The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act

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INTRODUCTION

In December 2014 the Obama Administration acknowledged the serious critiques of Secure Communities and replaced it with the Priority Enforcement Program (PEP). The United States Department of Homeland Security's Secure Communities program had been subject to extensive and prolonged critique, and quantitative data suggested that it did not deter crime in spite of identifying deportable individuals, nor did it primarily result in deportation of dangerous or serious criminals.[1] Tangible resistance to Secure Communities manifested in the form of "sanctuary city" policies and, more recently, sheriffs' refusal to detain individuals otherwise subject to Immigration and Customs Enforcement (ICE) detainers.[2] California is one of two states that

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1 Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence From "Secure Communities"*, 57 J.L. & ECON. (forthcoming 2015) (manuscript at 4) (on file with author); Charis E. Kubrin, *Secure or Insecure Communities? Seven Reasons to Abandon the Secure Communities Program*, 13 CRIMINOLOGY & PUB. POL'Y 323, 324 (2014) (noting that the seven reasons are: "(1) The assumptions upon which Secure Communities was founded are flawed; (2) Secure Communities is unnecessary; (3) Secure Communities does not target the right offenders; (4) Local law enforcement officials have not embraced Secure Communities; (5) Secure Communities creates insecure communities; (6) Secure Communities may increase instances of racial profiling and pretextual arrests; and (7) Secure Communities is associated with significant human costs"); Mark Noferi, *New Study Shows Deportations Don't Reduce Crime*, AM. IMMIGR. COUNCIL IMMIGR. IMPACT (Sept. 9, 2014), http://immigrationimpact.com/2014/09/09/new-study-shows-deportations-dont-reduce-crime/.

2 However, this has not stopped rogue sheriffs, such as Sacramento, California Sheriff Scott Jones, now being sued in federal district court as of January 23, 2015 for wrongful detention on an ICE hold in clear contravention of the TRUST Act. *See Lawsuit Challenges Immigration Holds on Undocumented Californians* (KPFA 94.1–FM Berkeley radio broadcast Jan. 23, 2015), *available at* http://pacificaeveningnews.blogspot.com/2015/01/lawsuit-challenges-immigration-holds-on.html; Complaint at 14–15, Del Agua v. Jones (E.D. Cal. 2015) (No. 2:15-cv-00185) (on file with author).

has gone a step further and codified the objection to Secure Communities by legislating instances where sub-federal law enforcement cannot comply with ICE detainer requests. Even though PEP eliminated one of the most controversial aspects of Secure Communities, in practice PEP will be similar to Secure Communities.[3]

Secure Communities significantly increased the involvement of state and local authorities in enforcement of federal immigration law. The discretion wielded by sub-federal agents has raised numerous concerns, including racial profiling and the threat of individual rights violations. Secure Communities has also been criticized for failing to effectively target non-citizens whom the Department of Homeland Security designated as priorities for enforcement action.

Racial profiling, or the threat of racial profiling, resulting from sub-federal agents' involvement in policing immigration is not adequately deterred or remedied through existing legal means, including for example, equal protection causes of action, Fourth Amendment motions to suppress, or acts of prosecutorial discretion in the immigration system.[4] In the absence of adequate measures to counteract the problems with Secure Communities, and absent comprehensive federal immigration reform that would provide a path to legalization, sub-federal entities have increasingly begun to take formal measures to counteract Secure Communities and its adverse impacts on communities. California's TRUST Act is one such response to these deficiencies.

In addition to a plethora of city and county ordinances and policies, as of the time of writing, two states, California and Connecticut, have passed "TRUST" Acts—sub-federal integrative

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3 Even though PEP eliminates the general policy of requesting sub-federal law enforcement cooperation in prolonging detention of a suspected unauthorized migrant for forty-eight hours and claims to prioritize specific individuals with convictions for crimes that indicate dangerousness, PEP replaces the request by ICE for continued detention with a request for immediate notification of an individual's impending release. It does not eliminate the fingerprints. Thus, for all intents and purposes, PEP, even after the TRUST Act in California, will be no different and will not disincentivize local law enforcement from using stops, arrests, and potential citations as a way to potentially identify those they perceive to be unauthorized migrants.

4 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1056 (1984) (White, J., dissenting) (showing that, similar to equal protection causes of action, proving a Fourth Amendment violation in immigration court sufficient to merit suppression requires "egregious violations"); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (explaining that ethnicity is one of many factors used by immigration enforcement agents in identifying unauthorized migrants and is therefore tolerated and not viewed as discriminatory in immigration enforcement).

immigration measures[5] restricting sub-federal agents' ability to prolong detention of suspected immigration violators. These acts do not prevent information sharing between local authorities and federal immigration enforcement agents as prior immigrant integrative, or sanctuary, laws attempted to do.[6] The TRUST Acts are limited to preventing detention of some categories of suspected unauthorized migrants or non-citizens by sub-federal agents beyond the original sentence of criminal incarceration.

Are TRUST Acts vulnerable to preemption as state immigration laws? The immigrant integration function of states and the role of the federal government in protecting immigrants from discrimination suggest that perhaps they would not be preempted. This Article will discuss why the California TRUST Act, an integrative immigration law, would not be preempted regardless of whether it is considered under traditional methodologies, and particularly not if its integrative qualities are considered. Particularly because Secure Communities may be responsible for incentivizing racial profiling and ethnically driven policing, absent appropriate remedies or protections, the principles of the 1870 Civil Rights Act and "equality principles" should be a part of the preemption analysis of measures like California's TRUST Act.

This Article will begin in Section I by describing the California TRUST Act. Section II considers sub-federal enforcement of immigration law focusing on Secure Communities and immigration detainers. Section III addresses the factors that led to passage of the TRUST Act, such as the threat of racial profiling where sub-federal agents have the opportunity to engage in pretextual immigration enforcement. Section IV considers the shortcomings of existing remedies to profiling in sub-federal, pretextual immigration enforcement, Section V assesses whether the TRUST Act would be preempted, and Section VI defines and assesses equality principles and considers the ultimate question of why the TRUST Act would not be

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5 "Integrative" measures or laws refer to those that encourage integration or otherwise treat non-citizen unauthorized migrants as intending immigrants and "Americans in Waiting," or those that otherwise attempt to minimize the adverse consequences of the discrimination that happens as a result of the legal category that includes citizens and residents and excludes others. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 89–91 (2007). Anti-detainer laws, like the TRUST Act, are integrative measures because they attempt to minimize the harms caused by policies like Secure Communities that emphasize the difference between those who are lawfully present, and those who are not.

6 Tyche Hendricks, *Immigrant Sanctuary Laws Seen as Practical*, SFGATE (July 6, 2008, 4:00 AM), http://www.sfgate.com/news/article/Immigrant-sanctuary-laws-seen-as-practical-3206563.php

preempted if such principles were employed in a preemption analysis.

I. THE CALIFORNIA TRUST ACT

In 2013 two states, California[7] and Connecticut,[8] passed statewide legislation known as the TRUST Act. In both states the TRUST Act prohibits local law enforcement from detaining individuals pursuant to an ICE hold request, except under limited circumstances.[9] The TRUST Acts are responsive, grassroots legislative efforts arising out of a combination of a lack of federal immigration reform providing avenues to lawful permanent resident status and an increase in internal enforcement,[10] including Secure Communities. However, TRUST Acts are also a means of bringing equality principles to the forefront of immigration enforcement concerns, rather than allowing the threat or reality of racial profiling to continue to evade detection and appropriate, effective response.[11]

The California TRUST Act was the result of a multi-year effort by advocates to address the many perceived harms caused by Secure Communities and recently confirmed allegations that data does not support the conclusion that Secure Communities has had any impact on crime.[12] Since implementation, the TRUST Act has impacted the number of immigration arrests resulting in deportations. The number of Secure Communities related deportations has declined since implementation of the TRUST Act. Following implementation, in February and March 2014 there were 2288 arrests resulting in deportation, as compared to 2875 in a similar period shortly before implementation of the TRUST Act.[13]

The TRUST Act prohibits immigration holds except in limited circumstances, including specific categories of convictions, a probable cause determination for specific kinds of charges (described in paragraph (5) of California Government

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7 CAL. GOV'T CODE §§ 7282–7282.5 (West 2014). Information for advocates, attorneys, and community members about the California TRUST Act can be found at http://www.catrustact.org.

8 CONN. GEN. STAT. § 54-192h (2014).

9 CAL. GOV'T CODE § 7282.5(a); CONN. GEN. STAT. § 54-192h(b).

10 Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 615–16 (2012); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1148–52 (5th ed. 2009) (describing increased resources for interior enforcement).

11 This Article will focus primarily on California's TRUST Act.

12 Miles & Cox, *supra* note 1.

13 *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH AUGUST 31, 2014 (2014), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf.

Code section 7282.5a), where the arrestee is a current registrant on the California Sex and Arson Registry, or where specific categories of federal criminal arrest warrants are in place.[14] In California, certain categories of criminal detainees must be released from custody when charges have been dropped, dismissed, left unfiled, or when the detainee posts bond, is acquitted of all charges, has completed an existing sentence, or is otherwise eligible for release from custody.[15] In other words, in order for a sub-federal agent to have the authority to exercise discretion to comply with an ICE detainer request, two conditions must now be met in California. First, one of the conditions in California Government Code section 7282.5(a)(1)–(6) must be present, *and,* second, compliance with the request may not violate federal, state, or local law.[16]

The California law identifies specific offenses wherein sheriffs may comply with an ICE hold request, including: specific serious or violent felonies (some requiring a judge to have made a probable cause determination pursuant to Penal Code section 872); higher level misdemeanors or "wobbler" crimes that can be classified as either a misdemeanor or felony; inclusion on the state sex offender registry; or when the individual has an outstanding federal criminal arrest warrant.[17] If the detainee has committed one of the above crimes, local authorities can detain him or her pursuant to an ICE request.[18]

Some of the circumstances in California where sheriffs may still have authority to exercise discretion to comply with an ICE hold request after implementation of the TRUST Act include: felony charges absent a conviction with a determination of probable cause pursuant to Penal Code section 872(a) (as opposed to a determination of probable cause for arrest purposes); domestic violence convictions; felonious driving under the influence; and felonious drug convictions.[19] If the detainee has

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14 CAL. GOV'T CODE § 7282.5(a); Letter from Spencer Amdur, Lawyers' Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel 5 (Dec. 19, 2013), *available at* http://www.catrustact.org/uploads/2/5/4/6/25464410/trust_act_memorandum_-_12_19_13.pdf. (on file with author)

15 CAL. GOV'T CODE § 7282(b)(1)–(5).

16 CAL. GOV'T CODE § 7282.5(a).

17 *Id.*

18 In Connecticut, the exceptions under which law enforcement may detain someone include: if the individual has been convicted of a felony, has not posted bond, has an outstanding arrest warrant in Connecticut, has been identified as a gang member or possible terrorist, is subject to a deportation order, or if the local law enforcement officer deems the person a risk to public safety. CONN. GEN. STAT. § 54-192h(b) (2014).

19 *See* Letter from Spencer Amdur, Lawyers' Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel, *supra* note 14, at 6–11. However, the circumstances under which local authorities may detain a juvenile are even more limited, since juveniles may only be detained if they have been convicted of a crime pursuant to California Penal

committed one of the above crimes, local authorities may have authority to choose to detain him or her pursuant to an ICE request.

Because the TRUST Act prevents immigration holds, except for the limited exceptions outlined in the Act, it will impact those who came to ICE's attention through Secure Communities or any other program where federal officials make immigration hold requests following identification of a suspected immigration violator.[20] ICE will still become aware of the individual and may still pursue removal proceedings. However, the TRUST Act prevents a sheriff from maintaining custody for an additional forty-eight hours to facilitate transfer to immigration detention once the arrestee is eligible for release from criminal custody.

The purpose of the TRUST Act is to set a minimum standard for elective compliance with ICE detainer requests to protect detainees from being held after they are eligible for release from criminal custody. However, the TRUST Act does not preclude local officials from enacting further protections for detainees against ICE holds. If a county wishes to further limit its own law enforcement's ability to comply with ICE hold requests, such as San Francisco and Santa Clara Counties—and increasingly others around the country—they may do so.[21]

Approximately forty cities and counties in California have adopted even stronger ICE hold reform policies, restricting detainers even more than the California TRUST Act.[22] Cities and counties continue to enact more restrictive policies in part to avoid litigation and potential liability related to Fourth and Tenth Amendment concerns caused by compliance with ICE detainer requests.[23]

When a sub-federal entity legislates in an area that may be considered traditionally reserved to the federal government, such as immigration law, the issue of preemption may arise. The

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Code section 667(d)(3). *See id.* at 11. The letter to the County Counsel also indicates that because detainers may be unconstitutional, compliance with the TRUST Act only shields counties from state-law litigation. In other words, if a sheriff complies with an ICE detainer request under circumstances authorized by TRUST, they may not be subject to liability under TRUST, but still may be subject to liability pursuant to section 1983. *See id.* at 12.

