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ARTICLES:

Fugitive Slaves and Undocumented Immigrants: Testing the Boundaries of Our Federalism

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Federalism—the dual system of sovereignty that invests both the nation as a whole and each individual state with the authority to govern the people of the United States of America—is a foundational pillar of American democracy. Throughout the nation's history, political crises have tested the resilience of this dual system of government established by the United States Constitution. The fundamental contradiction of slavery in a nation founded on the principle that "all men are created equal" triggered the nation's most prominent existential crisis, resulting in the Civil War. In the years leading up to that war, the federal government's protection of the institution of slavery, via the Fugitive Slave Acts, clashed with the personal liberty laws of the free states. These states had eliminated slavery within their own borders, and hence did not embrace federal laws compelling them to allow (or assist in) the pursuit and capture of putative slaves living on free soil. The intensity of the resistance within these states increased as the federal government

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ratcheted up efforts to enforce the Fugitive Slave Acts, with little consideration given to the conflicting values of American citizens living in free states.

The most crucial federalism crisis of today stems from conflicting state and federal perspectives as to immigration. The Trump administration's "zero tolerance" approach to "illegal" immigration has been tone deaf to the mores of people who live in diverse states such as California, especially as to immigrants who are seeking asylum. The President has personally repudiated and even mocked the nation's long-standing commitment to the legal principle of non-refoulement, *which prohibits the forcible return of refugees to countries where they face serious threats to their lives or freedom. Moreover, the Trump administration's heavy reliance on executive action to achieve its goals, rather than the legislative process, has generated policies that lack widespread support among the national citizenry, not just that of an individual state.*

The United States may learn some valuable lessons by reflecting on its past, specifically the history of the federal laws that sought to force the free states to recognize slavery within their borders. Heavy-handed attempts to compel compliance with federal law tend to engender resistance rather than cooperation, especially when, in the eyes of many, the federal law lacks both moral and democratic legitimacy. At a minimum, the federal government should not attempt to commandeer California and similar states to implement federal immigration policies that are misaligned with the values of the majority of their citizens. The safety valve of federalism allows these states to decline to do so.

INTRODUCTION

History does not repeat itself, but it rhymes.[1]

The presence of slavery in some, but not all, of the United States posed an existential threat to the dual system of federalism created by the U.S. Constitution from the earliest days of the Republic.[2] The South's dogged quest to protect the institution of slavery is traditionally associated with a states' rights philosophy.[3] However, during this era, the South relied heavily on federal power to preserve slavery in the South and enable its spread throughout the territories.[4] The battle over fugitive slaves—enslaved people who escaped their masters and fled to free states in the North—pitted the federal Fugitive Slave Acts of 1793 and 1850, which granted Southerners broad powers to reclaim human "property" in free states, against free states' personal liberty laws, which sought to protect the civil and human rights of all state citizens, including the free blacks and slaves who were at risk under the federal law.[5]

Today, the United States faces another challenge testing the boundaries of federalism, this time involving immigration rather

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[1] This quote is often attributed to Samuel Clemens, the nineteenth century author known by his pen name, Mark Twain. *History Does Not Repeat Itself, but it Rhymes*, QUOTE INVESTIGATOR (Jan. 12, 2014), https://quoteinvestigator.com/2014/01/12/history-rhymes/. However, the true origin of the quote is unknown. *See id.* A passage from Twain's satire of the Gilded Age encapsulates the idea expressed within it: "History never repeats itself, but the Kaleidoscopic combinations of the pictured present often seem to be constructed out of the broken fragments of antique legends." MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TO-DAY 430 (1873). Historian Eric Foner has made a similar observation regarding the immigration conflict that is the subject of this Article: "History never really repeats itself, but uncanny resemblances exist between the pre-Civil War years and our own time, in terms of both the actions of the federal government and the resistance it has evoked." Eric Foner, *What the Fugitive Slave Act Teaches Us About How States Can Resist Oppressive Federal Power*, NATION (Feb. 8, 2017), https://www.thenation.com/article/archive/what-the-fugitive-slave-act-teaches/ [hereinafter Foner, *What the Fugitive Slave Act Teaches Us*].

[2] *See infra* Section I.

[3] *See, e.g.*, Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 470 (2012) [hereinafter Finkelman, *States' Rights*].

[4] *See infra* Sections I.C.–I.E.

[5] *See infra* Sections I.B.–I.E.

than slavery. More parallels exist between these two controversies than are immediately apparent.[6] As most of the power in Washington, D.C. has shifted right with the Trump administration, proponents of states' rights are increasingly found in left-leaning Blue states, not the conservative Red states typically associated with demands for local control.[7] Like the Fugitive Slave Acts, efforts to increase enforcement of federal immigration laws have engendered conflict between federal and local governments.[8] President Trump,

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[6] *See, e.g.*, Foner, *What the Fugitive Slave Act Teaches Us*, *supra* note 1; Jeffrey M. Schmitt, *Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition*, 103 GEO. L.J. ONLINE 1, 5–7 (2013) [hereinafter Schmitt, *Immigration Enforcement Reform*]; Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 216–32 (2013); Karla M. McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 947–52 (2012); Kathleen L. Villarruel, Note, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429, 1435 (1987); 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, 1481–86 (2011).

[7] *See infra* Section II.C.2.; *see also* Mallory E. SoRelle & Alexis N. Walker, *Both Democrats and Republicans Care About 'States' Rights' – When It Suits Them*, WASH. POST (June 23, 2017, 6:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/23/both-democrats-and-republicans-care-about-states-rights-when-it-suits-them/ (discussing that while states' rights is a notion typically associated with the Republican party, in the wake of the Trump administration, Democrats are turning to state power); Heather Gerken, *We're About to See States' Rights Used Defensively Against Trump*, VOX, https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative (last updated Jan. 20, 2017, 2:14 PM).

[8] *See infra* Part II.

who decried federal government overreach during the Obama administration,[9] has vowed that recalcitrant states will bend to the federal will.[10]

Three main ideological parallels exist between the modern immigration debate and the fugitive slave crisis:

1) Lack of public faith in the federal law leads some individuals to conclude that the law is so morally bankrupt that they are compelled to violate it.[11] The Underground Railroad of the 1850s and the Sanctuary Movement of the 1980s existed for this reason.[12] In essence, the gulf between the beliefs of the people of an individual state versus the values embodied in a federal statute drives some citizens to exercise civil disobedience.[13]

2) Fundamentally, modern refugees share one critical commonality with antebellum fugitives: a desire to make or retain a home on "free soil" and not to return from whence they came.[14] In both eras, some members of these vulnerable populations are or were legally entitled to remain as either free persons of color in the nineteenth century or as asylees today.[15] The failure of federal law to provide due process to those who are targeted for removal under the terms

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[9] In 2012, Trump tweeted, "Why is @BarackObama constantly issuing executive orders that are major power grabs of authority?." @realDonaldTrump, TWITTER (July 10, 2012, 10:11 AM), https://twitter.com/realDonaldTrump/status/222739756105207808; *see also* Aaron Blake, *The GOP Decried 'King Obama.' Now It's Mostly Quiet on Trump's Effort to Revise the Constitution by Himself*, WASH. POST (June 31, 2018, 12:36 PM), https://www.washingtonpost.com/politics/2018/10/31/gop-decried-king-obama-now-its-mostly-quiet-trumps-effort-revise-constitution-by-himself/.

[10] *See infra* Section II.C.2.–II.C.3 (discussing Trump's Executive Order and lawsuits filed by the Department of Justice seeking to compel state cooperation with federal authorities in the immigration arena).

[11] *See infra* Section II.A; *see also, e.g.*, Michelle Boorstein, *Trump Administration's Immigration Policies are 'Immoral,' Say Leading Catholic Bishops*, INDEPENDENT (June 14, 2018, 6:46 PM), https://www.independent.co.uk/news/world/americas/trump-immigration-catholic-bishops-moral-us-mexico-border-a8399016.html.

[12] *See infra* notes 313–315, 316–334 and accompanying text.

[13] *See infra* Section II.A.

[14] Immigrants at risk of deportation, like free Blacks and fugitive slaves of the nineteenth century, must live "in constant fear of being torn from their families and homes." Schmitt, *Immigration Enforcement Reform*, *supra* note 6, at 1.

[15] *See infra* Sections II.B.1.–II.B.2.

of the Fugitive Slave Acts and the Immigration and Nationality Act undermines the legal and moral legitimacy of both laws.[16]

3) If the lack of public support for federal law is sufficiently widespread in a particular state, that state may decline to participate in the administration of the federal law.[17] The anti-commandeering principle, which traces its roots to the fugitive slave crisis,[18] is currently the primary means by which states resist the implementation of federal immigration policy within their borders.[19]

The struggles of the nineteenth century offer more than a history lesson in today's increasingly charged immigration debate. In each case, absolutist interpretation and enforcement of federal laws intended to compel compliance may have had the opposite effect. Hyper-charged efforts to enforce laws may do more to expose the injustice engendered by those laws than years of advocacy by people opposed to them.

I. THE FEDERAL GOVERNMENT'S ROLE IN PROTECTING SLAVERY IN THE UNITED STATES DURING THE ANTEBELLUM ERA

The existence of slavery in the United States, and its disproportionate concentration in the South, created sectional conflict from the time of the Founding until the Civil War. When the Constitutional Convention convened in 1787, slavery was recognized and protected under the laws of every state except Massachusetts.[20] However, the states were moving in opposite directions on the issue of slavery: states north of the Mason-Dixon line had begun the process of immediate or gradual emancipation or would soon do so, while states to the south clung to slavery, which tightened rather than loosened its grip on the region during the post-Revolutionary

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16 *See* Section II.B., *infra*.

17 *See* Section II.C., *infra*.

18 *See infra* notes 135–144, 510–513, 524–529 and accompanying text.

19 *See infra* Section II.C.

20 Massachusetts abolished slavery in 1780 by virtue of that state's constitutional Declaration of Rights, a result that was later affirmed by case law. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 43–45 (1975); *see also* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1742–73 (1996).

period.[21] The division between slave and free states created a federalism dilemma: what was the status of a person who was labeled a slave under the laws of one state upon removing himself to the territorial boundaries of a state that did not recognize the institution of slavery?[22] The Constitution's Fugitive Slave Clause was one of the nation's earliest attempts to answer that question.

A. *The Origins of the Constitution's Fugitive Slave Clause*

The Fugitive Slave Clause—which, like all other provisions of the Constitution, does not include the word "slave"—provides the following:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[23]

This provision of the Constitution, which was approved unanimously, generated a "puzzling" and "deeply disturbing" lack of debate.[24] The Fugitive Slave Clause and the statutes that later interpreted it were key factors contributing to the intersectional strife that culminated in the Civil War.[25]

The Fugitive Slave Clause was initially proposed by South Carolina delegates Charles Pinckney and Pierce Butler, in the context

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[21] *See* Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 781–84 (2011) (discussing the process by which slavery was abolished in the northeastern and mid-Atlantic states).

[22] *See infra* Part I; *see also* Paul Finkelman, *The Roots of* Printz*: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399, 1406, 1414 (2004) [hereinafter Finkelman, *The Roots of* Printz].

[23] U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1.

[24] *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 330–33 (2009) (discussing the legislative history of the clause).

[25] *See, e.g.*, Rierson, *supra* note 21, at 808–23 (discussing the Fugitive Slave Laws and concluding that "[t]he Fugitive Slave Laws and the controversies that they spawned were but one example of a force that drove the two regions apart, with each side becoming increasingly intolerant of the other's position").

of the debate regarding the extradition clause. Pinckney and Butler's original wording proposed "to require fugitive slaves and servants to be delivered up like criminals."[26] James Wilson of Pennsylvania immediately objected on the grounds that this language would require "the Executive of the State" to capture such fugitives, "at the public expence."[27] Roger Sherman of Connecticut interjected that he "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse."[28] Butler then withdrew his motion but reintroduced it the next day, revised as follows:

> If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor.[29]

The delegates then approved Butler's motion unanimously, with no further debate.[30]

The paucity of recorded debate surrounding the Fugitive Slave Clause suggests that, at a minimum, the delegates failed to appreciate the significance of it.[31] In part, this failure may have been due to a lack of foresight. As noted above, at the time of the Convention almost all of the states recognized the institution of slavery.[32] In fact, as of the date of the first national census, more slaves were living in New York and New Jersey than in Georgia.[33] Because the Mason-

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[26] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand ed., 1911) [hereinafter 2 THE RECORDS OF THE FEDERAL CONVENTION].

[27] *Id.*

[28] *Id.*

[29] *Id.* at 445–46.

[30] *Id.* at 446.

[31] Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 260 (1994) [hereinafter Finkelman, *Story Telling on the Supreme Court*] (describing the history of the clause and concluding that the lack of debate likely demonstrated that "northern delegates simply failed to appreciate the legal problems and moral dilemmas that the rendition of fugitive slaves would pose").

[32] *See* Wiecek, *supra* note 20.

[33] The census documented 21,324 slaves living in New York and 11,423 slaves living in New Jersey in 1790 (for a total of 32,747); at the same time 29,264

Dixon Line was not a bright demarcation between slavery and freedom in 1789, the federalism conflict presented by alleged fugitives was not a significant extant problem.[34] Although the slave population boomed in the South and declined (slowly or quickly, depending on the state) in the North after the Convention,[35] the delegates may not have fully appreciated that they were on the front end of this trend. Nevertheless, the Southern delegates would have been keen to avoid this conflict, given that English law on the subject was not favorable to them. The English high court decided *Somerset v. Stewart* in 1772, holding that a Virginia slave who escaped from his master while living in London was no longer a slave, given that the "positive law" of England did not allow slavery.[36] Therefore, Southern delegates would have wanted to ensure that freedom was not similarly bestowed upon a slave who escaped to a state, such as Massachusetts, that had no "positive law" respecting slavery.[37]

Northern delegates, however, may have regarded South Carolina's request regarding fugitive slaves as a relatively minor issue.

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slaves were recorded as living in Georgia. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, tbls 25, 45, 47 (United States Census Bureau, Population Division, Working Paper No. 56, 2002), http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf; *see generally* GRAHAM RUSSELL HODGES, ROOT & BRANCH: AFRICAN AMERICANS IN NEW YORK & EAST JERSEY 1613-1863 (1999) (discussing the history of slavery in these states).

[34] *See* DON E. FEHRENBACHER & WARD M. MCAFEE, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES' GOVERNMENT'S RELATIONS TO SLAVERY 207 (Ward M. McAfee ed., 2001) (observing that, in 1787, "flight of slaves across state boundaries was still far from being a significant national problem").

[35] Lincoln Mullen, *These Maps Reveal How Slavery Expanded Across the United States*, SMITHSONIAN MAG. (May 15, 2014), https://www.smithsonianmag.com/history/maps-reveal-slavery-expanded-across-united-states-180951452/; *see also* Rierson, *supra* note 21, at 781–84 (discussing the abolition of slavery in Northern and mid-Atlantic states).

[36] Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 510 (K.B.). For a more complete account of *Somerset*, see MARK S. WEINER, BLACK TRIALS: CITIZENSHIP FROM THE BEGINNING OF SLAVERY TO THE END OF CASTE 70–88 (2004); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 16–18, 70–125 (1981) (discussing treatment of *Somerset* in U.S. courts).

[37] *See* COVER, *supra* note 20, at 43–45; *see also Massachusetts Constitution and the Abolition of Slavery*, MASS.GOV, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery (last visited Mar. 11, 2020).

Even though *Somerset* raised the possibility that a slave's status could be altered by his location,[38] the common law (of which the delegates would have been aware) presumed that slave holders had a right of recaption as to any escaped slave.[39] The common law right of recaption permitted owners of "lost property capable of locomotion" to retrieve their property without legal process, so long as they did so in an "orderly" fashion without injuring any third parties.[40] When Connecticut representative Sherman compared the seizure of a slave to the capture of a horse,[41] he could have been referring to this common law principle, which did in fact treat fleeing slaves and runaway horses identically.[42] Moreover, unlike the other major compromises on slavery, the Fugitive Slave Clause did not impact the balance of power among the states in Congress.[43] The Three-Fifths Clause did so directly: it included three-fifths of all slaves in the population used to calculate the number of Congressmen a state could send to the House of Representatives.[44] The Slave Trade Clause indirectly enhanced Congressional representation in the

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[38] *See Somerset*, 98 Eng. Rep. at 510.

[39] *See* ERIC FONER, GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD 32 (2015) [hereinafter FONER, GATEWAY TO FREEDOM].

[40] *See id.*

[41] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 26, at 443; THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, 17 (1974).

[42] *See* FONER, GATEWAY TO FREEDOM, *supra* note 39, at 32.

[43] *Compare* U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2, *with* U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1.

[44] U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2. Based on the 1790 Census, Virginia's enslaved population alone entitled it to approximately six members in the House of Representatives, more than the total allotment of Congressional representatives for five other states. *See* Gibson & Jung, *supra* note 33. Three-fifths, or 60%, of Virginia's 1790 slave population (287,959) was equivalent to approximately 172,775 free persons for the purpose of calculating Congressional representation. *Id.* That number, divided by 30,000 (the population base for apportionment of Congressional representation), equals 5.8, or six seats in the House of Representatives. The states with total population below 172,775 were Delaware (59,096, including 8,887 slaves), Georgia (82,548, including 29,264 slaves), New Hampshire (141,885), Rhode Island (68,825), and Vermont (85,425). *Id.*

South.[45] By allowing the continued importation of slaves (or at least preventing Congressional interference with it) for twenty years, this Constitutional clause allowed Southern states participating in the international trade to increase their slave populations,[46] which ultimately would augment their representation in Congress via the Three-Fifths Clause.[47] Unlike these other Constitutional provisions, the Fugitive Slave Clause did not have the potential to alter any state's federal political representation.[48]

The delegates were also almost certainly aware that the Continental Congress had passed the Northwest Ordinance only weeks earlier. The Ordinance famously excluded slavery from the Northwest Territories and thereby provided an eventual template for the Thirteenth Amendment to the Constitution abolishing slavery.[49] However, it also included an analog to the Fugitive Slave Clause: "[A]ny person escaping into the [Northwest territories], from whom labor or service is lawfully claimed in any one of the original States, . . . may be lawfully reclaimed and conveyed to the person claiming his or her labor or service."[50] This provision of the Ordinance, which itself generated little recorded debate, was not directly discussed during the Convention debate on the Fugitive Slave Clause.[51] However, the delegates may have been inspired by it or at

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[45] *See* U.S. CONST. art. I, § 9, cl. 1.

[46] *Id.*

[47] *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 26 at 222–23 (recording remarks by Governor Morris (Pennsylvania), arguing that the southern states were encouraged to import "fresh supplies of wretched Africans" by the "assurance of having their votes in the Natl Govt increased in proportion" to the number of slaves imported).

[48] *Compare* U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S CONST. amend. XIV, § 2, *and* U.S. CONST. art. I, § 9, cl. 1, *with* U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1.

[49] Article 6 of the Ordinance provides: "There shall be neither slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 343 (Roscoe R. Hill ed., 1936) [hereinafter NORTHWEST ORDINANCE].

[50] *Id.*

[51] FEHRENBACHER & MCAFEE, *supra* note 34, at 35–36.

least aware of it; the differences between the two clauses, in terms of wording, are relatively minor.[52]

A final reason for the lack of extended discussion of the Fugitive Slave Clause may relate to its timing. When the Fugitive Slave Clause was proposed in August 1787, the delegates had already endured the long, hot summer months in Philadelphia.[53] The prospect of engaging in another lengthy, contentious debate regarding the subject of slavery (or anything else) would not have been enticing to anyone. The delegates almost certainly wanted to go home.[54] The Convention concluded on September 17, 1787,[55] approximately two weeks after the delegates added the Fugitive Slave Clause to the Constitution.[56]

Whatever the reason, Northern delegates acquiesced to Southern demands on the subject of fugitive slaves at the Constitutional Convention, offering a mere token resistance.[57] What followed, however, was a wave of increasingly hostile reactions to Southern slave catchers in the Northern states that were neither token nor insignificant.

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[52] *Compare* NORTHWEST ORDINANCE, *supra* note 49, at 343 ("[A]ny person escaping into the [Northwest territories], from whom labor or service is lawfully claimed in any one of the original States, . . . may be lawfully reclaimed and conveyed to the person claiming his or her labor or service . . . ."), *with* U.S. CONST. art. IV, § 2, cl. 3., *repealed by* U.S. CONST. amend. XIII, § 1 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[53] *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1206 (2003) (discussing the consequences of "four months of hard work drafting a Constitution in the hot Philadelphia summer of 1787").

[54] *See* FEHRENBACHER & MCAFEE, *supra* note 34, at 36 (noting that "ready acceptance" of the Fugitive Slave Clause of the Constitution was likely due in part to "the weary desire of most delegates to finish their work and go home").

