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ARTICLE

EXAMINING MARYLAND'S VIEWS ON IMMIGRANTS AND IMMIGRATION

By: Elizabeth Keyes*

INTRODUCTION

The *Baltimore Sun* has aptly described Maryland as having a “split personality” on immigration.¹ Maryland’s responses to a broken federal immigration system have diverged both in state-wide politics and in jurisdiction-by-jurisdiction approaches. We see the divergence in Frederick County’s embrace of using local law enforcement agencies to enforce immigration laws, contrasted with Baltimore City’s ongoing resistance to such efforts. Diverging views likewise complicated efforts to enact a law granting in-state tuition to “DREAMers,” high school graduates with no lawful immigration status who were brought here as youths by their parents. After the Maryland legislature passed such a law in 2011, anti-immigrant activists quickly gathered 50,000 signatures to have voters reconsider that law. Ultimately, voters approved the law through a November 2012 referendum, but the results of that referendum (as discussed below), reflect ongoing geographic divisions.

This essay examines these divergent trends in Maryland against the backdrop of federal actions and inactions in the realm of immigration, hoping to provide a useful overview of Maryland’s immigration politics to those not yet immersed in these issues. The failure of comprehensive

* Assistant Professor and Director of the Immigrant Rights Clinic, University of Baltimore School of Law. I thank the University of Baltimore Law Forum for extending the invitation for me to publish this essay, which is the basis for what I hope will be a future interdisciplinary collaboration examining these issues in more depth. I appreciate the thoughtful feedback provided by Sabrina Balgamwalla, Jayesh Rathod and Anita Sinha, and thank Aimee Mayer and Marlene Ailloud, from the American University Washington College of Law, for their indispensable research assistance.

¹ Julie Bykowicz, *Immigration Debate Splits Marylanders*, BALT. SUN, Jul. 31, 2011, http://articles.baltimoresun.com/2011-07-31/news/bs-md-maryland-immigrant-views-20110731_1_illegal-immigrants-undocumented-immigrants-sheriff-chuck-jenkins.

immigration reform in Congress has led many states, including Maryland, to consider how they might adjust to the broken immigration system through new laws of their own. Unlike states such as Arizona, Georgia and Alabama, which have responded in a more single-mindedly restrictionist manner,² Maryland's responses have showed far greater complexity. This essay examines ways in which Maryland's historical context has led to that complexity, and assesses the cost to states like Maryland of Congressional failure to pass comprehensive immigration reform.

I. BACKGROUND: RACE AND SOCIAL CHANGE, THEN AND NOW

A. *Historical Context*

Understanding the politics of immigration in Maryland today requires a brief foray into how Maryland has historically experienced polarizing social issues—a history which shows how often Maryland has struggled to accommodate divergent views. Any state-level response to the politics of immigration grows out of its own rich historical context.³ In Maryland that context dates back to the popular, if overstated, understanding of the state's founding as a site for those fleeing religious intolerance, combined with the deep racial and political divisions up to and through the Civil War; strands of history that endure in the ongoing political divisions between heavily African-American Baltimore City, the immigrant-heavy suburbs of Washington, D.C. and the predominantly white rural areas on Maryland's Eastern Shore and Western Panhandle.

Maryland's history provides no clear statewide narrative of tolerance or intolerance, racial harmony or racial disunity. Established in 1632 at the time of intense intra-Christian violence in Europe,⁴ Maryland was

² See *infra* note 107 and accompanying text for a discussion of Alabama's immigration policy. See Gustavo Vades, *Georgia Governor Signs Controversial Anti-Immigration Law*, CNN.COM (May 13, 2011, 4:42 PM), <http://www.cnn.com/2011/US/05/13/georgia.immigration.law/index.html> for a discussion of Georgia's immigration policy. Although the state-wide responses are more uniform, even within those states, there are small pockets of divergence, such as Tucson, in Arizona's case. See, e.g., Darren DaRanco, *Tucson Becomes an Immigrant-Welcoming City*, ARIZ. DAILY STAR (Aug. 8, 2012), http://azstarnet.com/news/local/govt-and-politics/tucson-becomes-an-immigrant-welcoming-city/article_c63f3f19-db26-5940-a1b1-8dc38428248d.html.

³ I drew inspiration for this project from Professor Kristina Campbell of the University of the District of Columbia, whose scholarship delves into Arizona's racial and immigration histories with the goal of understanding the origins of such high-profile laws as the Lawful Arizona Workers Act and the Support our Law Enforcement and Safe Neighborhoods Act (SB 1070). See *infra* note 84 and accompanying text for a discussion of SB 1070.

⁴ Oliver Cromwell's crusade to suppress Catholicism in Ireland alone is estimated to have cost the lives of approximately 618,000 people from fighting or war-related famine and

famously founded on principles of religious tolerance, although that tolerance did not extend to non-Christians, who were subject to land seizures or even execution.⁵ Even the intra-Christian efforts toward harmony were marred by uprisings, and the cornerstone of intra-Christian tolerance, the Toleration Act of 1649, was quickly revoked by a pro-Anglican commissioner during the Cromwell era in England.⁶ Racially, early settlers included both free and enslaved African-Americans⁷ and indentured white men and women.⁸ In these early days, the indentured white population greatly outnumbered enslaved Africans.⁹ As Maryland's economy shifted toward tobacco production, however, that balance shifted as well, and slaves made up 58% of the population of Prince George's County, where tobacco farming was particularly prominent, and approximately 40% of the overall population of the state.¹⁰

Contests over religious tolerance receded with the passage of the Bill of Rights, but the contest over slavery divided Maryland deeply, with dividing lines very similar to those existing today over the issue of immigration, involving comparable contests between federal and state authority. In this phase of Maryland history, too, we see division. On the one hand, Maryland had numerous communities supporting abolition and providing shelter as part of the Underground Railroad, from Sandy Spring in Montgomery County and the Leverton Farm in Carroll County, to African-American communities throughout the Eastern Shore, where Harriet Tubman lived and led many of her rescue missions.¹¹ On the other hand, Dorchester County saw Samuel Green, a free black man,

disease. See *THE CIVIL WARS: A MILITARY HISTORY OF ENGLAND, SCOTLAND, AND IRELAND 1638-1660*, at 278 (John Kenyon and Jane Ohlmeyer eds., Oxford Univ. Press 1998).

⁵ *Maryland Toleration Act*, CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION 14-15 (John J. Patrick & Gerald P. Long eds., Greenwood Press 1999) (1649).

⁶ The religious history of Maryland in the 17th century was intimately connected with the brutal history of repression in the British Isles under Oliver Cromwell. See *id.*

⁷ One African-American settler of Maryland was the first African brought to live at Jamestown, Anthony Johnson, who later migrated to Maryland as a freeman and purchased slaves himself. Project, *Knowing Our History: African American Slavery and the University of Maryland*, 20 (May 2009), <http://www.history.umd.edu/slavery/KOHFullTextnoendnotes.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Slavery in Maryland*, SMITHSONIAN: ANACOSTIA COMMUNITY MUSEUM, http://www.anacostia.si.edu/Plummer/docs/Teacher_Resources/High_School/hsslaveryreading.pdf. The estimate is of the black population, not specifically the slave population, but only a very small minority of the black population was free. *Maryland*, in *THE ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA* 256-57 (John Mack Faragher ed., 1990).

¹¹ The state of Maryland has assembled a guide to these and more sites related to slavery and the underground railroad. Maryland, *The Underground Railroad: Maryland's Network to Freedom*, <http://www.visitmaryland.org/BrochuresandMaps/UndergroundRailroad.pdf>.

sentenced to ten years in jail for merely possessing a copy of *Uncle Tom's Cabin*, and an Irish immigrant, Hugh Hazlett, sentenced to forty-four years in jail for his work freeing slaves on the Underground Railroad.¹²

Before the Civil War, Baltimore City itself had a slave population that was exponentially outnumbered by its free African-American population (2,218 slaves compared to 25,680 free African-Americans),¹³ and was a major point along the Underground Railroad.¹⁴ But slave-holders, too, lived in the city; it was in Baltimore that Frederick Douglass, while still enslaved, learned to read, and it was from Baltimore that he escaped to freedom in the North.¹⁵ One historian captured this ambivalence, writing

The decades-long transition from slavery to free labor had already forced many residents of upper Maryland to assume an ideological middle ground on matters of slavery and freedom, and this ambiguousness manifested itself in a subdued ambivalence on the concept of race---nowhere more evident than in Baltimore.¹⁶

On the question of slavery, a strong Quaker presence in Baltimore brought a northern perspective to the politics of slavery.¹⁷ But its effectiveness was muted in comparison to the Quaker movements farther North,¹⁸ and extreme secessionist views had a home, too, in Baltimore. Indeed, Baltimore was the site of a famous mob attack against a Union regiment passing through the city in 1861.¹⁹

In an incident with certain interesting resemblances to the dynamics of contemporary immigration politics, the Maryland legislature responded to the attack on Union soldiers by calling a special session to consider secession, but had to move the session to various locations because of

¹² KATE CLIFFORD LARSON, *BOUND FOR THE PROMISED LAND*, at 150 (2004).

¹³ CHRISTOPHER PHILLIPS, *FREEDOM'S PORT: THE AFRICAN-AMERICAN COMMUNITY OF BALTIMORE, 1790-1860*, at 15 (1997). This made Baltimore the city with the highest concentration of free African-Americans in the United States. See Matthew Crenson, *The Elephant in the City*, *URBANITE*, Nov. 1, 2006, <http://www.urbanitebaltimore.com/baltimore/the-elephant-in-the-city/Content?oid=1246619>.

¹⁴ Phillips, *supra* note 9, at 68-69.

¹⁵ FREDERICK DOUGLASS, *THE AUTOBIOGRAPHY OF FREDERICK DOUGLASS* (Library of America, 1994), at 346-47. For an account of Douglass' time in Baltimore, see *id.*, at 211-243.

¹⁶ Phillips, *supra* note 9, at 32.

¹⁷ Gordon E. Finnie, *The Antislavery Movement in the Upper South Before 1840*, 35 *THE JOURNAL OF SOUTHERN HISTORY* 319, 322 (1969).

¹⁸ The initial Maryland Society for Promoting the Abolition of Slavery failed by 1798, and was reformed in 1825 as the Maryland Anti-Slavery Society. *Id.* at 322-23.

¹⁹ Daniel Carroll Toomey, *Where the Civil War Began*, *BALTIMORE MAGAZINE* (Apr. 2011), <http://www.baltimoremagazine.net/features/2011/04/where-the-civil-war-began>.

Confederate sympathizers attacked soldiers of the 6th Massachusetts Regiment, and by the end of the fight, four soldiers and twelve civilians had been killed. *Id.*

unrest.²⁰ Finally settling on Frederick, a town known to be more sympathetic to the Confederate cause,²¹ the session met in August, and adjourned to reunite on September 17, 1861.²² But Baltimore police officers and federal troops arrived on that date to arrest the confederate sympathizers, ending the possibility of secession.²³ This incident foreshadows two elements of contemporary immigration politics in Maryland: how Baltimore City today stands in stark opposition to Frederick on federal policy, and how local law enforcement is deployed with the federal government to achieve federal government objectives. There is one major difference, though: unlike the Civil War era, when the federal government's position was perfectly clear, today both Baltimore City and the City of Frederick could be said to be supporting the federal government's immigration objectives, despite their position on opposite sides of the immigration divide. That this could be true signifies how deeply confused federal immigration policy itself is, which will be discussed further below.

