Characteristics, 2000-2006*, PEW HISPANIC CENTER 1, 1 (2008), *available at* http://pewhispanic.org/files/factsheets/37.pdf.

[114] *Id.*

[115] *Id.*

[116] Bill Hess, *Feds Failed State, SB 1070 Author Russell Pearce Tells Local Republicans*, SIERRA VISTA HERALD (Oct. 23, 2010, 12:51 AM), http://www.svherald.com/content/news/2010/10/23/feds-failed-state-sb-1070-author-russell-pearce-tells-local-republicans.

[117] Pew Hispanic Center, *supra* note 112, at 2.

[118] *Id.*

[119] Johnson, *supra* note 13, at 1116.

[120] S.B. 1070, 49th Leg., 2d Reg. Sess., 1 (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf.

[121] United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975) (describing through dicta that, when analyzed in conjunction with other factors, Mexican appearance is a valid factor that gives rise to reasonable suspicion).

[122] Ariz. S.B. 1070, at 3.

[123] Ngai, *supra* note 16, at 2521.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 2522.

[128] A CLASS APART (Camino Bluff Productions 2009).

[129] Johnson, *supra* note 13, at 1148.

[130] *Most Arizona Voters Still Support Immigration Law*, RASMUSSEN REPORTS (Oct. 31, 2010), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/arizona/most_arizona_voters_still_support_immigration_law.

[131] *Id.*

[132] *See Arizona: McCain, Brewer Re-elected*, USATODAY (Nov. 3, 2010, 8:42 PM), http://www.usatoday.com/news/politics/2010-11-02-az-full-election-results_N.htm.

[133] *See Sign the Petition to Veto SB1070*, MALDEF, http://www.maldef.org/truthinimmigration/sign_the_petition_to_veto_sb1070/index.html (last visited Nov. 28, 2010); s*ee also What Happens in Arizona Stops in Arizona*, ACLU, http://www.aclu.org/what-happens-arizona-stops-arizona (last visited Nov. 28, 2010). *NAACP Joins Its Arizona State Conference in Outrage Over Racial Profiling Impact on Arizona*, NAACP, http://www.naacp.org/press/entry/national-naacp-joins-its-arizona-state-conference-in-outrage-over-raci/# (last visited Nov. 28, 2010).

[134] *See* Jerry Markon & Stephanie McCrummen, *Arizona Immigration Law SB 1070 – Judge Blocks Some Sections*, WASHINGTON POST (Jul. 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072801794.html (describing that law suit brought by civil rights groups has led Judge Bolton to stay the most controversial aspects of the law).

[135] *Q & A Guide to Arizona's New Immigration Law,* IMMIGRATION POLICY CENTER (Jun. 2, 2010), http://www.immigrationpolicy.org/special-reports/qa-guide-arizonas-new-immigration-law.

[136] Pearce, *supra* note 93.

[137] *Id.*; *see also Approval for New Arizona Immigration Law Broad*, THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (May 12, 2010), http://people-press.org/report/613/arizona-immigration-law.

[138] *See 60% in Colorado Favor Immigration Law Like Arizona's; 61% Disagree With Challenge of Law*, RASMUSSEN REPORTS (July 15, 2010), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/colorado/60_in_colorado_favor_immigration_law_like_arizona_s_61_disagree_with_challenge_of_law; *see also 62% in Texas Favor Immigration Law Similar to Arizona's in Their State*,

Rasmussen Reports (Sept. 27, 2010), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/texas/62_in_texas_favor_immigration_law_similar_to_arizona_s_in_their_state.

[139] Quotations Book, http://quotationsbook.com/quote/45541/ (last visited Nov. 30, 2010).

[140] Erika Aguilar, *Senate Blocks Dream Act Amendment*, Texas Tribune (Sept. 21, 2010), http://www.texastribune.org/immigration-in-texas/immigration/senate-blocks-dream-act-amendment/.

[141] *See* A Class Apart (Camino Bluff Productions 2009) (quoting Israel Zangwill's interpretation of "melting pot" as the process by which "God . . . would melt down the races of Europe into a single pure essence, out of which He would mold American").

[142] Israel Zangwill, The Melting-Pot (Macmillan ed. 1921) (1909).

[143] Kasie Hunt, *Some Stories Hard to get in History Books*, USA Today (Apr. 5, 2006, 1:36 AM), http://www.usatoday.com/news/education/2006-04-04-history-books_x.htm.

[144] Ahmad, *supra* note 67, at 1275.

[145] *See*, *e.g.*, *L.A. Emergency Rooms Full of Illegal Immigrants*, FoxNews.com (Mar. 18, 2005), http://www.foxnews.com/story/0,2933,150750,00.html (stating that two million "undocumented aliens" in L.A. are "crowding" emergency rooms because they are uninsured and cannot afford to see a doctor). *But see* Mary Engel, *Latinos' Use of Health Services Studied*, L.A. Times (Nov. 27, 2007) , http://articles.latimes.com/2007/nov/27/local/me-immigrants27 (discussing a recent study published in the Journal Archives of Internal Medicine that reveals that undocumented immigrants are fifty percent less likely to visit emergency rooms in California).

[146] *Truth in Immigration*, MALDEF, http://www.maldef.org/immigration/public_policy/truth_in_immigration/index.html (last visited Nov. 30, 2010).

[147] *Five Facts About Immigration*, MALDEF, http://www.maldef.org/truthinimmigration/five_facts_about_immigration/index.html (last visited Nov. 29, 2010).

[148] Michael Falcone, *100,000 Parents of Citizens Were Deported Over 10 Years*, N.Y. Times (Feb. 13, 2009), http://www.nytimes.com/2009/02/14/us/14immig.html (describing that of the approximately 2.2 million immigrants deported from 1997 to 2007, more than 100,000 were the parents of U.S. citizen children).

[149] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[150] *Id.*

[151] Fiallo v. Bell, 430 U.S. 787, 800 (1977).

[152] *Id.*

[153] *Id.*

[154] U.S. Const. amend. XIV, §1 (emphasis added).

[155] Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").