RISING ARIZONA: THE LEGACY OF THE JIM CROW SOUTHWEST ON IMMIGRATION LAW AND POLICY AFTER 100 YEARS OF STATEHOOD

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INTRODUCTION

United States immigration law and policy is one the most controversial issues of our day, and perhaps no location has come under more scrutiny for the way it has attempted to deal with the problem of undocumented immigration than the State of Arizona. Though Arizona recently became notorious for its "papers please" law, SB 1070, the American Southwest has long been a bastion of discriminatory race-based law and policy – immigration and otherwise – directed toward Latinos, American Indians, African-Americans, and other non-White racial and ethnic minorities. While largely ignored by both legal and American historians, the so-called "Jim Crow Southwest" nonetheless persisted throughout the nineteenth and much of the twentieth century in both the Arizona Territory and the State of Arizona, forming the basis for, and giving shape to, laws meant to exclude and limit the participation of non-White persons in Southwestern society.

The State of Arizona, the last of the forty-eight contiguous States to be admitted to the Union, marked its 100th year of statehood on February 14, 2012. A few months later, on June 25, 2012, the United States Supreme Court issued its landmark decision in *United States v. Arizona*, striking down the majority of Arizona's aggressive state immigration enforcement law, S.B. 1070, as preempted by federal law. This Article discusses recent developments in Arizona immigration law

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and policy. By providing an overview of the history of race-based exclusion laws and policies in the Arizona Territory and the State of Arizona, it argues that Arizona's modern anti-immigrant laws and policies are merely the newest incarnation of the State's long history of discriminatory laws against racial and ethnic minorities, particularly Latinos and American Indians. In attempting to trace the genesis of racial animus toward non-Whites in the Southwest, Part I provides a historical overview of the Arizona Territory in the nineteenth century, including the development of the New Mexico Territory, the Confederate Territory of Arizona, and the impact of slavery and other race-based discrimination and exclusion laws in the Southwest. Part II discusses twentieth century race and immigration based policies in the Jim Crow Southwest that restricted and segregated the civil rights of non-Whites in the areas of marriage, education, and voting. Part III discusses the continuing legacy of the Jim Crow Southwest on the development of modern immigration law and policy in Arizona, and in particular, the aftermath of S.B. 1070's passage in April 2010, Arizona's subsequent rise as "ground zero" for state and local enforcement of immigration law in the United States, and the Supreme Court's decisions in *United States v. Arizona* in 2012 and *Arizona v. Inter-Tribal Council of Arizona* in 2013. Finally, the article concludes by summarizing how the historical evidence presented in this paper rebuts the claim that only in recent years has Arizona begun to "drown[] in a sea of extremism"[1] and become "the mecca for prejudice and bigotry,"[2] and argues that Arizona has a long history of race-based exclusion laws and intolerance toward racial and ethnic minorities that has only now begun to garner attention on the national stage.

I. RACE-BASED EXCLUSION LAWS IN THE NEW MEXICO AND ARIZONA TERRITORIES

A. The Compromise of 1850 and Slavery in the Union Territories

The land that ultimately became both the Union and Confederate Territories of Arizona was originally part of the New Mexico Territory and the Gadsden Purchase ceded to the United States in 1848 at the conclusion of the Mexican-American War.[3] The major events that led to the permission of slavery in the New Mexico (and later, Arizona) Territory were the Compromise of 1850 and the New Mexico Territory Slave Code.

1. The Compromise of 1850

The Treaty of Guadalupe Hidalgo, which ended the war between the United States and Mexico, was signed on February 2, 1848.[4] As part of the treaty, Mexico

1 *See* Max Blumenthal, *Arizona is Drowning in a Sea of Extremism*, Alternet (Jan. 13, 2011), http://www.alternet.org/story/149513/arizona_is_drowning_in_a_sea_of_extremism.

2. *See Sheriff Clarence Dupnik: Arizona 'Mecca for Prejudice and Bigotry*, The Huffington Post (Jan. 11, 2011), http://www.huffingtonpost.com/2011/01/08/sheriff-clarence-dupnik-a_n_806303.html.

3. *See generally* Donald S. Frazier, *Blood & Treasure: Confederate Empire in the Southwest* (Tex. A&M Univ. Press 1995). *See also* Fred Veil, *Law and Justice in 19th Century Arizona Territory*, Territorial Times, Vol. 1 No. 1, 6 (Fall 2007).

4. *See generally* Donald S. Frazier, ed., *The United States and Mexico at War: Nineteenth*

ceded to the United States a large of portion of present-day California and the majority of the modern American Southwest.[5] The Mexican Cession included most of modern-day Arizona, as well as portions of modern Nevada and the western part of New Mexico.[6] The Compromise of 1850 organized this land into the Territory of New Mexico, with a key provision that slavery be either permitted or prohibited based on the vote of territorial residents.[7] Although the New Mexico Territory would not enact its first Slave Code until 1859,[8] the agreement to allow or outlaw slavery via popular vote in the new Southwest territories would have a significant impact on the development of the region and set the stage for the cessation of the Confederate Territory of Arizona at the beginning of the Civil War.

2. The New Mexico Territory Slave Code

Slavery, primarily of American Indians, was in existence in the New Mexico Territory long before the official enactment of a Slave Code in the Territory.[9] As such, much of the economic growth of the Territory in the 1850s relied on slave labor.[10] Thus, in 1859, the Territorial Legislature enacted the New Mexico Territory Slave Code, which restricted slave travel, prohibited slaves from testifying in court, and limited an owners' right to arm slaves.[11] Because American Indians American Indians constituted the majority of slaves in the New Mexico Territory, one of the major goals of the Slave Code was to keep persons of African descent out of the Territory, American Indians and American Indians thus remained the predominant group of enslaved persons in the New Mexico Territory.[12]

As a result of the decision to permit slavery in the New Mexico Territory, the United States House of Representatives voted on January 14, 1861, to admit New Mexico to the Union as a slave state.[13] However, a bill on New Mexico statehood was tabled because of controversy surrounding the extension of slavery into the Southwest, and the belief that slavery would not be successful in New Mexico.[14] Thus, even though the United States Congress outlawed slavery in all Union

Century Expansionism and Conflict (New York; 1998).

5. *Id.*

6. *Id.*

7. The Wilmot Proviso would have outlawed slavery in the New Mexico Territory, but was rejected as part of the Compromise of 1850. *See* Nancy Gentile Ford, *Issues of War and Peace,* "The Three Million Bill and the Wilmot Proviso: The Debate over Westward Expansion during the Mexican War," at 75-100 (Greenwood Press, 2002).

8. *See* Alvin R. Sunseri, *Seeds of Discord: New Mexico in the Aftermath of the American Conquest, 1846-1861* (Nelson-Hall, Inc. 1979); *See also* Quintard Taylor, *In Search of the Racial Frontier: African Americans in the American West 1528-1990* (W.W. Norton & Co. 1998).

9. Despite their small numbers, some of the laws concerning slavery in the Territorial Southwest specifically targeted Blacks. Following the passage of the Fugitive Slave Act of 1850, slaves of African descent from Texas had begun to make their way into New Mexico Territory following its organization. In 1856, in order to discourage fugitive slaves from seeking refuge in the New Mexico, the Territorial Legislature passed a law limiting the number of free Blacks that were permitted to reside in the Territory. *See* Alton Hornsby, Jr., ed., *Black America: A State-by-State Historical Encyclopedia,* at 551 (Greenwood 2011).

10. *Id.*

11. *Id* at 547, 552.

12. *See generally* Sunseri; *Supra* note 9.

13. *See* Spencer C. Tucker, ed., *American Civil War: The Definitive Encyclopedia and Document Collection,* at 409 (ABC-CLIO, 2013).

14. *Id.*

territories in 1862,[15] New Mexico lost its chance at statehood in large part due to its Slave Code. As a result, New Mexico did not gain admission as a State until January 6, 1912, becoming the 47th State in the Union.[16]

B. The Confederate Territory of Arizona: 1861-1863

In order to understand the unique culture of Arizona, and the development of race-based exclusion laws as a means to disenfranchise and discriminate against non-White persons, it is important to highlight Arizona's time as part of the Confederate States of America. The Confederate Territory of Arizona was declared on August 1, 1861.[17] Prior to the beginning of the Civil War, in July 1860, settlers in Tucson drafted a constitution and attempted to form the Arizona Territory as part of the United States of America, even electing a territorial Governor and sending a delegate to the United States Congress.[18] However, because of fear that Arizona would become a slave state if admitted to the Union,[19] Congress did not ratify the constitutional convention, and the would-be Arizona Territory remained part of the New Mexico Territory until the ratification of the Arizona Organic Act, which established Arizona as a separate territory in 1863.[20]

On March 16, 1861, residents of the southern New Mexico Territory in Mesilla renewed the call for creation of the Arizona Territory.[21] This time, however, the proposal to establish the Arizona Territory also called for secession from the Union, and sought to formally admit Arizona to the Confederate States of America.[22] This led in part to the July 1861 Battle of Mesilla in the New Mexico Territory.[23] The Confederate Army prevailed, and on February 14, 1862, Confederate President Jefferson Davis signed a proclamation recognizing the Confederate Territory of

15. *See* Hornsby, Jr. at 552.

16. *See* National Archives, New Mexico and Arizona Statehood Anniversary (1912-2012), available at http://www.archives.gov/legislative/features/nm-az-statehood/.

17. Prior efforts to establish Arizona as a separate Union Territory were unsuccessful. *See* Melissa McDaniel and Wendy Mead, *Arizona: Celebrate the State*, at 37 (Marshall Cavendish; 2009) ("The first effort to make Arizona a separate territory came in 1856, when a group of Western New Mexico Territory residents asked Congress to create the territory of Arizona, but they were unsuccessful.").

18. *See Late From Arizona: A Provisional Government Convention in Session – Constitution Adopted – Election of a Governor – Two Days' Proceedings Entire*, THE NEW YORK TIMES, April 3, 1860, available at http://www.nytimes.com/1860/04/26/news/late-arizona-provisional-government-convention-session-constitution-adopted.html ("TUCSON, Tuesday, April 3, 1860. A Convention of delegates from all parts of Arizona, called for the purpose of forming a Provisional Government, assembled in this place yesterday morning.")

19. Before the start of the Civil War, a secessionist convention was held in Mesilla in the Arizona Territory pledging Arizona as a Confederate State on March 16, 1861. Less than two weeks later, on March 28, 1861, the convention was ratified in Tucson and Arizona was declared that it would be admitted to the Union as a slave state. *See* Jana Bommersbach, *How Arizona almost didn't become a state*, The Arizona Republic (Feb. 13, 2012), www.azcentral.com/news/articles/2012/01/20/20120130arizona-centennial-state-fight.html.

20. *See* Veil; *See supra* note 4 at 6. ("The Organic Act establishing Arizona as a separate territory on February 24, 1863 provided that ". . .the legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are, hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation.")

21. *See* James E. Officer, *Hispanic Arizona, 1536-185*6, at pp. 288-291 (University of Arizona Press, 1987)..

22. *Id.*

23. *Id.*

Arizona.[24]

The government of the Confederate Territory of Arizona was located in Mesilla, and Confederate Lieutenant Colonel John Baylor declared himself Territorial Governor.[25] However, the Union Army mounted a significant offense to reclaim the Arizona Territory as part of the New Mexico Campaign.[26] The major battle between Union and Confederate forces concerning the Arizona Territory was the Battle of Glorieta Pass in March 1862, often called "The Gettysburg of the West."[27] The Battle of Glorieta Pass was a significant defeat for the Confederate Army, and the Confederate Territory of Arizona was subsequently forced to relocate its capital from Mesilla to El Paso, Texas, in July 1862.[28]

In March 1862, around the same time as the Union victory at Glorieta Pass, the United States House of Representatives passed the Arizona Organic Act,[29] which created the Arizona Territory of the United States, with Tucson as its capital,[30] and abolished slavery in the territory.[31] The Senate subsequently approved the act, and President Abraham Lincoln signed it into law on February 24, 1863.[32] However, despite the reclamation of the Arizona Territory by the Union, the territory continued to be represented in the Confederate Congress until the end of the Civil War in 1865.[33]

C. The Jim Crow Southwest in the Arizona Territory: 1863-1912

Following the conclusion of the Civil War, many jurisdictions in the United States passed racially discriminatory laws designed to prohibit non-White persons from participating freely and fully in American society. These laws, which came to be known as "Jim Crow" laws, were primarily enacted in the former Confederate states in the South.[34] While the existence of Jim Crow laws in the Southwest has not

24. *Id*. at 396 ("Confederate troops occupied Tucson from February until May, 1862, and those not sympathetic to the Southern cause left town.")

25. Baylor, a Texan, led the Confederate victory in the Battle of Mesilla. He was ousted as governor shortly thereafter by Confederate President Jefferson Davis. *See* Mickey L. Dennis, *The Buffalo Soldier of the Western Frontier*, at 85 (AuthorHouse; 2008).

26. Flint Whitlock, *Distant Bugles, Distant Drums: The Union Response to the Confederate Invasion of New Mexico* (Univ. Press of Colo. 2006).

