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Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities

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IMMIGRATION ENFORCEMENT AND THE FUGITIVE SLAVE ACTS: EXPLORING THEIR SIMILARITIES

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Two seemingly different federal enforcement systems that affect the movement of unskilled workers—the 1793 and 1850 Fugitive Slave Acts and current state immigration enforcement policies—have remarkable similarities. Both systems are political stories that are demonstrative of the failure of federalism. The federal government's current failure to enforce immigration laws has encouraged state and local governments to pass their own laws. Alabama and Arizona have enacted far-reaching laws, which are similar to the

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federal Immigration and Nationality Act § 287(g) programs.[1] Both have been challenged on constitutional preemption and equal protection grounds.[2] Recent scholarship has focused mainly on whether the state and local actions are constitutionally preempted.[3] Current scholarship has overlooked ways the federal government has previously utilized state and local entities to enforce federal laws that govern individual rights.[4] For example, the landmark case *Prigg v. Pennsylvania* held that the federal government could not confer power to the states to implement the 1793 Fugitive Slave Act.[5] *Prigg* declared that the 1793 Fugitive Slave Act and the Constitution's Fugitive Slave Clause provided the exclusive remedy for the return of runaway slaves.[6] This case provides a normative and prescriptive response to contemporary debates about immigration federalism at a time when state and local governments are enacting their own immigration legislation due to federal inaction.

This Article uses legal history to understand the enforcement of immigration law and policy. This discussion began with immigration scholar Gerald Neuman's 1993 article, *The Lost Century of American Immigration Law, (1776-1875).*[7] Neuman claimed, "ignoring the early history of immigration

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1. *Compare* S.B. 1070, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. (2011)), *and* HB56, 2011 Ala. Acts 535, *with* 8 U.S.C. § 1357(g) (2006).

2. United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *aff'd in part, rev'd in part, and dismissed in part*, 691 F.3d 1269 (11th Cir. 2012); United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part, and remanded*, 132 S. Ct. 2492 (2012).

3. *See, e.g.*, Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, *in* IMMIGRATION, INTEGRATION, AND SECURITY: EUROPE AND AMERICA IN COMPARATIVE PERSPECTIVE 181–82 (Ariane Chebel d'Appolonia & Simon Reich eds., 2008), *available at* http://works.bepress.com/anil_kalhan/3; Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 53 (2007); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1376–77, 1391–95 (2006); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 620–28 (2008); Tiffany Walters Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1106–10 (2006).

4. *But see* Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of "Justice Delayed"*, 78 IOWA L. REV. 89, 99 (1992) (discussing the difficulties in drawing too close a historical parallel between immigration and the Fugitive Slave Acts, but noting that "[r]eturning to slavery meant breaking up families, depriving mortgage holders of full payment, and destroying the continuity and harmony of a community."); *see also* Craig B. Mousin, *A Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285, 287–88 (2005) (examining how "Chicago precedent of prohibiting local police from cooperating with federal officials in enforcing the Fugitive Slave Act of 1850 . . . provide[s] insight into city government's role, if any, when Congress requires local law enforcement to control movement of people.").

5. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625–26 (1842).

6. *Id.*

7. Gerald L. Neuman, *The Lost Century of American Immigration Law, (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) (examining the states' early role in regulating immigration).

regulation impairs constitutional understandings of the scope and character of federal immigration power, and of the way in which this power is distributed between Congress and the President."[8] Recently, Professor Kerry Abrams argued that the 1875 Page Act was the country's first restrictive federal immigration law.[9] Abrams also reviewed early state restrictions and noted that California "compared the immigration of 'persons incompetent to become citizens' with immigration of free blacks. If the state police power gave Southern states the authority to restrict the migration of free blacks, the logic went, why could not California restrict the migration of the Chinese?"[10]

This article furthers the Neuman and Abrams analyses, arguing that we should look back further to the 1850 Fugitive Slave Act to understand how the Act brought about the passing of the Equal Protection Clause and how current immigration enforcement policies can abrogate individual rights. Using these articles as a starting point, this Article explores the similarities between the current immigration enforcement policies and the Fugitive Slave Acts.

To date, legal scholars have not engaged in this comparison.[11] Legal historians who have examined the Fugitive Slave Acts have done so in the context of their constitutional foundations.[12] These historians, however, have not explored how the enforcement of the Fugitive Slave Acts relates to contemporary federal enforcement of immigration laws, perhaps because, as Professor Daniel Kanstroom wrote, "the repugnant but consistent classification of fugitive slave cases as matters of property renders comparison with the

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Neuman also encouraged others to explore regulation of immigration preceding 1875. *Id.* at 1840.

8. *Id.* at 1834–35.

9. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 6 VAND. L. REV. 1353, 1355 (2009) [hereinafter Abrams, *Hidden Dimension*] (arguing that conceptualizations of pre-1875 immigration law should be expanded to include intra-state and state-to-territory migration); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 645–647 (2005) [hereinafter Abrams, *Polygamy*] (arguing for the inclusion of the 1875 Page Law in understanding immigration federalism).

10. Abrams, *Polygamy*, *supra* note 9, at 673 (footnote omitted).

11. *But see* Mousin, *supra* note 4, at 292.

12. *See* Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 543 (2009) [hereinafter Finkelman, *John McLean*]; *see also* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 621 (1993) [hereinafter Finkelman, *Prigg*]; Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397, 397 (1990); Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 157 (2004) [hereinafter Kaczorowski, *Moral Anomaly*] ("[S]cholarly studies of the Fugitive Slave Clause and the Fugitive Slave Acts have focused on the ways this area of federal law was antithetical to the constitutional liberties of the tragic individuals it assisted slave owners to return to slavery."); Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1023–25 (1997) [hereinafter Kaczorowski, *The Tragic Irony*] (collecting important full-length legal histories on fugitive slave laws at 1027 n.57); Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1835–36 (1991).

deportation system difficult."[13] Outside the field of law, scholar and journalist Robert Lovato has alleged that the Fugitive Slave Acts mirror federal immigration enforcement programs such as Secure Our Communities Programs and Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS).[14] Lovato argues, "[f]ederal laws that allowed local and state authorities to pursue blacks under the Fugitive Slave Act appear to be the model for the Bush Administration's [ACCESS] program, which allows states to deputize law enforcement officials to chase, detain, arrest and jail the undocumented."[15]

This Article challenges the notion of the Fugitive Slave Acts' irrelevance by examining in detail the similarities of both systems and the results that are produced when the federal government is provided with unfettered discretion to abrogate individual rights.[16] This Article also contributes to a growing body of scholarship analyzing the role of African American slavery and pre-1875 immigration history in our conceptualization of the U.S. immigration system. Several scholars have already called for the inclusion of the early forced migration patterns of African Americans as part of our conceptualization of immigration history.[17]

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13. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 81 (2010); *see also* Neuman, *supra* note 7, at 1837 n.18 (providing reasons against reframing immigration law to place slavery at its origin because slavery was involuntary, enslaved people were deemed less than fully human, and the concerns that viewing slavery as immigration may be "euphemistic").

14. Roberto Lovato, *Juan Crow in Georgia*, THE NATION, May 26, 2008, at 20, 21, *available at* http://www.thenation.com/article/juan-crow-georgia.

15. *Id.*

16. *See* Rhonda V. MaGee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 287 (2009) (citing Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198, 200 (1968)).

> As Bilder has shown, slavery was not merely a degrading, exploitative economic system, legal status assignment, and existential condition. Rather it was also a means of transporting men and women from Africa and the diaspora into the colonies and slave-importing southern states. In other words, slavery was "both a labor relationship and a way of moving people" from one national landscape to another. Enslaved people were "simultaneously individuals who increased population and a pool of bound labor."

Id. (quoting Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 761 (1996) (footnotes omitted)).

17. *See, e.g.*, *id.* at 274 (analyzing the forced migration of African Americans through the trans-Atlantic slave trade). Legal scholars and historians have advocated for the inclusion of the trans-Atlantic slave trade in the United States' current immigration and human trafficking policies. *See* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 211–12 (2007); *see also* Karen Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 545, 569–70 (2009) [hereinafter Bravo, *Free Labor*]. In addition, some scholars use the forced migration of slaves to challenge the notion that early American history contained no immigration policy. MaGee, *supra* note 16, at 297 (citing Gabriel J. Chin, Chae Chan Ping & Fong Yue Ting, *The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005)); *id.* at 276 ("[C]hattel slavery was,

This examination addresses three main thematic questions: (1) how can social norms embedded in laws create a system that perpetuates tiered personhood?; (2) how has the federal government's action or inaction spurred state and local action that violates individual rights?; and (3) does acceptance of anti-immigrant laws reinforce divisive cultural norms that prevent integration of immigrants of color?[18]

The Article proceeds in three parts. Part I provides an overview of the implementation and enforcement of the Constitution's Fugitive Slave Clause and the 1793 and 1850 Fugitive Slave Acts. This Part also explores the implementation of the Fourteenth Amendment's Equal Protection Clause and the evisceration of the Fugitive Slave Acts when subsequent immigration laws refused to recognize equal protection rights for immigrants. Part II explores the reverse immigration-federalism story in which states and localities are enacting immigration legislation against the backdrop of federal inaction. Part III explores how both the Fugitive Slave Acts and current immigration enforcement laws create outsiders by failing to protect individual liberty rights. The Article concludes with broad doctrinal lessons on immigration federalism and demonstrates how the law and legal actors can perpetuate norms that facilitate the creation of tiered personhood.