20 *See* 8 C.F.R. § 287.7 (2014); *see also* CAL. GOV'T CODE § 7282(c).

21 See CAL. TRUST ACT, http://www.catrustact.org/text-of-trust-acts.html (last visited Sept. 19, 2014), for a list of states and several counties across the country that have adopted TRUST Acts.

22 See *id.* for a list of California county policies implementing the TRUST Act.

23 *See* Jennifer Medina, *Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time*, N.Y. TIMES (July 5, 2014), http://www.nytimes.com/2014/07/06/us/politics/fearing-lawsuits-sheriffs-balk-at-us-request-to-detain-non-citizens-for-extra-time.html?_r=0.

continued lack of comprehensive immigration reform has seen hundreds of sub-federal immigration measures throughout the country,[24] and accordingly, increased preemption litigation. The increase in preemption cases[25] has spurred consideration of what role preemption should play in invalidating pro-enforcement or integrative sub-federal immigration measures in the current political context.

Would the California TRUST Act survive a preemption challenge? Should the underlying reasons for passing the TRUST Act, such as concerns about racial profiling, matter in the preemption determination? Before addressing whether the TRUST Act would be preempted, I will outline Secure Communities, immigration detainers, and relevant critiques of both. In the context of addressing this background pertaining to the impetus for the TRUST Act, I will address the notion of "equality principles," and then finally, the role equality principles may play in a preemption assessment of the TRUST Act.

II. WHY TRUST?: SECURE COMMUNITIES, IMMIGRATION DETAINERS, AND SUB-FEDERAL ENFORCEMENT OF IMMIGRATION LAW

While enforcement of immigration law has historically been considered a plenary power of the federal government, particularly after Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, there has been a marked shift towards increased interior enforcement of immigration law—some authorized by federal law and some unauthorized.[26] With this shift towards interior enforcement has come significant participation of sub-federal law enforcement agents in the process of enforcing immigration law. Low-level offenses, like traffic offenses and misdemeanors, have

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24 The National Conference of State Legislatures reports that "[s]ince 2007, on average, 1,300 [state immigration-related] bills are introduced each year and 200 laws are enacted." ANN MORSE ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT: 2013 IMMIGRATION REPORT 2 (2013), *available at* http://www.ncsl.org/Portals/1/Documents/immig/2013ImmigrationReport_Jan21.pdf.

25 One scholar notes that preemption cases are increasingly a priority for the Roberts Court and cites *Arizona v. United States* and *Chamber of Commerce v. Whiting* to suggest that "preemption will be an important part of its doctrinal legacy." Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 341. In addition to the above immigration cases, "[t]he court has decided at least 10 preemption cases since early 2008, including ones on such products as prescription drugs, medical devices, and car seat belts." James Vicini, *Analysis: Supreme Court Immigration Case a Federal-State Test*, TERRA NEWS (Sept. 20, 2014, 2:45 PM), http://en.terra.com/news/news/analysis_supreme_court_immigration_case_a_federal_state_test/act439622.

26 *See, e.g.*, Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 148–51 (2010).

disproportionately been the underlying offenses resulting in ICE detainers.[27] For reasons that will be explored more fully in the next sections, the role of sub-federal law enforcement agents and the use of low-level offenses to identify potential unauthorized migrants trigger concerns about discriminatory policing. Problems with discriminatory policing suggest the appropriateness of consideration of equality principles in the preemption analysis of the TRUST Act.

Secure Communities, immigration detainers, state laws, and municipal regulations have all contributed to an environment of expanding sub-federal involvement in the enforcement of immigration law with troubling implications. After enactment of IIRIRA, the former INS created ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) measures, which were intended to enhance cooperation between federal and sub-federal agents. Initially, and until recently, ICE used agreements establishing formal enforcement collaboration with sub-federal authorities, authorized under section 287(g),[28] to explicitly delegate power to states and localities to deputize their law enforcement agents to enforce federal immigration laws.[29] Memorandums of Agreement (MOA) established a scope of authority delegated to sub-federal agents, and established training protocols. However, the Department of Homeland Security (DHS) moved away from use of 287(g) agreements in favor of Secure Communities, likely because of the lesser federal resources required by Secure Communities, which does not require training or the same degree of oversight.[30]

As a part of the Obama Administration's emphasis on enforcement, in 2008 DHS implemented Secure Communities to identify, detain, and remove "criminal aliens" with a stated priority of targeting non-citizens who are a danger to national security or public safety, "repeat violators," and those deemed "fugitives" due to outstanding removal orders.[31] Secure Communities was allegedly intended to target "convicted

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27 *Secure Communities and ICE Deportation: A Failed Program?*, TRACIMMIGR. (Apr. 8, 2014), http://trac.syr.edu/immigration/reports/349/.

28 8 U.S.C. § 1357(g) (2012) (providing statutory authority for 287(g) agreements).

29 *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009–563 (codified at 8 U.S.C. § 1357(g)); *see also* Velasquez, 19 I. & N. Dec. 377 (B.I.A. 1986), *available at* http://www.justice.gov/eoir/vll/intdec/vol19/3011.pdf.

30 DHS has stated that Secure Communities is more "efficient." Michele Waslin, *ICE Scaling Back 287(g) Program*, AM. IMMIGR. COUNCIL IMMIGR. IMPACT (Oct. 19, 2012), http://www.immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/.

31 *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 4, 2014).

criminals," specifically those characterized as "aggravated felons."[32] As of the end of 2013, all jurisdictions in the United States had activated the Secure Communities program. From implementation in 2008 to August 2014, Secure Communities resulted in 118,439 deportations in California alone.[33] One scholar has notably referred to Secure Communities as "one of the most ubiquitous examples of immigrant-exclusionary immigration federalism."[34]

Secure Communities established a mandatory sharing of information between local jail officials and Immigration and Customs Enforcement agents anytime an individual is arrested and booked.[35] Information sharing happens regardless of whether or not criminal charges are even ever filed. Historically, anytime sub-federal law enforcement agents book an individual in connection with an alleged crime, their fingerprints are transmitted to the Federal Bureau of Investigation (FBI). Secure Communities created the connection between the sub-federal law enforcement arrest and the immigration authorities by then transmitting those same fingerprints to DHS. DHS then checks the biometric information against its own database—the Automated Biometric Identification System or "IDENT."[36]

Where the arrestee is suspected to be a non-citizen based on the IDENT database results, under Secure Communities DHS could issue an immigration detainer or place an immigration hold requesting that the local law enforcement agents hold the individual in detention for up to forty-eight hours following completion of the criminal sentence and before issuance of a Notice to Appear (NTA).[37] IDENT, however, does not necessarily

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32 *Id.*

33 U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 13, at 6; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FY 2013 ICE IMMIGRATION REMOVALS 1 (2013) [hereinafter FY 2013 REMOVALS], *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf (368,644 in 2013).

34 Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 724 (2013).

35 States and municipalities have also increasingly been passing laws to permit their local law enforcement agents to have a role in checking immigration status when an individual is booked into a jail; however, state laws encouraging or authorizing sub-federal agents a role in policing immigration law will not be the focus of this Article. *Secure Communities*, *supra* note 31.

36 *Id.*

37 *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Oct. 4, 2014). Before ICE makes a detainer request, the arrestee's fingerprints are submitted electronically to the Integrated Automated Fingerprint Identification System (IAFIS). The fingerprint data is automatically transmitted to the FBI Criminal Justice Information Services Division (CJIS), and the prints are then compared with the United States Visitor and Immigrant Status Indicator Technology (USVISIT) and IDENT. This is the stage at which the sub-federal agent and

give a black or white answer concerning a non-citizen's status because determination of status requires a sophisticated application and understanding of immigration law to an individual's unique factual situation.[38] The database merely categorizes individuals as either: (1) non-citizens present in the United States in violation of immigration laws, perhaps as a result of a prior deportation or overstaying a visa, (2) noncitizens who are lawfully present but could be deportable if convicted of specific crimes, or (3) naturalized citizens who are in the system only because they were, at some prior time, not U.S. citizens.

The TRUST Act relates to Secure Communities through its restrictions on immigration detainers. A detainer, or "ICE hold," is a request that the state or local law enforcement agent hold the arrestee for up to forty-eight hours after completion of the criminal sentence so that ICE may take the individual into immigration custody and initiate immigration removal proceedings.[39] Initially, prior to 1987, detainers served as notification to jail or prison officials that the former INS wanted to be notified before the prisoner was released.[40] Subsequently, the Executive Branch enacted federal regulations requiring that agencies receiving a detainer request hold the arrestee for forty-eight hours. With the implementation of Secure Communities, the use of detainers became significantly more common and has had a dramatic effect on the number of immigration arrests, detentions, deportation orders, and removals.[41]

ICE obtain some information about the arrestee's immigration status. If the fingerprints register a match in the IDENT immigration database, CJIS automatically sends data to the ICE Law Enforcement Support Center (LESC). Within hours of the initial arrest, ICE determines whether or not to issue a detainer request so that ICE may obtain custody and initiate removal proceedings. *Secure Communities*, *supra* note 31. Note that under PEP the prolonged detention would not be authorized, but the information will still be shared with DHS who may still mobilize officers to make an immigration arrest once the individual is released from criminal custody.

38 *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (illustrating the complexities involved in the federal governance of immigration and alien status). Just as the Supreme Court refused to recognize the state of Arizona's delegation of sub-federal agents to enforce immigration law and determine whether an individual was removable because such determinations require complex legal analyses, the same problem is implicated here. However, this issue will not be addressed in this Article.

39 8 C.F.R. § 287.7 (2014).

40 Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281, 283 n.16 (2013) (citing U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., FORM I-247 (1983)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009–563 (codified at 8 U.S.C. § 1357(g)). Under PEP, this or a similar notification practice will likely be in place.

41 AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1 (2011) (noting a significant increase in

Section 287.7(a) of Title 8 of the Code of Federal Regulations provides the authority for immigration detainers. The regulations define detainers as "requests" that "advise another law enforcement agency" that ICE would like to take custody of the person in question.[42] The only language creating a mandatory duty on behalf of the detaining agent concerns possible constitutional violations and specifies that a hold must not exceed forty-eight hours.[43] The sections of the U.S. Code referenced in the detainer regulations indicate that ICE may collaborate with localities that "choose" to participate in immigration enforcement.[44]

Immigration detainers have been challenged from policy and legal doctrinal perspectives. Before TRUST Acts were in place, states and localities began demonstrating increasing resistance to ICE immigration detainer requests.[45] While local authorities could hypothetically refuse to fingerprint arrestees, resistance to Secure Communities and detainers has typically taken other forms. Fourth and Tenth Amendment challenges have caused numerous local sheriffs throughout the country to announce that they would no longer honor detainer requests.[46] Since January 2013, detainer requests have dropped by nearly twenty percent.[47] During a fifty-month period beginning in FY 2008 through the beginning of FY 2012, ICE issued close to one million detainers.[48]

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prosecutions and deportations since the Obama Administration's implementation of Secure Communities); AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., THE GROWTH OF THE U.S. DEPORTATION MACHINE 5 (2014), *available at* http://www.immigrationpolicy.org/printpdf/3283 (citing the U.S. Government Accountability Office, which stated that "from October 2008 through March 2012, Secure Communities led to the removal of about 183,000 aliens").

42 8 C.F.R. § 287.7.

43 *Id.*; *see* Letter from Spencer Amdur, Lawyers' Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel, *supra* note 14.

44 *See* 8 U.S.C. § 1103(a)(11), (c) (2012); 8 U.S.C. § 1357(d).

45 While there has been much consideration of whether or not ICE detainers are mandatory, this Article will examine the issue only to the extent necessary to consider whether the California TRUST Act could be deemed preempted. There has been much controversy over whether ICE holds are mandatory directives or mere requests, and the outcome may pertain to the ultimate federalism question considered here.

46 *See Some Colorado Sheriffs Ending Immigrant Detainers*, N.Y. TIMES (Apr. 29, 2014, 7:44 PM), http://www.nytimes.com/aponline/2014/04/29/us/ap-us-immigration-detainers.html; Letter to ACLU of San Diego (July 31, 2014) (on file with author) (explaining that San Diego, California Sheriffs will no longer use the I-200 Administrative Warrants as a basis for detaining individuals longer than their time of release and will treat these administrative arrests just like detainers); Medina, *supra* note 23.

47 The total number of detainers in 2012 was 273,982. *Number of ICE Detainers Drops by 19 Percent*, TRACIMMIGR., http://trac.syr.edu/immigration/reports/325/ (last updated January 2013).

48 *Who Are the Targets of ICE Detainers?*, TRACIMMIGR. (Feb. 20, 2013), http://trac.syr.edu/immigration/reports/310/.

The next section will explore the perceived need for the TRUST Act and measures that lessen the role of sub-federal law enforcement agents in immigration policing.

