Insecure Communities: How Increased Localization of Immigration Enforcement under President Obama through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution

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An undocumented immigrant who lives in Maryland was recently stopped by the police while walking to the Hyattsville Metro Station to go to work. Short, dark-skinned and Latino, with long, black hair, the police told him that he resembled someone suspected of mugging an old woman a few blocks away. The police questioned him about his whereabouts (home) and what he was doing that morning (getting ready for work). After approximately forty-five minutes, the police officers received a signal that some the real mugger had been apprehended across town, so the officers allowed the man to continue on his commute to work. What would have happened if he lived in Virginia (where Secure Communities is active state-wide) and not Maryland (where Secure Communities is only active in three counties)? What if the police never got the call that other officers had located the actual culprit? A completely innocent Mexican waiter with no criminal record, who takes English classes, pays his taxes, and supports his family, may have been deported.

In the wake of fiery controversy surrounding Arizona’s contentious immigration bill, S.B. 1070, the issue of localization of immigration enforcement sprung to the forefront of national political debate. Yet, S.B. 1070 is certainly not the first instance of localities, unhappy with federal immigration enforcement, taking matters into their own hands. De-centralization of immigration enforcement is a growing trend, and has been the subject of much legal debate. Virginia recently adopted one method of localized immigration enforcement, the Secure Communities program, making it “active” in all Virginia jurisdictions. Similarly, D.C. Police Chief Cathy Lanier has lobbied for the implementation of Secure Communities in the District of Columbia. In the D.C., Maryland and Virginia area, advocates on both sides of the debate have been ramping up their efforts to sway legislators and constituents.

Of the three million sets of fingerprints taken at local jails between the onset of the Secure Communities program in October 2008 and June of this year, nearly 47,000 fingerprints belonged to undocumented immigrants, against whom deportation proceedings were initiated. Nearly half of the individuals removed from the United States through Secure Communities have never been convicted of a crime.

This article will introduce the Secure Communities program within the context of the increased localization of immigration enforcement. It will also discuss some inherent problems with the program. Part I will explain how the program works and address arguments made for and against the program. Part II will discuss the rights maintained by immigrants, and the rights they are denied by virtue of their non-citizen status. Part III will examine the constitutionality of Secure Communities through an Equal Protection lens. Finally, Part IV will address the future of the Secure Communities program and the future of localized immigration enforcement, by discussing the potential impact of pending litigation, legislation, and advocacy within the immigration law field. Part VI will also propose an alternative to the localized immigration enforcement movement, and will advise interested individuals on ways to advocate against the implementation of the Secure Communities program in our local community.

I. The Move Towards Localized Immigration Enforcement

In 1976, the Supreme Court held in De Canas v. Bica that although the “[p]ower to regulate immigration is unquestionably exclusively a federal power . . . [not every state law] which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power.” Still, the Supremacy Clause, in Article VI, clause 2 of the Constitution, has been frequently invoked to give the Federal Government exclusive jurisdiction over matters as international in nature as immigration. The Supreme Court has repeatedly held that state attempts to enact legislation governing immigrants and immigration are unlawful because they are preempted by Federal law. Reaffirming the Federal Government’s power over immigration, the Supreme Court remarked that “[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.” More recently, the Federal Government again argued that a state unlawfully preempted Federal power by designing and implementing its own laws dealing with immigration within the state. For primarily that reason, Arizona’s controversial anti-immigration legislation, S.B. 1070, has been enjoined.

Recent studies show that nearly eleven million immigrants may be living in the United States without documentation. Immigrations and Customs Enforcement (ICE), a division of the Department of Homeland Security,
faced with an overwhelming task and caseload, has sought alternative means to achieve their objective of “enforce[ing] federal laws governing border control, customs, trade and immigration.” Over the past decade, increasing numbers of state and local law enforcement agencies have begun to collaborate with the federal government to enforce federal immigration law.

Congress amended the Immigration and Nationality Act (INA) of 1952 through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 to facilitate more rigorous enforcement of immigration laws. In particular, section 287(g) of IIRIRA authorizes the federal government to enter into Memorandums of Agreement (MOAs) with state and local law enforcement agencies, so that local police can help enforce Federal immigration law. In response to the positive reception of 287(g) by state and local law enforcement agencies, ICE created the Office of State and Local Coordination (OSLC) in 2007. OSLC builds and maintains a handful of programs, collectively known as “ACCESS” (Agreements of Cooperation in Communities to Enhance Safety and Security), which equip local law enforcement agents with a wealth of tools to enforce federal immigration law. In response to the positive reception of 287(g) by state and local law enforcement agencies, ICE created the Office of State and Local Coordination (OSLC) in 2007. OSLC builds and maintains a handful of programs, collectively known as “ACCESS” (Agreements of Cooperation in Communities to Enhance Safety and Security), which equip local law enforcement agents with a wealth of tools to enforce federal immigration law.14 The Secure Communities initiative falls under ACCESS’s umbrella of programs through which local law enforcement agencies can help with federal immigration enforcement. Congress further amended sections 274 and 276 of the INA to give state and local law enforcement agents express authority to enforce the prohibition of “smuggling, transporting, or harboring of illegal immigrants” and to establish “criminal penalties for illegal reentry following deportation.”

Similar to efforts of the Legislature, throughout the George W. Bush Administration, the Executive branch ramped up efforts to utilize local law enforcement officials in enforcing immigration law. In 2002, Attorney General Ashcroft issued a memorandum stating that the Department of Justice was mistaken in asserting that local officers did not have the power to enforce civil immigration violations (e.g., overstaying a visa). Ashcroft’s memo stipulated that local officers have “inherent authority” to make immigration arrests based on violation of civil immigration laws. The notion that local law enforcement maintains this “inherent authority” has been a powerful tool for law enforcement agencies attempting to substantiate their role as immigration enforcers. This language has never been written into federal regulation, and the actual legal weight of this memo is debated.

