

**Regulating Movement in a Federalist System:
Slavery's Connection to Immigration Law in the United States**

Under Review with a Journal

(This is a Draft Copy: Please Do NOT Cite Without Author Permission)

Allan Colbern

PhD Candidate, UC Riverside

Visiting Scholar, CCIS at UC San Diego

Abstract

San Francisco's "Due Process for All" ordinance, which restricts city official's cooperation with federal immigration detainers, has recently been cast into national spotlight for granting sanctuary to undocumented immigrants rather than enforcing federal law. This ordinance is nevertheless part of a larger history of states and localities welcoming and protecting classes of people who are considered to be unlawfully present inside the country. In taking a step back to consider what these laws mean, in this article, I document a lesser-known era, unpacking how slavery law regulated movement during a time when no formal immigration system existed, and I explore slavery law's similarities with contemporary immigration law. In particular, I show that state laws in each period grant both runaway slaves and undocumented immigrants free movement, legal sanctuary, and a range of rights that are in direct conflict with federal law, and to make sense of this striking parallel, I argue that these two periods are in fact connected by what I call a *federalism conflict* and an institutional framework set up under the 10th Amendment's anti-commandeering doctrine.

I. Introduction

In the most recent battle over immigration, the Republican controlled House passed a bill, the Enforce the Law for Sanctuary Cities Act (HR 3009), in July 2015, that would amend the Immigration and Nationality Act and make state and local jurisdictions ineligible for federal funding if they refuse to comply with reporting detained immigrants. This bill was proposed after an onslaught of conservative backlash to the tragic death of Kathryn Steinle, a San Francisco native, who was fatally shot by Juan Francisco Lopez-Sanchez, a convicted felon and undocumented immigrant. Prior to this event, federal immigration officers asked local police to hold Lopez-Sanchez, but under San Francisco's anti-detainer Due Process for All ordinance, passed in 2013, local police ignored the federal detainer request and released Lopez-Sanchez from custody.

This conflict is just one incident in a growing movement taking shape today at the state and local levels. In 2013, California and Connecticut both passed laws called Transparency and Responsibility Using State Tools (TRUST) Acts, which stipulate that officers can only enforce immigration detainers issued by the U.S. Immigration and Customs Enforcement (ICE) for persons convicted of serious crimes, and over the past decade, well over 100 counties and cities throughout the U.S. have passed similar anti-detainer ordinances. While sanctuaries are relatively new to modern immigration, our federalist system has historically created similar conflicts by allowing each level of government to regulate movement, particularly of groups considered unlawfully present under federal law. In taking a step back to make sense of what these laws mean, this article documents the lesser-known era in which freedom of movement was regulated under slavery laws and makes a case for why these earlier laws still matter today.

As I show in this article, immigration scholars have only recently begun to explore how slavery law relates to immigration law, and have done so with a very limited scope. By contrast, I greatly expand the scope in which slavery is unpacked to include variation across federal, state and local levels of government, and I disaggregate slavery law into restrictionist and inclusionary dimensions. From this foundation, I explore larger historical patterns in the regulation of movement, and I map out deep legal similarities and differences between slavery law and contemporary immigration law. I show that in both periods, state and local laws were passed that granted runaway slaves and undocumented immigrants sanctuary, due process protections, freedom of movement, and rights and access to state and local resources, in direct conflict with and contrary to federal law, which considered both groups' very presence inside the U.S. to be unlawful. I argue that these two seemingly disparate periods are in fact connected by what I call a *federalism conflict* and an institutional framework set up under the 10th Amendment's anti-commandeering doctrine, which has been applied by courts in both periods, preserving states' autonomy from federal law and authority to be inclusive towards all of its residents regardless of their status. I end by drawing out what these laws mean for our notions of citizenship and what their limitations are for influencing national level policymaking.

II. The Slavery Gap in Immigration Scholarship

Scholars have only recently looked to early American history to identify and explain developments in immigration law. Notably, Gerald Neuman, who calls the 19th Century the "Lost Century," documents a range of laws passed by states that restricted unwanted migration from abroad and from across states during the antebellum period, refuting the long-held belief that the U.S. had open borders prior to the Page Act of 1875.¹ According to Neuman, a de facto

immigration system was set up under statutes that “prevent[ed] or discourage[d] the movement of aliens across an international border, even if the statute also regulate[d] the movement of citizens, or movement across interstate borders, and even if the alien’s movement [was] involuntary.”² Neuman opens an entire century of lost legislation that effectively operated as a regulatory system to control movement, including criminal, poor, public health and slavery laws.

Early in the antebellum period, most states passed laws broadly restricting both convicted criminals and paupers from entry into state borders, placed sanctions on persons responsible for unlawfully transporting convicts and paupers into state borders, and granted state and local authorities the power to remove unauthorized persons to their “place of lawful settlement.”³ Beginning in the 1820s, states expanded their control by passing laws that required masters of vessels to post bonds, pay a head tax, or pay commutation fees before admitting immigrants into state borders, required passenger reporting to track all new arrivals, and began to establish almshouses and workhouses as an alternative solution to removing immigrants who became public charges.⁴

Following Neuman’s lead, scholars have begun to unpack this early history in more depth. Kunal Parker recently explored entry and settlement laws on immigrant paupers from the early colonial era to the end of the antebellum era in Massachusetts, looking specifically at how, over time, paupers’ rights of access to and presence within the state were restricted at both the state and local levels.⁵ These immigration regulations first appeared during the colonial period as restrictions targeting the poor, and then in 1794, a state law expanded its restrictions to encompass anyone that was not a national citizen from gaining lawful settlement in local jurisdictions. According to Parker, Massachusetts was able to use national citizenship as a vehicle for expanding the scope of its restrictionist laws.

Scholars have also begun to explore the moment of transition from state to federal immigration law. For example, Kerry Abrams shows that California passed a range of laws beginning in 1850 to restrict Chinese migration, which he argues were important precursors to the first federal immigration law that banned entry into the U.S. of involuntary migrants, prostitutes and criminals from Asia.⁶ Similarly, Hidetaka Hirota shows that northern eastern seaboard states' "approach to undesirable aliens" influenced national policy during the late 1800s.⁷

This emerging scholarship makes it clear that an early immigration system existed in diverse areas of antebellum law, and that these early laws left enduring legacies on federal immigration law. What is less known, however, is how slavery relates to immigration law; this gap exists even though scholars have long established the need for thinking about their relation to one another.

To this end, Rhonda Magee points out that our limited understanding is "all the more surprising given the recognition increasingly given to the concept of forced migration immigration in contemporary law."⁸ Similarly, Lolita K. Buckner Inniss argues that black slaves actually fulfill "the ultimate immigrant paradigm: the image of the downtrodden foreigner who through hard work and determination can rise."⁹ Each scholar points to slavery's relation with immigration in different ways, either as a form of involuntary migration similar to human trafficking, or as a life condition as a foreigner experienced by both black slaves and immigrants. Additionally, Roger Daniels calls black and immigration histories an artificial distinction, highlighting that the slave trade was also an important form of migration.¹⁰ Scholars outside of immigration have also become interested in revealing slavery's legacies, including its effect on political attitudes in southern states today and on the development of American taxation.¹¹

Regardless of this acknowledgement, scholars have been more or less reluctant to pursue a full discovery of how slavery relates to immigration law, with a few notable exceptions. Neuman continues to lead on this, arguing that it is important to avoid simply bracketing slavery law as “an obsolete law of bondage.”¹² Neuman highlights the function of slavery laws for closing national and state borders to both enslaved and free blacks. Equally notable, Anna Law addresses more fully how slavery was important to early immigration law.¹³ Law argues that, during the antebellum period, limited national development and robust subnational immigration controls emerged to avoid sensitive regional differences around the issue of slavery.¹⁴ More recently, Law refutes broad Constitutional claims made in support of federal plenary powers, arguing that the 1787 U.S. Constitution “purposely ‘did not resolve’ the question of how to balance national and state power.”¹⁵ Again, Law points to slavery’s centrality in shaping immigration law, from which contentious regional differences prevented the architects of the Constitution from clearly allocating immigration powers.

In a more limited way, scholars have also begun to look at how slavery speaks to contemporary immigration debates. Drawing on the legal contexts of federal plenary power, James A. Kraehenbuehl compares *Prigg v. Pennsylvania* (1842) and *United States v. Arizona* (2010) to argue that the courts today have historical precedence in *Prigg* to rule that Arizona’s recent restrictionist immigration law, SB 1070, is preempted under federal law.¹⁶ Similarly, Karla McKanders and Jeffrey Schmidt both compare state laws that regulated fugitive slaves to contemporary state laws regulating unauthorized immigrants, arguing that federal laws in each period inadequately addressed state level concerns, thereby resulting in enforcement gaps and failures of national policy in each period.¹⁷ According to McKanders: “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.”¹⁸ Both scholars use fugitive slave laws as reference points for defending solutions with the aim of establishing an enforceable and uniform national immigration policy today.

Drawing a similar comparison, but vastly different lesson, Criag B. Mousin highlights the city of Chicago’s refusal to enforce federal fugitive law in the 1850s and Chicago’s similar refusal today of enforcing federal immigration law; Mousin argues that there are limits to federal power because state/local jurisdictions have control over entering into enforcement partnerships with the federal government. Moreover, Mousin warns that while the federal government may enlist state and local law enforcement, they must balance enforcement with the risk of possibly “fracturing” local communities.¹⁹ In a separate study, Christopher N. Lasch adds further support to Mousin’s view that the federal government is restricted from compelling state and local officials to comply with its rendition demands.²⁰ Mousin and Lasch reveal important weaknesses and caveats to McKanders and Schmidt’s focus on national policy, particularly by showing how our federalist system sets up separate roles for states and localities in enforcing federal law.

III. Slavery Law as Early Immigration Law

There is a great need to consider slavery in the study of immigration, and we must move beyond eschewing the idea that enslaved Africans were also immigrants. Ignoring slavery’s connection has led to what Magee call’s the “no-Black paradigm” in immigration scholarship, where “enslaved African people disappear from cognition as an immigrant experience.”²¹ As I highlight in the review above, a few scholars begin to unpack this connection, but no study exists to-date that maps the full terrain of slavery’s relationship with immigration law. I fill this gap in two ways: first, I explore in depth slavery’s unique historical role in immigration control; second,

I map slavery law's similarities and differences with respect to contemporary immigration law, arguing that with sanctuary and inclusionary state level laws, there are important historical continuities connecting states' power to regulate runaway slaves and undocumented immigrants. Thus, I go well beyond drawing a parallel between slavery and immigration law today, by showing that they are connected in the structure of our federalist system and through the court's historical application of the 10th Amendment.

