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THE USUAL SUSPECTS: JUDICIAL REVIEW OF STATE LAWS THAT TARGET UNDOCUMENTED IMMIGRANTS

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I. INTRODUCTION

> [W]hat are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty . . . . And whether a State passes a quarantine law[ ] or a law . . . to regulate commerce . . . , in every case it exercises the same power; . . . the power to govern men and things *within the limits of its dominion*. It is by virtue of this power that it legislates . . . .[2]

> [The Fourteenth Amendment] disable[s] a State from depriving not merely a citizen of the United States, but any *person*, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation . . . giv[ing] to the humblest, the poorest, the most despised of the race the same rights and the same

1. J.D. Candidate, May 2014. The author would like to thank his entire family for their support, including his younger siblings: Jessica, Matthew, and Kathleen. He would also like to thank Samantha Donne for her patience and encouragement and his friends for their loyalty. Thank you to his editors at The John Marshall Law Review, especially Thomas Ferguson. Finally, he would like to dedicate this Comment to his parents, Jon and Jane, the hardest-working, most generous people he knows.

2. License Cases, 46 U.S. 504, 583 (1847) (emphasis added) (exemplifying a broad description of the States' police powers and advocating for judicial restraint).

> protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That . . . is republican government[ ] and . . . a just government.[3]

The two concepts detailed above are deeply rooted in Constitutional Law. In the arena of litigation, they are often pitted against each other, leaving the courts to balance the differing interests.[4] The words of then Michigan Senator Jacob Howard, a Fourteenth Amendment draftee, uphold the lasting American principle - that all men are created equal.[5] For centuries, that phrase was meaningless in its application for many different groups of minorities.[6] Justice Thurgood Marshall was a champion of the Fourteenth Amendment.[7] His view on individual rights will be an important part of this Comment.

Although impressive steps have been taken to ameliorate the status of these underrepresented groups through legislation and judicial interpretation,[8] the Equal Protection Clause of the Fourteenth Amendment has had its share of recent invocations. One field that has seen numerous challenges is illegal immigration.[9] With some scholars going so far as to refer to the

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3. CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (demonstrating the plain meaning of the Fourteenth Amendment as intending to apply to all persons regardless of citizenship. Senator Jacob Howard of Michigan, member of the Joint Committee on Reconstruction that drafted the Fourteenth Amendment, spoke of its purposes with respect to the recently emancipated slaves, but its message was intended to be a reflection of a strong federal government).

4. *See generally* Plyler v. Doe, 457 U.S. 202 (1982); Brown v. Board of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 583 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (enunciating the Supreme Court's role in reviewing a state regulation under the purview of the Equal Protection Clause and how it affects each state's citizens' rights).

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

6. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1-5 (1987) (reminding Americans that when the Founding Fathers used the phrase "We the people" in 1789, they did not include every person within the jurisdiction of the Nation – just free persons, and that it has taken a constitutional evolution to spark and continue the progression of civil rights).

7. *See* Anita Hill, *A Tribute to Thurgood Marshall: A Man Who Broke with Tradition on Issues of Race and Gender*, 47 OKLA. L. REV. 127, 127-28 (Spring 1994) (opining that Justice Marshall's greatest contribution to the American society was forcing the law to respect the individual); *see also* Janet Alexander, *TM*, 44 STAN. L. REV. 1231, 1234-35 (Summer 1992) (identifying Justice Marshall's legacy as one of a moral steadfastness to improving the Constitution in the field of Civil Rights).

8. *See generally Brown*, 347 U.S. at 583 (finding racial segregation in schools unconstitutional).

9. *See, e.g., Plyler*, 457 U.S. at 202 (involving children of unlawfully admitted parents who sought injunctive and declaratory relief against a Texas Statute that denied them enrollment in the public school system).

current immigration situation as a "crisis,"[10] the need for clear legislation for both the effective enforcement and interpretation of the laws is evident.[11]

This Comment will attempt to balance the interests of Arizona and Alabama in combating the growing problem of undocumented immigration against the interest of the documented and undocumented aliens and U.S. citizens protected by the Equal Protection Clause.

The Comment will start by briefly discussing the history of State regulation of immigration. It will then juxtapose that historical context with the current immigration situation that states such as Arizona and Alabama face today.

With those circumstances displayed, the Comment will review the goals put forth by the states when regulating immigration. Those goals often involve regulating individuals. The constitutionally protected interests of the documented and undocumented aliens and U.S. citizens must be weighed and analyzed. How the Court weighs those interests and the deference it gives to the states is the heart of this Comment.

The Comment will traverse through the Supreme Court's different standards of review. It will conclude by proposing a standard of review unique to the issue of illegal immigration - partly based on precedent and partly based on the implications such laws have on Latino individuals. There is a place for state participation in contemporary immigration legislation, but the standards imposed on the states must reflect the circumstances involved.

II. BACKGROUND

A. The Role of the State in Controlling Its Borders

The Supreme Court in *Arizona v. United States*,[12] severely limited the states' authority in the field of immigration regulation.[13] The Arizona statute under review prompted discussion as to whether the federal government has the exclusive power to regulate immigration, and if not, what would be left to

10. *See* GODFREY Y. MUWONGE, IMMIGRATION REFORM: WE CAN DO IT, IF WE APPLY OUR FOUNDERS' TRUE IDEALS, 17 (Hamilton Books 2009) (likening modern day immigration legislation to that of the Chinese Exclusion Act of 1882, which failed to deny the immigration of Chinese laborers during the Gold Rush).

11. *See id.* (demonstrating the inadequacy of contemporary immigration laws; Muwonge indicates that twelve to twenty million undocumented immigrants were estimated to be residing in the United States in 2007).

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

13. *See id.* at 2498 (reinforcing the federal government's "broad, undoubted power over the subject of immigration . . .").

the States.[14] An important aspect of this discussion, from Arizona's perspective, was the origin of the states' inherent authority to regulate.[15] From where, either inherently or textually supported in the Constitution, do states like Arizona and Alabama locate this power?

1. State Sovereignty as It Relates to Immigration

It is undisputed that the individual states have sovereignty.[16] The notion of "dual sovereignty"[17] was no more relevant than during the early developments of the Union.[18] Each state had its own concerns about how the ratification of the Constitution and subsequent legislation would change its historical independence and autonomy.[19]

One such area of independence was the relationship between the State and its citizens.[20] Immigration regulation was

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14. *See id*. at 2500 (tempering the "pervasiveness" of federal regulation in immigration with the acknowledgment that states must have immigration policies of their own).

15. *See id*. at 2511 (Scalia, J., concurring in part and dissenting in part) (noting that "as a sovereign, [the state] has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.").

16. U.S. CONST. amend. X; *see* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) (recognizing that the States retain a "significant measure of sovereign authority," but only to the extent that the Constitution has not dispossessed them of those residual powers); *see also* Timothy Zick, *Active Sovereignty*, 21 ST. JOHN'S J. LEGAL COMMENT. 541, 543 (Spring 2007) (indicating that the dual characteristic of federalism includes a certain degree of "respecting the states as states").

17. *See Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (likening the "dual character" of federalism to "split[ting] the atom of sovereignty . . . ," thereby creating two political capacities: one state and one federal).

18. *See* EEOC v. Wyoming, 460 U.S. 226, 271 (1983) (Powell, J., dissenting) (recognizing that "[d]uring the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government").

19. *See*, *e.g.*, Ky. Res. 1798 (Nov. 10, 1798) (declaring the Alien and Sedition Acts unconstitutional, while reaffirming state sovereignty and state authority over aliens who are under the jurisdiction of the state in which they reside); Va. Res. 1798 (Dec. 24, 1798) (protesting the Alien and Sedition Acts as unconstitutional and infringing on the residual powers left to the States); *see also* THE FEDERALIST NO. 39 at 377 (James Madison)(Oxford World's Classics ed., 2008) (reiterating that each state came to the ratification table as an independent sovereign).

20. *See* Ky. Res. 1798 (Nov. 10, 1798); *see also Arizona*, 132 S. Ct. 2492, 2511) (Scalia, J., dissenting) (citing Mayor of New York v. Miln, 36 U.S. 102, 132 (1837)) (demonstrating that throughout history the states' relationship with its citizens included regulating the influx of immigrants); Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875),* 93

not always a function of the federal government.[21] There was a time when the states, or soon-to-be-states, patrolled the influx of immigrants according to their own standards.[22] This not only suggests that the states acted independently in this regard, but also that this was inevitably part of their inherent "internal police" authority at the time of the formation of the Union.[23] It is not a foreign concept, therefore, to consider that the states may regulate immigration as they see fit, with the recognition that at one point, this was entirely and absolutely part of their authority.[24]

2. Federal Intervention in the Regulation of Immigration

Although the focus of this Comment will not be preemption, it is important to note the comprehensive schematic approach that Congress has taken to address the immigration issue. Once Congress adopted an intervening role with the naturalization of all U.S. citizens, the states were left to pick and choose their regulatory fields.[25] As federal legislation increased, the threat of preemption rendered the States' Tenth Amendment police powers less significant.[26]

The Constitution specifically vests the power to enact rules of naturalization, impose duties on imports, and regulate commerce with Congress.[27] According to those Constitutional

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COLUM. L. REV. 1833, 1834-35 (Dec. 1993) (cautioning that by ignoring the states' historical authority to regulate immigration it "impairs constitutional understandings of the scope and character of federal immigration power . . .").