I. COMPARING THE FUGITIVE SLAVE ACTS AND *PRIGG V. PENNSYLVANIA*'S CONTRIBUTION TO IMMIGRATION LAW AND POLICY

A. 1789 Fugitive Slave Clause and the 1793 Fugitive Slave Act

During the Constitution's drafting, the Fugitive Slave Clause was added as a compromise between the northern and southern states.[19] The clause provided:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[20]

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among very many other things, *a compulsory form of immigration, the protection and regulation of which, under federal and state law, was our nation's first system of 'immigration law.'* As a consequence, the formal system that developed was inculcated with the notion of a permanent, quasi-citizen-worker underclass and privileged white ethnics under naturalization law—its legacies we can see up to the present day."). MaGee criticizes the omission of African Americans' migration to the United States and alleges that the trans-Atlantic slave trade was "among the most significant historical antecedents of contemporary immigration law and policy, with legacies that reverberate through immigration law and policy in the United States up to the present day." *Id.* at 274–75.

18. Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 170–71 (2010).

19. THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, at 16–17 (1974).

20. U.S. CONST. art. IV, § 2, cl. 3 (superseded by U.S. CONST. amend. XIII).

According to Robert J. Kaczorowski, the Clause codified the common law right of reception, which "authorized the owner of chattel, such as livestock [or slaves] . . . , that strayed or were taken away, to recover them through self-help, provided it could be done without a breach of the peace."[21] Thus, the Fugitive Slave Clause permitted the federal government to resolve conflicts amongst the states by enforcing the right of slave owners to retrieve their fleeing property.[22] The Supreme Court eventually affirmed this grant of power, noting that "if, indeed, the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."[23]

In order to make the Fugitive Slave Clause operational, Congress passed the Fugitive Slave Act in 1793 (1793 Act).[24] The 1793 Act provided a process to return fugitive slaves, as well as penalties for those who obstructed their rendition.[25] Slave owners and their agents had a cause of action to enforce their constitutionally secured right of reception in private lawsuits brought in federal and state courts under the 1793 Act.[26] Their efforts were often successful as "[s]lave-owners and their agents brought many civil suits under the 1793 statute, and they succeeded in recovering the civil fine and tort damages more often than they failed."[27]

The removal process under the 1793 Act involved several steps: (1) the fugitive slave was seized or arrested; (2) the slave owner took the slave before a judge or magistrate in any state or federal court;[28] (3) upon proof the official issued a certificate authorizing removal of the fugitive slave from the state; and (4) a penalty of a fine or jail time was imposed if a person had or attempted to obstruct or hinder rights under the Act.[29] The seized fugitive slave "was not entitled to a trial by jury, was not guaranteed the right to testify, and oral testimony was [only] permitted to prove the claim of ownership."[30] There was no statute of limitation on claims under the Fugitive Slave Act, making the fear of recapture indefinite.[31]

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21. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1024.

22. *Id.* at 1025.

23. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615 (1842); *see also* Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1025 (explaining the significance of the Fugitive Slave Clause).

24. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302–05 (1845); *see also* Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1025 ("Congress exercised plenary power under the Fugitive Slave Clause when it enacted a statute to enforce it.").

25. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1026.

26. *Id.* at 1027; *see also* Act of Feb. 12, 1793, § 3, 1 Stat. at 302–05.

27. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1027; *see also id.* at 1027 n.58 (collecting cases).

28. MORRIS, *supra* note 19, at 21.

29. Act of Feb. 12, 1793, § 3, 1 Stat. at 302–05.

30. Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 401 (2003) (citing Act of Feb. 12, 1793, § 3, 1 Stat. at 305).

31. *Id.* at 401–02.

The 1793 Act proved ineffective for three reasons: (1) the reluctance of local officers to enforce the provisions; (2) the underlying moral conflict between the northern and southern states regarding slavery; and (3) the constitutionality of the Act.[32] In addition, "[a]s federal judges were rather scarce at the time, the implementation of this law was often quite inefficient, inconvenient, and dangerous. The law did not authorize the issuance of warrants, nor did it allow federal marshals to aid in the pursuit and capture of fugitives."[33]

Many cases brought under the 1793 Act were actions in tort against persons who harbored or concealed fugitive slaves.[34] Anyone who helped fugitive slaves abscond would be subject to a $500 fine.[35] Despite their personal views to the contrary and the lack of uniformity in state law on the issue, "antebellum state and federal judges felt obligated to enforce the Fugitive Slave Clause and the Fugitive Slave Act of 1793."[36] For example, in *Jones v. Van Zandt*, the plaintiff, a citizen from Kentucky, brought an action against the defendant, a citizen from Ohio, for harboring and concealing fugitive slaves.[37] Jones alleged that Van Zandt knew the persons were fugitive slaves yet concealed them.[38] Van Zandt claimed that he lacked notice that the persons he helped were fugitive slaves[39] and argued that, in order to be fined, proper notice was required.[40] The Supreme Court found that verbal notice or acts evidencing knowledge of the fugitive slave's status was enough to establish requisite notice.[41] Further, the Court found that an overt act intended to "elude the vigilance of the master or his agent, and which is calculated to attain such an object is a harboring."[42]

B. State Personal Liberty Laws

Between 1780 and 1861, northern states passed personal liberty laws, some in response to the 1793 Act.[43] Personal liberty laws were intended to interfere with slave owners' efforts to recapture slaves as well as protect free blacks and

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32. Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 7 (1970) (quoting HOMER S. CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 175 (1937)); *see also* Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1027–30.

33. KANSTROOM, *supra* note 13, at 78.

34. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1026–27.

35. Act of Feb. 12, 1793, § 3, 1 Stat. at 302–05.

36. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1027–28; *see also id.* at 1028 n.60 (collecting several cases displaying this dichotomy).

37. Jones v. Van Zandt, 46 U.S. (5 How.) 215, 217 (1847).

38. *Id.*

39. *Id.* at 225.

40. *Id.*

41. *Id.* at 231–32.

42. *Id.* at 232.

43. MORRIS, *supra* note 19, at x–xi.

fugitive slaves from fugitive slave laws.[44] The northern states wanted alleged fugitive slaves to have due process rights and a presumption of freedom.[45]

Pennsylvania was at the forefront of enacting state laws to prevent the enforcement of the Fugitive Slave Act.[46] The Pennsylvania law stated that if any person attempted to remove a "negro or mulatto" from the state with the intention of enslaving him or her, that person would be guilty of a felony, fined up to $3,000, and sentenced to hard labor.[47] Moreover, Pennsylvania considered children born to fugitive slaves while in the state to be free.[48]

Vermont and New York passed personal liberty laws during the 1840s.[49] These laws gave those accused as fugitive slaves the right to trial by jury and the right to an attorney.[50] Connecticut and Indiana also provided trial by jury on appeal.[51] Connecticut's early protective statutes, although employing language in the preamble favoring the return of fugitive slaves, fined state officials who took part in fugitive slave cases.[52]

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44. MARION GLEASON MCDOUGALL, FUGITIVE SLAVES (1619-1865), at 65 (1891).

45. *Id.*; *see also* MORRIS, *supra* note 19, at 12 (describing the revisions northern states made to their state laws).

> When the federal government refused to assert a right to eliminate gradually the property interest in human beings, most antislavery people in the free states saw little alternative but to try to separate sharply slavery and freedom at both the state and federal levels, and to assure that those who were free would not be deprived of their personal liberty.

MORRIS, *supra* note 19, at 24.

46. Edward Raymond Turner, *The Abolition of Slavery in Pennsylvania*, 36 PA. MAG. HIST. & BIOGRAPHY 129, 129 (1912), *available at* http://www.jstor.org/stable/10.2307/20085586.

47. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 539 (1842). The personal liberty statute provided

> that if any person or persons shall from and after the passing of the act, by force or violence take and carry away, or cause to be taken and carried away, and shall by fraud or false pretense, seduce, or cause to be seduced, or shall attempt to take, carry away, or seduce any negro or mulatto from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of felony, and shall forfeit and pay a sum not less than five hundred, nor more than one thousand dollars; and moreover, shall be sentenced to undergo a servitude for any term or terms of years, not less than seven years nor exceeding twenty-one years; and shall be confined and kept to hard labour . . . .

Id. at 608.

48. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY FEDERALISM, AND COMITY 65 (1981).

49. MCDOUGALL, *supra* note 44, at 66.

50. *Id.*

51. *Id.* at 65.

52. *Id.* at 65–66.

In the South, South Carolina passed its Declaration of the Causes of Secession in 1860.[53] In this declaration, the state noted that "fourteen of the States have deliberately refused for years past to fulfill their constitutional obligations, and we refer to their own statutes for the proof."[54] In response, Senator Benjamin Wade of Ohio posited, "[c]annot a sovereign State of this Union prevent the kidnapping of her free citizens because you have a right to claim a slave fleeing from service?"[55] Previously, the northern states took "positive action to remove the internal legal principles built upon the assumption that a person could be considered a thing."[56] This led to a schism on the Mason/Dixon Line[57] and raised an issue of comity amongst states.[58]

C. Prigg v. Pennsylvania *and the 1850 Fugitive Slave Act*

Prigg v. Pennsylvania was the main case challenging federal and state action under the 1793 Act.[59] In 1832, Edward Prigg, a professional slave catcher, seized Margaret Morgan, a black woman, whose former owner, John Ashmore, let her live virtually free in Maryland despite never formally emancipating her.[60] Because Morgan's parents were informally emancipated, "Morgan grew up thinking she was free and had always lived as a free woman in Maryland."[61] Thereafter, she moved to Pennsylvania, married a freeborn black man, and had children.[62] At least one of the children was born in Pennsylvania.[63]

Ashmore's heirs wanted Morgan returned as a slave and sent Prigg to capture her in Pennsylvania.[64] The state refused to return Morgan because Prigg failed to comply with its personal liberty statute.[65] Prigg applied to a state magistrate for certificates of removal, invoking the federal Fugitive Slave Act of 1793.[66] These certificates would allow Prigg to remove Morgan to Maryland legally.[67] When Prigg could not obtain the certificates, he took

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53. MORRIS, *supra* note 19, at 1.

54. DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION 7 (1860).

55. CONG. GLOBE APP., 36TH, 1ST SESS. 152 (1860).

56. MORRIS, *supra* note 19, at 7.

57. *Id.* at 8.