How did slavery operate as an early form of de facto immigration law? To be clear on terminology, I refer to any law that regulates the movement of blacks (enslaved or free) as a "slavery law," even though these laws can also be further disaggregated into distinct categories.²² Early in the antebellum period, slavery law directly functioned to control entry at both national and state borders. Beginning in 1808, Article 1 of the U.S. Constitution prohibited the migration or importation of slaves across the national border, ending the international slave trade.²³ Between 1776 and 1808, most states passed laws also banning the importation of slaves from abroad, allowing only the inter-state slave trade to continue.²⁴ While both federal and most state laws banned international slave migration, states went much further to regulate black migration, and these restrictionist laws were backed by a federal law passed in 1803, which explicitly devolved immigration powers to any state that restricted black internal migration within its state borders.²⁵ Therefore, at the same time, the 1803 federal law remained inactive with regards to any state that did not pass laws restricting black entry.

While laws concerning the international slave trade were often aligned, conflict emerged when states passed anti-black migration laws called Seaman Acts, restricting both foreign and out-of-state free blacks from entering state borders. In particular, this created a conflict on the freedom of black English seaman at national ports, whose protected freedom of movement under

federal treaties was denied under state laws. The federal government made many attempts to change state policy through diplomatic and judicial processes, but southern states remained unwilling to concede on the issue of black entry throughout the antebellum period.²⁶ As these laws illustrate, restrictive immigration controls were placed on both slaves and free blacks at both national and state borders.

Neuman and Law highlight these border restrictions as revealing a new origin of immigration law, and they show that the politics of slavery were central to shaping how and why immigration powers were allocated to subnational jurisdictions (states and localities) during the antebellum period. For example, Neuman echoes Law's position, stating: "[t]he uncoupling of migration from slavery by the Civil War made federal regulation possible."²⁷ They also paint similar narratives around the development of American immigration law, one where the national government supersedes subnational jurisdictions to control immigration law once slavery is abolished.²⁸

While these prominent scholars add much to our understanding of slavery law, there remains important unexplored variation, including how blacks' movement was regulated in the north and south, and how unlawful presence is regulated within varying jurisdictions. In the historical scholarship on slavery law, scholars have begun to reveal how southern states and localities developed regulatory authority over slaves, a power that was traditionally located in the master-slave relationship. Andrew Fede documents legal and judicial barriers placed against manumission and freedom suits, highlighting how states' powers superseded slave owners' powers for determining the lawful freeing of slaves.²⁹ Similarly, scholars have begun to document how states acquired control over slave auctions, slave patrols and criminal justice, re-defining in the process the allocation of power over slaves from the slave master to the state.³⁰

This shift sets up new ways to think about unlawful presence within slavery law, an area of regulation salient in contemporary immigration debates, but not yet explored as part of early immigration control.³¹ Here, I fill this gap.

Southern states passed a range of laws restricting the internal movement of blacks, including laws restricting their involvement in the trade and bartering of goods, laws designating specific black travel routes and curfews, and laws restricting who has access to public resources. Moreover, robust systems of enforcement were created, including slave and freedmen passes (and metal tags in some jurisdictions) that functioned both as an identification document and work visa, and local militias and slave patrols that enforced laws on the movement and activities of enslaved and free blacks. In addition, anti-harboring laws were passed that made it a punishable crime to harbor blacks considered to be unlawfully present. Restrictions on black entry/exit and removal, which have been the primary focus of immigration scholars, were paired with these comprehensive internal migration controls.

South Carolina passed one of the most comprehensive sets of laws restricting black movement. In 1686, the state (a colony at the time) created the first legal requirement inside the U.S. for slaves to carry passes, or “tickets,” while publicly trading goods outside of their owner’s plantation or residence. A pass included a hand written description to identify a travelling slave and travel route and time limitations to control the slave’s movement and activity. This law also established a nighttime curfew for all slaves in the state.³² In 1691, South Carolina passed a law that set up slave control duties for the colonial militia and a town watch in the city of Charleston, a major seaport that housed numerous slaves and free blacks, in order to enforce its pass system.³³ Moreover, the 1691 law required that all whites enforce laws on slave passes, slave bartering, and runaway slaves. In 1696, expanding its law that required whites to enforce slave

laws, the state passed a law explicitly protecting all whites in the event that they assaulted or killed slaves who resisted being arrested or detained.³⁴ To further secure the enforcement of its laws, in 1704, the state established a separate slave patrol militia from the colonial militia.³⁵ Until the Civil War, South Carolina continued to pass a range of laws expanding its control over the movement and activities of blacks, including freedmen passes/tags functioning as work visas for free blacks that had to be renewed in the city or country of residence each year, no entry policies for out-of-state free blacks, and the creation of local patrol committees to oversee slave patrols' enforcement of slavery laws (See Table 1).

Table 1. Restricted Movement in South Carolina, Over Time

1686	Slave Pass requirement for bartering Night curfew placed on slaves
1691	Militia given slave patrol duty Charleston town watch established
1696	Whites are given the right to beat, maim, assault, and kill resistant slaves
1704	Patrols setup to enforce laws over slaves and free blacks (Patrols are no longer controlled by militia)
1740	Manumissions require court approval
1783	Metal tags required for slaves and freedmen in major cities (1783-1789) Registration with city/county required for slaves and freedmen to find work
1800	Metal tags required for slaves and freedmen in major cities (1800-1865) Registration with city/county required for slaves and freedmen to find work Entry ban on free blacks (international and inter-state migration)
1822	Negro Seaman Act, banning black entry
1830	Local Patrol Committee established to oversee enforcement of laws regulating slaves and free blacks

Scholars that highlight how slavery laws regulated movement have narrowly confined their search to entry/exit and removal. This is partly due to an assumed equivalency between slavery, criminal, poor and public health laws, which filter out and hide slavery's more extensive set of regulations found in the interior. Moreover, scholars often struggle to distinguish between slavery's immigration function and its bondage function, preventing them from unpacking its internal dimensions to avoid confusion. What is important to consider, however, is that in many instances this categorical distinction is weak. Slavery laws often served multiple functions as both immigration law and bondage law. What is more fruitful is a concept of early de facto

immigration law that can be operationalized through a full range of regulations on movement, while also remaining conceptually distinct from bondage. Building on Neuman's concept of early immigration law, which he defines as any statute preventing or discouraging movement *across* borders, I add statutes regulating *internal* movement, which extend the jurisdiction's restrictions on who can freely enter or exit its borders.

As the case of South Carolina illustrates, all blacks were banned from entering its borders by 1800, and in 1820, this ban was extended to include temporary travel by black seaman. These restrictions were clear extensions prior policies. In 1740, slave owners were required by law to get court approval before manumitting any slave. As an immigration law, this restriction reveals an important interior dimension where courts decided, on a case-by-case basis, which slaves were permitted to be freed by their owners and to remain in the state as freedmen. Restrictions placed on internal movement and access to resources, which were placed against both slaves and free blacks living within the state, were also directly linked to the state's entry policies. Any slave or free black person caught infringing on the state's laws highlighted above were subject to penalties, including possible removal, forced labor, imprisonment or (re)enslavement. Early immigration law, as South Carolina demonstrates, was established under an expansive set of slavery laws on entry/exit, removal and lawful/unlawful presence than recognized by scholars. Together, these laws operate as a cohesive immigration regime.

IV. The Slavery Connection to Today's Immigration Laws

Unpacking how slavery law regulated movement during the antebellum period is significant for rethinking the origin of and transformation from early immigration law to its modern formation. As I highlight early on in this article, a few scholars have also begun to

highlight that slavery law may in fact speak to salient concerns in contemporary immigration law. Here, I provide the most comprehensive comparison to-date on laws regulating runaway slaves and undocumented immigrants. To be clear, the parallel developed here differs from scholarship on modern forms of slavery like human trafficking, debt-bondage, and child labor.³⁶ Instead, I draw a comparison between slavery law's regulations on movement and modern immigration laws, and provide an innovative connection between the two.

(i) Federal Parallel

Turning to the antebellum north, where free states passed laws that welcomed, integrated and protected runaway slaves, who were nevertheless considered unlawfully present under federal fugitive slave law, this section documents how slavery shares many parallels to contemporary state laws, which similarly integrate and protect undocumented immigrants regardless of their status under federal law. The federalism conflict highlighted here ushers in new meaning to the work of Mae Ngai, who documents illegality in U.S. immigration law, by adding runaway slaves as a predecessor illegal immigrant, but more importantly, it reveals how states and localities can create legal sanctuaries that help offset the effects of a restrictionist federal law.³⁷

Scholars are mostly correct in arguing that the federal government was absent from early immigration law; however, on matters of regulating the movement of runaway slaves, the federal government took on a central role, passing highly restrictive federal fugitive slave laws and developing a strong regime to enforce these laws. Recaption – the legal process of removing runaway slaves – was routinely practiced throughout colonial America. As states began to

abolish slavery within their borders and the federal government took on a more active role in territorial expansion, federal laws were passed to secure the institution of slavery.

The Northwest Ordinance of 1787 set up the first federal fugitive slave law, which was re-written into the U.S. Constitution, under Article 4, stating:

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.³⁸

As a result of political conditions of the time, the Constitution's fugitive slave clause did not specify the responsible entity or procedures for enforcing recaption, avoiding a potential disruption to the formation of a Union between states. However, these two laws clearly established that slave owners have a right to recaption of any runaway slave in northern states or federal territories, effectively making entry into and physical presence within these states illegal for runaway slaves. The Fugitive Slave Act of 1793 clarified the rights of slave owners to recapture runaway slaves from northern states and federal territories.³⁹ Specifically, the 1793 law gave additional remedies and protections to slave owners through an anti-harboring provision with up to a \$500 fine.⁴⁰

From 1783-1842, federal law provided slave owners the right of recaption, including hiring slave catchers to remove runaway slaves and requesting northern local and state officials to aid in recaption. In 1842, *Prigg v. Pennsylvania* established clearer guidelines, ruling that Congress had plenary powers over fugitive slave laws and that state laws preventing recaption were unconstitutional.⁴¹ The Fugitive Slave Act of 1850 further set up federal control over physical presence, creating new federal mechanisms for regulating recaption, including the appointment of a federal body to administer the system and procedures of issuing search and arrest warrants, certificates of removal, and fines for interference. This law further established

the federal government's ability to deputize citizens and to appoint commissioners in each federal circuit with powers to delegate authority to district and circuit court judges for fugitive slave claims.⁴²

Federal law considered runaway slaves to be unlawfully present in the free north, drawing an important parallel to federal immigration law today. In 1952, the Immigration and Naturalization Act fundamentally expanded the scope of federal immigration enforcement, making "unlawful presence" a federal crime. In particular, this law made a person's first illegal entry offense a misdemeanor crime with up to a six-month prison sentence, and added a provision stating that any person who has been previously deported, caught illegally re-entering or found inside the U.S., would be given a second offense of a felony crime with up to two-years in prison.⁴³ Contemporary federal law, like federal fugitive slave law, continued to expand. In 1986, the Immigration Reform and Control Act (IRCA) established new federal interior enforcement mechanisms, criminalizing the practice of knowingly hiring unauthorized immigrants and making unauthorized immigrants ineligible for work.⁴⁴ In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) further expanded federal control by linking proof of lawful status with access to public welfare.