Another contest between federal government priorities and states' rights emerged through the Civil Rights era of the 1960s, revealing comparable divisions in both the Maryland legislature and among Maryland's local jurisdictions. Different jurisdictions handled desegregation at different speeds, with Baltimore ending segregation in 1954,²⁴ and desegregating a popular pharmacy the following year²⁵ (early in the civil rights trajectory, but perhaps understandable knowing that the city was home to the NAACP's second oldest branch,²⁶ and was the city that raised Thurgood Marshall).²⁷ Typical of the middle stage of desegregation was Dorchester County on the Eastern Shore, which had a

²⁰ For a fascinating first-person account of events in Frederick, see Brig.Gen. Bradley T. Johnson, *Maryland, in 2 CONFEDERATE MILITARY HISTORY: A LIBRARY OF CONFEDERATE STATES HISTORY 3*, 25 (Clement A. Evans ed., Confederate Publishing Company), *also available at* <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0240%3Achapter%3D2>.

²¹ *Id.*

²² Maryland State Archives, *Arrest of the Maryland Legislature, 1861*, <http://msa.maryland.gov/msa/speccol/sc5500/sc5572/000001/000000/000017/html/t17.html>.

²³ *Id.*

²⁴ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (Oxford Univ. Press, 2004), at 346-47.

²⁵ Baltimore Heritage, *Why the West Side Matters: Read's Drug Store and Baltimore's Civil Rights heritage*, at <http://www.baltimoreheritage.org/2011/01/why-the-west-side-matters-reads-drug-store-and-baltimores-civil-rights-heritage/>.

²⁶ NAACP Baltimore, *About Us: History*, http://76.163.67.62/index.php?option=com_content&view=article&id=46&Itemid=54 (last visited Jan. 15, 2013).

²⁷ See generally, Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256, 318-19 (2005).

sizable African-American population, and a deeply divided school system—through stops and starts, the county came up with a desegregation plan that received the approval of the U.S. Commission on Civil Rights, but the tensions were high enough during that process that the National Guard had to be called out—and they remained in Dorchester's county seat, Cambridge, for six months.²⁸

The most stubborn hold-out on school desegregation in Maryland was Prince George's County. Historically a county with significant African-American presence, the county was nonetheless deeply racially divided, with tensions increasing as African-Americans from the District of Columbia fled in large numbers to the county following the 1968 riots that destroyed large swathes of African-American neighborhoods in D.C.²⁹ In this era of rapidly changing demographics, comparable to the rate of change seen with immigrant inflows of the past 10 years,³⁰ local officials resisted the federal desegregation mandate, and ultimately the issue had to be resolved through litigation by the NAACP, which resulted in a court-order busing scheme that lasted from 1973 until 1998.³¹ Again, the federal government policy was clear, and it had the means to promote compliance with that policy.

B. Maryland Today

Maryland's foreign-born, or immigrant, population has roughly doubled since 1990, from 6.6% of the population in 1990 to 13.9% in 2010.³² Almost half of these 803,695 foreign-born individuals had become naturalized citizens by the time of the 2010 census.³³ The population comes from all corners of the world and encompasses a striking range of socio-economic characteristics, as immigration to

²⁸ See U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN DORCHESTER COUNTY, MARYLAND 2-3 (1997), available at

<http://www.law.umaryland.edu/marshall/usccr/documents/cr12d4525.pdf>.

²⁹ *Nation's Capital Still Recovering from 1968 Riots*, CNN (Apr. 4, 1998), <http://www.cnn.com/US/9804/04/mlk.dc.riots/>.

³⁰ Philip Rucker & Avis Thomas-Lester, *Shifting Migration Patterns Alter Portrait of Pr. George's*, Wash. Post, Jul. 26, 2007, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072502384.html>.

³¹ Lisa Frazier and Jackie Spinner, *Prince George's Reaches Pact on Busing*, WASH. POST (Mar. 5, 1998), at <http://www.washingtonpost.com/wp-srv/local/longterm/library/pg/magnets/pact.htm>.

³² United States Census numbers compiled by the Immigration Policy Center. Am. Immigration Council, *Americans in Maryland: The Political and Economic Power of Immigrants, Latinos, and Asians in the Old Line State*, IMMIGR. POL'Y CTR. (Jan. 2012), http://www.immigrationpolicy.org/sites/default/files/docs/New_Americans_in_Maryland_2012.pdf.

³³ *Id.* Approximately 45% of foreign-born individuals had become naturalized, or 360,932 people in total. *Id.*

Maryland has been driven by *both* highly educated immigrants pursuing professional opportunities and low-wage workers with limited educations. The gap between these two streams of immigration in Maryland is widening; although the number of immigrants with a bachelor's degree or higher increased by 65% between 2000 and 2010, the number of those failing to attain a high school diploma rose by an almost identical percentage.³⁴

An important distinction within the foreign-born population of Maryland is whether or not the immigrant has become a naturalized citizen, something that shows both a certain longevity (the fastest path to citizenship is eight years, and for many people it takes considerably longer) as well as other favorable factors like family ties or good employment situations (the basis of lawful permanent residence for most of those who ultimately become citizens). Among foreign-born *citizens*, indicators like education or poverty level more closely approach the levels of U.S. born citizens.³⁵ One exception to this is in labor-force participation, where foreign-born individuals, regardless of citizenship status, participate in the labor force in higher percentages than U.S.-born citizens.³⁶ The nature of that labor force participation does vary by citizenship status.³⁷

The areas with the highest percentage of foreign-born population cluster between Baltimore City and Washington, D.C, with Montgomery County and Prince George's counties being home to the greatest numbers of foreign-born residents.³⁸ Those with the lowest percentages of foreign-born residents are largely in Western Maryland, with small percentages also found on the Eastern Shore.³⁹

Although there is a striking diversity among the origins and characteristics of this foreign-born population, the group that has received the overwhelming majority of attention in the media and by policymakers has been the Latino population that makes up roughly half of the foreign

³⁴ Migration Policy Inst., *Maryland: Language and Education*, MPI DATA HUB, <http://www.migrationinformation.org/datahub/state2.cfm?ID=MD> (last visited Oct. 9, 2012).

³⁵ *Id.* For example, 10% of U.S.-born citizens in 2010 had less than a high school diploma, and for foreign-born citizens the rate was 21.3%. *Id.* For non-citizens, however, the rate was a dramatic 29.8%. *Id.* Likewise, looking at poverty in 2010, 9.6% of U.S.-born citizens were below the poverty level, compared to 11.5% of foreign-born citizens, but 15.1% of non-citizens were below the poverty level. *Id.*

³⁶ See Migration Policy Inst., *supra* note 35.

³⁷ *Id.* Approximately 10% of foreign-born citizens participate in construction, compared to 6.1% of native-born, while 6.9% of foreign-born citizens work in the field of public administration, compared to 12.7% of native born. *Id.*

³⁸ Dep't of Legis. Servs., *Overview of Hispanic Community in Maryland*, 2 (June 2008), available at http://dls.state.md.us/data/polanasubare/polanasubare_intmatnpubadm/Overview-of-Hispanic-Community.pdf [hereinafter *Overview*].

³⁹ *Id.*

born population.⁴⁰ The Latino community also, of course, includes many U.S. citizens whose heritage is Latino, a distinction that is sometimes lost in the politics of immigration. Only 53.6% of the Hispanic population in Maryland is foreign-born.⁴¹

Driving much of the political energy around immigration is not the sheer numbers of immigrants, but changes in the presence of immigrants over a relatively short period of time. Jurisdictions experiencing the greatest growth in the immigrant, and particularly Latino, population included Frederick County, and the suburban counties alongside Washington, D.C.⁴² These jurisdictions have correspondingly generated most of the initiatives and policy debates discussed in Section III below.

II. THE FEDERAL CONTEXT

Maryland's split-personality immigration policies occur very much in the wake of the actions and inactions occurring at the federal level, and reflect deep ambivalence in federal immigration policy generally. Although states had some role in regulating immigration in the 19th century, the Supreme Court has held since 1889 that immigration is *purely* a federal power, and one that the Court has little power to review.⁴³ This "plenary power" doctrine provides the overarching context within which state efforts to address immigration must be understood. Before turning to Maryland-specific initiatives, it is therefore critical to address the failed series of reforms in Congress, the Supreme Court's jurisprudence on preemption in state-level immigration regulation, and the executive branch's responses to these developments.

A. Failed Legislative Reforms and the Executive Response

Immigration reform efforts dominated the U.S. Congress in 2006 and 2007.⁴⁴ These legislative efforts to overhaul the nation's immigration code sought a balance between the stated goals of increased border security and remedying the legal status of the several million individual immigrants living in the United States without lawful immigration status (usually termed "earned legalization").⁴⁵ These attempted reforms, both

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 6.

⁴² *Id.* at 4.

⁴³ *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889). See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 551 (1990).

⁴⁴ See generally Cristina M. Rodriguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C. R. & C. L., 125 (2010).

⁴⁵ Marc R. Rosenblum, Randy Capps and Serena Yi-Ying Lin, *Earned Legalization: Effects*

of which ultimately failed amid rancorous debate full of extreme rhetoric, came to be seen as part of a philosophy of Comprehensive Immigration Reform (or "CIR"), which stood for the political proposition that the border security and earned legalization goals needed to move in tandem for either to succeed in a closely divided Congress.⁴⁶ Progressives and conservatives alike were unhappy with much in the proposed reforms, but moderates from both parties expressed—and continue to express—such a philosophy.⁴⁷

The last serious effort to pass CIR happened in 2007, but again failed.⁴⁸ Subsequent legislative energy has gone toward—and against—more discrete sub-sections of immigrants and would-be immigrants, from survivors of human trafficking,⁴⁹ to farm workers⁵⁰ and technology-industry workers.⁵¹ The most persistent legislative effort in the aftermath of CIR's failure has been the Development, Relief and Education for Alien Minors (DREAM) Act.⁵² The DREAM Act would lead toward citizenship for certain immigrants who entered the U.S. before the age of 16 and who graduated from a U.S. high school or earned a GED—their immigration status would be contingent upon them completing a bachelor's degree or two years of military service.⁵³ The bill has been introduced in every Congress for a decade, without passing.⁵⁴ (Maryland has directly answered this failure by passing a state-level DREAM Act,

of Proposed Requirements on Unauthorized Men, Women and Children, Migration Policy Institute (2011), <http://www.migrationpolicy.org/pubs/legalization-requirements.pdf>.

⁴⁶ Marc R. Rosenblum, *US Immigration Policy Since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform*, Migration Policy Institute (2011), <http://www.migrationpolicy.org/pubs/rmsg-post-9-11policy.pdf>.

⁴⁷ See *How Democracy Works Now: The Senators' Bargain* (HBO Documentary broadcast Mar. 24, 2010), for an outstanding overview of the politics of these two years of Congressional efforts to achieve immigration reform. See also Marisa Silenzi Cianciarulo, *Can't Live With 'Em, Can't Deport 'Em, Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13, 24 (2008).