III. SUB-FEDERAL LAW ENFORCEMENT OFFICERS' DISCRETION TO ARREST AND SHADOW IMMIGRATION ENFORCEMENT[49]

Secure Communities empowers sub-federal agents to participate in identifying potentially unauthorized migrants. Because an arrest under Secure Communities automatically exposes any arrestee to the possibility of identification by federal immigration authorities,[50] it could incentivize state and local law enforcement agents to use criminal law violations as a pretext to enforce immigration law.[51] Sub-federal agents have significant power because of their discretion to make arrests.[52] Such "shadow immigration enforcement" may involve pretextual, though still legal, enforcement of criminal or traffic laws based on perceived ethnic or racial characteristics.[53]

As state and local law enforcement officers have become increasingly involved in enforcement of federal immigration law, their power to make or not make an initial arrest can be the act that creates a cascading effect for the individual arrestee, as well as his or her family and community. Sub-federal agents can, for example, use minor traffic violations as a pretext for determining immigration status.[54] There is little to prevent a local law enforcement agent from stopping individuals solely to check their immigration status, instead of checking their immigration status incidental to a legitimate arrest that they intend to pursue for substantive, criminal reasons.[55] Concern about the lack of

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49 *See* Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 230 (2014) (explaining "shadow immigration enforcement" as state or local police lacking immigration enforcement authority who use their police powers for the unsanctioned purposes of federal immigration enforcement and discussing the problem of the unavailability of usual constitutional law safeguards in the immigration context).

50 HIROSHI MOTOMURA, IMMIGRATION POLICY CTR., PROSECUTORIAL DISCRETION IN CONTEXT: HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM 4, 7 (2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf.

51 Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1186–87 (2012).

52 HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 128–31 (2014) (discussing discretion, which includes "micro-macro" discretion, in enforcement and the role of arresting agents).

53 Sweeney, *supra* note 49, at 240.

54 Banks, *supra* note 51.

55 ACLU LEGAL ACTION CTR., COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY 15 (2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf (noting that racial profiling has been a persistent concern where sub-federal agents are

adequate prevention of unconstitutional policing by sub-federal agents is not a new problem, and it has typically been presumed that federal agents may be less likely to engage in such conduct.[56]

A. Discretion to Arrest and the Problem of Profiling in Sub-federal Enforcement of Immigration Law

Discretion by law enforcement officers is generally exercised on micro and macro levels.[57] "Micro" level discretion may take the form of decisions by local, state, or federal law enforcement agents to arrest or prosecute, or not arrest or prosecute, an individual. Micro level discretion may be exercised at the time of the initial criminal arrest, or later, when either criminal prosecutors or immigration trial attorneys decide what charge(s), if any, to allege, or after a trial has begun.[58]

Patrol officers have a significant amount of discretion to decide whom to stop, arrest, and detain.[59] An officer exercises micro level discretion when deciding to stop an individual for a traffic violation or minor criminal offense, or make an arrest, rather than just issue a citation.[60] Secure Communities likely was, and PEP may remain a powerful and effective tool for a patrol officer motivated to decrease the presence of migrants she or he perceives as unauthorized.[61]

"Macro" level discretion functions at a systemic level such as when agencies and officials make policy decisions establishing enforcement priorities and commit resources accordingly.[62] Sub-federal agents' roles in policing immigration law are

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empowered to enforce immigration law); Lasch, *supra* note 40, at 292 (citing ACLU LEGAL ACTION CTR., *supra*); *see* Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011) (discussing racial profiling concerns resulting from state and local immigration enforcement).

56 Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1119 (referencing the *Lopez-Mendoza* decision, where "Chief Justice Burger believed that INS was 'better than most police departments' at preventing constitutional violations from occurring") (quoting Justice Harry Blackmun, Harry Blackmun's Conference Notes (Apr. 20, 1984), *in* HARRY A. BLACKMUN PAPERS, 407/83/491 (Manuscript Division, Library of Cong., Washington D.C.)).

57 MOTOMURA, *supra* note 50, at 3–5.

58 *Id.*

59 *Id.* at 4; *see* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–49 (2011).

60 Banks, *supra* note 51, at 1184. *See generally* Motomura, *supra* note 59, at 1819 (showing how the discretion to arrest at state and local levels can in some ways assume a kind of "abdication of federal authority").

61 Banks, *supra* note 51, at 1179–80.

62 *Id.* at 1183–84; MOTOMURA, *supra* note 50, at 2.

influenced by macro level exercises of discretion, which may in turn be evidenced by their micro level exercises of discretion. As an example, in some regions, such as Maricopa County, Arizona, local authorities create de facto macro level policies that encourage pretextual enforcement of immigration law.[63]

A local sheriff encouraging patrol officers to arrest, rather than just cite a driver without a valid license, or to apply rigorous standards for what constitutes a valid license, are examples of macro level discretion. Similarly, when government and law enforcement officials make public statements implicitly or directly blaming the undocumented population for crime, or suggest that *any* crime should subject non-citizens to deportation,[64] they convey macro-level policy directives. When an ICE supervisor states, contrary to federal law, that traffic violations represent "a public safety threat significant enough to warrant removal," the supervisor influences discretion on macro and micro levels.[65]

Secure Communities can create a context for discretion at both of these micro and macro levels. DHS has expressed intentions regarding whom individual officers should pursue, emphasizing a focus on serious criminals,[66] but local criminal justice officers may function outside of these directives. Moreover, ICE supervisors may or may not proactively address discrepancies between the federal policy objectives and how officers are exercising discretion in carrying out their authority.[67] The absence of means to ensure compliance with federal immigration arrest priorities suggests the appropriateness of preventative measures like the TRUST Act, which may decrease the prevalence of undetected and undeterred rights violations.

Secure Communities does not provide an express delegation of authority to sub-federal agents, but nonetheless, discretion exercised on micro and macro levels may play a role in whether and how an officer or agency exercises discretion in policing, including identifying individuals for an initial stop.[68] Laws, for

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63 *See* Melendres v. Arpaio, 989 F. Supp. 2d 822, 825–26 (D. Ariz. 2013).

64 *See, e.g.*, Brian Fraga, *Sheriff Hodgson on 'Secure Communities' and Undocumented Immigrants*, SOUTHCOASTTODAY.COM (June 9, 2011), http://blogs.southcoasttoday.com/new-bedford-crime/2011/06/09/sheriff-hodgson-on-secure-communities-and-undocumented-immigrants/.

65 Banks, *supra* note 51, at 1183 (quoting RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(g) STATE AND LOCAL IMMIGRATION ENFORCEMENT 6 (2011), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf).

66 *Secure Communities*, *supra* note 31.

67 *See* Banks, *supra* note 51, at 1182–84.

68 MOTOMURA, *supra* note 50, at 2, 4.

example, that authorize officers to use their discretion to arrest a driver without a license at the time of the stop, combined with Secure Communities or PEP, give sub-federal agents significant power to determine which drivers' immigration status will be checked.[69] Micro and macro exercises of discretion thus contribute significantly to the possibility of improper pretextual enforcement of immigration law as a result of Secure Communities, and now the PEP program.

B. Pretextual Arrests and Racial Profiling by Sub-federal Agents

Allegations of increased racial profiling immediately followed implementation of Secure Communities, as was the case following implementation of 287(g) agreements, and as will likely continue under PEP.[70] Race has historically been, and still serves as, a proxy for belonging and citizenship,[71] even though use of race as the *only* factor in making a civil immigration stop is illegal.[72] Resistance to Secure Communities and ICE detainers prompted substantiated civil rights and racial profiling concerns.[73]

Indeed, local law enforcement agents may use pretextual arrests to identify people they believe are unauthorized migrants to bring them to the attention of federal immigration authorities.[74] From the inception of Secure Communities to approximately 2011, 93% of those identified as removable

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69 Banks, *supra* note 51, at 1186.

70 *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 37; Chacón, *supra* note 26, at 149; Suzanne Ito, *No Security in "Secure Communities"*, ACLU (Aug. 19, 2010, 5:54 PM), https://www.aclu.org/blog/immigrants-rights-racial-justice/no-security-secure-co mmunities; *Immigration Bait and Switch*, N.Y. TIMES, Aug. 18, 2010, at A22, *available at* http://www.nytimes.com/2010/08/18/opinion/18wed3.html?_r=0.

71 For examples of select scholarly works addressing race as a proxy for citizenship, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009); Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1390–402 (2011) (considering the federal government's policing of interracial marriages and citizenship law). *See also* KOHLI, MARKOWITZ & CHAVEZ, *supra* note 41, at 2, 6 (finding 93% of people arrested under Secure Communities pursuant to one study were from Latin American countries).

72 Mexican appearance may be one of many factors relied on in making a civil immigration stop. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 885–87 (1975) (noting ethnicity as one of many factors used by immigration enforcement agents in identifying unauthorized migrants).

73 *See generally supra* note 71 and accompanying text.

74 TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009).

through Secure Communities were Latinos, while only 77% of the undocumented population was Latino.[75]

Not only did the majority of those subject to detainers in 2008 to 2012 lack a criminal record (at the time of the detainer issuing or after),[76] but over 80% of ICE detainers were issued in cases involving men from Mexico, Guatemala, El Salvador, Honduras, or Cuba.[77] Put differently, 95% of detainers were issued against males with a median age of thirty, and 80% of detainers were issued against Latinos. Specifically, 72.7% were Mexican citizens, approximately 15% were Guatemalans, Hondurans, El Salvadorans, or Cubans, and only about 22,000 were Canadian citizens.[78] Thus, the majority of ICE detainers have been issued against Latino males without criminal histories, or those whose criminal arrest leading to issuance of the detainer was not related to a serious offense.[79]

Sheriff Joe Arpaio of Maricopa County, Arizona is one particularly well-known example of a powerful law enforcement agent's sanctioning of the improper use of sub-federal immigration policing powers. His discriminatory policing was so egregious and his intentions so clearly discriminatory and anti-immigrant that the Department of Justice pursued litigation.[80] However, discriminatory policing may be less blatant, evading detection, sanction, or deterrence.

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75 KOHLI, MARKOWITZ & CHAVEZ, *supra* note 41, at 2.

76 *Who Are the Targets of ICE Detainers?*, *supra* note 48 ("In more than two out of three (77.4%) of the detainers issued by ICE, the record shows that the individual who had been identified had no criminal record — either at the time the detainer was issued or subsequently. For the remaining 22.6 percent that had a criminal record, only 8.6 percent of the charges were classified as a Level 1 offense."); *see also id.* fig.1.

77 *Id.*

78 *Id.*

79 "In FY 2014, DHS conducted a total of 577,295 removals and returns, including 414,481 removals and 162,814 returns. ICE had a total of 315,943 removals or returns, and CBP made 486,651 apprehensions." Press Release, Dep't of Homeland Sec., DHS Releases End of Year Statistics (Dec. 19, 2014), *available at* http://www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics (on file with author); *see also* FY 2013 REMOVALS, *supra* note 33. ICE's FY 2013 removal statistics indicate that 82% of those removed from the interior had criminal convictions, as opposed to 60% the prior year. *Id.* Even though more deportees may have had a criminal conviction than in the prior fiscal year, the data does not demonstrate that the crimes were overwhelmingly serious or violent, nor that pretextual enforcement is no longer a problem. Moreover, the author of the study contends that even if this alleged problem does not impact the majority of deportees, the problem of pretextual enforcement or racial profiling still merits significant consideration. *Id.*

80 The Department of Justice sued the Maricopa County Sheriff's Office for civil rights violations, beginning with an investigation in June 2008, and filed a lawsuit in May 2012, culminating in a ruling by Judge Snow that Arpaio had systematically profiled Latinos. Arpaio has since been found to have defied the court's order. Fernanda Santo, *Angry Judge Says Sheriff Defied Order on Latinos*, N.Y. TIMES, Mar. 25, 2014, at A18.

In the case of Sheriff Arpaio, the Department of Justice concluded that the Maricopa County Sheriff's Office was responsible for "egregious, pervasive and systemic" racial profiling.[81] Latino drivers in Maricopa County were significantly more likely to be subject to a traffic stop than similarly situated non-Latinos, and patrol officers conducted stops without constitutionally required reasonable suspicion or probable cause.[82]

Following the Department of Justice litigation against Sheriff Arpaio, DHS Secretary Janet Napolitano announced the decision to rescind part of the 287(g) agreement in Arizona, stating, "Discrimination undermines law enforcement and erodes the public trust. DHS will not be a party to such practices."[83] DHS instructed Arizona DHS not to respond to local police requests to enforce immigration law following a traffic stop or other law enforcement action unless the person targeted actually met the DHS criteria for Secure Communities, including those with criminal convictions and prior removals with unlawful reentries.[84] DHS's termination of a 287(g) agreement was virtually unprecedented.[85]

Even before Secure Communities, local police officers had been complicit in racially motivated immigration law enforcement. One infamous example was what became known as the "Chandler Roundup," where local police officers in Chandler, Arizona targeted individuals based on appearance and inability to speak fluent English and, with Border Patrol officers, spent a week arresting 432 people of Hispanic/Latino descent who were

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81 Letter from Thomas E. Perez, Assistant Attorney Gen. of the U.S., to Bill Montgomery, Cnty. Attorney for Maricopa Cnty., Ariz. 6 (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

82 U.S. DEP'T. OF HOMELAND SEC., SECURE COMMUNITIES: STATISTICAL MONITORING (2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-statistical-monitoring.pdf.

