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Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham

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IMMIGRATION AND CIVIL RIGHTS: IS THE "NEW" BIRMINGHAM THE SAME AS THE "OLD" BIRMINGHAM?

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Over the past few years, state legislatures have passed immigration enforcement laws at breakneck speed.[1] As one commentator characterized it:

> Immigration law is undergoing an unprecedented upheaval. The states . . . have taken immigration matters into their own hands. In response to the widespread perception that the federal government cannot or will not control the border, state legislatures are now furiously enacting immigration-related laws . . . . These attempts to wrestle control of enforcement decisions from the federal government have cast into doubt the doctrinal core of immigration law: federal exclusivity.[2]

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[1] *See* 2010 *Immigration-Related Bills and Resolutions in the States*, NAT'L CONF. OF STATE LEGS. (2010), http://www.ncsl.org/issues-research/immig/2010-immigration-related-bills-and-resolutions865.aspx ("With federal immigration reform currently stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate.").

[2] Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674–75 (2011).

The architect of many of the state immigration enforcement laws, Kris Kobach, has stated that their aim is to encourage undocumented immigrants to "self-deport"[3] by making their everyday lives as difficult as possible.[4]

Perhaps the most famous version of these laws, Arizona's S.B. 1070, struck a nerve and provoked calls for an economic boycott of the state.[5] The flood of state immigration enforcement laws comes at the same time that, in hopes of convincing Congress to pass immigration reform legislation, the Obama Administration aggressively pressed immigration enforcement, setting all-time records for the number of noncitizens removed from the United States.[6] In 2012, the Supreme Court struck down core provisions of S.B. 1070.[7] However, it upheld one provision involving state and local immigration enforcement that may encourage like-minded states to copy Arizona.[8]

In 2011, Alabama, a state considered by some to be the heart and soul of Dixie, entered the national immigration debate, a surprise to many Americans given that the state is not ordinarily thought of as home to many immigrants. The Alabama legislature did not enact just any ordinary law but passed what some, including its supporters, claimed was the toughest state immigration enforcement law of them all.[9] The Beason-Hammon Taxpayer and Citizen Protection Act, or H.B. 56,[10] built on Arizona's controversial S.B. 1070, but goes further by seeking to directly and indirectly limit access of undocumented students to public education.[11]

This Article analyzes Alabama's foray into immigration enforcement. It looks at H.B. 56 with the basic understanding that the enforcement of immigration laws implicates the civil rights of immigrants and U.S. citizens. To show how the law responds to a growing Latina/o population, Part I of this Article briefly summarizes

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[3] *See* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2008).

[4] *Id.* at 157, 159 n.12.

[5] *See* Randal C. Archibold, *In Wake of Immigration Law, Calls for an Economic Boycott of Arizona*, N.Y. TIMES, Apr. 27, 2010, at A13. For analysis of the legal issues raised by the Arizona law, see Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

[6] *See Removal Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/removal-statistics/ (last visited Dec. 6, 2012) (reporting the removal by the U.S. government of nearly 400,000 noncitizens, a new record, in 2011). For critical analysis of modern U.S. deportation practices, see BILL ONG HING, DEPORTING OUR SOULS (2006); DANIEL KANSTROOM, DEPORTATION NATION (2007); Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489 (2011); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009).

[7] *See* Arizona v. United States, 132 S. Ct. 2492 (2012).

[8] *See id.* at 2507–10.

[9] *See infra* note 141 and accompanying text.

[10] 2011 Ala. Acts 535.

[11] *See infra* Part IV.

Alabama's immigration history. Part II contextualizes the events leading to the passage of H.B. 56 into the contemporary national debate over immigration. Part III generally considers the possible civil rights consequences of the law on immigrants and Latino/as. Finally, Part IV specifically focuses on Alabama's efforts to limit access to education by undocumented immigrants. As in the days of Jim Crow, ensuring educational access remains central to the struggle of outsiders for fundamental civil rights and full membership in American society.[12]

In analyzing Alabama's H.B. 56, this Article identifies parallels between the state immigration enforcement laws and the racial caste system of the Jim Crow South. It contends that race, class, and caste, with significant social and economic (labor market) aspects, are integral to both episodes in U.S. history.[13] In each instance, supporters of the racial caste system invoked a claim of states' rights, or the equivalent, in the defense of state-sanctioned discrimination.[14] Both then and now, access to education is ground zero for the parallel civil rights movements of the two eras.[15]

As the title of this symposium ("Noncitizen Participation in the American Polity") suggests, the public is deeply ambivalent about the proper place of immigrants, especially undocumented ones, in American social life.[16] The struggle for hearts and minds in the national debate on the issue has come to a head in recent years, with much attention paid to the increasing deportations of long-term residents of the United States,[17] combined with the fact that millions of undocumented immigrants remain in the country.[18] While minimizing or ignoring the impacts of the U.S. government's immigration enforcement efforts, many state legislatures, like Alabama's, have responded to the undocumented immigrant population with tough state immigration enforcement laws.[19]

Supporters of state intervention often claim that they merely want to promote obedience to the rule of the law; such claims are usually combined with the exaggerated and unproven accusation that the federal government has "failed" to enforce the immigration laws.[20] This Article looks into, and beyond, this simplistic characterization to analyze how the current debates over immigration and immigration enforcement implicate the fundamental civil rights of residents of the United States and, specifically, the quest by Latina/os and immigrants for full membership in American society.

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[12] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[13] *See infra* Parts III and IV.

[14] *See id.*

[15] *See infra* Part IV.

[16] *See generally* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006) (examining the nation's ambivalence toward "aliens").

[17] *See infra* notes 183–89 and accompanying text.

[18] *See infra* notes 186–88 and accompanying text.

[19] *See infra* notes 86–93 and accompanying text.

[20] *See infra* notes 83–85 and accompanying text.

I. A SHORT HISTORY OF IMMIGRATION TO ALABAMA

A short history of immigration to Alabama helps to place the legislature's passage of H.B. 56 in 2011 in its appropriate historical context.

A. Immigration to Alabama After the Civil War

Before the Civil War, slave labor sustained Alabama's cotton economy.[21] With the abolition of slavery, planters looked for a new source of cheap labor,[22] with many slaves migrating north.[23] Some employers viewed white immigrant workers as more hardworking and therefore preferable to African-American labor.[24] Industrialists, mining companies, and railroads attempted to attract immigrant labor to Alabama.[25]

The cotton boom of the late 1860s increased demand for low-skilled labor.[26] In response, the Alabama legislature hired immigration agents to promote settlement of the state and made appropriations to allow the immigration commissioner to distribute information about Alabama abroad.[27] In 1888, Montgomery, Alabama hosted the Southern Inter-State Immigration Convention, a conference of Southern political and business leaders interested in promoting immigration to the South.[28] Commissioner of Agriculture Reuben Francis Kolb took a railcar exhibit known as "Alabama on Wheels" on a tour of the South and Midwest to attempt to lure workers to the state.[29]

Despite the effort, between 1860 and 1890, the percentage of foreign-born persons in Alabama decreased[30] due to Alabama's overall stagnant economy.[31] One prominent scholar of the era also attributed the lack of immigration to the South to the general distaste of white people for living in proximity to African Americans.[32] The

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[21] *See* Katharine M. Pruett & John D. Fair, *Promoting a New South: Immigration, Racism, and "Alabama on Wheels*,*"* 66 AGRIC. HIST. 19 (1992).

[22] *See* Rowland T. Berthoff, *Southern Attitudes Toward Immigration*, 17 J. S. HIST. 328, 328–29 (1951); Robert L. Brandfon, *The End of Immigration to the Cotton Fields*, 50 MISS. VALLEY HIST. REV. 591, 591–94 (1964).

[23] *See* William J. Collins, *When the Tide Turned: Immigration and the Delay of the Great Black Migration*, 57 J. ECON. HIST. 607, 607 (1997).

[24] *See* Brandfon, *supra* note 22, at 594–95.

[25] *See* Berthoff, *supra* note 22, at 333–36.

[26] *See id.* at 328–29.

[27] *See id.* at 338.

[28] *See* Carol Mary Tobin, The South and Immigration: 1865–1910, at 35 (Sept. 28, 1967) (unpublished M.A. thesis, Duke University) (on file with author). *See generally* JASON H. SILVERMAN & SUSAN R. SILVERMAN, IMMIGRATION IN THE AMERICAN SOUTH, 1864–1895 (2006) (discussing the Southern Interstate Immigration Convention).

[29] *See* Pruett & Fair, *supra* note 21, at 22, 24–25.

[30] *See id.* at 39–40.

[31] *See* Carl L. Bankston III, *New People in the New South: An Overview of Southern Immigration*, 13 S. CULTURES 24, 39 (2007).