⁴⁸ Robert Pear and Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), at http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html?_r=0.

⁴⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (2008), Pub. L. No. 110-457, § 235(d)(6) 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1232 (2008)).

⁵⁰ S. 1639, 110th Cong. (2007).

⁵¹ S. 3185, 112th Cong. (2012). See generally Jeffrey Mervis, *Senate Dips Toe Into STEM Immigration Reform Stream*, SCIENCE INSIDER (May 18, 2012, 5:10 PM), <http://news.sciencemag.org/scienceinsider/2012/05/senate-dips-toe-into-stem-immigr.html>.

⁵² DREAM Act of 2011, S. 952, 112th Cong. (2011). See generally Dream Act of 2010, S. 3992, 111th Cong. (2010); American Dream Act, H.R. 1275, 110th Cong. (2007); Dream Act of 2007, S. 2205, 110th Cong. (2007); DREAM Act, S. 1545, 108th Cong. (2003); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003); Dream Act, S. 1291, 107th Cong. (2001); Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001).

⁵³ Elisha Barron, Recent Development, *The Development, Relief and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 626-31 (2011).

⁵⁴ *Id.* at 632-33.

discussed in section III(B) below, which attempts to integrate DREAM-eligible youth into Maryland institutes of higher education. It notably cannot provide the path to legal immigration status, because only the federal government can confer immigration status.)

Keeping in mind the litany of failed legislative reforms, broad and discrete, the Obama administration quickly sought to examine what could be done by the Executive branch alone to remedy some of the brokenness of the immigration system—from border security to reducing backlogs for those in the pipeline for different immigration benefits. Within the Department of Homeland Security (“DHS”), these proposals emerged both from the enforcement bureau, Immigration and Customs Enforcement, (“ICE”) as well as the benefits side, U.S. Citizenship and Immigration Services (“USCIS”).⁵⁵ The Administration’s exploration of options for both benefits and enforcement mirrors, conceptually if not in execution, the philosophy of CIR: an expansion of paths to legal status for immigrants accompanied by heightened attention to enforcement. Occurring piecemeal, and outside a negotiated legislative framework, however, the administration’s efforts simply met heavy criticism from both sides of the immigration policy spectrum.

1. Efforts to Provide More Immigration Benefits

The earliest consideration of possible executive action on the benefits⁵⁶ side of DHS came through an internal memo to USCIS Director Alexander Mayorkas.⁵⁷ This memo examining the full range of ideas was leaked to the public in July 2010.⁵⁸ The Mayorkas memo included eighteen different ideas for actions that could be made in the absence of new legislation, two of which generated an enormous amount of controversy.⁵⁹ The first idea contemplated temporary relief from removal for discrete groups of immigrants like DREAM Act youth.⁶⁰ The second

⁵⁵ USCIS is known as the bureau that administers immigration benefits, largely by processing of petitions that provide temporary visas or other statuses, lawful permanent residence and citizenship.

⁵⁶ Benefits include temporary visas, asylum, lawful permanent residence, and other temporary immigration statuses that may or may not also include employment authorization.

⁵⁷ Memorandum from Denise A. Vanison, Policy and Strategy, U.S. Customs and Immigration Enforcement, to Alejandro N. Mayorkas, Director, U.S. Customs and Immigration Enforcement (July 2010) [hereinafter *Mayorkas Memo*] (on file with author), available at <http://s3.documentcloud.org/documents/6800/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ “Deferred action is a discretionary form of relief provided for by the District Director’s recommendation to the Regional Director. There is no statutory basis for deferred action, but the regulations reference this form of relief and provide a brief description: ‘[D]eferred action,

was to exercise prosecutorial discretion such that the Administration would only actively initiate deportation proceedings for high-priority cases like immigrants with serious criminal convictions.⁶¹ The combined ideas, in the context of a memo that showed an Administration seeking to flex its executive authority in the shadow of legislative stalemate, led opponents of immigration to dub the Mayorkas memo the Obama Administration's "amnesty memo."⁶² Twelve Senators wrote a letter to the Administration seeking clarification that the Administration would not be engaging in "back door amnesty" through the suggestions set forth in the memorandum.⁶³ The Administration responded that the memo simply contained "deliberation and the exchange of ideas,"⁶⁴ but this statement did little to quench the furor.

In June 2012, the Obama Administration announced that it would, via executive order, institute one of the suggestions made in the Mayorkas memo, providing deferred action for DREAM-eligible youth.⁶⁵ Deferred action, simply a promise not to deport an individual, allows an immigrant to apply for a work permit and to live for a specified period of time (in this instance, two years) without the fear of removal.⁶⁶ It likely also entitles these individuals to apply for driver's licenses, although different states are addressing that issue differently.⁶⁷ It is a policy that could

an act of administrative convenience to the government which gives some cases lower priority.'" Department of Homeland Security, *Recommendation from the CIS Ombudsman to the Director*, CIS, Apr. 6, 2007, available at

http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf. Where USCIS grants a request for deferred action, the foreign national is provided employment authorization. *Id.*

⁶¹ *Id.*

⁶² Robert VerBruggen, *The Amnesty Memo*, NAT'L REV. ONLINE (Jul. 29, 2010, 5:30 PM), <http://www.nationalreview.com/corner/233793/amnesty-memo-robert-verbruggen>.

⁶³ Press Release, Senator Chuck Grassley, Senators Ask Admin. if Plans are Underway for Large-Scale De Facto Amnesty (July 26, 2010), available at http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=27796.

⁶⁴ Stephen Dinan, *Memo Outlines Backdoor 'Amnesty' Plan; Immigration Staffers Cite Tools Available Without Reform*, WASH. TIMES, Jul. 29, 2010, <http://www.washingtontimes.com/news/2010/jul/29/memo-outlines-backdoor-amnesty-plan-for-obama/?page=all>.

⁶⁵ The criteria to be considered for deferred action are: (1) the individual must have arrived in the U.S. before 16th birthday, (2) be under the age of 31 as of June 15, 2012, (3) have at least five years of residency in the U.S., (4) be currently enrolled in school, or have a high school diploma or GED, or have served in the Coast Guard or military, and (5) no significant criminal history. See Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Protection (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁶⁶ Although popularly known as "deportation," the correct term is removal, which covers both the exclusion of those who have never been formally admitted to the U.S. and the deportation of those who *have* been lawfully admitted.

⁶⁷ Kathleen Miles, *DACA: Driver's Licenses for Undocumented Immigrants Vary by State*,

easily be reversed, and it does not provide any path to permanent status⁶⁸—such a path can only be created through Congress, which has thus far declined to act on the DREAM legislation for 12 years.

2. *Efforts to Increase Enforcement*

In its efforts on enforcement, the Obama Administration has maintained the structure and expanded the scale of most of the previous Administration's initiatives.⁶⁹ Although border enforcement itself has skyrocketed due to dramatic increases in the numbers of agents at the border, the Obama Administration's *interior* enforcement policy has also yielded dramatic numbers of deportations. ICE has increasingly engaged local law enforcement agencies in ICE's immigration enforcement work, redoubling the pace of those initiatives.⁷⁰ A broad array of tools for this cooperation with local law enforcement exist (and some have existed for many years), but the two most prominently disputed, including in Maryland politics, are the INA § 287(g) program which deputizes local law enforcement as immigration agents, and Secure Communities, which puts information about all those arrested through immigration databases.⁷¹ Although Secure Communities existed in fledgling form as early as March 2008,⁷² little was known about the program in its earliest days, and Secure Communities existed in only fourteen jurisdictions in 2008.⁷³ As of 2012, more than 1700 jurisdictions use the Secure Communities program, with ICE insisting that all jurisdictions will comply with the

THE HUFFINGTON POST (Aug. 20, 2012, 5:15 PM),
http://www.huffingtonpost.com/2012/08/20/daca-drivers-licenses_n_1811899.html
(contrasting California's position with that of Arizona).

⁶⁸ Jonathan Pitts, *Deportation Reprieve for Illegal Immigrants Starts Wednesday*, BALT. SUN (Aug. 24, 2012, 7:53 PM), <http://www.baltimoresun.com/news/maryland/bs-md-immigrant-kids-20120814,0,5211994,full.story>.

⁶⁹ See Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES (May 29, 2011), <http://www.nytimes.com/2011/05/30/us/politics/30raid.html?pagewanted=all> (the only noticeable shift from prior Administrations' efforts has been a decrease in workplace raids in favor of audits of companies whose records indicate a significant number of potential immigration-related violations). See also Brian Bennett, *Republicans Want a Return to Workplace Immigration Raids*, L.A. TIMES, Jan. 27, 2011, <http://articles.latimes.com/2011/jan/27/nation/la-na-immigration-raids-20110127>.

⁷⁰ Molly O'Toole, *Analysis: Obama Deportations Raise Immigration Policy Questions*, REUTERS (Sept. 20, 2012, 8:21 AM), <http://www.reuters.com/article/2011/09/20/us-obama-immigration-idUSTRE78J05720110920> (noting that Obama is on pace to deport in one term the number of immigrants that were deported in *two* terms under President Bush).

⁷¹ *Secure Communities*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 6, 2012).

⁷² *More Questions About the Secure Communities Program*, NAT'L IMMIGR. LAW CENTER (Mar. 2009), <http://www.nilc.org/secure-communities-2009-03-23.html>.

⁷³ *Secure Communities Crash Course*, IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 13, 2010), 2 http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf at 2.

program by 2013.⁷⁴

Immigration restrictionists have continued to call these measures inadequate, with even Supreme Court Justice Antonin Scalia voicing disapproval in his blistering partial dissent to *Arizona v. U.S.*, writing, “[t]he State’s whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax,” and continued by characterizing the Obama administration’s policy as “lax federal enforcement.”⁷⁵ Critics have sued Obama’s de-emphasis of workplace raids,⁷⁶ and generally perceived enforcement efforts as inadequate.⁷⁷

Meanwhile, immigrant advocates criticized the record numbers of deportations, believing that the Obama Administration had abandoned the balanced nature of CIR by undertaking an enforcement-only strategy.⁷⁸ Immigrant advocates suggested that this sole emphasis on enforcement betrayed the hopes for extending legal status to millions of long-term undocumented residents of America, arguing that “enforcement first” had become “enforcement only.”⁷⁹ Aggressive enforcement removed the main element of compromise that made CIR seem possible.⁸⁰

3. *A Shift in Federal Enforcement Strategy*

Believing that criticism about the ineffectiveness of the record numbers of removals was misplaced, but faced with simultaneous criticism over the draconian effects of those removals, the Obama

⁷⁴ *Secure Communities: The Basics*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/.

⁷⁵ *Arizona v. United States*, 132 S. Ct. 2492, 2517 (2012) (Scalia, J., concurring in part and dissenting in part). See also Ethan Bronner, *Scalia's Immigration Dissent is Criticized as Political*, N.Y. TIMES, June 28, 2012, available at

<http://www.nytimes.com/2012/06/28/us/scalias-immigration-dissent-is-criticized-as-political.html>.