[55] 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 26, at 641 (Sept. 17, 1787).

[56] The delegates adopted the clause in substance in a vote taken on August 29, 1787. *Id.* at 446. However, the final version of the Fugitive Slave Clause, which included minor changes in wording proposed by Committee of Style, was approved on September 15, 1787. *Id.* at 621.

[57] *See supra* notes 27–30 and accompanying text; *see also* FEHRENBACHER & MCAFEE, *supra* note 34, at 35–36.

B. *The Fugitive Slave Act of 1793 and the Anti-Kidnapping Laws of the Northern States*

Congress passed the first statute implementing the Fugitive Slave Clause of the Constitution in 1793.[58] Like the Constitution itself, the Fugitive Slave Act of 1793 never uses the word "slave"; instead, it refers to an enslaved person as "a person held to labor in any of the United States [or the Territories], under the laws thereof."[59] The Act empowered a slaveholder—a "person to whom such labor or service may be due, his agent or attorney"—"to seize or arrest" an alleged fugitive in the state to which he had escaped.[60] Once the alleged fugitive had been seized, the Act permitted the "claimant" to bring the fugitive before a federal judge or a local magistrate in the non-slave state, where he was required to prove the slave status of the fugitive "to the satisfaction of such Judge or magistrate, either by oral testimony or affidavit."[61] If the judge or magistrate was "satisfied" with the proof of the person's enslavement, he was required to "give a certificate" to the claimant, which acted as a warrant to remove that person to the state or territory where he was enslaved.[62] The Act also imposed a penalty of $500 on anyone who tried to "rescue," "harbor or conceal" a fugitive slave, or who tried to "obstruct or hinder" efforts to capture an alleged fugitive.[63]

The Fugitive Slave Act of 1793 was silent as to the rights of those accused of being fugitive slaves.[64] Although it empowered private citizens to "seize or arrest"[65] alleged fugitive slaves, it did not specify the manner by which an arrest could be carried out. More importantly, the Act did not describe the process by which the enslavement of a person could be proven, other than refer to "oral testimony or affidavit."[66] Due process protections on behalf of alleged fugitives—some of whom were in fact free—were not part of the

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58 Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302–05.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.* § 4.
64 *See id.* § 3.
65 *Id.*
66 *Id.*

Act.[67] Key procedural protections that were well-established under nineteenth century law, such as the right of trial by jury and the writ of habeas corpus,[68] were not guaranteed. Finally, although the Act imposed criminal penalties on those who sought to thwart the apprehension of an alleged fugitive, it did not punish those who intentionally kidnapped free blacks and sold them into slavery for profit, under the guise of capturing fugitive slaves.[69] The problem of kidnapping and wrongful enslavement was a significant one, even at the nation's Founding.[70]

Some efforts were made, at the federal level, to improve the Fugitive Slave Act of 1793, specifically as to its encouragement, or at least enablement, of the kidnapping of free blacks.[71] The free black

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[67] MORRIS, *supra* note 41, at 21 (describing the process established under the 1793 Act as "a summary ministerial hearing," pursuant to which a judge had "no authority to conduct a full investigation if there was a competing claim to freedom").

[68] *See id.* at 8–12.

[69] Fugitive Slave Act of 1793, ch. 7, § 2, 1 Stat. 302, 302.

[70] In 1788, Massachusetts abolished the slave trade and took steps to curb kidnapping of free blacks via statute. Act of Mar. 26, 1788, ch. 48, 1787 Mass. Acts 615. The statute, which provided a private right of action for "friends" and families of Massachusetts inhabitants who were removed from the state and sold into slavery, recognized that "peaceable inhabitants of this Commonwealth . . . have been privately carried off by force, or decoyed away under various pretenses, by evil minded persons, [and] with a probable intention of being sold as slaves" outside the Commonwealth. *Id.* at 616; *see also* Act of Jan. 25, 1819, ch. 444, pmbl., 1819 Ohio Laws 1052, 1052 (recognizing that "unprincipled persons have kidnapped free persons of color, within this state, and attempted to transport them out of the state, and sell them into slavery," a practice which the legislature characterized as "nefarious and inhuman"). The American Convention of Abolitionist Societies alerted its members in 1801 that the "inhuman crime of kidnapping" had "recently increased to an alarming degree" in certain parts of the country. MORRIS, *supra* note 41, at 26; *see also infra* notes 83–95 and accompanying text. Despite the Northern states' efforts to prevent the kidnapping of free blacks, this practice continued throughout the antebellum period. *See generally* SOLOMON NORTHRUP, TWELVE YEARS A SLAVE (David Wilson ed., 2011) (memoir of Solomon Northrup, a free man from New York who was kidnapped and sold into slavery in the South); CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA 1780–1865 (1994); *see also* Judson Crump & Alfred L. Brophy, *Twenty-One Months a Slave: Cornelius Sinclair's Odyssey*, 86 MISS. L. J. 457, 458–59, 468 (2017) (describing Sinclair's kidnapping in Philadelphia and the trial that eventually returned him to freedom).

[71] *See* MORRIS, *supra* note 41, at 30–34.

population was instrumental in raising these issues in Congress via the petition process.[72] In 1797, a group of former slaves from North Carolina submitted a petition to Congress claiming that, after they had been manumitted by their owners, they were pursued, captured from their homes in Pennsylvania, and ultimately sold back into slavery under the auspices of the 1793 Fugitive Slave Act.[73] They sought redress from the Congress, especially on behalf of those "who have been emancipated and tasted the sweets of liberty, and [were] again reduced to slavery by kidnappers and man-stealers," asking, "is not some remedy for an evil of such magnitude highly worthy of the deep inquiry and unfeigned zeal of the supreme Legislative body of a free and enlightened people?"[74] Although Congress ultimately provided the petitioners no relief, Representative Joseph B. Varnum of Massachusetts responded to the petition by suggesting that the Act should be amended to better protect alleged fugitives who claimed to be freemen but were labeled fugitive slaves under the Act, adding that he hoped "the House would take all possible care that freemen should not be made slaves."[75] A similar petition was submitted by Pennsylvania Rep. Robert Wal, on behalf of a group of free blacks from Philadelphia in 1800.[76] The petitioners wrote that the "solemn compact, the Constitution, was violated by the trade of kidnapping, carried on by the people of some of the Southern States on the shores of Maryland and Delaware," resulting

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[72] *See, e.g.*, 4 ANNALS OF CONG. 2015–18 (1797).

[73] *See id.*; *see also The Earliest Extant Negro Petition to Congress, 1797, reprinted in* 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE OF THE UNITED STATES 39, 39–44 (Herbert Aptheker, ed. 1951) (commenting on and reproducing text of the petition).

[74] 4 ANNALS OF CONG. 2018 (1797).

[75] *Id.* at 2023–24. Varnum observed that "[i]f these people had been free, and yet were taken up under a law of the United States, and put into prison, then it appeared plainly the duty of the House to inquire whether that act had such an unjust tendency, and if it had, proper amendments should be made to it to prevent the like consequences in the future." *Id.* at 2023.

[76] 6 ANNALS OF CONG. 229–31 (1800); *see also A "Disquieting" Negro Petition to Congress, 1800, reprinted in* 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE OF THE UNITED STATES, *supra* note 73, at 44, 44–45 (commenting on and reproducing text of the petition).

in the separation of families and the sale of free persons into slavery in Georgia, "which was degrading to the dignified nature of man."[77]

Congress took no action to solve the problem of kidnapping described in these petitions. Pro-slavery Congressmen successfully resisted any attempts to modify the Act in ways that would have complicated slaveholders' efforts to reclaim their human "property" in Northern states.[78] During debates regarding the 1850 Fugitive Slave Law, Senator Jefferson Davis of Mississippi (who would later become the first and only President of the Confederacy) flatly denied that any free black person had ever been kidnapped from a free state and sold into slavery.[79] In the end, the only proposed amendments to the 1793 Act that came close to success were those that restricted, rather than expanded, the rights of free blacks under the Act.[80]

As a result of their lack of success at the federal level, some states that either had abolished slavery or had enacted gradual emancipation statutes sought to mitigate the negative impacts of the Fugitive Slave Act of 1793 through their own laws. These early "personal liberty laws" were generally not intended to assist slaves who were attempting to escape to freedom.[81] Most proponents of these

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[77] 6 ANNALS OF CONG. 229 (1800). Rep. Waln characterized this grievance as "the operation of the fugitive act, by which free men were carried and sold into slavery." *Id.* at 230.

[78] *See, e.g.*, Cong. Globe, 31st Cong., 1st Sess. 1585, 1588 (1850); MORRIS, *supra* note 41, at 35–41.

[79] *See* Cong. Globe, 31st Cong., 1st Sess. 1588 (1850). Davis argued that he had "yet to see the first proof" that any free Black person living in a free state had been kidnapped and sold into slavery in the South, arguing that if such a kidnapping were to occur, the victim would be "liberated at once and the thief arrested." *Id.*; *see also* FEHRENBACHER & MCAFEE, *supra* note 34, at 228–29 (discussing legislative history of 1850 Fugitive Slave Act).

[80] *See* MORRIS, *supra* note 41, at 35–41 (describing Congressional efforts to amend the Fugitive Slave Act of 1793 during the period 1817 to 1822); H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133, 1143, 1146–48 (2012) (describing failed Congressional efforts to pass a bill in 1801 and 1802 that would have imposed liability on Northern employers for hiring fugitive slaves and required free blacks to carry certificates of freedom).

[81] The majority of these statutes were limited, by their terms, only to the kidnapping of free citizens who were sold into slavery. *See, e.g.*, Act of Apr. 1, 1808, ch. 96, § 1, 1808 N.Y. Laws 300, 300 (applying to any "person of colour, not being a slave"); Act of Jan. 25, 1819, ch. 444, pmbl., 1819 Ohio Laws 1052, 1052 (applying to "free persons of color"); Act of June 30, 1854, ch. 65, § 1, 1854 Conn. Pub. Acts 80, 80 (applying to "any free person entitled to freedom"); Act of Feb.

laws were not abolitionists: they did not believe that Congress had the power to eliminate slavery in any state that wanted to keep it.[82] These state laws were passed primarily to address the problem of kidnapping and subsequent enslavement of free blacks who resided in these states. To achieve this goal, these laws generally served one of two basic purposes: 1) to criminalize the kidnapping of free black people for the purpose of selling them into slavery;[83] and/or 2) to require some measure of due process in the proceedings that determined whether a person was in fact a fugitive slave (or, alternatively, a free person).[84]

The earliest state laws that addressed the problem of kidnapping, particularly as it applied to free black people residing in free states, tended to focus on criminal penalties associated with taking free people out of these states for the purpose of selling them into slavery in states or territories that recognized slavery.[85] The most obvious

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13, 1855, No. 162, § 6, 1855 Mich. Pub. Acts 413, 414 (same). Others achieved the same goal by limiting the scope of their application to persons to whom a claim had not been properly established under the federal Fugitive Slave Act. *See, e.g.*, ILL. CRIM. CODE § 56 (1833) (criminalizing the theft, taking, or arrest of any person, "whether white, black, or colored, in this state," for the purpose of carrying that person "into another country, state, or territory . . . without having established a claim according to the laws of the United States").

[82] *See, e.g.*, STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 24–25 (2010).

[83] *See, e.g.*, Act of Apr. 1, 1808, ch. 96, § 1, 1808 N.Y. Laws 300, 300 (punishing anyone who "without due process of law, [does] seize and forcibly confine or inveigle, or kidnap any negro, mulatto, mestee, or other person of colour, not being a slave, with intent to send him out of this state, against his will"); ILL. CRIM. CODE, § 56 (1833).

[84] LUBET, *supra* note 82, at 29 (noting that "many northern states attempted to impede the rush to bondage by enacting personal liberty laws . . . that required some measure of legal process as a condition of lawful removal" during this time period); MORRIS, *supra* note 41, at 29 (observing that "[t]hrough the first two decades of the nineteenth century . . . the free states acted to secure a hearing within their jurisdiction for those who claimed to be free in the face of a competing claim to slavery, and at the same time they continued to accept the fact that a general right of recaption [of slaves] existed.").

[85] One of the earliest statutes addressing this issue, however, addressed civil damages rather than criminal penalties assessed against those who would carry off by force or lure away "peaceable inhabitants" of the state, "with a probable intention of being sold as slaves" outside the state. Act of Mar. 26, 1788, ch. 48, 1787 Mass. Acts 615, 616. The title—*An Act to Prevent the Slave Trade, and for Granting Relief to the Families of Such Unhappy Persons as may be Kidnapped*

cases of kidnapping involved the forcible removal of a known free person of color from the state with the intent to transport that person over state lines and into slavery.[86] Such forcible removal could be accompanied by a bad faith claim that the person was a fugitive slave.[87] Of course, with no effective legal process, the states had no way to test claims as to a person's slave status. Particularly after the passage of the federal Fugitive Slave Act of 1793, states focused their statutory efforts on assuring that established legal processes—which often tracked the terms of the 1793 law—were followed, to provide some assurance of a good faith claim to slave status.[88] The goal of these laws was to decrease the likelihood that a free person would be doomed to slavery, either intentionally or unintentionally.[89] The penalties for violating these laws typically involved a

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or Decoyed Away from this Commonwealth—suggests the statute was designed to secure damages on behalf of the family of the person captured and sold into slavery, as it specified that the money recovered was for the "use and maintenance of the wife, children or family of the injured party." *Id.* at 617. The law notes that criminal remedies for kidnapping were provided by the common law, specifically the writ *de homine replegiando. Id.* at 616–17.

[86] In addition to forcible removal, however, almost all of the statutes also prohibited anyone from luring a free person out of the state by fraud or false pretenses. *See, e.g.*, Act of Apr. 1, 1808, ch. 96, § 1, 1808 N.Y. Laws 300, 300 (defining kidnapping to include inveigling "any negro, mulatto, mestee, or other person of colour, not being a slave" to leave the state); Act of Jan. 25, 1819, ch. 444, §1, 1819 Ohio Laws 1052, 1052 (preventing the removal of a free black person from the state by "fraud[] or deception"); Act of Mar. 27, 1820, ch. 73, § 1, 1820 Pa. Laws 104, 104 (criminalizing the removal of a free person of color from the state by "fraud or false pretences" or seduction); Act of Mar. 185, 1838, ch. 323, § 1, 1838 Me. Laws 470, 470 (imposing criminal penalties on anyone who "shall inveigle or kidnap any other person with intent either to cause such person to be secretly confined or imprisoned in this State against his will, or to be sold as a slave").

[87] *See supra* note 70 and accompanying text (discussing the problem of the intentional kidnapping of free blacks); *see also* LUBET, *supra* note 82, at 28–29.

[88] *See, e.g.*, Act of Apr. 15, 1846, ch. 6, § 13, 1846 N.J. Laws 567, 572 (penalizing anyone who takes a person out of the state "under pretence" that the person is a fugitive slave, without following procedures established by the statute); Act of Mar. 25, 1826, ch. 301, § 3, 1826 Pa. Laws 793, 794 (establishing a process for reclaiming a person "held to labour or service in any of the United States, or in any of the territories," who had escaped into Pennsylvania).

[89] *See supra* note 86 and accompanying text.

fine not exceeding $1,000, and/or a term of imprisonment or sentence to hard labor ranging from one to ten years or more.[90]

Later versions of the personal liberty laws focused more specifically on the procedural protections afforded to those who were accused of being fugitive slaves. Apparently unconvinced that the summary procedures afforded under federal law were adequate to prevent either errant or intentional wrongful declarations of enslavement, these state laws endeavored to provide fugitive slaves with a heightened degree of legal process.[91] In 1824, Indiana granted a right to an "appeal" to a trial by jury, if either party was dissatisfied with the outcome of the summary proceeding regarding a person's enslavement.[92] An 1840 New York law replaced the summary process previously established by statute with a right to trial by jury on behalf of the "claimant" or the person accused of being a fugitive slave.[93] Connecticut also granted the right to trial by jury to either party in a case involving an alleged fugitive slave, but also

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[90] *See, e.g.*, Act of Jan. 25, 1819, ch. 444, § 1, 1819 Ohio Laws 1052, 1052 (establishing a sentence of confinement plus hard labor for a period of one to ten years); Act of Mar. 27, 1820, ch. 73, § 1, 1820 Pa. Laws 104, 104–05 (establishing a penalty of a fine of $500 to $2,000, in addition to seven to twenty-one years of imprisonment); ILL. CRIM. CODE § 56 (1833) (establishing a penalty of one to seven years confinement, for each person kidnapped or attempted to be kidnapped). New York established a severe penalty for a second offense, imposing a term of imprisonment "at hard labor, or in solitude" for life. Act of Apr. 1, 1808, ch. 96, § 2, 1808 N.Y. Laws 300, 300. Vermont, in one of the earliest statutes, gave the convicted defendant a choice of being "publicly whipped, on his naked back, not exceeding 39 stripes," or paying a fine of up to $1,000, or hard labor or imprisonment for up to seven years, and also required him to pay damages to the person kidnapped. Act of Nov. 8, 1806, ch. 103, 1806 Vt. Acts & Resolves 151, 151–52.

[91] *See infra* notes 92–96.

[92] Act of Jan. 22, 2824, ch. 47, § 2, 1824 Ind. Acts 221, 221–22 (allowing either party to appeal from summary process of determining whether an alleged fugitive was a fugitive slave, to a jury trial).

[93] Act of May 6, 1840, ch. 225, § 1, 1840 N.Y. Laws 174, 174 (providing that, upon the return of the writ of habeas corpus on behalf of an alleged fugitive slave, "the claim to the service of such alleged fugitive, his identity, and the fact of his having escaped from another state of the United States into this state, shall be determined by a jury"). Several other states also guaranteed the right to a trial by jury in any case involving a fugitive slave. *See, e.g.*, Act of Oct. 29, 1840, No. 8, § 3, 1840 Vt. Acts & Resolves 13, 13; Act of Apr. 15, 1846, ch. 6, § 5, 1846 N.J. Laws 567; Act of Feb. 13, 1855, No. 162, § 2, 1855 Mich. Pub. Acts 413, 413; Act of Feb. 19, 1857, ch. 8, § 6, 1857 Wis. Sess. Laws 12, 13.

"[p]rovided, that "no person shall be qualified to sit as a Juror in said case, who believes there is not constitutionally, or legally, a slave in the land."[94] States also frequently guaranteed both claimants and accused slaves the right to seek relief via a writ of habeas corpus[95] or a writ of personal replevin.[96]

These laws illustrate free states' growing frustration with the federal government's failure to protect the rights of free black people living within their borders, who often lived in fear that they would be yanked from the street and sold into slavery. Free states acted in response to federal government inaction and their own shifting tides of public opinion, eventually erecting legal barriers to the reclamation of fugitive slaves that made "slave hunting" a legally fraught endeavor. As a result, historian Paul Finkelman has estimated that, after 1830, the Fugitive Slave Act of 1793 was "virtually unenforceable" outside the border states.[97]

C. Prigg v. Pennsylvania *and the Triumph of Federal Supremacy*

Against this backdrop of growing state resistance, in 1842 the Supreme Court of the United States decided the case of *Prigg v. Pennsylvania*.[98] *Prigg* tested the boundaries of federalism under the Fugitive Slave Clause of the Constitution.[99] The Supreme Court, in a majority opinion written by Associate Justice Joseph Story, upheld the constitutionality of the Fugitive Slave Act of 1793 and struck down Pennsylvania's personal liberty laws on federal supremacy grounds.[100] The Court's decision, however, did not put an end to

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[94] Act of June 1, 1838, ch. 37, § 4, 1838 Conn. Pub. Acts 32, 33.

[95] *See, e.g.*, Act of May 6, 1840, ch. 225, § 1, 1840 N.Y. Laws 174, 174; Act of June 1, 1838, ch. 37, § 1, 1838 Conn. Pub. Acts 32, 32; Act of May 21, 1855, ch. 489, § 2, 1855 Mass. Acts 924, 924; Act of Feb. 13, 1855, No. 162, § 2, 1855 Mich. Pub. Acts 413, 413; Act of Feb. 19, 1857, ch. 8, § 5, 1857 Wis. Sess. Laws 12, 13.

[96] *See, e.g.*, Act of Apr. 13, 1837, ch. 221, § 1, 1837 Mass. Laws 240, 240–41.

[97] Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1797–98 (1996) [hereinafter Finkelman, *Legal Ethics and Fugitive Slaves*],

[98] 41 U.S. (16 Pet.) 539 (1842).

[99] *See* Finkelman, *Legal Ethics and Fugitive Slaves*, *supra* note 97 at 1798–99.

[100] *Prigg*, 41 U.S. (16 Pet.) at 542, 571.

personal liberty laws, nor did it resolve the crisis of federalism created by the Mason Dixon Line's demarcation between slavery and freedom.