21. *Arizona*, 132 S. Ct. at 2512 (2012).

22. Neuman, *supra* note 19, at 1841 (identifying five categories of traditional state immigration legislation, including crime, public health, poverty, slavery, and racial subordination).

23. *See Miln*, 36 U.S. at 139 (holding that the powers that relate to the internal policies of the states are retained by the states).

24. *See Arizona*, 132 S. Ct. at 2513 (Scalia, J. dissenting) (concluding that there was no doubt as to the existence of the state power to regulate immigration prior to the adoption of the Constitution).

25. *See* DeCanas v. Bica, 424 U.S. 351, 355 (1976) (admitting that the power to regulate immigration is a federal power, but stopping short of recognizing per se preemption of any state regulations that also dealt with aliens or immigration); Chamber of Commerce of United States v. Whiting, 131 S. Ct. 1968, 1987 (2011) (finding that a federal law may reserve to the states the authority to regulate in a field of immigration as long as the state uses the least conflicting measures).

26. *See*, *e.g.*, *Whiting*, 131 S. Ct. at 1975 (finding that due to a more comprehensive federal scheme in the Immigration Reform and Control Act (1986), state laws like the one previously upheld in *DeCanas* would be expressly preempted by federal law).

27. *See* U.S. CONST. art. I § 8 cl. 4 (vesting the power to establish a uniform naturalization process in Congress); U.S. CONST. art. I § 9 cl. 1 (allowing the states to regulate the migration of persons across state lines as they see fit until 1808); U.S. CONST. art. I § 10 cl. 2 (forbidding the states from laying duties on imports).

powers, Congress passed the Immigration and Nationality Act in 1952,[28] the Immigration Reform and Control Act in 1986,[29] and most recently, the Illegal Immigrant Reform and Immigrant Responsibility Act in 1996.[30] These Acts gradually limited the once-held power of the States to control their borders[31] through federal preemption.[32]

An important takeaway from this Congressional intervention is that despite its best efforts, there are still areas within the field of immigration where the states may regulate according to their constitutionally valid police powers.[33] A state's interest may justify legislation of its own unless preempted by federal law.[34] In such a case, the nature of those interests will determine whether the state had reason to enter into a field that is "unquestionably . . . a federal power."[35]

3. The Current Immigration Landscape in Arizona and Alabama

There are two statutory provisions relevant to this discussion. One is section 2(B) of Arizona's S.B. 1070 Statute ("S.B 1070"),[36] which requires police officers, in certain circumstances, to verify a person's immigration status when conducting a stop.[37] The

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28. Immigration and Nationality Act, 8 U.S.C. § 1101 (1952).

29. Immigration Reform and Control Act, 8 U.S.C. §§ 1160, 1187, 1188, 1255a, 1324a, 1324b, 1364, 1365 (1986).

30. Illegal Immigrant Reform and Immigrant Responsibility Act, Pub. L. 104-208, 104th Cong. (Sept. 30, 1996).

31. U.S. CONST. art. I § 9 cl. 1.

32. *See generally Whiting*, 131 S. Ct. 1968; *Arizona*, 132 S. Ct. 2492; United States v. Alabama, 691 F.3d 1269, 1284 (11th Cir. 2012) (striking down state statutes that were found to have been impliedly and/or expressly preempted by federal law); *see also* Gary Endelman & Cynthia Lange, *State Immigration Legislation and the Preemption Doctrine*, 1698 PRACTISING LAW INSTITUTE, 123, 127 (Oct. 14-15, 2008) (discussing the authority of Congress to regulate immigration and the states' attempt to work around Congress' various legislative enactments and provisions).

33. *See Whiting*, 131 S. Ct. at 1974 (noting areas of regulation where states retain broad authority under their police powers); *id.* at 1987 (noting that it is Congress who preempts state laws and not the judiciary, and that finding a state law preempted requires Congress to meet a high threshold).

34. *See id.* at 1987 (holding that because the Immigration Reform and Control Act of 1986 did not preempt Arizona's employment regulation, a valid interest under its police powers, the State may exercise that authority without conflicting with federal power).

35. *DeCanas*, 424 U.S. at 355.

36. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

37. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010). (section B states:

> For any lawful stop . . . made by a law enforcement official . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person . . . . The person's immigration status shall be verified with the federal

second is section 31-13-12 of Alabama's Beason-Hammon Alabama Taxpayer and Citizen Protection Act ("HB 56"), which allows the same.[38] A more thorough analysis will be conducted below, but for contextual purposes, these statutes are relevant to demonstrate the immigration situation in Arizona and in Alabama. Why enact such stringent laws when a federal scheme was already in place? The answer lies in what many have referred to as a growing "crisis."[39]

a. Statistical Data: Evidence of the "Crisis" in Arizona

When S.B. 1070 was passing through the State Legislature in 2010, Arizona had just seen a decade of unprecedented

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government pursuant to 8 United States Code § 1373(c). A law enforcement official . . . may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification . . .).

38. ALA. CODE § 31-13-12(a-e) (2011) (Section 12 of the Alabama Code states:

(a) Upon any lawful stop . . . where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, ...

(b) . . . The alien's immigration status shall be verified by contacting the federal government pursuant to 8 U.S.C. § 1373(c) within 24 hours of the time of the alien's arrest . . . .

(c) . . . A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901 . . . .

(d) . . .

(e) If an alien is determined by the federal government to be an alien who is unlawfully present in the United States pursuant to 8 U.S.C. § 1373(c), the law enforcement agency shall cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests);

see also, *Alabama*, 691 F.3d at 1284 (acknowledging the Supreme Court ruling in *Arizona*, the court found that the similar provision in the Alabama Code is not preempted by federal law).

39. *See* Muwonge, *supra* note 9, at 16 (indicating that as the debate on immigration gained speed in 2005, partisans began referring to the situation as an "immigration crisis" due to the heavy influx of illegal immigrants and the lack of a consistent federal plan of enforcement).

population growth.[40] Although numbers throughout the country had risen,[41] certain Arizona cities were among the Nation's highest.[42] There is evidence to suggest that, unsurprisingly, the proximity of the U.S.-Mexican border accounted for the majority of this growth.[43] Problems associated with this population growth included crime,[44] unemployment, and misappropriated healthcare, amongst others.[45] It prompted the Arizona Legislature to propose a bill.[46]

S.B. 1070 was enacted as an anti-illegal immigration law, targeted at a specific group already federally identified.[47] The problems addressed by the bill naturally corresponded to the

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40. *See* Paul Mackum & Steve Wilson, *Population Distribution and Change: 2010 Census Briefs*, U.S. CENSUS BUREAU 2 (March 2011), www .census.gov/prod/cen2010/briefs/c2010br-01.pdf (demonstrating that Arizona was the second fastest growing state in the Nation between the years 2000 and 2010 at a 24.6% incremental change).

41. *See id.* (comparing individual state population growth to the National average growth of 9.7%).

42. *See id.* at 9 (charting the population growth for the ten most populous and ten fastest growing counties from 2000-2010); *id.* (noting specifically in Table 4 that Maricopa County, AZ saw a 24.2% increase in population from 2000-2010 while Pinal County, AZ grew at a rate of 109.1% over the same span).

43. *See Immigration Ground Zero: Arizona, The Fruit of Congress' Failure*, WASHINGTON POST, Dec. 26, 2007, *available at* 2007 WLNR 25434402 (indicating that in the midst of Arizona's surge in population growth, 14% of the six million people were foreign born, and that much of that growth could be explained by the illegal influx of undocumented aliens); *see also Immigration Figures to Bug Your Eyes Out*, THE ARIZONA REPUBLIC, March 25, 2005, at B9, *available at* 2005 WLNR 26864628 (stating that one third of Arizona's population growth over the past five years was a direct result of an increase in the immigration of undocumented aliens).

44. *See Arizona*, 132 S. Ct. at 2500 (exemplifying the dangers of drug cartels by examining a sign posted along an Arizona highway that read "DANGER . . . Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles.").

45. *See id.* (citing numerous statistical sources that indicate the consequences of Arizona's illegal immigration problem, including bearing the responsibility for "a disproportionate share in serious crime," safety risks, property damage, environmental damage, and drug smuggling); *see also* Ariz. Legis. Serv. Ch. 113 § 1 (2010) (declaring the intent of S.B. 1070 is " to make attrition through enforcement the public policy of all state and local government agencies in Arizona . . . . [T]o work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."); *Immigration to Arizona*, U.S. IMMIGRATION SUPPORT, www.usimmigrationsupport.org/arizona.html (last updated Oct. 4, 2012) (indicating that between the years of 2000 and 2010 providing healthcare to undocumented aliens cost Arizona hospitals an estimated $150 million annually).

46. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

47. *See* H.B. 2162, 49th Legislature, 2d Reg. Sess. (Ariz. 2010) (amending section 11-1051 of the Arizona Revised Statutes to specifically target illegal immigrants).

growing numbers of undocumented aliens. These numbers made up part of S.B. 1070's relevant findings.[48] What remained of the bill after the Court's ruling in *Arizona* would pit Arizona's interest against a new challenger: Civil Rights advocates.[49]

b. Statistical Data: A Similar "Crisis" in Alabama?