⁷⁶ Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 30, 2011, <http://www.nytimes.com/2011/05/30/us/politics/30raid.html?pagewanted=all> (quoting Rep. Elton Gallegly (R-Cal) as saying, “While President Bush’s so-called get-tough strategy clearly did not do enough to remove illegal workers, President Obama’s strategy is much worse”).

⁷⁷ Julia Preston, *Homeland Security Cancels Virtual Fence After \$1 Billion is Spent*, N.Y. TIMES, Jan. 15, 2011, <http://www.nytimes.com/2011/01/15/us/politics/15fence.html>.

⁷⁸ Daniel Kanstroom, *Deportation Nation*, N.Y. TIMES, Aug. 30, 2012, <http://www.nytimes.com/2012/08/31/opinion/deportation-nation.html?pagewanted=all>. See Adam Serwer, *It's Official: Obama has Deported More than a Million Unauthorized Immigrants*, MOTHER JONES (Sept. 20, 2011), <http://www.motherjones.com/mojo/2011/09/its-official-obama-has-deported-more-million-unauthorized-immigrants>.

⁷⁹ *U.S. Spent \$18 billion on Immigration Enforcement Last Year*, Fox News Latino (Jan. 7, 2013), <http://latino.foxnews.com/latino/politics/2013/01/07/obama-administration-spent-18-billion-on-immigration-enforcement-last-year/>.

⁸⁰ Serwer, *supra* note 80.

Administration articulated and publicized a significant shift in its enforcement policy to encourage the increased and more consistent use of prosecutorial discretion within the enforcement system.⁸¹ Through a series of memos from ICE Director John Morton, the Administration asked the Offices of Chief Counsel, who are the prosecutors of the immigration system, to use their inherent discretion to decline to prosecute cases that did not reflect the Administration's enforcement priorities: criminal immigrants and repeat immigration offenders. The first, published in August 2010, set forth ICE's enforcement priorities in general terms, and was received with interest but avoided much controversy.⁸² A much more detailed second memo followed in June 2011, which offered a vision of a greatly shifted enforcement strategy by DHS overall.⁸³ The policy guidance encourages the government not to prosecute cases where the following positive factors might be present states that the negative factors weighing against prosecutorial discretion include risks to national security: "serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind; known gang members or others who pose a clear danger to public safety; and individuals with an egregious record of immigration violations."⁸⁴ The prosecutorial discretion policy unrolled in earnest in late 2011 with the creation of two pilot projects, in Baltimore and Denver, to move through the dockets of the immigration courts in those two cities with a view to

⁸¹ Randy Capps, Marc R. Rosenblum, Cristina Rodriguez & Muffazar Chishti, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POLICY INSTITUTE, 7 (Jan. 2011), www.migrationpolicy.org/pubs/287g-divergence.pdf [hereinafter *Delegation and Divergence*] (noting the ambiguity resulting in interior enforcement without Comprehensive Immigration Reform).

⁸² John Morton, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*, IMMIGR. & CUSTOMS ENFORCEMENT (Aug. 20, 2010), http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf.

⁸³ John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, ICE (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. DHS Secretary Janet Napolitano defended this shift by noting that in the past, "ICE would conduct large scale worksite raids – and would not consistently punish the employer, nor target individuals who posed a public safety threat. Public safety wasn't enhanced by these raids, and they sometimes required hundreds of agents and thousands of hours to complete. As a result, while the agents were busy conducting these high profile raids, criminal aliens were free to roam our streets. This made no sense... Accordingly, one of the first steps we took was the implementation of common sense policies that govern the allocation of our enforcement resources. We established, as a top priority, the identification and removal of public safety and national security threats." Janet Napolitano, Sec'y of Homeland Security, Speech at American University, *Remarks on Smart, Effective Border Security and Immigration Enforcement* (Oct. 5, 2011), available at <http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm> [hereinafter "Remarks of Sec'y Napolitano"].

⁸⁴ Morton, *supra* note 85.

closing as many cases as possible that did not reflect the Administration's enforcement priorities.⁸⁵

Although increased prosecutorial discretion was supposed to use "smart enforcement" to mitigate against progressive criticisms of the enforcement-only approach,⁸⁶ the initiative resulted in comparatively few cases being closed (less than one percent of detained cases, and only two percent of immigration court cases overall, as of this writing).⁸⁷ Despite its modest results, the initiative nonetheless engendered fierce opposition from anti-immigrant actors, not least of which was a union of ICE agents themselves who believed that the initiative was illegal.⁸⁸ Here, as in all aspects of immigration policy, divisions run deep.

B. New Directions in State-Level Regulation of Immigration

The Administration has robustly asserted the unconstitutionality of state-level laws regulating immigrants such as those passed by Arizona, Georgia and Alabama, asserting that federal immigration law preempts these laws. In Arizona, its efforts succeeded first in district court, and again on appeal at the 9th Circuit, with both courts finding the majority of S.B. 1070's provisions to be preempted by federal immigration law.⁸⁹ Without waiting for other circuit courts to decide on the comparable questions being posed by the Alabama and Georgia litigation, the Supreme Court announced on December 12, 2011, that it would hear the appeal by Arizona of the 9th Circuit's decision.⁹⁰ In its June 25, 2012 decision, the Court held that most provisions of the Arizona law were preempted because the federal government had "occupied the field" of immigration law to such an extent that creating state-level immigration crimes or authorizing the arrest of individuals on the probable cause of

⁸⁵ *EOIR Statement Regarding Prosecutorial Discretion*, Dep't of Justice (Nov. 17, 2011), available at

<http://www.justice.gov/eoir/press/2011/EOIRProsecutorialDiscretion11172011.htm>.

⁸⁶ Remarks of Sec'y Napolitano, *supra* note 85.

⁸⁷ *Immigration and Customs Enforcement Prosecutorial Discretion Program*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 28, 2012), <http://trac.syr.edu/immigration/reports/287/>.

⁸⁸ Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES, Jan. 7, 2012, http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html?_r=1&pagewanted=all.

⁸⁹ *United States v. Arizona*, 703 F. Supp.2d 980 (D.Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

⁹⁰ *Arizona v. United States*, 132 S.Ct. 845 (2011), *cert. granted*. See also Adam Liptak, *Court to Weigh Arizona Statute on Immigration*, N.Y. TIMES, Dec. 12, 2011 at <http://www.nytimes.com/2011/12/13/us/supreme-court-to-rule-on-immigration-law-in-arizona.html?pagewanted=all>.

their illegal immigration status could not be permitted.⁹¹ Where one provision of the state law was understood to be *complementary* to federal policy however, the Court upheld its constitutionality; this provision, which permitted Arizona law enforcement to check immigration status pursuant to lawful stops and arrests, had been “encouraged” by Congress, according to the opinion.⁹² The Court left open the possibility that, as implemented, separate constitutional concerns might arise and, indeed, equal protection challenges based upon concerns over racial profiling are already percolating through the court system.⁹³

The import of the *Arizona* case is clearer in conjunction with another recent case refining the Court’s evolving views on preemption in the context of immigration, *Chamber of Commerce of the U.S. v. Whiting* (“*Whiting*”).⁹⁴ In *Whiting*, the Supreme Court upheld an Arizona law regulating immigrant workers that its opponents believed was preempted by the federal Immigration Reform and Control Act,⁹⁵ which set up the national system for ensuring that immigrants without work authorization could not be lawfully employed. The Legal Arizona Workers Act (LAWA)⁹⁶ permitted Arizona to revoke the business licenses of companies that refused to use a federal program, E-verify, to verify the employment authorization of their workforces.⁹⁷ The Court found that this law concerned licenses (with a strong dissent to that view), and found that the law fell within an exception in the 1986 Immigration Reform and Control Act allowing states to impose civil or criminal sanctions through “licensing and similar laws.”⁹⁸ In its reasoning, the Court applauded Arizona’s efforts to so scrupulously mirror the federal legislation’s terms, and pointed to a “high threshold” that had to be met to overturn a state law in the name of preemption.⁹⁹

The first application of this new legal landscape on immigration preemption came from the Eleventh Circuit, applying *Arizona* to HB 56,¹⁰⁰ Alabama’s law seeking to regulate even more broadly the

⁹¹ *Arizona v. United States*, 132 S. Ct. 2492, 2502-03, 2506-07 (2012).

⁹² *Arizona*, 132 S. Ct. at 2508.

⁹³ Pl.’s Mot. Prelim. Inj., at 44, *Valle del Sol v. Whiting* (formerly *Friendly House v. Whiting*), 2:10-cv-01061-SRB (D. Ct. AZ filed July 7, 2012) *available at* <http://www.nilc.org/sb1070friendlyhouse.html>.

⁹⁴ *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968 (2011).

⁹⁵ Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360-72 (codified as Immigration Reform and Control Act, 8 U.S.C. § 1324(a) (Supp. V 1987)).

⁹⁶ ARIZ. REV. STAT. ANN., §§ 23-211 – 23-214 (2011) (West).

⁹⁷ E-verify is “is an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.” *E-Verify*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://tiny.cc/vfa0kw> (last updated June 26, 2012).

⁹⁸ *Whiting*, 131 S.Ct. at 1970.

⁹⁹ *Id.* at 1984-85.

¹⁰⁰ *Beason-Hammon Alabama Taxpayer and Citizen Protection Act* (H.B. 56), ALA. CODE §§

immigrants living within Alabama. Like Arizona's law, HB 56 required foreign-born individuals to carry an alien registration document and criminalized unlawful presence.¹⁰¹ HB 56 further prohibited the undocumented from soliciting or performing work, and provided state level provisions mirroring IRCA.¹⁰² Alabama's law resulted in significant controversy due to additional features that exceeded those of SB 1070 in Arizona—particularly the prohibition on transporting undocumented immigrants, and the restrictions on private contracts.¹⁰³ HB 56 also required public schools to register students,¹⁰⁴ a feature of the law that has been associated with a five percent drop in school attendance.¹⁰⁵

After the Obama Administration challenged the law's constitutionality, the United States District Court for the Northern District of Alabama enjoined some provisions of the law (prohibiting solicitation for work, creating new state crimes related to immigration, and two employment-related provisions) while permitting others to go forward (creating a state crime for being unlawfully present, allowing officers to determine immigration status based upon reasonable suspicion of illegal immigration status, prohibiting contracts with undocumented individuals, and requiring schools to check enrollment). On cross-appeal to the Eleventh Circuit, the Circuit Court found that several more provisions were unconstitutional under *Arizona*.¹⁰⁶ Specifically the court held that all the provisions enjoined in the lower court were unconstitutional, as were the prohibition on the right to contract and the creation of a new state crime for being unlawfully present.¹⁰⁷ The Court also noted that the provision requiring data to be collected on the immigration status of school children had been invalidated under equal protection grounds in a companion case, so the question of whether it was preempted was moot.¹⁰⁸

31-13-1 – 31-13-30 (LexisNexis 2011).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ ALA. CODE § 31-13-26 (LexisNexis 2011).

¹⁰⁴ ALA. CODE § 31-13-27(a)(1) (LexisNexis 2011).