In increasing numbers, ICE has signed MOAs with local law enforcement agencies, giving state and local law enforcement officers authority and responsibility to enforce immigration laws within the normal course of their duties. Although law enforcement officers must undergo sensitivity training under 287(g) agreements, and should make complaint procedures available in various languages, myriad problems remain: prominent racial profiling; chilling effect on Latino/a communities; lack of oversight and accountability; potential infringement of constitutional rights and denial of due process.

a. About Secure Communities

Although local law enforcement officers have been increasingly involved in helping ICE identify and remove criminal aliens, Secure Communities takes the localization of immigration enforcement to a new level. Under 287(g)/ACCESS programs, local police officers train with immigration enforcement to implement federal immigration laws by checking immigration status of individuals stopped on the street or brought into jail. Under Secure Communities, local law enforcement officers (not trained by federal immigration enforcement officers) are authorized to send the fingerprints of all individuals charged with, but not yet convicted of crime to ICE, enabling cross-checking mechanisms with the Department of Homeland Security (DHS) immigration database and the FBI criminal history database. If the fingerprints match a DHS or FBI record, ICE is automatically notified, even if the individual has never been convicted of a crime. Local police can hold an individual suspected of being in the country illegally for 48 hours, until ICE arrives to take him or her into custody.

To achieve its goals, Secure Communities uses a three-tiered priority list for detaining and removing the most dangerous and high-risk criminal aliens. Level 1, the top priority, is to apprehend violent offenders: murderers, rapists, kidnappers, and major drug offenders. The Level 2 priority is to identify and remove individuals convicted of minor drug offenses and property offenses such as...
burglary, larceny, fraud, and money laundering. Level 3 represents the lowest priority of aliens to detain and deport and includes individuals who commit “public disorder” and minor traffic violations, such as driving without a license, or running a stop sign. Level 3 also includes the catch-all, “all others” arrested for other minor offenses.

The program falls short, however, of meeting its projected goal of “Identifying and Removing Dangerous Threats to [the] Community.” In 2009, ICE data showed that, of the 111,000 aliens successfully identified and detained through the Secure Communities program, approximately 11,000 (10%) were charged with or convicted of “Level 1” crimes; meanwhile, the other 90% of aliens identified and detained were charged with or convicted of lesser crimes, and not necessarily “dangerous threats” to their communities.

Nearly half of those currently detained in immigration detention have no criminal convictions at all. Moreover, five to six percent of those identified and detained through Secure Communities are mistakenly identified as aliens, when they are actually U.S. citizens.

Although the Secure Communities program was first introduced under the Bush Administration, it has expanded rapidly during the Obama Administration. As of July 20, 2010, it was activated in 467 jurisdictions in twenty-six states. By September 28, 2010, the program was activated in 658 jurisdictions in thirty-two states. It is activated in all Virginia jurisdictions, and in four out of twenty-four counties in Maryland. The District of Columbia has refused police department attempts to implement the program. ICE hopes to make the program available in every state by 2011, and in effect nation-wide by 2013. As the program grows, political debate surrounding the controversial program continues.

b. Problems with Secure Communities

i. Prominent Racial Profiling

Although ICE maintains that the goal of the Secure Communities program is to identify and remove dangerous criminal aliens, it effectively serves as a green-light for local law enforcement agencies to use racial profiling tactics to target Latino individuals they suspect to be undocumented immigrants. Once a law enforcement officer finds a pretext to arrest someone, the police officer can bring the arrested individual to the station for fingerprinting. When all fingerprints are immediately sent to ICE and the FBI for immigration enforcement cross-checking, it matters very little what the purpose of the initial arrest was, and whether the arrest ever led to a criminal conviction. Police officers motivated to rid their communities of Latino immigrants not only have an avenue to do so, but because their motives are never monitored or questioned, they are given nearly limitless power to enforce federal immigration law.

ii. Chilling Effect on Latino/a Communities

If police use the Secure Communities program as an excuse to identify and deport immigrants, fewer immigrants will feel comfortable calling the police to report criminal activity. Alienating a subset of a community, and, in urban neighborhoods, a very substantial percentage of the community, frustrates the goals and purposes of law enforcement. Police will have less information regarding the whereabouts of individuals involved in actual criminal activity, because when some community members feel targeted and vulnerable, they stop cooperating with local police, making the entire community less safe.

iii. Lack of Oversight and Accountability

A program, such as Secure Communities, wholly designed by an administrative agency, has never received legislative input as to specific procedures for oversight or accountability. Indeed, ICE outlines priorities for the Secure Communities program, but it is solely responsible for ensuring that those priorities are met; if they are not met, the impetus is on ICE alone to adjust its methods. Furthermore, besides the initial agreements between ICE and local law enforcement agencies, ICE has shown no indication that it intends to train or monitor local law enforcement in anti-racial profiling practices when utilizing Secure Communities. Consequently, local law enforcement agents are free to use their increased power without supervisory guidance or interference. Finally, ICE has been exceedingly reluctant to publish data regarding how effective the program has been in achieving its purported goals. The program was launched in October of 2008, but ICE only recently, after various Freedom of Information Act (FOIA) requests and complaints filed by advocacy groups suspicious of foul play, acquiesced and published data on the number of arrests connected to the program, the type of criminal records of aliens identified through the program, and the number of individuals deported through Secure Communities. Despite access to this information, many questions remain unanswered.

iv. Potential Infringement of Constitutional Rights and Denial of Due Process

Because the Secure Communities program implicitly condones the use of racial profiling (and racial discrimination) to achieve its goals, the program must be examined through a
constitutional lens to ensure the protection of fundamental rights. If the program is not narrowly tailored to achieve a specific and permissible government purpose, the program’s inherent discrimination violates the Equal Protection clause of the Fourteenth Amendment. Secure Communities is not narrowly tailored to suit its purported goal; in fact, it is not tailored in the least. It encourages checking the immigration status of all persons accused and arrested of crimes, even where criminal charges are never pressed and individuals are never convicted. The vast majority of aliens identified and removed through the program have never been convicted of a dangerous crime, or never been convicted of any crime at all. What is worse, about 5% of the database “hits” through the Secure Communities program identify United States Citizens, not criminal aliens.