58. *Id.* at 13–14.

59. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

60. *Id.* at 608–09.

61. Finkelman, *John Mclean*, *supra* note 12, at 544–45.

62. *Id.*

63. *Prigg*, 41 U.S. at 609.

64. Finkelman, *Prigg*, *supra* note 12, at 611.

65. *Prigg*, 41 U.S. at 608–09; THOMAS H. TALBOT, THE CONSTITUTIONAL PROVISION RESPECTING FUGITIVES FROM SERVICE OR LABOR, AND THE ACT OF CONGRESS, OF SEPTEMBER 18, 1850, at 29 (1852).

66. *Prigg*, 41 U.S. at 609.

67. *See* Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302–05 (1845).

Morgan and her children to Maryland in violation of Pennsylvania law.[68] What ensued was a long battle between Pennsylvania's personal liberty laws and the Ashmore heirs' ability to remove Morgan to Maryland as a slave under the 1793 Fugitive Slave Act.[69] Pennsylvania indicted Prigg, who pled not guilty,[70] and the state requested his extradition from Maryland.[71] Upon Prigg's return, he was convicted for violating Pennsylvania's personal liberty law.[72] Following his conviction, he appealed to the U.S. Supreme Court.[73]

The Court considered two issues in *Prigg*. First, the Court considered whether the power to legislate under the Fugitive Slave Clause of the Constitution resided with the federal government or the states.[74] Second, the Court considered whether federal law could oblige state officials to execute federal fugitive-slave law.[75] Pennsylvania argued its law was based on the police powers that the Tenth Amendment secured.[76]

The Court held that the 1793 Act's attempt to confer state magistrates jurisdiction over fugitive slaves was unconstitutional.[77] Specifically, the Supreme Court Justices found that Congress had *exclusive* jurisdiction over fugitive slaves and that only federal courts could enforce rights under the 1793 Act.[78] Legal scholar Paul Finkelman succinctly described the Court's holding as stating "that while state officials ought to enforce the federal Fugitive Slave Act, Congress could not obligate them to do so because Congress did not pay their salaries."[79]

Justice Story's majority opinion ruled that the constitutional clause prohibited the states from freeing fugitive slaves.[80] The majority found that, because the federal law was based on a specific constitutional provision, national in scope, the federal power over the provision was exclusive.[81] Further, the Court found it inconsistent to state that federal power was

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68. *Prigg*, 41 U.S. at 609; *see also* FINKELMAN, *supra* note 48, at 134 ("One of the blacks Edward Prigg took to Maryland had been conceived and born in Pennsylvania 'more than a year after the said negro woman had fled and escaped from Maryland.'" (quoting *Prigg*, 41 U.S. at 609)).

69. Finkelman, *Prigg*, *supra* note 12, at 611–12.

70. *Prigg*, 41 U.S. at 608.

71. Finkelman, *Prigg*, *supra* note 12, at 605.

72. *Prigg*, 41 U.S. at 609.

73. *Id.*

74. TALBOT, *supra* note 65, at 29.

75. JANE H. PEASE & WILLIAM H. PEASE, THE FUGITIVE SLAVE LAW AND ANTHONY BURNS: A PROBLEM IN LAW ENFORCEMENT 5 (Harold M. Hyman ed., 1975).

76. *Prigg*, 41 U.S. at 586; PEASE & PEASE, *supra* note 35, at 5.

77. *Prigg*, 41 U.S. at 598.

78. *Id.*

79. Finkelman, *John McLean*, *supra* note 12, at 543.

80. *Prigg*, 41 U.S. at 622.

81. *Id.*

exclusive, but then order the states to carry out the federal law.[82] Therefore, the federal government was "bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."[83] Although the Court believed that state judges should execute the federal law, it recognized that the federal government had no power to require them to do so.[84] The Court did recognize, however, that, in certain instances, the States could "regulate and remove fugitive slaves from their borders" under the police power.[85]

The disjointed holdings in *Prigg* encouraged opposition, which resulted in continuing disparities in the application of the law in different states.[86] For example, northern states continued to pass personal liberty laws in opposition to the Supreme Court's decision.[87] Prohibitive personal liberty laws were passed in Connecticut, Massachusetts, Ohio, Pennsylvania, Rhode Island, and Vermont.[88] After *Prigg*, "Northern resistance led to Southern demands for a more effective federal statute."[89] Because the *Prigg* Court held that mandatory state administration of the Fugitive Slave Act was unconstitutional, there were demands for the creation of a federal body to exercise authority over the return of fugitive slaves.[90] Consequently, Congress passed the 1850 Fugitive Slave Act (1850 Act).[91] The 1850 Act provided for the appointment of a federal body to administer the system, a procedure for the deportation of slaves (that included the issuance of search and arrest warrants), the issuance of certificates of removal, the imposition of fines for interference, and the deputization of citizens to help with the administration of the system.[92]

Under the 1850 Act, Congress authorized federal judges to appoint commissioners with "'the powers that any justice of the peace or other magistrate of any of the United States' had to arrest, imprison, or bail offenders

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82. *Id.* at 615–16.

83. *Id.* at 616.

84. *Id.* at 615–16.

85. KANSTROOM, *supra* note 13, at 79.

86. *See* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860, at 14 (1970).

87. *Id.*

88. *Id.*

89. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1035.

90. *Id.*

91. *See* Act of September 18, 1850, ch. 60, 9 Stat. 462; Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1035.

92. Act of September 18, 1850, §§ 1, 5–7, 9 Stat. at 462–64. Section 1 stated that the federal government may "exercise the power that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offense against the United States by arresting, imprisoning, or bailing" by the same virtue as judicial courts of the United States. *Id.* § 1.

of any crime against the United States."[93] Judges appointed commissioners[94] in each federal circuit[95] and granted them "concurrent jurisdiction with district and circuit court judges over fugitive slave claims."[96] With these grants of authority, commissioners could issue certificates of removal to claimants upon satisfactory proof that a person was a fugitive slave.[97] It was believed that the commissioners, unlike state officials, would be unbiased in their application of the Fugitive Slave Acts.[98] Many federal agents enforced the return of fugitive slaves.[99] Slave owners went to the appropriate court in their home state to initiate the removal process.[100] In state court, the slave owner would have to "establish that his slave had escaped and owed the owner service or labor."[101] The slave owner also "had to provide a general description of the fugitive."[102] During these proceedings,

> [i]f the judge of the local court was satisfied that the first two points were correct, . . . an official transcript was given to the claimant. The transcript, when presented to a fugitive slave commissioner . . . , was to be received as conclusive evidence that the slave described in

93. *Id.* § 1. These "[c]ommissioners . . . were . . . appointed by the superior court of each territory where 'reasonable facilities to reclaim fugitives from labor' were to be maintained." CAMPBELL, *supra* note 86, at 24 (quoting Act of 1850, § 3, 9 Stat. at 462).

94. Lindquist, *supra* note 32, at 4 (noting that U.S. Commissioners were "[c]reated primarily in response to the state's unwillingness to enforce unpopular federal laws in the early nineteenth century, the commissioner performs judicial functions for the federal government that are somewhat analogous to those performed by local magistrates or justices of the peace for the states"). When Congress enacted the 1789 Judiciary Act, there was not a clear delineation between federal and state jurisdiction. *Id.* Initially, many National Republicans believed that state courts could perform federal functions. *Id.* at 5. In response, "Congress authorized the circuit courts on February 20, 1812 'to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary, to take acknowledgements of bail and affidavits.' These 'discrete persons' . . . were customarily referred to as 'commissioners of the circuit court.'" *Id.* at 5–6 (footnotes omitted) (citing 1 Stat. 680–81, 682 (1812)).

95. Cloud, *supra* note 30, at 413.

96. *Id.* (footnotes omitted) (citing Act of Sept. 18, 1850, ch. 60, §§ 3–4, 9 Stat. 462, 462).

97. Act of Sept. 18, 1850, § 4, 9 Stat. at 462; Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1035–36 (citing Allen Johnson, *The Constitutionality of the Fugitive Slave Acts,* 31 YALE L.J. 161, 181–82 (1921)); *see also* CAMPBELL, *supra* note 86, at 24 ("The jurisdiction of the commissioners was to be concurrent with that of the circuit and district judges, and they had authority to grant certificates for the return of fugitive slaves."). The statute stated specifically that "the commissioners . . . *shall grant* certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such *fugitives from service or labor* . . . to the State or Territory from which *such persons* may have escaped or fled." Act of Sept. 18, 1850, § 4, 9 Stat. at 462 (emphasis added).

98. Lindquist, *supra* note 32, at 7–8.

99. PEASE & PEASE, *supra* note 75, at 11.

100. *See* CAMPBELL, *supra* note 86, at 113 (outlining the procedure for reclaiming a fugitive slave).

101. *Id.*

102. *Id.* at 113–14.

> the transcript had escaped and owed service or labor to the claimant.[103]

Fugitive slaves were not entitled to any rights during these proceedings.[104] Frequently, slaves were denied the "right to a jury trial, the right of the accused to testify in his own behalf, and the right to habeas corpus."[105] For example, congruent with the 1850 Act, statutes in South Carolina and Georgia provided "that the burden of legal proof was on free blacks to show that they were not slaves."[106] Despite their efforts, the free states were unable to provide alleged slaves with any protection because of the free states' non-existent legal rights within the pro-slave states.[107]

The state or local court provided the transcript to the commissioners within the federal district court and the commissioner would issue a warrant for the fugitive slave's arrest.[108] The 1850 Act "empowered commissioners . . . , as well as [federal] courts themselves, to issue certificates" of removal.[109] The commissioners could also appoint persons, such as state officials, to execute warrants for the capture of fugitive slaves.[110]

Once the warrants were issued for capture,

> [t]he law charged federal marshals and their deputies to execute all warrants for the arrest of alleged fugitives issued by the commissioners and the courts and to be financially accountable should the fugitives escape. In pursuance of their duties, the marshals were authorized to summon and call to their aid the bystanders . . . [b]ut, should the claimant so prefer, he might seize a fugitive on his own responsibility without a warrant.[111]

Following the adoption and enforcement of the 1850 Act, "for the first time, [the U.S. had] a large scale, relatively efficient federal system for the forced removal of people from one place to another on the basis of rather scanty proof, with minimal or no judicial oversight, and with only the most flimsy

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103. *Id.* at 114.