¹⁰⁵ Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, N.Y. TIMES, Oct. 4, 2011, http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html?pagewanted=1&_r=1&sq=alabama&st=cse&scp=3. This association is derived from snapshots of enrollment rates before and after the enactment of the law. The author is not aware of a longer-term study on the effects of the law on school enrollment. See Melissa Braun, *School Enrollment Drops After Passing of New Law*, SOUTHEAST SUN (Enterprise, Alabama), Oct. 5, 2011, available at http://www.southeastsun.com/news/article_6cc19ff6-eeb5-11e0-b673-0019bb30f31a.html.

¹⁰⁶ *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

¹⁰⁷ *Id.* at 1280-81, 1283, 1285, 1301.

¹⁰⁸ *Id.* at 1297.

Thus, post-*Arizona*, states interested in regulating immigration are left with this: state-level legislation that complements federal policy purposes, without adding any provisions extraneous to existing federal law, is likely to be found constitutional. Provisions purporting to complement federal policy (such as the contract and public school provisions of the Alabama law) but which do not precisely mirror specific provisions of the Immigration and Nationality Act *may* unconstitutionally preempt federal law, although not enough circuits have considered the question to provide certainty. Finally, even laws not explicitly preempted by federal immigration law may be deemed unconstitutional on equal protection grounds. With these parameters in place, state-level initiatives to pass laws *complementing* federal enforcement (in both the employment and immigration enforcement contexts), such as the ones upheld in *Arizona* and *Whiting*, are likely to proliferate, and those seeking regulation of immigrants beyond immigration status itself are likely to continue their efforts in the hopes that sufficient constitutional ambiguity would permit them to be upheld.

III. MARYLAND'S ADAPTATIONS TO FEDERAL ACTION AND INACTION

Faced with contradictory federal actions and inactions—sweeping enforcement measures alongside calls for discretion, vigorous lawsuits asserting the unconstitutionality of state laws regulating immigrants alongside executive initiatives to require states to engage in immigration enforcement, the response of Maryland as a whole reflects in many ways a similar ambivalence in policies about immigration. An interesting aspect of Maryland's response to changing demographics of immigration, however, is how dynamic and *un-ambivalent* have been the responses of counties and states. It is, as this section details, perhaps impossible to speak of a Maryland-wide view on immigrants and immigration, but rather essential to look at what is happening through a more localized lens.

A. Enforcement Trends in Maryland

1. Rise in Jurisdictions Actively Cooperating with ICE Enforcement

Many of Maryland's counties and municipalities have begun to partner with the federal government's variety of immigration enforcement efforts, through mechanisms under the umbrella of ICE "ACCESS" (Agreements of Cooperation in Communities to Enhance Safety and

Security”).¹⁰⁹ Although DHS has long held the ability to put immigration detainees on foreign-born inmates in Maryland's state jails and prisons through its Criminal Alien Program, or CAP, Maryland has also largely, but not entirely, embraced the newer programs that extend beyond CAP's capabilities.¹¹⁰

The first county to partner with ICE beyond the traditional CAP jail-based screenings of those serving sentences post-conviction was Frederick County. In February 2008, politically conservative Frederick County¹¹¹ entered a formal partnership with ICE under the auspices of INA § 287(g) (“287(g) programs”), which permits ICE to deputize local law enforcement officials to work as federal immigration officials (not simply as sources of information for ICE), including arresting individuals on suspicion of civil immigration violations.¹¹² Once the individuals are arrested, those officials can issue immigration detainees, keeping individuals in custody up to 48 hours until ICE takes them into custody.¹¹³ The most complex of the ICE ACCESS programs, 287(g) programs like Frederick County's require the local law enforcement agency to enter into a Memorandum of Understanding with ICE, and then to train its agents in immigration law in order to carry out their new enforcement duties.¹¹⁴ In the jail model, officers access federal databases to screen those arrested or convicted of offenses.¹¹⁵ A task force model allows this screening to happen outside jails, in the course of regular law enforcement operations.¹¹⁶ Frederick County opted to adopt both the jail

¹⁰⁹ See generally *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. 7, 2012). While other Maryland jurisdictions have not signed up for AACCESS, all signed up for Secure Communities, another ICE program. *Activated Jurisdictions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 10(Aug. 12, 2012) <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

¹¹⁰ Melissa Keaney & Joan Friedland, *Overview of the Key ICE ACCESS Programs*, NAT'L IMMIGR. LAW CENTER (Nov. 2009), <http://www.nilc.org/ice-access-2009-11-05.html>.

¹¹¹ In 2010, Frederick County elected five Republicans as County Commissioners. *Frederick County, Md. Election Results 2010*, TBD (Nov. 2, 2010), <http://www.tbd.com/articles/2010/11/frederick-county-md-election-results-2010-28173.html>. Likewise, although Democrat Barack Obama carried Maryland in 2008, Republican John McCain prevailed in Frederick County. *2008 Presidential Election Results in Frederick County, Md.*, CITY-DATA.COM, <http://www.city-data.com/elec08/FREDERICK-MARYLAND.html> (last visited Oct. 4, 2012).

¹¹² *Delegation and Divergence*, *supra* note 83, at 17; *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#signed-moa> (last viewed on Oct. 4, 2012).

¹¹³ *Delegation and Divergence*, *supra* note 83, at 13.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 14.

¹¹⁶ *Id.* at 15.

and the task force model.¹¹⁷

Frederick's enthusiastic embrace of the most comprehensive enforcement partnership available came in the wake of the county's dramatic growth in the Latino population in the early 2000s. Although the absolute numbers were relatively small, the Latino population had an astonishing growth rate of 147.49% between 2000 and 2006,¹¹⁸ part of a changing trend nationwide away from traditional immigrant "gateway" cities to suburbs and small towns.¹¹⁹ During roughly the same time period, Latino public school enrollment quadrupled,¹²⁰ and the number of limited English-proficient students in the Frederick county schools increased 150%.¹²¹ Alongside these demographic changes, concerns arose about the impact that the new arrivals to the county were having on public safety, schools, and the health system. One elected official suggested the need to "make Frederick County as unfriendly to illegal residents as possible. Let them go to Montgomery County."¹²² County leaders began speaking of the need for local action to respond to the changing population and perceived federal inaction on the immigrant concerns,¹²³ and shortly thereafter sought to partner with ICE via a 287(g) program, the only of its kind in Maryland, then or now.

Although the Obama Administration wants 287(g) partners to target more serious criminals,¹²⁴ 60% of the immigration detainers issued by Frederick County through its 287(g) program were for traffic violations.¹²⁵ Fewer than 10% of detainers were issued for the most serious Level 1 criminal offenses prioritized by the Administration.¹²⁶ Whether the Administration's stated priority or not, those identified through the 287(g) system are nonetheless processed into the federal

¹¹⁷ U.S. Immigr. & Customs Enforcement (ICE) and Frederick County Sheriff's Office, *Memorandum of Agreement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 15, 2009), http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gfrederickcounty101509.pdf.

¹¹⁸ *Overview of Hispanic Community in Maryland*, DEP'T OF LEGIS. SERVICES, 4 (June 2008), http://dls.state.md.us/data/polanasubare/polanasubare_intmatnpubadm/Overview-of-Hispanic-Community.pdf.

¹¹⁹ See generally Robert Suro, *Latino Growth in Metropolitan America: Changing Patterns, New Locations*, BROOKINGS INSTITUTION, 2 (July 2002), <http://www.brookings.edu/es/urban/publications/surosinger.pdf>.

¹²⁰ Karina Fortuny et. al, *The Integration of Immigrants and Their Families in Maryland*, URBAN INST., 41 (June 2010), <http://www.urban.org/UploadedPDF/1001424-maryland-immigrants-families.pdf>.

¹²¹ *Id.* at 43.

¹²² Mark Weaver, *Frederick County Officials Want Count of Students Who are Legal U.S. Citizens*, WMAL, <http://www.wmal.com/Article.asp?id=2318416> (last visited Oct. 7, 2012).

¹²³ *Delegation and Divergence*, *supra* note 83, at 26.

¹²⁴ *Id.*, at 11; see Remarks of Sec'y Napolitano, *supra* note 85.

¹²⁵ *Delegation and Divergence*, *supra* note 83, at 19.

¹²⁶ *Id.*

immigration enforcement system, and specifically into the docket of the immigration court in Baltimore, which has jurisdiction over immigration cases originating in Maryland, leading to an overcrowding of the docket, discussed further below.

The Migration Policy Institute studied the impact of this and other 287(g) programs, and noted that in Frederick, the program resulted in migration of immigrants to other jurisdictions, or “outmigration,” while other jurisdictions had either increases or no changes to the size of their Latino populations.¹²⁷ Specifically, although the Latino population had roughly doubled in the prior ten-year period, the population decreased to *below* its 2000 level after the implementation of 287(g)— a 61% drop in its Latino non-citizen population in the period after implementation of 287(g).¹²⁸

A legislative attempt to require all Maryland's counties to adopt the 287(g) program failed in the 2011 legislative session.¹²⁹ Although Frederick remains alone in Maryland, other jurisdictions have meanwhile begun complementing federal immigration enforcement by becoming part of the Secure Communities program.¹³⁰ This program ensures that all the fingerprints taken when an individual is booked by law enforcement will be sent not just to the FBI, as has been done traditionally, but also to ICE.¹³¹ Jurisdictions throughout the state agreed to cooperate with Secure Communities, and ICE activated most jurisdictions quickly. (As will be discussed below, ICE did meet pockets of resistance as the activations began.)

2. State-wide Legislation Seeking Restriction

Within the Maryland legislature, many of the forces found in the federal legislative arena have collided with tensions over Maryland's changing immigration population, creating an active—but largely unsuccessful—legislative agenda from those seeking to deter the presence of out-of-status immigrants in Maryland. In 2011, legislators introduced no fewer than 20 bills in the House and 8 bills in the Senate to address perceived problems with Maryland's immigrant populations. These bills

¹²⁷ *Id.* at 38-39.

¹²⁸ *Id.* at 3.

¹²⁹ H.B. 276, 2011 Leg., 428th Sess. (Md. 2011).

¹³⁰ *Activated Jurisdictions*, IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Jan. 14, 2013).

¹³¹ *Secure Communities*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 6, 2012).

ranged from a requirement for state contractors and grantees to use the federal E-Verify system,¹³² to a bill prohibiting pre-trial release for out-of-status immigrants with pending criminal cases,¹³³ to several bills concerned with proving immigration status to receive public benefits.¹³⁴ Another bill, ultimately withdrawn by its sponsor, specified that out-of-status immigrants could not be considered a citizen of Maryland.¹³⁵ A bill that went to vote, but was defeated, required county boards of education to gather data on and report the number of out-of-status students (similar to the provision of HB 56 in Alabama that was struck down on equal protection grounds).¹³⁶ None of these bills ultimately succeeded. In 2012, 10 such bills were introduced, and again, none succeeded.¹³⁷

One of the legislators leading the charge on these measures was Delegate McDonough, a Republican from a district straddling more conservative Baltimore County and Harford County. Describing his legislative agenda, Del. McDonough called Maryland “a sanctuary state,” and introduced laws comparable to the ones that have raised controversy in Arizona, Alabama and elsewhere.¹³⁸ In January 2012, he sponsored a bill seeking again to require Maryland government contractors and grantees to use E-Verify,¹³⁹ requiring immigrants to carry proof of lawful presence,¹⁴⁰ and punishing jurisdictions that resisted the implementation of Secure Communities,¹⁴¹ among others. The next most active sponsors of anti-immigrant legislation, Richard Impallaria and Susan McComas, represent roughly the same area (Harford and/or Baltimore County), each

¹³² H.B. 761, 2011 Leg., 428th Sess. (Md. 2011); S.B. 390, 2011 Leg., 428th Sess. (Md. 2011). This was a Maryland version of the Legal Arizona Workers Act (LAWA) that was upheld by *Whiting v. Chamber of Commerce*, *supra* note 96.