83 Press Release, Dep't of Homeland Sec., Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), *available at* https://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county.

84 Michele Waslin, *DHS Rescinds Part of Controversial 287(g) Program in Arizona*, AM. IMMIG. COUNCIL IMMIGR. IMPACT (June 27, 2012), http://immigrationimpact.com/2012/06/27/dhs-rescinds-part-of-controversial-287g-program-in-arizona/#sthash.7lAG6GA9.dpuf; *see also* Jorge Rivas, *Department of Homeland Security and ICE End Sheriff Arpaio's 287(g) Contract*, COLORLINES (Dec. 15, 2011, 5:00 PM), http://colorlines.com/archives/2011/12/department_of_homeland_security_and_ice_end_sheriff_arpaios_287g_contract.html.

85 DHS did not renew the 287(g) agreements in 2009 and 2011 and stopped its access to DHS databases pursuant to Secure Communities in 2011. *See* Waslin, *supra* note 84; Randal C. Archibold, *Immigration Hard-Liner Has His Wings Clipped*, N.Y. TIMES, Oct. 7, 2009, at A14; Press Release, Dep't of Homeland Sec., *supra* note 83; Editorial, *The Case Against Sheriff Arpaio*, N.Y. TIMES, Dec. 16, 2011, at A24.

eventually deported.[86] Following a successful equal protection and Fourth Amendment lawsuit against the city of Chandler, it became a sanctuary city.[87]

Immigration scholar Christopher Lasch has compared immigration rendition, or deportation, to "a legal system resembling slave and criminal rendition" such that it "raises questions as to whether immigration rendition is similarly driven by race . . . rather than by criminality, as the federal government claimed it would be when it launched Secure Communities."[88] The possibility that the drive to arrest is not crime, but in fact is the arrestee's perceived ethnicity, race, or alienage, implies that the equality principles inherent in immigration law should play a more significant role. There may be a threat of racial profiling in conjunction with pretextual enforcement of immigration law when sub-federal agents exercise criminal arresting discretion. This was clearly illustrated in Arizona, yet at the same time, Arizona highlights the limitations of the law in deterring the racial profiling that can result from programs like Secure Communities.[89]

Based on the history of discriminatory policing in immigration law, consideration of equality principles is relevant to any assessment of whether a sub-federal immigration law should be preempted. The TRUST Act grew, in part, out of a concern for discriminatory practices and may decrease the likelihood of discriminatory policing. In the absence of measures like the TRUST Act, the law falls woefully short with respect to deterring or preventing discriminatory immigration practices, particularly when sub-federal agents participate in the process.

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86 Corrie Bilke, Note, *Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities' Role in the "Illegal Immigration" Debate*, 42 IND. L. REV. 165, 185 (2009). One scholar's review of the "Blackmun files"—notes prepared by Justice Blackmun in connection with the *Lopez-Mendoza* decision—indicated that "Chief Justice Burger believed that INS was '*better than most police departments*' at preventing constitutional violations from occurring." Elias, *supra* note 56, at 1122 (emphasis added). Justice Burger's inclination that local police may be more likely to engage in constitutional violations has been echoed by immigrant rights organizations and in the media. *ACLU Puts Arizona Law Enforcement Agencies on Notice*, AM. CIV. LIBERTIES UNION (Nov. 12, 2013), https://www.aclu.org/immigrants-rights/aclu-puts-arizona-law-enforcement-agencies-notice.

87 Bilke, *supra* note 86, at 186.

88 Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 225 (2013).

89 MOTOMURA, *supra* note 52, at 115 ("As a corollary, preventing discrimination before it takes place allows courts to avoid the nearly impossible task that a discrimination lawsuit forces judges to undertake—ascertaining what particular state or local officials were thinking.").

IV. SHORTCOMINGS OF EXISTING MEANS OF DETERRING OR RESPONDING TO RACIALLY OR ETHNICALLY BIASED PRETEXTUAL IMMIGRATION POLICING

One of the legal vehicles to address discriminatory policing is a motion to suppress resulting from a successful Fourth Amendment or equal protection claim. Prosecutorial discretion could be used as a tool as well, but there is no evidence that it is being employed in this manner. However, in the context of sub-federal enforcement of immigration law, these remedies are no replacement for an affirmative measure like California's TRUST Act that limits the incentive to sub-federal agents to engage in racially motivated policing.

A. Fourth Amendment and Suppression

In criminal policing, a law enforcement agent's violation of an individual's Fourth Amendment rights may give rise to a cause of action resulting in suppression of illegally obtained evidence.[90] In immigration court, particularly in the context of Secure Communities, existing means of addressing racial profiling by sub-federal agents in immigration enforcement fall short even in the rare instances where suppression is available.

In the context of Fourth Amendment jurisprudence, the Supreme Court has permitted law enforcement agents to use ethnicity as one of multiple factors in establishing reasonable suspicion that an individual is unlawfully present in the United States.[91] Thus, not all pretextual stops contested in underlying criminal proceedings necessarily constitute Fourth Amendment violations.[92] While sub-federal agents enforcing criminal laws are *not* permitted to consider ethnicity as a factor in establishing reasonable suspicion of a crime, a Fourth Amendment violation addressed in immigration courts may not result in exclusion. The more restricted approach to the Fourth Amendment is one of several reasons that sub-federal agents may not be sufficiently

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90 *See* Wong Sun v. United States, 371 U.S. 471, 484–85 (1963) (holding that evidence obtained illegally is inadmissible as fruit of the poisonous tree); Mapp v. Ohio, 367 U.S. 643, 648 (1961) (holding that evidence obtained in violation of an individual's Fourth Amendment right against unreasonable searches and seizures may not be used against him or her in state criminal prosecutions); Weeks v. United States, 232 U.S. 383, 393 (1914) (ruling that illegal evidence gathered by state officers cannot be used against defendants in federal court).

91 *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (stating use of ethnicity as one of many factors by immigration enforcement agents in identifying unauthorized migrants); Elias, *supra* note 56, at 1151.

92 *See* Whren v. United States, 517 U.S. 806, 811–13 (1996) (holding that evidence may not be suppressed in criminal proceedings where criminal law enforcement agents engage in pretextual stops and race may seep into the calculus).

deterred from engaging in pretextual enforcement of immigration law, or racial profiling.

Though Fourth Amendment suppression of evidence is not generally available in immigration court, in 1984 the Supreme Court ruled in *INS v. Lopez-Mendoza* that the exclusionary rule could apply in immigration court, but only to address "egregious violations" of the Fourth Amendment.[93] The Circuit Courts have since evaluated what constitutes such a violation.[94] The *Lopez-Mendoza* Court implied that if violations were widespread, the doctrine could be viewed more expansively, and some immigration courts have slowly responded accordingly.[95] Justice O'Connor's reasoning regarding the need to recognize the exclusionary rule in deportation proceedings relied on "subconstitutional reasoning" to extend, albeit in limited circumstances, constitutional protections that otherwise previously only applied to citizens.[96]

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93 *See* MOTOMURA, *supra* note 52, at 161–62 (discussing *Lopez-Mendoza* and the role of the "egregious violation" principle in allowing judges to protect individuals and communities from racially and ethnically discriminatory policing and the notion of "comparative culpability," analogizing workplace raids to discriminatory immigration policing where the employer's wrongdoing against unauthorized migrants may outweigh certain characterizations of the alleged noncitizen's unlawful presence). "Just as employment law recognizes the integration of unauthorized migrants into workplace communities, the same approach makes sense when unauthorized migrants seek the protections of the Fourth Amendment." *Id.*

94 *See* Oliva-Ramos v. Attorney Gen. of the U.S., 694 F.3d 259, 271 (3d Cir. 2012) (finding suppression where violation is egregious or widespread); Ghysels-Reals v. U.S. Attorney Gen., 418 F. App'x 894, 895–96 (11th Cir. 2011) (finding there is no basis to apply the exclusionary rule absent an egregious constitutional violation); Gutierrez-Berdin v. Holder, 618 F.3d 647, 653 (7th Cir. 2010) ("[H]andcuffing an alien who resisted arrest is certainly not the 'egregious' behavior contemplated by *Lopez-Mendoza*."); Escobar v. Holder, 398 F. App'x 50, 53–54 (5th Cir. 2010) (declining to consider the question in the absence of a Fourth Amendment violation altogether); United States v. Oscar-Torres, 507 F.3d 224, 229–30 (4th Cir. 2007) (ruling it need not consider whether egregious violations of the Fourth Amendment warrant a suppression remedy); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006) (holding that any arrest predicated on race is an arrest for "*no* reason at all" and is per se egregious); United States v. Olivares-Rangel, 458 F.3d 1104, 1106 (10th Cir. 2006) ("*Lopez-Mendoza* does not prevent the suppression of all identity-related evidence . . . [it] merely reiterates the long-standing rule that a defendant may not challenge a court's *jurisdiction* over him or her based on an illegal arrest."); United States v. Navarro-Diaz, 420 F.3d 581, 587 (6th Cir. 2005) (finding no egregious violation of the Fourth Amendment when police asked the defendant to identify himself); Mendoza-Solis v. INS, 36 F.3d 12, 14 (5th Cir. 1994) (stating that the exclusionary rule does not apply in removal proceedings); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (stating that "bad faith" violations are egregious and occur when "'evidence is obtained by deliberate violations of the fourth amendment, or by conduct a *reasonable officer should have known* is in violation of the [U.S.] Constitution'").

95 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984); *see also* Sweeney, *supra* note 49, at 274–79 (providing a thoughtful analysis of the reasons to fully apply the exclusionary rule in immigration proceedings).

96 Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1763 (2010).

However, the limitations of the egregious violation requirement are only one of the deficiencies of the practical application of the Fourth Amendment exclusionary rule in immigration court. Suppression is not the best deterrent to racial profiling in large part because there is likely an alternate means of presenting the evidence sought to be suppressed. In immigration removal proceedings, one of the most valuable pieces of evidence is proof of the country of origin because removability cannot be determined or effectuated absent that information. Even if this evidence were suppressed, likely with the assistance of counsel (not presently appointed to all indigent respondents), it would be otherwise admissible because it is also available to law enforcement officers as a result of information sharing resulting from Secure Communities and PEP. Thus, PEP, and previously Secure Communities, undermine the Fourth Amendment's suppression remedy.[97]

B. Equal Protection

Equal protection claims alleging discriminatory intent require one to prove the intention of the law enforcement agent responsible for the alleged violation, which is notoriously hard to do. Intent is difficult to decipher because of implicit racial bias[98] and logistical challenges of gathering such data.[99] The difficulty of proving what was in an officer's mind when effectuating an arrest may deter many legitimate rights violations claims.[100] For those that pursue such claims, justice may be unattainable and the offending party evades consequences and will not be deterred from continued profiling. As will be addressed below, this is in part why preemption can and has played a role in indirectly addressing the harms of racial profiling.[101]

At a macro discretionary level, policy makers and politicians have demonstrated awareness of the possibility of perceived or

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97 See generally Carrie Rosenbaum, *Sub-federal Enforcement of Immigration Law: An Introduction to the Problem of Pretextual Enforcement and Inadequate Remedies*, 3 LAWS 61 (2014), *available at* http://www.mdpi.com/2075-471X/3/1/61, for a more complete discussion on the shortcomings of suppression in removal proceedings.

98 See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005), for a discussion on the implications of implicit biases in social interactions and the law.

99 Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 61–81 (2001) (explaining that racial profiling equal protection claims are particularly hard to prove).

100 *See* MOTOMURA, *supra* note 52, at 115 (referencing the difficulty of discrimination lawsuits which require a judge to "ascertain[] what particular state or local officials were thinking" when making an arrest).

101 *Id.* at 135 ("When equal protection violations based on discriminatory intent are a serious concern but hard to define and prove, a preemption challenge can shift who bears the practical risk that the truth is hard to ascertain.").

real discriminatory effects of measures like S.B. 1070 by going to great lengths to draft measures that have the appearance of racial neutrality.[102] This decreases the likelihood of a successful equal protection challenge because of the difficulty of proving discriminatory intent within the law itself,[103] which again, highlights the importance of equality concerns within the preemption context. And as will be discussed below, the Court has allowed concerns about discrimination into their preemption analysis.[104] What has been labeled "plenary power preemption" may act as a gap-filler for the inadequate equal protection remedy.[105]

C. Prosecutorial Discretion

While not historically viewed as a deterrent to improper police practices, an early exercise of prosecutorial discretion could provide a check on pretextual enforcement or racial profiling.[106] As a counter to the potential harm caused by sub-federal agents' discretion to arrest, ICE could, even more proactively, utilize discretion not to prosecute pursuant to the June 2010 and 2011 Morton Memos,[107] wherein then-ICE

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102 Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2133 (2013). In spite of the courts' avoidance of equality concerns, "political actors have been, and are, aware of the underlying connection between immigration law, state and local law, and race." *Id.* Governor Brewer's amendment of S.B. 1070 explicitly addresses concerns about racial profiling, which is seen as incentivized by drafts of the bill. *Id.*

103 Motomura, *supra* note 96, at 1743 ("An equal protection challenge would require proof of discriminatory intent, but a preemption challenge can persuade some judges based on reasonable possibility of discriminatory intent.").