In addition to these glaring similarities, federal governments in both periods established cooperative programs with state and local governments. In 1850, the federal government delegated the power of enforcing federal law to state and local courts and private citizens. Similarly, in 1986, the Criminal Alien Program established a cooperative program that granted federal immigration officers access to local jails in order to screen for unauthorized immigrants. In 1996, Section 287(g) of IIRIRA established a policy for the Department of Homeland Security to enter into agreements authorizing state and local officials to perform specific federal

immigration functions under federal supervision.⁴⁵ More recently, from 2008-2014, the Secure Communities program established new federal partnerships with state and local jails that used a federal immigration and criminal database to identify and track unauthorized immigrants, which was recently replaced by the Priority Enforcement Program in 2014.⁴⁶

The parallel between federal law and enforcement, especially cooperative programs, establishes a new vantage point for thinking about how slavery relates to contemporary immigration. It shows in particular that these two periods are not entirely dissimilar, and in fact, many period based distinctions between the antebellum and contemporary periods are blurred when it comes to runaway slaves and unauthorized immigrants.

What does this mean for our historical understanding of how movement gets regulated? The narrative that Neuman and Law provide in linking slavery to immigration focuses on how slavery law essentially bifurcated immigration into two periods: early and contemporary immigration law. In the former, subnational jurisdictions controlled immigration as a result of slavery, and in the latter, the national government took control of immigration law. This distinction, however, is most accurate for portraying the slave south where the federal government was largely absent on matters relating to the movement of blacks. In contrast, a strong federal presence emerged in the free north over regulating runaway slaves, which was anchored in southern slavery. This reveals an even more nuanced and powerful effect slavery law had on early immigration law than what is accounted for by scholars, whereby national development prioritized itself around the interests of the slave south in ways that conflicted with northern states. The following section builds the comparison even further by unpacking both restrictionist and inclusionary state level laws passed in both periods.

(ii) Restrictionist State-Level Parallel

In 1803, Ohio entered the Union with a state constitution banning slavery. However, it also added a clause permitting the indentured servitude of both whites and blacks. The state constitution also denied blacks' the ability to vote and hold public office.⁴⁷ In 1804, a year following admission to statehood, Ohio passed its first set of restrictive immigration laws, requiring blacks to show proof of freedom before entering, residing or searching for employment in the state, and requiring blacks to register with their county of residence, a practice not required for white immigrant residents. Regarding runaway slaves, the 1804 law mandated state institutions to aid in recaption and made it a misdemeanor crime for anyone to interfere in recaption, with fines of up to \$1000. Notably, this law established the first state recaption policy in the U.S., separate from enforcing the federal fugitive slave law.⁴⁸ In 1807, Ohio expanded its restrictions on entry by requiring blacks to attain two sponsors who were property owners and willing to post a \$500 bond that guaranteed future good behavior of new black residents. This law also banned black testimony against whites, increased fines for interfering in recaption, and mandated that employers and schools aid in the recaption of runaway slaves and verify certificates of freedom of all blacks in the state.⁴⁹

Following Ohio's lead, Indiana passed similar restrictions on black entry and registration. In 1816, Indiana entered the Union, passing a constitution that prohibited both slavery and indentured servitude; however, it continued enforcing territorial laws requiring blacks to provide proof of freedom for entry, and excluding blacks from enumeration, voting, testimony and serving in the militia.⁵⁰ In the wake of major national attention on the Fugitive Slave Act of 1850 and Kansas-Nebraska Act in 1854, Indiana went further than Ohio in the 1850s, shutting its doors to all blacks and developing a system of removal to rid the state of its current black

residents. In 1851, Indiana passed a new state constitution that banned all new blacks from entering and gaining employment in the state. Moreover, fines from enforcing employer sanctions were applied towards a colonization program to remove black residents from the state.⁵¹ In 1852, Indiana passed a law requiring all blacks residing in the state prior to November 1, 1851, to register or face removal.⁵² In 1852, 1853 and 1855, Indiana passed three additional laws that strengthened its colonization program.⁵³

Paul Frymer recently highlighted a similar dynamic found in homestead laws that banned or restricted free blacks from immigrating to new western territories and states.⁵⁴ In fact, in many of the northern and western states, blacks were often presumed to be runaway slaves and required to carry proof of freedom to protect themselves from removal and enslavement. While slavery was formally ended in the north, as Ohio and Indiana highlight, black immigration restrictions were expansive and not exclusive to southern slave states.

Functionally similar laws have been passed by states today to restrict unauthorized immigrants' movement, residency and access to public resources. In 1993, California passed a law requiring all driver license applicants to provide a social security number and proof of lawful immigration status.⁵⁵ By 2012, states requiring proof of lawful presence for access to driver licenses reached its highest point at 46 states.⁵⁶ States have also restricted immigrant access to employment by mandating employers to use E-Verify, an internet-based system that verifies work eligibility under the federal law IRCA. Here, a clear parallel is drawn between contemporary and antebellum state laws, particularly restrictions requiring blacks to carry certificates of freedom and anti-harboring laws mandating employers and schools to verify blacks' legal status.

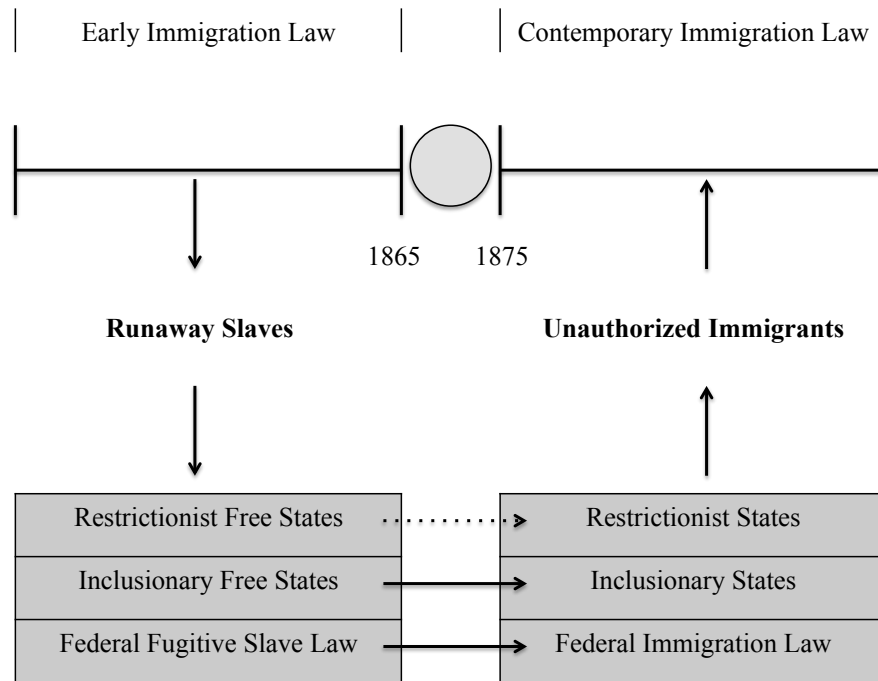
More controversial, however, are state laws today that operate similarly to federal laws on entry/exit and removal. In 1994, California passed Proposition 187, sparking national attention as the first major restrictive state legislation. This law banned unauthorized immigrants from receiving any public service in the state, including health care and public education, and mandated state law enforcement officers to check the legal status after arresting anyone suspected of being unlawfully present in the country. Prop 187 was immediately challenged in several lawsuits and eventually held unconstitutional. Nevertheless, in 2010, Arizona passed a similar restrictive immigration law, SB 1070, allowing police to detain anyone suspected of being an unauthorized immigrant during regular traffic stops.⁵⁷ This Arizona law also imposed penalties on harboring undocumented immigrants and made illegal immigration a state crime. In the wake of SB 1070, six states proposed similar bills.⁵⁸ While these laws have been ruled unconstitutional, many restrictive provisions have been upheld, and this recent emergence in restrictionist laws demonstrate how contemporary states continue to shape immigration law on their own terms. The state level restrictionist parallel reveals that in both the antebellum and contemporary periods, states have important roles in immigration control.

(iii) Inclusionary State-Level Parallel

Restrictive immigration laws in the free north provide more evidence in support of Neuman and Law's arguments that a robust immigration law existed in the antebellum period; however, for the free north, restriction is only one side of the immigration story.⁵⁹ In fact, as I show below in Figure 1, which illustrates the parallel mapped out in this article, a deeper parallel exists between the antebellum and contemporary periods on state level inclusionary laws, signified by a solid arrow. Meanwhile on restrictionist state laws, the parallel between the two

periods has gaps in what states today can do to restrict unauthorized immigrants, signified by the dashed arrow (states today cannot restrict entry or practice in removal).

Figure 1. Slavery Parallel (Federal and State Levels)



Unlike Ohio and Indiana, who passed a range of restrictions after joining the Union as free states, Pennsylvania and Massachusetts’ end of slavery marked a beginning for their open doors policies. In addition to ending slavery, both states passed laws automatically freeing any slave brought into their borders by slave owners, creating a new type of *immigrant* – blacks referred to as “slaves in transit.”⁶⁰ Thus, the only group not expressly freed under state laws were runaway slaves; but much like undocumented immigrants, state laws were passed that provided this group with a range of rights and freedoms that essentially blurred their status with those of free blacks, or in today’s case, with those of legal immigrants. The very existence of runaway slaves within America’s federalist system, like undocumented immigrants today,

reveals deep-seated tensions in state and local governments' power to regulate movement, which includes the capacity for these jurisdictions to pave alternative paths other than and potentially in conflict with how the federal government regulates movement. Both groups are considered unlawfully present under federal law, but nevertheless are provided sanctuary and are welcomed under some state laws.

Pennsylvania and Massachusetts led in this sanctuary movement, uniformly protecting all blacks within the state regardless of their status under federal law. This included due process protection rights granted to all blacks, including: habeas corpus (ensuring that a judge investigated recaption claims and afforded them a full hearing), writs of repliven (ensuring that all detained blacks were brought to court), trial by jury, and black testimony. These two states also passed anti-kidnapping laws that made it a punishable crime to remove *any* black person from their jurisdictions without court approval. Both states passed a range of laws, that I call “non-enforcement laws,” banning state and local officials from participating in recaption, and denying the federal government the right to use state and local courts and resources to hear cases.