Similar laws were enacted in other states across the nation,[50] but Alabama's HB 56 and current immigration situation make it a good comparison case.

Arizona's population spike has a territorial connection with an immigration source in Mexico. Alabama does not share that characteristic. The racial composition of Alabama reflects this.[51] The estimated percentage of "Persons of Hispanic or Latino

48. *See* S. F. Sheet, S.B. 1070, 49th Legislature, 2d. Reg. Sess. (Jan. 22, 2010) (indicating that the purpose of the bill was to deter immigration by allowing police officers more discretion in enforcing federal deportation procedures).

49. *See* Howard Fischer, *Time Running Out, Civil Rights Groups Challenge SB 1070*, AZDAILYSUN.COM (Sept. 12, 2012, 5:00 AM), http://azdailysun.com/news/state-and-regional/time-running-out-civil-rights-groups-challenge-sb/article_906966ce-4328-517f-b23f-b3690686ff45.html (recounting the frantic attempts of Civil Rights groups in Arizona to challenge S.B. 1070 for causing irreparable harm to Latinos in the form of racial profiling and discrimination); *Arizona Immigration Law Fight Continues for Civil Rights Groups*, HUFFINGTON POST (last updated July 2, 2012 12:42 PM), www.huffingtonpost.com/2012/07/02/arizona-immigration-law-civil-rights-fight_n_1641679.html (identifying groups such as the American Civil Liberties Union ("ACLU") and the National Immigration Law Center as two advocates on behalf of potentially profiled Latinos throughout Arizona as a result of S.B. 1070 section 2(B)); *see also* Press Release, Appeals Court Asked to Block Show-Me-Your-Papers Provision of Arizona Anti-Immigration Law, NATIONAL IMMIGRATION LAW CENTER (Sept. 14, 2012) *available at* http://nilc.org/nr2_091412.html (noting that the fundamental rights of Arizona Latinos are in danger, and without an injunction they are likely to endure irreparable harm); Petitioners' Emergency Motion Under Circuit Court Rule 27-3 for an Injunction Pending Appeal, Valle de Sol v. Whiting, No. 12-17406 (9th Cir. 2012) (pleading for injunctive relief as the petitioners stand to face "racial profiling, police scrutiny, and prolonged detention").

50. *See* Anna Gorman, *Arizona's immigration law isn't the only one*, LA TIMES (July 16, 2010), http://articles.latimes.com/2010/jul/16/nation/la-na-immigration-states-20100717 (listing Pennsylvania, Michigan, Rhode Island and Minnesota as states that have all enacted Arizona-like immigration laws); Harriet McLeod, *Judge Keeps South Carolina Immigration Law on Hold After Arizona Ruling*, REUTERS (July 9, 2012 7:28 PM), www.reuters.com/article/2012/07/09/us-usa-immigration-scarolina-idUSBRE86812Q20120709 (adding South Carolina, Alabama, Utah, and Indiana to "show-me-your-papers" list).

51. *See State and County Quickfacts – Alabama*, U.S. CENSUS BUREAU, (last visited Oct. 5, 2012), http://quickfacts.census.gov/qfd/states/01000.html (estimating that in 2011 the percentage of persons of Hispanic or Latino origin in Alabama was at 4.0%).

Origin"[52] in 2011 was 4.9, or about 235,334 people out of the total population of 4,802,704.[53] Though this number does not seem striking when compared to the composition of states like Arizona and California,[54] the decade of growth that led to that number was what concerned most Alabama Representatives.[55]

From 2000 to 2012 Alabama's Hispanic population was the "fastest growing group in the state . . . ."[56] It is important to note that these numbers represent Alabama's Hispanic population in general, according to the 2000 and 2010 U.S. censuses, and makes no mention of whether they are documented or undocumented - numbers that can only be speculated.[57] Of equal importance, however, is that the House Sponsor of HB 56, Micky Hammon,

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52. *See infra* notes 93, 125 and accompanying text (identifying "Hispanic" as a government-created term with negative connotations). Please note that this Comment will only use "Hispanic" when referring to the government designation, and will use "Latino" in all other respects.

53. *Cf. State and County Quickfacts – Arizona*, U.S. CENSUS BUREAU, (last visited Oct. 5, 2012), http://quickfacts.census.gov/qfd/states/04000.html (estimating that the percentage of Hispanic or Latino persons in Arizona in 2011 made up 30.1% of the overall population).

54. *See State and County Quickfacts – California*, U.S. CENSUS BUREAU, (last visited Oct. 5, 2012), http://quickfacts.census.gov/qfd/states/06000.html (listing California's Hispanic estimated population at 38.1% of the overall population).

55. *See* ALA. CODE 31-13-2 (2011) (supporting HB 56's strong stance on illegal immigration with findings that it has caused "economic hardship and lawlessness . . . [,] adverse[] affect[s] [on] the availability of public education resources to students who are United States citizens . . . " and has "undermine[d] the security of our borders . . . ."); *see also* Transcript, *Alabama's Immigration Law: Radical or within Reason?*, PUBLIC BROADCASTING SYSTEM (aired on Aug. 24, 2011), *available at* www.pbs.org /newshour/bb/law/july-dec11/alabama_08-24.html (revealing the reasoning behind HB 56's enactment, through one of its main contributors Kansas Secretary of State Ken Kobach, as a step towards "stop[ping] illegal immigration" and "helping to discourage and deter illegal immigration").

56. *See* Yanji Djamba et al., *The Hispanic Population in Alabama*, CENTER FOR DEMOGRAPHIC RESEARCH – AUBURN UNIVERSITY AT MONTGOMERY, 1 (May 2011), *available at* www.demographics.aum.edu/docs/reports/hispanicpopulation-abridged.pdf?sfvrsn=2 (demonstrating that the Hispanic population in Alabama from the years 2000 to 2010 doubled in size, representing a growth rate of 144.8%, the second highest over that span in the United States); *see also* Catalina Jaramillo, *Census: Alabama Latino Population up 145% in 10 Years*, NEW AMERICA MEDIA (posted Nov. 8 2011), http://newamericamedia.org/2011/11/census-alabama-latino-population-up-145-in-10-years.php (hypothesizing that the actual number of persons of the Latino race in Alabama did not rise from 75,830 to 185,602, but actually rose closer to 200,000 people, when including the non-census persons).

57. *See* Djamba, *supra* note 55, at 1 (limiting the report to the census numbers and making no distinction between undocumented and documented Hispanics).

made that connection, referencing the unprecedented growth in the Hispanic population as a reason for the law's enactment.[58]

The provisions within HB 56 reveal what illegal immigration problems the Alabama legislature viewed as most pressing at the time. These included provisions regulating employment, education, and healthcare benefits, voter registration, police discretion, and the employment of undocumented aliens.[59] Because Alabama's total population growth coincided with its steep Hispanic population growth, a certain racial cognizance developed among its representatives and residents alike.[60]

HB 56, like S.B. 1070, spawned constitutional complainants in the form of ardent Civil Rights Groups on behalf of Latino citizens, lawfully admitted Latino immigrants and undocumented aliens.[61]

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58. *See Alabama's Shame: HB 56 and the War on Immigrants*, SOUTHERN POVERTY LAW CENTER, 4 (Feb. 2012) www.splcenter.org/sites/default/files/downloads/publication/SPLC_HB56_AlabamasShame.pdf (chastising Alabama Representative Micky Hammon for citing the increase in the Hispanic population growth as an indicator of the increase in the population of undocumented aliens, convoluting the two terms); Mary Bauer, *Court Cites Discriminatory Intent Behind Anti-Immigration Law*, SOUTHERN POVERTY LAW CENTER (Dec. 14, 2011), http://splcenter.org/get-informed/news/court-cites-discriminatory-intent-behind-alabamas-anti-immigrant-law (noting that Hammon's and the legislature's correlation between the Hispanic population growth between 2000 and 2010 and the rise in undocumented aliens in Alabama was referenced in a District Court ruling where Judge Myron Thompson noted that "'Hispanic' and 'illegal immigrant' [were used] interchangeably").

59. ALA. CODE § 31-13-2 (2011); *see also* Eric A. Ruark, *HB 56: Helping to Move Alabama's Economy Forward*, FEDERATION FOR AMERICAN IMMIGRATION REFORM, 1 (April 2012) *available at* www.fairus.org/DocServer/hb56.pdf (standing by HB 56 as a beneficial measure for reviving the Alabama economy, arguing that the key to a thriving economy is creating incentives for employers to hire locally by providing opportunities to less-educated Alabama residents).

60. *See* Ruark, *supra* note 58, at 1 (maintaining that illegal immigration is at odds with the economic goals of Alabama and its citizens).