Furthermore, as many immigration law scholars note, what was once considered a non-punitive consequence of a civil infraction, immigration detention and deportation are increasingly likened to criminal punishment. As the consequences of civil immigration violations become more severe, many argue that individuals involved in the immigration system should be afforded more substantial due process rights, like in the criminal system. Without such procedural safeguards, our government runs the risk of embodying an unfortunate hypocrisy, glorifying the protection of liberty and freedom at all costs by ensuring proper due process before convicting and punishing the accused, while simultaneously denying such due process and enforcing severe judgments on others accused, on the basis of immigration status.

c. Community Tension

Many advocates of Secure Communities base their support on anti-terrorism efforts. Bringing to light the fact that some of the 9/11 terrorists had been stopped for minor traffic violations before the infamous plane hijacking, some argue that if local police officers had access to Secure Communities technology at the time, the suspects may have been identified earlier as criminal aliens, and could have been taken into custody and placed in deportation proceedings. According to some, if Secure Communities had been implemented more broadly, and earlier, the entire devastating terrorist attack could have been averted, and the lives of thousands of innocent people could have been saved. Utah Republican Senator Orrin Hatch even proposed legislative amendments to immigration law that would require all localities to sign on to either 287(g) programs or Secure Communities.

Proponents of Secure Communities in Ohio praise the program as a tool to help identify dangerous criminals that would otherwise go undetected. Butler County Sherriff Rick Jones attested, “[i]t’s really a heaven-sent for us. [...] I don’t want [criminal aliens] in my community, I’ve got enough homegrown criminals here.”44 Indeed, as traditional methods of law enforcement fail to target immigrant criminals specifically, Secure Communities helps differentiate between American citizen criminals and immigrants. For law enforcement officials seeking to rid their localities of criminal aliens, the goals of Secure Communities certainly align with their own.

Similarly, in Virginia, Fairfax County Sheriff Stan Barry remarked that the Secure Communities program was “a win-win situation both for the community and law enforcement.” Barry boasts, “[w]e will be able to identify illegal immigrants who commit crimes in Fairfax County and get them in the process for deportation, and it does not require additional funds or manpower from us.” Indeed, Fairfax County will be able to identify undocumented immigrants much sooner in the criminal process, without needing to specifically recruit, employ, or train special teams of law enforcement to deal exclusively with immigration enforcement. Still, despite Barry’s contention that the program will not cost Virginia taxpayers money, the State is in the process of building the largest immigration detention center in the Mid-Atlantic, a $21 million project that hopes to house up to 1,000 immigrant detainees by next year.

In contrast, opponents of Secure Communities argue that the program ultimately will result in communities being less safe. Noting that Secure Communities enforcement has not resulted in significant deportation of violent or dangerous criminals, CASA de Maryland Attorney, Enid Gonzalez, remarked that although the Program “claims to keep violent criminals off the streets, [...] it’s just incarcerating innocent busboys.” Furthermore, many advocates worry that the program has a chilling effect on Latino members of the community, dissuading them from coming forward as crime victims and witnesses, and thereby enabling actual criminals to continue terrorizing the community. An opponent of Secure Communities in Utah, Police Chief Chris Burbank recognized this problem in his own community of Salt Lake City: “Fighting crime without the help of one’s community [...] is like trying to disarm a hidden mine by stomping on the ground. By the time you have found the problem, it is already too late.”

Opponents in Virginia argue that the State unjustly instituted the Program without the approval or consent of the local government. Although Secure Communities is most frequently enacted through individual agreements between localities and ICE, Virginia recently implemented Secure Communities state-wide, leaving many immigrants’ rights advocates in Arlington arguing that it was unfairly instituted, since the agreements had not been negotiated with Arlington law enforcement, or Arlington County government.
Raising the level of confusion about the implementation and possible dissolution of Secure Communities, ICE first announced there are no opt-out options, but then later explained that despite discouragement, cities could opt out.\(^{51}\) ICE Deputy Press Secretary has stated that localities like Arlington cannot opt-out of the program through ICE, rather, the locality must settle the matter with the state government.\(^{52}\) Oddly, in a letter dated September 8, 2010, Secretary of Homeland Security Janet Napolitano explained to Representative Zoe Lofgren that local jurisdictions could opt-out by formally notifying the Assistant Director for the Secure Communities Program.\(^{53}\) In early November 2010, ICE officials met with Arlington County officials, and informed them that “local activated communities do not have the option of withholding information from the [Secure Communities] program.”\(^{54}\)

San Francisco’s Sherriff repeatedly attempted to opt-out of California’s growing implementation of Secure Communities.\(^{55}\) His appeal was denied by the State Attorney General,\(^{56}\) but San Francisco advocates persisted, searching for ways to escape the implementation of Secure Communities. On September 1, 2010, after two years of dedicated advocacy by Immigrants’ rights groups and Sherriff Michael Hennessey, ICE finally announced a procedure for local jurisdictions to request to opt-out of Secure Communities.\(^{57}\) Angela Chan, an attorney at the Asian Law Caucus acknowledged the potential impact this recent announcement may make:

It’s a promising development that ICE has finally come out and acknowledged that the program is voluntary in a written statement. The next step is for ICE to follow through and allow San Francisco to opt out since both our Sherriff and our Board of Supervisors have clearly stated our city’s request to opt out.\(^{58}\)

Similarly, attorneys and advocates in Arlington, Virginia have fervently lobbied state legislators to permit the county to opt-out of the program.\(^{59}\) After indications that opting-out was possible,\(^{60}\) the Arlington County Board voted to withdraw from Secure Communities.\(^{61}\)

Whether jurisdictions feasibly can opt-out continues to be unclear. After Arlington announced its intention to opt-out, a senior ICE official explained to the Washington Post:

The only way a local jurisdiction could opt out of the program is if a state refused to send fingerprints to the FBI. Since police and prosecutors need to know the criminal histories of people they arrest, it is not realistic for states to withhold fingerprints from the FBI, which means it is impossible to withhold them from ICE.\(^{62}\)

In early October 2010, in stark contrast to its declaration one month earlier, ICE announced that local governments would not be able to opt-out of the program.\(^{63}\) ICE Director John Morton conceded that “the agency would meet with the localities to discuss the issue, but in the end the agreement is with the state.”\(^{64}\) After meeting with ICE officials on November 5, 2010, Arlington County Manager Barbara Donnellan explained to the rest of the County Board, “ICE stated that Secure Communities is a federal information-sharing program which links two federal fingerprint databases… The program does not require state and local law enforcement to partner with ICE in enforcing federal law.”\(^{65}\) Whether local jurisdictions will be free to opt-out remains to be definitively explained to confused law enforcement and government officials nation-wide.