27. *Id.*

28. The seat of the government of the Confederate Territory of Arizona ultimately moved from El Paso to San Antonio, remaining in exile in Texas until the end of the Civil War. *See* William L. Richter, *Historical Dictionary of the Civil War and Reconstruction*, at 422 (Scarecrow Press, Inc. 2004).

29. H.R. 357, 37th Cong. (1862).

30. Despite this stipulation, the first capital of the Arizona Territory was actually Ft. Whipple, which was succeeded as the capital by Prescott. Tucson did not become the capital until after the Civil War, from 1867-1877 (when the capital seat was returned to Prescott). Phoenix, the capital of the modern State of Arizona, became the territorial capital in 1889. *See* Andrew E. Masich, *The Civil War in Arizona: The Story of the California Volunteers, 1861-1865*, at 261 (University of Oklahoma Press, 2006).

31. Although there was not a great number of slaves of African descent in the Arizona Territory at the time the Arizona Organic Act expressly abolished slavery in the territory, the New Mexico Territory did have a long history of slavery of American Indians – by both White and Hispanic settlers. *See* supra note 10.

32. *Supra* note 30.

33. *Id.*at 172, n. 51 (describing Baylor's election to the Confederate Congress and his attempts to officially reclaim Arizona for the Confederacy until the end of the Civil War in April 1865).

34. *See* Encyclopedia Britannica, "Jim Crow law," available at http://www.britannica.com/EBchecked/topic/303897/Jim-Crow-law ("Jim Crow law, in U.S. history, any

received much attention,[35] an examination of the laws passed in the Arizona Territory in the late-nineteenth and early-twentieth century demonstrates how the territorial government of Arizona attempted to preserve the pre-Civil War culture of White privilege and supremacy through the use of race-based exclusion laws.

At the time of the Arizona Territory's inception, native Mexicans and American Indians vastly outnumbered the White settlers in the Territory.[36] Therefore, one of the first laws of the new Arizona Territory in 1863 extended voting rights only to White men.[37] Because the Gadsden Treaty and the Treaty of Guadalupe Hidalgo guaranteed United States citizenship to Mexican citizens in the acquired territories, all Mexicans who acquired citizenship as a result of the treaties were considered White under United States law, and could therefore vote in the Arizona Territory.[38]

Despite this legal racial classification, however, the vast majority of White settlers in the Arizona Territory viewed Mexicans as non-White.[39] This led to an effort in the Arizona Territory to reclassify United States citizens of Mexican descent as American Indian rather than White, since at the time Indians were ineligible for United States citizenship, and thus unable to vote.[40]

1. Mexicans and Whiteness in Territorial Arizona

As noted above, while Mexicans received American citizenship pursuant to the Treaty of Guadalupe Hidalgo,[41] legislatures with significant Mexican-American

of the laws that enforced racial segregation in the South between the end of the formal Reconstruction period in 1877 and the beginning of a strong civil rights movement in the 1950s.

35. Jim Crow laws in the Southwest are sometimes referred to as "Juan Crow" laws, reflecting the fact that the majority of persons targeted by race-based exclusion laws in the Southwest were Latino. *See e.g.*, Diane McWhorter, *The Strange Career of Juan Crow*, N.Y. Times (June 16, 2012), http://www.nytimes.com/2012/06/17/opinion/sunday/no-sweet-home-alabama.html?_r=0.

36. *Id.*

37. Voting rights in the Arizona Territory were guaranteed to "every white male citizen of the United States, and every white male citizen of Mexico. *See infra* note 43.

38. The link between race and citizenship – namely, the requirement that one must be White to be a United States citizen – was first established in the Naturalization Act of 1790, which provides for citizenship only for "white immigrants." *See* Statutes at Large, 1st Congress, 2nd Session (1790), available at http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=226. The text of the Act reads in part: "[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof. . .". Thus, because of the interplay between the treaties between the United States and Mexico following the Mexican-American War guaranteeing citizenship to Mexicans – and the requirement that all citizens be white in the Naturalization Act – Mexican-Americans became "white by law." *See generally* Ian Haney Lopez, *White By Law: The Legal Construction of Race* (N.Y. Univ. Press 2006).

39. *See infra* note 43 at 30.

40. Although the Fourteenth Amendment to the United States Constitution in 1868 extended birthright citizenship to all persons born in the United States regardless of race, this grant of citizenship did not extend to American Indians because they were deemed to be members of sovereign nations not subject to the jurisdiction of the United States. *See Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that an American Indian born on Indian reservation in the U.S. territory is not a citizen of the United States under the Fourteenth Amendment because Indian tribes are alien nations). American Indians were finally granted United States citizenship by statute in the Indian Citizenship Act of 1924. *See* 43 U.S. Stats. At Large, Ch. 233, p. 253 (1924); however, Arizona did not extend voting rights to American Indians until 1948. *See* Janine B. Pease, "Voting Rights in Indian Country," at 169 (in AMERICAN INDIAN NATIONS: YESTERDAY, TODAY, AND TOMORROW, George Horse Capture, Duane Champagne, and Chandler C. Jackson, Eds., 2007).

41. By the year 1860, nearly 100,000 Mexicans had become American citizens under the

populations began to interpret their laws in such a way that only provided "White Mexicans" constitutional rights, thus prohibiting Mexicans of Indian and African descent (who were commonly called mestizos or mulattoes) from voting, holding public office, practicing law, testifying in court cases involving Whites, or serving on juries.[42] For example, the Arizona Territory limited suffrage to "[e]very white male citizen of the United States, and every white male citizen of Mexico."[43]

However, because of racism against dark-skinned persons in general in the Southwest, even legally White Mexicans were subject to the hallmark violence, ostracism, and oppression of the Jim Crow regime in the United States. Professor Salvador Acosta describes life in early Arizona in the following way:

> The social experiences of Mexicans in Arizona proved that legal whiteness did not necessarily translate into social toleration. They were victims of lynchings and mob violence; a sheriff could manipulate state tax laws to strip them of their property; they participated on juries at lower rates than whites; they were subject to more prosecutions, longer sentences, and a disproportionate number of death sentences; hospitals often denied them services; some employers – mines in particular – used dual-wage systems where Mexicans received lower salaries for equal work and had no access to higher-paying positions . . . [N]ativist organizations and labor unions – many of which excluded Mexicans – endorsed propositions to ban aliens from public projects . . . and to require all employers to maintain their alien workforce at a maximum of twenty percent, and to administer literacy tests to potential voters. Mexicans were the primary targets of these political maneuvers since the number of Chinese residents had declined significantly and the black population was miniscule.[44]

The parallels between the race-based exclusion laws of late-nineteenth century Arizona and the laws targeting noncitizens in early twenty-first century Arizona are clear to anyone with even a passing familiarity of the state's recent attempt to enforce its "attrition by enforcement" regime.[45] When placed in this historical and social context, much of the confusion over the origins of Arizona's "sudden" emergence as a hotbed of racism and nativism, and particularly the animus directed toward Latinos, no longer seems so mysterious. Professor Acosta demonstrates that in addition to American Indians, who are the largest non-White population in the state,[46] Mexicans in Arizona have long been the targets of racially discriminatory laws designed to disenfranchise and marginalize their full

Treaty of Guadalupe Hidalgo, notwithstanding the fact that the majority of them were not Caucasian and, therefore, would likely not have otherwise qualified for United States citizenship under the Immigration Act of 1790. *See* Salvador Acosta, *Crossing Borders, Erasing Boundaries: Interethnic Marriages in Tucson, 1854-1930*, Ch. 3, Ph.D. dissertation, University of Arizona (2010).

42. *See* Acosta at 53.

43. *See* Katherine Benton-Cohen, *Borderline Americans: Racial Division and Labor War in the Arizona Borderlands*, at p. 31. (Harvard Univ. Press 2009).

44. *See* Acosta at 56.

45. Discussed in depth in Part III: THE IMPACT OF JIM CROW ON MODERN ARIZONA IMMIGRATION LAW AND POLICY.

46. *See generally* Acosta at 53.

participation as citizens of Arizona and the United States.

2. The Camp Grant Massacre of 1871

Perhaps the most striking example of the unequal protection and application of the law in the Arizona Territory against non-White persons is the Camp Grant Massacre, which occurred on April 30, 1871.[47] Following rising tensions between White settlers and the indigenous Apache,[48] a vigilante group slaughtered more than 100 Aravaipa and Pinal Apaches, the majority of whom were women and children.[49] The vigilante group, which called itself the Committee for Public Safety, blamed the Apache for the widespread plundering of southern Arizona.[50] The group targeted Camp Grant, located about 50 miles from Tucson and a hotbed of anti-Apache sentiment at the time.[51] Camp Grant was apparently targeted because the commander, Royal Emerson Whitman, had permitted approximately 455 Apache to receive rations and plant crops on land 5 miles outside of Camp Grant.[52]

The catalyst for the Camp Grant Massacre appears to have been the driving of livestock off the land in San Xavier on April 10, 1871.[53] The attack was exceptionally brutal, and because the Apache men were out hunting at the time of the attack, women and children comprised all but 8 of the victims.[54] In response to President Grant's threat to place Arizona under martial law if the vigilantes were not charged, some 115 members of the group were indicted and stood trial for murder in federal district court in December 1871.[55] However, the majority of the White settlers in southern Arizona believed the massacre was justified because of the alleged pillaging of the land by the Apache.[56] After a five day trial, a jury deliberated only 19 minutes and acquitted all the defendants of murder charges.[57]

The Camp Grant Massacre is a striking example of the racial tensions that existed in the Territory of Arizona between Whites, Mexicans, and various American Indian tribes, and the failure of the justice system to hold anyone accountable for crimes committed against non-White persons in the Territory. Even before the Camp Grant Massacre, the slaughter of American Indians in the Arizona Territory by White

47. For a detailed treatment of the events that gave rise to the Camp Grant Massacre, *see* Thomas E. Sheridan, *Arizona: A History* 86-89 (Joseph C. Wilder ed., Univ. of Ariz. Press 2012).

48. *Id.*

49. *See* Veil, *supra* note 4 at 13. It is important to note that while two of the leaders of the vigilante group - Sidney R. DeLong and William S. Oury - were both White men, the group as a whole included Mexicans and American Indians, as well. *See Id.* Additionally, Jesus Maria Elias, a Mexican Tucsonian, played a prominent role in the Camp Grant massacre and had previously organized an attack against the Apache in Aravaipa Canyon in 1863. *See* Sheridan at 88. The precise numbers of the vigilante group included six Whites (Anglos), forty-eight Mexicans, and ninety-four American Indians (O'odham). *Id.* at 87.

50. *See* Sheridan, at 86-9.

51. *Id.*

52. *Id.*

53. *Id.* at 87.

54. The vigilantes "bounded forward . . . clubbing, stabbing, and splitting heads open with rocks. . . By the time the carnage ended, about thirty children had been captured and more than a hundred Aravaipas and Pinals had been mutilated and slain." *Id.* at 87-8.

55. *Id.*

56. William Oury opined that the massacre was "the killing of about 144 of the most bloodthirsty devils that ever disgraced mother earth." *Id.* at 88.

57. *Id.*

settlers and Mexicans is well-documented[58] – and nearly never avenged.[59] The confluence of these three diverse communities in southern Arizona – whose lives were so intertwined that historian Karl Jacoby has labeled them "intimate enemies"[60] – and the animosities, power struggles, and violence that occurred between and among them as control of the Arizona Territory was wrested away from Mexico and Indian tribes sheds light on the continuing racial and ethnic tensions among Whites and non-Whites, and provides context for the roots of the xenophobic immigration laws and policies in modern-day Arizona.[61]

3. Anti-Miscegenation Laws in Territorial Arizona

Anti-Miscegenation laws, which prohibit marriage between persons of different races, were commonplace until the United States Supreme Court declared such laws unconstitutional in 1967.[62] The first anti-miscegenation law in what is now modern-day Arizona was enacted in 1857, when it was still part of the New Mexico Territory.[63] The territorial legislature initially prohibited marriages and cohabitation between Black men and White women, although marriage between White men and Black women was permitted.[64] Both men and women found guilty of miscegenation could be punished by two to three years of hard labor in prison.[65]

Arizona became its own territory in 1863, and the First Territorial Legislature met in Prescott, Arizona in the fall of 1864.[66] One of the first laws passed by the Arizona Territory was its anti-miscegenation law in 1864, which was based on California's anti-miscegenation statute at the time.[67] In 1865, the Second Territorial Legislature amended the law, which initially only prohibited marriage between Blacks and Whites, to prohibit marriages between whites with "Negroes, mulattoes, Indians, and Mongolians,"[68] and declared all such marriages illegal and void in the Arizona Territory.[69] Although the Arizona anti-miscegenation statute did not prohibit

58. In the 1860s, bands of civilian militias took it upon themselves to exterminate the Indian tribes in Arizona: "Pioneers with time on their hands and a taste for blood . . . went Indian hunting – slaughtering men, women, and children wherever they found them. . . These were hit-and-run affairs, often degenerating into massacres of women and children as well as men. Many Indians died, but not enough to change the balance of power in the territory." *See Id*. at 79-80.