104. *See* Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1036 (noting that fugitive slaves were prohibited from entering evidence).

105. *Id.* at 1038; *see also* PEASE & PEASE, *supra* note 75, at 12 (stating that there was no provision for habeas corpus under the Fugitive Slave Act); *id.* at 11–12 ("At no time during this process was the alleged fugitive allowed to testify in his own behalf."); Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1038 ("[C]ombined with the summary nature of the proceeding based exclusively on the claimant's evidence relating to the alleged fugitive's status, [this] effectively prevented the free states' presumption of freedom and other personal liberty guarantees from interfering with the slaveholder's right of reception.").

106. MORRIS, *supra* note 19, at 2, 11.

107. Kaczorowski, *The Tragic Irony*, *supra* note 12, at 1038.

108. CAMPBELL, *supra* note 86, at 114.

109. PEASE & PEASE, *supra* note 35, at 11.

110. Act of Sept. 18, 1850, ch. 60, §§ 2, 5, 9 Stat. 462, 462–63.

111. PEASE & PEASE, *supra* note 35, at 11; *see also* Act of Sept. 18, 1850, § 5, 9 Stat. at 463.

constitutional protections."[112] The underlying flaw with the 1850 Act was that it created a federal enforcement mechanism that allowed the preferences of slave-holding states to override those of the free states.[113] The delegation itself was not problematic; rather, more troublesome was the federal preference to enforce a system that did not recognize what we now know as equal protection or individual liberty interests of the slaves.

D. The Impact of the Fourteenth Amendment's Reconstruction Clause on the Fugitive Slave Acts and Early Immigration Law

After passage of the Reconstruction Amendments, the states no longer had supreme authority over the forced migration of African American slaves.[114] Instead, they were required to treat all persons equally under the law.[115] Following the *Dred Scott* decision and passage of the Fourteenth Amendment, Reconstruction radically changed the federal-state balance.[116]

At the time that Congress and the States passed the 1850 Act and personal liberty laws, there were numerous questions surrounding the boundaries of state sovereignty in relation to the federal government.[117] States saw it within their authority to invoke their police power to control migration at a state level.[118] For the first one hundred years of the country's existence, states heavily regulated immigration.[119] Many states had their own naturalization and immigration laws[120] and laws were passed to protect states from

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112. KANSTROOM, *supra* note 13, at 82 ("Three presidential successive administrations—those of Fillmore, Pierce, and Buchanan—enforced the laws vigorously.").

113. *Id.* at 80–81.

114. Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2115–16 (1996) ("Even most antislavery politicians admitted that the Constitution denied the federal government authority to interfere with slavery in any state that chose to sanction it.").

115. Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 8 (1995) (footnotes omitted) ("States' rights advocates knew that granting freedom meant much more than a simple exemption from personal servitude. They argued that freedom for African Americans would mean the right to participate in government and to enjoy the rights of citizenship. They fully appreciated that abolishing slavery would make African Americans their equals before the law.").

116. Nieman, *supra* note 114, at 2116–17.

117. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81–83 (2002).

118. GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 19 (1996); Chin, *supra* note 17, at 7.

119. Chin, *supra* note 17, at 7 ("States regulated entry of immigrants, particularly in major seaports like New York and later San Francisco, but once the newcomer had successfully landed, he or she was in. There were no green cards, no quotas, no caps, no Border Patrol or ICE [Immigration and Customs Enforcement]. And there was no deportation.").

120. In the 1790 Naturalization Act, Congress required state courts to record applications for citizenship. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103. Further, states had to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State. Act

undesirable classes of immigrants.[121] These laws applied to immigrants as well as to citizens of other states.[122]

The 1857 *Dred Scott* decision denied the possibility of citizenship to all slaves, ex-slaves, and descendants of slaves and also prevented Congress from prohibiting slavery in the territories.[123] This case "'made freedom local' and 'it made slavery national, in the sense that slavery would be legal in any part of the United States where a state government had not abolished it.'"[124] In 1868, Congress passed the Thirteenth and Fourteenth Amendments, which effectively overturned *Dred Scott*, thus providing citizenship for all African Americans.[125]

The Reconstruction Amendments made slavery unconstitutional and, in principle, ensured equality under the law.[126] During the Fourteenth Amendment's passage, Republican senators argued that freed slaves should have the full and equal benefits of the law.[127] The fear was that failure to guarantee equal protection could place the "ex-slave . . . in a social limbo" and create tiered citizenship.[128]

The Fourteenth Amendment's Equal Protection Clause, on its face, ensures that all persons are equal under the law.[129] Federal immigration law, however, emerged as an exception to this general rule. Racial discrimination of Chinese immigrants challenged the Amendment's boundaries in California.[130]

California's legislature, after having numerous taxes targeted at Chinese immigrants struck down as unconstitutional, switched tactics and passed laws in the 1870s under their police power, focusing on character and conduct.[131] In actuality, the laws targeted Chinese women and the alleged goal was to keep lewd women from migrating into the state.[132]

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of June 18, 1798, ch. 54, § 2, 1 Stat. 566, 567. States also had to register aliens seeking naturalization and issue certificates of registry. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154–55; *see also* NEUMAN, *supra* note 118, at 19–20.

121. NEUMAN, *supra* note 118, at 19–20.

122. Abrams, *Polygamy*, *supra* note 9, at 665 (citing NEUMAN, *supra* note 118, at 20).

123. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857), *superseded by* U.S. CONST. amend. XIV.

124. FINKELMAN, *supra* note 48, at 315 (quoting DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 293 (1976)).

125. U.S. CONST. amend. XIII & XIV.

126. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 135–36 (1950).

127. *Id.* at 134–35.

128. *Id.* at 133–34 (comparing the potential differentiations to India's caste system).

129. U.S. CONST. amend. XIV.

130. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1122–23 (1998); *see also* Abrams, *Polygamy*, *supra* note 9, at 682–89 (discussing California immigration law).

131. Abrams, *Polygamy*, *supra* note 9, at 672–77.

132. *Id.* at 674–76; *see also supra* note 10 and accompanying text.

State regulation of immigration faltered in *In re Ah Fong* when a California district court found a California statute regulating the immigration of Chinese women unconstitutional.[133] Circuit Justice Field posited that states could not exercise state police powers for "corrupt uses," such as discrimination against free blacks.[134] Justice Field indicated that previous state police powers were premised upon the institution of slavery and the exclusion of black slaves.[135] In the wake of the Civil War, he stated that "no such power would be asserted, or if asserted, allowed, in any federal court."[136] With the emancipation of slaves, states shifted their use of police power from a pretext for discriminating against African Americans to a pretext for the discrimination of Chinese immigrants. Under the Fourteenth Amendment, this was as an invalid exercise of a state's police power.[137] Justice Field remarked that if Chinese migration "is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies."[138]

Rather than striking down state discriminatory laws against immigrants, the federal government passed similar laws.[139] At the time, the equal protection provisions of the Fourteenth Amendment were not applicable to the federal government.[140] The Chinese exclusion laws of the 1880s marked the federal government's entrance into prominent regulation of immigration.[141] These laws were passed in reaction to the economic depression in California and concerns over Chinese laborers taking jobs away from native-born Americans.[142]

The two main cases challenging the Chinese exclusion laws were *Chae Chan Ping v. United States*[143] and *Fong Yue Ting v. United States*.[144] In *Chae*, the Court "held that a returning resident non-citizen could be excluded if

133. *In re* Ah Fong, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102).

134. Abrams, *Polygamy*, *supra* note 9, at 688 (citing *Ah Fong*, 1 F. Cas. at 216–17).

135. *Ah Fong*, 1 F. Cas. at 216–17.

136. *Id.* at 217.

137. *See* U.S. CONST. amend. XIV.

138. *Ah Fong*, 1 F. Cas. at 217.

139. Abrams, *Polygamy*, *supra* note 9, at 705–06.

140. *Id.* at 703–04. It was not until 1954 that the Equal Protection Clause was applied to the federal government by incorporation into the Fifth Amendment. *Id.* at 703 n.317 (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).

141. Chin, *supra* note 17, at 7 ("Anxiety over Asian immigration led the federal government to assume regulatory authority over immigration."). *But see* Abrams, *Polygamy*, *supra* note 9, at 645 (arguing for the inclusion of the 1875 Page law, which excluded Chinese women from migrating to the country, as marking the federal government's entrance into the regulation of immigration); Cleveland, *supra* note 117, at 106 (stating that Congress did not pass a major immigration law until 1875).

142. Chin, *supra* note 17, at 8. "[M]any Chinese immigrants were miners, manual laborers, [and] laundrymen" and were viewed as a threat to American jobs. *Id.* at 9.

143. Chae Chan Ping v. United States, 130 U.S. 581, 589 (1889).

144. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); *see also* Chin, *supra* note 17, at 7 (discussing both cases).