In 1820, Pennsylvania passed the first non-enforcement law (also referred to as “sanctuary” law today), banning all state officials and state resources from being used to enforce the 1793 fugitive slave law, and providing a model for other northern states to enact similar policies. In 1843, Massachusetts passed its first law modeled after Pennsylvania, and in 1855, Massachusetts went further than any state in the north by passing an omnibus law, which forbid state officials from enforcing the federal fugitive slave law and included a strict anti-kidnapping law and additional due process protections (it appointed special state commissioners to defend runaway slaves in court, placed the burden of proof on slave owners and provided all blacks with the right of habeas corpus, trial by jury, and right to testify against whites in court).⁶¹

Table 2. “Sanctuaries” Laws in Pennsylvania (PA) and Massachusetts (MA)

1780	PA	Gradual emancipation law (first in the north)
1783	MA	Court ordered emancipation (<i>Commonwealth v. Jennison</i>)
1785	PA	Due process protection – habeas corpus
	MA	Anti-kidnapping law
	MA	Due process protection – habeas corpus
1787	MA	Due process protection – writ of replevin
1788	MA	Anti-kidnapping law
1820	PA	Non-enforcement law
1820	PA	Anti-kidnapping law
1826	PA	Non-enforcement law
1836	MA	Slaves in transit emancipation law
1837	MA	Due process protection – trial by jury
1842	U.S.	<i>Prigg v. Pennsylvania</i>
1843	MA	Non-enforcement law
1847	PA	Non-enforcement law
	PA	Due process protection – habeas corpus
	PA	Anti-kidnapping law
	PA	Slaves in transit emancipation law
1855	MA	Non-enforcement law
	MA	Anti-kidnapping law
	MA	Due process protections – habeas corpus, trial by jury, black testimony, burden of proof on the claimant

The deepest parallel to the past is not on state level restriction, but rather on state level inclusionary laws and the conflict they create with restrictionist federal law. Today, states are passing a range of laws that are similarly inclusive and protective of unauthorized immigrants, creating a parallel to antebellum states’ openness to and protection of runaway slaves. In 2013, California passed a law granting state driver licenses to immigrants regardless of legal status, which notably included an anti-discrimination provision making it illegal for police to target and investigate drivers with new licenses for possible immigration violations. California also recently passed two laws granting undocumented immigrants professional licenses, including a law in 2012, expressly authorizing unauthorized immigrants to practice law in the state, and a law in 2014, requiring forty licensing boards under the California Department of Consumer Affairs to consider applicants regardless of legal status.⁶² California and other states have passed a range of inclusionary laws that extend immigrant access to employment, higher education and health care.⁶³

Counties and cities are also taking important steps in the same direction. Between 2007 and 2012, San Francisco, Oakland, Richmond, and Los Angeles passed municipal ID ordinances that created identification cards accessible to all residents including undocumented immigrants.⁶⁴ These city ID cards facilitate access to vital resources, including banking, health care services and libraries, and they make it easier for unauthorized immigrants to interact with public officials and law enforcement without fear of removal.⁶⁵

The most striking parallel, however, are states and localities passing non-enforcement laws, limiting their participation in enforcing federal immigration law. In 2013, California and Connecticut enacted the first TRUST Acts, which stipulate that officers can only enforce immigration detainers issued by the ICE for persons convicted of serious crimes.⁶⁶ Much like removal certificates issued to detain runaway slaves, a detainer request is a formal notice by ICE to federal, state or local law enforcement agencies of their intention to take custody of potential unauthorized immigrants. Moreover, at the local level, the District of Columbia currently restricts detainers by requiring ICE to provide court ordered warrants, and in a joint statement, every jail in Colorado has stated their intention of not honoring ICE detainer requests. Over 100 counties and cities in the U.S. have anti-detainer policies, and in California, the city of San Francisco and counties of Contra Costa, Alameda and San Mateo no longer cooperate with ICE detention requests.⁶⁷

The recent event of Juan Francisco Lopez-Sanchez, a convicted felon and undocumented immigrant, shooting and killing Kathryn Steinle, a San Francisco native, has sparked heated debate on the legality of sanctuary policies. Even in states like California, which have led in the movement to welcome, integrate and protect undocumented immigrants, political leaders have

responded to push legislation that would punish, and possibly limit, localities from continuing to pass sanctuary laws. Similar debates emerged over runaway slaves.

In 1851, one year following the passage of the Fugitive Slave Act, Shadrack Minkins, a runaway slave who worked at a café in the city of Boston, was arrested and detained by slave catcher John Caphart, a federal commissioner and an assistant deputy marshal. Prior to this event, Massachusetts had passed a range of laws protecting and integrating runaway slaves, including due process, anti-kidnapping and non-enforcement (“sanctuary”) laws preventing federal officers from using state resources during their arrest of Minkins. Immediately following his arrest, the Boston Vigilance Committee alerted city officials, activists and abolitionist lawyers, and an abolitionist petition was drafted and given to the State Supreme Court to delay federal action on Minkins’ removal. Soon after, black abolitionists entered the federal courthouse and physically remanded Minkins from federal marshals, and Minkins successfully escaped to Canada, where he was granted a more permanent sanctuary. This story is deeply woven in the history of state and local sanctuary laws.

In 1842, the Supreme Court ruled in *Prigg v. Pennsylvania* that the federal government had plenary powers over fugitive slave law, but equally important, it also ruled that the federal government could not mandate states and localities to enforce federal law, preserving a separation between levels of government. Months after the *Prigg* ruling, a slave named George Latimer and his pregnant wife escaped from Norfolk, Virginia to Boston, Massachusetts, where they were shortly thereafter arrested. Judge Joseph Story in Massachusetts ordered Latimer to be detained and asked for proof of ownership before ordering his removal. The Liberty Party and abolitionists immediately responded by establishing a Latimer Committee, purchased Latimer’s freedom, and led in a targeted state petition campaign that received over 64,000 signatures for

new state legislation to protect runaway slaves. Massachusetts passed its first non-enforcement law, or sanctuary law, in 1843.

The deep-seated tension between restrictionist federal and sanctuary state level laws is most illuminated by the infamous 1854 rendition case of Anthony Burns, who escaped in 1843 and was recognized and detained the following year by a slave catcher in Boston. During his hearing, a large group of abolitionists stormed the courthouse to physically remove Burns from federal custody. President Franklin Pierce responded by sending over two thousand U.S. troops to enforce the Fugitive Slave Act of 1850, demonstrating the federal government's resolve to enforce its laws and to use the rendition of Burns as an example. While this case ended with Burns' removal, Massachusetts responded in 1855 by passing its most comprehensive non-enforcement law, showing its own resilience and resolve in protecting runaway slaves.

Federalism has always left an indelible mark on the scope of state and local governments' power to regulate movement on their own terms, which includes the capacity for these jurisdictions to pave alternative paths other than and potentially in conflict with how the federal government regulates movement. The very existence of runaway slaves and undocumented immigrants creates conflict in federalist systems, ones that are not easily resolved from a federal enforcement or federal plenary powers perspective. State and local regulations restricting or expanding freedom of movement of undocumented immigrants today is new to immigration scholars; however, as I show in the parallel to runaway slaves, there is a robust early history of these types of laws and their conflict with restrictionist federal law.

V. Revealing a Bridge to the Contemporary Period

Beyond their similarities, what connects these two disparate periods in American history together? Here, I develop a theoretical linkage that I call the *federalism conflict*, which depicts the peculiar capacity of federalism to create pathways for conflicts to emerge between federal and subfederal law, and I argue that this conflict is unique to the regulation of movement. Moreover, I show that this conflict is not just a blip in inter-governmental relations, but instead, it is grounded in the 10th Amendment's anti-commandeering clause, which has been applied by the courts throughout American history. This raises a political puzzle that is at first glance, not intuitive, wherein one level of government considers a class of people to be unlawfully present, while another level of government recognizes that same class to be accepted residents and members of its community. To make sense of this, I argue that federalism sets up pathways for independent and autonomous legal systems to emerge and conflict with one another, and that this conflict is the historical norm rather than exception.

Inter-governmental conflict is not new. However, federalism scholars have approached conflict with an underlying assumption that each level of government will work towards eventual uniformity, placing conflict into context as being a momentary disruption in federalism's longer trajectory towards cohesion. As a result of this view, scholarly questions tend to focus on which level of governance has more leveraging power at particular moments to influence long-term policy change. For example, in analyzing conflicts emerging in federalism, Shanna Rose and Cythnia Bowling argue that today's polarized Congress and unified state governments have re-routed policymaking onto states for the policy areas of immigration, health, education, marijuana and same-sex marriage.⁶⁸ Moreover, adding fuel to this devolution in policymaking, Rose and Bowling argue that the executive and judicial governments have opened new pathways for states

to pass policy in areas previously closed to them, resulting in a fragmented policy landscape that is outside the norm of a cohesive set of laws.⁶⁹ This heightened role of subnational legislation is not viewed as a long-term condition, and the focus is on how conflict gets resolved between each level of government.

Take, for example, the issue of the Affordable Care Act's (ACA) (2010) Medicaid expansion provision. In *National Federation of Independent Business (NFIB) v. Sebelius* (2012), the Supreme Court generally upheld ACA, but also struck down one of its provisions that mandated states to expand eligibility requirements or face federal withholding of funding, since this provision was coercive in nature, and therefore, was in conflict with the 10th Amendment. States have the power to decide whether or not to participate in expanding Medicaid through ACA, and this leverage has allowed states to use federal waivers to resolve their differences with ACA by leading in experimentation in health-care, "as long as they promote the objectives of the Medicaid program."⁷⁰ Thus, from the vantage point of federalism, while a conflict emerged in states' opposition to ACA, federal waivers provide enough flexibility for states to both enforce certain aspects of ACA they agree with, while also experimenting in other areas. Similarly, on states' implementation of the No Child Left Behind Act (2002), Kenneth Wong highlights that federal waivers have empowered the executive branch with some leverage for influencing states to adopt policy changes and resolve federal-state differences.⁷¹

The legalization of marijuana by Colorado and Washington sets up a very similar federalism conflict to that of regulating movement, since the Controlled Substances Act (1970) makes it a federal crime to produce, distribute and possess marijuana. In this situation, federal law covers all territories of the U.S. and applies to all individuals within its borders. Equally notable, however, there are important limits to federal power to mandate states to enforce federal

law under the 10th Amendment. According to Sam Kamin, on marijuana, there is a current standoff between the federal and state governments, one where a national repeal of marijuana prohibition is the most likely scenario.⁷² In fact, the federal government announced in 2013 that it would allow both states to proceed with their experiment, since they did not directly threaten federal priorities and were consistent with traditional allocation of federal-state-local enforcement on marijuana-related activity.⁷³

The general narrative given by federalism scholars is that when conflicts do emerge, pathways are sought by political actors to reconcile conflicts in law, with a larger birds-eye view of national level changes grounded in state level experimentation. Always in the background, however, is a deeper puzzle wherein federalism separates federal and state governments into distinct legal systems. On immigration, when states and localities pass laws severing their enforcement of federal law and shielding entire classes of people considered to be unlawfully present, an entirely distinctive and long-term federalism conflict emerges, one that is unlikely to get resolved through traditional federalism dynamics highlighted in the scholarship.