61. *See U.S. Commission on Civil Rights*, Hearing on Aug. 17, 2012 in Birmingham, AL (Testimony of Mary Bauer, Legal Director, Southern Poverty Law Center), at 3-5, *available at* http://cdna.splcenter.org/sites/default/files/mbcr.pdf (noting that the real world effects of this anti-illegal immigration law include the ripping apart of Latino families, the devastation of the Latino communities and a decline in the state's economy and education); *see also Racial Profiling After HB 56: Stories from the Alabama Hotline*, NATIONAL IMMIGRATION LAW CENTER, at 2-4 (Aug. 2012) *available at* www.nilc.org/document.html?id=800 (chronicling both legal and illegal residents' distresses and fears since the imposition of HB 56); Hearing, U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON IMMIGRATION, REFUGEES, AND BORDER CONTROL, *Examining the Constitutionality and Prudence of State and Local Governments Enforcing Immigration Law*, (Apr. 24 2012) (identifying the

4. The Individual Rights of Undocumented and Documented Aliens and Latino U.S. Citizens

After the preemption lines have been drawn, and states such as Arizona and Alabama stagger back to implement what remains of their laws, they must face another constitutional hurdle. The crux of this Comment, and the center of the conflict presented is what rights the undocumented aliens have when a state attempts to directly regulate them; and additionally, what rights the legal aliens and lawful citizens have when a state's immigration laws indirectly affect them.

Many advocates have already asserted those rights in support of documented and undocumented aliens alike, and urged the judiciary to review Arizona and Alabama's laws under the Fourteenth Amendment.[62] These laws have created victims of racial profiling and social stereotyping, both directly and indirectly.[63] Those interests must be protected, but at what cost? How should the traditional Fourteenth Amendment jurisprudence of the Supreme Court be applied in this context?

In the sections to come, this Comment will analyze why state regulation is important in an era that has seen remarkable population growth coupled with an economic crisis,[64] but also, why the interests of undocumented and documented aliens, whose identification is oftentimes presupposed by race,[65] are of equal or greater importance.

National Immigration Law Center as a challenger to state laws in Arizona, Utah, Georgia, Indiana, South Carolina, and Alabama).

62. *See* Emergency Motion Under Circuit Rule 27-3 For An Injunction Pending Appeal, Valle del Sol v. Whiting, *supra* note 48, at i-iii (naming numerous additional counsel on behalf of appellants all advocating for illegal Latino immigrants' and lawful Latino residents' rights, including: America Civil Liberties Union Foundation Immigrant's Rights Project, Mexican American Legal Defense and Educational Fund, National Day Labor Organizing Network, amongst others).

63. *See Alabama's Shame: HB 56 and the War on Immigrants*, *supra* note 57, at 3 (shaming the Alabama legislature with stories from the state's Latino population, claiming the that HB 56 "virtually guarantees racial profiling, discrimination and harassment against all Latinos . . . ," their citizenship status notwithstanding); *see also* Fernando Santos, *Confronted in Court With His Own Words, Sherriff Denies Profiling*, N.Y. TIMES, July 24, 2012, *available at* 2012 WLNR 15503971 (displaying the negative effects of section 2 of SB 1070 when immigration procedures are left to the discretion of local law enforcement).

64. Moria Herbst, *Immigration Amid a Recession*, BLOOMBERG BUSINESSWEEK (May 8, 2009), www.businessweek.com/bwdaily/dnflash/content/may2009/db2009058_701427.htm (noting that the relationship between illegal immigration and the U.S. economy hinges on whether the undocumented workers are complimenting U.S. workers or replacing them).

65. VICTORIA HATTAM, IN THE SHADOW OF RACE: JEWS, LATINOS, AND IMMIGRANT POLITICS IN THE UNITED STATES, 121 (Univ. of Chicago Press 2007):

III. ANALYSIS

A. The Purview of the Equal Protection Clause and the Differing Levels of Judicial Scrutiny

It is well established that the Fourteenth Amendment's Equal Protection Clause protects all persons under the jurisdiction of the laws of the State regardless of that person's citizenship status.[66] An alien's illegal status does not deny him the equal protection of a state's laws.[67]

When attacked under the Equal Protection Clause, a state's law-made classification will be viewed according to one of three different levels of judicial scrutiny. This three-tiered approach includes rational basis, the most deferential standard; intermediate scrutiny, a heightened standard based on the circumstances; and strict scrutiny, the most demanding standard.

State legislators are given discretion to determine how to regulate their constituency.[68] State regulation of undocumented aliens presents a somewhat unique situation that could hypothetically involve an overlapping comprehensive federal

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> Difference was not limited to race, but rather had long accommodated identities tied to creed and national origin . . . . [The Office of Management and Budget] institutionalized a set of presumptions about the heterogeneous nature of difference in the United States in which ethnicity was given a place in the emerging ethno-racial taxonomy.

See also Vanessa Cardenas & Sophia Kerby, *The State of Latinos in the United States*, CENTER FOR AMERICAN PROGRESS, 9 (Aug. 7, 2012), *available at* www.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/stateoflatinos.pdf (indicating that an estimated "16.6 million people, many of Hispanic Origin, live in mixed-status families with at least one unauthorized alien family member," which demonstrates how the impact of the Arizona and Alabama laws will be felt not only by undocumented Latino aliens but also their documented Latino family members and friends).

66. *See Plyler*, 457 U.S. at 215 (confirming that the scope of the Fourteenth Amendment includes citizens and strangers within the territories of the States); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (including the "millions" of aliens within the borders of the United States under the protection of the Fifth and Fourteenth Amendments); *Yick Wo*, 118 U.S. at 6 (establishing that the Fourteenth Amendment is not confined to only protect U.S. citizens).

67. *Plyler*, 457 U.S. at 215.

68. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (demonstrating judicial restraint in refraining from judging the "wisdom, fairness, or logic of legislative choices"); *see also* People v. Crane, 214 N.Y. 154, 161 (1915) (authorizing the states to discriminate between citizens and non-citizens in the distribution of its resources). *But see* Truax v. Raich, 36 S. Ct. 7, 10 (acknowledging the broad powers of the state to promote the health, safety, morals, and welfare of its citizens, the Court still refused to extend that authority to deny employment to lawful state residents on the basis of national origin).

objective,[69] creation of a subclass citizenry, race-based discrimination, or a combination of all three. This potentially qualifies it for all three judicial levels of scrutiny. Accordingly, the comment will analyze S.B. 1070's and HB 56's relevant provisions under all three levels.

1. Classifying Undocumented Aliens and the Rational Basis Standard

The Supreme Court will rarely interfere with a state's democratic process.[70] This deference to the state demonstrates the amount of restraint the Supreme Court Justices will exercise when a state classification does not involve a suspect class or is strictly a socio-economic regulation.[71] Under this test, the classification must only reasonably relate to a legitimate state purpose.[72]

When a state discriminates on the basis of alienage, it has been viewed under strict judicial scrutiny.[73] However, the Supreme Court has limited that class exclusively to lawfully admitted aliens.[74] Therefore, when a law such as Arizona's S.B. 1070 or Alabama's HB 56 makes it clear that it targets only undocumented aliens,[75] that group falls outside the suspect class. A statute targeting only illegal immigration would be viewed

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69. 8 U.S.C. § 1357(g).

70. *FCC*, 508 U.S. at 314 (allowing the democratic process to rectify otherwise unwise decisions of the state legislatures).

71. *Id.*; *Plyler*, 457 U.S. at 216 ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill."); *see also* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (requiring the state to meet a standard of reasonable basis when justifying classifications in the field of economics and social welfare).

72. *Dandridge*, 397 U.S. at 485 (holding that a state's legislative decision meets the rational basis standard when "it does not offend the Constitution . . .").

73. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984) (identifying classifications based on alienage to be subject to strict scrutiny); Graham v. Richardson, 403 U.S. 365, 371-372 (1971) (reestablishing the court's view that classifications based on alienage, nationality, or race are inherently suspect).

74. *See Graham*, 403 U.S. at 372 (taking into consideration the rights of lawful permanent resident aliens without also hypothetically considering illegal aliens' rights as a possible distinction); *Mathews*, 426 U.S. at 79, n.13 (listing the various classifications of aliens and including illegal aliens as an afterthought); *Plyler*, 457 U.S. at 223 (noting that undocumented aliens cannot make up a suspect class because their presence is "in violation of federal law" and not a "constitutional irrelevancy").

75. *See* S.B. 1070 sec. 1, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) (reiterating that the intent of the bill is to address the problems of unlawful entry into the state); *see also* ALA. CODE § 31-13-2 (2011), (finding that *illegal* immigration is causing economic hardship and lawlessness) (emphasis added).

under a rational basis test.[76] This is particularly true when its purpose is in conformity with a federal objective.[77]

Under the rational basis test, the Supreme Court would likely give deference to Arizona and Alabama. Each state can point to many legitimate governmental interests for implementing section 2(B) of S.B. 1070 and section 31-13-12 of HB 56, including crime, unemployment, healthcare, and tax collection.[78] If allowing police officers to validate immigration statuses during lawful detentions[79] is both rationally related to those interests and not adverse to federal immigration objectives, it would likely survive the Court's deferential review.[80]

The federal objective, deterring illegal immigration with the help of delegated local officials, provides one avenue to the rational basis test. The Court would consider whether the state's implementation of police discretion to determine the immigration statuses of reasonably suspected undocumented aliens furthers a shared federal and state objective. Because both target the same group, the Court would give deference to the state's use of its federally approved police powers.