The facts underlying the dispute in *Prigg* illustrate both the tragic circumstances under which the states' personal liberty laws were invoked and the practical limits of their effectiveness. The case involved a woman named Margaret who was, at least in theory, enslaved under the laws of Maryland.[101] Her parents were held in slavery in Maryland, but their putative owner, John Ashmore, allowed them to live independently and told others that he had freed them.[102] Margaret, her husband Jerry Morgan (a free black man born in Pennsylvania), and their two children were all described as "free" in the 1830 Maryland census.[103] In 1832, several years after Ashmore's death, Margaret and Jerry Morgan and their children moved from Maryland to Pennsylvania.[104] The Morgans had at least one additional child while living in Pennsylvania, who would have been considered free under Pennsylvania law.[105] Five years after the family left Maryland, Ashmore's widow hired an attorney and neighbor, Edward Prigg, to recover Margaret Morgan and her children from Pennsylvania, claiming to own them as slaves.[106] Prigg traveled to Pennsylvania, apprehended the Morgan family, and took them to a local magistrate to obtain a certificate deeming Margaret and her children fugitives, thus authorizing their rendition to Maryland as

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[101] *Id.* at 539.

[102] Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 274.

[103] *Id.* at 275. Despite this evidence, the jury in the underlying state case found that Margaret Morgan was, in fact, a fugitive slave who was the property of John Ashford's widow, Margaret Ashford. *Prigg*, 41 U.S. (16 Pet.) at 556.

[104] *Prigg*, 41 U.S. (16 Pet.) at 556 (discussing jury's special verdict, finding that Margaret Morgan moved from Maryland to Pennsylvania in 1832); *see also* LUBET, *supra* note 82, at 30; Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 274–75.

[105] Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 276. The Pennsylvania jury found that at least one of the Morgans's children was born in Pennsylvania under circumstances that would have rendered the child free under Pennsylvania law. *Prigg*, 41 U.S. (16 Pet.) at 557.

[106] Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 275–76; *see also* LUBET, *supra* note 82, at 30. Prigg was accompanied by John Ashmore's son-in-law, Nathan Bemis, and two neighbors, Jacob Forward and Stephen Lewis, Jr. Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 275–76.

slaves.[107] The magistrate, however, refused to issue the certificate, apparently not convinced of their enslavement.[108] Rather than seek the legal redress provided for in the Pennsylvania statute, Prigg forcibly took Margaret Morgan and her children (but not her husband Jerry Morgan) south to Maryland, where they were delivered to Ashmore's widow and later sold to a slave trader.[109] The legal record makes no further mention of the fate of Margaret Morgan or her children. Prigg, however, was extradited from Maryland and tried and convicted of kidnapping by a Pennsylvania jury.[110] The appeal of his criminal conviction was taken up directly by the U.S. Supreme Court. [111]

Prigg was charged under a Pennsylvania law enacted in 1826, titled "An act to give effect to the provisions of the constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping."[112] Prigg was indicted for violating section 1 of this law when he removed Margaret Morgan from the commonwealth of Pennsylvania "with force and violence" and took her to Maryland, "with a design and intention there to sell and dispose of [her] as and for a slave and servant for life."[113] The jury that convicted Prigg did not find that Margaret Morgan was free.[114] On the contrary, they found that she was enslaved and further that she had "escaped and fled from the state of

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[107] *Prigg*, 41 U.S. (16 Pet.) at 556–57 (findings of jury's special verdict).

[108] LUBET, *supra* note 82, at 30; Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 276.

[109] *Prigg*, 41 U.S. (16 Pet.) at 557 (findings of jury's special verdict); *see also* LUBET, *supra* note 82, at 30; Finkelman, *Story Telling and the Supreme Court*, *supra* note 31, at 276.

[110] *Prigg*, 41 U.S. (16 Pet.) at 543. Bemis, Forward, and Lewis were also indicted for kidnapping. *Id.*

[111] *Id.* at 558 (noting that the Pennsylvania Supreme Court approved the lower court judgment *pro forma*, allowing defendant to prosecute a writ of error in the U.S. Supreme Court).

[112] Act of Apr. 11, 1826, ch. 301, 1826 Pa. Laws 150. The text of this statute is reproduced in the *Prigg* opinion, as part of the jury's special verdict. *Prigg*, 41 U.S. (16 Pet.) at 551–56.

[113] *Prigg*, 41 U.S. (16 Pet.) at 543; *see also* Act of Apr. 11, 1826, ch. 301, § 1, 1826 Pa. Laws 150, 150 (any person who "by force and violence" takes or carries away "any negro or mulatto" from the commonwealth of Pennsylvania, "with a design and intention of selling and disposing of such negro or mulatto, as a slave or servant for life," is guilty of a felony).

[114] *Prigg*, 41 U.S. (16 Pet.) at 556.

Maryland" without her owner's knowledge or consent.[115] The jury's finding of guilt was based on Prigg's failure to follow the procedures set forth in the Pennsylvania statute for reclaiming an alleged fugitive slave.[116]

Justice Story invalidated Prigg's conviction for kidnapping, holding that the law he violated—Pennsylvania's personal liberty law—was unconstitutional on grounds of federal supremacy.[117] He wrote that "[t]he [Fugitive Slave] clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave [to reclaim his property], which *no state law or regulation can in any way qualify, regulate, control, or restrain*."[118] Story concluded that "we hold the power of legislation on this subject to be *exclusive in Congress*."[119] Under this logic, almost all of the existing state personal liberty laws were unconstitutional in that they infringed upon the plenary power of Congress to regulate in this arena. The Supreme Court thus held that the free states were powerless to directly impose conditions on the manner in which the Fugitive Slave Clause was implemented on their soil.

Justice Story claimed that his decision in *Prigg* was compelled by his duty to faithfully interpret the law, especially as expressed in the U.S. Constitution.[120] However, the decision that he wrote was anything but inevitable. From a structural standpoint, the Fugitive Slave Clause was not a poster child for federal supremacy. The powers of Congress are articulated in Article I, Section 8, of the United States Constitution.[121] The Constitution imbues Congress with the power "[t]o lay and collect taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United

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115 *Id.*

116 *Id.* at 556–57.

117 *Id.* at 612.

118 *Id.* at 612 (emphasis added).

119 *Id.* at 625 (emphasis added).

120 2 JOSEPH STORY, LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 431 (William W. Story ed., 1851) [hereinafter LIFE AND LETTERS OF JOSEPH STORY] ("I [would] never hesitate to do my duty as a Judge, under the Constitution and laws of the United States, be the consequences what they may. That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure.")

121 U.S. CONST. art. I, § 8.

States, . . . [t]o borrow money, . . . [t]o regulate commerce, . . . [t]o establish a uniform Rule of Naturalization, . . . [t]o coin money," to create federal courts, and "[t]o declare war," among other things.[122] Article I, Section 8, does not refer to fugitive slaves, either directly or indirectly.[123] Therefore, as a matter of textual interpretation, the Fugitive Slave Clause is not obviously within the plenary power of Congress.[124]

The Fugitive Slave Clause appears in Article IV of the Constitution, which generally addresses comity among the states.[125] Section 1 of Article IV contains the Full Faith and Credit Clause, which requires each state to give "full faith and credit" to the laws and judicial proceedings of other states.[126] When the laws of two states are diametrically opposed—e.g., when one state embraces slavery and another state rejects the propertization of human beings—then "full faith and credit" is impossible.[127] Section 2 of Article IV contains the Fugitive Slave Clause, which attempted to resolve this anticipated conflict among free and slave states.[128] Abolitionists argued, and some state courts agreed, that the Fugitive Slave Act of 1793 was unconstitutional on the grounds that the States, rather than Congress, held the exclusive power to implement this Constitutional directive.[129] From a textual standpoint, these state courts may have had

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[122] *Id.*

[123] *See id.*

[124] Justice Story addressed this argument in his decision, dismissing it on grounds that Congress was empowered to enact the 1793 Fugitive Slave Act under the Necessary and Proper Clause of the Constitution. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618–19 (1842) ("The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also.").

[125] *See generally* U.S. CONST. art. IV.

[126] U.S. CONST. art. IV, § 1.

[127] *See Prigg*, 41 U.S. (16 Pet.) at 623–24.

[128] U.S. CONST. art. IV, § 2; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 26, at 443–46.

[129] *See* Baker, *supra* note 80, at 1153 (describing arguments made by the Pennsylvania Abolition Society regarding the constitutionality of the Fugitive Slave Law of 1793); Finkelman, *Story Telling on the Supreme Court*, *supra* note 31, at 269–73 (discussing state court opinions interpreting the constitutionality of same). State courts in New York and New Jersey held the 1793 Fugitive Slave Law unconstitutional. *See, e.g.*, Jack v. Martin, 14 Wend. 507, 525–26 (N.Y. 1835); Finkelman, *Story Telling on the Supreme Court*, *supra* note 31, at 269–73 (discussing state court opinions finding the 1793 Fugitive Slave Law unconstitutional). The New Jersey opinion was unpublished. Finkelman, *Story Telling on*

the better side of the argument. However, *Prigg* held the opposite, thereby placing the power of implementing the Fugitive Slave Clause squarely within the plenary powers of Congress.[130]

Justice Story also relied on the "historical necessity" argument to buttress his decision.[131] Story and many other judges argued that the Fugitive Slave Clause could not be tampered with by the states, because, without it, "the Union could not have been formed."[132] However, as discussed, the Fugitive Slave Clause of the Constitution generated very little debate.[133] As to other Constitutional provisions—most prominently the Three-Fifths and Slave Trade Clauses—Southern delegates loudly and frequently threatened to abandon the Union if they did not get the concessions they demanded on slavery.[134] However, no legislative history suggests that the same was true as to the Fugitive Slave Clause. Therefore, the

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the Supreme Court, *supra* note 31, at 270–71. Writing for New York's highest court, Chancellor Reuben Wallworth reasoned, "I have looked in vain among the powers delegated to congress by the constitution, for any general authority to that body to legislate on this subject. It certainly is not contained in any express grant of power, and it does not appear to be embraced in the general grant of incidental powers contained in the last clause of the constitution relative to the powers of congress." *Jack*, 14 Wend. at 525–26; *see also* Finkelman, *Story Telling on the Supreme Court*, *supra* note 31, at 272–73 (discussing Story's treatment and misinterpretation of *Martin* in his opinion in *Prigg*).

130 *Prigg*, 41 U.S. (16 Pet.) at 625.

131 *Id.* at 610–11.

132 *Id.* at 611; *see also* Wright v. Deacon, 5 Serg. & Rawle 62, 63 (Pa. 1819) (reasoning that "it is well known that our southern brethren would not have consented to become parties to a constitution . . . unless their property in slaves had been secured").

133 *See supra* Section I.A.

134 During the Three-Fifths Clause debate, North Carolina delegate William Richardson Davie stated that he was sure his state "would never confederate on any terms that did not rate [slaves] at least as 3/5," and further that "[i]f the Eastern States meant therefore to exclude [slaves] altogether [from the ratio of representation] the business was at an end." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 593 (Max Farrand ed., 1911) [hereinafter 1 THE RECORDS OF THE FEDERAL CONVENTION]. During the debate regarding the international slave trade, South Carolina delegate Benjamin Rutledge bluntly stated that "[t]he true question . . . is whether the Southn. [sic] States shall or shall not be parties to the Union." 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 26, at 364. His fellow South Carolinian, Charles Pinckney, similarly threatened that "South Carolina can never receive the plan if it prohibits the slave trade." *Id.*

historical necessity justification for Story's decision in *Prigg*, like the argument based on the plain language of the Constitution, is weak.

Although the Supreme Court's decision in *Prigg* undermined many of the free states' attempts to protect the rights of black citizens via anti-kidnapping laws, the decision's emphasis on the plenary power of Congress also created new avenues for state legislation designed to achieve the same ends.[135] In his opinion, Justice Story questioned the section of the 1793 Act that purported to require state enforcement of the federal law.[136] In keeping with his finding that the power to legislate on the subject of fugitive slaves was "exclusive in Congress,"[137] Story suggested that the states could not be compelled to enforce the Act.[138] He reasoned that it might be unconstitutional "to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the Constitution."[139]

Story's opinion did not hold that states were powerless to pass laws or decide court cases that affected fugitive slaves.[140] Story recognized that the states, under their general police powers, did possess "full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders," for the purpose of securing "the protection, safety, and peace of the state."[141] Although these types of state laws could and did incidentally benefit slave owners, the federal government could not *require* the states to pass such laws for

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135 *Prigg*, 41 U.S. (16 Pet.) at 625; *see infra* notes 147–51.

136 *Prigg*, 41 U.S. (16 Pet.) at 616.

137 *Id.* at 625.

138 *Id.* In a concurring opinion, Chief Justice Taney rejected Story's reasoning on this point, arguing that the states had a duty to "protect and support the [slave] owner when he is endeavouring to obtain possession of his property found within their respective territories," while they were expressly forbidden to "make any regulation" that would impair the slave owner's ability to do so. *Id.* at 627 (Taney, C.J., concurring).

139 *Id.* at 616 (majority opinion).

140 *Id.* at 615–16, 625.

141 *Id.* at 625; *see also* Kraehenbuehl, *supra* note 6, at 1477 (concluding that, under this reasoning from *Prigg*, "States could . . . either assist in enforcing federal law or refuse to aid in enforcement if they so desired."); Finkelman, *The Roots of* Printz, *supra* note 22, at 1408–09 (concluding that, under *Prigg*, state officials could enforce the federal Fugitive Slave Law, but could not be required to do so by the federal government).

the purpose of enforcing the Constitution's Fugitive Slave Clause.[142] Similarly, although Story noted that a "difference of opinion" existed as to whether state magistrates were required to accept jurisdiction over Fugitive Slave Act cases, the Court entertained no doubt that state magistrates could exercise such authority if they chose to do so, "unless prohibited by state legislation."[143]

In response to this reasoning in *Prigg*, some states passed new legislation that forbade state cooperation with federal enforcement of the Fugitive Slave Act of 1793.[144] These "noncooperative" personal liberty laws prohibited the use of state resources—including jurists, jails, sheriffs, and courtrooms—to recapture alleged fugitive slaves.[145] These personal liberty laws were intended to send a message to the slave states: free state citizens would not voluntarily hunt down alleged fugitive slaves, forcibly remove them from free state soil, and send them back into slavery. If the laws were intended to end southern demands of this nature, however, they failed miserably.[146]

D. *Northerners Fight for Local Control: The Second Wave of Personal Liberty Laws*

In the years following the *Prigg* decision, and prior to the passage of a new, more pro-slavery version of the federal Fugitive Slave Act in 1850, five free states passed personal liberty laws that explicitly forbade cooperation with the federal government with regard to the rendition of fugitive slaves: Massachusetts (1843),[147] Vermont (1843),[148] Connecticut (1844),[149] Pennsylvania (1847),[150] and

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142 *Prigg*, 41 U.S. (16 Pet.) at 615–16, 625.

143 *Id.* at 622; *see also* Finkelman, *The Roots of* Printz, *supra* note 22, at 1408–11 (discussing this reasoning in *Prigg*).

144 *See infra* notes 147–51; MORRIS, *supra* note 41, at 118.

145 *See, e.g.*, Act of Mar. 24, 1843, ch. 69, § 2, 1843 Mass. Acts 33, 33. Historian Thomas D. Morris describes these "noncooperative" personal liberty laws as part of a "containment policy" in the free states. *See* MORRIS, *supra* note 41, at 107–29 (discussing the legislative history of these laws).

146 *See* Rierson, *supra* note 21, at 813–14 (describing Southern reaction to the personal liberty laws passed by Northern states after the Supreme Court's decision in *Prigg*).

147 Act of Mar. 24, 1843, ch. 69, 1843 Mass. Acts 33.

148 Act of Nov. 1, 1843, No. 15, 1843 Vt. Acts & Resolves 11.

149 Act of June 6, 1844, ch. 27, 1844 Conn. Pub. Acts 33.

150 Act of Mar. 3, 1847, ch. 804, 1847 Pa. Laws 206.

Rhode Island (1848).[151] By enacting these laws, free states attempted to "disassociate themselves from slavery and thereby confine all action to the narrowest limits that would satisfy the Constitution."[152] These laws hindered Southerners' efforts to reclaim slaves in these states, at least temporarily, because, at the time, few federal marshals and even fewer federal jails existed to fill the void left by the denial of state law enforcement and judicial resources.[153] In fact, before 1850, most free states—where fugitive slave disputes were decided—had but a single federal judge.[154]

Connecticut passed a personal liberty law explicitly in response to the *Prigg* decision.[155] In its preamble, Connecticut's 1844 law repealed two personal liberty laws passed in 1838 and 1839, reasoning that "it has been decided by the Supreme Court of the United States . . . that both the duty and the power of legislation on [the] subject [of fugitive slaves] pertain exclusively to the National Government."[156] The new statute deprived state judicial officers of the authority to issue a warrant "for the arrest or detention of any person claimed to be a fugitive from labor or service, as a slave, under the laws of any other state or country, escaping into this state, or to grant a certificate of the title of any claimant to the service of any person so claimed to be a fugitive."[157] The Act specified, however, that it did not purport to deprive any slaveholder of his Constitutional right

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151 Act of Jan. 13, 1848, 1848 R.I. Acts & Resolves 12. Rhode Island amended this statute in 1854 to clarify that its provisions were still in effect after Congress passed a new Fugitive Slave Law in 1850. Act of June 14, 1854, 1854 R.I. Acts & Resolves 22.

152 MORRIS, *supra* note 41, at 127.

153 *See* LUBET, *supra* note 82, at 34 ("At a time when there were few federal judges and marshals, and virtually no federal jails, the denial of state facilities was potentially a major impediment to the arrest, detention, and eventual return of fugitives."); Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 879 (2011) [hereinafter Finkelman, *The Cost of Compromise*] ("With only a few federal courts operating in the country and a similarly small number of federal marshals, masters had to pursue their slaves on their own or with professional slave catchers.").

154 Finkelman, *The Roots of* Printz, *supra* note 22, at 1403–04.

155 Act of June 6, 1844, ch. 27, 1844 Conn. Pub. Acts 33.

156 *Id.* pmbl.

157 *Id.* § 2.

to reclaim a fugitive or to prevent any *federal* judicial officer from enforcing those rights.[158]

Massachusetts enacted a non-cooperative personal liberty law in 1843, one year before the Connecticut statute was passed.[159] More than any other state, the Massachusetts law reflected popular sentiment against the federal Fugitive Slave Act, specifically in response to the well-publicized arrest and trial of fugitive slave George Latimer in Boston.[160] After much legal maneuvering in the Massachusetts courts, Latimer was ultimately released to the custody of his putative owner, James Gray of Virginia.[161] However, a group of prominent Bostonians "bought" Latimer from Gray and thereby prevented his re-enslavement.[162] In a letter published in *The Liberator*, abolitionist and former slave Frederick Douglass wrote the following in reference to Latimer's case:

> Boston has become the hunting-ground of merciless men-hunters, and man-stealers. Henceforth we need not portray to the imagination of northern people, the flying slave making his way through thick and dark woods of the South, with white-fanged blood hounds yelping on his blood-stained track; but refer to the streets of Boston, made dark and dense by crowds of professed christians.[163]

In response to the Latimer case, Massachusetts citizens submitted the "Great Massachusetts Petition" to the state legislature, a document containing over 60,000 signatures.[164] The petition requested the following:

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158 *Id.*

159 Act of Mar. 24, 1843, ch. 69, 1843 Mass. Acts 33.

160 *See id.* For a discussion of George Latimer's arrest and trial under the Fugitive Slave Act and the passage of legislation in response to it, *see* FONER, GATEWAY TO FREEDOM, *supra* note 39, at 111; MORRIS, *supra* note 41, at 109–11; LUBET, *supra* note 82, at 32–34.

161 MORRIS, *supra* note 41, at 111; LUBET, *supra* note 82, at 32, 34.

162 MORRIS, *supra* note 41, at 111; LUBET, *supra* note 82, at 34.

163 Letter from Frederick Douglass to *The Liberator* (Nov. 18, 1842), *reprinted in* 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE OF THE UNITED STATES, *supra* note 73, at 222, 224–25.