[32] *See* Walter L. Fleming, *Immigration to the Southern States*, 20 POL. SCI. Q. 276, 277 (1905).

sporadic lynching of foreigners in the South, among other factors, no doubt also discouraged immigration.[33]

Alabama coal mines received Scottish, Welsh, and Slovakian workers from the late 1860s to the 1880s.[34] The coal mine operators next brought in French, English, Italian, and Irish laborers.[35] In response to strikes in 1904 and 1908, the coal companies hired southern and eastern European immigrant workers as strikebreakers.[36] In addition, German immigrants established farms in rural Alabama towns.[37]

Efforts to bring immigrants to Alabama surged with a growing economy in the early twentieth century.[38] The Alabama legislature required a state immigration board to assist immigrants from "desirable" backgrounds to settle in Alabama while encouraging disfavored ethnic groups to move on.[39]

By 1913, as in the nation as a whole, nativist attitudes had become common in Alabama.[40] Immigration advocates preferred Protestant northwestern European immigrants, but they would grudgingly accept southern and eastern Europeans, many of whom were Catholic.[41] Italians often were paid low wages similar to those paid to African-American workers and were generally treated as a lower caste of whites.[42] Employers accepted Asian labor only as a last resort.[43]

One, perhaps surprising, constant in Alabama attitudes was the fierce resistance to federal control of immigration,[44] consistent with the state's historical antipathy for the federal government. State railway immigration agents spoke out against federal immigration laws,[45] such as the Chinese Exclusion Acts,[46] which commenced the era of federal primacy over immigration regulation.[47] In 1905, "[i]t [was] safe

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[33] *See* JOHN HIGHAM, STRANGERS IN THE LAND 185–86 (2002) (discussing the infamous 1915 lynching in Georgia of Leo Frank, the Jewish son of a New York merchant). *See generally* Clive Webb, *The Lynching of Sicilian Immigrants in the American South, 1886–1910*, 3 AM. NINETEENTH CENTURY HIST. 45 (2002).

[34] *See* Berthoff, *supra* note 22, at 335.

[35] *See id.*

[36] *See id.* at 336.

[37] *See* Fleming, *supra* note 32, at 284–86.

[38] *See* Berthoff, *supra* note 22, at 335–36.

[39] *Id.* at 340, 349.

[40] *See id.* at 343–47, 349, 352, 360. *See generally* HIGHAM, *supra* note 33 (analyzing the rise of nativist sentiment in the United States during this period).

[41] *See* Fleming, *supra* note 32, at 282–83, 291; *see also* Brandfon, *supra* note 22, at 608.

[42] *See* Brandfon, *supra* note 22, at 605, 608, 610.

[43] *See* Fleming, *supra* note 32, at 291.

[44] *See id.* at 290.

[45] *See id.*

[46] Act of May 6, 1882, Pub. L. No. 47-126, 22 Stat. 58; *see* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 119 (1996).

[47] *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (upholding a law designed to bar Chinese immigrants from the United States in the face of a constitutional challenge). *See generally* NEUMAN, *supra* note 46 (tracing the shift from state to federal immigration regulation over the course of the 1800s).

to say that *no* plan involving federal regulation of the distribution of immigrants [would] be acceptable to the southern states."[48]

B. The Modern Era: Latino/a Migrants Come to Alabama

The U.S. federal government, in the wake of the Vietnam conflict in the 1970s, resettled refugees from Southeast Asia across the United States, including Alabama.[49] The southern states provided little English-language education, limited job training opportunities, and few public benefits for the refugees,[50] which eventually led to many Southeast Asian immigrants moving away from the South.

Beginning in the 1990s, increasing numbers of Latina/o immigrants moved to Alabama in response to the state's expanding employment opportunities.[51] This migration has been part of what has been described as "a dramatic demographic, economic, and cultural transformation" of Dixie.[52]

Alabama's Hispanic Population 1980–2010[53]

Year	Population	Hispanic	Percent Hispanic
1980	3,893,888	33,299	0.9%
1990	4,040,587	24,629	0.6%
2000	4,447,100	75,830	1.7%
2010	4,779,736	185,602	3.9%

The demand for unskilled labor, the suspension of the Davis-Bacon Act,[54]+ which requires federal contractors to pay construction workers the prevailing local wage,

[48] Fleming, *supra* note 32, at 290 (emphasis added).

[49] *See* Frank Viviano, *From the Asian Hills to a U.S. Valley . . .* , FAR E. ECON. REV., Oct. 16, 1986, at 47.

[50] *Id.*

[51] *See* Raymond A. Mohl, *Globalization and Latin American Immigration in Alabama*, *in* LATINO IMMIGRANTS AND THE TRANSFORMATION OF THE U.S. SOUTH 51, 53 (Mary E. Odem & Elaine Lacy eds., 2009).

[52] *Id.*

[53] BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: ALABAMA, at tbl. 14, 16 (1982), *available at* http://www2.census.gov/prod2/decennial/documents/1980a_alABC.zip; BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: ALABAMA, at tbl. 3 (1992), *available at* http://www.census.gov/prod/cen1990/cp1/cp-1-2.pdf; U.S. CENSUS BUREAU, ALABAMA: 2000 SUMMARY POPULATION AND HOUSING CHARACTERISTICS, tbl. 3 (2002), *available at* http://www.census.gov/prod/cen2000/phc-1-2.pdf; U.S. CENSUS BUREAU, 2010 CENSUS INTERACTIVE POPULATION SEARCH, *available at* http://2010.census.gov/2010census/popmap/ipmtext.php?fl=01.

[54] 40 U.S.C. §§ 3141–3144, 3146–3147 (2006); *see* WILLIAM G. WHITTAKER, CONG. RES. SERV., RL 33100, THE DAVIS-BACON ACT: SUSPENSION 16–18 (2005); *see also* Elisabeth

and the devastation of Hurricane Katrina in 2005 contributed to the doubling of the foreign-born population of the state, and the Gulf region, in a decade.[55] Cities such as Birmingham offered employment opportunities for unskilled laborers in the construction and restaurant industries.[56]

Latina/o immigrants also have moved to rural northern Alabama to work on chicken farms and poultry processing plants and in factories.[57] One poultry processing plant advertised on a billboard in Tijuana, Mexico, "Mucho Trabajo en Russellville, Alabama" (Much Work in Russellville, Alabama).[58] As this suggests, poultry companies in Alabama targeted Mexican workers for recruitment.[59]

Alabama political leaders have not generally been especially responsive to the political concerns of the burgeoning Hispanic community.[60] For example, Senators Jeff Sessions and Richard Shelby oppose immigration reform, taking a "tough" approach to undocumented immigration.[61] In addition, some African Americans have felt in competition with immigrants for jobs and housing.[62]

"Juan Crow" has been used to describe the subordination of Latina/o undocumented immigrants in the South, including the restricted access of undocumented

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Bumiller & Anne E. Kornblut, *Black Leaders Say Storm Forced Bush to Confront Issues of Race and Poverty*, N.Y. TIMES, Sept. 18, 2005, at 21 (discussing criticism of President Bush's decision to suspend the Davis-Bacon Act). For critical analysis of the suspension of the Davis-Bacon Act, see Haley E. Olam & Erin S. Stamper, Note, *The Suspension of the Davis Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145, 146–47 (2006), and D. Aaron Lacy, *The Aftermath of Katrina: Race, Undocumented Workers, and the Color of Money*, 13 TEX. WESLEYAN L. REV. 497, 504–08 (2007) (analyzing how suspension of minimum wage and employer sanction laws helped foster migration of undocumented immigrants to the Gulf Coast). *See generally* Bennett S. Miller, Note, *No Such Thing as a Free Lunch: Hurricane Katrina and the Davis-Bacon Act*, 16 S. CAL. REV. L. & SOC. JUST. 197 (2006) (reviewing negative impacts on the most vulnerable due to suspension of the Act).

[55] Bankston, *supra* note 31, at 40; *see* Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 58–60 (2008) (analyzing exploitation of Latina/o workers who flocked to the Gulf for employment after Hurricane Katrina).

[56] *See* Raymond A. Mohl, *Globalization, Latinization, and the Nuevo New South*, 22 J. AM. ETHNIC HIST. 31, 42 (2003).

[57] *See id.*

[58] *Id.* at 35.

[59] *See id.*

[60] *See* JOSÉ MARÍA MANTERO, LATINOS AND THE U.S. SOUTH 67 (2008). Latina/o immigrant communities have emerged in the Midwest as well as in Alabama and other southern states. *See generally* APPLE PIE & ENCHILADAS: LATINO NEWCOMERS IN THE RURAL MIDWEST (Ann V. Millard & Jorge Chapa eds., 2004) (discussing Latina/o communities in the rural Midwest and Southwest).

[61] Kenneth Mullinax, *Shelby, Sessions, Congressmen Oppose Immigration Bill*, MONTGOMERY ADVERTISER, June 27, 2007, *available at* http://votesmart.org/public-statement/274217/montgomery-advertiser-shelby-sessions-congressmen-oppose-immigration-bill#.UFpghK472So.

[62] *See* Mohl, *supra* note 56, at 47–48.

immigrants to driver's licenses, public assistance, and public education.[63] Latina/o marches in Atlanta and other southern cities in 2006, protesting strict proposed immigration enforcement laws, resembled the civil rights marches of the 1960s.[64] In the wake of the raids at a poultry processing plant in Albertville, Alabama,[65] more than five thousand people marched in protest.[66]

After a fiery debate ("the Spanish are creeping in," one legislator commented),[67] Alabamans amended their state constitution in 1990 to declare English the official state language.[68] In response, the Alabama Department of Public Safety "decided to administer state driver's license examinations only in English."[69] In *Alexander v. Sandoval*,[70] the Supreme Court found that a Spanish-speaking plaintiff could not bring a federal civil rights claim challenging the requirement that driver's license examinations be given only in English.[71]

II. THE BACKDROP TO ALABAMA'S H.B. 56: THE NATIONAL DEBATE OVER IMMIGRATION

The last decade has been a tumultuous time in U.S. immigration history. September 11, 2001 understandably sparked deep concern over national security,

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[63] *See* Roberto Lovato, *Juan Crow in Georgia*, THE NATION, May 26, 2008, at 21; *see also* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigration Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 172 (2010).