¹³³ H.B. 342, 2011 Leg., 428th Sess. (Md. 2011).

¹³⁴ H.B. 380, 2011 Leg., 428th Sess. (Md. 2011); H.B. 28, 2011 Leg., 428th Sess. (Md. 2011).

¹³⁵ H.B. 923, 2011 Leg., 428th Sess. (Md. 2011).

¹³⁶ See generally Mary Bauer, *Alabama's Shame: HB 56 and the War on Immigrants*, SOUTHERN POVERTY LAW CENTER, (Feb. 2012), http://cdna.splcenter.org/sites/default/files/downloads/publication/SPLC_HB56_AlabamasShame.pdf.

¹³⁷ The General Assembly's database lists fourteen bills indexed concerning the category, “Aliens and Citizenship,” four of which were not anti-immigrant (two concerning notary public eligibility, and two concerning human trafficking prevention). *List of Aliens and Citizenship Legislation, 2012 Regular Session*, MD. GENERAL ASSEMBLY, <http://mlis.state.md.us/2012rs/subjects/aliensc.htm> (last visited Oct. 6, 2012).

¹³⁸ Maggie Clark, *Baltimore County Delegate Pegs Illegal Immigration for Top of Legislative Agenda*, CAPITAL NEWS SERVICE, Jan. 13, 2011, available at <http://www.newsline.umd.edu/blog/index.php/2011/01/13/baltimore-county-delegate-pegs-illegal-immigration-for-top-of-legislative-agenda/>.

¹³⁹ H.B. 82, 2012 Leg., 431st Sess. (Md. 2012) (introduced Jan. 18, 2012).

¹⁴⁰ H.B. 684, 2012 Leg., 431st Sess. (Md. 2012).

¹⁴¹ H.B. 467, 2012 Leg., 431st Sess. (Md. 2012).

with 20 such bills since 2008, compared to McDonough's 34.¹⁴² Although Harford County's rates of foreign-born and Hispanic populations are low compared to statewide figures,¹⁴³ this legislative interest comes at a time when those populations are increasing at a significant rate—33.6% between 2000 and 2006.¹⁴⁴

B. Efforts to Promote Integration and Resist Federal Enforcement Schemes

By contrast, other jurisdictions in Maryland, and occasionally the state legislature and Governor's Office, have made intensive efforts to resist being drawn into immigration enforcement, instead trying to bolster an image of welcoming immigrants. Baltimore City and Montgomery County have led such efforts, but some of the initiative has occurred statewide as well, as described below.

1. Resisting: Secure Communities

Although many of Maryland's counties have either acquiesced to or actively sought out ways to support federal immigration enforcement, this trend has been far from uniform. Baltimore City adopted a resolution on June 13, 2011, suspending participation in Secure Communities.¹⁴⁵ Baltimore City has made steady efforts to be seen as friendly to immigrants, at least in part as a response to the city's population decline.¹⁴⁶ Baltimore City's Secure Communities resolution in particular

¹⁴² *List of Aliens and Citizenship Legislation, 2011 Regular Session*, MD. GENERAL ASSEMBLY, <http://mlis.state.md.us/2011rs/subjects/aliensc.htm> (last visited Oct. 21, 2012); *List of Aliens and Citizenship Legislation, 2012 Regular Session*, MD. GENERAL ASSEMBLY, <http://mlis.state.md.us/2012rs/subjects/aliensc.htm> (last visited Oct. 21, 2012).

¹⁴³ Only 4.6% of Harford's population was foreign-born from 2006-2010, well below the 13.2% rate for Maryland as a whole. Likewise, Harford County's Hispanic population, at 3.7%, is below half of the statewide rate of 8.4%. *State and County QuickFacts: Harford County, Maryland*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qdf/states/24/24025.html> (last visited Oct. 6, 2012).

¹⁴⁴ *Harford County, Maryland*, GRANTMAKERS CONCERNED WITH IMMIGRANTS AND REFUGEES (GCIR), <http://www.gcir.org/node/3113> (last visited Oct. 8, 2012).

¹⁴⁵ City of Baltimore, Leg. File No. 11-0298, City Council Resolution, "*The Promotion of Community Safety and Trust Between Baltimore City Residents and Local Law Enforcement Agencies*," CITY OF BALTIMORE (June 8, 2011), available at <http://legistar.baltimorecitycouncil.com/detailreport/Reports/Temp/125201213308.pdf>.

¹⁴⁶ "If the mayor's goal is to halt Baltimore's long-term population slide, the city needs to start planning how to attract and keep them here. Immigration is one of the few bright spots in Baltimore's growth picture... Were it not for these new arrivals, the city's population decline would have been even steeper." *Put Out the Welcome Mat*, BALT. SUN, Jan. 12, 2012, http://articles.baltimoresun.com/2012-01-11/news/bs-ed-city-immigration-20120111_1_foreign-born-target-immigrants-baltimore-residents. See also Carol Morello &

noted the ineffectiveness of the program at achieving its stated objective of targeting serious criminals, while potentially undermining law enforcement trust within immigrant communities. The resolution stated that “the City Council of Baltimore is concerned that participation in the Secure Communities Initiative will create divisions in our communities, promote a culture of fear, and discourage trust between local law enforcement and immigrant communities throughout the City.”¹⁴⁷ This view of the disruptions Secure Communities could cause to local law enforcement’s community-oriented policing reflects a view held by numerous law enforcement agencies,¹⁴⁸ and highlights the potential conflicts between federal immigration enforcement priorities and local public safety considerations.¹⁴⁹

Montgomery County, with a highly concentrated foreign-born and Latino population,¹⁵⁰ was likewise troubled by Secure Communities and voiced consistent concerns over these potential conflicts. Montgomery County has a history of only minimal cooperation between immigration and local law enforcement authorities,¹⁵¹ but with the arrival of Chief

Luz Lazo, *Baltimore Puts Out Welcome Mat for Immigrants, Hoping to Stop Population Decline*, WASH. POST, July 24, 2012, http://www.washingtonpost.com/local/baltimore-puts-out-welcome-mat-for-immigrants-hoping-to-stop-population-decline/2012/07/24/gJQA4WEk7W_story.html.

¹⁴⁷ CITY OF BALTIMORE, *supra* note 148, at 1.

¹⁴⁸ Debra Hoffmaster, Gerard Murphy, Shannon McFadden & Molly Griswold, *Police and Immigration: How Chiefs Are Leading Their Communities Through the Challenges*, POLICE EXECUTIVE RESEARCH FORUM (March 2011), <http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf> [hereinafter “*Police and Immigration*”].

The government task force examining Secure Communities cited this as an “unintended impact” of the program. *Task Force on Secure Communities, Findings and Recommendations*, HOMELAND SECURITY ADVISORY COUNCIL (Sept. 2011), <http://big.assets.huffingtonpost.com/TaskForce.pdf> [hereinafter, “TASK FORCE REPORT”].

¹⁴⁹ “Law enforcement experts have stated that the trust that exists between police and immigrant communities can take years to develop and can remain tenuous despite the hard work of local law enforcement agencies. When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information. This may have a harmful impact on the ability of the police to build strong relationships with immigrant communities and engage in community policing, thereby negatively impacting public safety and possibly national security.” TASK FORCE REPORT, *supra* note 151, at 24.

¹⁵⁰ See Debra A. Hoffmaster, Gerard Murphy, Shannon McFadden, & Molly Griswold, *Police and Immigration: How Chiefs are Leading Their Communities Through the Challenges*, POLICE EXECUTIVE RESEARCH FORUM (2010), available at <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmmk>.

¹⁵¹ *Police and Immigration*, *supra* note 151 at 21. “At that time, MCPD did not have what he considered to be a ‘sanctuary’ policy, but, in Chief Manger’s view, it tended to slant in that direction.” *Id.*

Thomas Manger in 2004, the police department began examining how and when the county might cooperate more with federal immigration authorities. In a dialogue between the Chief and the County Council, the county began defining the contours of the federal-local relationship.¹⁵²

While remaining cognizant of the federal government's interests in immigration enforcement, Police Chief Manger tried to balance what the federal government requires with his two public safety priorities: taking dangerous criminals off the streets and maintaining the trust that police officers had with the communities where they work.¹⁵³ Ultimately, after a lengthy process of internal and public debate, the county adopted a policy that provides for partial cooperation with federal immigration authorities for an enumerated list of what the county has deemed the most serious crimes: murder, rape, certain types of assaults, carjacking, sexual assault, arson, and robbery, as well as certain handgun violations.¹⁵⁴

The Montgomery County Council likewise adopted a moderated view, choosing a path between full engagement with immigration authorities and non-engagement. On May 3, 2011, the Council passed a "Resolution Promoting Community Safety and Trust Among Residents and the County's Law Enforcement Agencies," stating that the county would cooperate with Secure Communities when required to, but strongly criticizing DHS's failure to implement the program according to its stated objectives.¹⁵⁵ The resolution signaled support so long as Secure

¹⁵² One jurisdiction within the county, the City of Takoma Park, remains officially a sanctuary city, and resisted pressure to end the sanctuary policy in 2007. The press release describes the city's sanctuary policy as follows: "Takoma Park's sanctuary law was enacted in 1985 to protect numerous refugees from El Salvador and Guatemala from being deported to their homelands, which were in a state of civil war. In accordance with the City's sanctuary law, the Takoma Park Police Department neither inquires nor records information about individuals' immigration status. The sanctuary law does not restrict officers from arresting individuals who are suspected of criminal activity or who have an outstanding non-immigration related criminal warrant, even if the person is also identified as an immigration violator in the National Crime Information Center database." Press Release, City of Takoma Park, Takoma Park City Attorney Re-Affirms the Legality of City's Immigrant Sanctuary Law (Jul. 20, 2007), <http://www.takomaparkmd.gov/news/documents/pslnews.pdf>.

¹⁵³ "In his approach to the issue, Chief Manger's primary concern was ensuring that the policy would help his officers get undocumented immigrant criminals off the streets. However, it also was essential that the policy allow officers to maintain the relationships that they had worked to build within various immigrant communities." *Police and Immigration*, *supra* note 151, at 21-22.

¹⁵⁴ *Id.*, at 21-22.

¹⁵⁵ "[A]ccording to ICE data, 26% of those deported nationwide under Secure Communities since 2008 have been non-criminals. In some jurisdictions, more than 75% of deportations have been of non-criminals. This data contradicts the stated purpose of Secure Communities..." Montgomery Cnty. Council, Res. No. 17-108, *Resolution Promoting Community Safety and Trust Among Residents and the County's Law Enforcement Agencies* (May 3, 2011), http://www.montgomerycountymd.gov/content/council/pdf/res/2011/20110503_17-108.pdf.