As the debate grows, and immigrants’ rights groups advocate for the end of the Secure Communities program, the concern of whether and how the program infringes upon the rights of immigrants becomes more ubiquitous. Although immigrants to the United States do not enjoy all of the Constitutional rights as American citizens, the courts have held that immigrants enjoy some Constitutional protection. As such, the Secure Communities program may need careful scrutiny to determine whether it satisfies Constitutional precedent.

II. Immigrants’ Rights

In determining whether constitutional rights extend to immigrants, courts have frequently considered whether the framers of the Constitution would have meant for terms like “persons,” “people,” and “citizens,” to include immigrants. If the terms were intended to include immigrants, which immigrants should be included? Most often, whether constitutional rights are afforded to immigrants depends on their status.

Some rights guaranteed to United States citizens have rarely been afforded to immigrants, and have rarely been contested. For example, interpretations of the Constitution dating back to the early 1800s indicate that aliens were not included in “the people of the several states” who enjoyed the right to vote.\(^{66}\) Voting was considered a privilege, or at most, a “political right,” subject to the discretion of the State.\(^{67}\) In United States v. Esparza-Mendoza, the Supreme Court determined in 1874 that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage.”\(^{68}\) However, scholars note that
un-naturalized alien immigrants were not officially excluded from suffrage until 1928. The conclusion that immigrants are not included in “the people of the several states” has left the door open to the determination that immigrants are excluded from several other Constitutional protections as well.

a. Equal Protection

Despite being denied the right to vote, immigrants are afforded some constitutional rights. Plyler v. Doe ensured that immigrants are protected under the Equal Protection clause of the Fourteenth Amendment. In Plyler, a group of undocumented Mexican children sought declaratory and injunctive relief against a Texas statute that excluded them from access to free education at state public schools. The Supreme Court struck down the statute, noting that even though the children had not been “legally admitted” to the United States, discrimination against them on the basis of their immigration status was impermissible because the State did not establish a rational basis sufficient to deny the benefit of public education. Reflecting on the text of the Fourteenth Amendment, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws[.]” the court held that “an alien is surely a ‘person’ in any ordinary sense of that term.” Because undocumented alien children are protected by the Fourteenth Amendment, a law discriminating against them on the basis of immigration status violated their Constitutional right to Equal Protection because, although conserving the state’s financial resources may be a legitimate government interest, the law was not narrowly tailored enough to advance such an interest.

Even facially neutral laws have been found to violate the Equal Protection clause if they are applied in a racially discriminatory manner against immigrants. In the 1880s, many Chinese citizens immigrated to the Western United States and opened small businesses. A San Francisco ordinance gave the San Francisco Board of Supervisors the power to oversee and authorize the opening and maintenance of laundromats, particularly laundromats in wooden buildings. Although the ordinance was not discriminatory on its face, the custom of the Board of Supervisors was to deny laundry permits to Chinese laundry shop owners. The Supreme Court held in Yick Wo v. Hopkins that the arbitrary and discriminatory practices of the Board of Supervisors, effectively barring Chinese immigrants from the entire profession of owning and operating laundromats, constituted racial discrimination and therefore infringed upon the Constitutional rights of Chinese immigrant applicants. The court noted that, “[t]he rights of the petitioners . . . are not less because they are aliens and subjects of the emperor of China.” Reflecting upon protections ensured by the Constitution, in invalidating the local ordinance, the Supreme Court stated:

[If, by an ordinance general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and in effect nullifying the provisions of the national constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act.

b. Confusion, Abridgement and Reinforcement of Immigrants’ Rights

In the years since Yick Wo, Constitutional rights afforded to immigrants have been substantially abridged. Indeed, the Supreme Court recently reinforced the notion that laws based on alienage or immigration status be subject to a higher level of judicial scrutiny. As such, “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”

In 1904, John Turner, an Irish citizen and immigrant to the United States, filed a writ of habeas corpus after his detention and the commencement of deportation proceedings. Turner was a self-proclaimed anarchist, and the 1903 Act to Regulate the Immigration of Aliens into the United States prohibited anarchists from entering the country. Many later courts have co-opted one famous line of dicta from Turner, in order to further deny rights to immigrants: “[A]n alien does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law.” The Supreme Court held that the 1903 Act was not an unconstitutional abridgment of First Amendment rights; the First Amendment’s guarantee of free speech did not extend to an alien anarchist, particularly when his entry into the country was prohibited by an act of Congress.

Similarly, in 1945, an Australian citizen and immigrant to the United States filed a writ of habeas corpus
appealing his detention and imminent deportation after he was determined to be affiliated with the Communist party in violation of an amendment to the Immigration Act of 1917.86 Unlike Turner, however, the court determined that Bridges’ “isolated instances”87 of affiliation with the Communist party did not necessitate his immediate deportation. Somewhat confusingly, the court asserted that aliens residing within the United States are afforded Constitutional protections of freedom of speech and freedom of press.88 In reversing the Circuit court’s dismissal of Bridges’ habeas petition, the court reiterated that,

although deportation technically is not criminal punishment . . . it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling . . . . As stated by Mr. Justice Brandeis . . . deportation may result in the loss ‘of all that makes life worth living’.89

As such, procedures involving such a deprivation must “meet the essential standards of fairness.”90 The court determined that the lower courts misconstrued the definition of “affiliation” when considering Bridges’ relationship to the communist party, and therefore his detention under the deportation order was indeed unlawful. In his concurring opinion, Justice Murphy remarked famously upon the importance of safeguarding Constitutional rights:

The record in this case will stand forever as a monument to man’s intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution.91 . . . [T]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.95

The exclusion of aliens from the definition of community stands in contrast to prior declarations that aliens are included within the definition of “people” protected under the Constitution.96 Diverging interpretations of whether immigrants should be afforded Constitutional protections continue to result in differing and sometimes conflicting case law. A recent local case in a Virginia circuit court held that an undocumented immigrant was barred from bringing a workers’ compensation claim against his employer.97 The court determined that, although Virginia code defined “employee” as “every person, including aliens and minors, in the service of another under any contract of hire . . . whether lawfully or unlawfully employed[,]” an undocumented immigrant could not be included in that definition “without subverting federal immigration policy.”98 Relief like worker’s compensation “is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and
Looking back, the *Plyler* decision may have been either an aberration on a historical tradition of denying rights to immigrants, or it may be a turning point towards broader assurance of rights for aliens in the United States. While some immigrants are afforded Constitutional and other legal protections, others are excluded due to various interpretations of “person,” “people,” “employee,” and even “immigrant.” Still, precedent set by *Plyler* assures that all immigrants (documented and undocumented alike) are protected by the Equal Protection clause. Considering both the broad power of Congress with respect to immigration, and the rights that immigrants maintain under the Constitution, is Secure Communities a permissible exercise of government power?

### III. Secure Communities: An Equal Protection Analysis

A law violates the Equal Protection clause when it denies a benefit to a discrete class of people while it is afforded to others similarly situated. In analyzing the constitutionality of a law under Equal Protection, a court will first determine what level of scrutiny must be applied. A law is presumed valid unless a challenger shows that the law in question falls within exceptions to this presumption: if the law infringes upon a fundamental right; if the law distorts the political process; if the law targets a racial or religious minority; or if the law targets another “discrete and insular minority.”

The next step in an Equal Protection analysis is discerning whether the law seeks to achieve a permissible government purpose. If the purported goal of the law is impermissible, it fails an Equal Protection review, and is unconstitutional. However, the actual purpose of a law may differ from its purported goal. If the actual purpose of a law is impermissible, it also fails an Equal Protection review, and is unconstitutional. If the government purpose is legitimate, the final step is to determine whether the law is related to the achievement of its goal.

#### a. What Level of Scrutiny Should be Applied?

For the purposes of an Equal Protection challenge, a law is presumed valid, and subject to rational basis review, unless a challenger can show either that the benefit denied is a fundamental right, or that individuals denied the benefit are part of a discrete or suspect class. If the benefit denied is a fundamental right, the court will review the questionable law or practice with strict scrutiny. If the law discriminately affords the benefit, and denies it to a group of individuals on the basis of race or religion, the court similarly applies strict scrutiny review. However, if the law denies a benefit on the basis of legitimate differences between differentiated classes, or the characteristic upon which the discrimination is based is not an immutable characteristic, the court may apply an intermediate level of review, less stringent than strict scrutiny, but more stringent than rational basis review. Although discrimination on the basis of race and national origin are afforded strict scrutiny review, discrimination on the basis of immigration status is analyzed under intermediate scrutiny. Immigration status is largely considered a voluntary condition, and therefore not an immutable characteristic. Still, immigrants are a discrete and vulnerable class, and often the target of discrimination. While laws analyzed under rational basis review are given much deference, and only rarely overturned, laws evaluated under intermediate review or strict scrutiny are subject to a higher standard; as such, they are examined more critically to determine if the discrimination in question is sufficiently invidious to be deemed unconstitutional.

According to *Plyler*, although immigrants are a discrete class of individuals, and frequently discriminated against, their status is at least partly voluntary (and not immutable); therefore, their Equal Protection claim may be subject to an intermediate level of scrutiny. One could argue that the immigration status of most undocumented immigrants is involuntary because there are few and near-impossible legal avenues for an undocumented immigrant to adjust his/her status. Furthermore, many individuals faced with poverty, political persecution, or gang violence in their home country, feel as though they have no choice but to immigrate to the United States. Still, some would argue that, albeit an unappealing choice between remaining in the United States undocumented or returning to one’s country of origin, the fact that an individual chooses to remain in the United States without documentation is evidence of his/her voluntarily determined status; therefore an Equal Protection claim would require an analysis under intermediate scrutiny.

#### b. Permissible Government Purpose

##### i. Purposed Purpose

Does the Secure Communities program seek to achieve a permissible government goal? ICE’s purported goals of Secure Communities are to identify aliens in law enforcement custody, prioritize apprehending and removing criminal aliens who pose the greatest threat to public safety, and efficiently identify, process and remove criminal aliens from the United States. First, identifying aliens in law enforcement custody may be problematic. Although deportation was
always considered a civil penalty, the current process and consequences of deportation make the reality of deportation more like criminal punishment. If deportation is more akin to a criminal punishment, aliens in custody should be given proper due process, including notice, an opportunity to be heard, and an opportunity to contest charges against them, before punishment is exacted. Identifying, apprehending and removing criminal aliens from the United States may be a permissible goal for the federal government, but is it a permissible responsibility for localities? Surely efficiency in the process of identifying and removing criminal aliens should be a permissible government goal, but is it permissible to delegate this power to localities, and require locality compliance? It is likely permissible if localities opt-in to the program on their own accord, but ICE expects to have the Secure Communities program in effect nation-wide by 2013. Requiring states and localities to enforce federal law is a violation of the Tenth Amendment. If Secure Communities defies the Tenth Amendment by unlawfully forcing state participation in the enforcement of federal law, it will have an impermissible goal and will consequently violate Equal Protection principles as well.

ii. Actual Purpose

Where a facially-neutral law has a dubiously impermissible actual purpose, the court will take into account the actual purpose in analyzing whether the law violates the Equal Protection clause. However, the court most often defers to decisions of the legislature where the level of scrutiny is not heightened. If the impermissible outcome of the law is simply an unintended effect, a law may not necessarily be invalidated for having an impermissible purpose. However, if the court determines that a law has an impermissible intended purpose, despite being facially neutral, the court may invalidate it for violating Equal Protection.