[64] *See* Cameron D. Lippard & Charles A. Gallagher, *Introduction: Immigration, the New South, and the Color of Backlash*, *in* BEING BROWN IN DIXIE 1, 1 (Cameron D. Lippard & Charles A. Gallagher eds., 2011); *see also infra* notes 75–76 and accompanying text (referring to mass marches in 2006 protesting tough immigration legislation proposed by Congress).

[65] *See Special May Day Issue*, IMMIGR. NEWS BRIEFS (May 7, 2006, 6:00 PM), http://immigrationnewsbriefs.blogspot.com/2006/05/inb-5706-special-may-day-issue.html.

[66] *See* Lippard & Gallagher, *supra* note 64, at 1.

[67] Mohl, *supra* note 51, at 57 (quoting Rep. Euclid Rains).

[68] ALA. CONST. art. I, § 36.01 (2012) (submitted at the election held on June 5, 1990, and proclaimed ratified on July 13, 1990, by Proclamation Register No. 6, p. 178) (declaring English to be "the official language of the state of Alabama" by Amendment 509 in 1990).

[69] Alexander v. Sandoval, 532 U.S. 275, 279 (2001). While imposing the English testing requirement on foreigners to obtain an Alabama license, Alabama provided special accommodations for illiterate and disabled applicants; the state also did not require an examination for non-English-speaking drivers with licenses in other states. *See* Sandoval v. Hagan, 197 F.3d 484, 488 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001). For an analysis of whether Alabama's English language amendment and driver's license testing policy constituted discrimination against Hispanics, see Crystal Goodson Wilkerson, Comment, *Patriotism or Prejudice: Alabama's Official English Amendment*, 34 CUMB. L. REV. 253 (2004).

[70] 532 U.S. 275 (2001). In response to the legal challenges, Alabama later offered the written portions of driver's license examinations in multiple languages, which pro-English groups unsuccessfully challenged as violating the Alabama Constitution. *See* Cole v. Riley, 989 So.2d 1001 (Ala. 2007).

[71] *Sandoval*, 532 U.S. at 293.

with this uneasiness morphing into more general calls for increased immigration enforcement along the U.S.-Mexico border.[72] In 2005, the House of Representatives passed an enforcement-oriented measure[73] that, among other things, would have criminalized the status of being undocumented as well as the conduct of those who provide humanitarian assistance to undocumented immigrants.[74] To the surprise of many Americans, opposition to the bill sparked spontaneous mass marches of tens of thousands of people in cities across the United States (including Albertville, Alabama),[75] bringing back memories of the famous civil rights protests of the 1960s.[76]

Over the next few years, Congress debated a variety of more balanced immigration reform proposals,[77] including some that would provide a path to legalization for millions of undocumented immigrants, and was denigrated by opponents as an "amnesty" for "law-breakers."[78] Many supporters of immigration reform expressed optimism about its prospects with the 2008 election of President Barack Obama, who consistently voiced support for comprehensive immigration reform, including a path to legalization for undocumented immigrants.[79]

In hopes of prodding Congress to pass reform legislation, the Obama Administration, in its first term, sought to demonstrate its commitment to immigration enforcement. To that end, the Administration created new programs to facilitate removal of noncitizens and, as a consequence, set a series of annual records for deportations.[80] At least through the 2012 elections, the Administration's enforcement

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[72] *See* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1386–87 (2007).

[73] *See* Border Protection, Antiterrorism, and Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

[74] *See* Roger Mahony, *Called by God to Help*, N.Y. TIMES, Mar. 22, 2006, at A25 (condemning the Sensenbrenner bill).

[75] *See* Lippard & Gallagher, *supra* note 64, at 1.

[76] *See* Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.–C.L. L. REV. 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

[77] *See* Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1600–01 (2009).

[78] *Ideas on Slowing Illegal Immigrants*, LIMITS TO GROWTH (Mar. 31, 2006), http://www.limitstogrowth.org/WEB-text/archive-march06.html (quoting an interview with Professor George Grayson).

[79] *See* Kathleen Kim, *Introduction: Perspectives on Immigration Reform*, 44 LOY. L.A. L. REV. 1323, 1327–28 (2011).

[80] *See supra* note 6 and accompanying text; *infra* notes 183–85 and accompanying text. Immigration detentions, removal of "criminal aliens," and criminal prosecutions of immigration violations have skyrocketed over the last few years. *See* David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012). At the same time, the Obama Administration has taken steps to direct immigration enforcement authorities to exercise prosecutorial discretion and not seek to deport long-term noncitizen residents who

efforts and record number of removals failed to prod Congress to pass comprehensive immigration reform.[81]

While some immigrant rights advocates have criticized the enforcement measures,[82] other critics, including many champions of the state immigration enforcement laws, challenge President Obama's immigration record on very different grounds. They boldly assert that his Administration has failed to enforce the U.S. immigration laws[83] and has acted lawlessly in not protecting the integrity of the U.S. border with Mexico.[84] This fervent—yet, in my view, unsubstantiated—claim has become nothing less than a battle cry for political leaders supporting state immigration enforcement measures.[85]

The intense debate over immigration has also been fueled in no small part by the fact that immigrants from Mexico today settle in regions of the country, including the Midwest and South, which previously have not been destination points for large numbers of Mexican immigrants.[86] Changes in immigration patterns to the United States in recent years have slowly transformed the nature, as well as the locations of, the nation's civil rights conflicts.[87] Besides seeing debates over immigration

do not pose a safety threat to the community. *See* Julia Preston, *U.S. Issues New Deportation Policy's First Reprieves*, N.Y. TIMES, Aug. 23, 2011, at A15; *see also* Meghan McCarthy, *Deferred Deportation Program Set to Take Applications,* WASH. POST, Aug. 12, 2012, at A4 (reporting on the Obama Administration's implementation of the Deferred Action for Childhood Arrivals program, which allows for the deferral of removal proceedings against noncitizens who arrived in the United States as minors). Such a policy may benefit some immigrants but would do nothing to provide security to undocumented immigrants, who even with a favorable exercise of prosecutorial discretion, will continue to live in legal limbo. *See infra* notes 186–89 and accompanying text.

[81] *See* Johnson, *supra* note 77, at 1600.

[82] *See* Kim, *supra* note 79, at 1327 (stating "commentators" do not believe the enforcement measures reflect "meaningful" policy reform).

[83] *See Congress' Inaction on Immigration Reform Fuels States' Actions*, MONTGOMERY ADVERTISER (Oct. 10, 2011), http://dreamact.info/node/252533.

[84] As one cosponsor of Alabama's H.B. 56 stated, "[t]he federal government's job is to enforce immigration law. . . . We are hoping . . . this [law] . . . will put pressure on Washington now to correct the broken immigration system." *Id.* (quoting House Majority Leader Mickey Hammon); *see* James A. Kraehenbuehl, Comment, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465, 1470–71 (2011) ("Supporters of [state laws like Arizona's S.B. 1070] contend that they are motivated by the federal government's failure to fully enforce immigration law.").

[85] *See* Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at Al.

[86] *See supra* Part I.B.

[87] *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1492–96 (2002); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009); *see also* Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009) (criticizing state and local governments' pursuit of immigration enforcement measures to protect cultural cohesion); George A.

inflame the nation,[88] eligibility for driver's licenses and access to a college education, to offer two examples, have emerged as issues of pressing concern to undocumented immigrants (as well as the greater Latina/o community) in states from coast to coast.[89] The ardent, although often unsuccessful, resistance to the rapid proliferation of state immigration enforcement laws has starkly revealed how immigration enforcement has become a core Latina/o civil rights concern in the early twenty-first century.[90]

The negative impacts of the state immigration enforcement laws on immigrants and Latina/os closely track those created by the racial caste system of Jim Crow for African Americans—with the machinery of the justice system serving as an important enforcement tool—that dominated the South for much of the twentieth century.[91] This is true even though many of the current legal challenges to the state laws[92] center on the ostensibly race-neutral claim that the states are intruding on the federal power to regulate immigration and thus that federal immigration laws preempt certain provisions of state laws.[93]

Claims based on the Equal Protection Clause of the Fourteenth Amendment and allegations of invidious racial discrimination have not been the centerpiece of the U.S. government's legal challenges to the immigration enforcement laws of Arizona and Alabama.[94] By focusing on the relative distribution of federal and state power

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Martínez, *Arizona, Immigration, and Latinos*, 44 ARIZ. ST. L.J. 175, 204 (2012) ("Opponents of immigration—especially Latino immigration—often contend that immigrants pose a threat to American cultural identity or the American way of life.").

[88] *See generally* Catherine Lejeune, *Immigrants in the United States: "Illegal Aliens" on Their Way to Becoming Emergent "Possible Subjects,"* EURO. J. OF AM. STUD. 2 (2009).

[89] *See* Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004); Maria Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004); Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775 (2002); *see also infra* Part IV.B.

[90] *See infra* Part III.B.

[91] *See* McKanders, *supra* note 63; *see also* Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2–3 (2011) (discussing how the various legal measures directed at immigrants, including S.B. 1070, have "transformed [Arizona] from a place where immigrants and Latinos suffered in relative silence into a home of a vocal, passionate group of advocates whose activism has made Phoenix the modern-day Selma[, Alabama,] in the struggle for immigrant and Latino civil rights in America"). For an analysis of civil rights rhetoric in the advocacy of immigration reform, see Cristina M. Rodriguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125 (2010). *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH (2004) (analyzing historically the civil rights impacts of the administration and enforcement of U.S. immigration laws).

[92] *See infra* note 133.

[93] *See infra* notes 155–56 and accompanying text.