164 MORRIS, *supra* note 41, at 113; LUBET, *supra* note 82, at 34.

> 1. To forbid all persons holding office under any law of this state from in any way . . . aiding or abetting the arrest or detention of any person claimed as a fugitive from slavery.
>
> 2. To forbid the use of our jails or public property . . . in the detention of any alleged fugitive from slavery.
>
> 3. To propose such amendments to the Constitution of the United States as shall forever separate the people of Massachusetts from all connection with slavery.[165]

The first and second objectives of the Petition took the form of a bill introduced by State Representative Charles Francis Adams (son of former President John Quincy Adams and grandson of former President John Adams),[166] which was signed into law on March 24, 1843, with little debate.[167] Like Connecticut, Massachusetts deprived its state judges of the authority to issue certificates or otherwise adjudicate fugitive slave cases.[168] Massachusetts went further, however, and also decreed that "[n]o sheriff, deputy-sheriff, coroner, constable, jailer, or other officer of this Commonwealth" could arrest, detain, or imprison "in any jail or other building belonging to this Commonwealth" any person on grounds that such person was

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[165] Massachusetts Historical Society, *The Great Massachusetts Petition*, MASS. HIST. SOC'Y (1842), http://www.masshist.org/database/viewer.php?item_id=1683&mode=large&img_step=1&; *see also* MORRIS, *supra* note 41, at 113.

[166] *Adams, Charles Francis*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=A000032 (last visited April 10, 2020).

[167] Act of Mar. 24, 1843, ch. 69, 1843 Mass. Acts 33; MORRIS, *supra* note 41, at 112–13 (discussing legislative history).

[168] Act of Mar. 24, 1843, ch. 69, §1, 1843 Mass. Acts 33, 33.

"claimed as a fugitive slave."[169] Both Vermont[170] and Rhode Island[171] passed statutes that were essentially identical to Massachusetts' 1843 personal liberty law, in 1843 and 1848, respectively. As discussed *infra*, the 1843 Massachusetts statute was amended and supplemented in 1855, yielding a more detailed personal liberty law that pushed even farther at the bounds of the states' Constitutional ability to mandate resistance to enforcement of the federal fugitive slave law within their borders.[172]

The state that was at the center of the controversy in *Prigg*—Pennsylvania—was actually the first state to enact a personal liberty law that deprived state judges of the authority to hear Fugitive Slave Act cases.[173] Pennsylvania enacted this law in 1820, approximately twenty years before the Supreme Court's decision in *Prigg*.[174] The Act specified that "no alderman or justice of the peace of this Commonwealth shall have jurisdiction or take cognizance of the case of any fugitive from labor from any of the United States or Territories, under [the 1793 Fugitive Slave Act]."[175] However, six years later Pennsylvania passed a new personal liberty law that detailed the process by which state judges would hear such cases.[176] As discussed *supra*, the Supreme Court in *Prigg* struck down Pennsylvania's 1826 personal liberty law on grounds of federal supremacy.[177]

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169 *Id.* § 2. The penalty for violating either section 1 or 2 of the Act was a fine of up to $1,000 or a maximum jail sentence of one year. *Id.* § 3.

170 Act of Nov. 1, 1843, No. 15, 1843 Vt. Acts & Resolves 11. Section 3 of the Act also prohibited a sheriff or other "officer or citizen of this state" from transporting or removing a fugitive slave "from any place in this state to any other place within or without" the state of Vermont. *Id.* § 3. The statute also repealed Vermont's earlier personal liberty law, which focused on providing a right to trial by jury and other procedural protections to alleged fugitive slaves. *Id.* § 6.

171 Act of Jan. 13, 1848, 1848 R.I. Acts & Resolves 12. The penalties provided for under the Rhode Island statute were a maximum $500 fine or up to six months in jail. *Id*. § 3.

172 *See infra* notes 259–67 and accompanying text (discussing Act of May 21, 1855, ch. 489, 1855 Mass. Acts 917; Act of Mar. 27, 1858, ch. 175, 1858 Mass. Acts 151).

173 Act of Mar. 27, 1820, ch. 73, 1820 Pa. Laws 70.

174 *See id.*; Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

175 Act of Mar. 27, 1820, ch. 73, § 3, 1820 Pa. Laws 70, 70.

176 Act of Apr. 11, 1826, ch. 301, § 5, 1826 Pa. Laws 150, 152.

177 *See Prigg*, 41 U.S. at 625.

In 1847, Pennsylvania enacted a new personal liberty law that repealed the law passed in 1826, attempting to comply with the letter of the law as explicated by Story in *Prigg*.[178] Section 3 of that law, which was essentially identical to the same section in the 1820 statute, effectively deprived state judges of jurisdiction to hear Fugitive Slave Act cases.[179] Similar to the personal liberty laws passed by Massachusetts, Vermont, and later Rhode Island, the Pennsylvania statute further prohibited use of "any jail or prison of this commonwealth, for the detention of any person claimed as a fugitive from servitude or labor."[180] The law also prohibited the kidnapping of any "free negro or mulatto" from the commonwealth of Pennsylvania for the purpose of selling that person into slavery outside the state.[181] It also recognized and reaffirmed state court judges' authority to issue the writ of habeas corpus, "and to inquire into the causes and legality of the arrest or imprisonment of any human being within this commonwealth."[182] Historian Thomas Morris has described Pennsylvania's 1847 statute as "an experiment in the possibilities left open by [*Prigg*], as well as an effort at containment."[183]

The personal liberty laws that were passed in the wake of the Supreme Court's decision in *Prigg v. Pennsylvania* aimed to satisfy the constitutional obligations imposed on states while minimizing the states' connection to the institution of slavery. Some states repealed all pre-existing laws that attempted to provide accused fugitives with procedural protections in favor of the non-cooperative approach,[184] but others, like Pennsylvania, attempted to maintain some of these procedural protections even in the wake of *Prigg*.[185] The viability of these laws was thrown into question when Congress

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[178] Act of Mar. 3, 1847, ch. 804, 1847 Pa. Laws 206; *Prigg*, 41 U.S. (16 Pet.) at 625.

[179] Act of Mar. 3, 1847, ch. 804, § 3, 1847 Pa. Laws 206, 207.

[180] *Id.* § 6. The Act further required any jailer violating this part of the Act to pay a $500 fine and "be removed from office, and be incapable of holding such office . . . at any time during his natural life." *Id.*

[181] *Id.* §§ 1–2. These sections of the Act were essentially identical to the same sections of the 1820 Act, except the 1847 statute specifically applied to "free" negros or mulattos, whereas the word "free" was omitted from the 1820 statute. *Compare id.*, *with* Act of Mar. 27, 1820, ch. 73, 1820 Penn. Laws 70.

[182] Act of Mar. 3, 1847, ch. 804, § 5, 1847 Pa. Laws 206, 208.

[183] MORRIS, *supra* note 41, at 118.

[184] *See, e.g.*, Act of June 6, 1844, ch. 27, 1844 Conn. Pub. Acts 33.

[185] *See, e.g.*, Act of Mar. 3, 1847, ch. 804, 1847 Pa. Laws 206.

passed a law that did not attempt to compromise on the subject of fugitive slaves, but rather capitulated to Southern demands: the 1850 Fugitive Slave Act.[186]

E. *The Triumph of Federal Power via the Fugitive Slave Act of 1850*

Congress attempted to resolve the federalism issues created by the *Prigg* decision and the free states' response to it when it enacted the Fugitive Slave Act of 1850.[187] The Fugitive Slave Act of 1850 was part of the Compromise of 1850, an omnibus agreement that was intended to (but obviously did not) avert the Civil War, which broke out about a decade later.[188] The Act, like many parts of the Compromise of 1850, was a concession to the Southern States.[189] No part of the Act was designed to protect the rights of black Americans, and it expressly required free state citizens to assist with the implementation of the federal law and the apprehension of alleged fugitives found on their soil.[190] Historian Eric Foner has described this statute as "the most robust expansion of federal authority over the states, and over individual Americans, of the antebellum era."[191]

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[186] *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

[187] *Id.*; *see also* MORRIS, *supra* note 41, at 146 (noting key provisions of the Act); COVER, *supra* note 20, at 175 (same). The legislative history of the Act is discussed at MORRIS, *supra* note 41, at 131–45.

[188] Under the Compromise of 1850, Congress: (1) admitted California to the Union as a free state; (2) prohibited the slave trade in the District of Columbia; (3) paid ten million dollars to Texas to settle a border dispute with New Mexico; (4) enacted the Fugitive Slave Act; and (5) organized Utah and New Mexico as territories without restrictions on slavery. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 75–76 (C. Vann. Woodward ed., 1988) (summarizing key provisions of the Compromise of 1850). For a more in-depth discussion of the Compromise of 1850, *see* HOLMAN HAMILTON, PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850 (2005); *see also* WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854, at 487–510 (1990).

[189] *See* Finkelman, *The Cost of Compromise*, *supra* note 153, at 882 (arguing that the 1850 Fugitive Slave Act could not "be considered part of a 'compromise' because it was so utterly one-sided" in favor of the South); MORRIS, *supra* note 41, at 146 (observing that the "Fugitive Slave Law of 1850 was scarcely a compromise").

[190] *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

[191] FONER, GATEWAY TO FREEDOM, *supra* note 39, at 125; *see* Foner, *What the Fugitive Slave Act Teaches Us*, *supra* note 1 (characterizing the 1850 Fugitive

The Fugitive Slave Act of 1850—which, like the Constitution's Fugitive Slave Clause and the Fugitive Slave Act of 1793, never uses the word "slave"[192]—was intended to ensure that the free states and their citizens did not impede Southern slaveholders' efforts to reclaim putative human property on free soil.[193] The 1850 Act took aim at free states' personal liberty laws, trying to dismantle their attempts to provide procedural protections to those who were accused of being fugitive slaves.[194] The 1850 Act also went further, legislatively declaring that free state citizens owed a duty to assist the slave-catchers who pursued fugitives within their states.[195] Although the Act attempted to squelch free states' resistance to slave-hunting on their soil, it failed.[196] The Fugitive Slave Act of 1850 ultimately inflamed, rather than ameliorated, the federalism crisis engendered by the Fugitive Slave Act of 1793.[197]

Free-state efforts to provide alleged fugitive slaves with a measure of due process, which had been ruled unconstitutional by the Supreme Court's decision in *Prigg v. Pennsylvania*,[198] were targeted

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Slave Act as "probably the most intrusive intervention by Washington into local affairs of the entire pre-Civil War period"). *See also* Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 L. & HIST. REV. 1, 20–26 (2008) (discussing the incorporation of the federal *posse comitatus* doctrine into the Fugitive Slave Law of 1850, concluding that the doctrine radically transformed federal power over the U.S. citizenry).

192 *See* U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1; Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302. Like the 1793 Act, the statute adopted in 1850 refers to escaping slaves as "fugitives" or "fugitives from service or labor." *Compare* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302, *with* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. Slaveholders are consistently referred to as "claimants." Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. The word "slave" appears nowhere in either Act or in the Constitution.

193 *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462; *see also* LUBET, *supra* note 82, at 43 (noting that "it was evident from the start that the entire purpose of the Act was to make it nearly impossible for judicial process to delay the restoration of slaves to claimants").

194 *See* LUBET, *supra* note 82, at 45.

195 *See* Fugitive Slave Act of 1850, ch. 60, §§ 5–6, 9 Stat. 462, 462–63.

196 *See* FONER, GATEWAY TO FREEDOM, *supra* note 39, at 125 (observing that the Act "could hardly have been designed to arouse greater opposition in the North").

197 *See* Rierson, *supra* note 21, at 814–22 (discussing the Fugitive Slave Act of 1850 and the role it played in bringing about the Civil War).

198 Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842).

and dismantled by federal law. While the 1793 Act did not guarantee a jury trial, an appeal, or any other procedural protections, it also did not explicitly exclude them.[199] The 1793 Act also did not specify acceptable forms of evidence on the issue of slave status, other than to reference proof "either by oral testimony or affidavit."[200] The Fugitive Slave Act of 1850 was more specific in its denial of procedural protections for those accused of being fugitive slaves.[201] In defining what constituted "satisfactory proof" of ownership of an alleged fugitive, the 1850 Act excluded the testimony of the person accused of being a fugitive slave, which could not be admitted into evidence.[202] The law allowed slave holders to seize and arrest a person suspected to be a fugitive slave in a free state "without process," so long as they took the alleged fugitive before a federal commissioner to have his slave status determined in a summary proceeding.[203] The federal commissioner's decision as to the status of an alleged fugitive was final; appeals were not permitted.[204] The law further provided that, if a commissioner issued a certificate finding a person to be a fugitive slave, that finding would "prevent all molestation of [the putative owner of the slave] by any process issued by any court, judge, magistrate, or other person whomsoever."[205] Most courts interpreted this statutory language to prevent use of the writ of habeas corpus to seek state court review of the legality of a person's detention as a fugitive slave.[206] The Act contained no statute of limitations.[207]

To resolve the problems created by a lack of federal manpower to enforce the federal fugitive slave law, the 1850 Fugitive Slave

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199 *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

200 *Id.* § 3.

201 *See* Fugitive Slave Act of 1850, ch. 60, §§ 6–7, 9 Stat. 462, 463–64.

202 *Id*. § 6.

203 *Id.*

204 The certificate issued by the commissioner was considered "conclusive" of the claimant's right to remove the fugitive "to the State or Territory from which he escaped." *Id.*

205 *Id.*

206 *See* MORRIS, *supra* note 41, at 143–44, 152–54 (discussing legislative history on writ of habeas corpus and the federal fugitive slave law, describing various court opinions interpreting the fugitive slave law, and noting that the "effect of the federal law on runaways upon a state habeas corpus" was "one of the most warmly debated legal and constitutional problems of the decade").

207 *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

Act created a new, "national system of law enforcement."[208] The Act authorized the creation of a new type of federal judicial officer in the States and Territories: the federal commissioner, one of whom was to be appointed in every county.[209] The Act supplemented the power of the federal commissioners by authorizing and empowering them to appoint "any one or more suitable persons" to execute warrants issued under the Act, and further "to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to ensure a faithful observance" of the Constitution's Fugitive Slave Clause.[210] The Act further commanded "all good citizens" to "aid and assist in the prompt and efficient execution of this law, whenever their services may be required."[211]

> From the perspective of citizens residing in the free states, the section of the Act that compelled their participation was particularly offensive, as it effectively impressed them into the service of the slaveholder and thereby metaphorically "enslaved" them as well. Moreover, it directly and inescapably conflicted with the laws and social norms of free state society, which did not embrace complaisance with perpetrating slavery.[212]

Anyone who resisted the commands of the Fugitive Slave Act risked his liberty and the contents of his wallet. Any person who assisted a runaway slave—by attempting to rescue him, harboring or concealing him, or by aiding or abetting his escape (either directly or indirectly)—could be sentenced to a maximum of six months in prison, forced to pay a maximum $1000 fine, plus an additional

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[208] Finkelman, *The Cost of Compromise*, *supra* note 153, at 879.

[209] Fugitive Slave Act of 1850, ch. 60, §§ 1–2, 9 Stat. 462, 462. The Act specified that the federal courts "shall from time to time enlarge the number of the commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act." *Id.* § 3

[210] *Id.* § 5; *see also* Rao, *supra* note 191, at 20–26 (concluding that the incorporation of the federal *posse comitatus* doctrine into the Fugitive Slave Law of 1850 radically transformed federal power over the U.S. citizenry).

[211] Fugitive Slave Act of 1850, ch. 60, §5, 9 Stat. 462, 463.

[212] *See* Rierson, *supra* note 21, at 816; *see also* Rao, *supra* note 191, at 5 (noting that "a national duty to assist in the recovery of fugitive slaves imposed the legal norms of slave society on free states").

thousand dollars in civil damages payable to the claimant.[213] If a federal marshal failed to "obey and execute" a warrant for a fugitive, he could be fined $1000, payable to the claimant.[214] If a marshal had custody of a fugitive who managed to escape (with or without the marshal's assent), the marshal was liable to the claimant for the "full value of the service or labor" of the fugitive.[215] The federal commissioners who administered the Act also had a financial incentive to find in favor of slaveholders.[216] They earned a fee of $10 if they issued a certificate affirming the claimant's right to reclaim a fugitive slave; the fee was reduced to $5 if the commissioner found insufficient proof to issue a certificate.[217]

The Supreme Court affirmed the constitutionality of the 1850 Fugitive Slave Act in *Ableman v. Booth*, a case arising from a slave rescue in Milwaukee, Wisconsin in 1854.[218] Sherman M. Booth, the editor of an abolitionist newspaper in Milwaukee, led the group that freed Joshua Glover, an enslaved man who fled from Missouri and ultimately escaped to Canada.[219] Booth was charged with violating the anti-aiding and abetting provisions of the 1850 Fugitive Slave Act.[220] The Wisconsin Supreme Court, acting on a writ of habeas corpus, ordered that Booth be released from custody on the grounds that the Fugitive Slave Act violated the U.S. Constitution and was

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213 Fugitive Slave Act of 1850, ch. 60, §5, 9 Stat. 462, 463.

214 *Id.* § 5.

215 *Id.*

216 *See id.* § 8.

217 *Id.*

218 62 U.S. (21 How.) 506, 526 (1858). For a more complete discussion of the facts and politics surrounding this case, *see generally* Earl M. Maltz, *Slavery, Federalism, and the Constitution:* Ableman v. Booth *and the Struggle over Fugitive Slaves*, 56 CLEV. ST. L. REV. 83 (2008); Jeffrey Schmitt, Note, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007); A.J. Beitzinger, *Federal Law Enforcement and the* Booth *Cases*, 41 MARQUETTE L. REV. 7 (1957).

219 Maltz, *supra* note 218, at 89–90; *see also* Schmitt, *supra* note 218, at 1323–25; Beitzinger, *supra* note 218, at 10–11.

220 *Ableman*, 62 U.S. (21 How.) at 507 (referencing Fugitive Slave Act of 1850, ch. 60, § 7, 9 Stat. 462, 464) (imposing liability on any person who aids, abets or assists a slave who attempts to escape from custody under the Act).

therefore void.[221] The case eventually found its way to the U.S. Supreme Court. In a unanimous decision written by Chief Justice Taney, the Court held that "the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States."[222] The decision, which has been characterized as a "powerful reassertion of the Supreme Court's authority over state courts,"[223] reasoned that "no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws."[224] *Booth* reaffirmed the federal courts' ability to compel enforcement of federal law, even in states where that law was exceedingly unpopular, like the Fugitive Slave Act in antebellum Wisconsin.

The heavy-handedness of the 1850 Fugitive Slave Act was undeniable, leading one historian to describe it as "one of the most draconian laws ever passed by Congress."[225] Perhaps not surprisingly, one of the first persons determined to be a fugitive slave under the Act, Adam Gibson, was not, in fact, a slave: when Gibson was presented to his putative owner in Maryland, the slaveholder acknowledged that Gibson was not the man who had escaped him.[226] The vast majority of proceedings instituted under the Act resulted in the re-enslavement of alleged fugitives; federal commissioners rarely found that an alleged fugitive slave was, in fact, free.[227]

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[221] *Id*. at 507–08. The Wisconsin Supreme Court found the Fugitive Slave Act to be "unconstitutional and void" on five separate grounds, which are briefly set forth in its opinion. *In re* Booth, 3 Wis. 13, 14 (Wis. 1854), *rev'd sub nom. Ableman*, 62 U.S. (21 How.) at 506; *see also* Schmitt, *supra* note 218, at 1330–36 (discussing the opinions of the Wisconsin Supreme Court).

[222] *Ableman*, 62 U.S. (21 How.) at 526.

[223] Maltz, *supra* note 218, at 105.

[224] *Ableman*, 62 U.S. (21 How.) at 525.

[225] Finkelman, *The Roots of* Printz, *supra* note 22, at 1416; *see* FONER, GATEWAY TO FREEDOM, *supra* note 39, at 124 (similarly describing the Act as "draconian").

[226] FEHRENBACHER & MCAFEE, *supra* note 34, at 241–42.

[227] Out of 332 total cases brought under the 1850 Fugitive Slave Act over a ten-year period, only eleven alleged fugitives were released from custody on the grounds that they were free. *See* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 207 (1970); *see also* HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION

Slave owners' high rate of success in proceedings instituted under the 1850 Fugitive Slave Act perhaps belied the overall ineffectiveness of the law in retrieving slaves who fled North in search of freedom.[228] Although it is impossible to calculate the exact number of slaves who escaped bondage during the decade between the enactment of the 1850 Fugitive Slave Law and the outbreak of the Civil War in 1861, estimates range from eight to fifteen thousand.[229] During this same period, only about three hundred fugitives were returned to slavery under the auspices of the 1850 Fugitive Slave Act.[230] Many factors contributed to the fugitive slaves' ability to avoid capture, especially once they were ensconced in free communities.[231] Resistance in the free states, both via efforts to work within the law and in outright defiance of it, was one of them.

1. CONTINUED LEGISLATIVE RESISTANCE IN THE FREE STATES

The free states did not embrace the Fugitive Slave Act of 1850. Although some political and religious leaders in these states initially counseled citizens to follow the law, regardless of their disdain for it, resistance grew over time.[232] Other events in the nation fed anti-

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OF SLAVERY 412 (1998) (estimating that approximately 98% of prosecutions under the Fugitive Slave Act of 1850 resulted in the fugitive being returned to slavery).