ICE maintains that the actual purpose of Secure Communities is to ensure community safety by removing dangerous criminal aliens. However, ICE’s own statistics show that the majority of those identified and removed through Secure Communities have been Level 2 and Level 3 offenders. Indeed, only 8-10% of those identified through the program are Level 1 offenders, those specifically targeted as dangerous and high-risk threats. Interestingly, the number of Level 1 offenders is only slightly higher than the number of U.S. citizens who are identified as a “hit” through the Secure Communities program (5%). Specific data on the race and national origin of individuals identified and deported through Secure Communities is seriously lacking, and is the subject of both FOIA investigations and complaints. If this specific data were published, it may very likely show that the overwhelming majority of individuals identified through the program are Latino. Although the program does not overtly require discrimination on the basis of race, its intended effect is to remove as many Latino immigrants from the United States as possible. If this were the case, the program would fail an Equal Protection challenge, for promoting an impermissible government objective.

c. Ends and Means Nexus

i. How Closely Should the Program Fit its Purported Goals?

Assuming that an analyzing court determines that the purpose of the Secure Communities program is not dubious, but rather a permissible government goal, how broad or narrow must be program be tailored to remain constitutionally valid under Equal Protection? Under a rational basis review, a law challenged under Equal Protection must be rationally related to a legitimate government purpose. It is unlikely that Secure Communities, a program highly contested for its overwhelming reliance on racial profiling, would be subject to such a low level of constitutional review. If Secure Communities were analyzed under rational basis review, because the court pays high deference to existing laws and administrative programs, Secure Communities would likely be found constitutionally permissible.

Under strict scrutiny review, a challenged program is presumed invalid. In order to remain valid, the program must be necessary to achieve a compelling government purpose. Under intermediate scrutiny review, a challenged program must be narrowly tailored to achieve an important government goal. If ICE’s important government goal is prioritizing the identification and removal of criminal aliens, it may need to clarify the definition of a “criminal alien.” If violating a civil immigration law is not a crime, undocumented aliens who have never been convicted of criminal offenses would not be “criminal aliens,” and therefore would not be reached by the Secure Communities program. If this is the case, the fact that some non-criminal undocumented workers have been removed under the Secure Communities program may constitute prima facie evidence that the government’s program is not sufficiently tailored to meet its goal. It is unlawfully over-inclusive, catching in its net far more individuals than it purports to identify and deport. If the program is too broad in attempting to achieve its purported goal, it may be an unconstitutional violation of Equal Protection.

ii. Negative Externalities and Policy Concern
If the goal of Secure Communities is to promote safety, it is deeply and ironically flawed since a troubling consequence of Secure Communities is its profound chilling effect on immigrants with respect to reporting crimes. Concerned about their potential vulnerability to inquiries about immigration status, fewer immigrants who are crime witnesses or victims will come forward to the authorities. Increased reluctance to report criminal activity can only result in insecure communities, where criminals remain free to commit more crimes.

Additionally, although ICE admitted that 5% of individuals identified through the Program are U.S. citizens, it never mentioned how many of those identified were Lawful Permanent Residents. ICE’s data fails to include how often U.S. Citizens or Lawful Permanent Residents were arrested, fingerprinted, identified, and detained by ICE as a result of Secure Communities. The Supreme Court cautioned against imposing substantial burdens on lawful immigrants, because “our traditional policy [is] not treating aliens as a thing apart.” Highlighting Congress’s role in specifically regulating immigration, the Court held that the purpose of immigration regulation is to “protect the personal liberties of law-abiding aliens . . . and to leave them free from the possibility of inquisitorial practices and police surveillance.” Because Secure Communities effectively facilitates removals for many individuals who, though arrested and fingerprinted, have never have been convicted of a crime, the Program inherently stands in stark contrast to the Supreme Court’s mandate of leaving law-abiding aliens free from invasive police practices.

Furthermore, the Secure Communities program relies heavily on racial profiling to achieve its goal of identifying and removing alien immigrants. The practice of racial profiling alone is problematic because it perpetuates negative stereotypes and bias-related crime against individuals on the basis of their skin color. Furthermore, it makes already-vulnerable groups even more vulnerable to discrimination and socio-economic oppression. It reinforces despicable notions of inferiority, and deeply offends the dignity of people of color, regarding both an individual’s sense of self-worth and the presumptive social value of such and individual in the community. As Justice Murphy remarked in his dissent in Korematsu v. United States,

> giving [inference that race could be used as a proxy for criminal suspicion] . . . is to adopt one of the cruellest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

More recently, Justice Goldberg, reflecting upon the Civil Rights Act of 1964, emphasized the importance of protecting the dignity of individuals discriminated against on the basis of race: “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.”

Governmental utilization of racial profiling programs serves to aggravate these issues. Condoning racial profiling tactics is not only unethical, but may soon be explicitly unlawful as well. Considering the multitude of negative externalities of Secure Communities program, Congress must specifically address the program, and local governments must reconsider their involvement in the enforcement of federal immigration law.

IV. The Future of Secure Communities

a. Litigation Against Secure Communities

In February 2010, the National Day Laborer Organizing Network, Center for Constitutional Rights, and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (the “Network”) filed a Freedom of Information Act (FOIA) request, to obtain data related to the two-year old Secure Communities program. In late April 2010, they commenced a lawsuit against ICE, DHS, Executive Office for Immigration Review, the FBI, and the Office of Legal Counsel, for failing to release agency records under the Freedom of Information Act. After much delay, ICE and DHS reluctantly disclosed information about the Secure Communities program, confirming what advocates at the Network feared: the Program functions as a “dragnet,” funneling individuals into a highly flawed detention and removal system; 79% of those caught in the Program’s net are not criminals or were picked up for minor offenses; the Program serves as a smokescreen for racial profiling, allowing police officers to make arrests that could lead to deportations, rather than to convictions; and although the Program is not mandatory, there is no clear opt-out procedure. Although ICE complied with FOIA requests, many of the questionable practices inherent in Secure Communities remain. As such, it is likely that the Network, or other like-minded advocacy organizations, will continue to pursue litigation against ICE to remedy these issues.
b. Effect of Judicial Findings in United States v. Arizona

If Arizona’s SB 1070 withstands Constitutional scrutiny, it may provide a dangerous foundation for racial profiling and the expansion of Secure Communities. Like Secure Communities, Arizona’s recent anti-immigration bill has been the subject of much political debate. Both programs involve delegating significant responsibility to unsupervised local law enforcement officers, which implicates a grave potential for racial profiling tactics to be tacitly enacted in day-to-day policing.