59. *Id.*

60. *See Id*. at 89.

61. The extent to which the intermingling of these racial and ethnic groups in southern Arizona and northern Mexico spurred racism among White settlers is best exemplified by the words of Democratic politician John Ross Browne in 1863: "I think that Sonora can beat the world in the production of villainous races. Miscegenation has prevailed in this country for three centuries. Every generation of that population grows worse; and the Sonorans may now be ranked with their natural comrades – Indians, burros, and coyotes." *See* Benton-Cohen, at 29.

62. *Loving v. Virginia*, 388 U.S. 1 (1967).

63. *See* Acosta at 39-40.

64. *Id.*

65. *Id.*

66. *See* Veil at 6.

67. In addition to the Arizona and New Mexico Territories, several other states and territories in the American West had anti-miscegenation statutes in the 1850s and 1860s, among them California (1850), Utah (1852), Washington (1855), Kansas (1855), and Nevada (1861). The Arizona anti-miscegenation statute was copied word-for-word from the California statute. *See* Acosta at 40.

68. The inclusion of "Mongolians" in the territorial anti-miscegenation statute is a reflection of the anti-Chinese sentiment that was prevalent at the time. *See Id.*

69. *See Id.* at 41. (providing that "marriages of white persons with negroes or mulattos are

cohabitation between persons of different races,[70] the punishment for violating the Arizona law was a fine in the range of $100 to $10,000, and a prison term of anywhere from three months to ten years.[71] However, although intermarriage in Arizona itself constituted a misdemeanor, Arizona did recognize interracial marriages legally entered into in other jurisdictions.[72]

As Professor Acosta notes, he "the Arizona Territory also holds the dubious distinction of being the one of the first legislatures to include definitions of Whiteness in its anti-miscegenation law."[73] This is due to the revision of the 1865 statute in 1887 to add the word "descendants" to the list of minority groups.[74] ""The revised statute prohibited marriages between "persons of Caucasian blood or their descendants with Africans, Mongolians and their descendants,"[75] which is a precursor to the American "one-drop" laws defining Whiteness.[76] Thus, it is important to note that while Mexicans were White by law,[77] and therefore marriages between Caucasians and Mexicans were not strictly prohibited by Arizona's anti-miscegenation statutes, the fact that Mexicans could be classified as mestizos, mulattos and/or Indians guaranteed their *de facto* inclusion in Arizona's race-based exclusion laws, including its anti-miscegenation statute.[78] However, although intermarriage in Arizona itself was a misdemeanor, Arizona did recognize interracial marriages that were legally entered into in other jurisdictions.[79]

a. In re Walker's Estate[80]

An early case upholding the constitutionality of territorial Arizona's anti-miscegenation statute was *In re Walker's Estate*, which was decided by the Arizona Supreme Court in 1896.[81] The case concerned a claim filed against the estate of a White man, John D. Walker, by his daughter Juana following his death.[82] Juana

declared to be illegal and void.").

70. The anti-miscegenation statute in the New Mexico Territory prohibited cohabitation as well as marriage. *Id.*

71. *Id.*

72. *Id.*

73. Acosta at 44.

74. *Id.*

75. *Id.*

76. Professor Acosta notes that a bizarre unintended consequence – and absurd result – of the Arizona Territory's anti-miscegenation statute is that it "forbade virtually all people of mixed ancestry – and who had at least one white ancestor – from marrying anyone . . . Therefore, all mestizos and mulattoes who married anyone between 1887 and 1942 [when Arizona's anti-miscegenation statute was amended] effectively broke the law." *See Id* at 46.

77. *See Id.* at 52, 61.

78. *See Id.* at 71. Professor Acosta notes that, because of Mexicans were both legally White and socially non-White, they were often permitted to violate Arizona's anti-miscegenation statutes by marrying non-White persons. He also observes that "Mexicans partially benefited from their legal whiteness. . . Mexicans thus occupied a unique place in the legal and social spaces of the west. They belonged to the only ethnic cohort that oscillated between whiteness and non-whiteness as a group. This racial ambiguity, perhaps because of the long history of *mestisaje* among Mexicans, probably facilitated the acceptance of their marriages with non-whites, both with civil officials and among the Mexican community. In their eyes, these marriages seemed natural, regardless of the law that prohibited them."

79. Acosta at 41.

80. In Re. Walker, 5 Ariz. 70 (Ariz. Terr. 1896).

81. *Id.*

82. *Id.* at 74.

claimed that her mother, a Pima Indian woman named Chur-ga, was married to John Walker "according to the customs of such Indians governing marriage, and that she is the child of such union."[83] At the time, Arizona's anti-miscegenation statute provided that "All marriages of white persons with negroes, mulattoes, Indians, or Mongolians, are declared illegal or void."[84]

In denying Juana's claim against the estate of her father, the Arizona Supreme Court stated that "[i]t is readily seen that this pretended marriage, if it had been a marriage in fact, was illegal and void, and imposed no obligation on either party thereto."[85] The Court continued:

> We do hold . . . that marriage in fact could not be consummated at the time this was alleged to have taken place, in Arizona, between a Pima Indian squaw and a white man . . . Such marriages are null and void.[86]

In reaching this conclusion, the Court expressly rejected Juana's argument that her parents' marriage was valid because "it was established and existed between them on the Pima and Maricopa Indian reservation according to the customs of such Indians, and notwithstanding the laws of Arizona forbade such marriages."[87] Juana's argument was premised on the notion that because her parents' marriage occurred on the Indian reservation and was valid there, that Arizona must recognize the marriage because Arizona law recognized legal marriages entered into in other jurisdictions.[88]

The Court rejected this argument by asserting the plenary power of the United States government over Indians, stating:

> This doctrine is not tenable in a territory. There is only one sovereignty here, - that of the United States, - which delegates its power to the territory to legislate on all rightful subjects of legislation . . . If both of these parties had been Indians, the courts would recognize such relations as a marriage. Such marriages between a white man and an Indian woman have been upheld by the decisions of some of the states . . . But such marriages have never been recognized in Arizona.[89]

Thus, despite the fact that John Walker had entered into a valid marriage by Indian customs and recognized Juana as his child during his life,[90] the Arizona Supreme Court held that his marriage to Chur-ga was null and void under Arizona's

83. *Id.*

84. *Id.* at 75 (citing "Marriages," Comp. Law Ariz. 1877).

85. *Id.*

86. *See* 5 Ariz. at 75.

87. *Id.* at 76.

88. *Id.*

89. *Id.* at 76-7.

90. Although Juana's counsel offered to proffer testimony from witnesses to support her assertion that John Walker recognized her as his child, the court stated that she had not met her evidentiary burden to support a claim to his estate: "If she had offered testimony showing that she was the offspring of an illicit union between John D. Walker and a Pima Indian squaw named Chur-ga, and that she had changed her status from a Pima Indian to the child of John D. Walker, who, when he left the Pima Indian reservation, instead of leaving her there, had taken her with him, and educated her, introduced her to his relatives, and held her out to the world as his daughter . . . there might be some basis for her claim." *Id.* at 76.

anti-miscegenation statute, and denied Juana's claim against her father's estate.[91]

In re Walker's Estate is significant because it marked the first time that the constitutionality of Arizona Territory's anti-miscegenation law was recognized and that it applied to all citizens in the state of Arizona.[92] Thus, because the anti-miscegenation statute was held to be constitutional, it was able to be invoked in successive cases in order to keep non-White offspring from inheriting property or otherwise invoking their status of heirs of White persons.[93] This decision would remain good law until well into the next century, when Arizona's anti-miscegenation law was finally repealed in 1962.[94]

D. Race, Labor, and the Quest for Statehood

The issue of race in the Arizona Territory's quest for statehood was significant, and the fact that the majority of the inhabitants of the territory were non-White is the main reason why Arizona did not achieve statehood for nearly 50 years.[95] As early as the 1860s, members of the United States Congress were opposed to Arizona's bid for territorial status because of its lack of a significant White population.[96] In order to attract more White persons to the Arizona Territory in order to gain statehood, territorial politicians sought ways to expand industries in Arizona – such as railroad and mining – while also discouraging or prohibiting non-White persons from migrating to the territory and further jeopardizing its statehood ambitions.[97]

1. Chinese in the Arizona Territory

The first federal law excluding certain classes of immigrants based on race, The Chinese Exclusion Law, was enacted in 1882.[98] The Chinese Exclusion Law barred Chinese immigrants from obtaining United States citizenship, and made it nearly impossible for most Chinese to immigrate to the United States.[99] Given the rampant anti-Chinese sentiment in the United States during the 1870s and 1880s,[100] it is not surprising that there was significant racism against the Chinese in territorial

91. *Id.* at 80.

92. *See* Acosta at 64-5.

93. *Id.* at 70-1. ("Interracial relations threatened the purity of the white race, but, more importantly, interracial marriage was a greater concern to whites because marriage carried legitimacy, respectability, and economic benefits – such as inheritance, alimony and child support. Legal disputes that invoked miscegenation primarily involved property. . . All cases concerning the legality of interethnic unions in Arizona resulted in the loss of property or rights of non-whites, particularly of non-white women and their children, to the benefit of whites.").

94. *See Id.* at 51.

95. *See Id.* at 54. Mexicans were considered White by law, and therefore were counted by the proponents of granting Arizona territorial status as White. However, opponents in Congress argued that only ten percent of the White residents of Arizona were non-Mexicans – which would have meant that, in 1863, the entire Arizona territory had only 600 White residents. *See also* Benton-Cohen, at 18-48.

96. *Id.*

97. *Id.* Mining was a major industry in the Arizona Territory, and seven of the ten territorial legislators affiliated with mining voted for the 1865 amendment to the anti-miscegenation statute prohibiting marriage between Whites and Indians.

98. *See* Benton-Cohen at 72

99. *Id.*

100. *Id.*

Arizona. Some of the first race-based exclusion laws in the Arizona Territory were directed at Chinese immigrants, and served as models for subsequent race-based exclusion laws against other non-White persons.[101]

Although the overall Chinese population in Arizona was relatively small, their presence in Arizona building the railroads and working in the mines prompted a backlash – particularly near Tombstone, where approximately 1,000 Chinese laborers were living while constructing the Southern Pacific Railroad.[102]

Professor Katherine Benton-Cohen notes that the anti-Chinese activism by White settlers in Arizona "demonstrated, like the removal of the Apaches, a persistent commitment to racial exclusion."[103] In 1880, the United States Census reported forty-four Chinese residents living in Tombstone.[104] Shortly thereafter, John Clum, the editor of the *Tombstone Epitaph*, organized an Anti-Chinese League which railed against "the despised Mongolians" and vowed "to rid the town of evil."[105] The passage of the federal Chinese Exclusion Act of 1882[106] only added fuel to the fire, and in February 1886, Tombstone citizens called for a boycott of local Chinese businesses due to the "influx of Chinese."[107]

Like modern-day Arizona, the anti-Chinese fever in Tombstone during the 1880s was spurred, at least in part, by political opportunism.[108] Professor Benton-Cohen writes:

> Both the 1880s and 1886 [anti-Chinese] campaigns were launched by political aspirants looking for a hot issue. In 1880 John Clum was running successfully for mayor and hoping to sell newspapers. In 1886, a Tombstone "Anti-Chinese Political Party" ran slates of local candidates. Chinese immigrants were an easy target: they could not vote and they employed mostly fellow Chinese.[109]

Another similarity between the anti-Chinese movement and modern anti-immigrant laws in Arizona is the passage of local ordinances across the state designed to harass and intimidate local Chinese residents, such as laws requiring the health inspection of laundries (which were mainly Chinese-owned businesses).[110] As Professor Benton-Cohen notes, "In the late nineteenth century, Chinese, not Mexicans, were the primary targets of anti-immigrant campaigns in the West . . .The Chinese were the nation's first 'illegal immigrants,' and the first to be refused entry

101. *Id. at* 71-9.

102. *Id.* at 71 ("At their peak numbers, in mid-1882, Chinese made up only about 4 percent of Tombstone's population, a much lower percentage than in many western mining regions. . . Small numbers, however, did not stop the Tombstone activists, who, drawing on precedents elsewhere in the West, launched local anti-Chinese campaigns in 1880 and 1886.").

103. *Id.*

104. *See* Benton-Cohen at 73.

105. *Id.*

106. *Id.*

107. *Id.* at 74.

108. *Id.*

109. *Id.*

110. *See* Benton-Cohen at 74. ("One movement leader, Stanley Bagg, was elected to the [Tombstone] city council, where he secured an ordinance to require the health inspection of laundries. Many communities passed such ordinances, which provided a way to harass Chinese businesses and reflected a fear that the Chinese would spread disease.").

on the basis of nationality alone – which became an easy proxy for race."[111] She continues:

> In the early years of border enforcement, agents were concerned not with excluding Mexicans, but with preventing Chinese from coming in from Mexico. The predecessors of today's Border Patrol were the so-called "Chinese inspectors" first appointed in 1891. Some newspapers in the early twentieth century even referred to "Chinese wetbacks" (though Arizona border crossers trekked on dry land).[112]

Finally, the threat of cheap labor that Chinese immigrants signified to White settlers is also reminiscent of modern anti-immigrant sentiment against Latinos in Arizona. The perception that the increase in Chinese immigrants contributed to lower wages for the White working class caused the Arizona Republican Party to officially take an anti-Chinese immigrant stance in its party platform, stating: "The immigration of the so-called "Coolies" to complete with the intelligent white laborers of our land is degrading to their manhood."[113] Thus, "Chinese exclusion created a framework for immigration control that would dramatically shape the future of Mexicans and many others"[114] not just at the federal level, but at the state level in Arizona, for years to come.

