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DISCRIMINATION, PREEMPTION, AND ARIZONA'S IMMIGRATION LAW: A BROADER VIEW

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The Supreme Court is expected to decide within days whether Arizona's controversial immigration enforcement statute, S.B. 1070, is unconstitutional. Arizona's law is widely condemned because of the discrimination the law will engender. Yet the Court appears intent on relegating questions of racial and ethnic profiling to the back of the bus, as it were.[1] That is because the Supreme Court is considering only the United States' facial preemption challenge to S.B. 1070 under the Supremacy Clause. That preemption claim asserts that Arizona's statute conflicts with the Immigration and Nationality Act's federal enforcement structure and authority.

But discarding the relevance of discrimination as a component of that ostensibly limited preemption claim expresses the federal interest too narrowly. State laws targeting noncitizens should also be tested against another fundamental federal norm, namely the prohibition against state alienage discrimination that dates back to Reconstruction-era civil rights laws. In other words, the

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1. In a revealing moment at oral argument, the Chief Justice demanded of the Solicitor General before he could offer a single word of argument: "No part of your argument has to do with racial or ethnic profiling, does it?" A moment later, Chief Justice Roberts reiterated, "So this is not a case about ethnic profiling." Transcript of Oral Argument at 34, Arizona v. United States, No. 11-182 (U.S. argued Apr. 25, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf. For a recent discussion by a prominent commentator that "[r]ace is the project of the Roberts court," see Linda Greenhouse, *The Fire Next Term*, N.Y. TIMES OPINIONATOR BLOG (May 30, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/05/30/the-fire-next-term/ (arguing that the Chief Justice is intent on undoing the Court's affirmative action and voting rights decisions).

federal principles that states may not transgress under the Supremacy Clause should be defined *both* by the benefits and penalties in the immigration statute *and* by the protections embodied in historic anti-discrimination laws.

The United States correctly and forcefully invoked the harassment of foreign nationals as an impermissible consequence of the Arizona law. But that oblique discrimination claim did not directly rely on the anti-discrimination norm embedded elsewhere in federal law. The fundamental point I want to urge is that immigration preemption must take account of the rights that immigrants are afforded under federal statutes outside the narrow confines of immigration laws.

S.B. 1070

The expressly-stated purpose of Arizona's law is "attrition through enforcement," a phrase that—as states supporting the federal challenge pointed out in their brief—is well known in anti-immigrant circles. The goal is to make life so difficult for undocumented immigrants—and their unwanted "networks of relatives, friends, and countrymen"—that they will all leave the state.[2] That means targeting some unknown number of Arizona's estimated two million Latino residents.[3]

Four specific provisions of S.B. 1070 are at issue before the Court in *Arizona v. United States*. The notorious "show me your papers" provision, section 2(B), *requires* police officers to demand proof of legal status from anyone they otherwise stop or arrest if an officer has a "reasonable suspicion" that the person is an undocumented alien. And the law requires that such person be detained until his or her status is verified. As a result, S.B. 1070 subjects anyone suspected of being an undocumented immigrant to continual interrogations, detentions, and status checks by police. Failure to fully implement this mandate exposes an officer and agency to civil suit by any Arizonan and daily fines of thousands of dollars. The other challenged provisions are section 5(C), which criminalizes engaging in or seeking unauthorized work; section 3, which creates a state crime for violating the federal alien registration provision; and section 6, which authorizes Arizona police to arrest anyone without a warrant for having committed a "deportable" public offense.

The United States' suit asserts that S.B. 1070 is preempted by the Immigration and Nationality Act (INA) because the state law conflicts with the comprehensive federal scheme that has vested exclusive immigration enforcement au-

2. Brief for the States of New York et al. as Amici Curiae in Support of Respondent at 17-18, Arizona v. United States, No. 11-182 (U.S. Mar. 26, 2012).

3. Arizona has an undocumented immigrant population estimated at 360,000, predominantly of Mexican origin. Jeffrey S. Passel & D'Vera Cohn, *How Many Hispanics in the U.S.?*, PEW RES. CENTER (Mar. 15, 2011), http://pewresearch.org/pubs/1928/census-hispanic-count-compared-with-estimates.

thority in the federal government. As a result, the dispute between Arizona and the United States turns on how to read various provisions of a notoriously labyrinthine statute, how to discern congressional intent based on decades of debates and amendments, and whether Arizona's arrest and detention mandates interfere with the Obama Administration's recent and laudable "prosecutorial discretion" policy that is designed to focus deportation resources on those categories of immigration law violators that the Department of Homeland Security deems as high-priority targets.