228 Schmitt, *Immigration Enforcement Reform*, *supra* note 6, at 4 (noting that "[a]lthough the federal government vigorously enforced the Fugitive Slave Act of 1850, it was widely perceived to be a failure."); Foner, *What the Fugitive Slave Act Teaches Us*, *supra* note 1, ("The draconian law of 1850 didn't stop the steady flow of runaways from the South.").

229 CAMPBELL, *supra* note 227, at 168. Research has suggested that the number of runaway slaves in the South may have been understated, particularly on the eve of the Civil War. *See, e.g.*, JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION 282 (1999). In 1860 alone, as many as 50,000 slaves may have fled their masters but did not leave the South. *Id.*

230 Out of 332 total cases, about 300 alleged fugitives were either "remanded" to the South pursuant to a federal court order or were returned to the South "without due process." CAMPBELL, *supra* note 227, at 207. About thirty alleged fugitives were either found to be free, escaped, or were rescued from federal custody. *Id.*

231 *See id.* at 168–69.

232 *See* Rierson, *supra* note 21, at 818–22 (describing the evolution of Northern opinion in relation to the Fugitive Slave Act of 1850, from grudging acceptance to outright defiance).

slavery sentiment and increased politicians' desire and ability to enact personal liberty laws that—at least in certain states—increasingly defied federal law on the subject.[233] Most of the personal liberty laws discussed below were adopted after the passage of the Kansas-Nebraska Act of 1854.[234] The Kansas-Nebraska Act, which repudiated the Missouri Compromise by repealing the federal ban on slavery in the Northwest Territories,[235] was a concession to Southerners that generated an "explosion of northern anger" that ultimately "transformed the national party system and renewed the sectional controversy in all its bitterness."[236] It also generated renewed opposition to the Fugitive Slave Act of 1850.[237] Other social and political events during the 1850s also contributed to anti-slavery sentiment in the Northern free states, including the publication of *Uncle Tom's Cabin* in 1852,[238] Preston Brooks' assault on Charles Sumner in the Senate in 1856,[239] and the Supreme Court's decision in *Dred Scott v. Sandford* in 1857.[240] All of these events influenced

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[233] *See id.* at 834 ("Although many white citizens in the free states opposed slavery in the mid-nineteenth century, few would have accepted the label of 'abolitionist,' defined as one who advocated the immediate and total abolition of slavery, even in the southern states."). Few anti-slavery Northerners wanted to eliminate slavery in the South; instead they were determined to prevent the spread of slavery to the Territories. *Id.* at 838. Their objections to the institution of slavery were primarily founded on a "free labor" philosophy, not a moral critique of the institution. *See id.* at 838–44; *see also* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 54–58 (1970) (describing reasons for intense Republican opposition to the spread of slavery into the Territories).

[234] *See, e.g.*, Act of May 21, 1855, ch. 489, 1855 Mass. Acts 924.

[235] Kansas-Nebraska Act of 1854, ch. 59, § 14, 10 Stat. 277, 282–83.

[236] FEHRENBACHER & MCAFEE, *supra* note 34, at 236; *see* DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 160–76 (Don E. Fehrenbacher ed., 1976) (discussing the legislative history of the Kansas-Nebraska Act).

[237] *See* FEHRENBACHER & MCAFEE, *supra* note 34, at 236 ("Enactment of the Kansas-Nebraska bill, said one conservative Whig, would mean the 'complete nullification of the Fugitive Slave Law.'") (citation omitted).

[238] *See infra* notes 439–43 and accompanying text.

[239] *See* DAVID DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 293–96 (1960); *see also* Rierson, *supra* note 21, at 826–28.

[240] 60 U.S. (19 How.) 393, 454 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that Dred Scott was a citizen and therefore the Court could not exercise jurisdiction over his lawsuit); *see also* Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L.

public sentiment towards the Fugitive Slave Act of 1850, which in turn inspired numerous states to take legislative action in opposition to it.[241]

The Fugitive Slave Act of 1850 did not attempt to compel the States to administer it. Rather, the Fugitive Slave Act authorized the appointment of federal commissioners to enforce its own provisions.[242] In 1855, Maine and Michigan passed new laws forbidding cooperation with the Fugitive Slave Act of 1850.[243] The language used in Maine's statute was essentially identical to that contained in the non-cooperative personal liberty laws passed earlier by Massachusetts, Vermont, and Rhode Island.[244] As discussed above, these laws prohibited use of state resources to pursue and capture fugitive slaves on their soil, primarily (1) the state judiciary; (2) state deputies and other law enforcement officers; and (3) state jails and other facilities for holding prisoners.[245]

Other personal liberty laws passed after the Supreme Court's decision in *Prigg v. Pennsylvania* and Congress's adoption of the 1850

REV. 1, 30–33 (1996) (discussing the impact the *Dred Scott* decision had on slavery); ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 92–98 (2010) (discussing Republican reactions to the *Dred Scott* decision); Rierson, *supra* note 21, at 828–32 (discussing the *Dred Scott* opinion and the reaction to it in the Northern states).

241 *See infra* notes 243–69.

242 Fugitive Slave Act of 1850, ch. 60, §§ 1–2, 9 Stat. 462, 462.

243 *See* Act of Mar. 17, 1855, ch, 182, §§ 1–2, 1855 Me. Laws 207, 207–08; Act of Nov. 13, 1850, No. 16, §§ 3, 6, 1855 Vt. Acts & Resolves 9, 9–10.

244 *Compare* Act of Mar. 17, 1855, ch. 182, 1855 Me. Laws 207, *with* Act of Mar. 24, 1843, ch. 69, 1843 Mass. Acts 33, *and* Act of Nov. 1, 1843, No. 15, 1843 Vt. Acts & Resolves 11, *and* Act of Jan. 13, 1848, 1848 R.I. Acts & Resolves 12. Maine's law additionally clarified that it did not permit anyone to "hinder or obstruct" a U.S. marshal or any federal official from enforcing the Fugitive Slave Law. Act of Mar. 17, 1855, ch. 182, § 4, 1855 Me. Laws 207, 208.

245 *See supra* notes 168–172 and accompanying text (discussing personal liberty laws of Massachusetts, Vermont, and Rhode Island). The law passed in Michigan focused solely on law enforcement officers and jails; it did not address the use of state judicial officers in Fugitive Slave Act cases. Act of Feb. 13, 1855, No. 162, § 5, 1855 Mich. Pub. Acts 413, 414 ("No person arrested and claimed as a fugitive slave shall be imprisoned in any jail or other prison in this State . . . ."); Act of Feb. 13, 1855, No. 163, § 1, 1855 Mich. Pub. Acts 415, 415 ("[N]othing in this [statute] . . . shall be construed to authorize or require any sheriff or other officer to receive into or detain . . . in any of said jails or other public buildings, any person claimed as a fugitive slave . . . .").

Fugitive Slave Act appeared to either ignore or narrowly interpret these federal authorities.[246] These personal liberty laws focused again on extending procedural protections to those who were accused of being fugitive slaves.[247] Some states, like Michigan, passed such laws in concert with the non-cooperative personal liberty laws described above.[248] Michigan's statute, passed in 1855, guaranteed a person accused of being a fugitive slave the right to seek review of detention decisions via the writ of habeas corpus and a jury trial.[249] Vermont, which had repealed its statute guaranteeing procedural protections to alleged fugitives in 1840 (in the same statute that mandated non-cooperation with the federal government),[250] reinstated some of these procedural protections in 1850, including the writ of habeas corpus and the right to a trial by jury.[251]

Other statutes passed in the 1850's granted further procedural protections that directly contravened the 1850 Fugitive Slave Act,[252] which required commissioners to "hear and determine" fugitive slave cases "in a summary manner; and upon satisfactory proof being made, by deposition or affidavit."[253] Connecticut, Vermont, Massachusetts, and Wisconsin passed laws mandating that testimony by deposition could not be offered at a trial regarding a person's slave status.[254] These same states, along with Michigan, also required that any declaration offered to establish a person's enslavement required the support of the testimony of "at least two credible

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246 *See, e.g.*, Act of Mar. 17, 1855, ch. 182, 1855 Me. Laws 207.

247 *See, e.g.*, Act of Feb. 13, 1855, No. 162, §§ 3–4, 1855 Mich. Pub. Acts 413, 414.

248 *Id.*

249 *Id.*

250 Act of Nov. 1, 1843, No. 15, 1843 Vt. Acts & Resolves 11.

251 Act of Nov. 13, 1850, No. 16, §§ 3, 6, 1850 Vt. Acts & Resolves 9, 9–10.

252 *See, e.g.*, Act of Mar. 17, 1855, ch. 182, 1855 Me. Laws 207.

253 Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463–64.

254 Act of June 30, 1854, ch. 65, § 4, 1854 Conn. Pub. Acts 80, 81; Act of Nov. 14, 1854, No. 52, § 3, 1854 Vt. Acts & Resolves 51, 52; Act of May 21, 1855, ch. 489, § 6, 1855 Mass. Acts 924, 925–26; Act of Feb. 23, 1857, ch. 8, § 9, 1857 Wis. Sess. Laws 12, 14.

witnesses."[255] Some states also specified that giving false testimony as to a person's slave status was a criminal offense.[256]

Some personal liberty laws attempted to ensure that those accused of being fugitive slaves had meaningful access to the courts in that state.[257] Over a hundred years before the Supreme Court held that the Fourteenth Amendment required states to provide indigent criminal defendants with access to counsel,[258] New York, Massachusetts, Michigan, and Wisconsin passed laws instructing state officials, typically a prosecutor, to provide free legal representation to persons accused of being runaway slaves.[259] New York and Vermont also statutorily mandated that alleged fugitive slaves could subpoena witnesses free of charge.[260] By passing these laws, states recognized that without legal counsel and meaningful access to

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[255] Act of June 30, 1854, ch. 65, § 2, 1854 Conn. Pub. Acts 80, 80; Act of Nov. 14, 1854, No. 52, § 2, 1854 Vt. Acts & Resolves 51, 52; Act of May 21, 1855, ch. 489, § 6, 1855 Mass. Acts 924, 925–26; Act of Feb. 23, 1857, ch. 8, § 8, 1857 Wis. Sess. Laws 12, 13–14; Act of Feb. 13, 1855, No. 162, § 8, 1855 Mich. Pub. Acts 413, 414–15.

[256] *See, e.g.*, Act of June 30, 1854, ch. 65, § 1, 1854 Conn. Pub. Acts 80, 80 (imposing criminal penalties on anyone "who shall falsely and maliciously declare, represent or pretend, that any free person" is a slave, "with intent to procure or to aid or assist in procuring the forcible removal of such free person from this State as a slave"); Act of Feb. 13, 1855, No. 162, § 6, 1855 Mich. Pub. Acts 413, 414 (same); Act of Feb. 23, 1857, ch. 8, § 7, 1857 Wis. Sess. Laws 12, 13 (same).

[257] *See, e.g.*, Act of May 21, 1855, ch. 489, § 17, 1855 Mass. Acts 924, 928.

[258] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that indigent criminal defendants charged with serious crimes are entitled to legal representation in state courts under the Fourteenth Amendment).

[259] Act of May 6, 1840, ch, 225, § 9, 1840 N.Y. Laws 174, 175–76 (providing that the County district attorney must "render his advice and professional services" to alleged fugitive slaves, and "shall attend in his behalf on the trial of such claim"; attorney fees were paid by the county); Act of May 21, 1855, ch. 489, § 17, 1855 Mass. Acts 924, 928 (requiring the governor to appoint, in every county, a commissioner who would "diligently and faithfully . . . use all lawful means to protect, defend, and secure to [alleged fugitive slaves] a fair and impartial trial by jury"); Act of Feb. 13, 1855, No. 163, § 1, 1855 Mich. Pub. Acts 415, 415; (requiring prosecuting attorneys to "diligently and faithfully . . . use all lawful means to protect and defend" any inhabitant of their respective counties who is "arrested or claimed as a fugitive slave"); Act Feb. 23, 1857, ch. 8, § 2, 1857 Wis. Sess. Laws 12, 12 (same).

[260] *See, e.g.*, Act of May 6, 1840, ch, 225, § 10, 1840 N.Y. Laws 174, 176; Act of Oct. 29, 1840, No. 8, § 7, 1840 Vt. Acts & Resolves 13, 14.

courts, black citizens accused of being fugitive slaves stood no chance of preserving their freedom.

The personal liberty law that went the farthest in terms of punishing those who assisted with enforcement of the Fugitive Slave Act was adopted by Massachusetts in 1855[261] over the veto of Governor Henry Gardner, a member of the Know-Nothing Party.[262] Its most controversial provisions were repealed in 1858.[263] The law passed in 1855 forbade any person "holding any office of honor, trust, or emolument, under the laws of this Commonwealth" from serving a warrant or issuing a certificate to enforce the Fugitive Slave Act.[264] Anyone who violated this provision was deemed to have resigned his office, and was "forever thereafter ineligible to [hold] any office of trust, honor or emolument" in the state.[265] Any judge who acted as a federal commissioner in a Fugitive Slave Act case could be impeached.[266] Any lawyer who represented a claimant/slaveholder in a Fugitive Slave Act case could no longer appear in the courts of the Commonwealth.[267] Any law enforcement officer who arrested or detained an alleged fugitive slave was subject to a $1000 to $2000 fine and required to serve one to two years in state prison.[268] Three years later, these controversial provisions were either repealed or amended to clarify that punishment would not apply to acts of "military obedience and subordination."[269]

These non-cooperative personal liberty laws sought to fill the space left by the Supreme Court's decision in *Prigg* and to minimize free states' participation in the system of slavery that permeated the South. Many states also sought to legislatively enhance due process in fugitive slave rendition, despite the Supreme Court's instruction that such laws were invalid on grounds of federal preemption. Ultimately, these efforts were not effective in protecting individuals who were arrested and charged under the Fugitive Slave Acts, only a tiny fraction of whom were found to be free. Defiance of the law,

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261 Act of May 21, 1855, ch. 489, 1855 Mass. Acts 924.
262 *See* MORRIS, *supra* note 41, at 168–71.
263 Act of Mar. 27, 1858, ch. 175, 1858 Mass. Acts 151.
264 Act of May 21, 1855, ch. 489, § 9, 1855 Mass. Acts 924, 926.
265 *Id.* § 10.
266 *Id.* § 12.
267 *Id.* § 11.
268 *Id.* § 15.
269 Act of Mar. 27, 1858, ch. 175, 1858 Mass. Acts 151.

rather than attempts to reform it, secured freedom on behalf of hundreds, if not thousands, of individuals, very few of whom were ever prosecuted under the Fugitive Slave Acts.

2. SLAVE RESCUES AND JURY NULLIFICATION

The personal liberty laws described above represented just one form of resistance to the activity of "slave catching" in the free states. Some citizens, who answered to a "higher law" than the Fugitive Slave Acts, actively sought to thwart slaveholders who attempted to capture former slaves living on free soil. Prosecutors who sought to convict these abolitionists for violating the Fugitive Slave Acts, or for more serious crimes, often faced juries who refused to convict. These well-publicized clashes among slave catchers, fugitive slaves, and abolitionists eroded public support for the Fugitive Slave Acts in the free states, especially after 1850. As the cost of the law's enforcement grew, so did its repugnance in the eyes of northern citizens.

During the antebellum era, some opponents of slavery denied that they owed any duty to slaveholders, under either the Constitution or federal law, on the grounds that they were bound by a "higher law" that did not recognize slavery. This philosophy was famously articulated by New York Senator William Seward, who proclaimed the following on the floor of the Senate during debates regarding the status of slavery in the proposed new state of California:

> the Constitution devotes the domain [of the territories] to union, to justice, to defence, to welfare, and to liberty. But there is a higher law than the Constitution, which regulates our authority over the domain, and devotes it to the same noble purposes. The territory is a part . . . of the common heritage of mankind, bestowed upon them by the Creator of the Universe.[270]

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[270] CONG. GLOBE, 31st Cong., 1st Sess. 1446 (1850) (emphasis added); *see also* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 146–48 (2005) (discussing Seward's speech); FONER, GATEWAY TO FREEDOM, *supra* note 39, at 87 (noting Lincoln's rejection of the "higher law" doctrine). References to a "higher law" were also part of the rhetoric

Although Seward did not urge defiance of federal law in this speech, others did. Defense attorney Albert Riddle unapologetically espoused allegiance to the "higher law" in court, in a legal proceeding stemming from an incident known as the Oberlin-Wellington rescue.[271] Although thirty-seven indictments for violations of the Fugitive Slave Act were obtained in this case, most of the indictments were abandoned, and only two individuals were convicted.[272] In defending the men who assisted fugitive slave John Price in his escape to freedom,[273] Riddle declared himself a "votary" of the "Higher Law," arguing, "Right, and its everlasting opposite, *Wrong*, existed anterior to the feeble enactments of men, and will survive their final repeal . . . they are such unchanged and unqualified by your acts of Congress, and statutes of your Legislatures."[274] Riddle encouraged the jury to reward rather than convict Price's rescuers, who had "follow[ed] the path of conscience" and "obeyed the laws of God."[275] After his conviction, defendant Charles Langston, a free black man, also eloquently embraced the higher law when he spoke to the court, arguing that his actions were honorable and right, "no matter what the laws might [be]."[276]

The Oberlin-Wellington rescue was but one example of the clashes that arose among slaveholders, federal authorities, and

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of the American Revolution. Hamilton eloquently espoused this view: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of the divinity itself and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted, &c., [23 February] 1775*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-01-02-0057.

271 *See* LUBET, *supra* note 82, at 267–68; *see also* NAT BRANDT, THE TOWN THAT STARTED THE CIVIL WAR 89–111 (1990) (discussing Price slave rescue and resistance to slavery in Oberlin, Ohio); Villarruel, *supra* note 6, at 1437–39 (same).

272 FEHRENBACHER & MCAFEE, *supra* note 34, at 239.

273 With the help of Langston and others, Price escaped slavery and fled to Canada. LUBET, *supra* note 82, at 246–47.

274 *Id.* at 267.

275 *Id.* at 267–68.

276 *Charles Langston's Speech at the Cuyahoga County Courthouse*, ELECTRONIC OBERLIN GROUP, http://www2.oberlin.edu/external/EOG/Oberlin-Wellington_Rescue/c._langston_speech.htm (last visited Mar. 14, 2020). Charles Langston's grandson was the acclaimed poet Langston Hughes. *See* FAITH BERRY, LANGSTON HUGHES, BEFORE AND BEYOND HARLEM 2 (1992).

northern citizens when abolitionists attempted to physically block enforcement of the 1850 Fugitive Slave Law in their states (with varying degrees of success). Many of the most well publicized slave rescues occurred in Massachusetts. Early attempts to enforce this federal law in Boston were unsuccessful: William and Ellen Craft, prominent Boston abolitionists who had fled slavery in Georgia, evaded slavecatchers just weeks after passage of the 1850 Fugitive Slave Law.[277] The Crafts ultimately settled in England, where they continued to protest slavery.[278] Shadrach Minkins, a former Virginia slave who worked as a waiter at a Boston coffee shop, evaded attempts to re-enslave him when members of the black community forcibly removed him from the federal courtroom in Boston and then hid him so that he could escape to Canada.[279] Although ten defendants were criminally charged in Minkins' escape (three white and seven black men), none were convicted.[280] Another former slave from Georgia, Thomas Sims, was not so fortunate. Sims was seized on April 3, 1851, and tried before federal commissioner George Ticknor Curtis in Boston.[281] Ultimately, in spite of much legal maneuvering by the anti-slavery bar, Curtis issued a certificate authorizing Sims' return to slavery in Savannah, Georgia.[282] To avoid another escape and to ensure successful enforcement of the federal law, a heavy chain was placed around the Boston courthouse. [283] Sims was marched from the federal courthouse to a south-bound ship at 4:00 AM, escorted by three hundred armed men.[284] Sims'

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277 *See* LUBET, *supra* note 82, at 267–68.

278 *Id.* at 47–49, 134–35.

279 *See id.* at 137–41.

280 *See id.* at 141–46.

281 *Id.* at 147–48; CAMPBELL, *supra* note 227, at 117–21 (discussing Sims's arrest and rendition to slavery).

282 *See* LUBET, *supra* note 82, at 149–55. After he was forced to return to Georgia, Sims was jailed and ultimately sold to a brick mason in Vicksburg, Mississippi, from whom he escaped in 1863, during the Civil War. CAMPBELL, *supra* note 227, at 120.

283 *See* LUBET, *supra* note 82, at 149–49; *see also* COVER, *supra* note 20, at 176 (noting that an abolitionist newspaper, *The Liberator*, proclaimed, "Justice in Chains.")