Communities was “implemented consistent with its stated purpose and goals.”¹⁵⁶ Although this signaled a shift from the approach the County Council was considering, an approach like that adopted in Baltimore City, it met with approval from one of Secure Communities’ biggest critics in Maryland, CASA of Maryland.¹⁵⁷

2. *Struggle Followed By Accommodation: REAL ID*

The struggle by some in Maryland to carve out a distinct, and more inclusive, approach to immigration enforcement was prominent, too, in the state’s initial resistance to changing its driver’s license eligibility requirements to include lawful immigration status. Until 2008, Maryland did not require proof of lawful immigration status in order to issue a driver’s license, one of only seven states at that time without such a requirement.¹⁵⁸ The REAL ID Act passed by Congress, however, mandated that all fifty states screen for lawful immigration status in order to issue licenses, or else those licenses would not be acceptable for federal purposes, including as identification at airports.¹⁵⁹

Maryland, along with many other states, initially resisted implementation of REAL ID. Martin O’Malley campaigned for governor promising to keep Maryland’s doors open to immigrants, and urging integration for immigrants.¹⁶⁰ At a campaign event hosted by CASA in Action, O’Malley announced that “I don’t believe that at the state and local level that we should exacerbate the problem by enacting policies that put up . . . barriers to getting a driver’s license or getting to and from work or home.”¹⁶¹ The candidate also had concerns about requiring state Motor Vehicle Administration employees to become *de facto* immigration screeners, something which requires a great degree of complex knowledge.¹⁶² In other states, opposition was based more on libertarian principles.¹⁶³

¹⁵⁶ Montgomery Cnty. Resolution 17-108 (May 3, 2011), http://www.montgomerycountymd.gov/content/council/pdf/res/2011/20110503_17-108.pdf. CASA’s approval was overstated in this article, according to CASA Political Action and Communications Director Kim Propeack. (Email exchange on file with author.)

¹⁵⁸ *Maryland Is Not Ready for REAL ID Act, Officials Say*, THE WASHINGTON EXAMINER, Jan. 24, 2007, <http://washingtonexaminer.com/article/66300#.UEzixI2uanQ>.

¹⁵⁹ *Id.*

¹⁶⁰ Marc Fisher, *Maryland’s ID Policy Won’t Make Us Safer*, WASH. POST, Jan. 27, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/26/AR2008012601979.html>.

¹⁶¹ *Id.* The article references CASA of Maryland, but CASA staff clarified via email on file with the author that the event was hosted by the affiliated but independent 501(c)(4), CASA in Action.

¹⁶² *Id.*

¹⁶³ As recently as March 2012, Montana Governor Brian Schweitzer wrote “Montana is in no mood at all for another heavy-handed play by the federal government, such as what transpired

In January 2008, however, Governor O'Malley reversed course and announced his support for REAL ID.¹⁶⁴ After debates about how to balance the interests of road safety and compliance with the federal government, in 2009, the Maryland legislature passed a law ensuring compliance with REAL ID.¹⁶⁵ The legislation came after O'Malley administration officials testified that out-of-state individuals were seeking licenses in Maryland in large numbers because of the absence of immigration-related eligibility criteria.¹⁶⁶ Although this could be seen as an unavoidable bending to the demands of the federal government, other states are still, as of this writing, actively opposing implementation.¹⁶⁷ It is more accurate to say Maryland yielded to this particular federal policy, one deeply unpopular with immigration advocates.

3. *Supporting Immigrants: The Maryland DREAM Act*

The most significant, and divisive, piece of immigrant-related legislation in Maryland recently has been the Maryland version of the DREAM Act, providing in-state tuition at community colleges (and later at Maryland state universities, if they get their associate degree from a community college) for residents and graduates of Maryland high schools, regardless of residency status.¹⁶⁸ The law requires that the students have attended Maryland schools for at least three years, and that their parents filed their tax returns.¹⁶⁹ This legislation passed the Maryland Senate in March 2011, largely along party lines,¹⁷⁰ and passed a

in 2008 when the homeland security director threatened to prevent Montanans from boarding an airplane unless we complied with the REAL ID act. We refused, and will refuse again." Letter from Governor Schweitzer to House Judiciary Committee Members (Mar. 21, 2012), http://governor.mt.gov/news/docs/032112_RealID_Sensenbrenner.pdf.

¹⁶⁴ Lisa Rein, *Immigrant Driver ID Rejected by O'Malley*, WASH. POST, Jan. 16, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011503767.html> (noting that this "... effectively reversed a long-standing policy that made Maryland one of only seven states that allow driving privileges for illegal immigrants.").

¹⁶⁵ Janice Kephart, *Maryland Faces the Music on Drivers Licenses*, CENTER FOR IMMIGRATION STUDIES (Apr. 22, 2009), <http://www.cis.org/Kephart/MDHouseBill387-REALID>.

¹⁶⁶ *Id.*

¹⁶⁷ Neighboring Pennsylvania is one of only a handful of jurisdictions that continue to resist implementation of REAL ID. Janice Kephart, *Pennsylvania's Decision to Play Chicken with the Feds Over Driver's Licenses Is a Bad Idea*, CENTER FOR IMMIGRATION STUDIES (June 18, 2012), <http://cis.org/kephart/pennsylvanias-decision-play-chicken-feds-over-drivers-licenses-bad-idea>.

¹⁶⁸ Sen. B. 167, 2011 Leg. (Md. 2011), <http://mlis.state.md.us/2011rs/billfile/sb0167.htm>.

¹⁶⁹ *Id.*

¹⁷⁰ Armando Trull, *Maryland DREAM Act Passes in Senate*, WAMU 88.5 AMERICAN UNIVERSITY RADIO (Mar. 15, 2011), http://wamu.org/news/11/03/15/maryland_dream_act_passes_in_state_senate.php.

sharply divided House on April 9. Governor Martin O'Malley signed it into law on May 10, 2011,¹⁷¹ but already, those opposed to the bill were promising to bring it to the Maryland public in a referendum in 2012—the first time in 20 years that a Maryland law has been challenged by a referendum.¹⁷²

Powerful Maryland voices spoke out in favor of the law, from the Governor and Lieutenant Governor¹⁷³ to the President of the University of Maryland.¹⁷⁴ Faith-based organizations throughout the state also supported the law, and it was supported through editorials in the *Washington Post*¹⁷⁵ and the *Baltimore Sun*.¹⁷⁶ But with only a few exceptions, the strongest support came principally from three traditionally immigrant-friendly jurisdictions: Montgomery County, Prince George's County and Baltimore City.¹⁷⁷ Other jurisdictions showed greater discomfort with a bill that, according to its supporters, puts a fiscal burden on the state during difficult economic times; some opposed to the bill also call it a reward for law-breakers.¹⁷⁸ The editorial in the *Frederick News-Post*, for example, was highly ambivalent, concluding simply, “there is clearly more to this story—for anyone who is willing to think about it with an open mind and heart.”¹⁷⁹ Ultimately, the voters of Maryland approved the law, with the highest support in the jurisdictions with the highest foreign-born populations—not just from immigrant

¹⁷¹ *O'Malley Signs DREAM Act Into Law*, ABC 2 NEWS, May 10, 2011, <http://www.abc2news.com/dpp/news/state/o/malley-signs-dream-act-into-law,-providing-in-state-tuition-to-certain-illegal-immigrants>.

¹⁷² Aaron Davis, *Md. Voters to Decide Immigrant Tuition Law*, WASH. POST, July 7, 2011, http://www.washingtonpost.com/local/dc-politics/md-voters-to-decide-immigrant-tuition-law/2011/07/07/gIQAfAsr2H_story.html.

¹⁷³ Lieutenant Governor Anthony Brown wrote a personal endorsement of the law, and opposing the referendum, in an op-ed for the Washington Post. Anthony Brown, *If the DREAM Act Wins, all Marylanders Win*, WASH. POST, July 2, 2012, http://www.washingtonpost.com/opinions/if-the-dream-act-wins-all-marylanders-win/2012/07/02/gJQAcCXJTW_story.html.

¹⁷⁴ Wallace Loh, *For Young Md. Immigrants, a Path Out of the Shadows*, WASH. POST Sept. 7, 2012, http://www.washingtonpost.com/opinions/for-young-md-immigrants-a-path-out-of-the-shadows/2012/09/07/c8c9cd22-f79d-11e1-8b93-c4f4ab1c8d13_story.html.

¹⁷⁵ *Unleashing the Potential of Immigrants*, WASH. POST, Sept. 2, 2012, http://www.washingtonpost.com/opinions/unleashing-the-potential-of-immigrants/2012/09/02/fd8f8694-eb10-11e1-9ddc-340d5efb1e9c_story.html.

¹⁷⁶ *Educational Opportunity*, BALT. SUN, July 22, 2012, at A22.

¹⁷⁷ For a full list of supporters, see *Supporters of the Passage of the Maryland DREAM Act*, CASA DE MARYLAND, available at http://www.casademaryland.org/index.php?option=com_content&view=article&id=1450:some-of-the-many-organizations-and-institutions-that-supported-passage-of-the-maryland-dream-act-&catid=45:press-release&Itemid=128 (last visited Sept. 30, 2012).

¹⁷⁸ Nicholas Stern, *Residents Vary in Views About DREAM Act*, FREDERICK NEWS-POST, June 15, 2012, <http://www.fredericknewspost.com/sections/news/display.htm?StoryID=137002>.

¹⁷⁹ *Dream On*, FREDERICK NEWS-POST, Mar. 8, 2011, http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=122547.

communities, but those who most routinely interact with them, whose children are in school with the children who would benefit from the Maryland DREAM Act.¹⁸⁰ Thus, in Baltimore City and Montgomery and Prince George's counties, between 70% and 75% of voters approved the measure.¹⁸¹ However, in jurisdictions without significant interaction with the population that would benefit from the bill, i.e. the jurisdictions with the fewest foreign-born residents, opposition was more intense. In Western Maryland, approximately 60% of voters opposed the measure.¹⁸²

4. *Immigrant Integration in Maryland*

Several Maryland-wide policies support immigrant integration. Maryland has long filled in the gap in public benefit provision for non-citizens since the federal government sharply limited non-citizens eligibility for a wide array of public benefits in 1996, one of only nine states nationally to do so in the aftermath of welfare reform.¹⁸³ Former Republican Governor Ehrlich attempted to change eligibility criteria administratively, but the Court of Appeals applied strict scrutiny to his actions and enjoined the policy.¹⁸⁴ Legislative efforts to reverse this policy and require lawful immigration status in order to access benefits have likewise failed every time they have been introduced.¹⁸⁵ Not only do the services continue, but, since 2002, the legislature has required that they be accessible to limited English proficient speakers.¹⁸⁶

Since 2008, under Governor O'Malley, Maryland has also promoted a policy of immigrant integration that emphasizes the growth and importance of Maryland's immigrant population, and that created the Maryland Council for New Americans to coordinate citizenship, workforce development and governmental access programs, among

¹⁸⁰ Detailed results for this ballot question are available from the Maryland State Board of Elections, http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0004S-.html.