Congress determined that his race was undesirable—or for any other reason."[145] Thus, the Court upheld a federal statute that prohibited unskilled migratory workers of Chinese descent from migrating to and remaining in the United States.[146] Although this result is not incongruent with the modern understanding of constitutional equal protection,[147] the Supreme Court found that Congress and the executive branch had plenary powers over immigration and believed that the judiciary should not intervene at the time.[148] Moreover, in *Fong*, the Court determined

> [d]eportation or exclusion of aliens "may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts." Imposing the burden of proof on the Chinese person, and providing for testimony of white witnesses only "is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government."[149]

Chae sustained Congress's plenary power over immigration,[150] whereas *Fong* affirmed congressional power to pass deportation statutes excluding non-citizens based on race or for any other reason.[151] Both cases affirmed that federal immigration power superseded the equal protection rights of immigrants.[152]

Here, we see the affirmation of the federal government's exclusive power over immigration, even in upholding racial exclusionary policies. This is evident despite that, under equal protection norms, state discrimination against non-citizens receives greater scrutiny.[153] Once the Court chose to uphold federal immigration laws, equal protection norms were not given much attention.[154]

States' use of police powers to exclude Chinese immigrants declined as southern states lost the ability to use police powers to control the migration of free African Americans[155] and an increase of federal laws aimed at excluding

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145. Chin, *supra* note 17, at 7; *see also Chae Chan Ping*, 130 U.S. at 606.

146. *Chae Chan Ping*, 130 U.S. at 589, 611.

147. *See* Chin, *supra* note 17, at 15.

148. *See Chae Chan Ping*, 130 U.S. at 609.

149. Chin, *supra* note 17, at 19 (footnotes omitted) (quoting *Fong Yue Ting*, 149 U.S. at 714, 729).

150. *Id.* at 7.

151. *Id.*

152. *But see* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (finding that, under the Fourteenth Amendment, a child born in America to Chinese parents was a U.S. citizen).

153. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999).

154. Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 939–41 (2007) (discussing other instances of constitutional conflict).

155. Abrams, *Polygamy*, *supra* note 9, at 673.

Chinese immigrants replaced unconstitutional state attempts.[156] If a person was in the country unlawfully, the violation gave the federal government the right to devalue a Chinese immigrant as a person and exploit his or her willingness to work at no cost. Thus, the federal immigration system's early foundation, instead of striking down discriminatory state immigration laws, simply moved discriminatory laws to the federal level where they continued against Chinese immigrants.

In analyzing federal power over immigration, a commentator noted that

> [i]t was no coincidence that greater legal freedoms for African Americans were tied to Chinese misfortunes. As one historian observed, "[w]ith Negro slavery a dead issue after 1865, greater attention was focused [on immigration from China]." Political forces quickly reacted to fill the racial void in the political arena. In California, partisan political concerns, along with labor unionism, in the post-Civil War period figured prominently in the anti-Chinese movement.[157]

The Supreme Court explored the relationship between the treatment of African Americans and other racial minorities in *Plessy v. Ferguson*.[158] Justice Harlan, dissenting from the "separate but equal" holding,[159] made the first declaration that "[o]ur Constitution is color-blind."[160] He also noted the irony that the "separate but equal" doctrine applied to blacks, who unquestionably were part of the political community, but not Chinese immigrants, "a race so different from our own that we do not permit those belonging to it to become citizens of the United States" and who generally are excluded from entering the country.[161] Justice Harlan, although promoting legal equality for citizens, continued to display a strong racial bias.[162]

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156. *See id.* at 690–98 (discussing other legislation passed by Congress in the 1870s).

157. Johnson, *supra* note 130, at 1123 (1998) (alteration in original) (footnote omitted) (quoting STUART CREIGHTON MILLER, THE UNWELCOME IMMIGRANT 151 (1969)); *see also* Abrams, *Polygamy*, *supra* note 9, at 652 (stating that the "prevailing viewpoint was that Chinese laborers were effectively slaves" during the 1870s).

158. Plessy v. Fergusson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

159. *Id.* at 552.

160. *Id.* at 559 (Harlan, J., dissenting).

161. Johnson, *supra* note 130, at 1124 (quoting *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting)).

162. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id.

II. IMMIGRATION: A STORY OF FAILED FEDERALISM

A. Parallel Stories of the Failure of Federalism

The 1850 Fugitive Slave Act is analogous to current immigration enforcement laws and policies in terms of federal supremacy and congressional deference—both demonstrate the failure of federalism. In the case of fugitive slaves, the states could not agree and the federal government was relatively powerless to enforce the desires of the southern states until 1850. The underlying problem, of course, was a fundamental disagreement about the meaning of personhood and citizenship. The southern states felt quite comfortable abusing African Americans' rights because they strongly believed that slaves were property and they were not intended to become citizens.[163] The fundamental disagreement with the northern states on this issue made political compromise impossible.[164]

The immigration story is an example of reverse-federalism. States are currently frustrated by the federal government's relative inaction on the immigration front.[165] Accordingly, states like Alabama, Arizona, Utah, and Georgia have begun enacting their own immigration laws.[166] The state immigration laws will have a significant impact on immigrant rights. This section examines the reverse federalism story and the extent to which current federal immigration enforcement policy reinforces state and local actors enacting their own immigration laws against both citizen and noncitizens' rights—especially those who look or sound foreign.

Similar to the time when the 1850 Fugitive Slave Act was enacted, there is currently a conflict amongst states and localities about how to address immigrants within their communities.[167] Recently, various states and localities have enacted laws targeting immigrants while others have enacted laws that give sanctuary to immigrants within their communities.[168]

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163. Johnson, *supra* note 97, at 178–80 (discussing the southern notion that slaves were less than citizens and thus had no due process rights when seized in the North).

164. *Id.* at 179.

165. Letter from Governor Janice Brewer to President Barack Obama (June 23, 2010), *available at* http://www.azgovernor.gov/dms/upload/PR_062410_LettertoPresidentObama.pdf; Nat'l Conference of State Legislatures, *2010 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 31, 2010)*, NCSL (Jan. 5, 2011), http://www.ncsl.org/issues-research/immig/2010-immigration-related-laws-and-resolutions-in-t.aspx.

166. *See, e.g.*, *Common Threat Present in Immigration Law Challenges*, CNN (June 28, 2011), http://www.cnn.com/2011/US/06/28/immigration.laws/index.html.

167. Karla Mari McKanders, *Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 585 (2009).

168. *Id.* ("There are a multitude of state and local laws that target immigrants. For instance, some states and localities have passed 'pro-immigrant' laws encouraging immigration to their states, while others have passed 'anti-immigrant' laws that primarily deny immigrants essential services to force immigrants to leave the states and cities.").

When discussing federal authority over immigration, most dialogues start with the proposition that immigration went largely unregulated until the federal government first exerted authority over immigration in the early twentieth century.[169] Discussions related to federal supremacy in the area of immigration are often based on the plenary powers doctrine to justify federal control over immigration without a detailed examination of the historical underpinnings of the federal immigration system.[170]

Recently, immigration scholars have focused on the relationship between federal, state, and local governments in regulating immigration.[171] States and localities claim that they should be able to use their Tenth Amendment police powers to regulate immigrants within their borders, while the federal government claims exclusivity in the area of immigration law and policy.[172]

One striking similarity between the Fugitive Slave Acts and current immigration laws is that the 1850 Act created a unique federal law enforcement institution that removed power from state and local hands.[173] The Thomas Sims case perfectly illustrates the parallel.[174] Thomas Sims, a fugitive slave, escaped to Massachusetts and began working.[175] A few years later, his former owner located him in Massachusetts and sought his return.[176] The former owner went through a commissioner to obtain a certificate of removal and then sought to arrest Sims.[177] Instead of using U.S. Marshals to enforce the certificate of removal, the federal government deputized state and local officials as federal agents to enforce the provisions of the 1850 Act.[178] City policemen were hastily sworn in as deputy federal marshals and effectuated the arrest.[179] They ignored the Massachusetts personal liberty law, which stated that Massachusetts would not comply with the 1850 Act and return fugitive slaves to slave states in the South.[180] Despite the clash between federal and Massachusetts law, Sims was returned to Georgia as a fugitive slave.[181]

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169. Neuman, *supra* note 7, at 1833–35.

170. *Id.*

171. *See generally* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008); *see also* sources collected *supra* note 3.

172. Laurel R. Boatright, *"Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1653–54 (2006); Rodriguez, *supra* note 3, at 575.

173. Kaczorowski, *Moral Anomaly*, *supra* note 12, at 192–93.

174. PEASE & PEASE, *supra* note 35, at 18.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

B. States and Localities Take Action

Currently, states and localities argue that the federal government fails to enforce existing federal law governing the removal of immigrants within their borders.[182] For example, the Immigration and Nationality Act (INA) § 287(a) gives U.S. Immigration and Customs Enforcement (ICE) the power to interrogate any person believed to be a noncitizen regarding his or her right to be present in the United States and to arrest noncitizens for violation of immigration laws.[183] Further, INA § 287(g) empowers the federal government to enter into agreements with states and localities to apprehend and deport undocumented immigrants.[184] States and localities believe that the federal government is not effectively implementing these types of federal provisions and, as a result, have begun enacting their own laws that mimic § 287(a).[185]

1. Arizona: S.B. 1070

Arizona has perhaps the most controversial law, which overtly permits its state and local law enforcement officials to exercise federal immigration powers.[186] In April 2010, Arizona passed S.B. 1070: The Support Our Law Enforcement and Safe Neighborhoods Act.[187] Its purpose is to use state and local government actors to target undocumented immigrants in order to increase the attrition of undocumented immigrants out of the state.[188]

Under the law, any person who the police reasonably suspect of being an undocumented immigrant may be subject to detention and questioning regarding their immigration status.[189] Section 2 requires officers to make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest already effected.[190] Section 2 also requires that all arrested persons have their immigration status determined prior to release.[191] Further, Section 2 describes who may verify immigration statuses and lists documents that create a presumption of lawful presence.[192]

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182. Rodriguez, *supra* note 3, at 570, 575.

183. 8 U.S.C. § 1357(a) (2006).

184. *Id.* § 1357(g).

185. Rodriguez, *supra* note 3, at 570, 575.

186. Nat'l Conference of State Legislatures, *supra* note 165 ("Bills similar to Arizona's were subsequently introduced in six state legislatures—Illinois, Michigan, Minnesota, South Carolina, Pennsylvania, and Rhode Island—but none were enacted.").