284 *See* LUBET, *supra* note 82, at 155; *see also* FEHRENBACHER & MCAFEE, *supra* note 34, at 234.

rendition to slavery cost the federal government approximately $20,000.[285]

The arrest and rendition of another fugitive slave in Boston, Anthony Burns, further aroused public sentiment against slavery in the Northeast.[286] After Burns' arrest, a mob stormed the courthouse in a violent, yet ultimately futile, attempt to free him.[287] During the attempt to free Burns from federal custody, a U.S. Marshal was killed.[288] An estimated crowd of 10,000 people subsequently gathered around the courthouse for the trial.[289] After Burns was convicted of being a fugitive slave, federal troops marched him to the harbor through the streets of Boston, which were draped in black.[290] The federal power displayed in Boston on behalf of the Southern slaveholder who claimed to own Anthony Burns was even more "formidable and costly" than in the Sims case.[291] American flags were hung at half-mast and a coffin labeled "The Funeral of Liberty" was displayed over State Street.[292] At an antislavery rally held at Faneuil Hall in Boston soon after Burns was returned to slavery

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[285] *See* LUBET, *supra* note 82, at 155; *see also* FEHRENBACHER & MCAFEE, *supra* note 34, at 234. In an apparent reference to the arrest and rendition of Thomas Sims, Maine Republican John Perry remarked on the House floor in 1860 that the "Boston court-house has been put in chains, and the peaceable people of that State kept out of the temple of justice by Federal bayonets, and the Treasury of the United States robbed of its thousands and tens of thousands to pay the bills for returning a fugitive slave." CONG. GLOBE, 36th Cong., 1st Sess. 1034, 1036 (1860). Perry's point in making this observation was to demonstrate that Northern citizens had enforced the Fugitive Slave Law, despite the heavy burden of doing so, in response to Southern claims that they had failed to uphold their Constitutional duty in this respect. *See id.* at 1035 ("[Y]ou charge us with numerous derelictions in duty [under the Constitution]; we charge them back upon you.").

[286] See CAMPBELL, *supra* note 227, at 124–32 (discussing arrest, trial, and rendition of Anthony Burns); LUBET, supra note 82, at 159–67 (same); *see generally* ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1998); JANE H. PEASE & WILLIAM H. PEASE, THE FUGITIVE SLAVE LAW AND ANTHONY BURNS: A PROBLEM IN LAW ENFORCEMENT 43 (1975); Finkelman, *Legal Ethics and Fugitive Slaves*, *supra* note 97.

[287] CAMPBELL, *supra* note 227, at 126.

[288] *Id.* at 127.

[289] *Id.* at 128.

[290] *Id.* at 129.

[291] FEHRENBACHER & MCAFEE, *supra* note 34, at 237.

[292] Finkelman, *The Roots of* Printz, *supra* note 22, at 1795

in Virginia, abolitionist Wendell Phillips said, "Nebraska I call knocking a man down, and this [the arrest and extradition of Anthony Burns] is spitting in his face after he is down."[293] Despite attempts to prosecute those who were involved in the rioting and in the death of the marshal during Anthony Burns' arrest, trial, and return to slavery, no one was convicted.[294]

The need for federal intervention to enforce the Fugitive Slave Law was not isolated to Boston. One of the most violent confrontations between the federal authorities and abolitionists occurred in Christiana, Pennsylvania, on September 11, 1851, soon after the passage of the 1850 Fugitive Slave Law.[295] A Maryland slaveholder, Edward Gorsuch, his relatives, and a deputy marshal attempted to reclaim two alleged fugitive slaves from the home of a free black person, William Parker.[296] A group of black men armed with guns and clubs assembled at Parker's home, and they refused to surrender the alleged fugitives.[297] Shooting ensued, leaving Gorsuch and three black men dead, with several others injured.[298] President Millard Filmore sent the Marines and federal marshals to arrest those responsible.[299] A federal grand jury indicted thirty-six blacks and five whites for violating the Fugitive Slave Act and for treason; however, no one was convicted.[300]

These incidents, in conjunction with political developments—chief among them the passage of the Kansas-Nebraska Act—both molded and mirrored public opinion in the free states regarding slavery. Resistance to the institution of slavery, at least as to Southerners' attempts to capture and enslave (or re-enslave) those living on free soil, was thus not significantly impeded by the 1850 Fugitive Slave Act, but ultimately encouraged by it.

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293 FEHRENBACHER & MCAFEE, *supra* note 34, at 237. Phillips' reference to Nebraska alluded to passage of the Kansas-Nebraska Act.

294 *Id.*

295 *See* CAMPBELL, *supra* note 227, at 151–53; LUBET, *supra* note 82, at 51–52; *see generally* THOMAS P. SLAUGHTER, BLOODY DAWN: THE CHRISTIANA RIOT AND RACIAL VIOLENCE IN THE ANTEBELLUM NORTH (1991) (detailing the events leading up to, during, and after the Christiana Riot).

296 CAMPBELL, *supra* note 227, at 151.

297 *Id.* at 152; *see also* LUBET, *supra* note 84, at 52.

298 CAMPBELL, *supra* note 227, at 152.

299 FONER, GATEWAY TO FREEDOM, *supra* note 39, at 146.

300 *Id.*

II. FUGITIVE SLAVES AND UNDOCUMENTED IMMIGRANTS: THE PRESENT ECHOES THE PAST

In many ways, the modern conflict between federal immigration laws and state sanctuary policies echoes the crisis of federalism engendered by the clash between the Fugitive Slave Acts and state personal liberty laws. In each case, the federal government has enacted laws or enforced laws in ways that deviate from the mores of individual citizens (at least those living in certain states). Both then and now, some states have enacted laws that attempt to reflect and protect the values of the people living within their borders. The extent to which these state and federal laws can peacefully co-exist presents a thorny legal and ethical issue today, just as it did approximately 150 years ago.

A. *The Higher Law Fuels Resistance to Federal Enforcement on Moral Grounds*

A law that deviates sharply from the beliefs and mores of the citizens it purports to regulate has lost its moral legitimacy, and thus some people will defy it.[301] This phenomenon played out in the antebellum era, as many Northern citizens were confronted with a federal Fugitive Slave Law that opened their borders to the institution of slavery, undermining their core values with respect to freedom and humanity. In the modern era, many citizens similarly believe that federal immigration laws are being enforced in ways that are inhumane and destructive to fundamental notions of human dignity. In both contexts, some of those who perceive the applicable federal law as immoral or unjust will reject the law and refuse to follow it.[302]

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[301] Rierson, *supra* note 25, at 768 (observing that "the greater the disparity between the conduct demanded by law and the underlying social norm, the greater the possibility that the governed will reject or rebel against the law and, consequently, that the law will have limited effectiveness."); *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 137–47 (1991) (arguing that "legal centralism," the primacy of law in shaping human behavior, has been overstated); *see generally* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

[302] *See generally* Villarruel, *supra* note 6; Pamela Begaj, Comment, *An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135 (2008). *See also* BRANDT, *supra* note 271, at xiii (comparing the abolitionist community in Oberlin, Ohio to the Sanctuary movement of the 1980's). Similar networks of individuals willing to defy

If the underlying law is unjust, the argument then goes, good citizens should not support it and are not morally bound to follow or enforce the law.[303]

The federal laws at issue in the context of both immigration and slavery expressly anticipate and forbid resistance to their enforcement. As discussed above, anyone who assisted in the escape of a runaway slave could be imprisoned and/or forced to pay a significant fine under either the 1793 or 1850 version of the Fugitive Slave Act. The 1793 Act imposed a $500 fine on anyone who "knowingly and willingly" obstructed or hindered attempts to seize and arrest a fugitive slave or who concealed or harbored a known fugitive slave.[304] The 1850 Act went farther, both in terms of prohibited conduct and its penalties.[305] It contained the same language noted above from the Fugitive Slave Act of 1793;[306] in addition, it imposed liability on anyone who rescued or attempted to rescue a fugitive slave, or who aided, abetted, or assisted in the escape of a fugitive slave, either "directly or indirectly."[307] A person who violated these provisions risked six months imprisonment and up to $1000 in fines and civil penalties.[308]

Modern immigration law echoes the Fugitive Slave Acts with regard to the harboring or concealment of those the law targets for exclusion. The anti-harboring provisions of the Immigration and Nationality Act ("INA") impose criminal penalties on anyone who knowingly "conceals, harbors, or shields from detection" an alien who "has come to, entered, or remains in the United States in violation of law," or attempts to do so.[309] To prove a violation of the INA's harboring provisions, the government must show

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unjust laws existed in Europe during World War II, saving thousands of Jews from death during the Holocaust. *See* LINDA RABBEN, SANCTUARY AND ASYLUM: A SOCIAL AND POLITICAL HISTORY 108–21 (2016).

303 *See* Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of 'Justice Delayed*,' 78 IOWA L. REV. 89, 89 (1992) (noting that "[i]f the law itself is unjust, then its enforcement may be equally unjust.").

304 Fugitive Slave Act of 1793, ch. 7, § 4, 1 Stat. 302, 305.

305 *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

306 *Compare* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302, *with* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

307 Fugitive Slave Act of 1850, ch. 60, § 7, 9 Stat. 462, 464.

308 *Id.*

309 8 U.S.C. § 1324(a)(1)(A)(iii) (2018).

> (1) the alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law, and (4) the defendant's conduct tended to substantially facilitate the alien remaining in the United States illegally.[310]

Violation of these provisions constitutes a felony, punishable by a fine and up to five years imprisonment.[311] The individuals who violate these laws generally do so intentionally—and sometimes openly—because they reject the law's legitimacy.[312]

Abolitionists who shepherded former slaves to freedom during the late eighteenth and mid-nineteenth centuries, like Harriet Tubman and Frederick Douglass, made no pretense of obeying the Fugitive Slave Laws or any other statutory authority that sanctioned slavery.[313] As discussed above, well-publicized incidents such as the freeing of Shadrach Minkins in Boston, the Oberlin-Wellington Rescue, and the violent confrontation at Christiana, Pennsylvania, demonstrated that some opponents of slavery were willing to openly defy state and federal laws with respect to slavery and fugitive slaves.[314] Sometimes referred to as the Underground Railroad, the collection of people who chose to violate the Fugitive Slave Acts in

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[310] United States v. Shum, 496 F.3d 390, 391–92 (5th Cir. 2007) (quoting United States v. De Jesus-Batres, 410 F.3d 154, 160 (5th Cir. 2005)); *see also* John Medeiros & Philip Steger, *Sanctuary and Harboring in Trump's America*, 44 MITCHELL HAMLINE L. REV. 869, 885–900 (2018) (discussing the definition of "harboring" under INA).

[311] 8 U.S.C. § 1324(a)(1)(B)(ii). The penalties significantly increase if aliens are harbored for private financial gain (up to ten years imprisonment), or if serious bodily injury occurs as a result of the defendant's conduct (up to twenty years imprisonment). 8 U.S.C. §§ 1324(a)(1)(B)(i), (iii). If a person is killed as a result of defendant's conduct in violation of the statute, the defendant may be subject to the death penalty or life in prison. 8 U.S.C. §1324(a)(1)(B)(iv).

[312] *See, e.g.*, Lorne Matalon, *Extending 'Zero Tolerance' to People Who Help Migrants Along the Border*, NPR (May 28, 2019, 4:22 PM), https://www.npr.org/2019/05/28/725716169/extending-zero-tolerance-to-people-who-help-migrants-along-the-border.

[313] *See generally* FONER, GATEWAY TO FREEDOM, *supra* note 39.

[314] *See supra* Section I.E.2.

favor of allegiance to God's "higher law" risked prosecution and imprisonment. In some communities, the broader populace shared these beliefs, as evidenced by numerous examples of jury nullification in such cases.[315]

Willingness to defy an unjust law—also known as civil disobedience—is also part and parcel of the state/federal conflict embedded in modern immigration law. Beginning in the 1980s and continuing to the present in the Trump era, defiance of federal immigration law, especially in religious communities, reflects the judgment of those communities that these laws are immoral and unjust, just as similar communities rejected the laws of slavery and the Fugitive Slave Acts over 150 years ago. As federal immigration law has waxed and waned in its enforcement severity, it has to varying degrees conflicted with the mores of the people who live in the states where the laws are being enforced. For example, the Sanctuary Movement in the United States relies on "God's law" to justify offering shelter and support to immigrants who may face death or persecution if they are deported. Like the slave rescuers, these individuals, who are often religious leaders, risk and have faced criminal prosecution.

The most well-documented immigration sanctuary movement in the United States arose during the 1980s. Like the conductors on the Underground Railroad, the leaders of this movement spurned federal laws they deemed to be fundamentally unfair and sinful.[316] The Sanctuary Movement arose from the Reagan administration's treatment of immigrants from Central America, primarily El Salvador

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[315] *See supra* notes 272, 280, 294, & 285 and accompanying text.

[316] *See* Valerie J. Munson, *On Holy Ground: Church Sanctuary in the Trump Era*, 47 SOUTHWESTERN L. REV. 49, 52–53 (2017); Begaj, *supra* note 302, at 141–45; Michael Scott Feeley, *Towards the Cathedral: Ancient Sanctuary Represented in the American Context*, 27 SAN DIEGO L. REV. 801, 819–24 (1990); Villarruel, *supra* note 6, at 1433–35. A leader of the movement, Pastor John Fife, explained,

> We believe that justice and mercy require that people of conscience actively assert our God-given right to aid anyone fleeing from persecution and murder. The current administration of the United States law prohibits us from sheltering these refugees from Central America. Therefore we believe that administration of the law is immoral as well as illegal.

Arthur Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. REV. 493, 502 (1986).

and Guatemala.[317] During this time period, the United States largely refused to grant asylum to individuals fleeing these countries.[318] Out of approximately 5500 applications for asylum submitted by Salvadorans in 1981 and 1982, the United States granted two.[319] As advocates began to realize that individuals fleeing these countries could not obtain safe haven in the United States through asylum procedures administered by the INS, they adopted a new strategy of evading immigration laws rather than adhering to them.[320] By the mid-1980s, approximately five hundred churches and synagogues across the country had declared themselves sanctuaries for Central Americans seeking refuge in the United States.[321] These religious havens sought to provide "physical and spiritual assistance" to Central American refugees, and often placed them with sponsoring congregations to ease their transition to life in the United States.[322]

The federal government's tolerance of the church-led sanctuary movement ended in 1984, when federal prosecutors conducted an

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[317] Munson, *supra* note 316, at 52; Begaj, *supra* note 302, at 141–45; Feeley, *supra* note 316, at 819–21; Villarruel, *supra* note 6, at 1433–34.

[318] Begaj, *supra* note 302, at 145 (describing the Sanctuary Movement as a "'dramatic response to the refusal of the United States Government to grant legal sanctuary, or asylum' to immigrants facing deportation.") (citation omitted); Feeley, *supra* note 316, at 820 (noting that "[i]n spite of an energetic legal advocacy program, the INS deported Salvadorans and Guatemalans in droves" during the early 1980's).

[319] Feeley, *supra* note 316, at 817, 820 (comparing Salvadoran and Guatemalan asylum approval rates in 1983 and 1985, ranging from one percent to three percent, with much higher rates for applicants from other countries); Medeiros & Steger, *supra* note 310, at 877–78 (citing similar statistics).

[320] *See* Feeley, *supra* note 316, at 820; *see also* Medeiros & Steger, *supra* note 310, at 878–79 (noting that the movement "transitioned from working within the law to exploring more options that posed higher legal risks" after discovering that its efforts to secure asylum were "futile").

[321] Munson, *supra* note 316, at 53; *see also* Feeley, *supra* note 316, at 820 (noting that "several hundred churches [had] openly declared themselves sanctuaries"); Medeiros & Steger, *supra* note 310, at 880 (noting that "[b]y the fall of 1983, the number of sanctuary sites throughout America rose to almost 70, and by the summer of 1984 grew to more than 150, with thousands of individuals committed to the movement")

[322] Feeley, *supra* note 316, at 820; *see also* Munson, *supra* note 316, at 52–53 (noting that sanctuaries provided lodging to refugees and "aided them in obtaining medical, legal, and other needed services."); Helton, *supra* note 316, at 493.

undercover sting ironically named "Operation Sojourner,"[323] referencing the former slave and conductor on the Underground Railroad, Sojourner Truth.[324] Operation Sojourner employed four undercover agents to infiltrate church congregations, where they surreptitiously gathered evidence.[325] As a result, several religious leaders (including Catholic priests, a nun, and a Presbyterian minister) were arrested, indicted, and ultimately convicted of violating INA's anti-harboring provisions.[326]

In upholding these convictions, the Ninth Circuit in *United States v. Aguilar* described the sanctuary movement as "a modern-day underground railroad that smuggled Central American natives across the Mexican border with Arizona."[327] In this case, which the prosecutor dubbed the "death knell of the Sanctuary Movement,"[328] the Ninth Circuit refused to allow the defendants to argue that they had not "knowingly" violated federal immigration law because they honestly believed that the aliens they were assisting were legally entitled to remain in the United States.[329] Specifically, the defendants argued that they believed these individuals qualified as refugees under the Refugee Act of 1980[330] due to the individuals' well-founded fear of persecution in their home countries.[331] The Ninth Circuit determined that to allow such a defense would essentially "put Reagan Administration foreign policy on trial" in the context of the criminal case.[332] The court also rejected the argument that the defendants' activities were protected as religious exercise under the First

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323 Medeiros & Steger, *supra* note 310, at 882; Feeley, *supra* note 316, at 821.

324 Sojourner Truth was a former slave from New York who settled in Battle Creek, Michigan, in 1857, where she assisted runaway slaves on the Underground Railroad. *See generally* SOJOURNER TRUTH, NARRATIVE OF SOJOURNER TRUTH, A NORTHERN SLAVE (1850).

325 Feeley, *supra* note 316, at 821; *see also* Medeiros & Steger, *supra* note 310, at 882.

326 Feeley, *supra* note 316, at 821–22; *see also* United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989).

327 *Aguilar*, 883 F.2d at 666.

328 Medeiros & Steger, *supra* note 310, at 882.

329 *Aguilar*, 883 F.2d at 673.

330 *See* 8 U.S.C. § 1324 (1982).

331 *See Aguilar*, 883 F.2d at 673–76.

332 *Id.* at 673.

Amendment.[333] The jury convicted all of the defendants, who were then sentenced to probation and did not serve jail time.[334]

Although more recent examples of religious sanctuary have not had the same level of impact as the widespread movement of the 1980s, they do still exist.[335] In fact, the number of places of worship acting as immigration sanctuaries has more than doubled since the

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[333] *Id.* at 684–85. *But see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719–26 (2014)) (holding that a contraception mandate would violate a corporation's right to free exercise of religion under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000(b)(b), enacted 1993); Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion*?, 20 U. PA. J. CONST. L. 1101, 1121–38 (2018) (arguing for a corporate right to offer sanctuary under the RFRA).

[334] *Aguilar*, 883 F.2d at 667.

[335] *See*, *e.g.*, Stephanie McCrummen, *A Sanctuary of One*, WASH. POST (Mar. 31, 2018), https://www.washingtonpost.com/news/national/wp/2018/03/31/feature/after-30-years-in-america-she-was-about-to-be-deported-then-a-tiny-colorado-church-offered-her-sanctuary/ (describing one woman's decision to seek sanctuary from deportation by living in a small Colorado church); *see also* Jason Hanna, *Can Churches Provide Legal Sanctuary to Undocumented Immigrants*?, CNN (Feb. 17, 2017) (discussing the growing number of churches willing to provide sanctuary to undocumented immigrants in the Trump era); Laurie Goodstein, *Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries*, N.Y. TIMES (Dec. 27, 2016), https://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html. (same). One website, action.groundswell-mvmt.org, has collected over 40,000 signatures through various campaigns, supporting a resurgent sanctuary movement. *Sanctuary Movement*, GROUNDSWELL, https://action.groundswell-mvmt.org/efforts/sanctuary2014?page=2 (last visited Mar. 15, 2020). It describes its mission as follows:

> Calling upon the ancient traditions of our faiths, which recognized houses of worship as a refuge for the runaway slave, the conscientious objector, and the Central American refugee fleeing the civil wars of the 1980s, Sanctuary is once again growing among communities of faith that are standing in solidarity with immigrants and marginalized communities facing immoral and unjust deportation and discrimination policies.