2. Race-Based Exclusion Laws in Arizona's Mining Industry – the Bisbee "White Man's Camp"

The most notorious incidence of racial exclusion in Bisbee was the Bisbee Deportation of 1917, in which thousands of non-White (and "questionably White")[115] miners were "deported" from Arizona to New Mexico.[116] Along with many other mining towns in the West, Bisbee had long been subject to local "district codes" that, in addition to addressing mining and sanitation laws, also contained provisions excluding Chinese, Mexican, and South American miners – hence, the development of the settlements known as "white man's camps."[117] Such race-based exclusion laws in the mine camps existed in Arizona as early as 1863, when the Pioneer Mining District passed a resolution that barred "Asiatics & Sonorans" from working in the mines there.[118] By the end of the century, the copper-mining towns of

111. *Id.* at 77.

112. *Id.* Benton-Cohen also notes that "[t]hen, as now, the term 'wetback' conjured an image of poverty, illegality, and racial otherness."

113. *Id.* at 78.

114. *Id.* at 79.

115. *Id.* at 95-104. Those who were "questionably white" in late nineteenth century Arizona included Southern Europeans, primarily Italian and Slavonic workers. ("[N]o well-established rules existed about whether Italians or Serbs counted as white or could work underground . . . Like Mexicans, Italians supposedly threatened the American standard of living . . . In some ways, Italians were 'honorary Mexicans' . . . But it was more complicated than that, because Italians were both more white than Mexicans, and nonwhite in a different way. . . Unlike African Americans and Asians, Italians, like other Europeans, were legally 'white on arrival' . . . Even so, in 1898, lawmakers in the racially complex state of Louisiana had seriously contemplated disenfranchising Italians along with African Americans.") Benton-Cohen at 96, 100.

116. *See Id.* at 211-6.

117. *Id.* at 82.

118. *Id.* The Pioneer Mining District is near modern-day Prescott, Arizona.

Jerome, Globe, and Bisbee all had large white man's camp settlements.[119]

Bisbee in particular was inhospitable – even hostile – to non-White persons who attempted to live or work in the town. Following Tombstone's lead, Bisbee first enacted a series of laws aimed at Chinese immigrants, forbidding them from being in town after sundown, a common restriction among so-called "Sundown Towns" in the Jim Crow South and Southwest.[120] The district – known as the Warren District[121] - then targeted Mexican workers, who were permitted to live and work in the district, but who could not hold the best-paying jobs in the underground mines.[122] Even when Mexican workers did work in the same jobs as their White counterparts, they were subject to the "dual-wage" system of the Southwest in which Mexicans were openly paid less money for the same work performed by Whites.[123] For example, a pay scale published by Copper Queen in 1885 listed two different wages for wheeling adobe bricks based on race - $2.25 a day for "whites," versus $1.50 a day for "Mexicans."[124]

Thus, "the rules of the white man's camp [in Bisbee] made the [racial] division formal and explicit. A promotional issue of the *Bisbee Daily Review* published for the St. Louis World's Fair in 1904 explained that Bisbee 'is strictly a 'white man's camp' . . . Mexicans are employed only in the common or rough labor.'"[125] Professor Benton-Cohen puts the ethos of the "white man's camp" into context with her astute observation that:

> The rules of the white man's camp were designed to protect the white workers who created them . . . The rules of the white man's camp constituted a kind of ideology. They did much more than create a list of job categories. They also structured local citizenship, hierarchy, and values, and they did so by projecting a particular worldview. These rules discriminated, even as they conveyed the notion that the discrimination was necessary and inevitable.[126]

This structure created a worldview consistent with the belief that favoring Whites over non-Whites was not just favorable, but "natural."[127] It is this ideology that made it possible for Arizona's pattern and practice of enacting race-based exclusion laws, particularly against noncitizens, to continue long after the abolition

119. *Id.*

120. *Id.* at 82-3. ("Chinese truck farmers along the San Pedro River could sell fruits and vegetables in town, so long as they left by sundown. This rule linked Bisbee with hundreds of other 'sundown towns' across the country where racial minorities – usually but not always African Americans – were forbidden to dally after dark, sometimes on pain of death. Bisbee's complete exclusion of Chinese lasted as late as 1920 and probably longer.").

121. Benton-Cohen at 83.

122. *See Id.* 83.

123. *Id.* at 83-4. ("Across the Southwest, even highly skilled Mexican men were shunted into positions labeled 'helper' or 'assistant.' 'One candid American mechanic' in another mining camp admitted to federal labor investigator Victor Clark in 1908, 'They will never pay a Mexican what he's really worth compared with a white man. I know a Mexican that's the best blacksmith I ever knew. . . But they pay him $1.50 a day as a helper, working under an American blacksmith who gets $7 a day.").

124. *Id.* at 84.

125. *Id.* at 84-5.

126. *Id.* at 86.

127. Benton-Cohen at 300.

of the "white man's camps" and well into the twenty-first century.

3. Arizona's Constitutional Convention: 1910-1912

Although it achieved independent territorial status in 1893, Arizona and its sister New Mexico Territory had still had not been granted statehood by the early twentieth century.[128] Following a proposal by the chairman of the Senate committee on territories to admit the Arizona and New Mexico Territories as one state, the White settlers in Arizona were outraged and fought bitterly against their potential inclusion with New Mexico and its large, powerful Hispanic population.[129] The powerful labor lobby in Arizona also opposed joint statehood, and the proposal went down in defeat in 1906 due to its overwhelming rejection by Arizona voters.[130]

As Professor Thomas Sheridan notes, "[f]rom then on, the battle was to shape the kind of state Arizona would inevitably become."[131] One of the key battles following the signing of the Enabling Act by President Taft on June 20, 1910, admitting both Arizona and New Mexico to the Union, concerned the roles both race and labor played in the formation of Arizona's constitutional convention.[132] Although the labor unions in Arizona ultimately were successful in achieving most of their agenda at the constitutional convention,[133] they were unable to secure the passage of a provision to restrict alien labor in Arizona.[134] Labor union leaders at the time held the opinion that Mexican workers were a threat to advancement of organized labor in the Southwest – they believed that Mexican workers were strike-breakers who were willing to work for lower wages than their English-speaking counterparts, and that their lack of English language skills endangered other workers.[135]

Labor leaders sought the inclusion of race-based exclusion laws in the Arizona Constitution through a series of propositions. The first of these proposals,

128. That the delay in granting both Arizona Territory and New Mexico Territory was predicated largely on the concern that the territories had significant non-White populations is undisputed. See Sheridan at 181. ("[O]pponents [for statehood] argued that neither 'the desert sands of Arizona' nor 'the humble Spanish-speaking people of New Mexico' were ready for statehood.").

129. *Id.* ("Arizonans reacted [to the statehood proposal] with an indignation that was as much racist as righteous . . . The majority of New Mexico's population was Hispanic, and an entrenched Hispanic oligarchy wielded considerable power. Arizona, in contrast, had fewer Hispanics, and they were practically disenfranchised except in a few strongholds like Tucson and Florence. As one senator from South Carolina proclaimed, Arizona's opposition to joint statehood was 'a cry of a pure blooded white community against the domination of a mixed breed aggression of citizens of New Mexico, who are Spaniards, Indians, Greasers, Mexicans, and everything else.").

130. New Mexicans voted to approve joint statehood by a vote of 26,195 to 14,735, while Arizona rejected the measure by a vote of 16,265 to 3,141. *See Id.*

131. *Id.*

132. *Id.* at 182.

133. The labor unions and their progressive allies sought the inclusion of many pro-labor provisions in the Arizona Constitution, including an eight-hour work day, liability for employers, worker's compensation, and the abolition of child labor. Many of these provisions succeeded, including the prohibition of child labor and the establishment of an eight-hour work day in Article 18 of the Arizona Constitution, as well as a prohibition on employee "blacklists" by employers, worker's compensation, and protection for workers in hazardous occupations. *See Id.* at 182-83.

134. *See Id.* at 183.

135. Sheridan at 183. However, Professor Sheridan notes that the notion that others were endangered because Mexican workers did not speak English was "a racist assumption with no basis in the accident records of the mines that employed them."

Proposition 48, provided that "no one who was not a citizen or had not declared his intention of becoming a citizen could be employed on any public project at the state, county, or municipal level."[136] Supporters of the initiative argued that the proposition was necessary because Mexican and American Indian workers were driving down wages. As Professor Sheridan notes, these were "[t]he same arguments [that] had been advanced in the debate over Chinese labor on the railroads in the 1880s, and they would be repeated over and over again during labor-management struggle in the years to come."[137] Proposition 48 ultimately passed, though by a very narrow margin of only five votes.[138]

The other two racial-exclusion laws proposed by organized labor were less successful. Proposition 89, which was introduced by Yavapai County delegate Michael Cunniff, would have banned the importation of alien contract laborers – although such labor was already prohibited by federal law.[139] After Proposition 89 died in committee,[140] organized labor then introduced Proposition 91, which would have "prohibited anyone who could not 'speak the English language' from working in 'underground or other hazardous occupations,'" as well as forbidding most employers from having an "alien labor" workforce of more than twenty percent.[141] In practical terms, the limits placed on "alien labor" in Proposition 91 would have meant that:

Mexicans, Italians, and other non-English speaking immigrants could not work in the mines or as brakemen or engineers on the railroads. Moreover, Mexican nationals could not constitute more than 20 percent of any ranch's cowboys, any lumber company's mill workers, or any field's farm hands.[142]

Because of Arizona's significant non-White and immigrant population, such restrictions would have been devastating:

> According to a US Immigration Commission study in 1911, 60 percent of Arizona's smelter workers were Mexicans, half of whom had been in the United States less than five years. There are no reliable figures for the agricultural sector, but the percentage of Mexicans on farms and ranches was undoubtedly higher. Proposition 91 therefore threatened not just Mexican labor but the entire foundation of Arizona's extractive economy.[143]

Thus, Proposition 91 lost most of its support from non-labor delegates, and was defeated by a vote of 26 to 19.[144] The race-based exclusions against Mexicans

136. *Id.* "Mexican road construction workers, whom labor wanted to replace with union men, were the primary targets." *Id.* at 183-4.

137. *Id.* at 184. Michael Cunniff, a Yavapai County delegate who supported Proposition 48, said at the time, "If the right salary is paid, they will get American labor where they are now compelled to take Mexican or Indian."

138. *Id.*

139. *Id.* The author notes that this attempt to include in the state law of Arizona restrictions against aliens that were already present in federal law is very reminiscent of the state's targeting on noncitizens through S.B. 1070 in 2010. Discussed in depth in Part III: THE IMPACT OF JIM CROW ON MODERN ARIZONA IMMIGRATION LAW AND POLICY.

140. *See* Sheridan at 184.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

proposed during Arizona's constitutional convention were rooted in some provisions passed by the territorial legislature. In 1909, just one year before Arizona's constitutional convention convened, the twenty-fifth territorial legislature had passed a law that prohibited the voter registration of individuals who could not read a portion of the United. States Constitution and write his name.[145] Of course, this literacy test had the (intended) result of disenfranchising a significant percentage of Mexican-American citizens, much like similar literacy laws did to African-American voters in the Jim Crow South.[146] Unfortunately, as the next section will discuss, race-based exclusion laws – particularly those aimed at non-White persons' ability to vote and work – did not subside when the constitutional convention concluded and Arizona was admitted to statehood.

II. THE STATE OF ARIZONA AND JIM CROW LAWS: 1912-1962

Arizona finally gained statehood on February 14, 1912, becoming the 48th State in the Union.[147] As noted previously, part of the reason for the long delay in admitting both New Mexico[148] and Arizona to statehood was due to the fact that a significant percentage of the Territories' population was non-White.[149] Like Southern states that discriminated against African-Americans on the basis of race, Arizona and other Southwestern states implemented laws and policies that segregated Latinos and American Indians from the White population and inhibited their ability to participate freely and fully in the public sphere.[150] While some of the laws in the Jim Crow Southwest were federal laws, many of the laws with the widest sweep were the race-based exclusion and segregation laws of the State of Arizona.[151] Thus, the laws ultimately did the most damage to the civil liberties of Latinos and American Indians. Furthermore, as the Arizona Territorial Legislature did previously, the Arizona State Legislature targeted interracial marriage, suffrage, and labor, as well as the segregated education of non-White persons – primarily American Indians.

A. Race and Labor in the New State of Arizona

Much like modern-day Arizona, race-based exclusion laws in the state's early history came into being through the ballot initiative process, which is provided for in the Arizona Constitution.[152] In the November 1914 election, Arizona voters

145. *Id.*

146. *See* Sheridan at 184.