[94] *See* Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011)

over immigration regulation, the much-publicized litigation over current state immigration enforcement laws harkens back to the uneasy memories of the "states' rights" defense of racial segregation in Jim Crow America.[95]

The sensitivity of the modern immigration debate—and the underlying salience of race—can be seen in two contemporary American controversies touching on immigration and citizenship: (1) the debate over birthright citizenship in the U.S. Constitution;[96] and (2) the claim of a loosely affiliated group known as the "birthers" that President Barack Obama is foreign-born and therefore constitutionally ineligible to be President.[97] Those controversies provide important insights about the nature of the modern debate over immigration reform in the United States.

A. "Anchor Babies"

Ratified immediately after the Civil War, the Fourteenth Amendment, at a minimum, was designed to extend citizenship to African Americans, who the Civil War freed from slavery.[98] Section 1 provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[99] Under the rule of birthright or *jus soli* citizenship, national citizenship with few exceptions, such as in the case of the birth of the children of diplomats, is based on the territory of one's birth,[100] which contrasts with citizenship by blood (*jus sanguinis*), the rule that historically governed citizenship in many nations.[101]

(analyzing how successful federal preemption challenges to state and local immigration enforcement laws may further equality principles).

[95] *See* Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and "Unusable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 53 (2010) (analyzing the reaction of states to the federal government's immigration policy and the implementation of "anti-immigration measures" at the state level).

[96] *See* Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331 (2010).

[97] *See* ARTHUR GOLDWAG, THE NEW HATE 4 (2012).

[98] *See* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 459–74 (2009) (reviewing the fundamentals of U.S. citizenship law).

[99] U.S. CONST. amend. XIV, § 1.

[100] For analysis of the history of the citizenship clause of the Fourteenth Amendment—and a vigorous defense of birthright citizenship, see Epps, *supra* note 96; *see also* Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311 (2012) (analyzing the history of political efforts to curtail the Fourteenth Amendment's provision for birthright citizenship).

[101] *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY 17, 17–21 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

Contributing to the tensions that culminated in the Civil War, the Supreme Court's watershed decision in *Dred Scott v. Sandford*[102] made clear to the nation, if not the world, that race was a central ingredient to U.S. citizenship in antebellum America. Racial prerequisites also historically have been integral to U.S. naturalization laws.[103]

Under the original American naturalization law passed in 1790, eligibility for naturalization was limited to "white" immigrants.[104] After ratification of the Fourteenth Amendment, Congress amended the law to make persons of African ancestry eligible for citizenship as well.[105] As a result, the largest group of immigrants denied citizenship by the racial naturalization requirements in the post–Civil War period were neither black nor white, but Asian.[106] Denied the opportunity to naturalize and become U.S. citizens, Asian immigrants, like African Americans before the Civil War, could not vote and were perpetually disenfranchised from the formal political process.[107]

Today, political leaders and news reports often refer disparagingly to "anchor babies,"[108] U.S. citizens born to undocumented parents, and suggest that they are nothing less than a "scourge" on American society.[109] Having been born in the United States, these residents are citizens by operation of the Fourteenth Amendment.[110] Opponents of birthright citizenship frequently criticize "anchor babies,"[111] who they

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[102] 60 U.S. (19 How.) 393 (1857) (holding that a freed slave was not a U.S. citizen for purposes of determining access to the federal courts), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see* Kenneth W. Mack, *The Role of Law in the Making of Racial Identity: The Case of Harrisburg's W. Justin Carter*, 18 WIDENER L.J. 1, 3 (2008) (noting how in *Dred Scott* and related cases, the American "legal system had . . . put its imprimatur on an idea, a powerful idea, that United States citizenship was racially coded").

[103] *See* IAN HANEY LÓPEZ, WHITE BY LAW 2–3 (10th anniv. ed. 2006).

[104] Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). For the classic treatment of the judicial decisions applying the "whiteness" requirement for citizenship, see LÓPEZ, *supra* note 103.

[105] Act of July 14, 1870, ch. 254, 16 Stat. 254, 256.

[106] *See* Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000*, 8 ASIAN PAC. AM. L.J. 1, 5 (2002).

[107] *See, e.g.*, United States v. Thind, 261 U.S. 204, 215 (1923) (holding an immigrant from India was not eligible for naturalization); Ozawa v. United States, 260 U.S. 178, 190, 198 (1922) (finding that an immigrant from Japan was not eligible for naturalization); *see also* Aoki, *supra* note 106, at 4–8 (reviewing the history of disenfranchisement of Asian Americans as a consequence of racial exclusions in U.S. naturalization law).

[108] *See* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant*, 44 GA. L. REV. 65, 86 n.52 (2009).

[109] *See, e.g.*, Will Wilkinson, *Arizona's Latest Immigration Idea Makes Sense*, CATO INST. (July 2, 2010), http://www.cato.org/publications/commentary/arizonas-latest-immigration-idea-makes-sense (describing opposition to birthright citizenship for children of non-U.S. citizens).

[110] *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[111] *See* Laura A. Hernández, *Anchor Babies: Something Less than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 331 (2010) ("[T]here is a real and growing subclass of citizens: children born in the United States to undocumented immigrant

allege seek to secure legal immigration status in the United States for their family members and propagate what is disparaged as "chain migration."[112]

The current attacks on "anchor babies" build on negative racial, gender, and class stereotypes in U.S. society about Latina/os, especially the stereotypical poor, fertile Latina who gives birth young and often to access U.S. citizenship for her offspring and the public benefit system.[113] Racially charged terminology is common to the debate over immigration in the United States. The denigration of "aliens" and "illegal aliens" can be heard frequently in modern times, with these terms often used as a proxy—racial code for use in polite company, if you will—for Latina/os.[114]

Once a supporter of comprehensive immigration reform,[115] Senator Lindsay Graham (R-SC) offered mainstream credibility to the call for the reevaluation of birthright citizenship by calling for its outright abolition through amendment of the Fourteenth Amendment. He stated that:

> People come here to have babies. . . . *They* come here to drop a child. It's called "drop and leave." To have a child in America, *they* cross the border, *they* go to the emergency room, have a child, and that child's automatically an American citizen. That shouldn't be the case. That attracts people here for all the wrong reasons.[116]

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parents. Pejoratively described as 'anchor babies,' these citizen children suffer from misguided attempts at immigration control by municipal and state governments." (footnote omitted)).

[112] The claim that "anchor babies" facilitate "chain immigration" is often overstated in the public debate over birthright citizenship. Under U.S. immigration law, a U.S. citizen child cannot petition for their parents to obtain legal status until the child is twenty-one. Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006). It thus would take many years for an "anchor baby" to attempt to help his or her parents, or other family members, become lawful permanent residents. *See* Jennifer M. Chacón, *Civil Rights, Immigrants' Rights, Human Rights: Lessons from the Life and Works of Dr. Martin Luther King, Jr.*, 32 N.Y.U. REV. L. & SOC. CHANGE 465, 472 n.36 (2008).

[113] *See* Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 60, 81–82 (2012); Gebe Martinez et al., *Birthright Citizenship Debate Is a Thinly Veiled Attack on Immigrant Mothers*, CENTER FOR AM. PROGRESS (Aug. 18, 2010), http://www.americanprogress.org/issues/2010/08/citizenship_debate.html.

[114] *See* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 269 (1997). *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (examining the emergence of "illegal aliens" in the modern United States).

[115] *See* Charles E. Schumer & Lindsey O. Graham, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, at A23; Andy Barr, *Graham Eyes 'Birther Citizenship,'* POLITICO (July 29, 2010, 5:14 PM), http://www.politico.com/news/stories/0710/40395.html.

[116] Barr, *supra* note 115 (emphasis added) (quoting Senator Graham).

The debate over birthright citizenship influences policy and proposals for changes in the law. As is well-known, the Arizona legislature passed the controversial immigration enforcement law known as S.B. 1070.[117] Roughly contemporaneously, the legislature also considered a bill that would have prohibited state and local officials from issuing birth certificates to the children of undocumented immigrants,[118] a move clearly intended to undercut birthright citizenship under the Fourteenth Amendment. The state also passed a panoply of immigration and related measures, including a ban on teaching ethnic studies in public schools, which was unquestionably focused on Chicana/o Studies (and thus, by definition, on persons of Mexican ancestry).[119]

Florida has gone even further in its efforts to punish "anchor babies." It made all students, including U.S. citizens born on American soil, ineligible for in-state fees at public colleges and universities if they cannot prove the lawful immigration status of *their parents*.[120] U.S. citizens thus are punished for the immigration status of their parents. The constitutionality of the policy, which affects many Latina/o college students in Florida who are U.S. citizens, was successfully challenged as a violation of the U.S. Constitution.[121]

While public debates over citizenship today are often not as overtly about race as they were in antebellum America, citizenship restrictions at some level represent a response to the changing racial demographics of modern immigration, as well as changes in immigrant destinations. The last decades have seen increasing numbers of Mexican immigrants moving to the South, including places like Alabama, Georgia, and South Carolina,[122] all of which in recent years passed state immigration enforcement laws.

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[117] *See* Arizona v. United States, 132 S. Ct. 2492, 2947–98 (2012) (affirming preliminary injunction of three of four provisions of S.B. 1070).

[118] *See* Keith Aoki, *Arizona—Pick On Someone Your Own Size*, SFGATE, June 17, 2012, http://www.sfgate.com/opinion/openforum/article/Arizona-pick-on-someone-your-own-size-3184596.php.