¹⁸¹ *Id.*

¹⁸² Specifically, 62.8% in Garrett County voted against, followed by 62.4% in Carroll County, 60.4% in Washington County, and 60.2% in Allegany County. The geographically proximate county to be more closely contested was Frederick County (50.3% opposed), which is also the only county among these Western Maryland counties to have a significant immigrant population.

¹⁸³ Amanda Levinson, *US in Focus: Immigrants and Welfare Use*, MIGRATION POLICY INSTITUTE (2002), <http://www.migrationinformation.org/usfocus/display.cfm?ID=45>.

¹⁸⁴ *Ehrlich v. Perez*, 394 Md. 691, 908 A.2d 1220 (2006).

¹⁸⁵ H.B. 28, 2011 Leg., 428th Reg. Sess. (Md. 2011); H.B. 380, 2011 Leg., 428th Reg. Sess. (Md. 2011).

¹⁸⁶ S.B. 265, 2002 Leg., 416th Reg. Sess. (Md. 2002).

others.¹⁸⁷ This mirrors efforts made by specific localities like Montgomery County and Baltimore City, which routinely pass resolutions supporting their immigrant communities.

Prince George's County provides a particularly interesting case study in transformation regarding the question of immigrant integration. Just as in Frederick County, the Latino population rapidly increased in Prince George's County—more than doubling over a period of approximately ten years from roughly 57,000 to 129,000.¹⁸⁸ Unlike Frederick, where the absolute numbers were significantly smaller but the growth rate even higher,¹⁸⁹ Prince George's County has avoided the kinds of high-profile controversies over immigration policies that Frederick became well known for, and has acted affirmatively to encourage immigrants in a number of ways. Part of the difference is surely the context into which the Latinos were moving. Prince George's county is Maryland's preeminent “majority-minority” county, its African-American identity dating back to the 17th century, and also becoming a magnet for African-Americans leaving urban Washington D.C. to seek the comfort and safety of the suburbs over the last forty years, but not without civil rights struggles of its own.¹⁹⁰

Prince George's experience is particularly interesting given that having a non-white majority is no guarantee of racial harmony. The experiences of Latino integration into urban neighborhoods in earlier decades were often difficult.¹⁹¹ Yet, in Prince George's County, these struggles have been largely absent, particularly over the last ten years when the rate of increase might otherwise lead one to expect evidence of tension. Three of the most prominent Latino legislators in Maryland were elected from Prince George's County (State Senator Victor Ramirez, Delegate Joseline Pena-Melnyk and County Council member Will Campos). All have championed legislation and policies that promote

¹⁸⁷ Md. Exec. Order No. 01.01.2008.18, (Dec. 3, 2008),

<http://www.newamericans.maryland.gov/documentsNA/ExecOrder.pdf>.

¹⁸⁸ Miranda S. Spivack, *Hispanic Population in Prince George's Doubles, Fueling Much of County's Growth*, WASH. POST, Feb. 9, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/09/AR2011020906235.html>.

¹⁸⁹ In the same six year period noted above where Frederick's Latino population grew by 159%, Prince George's County grew by 72.8%—the fourth highest rate in the state. See *Overview of Hispanic Community*, *supra* note 120, at Exhibit 4.

¹⁹⁰ Prince George's County was so slow to desegregate schools that the NAACP sued, resulting in a federal order for busing that lasted until 1998, the only such order in Maryland. See also *SCHOOL DESEGREGATION IN DORCHESTER COUNTY*, *supra* note 29.

¹⁹¹ In the majority-minority city of Washington, D.C., for example, the Mount Pleasant riots of 1991 revealed the tense relations among the city's ethnic groups, and how ill prepared the city government was to manage those tensions. Sharon Pratt, *Echoes of a D.C. Riot*, WASH. POST, Aug. 14, 2011, at A13, available at http://www.washingtonpost.com/opinions/lessons-from-a-dc-riot/2011/08/12/gIQAQQ2kBJ_story.html.

integration of immigrants, like the ones described above,¹⁹² and all three have provided the Latino community with a voice to avoid the kinds of frictions seen in urban areas in earlier decades.

Prince George's participation in Secure Communities was activated early on by ICE, but has garnered political opposition while being implemented by local law enforcement. Enforcement through Secure Communities by the Prince George's County Police Department led to one of the highest profile cases used by advocates to show the program's over-reach—the deportation proceedings against a woman, Maria Bolaños, who had called police as a domestic violence victim, but whose information was allegedly run through the Secure Communities database.¹⁹³ Stories such as hers, and media reports that the implementation of Secure Communities in the county has led to the highest rate of deportations of non-criminal offenders, have begun to create a political backlash against the program. County Executive Rushern Baker voiced concerns with the program, and is “studying options” for how the county will go forward in terms of cooperation with it.¹⁹⁴ As the county feels the pressure from the effects of the policy's implementation, it, too, is struggling with how to effectively navigate the contradictions within federal immigration policy.

IV. MOVING FORWARD

In previous periods from emancipation through the civil rights era when Maryland—and jurisdictions within Maryland—contested federal policies, the federal government obtained compliance vigorously, and with force. In the Civil War, states knew precisely what to expect from their disavowals of federal authority, and even in the more complicated Civil Rights era, states knew to expect the presence of the National Guard or litigation and injunctions resulting from litigation by the U.S. Department of Justice. The same level of clarity is missing from today's

¹⁹² State Senator Victor Ramirez introduced the Maryland Dream Act in the Senate. Ann E. Marimow, WASH. POST, Apr. 5, 2011, <http://www.casademaryland.org/news-archive/1446-washington-post-in-state-tuition-bill-picks-up-support-in-md-house-committee>. Delegate Pena-Melnyk sponsored the version in the House. County Council member Will Campos helped open a large center for multicultural services in the County. *Prince George's County and CASA de Maryland to Open the Country's Largest Worker's Center in Langley Park*, CASA DE MARYLAND, <http://www.casademaryland.org/news-archive/578-11172008> (last visited, Oct. 1, 2012).

¹⁹³ Shankar Vedantam, *Call for Help Leads to Possible Deportation for Hyattsville Mother*, WASH. POST, Nov. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/01/AR2010110103073.html>.

¹⁹⁴ John Fritze and Julie Scharper, *Feds to Check Immigration Status of People Arrested in the City*, BALTIMORE SUN, Feb. 21, 2012, http://www.baltimoresun.com/news/breaking/bs-md-secure-communities-20120221_0,5685656.story.

immigration policy landscape, where the federal government is simultaneously pushing states to engage in immigration enforcement and challenging states' authority to pass laws regulating immigrants who are state residents. With contradictions emanating from the executive branch as it tries to act in the shadow of Congressional inaction, who can say which jurisdiction in Maryland is more faithfully following federal policy? Is it Frederick County, embracing tough measures and participating in the federal government's 287(g) partnership? Is it Montgomery County, insisting that their participation in Secure Communities be conditioned upon the program being implemented faithfully with its stated goals? Is it Baltimore City, ensuring that immigrants are able to access all available services in the hopes of the city benefiting from their economic contributions? Unfortunately for states like Maryland, federal policy leaves open the possibility that they are all, despite their hotly contested differences, simultaneously achieving federal objectives.

Part of Maryland's difficulty is that although the federal government has attempted to devolve some responsibility for enforcement to the states, it has no ability to devolve responsibility for benefits—regularizing the immigration status of undocumented immigrants residing in Maryland. This leaves Maryland attempting to navigate questions of education, public benefits, public safety and more without an ability to take immigration status out of the discussions. Legally, in the wake of *Arizona*, states like Maryland can predict endorsement of efforts to complement federal enforcement priorities so long as they hew carefully to the precise language of the Immigration and Nationality Act without exceeding it—states must also be wary of initiatives that create a climate so hostile to immigrants as to seemingly interfere with the federal government's plenary power over immigration. The contours of what constitutes such a hostile climate, however, are only beginning to take shape. This area of ambiguity embraces a state like Maryland, with its varied attempts to engage in enforcement initiatives while promoting integration and avoiding the more draconian legislative ideas adopted in other states—but at the price of ongoing political energy expended in heated but often fruitless battles at both the state and local levels.

Justice Scalia, in his dissent to *Arizona*, suggests that the proper framework for states trying to work through immigration issues is not *how* to adapt to the plenary power, but *whether* there should be a plenary power at all.¹⁹⁵ For Justice Scalia, this question of federalism is best answered by giving states more power, and he points to historical antecedents for this, including *inter alia* laws controlling the

¹⁹⁵ *Arizona*, 132 S. Ct. at 194 (Scalia, J., dissenting).

“immigration” of slaves from one state to another.¹⁹⁶ Although Justice Scalia does not advocate a world in which states have their own sovereign power to issue visas and offer (or withhold) immigration status or citizenship, he does argue that in light of seeming federal inaction, states should be given the right to defend themselves, and the Arizona law should have been held up in its entirety.¹⁹⁷

Maryland's experience grappling with immigration politics within its own borders shows us the limitations of moving toward such a states' rights position on the question of immigration. While states have been far more active legislating in the immigration arena than the federal government itself, activity does not signify policy cohesion. Indeed, discussion of state-level responses to immigration obscures the important, sharp divides that exist within states; moving immigration regulation back to the states does not resolve the contradictions, but simply shifts their playing field. Even if states were permitted a broader role in legislating in this arena, important constitutional concerns would keep the federal government heavily involved, particularly as passage and implementation of immigrant-focused laws raises questions of equal protection violations. The civil rights era shows us this with clarity: although states unquestionably have the authority to regulate their own educational systems, the federal government intervened heavily to ensure that that power was deployed consistent with the Fourteenth Amendment. The same is and would continue to be true for regulation of immigrants.¹⁹⁸

Maryland would be far better served by a comprehensive federal response to immigration. Enforcement by the executive branch is part of the response, and greater coherence there would be useful—but the key player needed to resolve the incoherence fundamentally is Congress. Unless the plenary power doctrine is someday reversed, an extremely unlikely outcome in light of the *Arizona* decision, only Congress can create the laws that permit individuals to regularize their status, or provide the budgetary resources to fully implement the existing laws (an outcome few believe possible, or desirable). Congressional paralysis on matters of immigration inexcusably moves a contentious political conversation to a level of government with no authority to address its real substance. Maryland's difficulties finding state-wide solutions to the regulation of immigrants within its borders tells a cautionary tale, and

¹⁹⁶ *Arizona*, 132 S. Ct. at 2512 (Scalia, J., dissenting) (citing Neuman, *The Lost Century of American Immigration* (1776–1875), 93 COLUM. L. REV. 1833, 1835, 1841–1880 (1993)).

¹⁹⁷ *Arizona*, 132 S. Ct. at 2522 (Scalia, J., dissenting).

¹⁹⁸ Because “alienage” (or citizenship status) is not a suspect classification for equal protection analysis, challenges to these laws under the Fourteenth Amendment are made on the basis of alleged racial discrimination.

makes it all the more essential that the federal government, and Congress in particular, summon the courage to create a more sustainable framework so that states like Maryland can devote their political energies to governance and not to resolving disputes that are not rightly their responsibility in the first place.