147. A previous bid for statehood by Arizona failed in 1902. *See* Robert W. Larson, *New Mexico's Quest for Statehood, 1846-1912*, at 205.

148. New Mexico was the 47th State admitted to the Union, on January 6, 1912 – just a little over a month prior to Arizona. *See supra* note 17.

149. *See, e.g.*, Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 298-300 (2003). ("While Texas and California were promptly admitted to statehood because of white political control in each of the states, New Mexico languished for sixty-two years as a federal territory. Among the principal reasons for denying statehood to New Mexico were that racially mixed, dark-skinned Mexicans lived there and that they spoke Spanish.").

150. *See generally* Brian D. Behnken, ed., *The Struggle in Black and Brown: African American and Mexican American Relations During the Civil Rights Era,* (University of Nebraska Press, 2012).

151. *Id.* at 6-8 (providing examples of racial segregation laws affecting non-whites in the Southwest, including Arizona).

152. ARIZ. CONST. art. IV, § 1

overwhelmingly passed a ballot initiative providing that "80 percent of the employees of any individual or firm had to be 'qualified electors or native born citizens of the United States.'"[153] The initiative, which was known as the Kinney-Claypool or the Eighty-Percent Bill, won by a margin of 10,694 votes.[154] This was likely due in no small part to the fear-mongering by those such as the editors of the *Arizona Labor Journal*, who urged the Arizona electorate to support the initiative because the state "cannot assimilate untold hordes of aliens."[155]

However, the Eighty-Percent bill did not just affect Mexican laborers – it applied to all foreign workers, and some of them fought back. The most prominent noncitizen worker in Arizona to challenge the restriction against foreign labor was Mike Raich, a cook from Austria who filed suit in the United States District Court to keep his job.[156] Raich's case eventually made it all the way to the United States Supreme Court, foreshadowing Arizona's attempt to regulate noncitizens at the state level in the early twenty-first century, and with much the same result.

1. Truax v. Raich[157]

In November 1915, the United States Supreme Court issued its decision in *Truax v. Raich*, which challenged the constitutionality of a law placing restrictions on the employment of non-citizens in the State of Arizona.[158] The challenged provision, which had been approved as a ballot initiative by Arizona voters in 1914, was entitled "An Act to Protect the Citizens of the United States in Their Employment against Noncitizens of the United States, in Arizona, and to Provide Penalties and Punishment for the Violation Thereof."[159] The law provided that:

> Section 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the state of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some subdivision thereof.
>
> Sec. 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred ($100) dollars, and imprisoned for not less than thirty (30) days.
>
> Sec. 3. Any employee who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon

153. *See* Sheridan at 185.
154. *Id.* at 186.
155. *Id.*
156. *Id.*
157. Truax v. Raich, 239 U.S. 33 (1915).
158. *Id.*
159. *Id.* at 35.

> conviction thereof, be subject to a fine of not less than one hundred ($100) dollars, and imprisoned for not less than thirty (30) days.[160]

On December 15, 1914, Mike Raich, a cook in Bisbee of Austrian descent, filed suit in the United States District Court for the District of Arizona after being informed by his employer that he was being fired pursuant to the law restricting the employment of noncitizens in the state of Arizona.[161] Raich alleged that the Arizona law violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and sought to have the law enjoined as unconstitutional.[162] In its decision striking down the law, the Court first made clear the Fourteenth Amendment protects noncitizens:

> [T]he complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. . . Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction,' as it has frequently been held, includes aliens.[163]

The Court then addressed whether the Arizona law restricting the employment of aliens is a legitimate exercise of state power:

> It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. . . It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved.[164]

The Court then addressed the issue that would be central to another case it would hear nearly one hundred years later in *Arizona v. United States:*[165] whether the Arizona law regulating noncitizens is in conflict with, and therefore preempted by, federal law:

160. *Id.* at 35 (quoting Laws of Arizona, 1915. Initiative Measure, p. 12.).
161. *Id.* at 36.
162. *Id.*
163. 239 U.S. 33, 39.
164. *Id.* at 41-2.
165. Arizona v. U.S., 567 U.S. ___ (2012).

> It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.[166]

Thus, as Justice Kennedy would affirm many years later, the United States Supreme Court held federal immigration law restricts the ability of Arizona to pass its own state regulations on aliens, and invalidated the state employment law.[167]

It is important to note that unlike S.B. 1070 in 2012,[168] the Court in *Raich* ruled that the Arizona law was invalid under the Equal Protection Clause of the Fourteenth Amendment as a discriminatory regulation of lawfully present aliens.[169] This is an important distinction, because while it is clear that aliens are "persons" within the meaning of the Fourteenth Amendment, and therefore entitled to constitutional protections,[170] the extent to which those protections extend to undocumented aliens and the level of constitutional scrutiny that should be afforded to such regulations in various contexts remains unsettled.[171]

B. Educational Segregation in Arizona

1. Segregation Between African-American and White Students in Arizona

Despite Arizona's relatively small African-American population,[172] the Jim Crow Southwest operated under the "separate but equal" educational system for Black and White students in public schools in the Jim Crow South, a regime that had

166. 239 U.S. 33, 42.

167. 567 U.S. __ . (2012).

168. S.B. 1070 was struck down purely on preemption grounds. *See Id.*

169. 239 U.S. at 42.

170. *See* Yick Wo v. Hopkins, 118 U. S. 356 (1886); *see also* Wong Wing v. U.S., 163 U.S. 228 (1896); U.S. v. Wong Kim Ark, 169 U. S. 649 (1898).

171. The only United States Supreme Court case addressing the constitutional rights of undocumented aliens is Plyer v. Doe, 457 U.S. 202 (1982). The case, which is a very narrow decision involving the rights of undocumented children to receive a free public education, holds that state regulations of undocumented individuals based on their immigration status are to be analyzed under the intermediate scrutiny standard. *Id.*

172. As of 2010, the African-American population in Arizona is 4.5% statewide. *See* United States Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/04000.html.

been in place since before statehood.[173] A 1909 statute of the Arizona Territory gave school district trustees the authority to segregate Black students from White children, where there were "more than eight Negro pupils" in the school district.[174] The territorial legislature passed the segregation law over a veto by the governor, and public schools remained segregated after Arizona achieved statehood.[175] Indeed, in 1927, the law provided that in areas with 25 or more Black high school students, an election would be called to determine if these pupils should be segregated in separate but equal facilities.[176]

White students in Arizona were also segregated from Latino and American Indian students in public education.[177] Until recently, the segregation between White students and students of color in Tucson remained subject to consent decree pursuant to a settlement in a school desegregation case originally filed in 1974 on behalf of African-American and Mexican-American students and employees of the Tucson Unified School District.[178] However, perhaps the most striking example of race-based inequality in Arizona education occurred in the case of American Indians, who were taken from their families of origin and enrolled in the Phoenix Indian Industrial Boarding School with the goal of "assimilating" them to White culture.[179]

2. The Phoenix Indian Industrial Boarding School ("The Phoenix Indian School")

Like many States, Arizona has a long and shameful history of separate, unequal, and discriminatory treatment of American Indians. To this day, one of the major thoroughfares in Maricopa County bears the name Indian School Road - which commemorates the Phoenix Indian School, one of the most egregious examples of discriminatory treatment of American Indians in Arizona and the attempt by White settlers to strip them of their cultures and "assimilate" them into theirs.

Although the "education" of American Indians in schools designed to indoctrinate them with White culture and values is not unique to Arizona,[180] the

173. Many African-American students in Arizona attended the Phoenix Colored High School, which was established in 1926. Prior to the establishment of the segregated high school, African-American students were segregated in the "colored department" of Phoenix Union High School, which held classes in the basement of the high school. *See* The African American Registry, "The Phoenix Colored High School, Haven for the Mind," *available at* http://www.aaregistry.org/historic_events/view/phoenix-colored-high-school-haven-mind.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. In February 2013, United States District Judge David Bury approved TUSD's Unitary Status Plan. *See Tucson school desegregation approved; Mexican American Studies could return*, Tucson News Now, Feb. 6, 2013, *available at* http://www.kcbd.com/story/21017652/tucson-school-desegregation-consent-decree-okd.

179. Discussed in depth in Part II: THE STATE OF ARIZONA AND JIM CROW LAWS, Educational Segregation in Arizona: The Phoenix Indian Boarding School.

180. Following the conclusion of the Civil War, the United States government began to assume responsibility for the education of American Indians, both on and off the Reservations. *See* Robert A. Trennert, *The Phoenix Indian School: Forced Assimilation in Arizona, 1891-1935* (University of Oklahoma Press, 1988), at 1 ("During the 1880s the United States committed itself to incorporating the Indian population into the mainstream of American life. . . [N]ational leaders believed that the time had arrived to make good on the centuries-old pledge to exchange native lands for "gifts of civilization" . . . The Indian reform organizations of the 1880s thus dedicated themselves to devising a process whereby the

history of the Phoenix Indian Industrial Boarding School is instructive of the discriminatory treatment of American Indians in the Jim Crow Southwest. In 1889, Indian Commissioner Thomas J. Morgan wrote: "[T]he Indians must conform to 'the white man's ways,' peaceably if they will, by force if they must."[181] Based on this guiding principle, the Phoenix Indian Industrial Boarding School – colloquially known as the Phoenix Indian School[182] – was established in Arizona in 1891 in order to "educate" American Indians children by removing them from Indian reservations in Arizona and "assimilate" them into the newly-settled White culture in the more populous regions of the Arizona Territory.[183]

The Phoenix Indian School was run by the Bureau of Indian Affairs ("BIA"), a federal government agency that is part of the Department of the Interior.[184] The BIA states that its mission is to "enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives."[185] Within the BIA is the Bureau of Indian Education ("BIE"), which states that its mission is to:

> Provide quality education opportunities from early childhood through life in accordance with the tribes' needs to cultural and economic well being in keeping with the wide diversity of Indian tribes and Alaska Native villages as distinct cultural and governmental agencies. The Bureau considers the whole person (spiritual, mental, physical and cultural aspects.[186]

Despite the stated missions of the BIA and BIE, federal agents in Arizona wished to keep Native American children as far away as possible from their families on the reservations so that their assimilation would be more complete.[187] Thus, it was decided to put the Indian School in Arizona's growing metropolis, Phoenix. Phoenix was chosen as the location of Arizona's Indian School for several reasons. First, it was centrally located within the Arizona Territory, while also being sufficiently far away from the many Indian reservations to ensure that the indoctrination of the American Indian children would not be compromised.[188] Second, the residents of the City of Phoenix saw the establishment of the Indian School as an opportunity for their young, small town to benefit from cheap labor provided by the students of the school and present other opportunities for economic growth that would benefit the

reservations might be slowly abolished and their residents assimilated.").

181. *See* Trennert at 206.

182. In fact, Indian School Road is still a major thoroughfare in the City of Phoenix and Maricopa County, Arizona. *See* Brad Hallart, "The History of the Street Names in Phoenix, Arizona: The stories behind the street names," available at http://www.bradhallart.com/phoenix_streets.htm ("Major street. This road was named for the Phoenix Indian School, which opened on September 30, 1891, with an enrollment of thirty-four Pima boys.").

183. *See* Trennert at 12.

184. *See* U.S. Dep't of The Interior, Indian Affairs, *Who We Are" available at* www.bia.gov/whoweare/index.htm.

185. *Id.*

186. *Id.*

187. The federal agents noted that, in their opinion, it was in the best interest of American Indian children to be kept from their families and the reservations so that they did not "drop back into their old filthy ways." *See* Trennert at 14.

188. *See* Trennert at 11, 14-9.

White settlers of the Arizona Territory.[189] Finally, by building the Indian School in Phoenix, the BIA agents believed it would be easier to attract a school staff with a "high degree of moral fitness" and a "positive religious character" that would assist them not only in eradicating American Indian culture, but also in diminishing the ostensibly detrimental effects of the Arizona Territory's Mexican heritage.[190]

The philosophy of the founders of the Phoenix Indian School, which was that it was "cheaper to educate Indians than to kill them,"[191] was underscored by the fact that the "education" provided to the American Indian children at the Phoenix Indian School was seriously compromised by the conscripted labor of the children for the benefit of the school itself.[192] Eventually, the pretense of providing the American Indian children at the Phoenix Indian School with an academic education was abandoned in favor of a completely "industrial" course of study, which prepared the children for a lifetime of servitude as members of a permanent underclass.[193] The view of the BIA was that American Indian children would not benefit from any academic training and should receive vocational training because they "will have to make their living by the 'sweat of their brow,' and not their brains."[194] The Superintendent stated that the goal of the Phoenix Indian School was to teach students how to work, as "indolence" was perceived by the federal agents to be a trait endemic to American Indians.[195] In fact, the official "Course of Study for Indian Students" prepared by the superintendent focused on providing American Indian children a practical, vocational education because of their supposed intellectual

189. At the time of the establishment of the Indian School, Phoenix had been in existence as a settlement for 23 years, and had a population of around 3,000 people. The hope was that locating the Indian School – a federal facility - in Phoenix would both increase property values for the White settlers and provide them with the opportunity to put the Native American children to work in the fruit orchards surrounding the city. An article in the Arizona Herald in 1892 stated that by building the Indian School in Phoenix, "Maricopa County will soon have a number of educated and intelligent laborers, whose training will be especially appreciated by the fruit growers." *See* Trennert at 19-20, 32; *see also* Hispanic Historic Property Survey, "Establishing a Community" 1870-1900," available at http://phoenix.gov/webcms/groups/internet/@inter/@dept/@dsd/documents/web_content/pdd_hp_pdf_00044.pdf (listing the population of Phoenix in 1890 as 3,152)..