[119] *See* Nicholas B. Lundholm, Law and Policy Note, *Cutting Class: Why Arizona's Ethnic Studies Ban Won't Ban Ethnic Studies*, 53 ARIZ. L. REV. 1041, 1042–43, 1047 (2011). Professor Mary Romero has analyzed how an activist group in Arizona known as Mothers Against Illegal Aliens advocated the passage of a series of laws designed to punish undocumented immigrants living in the United States as well as Latina/os generally. *See* Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff,"* 14 HARV. LATINO L. REV. 337, 352–54 (2011).

[120] *See* Linda Greenhouse, *Sins of the Parents*, N.Y. TIMES OPINIONATOR (Nov. 30, 2011, 9:00 PM), http://opinionator.blogs.nytimes.com/2011/11/30/sins-of-the-parents/. A district court invalidated the university restrictions on Equal Protection grounds. *See* Ruiz v. Robinson, 2012 U.S. Dist. LEXIS 124209, No. 11-CV-23776-K-M-M (S.D. Fla. Aug. 31, 2012).

[121] *See* Greenhouse, *supra* note 120.

[122] *See supra* notes 84–90 and accompanying text.

States with Largest Hispanic Population Growth, 2000–2010[123]

State (rank among all states)	*Growth (Percentage)*
South Carolina (1)	148
Alabama (2)	145
Georgia (9)	96

B. The "Birthers"

Section 1 of Article II of the U.S. Constitution provides that "[n]o person except *a natural born Citizen* . . . shall be eligible to the Office of President."[124] The United States, in electing as president, Barack Obama, whose father was Kenyan, saw the emergence of the unprecedented "birther" movement. The "birthers" claim that President Obama, the first African-American President, was in fact not born in the United States, is not a citizen by birth under the Fourteenth Amendment, and is therefore ineligible for the Presidency.[125]

The challenge to Barack Obama's constitutional eligibility for the Presidency persists even though he has provided proof of his birth in Hawaii, which makes him a U.S. citizen under the Constitution.[126] In stark contrast, the fact that Barack Obama's opponent in the 2008 election, Senator John McCain, who is white, was undisputedly born not in the territorial United States but in the Panama Canal Zone and, in the

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[123] PEW HISPANIC CTR., PEW RESEARCH CTR., CENSUS 2010: 50 MILLION LATINOS: HISPANICS ACCOUNT FOR MORE THAN HALF OF NATION'S GROWTH IN PAST DECADE 2 (2011), *available at* http://www.pewhispanic.org/files/reports/140.pdf.

[124] U.S. CONST. art. II, § 1 (emphasis added).

[125] *See* Stephen Parks, *The Birthers' Attacks and the Judiciary's Article III "Defense" of the Obama Presidency*, 38 S.U. L. REV. 179, 180 (2010); *see also* Samuel G. Freedman, *In Untruths About Obama, Echoes of a Distant Time*, N.Y. TIMES, Nov. 1, 2008, at A21 (discussing the campaign to label Obama as a Muslim as an effort to make him seem un-American); Frank Rich, *The Obama Haters' Silent Enablers*, N.Y. TIMES, June 14, 2009, at WK8.

[126] *See Birthers Unconvinced by Obama's Certificate*, NPR (Apr. 28, 2011), http://www.npr.org/2011/04/28/135808711/birthers-unconvinced-by-obamas-certificate. In 2012, Maricopa County Sheriff Joe Arpaio, the subject of a scathing Justice Department report documenting rampant and systemic civil rights violations of Latina/os and immigrants, *see* Letter from Thomas E. Perez to Bill Montgomery (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf, announced that there was probable cause for further investigation into whether President Obama was born outside the United States. *See* Ross D. Franklin, *Arizona Sheriff Unveils Obama Birth Probe*, USA TODAY (Mar. 1, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-03-01/arizona-sheriff-joe-arpaio-obama-birth-certificate/53318688/1. The Department of Justice later filed suit for discriminatory and unconstitutional law enforcement practices by the Maricopa County Sheriff's Office. *See Assistant Attorney General for the Civil Rights Division Thomas E. Perez Speaks at the Maricopa County Press Conference*, U.S. DEP'T OF JUST. (May 10, 2012), http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-120510.html.

view of at least one prominent legal scholar, is not a "natural born citizen" eligible to be President, failed to generate much public attention or controversy.[127]

The claim that President Obama is constitutionally ineligible for the Presidency has placed into doubt, in the minds of a vocal minority of Americans,[128] the legitimacy of his entire Administration. The birther controversy highlights the intersection of race and citizenship.[129] It demonstrates how people of color—even the duly elected President of the United States—whether legal citizens or not, must struggle for full membership in U.S. society, thus belying the notion that the election of President Obama demonstrates that we now live in a post-racial America.[130]

C. The Failure of Comprehensive Immigration Reform

The harsh debate over immigration, replete with frequent nasty attacks on "illegals," "anchor babies," and President Obama's legitimacy as President, continues. As a result, Congress has been stymied in its efforts to pass comprehensive national immigration reform.[131] State and local governments enthusiastically filled a perceived void in effective federal enforcement of the immigration laws, moving to slow down increased migration to their jurisdictions from Mexico by making the lives of all persons of Mexican ancestry in the state nothing less than miserable.[132]

In 2011, the legislatures of the states of Alabama, Georgia, and South Carolina all passed strict immigration enforcement measures.[133] Unsettling demographic change,[134] combined with Congress's failure to reform an immigration system that

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[127] *See* Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2008).

[128] *See, e.g.*, THE BIRTHERS, http://www.birthers.org (last visited Dec. 6, 2012).

[129] *See supra* notes 102–07 and accompanying text.

[130] *See* Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-Discrimination Law*, 87 IND. L.J. 325, 325 (2012) ("The election of Barack Obama to the U.S. presidency on November 4, 2008, prompted many declarations from journalists and commentators about the arrival of a post-racial society, a society in which race is no longer meaningful.").

[131] *See infra* notes 133–35 and accompanying text.

[132] *See, e.g.*, Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1170 (M.D. Ala. 2011) (describing Representative Mickey Ray's view that the purpose of Alabama's immigration law as to make an illegal immigrant's life "difficult").

[133] *See* Georgia Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317 (N.D. Ga. 2011), *aff'd in part*, *rev'd in part sub nom.*, Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012); United States v. Bentley, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *aff'd in part*, *rev'd in part*, United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012); Complaint, Lowcountry Immigration Coal. v. Haley, No. 2:11-CV-02779-RMG (D.S.C. Oct. 12, 2011).

[134] *See supra* notes 86–87 and accompanying text.

commentators across the political spectrum vigorously criticize,[135] contributed to the partisan political dynamics resulting in the passage of "get tough on immigrant" measures by several states. Alabama is simply the latest state to act—and act decisively it did.

As will be discussed, there is considerable uncertainty today about the extent of the power of the states to participate in the enforcement of the immigration laws.[136] Despite that uncertainty, states have not shied away from passing their own immigration enforcement legislation.[137] Although the legal debate centers on state versus federal power over immigration enforcement, immigrant and Latina/o advocacy groups, as well as many Latina/os, see the stakes in terms of the civil rights of immigrants and Latina/os.[138]

III. THE U.S. GOVERNMENT'S CHALLENGE TO ALABAMA'S IMMIGRATION ENFORCEMENT LAW

Many iconic incidents in U.S. civil rights history—from Governor George Wallace proclaiming "Segregation now! Segregation tomorrow! Segregation forever!" in his 1963 inaugural address, to Birmingham Police Chief Bull Connor unleashing fire hoses on peaceful civil rights marchers—are set in Alabama and, despite the passage of roughly half a century, remain indelibly imprinted on the national imagination.[139] Echoing the segregationists who invoked "states' rights" as a defense to the intervention of the U.S. government to guarantee the civil rights of African Americans, political leaders in the South and elsewhere today oppose the attempts of the U.S. government to defend the civil rights of immigrants through lawsuits challenging the proliferating state immigration enforcement laws.[140]

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[135] *See infra* notes 183–87 and accompanying text (summarizing the Obama Administration's removal campaigns and President Bush's recognition of the hardships undocumented immigrants face in the United States).

[136] *See infra* Part III.A.

[137] *See supra* notes 1–2 and accompanying text.

[138] *See* Kevin R. Johnson, *Public Perception and the Law in* Arizona v. United States, JURIST (Apr. 29, 2012), http://jurist.org/forum/2012/04/kevin-johnson-arizona.php; *see also* Michael A. Olivas, *The Political Efficacy of* Plyler v. Doe*: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 15–16 (2011) (characterizing state and local immigration enforcement measures as "a racial, ethnic, and national origin 'tax' that will only be levied upon certain groups, certain to be Mexicans in particular, or equally likely, Mexican Americans").

[139] HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY, 1954–1980, at 145, 156 (1981); *see also* William Arrocha, *From Arizona's S.B. 1070 to Georgia's H.B. 87 and Alabama's H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation*, 48 CAL. W. L. REV. 245, 272–77 (2012) (tying H.B. 56 into Alabama's segregationist history and quoting Governor Wallace). *See generally* DIANE MCWHORTER, CARRY ME HOME (2001); WILLIAM WARREN ROGERS ET AL., ALABAMA (1994).

[140] *See* Fan, *supra* note 94, at 908.