The United States' suit enumerates important federal interests, shows how legally present aliens will be improperly punished, and demonstrates multiple conflicts with federal law and policies. But it does not directly rely on the federal mandate outlawing discrimination against noncitizens. Many reasons could explain that omission, including that the suit presents a facial challenge or that Arizona claims (incorrectly) to be taking aim only at undocumented immigrants who are already subject to federal penalties. But I suggest that the federal framework governing the treatment of noncitizens by states (and others) supports a basis for preemption grounded in the historic prohibition against alienage discrimination enacted in the aftermath of the Civil War.

Preemption is a famously malleable doctrine. Critical to the question of whether a state law is inconsistent with federal law is *how* the federal interest is defined. Given that the essential inquiry is the scope of the federal interest, it matters critically *which* federal laws are deemed implicated. In today's setting—where state immigration laws single out immigrants for enforcement, questioning, detention or sanction—the federal interest and legal regime should not be defined solely by reference to federal immigration law. Rather, they should also encompass the longstanding protections against discrimination to which aliens are entitled.

THE PREEMPTIVE ROLE OF SECTION 1981

In an earlier time, when states targeted foreigners—even in ways arguably less hostile than today—the Supreme Court grappled with the borders of permissible state immigration legislation for preemption purposes. In that context the Court decisively did *not* limit its inquiry to the almost indecipherable federal immigration statute. Instead, the Court found equally important and directly relevant the prohibitions against discrimination contained in venerable federal civil rights statutes enacted by the Reconstruction Congress in 1866 and 1870 and now codified in 42 U.S.C. § 1981. This statute outlaws state (and private) discrimination on the basis of alienage and embodies an entrenched federal norm that protects noncitizens and preempts inconsistent state laws.

In 1971, the Supreme Court recognized the central importance of § 1981's preemptive force. In *Graham v. Richardson*,[4] the Supreme Court issued a landmark ruling holding that another Arizona law—denying welfare benefit eligibility to longtime legal permanent resident immigrants—violated the Equal Protection Clause of the Fourteenth Amendment.

Easily overlooked is that *Graham* invalidated the Arizona law on two separate and independent grounds. In addition to its Equal Protection holding, *Graham* also held that federal preemption constituted an alternative basis for striking down the Arizona law.[5] Justice Blackmun explained that the Arizona law was inconsistent with federal immigration policy and—critically—also emphasized that it violated a deeper principle embodied in the century-old federal civil rights law prohibiting discrimination against non-citizens. This portion of the decision stands for the important proposition that federal law and policy preempt state authority affecting immigrants not only when the exercise of state power is inconsistent with federal immigration laws but also when it contravenes the fundamental federal policy prohibiting state discrimination on the basis of alienage.[6]

To define the federal interest that preempted the Arizona law at issue in *Graham*, the Supreme Court relied in part on 42 U.S.C. § 1981.[7] The importance of these post-Civil War civil rights statutes is well known. After the Civil War and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments guaranteeing equal protection and due process to every "person"—not only to citizens—the Reconstruction Congress enacted landmark civil rights statutes. In so doing, it sought to protect equal rights and fundamental freedoms for newly freed slaves and all African Americans.

But not as widely understood is that the Reconstruction Congress also was acutely aware of the despicable treatment of Chinese immigrant workers in

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4. 403 U.S. 365 (1971).

5. Part III of the opinion held that the state's discrimination against aliens lawfully within the United States conflicted with "overriding national policies" reflected both in the immigration laws and in § 1981's guarantee of "'an equality of legal privileges with all citizens under nondiscriminatory laws.'" *Graham*, 403 U.S. at 377-78 (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948)). Notably, Justice Harlan joined only Part III and would have ruled solely on preemption grounds.

6. *Graham*, 403 U.S. at 377. *See also Takahashi*, 334 U.S. at 419-20 (stating that § 1981 protects all persons against state alienage discrimination). After *Graham*, courts grappled with the question of whether §1981 also outlaws *private* alienage discrimination, and the Court upheld California's employer sanctions regime in *DeCanas v. Bica*, 424 U.S. 351 (1976), against a field preemption challenge. But litigation based on federal preemption claims largely receded until the recent spate of state and local regulation.

7. The operative portion of 42 U.S.C. § 1981 as codified at the time of *Graham v. Richardson*, provided: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (1970).