190. BIA agents were also concerned that American Indian children be shielded from the growing influence of the Church of Jesus Christ of Latter-Day Saints. A report on the establishment of the Indian School stated that "The Indians of Arizona, long under the tutelage of a Mexican Civilization, are now exposed to the no less debauching influence of Mormonism. Now is the fit time for the Government to render them its best service. This golden opportunity should not be allowed to pass unimproved." *See* Trennert at 15.

191. *See* Trennert at 22.

192. Students at the Indian School were forced to sew uniforms, do laundry, cook, and engage in other routine maintenance at the facility. These duties, which were performed without compensation described as "not equal to those paid to white people but . . . quite satisfactory to the Indians," often took precedence to the education that the children were supposed to be receiving while at the school. *See* Trennert at 52.

193. In 1893, the administrator of the Phoenix Indian School stated that "In order to civilize, to make good citizens of Indian youth, it is absolutely necessary that they be inspired with a strong desire for better homes, better food, better clothing, etc., than they enjoy in their natural state, and that they be qualified to obtain these things by their own exertions." *See* Trennert at 34.

194. The Superintendent of the Indian School stated that forcing American Indian girls to spend most of their time on housekeeping made them "true wom[e]n . . . From slouchy, dissatisfied girls, the year produced neat, ladylike, agreeable young ladies, who are proud of exhibiting their achievements, and who I feel have made significant strides toward civilization and the higher aim in life." *See* Trennert at 47.

195. A slogan of the Phoenix Indian School was "Be a Phoenix student not a reservation bum." *See* Trennert at 112.

limitations.[196]

While enrolled in the Phoenix Indian School, American Indian children were initially required to speak only in English, and their native languages and traditions were prohibited.[197] Although later superintendents permitted American Indian language and culture to be integrated into the curriculum in a limited manner, this did not in any way undermine the federal government's commitment to the "de-Indianization" of American Indian students enrolled in the Phoenix Indian School.[198] The overarching goal of ushering the students from "savagery" into "civilization" required students enrolled in the Phoenix Indian School to wear a school uniform, and they were often separated from students who were members of their tribes so that they would not be able to communicate with each other in their native language.[199] Several former students of the Phoenix Indian School describe the environment as akin to a military institution, with a very regimented schedule and regular inspections by school administrators.[200]

Even in the face of overt and unapologetic racism, the Phoenix Indian School endured for most of the twentieth century, finally closing in 1990 after nearly 100 years of operation.[201] While the Phoenix Indian School was certainly not a unique form of institutionalized racism, its history of segregation and the use of its existence to justify the limitations placed on educational and personal advancement for American Indians in Arizona is another example of life for people of color in the Jim Crow Southwest.

C. Voting in Jim Crow Arizona

Shortly after gaining statehood in 1912, the Arizona Legislature passed a statute requiring that voters be able to "read the Constitution of the United States in

196. The emphasis on vocational training of American Indian students sought to prepare the boys for careers as "farmers, . . . lumbermen, ditchers, miners, [and] railroad hands." Girls were encouraged to seek work as domestic servants. *See* Trennert at 95.

197. See Trennert at 46.

198. *See* Trennert at 115 ("The school . . . operated on the assumption that Indian children needed strict discipline. The introduction of military-style routine—the forming of regular habit, that mother of self-control, which distinguishes civilization from savagery"—therefore came immediately. Permitted to retain their traditional clothing only long enough to have a photograph taken (which might later be used to contrast with their "civilized" look), new pupils were issued a uniform, school clothes, and work outfits, and were assigned a dormitory. Almost as rapidly, they were separated from friends and fellow tribesmen to make it more difficult to speak their native tongue. Indeed, the first thing new arrivals learned was to avoid using their own language, although, admitted one, "sometimes we forget and talk Pima.").

199. The harsh treatment of the American Indian students was justified by the school administrators as necessary in order to "better" the lives of the children through forced assimilation. When confronted for such tactics as nailing windows shut and bolting fire-escape doors, Superintendent Brown stated that "[I]f we would lift a race from ignorance and disease, we must do many things which they do not want done . . . We deal with a primitive race, with persons who often lack appreciation of the better reasons of good behavior." *See* Trennert at 188-9.

200. Former students of the Phoenix Indian School also state that corporal punishment and other forms of discipline were often used to keep students in line. "Penalties . . . consisted of a stay in the guardhouse, several days on bread and water, and various forms of ridicule." The punishment for running away from the school was greeted with the harshest punishments, including jail time for the boys. Repeat male offenders sometimes had their hair shorn and were forced to wear dresses. *See* Trennert at 118-9, 126.

201. *See* Phoenix Indian School Park Executive Summary, July 1993, "History of the Phoenix Indian School Property," at 3 ("The federal government officially closed the school in 1990).

the English language in such manner as to show he is neither prompted nor reciting from memory, and to write his name."[202] The limits on voting for persons of color in Arizona would become progressively more restrictive over the years, as the state sought to find ways to disenfranchise the non-White citizen population.

1. Prohibitions on American Indian Voting in Arizona

Although American Indians were granted United States citizenship with the passage of the Indian Citizenship Act of 1924,[203] many of the western states with large American Indian populations refused to grant suffrage to tribal members for several decades.[204] The exclusion of American Indians from the right to vote was premised mainly on the argument that the federal government rather than the states governed the tribes.[205] In Arizona, American Indians were not granted the right to vote until 1948, following the Supreme Court of Arizona's decision in *Harrison v. Laveen.*[206] However, the exclusion was initially challenged in 1928 without success.

a. Porter v. Hall[207]

The first case that sought to invalidate Arizona's prohibition against suffrage for American Indians was *Porter v. Hall*, which reached the Supreme Court of Arizona in 1928.[208] Peter H. Porter and Rudolph Johnson, members of the Pima Indian Tribe that resided on the Gila River Indian Reservation, filed the case.[209] They filed a writ of mandamus directing the county recorder of Pinal County, in which the Gila River Indian Reservation is located, to register them as voters in the county.[210] The county recorder refused to register Porter and Johnson as voters in Pinal County, alleging that they were "exclusively subject to and under the jurisdiction of the law and courts of the United States and the tribal customs of said Pima Tribe, and are not subject to the laws or within the jurisdiction of the state of Arizona."[211]

The Supreme Court of Arizona summarized the issues before them as follows:

202. *See* Eric V. Meeks, *Border Citizens: The Making of Indians, Mexicans, and Anglos in Arizona*, at 42 (The University of Texas Press; 2007).

203. *See* National Archives, "Act of June 2, 1924, which authorized the Secretary of the Interior to issue certificates of citizenship to Indians," available at http://www.archives.gov/historical-docs/todays-doc/?dod-date=602.

204. As of 1938, seven states still had not extended voting rights to American Indians; Arizona and New Mexico did not grant American Indians the right to vote until 1948. *See* Pease, *supra* note 41.

205. In addition to the oversight of the tribes by the federal Bureau of Indian Affairs (BIA) and the maintenance of their tribal memberships, the states that did not want to extend voting rights to American Indians argued that they were not entitled to suffrage because Indians were exempt from real estate taxes and lived on lands controlled by the federal government. *See Id.* ("Western states imposed severe restrictions on American Indian voting that pertain to residence, competence, civilization, tax status (meaning property owners), or in various combinations of these restrictions.").

206. Harrison v. Laveen, 67 Ariz. 337 (Ariz. 1948).

207. Porter v. Hall, 34 Ariz. 308 (Ariz. 1928).

208. *Id.*

209. *Id.* at 313.

210. *Id.* at 311.

211. *Id.* at 312.

> First, is the Gila River Indian Reservation within the political and governmental boundaries of the state of Arizona, so that a residence thereon is a residence in the state of Arizona, within the meaning of Section 2, article 7, of our Constitution? Second, are persons of Indian race, under the conditions set forth in the stipulation of facts as being those in which plaintiffs find themselves, 'under guardianship,' within the meaning of the same section?[212]

Section 2, article 7, of the Arizona Constitution limited the right to vote to male and female citizens of the United States over the age of 21 who resided in the state for at least one year preceding the election in question.[213] It also provided that "no person under guardianship . . . shall be qualified to vote at any election."[214] As to the first question of residence, the Arizona Supreme Court relied on several United States Supreme Court cases[215] and its own prior decision in *Territory v. Delinquent Tax List*[216]to hold "that all Indian reservations in Arizona are within the political and governmental, as well as geographical, boundaries of the state . . . and not as a territorial area withdrawn from the sovereignty of the state of Arizona. Plaintiffs, therefore, under the stipulation of facts, are residents of the state of Arizona, within the meaning of section 2, article 7."[217]

Regarding the second question, however – whether Indians "under guardianship within the meaning of the Arizona Constitution and, therefore, prohibited from voting – the Supreme Court of Arizona held that "[i]t is the undisputed law, laid down by the Supreme Court of the United States innumerable times . . . to the present time, that all Indians are wards of the federal government, and as such are entitled to the care and protection due from a guardian to his ward."[218] Citing *Cherokee Nation v. Georgia*[219] to support the proposition that "Indians [are] not capable of handling their own affairs in competition with the whites, if left free to do so,"[220] the Arizona Supreme Court reaffirmed the Supreme Court's opinion that:

> [The Indians'] relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.[221]

The Supreme Court of Arizona then goes on to cite the voluminous body of

212. *Id.* at 315.

213. 34 Ariz. 315

214. *Id.*

215. The Supreme Court of Arizona relied primarily on the United States Supreme Court decisions in *Harkness v. Hyde*, 98 U.S. 476 (1878), *Langford v. Monteith*, 102 U.S. 145 (1880), and *U.S. v. McBratney*, 104 U.S. 621 (1881).

216. 3 Ariz. 302 (Ariz.Terr. 1891) (holding that "[i]n the absence of treaty or other express exclusion, the reservation becomes part of the territory, subject, however, to the power of the general government to make regulations respecting the Indians, etc.").

217. *See* 34 Ariz. 321.

218. *Id.* at 325.

219. 30 U.S. 1 (1831).

220. 34 Ariz. 325.

221. *Id.* (citing *Cherokee Nation*, 30 U.S. 1 (1831).).

United States Supreme Court precedent characterizing American Indians as "weak[ ] and helpless[ ],[222] "a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression."[223] The Arizona Supreme Court also invokes Congress' plenary power[224] over "the welfare of the rather helpless people concerned"[225] and its duty to "protect them from spoliation"[226] to support its finding that the Indians in Arizona are "under guardianship" within the meaning of the state constitution, relying once again on extensive precedent from the United States Supreme Court that "such guardianship [is not] terminated by the Indians becoming citizens of the United States or the state in which they live,"[227] and that "[Indians] owe no allegiance to the states and receive no protection from them."[228] Therefore, the Arizona Supreme Court concluded that:

> [P]laintiffs have not been emancipated from their guardianship, and to some extent, at least, are not subject to the laws of the state of Arizona, in the same manner as are ordinary citizens . . . [S]o long as the federal government insists that, notwithstanding their citizenship, their responsibility under our law differs from that of the ordinary citizen, and that they are, or may be, regulated by that government, by virtue of its guardianship, in any manner different from that which may be used in the regulation of white citizens, they are, within the meaning of our constitutional provision, 'persons under guardianship,' and not entitled to vote.[229]

Despite the paternalistic and racist legal analysis employed by the courts, this interpretation of the Arizona Constitution disenfranchising American Indians would stand for another twenty years until, in 1948, the Arizona Supreme Court overturned *Porter* with its unanimous decision in *Harrison and Austin v. Laveen.*

b. Harrison and Austin v. Laveen

The first sentence of the Arizona Supreme Court's decision in *Harrison and Austin v. Laveen*, written by Judge Levi S. Udall,[230] reads:

> The right of American Indians to vote in Arizona elections for state and federal officers has after two decades again arisen, like Banquo's ghost, to challenge us.[231]

Again addressing whether American Indians were "under guardianship"

222. *U.S. v. Kagama*, 118 U.S. 375, 384(1886).

223. *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

224. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *see also Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911).

225. *U.S. ex rel. West v. Hitchcock*, 205 U.S. 80, 85 (1907).

226. *U.S. v. Osage County*, 251 U.S. 128, 133 (1919).

227. *Winton v. Amos*, 255 U.S. 373, 392 (1921).

228. *Kagama*, 118 U.S. at 384.

229. Porter at 330-2.

230. The Udalls are a prominent Arizona political family. *See Arizona Stories: The Udall Family*, Eight/KAET Public Broadcasting Service, Arizona State University, available at http://www.azpbs.org/arizonastories/ppedetail.php?id=82.