2. Classifying Undocumented Aliens and Intermediate Scrutiny

The Supreme Court case of *Plyler v. Doe*[81] opened the possibility for a deviation from the traditional two-tiered equal

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76. *Plyler*, 457 U.S. at 223.

77. 8 U.S.C. §§ 1357(g), 1373(a), (c), 1644; *Arizona*, 132 S. Ct. at 2508 (noting that section 2(B) of Arizona's statute must be "implemented in a manner consistent with federal law regulating immigration, . . ." (quoting ARIZ. REV. STAT. ANN. § 11 1051(B) (2010)); *see also id.* at 2509 (indicating that unless the law has some other consequences that are adverse to federal objectives, the provision is valid); *DeCanas*, 424 U.S. at 356 (acknowledging the authority of the states to regulate its residents even when those residents might be there unlawfully, especially when the regulation mirrors a federal objective).

78. *See* Ariz. Legis. Serv. Ch. 113 (S.B. 1070), 49th Congress, 2d Reg. Sess. (West 2010) (revealing the intent behind the Act was to deter and discourage the entry, presence, and economic activity of undocumented aliens by "attrition through enforcement"); *Arizona*, 132 S. Ct. at 2501 (listing many different concerns facing Arizona with respect to undocumented aliens, including crime, property damage, and drug trafficking); ALA. CODE § 31-13-2 (2011) (finding that illegal immigration has had adverse effects on funding for education, economic growth, and law abidance in general).

79. ARIZ. REV. STAT. ANN. § 11 1051(B) (2010); ALA. CODE § 31-13-12(a) (2011).

80. *Id.*; *see also Arizona*, 132 S. Ct. at 2509; *Alabama*, 691 F.3d 1269 at 1285 (finding section 12 of HB 56 to be unproblematic due to the fact that it requests immigration information "explicitly contemplated by federal law"); *Cf. Plyler*, 457 U.S. at 226 (revealing that a very important part of the Court's analysis in striking down the Texas statute was the fact that it did not "operate harmoniously within a federal program").

81. *Plyler*, 457 U.S. 202.

protection analysis in the context of illegal immigration.[82] Justice Brennan's opinion in *Plyler* suggests that certain circumstances may warrant a heightened level of scrutiny even when specifically dealing with unlawfully admitted aliens.[83]

The surrounding circumstances in *Plyler* are what make the case unique.[84] In *Plyler*, a Texas statute denied funding to school districts for the education of undocumented children and authorized those districts to deny them enrollment.[85] Justice Brennan, seemingly persuaded by the District Court's findings,[86] did not go as far as to apply strict scrutiny in review of the Texas Statute, but did require that Texas' exclusion of these children "be justified by a showing that it furthers a substantial state interest."[87] This marked a deviation from the two-tiered standard applied in earlier cases involving illegal and legal aliens.[88]

The factors Brennan relied on were the importance of elementary education and the threat that a denial of that education would create a "subclass" citizenry.[89] While education

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82. *See id.* at 231 (Marshall, J., concurring) (indicating that this case presents a good example of why there should be varying levels of scrutiny, instead of the traditional two-tiered rigid approach because it involves constitutional significance, societal impact on immigration and education, and an indication that there is a degree of invidiousness in the classification drawn in the Texas statute).

83. *Id.* at 224 (heightening the level of judicial scrutiny to require that the classification contained in the Texas statute furthers some *substantial* goal of the State) (emphasis added).

84. *Id.* at 223 (mentioning that the Texas statute imposed costs on the Nation and on an innocent discrete class of children, therefore its approval required a showing of substantial interests on the part of the State); *see also id.* (naming factors such as the importance of education and the innocence of the children as to their situation as reasons why this situation is different from the traditional equal protection cases involving undocumented aliens).

85. *See id.* at 205 (reading the Texas statute as applying to all children not "legally admitted" to the United States).

86. *See* Doe v. Plyler, 458 F. Supp. 569, 582 (E.D. Tex. 1978) (entertaining the idea of undocumented aliens as a suspect class noting that their characteristics arguably reflect the traditional indicia of suspectness); *id.* (reasoning that "[t]he issue of [undocumented aliens'] suspectness as a class is raised by the uncontroverted history of their abuse and exploitation in certain conditions and circumstances unrelated to the federal basis for their extinction.").

87. *Plyler*, 457 U.S. at 224.

88. *See generally Dandridge*, 397 U.S. 471; *Yick Wo*, 118 U.S. 356; *Graham*, 403 U.S. 365; *Mathews*, 426 U.S. 67, *Truax*, 36 S. Ct. 7; McCready v. State of Virgina, 94 U.S. 391, 396 (1876) (applying rational basis to classifications that were not based on alienage and could instead be classified as an economic or social regulation well within the ambit of the state's valid police powers).

89. *See Plyler*, 457 U.S. at 230 (admitting that it is difficult to understand the motives of the state government in creating a "subclass of illiterates" within Texas, and within the United States, that will surely lead to an increase in crime, unemployment, and welfare).

has never been held to be a fundamental right,[90] the lack thereof for the children in this case could potentially lead to what Brennan coined a "shadow population of illegal migrants."[91] In light of the statute's negative effect, the state's interests in maintaining its limited resources for those with legal status proved to be insubstantial.[92]

Could S.B. 1070 or HB 56 be viewed under this level of intermediate scrutiny? There is evidence that these laws have caused anxiety in all Latinos regardless of citizenship status.[93] There is also the notion that the government-created "Hispanic" classification groups otherwise culturally and nationally different persons together for the purposes of discrimination.[94] The

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90. *See* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 38 (1973) (concluding that education is not a fundamentally guaranteed right); *Cf. id.* at 111-114 (Marshall, J., dissenting) (pining for the Court to recognize education as a fundamental right protected by the Fourteenth Amendment, arguing that it is as equally important as the right to knowledge and the right to participate in the democratic process).

91. *Plyler*, 457 U.S. at 218.

92. *Id.* at 228-230 (identifying those State interests to be (1) the state may protect itself from an influx of illegal aliens, (2) undocumented aliens pose special burdens on the state's ability to provide high-quality public education, and (3) the unlawful presence of the children renders them less likely than other children to remain within the United States); *see id.* at 230 (rejecting each state interest as insufficient, and failing to rise to the level of a substantial interest).

93. *See Racial Profiling After HB 56: Stories from the Alabama Hotline*, *supra* note 60, at 5, 10 (detailing Alabama's problem with racial profiling in the workplace, in schools, when dealing with police, and by private citizens affecting both documented and undocumented Latinos); *Alabama's Shame: HB 56 and the War on Immigrants supra* note 57, at 4-25 (listing specific negative effects that HB 56 has had on the individuals of the Latino race through anecdotal evidence); *see also* Santos, *supra* note 62 (revealing the state of racial tension in Arizona through the questionable conduct of one of its own sheriffs, who faced allegations from both the Justice Department and civil rights groups of discriminatory police practices).

94. *See* GERALD JAYNES, NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES 106 (Forner & Frederickson eds., Russell Sage Foundation 2004):

> People of Puerto Rican, Nicaraguan, Mexican, Panamanian, and Salvadorian descent find that they must negotiate U.S. society's relentless capacity to assimilate them under the homogenizing designation 'Hispanic.' In doing so, they are perpetually challenged to signal against a negative virtual social identity. 'Hispanic' . . . is 'a stereotyping machine'.);

see id. at 131:

> In the 1970s, 1980s, and 1990s [the United States] focused their energy and vitriol mostly on one group – illegal immigrants from Mexico – while ignoring illegals from other countries. The U.S. government's efforts to crack down on illegal Mexican immigrants have placed the entire Mexican American community under suspicion, making illegal immigrants, legal residents, and even native-born American citizens of

"Hispanic" designation invites presumptions that mesh residents together with undocumented aliens.

Plyler's uniqueness is based on the fact that its heightened standard has never been applied outside the context of elementary education.[95] However, the law and its effects in *Plyler* are somewhat analogous to the current situation in Arizona and Alabama. Each law has resulted in deterring undocumented aliens and their children from interacting with local government.[96]

Negative effects such as these create a near parallel to the situation in *Plyler*, where Texas denying children education diminished their chance to become valuable contributors to the well-being of society.[97] When there are "countervailing costs" such as these, the level of scrutiny must be higher.[98]

The purpose of each Arizona's and Alabama's statutory provisions was to deter the influx of illegal immigration.[99] This is unquestionably a legitimate state interest and also mirrors federal objectives.[100] This mirroring aspect is the major distinction between Arizona and Alabama's law as compared to Texas' law in *Plyler*.[101] Under that view, rational basis seems like the more

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Mexican descent vulnerable to scrutiny and governmental action.

95. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1734 (May 2010) (stating that despite its unusual holding and unique plaintiff class, history has shown *Plyler* did not prompt "a new era in equal protection" for undocumented aliens).

96. *See Alabama's Shame: HB 56 and the War on Immigrants supra* note 57, at 4 (indicating, much like in *Plyler*, that school children are afraid to go to school for fear of potentially causing their parents' deportation, not to mention the threat of bullying by private citizens); *see also* Amanda J. Crawford, *Court Ruling Fuels Fear Among Hispanics in Arizona*, BLOOMBERG (June 26, 2012), www.bloomberg.com/news/2012-06-26/court-ruling-fuels-fear-among-hispanics-in-arizona.html (quoting various citizens who state that "[p]eople are living in fear" because they believe, whether correctly or not, that the new Arizona law is "criminalizing brown skin").