104 Gulasekaram & Ramakrishnan, *supra* note 102, at 2135 & n.289 ("As Professor Hiroshi Motomura argues, some courts may already be aware of this latent racial dynamic, implicitly folding equality considerations into their preemption analysis when striking down state and local laws.").

105 Kerry Abrams, Essay, *Plenary Power Preemption*, 99 VA. L. REV. 601, 639 (2013) (noting that plenary power preemption may allow redress to discrimination or racial profiling where claims otherwise may fail or not be brought by unauthorized migrants).

106 In June 2010 and June 2011, former ICE Director John Morton issued memos instructing ICE Chief Counsel to exercise discretion in removal proceedings with a focus on prosecuting dangerous criminals, repeat immigration violators, and suspected terrorists. *See* Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, to U.S. Immigration & Customs Enforcement Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010) [hereinafter Morton, 2010 Memorandum], *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton, 2011 Memorandum], *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

107 *See* Morton, 2010 Memorandum, *supra* note 106; Morton, 2011 Memorandum, *supra* note 106.

Director John Morton instructed the ICE Chief Counsel to exercise discretion in removal proceedings with a focus on prosecuting dangerous criminals, repeat immigration violators, and suspected terrorists.[108]

While a district attorney might be likely to drop charges against a non-citizen stopped for a minor criminal violation, DHS has not historically exercised equivalent discretion in the immigration context, even where DHS lacks the actual capacity to carry out removal. Discretion not to prosecute may be an appropriate tool where sub-federal agents engage in behavior that falls short of an egregious violation for Fourth Amendment purposes, and the individual is not a designated enforcement target.

While the 2011 Morton Memo also suggests that discretion be exercised where the respondents are litigating civil rights violations,[109] discretion could be exercised more expansively in the context of pretextual arrests where suppression of evidence under the exclusionary rule may not be an appropriate or available remedy, or where an equal protection[110] claim is inadequate to provide protection of individual rights.

Following the letter and spirit of the Morton Memos on prosecutorial discretion, ICE trial attorneys could more actively exercise prosecutorial discretion where there are indicators that the initial criminal arrest was pretextual or marred by racial profiling.[111] An exercise of discretion would serve the policy goals outlined in the 2011 Morton Memo because the agency could focus resources on seeking removal of those who pose a public safety or national security threat, rather than individuals who entered without inspection, and/or overstayed a visa. An exercise of discretion in this context could help demonstrate the integrity of the immigration enforcement system and discourage pretextual enforcement practices.[112]

In the absence of adequate means of deterring discriminatory immigration policing, communities have expressed their resistance to Secure Communities and detainer practices by advocating for non-compliance, or by advocating for

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108 *See* Morton, 2011 Memorandum, *supra* note 106.

109 *See id.*; *see also* Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 339 (2011).

110 INS v. Lopez-Mendoza, 468 U.S. 1032, 1055 (1984) (White, J., dissenting); *see* Elias, *supra* note 56, at 1150.

111 *See generally* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013).

112 *See* Morton, 2011 Memorandum, *supra* note 106.

immigrant integrative ordinances and state laws. Additionally, following successful detainer litigation by rights advocates resulting in validation of Fourth Amendment claims, sheriffs have declared their intent to cease compliance with detainers.[113] As of the spring of 2014, the following cities or counties had implemented measures rejecting detainers and/or Secure Communities: Philadelphia, Pennsylvania; Skagit County, Mount Vernon, Walla Walla, and Kitsap, Washington; Orange County, California; New York, New York; Newark, New Jersey; Cook County, Illinois; San Miguel and Boulder, Colorado;[114] and the states of California and Connecticut.[115] By the time of publication there may be more cities and counties on this list.

The California TRUST Act may begin to address the discriminatory effects of Secure Communities and PEP.[116] Because the TRUST Act is intended to, and may result in minimizing the potential for racial and ethnic profiling in policing resulting from Secure Communities, it is in line with equality principles and would not be preempted by federal law.

V. PREEMPTION OF THE TRUST ACT

Pursuant to traditional preemption principles, the TRUST Act should survive a preemption challenge, and by incorporating equality principles, it is even clearer that the TRUST Act would not be preempted. This section will address traditional express, conflict, and implied preemption doctrines and two other forms of preemption that I will refer to as "constitutional preemption" and "statutory preemption," versions of which have been applied to sub-federal immigration measures. The section will conclude with consideration of the role of equality principles in the preemption analysis.

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113 Courts in Oregon and Pennsylvania determined that ICE detainer requests are not mandatory and are merely requests, and that sheriffs could be liable for constitutional violations for holding people pursuant to ICE detainers. *See* Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014); *see also* Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or. Apr. 11, 2014).

114 Fear of potentially detaining U.S. citizens as a result of complying with an ICE detainer request may be part of the drive towards policies rejecting ICE holds. Colleen Slevin, *Some Colorado Sheriffs Ending Immigrant Detainers*, N.Y. TIMES (Apr. 29, 2014, 7:44 PM), http://www.nytimes.com/aponline/2014/04/29/us/ap-us-immigration-detainers.html?_r=0.

115 CAL. GOV'T CODE §§ 7282–7282.5 (West 2014); CONN. GEN. STAT. § 54-192h (2014).

116 Local policies developed in the above cities and counties "reflect a broader kind of ideological conflict expressed across the federal-state-local axis: sanctuary laws represent instances of local officials staking out political positions in some tension with federal intentions . . . in the case of noncooperation laws, the laws reflect a general desire to make government institutions accessible to all people." Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 604 (2008).

A. Traditional "Express" Preemption

At the outset, the TRUST Act is not expressly preempted because Congress has not indicated through an expression of federal legislation that it intends to supersede the TRUST Act as a related law. No federal statute contains an "express preemption" provision preempting the TRUST Act.[117]

The non-cooperation or sanctuary policies of the 1980s and 1990s provide an example of sub-federal non-cooperation laws that were expressly preempted. While substantively different from the California TRUST Act, the sanctuary policies of the 1980s provide a context in which to consider sub-federal legislation.

Following the civil wars in El Salvador and Guatemala, communities throughout the United States provided refuge to people who came to the United States but had not received, or had been denied, refugee status.[118] What came to be known as "sanctuary cities" represented a form of resistance to federal immigration law, or semi-organized non-cooperation.[119] Cities and counties had informal policies, and some passed ordinances.[120] In response, in 1996, Congress prohibited local government officials or employees from refusing to provide information about an individual's immigration status.[121] Congress's action preempted existing sanctuary ordinances, though there was no litigation of them by the federal government.[122] If the TRUST Act had attempted to codify sanctuary city policies like those preempted by Congress in 1996, it could have been subject to express preemption. Instead, the TRUST Act was drafted narrowly to only address immigration detainers.

To date, Congress has not expressly prohibited states or localities from regulating sub-federal authorities' prolonged detention of non-citizens pursuant to ICE detainers. While

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117 *See, e.g.*, 8 U.S.C. § 1229a(a)(3) (2012); *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–28 (2000) (providing a concise summary of express, field, and conflict preemption).

118 *See* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–83 (2006); Christopher Carlberg, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740, 744–45 (2009); Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 50–51 (1994).

119 *See* Pham, *supra* note 118.

120 *See id.* at 1383.

121 *See id.* at 1376 (citing 8 U.S.C. §§ 1373, 1644 (2000)); Rodríguez, *supra* note 116, at 601.

122 *See* Pham, *supra* note 118, at 1384.

Congress in 1996 expressly preempted the "non-cooperation" sanctuary policies of the 1980s and 1990s, the preempted sanctuary laws were markedly different from the TRUST Act.

Unlike the sanctuary policies, the TRUST Act does not directly prevent or interfere with information sharing between sub-federal criminal entities and federal immigration authorities. Instead, the TRUST Act prevents sub-federal agents from detaining certain suspected non-citizens past the time that detention might otherwise be authorized in connection with the underlying criminal matter.[123] The TRUST Act does not prevent discovery of a criminal detainee's immigration status.[124] While the sanctuary laws prohibited communication regarding immigration status, the TRUST Act merely prevents actual prolonged detention.

B. Conflict Preemption

The TRUST Act would also not be conflict preempted because it does not create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[125] It does not present an actual conflict with federal law, and it is not impossible or difficult for an actor to comply with both the state and federal laws at the same time.[126] No federal law mandates sub-federal agents' detention of suspected non-citizens. Such a mandate would violate the Tenth Amendment prohibition on commandeering.[127]

C. Implied Preemption

While implied preemption is less clearly defined and broader than express preemption, the TRUST Act would likely also survive an implied, field, or obstacle preemption challenge.[128] The

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123 CAL. GOV'T CODE § 7282.5 (West 2014).

124 *See* Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2013) (cataloguing and discussing these laws); Rodríguez, *supra* note 116, at 600–05.

125 Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 (1940)).

126 *See Hines*, 312 U.S. at 67; *see also* Nelson, *supra* note 117, at 226–31.

127 Lasch, *supra* note 40, at 290. Section 287.7(a) of Title 8 of the Code of Federal Regulations defines detainers as "requests," and indicates that detainers "advise another law enforcement agency" that ICE would like to take custody. 8 C.F.R. § 287.7(a) (2014). The sections of the U.S. Code referenced in the detainer regulations indicate that ICE may collaborate with localities that "choose" to participate in immigration enforcement. *See* 8 U.S.C. §§ 1103(a)(11), (c), 1357(d) (2012); *see also* Letter from Spencer Amdur, Lawyers' Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel, *supra* note 14.

128 Field preemption requires Congress to have legislated in a way that was so comprehensive as to occupy the field of an issue, where the framework of their legislation

TRUST Act is not generally incompatible with immigration enforcement regulations and would not be impliedly field preempted because it does not prevent DHS from enforcing immigration law, nor does it supplement immigration law. Instead, it addresses otherwise potentially unlawful extended detention of criminal arrestees for immigration purposes.

Even if the number of detainers or detainer requests has declined as a result of the TRUST Act, there is no indication that the decrease in detainers has interfered with ICE's enforcement of immigration law. The number of Notices to Appear (NTA) being issued annually is still at record high levels.[129] The TRUST Act would not slow actual rates of deportation, in part because so many deportations happen at the border in expedited proceedings, and because of immigration court backlogs.[130] Moreover, regardless of the number of apprehensions or orders of removal, DHS only has the capacity to deport about 300,000 to 400,000 people annually.

Instead of interfering with enforcement, the TRUST Act may result in a decrease in superfluous immigration detention of non-priority non-citizens, a cost borne by local law enforcement agencies, and subsequently ICE once the non-citizen is transferred to ICE custody. The TRUST Act may also increase the proportion of removals of higher priority offenders as identified by DHS.[131] Thus instead of interfering with enforcement, it may increase efficiency and cost effectiveness.

Additionally, even if the TRUST Act decreased the use of immigration detainers, it would not interfere with the information-sharing component of Secure Communities. Even after implementation of the TRUST Act, if a local law enforcement agent does not comply with the detainer request, the data-sharing component of Secure Communities, and now PEP,

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is "so pervasive . . . that Congress left no room for states to supplement it," or where the federal system of laws would "preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at 2501 (quoting *Hines*, 312 U.S. at 70). The Supremacy Clause disallows state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted).

129 *See At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013*, TRACIMMIGR. (Nov. 25, 2013), http://trac.syr.edu/immigration/reports/336/.

130 *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRACIMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Dec. 15, 2014); FY 2013 REMOVALS, *supra* note 33 (reporting that in FY 2013, of 368,644 removals, 235,093 were apprehended and removed at the border and 133,551 were apprehended within the United States).

131 *Enforcement Without Focus: Non-violent Offenders Caught in the US Immigration Enforcement System*, AM. IMMIGR. COUNCIL IMMIGR. POL'Y CTR. (Apr. 2, 2013), http://www.immigrationpolicy.org/printpdf/2925; KOHLI, MARKOWITZ & CHAVEZ, *supra* note 41.

remains in place because the biometric data will still be transmitted to DHS.[132]

Preemption in the immigration context is somewhat doctrinally muddled[133] and therefore necessitates additional consideration. The rest of this section will attempt to set forth two additional, more nuanced preemption methodologies relevant to the immigration context to offer additional insight into whether an integrative measure like the TRUST Act would be preempted. One model emphasizes the federal government's exclusive power and control over immigration pursuant to the plenary power doctrine,[134] which I will refer to as "constitutional preemption," and the other, "statutory preemption," favors a power-sharing approach enabling more of a role for sub-federal entities in legislating. These frameworks are merely two general approaches and do not create a dichotomy, but instead define a spectrum of views on the preemption doctrine. This next section will outline these two methodologies within discussions of immigration preemption before finally moving to consideration of civil rights preemption and "equality principles," and the role they may play within either framework for assessing the constitutionality of the TRUST Act.