In the recent case of marriage, in *Obergefell v. Hodges* (2015), the Supreme Court ended the fragmented patchwork of state laws by setting up a constitutional floor under the 14th Amendment's equal protection and due process clauses, uniformly protecting same-sex couples' right to marriage. Once a federalism conflict, wherein the federal government did not protect the right to marriage while some states did, was now resolved through wholesale change at the national level. Similarly, Kamin predicts that marijuana will eventually be made legal at the national level, ending the current conflict between federal and state law. It is fundamentally more complicated to imagine national reform on immigration that would resolve the tension drawn out in this article, with the exception of Comprehensive Immigration Reform (CIR)

removing “unlawful presence” from law and thereby focusing exclusively on the illegality of entry, which is highly unlikely. In fact, increased expansion of federal restrictions on unlawful presence and interior enforcement has been the historical norm.

Furthermore, the courts have solidified this federalism conflict. In three contemporary cases, the Supreme Court expressly prohibits Congress from compelling state governments to enact, enforce, or administer federal policies under the 10th Amendment’s anti-commandeering principle. In *New York v. United States* (1992), it ruled that that Congress could not order state legislatures either to regulate low-level radioactive waste in accordance with federal instructions or to take title to the waste. Similarly, in *Printz v. United States* (1997), it ruled that Congress could not order state executive officials to help conduct background checks on would-be handgun purchasers on an interim basis. In *NFIB v. Sebelius* (2012), it struck down the provision mandating states to expand Medicaid eligibility requirements or face federal withholding of funding. These rulings mirror the Supreme Court’s ruling in *Prigg v. Pennsylvania* (1842) that the federal government could not mandate that states enforce federal fugitive slave law.

While the Supreme Court has not yet weighed in on sanctuary or non-enforcement state and local laws today, lower federal courts have ruled on the use of ICE immigration detainer requests. In *Galarza v. Lehigh County* (2014), the Third Circuit court ruled that states and localities are not required to imprison people based on ICE detainers. Moreover, it ruled that since Lehigh County, Pennsylvania was free to disregard the ICE detainer, it therefore shared in the responsibility for violating Galarza’s 4th Amendment and due process rights. Galarza settled and was paid \$50,000 in damages by the U.S. government, the City of Allentown and Lehigh County in Pennsylvania. Following this case, the Lehigh County Board of Commissions ended

its policy of imprisoning people on ICE detainers. In *Miranda-Olivares v. Clackamas County* (2014), the U.S. District Court for the District of Oregon ruled that honoring ICE detainers without probable cause is a violation of the 4th Amendment, following *Galarza*'s lead. The 10th Amendment's anti-commandeering principle is unique when it gets applied to immigration, since it establishes conditions for states to significantly decouple themselves from the national government and to pass laws that are in conflict with federal law.

Notably, this federalism conflict resides hidden in the background of both the slavery scholarship and immigration scholarship, which focus on inter-governmental conflicts that are both time-bound and resolvable. Slavery scholars, for instance, frame northern sanctuary laws that were in conflict with federal fugitive slave law by using antebellum concepts: comity, sectionalism and nullification. From this perspective, the conflict in laws was overcome as a result of the Civil War. Paul Finkelman, who explores interstate court cases related to slaves in transit and runaway slaves, argues that over time, northern and southern courts stopped using the doctrine of comity – the recognition of out-of-state laws.⁷⁴ Thomas Morris similarly explores the statutory law and court case law records in the north and argues that increased sectionalism explains why courts and states protected runaway slaves. Norman Rosenberg and Stanley Campbell both argue that national slavery events, like the Missouri Compromise and Kansas-Nebraska Act, sparked frustration in the north and acted as a catalyst for northern legislation protecting runaway slaves.⁷⁵ Thus, the focus given by slavery scholars is on the north-south conflict, and not on the longer-term federalism conflict drawn out in this article.

The use of time-bound concepts of the antebellum era to explain why and how states passed laws welcoming and protecting runaway slaves does not fully capture conflict with federal law. After national abolition, the institutions allowing for this conflict to emerge

continued to exist, and the power of states and localities to pass laws granting freedom of movement remained possible. However, the conflict itself disappeared, as a result of the 13th and 14th Amendments removing altogether federal restrictions on all blacks. This conflict has resurfaced from its submerged state with the new politics over undocumented immigrants. Similar to slavery scholars, immigration scholars have made concerted attempts to neatly categorize the allocation of federal-state-local powers to regulate movement and the lives of immigrants so that they avoid federalism conflicts, which is one reason why the deep-seated connections between the antebellum and contemporary periods laid out in this article have been obscured from our view.

In her important study of slavery and immigration, Law makes a categorical distinction, stating: “the nineteenth-century time period cautions us against using contemporary concepts and constructs such as ‘immigration’ and ‘immigrant policy,’ when the distinction between those terms is highly time bound and absolutely meaningless in the antebellum period.”⁷⁶ Law highlights early immigration law as an indistinguishable mass, and contemporary immigration law as composing distinctive *immigration* and *immigrant* policies. It is important to note, however, that this distinction is a doctrinal one that emerged in the late 1800s and focuses on the issue of federal plenary powers over entry/exit and removal. On restriction, Law’s distinction is highly relevant, and was recently upheld in *Arizona v. United States* (2012). But it does not hold resonance for states and localities that intend to pass laws that would protect and welcome undocumented immigrants, a regulatory power that has historically been preserved under the 10th Amendment.

From 1875 to 1965, federal primacy in immigration law flourished, with very limited state level involvement in passing laws to regulate movement. In contrast to the traditional

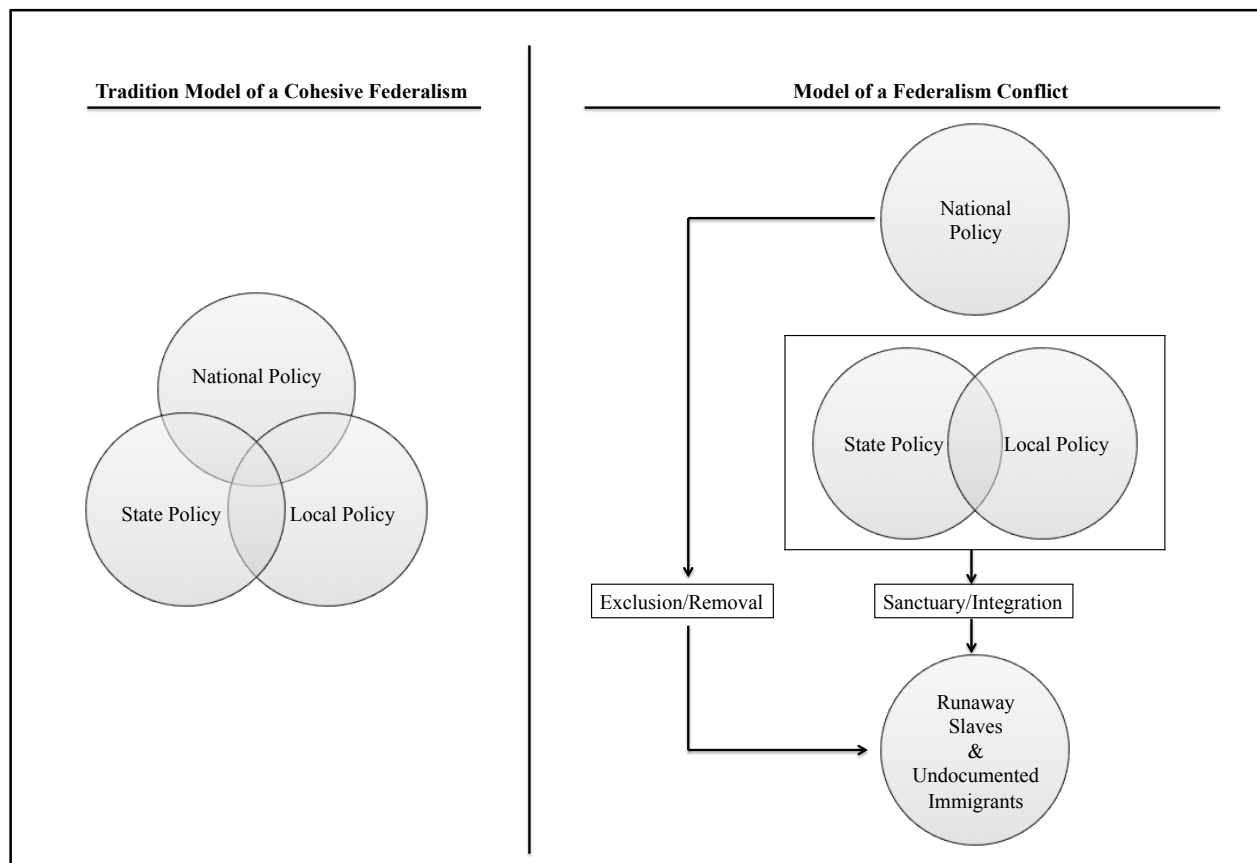
narrative of this period as a transition to federal power, state and local roles in regulating movement continued to exist, but remained in a submerged state. Beginning in the mid 2000s, however, a re-emergence of state and local immigration law has taken place, marking a new period that Pratheepan Gulasekaram and Karthick Ramakrishnan call the “third era” of immigration federalism.⁷⁷ Increased subnational legislation took off between 2008 and 2012, when nearly 7000 bills and resolutions related to immigration were proposed and over 1400 passed by states.⁷⁸ This change has led scholars to question the long-standing distinction between immigration and immigrant policy, and to question the view that the federal government has an exclusive power to regulate movement.

Gulasekaram and Ramakrishnan note that even today there continues to remain no clear separation between immigration and immigrant policy.⁷⁹ Similarly, Daniel Tichenor and Alexandra Filindra highlight that there are many ways in which states have continued to play an important role in contemporary immigration law, stating that “despite the ‘plenary power’ doctrine . . . exclusive federal control over immigrant admissions and rights” is a myth, and “states have routinely left their mark on the formation and outcomes of U.S. immigration policies.”⁸⁰ In understanding this allocation of power, it is essential to distinguish between restrictionist and inclusionary state and local laws. The courts have begun to weigh in on what states can and cannot do to further restrict undocumented immigrants, beyond the controls set up under federal law. However, no such limitations have been placed against states and localities on sanctuary and integrationist policy.

What is highlighted here is a peculiar area in law, where federal and state jurisdictions overlap in determining if a class of people have the right to be present or not. When the two jurisdictions pass a range of laws at odds with one another, a federalism conflict emerges. In the

antebellum period, this conflict solidified between a few northern states and the federal government, and resolution required a Civil War and removal from federal law of the idea that some classes of blacks were unlawfully present. Today, a federalism conflict has surfaced and in many ways has solidified as states continue to innovate pathways for protecting and integrating undocumented immigrants.

Figure 2: Alternative Models of Federalism



As Figure 2 illustrates, on matters of regulating the movement and presence of runaway slaves and undocumented immigrants, states and localities have passed a range of laws decoupled from national level policy. Furthermore, in both periods, extensive national and subnational policymaking developed in parallel to one another, creating deep layers to the conflict in federalism.