187. S.B. 1070, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. (2011)).

188. S.B. 1070, Sec. 1, 2010 Ariz. Sess. Laws 450, 450 ("The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.").

189. S.B. 1070, Sec. 2, 2010 Ariz. Sess. Laws at 451.

190. *Id.*

191. *Id.*

192. *Id.*

These provisions closely resemble the federal immigration powers of INA § 287(a).[193]

Section 3 of S.B. 1070 criminalizes the failure to carry an alien registration document at the state level.[194] Section 3 provides that "a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of" 8 U.S.C. § 1304(e) or § 1306(a), which are analogous federal statutes.[195] A first offense is a class one misdemeanor, punishable by up to twenty days of incarceration and up to a $100 fine.[196] The second offense is punishable by up to thirty days of jail time.[197]

The Arizona law was challenged in *United States v. Arizona*[198] and *Friendly House v. Whiting*.[199] The *Whiting* lawsuit alleged that S.B. 1070 interferes with federal immigration law in violation of the Supremacy Clause, causes racial profiling in violation of the Equal Protection Clause, and violates the Free Speech Clause of the First Amendment.[200] One of the plaintiffs, Jim Shee, is an American citizen of Spanish and Chinese descent and is fluent in Spanish.[201] Despite having lived in Arizona his entire life, he alleges that the police have racially profiled him twice in a single month and asked him to produce his citizenship papers.[202] Shee fears that the bill's implementation would increase the incidence of these frustrating situations.[203] Recently, in *United States v. Arizona*, in June 2012, the Supreme Court struck down the Arizona law as constitutionally preempted with the exception of section 2, which requires the police to check the immigration status of persons whom they detain before releasing them. The Court found that the law's mandate for state and local police offers to make reasonable attempts to determine the immigration status of a detained person does not interfere with federal immigration laws.[204]

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193. *Compare id.*, *with* 8 U.S.C. § 1357(a) (2006).

194. S.B. 1070, Sec. 3, 2010 Ariz. Sess. Laws at 453–55.

195. *Id.*

196. *See* ARIZ. REV. STAT. ANN. § 13-509(H) (Supp. 2011). The original penalties in S.B. 1070 were harsher than those codified, but H.B. 2162 lessened these penalties. H.B. 2162, 2010 Ariz. Sess. Laws 1070, 1076 (codified in scattered sections of ARIZ. REV. STAT. ANN. (2011)).

197. ARIZ. REV. STAT. ANN. § 13-509(H).

198. 70 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part, and remanded*, 132 S. Ct. 2492 (2012).

199. Complaint, Friendly House v. Whiting, No. CV 10-1061 (D. Ariz. May 17, 2010), 2010 WL 2019492. On September 5, 2012, Judge Susan R. Bolton denied the specifc part of the plaintiffs' motion to enjoin the enforcement of subsection 2(B) of Arizona law S.B. 1070. Valle del Sol v. Whiting, No. CV 10-1061 (D. Ariz. Sept. 5, 2012), http://nilc.org/sb1070friendlyhouse.html.

200. Complaint, *supra*, note 199, at 6.

201. *Id.* at 21.

202. *Id.*

203. *Id.*

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

2. Alabama: House Bill 56

More recently, Alabama passed House Bill 56, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act.[205] Opponents of the bill claim that Alabama Governor Robert Bentley "touted HB 56 as 'the strongest immigration bill in the country' and a co-sponsor of the bill boasted that it regulates 'every aspect of a person's life.'"[206] The ACLU alleges that H.B. 56 is "[a] shocking throwback to the days of de jure segregation, [and] attempts to make a class of individuals non-persons in the eyes of the law."[207]

H.B. 56 asserts there is "a compelling public interest to discourage illegal immigration by requiring all agencies within [Alabama] to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws."[208] This law goes even further than Arizona's, authorizing the Alabama Department of Homeland Security to hire and maintain its own immigration enforcement body.[209] Like Arizona's S.B. 1070, H.B. 56 Section 12(a) requires a law enforcement officer to make a reasonable attempt to determine the immigration status of a detained person when reasonable suspicion exists that the person is an unlawful alien.[210] Further, H.B. 56 Section 18 allows police to detain persons found driving without a proper license for up to forty-eight hours to determine their immigration status.[211] The most controversial part of the statute requires an assessment of immigration status for every student in Alabama public schools when the student enrolls.[212]

On July 8, 2011, the Hispanic Interest Coalition of Alabama filed a lawsuit against the state alleging that federal immigration law preempts H.B. 56.[213] Specifically, the complaint claims that:

> HB 56 will subject Alabamians—including countless U.S. citizens and non-citizens who have permission from the federal government to remain in the United States—to unlawful interrogations, searches, seizures, and arrests, and will result in racial profiling. This is because HB 56 mandates law enforcement officers to investigate the immigration status of any individual they stop, detain, or arrest when

205. H.R. H.B. 56, 2011 Leg. (Ala. 2011).

206. Complaint at 2, Hispanic Interest Coal. Of Ala. V. Bentley, No. 5:11-cv-2428-SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011).

207. Am. Civil Liberties Union Found. Immigration Rights Project, *Preliminary Analysis of HB 56, "Alabama Taxpayer and Citizen Protection Act"*, ACLU, https://www.aclu.org/files/assets/prelimanalysis_alabama_hb56_0.pdf (last visited May 28, 2012).

208. H.R. H.B. 56 § 2, 2011 (Ala. 2011).

209. *Id.* § 22.

210. *Id.* § 12(a).

211. *Id.* § 18.

212. *Id.* § 28.

213. Complaint, *supra* note 206, at 3 (stating that "[a]mong other constitutional defects, HB 56 is preempted in its entirety because it encroaches on exclusively federal immigration authority and because it conflicts with federal law in multiple ways").

> they have "reasonable suspicion" that the individual lacks immigration status. Individuals who may be perceived as "foreign" by state or local law enforcement agents will be in constant jeopardy of harassment and unlawfully prolonged detention and arrest by state law enforcement officers operating under HB 56's new immigration enforcement mandates. And all Alabamians will be required to carry state-approved identity documentation in order to prevent lengthy investigations as to their status.[214]

Like the Supreme Court in the Arizona case, the district court judge refused to enjoin Section 12 of the Act, which requires state and local law enforcement officials to try to verify a person's immigration status during routine traffic stops or arrests.[215] The court also denied the injunction of Section 10, which criminalized the willful failure of a person in the country illegally to carry federal immigration papers, because the sections were not preempted by federal law.[216] Like the laws that violated the rights of fugitive slaves, Alabama's law is reminiscent of "pervasive and systematic targeting of a class of persons through punitive state laws that seek to render every aspect of daily life more difficult and less equal."[217]

3. Georgia's Illegal Immigration Reform and Enforcement Act

Another timely example is the Georgia Illegal Immigration Reform and Enforcement Act of 2011.[218] The statute provides criminal sanctions for identity fraud[219] and transporting[220] or harboring an illegal alien.[221] The status also contains provisions similar to the Act of 1850, broadly allowing certain federal documents and oral testimony to summarily establish a person's unlawful status.[222] The law further provides that during an investigation, upon probable cause, state and local police officers may

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214. *Id.* (citations omitted).

215. Hispanic Interest Coal. of Ala. v. Bentley, No. 5:11-CV-02484-SLB, 2011 WL 5516953, at *36–37 (N.D. Ala. July 8, 2011).

216. *Id.* at *24–26.

217. Complaint, *supra* note 206, at 3.

218. Illegal Immigration Reform and Enforcement Act, H.B. 87, 2011 Ga. Laws 794 (codified in scattered sections of GA. CODE ANN. (West 2011)).

219. GA. CODE ANN. § 16-9-121.1 (Supp. 2011).

220. *Id.* § 16-11-200.

221. *Id.* § 16-11-201.

222. *Id.* § 16-11-203 ("The testimony of any officer, employee, or agent of the federal government having confirmed that a person is an illegal alien shall be admissible to prove that the federal government has verified such person to be present in the United States in violation of federal immigration law. Verification that a person is present in the United States in violation of federal immigration law may also be established by any document authorized by law to be recorded or filed and in fact recorded or filed in a public office where items of this nature are kept.").

> verify such suspect's immigration status when the suspect is unable to provide one of the following: (1) A secure and verifiable document as defined in [the Georgia law]; (2) A valid Georgia driver's license; (3) A valid Georgia identification card issued by the Department of Driver Services; (4) If the entity requires proof of legal presence in the United States before issuance, any valid driver's license from a state or district of the United States or any valid identification document issued by the United States federal government; . . . (6) Other information as to the suspect's identity that is sufficient to allow the peace officer to independently identify the suspect.[223]

Like the 1793 Fugitive Slave Act, this law empowers the state to exercise federal enforcement powers.[224]

Similar to the Arizona and Alabama laws, the Georgia law was challenged in *Georgia Latino Alliance for Human Rights v. Deal*.[225] The lawsuit alleged that the Georgia statute violates the Equal Protection and Due Process Clauses by unlawfully discriminating against people based on national origin.[226] The plaintiff, Jaypaul Singh, is a U.S. citizen of South Asian descent, who permanently resides in Washington state.[227] Singh, a law student, spends summers in Atlanta as a law clerk.[228] He has a Washington driver's license, but that state does not determine an applicant's immigration status before issuing a license.[229] Thus, his license is insufficient to verify his immigration status under the new Georgia law.[230] Singh fears that he might be subjected to a long detention while police try to ascertain his immigration status.[231]

4. Utah: H.B. 497

In Utah, the recently passed H.B. 497 requires state and local law enforcement officers to verify the immigration or citizenship status of individuals they encounter who are unlawfully present in the United States.[232] Plaintiffs in *Utah Coalition of LaRaza v. Herbert* alleged that the statute violates the Equal Protection Clause because it encourages racial profiling of

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223. *Id.* § 17-5-100.