97. *Plyler*, 457 U.S. at 233.

98. *Id.* at 224. *Cf. id.* at 249-254 (Rehnquist, J., dissenting) (applying the rational basis standard instead of Justice Brennan's intermediate scrutiny test, noting that the immigration problem is better left to the different branches of both the federal and state governments rather than to the judiciary).

99. H.B. 2162, 49th Leg., Reg. Sess. (Ariz. 2010); ALA. CODE. § 31-13-2 (2010) (detailing the purpose of the statute in light of the legislative findings).

100. *See Arizona*, 132 S. Ct. at 2509-2510 (considering section 2(B) of Arizona's law as a way to conduct state proceedings regarding immigration according to the guidelines specified in 8 U.S.C. § 1357(g), which allow for communication and delegation between the federal immigration agents and local law enforcement); *Alabama*, 691 F.3d at 1284 (noting that the consultation between local law officials and federal officials with regards to immigration pursuant to 8 U.S.C. § 1357(g) is an important aspect of the entire immigration system).

101. *Plyler*, 457 U.S. at 226.

appropriate test. However, as was suggested in *Arizona*, the "show-me-your-papers" provision, although in step with a federal scheme, was left open to future constitutional challenges.[102]

Under *Plyler*, Arizona's and Alabama's interests must be substantial and must be furthered by the scope of each statute's relevant provision. It follows that the relationship between the means and ends be more precise than "reasonably related."[103] This heightened precision requirement may reveal that each state's statute sweeps too broadly so as to place a "shadow of deportation"[104] upon its citizenry of a size and shape similar to the shadow Brennan saw in Texas.

3. Suspect Classifications and Strict Scrutiny

When a state classifies according to race, alienage, or ancestry, the Court has subjected such legislation to strict judicial scrutiny.[105] The Court attempts to identify classifications marked with "indicia of suspectness."[106] If the Court finds a suspect class, the state must provide a compelling interest and the means of implementation must be precisely tailored to further that interest.[107]

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102. *Arizona*, 132 S. Ct. at 2510 (stating that this opinion does not foreclose future preemption and constitutional challenges to the law as interpreted by the state courts and applied by state officials after it goes into effect).

103. *Plyler*, 457 U.S. at 236 (Blackmun, J., concurring) (invalidating the Texas statute because it sweeps too broadly, making the classification of children of undocumented aliens "fatally imprecise" and not related to the goals of the statute).

104. Transcript of Obama's Speech on Immigration Policy, N.Y. TIMES (June 16, 2012), *available at* 2012 WLNR 12603721 (West 2012)

> Effective immediately, the Department of Homeland Security is taking steps to lift the *shadow of deportation* from these young people . . . [E]ligible individuals . . . will be able to request temporary relief from deportation proceedings and apply for work authorization . . . This is a temporary, stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people. (Emphasis added).

105. *See generally Plyler*, 457 U.S. 202; United States v. Carolene Products, Co., 304 U.S. 144 (1938); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (indicating what constitutes a suspect class).

106. *See San Antonio Independent School Dist.*, 411 U.S. at 28 (noting the indicia of suspectness necessarily includes "classes saddled with disabilities, or subjected to a history of purposeful unequal treatment, or relegated to a position of political powerlessness").

107. *Plyler*, 457 U.S. at 217.

a. Do Undocumented Aliens Constitute a Suspect Class?

The easy answer is provided by *Graham v. Richardson*,[108] which specifically excluded undocumented aliens from its discussion of the alienage suspect class.[109] Without deviating from this traditional holding, the states have authority to directly regulate undocumented aliens if furthering a legitimate state interest.[110] However, it has been argued that undocumented aliens could constitute a subclass of alienage.[111] There are two obstacles to that line of thinking.

First, the court in *Mathews v. Diaz*,[112] notes that the federal government may discriminate between its citizens and alien visitors, but also, that it need not treat all aliens alike.[113] *Graham* speaks only of "resident aliens" as being a part of the suspect class.[114] These two cases suggest that when a suspect class is based on alienage, undocumented aliens are not part of that discussion, even as a subclass.

Second, even if the undocumented aliens were made a part of that suspect class, *Graham* indicates that an important aspect of these classifications is federal and state relations.[115] The federal government, as noted, has broad discretion in regulating immigration.[116] If a state regulates according to a federal objective and neither "add[s] to nor take[s] from the conditions lawfully imposed by Congress," the classification is likely to be upheld under a rational basis standard.[117]

Arizona's and Alabama's laws were written to specifically target illegal aliens. For this reason, it is difficult to argue that it discriminates on the basis of alienage. Even if an argument could be made, it is not apparent that either section is outside of the warranted discretion provided by Congress.[118]

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108. *Graham*, 403 U.S. 365.

109. *See id.* at 376 (discussing only the rights of permanent resident aliens for purposes of the suspect class without determining the rights and analysis that would be given to undocumented aliens).

110. *DeCanas*, 424 U.S. at 355.

111. *See Doe*, 458 F. Supp. at 584 (hypothesizing that undocumented aliens arguably fit the three criteria required for finding a suspect class).

112. *Mathews*, 426 U.S. 67.

113. *See id.* at 78 (revealing that the Court can identify different classes of aliens based on their citizenship status and not all of them fit the mode of a suspect classification).

114. *Graham*, 403 U.S. at 376.

115. *Id.* at 377.

116. *Arizona*, 132 S. Ct. at 2498.

117. *Truax*, 36 S. Ct. at 41.

118. *See Arizona*, 132 S. Ct. at 2527 (refusing to find section 2(B) preempted because it operates "consistent[ly] with federal statutes.").

b. Does Each Section of the Arizona and Alabama Statutes Have the Effect of Discriminating Against Latinos?

Although discriminating on the basis of race constitutes a suspect classification, a statute will not be unconstitutional absent a finding of discriminatory intent.[119] The legislatures in Arizona and Alabama undoubtedly took precautionary measures to ensure that, facially, their statutes would survive a discriminatory intent analysis.[120]

Justice Powell's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[121] suggests additional ways to find discriminatory intent. In reviewing the racial effects of a zoning ordinance, Justice Powell discusses the very difficult practice of finding a discriminatory purpose in a legislative act.[122] However, he did not limit his inquiry to the language of the ordinance, but also considered circumstantial evidence of legislative intent.[123]

He set out the following evidentiary factors for finding discriminatory intent: (1) whether the effect of the State law bears more heavily on one race than another; (2) whether the historical background suggests that the laws were implemented for an invidious purpose; and (3) whether the legislative history indicates any reason behind the governmental action.[124]

Although the provisions have only been in place for a short period of time, their effect on the Latino population has already been noted.[125] When does reasonable suspicion become racial profiling? History of each state's immigration enforcement, especially in Arizona, may also evince some invidious purpose. As noted earlier, the "Hispanic" classification invites shortcuts for

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119. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (noting that finding a discriminatory purpose behind an enacted statute requires proof that the state legislature selected a course of action because of, and not in spite of, its adverse effects upon a particular group).

120. H.B. 2162, 49th Leg., Reg. Sess. (Ariz. 2010) (amending Arizona's S.B. 1070 enactment to make sure that race, national origin, and ancestry would not be considered in its application).

121. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

122. *See id.* at 265 (noting that it is exceedingly rare that a legislature would denote one purpose as being the primary or dominant one).

123. *Id.*

124. *Id.* at 266-68.

125. *See, e.g., Racial Profiling After HB 56: Stories from the Alabama Hotline*, *supra* note 59, at 2-10; *Alabama's Shame: HB 56 and the War on Immigrants*, *supra* note 57, at 4-25 (detailing some dramatic stories from Alabama Latino residents, including a boss refusing to pay his Latino employee, a clinic refusing to treat a Latino patient, a traffic stop that ends up splitting a Latino family, and the utilities at one Latino resident being shut off shortly after HB 56 went into effect; *U.S. Commission on Civil Rights*, *supra* note 60, at 3-5; Santos, *supra* note 62.

government officials to identify different persons as part of one singular and possibly unlawful group.[126]

Despite these concerns, there are factors that weigh against finding discriminatory intent. First, the statute has been found facially valid by the Supreme Court and the 11th Circuit.[127] Second, the laws were specifically written as anti-illegal immigrant legislation, expressly forbidding enforcement on the basis of race, national origin, or ancestry.[128] Third, the U.S. Immigration and Customs Enforcement agency specifically delegates to local officers discretion in identifying potentially undocumented aliens and offers training in implementing that discretion.[129] Finally, the Court's decisions in *U.S. v. Brignoni-Ponce*[130] and *U.S. v. Martinez-Fuerte*[131] identified a person's Mexican appearance as a relevant factor in stopping a potentially undocumented alien.[132]

All of these reasons make it less likely that, even with proof of a discriminatory impact on the Latino populations of Arizona and Alabama, each State's statute would be struck down on the basis that it discriminates against a suspect class.