D. Constitutional Preemption

Federal exclusivity preemption, or what I refer to as "constitutional preemption," is based on the federal government's unique power over certain matters. Federal exclusivity in immigration law is not established explicitly as a matter of constitutional doctrine, but is instead based on implied powers. Only Article I, Section 8, Clause 4 gives Congress the power to "establish a uniform Rule of Naturalization."[135] Otherwise, the federal government's power over immigration has been

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132 Once the FBI checks the fingerprints of an arrestee, the FBI automatically sends them to DHS, and ICE determines if the person is subject to removal. Secure Communities however, does not authorize local agents to issue Notices to Appear, as the 287(g) regulations did. *Secure Communities*, *supra* note 31.

133 Abrams, *supra* note 105, at 626.

134 *Id.* at 601, 615 (discussing preemption following the Supreme Court's decision in the *Arizona v. United States* case and helping to make sense of contemporary immigration preemption doctrine by suggesting that the Court will apply field or structural preemption to consider or invalidate a state statute that regulates core immigration functions (admissions and removals) and what Abrams terms "plenary power preemption," used to invalidate alienage laws, and describing plenary power preemption in part as a manifestation of immigration exceptionalism as linked to structural immigration preemption concerns regarding the unique nature of foreign affairs).

135 U.S. CONST. art. I, § 8, cl. 4.

interpreted as implied.[136] The power of Congress to admit or deport non-citizens is considered "plenary," or absolute.

The federal government's plenary power is what gives rise to federal exclusivity in the context of preemption of sub-federal immigration laws.[137] The plenary power doctrine has evolved since its establishment pursuant to the Chinese exclusion cases in 1889 and 1893, where the Court held in *Fong Yue Ting v. United States* and *Chae Chan Ping v. United States* that the federal government has exclusive power over admissions and removals.[138]

Perhaps most recently and relevantly, the Supreme Court's 2012 decision in *Arizona v. United States* reaffirmed the exclusivity of the federal government in immigration law.[139] In spite of the critiques of federal exclusivity, some contend that it remains relevant as a tool to stem "the discriminatory powers of the states on immigrants,"[140] particularly in the absence of civil rights preemption or application of equality principles within the preemption analysis.

Unlike S.B. 1070, the TRUST Act does not regulate in an area that is a core immigration matter (admissions or removals), compared to the main thrust of S.B. 1070, which was clearly revealed in Section 1 as Arizona's immigration policy.[141] Instead it only indirectly concerns enforcement, and relies on a typical exercise of state police power by identifying non-citizens and limiting their continued incarceration. The impact of the TRUST Act can be characterized as ancillary to immigration. While a court could use the national sovereignty rationale from structural preemption and plenary power preemption and characterize the TRUST Act as an immigration regulation in disguise, even

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136 LEGOMSKY & RODRÍGUEZ, *supra* note 10, at 113–30.

137 *Id.* at 113–14.

138 Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889); LEGOMSKY & RODRÍGUEZ, *supra* note 10, at 195 (explaining the evolution of the plenary power doctrine).

139 Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. & C.L. 1, 2–3 (2013) (noting the Court's support for federal primacy in the context of immigration enforcement); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 580–81 (2012).

140 Rodríguez, *supra* note 116, at 613; Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102–15 (2004) (discussing the threat of racial profiling by state and local law enforcement).

141 *See* Abrams, *supra* note 105 (discussing the Court's application of plenary power or structural preemption based in part on distinguishing alienage and immigration laws).

though it is otherwise an exercise of state police power, this seems unlikely.[142]

Constitutional preemption does not necessarily indicate that any sub-federal law, whether immigrant integrative or anti-immigrant, would be preempted. While S.B. 1070 was preempted based largely on a federal exclusivity-oriented preemption analysis,[143] as will be discussed in the next section, where civil rights and equality principles are incorporated into the preemption analysis, an immigrant integrative sub-federal measure should survive a preemption challenge.

Scholars have questioned the rationale behind federal exclusivity in preemption analyses of state laws concerning immigration.[144] Some suggest that the foreign policy rationale justifying federal exclusivity is no longer relevant,[145] or that federal exclusivity is no longer appropriate as a result of the shift towards increased power sharing between the federal government and sub-federal entities, and the immigrant-integration role of localities.[146] Additionally, prior to 1840 the states played a direct role in regulating immigration.[147]

E. Statutory Preemption

Statutory preemption may allow more room for state and local governments to legislate in the field of immigration law[148] because it recognizes some degree of shared authority between

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142 *Id.* at 637 (explaining that in preemption cases with state alienage statute challenges, the Court has taken the national sovereignty issues from structural and plenary power preemption to suggest that the state statue is an immigration regulation in disguise even though it otherwise appeared to be an exercise of a traditional police power). The author suggests (and agrees) that based on Abrams's rationale, the Court would, however, be more likely to invalidate a sub-federal law using this rationale if the law were discriminatory, because in alienage cases the Supreme Court "deviates from the usual preemption doctrine and applies plenary power preemption," in part as a substitute for an inadequate equal protection doctrine. *Id.*

143 The author acknowledges that this is an oversimplification and extensive scholarly work has addressed the Court's preemption analysis.

144 *See, e.g.*, Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 789 (2008).

145 Peter J. Spiro, *The States and Immigration in an Era of Demi-sovereignties*, 35 VA. J. INT'L L. 121, 161–74 (1994).

146 Rodríguez, *supra* note 116, at 600–05.

147 States had used their constitutionally derived police power to regulate immigration until about 1840 when the courts started placing limits on their regulation of immigration. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 180–83, 189–90 (1987); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 21–23, 31–37 (1996).

148 Huntington, *supra* note 144, at 792–93.

national and sub-national levels of government.[149] The Immigration and Nationality Act can statutorily preempt sub-federal laws governing admission and removal of non-citizens.[150] Statutory preemption is neither express nor implied preemption, but a separate and distinct view of the preemption doctrine.[151]

New configurations of the term "immigration federalism" may be parallel to statutory preemption in that they recognize simultaneous engagement of federal and sub-federal actors in immigration regulation regardless of whether the rulemaking is integrative or anti-immigrant.[152]

Statutory preemption recognizes sub-national authority arising in part pursuant to the police power to regulate health and safety.[153] Because the federal government has traditionally dominated the field of immigration law, if a sub-federal law were preempted, it will most likely be field preempted.[154]

Statutory preemption recognizes that the foreign affairs justification for federal exclusivity may be less relevant because foreign powers interact directly with sub-federal actors,[155] and nations understand that the actions of one state or locality may not reflect the will of the federal government.[156] It is also less possible now than in the past to exclude states and localities from activities with foreign affairs impact.[157] At the same time, leaders of other countries recognize that sub-federal entities within the United States have the power to act in ways that may be at odds

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149 *Id.* at 810 n.90 (citing Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 131 (2004)); *id.* at 826.

150 *Id.* at 825.

151 *Id.* at 842.

152 Elias, *supra* note 34, at 708.

153 Huntington, *supra* note 144, at 825.

154 Within the context of statutory preemption is the question of whether federal rules expressly or impliedly preempt sub-federal rules. *Id.* at 850 (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983)). Implied field preemption is a type of statutory preemption. For more on statutory and implied field preemption, see *id.* at 850–52.

155 *See* Rodríguez, *supra* note 116, at 615–16 (citing Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1639–43 (2006)); Spiro, *supra* note 145, at 162–63 (showing how states and localities interact with international entities).

156 *See* Amanda Mangaser, State and Local Regulation of Immigration and Immigrants: A Connecticut Case Study 12 (Dec. 17, 2013) (Student Legal History Paper, Yale Law School), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1027&context=student_legal_history_papers (citing Rodríguez, *supra* note 116, at 571).

157 Rodríguez, *supra* note 116, at 615 ("[I]t is no longer clear that it is possible or even desirable to exclude states and localities from activities that implicate foreign affairs.").

with federal policies.[158] Under this preemption model, the TRUST Act should not be preempted because it should not have an adverse impact on foreign affairs, as it is immigrant integrative, and regardless, it is reasonable to presume that other nations will not attribute the TRUST Act to the federal government.

Historically, prior to the era of the plenary power doctrine, states played a role in immigration.[159] Today, sub-federal entities play a significant role in integrating immigrants through public services such as hospitals, schools, and the workplace.[160] There is a "de facto" power sharing occurring between these levels of government and the federal government.[161] At the same time, even if federal exclusivity were removed from the analysis of state immigration laws, civil rights preemption or active incorporation of equality principles would facilitate sub-federal integrative measures while casting more of a shadow on disintegrative ones. In other words, it could be possible to move away from federal exclusivity in preemption considerations while still protecting civil and individual rights.

Within this context, the federal government should not require states and localities to participate in immigration enforcement where those bodies are attempting to integrate.[162] However, failure to recognize immigrant equality principles as an essential part of preemption analyses would still result in creation of anti-immigrant zones where states and localities choose to create discriminatory or enforcement-oriented measures. Some scholars suggest that permitting states to enact anti-immigrant measures may help facilitate the eventuality of

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158 Instead of suggesting the elimination of federal exclusivity or "immigration federalism," others, such as Peter Schuck, have suggested that federalism need not mean "constitutional state sovereignty," where "state authority inheres in the constitutional settlement among the states and the people, whereby only limited powers . . . were delegated to the national government while all other powers were reserved to the states and the people." Schuck, *supra* note 144, at 66. He explains that instead, "state participation can take many different forms: administration and/or enforcement of federally-established rules and policies; policy development and implementation within parameters (more or less constraining) set by federal policymakers; federal funding of states to develop their own policies; and many other collaborative (though inevitably conflicting) arrangements," and immigration federalism occurs when "states operate under, and are obliged to respect, federal immigration policies and supervision." *Id.* at 66–67. He also notes that this is what Peter Spiro calls "cooperative federalism." *Id.* at 67 (citing Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 167 INT'L SOC. SCI. J. 67, 67–68 (2001)).

159 *See* LEGOMSKY & RODRÍGUEZ, *supra* note 10, at 110–30.

160 *See* Rodríguez, *supra* note 116, at 571–72, 609–17.

161 *Id.* at 610.

162 *Id.* at 631.

their independent decision to cease such practices.[163] However, even if this were true, because the preemption analysis can and should address issues of civil and individual rights, we need not permit such potentially harmful and optimistic experimentation.

The statutory preemption model would still permit analysis of individual rights because the Constitution's concern with structural issues includes not only the relationship among the branches of sub-national and national government, but also individual rights.[164] The allocation of authority can be informed by questions of individual rights and both can be considered in the preemption analysis, even if federalism and individual rights are fundamentally different questions.[165] However, I would suggest that federalism and individual rights are not fundamentally different questions, as was suggested by the Court's interpretation of the role of the Civil Rights Act in preemption in *Takahashi v. California Fish and Game Commission*,[166] *Hines v. Davidowitz*,[167] and *Graham v. Richardson*.[168]

VI. EQUALITY PRINCIPLES AND CIVIL RIGHTS PREEMPTION

For the purposes of this Article, the "equality principle" refers to the constitutional ideal of equality derived from the rationales of the *Plyler v. Doe* and *Brown v. Board of Education* Courts,[169] combined with the notion that everyone in the United States should be treated equally whether their presence in the United States is authorized or not. Immigration scholar Hiroshi Motomura has written extensively about the notion of "Americans in Waiting," or "future members of American society." "Americans in Waiting" may be unauthorized migrants who are already members of and participants in American

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163 *Id.* at 639 ("[T]his transition from fear to acceptance is more likely to occur not only if the local debate over immigration is permitted to run its course (subject to generally applicable laws), but also if the localities that adopt these [anti-immigrant] ordinances come to feel the consequences of excluding immigrants from their communities—namely, the economic consequences of pushing immigrants out of places they helped revitalize."). Rodríguez responds by questioning whether once immigrant labor has helped revitalize a locale, might the immigrant contribution be dismissed and the population be just as unwelcome as they were initially, as if they had made no measurable or perceivable contribution. *Id.* at 639–40.

164 Huntington, *supra* note 144, at 793–94, 828, 834–37.

165 *Id.* at 794.

166 *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

167 *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

168 *See* Graham v. Richardson, 403 U.S. 365 (1971).

169 *See* MOTOMURA, *supra* note 52, at 88 (discussing the *Plyler* decision which treated Texas schoolchildren as future members of U.S. society because of a concern about their integration ability and consequences for them, and the United States as a whole, absent such consideration).

society based on their presence and participation as consumers, workers, and beyond.[170] Thus it is reasonable to propose that future Americans should be entitled to certain rights and protections. Accordingly, by incorporating this kind of equality principle into the preemption analysis, an integrative sub-federal law pertaining to immigration or alienage[171] should not be preempted.