Id. The religious sanctuary phenomenon is not limited to the United States. *See*, *e.g.*, Richard Perez-Pena, *5 Weeks and Counting: Dutch Church Holds Worship Marathon to Protect Migrant Family*, N.Y. TIMES (Nov. 29, 2018), https://www.nytimes.com/2018/11/29/world/europe/bethel-church-netherlands-deportation.html (describing the efforts of one Dutch church to prevent the deportation of an Armenian family who was denied asylum in that country).

inauguration of President Trump.[336] The federal government has not aggressively cracked down on these efforts to provide safe harbor within the confines of houses of worship, most likely because of the negative publicity that would almost certainly accompany Department of Homeland Security ("DHS") raids on churches and synagogues.[337] Recently, however, Immigration and Customs Enforcement ("ICE") has attempted to coerce self-deportation by issuing hundreds of thousands of dollars in fines to immigrants seeking sanctuary in houses of worship for "willfully" remaining in the United States and having "connived or conspired" to avoid deportation.[338]

The Trump administration has aggressively prosecuted individuals whom it perceives to have impeded enforcement of federal immigration laws. In April 2017, Trump's then-attorney general, Jefferson Beauregard Sessions,[339] issued a memorandum to all federal prosecutors instructing them to prioritize cases under the anti-harboring provisions of the INA.[340] In fiscal year 2018, more than 4500

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[336] Medeiros & Steger, *supra* note 310, at 872 ("In response to the President's hard line stance on immigration, many American churches and other places of worship have declared themselves sanctuaries, or safe havens, for undocumented and other vulnerable immigrants."); *see also* Brown & Scott, *supra* note 333, at 1102–03 (noting that, as a result of President Trump's immigration policies, a growing number of institutions have begun to offer "support and refuge" to an "increasingly vulnerable immigrant population").

[337] The United States Immigration and Customs Enforcement ("ICE") avoids arresting individuals at "sensitive locations" like a church. Hanna, *supra* note 335. Immigration law professor Stephen Yale-Loehr suggests that ICE "does not like to go into churches," for "publicity reasons." *Id.*

[338] Maria Sacchetti, *Trump Administration Threatens Hefty Fines on Immigrants Who Elude Deportation*, WASH. POST (July 2, 2019, 2:27 PM), https://www.washingtonpost.com/immigration/trump-administration-threatens-hefty-fines-on-immigrants-who-elude-deportation/2019/07/02/956e2334-9cc2-11e9-9ed4-c9089972ad5a_story.html.

[339] Attorney General Jeff Sessions resigned at the request of President Trump in November 2018. *See* Devil Barrett et al., *Jeff Sessions Forced Out as Attorney General*, WASH. POST (Nov. 7, 2018, 7:01 PM), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html.

[340] Memorandum from Attorney Gen. Jeffrey Sessions to All Federal Prosecutors About Renewed Commitment to Criminal Immigration Enforcement (Apr. 17, 2017), https://www.justice.gov/opa/press-release/file/956841/download.

people were charged with violating this section of the statute, a more than 30% increase since 2015.[341]

The government has also taken an increasingly broad view of what constitutes "harboring" an alien, filing criminal charges against individuals who have provided food and water to migrants in southern border crossing areas. Many border regions are harsh deserts, and, since 2001, thousands have died here as they attempted to cross the border into the United States.[342] A spokesperson for the humanitarian aid group *No Más Muertes*, or No More Deaths, has decried the government's recent "criminalization of humanitarian aid work."[343]

The government has criminally charged multiple members of *No Más Muertes* for illegally entering federally protected land—a necessary action for the members to assist migrants in remote desert areas.[344] For example, in August 2017, four members of the group were charged with misdemeanors for leaving canned food and water jugs in a federal refuge frequented by migrants.[345] A federal magistrate judge convicted them in January 2019, finding that the women had violated "the national decision to maintain the Refuge in its pristine nature."[346] However, in February of 2020, United States District Judge Rosemary Márquez reversed the convictions on the basis that the defendants' actions were protected under the Religious Freedom Restoration Act ("RFRA").[347] The RFRA was enacted in 1993, four years after the Ninth Circuit's decision in *Aguilar*, which rejected a

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341 Matalon, *supra* note 312.

342 *Id.*

343 Asher Stockler, *As Trump's DOJ Prosecutes Aid Worker, Humanitarian Groups Promise Continued Support for Migrants*, NEWSWEEK (May 29, 2019, 5:10 PM), https://www.newsweek.com/work-continues-humanitarian-groups-vow-support-migrants-doj-prosecutes-aid-1438793.

344 *See* Matalon, *supra* note 312.

345 Kristine Phillips, *They Left Food and Water for Migrants in the Desert. Now They Might Go to Prison*, WASH. POST (Jan. 20, 2019, 2:52 PM), https://www.washingtonpost.com/nation/2019/01/20/they-left-food-water-migrants-desert-now-they-might-go-prison/.

346 *Id.*

347 United States v. Hoffman, No. CR1900693001TUCRM, 2020 WL 531943, at *2 (D. Ariz. Feb. 3, 2020) (holding that defendants' actions were protected under the RFRA, 42 U.S.C. § 2000bb-1, as interpreted by the Supreme Court in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)).

similar defense based on freedom of religion.[348] Whether other courts will similarly recognize the provision of life-saving food and water to migrants as a religious act, entitled to protection under the RFRA, remains to be seen.

The government has also filed more serious criminal charges against individuals offering humanitarian assistance to migrants. Scott Warren, a thirty-six-year-old geography teacher and *No Más Muertes* volunteer, was charged with three felonies under the anti-harboring provisions of the INA in 2018.[349] In June 2019, Warren was tried by a jury, which deadlocked 8-4 in favor of acquittal.[350] When the government chose to retry the case against Warren in November of the same year, the jury acquitted him.[351] If convicted, Warren would have faced up to twenty years in prison.[352] In a similar case, Theresa Todd, a city and county attorney in Marfa, Texas, was arrested and detained by Customs and Border Protection ("CBP") officers on suspicion of harboring aliens, because she pulled over in her car to help a woman in danger of dying from dehydration.[353] Whether the Department of Justice will continue to prosecute these types of humanitarian activities—and, if it does, whether juries will convict—is an open question.

The "zero tolerance policy" embraced by the Department of Justice has also resulted in legal action against a sitting state court judge

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348 United States v. Aguilar, 883 F.2d 662, 684–85 (9th Cir. 1989); *see supra* note 333 and accompanying text.

349 United States v. Warren, No. MJ-17-0341-TUC-BGM, 2018 WL 2416188, at *1 (D. Ariz. May 29, 2018); *see also* Miriam Jordan, *An Arizona Teacher Helped Migrants. Jurors Couldn't Decide If It Was a Crime*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/us/scott-warren-arizona-deaths.html..

350 *Hung Jury in Case Against Scott Warren*, NO MORE DEATHS (June 11, 2019), https://nomoredeaths.org/hung-jury-in-case-against-scott-warren/; *see also* Jordan, *supra* note 349.

351 Teo Armus, *After Helping Migrants in the Arizona Desert, an Activist Was Charged with a Felony. Now, He's Been Acquitted*, WASH. POST (Nov. 21, 2019, 7:03 AM), https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/.

352 Matalon, *supra* note 312.

353 Manny Fernandez, *She Stopped to Help Migrants on a Texas Highway. Moments Later, She Was Arrested*, N.Y. TIMES (May 10, 2019), https://www.nytimes.com/2019/05/10/us/texas-border-good-samaritan.html.

in Massachusetts, Judge Shelley M. Richmond Joseph.[354] In a case described by the media as a "dramatic turn in the long-running clash between the Trump administration and state governments that have resisted its hard-line approach to immigration," federal prosecutors obtained a grand jury indictment against Judge Joseph due to her failure to cooperate with ICE.[355] They charged her with obstruction of justice, conspiracy to obstruct justice, and obstruction of a federal proceeding.[356] The judge allegedly orchestrated the exit of a criminal defendant from the courtroom after he was released from state custody via a back door rather than the front, to enable him to avoid arrest and deportation.[357] Massachusetts Attorney General Martha Healey, a Democrat, described the indictment as "a radical and politically motivated attack on our state and the independence of our courts."[358] The U.S. Attorney defended the indictment, stating that "[w]e cannot pick and choose the federal laws we follow, or use our personal views to justify violating the law."[359] Judge Joseph, who rejected a plea deal from the federal government, faces up to twenty-five years in prison if convicted of the obstruction of justice charges.[360]

The Trump administration's zero tolerance policy with regard to illegal immigration—a category that it has defined to include individuals who have a legal right to apply for asylum in this country—

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354 *See* Liam Stack, *Judge Is Charged with Helping Immigrant Escape ICE at Courthouse*, N.Y. TIMES (Apr. 25, 2019), https://www.nytimes.com/2019/04/25/us/judge-shelley-joseph-indicted.html.

355 *See id.*; *see also* Steve Burkholder, *Massachusetts Judge and Ex-Official Accused of Preventing Migrant's Arrest by ICE*, WASH. POST (Apr. 25, 2019 7:46 PM), https://www.washingtonpost.com/immigration/massachusetts-judge-and-ex-official-accused-of-preventing-migrants-arrest-by-ice/2019/04/25/664ed43c-677e-11e9-82ba-fcfeff232e8f_story.html.

356 Indictment at 15–17, United States v. Joseph, No. 19-CR-10141 (D. Mass. Apr. 25, 2019), ECF No. 1, 2019 WL 1878050.

357 *Id.* at 10–11.

358 Stack, *supra* note 354. Healey also argued that "[i]t is a bedrock principle of our constitutional system that federal prosecutors should not recklessly interfere with the operation of state courts and their administration of justice." *Id.*

359 *Id.*

360 Jonathan Ng, *Judge Shelley Joseph Rejects Deal in ICE Obstruction Case*, BOS. HERALD (July 24, 2019), https://www.bostonherald.com/2019/07/24/indicted-massachusetts-judge-shelley-joseph-rejects-plea-deal-over-ice-obstruction-case/ (last updated July 24, 2019, 6:14 PM); Stack, *supra* note 354 (noting the possibility of a twenty-five year sentence for Judge Joseph).

has led to heart-wrenching results. While these policies may appeal to President Trump's base of support among Republican voters, they are not widely shared across the country.[361] Among Democratic voters in the states where these laws are being enforced, especially California, the rate of disapproval is presumably even higher.[362] As the gulf between the values reflected in federal policy and those held by individuals widens, the incentive to reject and disobey the law exponentially increases.

B. *Deprivation of Due Process in the Nineteenth Century and Today*

While some individuals may be compelled by religious belief or internal moral compass to openly defy an unjust law, most citizens are unwilling to take this risk. Moreover, some people comply with laws that they disagree with, even those that they find to be morally repugnant, out of respect for the rule of law. To these individuals, the only acceptable way to protest an unjust law is to attempt to amend or repeal it via the legislative process.

Federalism, of course, poses unique challenges in this regard. Citizens of an individual state are constrained in their ability to change federal law, especially if their views are not shared across the United States. They can more easily adopt state laws reflecting their own views and values, but these laws are valid only so long as they do not conflict with or frustrate the purpose of federal law. With respect to both fugitive slaves and immigrants, the concept of federal supremacy has limited states' ability to effect change via legislation, as discussed below.

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[361] *See* Aaron Blake, *Trump's Asylum Changes Are Even Less Desired Than His Border Wall*, WASHINGTON POST (Apr. 30, 2019, 10:02 AM), https://www.washingtonpost.com/politics/2019/04/30/trumps-asylum-changes-are-even-less-desired-than-his-border-wall/ (noting that, according to a Post-ABC poll, only about thirty percent of Americans favor changes to make the process of applying for asylum more difficult); Alana Abramson, *Most Americans Don't Approve of Trump's Immigration Policies, Poll Finds*, TIME (July 6, 2018), https://time.com/5332298/trump-immigration-policy-poll/ (discussing a Post-Schar School poll result showing that approximately sixty percent of American do not approve of Trump's immigration policies).

[362] *See* Blake, *supra* note 361 (noting only 15% of Democrats support parts of President Trump's immigration policies).

One aspect of federal legislation that is central to the controversies surrounding both fugitive slaves and undocumented immigrants, hinges on the legal status of specific individuals: free versus slave; asylee versus excludable alien. As in the antebellum era, some people are wrongfully targeted for removal when they have a legal right to stay. Some alleged fugitive slaves were free blacks who had been kidnapped and sold into slavery.[363] Some "illegal aliens" have a right to stay in the United States because they have a well-founded fear of persecution in their home countries.[364] In each instance, the law must provide a process to determine the legal status of the individual. Under the INA, like the Fugitive Slave Acts, the process to determine removal is often wholly inadequate, especially given that an incorrect decision can result in serious bodily harm or death to the affected person.[365] In both instances, federal judicial officers are (or were) making these critical decisions with a lesser and inferior degree of process than would be accorded in a criminal case.[366] The doctrine of federal supremacy prevents the states from altering or augmenting these federal procedures, but their inadequacy undermines public confidence in the laws and increases the difficulty of their enforcement.

1. SLAVE OR FREE?

As discussed at length above, blacks were afforded very little process when they were arrested and accused of being fugitive slaves.[367] This system almost certainly led to errant results. Because there was no right of appeal, it is impossible to tell what percentage of individuals arrested and ultimately deported to the South, under the auspices of the Fugitive Slave Laws, were in fact free.

Both the 1793 and 1850 Fugitive Slave Acts failed to guarantee any semblance of due process to a person accused of being a fugitive

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363 *See supra* notes 70–77 and accompanying text.

364 *See infra* notes 378–387 and accompanying text.

365 Professor Christopher Lasch has similarly drawn a parallel between the lack of procedural integrity under the Fugitive Slave Acts and in immigration rendition proceedings. *See* Lasch, *supra* note 6, at 220–24 (arguing that the "near absolute lack of procedural protections for immigrants in the rendition" causes it to mirror the slave rendition process of the antebellum period).

366 *See infra* note 392 and accompanying text.

367 *See supra* Sections I.B & I.E.

slave.[368] Perhaps most offensive to modern sensibilities, the 1850 Fugitive Slave Law prohibited the alleged fugitive from testifying in her own defense: the accused could not tell the court why she believed herself to be free.[369] Slaveholders, on the other hand, could not be *required* to provide in-person testimony; instead they could establish their putative property interest in another human being by simply providing an affidavit.[370] Two of the key procedural protections that were fundamental to antebellum law—the right to trial by jury and the right to seek review via the writ of habeas corpus—were denied to alleged fugitives under federal law.[371] States attempted to extend these rights to alleged fugitives long after the Supreme Court declared such laws void under the Constitution's Supremacy Clause in *Prigg v. Pennsylvania*.[372] Moreover, there was no right of appeal from the decision of a federal commissioner as to a person's slave status under either version of the law.[373] If the alleged fugitive claimed that the federal commissioner had erred in finding him to be a slave, his only legal recourse was to seek justice in the courts of the slave state to which he was returned.[374] Perhaps not surprisingly, this option was not feasible for most slaves, who neither had access to courts nor the resources to hire counsel in the states where they were enslaved.[375]

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[368] *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

[369] Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463–64.

[370] *Id.*

[371] *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

[372] *See supra* notes 70–77 and accompanying text; *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842).

[373] *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

[374] *See* Fugitive Slave Act of 1850, ch. 60, § 6, 9 stat. 462, 463–64; *see also* Crump & Brophy, *supra* note 70, at 480–81.

[375] *See* Crump & Brophy, *supra* note 70, at 489 (observing that "even temporarily and wrongfully enslaved people . . . needed the assistance of powerful white people to successfully assert their freedom."); *see also* ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 147–50 (2011).

2. EXCLUDABLE ALIEN OR ASYLEE?

Even in the context of a legal system that recognizes slavery, legal process should not permit the enslavement of persons who are legally free. Similarly, the U.S. government should not deport a person who has a "well-founded fear of persecution" in the country from which she is fleeing.[376] Under the letter of the law, these individuals are entitled to remain in the United States.[377] However, the attainment of this status requires the decision of a court, just as courts were called upon to determine whether a black person who was apprehended in the mid-nineteenth century was free or a fugitive from slavery. As was the case with fugitive slaves, the cost of an errant decision can be fatal.[378]

Asylum law, in the United States and many other countries, traces its roots to World War II and the Holocaust. As a result of the horror unleashed by this war, particularly the genocide resulting in the deaths of approximately six million Jewish people, the United States and 144 other countries signed a treaty—the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention").[379]

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[376] 8 U.S.C. § 1101(a)(42)(A) (2018) (defining the term "refugee").

[377] *See infra* notes 384–388 and accompanying text.

[378] *See* Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/ 2018/01/15/when-deportation-is-a-death-sentence (recounting various instances of refugees who were deported from the United States and subsequently murdered in their home countries). The article is based on a study conducted by the Global Migration Project at the Columbia School of Journalism, which created a database of over sixty people who were deported to their deaths or other serious harm. *Id.*; *see also* C.J.L.G. v. Barr, 923 F.3d 622, 633 (9th Cir. 2019) (Paez, J., concurring) (noting that "[t]he impact of deportation could be persecution, including potential police beatings, torture, and sexual assault . . . or gun violence at the hands of gang members"); Anthony Asuncion, Note, INS. v. Cardoza-Fonseca*: Establishment of a More Liberal Asylum Standard*, 37 AM. U. L. REV. 915, 919 (1988) (observing that the "[r]eality for those wrongfully deported may mean death").

[379] *See* Convention Relating to the Status of Refugees art. 32, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; *see also* RABBEN, *supra* note 302, at 122–26 (discussing the Refugee Convention and noting the connection between the Holocaust and the revivification of international human rights law). The United States signed the 1967 United Nations Protocol Relating to the Status of Refugees ("Protocol") in 1968. The Protocol incorporated articles 2 through 34 of the Refugee Convention and adopted the Convention's definition of refugee. Protocol Relating to the Status of Refugees, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268; *see also*

The "core principle" embodied in the Refugee Convention is that of *non-refoulement*, which commands that "a refugee should not be returned to a country where they face serious threats to their life or freedom."[380] The treaty defines a refugee as a person who has "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[381] Under the terms of the Refugee Convention, a person who satisfies these criteria cannot be compelled to return to a territory where she fears threats to her "life or freedom."[382] Thousands of would-be Jewish refugees died in the Holocaust because the United States and other countries refused to admit them as immigrants.[383] The Refugee Convention reflects an international consensus that this tragedy should not happen again.

Kristin Garner, *Aliens' Rights to Notification of the Availability of Political Asylum and Assistance of Counsel Affirmed,* Orantes-Hernandez v. Thornburgh, *919 F.2d 529 (9th Cir. 1990)*, 15 SUFFOLK TRANSNAT'L L.J. 822, 825–26 (1992) (discussing the Convention and the Protocol).

[380] *The 1951 Refugee Convention*, U.N. HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/en-us/1951-refugee-convention.html (last visited Mar. 16, 2020); *see also* 1951 Refugee Convention, *supra* note 379, art. 33. *Non-refoulement* was first recognized as a principle of international law when it was embodied in the Convention Relating to the International Status of Refugees of 1933. *See* Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 199. However, only eight countries signed this treaty (Belgium, Bulgaria, Denmark, Egypt, France, Italy, Norway, and Czechoslovakia), and it applied only to a narrow category of Russian and Armenian refugees. *Id.* art. 1; *see also* Henry Mascia, Comment, *A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT'L L. REV. 287, 290–91 (2007).

[381] 1951 Refugee Convention, *supra* note 379, art. 1, ¶ A(2).

[382] *Id.* art. 31, ¶ 1.

[383] *See* Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing that They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 18, 2015), https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/ (discussing Herbert Karl Friedrich Bahr, a Jewish refugee convicted of spying on behalf of Germany, and the impact of his case on refugee policy in the United States during World War II); *see generally* DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941–1945 (1984). The most infamous example of U.S. policy in this regard is the case of the St. Louis, a German ship that carried over 900 refugees, almost all Jewish, to the United States in 1939, only to be denied entry and sent back to Germany. Gross, *supra*. About a fourth of those onboard died in the Holocaust. *Id.*; *see also* Rebecca Erbelding, *After the*

The principle of *non-refoulement*, expressed in the Refugee Convention, is codified in two sections of United States immigration law that provide alternative remedies.[384] First, the INA permits withholding of deportation as to any alien who "more likely than not" would be persecuted, if forced to return to his home country.[385] Second, the Refugee Act of 1980 provides a broader remedy to those seeking refuge in the United States: asylum.[386] Under this statute, a refugee is defined as a person who is unable or unwilling to return to his home country due to a "well-founded fear of persecution" on the grounds of "race, religion, nationality, membership in a particular social group, or political opinion."[387] The right to apply for asylum exists for "[a]ny alien who is physically present in the United States or who arrives in the United States," regardless of whether she crosses the border "illegally" (i.e., not at a designated port of entry) and "irrespective of [her] status."[388]

The rights of asylum applicants are protected by the U.S. Constitution and by statute. The Due Process guarantees of the Fifth Amendment apply to individuals who apply for asylum in the United States.[389] By statute, individuals applying for asylum have a right to

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Holocaust, the U.S. Promised to Protect Refugees. We're Failing, WASH. POST (Jan. 31, 2018, 6:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/01/31/after-the-holocaust-the-u-s-promised-to-protect-refugees-were-failing/?utm_term=.8de26754dfe5 ("We lament America's failure to admit more European Jewish refugees before the Holocaust. Our descendants will be much harsher when they look at America's inaction today.").