The fact that states in both periods have passed a range of laws as part of their own comprehensive goal of either excluding or including runaway slaves and undocumented immigrants, allows us to map continuity and change in state's power over time. This sheds a new historical light on the recent flurry in subnational legislation and in our understanding of the proper allocation of power between federal and subfederal jurisdictions. Table 3 below maps the scope of state power to pass a range of exclusive and inclusive laws related to the movement and physical presence of runaway slaves and free blacks in the antebellum north and unauthorized and authorized immigrants today. Specifically, it addresses the question: What is the scope of state power to regulate the lives of persons considered unlawfully present (runaway slaves; unauthorized immigrants) and lawfully present (free blacks; immigrants) under federal law? Mapping these regulatory powers provides a nuanced comparison for what is and what is not fundamentally linked by our federalist system between slavery and immigration law.

As I highlight throughout this section, this bridge has been hidden in the works of federalism, slavery and immigration scholars alike, largely because our understanding of the federalist system itself has been centered on cohesion across levels. Further, scholars have been uncomfortable with bridging slavery law and immigration law, especially on slavery's relevance for understanding contemporary immigration law. Nevertheless, there is a clear and fundamental bridge that has always been intact as a result of states' power to pass robust sanctuary and integrationist laws, one that is highly unlikely to be superseded by national level reforms.

Table 3. Scope of State Power to Pass Laws: Yes (✓); No (N/A)

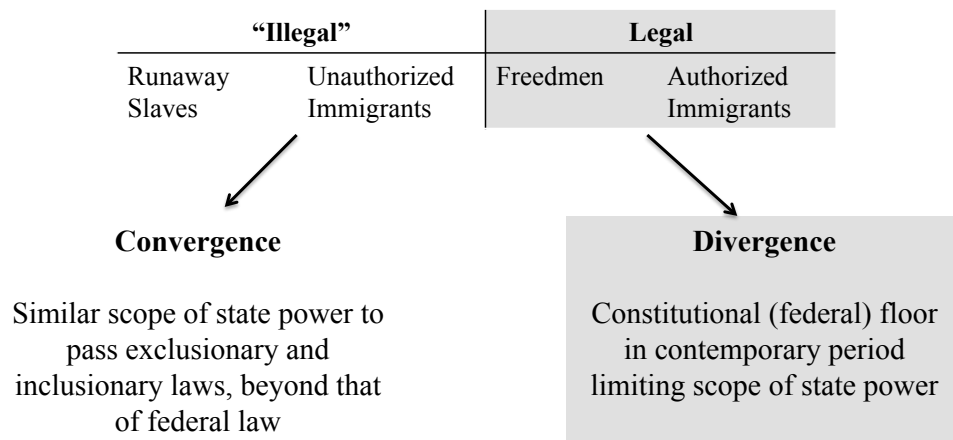
Scope of State Power to Pass “Exclusionary” and “Inclusionary” Laws: “Yes” (✓) or “N/A” (Federal Floor/Ceiling)				
	Unauthorized		Freedmen	Immigrants
	Runaway Slaves	Immigrants		
Exclusion	Entry Ban	✓	N/A	✓
	Cooperation with Federal Law	✓	✓	N/A
	Private Enforcement	✓	✓	N/A
	Transportation Ban	✓	✓	N/A
	Internal Check Points	✓	✓	N/A
	Harassment	✓	✓	N/A
	Segregation	✓	✓	N/A
	Detention	✓	✓	N/A
	Expulsion/Removal	✓	N/A	✓
	Employment Ban	✓	✓	N/A
	Education Ban	✓	✓	N/A
	Voting Ban	✓	✓	✓
	"Freedom of Movement" (Cumulative)	High Scope	Medium Scope	Medium Scope
	"Life Chances" (Cumulative)	High Scope	High Scope	Low Scope
	Comparison “Fit” Across Periods	Medium Similarity		High Difference
Inclusion	Non-Cooperation with Federal Law	✓	✓	N/A
	Free Movement/Presence	✓	✓	✓
	Anti-Discrimination Law	✓	✓	✓
	Due Process Protections from Removal	✓	✓	N/A
	Employment (No Proof of Status Required)	✓	✓	✓
	Education (No Proof of Status Required)	✓	✓	✓
	Voting (No Proof of Status Required)	✓	✓	✓
	"Freedom of Movement" (Cumulative)	High Scope	High Scope	Medium Scope
	"Life Chances" (Cumulative)	High Scope	High Scope	High Scope
	Comparison “Fit” Across Periods	High Similarity (Parity)		Medium Difference

Notably, Table 3 highlights that on a range of both exclusionary and inclusionary laws, the distinction between the antebellum and contemporary periods is blurred. Northern states that welcomed free blacks, but also passed laws to restrict runaway slaves from entry, internal movement and access to public resources, created a sharp distinction between legal and “illegal,” which parallels contemporary states that pass laws exclusive of unauthorized immigrants. In these two contexts, both federal and state restrictionist laws sharpen illegality. A key difference here is that contemporary states have little power to exclude legal immigrants, while antebellum states had the power to restrict both free blacks and runaway slaves. Also, states today have less

power to exclude unauthorized immigrants concurrent to federal enforcement, highlighted by the fact that states are unable to ban entry or practice in removal. The most notable comparison is in the parity across periods in the scope of states' power to pass laws inclusive of runaway slaves and unauthorized immigrants.

To summarize, for groups considered legal under federal law, there is a clear separation between the two periods. Today, the federal government's protections and national rights granted to these groups supersede those at the subnational levels, and they preempt any possible legal conflict from emerging. For groups considered unlawfully present under federal law, however, a blurring of the two periods emerges and reveals both federal and state governments as continuing to hold significant regulatory powers.

Figure 3. Similarities and Differences in Power Allocation



For groups considered lawfully present under federal law, including free blacks and authorized immigrants, Table 3 and Figure 3 provide a very different picture of divergence and lack of commonality across periods. This fits the narrative given by Neuman and Law that emphasizes a break in immigration law between the antebellum and contemporary periods.⁸¹

Whereas federal law considered free blacks to be lawfully present, unlike runaway slaves, the scope of state power to regulate free blacks were expansive during the antebellum period. In the slave south, states consolidated power not only over movement into and within its borders, it also had power to enslave free blacks and engage in the inter-state slave trade. In contrast, states today have very limited power over legal immigrants, marking a clear divergence between the two periods in immigration law. In contrast, notable similarities exist across periods on the scope of state powers to include runaway slaves and unauthorized immigrants, in conflict with federal law.

VI. Beyond Federalism: The Significance and Limitation of Sanctuary and Integration

Slavery has much to offer immigration scholars. This is especially true for historically minded scholars interested in unpacking early de facto immigration laws, which is essential to discovering the origin, development and precedence for today's developing immigration policy. Tichenor highlights that history is significant for more systematic investigations into "crucial patterns and transformations in American immigration politics and policy over time."⁸² Similarly, Law argues that by not exploring immigration history our understanding of contemporary events gets distorted.⁸³ As I argue in this article, slavery law established a unique and multi-faceted system of immigration control, one that not only restricted the movement of enslaved and free blacks across and within national, state and local borders, but also opened some state borders as legal sanctuaries, through passing laws that were in direct conflict with restrictionist federal law.

By disaggregating both antebellum slavery law and contemporary immigration law into their restrictionist and inclusionary dimensions, this article reveals new patterns in the allocation

of immigration powers over time. This is critical because scholars who study “immigration federalism” today have begun to unpack the scope of state and local governments’ power to regulate movement on their own terms; however, the dominant way of thinking has remained in favor of finding cohesion in federalism.⁸⁴ Nevertheless, federalism may in fact establish irresolvable conflicts, for which the concept of a federalism conflict developed in this article adds important meaning to how we think about sanctuary and integrationist laws, particularly for our notions of citizenship and policymaking.

Northern antebellum laws constructed highly inclusive models of membership by granting all blacks protection from removal, rights to free movement and access to resources. These laws influenced national policy greatly, but unlike traditional models of federalism where states are considered laboratories, national change only occurred as a result of tension between the north and south on slavery eventually hitting a violent tipping point. Only after the Civil War and over six hundred thousand deaths, Congress passed the 14th Amendment and secured freedom of movement for all blacks, a momentous change that was not made possible during the antebellum period, either through states’ leveraging power or diffusion of policy to the national level.⁸⁵ A focus on there being a long-term and irresolvable federalism conflict reveals how states can become decoupled from national conceptions of citizenship, and state level “sanctuary” and integrationist laws can be more clearly seen as accumulating over time to create a highly inclusive subnational citizenship regime, one that embraced and protected runaway slaves in ways that contrast national citizenship.

This contributes to scholars exploring what pro-immigrant integration laws might mean for membership today.⁸⁶ In a recent policy report, Karthick Ramakrishnan and Allan Colbern similarly link state level laws to notions of state citizenship, arguing that a “growing number of

state laws that push towards greater immigrant integration, on matters ranging from in-state tuition and financial aid to undocumented students, to expanded health benefits and access to driver's licenses" create a "de facto state citizenship" that is inclusive of unauthorized immigrants.⁸⁷ They also show that laws in states like California are blurring the distinction between authorized and unauthorized immigrants within the state, not only by facilitating new ways for undocumented immigrants to freely move within state borders and gain state level documentation, but also by granting them important access to state resources, rights and protections. I show in this article that these developments are not unprecedented. Northern states re-defined the status of runaway slaves under state law, granting a range of due process rights and protections from recaption.

Unlike the policy areas of same-sex marriage and marijuana, states are less likely to function as models for wholesale change at the national level, and thus, the conflict produced here is more long-term. While there may be some diffusion from the state to national level, or vice versa, in how to protect and integrate undocumented immigrants, particularly in terms of not targeting children and focusing removals on those with criminal records, states like California have gone well beyond what is possible at the national level in future Comprehensive Immigration Reform.

To be sure, there are significant limitations found in these unique forms of subnational memberships. The rights granted to undocumented immigrants are extremely limited to the territorial borders of states and localities. To put this into context, while a U.S. citizen and authorized immigrant can use federal identity documents to cross borders within the country and to travel abroad, undocumented residents with access to state drivers licenses or city ID cards are territorially bound to those accepting jurisdictions and are unable to cross over to non-accepting

jurisdictions without high risks to themselves. This limitation was even more heightened for runaway slaves who faced constant threats of being detained and removed by slave-catchers in the north.

Further, undocumented immigrants remain under the constant purview of federal immigration law and enforcement, regardless of their residing jurisdiction. This is a paradox: runaway slaves and undocumented immigrants are subject to two authorities – federal and state – who construct competing definitions of belonging and have varying capacities to enforce their laws. Thus, the federalism conflict highlighted here creates a condition for what scholars have called *semi-citizenship* or *second-class citizenship* to emerge within state and local memberships, by preventing both groups from receiving full inclusion with the same level of security as residents who are also national citizens.⁸⁸ At the same time, subnational citizenships positively contribute life-changing rights and protections to undocumented immigrants, who have no alternative recourse.

VII. Conclusion

The recent killing of Kathryn Steinle by an undocumented immigrant in San Francisco is a tragedy, but despite this, history shows that sanctuary laws are rooted in our Constitution's separation of powers. Much like removal certificates issued to detain runaway slaves, the federal government is limited to incentivizing and encouraging state and local compliance of detainer request by ICE. This feature in our federalist system has a long standing in the 10th Amendment's anti-commandeering principle, and was recently upheld in *Galarza v. Lehigh County* (2014).