Similarly, immigration scholar Lucas Guttentag discusses and defines an "equality principle" by focusing on civil rights preemption as derived from the Civil Rights Act of 1870, which prohibits discrimination based on "alienage."[172] Guttentag examines the role of this equality principle in the context of assessing sub-federal immigration laws. Application of this equality principle also suggests that an immigrant integrative sub-federal law that furthers the immigrant equality principle derived from the Civil Rights Act would not be preempted.

The next section will employ a combined equality principle based on the notion of applying principles of non-discrimination to all present in the United States irrespective of immigration status, and application of the civil rights equality principle derived from the Civil Rights Act to establish a relevant framework to assess the TRUST Act.

A. The Equality Principle Derived from the Civil Rights Act of 1870

While the Constitution creates what is known as the federalist structure, the role of individual rights expands beyond equal protection, into preemption analyses.[173] The 1866 and 1870

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170 *Id.* at 86–112.

171 Unless otherwise noted, I do not distinguish between immigration and alienage laws for the purposes of my discussion.

172 Guttentag, *supra* note 124.

173 Huntington, *supra* note 144, at 837 (explaining that "the Constitution also is concerned centrally with the rights of individuals" at the same time that it creates the federalist structure). The author notes that there is an interesting interplay between the appropriateness of preemption as opposed to equal protection in addressing discrimination and federalism. Though there are reasonable arguments for why the Equal Protection Clause should apply uniformly, with the same level of review at the state and federal level, consideration of individual rights has figured into preemption analyses and may rightfully belong there as well. Scholars have suggested that equality principles might be better recognized and the equal protection doctrine might be more effective if federal exclusivity were eliminated in the context of equal protection claims which result in differing levels of scrutiny depending on whether the action arises in state or federal contexts. Elimination of federal exclusivity would mean that alienage classifications would be subject to a higher level of scrutiny than they are now at the federal level. However, equal protection is still an after-the-fact remedy, as opposed to recognizing integrative state immigration measures as not subject to preemption by taking into

Civil Rights Acts included "alien" or non-citizen anti-discrimination principles which were codified in the United States Code and Immigration and Nationality Act, though they eventually found their way into a different section.[174] Congress's intent to acknowledge and potentially prevent discrimination against non-citizens is evidenced by the express provisions of the Civil Rights Act, codified at Title 42 of the U.S. Code section 1981, and first set forth in section 16 of the 1870 Act. The provisions state in relevant part, "'all persons' shall have the same right as 'white citizens' in 'every State and Territory' to certain enumerated rights."[175] From approximately 1886 to 1971, the Supreme Court referenced this provision in preempting discriminatory sub-federal legislation.[176]

B. The Supreme Court's Use of Civil Rights Preemption and Equality Principles to Protect Non-citizens

In prior decades, up until approximately 1971, the Supreme Court actively recognized the anti-immigrant discrimination components of federal law when preempting state statutes.[177] In this respect, immigration scholar Lucas Guttentag and others have focused on the Court's decisions in the 1866, 1941, 1948, and 1971 cases of *Yick Wo v. Hopkins,*[178] *Hines v. Davidowitz,*[179] *Takahashi v. California Fish and Game Commission,*[180] and *Graham v. Richardson,*[181] respectively. I will briefly reference some of the instances where the Court considered individual rights pursuant to the Civil Rights Act, addressing their

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consideration equality principles, and considering the possible preemption of anti-immigrant enforcement measures that run contrary to equality principles.

174 Guttentag, *supra* note 124, at 20–26 (examining the role "equality principles" were intended to play in preemption of sub-federal measures affecting non-citizens, as well as the reason the Court has not emphasized civil rights preemption for the past several decades—primarily because of the codification of the Civil Rights Act in disparate parts of the U.S. Code and elsewhere, and partially because of the relationship between the Equal Protection Clause and preemption). The "alien non-discrimination" provision, section 1977 (originally section 16 of the 1870 Act), became codified at 8 U.S.C. section 41, in what was the "Civil Rights" chapter of the Aliens and Citizenship Act as was first published in 1926. The current version is located at 42 U.S.C. sections 1981–1983. *Id.* at 23; *see* 8 U.S.C. §§ 41–43 (1926). After enactment of the first comprehensive set of immigration laws into the Immigration and Nationality Act (INA) in 1952, the two civil rights provisions from the 1866 and 1870 Acts ended up in the Health and Welfare title, and were no longer contained in Title 8, the Immigration title.

175 Guttentag, *supra* note 124, at 10 (citing the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified in part at 42 U.S.C. § 1981 (2012))).

176 *Id.*

177 Preemption was generally of "alienage" laws rather than "immigration" ones, but an in-depth discussion is not necessary for the purposes of the following discussion.

178 *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

179 *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

180 *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

181 *See* Graham v. Richardson, 403 U.S. 365 (1971).

characterization of the relationship between equal protection and preemption where relevant. These cases demonstrate the instances where the Court recognized equality principles of the Civil Rights Act to preempt a sub-federal law. The same rationales apply in assessing the TRUST Act.

In 1886, the Supreme Court considered the constitutionality of a San Francisco ordinance barring laundries of wooden construction because the ordinance was applied in a racially discriminatory manner.[182] While the Court's holding in *Yick Wo v. Hopkins*[183] relied on equal protection grounds, the Court referenced the 1870 Act explicitly.[184] *Yick Wo* was subsequently cited by other courts in striking down state law as discriminatory on preemption grounds.[185]

In *Hines v. Davidowitz* the Supreme Court invalidated a Pennsylvania statute creating a state crime for a non-citizen's failure to comply with federal registration requirements, and criminalizing unauthorized employment.[186] In preempting the measure, the Court validated the plaintiff's claims that the state law conflicted with constitutional rights and the 1870 Civil Rights Act.[187] The *Hines* Court specifically acknowledged the 1870 Civil Rights Act's "non-discrimination mandate" tied to federal immigration laws for the purposes of preemption analysis.[188]

In *Takahashi v. California Fish and Game Commission*,[189] the Court invalidated a California state law prohibiting issuance of a commercial fishing license to an "alien Japanese" on civil rights preemption grounds.[190] The Court preempted the law, finding the 1870 Civil Rights Act anti-discrimination protections inextricable from Congress's comprehensive immigration plan even though it did not rule that the law violated equal protection.[191] The *Takahashi* ruling demonstrated that the Civil Rights Act could serve as the basis for invalidating a state law to further equality principles, even where the state law is not invalid pursuant to Fourteenth Amendment equal protection standards.[192]

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182 *Yick Wo*, 118 U.S. at 356–59, 374.
183 *Id.* at 369.
184 Guttentag, *supra* note 124, at 28 (citing *Yick Wo*, 118 U.S. at 374).
185 *Id.* at 28–29 & n.106.
186 Hines v. Davidowitz, 312 U.S. 52, 60–74 (1941).
187 Guttentag, *supra* note 124, at 30 (citing *Hines*, 312 U.S. at 69).
188 *Id.*
189 Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
190 *Id.* at 410–20.
191 *Id.* at 419; Guttentag, *supra* note 124, at 34.
192 Guttentag, *supra* note 124, at 34.

In 1971 the Court invalidated state welfare statutes restricting eligibility of immigrants for state benefits programs on equal protection grounds,[193] and simultaneously on civil rights preemption grounds.[194] In *Graham v. Richardson,* the Court found that the state laws were preempted under the Supremacy Clause[195] based on immigrant protections of section 16 of the Civil Rights Act,[196] as well as an overarching implied conflict with federal immigration law.[197] Thus the *Graham v. Richardson* decision signified the Court's acknowledgement that preemption could stem from the Civil Rights Act itself in the immigration context and not just the 1952 Immigration and Nationality Act.[198]

When considering the validity of a state immigration-related law, the Court has recognized the importance of the relationship between the state law and equality principles of federal law.[199] Yet in the decades following *Graham,* where the Court has invalidated a sub-federal law, it has done so based on foreign affairs related preemption or equal protection considerations.

Several recent preemption cases provide examples of instances where the Court relied on non-civil rights preemption grounds or equal protection.[200] A brief consideration of how the courts have strayed from civil rights preemption helps frame the discussion regarding why the Court could and should consider individual rights in the preemption analysis of both immigrant integrative or discriminatory state or sub-federal measures.

In *Plyler v. Doe,* the Supreme Court invalidated what was found to be a state attempt at enforcing immigration law by denying a public education to unauthorized migrant children.[201] The Court ruled on equal protection grounds rather than finding that the federal law preempted the Texas statute.[202] Justice Brennan noted that the Constitution required protecting undocumented children from discriminatory laws, and that

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193 *Id.* at 29 n.106 (citing Graham v. Richardson, 403 U.S. 365, 371–72 (1971)).

194 *Id.* at 35 (citing *Graham*, 403 U.S. at 366–68).

195 *Id.* at 36 n.151 (citing *Graham*, 403 U.S. at 376–77).

196 *Id.* at 36 (citing *Graham*, 403 U.S. at 377).

197 *Id.* (citing *Graham*, 403 U.S. at 378).

198 *Id.* at 37–38.

199 *Id.* at 36–37 (citing *Graham*, 403 U.S. at 377).

200 *See* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013), *cert. denied,* 134 S. Ct. 1491 (2014); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013), *cert. denied,* 134 S. Ct. 1491 (2014); Arizona v. United States, 132 S. Ct. 2492 (2012); Plyler v. Doe, 457 U.S. 202 (1982) (holding that discrimination against undocumented children is subject to heightened scrutiny in the equal protection analysis); De Canas v. Bica, 424 U.S. 351 (1976).

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

202 *Id.* at 210 n.8.

preemption decisions may be influenced by a concern about "negative externalities."[203] However, the furthest the Court went in addressing the possibility of civil rights preemption was the suggestion, within their equal protection analysis, that states and localities have less authority than the federal government to discriminate based on immigration status.[204]

Similarly, in *Farmers Branch*, the Supreme Court also found a state law conflicted with federal immigration law where it restricted lawfully present non-citizens' ability to rent housing.[205] The Supreme Court found the state law preempted by federal immigration law, but did not address civil rights preemption.[206] While the Court cited a case where it had struck down a state law which interfered with the ability of an inhabitant to earn a living based on race or nationality,[207] it did not rely on the individual rights protections of the 1870 Civil Rights Act in its preemption analysis.

The plaintiffs in *Lozano v. City of Hazleton* brought preemption and equal protection claims alleging that two Hazleton, Pennsylvania ordinances were discriminatory and preempted by federal immigration law.[208] The ordinances required proof of U.S. citizenship or lawful immigration status in order to work or rent housing.[209] On remand following the Supreme Court's decisions in *Chamber of Commerce v. Whiting* and *Arizona v. United States,* the Third Circuit determined that the broad employment and housing provisions of the ordinance were impliedly preempted.[210]

The *Hazleton* court's preemption of the employment provisions was based in significant part on the Hazleton ordinance's omission of protections against discrimination.[211] In passing the 1996 Act expanding workplace enforcement,

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203 Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 165 n.348 (2014) (citing *Plyler*, 457 U.S. at 218–19) ("[There is a] concern over the development of 'a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents'. . . . (citation omitted) 'We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.'").

204 MOTOMURA, *supra* note 52, at 117, 137.

205 *Farmers Branch*, 726 F.3d 524.

206 *Id.*

207 *Id.* at 559 (citing Truax v. Raich, 239 U.S. 33, 42 (1915)).

208 Lozano v. City of Hazleton, 724 F.3d 297, 301–02 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014).

209 *Id.* at 301.

210 *Id.* at 300.

211 *See* MOTOMURA, *supra* note 52, at 108–11, 125–29.

Congress had been careful to include anti-discrimination measures. In finding the employment provisions preempted, the *Hazleton* court specifically cited the lack of similar protections in the Hazleton legislation.[212]

Underlying the court's conflict preemption analysis was the notion that the ordinances were impliedly conflict preempted by federal immigration law because they interfered with the way in which federal immigration authorities exercise discretion in immigration enforcement.[213] Even though the plaintiffs provided ample evidence that the ordinances resulted in potential racial and ethnic discrimination against unauthorized migrants and Latino U.S. citizens, the court did not apply civil rights preemption.[214]

In 2012, the Court relied on foreign-affairs preemption to address underlying concerns about discrimination in *United States v. Arizona.* This kind of disingenuous reliance on foreign-affairs preemption[215] has caused critics to argue for the end of federal exclusivity in preemption analyses and to suggest more direct consideration of the role of individual rights and recognition of the rights of non-citizens.[216] The *Arizona* Court referenced *Hines v. Davidowitz* regarding the possibility of "unnecessary harassment of aliens" (whom the government may not seek to deport) as a threat to federal, presumably civil rights, interests.[217] The Court's reference to the possibility of mistreatment of non-citizens based on race by sub-federal agents was, however, couched in a reference to foreign affairs concerns. Instead, the Court could have addressed the issue of discrimination by employing civil rights preemption.[218]

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212 *See* Motomura, *supra* note 96, at 1734. The *Lozano* court might not have found the ordinance preempted had the plaintiffs not brought forth evidence of racial and ethnic bias. *Id.* at 1743.