The most prominent argument in the Federal Government’s case against the State of Arizona regarding Arizona’s anti-immigration law, SB 1070, is that the state impermissibly attempts to preempt an area of law specifically reserved for the Federal Government. Control over immigration policy and enforcement, a clear responsibility of the Federal Government, is reinforced by the Tenth Amendment. However, considering the proliferation of ICE programs that delegate significant power in immigration enforcement to localities, this argument may no longer be persuasive. Arizona District Court Judge Bolton granted a preliminary injunction against SB1070, concurring with the Federal Government’s argument that Arizona unlawfully attempted to preempt Federal law, but in the absence of clear Congressional discussion of ICE’s current programs, and authority to delegate the power of immigration enforcement, the Secure Communities program may similarly be found to be an impermissible co-opting of Federal authority. Furthermore, ICE’s attempt to delegate its clearly federal responsibility to state and local governments may violate the Tenth Amendment.

c. The Impact of Congressional Legislation: The End Racial Profiling Act of 2010

Legislative efforts to end discrimination are evident in HR 5748, also known as the End Racial Profiling Act of 2010. The bill, introduced in Congress in July of 2010, seeks to eliminate racial profiling by law enforcement by giving individual victims of racial profiling a private right of action to sue; by creating a disparate impact private right of action; by requiring the Attorney General’s oversight; and by requiring data collection and publication, allowing the public to provide external oversight.

If passed, this bill has the potential to change the current state of immigration enforcement radically, and ensure the liberty and dignity of all citizens, immigrants, residents and visitors to the United States. Granting individual victims of racial profiling a private right of action to sue would force ICE and local law enforcement to exercise discretion and care in routine practices. Rather than receiving measly declarative relief, victims may finally witness unlawful government action being judicially sanctioned. Rather than receiving apologies, victims would receive financial compensation. Additionally, allowing a disparate impact private right of action ensures that facially-neutral, or even unintentional discrimination is avoided. Perhaps most significantly, the bill would require agencies like ICE to regularly publish data to show how its program functions, and whether it is achieving its goals. Making such data available to the public would force ICE to be responsible for the way in which its programs are executed. It would better equip advocacy organizations to ensure that civil rights are not violated. The bill would require steadfast and dedicated oversight to ensure that racial profiling be eradicated. Still, although this bill would deeply de-claw some of the problematic aspects of the Secure Communities program, it would not rectify all of its injustices.

d. Alternative Approaches to Immigration Enforcement

Rather than engaging in complicated, ad-hoc, non-congressionally authorized, federal-local collaborations to identify and deport all undocumented immigrants, the Federal government needs to re-examine and reinstate comprehensive immigration reform, including just and fair immigration enforcement. This reform should consider why individuals come into the United States illegally. As experts at the Migration Policy Institute point out, “our immigration laws provide inadequate legal avenues to enter the United States for employment purposes at levels that our economy demands.”

By issuing visas like the H1-A and H1-B, U.S. Customs and Immigration Services grants temporary legal status to immigrants coming to work in the United States. Unfortunately, the government offers only 66,000 visas to individuals coming to work in low-skilled, non-agricultural settings inside the United States; this number falls grossly below the number of people interested, and actually performing this work. If the U.S. issued more visas to low-skilled workers, more people would follow legal avenues to obtain employment here. Furthermore, because applying for and obtaining visas through family members take many immigrants nearly a decade, there is little incentive to follow government rules. Rather, as experts note, immigrants and their employers follow market rules.

Indeed, changes in immigration enforcement are an empty and fool-hardy attempt to solve what is a tremendously decisive issue to all sides of the contemporary political debate. Before reforming immigration enforcement, the federal government
first needs to address much-needed reforms to federal immigration policy.

e. Local Advocacy Efforts Against Secure Communities

Rights Working Group (RWG) a group of hundreds of progressive local, state and national organizations, committed to protecting civil liberties and human rights, spearheads two campaigns closely tied to addressing and reforming recent changes in immigration enforcement: Face the Truth (addressing racial profiling), and Hold DHS Accountable (urging President Obama to issue a moratorium on current immigration enforcement policies that deny due process). In addition to supporting pending legislation by the Network and the Center for Constitutional Rights, RWG also worked closely with Virginia-based attorneys in Arlington to investigate the possibility of Arlington opting-out of the state-mandated Secure Communities program. After Secretary Napolitano announced to Congress that jurisdictions could opt-out, the Arlington County Board voted to officially withdraw from participating in the program, despite Virginia’s statewide activation of Secure Communities. Despite this seemingly successful event, the outcome of which remains vague, Secure Communities continues to spread rapidly across the country.

Conclusion

In the wake of Virginia Attorney General Ken Cuccinelli’s recent opinion, authorizing law enforcement to check the immigration status of anyone stopped by police officers for any reason, it is likely that local immigration enforcement policies will be thrust further into the center of political debate.

Is Secure Communities Constitutional? Probably not. The Supreme Court has held and reaffirmed that immigrants constitute a discrete class of individuals, worthy of at least an intermediate standard of review in an Equal Protection claim. The program relies substantially on racial profiling, and laws enabling or condoning racial classifications are always strictly scrutinized by a reviewing court. Considering the heightened level of scrutiny to be applied, the program certainly is not narrowly tailored enough to warrant deference. ICE’s own data proves that Secure Communities broadly overreach its goal of identifying and removing dangerous criminal aliens; nearly 80% of the immigrants removed through Secure Communities since 2008 were neither dangerous, nor criminals.