In 2011, the legislature of the state of Alabama passed what many observers believed—and state political leaders bragged—was the toughest state immigration enforcement law in the United States.[141] In these times, being tougher than the rest of the states was no small feat. In the last few years, the nation has seen a flood of progressively more unforgiving state and local immigration enforcement laws.[142]

H.B. 56 did not just spontaneously happen, but came after years of political agitation. Increased Latina/o immigration to Alabama—and hostile responses—were precursors to H.B. 56.[143] In 2007, the Alabama Policy Institute (API) published an article in the *Huntsville Times* blaming the "vacuum of leadership" by the U.S. government for the influx of undocumented immigrants into the United States.[144] The Institute called for the State to create a commission to formulate "a fair, but tough, plan of action to address illegal aliens."[145] Alabama, according to the API, should only welcome immigrants "who want to embrace and assimilate into the culture of the United States."[146]

In response, the Alabama legislature passed a joint resolution forming the Joint Interim Patriotic Immigration Commission to study immigration in Alabama and make recommendations to the legislature.[147] The resolution began by stating that "the debate on illegal immigration continues unabated across the nation and in every state capitol while the unprecedented influx of non-English speaking immigrants requires Alabama policy makers to confront a growing critical public policy crisis."[148] It further stated that "the states must exercise power to investigate, apprehend, detain, and remove illegal aliens."[149]

In 2008, the Commission issued its report that, besides making many recommendations to the federal government to discourage illegal immigration, recommended English-only education, proof of lawful presence to obtain public benefits, and expansion of various activities to enforce the immigration laws.[150] Undocumented

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[141] *See* Deborah Barfield Berry, *Gutierrez Joins Fight Against Alabama Law*, CHI. SUN-TIMES, Nov. 20, 2011, at 6.

[142] *See supra* notes 1–2 and accompanying text.

[143] *See supra* Part I.B.

[144] Alabama Policy Institute, *Proposal to Bring Clarity and a Way Forward to Address Immigration in Alabama*, HUNTSVILLE TIMES, Feb. 20, 2007, *available at* http://www.alabamapolicy.org/legislative_update/print.php?ledgeUpdateID=52.

[145] *Id.*

[146] *Id.* Immigrants to the United States—especially immigrants from Mexico—historically have been criticized for allegedly failing to assimilate into U.S. society. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997).

[147] 2007 Ala. Acts 1107.

[148] *Id.*

[149] *Id.*

[150] *See* JOINT INTERIM PATRIOTIC IMMIGR. COMM'N, JOINT INTERIM PATRIOTIC IMMIGRATION COMMISSION REPORT 8–10 (2007).

immigrants charged with a crime should not be released on bond.[151] The report further recommended that undocumented persons should be prosecuted aggressively and that "illegal immigrants [should] be discouraged from coming to Alabama."[152] The cosponsors of H.B. 56, Senator Scott Beason (Vice Chair) and Representative Micky Hammon, served on the Commission.[153] With the Commission's report serving as a blueprint, the Alabama legislature enacted H.B. 56 in 2011.[154]

A. The U.S. Government's Challenge to H.B. 56

Shortly before H.B. 56 was to go into effect, the U.S. Department of Justice challenged the constitutionality of the Alabama immigration enforcement law, as it challenged those enacted in Arizona and South Carolina.[155] The challenges were primarily founded on the U.S. Constitution's Supremacy Clause, which makes federal law the "supreme Law of the Land."[156] In these race-neutral legal challenges, the U.S. government claimed that the state laws impermissibly intrude on the federal power to regulate immigration and thus violate the Constitution's dictate that federal law is supreme.

To this point, the Supreme Court has not been altogether clear on the role that states can play in the enforcement of federal immigration laws.[157] For example, in *De Canas v. Bica*,[158] the Court in 1976 stated that the "[p]ower to regulate immigration is *unquestionably exclusively a federal power*"; although that language sounds crystal clear, the Court proceeded to uphold a California law allowing the imposition of sanctions on the employers of undocumented immigrants.[159] In 2011, in *Chamber of Commerce v. Whiting*,[160] the Court reiterated federal supremacy over immigration regulation but, at the same time, refused to disturb an Arizona law that allowed the

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[151] *See id.* at 9.

[152] *Id.* at 10–11.

[153] *See* JOINT INTERIM PATRIOTIC IMMIGR. COMM'N, *supra* note 150.

[154] *See supra* notes 9–11 and accompanying text.

[155] *See supra* note 133.

[156] U.S. CONST. art. VI, cl. 2.

[157] A number of scholars have advocated greater state and local involvement in immigration regulation. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994). Other scholars have raised serious questions about the propriety of allowing state and local governments to assist in the enforcement of the U.S. immigration laws. *See, e.g.*, Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

[158] 424 U.S. 351 (1976).

[159] *Id.* at 354 (emphasis added).

[160] 131 S. Ct. 1968 (2011).

state to strip the licenses of businesses that were repeatedly found to employ undocumented immigrants.[161]

In 2011, the U.S. Court of Appeals for the Ninth Circuit struck down four core provisions of Arizona's S.B. 1070.[162] In affirming in part and reversing in part, the Supreme Court reaffirmed federal primacy over immigration but let one of the four provisions—one of the more controversial ones—stand.[163] Although including strong language about the primacy of federal power over immigration, the Court did not wholly displace state regulation in the field.[164]

As it had done with respect to Arizona's S.B. 1070, the U.S. Department of Justice challenged certain provisions of the Alabama immigration enforcement law on the ground that they usurped the power of the federal government to regulate immigration and thus were preempted by federal law.[165] A federal district court enjoined four provisions of H.B. 56 from going into effect.[166] Disagreeing with the Ninth Circuit in *United States v. Arizona* (but consistent with the Supreme Court's subsequent ruling[167]), the district court upheld H.B. 56's requirement that state and local police check the immigration status of persons about whom they have a "reasonable suspicion" are undocumented.[168] The U.S. Court of Appeals for the Eleventh Circuit and upheld that provision.[169]

A district court also enjoined the provisions of H.B. 56 as applied to Alabama's mobile home statute;[170] the new law would have made it unlawful for an undocumented immigrant to pay a registration fee for an application, or renewal of, a manufactured home permit.[171] The court found that "there is evidence that the legislative debate on HB 56 was laced with derogatory comments about Hispanics. This evidence reinforces the contention that [the] term illegal immigrants (the purported target of HB 56) was just a racially discriminatory code for Hispanics."[172] The court further

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[161] *See id.* at 1973.

[162] *See* United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), *aff'd in part*, *rev'd in part*, 132 S. Ct. 2492 (2012).

[163] *See Arizona*, 132 S. Ct. at 2507–10.

[164] *See id.* at 2500–01, 2507–10.

[165] Complaint, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-02746).

[166] *See* United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011).

[167] *Arizona*, 641 F.3d at 346–54.

[168] *See Alabama*, 813 F. Supp. 2d at 1324–28. The Supreme Court later upheld, in the face of a facial challenge a similar provision in the Arizona law. *See Arizona*, 132 S. Ct. at 2507–10.

[169] *See* United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012).

[170] Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1196 (M.D. Ala. 2011).

[171] *See id.* at 1171–72, 1198.

[172] *Id.* at 1193 (emphasis added); *see also* Villas at Parkside Partners v. City of Farmers Branch, 675 F.3d 802, 804 (5th Cir. 2012) (striking down a local ordinance prohibiting the rental of housing to undocumented immigrants and "conclud[ing] that the ordinance's sole purpose is *not* to regulate housing but to exclude undocumented aliens, specifically Latinos,

recognized that "the State's actions in enforcing § 30 of HB 56 will have a disproportionate effect on Latinos in Alabama."[173]

The fact that race is implicated by state and local laws designed to bolster enforcement of the immigration laws, should not be surprising. From the days of the infamous Chinese Exclusion Acts in the late 1800s to the present, the U.S. immigration laws and their enforcement have resulted in the exclusion and deportation of certain disfavored racial and other groups from the United States.[174]

B. Civil Rights Implications of Immigration Enforcement

Federal preemption doctrine aside, many critics of the state and local immigration enforcement laws contend that those laws threaten the civil rights of immigrants and U.S. citizens of particular national origin ancestries.[175] In particular, the provisions in both the Arizona and Alabama laws, requiring police to verify the immigration status of persons about whom they have a "reasonable suspicion" of being undocumented, raise serious concerns about possible increased racial profiling of Latina/os by state and local police.[176] The Supreme Court upheld this provision in the Arizona

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from the City of Farmers Branch"), *vacated and reh'g en banc granted*, 688 F.3d 801 (5th Cir. 2012); Sofia D. Martos, Note, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099, 2102 (2010) (stating that local immigration ordinances "can . . . serve as 'coded codes'—facially neutral ordinances enacted to address immigration concerns and target specific communities"); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (contending that local immigration ordinances that bar rental of housing to undocumented immigrants increase the likelihood of housing discrimination against Latina/os).

[173] *Cent. Ala. Fair Hous. Ctr.*, 835 F. Supp. 2d at 1197.

[174] *See generally* Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009); Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008), http://yalelawjournal.org/2008/10/28/johnson.html.

[175] *See supra* notes 136–38 and accompanying text. Localities obviously do not always act in racially discriminatory ways. In fact, local governments at times have embraced policies designed to promote racial equality. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (reviewing—and invalidating—two school district plans considering race in public school assignments in an attempt to ensure racially diverse schools); R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 265 (2011). With respect to immigration enforcement, some cities have sought to limit their involvement in assisting the U.S. government in enforcing the immigration laws. *See* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012); *see also* Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (exploring various types of so-called "sanctuary cities").