231. 67 Ariz. 340.

within the meaning of section 2, article 7 of the Arizona Constitution, Judge Udall stated that "we must determine whether such denial of the franchise to plaintiffs violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States."[232]

In answering this question, the specter of unequal protection under the law for American Indians through the denial of suffrage clearly haunted Judge Udall. Speaking for the entire Court in striking down the decision in *Porter,* Judge Udall stated:

> We have . . . no hesitancy in re-examining and reconsidering the correctness of the legal principles involved because the civil liberties of our oldest and largest minority group (11.5% of State's population) of whom 24,317 are over twenty-one years of age (1940 U.S. Census) are involved, and it has ever been one of the great responsibilities of supreme courts to protect the civil liberties of the American people, of whatever race or nationality, against encroachment.[233]

The characterization of American Indians' right to vote as a civil liberties issue – and the duty of the courts to "protect the civil liberties of the American people, of whatever race or nationality, against encroachment" - marks a dramatic shift from the portrayal of American Indians in the *Porter* decision as less-than-full citizens of the United States.[234]

Judge Udall's decision even cites Felix Cohen, a prominent Indian law scholar, stating:

> In a democracy, suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safe-guarded. To deny the right to vote where one is legally entitled to do so, is to do violence to the principles of freedom and equality.[235]

Perhaps the most interesting part of Judge Udall's opinion, however, is his discussion of Professor N.D. Houghton's article on *Porter* that appeared in the California Law Review in 1930.[236] Judge Udall notes that "[Professor Houghton] clearly points out the greatest weakness in the [*Porter*] opinion, that is, that the court largely based its decision upon the question of whether it was sound public policy to permit Indians to vote rather than adhering . . . to applying the disqualifying provisions of the law as written."[237] Professor Houghton observed that in *Porter*:

> The majority of the court . . . [was] strongly affected by the legitimate question as to whether it would be good public policy to

232. *Id.* at 341. The Court also considered the constitutionality of a corresponding Arizona statute prohibiting suffrage for persons under guardianship, section 55-201.

233. *Id.* at 341. Judge Udall also notes in his opinion that according to the 1940 U.S. Census, approximately one-sixth of all Indians in the United States resided in Arizona. *See Id.* at 344.

234. It should be noted, however, that despite his grand pronouncements concerning the civil liberties of American Indians, Judge Udall nonetheless makes reference to "some of our more illiterate and backward tribes, such as the neglected Navajos," in his opinion. *See Id.*

235. *Id.* at 342.

236. 19 Cal. L. Rev. 507; 67 Ariz. 342.

237. 67 Ariz. 342.

> permit large numbers of tribal Indians living on reservations in the state, and entirely immune from the laws and governmental authority of the state . . . to participate in the formulation of state governmental policy and the election of state and local officials.[238]

Professor Houghton further noted that Chief Justice Ross, who wrote a dissenting opinion in *Porter*, believed that although "it might be possible that tribal Indians on reservations ought not, as a matter of public policy, to be allowed to vote, but he expressed the opinion that further legal or constitutional action was necessary in Arizona in order legally to disqualify them."[239]

Judge Udall then writes for the Court:

> Our view coincides with the late Chief Justice Ross that the matter of determining what is "good public policy" is for the executive and legislative departments and that the courts must base their decisions on the law as it appears in the constitution and statutes. We concede that very persuasive arguments may be advanced upon both sides of the "public policy" question, but we refuse to be drawn into the controversy as to the wisdom of granting suffrage to the Indians, our sole concern being whether the constitution, fairly interpreted, denies them the franchise.[240]

In undertaking this analysis, the Court held that it was "unable to find the slightest evidence to indicate that the framers of our constitution, in specifying that 'persons under guardianship' . . . should be denied the right of franchise, thereby intended that this phrase be applied to Indians as such . . . rather we feel, it is a tortious construction by the judicial branch of the simple phrase 'under guardianship,' accomplishing a purpose that was never designed by its framers."[241]

Finally, noting that "in the instant case the United States is appearing specially in this litigation as amicus curiae to disclaim any intention to treat the plaintiffs as 'persons under guardianship,'"[242] the Court concluded that "to ascribe to all Indians residing on reservations the quality of being 'incapable of handling their own affairs in an ordinary manner' would be a grave injustice,"[243] and held that "the term 'persons under guardianship' has no application to the plaintiffs or to the Federal status of Indians in Arizona as a class. . . The majority opinion in the case of *Porter v. Hall* is expressly overruled in so far as it conflicts with our present holding."[244]

Although the Arizona Supreme Court's ruling in *Harrison* gave American Indians suffrage in Arizona, it was unfortunately not the last time their right to meaningfully exercise their vote would be challenged.[245] As discussed in the next

238. *Id.*

239. *Id.* (citing 19 Cal. L. Rev. at 518).

240. *Id.*

241. *Id.*at 345. The Court also opined that "[t]he same thing may be said as to the legislative implementing enactment contained in section 55-201."

242. *Id.* at 348.

243. 67 Ariz. 348.

244. *Id.* at 349.

245. Discussed in depth in Part III: THE IMPACT OF JIM CROW ON MODERN ARIZONA IMMIGRATION LAW AND POLICY. (discussing *Arizona Inter-Tribal Council* case)

section, Arizona's long history of racial-exclusion laws would continue to influence the law and policy of the state and efforts to disenfranchise and marginalize people of color. However, rather than attempting to single out individuals based explicitly on race (which are likely unconstitutional), the laws now focused on restricting the civil liberties of non-White people through a new vehicle that policymakers hoped would be more likely to survive legal scrutiny: enforcement of immigration and nationality law.

III. THE IMPACT OF JIM CROW ON MODERN ARIZONA IMMIGRATION LAW AND POLICY

The connection between Arizona's history of race-based exclusion laws – what I refer to in this Article as the "Jim Crow Southwest," but what has been called by others "Juan Crow,"[246] – and modern Arizona's hardline stance on immigration law and policy may not be immediately apparent. However, upon closer examination, it can be argued that Arizona's relatively recent focus on the regulation of noncitizens at the state level is an outgrowth of the race-based exclusion laws historically targeting Latinos and American Indians in the state. The argument that Arizona's immigration laws are really race-based exclusion laws in disguise finds support in the fact that the enforcement of laws attempting to regulate noncitizens in Arizona has led to well-documented instances of racial profiling against people of color, many of whom were lawful permanent residents or United States citizens.[247] The trumped-up enforcement of immigration law in the state of Arizona, then, has largely been an end-run around the racially discriminatory laws of the past directed at non-White persons, and has resulted in serious threats to the civil liberties of those individuals.

A. The Chandler Round-Up

In the 1970s and 1980s, the State of Arizona, in particular the City of Phoenix, experienced phenomenal population growth.[248] By the 1990s, the demographics of the State of Arizona were also changing, with persons of Latino heritage showing tremendous population growth in the state by 2003.[249] Although Arizona has always had a large Latino and American Indian population,[250] and has

246. *See, e.g.*, Diane McWhorter, *The Strange Career of Juan Crow*, THE NEW YORK TIMES, June 16, 2012, *available at* http://www.nytimes.com/2012/06/17/opinion/sunday/no-sweet-home-alabama.html?_r=0.

247. Discussed in depth in Part III: THE IMPACT OF JIM CROW ON MODERN ARIZONA IMMIGRATION LAW AND POLICY Section A. *The Chandler Round-Up*

248. *See* U.S. Census Bureau, Arizona Population of Counties by Decennial Census: 1900 to 1990, available at http://www.census.gov/population/cencounts/az190090.txt The State of Arizona, which had less than 750,000 residents in 1950, saw its population surge to nearly 2 million by 1970, close to 3 million by 1980, and almost 4 million by 1990. The 2010 census revealed that Arizona's current population is more than 6 million people. *See* U.S. Census Bureau, "Arizona: State and County QuickFacts," available at http://quickfacts.census.gov/qfd/states/04000.html.

249. *See* Paul Luna, "Each of Us Has a Role," at 41 (State of Latino Arizona, Arizona State University, 2009) (noting that in 2003, 43% of the babies born in Arizona were Latino).

250. *See* U.S. Census Bureau, "Arizona – Race and Hispanic Origin: 1860 to 1990," available at http://www.census.gov/population/www/documentation/twps0056/tab17.pdf . Currently, more than 5% of the population in Arizona is of American Indian descent alone, compared to 1.2% of the United States as a whole. *See* Arizona State and County Quick Facts.

traditionally been politically conservative, the aging White population in Arizona faced the certainty of becoming a statistical minority in the state of Arizona by 2050.[251] This environment, coupled with the hysteria surrounding immigration law enforcement and border security, made Arizona the perfect staging ground for a new battle surrounding race-based law and policy in the American Southwest, starting with the mass racial profiling of Latinos in the Phoenix suburb of Chandler in 1997.

Like other instances of race-based law enforcement in the Southwest, the so-called "Chandler Round-Up" conducted in July 1997 was a cooperative effort between the federal immigration authorities and local law enforcement in Arizona.[252] Named "Operation Restoration,"[253] state and federal law enforcement officials patrolled the City of Chandler on their bikes, stopping persons who appeared to be of Latino descent and demanding identification and proof of United States citizenship.[254] Those individuals that could not provide proof of U.S. citizenship immediately were arrested and detained on suspicion of being undocumented immigrants.[255] This led to the unlawful arrest and detention of United States citizens and lawfully present immigrants on the basis of nothing more than their skin color, and nearly 100 complaints were subsequently filed alleging civil rights violations by the INS and local law enforcement.[256] Subsequent investigations into the propriety of the Chandler Round-Up revealed that all of the complainants were Latino, and that no White persons were detained by law enforcement during the sting.[257]

The Chandler Round-Up resulted in Congressional hearings regarding the illegality of the tactics used by law enforcement to identify persons without legal immigration status, as well as several civil rights lawsuits brought by United States citizens and legal permanent residents were who racially profiled as undocumented based on their perceived Latino heritage.[258] And, although the Congressional hearings held several years later would refer to the Chandler Round-Up as "the only major ethnic profiling incident actually related to immigration,"[259] the raids in Chandler would turn out to be merely the beginning of race-based immigration law enforcement in Arizona.

B. State and Local Enforcement of Immigration Law in Arizona

1. SB 1070: Support Our Law Enforcement and Safe Neighborhoods Act

In April 2010, Arizona Governor Janice K. Brewer signed into law SB

251. *See* Arizona Department of Administration, Office of Employment and Population Statistics, 2012-2050 State and County Population Projections, available at http://www.workforce.az.gov/population-projections.aspx (demonstrating that by 2050, non-Hispanic whites in Arizona will constitute 40% of the population and Hispanics of all races will make up 45% of the population in Arizona).

252. *See* "Chandler Roundup: 10 Years After," EAST VALLEY TRIBUNE, August 19, 2007, *available at* http://www.eastvalleytribune.com/article_abd9d4ee-aef8-52f8-9cdd-a0839b330591.html.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Chandler Roundup: 10 Years After

259. *Id.*

1070, also known as the Support Our Law Enforcement and Safe Neighborhoods Act.[260] Referred to as one of the "toughest immigration law in the country,"[261] SB 1070 is a statewide regulation of immigration that would give local law enforcement throughout Arizona the ability – indeed, the responsibility – to detain persons whom they have "reasonable suspicion" to believe may be in the country without documents.[262] The law also requires all persons to carry with them documents regarding their immigration status, which apparently includes United States citizens.[263] This regulation has caused critics of SB 1070 to compare it to laws passed in Germany's Third Reich,[264] and has given rise to accusations that the law will lead to racial profiling of Latinos and other persons of color that law enforcement may believe "look" undocumented.[265] The law was immediately challenged in the United States District Court for the District of Arizona by the United States Department of Justice as being preempted by federal immigration law,[266] and the majority of the law was enjoined and struck down on preemption grounds by Judge Susan Ritchie Bolton in July 2010.[267] After the affirmance of Judge Bolton's decision by a 2-1 panel of the United States Circuit Court of Appeals for the Ninth Circuit in April 2011,[268] the State of Arizona petitioned the United

260. *See* Arizona SB 1070, *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

261. *See, e.g.* Randal C. Archibald, "Arizona Enacts Stringent Law on Immigration," THE NEW YORK TIMES, April 23, 2010, *available at* http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=1&hp ("[P]roponents and critics alike said [the Arizona law] was the broadest and strictest immigration measure in generations.")

262. *See supra* note 260

263. *Id.* Different interpretations of SB 1070 have reached different conclusions regarding who must carry proof of citizenship with them under the Arizona law. Proponents of the law claim that the Arizona law merely mirrors federal immigration law, which requires lawfully present aliens to carry proof of their legal status with them at all times and to present such documents to immigration authorities on demand. Opponents, however, point out that there is no law that requires U.S. citizens to carry proof of citizenship with them or to present their citizenship documents to law enforcement, and argue that the document provisions of SB 1070 will be unevenly and unfairly enforced against U.S. citizens of color. *See, e.g.*, John Merline, "Opinion Roundup: Ariz. Immigration Lawsuit's Uncertain Future," AOL NEWS, July 7, 2010, *available at* http://www.aolnews.com/article/opinion-roundup-the-arizona-immigration-lawsuits-uncertain-fut/19545017 (quoting different experts opinions about the merits of SB 1070 and the likelihood of success of the government's legal challenge to the law).