California and elsewhere. Chinese immigrants faced discrimination, abuse, brutality, and worse under state laws and local ordinances and at the hands of vigilante mobs. The Chinese were, of course, also the subject of discriminatory federal immigration and naturalization laws at that time.

Nonetheless, the Civil Rights Laws protected Chinese immigrants from state discrimination. The critical provision codified in §1981 mandated that every "person" shall have the same right to commercial transactions and to the "full and equal benefit of all laws and proceedings" as "white citizens." The law's formulation established a federal norm of equality requiring all "persons" to be treated the same as "white citizens," thereby outlawing both race and alienage discrimination.[8]

In a 1948 case, *Takahashi v. Fish and Game Commission*, the Supreme Court recognized the scope of these laws when it struck down a California law that denied Japanese aliens—who were denied citizenship under the laws of that era—the right to earn a livelihood as fishermen in coastal waters.[9] The jurisprudence stemming from the mandate of §1981, articulated in *Graham* and *Takahashi*, demonstrates that the consequences for a state's immigrant and Latino populations are an essential consideration in federal preemption of state immigration laws. Discrimination against and profiling of those residents is a violation of the principle embodied in federal law.[10]

To be sure, *Graham* and *Takahashi* concerned discrimination against legal resident immigrants, and Arizona claims to target only the undocumented. But that supposedly narrow focus is belied by the law's "attrition through enforcement" goal, which seeks deterrence by ensnaring friends, families, and communities of suspected undocumented immigrants—inevitably denying equality to citizens and legal immigrants alike. More significantly, § 1981 should be considered as part of the federal scheme even if only undocumented immigrants were the enumerated target since S.B. 1070's reach is far broader. Arizona's mandatory detain-and-verify provision, for example, applies to anyone who is deemed suspicious, regardless of actual status or citizenship. And it bears emphasis that § 1981 gave protection to Chinese (and Japanese) immigrants against state discrimination at a time when they were denied equal rights under the immigration laws, were denied the right to citizenship under "white only" naturalization laws, and were subject to our harshest and most discriminatory deportation measures. Discriminatory state laws should not be deemed permissible simply because they purport to apply to a disfavored federal category of noncitizens.

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8. *See Takahashi,* 334 U.S. at 419-22. *See generally* Runyon v. McCrary, 427 U.S. 160, 200 (1975) (White, J., dissenting).

9. 334 U.S. at 419-22.

10. Recognizing the importance of § 1981 to the federal preemption analysis is not the same as asserting a direct violation of that statute.

While the precise force and scope of the Civil Rights Laws with regard to non-legal resident aliens remain undetermined, and Arizona claims to be penalizing only undocumented immigrants, defining the federal interest solely through the lens of immigration regulation and enforcement is still too narrow. Federal law is not only about federal immigration enforcement—it is equally about preventing discrimination. Measuring state laws only against the intricacies of federal immigration statutes and policies misses this essential point.

Looking at preemption through the broader prism I propose also helps explain a key difference between laws like S.B. 1070 that single out noncitizens for adverse treatment and other laws or ordinances that may benefit immigrants by enhancing equality and opportunity. When cities and states adopt policies that prohibit distinctions based on immigration or citizenship status, those actions embrace the values embodied in federal anti-discrimination laws. Thus, preemption properly conceived presents no impediment to equality-furthering laws designed to protect noncitizens, such as universal municipal ID cards.[11] But preemption should erect a higher barrier to state laws inviting profiling and discrimination as contravening the federal anti-discrimination principles.

CONCLUSION

Some Justices may recognize the broader non-discrimination interests presented in the federal government's preemption claim. And even if the pending challenge does not enjoin any or all of the S.B. 1070 provisions, civil rights challenges will more directly raise the rights of immigrants, their families and communities. But that eventuality should not obscure the importance of understanding that the federal values transgressed by S.B. 1070 and similar laws encompass both immigration and anti-discrimination imperatives.

11. *See, e.g.*, Cristina Costantini, *Municipal ID Cards Given to Undocumented Immigrants in Cities Across the U.S. with Varied Success*, HUFFINGTON POST (Oct. 24, 2011), http://www.huffingtonpost.com/2011/10/21/municipal-id-cards-undocumented-immigrants_n_1024412.html; David G. Savage, *Supreme Court Allows California to Grant In-State Tuition to Illegal Immigrants*, L.A. TIMES (June 6, 2011), http://articles.latimes.com/2011/jun/06/news/sc-dc-0607-court-tuition-20110607.