[176] *See* H.B. 56, *supra* note 10, § 12; *see, e.g.*, Gabriel J. Chin & Kevin R. Johnson, *Profiling's Unlikely Enabler: A High Court Ruling Underpins Ariz. Law*, WASH. POST, July 13,

law but left the door open to future legal challenges as state and local police apply that provision.[177]

Racial profiling in law enforcement, including immigration enforcement, is an evil that the nation has long battled but has found extremely difficult to eradicate.[178] The claim of civil rights advocates is that "foreign-looking" people, especially (but not limited to) Latina/os, will bear the brunt of the mandatory immigration checks under state laws like Arizona's and Alabama's.[179] Fear of racial profiling may well be the most frequently stated objection to the state immigration enforcement laws.[180]

Importantly, the civil rights implications of immigration enforcement exist regardless of whether the states or the federal government are primarily responsible for immigration enforcement. Although the *state* immigration enforcement laws are especially stark in terms of their civil rights consequences, the record numbers of immigrants detained and deported by the *federal* government in recent years also have provoked considerable criticism on civil rights grounds.[181] The racially disparate consequences of U.S. immigration enforcement have been well-documented.[182]

High level officials in the Obama Administration, including the President himself, regularly proclaim that its removal campaigns seek to promote public safety by focusing on "criminal aliens."[183] However, the Administration's much-touted—and almost as frequently maligned—"Secure Communities" program, which requires state and local law enforcement agencies to cooperate with U.S. immigration authorities, has facilitated the removal of many immigrants arrested for, but not necessarily convicted of, relatively minor criminal offenses.[184] To make matters worse, record

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2010, at A15; Brian Lyman, *Catholic League Criticizes Illegal-Immigration Law*, MONTGOMERY ADVERTISER, Aug. 31, 2011, *available at* http://cis.org/MorningNews/083111.

[177] *See* Arizona v. United States, 132 S. Ct. 2492, 2492, 2510 (2012).

[178] *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing racial profiling in criminal law and immigration law enforcement). Some commentators have expressed concern that the new local efforts to enforce U.S. immigration laws are expanding police discretion in negative ways. *See* Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901 (2011).

[179] *See* Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 342 (2011).

[180] *See* Johnson, *supra* note 138.

[181] *See supra* note 6 and accompanying text.

[182] *See supra* notes 86–87 and accompanying text.

[183] *See* Robert Farley, *Obama Says Deportation of Criminals Up 70 Percent Under His Administration*, TAMPA BAY TIMES, May 11, 2011, http://www.politifact.com/truth-o-meter/statements/2011/may/11/barack-obama/obama-says-deportation-criminals-70-percent-under-/.

[184] *See* Ray, *supra* note 179, at 327–28. *See generally* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (analyzing critically state and local cooperation

levels of removals have torn apart families comprised of people with mixed immigration statuses; thousands of U.S. citizen children have been effectively removed from, or abandoned in, the United States when the U.S. government deported their immigrant parents.[185]

The civil rights implications of federal immigration enforcement should be self-evident. After all, approximately 11–12 million undocumented immigrants (roughly 60% from Mexico) live,[186] to quote President George W. Bush, in the "shadows of American life."[187] In communities across the country, they toil in the fields, restaurants, hotels, construction sites, garment factories, and homes, with many immigrant workers today caring for our children, just as African Americans did in the days of Jim Crow. Millions of undocumented immigrants live in legal limbo, facing uncertainty about what legal rights they enjoy in the United States. Even such a mundane event as a traffic stop for a broken tail light on an automobile places their entire lives—family, friends, job—in this country in jeopardy.[188] To make matters worse, racial profiling in immigration enforcement is a fact of life for many immigrants and U.S. citizens alike.[189]

Although civil rights impacts are endemic to immigration enforcement by the state and federal governments, state immigration enforcement efforts raise greater civil rights concerns than federal—and, by definition, national—immigration enforcement efforts.[190] Laws by individual states create a patchwork of enforcement

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with the federal government in immigration enforcement and efforts at removal of "criminal aliens" from the United States).

[185] *See* U.C. BERKELEY INT'L HUM. RTS. LAW CLINIC ET AL., IN THE CHILD'S BEST INTEREST? (2010), *available at* http://www.law.berkeley.edu/files/Human_Rights_report.pdf; Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010).

[186] *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., PEW RESEARCH CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i (2009), *available at* http://pewhispanic.org/files/reports/107.pdf; JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., PEW RESEARCH CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE, at i (2010), *available at* http://pewhispanic.org/files/reports/126.pdf; *see also* Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1090 (2011) ("More than two-thirds of the total unauthorized immigrant population—roughly 8 million out of 11.2 million—is in our nation's workforce . . . .").

[187] President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-3.html (stating that undocumented immigrants "who seek only to earn a living end up in the shadows of American life—fearful, often abused and exploited").

[188] *See generally* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1595–98 (2010) (analyzing impacts of the Secure Communities program).

[189] *See supra* note 178 and accompanying text.

[190] *See* Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 635–38 (2012); Olivas, *supra* note 157; Wishnie, *supra* note 157.

regimes that lack the more uniform enforcement that the U.S. government can strive to achieve.[191] Moreover, U.S. immigration officials generally have more training, experience, and expertise in the enforcement of U.S. immigration laws than state and local law enforcement officers.[192] For this and other reasons, scholars have vigorously criticized state and local involvement in the enforcement of the immigration laws through state/federal cooperative agreements that provide for training of state and local law enforcement officers.[193] Such programs have more protections and federal oversight than those provided by the state immigration enforcement laws.[194]

IV. ALABAMA SEEKS TO RESTRICT ACCESS TO EDUCATION FOR UNDOCUMENTED STUDENTS

Alabama has a rich, if not envious, tradition of segregation of its schools to ensure the separation of Blacks and whites.[195] Fitting comfortably into that history, H.B. 56, both directly and indirectly, seeks to limit educational access to public schools and universities for undocumented students, many of whom are from Mexico,[196] with the law arguably motivated by not just anti-immigrant, but anti-Mexican, bias.[197]

The civil rights movement is often remembered for the dedication of African Americans, in the face of dogged resistance, to desegregate the South's public schools, including the historic struggle to integrate the state's flagship public university, the University of Alabama.[198] The activism of many immigrants and their supporters today involves a similar dedicated struggle for equal access to public education.[199]

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[191] *See* United States v. Arizona, 641 F.3d 339, 354 (9th Cir. 2011) ("[T]he threat of 50 states laying their own immigration enforcement rules on top of the [Immigration and Nationality Act] also weighs in favor of preemption."), *aff'd in part*, *rev'd in part on other grounds*, 132 S. Ct. 2492 (2012).

[192] *See* Cunningham-Parmeter, *supra* note 2, at 1720.

[193] *See, e.g.*, Chacón, *supra* note 188, at 1582–86; Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

[194] *See* Wishnie, *supra* note 193.

[195] *See* Phillip Scott Arnston, *Thirty Years Later, Is the Schoolhouse Door Still Closed? Segregation in the Higher Education System of Alabama*, 45 ALA. L. REV. 585 (1994).

[196] *See* María Pabón López et al., *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and Other State Immigration Measures*, 6 FLA. INT'L L. REV. 231 (2011).

[197] *See supra* notes 170–73 and accompanying text.

[198] *See generally* E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR (1993) (documenting the history of efforts to desegregate the University of Alabama).

[199] *See generally* Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275 (analyzing the significance of the modern struggle of immigrants for educational access).

A. Chilling Latina/os and Immigrants from Pursuit of an Elementary and Secondary Education

Section 28 of H.B. 56 requires public elementary and secondary schools in Alabama to determine if an enrolling student: (1) was born outside the jurisdiction of the United States or is the child of an undocumented immigrant; or (2) qualifies for assignment to an English as second language class or other remedial program.[200] It would thus, among other things, require school districts to verify the immigration status of parents as well as students. Although the district court refused to enjoin implementation of the section, the Court of Appeals did enjoin the enforcement of the provision.[201]

The apparent purpose of Section 28 is to collect the data necessary to challenge the Supreme Court's holding in *Plyler v. Doe*,[202] which struck down as unconstitutional a Texas law that effectively barred undocumented students from receiving a public education from kindergarten through high school.[203] In striking down the law, the Court found that the state had failed to provide compelling evidence of the economic and other costs of undocumented student attendance in the public schools.[204] With that in mind, Section 2 of H.B. 56 explains that

> [b]ecause the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state.[205]

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[200] *See* H.B. 56, *supra* note 10, § 28.

[201] *See* Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236 (11th Cir. 2012).

[202] 457 U.S. 202 (1982); *see* John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 HARV. J.L. & PUB. POL'Y 569, 589–91 (2012); Campbell Robertson, *Critics See "Chilling Effect" in Alabama Immigration Law*, N.Y. TIMES, Oct. 28, 2011, at A14. *See generally* MARÍA PABÓN LÓPEZ & GERARDO R. LÓPEZ, PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS (2010) (analyzing the inequalities undocumented students face in pursuing an education); MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND (2012) (analyzing legal developments concerning access to public education by undocumented students).

[203] *See Plyler*, 457 U.S. at 202–03.

[204] *See id.* at 227–30.

[205] 2011 Ala. Acts 535, § 2.