224. *See supra* notes 14–15 and accompanying text.

225. 793 F. Supp. 2d 1317, 1322 (N.D. Ga. 2011), *aff'd in part, rev'd in part, and remanded*, 691 F.3d 1250 (11th cir. 2012).

226. *Id.* at 1338–39.

227. Complaint at 31, *Deal*, 793 F. Supp. 2d 1317 (No. 1:11-CV-1804-TWT).

228. *Id.*

229. *Id.* at 31–32.

230. *Id.*

231. *Id.* at 32.

232. UTAH CODE ANN. §§ 76-9-1001 to 76-9-1009 and 77-7-2 (Supp. 2011).

Latinos and anyone who looks or sounds foreign.[233] Similar to the Arizona and Georgia profiling stories, one plaintiff, Milton Ivan Salazar-Gomez, is a resident of Salt Lake City, Utah, and fears that he will be subject to racial profiling.[234] Although he has lived in the United States for nearly his entire life, he is a Mexican national whose parents brought him to the United States when he was ten months old.[235] Salazar-Gomez was stopped for driving with expired tags and turned over to federal immigration officials.[236] Following two months of detainment, he was released and now fears that he might be stopped and harassed during the pendency of his removal proceedings.[237]

C. State Laws Demonstrate a Failure of Federalism

The Arizona, Alabama, Georgia, and Utah laws mirror INA § 287(a), which provides federal officers the right to interrogate persons believed to be in the United States without authorization.[238] Reminiscent of personal liberty laws,[239] states claim they are inclined to pass anti-immigrant laws because the federal government is not taking action to remedy unauthorized immigration.[240] Both the Fugitive Slave Acts and current state immigration laws demonstrate the failure of federalism. The underlying problem in both cases is a fundamental disagreement couched in terms of federalism that pits states' powers against citizens' civil rights.[241] The current passage of state immigration laws represents reverse-federalism. States like Alabama, Arizona, Utah, and Georgia are responding to federal inaction and are enacting their own immigration laws, whereas the era of the 1850 Act witnessed the federal government taking supreme authority over the regulation of fugitive slaves.

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233. Complaint at 5, Utah Coal. of La Raza v. Herbert, No. 2:11-CV-401-CW, 2011 WL 7143098 (D. Utah May 11, 2011).

234. *Id.* at 14–15.

235. *Id.*

236. *Id.* at 15.

237. *Id.*

238. 8 U.S.C. § 1357(a) (2006); Ariane de Vogue, *Supreme Court Takes Up Arizona's Strict Immigration Law*, ABC NEWS (Dec. 12, 2011, 10:53 AM), http://abcnews.go.com/blogs/politics/2011/12/Supreme.court.takes.up.arizonas.strict.immigration.law./.

239. *See supra* Part I.B.

240. Lynn Tramonte, *Debunking the Myth of "Sanctuary Cities"*, IMMIGRATION POLICY CTR. (Apr. 26, 2011), http://www.immigrationpolicy.org/special-reports/debunking-myth-sanctuary-cities ("Historically, the federal government has enforced civil immigration law, and state and local police have focused on enforcing criminal law. However, propelled by increased frustration with the nation's broken immigration system and by growing anti-immigrant sentiment, politicians' demands for state and local police to take an increased role in immigration enforcement have grown exponentially. This culminated in the passage of Arizona's notorious SB 1070 [sic] law in 2010, which would turn Arizona state and local police officers into deportation agents.").

241. Editorial, *The Nation's Cruelest Immigration Law*, N.Y. TIMES (Aug. 28, 2011), http://www.nytimes.com/2011/08/29/opinion/the-nations-cruelest-immigration-law.html.

III. THE FUGITIVE SLAVE ACTS AND CURRENT IMMIGRATION LAWS CREATE OUTSIDERS

A. Racial Profiling and the Presumption of Illegality Against Fugitive Slaves and Immigrants

State enforcement of federal immigration laws often leads to racial profiling. This practice, a presumption of illegality based on racial identity,[242] is inconsistent with the Fourth Amendment's protections against unreasonable searches and seizures.[243] It is also inconsistent with the Fourteenth Amendment's equal protection guarantees. The Department of Justice has stated that racial profiling,

> at its core[,] concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual or one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.[244]

When law enforcement engages in profiling, there is "[n]o logical relationship . . . between any of these characteristics and the commission of crimes."[245] Yet, "[g]overnment agencies employ race-based enforcement tactics without empirical proof of their success."[246]

During enforcement of the Fugitive Slave Acts, courts held that

> [i]n the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew [sic] that he is a slave.[247]

Thus, presumptions in the recovery of fugitive slaves are very similar to current racial profiling.[248] The legislation, which permitted slave owners to

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242. Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1196 (2002).

243. Cloud, *supra* note 30, at 369.

244. *Id.* (citing U.S. Dep't of Justice, Civil Rights Div., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

245. Cloud, *supra* note 30, at 370.

246. Ashar, *supra* note 242, at 1196.

247. Cloud, *supra* note 30, at 402 (citing Hudgins. v. Wright, 11 Va. (1 Hen. & M.) 134, 141 (1806)).

248. *Id.* at 371.

capture any African American and impress him into servitude, was as racially focused as today's profiling.[249]

An example of the use of racial profiling in the enforcement of the 1850 Act is illustrated in the story of Solomon Northrup, a free African American,[250] who was captured by James H. Burch, a slave catcher and dealer.[251] Northrup was racially profiled, abducted, and incarcerated and did not did not know why he was imprisoned, as he was never a slave.[252] Scholar Larry Stokes explains that

> [a] White could fraudulently claim that a Black was a slave, and there was very little that a Free Negro could do about it. There always existed the danger of a free Black being kidnapped, as often happened, and taken into slavery. A large majority of free Blacks lived in daily fear of losing what freedom they had. One slip of ignorance of the law would endanger their slight freedom and place them into slavery.[253]

Anti-slavery activists pointed out the frequent occurrence of free African American men and women being illegally enslaved.[254]

In recent state and federal immigration laws, there appears to be a similar presumption of illegality that is applied to Latinos. For example, in *United States v. Brignoni-Ponce*, the Supreme Court held that immigration officers could use racial identifiers with other factors near the U.S. border.[255] Immigration scholar Kevin Johnson critiqued this decision as authorizing the racial profiling of Latinos.[256] Just as Northrup was racially profiled as a slave because he was African American, *Brignoni* allows the presumption that a Latino with predominant Mesoamerican features near the border is unauthorized.[257]

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249. Larry D. Stokes, *Legislative and Court Decisions That Promulgated Racial Profiling: A Sociohistorical Perspective*, 23 J. CONTEMP. CRIM. JUST. 263, 268 (2007), *available at* http://ccj.sagepub.com/content/23/3.toc.

250. *Id.* at 269; *The Kidnapping Case. Narrative of the Seizure and Recovery of Solomon Northrup. Interesting Disclosures.* N.Y. DAILY TIMES, Jan. 20, 1853, at A1 [hereinafter *The Kidnapping Case*] (stating that Northrup was "a free colored citizen of the United States; was born in Essex County, New York, about the year 1808").

251. *The Kidnapping Case*, *supra* note 250, at A1.

252. Stokes, *supra* note 249, at 269 ("This incident is a firsthand account of a free Black who was racially profiled, captured, and placed into slavery.").

253. *Id.*

254. Cloud, *supra* note 30, at 397. Between adversion to slavery and "fears that crude standards of proof employed by slave catchers led to the enslavement of free blacks living in Northern and border states," the nation saw "resistance to enforcement of the federal law." *Id.* at 371.

255. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010) (discussing *Brignoni-Ponce*).

256. *Id.*

257. *Id.*

Renteria-Villegas v. Hall is demonstrative of the Latino presumption.[258] The Davidson County Sheriff's Office of Nashville, Tennessee, detained Daniel Renteria-Villegas, a 19-year-old Portland, Oregon-born man, twice within the same month.[259] During the first incident, even though the arrest report and booking documents stated that Renteria-Villegas was born in Portland, Oregon, he was placed on an "ICE hold."[260] The arresting officer, without asking, recorded Renteria-Villegas's place of birth as Mexico.[261] Renteria-Villegas was not released until his family presented officials with his passport and birth certificate.[262]

These cases illustrate how racial profiling reinforces the unequal application of the laws against certain populations. Lawful residents fear unlawful detention based on criteria such as their race, ethnicity, or proximity to the border. Racial profiling in enforcement may lead to denied access to counsel, unlawful, prolonged detention without the bringing of charges, and denial of substantive and procedural due process rights.[263]

B. Membership Within a State: Are Fugitive Slaves and Immigrants Chattel or Humans?

Both the 1850 Fugitive Slave Act and current immigration policies have inspired a debate that requires the American people to decide if human beings who live and work among us are morally and legally equal to us. The purpose of this comparison is to highlight similarities between the enforcement of immigration laws and the Fugitive Slave Acts' regulation of human labor. This comparison demonstrates that immigration policies should be instituted based on norms that recognize the personhood and humanity of the subjects of the law. The key connection between the Fugitive Slave Acts and current migration policies is the ways in which immigration law and policy have facilitated dehumanization and created a quasi-citizen worker.

The most significant parallel between the Fugitive Slave Acts and the current deportation regime is the unjust treatment of human subjects in the course of using cheap labor to maximize profit. Slaves were treated as chattel property and forced into labor. They were counted as three-fifths of a person for purposes of Congressional representation and received no protections under the law.[264] U.S. immigration policies have sought the benefit of migrant

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258. Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cnty., 796 F. Supp. 2d 900 (M.D. Tenn. 2011), *motion to certify appeal denied*, No. 3:11-00218, 2011 WL 2938428 (M.D. Tenn. July 19, 2011).

259. *Id.* at 902.