Restrictionist are using the San Francisco incident to gain larger traction on their goal of expanding how federal immigration law is enforced in the interior, with the factually unsupported assumption that history of federal plenary powers is on their side. Ending states and localities' capacity to create sanctuaries would in fact create a significant shift in immigration's legal history, one that moves away from what has historically been the norm of the federal government not being able to mandate that states and localities enforce federal law. Although anti-detainer policies are relatively new, the extensive set of regulations on runaway slaves reveals historical precedence on this issue, and it sheds more favorable light in support of preserving states and localities' authority.

Recognizing this federalism conflict offers immigrant advocates a powerful tool, particularly in deciding which pathways – national, state or local – to pursue policy change, and for distinguishing both the opportunities and limitations for policies to be transferred across these distinctive levels of governance and legal systems.

- ¹ Neuman 1993.
- ² Neuman 1993, 1837–1838.
- ³ Neuman 1993, 1848–1849.
- ⁴ Neuman 1993, 1849–1851, 1961–1862.
- ⁵ Parker 2001.
- ⁶ Abrams 2005.
- ⁷ Hirota 2013.
- ⁸ Magee 2010; Martin et al. 2013.
- ⁹ Inniss 1999, 91.
- ¹⁰ Daniels 1990, 54-55.
- ¹¹ Einhorn 2000; 2006; Acharya et al. 2013.
- ¹² Neuman 1993, 1872.
- ¹³ Law, 2014; 2015.
- ¹⁴ Law 2014.
- ¹⁵ Law 2015, 309.
- ¹⁶ Kraehenbuehl 2011.
- ¹⁷ McKanders 2012, 921; Schmidt 2013.
- ¹⁸ McKanders 2012, 939.
- ¹⁹ Mousin 2004, 316.
- ²⁰ Lasch 2013, 149.
- ²¹ Magee 2010, 7.
- ²² See, e.g., Neuman 1993, Wallenstein 2004. Neuman similarly addresses laws regulating slaves and free blacks jointly.
- ²³ U.S. Const. art. I, sect. 9, cl. 1
- ²⁴ Du Bois 1904.
- ²⁵ Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (this law banned importing or bringing in “any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman, of the United States”); Neuman 2010, 36.
- ²⁶ Neuman 1993, 1876.
- ²⁷ Neuman 1993, 1893.
- ²⁸ Hirota 2013, Law 2014, Neuman 1993.
- ²⁹ Fede 1992, 2011.
- ³⁰ Campbell 2007, Gross 2000, 2010, Hadden 2001, Johnson 1999, McNair 2009, Finkelman 1996, Goodell 1853, Higginbotham 1978, Hurd 2006, Schafer 1994, Wahl 1998.
- ³¹ Massey et al. 2003, Ngai 2004.
- ³² Cooper and McCord 1836 (Vol. 2), 23.
- ³³ Cooper and McCord 1836 (Vol. 7), 343.
- ³⁴ Hadden 2001, 18.
- ³⁵ Cooper and McCord 1836 (Vol. 2), 254–255.
- ³⁶ Androff 2011, Bravo 2007, Brysk and Choi-Fitzpatrick 2012, Craig et al. 2007, Herzfeld 2002, Lusk and Lucas 2009, Quirk 2006, Ruggiero 1997.
- ³⁷ Massey et al. 2003, Ngai 2004.
- ³⁸ U.S. Const. art. IV, § 2, cl. 3.
- ³⁹ Act of February 12, 1793 (1 Stat. 302); *Annals of Congress*, 2nd Cong., 2nd sess. (1793), 1414-1415.
- ⁴⁰ *Annals of Congress*, 2nd Cong., 2nd sess. (1793), 1415.
- ⁴¹ *Prigg v. Com. of Pennsylvania*, 41 U.S. 539 (1842)
- ⁴² Act of September 18, 1850, (9 Stat., 462).
- ⁴³ The Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163.
- ⁴⁴ The Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3445.
- ⁴⁵ Wong 2012.
- ⁴⁶ Cox and Miles 2013, Motomura 2014.
- ⁴⁷ Oh. Const. of 1802, art. IV § I, reprinted in Thorpe 1909 (Vol. 5), 2901-2913; Middleton 2005, 19–41.
- ⁴⁸ An act to regulate black and mulatto persons, Oh. Laws, January 5, 1804; Middleton 1993, 15-17; Middleton 2005, 49-51.
- ⁴⁹ An Act to Regulate Black and Mulatto Persons, Oh. Laws, January 25, 1807; Middleton 1993, 17-18; Middleton 2005, 51-52.

⁵⁰ Middleton 1993, 275–279, 286; Middleton 2005, 59.

⁵¹ In. Const. of 1851 Art. 13 § 1, reprinted in Thorpe 1909 (Vol. 2), 1073-1095; Finkelman 1986, 434–435; Middleton 1993, 204.

⁵² An act to enforce the 13th Article of the Constitution, In. Rev. Stat, June 18, 1852; Finkelman 1986, 439–440; Middleton 1993, 204.

⁵³ An act providing for the colonization of Negroes and mulattoes and their descendants, and appropriating 5,000 dollars thereof, constituting the State Board of Colonization, declaring the duties of said board, and of state treasurer and county treasurer in relation thereof, In. Rev. Stat, April 28, 1852 § 1-6; An act providing for the colonization of free Negroes, making appropriations thereof, and establishing a colonization agency, In. Rev. Stat, March 3, 1853 § 1-3; An act to give power to the State Board of Colonization, In. Rev. Stat, March 1, 1855 § 1-4; Middleton 1993, 219–221.

⁵⁴ Frymer 2014.

⁵⁵ Cal. S.B. 976, Reg. Sess. (1993)

⁵⁶ Ramakrishnan and Gulasekaram 2013.

⁵⁷ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); Archibold 2010.

⁵⁸ Morse 2011.

⁵⁹ Law 2014, Neuman 1993.

⁶⁰ Commonwealth v. Ayes, 35 Mass. (18 Pick.) 193 (1836); Finkelman 1981, 101–125; Finkelman 1986, 444.

⁶¹ An Act to protect the Rights and Liberties of the People of the Commonwealth of Massachusetts, Mass. Gen. Laws ch. 0489 § 1-23 (1855), reprinted in *Acts and Resolves Passed by the General Court of Massachusetts, in the Year 1855: Together with the Messages*. Boston: Secretary of the Commonwealth, 924-929; *Mass. Senate Document No. 162*, 1855; *Mass. Senate Journal*, 1855, Mass. State Library, 76:801; *Mass. House Journal*, 1855, 77:1710; Morris 1974, 167–170.

⁶² Motomura 2014, 151.

⁶³ Ramakrishnan and Colbern 2015.

⁶⁴ Saillant 2012.

⁶⁵ Graauw 2014.

⁶⁶ The Trust Act of 2013 Cal. Stat. 4650 (codified at CAL. GOV'T CODE §§ 7282–7282.5 (West Supp. 2014)).

⁶⁷ Gulasekaram and Ramakrishnan 2015, Ramakrishnan and Colbern 2015.

⁶⁸ Rose and Bowling 2015.

⁶⁹ Pickerill and Bowling 2014.

⁷⁰ Rose and Bowling 2015, 361.

⁷¹ Wong, 2015.

⁷² Kamin 2015.

⁷³ Kamin 2015, 431.

⁷⁴ Finkelman 1981.

⁷⁵ Campbell 1970, Rosenberg 1999.

⁷⁶ Law 2014, 128.

⁷⁷ Gulasekaram and Ramakrishnan 2015.

⁷⁸ Chacón 2012, Gulasekaram and Ramakrishnan 2013, 2015, Motomura 2014, National Conference of State Legislatures 2012, Rodríguez 2008, Varsanyi 2010, Varsanyi et al. 2012, 138–58.

⁷⁹ Gulasekaram and Ramakrishnan 2013, 2015.

⁸⁰ Tichenor and Filindra 2012, 1219.

⁸¹ Law 2014, Neuman 1993.

⁸² Tichenor 2015, 300.

⁸³ Law 2015, 318.

⁸⁴ Chacón 2012, Gulasekaram and Ramakrishnan 2013, 2015, Motomura 2014, Rodríguez 2008, Tichenor and Filindra 2012, Varsanyi 2010, Varsanyi et al. 2012.

⁸⁵ Gugliotta 2012.

⁸⁶ Bosniak 2000, 2008, Graauw 2014, Markowitz 2015, Ramakrishnan and Colbern 2015.

⁸⁷ Ramakrishnan and Colbern 2015, 1.

⁸⁸ Cohen 2009.

References

- Abrams, Kerry. "Polygamy, Prostitution, and the Federalization of Immigration Law." *Columbia Law Review* 105, no. 3 (April 1, 2005): 641–716.
- Acharya, Avidit, Matthew Blackwell, and Maya Sen. "The Political Legacy of American Slavery." *Unpublished*, August 28, 2013. <http://scholar.harvard.edu/files/msen/files/slavery.pdf>.
- Androff, David K. "The Problem of Contemporary Slavery: An International Human Rights Challenge for Social Work." *International Social Work* 54, no. 2 (March 1, 2011): 209–22.
- Archibold, Randal C. "Arizona Enacts Stringent Law on Immigration." *The New York Times*, April 23, 2010, sec. U.S. / Politics. <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.
- Bois, William Edward Burghardt Du. *The Suppression of the African Slave-Trade to the United States of America, 1638-1870*. Cambridge: Harvard University Press, 1904.
- Bosniak, Linda. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton University Press, 2008.
- . "Universal Citizenship and the Problem of Alienage." *Immigration and Nationality Law Review* 21 (2000): 373.
- Bravo, Karen E. "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade." *Boston University International Law Journal* 25 (2007): 207.
- Brysk, Alison, and Austin Choi-Fitzpatrick, eds. *From Human Trafficking to Human Rights: Reframing Contemporary Slavery*. Philadelphia: University of Pennsylvania Press, 2012.
- Campbell, James M. *Slavery on Trial: Race, Class, and Criminal Justice in Antebellum Richmond, Virginia*. Gainesville, FL: University Press of Florida, 2007.
- Campbell, Stanley W. *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860*. Chapel Hill: University of North Carolina Press, 1970.
- Chacón, Jennifer. "The Transformation of Immigration Federalism." *William & Mary Bill of Rights Journal* 21, no. 2 (December 1, 2012).
- Cohen, Elizabeth F. *Semi-Citizenship in Democratic Politics*. Cambridge University Press, 2009.
- Cooper, Thomas, and David James McCord, eds. *The Statutes at Large of South Carolina: Containing the Acts from 1682 to 1716, Inclusive*. Vol. 2. Columbia, S.C.: A.S. Johnston, 1836.
- , eds. *The Statutes at Large of South Carolina*. Vol. 7. Columbia, S.C.: A.S. Johnston, 1836.
- Cox, Adam B., and Thomas J. Miles. "Policing Immigration." *The University of Chicago Law Review* 80, no. 1 (January 1, 2013): 87–136.
- Craig, Gary, Aline Gaus, Mick Wilkinson, Klara Skrivankova, and Aidan McQuade. *Contemporary Slavery in the UK*. York, United Kingdom: Joseph Rowntree Foundation, 2007.
- Daniels, Roger. *Coming to America: A History of Immigration and Ethnicity in American Life*. Harper Collins Publishers, 1990.
- Einhorn, Robin L. *American Taxation, American Slavery*. Chicago: University of Chicago Press, 2006.
- . "Slavery and the Politics of Taxation in the Early United States." *Studies in American Political Development* 14, no. 02 (October 2000): 156–83.
- Fede, Andrew. *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*. Distinguished Studies in American Legal and Constitutional History. New York: Garland Pub, 1992.
- . *Roadblocks to Freedom: Slavery and Manumission in the United States South*. New Orleans, LA.: Quid Pro Books, 2011.
- Finkelman, Paul. *An Imperfect Union: Slavery, Federalism, and Comity*. The Lawbook Exchange, Ltd., 1981.
- . "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North." *Rutgers Law Journal* 17 (1986): 415.
- , ed. *Slavery & the Law*. 1st ed. Madison, Wis: Madison House, 1996.
- , ed. *Statutes on Slavery: The Pamphlet Literature*. Slavery, Race, and the American Legal System, 1700-1872, ser. 7. New York: Garland Pub, 1988.
- Frymer, Paul. "'A Rush and a Push and the Land Is Ours': Territorial Expansion, Land Policy, and U.S. State Formation." *Perspectives on Politics* 12, no. 01 (March 2014): 119–44.
- Goodell, William. *The American Slave Code In Theory and Practice: Its Distinctive Features Shown By Its Statutes, Judicial Decisions, and Illustrative Facts*. Reprint 1968. USA: Johnson Reprint Corporation, 1853.