213 MOTOMURA, *supra* note 52, at 121, 123.

214 *Id.* at 133; Lozano v. City of Hazleton, 620 F.3d 170, 176, 195 & n.19 (3d Cir. 2010), *vacated,* 131 S. Ct. 2958 (2011); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484–85, 508–10, 538–42, 556–62 (M.D. Pa. 2007), *aff'd in part, rev'd in part,* 724 F.3d 297 (3d Cir. 2013), *cert denied,* 134 S. Ct. 1491 (2014).

215 A more complete discussion of foreign-affairs preemption is beyond the scope of this Article, with the exception of references made here pertaining to the relationship between foreign-affairs preemption and constitutional preemption or preemption influenced by the plenary power doctrine.

216 Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States,* 44 COLUM. HUM. RTS. L. REV. 367, 421 (2013).

217 Arizona v. United States, 132 S. Ct. 2492, 2498–99 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)).

218 Guttentag, *supra* note 124, at 9 (citing *Arizona,* 132 S. Ct. at 2506) (noting that the *Arizona* Court did not address the discrimination concerns based on the prohibition on alienage discrimination creating an avenue for civil rights preemption, based on the 1870 Civil Rights Act); *id.* at 30 (discussing *Hines v. Davidowitz,* which the *Arizona* Court also cited in relying on the foreign affairs power as a source of immigration authority to

Many scholars have criticized the Court's failure to address S.B. 1070's potential for harassment of immigrants as a civil rights matter. Professor Guttentag critiqued the Court's analysis as "significant but incomplete" for failing to address this issue in the preemption analysis, and for only considering the harm of discrimination to foreign relations, as opposed to those suffering the discrimination themselves.[219] Other scholars have noted that the Court has demonstrated a "'disregard [of] the antidiscrimination goals of federal immigration policy' and a 'deemphasiz[ing of] antidiscrimination norms'" within federal immigration enforcement policy and practice.[220] Indeed, the *Arizona* Court was "unwilling or unprepared to embrace civil rights issues in its preemption analysis."[221] Yet, at least one scholar has optimistically proposed that even without addressing equality principles or civil rights preemption, the *Arizona* ruling is indicative of a "new immigration federalism" that will allow states and localities to engage in integrative, or "inclusionary rulemaking," while limiting measures that would exclude immigrants.[222] Irrespective of the Court's failure to address equality principles or civil rights, the *Arizona* decision may stand for the principle that states cannot engage in anti-unauthorized migrant "immigration" (as opposed to "alienage") legislating if the measure interferes with the federal government's plenary power over immigration.[223]

While equality principles played a role, civil rights preemption did not prevail in the determination of whether Arizona labor regulations were preempted in *Chamber of Commerce v. Whiting*.[224] In 2011 the Supreme Court held in *Whiting* that the 1986 Immigration Reform and Control Act (IRCA) did not expressly preempt the Legal Arizona Workers Act provision allowing suspension and/or revocation of business licenses for employers who knowingly or intentionally employ undocumented workers lacking work authorization, or for

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consider invalidation of state discriminatory laws); *id.* at 31 (citing *Hines*, 312 U.S. at 70) (emphasizing that Justice Black's discussion of preemption in *Hines* "recognized the equality rights and liberty interests of the immigrants themselves that underscores the immigrant equality element of federal law").

219 Guttentag, *supra* note 124, at 9–10.

220 Lasch, *supra* note 40, at 292.

221 *Id.*

222 Elias, *supra* note 34, at 743–47.

223 *Id.* at 719 (explaining that the *Arizona* decision prohibits sub-federal anti-immigrant "immigration" legislation while permitting sub-federal integrative "alienage" measures because the decision contemplated "immigration" laws and not "alienage" measures); *see also* Kit Johnson & Peter Spiro, Debate, *Immigration Preemption After* United States v. Arizona, 161 U. PA. L. REV. ONLINE 100, 105 (2012), *available at* http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-100.pdf.

224 *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

adopting a provision that mirrored federal law mandating use of the federal E-Verify database.

Plaintiffs had alleged in part that the law condoned discrimination against those perceived as appearing "foreign looking."[225] Justice Roberts stated that there was no reason to suspect that the law would cause discrimination against Hispanics "lawfully" in the United States.[226] Roberts's concluding remarks on preemption indicated that implied preemption does not permit a "'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,'" and that civil rights or discrimination concerns could not establish the requisite high threshold for finding preemption in that case.[227] Justice Breyer elicited civil rights preemption by countering that the law disrupts a careful balance between competing Congressional goals and "seriously threatens the federal Act's antidiscriminatory objectives" by not including anti-discrimination protections present in the federal immigration law while increasing penalties for hiring unauthorized workers, thus increasing the chances of discrimination.[228]

Hiroshi Motomura has aptly recognized that the relationship between equal protection and preemption is, in part, that preemption steps in where equal protection fails.[229] These cases, even those where the equal protection claim was validated, present instances where the Court could have employed civil rights preemption. Rather than relying on ill-suited or ineffective tools to address rights issues, the courts should resurrect civil rights preemption whether they take a view of preemption that favors federal exclusivity, or statutory preemption.

After the passage of the 1866 and 1870 Civil Rights Act, up until about 1971, the Supreme Court explicitly considered civil

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225 For an insightful discussion of *Whiting*, see Hiroshi Motomura's 2014 book: *Immigration Outside the Law*. MOTOMURA, *supra* note 52, at 119–20, 124–25. Motomura discusses preemption in *Whiting* and *Hazleton* and the courts' omission of consideration of the way in which states indirectly enforce immigration law by making living and working in a state exceptionally difficult. *Id.* He contrasts these decisions to the *Arizona* decision, which acknowledged this issue in the context of their preemption decision. *Id.* at 124–25.

226 *Whiting*, 131 S. Ct. at 1970.

227 *Id.* ("Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.' Our precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.' That threshold is not met here.") (citations omitted).

228 *Id.* at 1990 (Breyer, J., dissenting).

229 MOTOMURA, *supra* note 52, at 136.

rights and discrimination concerns in the context of their preemption analysis. Immigrant equality is a part of Supremacy Clause analysis, and as a part of the preemption analysis, "equality adds a ground for preempting laws that cause discrimination and for validating measures that promote immigrant integration and protection."[230] Equality concerns can play a role in addressing whether a sub-federal measure should be deemed preempted.

Because statutory preemption permits power sharing between the federal government and sub-federal authorities, the TRUST Act would likely not be preempted pursuant to a statutory preemption analysis.[231] When considering whether the TRUST Act would be statutorily preempted, the analysis would depend on whether the Act was field preempted. As discussed above, Congress's legislation in the field of immigration law may be comprehensive; however, the TRUST Act regulates within a state's police power, concerning incarceration in a state prison or jail, using state resources. Thus, even though federal immigration law occupies a comprehensive field, it does not preempt the TRUST Act.

If equality principles were incorporated into a statutory preemption analysis, the Court could also look to the field of civil rights law. When considering the TRUST Act in the context of field preemption incorporating federal civil rights law, the TRUST Act is even less likely to be preempted. The integrative components of the Act have the potential to protect individual rights by counteracting the potential discriminatory threats of Secure Communities, which suggest its harmony with the field of federal civil rights law.

In the context of shared authority between federal and sub-federal law enforcement agents, the historic prevalence of racial discrimination in law enforcement necessitates incorporation of equality principles into the preemption analysis. Even if shared authority between the federal government and the sub-federal entities suggests the need to move away from preemption of sub-federal immigration-related measures, application of equality principles would result in preemption of discriminatory enforcement measures, but survival of inclusive state or sub-federal laws like the TRUST Act. Regardless of

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230 Guttentag, *supra* note 124, at 4–5.

231 Huntington, *supra* note 144, at 832. Statutory preemption does not eliminate the applicability of express or implied preemption. *Id.* at 824–25. Field preemption is a type of statutory preemption, and considers the extent to which the federal government has regulated the entire field and as a result, prohibited sub-federal entities from playing a role. *Id.* at 851.

whether a statutory preemption or federal exclusivity model is used, as long as essential equality principles are incorporated into the analysis, the TRUST Act would not be preempted.

Federal exclusivity generally suggests that a sub-federal measure may be more likely to be preempted than under statutory preemption. However, if equality principles were incorporated under a federal exclusivity preemption analysis, the TRUST Act and similar immigrant integration measures should survive a federal exclusivity preemption challenge. Because Secure Communities has the potential to incentivize or present a threat of discrimination,[232] and because it undermines the few existing and already inadequate remedies to discrimination, such as Fourth Amendment suppression,[233] equality principles should be considered when evaluating the possible preemption of measures like the TRUST Act.

One of the reasons for maintaining federal exclusivity in immigration law may not be the foreign affairs rationale, but instead may be to ensure that sub-federal law enforcement agents do not have the power to discriminate based on race or national origin, including in determining who is an American.[234] Federal exclusivity has the potential to prevent the erosion of anti-discrimination principles resulting from increasing involvement of sub-federal agents in immigration enforcement.[235]

A broad view of preemption may also be important because the federal government's power to exercise discretion in enforcement is an important part of federal immigration doctrine.[236] The Court has struck down sub-federal measures as

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232 As noted by Lucas Guttentag, it is the threat of potential discrimination and harassment that the Civil Rights Act was designed to curtail, which is why equality principles should play a role in preventing harassment through application in preemption analyses. A law could be deemed "inconsistent with federal purposes" if it threatens the risk of harassment or abuse. Guttentag, *supra* note 124, at 49–50. Thus, correspondingly, where a state law *decreases* or counteracts the possibility of such a threat or risk of harm, equality principles founded in federal civil rights law may result in finding the sub-federal measure not preempted.

233 *See* discussion *supra* Section IV.A.

234 MOTOMURA, *supra* note 52, at 137 ("[O]ne of the most essential functions of the federal government has been to make sure that regions, states, or localities are not allowed to decide who is an American in ways that rely improperly on race or ethnicity.") (suggesting that this federal role trumps the federal government's role in conducting foreign affairs in supporting immigration federal exclusivity or exceptionalism).

235 Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

236 MOTOMURA, *supra* note 52, at 115. There may be a higher likelihood of racial and ethnic discrimination by sub-federal law enforcement officers on the street exercising micro level discretion, resulting indirectly in inappropriately biased decisions about immigration enforcement, and that bias escapes remedy. Thus, "limiting the state and local role in immigration law is a way of preventing discrimination in state and local enforcement before it might happen." *Id.*

preempted by federal immigration law precisely because immigration law includes the discretion *not* to arrest, and not to deport individuals who may in fact be deportable.[237] In addition to being able to exercise discretion not to arrest a suspected unauthorized migrant, or not to pursue removal proceedings, immigration law creates discretionary forms of relief from removal. Where sub-federal laws interfere with the federal government's intended broad exercises of authority in immigration enforcement, some state immigration laws may properly be found preempted. In part because of federal exclusivity principles, and because the TRUST Act does not constrict the federal government's ability to exercise discretion in the enforcement of immigration law, it should not be found preempted.

Preemption analysis should take into consideration not only the source of the law, but also the substance,[238] and whether the execution of the law will have discriminatory effects.[239] Similarly, courts should heed inherent equality concerns in federal immigration law when considering whether federal immigration law preempts state integrative measures.

CONCLUSION

Millions of non-citizens in the United States either live with the threat of racial profiling by law enforcement agents or have experienced it. They know that such profiling can impact their life's trajectory and that of their families. Sub-federal involvement in immigration enforcement resulting from Secure Communities—and now PEP—and immigration detainer practices have played a direct role in creating both this perceived and actual threat. There is substantive support for allegations of ethnic or racial bias in immigration policing, particularly in conjunction with Secure Communities.

Legal avenues to prevent such profiling, or reverse the harms stemming from it, are insufficient. In the continued absence of immigration reform permitting millions to go to work, attend school, and care for their families without the fear of detection and deportation, TRUST Acts and similar measures have arisen.

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237 *Id.* at 121.

238 MOTOMURA, *supra* note 52, at 136–37 ("In defining the constitutional division of power between the federal government and states and localities, the *content* of state and local decisions also matters.").

239 Gulasekaram & Ramakrishnan, *supra* note 102, at 2131 ("[T]o the extent federal courts insist on treating laws like S.B. 1070 as alienage laws, they must pay heed to the equality concerns inherent in the creation—and not just the execution—of such laws.").

If state laws that support immigrant equality or integration are considered in the context of the anti-discrimination aspects of federal immigration law and the Civil Rights Act, they may be understood as consistent with federal law and not preempted. By incorporating equality principles and employing civil rights preemption, a court could find a discriminatory state law preempted under either a federal exclusivity or statutory preemption model. Similarly, a state law that *prevents* discrimination or furthers inclusiveness should be viewed as in line with federal law and not preempted.

This Article has examined why immigrant integrative measures like the TRUST Act should be able to survive a preemption challenge. Eventually, federal immigration reform may decrease sub-federal legislating relating to immigration law. However, the essential equality principles derived from the Civil Rights Act and incorporated into immigration law may eventually return to the forefront in preemption litigation.