264. *See, e.g.*, Stephen Lemons, "Cardinal Roger Mahoney Compares SB 1070 to 'German Nazi and Russian Communist Techniques," PHOENIX NEW TIMES, April 19, 2010, *available at* http://blogs.phoenixnewtimes.com/bastard/2010/04/cardinal_roger_mahony_compares.php.

265. *See, e.g.*, John Blackstone, "Will Arizona's Law Lead to Racial Profiling? Law Enforcement See Legislation as a Tool for Fighting Crime; Opponents Worry Measure Will Perpetuate Racism," CBS NEWS, April 26, 2010, *available at* http://www.cbsnews.com/stories/2010/04/26/eveningnews/main6434594.shtml (expressing concerns that United States citizens of Hispanic descent will be targeted for enforcement under the Arizona law "because [they are] brown").

266. Although the case would ultimately be the first to reach the United States Supreme Court, the lawsuit filed by the Department of Justice was not the first challenge to S.B. 1070's constitutionality to be filed. Several challenges to the law – primarily on equal protection grounds – were initially filed by various private individuals and civil rights groups, only to be consolidated and stayed pending the resolution of the DOJ's lawsuit. For the procedural history of all of the lawsuits filed challenging S.B. 1070, *see* "Arizona S.B. 1070, Legal Challenges and Economic Realities," American Immigration Council Legal Action Center, available at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/arizona-legal-challenges.

267. *U.S. v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

268. *See Arizona v. U.S.*, 641 F.3d 339 (9th Cir. 2011).

States Supreme Court for a writ of certiorari in August 2011.[269] The Petition was granted on December 12, 2011, and the Court heard oral argument on April 25, 2012.[270]

2. U.S. v. Arizona

On June 25, 2012, the United States Supreme Court issued its decision in *U.S. v. Arizona*, striking down the majority of Arizona's state immigration enforcement law, S.B. 1070, in a 5-3 decision.[271] The major provisions that the Court determined were preempted by the Immigration and Nationality Act (INA) were Section 3, Section 5(C), and Section 6.[272] However, the Court let stand the most controversial provision of S.B. 1070: Section 2(B), the so-called "show me your papers" requirement.[273] In allowing Section 2(B) to stand, the Court stated that "if §2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption."[274]

The elephant in the room that the Court did not address in its decision in the *Arizona* case was the racial profiling concerns that were raised by many observers, including prominent lawyers and academics.[275] Although Justice Kennedy's decision leaves room for an as-applied challenge to S.B. 1070 should enforcement of the law result in unconstitutional racial profiling of minorities,[276] the fact that the provision was allowed to stand without so much as an acknowledgment by the Court that the "reasonable suspicion" invites a racially disparate impact of the law on people of color is troubling to those who believe the intent and design of the law is to intimidate racial and ethnic minorities in Arizona.[277]

3. Arizona v. Inter-Tribal Council of Arizona

In 2004, the voters of Arizona overwhelmingly approved the ballot

269. *See Arizona v. U.S.*, 641 F.3d 339 (9th Cir. 2011), *petition for cert. filed*, 2011 WL 3562633 (U.S. Aug. 8, 2011) (No. 11–182).

270. *Arizona v. U.S.*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11–182).

271. *Arizona v. U.S.*, 132 S. Ct. 2492, 2510 (2012). Only eight of the nine justices took part in the decision, as Justice Elena Kagan recused herself from participation in the case.

272. *Id.* These sections dealt with alien registration documents, employment of aliens, and probable cause arrest of aliens. *See* ARIZ. REV. STAT. ANN. § 13-2928 (2011).

273. Section 2(B) requires Arizona law enforcement officers the duty to make a "reasonable attempt . . . to determine the immigration status" of a person detained for a legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States" and also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

274. 132 S. Ct. 2509.

275. *See, e.g.*, Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, J. FOR SOC. JUST. 5, 18 (2011); *see also See* Lucas Guttentag, *Arizona's Immigration Law Violates Civil Rights. Why Didn't Anyone Mention That at the Supreme Court*, NEW REPUBLIC, May 14, 2012, http://www.tnr.com/article/politics/103188/sb1070-arizona-immigration-civil-rights-federalism.

276. *Supra* note 274.

277. *See* Johnson at 13-21 (discussing the disparate impact of S.B. 1070's "reasonable suspicion" clause on people of color and the propensity of the law to encourage racial profiling).*supra*

initiative known as Proposition 200.[278] Proposition 200 had a myriad of provisions ostensibly aimed at preventing welfare fraud[279] and voter fraud by noncitizens.[280] Although several portions of the law were challenged with varying degrees of success, the voter identification provision of Proposition 200 was the most controversial and resulted in the most protracted litigation, eventually reaching the United States Supreme Court in 2013.[281]

Although the United States Supreme Court has upheld voter identification laws in many states,[282] the Arizona law was unique because of its requirement that individuals present proof of United States citizenship in order to register to vote.[283] Proposition 200 required county recorders in the state of Arizona to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship."[284] "Satisfactory evidence" of United States citizenship within the meaning of the statute required:

> (1) a photocopy of the applicant's passport or birth certificate, (2) a driver's license number, if the license states that the issuing authority verified the holder's U.S. citizenship, (3) evidence of naturalization, (4) tribal identification, or (5) '[o]ther documents or methods of proof . . . established pursuant to the Immigration Reform and Control Act of 1986.[285]

In 2010, the Ninth Circuit Court of Appeals held that "Proposition 200's documentary proof of citizenship requirement conflicts with the [National Voter Registration Act]'s text, structure, and purpose," and enjoined the law as preempted by the NVRA.[286] The Ninth Circuit held that Arizona's law was preempted because the National Voter Registration Act of 1993[287] requires states to "accept and use" a uniform federal form to register voters for federal elections.[288] The en banc Court of

278. The proposition was formally known as the "Arizona Taxpayer and Citizen Protection Act." The initiative, as passed, amended §§ 16-152, 16-166 and 16-579 of the Arizona Revised Statutes by adding A.R.S. § 46-140.01. *See* www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.html

279. In addition to the voter identification requirement, Proposition 200 required state and local agencies to determine the immigration status of applicants who applied for public benefits, made it a misdemeanor for officials employed by such agencies for failing to report to authorities applicants who could not prove their lawful immigration status, and also permitted a private right of action for enforcement of this provision. *See id.*

280. Proposition 200 was intended to "combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day." *See* Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (*per curiam).*

281. *See Arizona v. Inter-Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

282. *See, e.g.*, Crawford v. Marion County Election Board, 553 U.S. 181 (2008) (upholding as constitutional Indiana state law requiring voters to present photo ID).

283. *See* 549 U.S. 2, Proposition 200 also required voter identification at the polling place. *See* Arizona Secretary of State, 2004 Ballot Initiatives, Proposition 200, available at https://www.azsos.gov/election/2004/Info/PubPamphlet/english/prop200.htm ("Proposition 200 requires that prior to receiving a ballot at a polling place, a voter must present either one form of identification that contains the name, address and photograph of the person or two different forms of identification that contain the name and address of the person.").

284. *See* A.R.S. § 16-166(F) (West Supp. 2012).

285. 133 S. Ct. 2247, 2252 (citing A.R.S. § 16-166(F)).

286. *Gonzales v. Arizona*, 624 F.3d 1162,1181 (2010).

287. 42 U.S.C. § 1973gg et. seq.

288. 42 U.S.C. § 1973gg-4(a)(1). One of the stated purposes for enacting the NVRA, which is colloquially referred to as the "Motor Voter Act" because of the provision that permitted people to

Appeals reached the same conclusion in 2012,[289] and the United States Supreme Court granted the state of Arizona's petition for a writ of certiorari shortly thereafter.[290]

In determining whether Proposition 200 is preempted by the NVRA, the Supreme Court first examined the Elections Clause, Art. I, § 4, cl. 1 of the United States Constitution, which provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.[291]

Justice Scalia, writing for the majority in *Inter-Tribal Council of Arizona,* stated that "[t]he question here is whether the federal statutory requirement that States 'accept and use' the Federal Form pre-empts Arizona's state-law requirement that officials 'reject' the application of a prospective voter who submits a completed Federal Form unaccompanied by documentary evidence of citizenship."[292]

In answering this question, Justice Scalia summarized Arizona's position as "[t]he NVRA . . . requires merely that a State receive the Federal Form willingly and use the form as one element in its . . . transaction with a prospective voter."[293] However, the Court determined that "Arizona's reading is . . . difficult to reconcile with neighboring provisions of the NVRA."[294] The Opinion continues:

> Arizona's reading would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form. If that is so, the Federal Form ceases to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.[295]

Finally, after rejecting the state of Arizona's argument to invoke the presumption against preemption,[296] the Court concludes that "the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form,"[297] and held that "42 U.S.C. §1973gg-4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself."[298]

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register to vote when they obtain their state driver license, was to encourage persons from diverse racial and socioeconomic populations to vote. *See* Raymond E. Wollfinger and Jonathan Hoffman, "Registering and Voting with Motor Voter," Political Science and Politics, American Science Association (2001).

289. *Gonzales v. Arizona*, 677 F.3d 383, 403 (2012).
290. 568 U.S. __ (2012).
291. U.S. Const. Art. I, § 4, cl. 1.
292. 133 S. Ct. 2251
293. *Id.* at 2254.
294. *Id.*
295. *Id.* (citing § 1973gg(b)).
296. *Id.* at 2256.
297. *Id.* at 2254. (citing Siebold, at 397).
298. *Id.* at 2260.

The demise of Proposition 200's proof of citizenship requirement seems, at first blush, to be a victory for voting rights and a blow to voter suppression efforts based on race and ethnicity in Arizona. However, several astute observers of the Supreme Court and voting rights experts have noted that the Court's decision to strike down Proposition 200's proof of citizenship provision may, in the end, be a hollow victory.[299] This is because, in the same term, the Supreme Court invalidated Section 4 of the Civil Rights Act of 1964 as unconstitutional.[300] Section 4, which permits Congress to identify regions of the country with a history of voter suppression based on race and require the Department of Justice to pre-clear its congressional districts under Section 5 of the Voting Rights Act,[301] is a major tool in the fight against the dilution of voters of color.[302] Notably, like many States in the Jim Crow South, Arizona has been subject to pre-clearance by the DOJ under Section 5 because of its long history of voter suppression of people of color.[303] Thus, the practical effect – if any - of the Court's decision in *Inter-Tribal Council of Arizona* on the preservation of voting rights for people of color in Arizona to be seen.

IV. CONCLUSION

More than perhaps any other state in the last decade, the state of Arizona has distinguished itself nationally, for better or for worse, as the state at the forefront of the immigration battle in the United States. Because it shares a heavily-trafficked border with Mexico, Arizona has become both literally and figuratively "ground zero" for the debate over the development of immigration law and policy in the twenty-first century.[304] However, the question frequently arises: why Arizona? What about Arizona's history and culture, as opposed to other border states with substantial non-White and noncitizen populations such as New Mexico and Texas, makes it particularly hostile to people of color generally and immigrants in particular?

This Article has attempted to shed light on the long and complicated history of race relations in Arizona, and demonstrate the link between modern immigration law and policy in the state and its history of race-based exclusion laws targeted at non-White persons. Since pre-statehood, Arizona has been a bastion of the Jim Crow Southwest, passing laws that restricted the rights of non-White persons to marry, vote, and participate fully in society as citizens and residents of the United States. Because of Congress' plenary power over noncitizens, and the resulting restrictions on their rights and privileges in the context of the right to remain in the United

299. *See, e.g.*, Brad Plumer, *The Supreme Court's Decision on Arizona Won't Put an End to Voting Wars*, THE WASHINGTON POST, June 17, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/17/the-supreme-courts-decision-on-arizona-wont-put-an-end-to-voting-wars/.

300. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

301. *Id.*

302. *Id.*

303. *Id.*

304. *See, e.g.*, Michael White, "Arizona is Immigration Debate Ground Zero With Hispanics Rising," BLOOMBERG, March 22, 2011, available at http://www.bloomberg.com/news/2011-03-22/arizona-is-immigration-debate-s-ground-zero-with-hispanic-majority-in-view.html.

States, modern Arizona has focused on the enforcement of immigration law as a way to attempt to intimidate, harass, and restrict the rights of non-White persons in the state.

More than one hundred years after first gaining statehood, Arizona remains a place that is strongly influenced by its history of war, genocide, colonization, and racism. While the Supreme Court's recent decision in *Arizona v. United States* has placed a temporary damper on its attempt to make "attrition through enforcement" the law of the state, history shows that the Arizona legislature has been both creative and persistent in its attempt to ensure that the power of non-Whites in the state is diluted as much as possible. However, the effects of the Jim Crow Southwest on modern immigration law and policy in Arizona are apparent, and whether and how the state of Arizona will evolve into a place that embraces and respects its rich history and diversity remains to be seen.