IV. PROPOSAL

The issue of illegal immigration has become increasingly difficult to address. Almost inevitably, race has become

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126. JOSE LUIS MORIN, LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES 9-10 (Carolina Academic Press, 2d Ed. 2009):

> Increasingly, "Hispanic" is viewed as deficient and inaccurate. The term "Hispanic has been deemed inappropriate, as an ethnic designator that homogenizes and subsumes millions of persons in the United States from diverse racial and ethnic origins and broad national and cultural characteristics . . . It is a term that obscures the political struggle for identity by Latin Americans in the United States . . . the label Hispanic has been used to racialize and, through government sanction, officially homogenize[.]

127. *Arizona*, 132 S. Ct. at 2510; *Alabama*, 691 F.3d at 1284.

128. H.B. 2162; ALA. CODE § 31-13-12.

129. Fact Sheet: Delegation of Immigration Authority, Section 287(g) Immigration and Nationality Act, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, (last visited Oct. 26, 2012), www.ice.gov/news/library/factsheets/287g.htm (indicating that Immigration and Customs Enforcement will train and work with local law enforcement to help combat illegal immigration and is already working with fifty seven offices with some located in Arizona and Alabama).

130. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

131. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

132. *See Brignoni-Ponce*, 422 U.S. at 887 (allowing for race, or the appearance of a particular race, to be a factor in making a police stop or detention); *Martinez-Fuerte*, 428 U.S. 543; *see also* Ill. Migrant Council v. Pilliod, 398 F. Supp. 882, 899 (N.D. Ill. 1975) (holding that Mexican ancestry is a relevant circumstance to support a reasonable suspicion that a person is in the country as an undocumented alien).

inextricably connected to it.[133] The core of this proposal is twofold. In light of all the constitutional difficulties that surround the immigration issue, state enforcement of a law aimed at deterring illegal immigration should be (1) challengeable under the Equal Protection Clause of the Constitution and (2) reviewable under a heightened standard of judicial scrutiny. Even though both section 2(B) of S.B. 1070 and section 31-13-12 of HB 56 were within the congressionally delegated powers of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[134] and thus found not preempted by federal law,[135] the Supreme Court indicated that both sections would be left open for future constitutional challenges.[136]

A major portion of the analysis of this Comment, and a good starting point, is Brennan's opinion in *Plyler*. *Plyler* stands for a heightened level of judicial scrutiny in the context of undocumented children's education.[137] The language Brennan used in his opinion is applicable today. Brennan was concerned about a state law that would effectively create a "shadow population" of undocumented aliens.[138] The Arizona and Alabama laws have struck fear in both documented and undocumented persons who may appear to be foreign, negatively impacting their daily lives.[139]

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133. *See* Morin *supra* note 118, at 8, 61 (Carolina Academic Press, 2d Ed. 2009) (pointing out that Latinos, the "fastest-growing minority group" in the United States, are often stereotyped as "inferior, dangerous and criminal," making them targets for discrimination in the law); *see also* Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POLICY REV. 35, 39 (1996) (noting that "[e]ven if national sovereignty establishes that the United States can and should distinguish among potential new citizens, it does not directly follow that race-based restrictions on immigration are natural or any more acceptable at the border than elsewhere.").

134. 8 U.S.C. §§ 1357(g); *see also Arizona*, 132 S. Ct. at 2509 (noting that cooperation between local and federal immigration enforcement do not conflict with each other); Nicholas Michaud, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1085 (Winter 2010) (reviewing the efficacy of section 1357(g) of the IIRAIRA with respect to facilitating immigration enforcement on the local level).

135. *Arizona*, 132 S. Ct. at 2509.

136. *Id.*

137. *Plyler*, 457 U.S. at 230.

138. *Id.* at 218 (naming the lack of border control and the unlawful employment of undocumented aliens as reasons for the creation of a "'shadow population' of illegal migrants – numbering in the millions – within our borders"); *Cf. Transcript of Obama's Speech on Immigration Policy*, *supra* note 103 (labeling those undocumented workers and students a group of persons beneath a "shadow of deportation").

139. *See Crisis in Alabama: Immigration Law Causes Chaos*, AMERICAN CIVIL LIBERTIES UNION (last visited Nov. 16, 2012), www.aclu.org/crisis-alabama-immigration-law-causes-chaos (stating that the effect of the new

This is where race becomes entangled with the immigration policies of Arizona and Alabama. Despite having antidiscrimination provisions within each law,[140] it is difficult to imagine a scenario where race would not be a dominating factor in forming a reasonable suspicion of a person's undocumented status. The employment of undocumented aliens, albeit a separate issue, is analogous in this respect.[141] *Lozano v. City of Hazelton*[142] is just one example involving employers safeguarding themselves against hiring undocumented aliens by impermissibly discriminating against potential employees on the basis of race.[143]

The evidence of what Brennan referred to as "countervailing costs" has been chronicled by the many Civil Rights groups that intend to challenge the laws.[144] In sum, it reveals the formation of another, more encompassing "shadow population" of the "Hispanic" people.[145] Not only does this population include those

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Alabama law "invites racial profiling of Latinos . . . who appear foreign to an officer . . ."); *see also* Ortega Melendres v Arpaio, 598 F. Supp. 2d 1025, 1037 (D. Ariz. 2009) (evidencing that racial profiling is already apparent in Arizona where plaintiffs provided factual allegations including: evidence that Arizona Sheriff Arpaio relies on physical appearance alone in determining immigration statuses; that his crime sweeps are targeting Hispanic communities; and that similarly situated Caucasians are not treated the same as the Hispanic population when stopped for traffic violations); Santos, *supra* note 62; *Some of the Plaintiffs Challenging SB 1070*, AMERICAN CIVIL LIBERTIES UNION (last visited Nov. 16, 2012), www.aclu.org/immigrants-rights-racial-justice/some-plaintiffs-challenging-sb-1070 (listing some of the plaintiffs who will be challenging Arizona's law, of which, some are concerned that they will be targeted based on their appearance or ethnicity).

140. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010) ("A law enforcement official . . . may not consider race, color, or national origin in implementing the requirements of this subsection . . ."); ALA. CODE. § 31-13-12(c) ("A law enforcement officer may not consider race, color, or national origin . . .").

141. *See* Lozano v. City of Hazleton, 620 F.3d 170, 218 (3d Cir. 2010) (demonstrating through the legislative history of the Immigration Reform and Control Act that sanctioning employers who hired illegal immigrants may result in employment discrimination); *id.* (indicating that Congress sought to combat the possibility employment discrimination brought on by local immigration sanctions by "imposing sanctions of equal severity on employers found guilty of discriminating").

142. *Lozano*, 620 F.3d 170.

143. *Id.* at 219 (noting that a state regulation may enforce part of a federal objective in an unconstitutional way or while enforcing one objective the state could also "disregard Congress' other objectives – protecting lawful immigrants and others from employment discrimination . . .").

144. *Alabama's Shame: HB 56 and the War on Immigrants, supra* note 57, at 1-30; *U.S. Commission on Civil Rights*, *supra* note 60, at 3-5; *Racial Profiling After HB 56: Stories from the Alabama Hotline*, *supra* note 60, at 2-10.

145. *Id.*; *see* Alia Beard Rau et al., *SB 1070 Opponents Blast Pearce E-mails*, THE REPUBLIC – AZCENTRAL.COM (July 20, 2012), www.azcentral.com /news/politics/articles/20120719sb-1070-pearce-aclu-emails.html (quoting one e-mail sent from Arizona State Senator Russell Pearce: "Can we maintain our

undocumented Latino aliens positively contributing to society,[146] but also lawfully admitted Latino aliens and Latino U.S. citizens.[147] Where so many persons of predominately the same race are affected, state enforcement of this traditionally federal objective should have to meet a higher standard of judicial review.

It is important to note the distinction between the Arizona and Alabama laws and the Texas statute in *Plyler*. Brennan notes the importance of the fact that the Texas statute does not operate in step with any federal objective.[148] In contrast, both the Arizona and Alabama laws operate within the scope of Congress's immigration objectives.[149] Despite this major distinction, states may still act independently and unconstitutionally within the scope of a federal scheme.[150] Antidiscrimination is entirely important to the federal government, and while Federal Immigration officers have the requisite training to handle culturally difficult cases,[151] it is less apparent that local officials in

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social fabric as a nation with Spanish fighting English for dominance . . . It's like importing leper colonies and hope we don't catch leprosy. It's like importing thousands of Islamic jihadists and hope they adapt to the American Dream.") (internal quotations omitted); Sushilo Rao, *'Papers, Please' Provision Comes into Effect in Arizona*, HARVARD LAW & POLICY REVIEW (Sept. 21, 2012), http://hlpronline.com/2012/09/papers-please-provision-comes-into-effect-in-arizona/ (harping on the fact that Latinos will be the likely victims of racial profiling).

146. *Transcript of Obama's Speech on Immigration Policy*, *supra* note 103 (identifying those undocumented aliens who reside in the United States and who the law should be helping as "young people who study in our schools . . . pledge allegiance to our flag" and those who are willing to "go to college or serve in our military . . .").

147. *See Ortega Melendres*, 598 F. Supp. 2d at 1037 (indicating that the complaint alleges that once the officers knew of the plaintiff's U.S. citizenship, they released them from custody); *see also* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 529 (M.D. Pa. 2007) (noting the possibility that the state law, although targeted at undocumented aliens, will also affect "every employer, every employee who is challenged or questioned as an undocumented alien and every prospective employee especially those who look or act as if they are foreign").