Not surprisingly—and perhaps intentionally given the law's stated purpose of encouraging self-deportation[206]—H.B. 56's passage appears to have frightened Latina/o and immigrant students and their families. In the aftermath of its enactment, school absences reportedly skyrocketed.[207] If students or their parents are undocumented, they might well worry that information about their immigration status could end up in the hands of U.S. immigration enforcement authorities and result in their entire families' deportation from the United States. The record numbers of removals in recent years, as well as increasing state and local cooperation with federal immigration authorities, suggest that such fears are not far-fetched.[208]

In late 2011, the Civil Rights Division of the U.S. Department of Justice requested that Alabama school districts provide information designed to determine whether H.B. 56 adversely affected the civil rights of Latina/os and immigrant schoolchildren.[209] The request explained that "[i]t has come to our attention that the requirements of Alabama's H.B. 56 may chill or discourage student participation in, or lead to the exclusion of school-age children from, public education programs based on their or their parents' race, national origin, or actual or perceived immigration status."[210] The Justice Department requested information from the school districts about the race, national origin, and English Language Learner status of students who have withdrawn from the Alabama public schools, or have unexplained absences or a pattern of absences.[211]

Consistent with the state's checkered civil rights history, Alabama Attorney General Luther Strange invoked a "states rights" objection to the Justice Department's request and questioned the authority of the federal government to request information from the state's school districts about the possible unconstitutional impacts of H.B. 56.[212] Such objections suggest the parallels between H.B. 56 and Alabama's strident stand against desegregation of the public schools in the 1950s and 1960s.[213]

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[206] *See supra* note 3 and accompanying text.

[207] *See* Richard Faussert, *In Alabama, Strict New Immigration Law Prompts Alarm*, L.A. TIMES, Oct. 9, 2011, at A18; *see also* Jeremy B. Love, *Alabama Introduces the Immigration Debate to Its Classrooms*, 38 HUM. RTS. 7, 8 (2011) ("The Monday after H.B. 56 took effect, 2,285 Latino students were absent from school out of the 34,000 Latino students statewide. That absentee rate is nearly double what it would be on a normal day.").

[208] *See supra* note 6 and accompanying text.

[209] *See* Tracy Russo, *AAG Perez Reminds Alabama School Districts Children Deserve Equal Access to Public Education*, JUST. BLOG (Nov. 1, 2011), http://blogs.usdoj.gov/blog/archives/1710.

[210] *Id.*

[211] *See id.*

[212] *See* Op-Ed., *Standing in the Schoolhouse Door*, N.Y. TIMES, Nov. 6, 2011, at SR10 (criticizing the Alabama Attorney General's position).

[213] *See supra* notes 195–99 and accompanying text.

The Justice Department later informed the Alabama State Superintendent of Education that, as suspected, the data submitted in response to the request suggested that

> H.B. 56 has had significant and measurable impacts on Alabama's schoolchildren, impacts that have weighed most heavily on Hispanic and English language learner . . . students. Although these impacts may have been most acute in the period that § 28 . . . was in effect, our investigation suggests that the legislation overall has had continuing and lasting consequences in the education context.[214]

Alabama is not the first state seeking to limit access to public education by undocumented elementary and secondary school students.[215] For years, state and local governments have chafed at their obligations to undocumented school children under *Plyler v. Doe*, which unquestionably prove costly to state and local governments that, in challenging fiscal times, fund the education.[216] Nearly twenty years ago, California voters in 1994 overwhelmingly passed Proposition 187, an initiative that, if not for an injunction issued by a federal court, would have denied access of undocumented students to the Golden State's public elementary and secondary schools, and would have required school officials to collect information about the immigration status of students and parents.[217]

B. Denying DREAMers' Access to Post-Secondary Education

The Supreme Court's decision in *Plyler v. Doe* did not involve access to post-secondary education, and undocumented students lack any constitutional right to a college education.[218] Because undocumented college students are among the most

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[214] Letter from Thomas E. Perez to Dr. Thomas R. Bice (May 1, 2012), *available at* http://images.politico.com/global/2012/05/doj_letter_5-1-12.html. A court enjoined those provisions from going to effect. *See supra* note 166 and accompanying text.

[215] *See* María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyler v. Doe, 35 SETON HALL L. REV. 1373, 1395–98 (2005) (describing California's Proposition 187, which was enacted in 1994 and "denied undocumented children in the state a free public school education").

[216] *See id.*

[217] *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995); *see also* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1563–67 (1995) (analyzing Proposition 187 and its impact on discrete groups of minorities).

[218] *See* López, *supra* note 215, at 1400–04 (examining access of undocumented students to higher education). *But cf.* Toll v. Moreno, 458 U.S. 1 (1982) (holding that a public university could not deny in-state status to lawful nonimmigrants and that the state law at issue was preempted by federal law).

politically sympathetic of all undocumented immigrants, the nation for many years has been actively debating various incarnations of the DREAM Act,[219] which, generally speaking, would allow for the regularization of the immigration status of undocumented college students and facilitate their access to public university educations;[220] the DREAM Act has been the subject of considerable political activism on college campuses across the country.[221]

Moving in opposition to the pro-educational access aims of the DREAM Act, Section 8 of Alabama's H.B. 56 prohibits undocumented students from enrolling in Alabama's public colleges and universities.[222] A district court enjoined that section of H.B. 56 from going into effect, but the court of appeals lifted the injunction.[223]

Other states also have taken steps to limit the access of undocumented students to higher education. In 2010, Georgia prohibited undocumented students from selective public colleges and universities, while, like Alabama, South Carolina banned the undocumented from all public colleges and universities.[224] As discussed previously, Florida has gone even further to bar access to the State's public universities and colleges to U.S. citizen children who cannot establish the lawful immigration status of their parents.[225]

In contrast, some states, such as California, have pursued steps to improve access for undocumented students, as well as other students, to public universities and colleges.[226] In June 2012, the Obama Administration took steps to prevent the removal of certain undocumented immigrants brought to the United States as children.[227]

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[219] *See* Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process*, 55 WAYNE L. REV. 1757, 1759–88 (2009).

[220] *See generally* Olivas, *supra* note 219.

[221] *See* OLIVAS, *supra* note 202, at 63–86; Olivas, *supra* note 219; *see also* Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1282 (2008) ("[A]nti-affirmative action and anti-immigrant groups have joined forces in opposing both affirmative action and efforts like the DREAM Act to ease the barriers limiting access of undocumented immigrants to public colleges and universities, with a resulting negative impact on Latina/o immigrants.").

[222] *See* 2011 Ala. Acts 535, § 8.

[223] *See* Hispanic Interest Coal. of Ala. v. Bentley, No. 5:11-CV-2484-SLB, 2011 U.S. Dist. Lexis 137846 (N.D. Ala. Sept. 28, 2011) (holding that federal law preempted Section 8 of H.B. 56), *vacated as moot sub nom.*, Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236 (11th Cir. 2012).

[224] *See* Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357, 358–59.

[225] *See* Greenhouse, *supra* note 120 and accompanying text.

[226] *See* Martinez v. Regents of Univ. of Cal., 241 P.3d 855 (Cal. 2010) (rejecting the claim that a California law allowing undocumented students to be eligible for in-state fees at public colleges and universities violated federal law), *cert. denied*, 131 S. Ct. 2961 (2011).

[227] *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion

Undocumented students through the DREAM Act seek to be placed on the same footing as other similarly situated residents of the state with respect to access to public colleges and universities. They strive to pay the same fees to the university charged other residents of the state, and to be eligible for financial assistance programs for which other state residents are eligible.[228] They do not argue for any kind of preference for undocumented students for admission to public universities and colleges.[229]

CONCLUSION

Educational access, as we saw in the famous civil rights movement of the 1950s and 1960s, is often central to the struggles of outsiders seeking full membership in U.S. society. Today, we see immigrants and Latinas/os pursuing equal access to education, including public college and university educations. Through H.B. 56, the State of Alabama, as it did in resisting the desegregation of public schools in the days of Jim Crow, once again seeks to restrict equal school access to vulnerable students of color. The state justifies its exclusionary stand by invoking the claim that it seeks nothing more than to enforce the federal immigration laws.[230]

As the resistance to the efforts to limit educational access suggests, the United States is at a civil rights crossroads. Although millions of immigrants and undocumented immigrants live in the United States,[231] the nation has been at best ambivalent about how the law should treat immigrants, especially undocumented ones. We, as a nation, must address the fundamental civil rights grievances of immigrant residents of this country. Until we do, we can expect more turmoil in the states over immigration enforcement and, consequently, continued assaults on the civil rights of immigrants and U.S. citizens of particular national origins, as seen in Arizona, Alabama, Georgia, South Carolina, and other states that have passed state immigration enforcement laws. Ultimately, even if federal preemption doctrine is at the center of many of the legal challenges, the civil rights of immigrants and Latina/os are at the core of the debate over the state immigration enforcement laws and immigration enforcement generally.[232]

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with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[228] *See, e.g.*, CAL. EDUC. CODE § 68130.5 (West 2012).

[229] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's multifactored scheme that considered race as one factor in admissions decisions); Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011) (refusing to disturb the University of Texas's race-conscious undergraduate admissions scheme), *cert. granted*, 132 S. Ct. 1536 (2012).

[230] *See supra* notes 82–85, 132 and accompanying text.

[231] *See supra* notes 82–85 and accompanying text.

[232] *See supra* Part III.B.

State political leaders have repeatedly emphasized that the states must act because the U.S. government has allegedly failed to enforce the immigration law.[233] The rationale for enacting state immigration enforcement laws therefore evaporates if Congress acts to reform the U.S. immigration laws in a meaningful way that can be effectively enforced.[234] Consequently, if Congress addresses the current "broken" immigration system, it also might do much to address the civil rights deprivations suffered by Latina/os and immigrants today. As with the Civil Rights Act of 1964[235] and a slew of other pieces of legislation, congressional action is necessary to eliminate the "new" Birmingham for immigrants and Latina/os, just like it did the "old" Birmingham for African Americans.

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[233] *See supra* notes 82–85 and accompanying text.

[234] *See supra* notes 82–85 and accompanying text.

[235] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 42 U.S.C.).