Too many people get caught up in popular political fervor, repeating uninformed rhetoric without fully considering the realities of the debate. Despite our embarrassing history of slavery, oppression and racism, the United States has a strong history of protecting the disenfranchised, impoverished, and vulnerable from tyranny of an unrelenting majority. This nation was founded upon the premise that all individuals, even the politically unpopular, are free from persecution, and afforded due process and equal protection of the laws. However contentious this debate may be, considering the high stakes of constitutional and human rights violations at hand, legal advocacy cannot wait.

Endnotes

1 Rachel Zoghlin is a second-year student at American University Washington College of Law. She is a graduate of Vassar College, and is involved in immigrant advocacy through her work with the UNROW Human Rights Impact Litigation Clinic (litigating on behalf of a derivative U.S. citizen in ICE custody) and the Central American Resource Center (CARECEN) (assisting clients filing various visa petitions and applications for Temporary Protected Status). She extends a special thanks to TMA Editor-in-Chief Richael Faithful for her thoughtful advice and support in the creation and evolution of this piece.


8 See Henderson v. Mayor of New York, 92 U.S. 259, 272-74 (1875) (holding that “[w]e are of the opinion that this whole subject (immigration) has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled.). See also Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (citing Article VI of the Constitution to illustrate that “[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.

9 Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419 (1948) (citation omitted).


14 See Office of State, Local and Tribal Coordination, Immigration and Customs Enforcement, www.ice.gov/about/offices/leadership/osltc/.


16 Id. at 219-20.

17 Id.

18 ACLU Immigrants’ Rights Project, (Sept. 6, 2005), http://www.aclu.org/FilesPDFs/ACF3189.pdf

19 Chandler, supra note 15, at 216-17.

20 Secure Communities, supra note 6.

21 Id.

22 Id.

23 Id.

24 Interview with Margaret Huang, Executive Director, Rights Working Group, in Washington D.C. (July 28, 2010).


27 Secure Communities Presentation, supra note 25; Interview with Margaret Huang, supra note 24.

28 Secure Communities Presentation, supra note 25.


30 Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year, HOMELAND SECURITY (Nov. 12, 1999), http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm.


36 Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year, U.S IMMIGRATION AND CUSTOMS ENFORCEMENT (Nov. 12, 1999), http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm.

37 Supra note 35.


remain in the United States may be more important to the client than any potential jail sentence.”).


41 See id.; see generally Janice Kephart, Dallas Would-Be Bomber Hosam Smadi: The Case for 287(g) and Exit Tracking, CENTER FOR IMMIGRATION STUDIES, (Nov., 2009), http://cis.org/exit-tracking.


44 Ivan Moreno, Immigrant Groups Criticize Fingerprint Initiative, ASSOCIATED PRESS (July 26, 2010), abcnnews.go.com/US/wireStory?id=11253152.

45 Sheriff’s Office Partners with ICE to Launch Secure Communities Program (Mar. 9, 2009), http://www.fairfaxcounty.gov/sheriff/news/ice.htm.

46 Id.


50 See Secure Communities Program, ARLINGTON COUNTY (Aug. 5, 2010), http://www.arlingtonva.us/departments/Communications/page77334.aspx (attempting to clarify its participation in the Secure Communities Program and to answer its residents’ frequently asked questions, Arlington County has published a news alert on its website).

51 See Denvir, supra note 18.

52 Id.


58 Id.

59 Interview with Margaret Huang, supra note 24.


64 Id.

65 See Cooper, supra note 54.


71 Id. at 205.
by the First Amendment).

alien, editorials published in the newspapers were protected (1941))(holding that, although one of the petitioners was an alien, editorial publications in the newspapers were protected by the First Amendment).

suspicion and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”).

Torao Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420 (1948).


Id. at 292.

Id. at 284.


Id. at 144-45.

Id. at 148 (citing Bridges v. California, 314 U.S. 252, 280 (1941))(holding that, although one of the petitioners was an alien, editorials published in the newspapers were protected by the First Amendment).

Id. at 147 (citations omitted).

Id. at 154.

Id. at 157 (Murphy, J., concurring).

Id. at 159-60 (Murphy, J., concurring) (citations omitted).

Id. at 161 (Murphy, J., concurring) (citing Turner v. Williams, 194 U.S. 279 (1904)).

Id. (emphasis added).


Id.

See e.g., United States v. Virginia, 518 U.S. 515, 563 (1996) (Rehnquist, J., concurring) (agreeing that the exclusion of women from the Virginia Military Institute violated Equal Protection, but explaining that “[h]ad Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation.”).


Id. at 219, n.19.


See Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 Yale L. J. On Reg. 47, 51 (2010) (arguing that the doctrinal foundation for the assertion that immigration removals are not punishment for crime but rather remedial civil sanctions and collateral consequences has disintegrated, and that changes in immigration law have rendered removal for many crimes a direct consequence of a defendant’s conviction).


Printz v. United States, 521 U.S. 898, 909 (1997) (emphasizing that, “[n]ot only do the enactments of the early Congresses . . . contain no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption.”).


See, e.g., Allegheny Pittsburgh Coal Co. v. County Com’n of Webster County, 488 U.S. 336, 344 (1989) (citing Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)) (noting that, “[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.”)

Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year, HOMELAND SECURITY (Nov. 12, 1999), http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm.


National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency, No. 10 CV 3488 (S.D. N.Y. filed Apr. 27, 2010); National Day


117 Id. at 74.


119 Toyosaburo Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

120 Bracey, supra note 118, at 698 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring).


127 See Rachel Zoghlin’s “Inside the Authors’ Studio” interview on our website to learn more about her inspiration for the article, and her thoughts about the issues and questions emerging from the article.


130 H-2B Temporary Non-Agricultural Workers, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Nov. 8, 2010), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a?vgnextoid=356b6c521eb97210VgnVCM100000082ca60aRCRD&vgnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD.


132 Meissner & Ziglar, supra note 130.