148. *Plyler*, 457 U.S. at 226.

149. *Arizona*, 132 S. Ct. at 2509 (noting that Arizona's law works according to federal delegations and in no way conflicts with its objectives); *see also* Fact Sheet: Updated Facts on ICE's 287(g) Program, IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPT. OF HOMELAND SECURITY (last visited Nov. 14, 2012), www.ice.gov/news/library/factsheets/287g-reform.htm (demonstrating that the federal delegation procedure "provides flexibility to address issues of local concern, such as state and local laws or other needs of a particular agency").

150. *Lozano*, 496 F. Supp. 2d at 529.

151. *See* Fact Sheet: Updated Facts on ICE's 287(g) Program, IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPT. OF HOMELAND SECURITY (last visited Nov. 14, 2012), www.ice.gov/news/library/factsheets /287g-reform.htm (indicating that ICE offers a training program to local offers,

Arizona or Alabama would have the same sensitivities. The line between reasonable suspicion and racial profiling is less defined on the state level. The standard for reviewing these socially adverse effects should be more exacting under these circumstances.

Relying also on Justice Powell's evidentiary sources in *Village of Arlington Heights*, as analyzed above, it is not unreasonable to conclude that these laws at least have the potential to weigh more heavily on the Latino population than on any other race or group. It has already been noted that Arizona has one of the highest Hispanic populations in the nation.[152] Alabama's census data revealed one of the fastest growing Hispanic populations in the nation.[153] Combine those facts with the numerous complainants that have lined up to challenge the new laws on the basis of racial profiling,[154] and there is at least circumstantial evidence that these laws, as applied in Arizona and Alabama, would weigh more heavily on Latinos than on any other race.

History can also provide some evidence of the invidiousness of this legislative decision. Difficulties in immigration enforcement near the U.S.-Mexican border have led to Supreme Court decisions which seem to stretch the boundaries of the Constitution.[155] In *Martinez-Fuerte,* Justice Brennan voiced these concerns in a dissenting opinion.[156] He lamented the practical negative effect the majority's decision would have on American citizens of Mexican ancestry.[157] He also distrusted the subjective good faith of the local law enforcement to not solely rely on a person's race when using police discretion.[158]

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which specifically deals with "multicultural communication and the avoidance of racial profiling").

152. *State and County Quickfacts – Arizona*, *supra* note 52.

153. State and County Quickfacts – Alabama *supra* note 50; Djamba, *supra* note 55, at 1.

154. *Crisis in Alabama: Immigration Law Causes Chaos*, *supra* note 138. *Racial Profiling After HB 56: Stories from the Alabama Hotline*, *supra* note 60, at 2-10.

155. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Martinez-Fuerte*, 428 U.S. 543 (1976) (Brennan, J., dissenting).

156. *Martinez-Fuerte*, 428 U.S. 543.

157. *Id.* at 572-573 (1976) (Brennan, J., dissenting) (acknowledging the serious discriminatory consequences of the majority's opinion for the Mexican-American who is selected because of his appearance and because that appearance resembles the targeted Mexican undocumented alien). *Id.* ("That deep seated resentment will be stirred by a sense of unfair discrimination is not difficult to foresee.").

158. *Id.* at 573 n.4 (indicating that the Court should not trust the good faith of a local law enforcement official when something as important as personal liberties are at stake); *Id.* ("The fact still remains that people of Mexican ancestry are targeted for examination at checkpoints and that the burden of checkpoint intrusions will lie heaviest on them.").

Lastly, Justice Thurgood Marshall's Equal Protection Clause jurisprudence makes an appropriate bookend for taking an alternative approach to judicial review of immigration laws. Justice Marshall was dissatisfied with the two-tiered approach in Equal Protection cases.[159] He thought issues in cases like *Dandridge v. Williams*[160] "defie[d] easy characterization in terms of one or the other of these tests."[161]

Rather than always categorizing the issue as either requiring rational basis or strict scrutiny review, Justice Marshall viewed the analysis in three parts: (1) the character of the classification in question; (2) the relative importance of the discriminated class' interests; and (3) the asserted state's interests supporting the classification.[162]

Testing state laws and classifications in this way would lead to a varying level of judicial scrutiny.[163] Under Justice Marshall's view, in cases that "def[y] easy characterization,"[164] the "constitutional importance of the interests at stake" pitted against the "invidiousness of the particular classification" will dictate what survives judicial scrutiny.[165] Likewise, the means that the states employ must reflect the importance of its interests and the degree of invidiousness of the classification.[166]

The laws in effect in Arizona and Alabama should be reviewed according to that analysis. Each involves the personal liberties of undocumented as well as documented Latinos. The classification, although directly targeted at undocumented aliens, has a certain degree of invidiousness, as it indirectly and negatively affects legal Latino citizens as well. Finally, the

159. *See Dandridge*, 397 U.S. at 520 (Marshall, J., dissenting) (internal quotation marks omitted) ("This case simply defies easy characterization in terms of one or the other of these tests."); *see generally San Antonio Independent School Dist.*, 411 U.S. at 1 (Marshall, J., dissenting); *Plyler*, 447 U.S. at 202 (Marshall J., concurring).

160. *Dandridge*, 397 U.S. 471 (1970).

161. *Id.* at 520.

162. *Id.* at 521; *see also San Antonio Independent School Dist.*, 411 U.S. at 109 (Marshall J, dissenting) ("[I]t seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification."); *Plyler*, 457 U.S. at 232 (Marshall, J., concurring) ("I believe that the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis . . . .").

163. *San Antonio Independent School Dist.*, 411 U.S. at 125 (Marshall, J., dissenting).

164. *Dandridge*, 397 U.S. at 520 (Marshall, J., dissenting).

165. *San Antonio Independent School Dist.*, 411 U.S. at 124 (Marshall, J., dissenting).

166. *See id.* at 125 (noting that the "Court traditionally has become increasingly sensitive to the means by which a State chooses to act," especially if it directly affects "interests of constitutional significance.").

discretionary nature of the "reasonable suspicion" requirement in the statute may not adequately protect the importance of the Latinos' constitutional interests involved.

The fact that Justice Marshall dissented in both *Dandridge* and *San Antonio Independent School District*,[167] while concurring in *Plyler*, suggests that Brennan's decision in *Plyler* to apply a heightened level of scrutiny was at least more consistent with his idea of a varying level of judicial review.[168] The prevalence of the immigration issue and the way in which the laws are being enforced in Arizona and Alabama qualifies it as a case that "defies easy characterization."[169]

V. CONCLUSION

Although in traditional Equal Protection claims undocumented aliens are not a suspect class, the situations in both Arizona and Alabama present classifications that not only effect undocumented aliens, but also lawfully admitted aliens and U.S. citizens. Residing in the U.S. unlawfully does not require any outward action or behavior. It does not require a certain appearance. Neither does residing in the United States lawfully, for that matter. "Reasonable suspicion" must draw upon something. Too often that "suspicion" is based on race.

The threat that a law like this would create an undocumented population living in the "shadow of deportation" is in itself a concern similar to that presented in *Plyler*. The fact that this law has borne, and will bear, more heavily on the Latino population is circumstantial evidence of a discriminatory purpose. Finally, as Justice Marshall so vehemently fought for during his

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167. *San Antonio Independent School District*, 411 U.S. 1 (1973).

168. *Plyler*, 457 U.S. at 230-231 (Marshall, J., concurring) (concurring to the extent that he does not abandon his approach to Equal Protection analysis in *San Antonio Independent School District*); *id.* at 231 (internal quotations omitted) (asking for "an approach that allows for varying levels of scrutiny depending upon the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.").

169. *Some of the Plaintiffs Challenging SB 1070*, *supra* note 138; *Racial Profiling After HB 56: Stories from the Alabama Hotline*, *supra* note 60, at 2-10; *Alabama's Shame: HB 56 and the War on Immigrants*, *supra* note 57; Cecelia Chan, *Hundreds March to County Jail to Protest SB 1070*, THE REPUBLIC – AZCENTRAL.COM (Sept. 22, 2012), www.azcentral.com/community/phoenix/20120922immigration-law-protest-phoenix.html; *Thousands Protest HB 56 at Rally*, CBS42.COM (Nov. 21, 2011), www.cbs42.com/content/localnews/story/Thousands-protest-HB-56-at-Monday-rally/xTyRTs-41kC8ZgHk08nSMA.cspx; *Arizona*, 132 S. Ct. at 2529 (Alito, J., concurring) ("Close and difficult questions will inevitably arise as to whether an officer had reasonable suspicion to believe that a person who is stopped . . . entered the country illegally, and there is risk that citizens, lawful permanent residents, and others who are lawfully present in the country will be detained.").

time on the bench, certain cases present issues that are not so easily characterized as requiring rational basis or strict scrutiny review. Cases that involve important constitutional and state interests or involve difficult classifications should dictate what level of scrutiny the court will use in determining its constitutionality.

These factors demonstrate that not only are these laws challengeable under the Equal Protection Clause, but they also have a significance that calls for a stricter approach to finding constitutional validity.