-
- Graauw, Els de. "Municipal ID Cards for Undocumented Immigrants Local Bureaucratic Membership in a Federal System." *Politics & Society* 42, no. 3 (September 1, 2014): 309–30.
- Gross, Ariela Julie. *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*. Princeton, N.J.: Princeton University Press, 2000.
- . *What Blood Won't Tell: A History of Race on Trial in America*. Cambridge, MA: Harvard University Press, 2010.
- Gugliotta, Guy. "Civil War Toll Up by 20 Percent in New Estimate." *The New York Times*, April 2, 2012. <http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html>.
- Gulasekaram, Pratheepan, and S. Karthick Ramakrishnan. "Immigration Federalism: A Reappraisal." *NYUL Rev.* 88 (2013): 2074–2319.
- . *The New Immigration Federalism*. New York: Cambridge University Press, 2015.
- Hadden, Sally E. *Slave Patrols: Law and Violence in Virginia and the Carolinas*. Harvard Historical Studies, v. 138. Cambridge, Mass: Harvard University Press, 2001.
- Herzfeld, Beth. "Slavery and Gender: Women's Double Exploitation." *Gender & Development* 10, no. 1 (March 1, 2002): 50–55.
- Higginbotham, A. Leon. *In the Matter of Color: The Colonial Period*. Race and the American Legal Process, v. 1. New York: Oxford University Press, 1978.
- Hirota, Hidetaka. "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy." *Journal of American History* 99, no. 4 (March 1, 2013): 1092–1108.
- Hurd, John C. *The Law of Freedom and Bondage in the United States*. Clark, N.J.: Lawbook Exchange, 2006.
- Inniss, Lolita K. Buckner. "Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness." *DePaul L. Rev.* 49 (1999): 85.
- Johnson, Walter. *Soul by Soul: Life Inside the Antebellum Slave Market*. Cambridge, MA: Harvard University Press, 1999.
- Kamin, Sam. "The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization." *Publius: The Journal of Federalism* 45, no. 3 (July 1, 2015): 427–51.
- Kraehenbuehl, James A. "Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law." *The University of Chicago Law Review* 78, no. 4 (October 1, 2011): 1465–1502.
- Lasch, Christopher N. "Rendition Resistance." *North Carolina Law Review* 92 (2014 2013): 149.
- Law, Anna O. "Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State." *Studies in American Political Development* 28, no. 02 (October 2014): 107–28.
- . "The Historical Amnesia of Contemporary Immigration Federalism Debates." *Polity* 47, no. 3 (July 2015): 302–19.
- Lusk, Mark, and Faith Lucas. "The Challenge of Human Trafficking and Contemporary Slavery." *Journal of Comparative Social Welfare* 25, no. 1 (2009): 49–57.
- Magee, Rhonda V. "Slavery As Immigration?" *University of San Francisco Law Review Research Paper No.* 2010–30 (2010): 1–33.
- Markowitz, Peter L. "Undocumented No More: The Power of State Citizenship." *Stanford Law Review* 67 (2015): 1–42.
- Martin, David A., Thomas Alexander Aleinikoff, Hiroshi Motomura, and Maryellen Fullerton. *Forced Migration: Law and Policy*. 2nd ed. West Academic, 2013.
- Massey, Douglas S., Jorge Durand, and Nolan J. Malone. *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration*. New York: Russell Sage Foundation Publications, 2003.
- McKanders, Karla Mari. "Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities." *Catholic University Law Review* 61 (2012): 921.
- McNair, Glenn. *Criminal Injustice: Slaves and Free Blacks in Georgia's Criminal Justice System*. Charlottesville: University of Virginia Press, 2009.
- Middleton, Stephen. *The Black Laws in the Old Northwest: A Documentary History*. Contributions in Afro-American and African Studies, no. 152. Westport, Conn: Greenwood Press, 1993.
- . *The Black Laws: Race and the Legal Process in Early Ohio*. Ohio University Press, 2005.
- Morris, Thomas D. *Free Men All: The Personal Liberty Laws of the North, 1780-1861*. The Lawbook Exchange, Ltd., 1974.
- Morse, Ann. "Arizona's Immigration Enforcement Laws." June 28, 2011. <http://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx>.

-
- Motomura, Hiroshi. *Immigration Outside the Law*. Oxford: Oxford University Press, 2014.
- Mousin, Craig B. "Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights, A." *S. Ill. ULJ* 29 (2004): 285.
- Neuman, Gerald L. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton, New Jersey: Princeton University Press, 2010.
- . "The Lost Century of American Immigration Law (1776-1875)." *Columbia Law Review* 93, no. 8 (December 1, 1993): 1833–1901.
- Ngai, Mae M. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton University Press, 2004.
- Parker, Kunal M. "State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts." *Law and History Review* 19, no. 03 (September 2001): 583–643.
- Pickerill, J. Mitchell, and Cynthia J. Bowling. "Polarized Parties, Politics, and Policies: Fragmented Federalism in 2013–2014." *Publius: The Journal of Federalism* 44, no. 3 (July 1, 2014): 369–98.
- Quirk, Joel Forbes. "The Anti-Slavery Project: Linking the Historical and Contemporary." *Human Rights Quarterly* 28, no. 3 (2006): 565–98.
- Ramakrishnan, S. Karthick, and Allan Colbern. "The California Package: Immigrant Integration and the Evolving Nature of State Citizenship." *Policy Matters* 6, no. 3 (2015): 1–19.
- Ramakrishnan, S. Karthick, and Pratheepan Gulasekaram. "Driver's Licenses for Undocumented Immigrants: How the Obama Administration's Deferred Action Policy Paved the Way." *San Jose Mercury News*. October 14, 2013. http://www.mercurynews.com/opinion/ci_24283776/drivers-licenses-undocumented-immigrants-how-obama-administrations-deferred.
- Rodríguez, Cristina M. "The Significance of the Local in Immigration Regulation." *Michigan Law Review* 106, no. 4 (February 1, 2008): 567–642.
- Rosenberg, Norman L. "Personal Liberty Laws and Section Crisis: 1850-1861." In *Abolitionism and American Law*, 320–40. History of the American Abolitionist Movement. New York: Garland Publishing, Inc., 1999.
- Rose, Shanna, and Cynthia J. Bowling. "The State of American Federalism 2014–15: Pathways to Policy in an Era of Party Polarization." *Publius: The Journal of Federalism* 45, no. 3 (July 1, 2015): 351–79.
- Ruggiero, Vincenzo. "Trafficking in Human Beings: Slaves in Contemporary Europe." *International Journal of the Sociology of Law* 25, no. 3 (September 1997): 231–44.
- Saillant, Catherine. "L.A. Council Approves ID Cards for City Residents." *Los Angeles Times*, November 7, 2012. <http://articles.latimes.com/2012/nov/07/local/la-me-city-id-card-20121108>.
- Schafer, Judith Kelleher. *Slavery, the Civil Law, and the Supreme Court of Louisiana*. Baton Rouge: Louisiana State University Press, 1994.
- Schmitt, Jeffrey M. "Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition." *The Georgetown Law Journal Online* Vol. 103 Online: 1 (2013): 1–7.
- The Constitutions of Ohio: Amendments, and Proposed Amendments, Including the Ordinance of 1787, the Act of Congress Dividing the Northwest Territory, and the Acts of Congress Creating and Recognizing the State of Ohio*. The Arthur H. Clark Company, 1912.
- Tichenor, Daniel. "The Political Dynamics of Unauthorized Immigration: Conflict, Change, and Agency in Time." *Polity* 47, no. 3 (July 2015): 283–301.
- Tichenor, Daniel J., and Alexandra Filindra. "Raising Arizona v. United States: Historical Patterns of American Immigration Federalism." *Lewis & Clark L. Rev.* 16 (2012): 1215.
- Thorpe, Francis Newton. 1909. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America*. Vol. 2. Washington, DC: Government Printing Office.
- . 1909. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America*. Vol. 5. Washington, DC: Government Printing Office.
- Varsanyi, Monica, ed. *Taking Local Control: Immigration Policy Activism in U.S. Cities and States*. Stanford, CA: Stanford University Press, 2010.
- Varsanyi, Monica W., Paul G. Lewis, Doris Marie Provine, and Scott Decker. "A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States." *Law & Policy* 34, no. 2 (April 1, 2012): 138–58.
- Wahl, Jenny Bourne. *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*. Cambridge Historical Studies in American Law and Society. Cambridge ; New York: Cambridge University Press, 1998.

Wallenstein, Peter. *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia*.

Charlottesville: University of Virginia Press, 2004.

Wong, Kenneth K. "Federal ESEA Waivers as Reform Leverage: Politics and Variation in State Implementation."

Publius: The Journal of Federalism 45, no. 3 (July 1, 2015): 405–26.

Wong, Tom K. "287(g) and the Politics of Interior Immigration Control in the United States: Explaining Local Cooperation with Federal Immigration Authorities." *Journal of Ethnic and Migration Studies* 38, no. 5

(April 19, 2012): 737–56.