260. *Id.*

261. *Id.*

262. *Id.*

263. Ashar, *supra* note 242, at 1197.

264. Becky Petit, *Enumerating Inequality: The Constitution, the Census Bureau, and the Criminal Justice System*, 9 CONN. PUB. INT. L.J. 37, 40 (2009) ("At the nation's founding[,] the

laborers separate from their value as persons.[265] At times, our country's migration policies are executed in a manner in which people are seen as machines that simply move levers.[266] This approach has resulted in laws that infringe on the personal liberties of target classes.[267]

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three-fifths compromise required the consideration of slaves as three fifths of a free person for apportionment" (citing MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS?: THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 14 (1999))).

265. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 986 (1988) ("[E]ven where formal rights exist, the ability of the undocumented to exercise these rights in practice is limited. Undocumented aliens often fear exposing themselves to the exclusionary powers of the state and will often forego the exercise of membership rights in order to avoid such an eventuality. Undocumented immigrants commonly decline to report private or official abuse and are frequently unwilling to pursue civil claims in court or to step forward to receive benefits to which they are entitled." (footnotes omitted)); Bravo, *Free Labor*, *supra* note 17, at 550 ("Individual migrants, who comprise a significant source of trafficked persons, seek to exchange their labor for value—to respond to market forces that promise higher prices for their labor across internal domestic and/or international borders. Those borders are now heavily policed and enforced, and unsanctioned crossing is essentially verboten. In seeking to trade their labor and to navigate the state-created barriers (i.e., borders) to transnational labor markets, individuals become more vulnerable to the predations of exploitative middlemen such as traffickers in human beings."); *see also* Beth Lyon, *The Unsigned United Nations Worker Rights Convention: An Overlooked Opportunity to Change the "Brown Collar" Migration Paradigm*, 42 N.Y.U. J. INT'L L. 389, 393 (2010) (arguing for the United States to ratify the United Nations Convention to prompt Americans to consider that immigrant workers should receive human rights protections).

266. Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 162 (1998) ("The costs for immigrants are demonstrable and severe in terms of stigmatization, invasion of privacy, denial of a social and employment safety net, and the lasting invalidation of their—and our—collective dreams for progress and community."); Kathleen Newland & Demetrios G. Papademetriou, *Managing International Migration: Tracking the Emergence of a New International Regime*, 3 UCLA J. INT'L L. & FOREIGN AFF. 637, 650 (1998) (discussing "economic stream—employment- or skills-based immigration" where immigration decisions "are based primarily on economic considerations, such as the need for skilled workers, and calculations about the foreign workers' effect on the jobs and income of citizens," and noting further "[i]n recent years, this immigration stream has become omnipresent across advanced industrial societies as globalization and the imperatives of international competition combine to make many foreign workers, from highly educated scientists to temporary agricultural workers, highly desirable.").

267. Michelle Brané & Christina Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 147 (2008) (addressing the "urgent need for creative approaches in upholding international human rights norms . . . and extending protection to those affected"); Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1499 (2002) ("In sum, if history proves to be an accurate guide, immigration and immigration enforcement will remain a civil rights trouble spot."); Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 893–94 (1997) (discussing the need for immigration reform that accounts for the basic human dignity of any person). *See generally* Kristina M. Oven, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 499 (1999) (highlighting the recent trend of laws that strip immigrants of their most basic human rights).

This personless approach is reinforced when those who do not have citizenship are denied the protection of the law.[268] When a person does not fit within membership in a polity, that person may be outside of state protection of rights and can be subject to subordination and exploitation. In this context, when people are divorced from their humanity, the policies surrounding their migration perpetuate dehumanization. In the area of immigration law, scholars such as Kevin Johnson and Linda Bosniak have critiqued how the immigration system has continually perpetuated the subordination of marginalized groups.[269] Bosniak specifically critiques "progressive" scholarship in that it "tends to normatively embrace the very national boundary which serves to effect, and justify, the immigrants' exclusion."[270] This context questions the "'national political imagination,' one which regards the national community as the predominant community of normative concern and presumes the legitimacy, and perhaps the necessity of maintaining borders around it."[271] Thus, despite their contributions, immigrants' individual rights are severely restricted.[272] Although there must be some form of immigration laws under these theories, our country must examine and limit these laws to the extent that they violate equal protection norms. One can accept some difference in the law, but one cannot accept laws that blatantly violate equal protection norms.

There is a striking similarity in the regulation of both slaves and migrant workers to low paying and low status jobs. Slaves performed jobs such as

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268. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 1 (2006) ("The idea of citizenship is commonly invoked to convey a state of democratic belonging or inclusion, yet this inclusion is usually premised on a conception of a community that is bounded and exclusive. Citizenship as an ideal is understood to embody a commitment against subordination, but citizenship can also represent an axis of subordination itself."); *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 70-79 (2006).

269. Bosniak, *supra* note 265, at 987 ("[T]he incidents of membership [the immigrant] enjoys are severely circumscribed by [his or her] status as [an] outsider, constrained directly and indirectly by the state's exclusionary powers. The experience and identity of the undocumented worker are thus defined along two matrices, exclusion and membership. It is this duality that has characterized [his or her] existence in United States society."); *see also* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 641, 651 (2005) ("Race is implicated in naturalization not only as a prerequisite—that is, as a basis for determining who gets to become an American citizen. Race also determines the kind [social] status one occupies.").

270. Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 585, 578–79 (1996) ("[S]ubsuming alienage-based exclusion into analyses of racial and cultural marginalization is problematic, not merely because not all undocumented immigrants belong to ethnic and racial minority groups, but also because it fails to capture what is specific about the exclusion experienced by undocumented immigrants, which is constituted, in substantial part, by their irregular status under the country's immigration laws." (footnotes omitted)); *see also* Johnson, *supra* note 130, at 1148.

271. Motomura, *supra* note 153, at 1376 (citing Bosniak, *supra* note 270, at 559).

272. McKanders, *supra* note 18, at 171.

agricultural and household work.[273] Today, both documented and undocumented migratory workers are pigeonholed into low paying agriculture, household, and construction jobs.[274] In both positions, the law facilitates the exploitation of the most vulnerable population.

The Reconstruction Amendments were intended to "abolish[] all class legislation in the States and [do] away with the injustices of subjecting one caste of persons to a code not applicable to another."[275] Similarly, when immigration law and policy begin to recognize the humanity of the subjects of the laws, there will be more equitable policies towards immigrants who come to the United States as economic migrants. Most acknowledge that "[s]lavery was a system of racial adjustment and social order."[276] So, too, is an immigration regime that has the indirect effect of targeting the poorest immigrants of color.

IV. CONCLUSION

Scholars caution "against creating simplistic solutions to contemporary problems based on complex legal history."[277] The similarities between current immigration policies and the Fugitive Slave Acts provide insight into current enforcement policies and how federal policies should not follow the same patterns that earlier failed to provide equal protection under the law. In both instances, state and federal governments can enact oppressive laws that fail to recognize the humanity of the subjects of the laws.

The Fugitive Slave Acts had no procedural protections for free blacks or fugitive slaves.[278] Further, the plenary powers doctrine was implemented in a manner that, while reinforcing Congress's ability to legislate immigration matters, also supported the violation of Chinese migrant workers' rights. Historically, multiplying forces have widespread implications on immigrants' equal protection rights. This is evident from the allegations in the Arizona,

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273. Nicholas Boston, *Slavery and the Making of America: The Slave Experience, Historical Overview: Living Conditions*, PBS, http://www.pbs.org/wnet/slavery/experience/living/history2.html (last visited May 28, 2012).

274. Wendy Williams, *Model Enforcement of Wage and Hour Laws for Undocumented Workers: One Step Closer to Equal Protection Under the Law*, 37 COLUM. HUM. RTS. L. REV. 755, 756, 760 (2006).

275. Frank & Munro, *supra* note 126, at 141 (quoting Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)).

276. MORRIS, *supra* note 19, at 2 (quoting ULRICH BONNELL PHILLIPS, THE COURSE OF THE SOUTH TO SECESSION 152 (E. Merton Coulter, ed. 1939)).

277. Cloud, *supra* note 30, at 418; *see also* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 568 (2001) (concluding that Congress cannot "devolve by statute its exclusive immigration power to the States").

278. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302–05 (1845); Act of Sept. 18, 1850, ch. 60, § 1, 9 Stat. 462, 462–65.

Alabama, Georgia and Utah cases. Inevitably, having numerous states and localities enforce immigration policies will lead to increased racial profiling.

Under the Fugitive Slave Acts, all basic rights of humanity were denied to African Americans.

> [B]lack slaves enjoyed no social status, no wealth, no political influence in the North. This was as weak and disadvantaged a minority as has ever lived in the nation. Whether free or slave, in the decades preceding the Civil War blacks were a group particularly vulnerable to profile based seizures.[279]

The unlawful Fugitive Slave Acts reinforced this caste-like system.

Current anti-immigration laws in several states and municipalities across the country deny undocumented immigrants their humanity based upon their unlawful entry into the United States or permitting their immigration status to expire. Like the Fugitive Slave Acts, some state and local laws, such as those in Alabama, Arizona, Georgia, and Utah, were intended to exclude people, regardless of their immigration status, from formerly homogenous states, cities and towns.[280]

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279. Cloud, *supra* note 30, at 411.

280. Brief for the Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity at University of California, Berkeley Law School as Amicus Curiae in Support of Plaintiffs-Appellees, Supporting Affirmance at 5, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub. nom.*, 131 S. Ct. 2958 (2011); *see also* Roberto Suro & Sonya Tafoya, *The New Latino South: The Context and Consequences of Rapid Population Growth*, PEW HISPANIC CTR., i (July 26, 2005), http://pewhispanic.org/files/reports/50.pdf ("[S]izeable Hispanic populations have emerged suddenly in communities where Latinos were a sparse presence just a decade or two ago.").