[384] *See generally Supreme Court, 1986 Term: Leading Cases—Immigration Law, Political Asylum:* Immigration and Naturalization Service v. Cardoza-Fonseca, 101 HARV. L. REV. 340 (1987) (discussing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), and the difference between these two remedies); Asuncion, *supra* note 378.

[385] 8 U.S.C. § 1231(b)(3)(B) (2018); INS v. Stevic, 467 U.S. 407, 429–30 (1984) (interpreting 8 U.S.C. § 1253(h)) (1976)); *see also Cardoza-Fonseca*, 480 U.S. at 423–24. The test for determining withholding of deportation is commonly referred to as the "clear probability of persecution" standard. *Stevic*, 467 U.S. at 429.

[386] 8 U.S.C. § 1158(b)(1)(A) (cross-referencing 8 U.S.C. § 1101(a)(42)).

[387] 8 U.S.C. § 1101(a)(42).

[388] 8 U.S.C. § 1158(a)(1); *see also* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 553–54 (9th Cir. 1990).

[389] C.J.L.G. v. Barr, 923 F.3d 622, 630 (9th Cir. 2019) (Paez, J., concurring); *see also Orantes-Hernandez*, 919 F.2d at 554; Baires v. INS, 856 F.2d 89, 90–91 (9th Cir. 1988); Rios-Berrios v. INS., 776 F.2d 859, 862 (9th Cir. 1985); Haitian

be represented by counsel of their choosing.[390] Furthermore, they are entitled to be notified of their right to seek counsel.[391] However, they do not have a right to appointed counsel under the Sixth Amendment because immigration matters are considered civil, not criminal, proceedings.[392] Given that most aliens seeking asylum arrive in the United States penniless and destitute, as a practical matter, the vast majority rely on pro bono legal services for representation, which are often unavailable.[393]

International human rights law recognizes a right to procedural due process in expulsion proceedings, including, "most importantly, the right to be represented."[394] Although immigration advocates

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Refugee Ctr. v. Smith, 676 F.2d 1023, 1039 (5th Cir. Unit B 1982); United States v. Barraza-Leon, 575 F.2d 218, 220 (9th Cir. 1978).

390 8 U.S.C. § 1229a(b)(4)(a); § 1362; *see also Baires*, 856 F.2d at 91; 8 C.F.R. § 242.10 (2019).

391 *Rios-Berrios*, 776 F.2d at 862 (discussing the right to counsel in deportation proceedings); 8 C.F.R. § 242.16 (2019) (requiring Immigration Judges to advise aliens seeking asylum of their "right to representation, at no expense to the Government, by counsel of [their] own choice," and to advise them "of the availability of free legal services programs" authorized to practice in the immigration courts); U.S. CUSTOMS & BORDER PROTECTION, NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 16 (Oct. 2015), https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf [hereinafter CBP STANDARDS] (instructing CBP officers that "[d]etainees referred for removal proceedings shall be provided with a list of legal service providers and their contact information").

392 *Baires*, 856 F.2d at 90; *see also* Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988).

393 *See* Kara A. Naseef, Note *How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary Detention*, 52 U. MICH. J.L. REFORM 771, 780 (2019) (noting that "non-citizens often must proceed pro se as they are unable to afford or find counsel."); Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, ATLANTIC (Aug. 21, 2018), https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/ (discussing the dearth of lawyers available to represent children in immigration proceedings in Fresno County, California).

394 Won Kidane, *Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Union Law: A Comparative Analysis*, 27 EMORY INT'L L.J. 285, 297–302 (2013); *see also* 1951 Refugee Convention, *supra* note 379, art. 33, ¶ 2; International Covenant on Civil and Political Rights art. 13, Dec. 6, 1966, 999 U.N.T.S. 171; Convention Relating to the Status of Stateless Persons art. 31 ¶ 2, Sept. 28, 1954, 360 U.N.T.S. 117.

have argued that the Fifth Amendment's due process guarantee extends the right of counsel in this setting,[395] the federal courts have not agreed to date.[396] Not surprisingly, access to counsel is critical for asylum-seekers, especially minors.[397] Data collected from over 100,000 cases showed that about 90% of children who did not have a lawyer in their immigration proceedings were ordered deported; almost half of the children who were represented by an attorney were allowed to stay in the United States.[398] In cases involving women and children, courts were fourteen times more likely to allow those represented by an attorney to stay in the United States.[399]

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[395] *See, e.g.*, Denis Slattery, *New Push to Grant Immigrants Right to Counsel Gains Support from Advocates and Lawmakers*, N.Y. DAILY NEWS (Jan. 15, 2020, 4:00 AM), https://www.nydailynews.com/news/politics/ny-immigrants-right-to-counsel-legislation-hoylman-albany-20200115-3ltsjawul5acvfiecv5ntyuh5i-story.html.

[396] The Ninth Circuit recently had the opportunity to address the issue of minors' right to counsel in immigration proceedings, but, in the words of the concurrence, "inexplicably punt[ed] the question yet again." C.J.L.G. v. Barr, 923 F.3d 622, 630 (9th Cir. 2019) (Paez, J., concurring). The concurrence argues in favor of a right to appointed counsel for minors claiming asylum. *Id*. at 630–39.

[397] *Id*. at 631 ("'The importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored.' For immigrant children, that is especially true.") (quoting Reyes-Palacios v. INS, 836 F.2d 1154, 1155 (9th Cir. 1988)). According to data collected by the Study Group on Immigrant Representation, headed by Second Circuit Chief Judge Robert Katzmann, "[o]nly 13 percent of asylum-seeking immigrants prevail in their cases without a lawyer, while 74 percent of those with a lawyer see success." Nicole Narea, *3 Cases that Could Boost Immigrants' Access to Counsel*, LAW360 (Feb. 10, 2019, 8:02 PM), https://www.law360.com/articles/1124682/3-cases-that-could-boost-immigrants-access-to-counsel.

[398] TRAC Immigration, *New Data on Unaccompanied Children*, *in* TRAC SERIES ON JUVENILES AND FAMILIES IN IMMIGRATION COURT (2014), https://trac.syr.edu/immigration/reports/359/; *see also* Stillman, *supra* note 378 (discussing the case of a Honduran girl who was separated from her grandmother at the border and convinced to sign a form waiving her right to a hearing before an immigration judge).

[399] TRAC Immigration, *Representation Makes 14-Fold Difference*, *in* TRAC SERIES ON JUVENILES AND FAMILIES IN IMMIGRATION COURT (2014), https://trac.syr.edu/immigration/reports/396. The report further found that "[i]n cases that have thus far been closed, women and children were represented by an attorney only 14.0 percent of the time." *Id.*

Under the Trump administration's family separation policy, discussed *infra*,[400] children as young as three are representing themselves in immigration court.[401]

The need for legal representation in cases where a person's safety and freedom are at stake is as apparent today as it was in the nineteenth century. Not surprisingly, under the Fugitive Slave Acts, the federal government did not provide legal representation to persons accused of being fugitive slaves.[402] However, some states' personal liberty laws guaranteed alleged fugitives the right to counsel, a role often fulfilled by the local district attorney.[403] These states also endeavored to ensure that alleged fugitives were not hamstrung by a lack of resources, providing that they could not be charged for the cost of serving a subpoena, for example.[404] These states recognized that, without legal assistance and access to the courts, alleged fugitives stood no chance of proving their entitlement to freedom.

Some states have attempted to ensure that immigrants have access to counsel in deportation proceedings, even though federal courts have not required them to do so. New York, which was the first state to guarantee legal representation to alleged fugitive slaves,[405] recently became the first state to provide this same right to immigrants in detention and facing deportation.[406] While the right to counsel is not guaranteed in California, the state has expanded its state budget allocation for immigration legal services, and the San Francisco Public Defender's Office recently opened an immigration unit to fight "deportation of detained non-citizens."[407] These efforts, while laudable, are insufficient in that the majority of individuals

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400 *See infra* notes 419–38 and accompanying text.

401 *See* Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, TEX. TRIBUNE (June 27, 2018, 9:00 PM), https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/; Egkolfopoulou, *supra* note 393.

402 *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

403 *See, e.g.*, Act of May 6, 1840, ch, 225, § 9, 1840 N.Y. Laws 174, 175–76.

404 *See, e.g.*, *id.* § 10.

405 *See id.* § 9 (providing that the County district attorney must "render his advice and professional services*"* to alleged fugitive slaves, and "shall attend in his behalf on the trial of such claim"; attorney fees were paid by the county).

406 Naseef, *supra* note 393, at 790.

407 *Id.*

who appear in immigration court proceedings, including children, still lack legal representation.[408]

Even the limited statutory and Constitutional rights that are accorded to asylum applicants are routinely violated. CBP officers are supposed to screen detained noncitizens for potential asylum claims before deporting them by asking whether the person has "any fear or concern about being returned to [her] home country or being removed from the United States."[409] Approximately a dozen female asylum seekers interviewed by the Columbia Global Migration Project in 2016 and 2017 reported that CBP officers did not ask them if they feared returning to their home countries; instead, officers "ignored, mocked, or even sexually propositioned" the women and then deported them with no further process.[410] Many of these women were attacked and seriously harmed after they were forced to return to the places from which they had fled.[411] Similarly, approximately half of the 350 asylum-seeking individuals surveyed at the San Diego Migrant Family Shelter in 2019 indicated that they had suffered various forms of "mistreatment from immigration officers during apprehension, processing and/or detention."[412] Although the scale of these abuses appears to have grown during the

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[408] Despite efforts to increase legal representation for minors in immigration proceedings, data shows a trend in the opposite direction. Thirty percent of children whose immigration cases began in fiscal year 2015 were unrepresented. TRAC Immigration, *Children: Amid A Growing Court Backlog Many Still Unrepresented*, *in* TRAC SERIES ON JUVENILES AND FAMILIES IN IMMIGRATION COURT (2014), https://trac.syr.edu/immigration/reports/482. That figure rose to forty percent, for children whose cases began in 2016. *Id.* Seventy-five percent of children whose immigration cases originated in 2017 represented themselves in their immigration proceedings. *Id.*

[409] *Claims of Fear*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear (last visited Mar. 17, 2020).

[410] Stillman, *supra* note 378. Of course, such conduct violates internal government standards, which require all CBP officers to "speak and act with the utmost integrity and professionalism," and espouses a "zero tolerance policy" as to all forms of sexual abuse of detainees. CBP STANDARDS, *supra* note 391, at 3, 4.

[411] Stillman, *supra* note 378.

[412] JILL ESBENSHADE ET AL., AMER. CIVIL LIBERTIES UNION FOUND. OF SAN DIEGO, THE RIGHT TO SEEK ASYLUM: MIGRANT'S STORIES OF THE STRUGGLE FOR HUMAN RIGHTS, DIGNITY, PEACE AND JUSTICE IN THE UNITED STATES 2, 6, 24 (2019), https://www.aclusandiego.org/wp-content/uploads/2019/12/The_Right_to_Seek_Asylum-Migrant-Stories_with_Links-1.pdf.

Trump administration, they did not originate with it.[413] However, the remarkable level of hostility towards asylum-seekers expressed by the President himself is unprecedented.[414]

President Trump has loudly and persistently complained about the very existence of asylum law in the United States, characterizing it as a "loophole"[415] in the immigration system and a "big fat con job"[416] being perpetrated on the American people. He has character-

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[413] For example, the Ninth Circuit affirmed a permanent injunction against the U.S. Immigration and Naturalization Service ("INS") in 1990, supported by "overwhelming" evidence that the agency had systematically coerced El Salvadoran immigrants to waive their right to apply for asylum by signing voluntary departure forms. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 559, 562 (9th Cir. 1990) (finding that, even after a preliminary injunction was issued forbidding this conduct, the pattern of inducing class members into accepting voluntary departure persisted, even when the noncitizen expressed fear of returning to El Salvador or had specifically requested asylum).

[414] *See infra* notes 415–18 and accompanying text.

[415] *E.g.*, *President Donald J. Trump is Working to Stop the Abuse of our Asylum System and Address the Root Causes of the Border Crisis*, WHITE HOUSE (Apr. 29, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/ [hereinafter *Trump Working to Stop Abuse of Asylum System*] ("The Asylum Loophole: Migrants are flooding to our border to use asylum to gain entry into our country and remain here indefinitely."). President Trump is quoted as stating, "The biggest loophole drawing illegal aliens to our borders is the use of fraudulent or meritless asylum claims to gain entry into our great country." *Id.*; *see also Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review (charging that the asylum system "is currently subject to rampant abuse and fraud").

[416] President Trump made this statement during a campaign rally in Grand Rapids, Michigan. Donica Phifter, *Donald Trump Calls Asylum Claims a 'Big Fat Con Job,' Says Mexico Should Stop Migrant Caravans from Traveling to U.S. Border*, NEWSWEEK (Mar. 29, 2019, 12:13 AM). During the speech, he appeared to mock a would-be asylum applicant:

> You have people coming, you know they're all met by the lawyers . . . and they say, 'Say the following phrase: I am very afraid for my life. I am afraid for my life.' OK. And then I look at the guy. He looks like he just got out of the ring. He's a heavyweight champion of the world. It's a big fat con job.

ized immigrants as "invad[ing]" the country and advocated removing them with "no Judges or Court cases."[417] In addition to the incendiary rhetoric, Trump has issued executive orders and proposed changes to existing administrative regulations that make it even more difficult, if not impossible, for asylum-seekers to file claims and have them fairly adjudicated.[418] Much like the Fugitive Slave Act of 1850, which gutted the limited procedural safeguards accorded to those accused of being fugitive slaves, the changes wrought by the Trump administration have vitiated procedures designed to protect some of society's most vulnerable people.

The most infamous of Trump's policies designed to discourage migration of asylum-seekers into the United States was known as the "zero tolerance" family separation policy.[419] Without a formal announcement of a change in policy, in 2017, the Trump administration began to forcibly separate parents and children who crossed the border together.[420] Many of these families were fleeing persecution in their home countries and thus sought to claim asylum in the

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Id.; *see also* Maria Sacchetti, *U.S. Asylum Process is at the Center of Trump's Immigration Ire*, WASH. POST (Apr. 9, 2019, 6:21 PM), https://www.washingtonpost.com/immigration/us-asylum-process-is-at-the-center-of-trumps-immigration-ire/2019/04/09/7f8259b8-5aec-11e9-842d-7d3ed7eb3957_story.html. Trump also referred to the asylum process as a "con job" at a roundtable discussion regarding the economy in Minnesota, claiming, "You look at some of these people, you want protection from them, and they are saying, 'We need protection from our country.'" Steven Nelson, *Trump Says GOP 'Can Retake the House' by Addressing Asylum 'Con Job*,' WASH. EXAMINER (Apr. 15, 2019, 4:30 PM), https://www.washingtonexaminer.com/news/white-house/trump-says-gop-can-retake-the-house-by-addressing-asylum-con-job.

417 President Trump tweeted, "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came." @realDonaldTrump, TWITTER (Jun. 24, 2018, 8:02AM), https://twitter.com/realDonaldTrump/status/1010900865602019329.

418 *See, e.g.*, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); *see generally* Jean Galbraith, *Trump Administration Tightens Procedures with Respect to Asylum Seekers at the Southern Border*, 113 AM. J. INT'L L. 377 (2019) (discussing various actions by the Trump administration to restrict access to asylum); *see also infra* notes 470–478 and accompanying text.

419 *See* Julia Ainsley, *Trump Administration Discussed Separating Moms, Kids to Deter Asylum Seeks in Feb. 2017*, NBC (June 18, 2018, 3:43 PM), https://www.nbcnews.com/politics/immigration/trump-admin-discussed-separating-moms-kids-deter-asylum-seekers-feb-n884371.

420 *See id.*

United States.[421] Rather than release or detain the parents and children together, CBP agents began to forcibly separate the two by placing adults in federal detention centers and children in foster care or government facilities for "unaccompanied minors," sometimes thousands of miles away.[422] The federal government implemented the family separation policy to dissuade Central Americans from seeking asylum in the United States.[423] As news of this policy began to trickle out, moral outrage ensued and continues to this day.[424] Forcibly separating children from their parents causes both the child and the parent to suffer severe emotional harm and can permanently damage the relationship between parent and child, even after they are reunited.[425] A federal court has held that the policy deprives parents of their substantive due process rights to family integrity.[426] The

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[421] *See* Ms. L. v. U.S Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018), *modified by* 330 F.R.D. 284 (S.D. Cal. 2019) (finding that many of the parents and children who were separated were seeking asylum in the United States).

[422] *See id.* at 1154–55.

[423] John Burnett, *To Curb Illegal Immigration, DHS Separating Families at the Border*, NPR (Feb. 27, 2018, 7:41 AM), https://www.npr.org/2018/02/27/589079243/activists-outraged-that-u-s-border-agents-separate-immigrant-families ("The Department of Homeland Security has undertaken its most extreme measure yet to discourage asylum seekers from coming to the U.S.—family separation.").

[424] *See, e.g.*, Ashley Fetters, *The Moral Failure of Family Separation*, ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/trumps-family-separation-policy-causes-national-outrage/579676/.

[425] *See HHS-OIG Oversight of the Unaccompanied Alien Children Program: Hearing Before the H. Comm. on Appropriations*, 116th Cong. 8 (2019) (statement of Ann Maxwell, Assistant Inspector General, Department of Health and Human Services) (stating that "separated children exhibited more fear, feelings of abandonment, and post-traumatic stress than did children who were not separated. Separated children experienced heightened feelings of anxiety and loss as a result of their unexpected separation from their parents after their arrival in the United States."); *see also* Christopher Sherman et al., *US Held Record Number of Migrant Children in Custody in 2019*, ASSOCIATED PRESS (Nov. 12, 2019), https://apnews.com/015702afdb4d4fbf85cf5070cd2c6824 (quoting Dr. Jack Shonkoff as stating that "'decades of peer-reviewed research' show that detaining kids away from parents or primary caregivers is bad for their health"); Joanna Dreby, *U.S. Immigration Policy and Family Separation: The Consequences for Children's Well-Being*, 132 SOCIAL SCI. & MED. 245, 247–49 (2015).

[426] *See Ms. L.*, 310 F. Supp. 3d at 1137.

damage that the U.S. government has done to these families may never be repaired.[427]

After inflicting the trauma of family separation, the government had to admit that it had no plan to reunify the families it had torn apart. It had made no effort to do so.[428] In June 2018, a federal court ordered the government to discontinue the policy and reunite the thousands of families that it had separated, finding that the government's conduct was "egregious," "outrageous," and sufficient to "shock the contemporary conscience."[429] Approximately 5500 migrant children were separated from their parents at the border under the policy that was officially halted in June 2018.[430] Although most of these families were eventually reunited, as of January 2020, twenty-one children remained in government custody.[431]

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[427] A class action lawsuit was filed in 2019 seeking damages against the federal government for the harms inflicted by the family separation policy. Class Action Complaint, A.I.I.L. v. Sessions, No. 4:19-CV-00481-JAS (D. Ariz., Oct. 10, 2019).

[428] The court made the following findings in this regard:

> [T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. This is a startling reality.

Ms. L., 310 F. Supp. 3d at 1144; *see also* Jonathan Blitzer, *The Government Has No Plan for Reuniting the Immigrant Families it is Tearing Apart*, NEW YORKER (June 18, 2018), https://www.newyorker.com/news/news-desk/the-government-has-no-plan-for-reuniting-the-immigrant-families-it-is-tearing-apart.

[429] *Ms. L.*, 310 F. Supp. 3d at 1145–46.

[430] Jasmine Aguilera, *Here's What to Know About the Status of Family Separation at the U.S. Border, Which Isn't Nearly Over*, TIME, https://time.com/5678313/trump-administration-family-separation-lawsuits/ (last updated Oct. 25, 2019, 2:49 PM); *see also* Camilo Montoya-Galvez, *U.S. Planned to Separate 26,000 Migrant Families Before Outcry Over 'Zero Tolerance' Policy*, CBS, https://www.cbsnews.com/news/family-separations-zero-tolerance-policy-us-planned-to-separate-more-than-26000-migrant-families-2019-11-27/ (last updated Nov. 27, 2019, 9:47 PM).

[431] CHRISTI A. GRIMM, U.S. DEP'T OF HEALTH & HUMAN SERVICES, COMMUNICATION AND MANAGEMENT CHALLENGES IMPEDED HHS'S RESPONSE TO THE ZERO-TOLERANCE POLICY 8 (2020), https://oig.hhs.gov/oei/reports/oei-BL-18-00510.pdf*; see also* Aguilera, *supra* note 430 (noting that, as of September

Although the Trump administration officially halted the family separation policy in June 2018,[432] family separation has clearly continued.[433] Over one thousand children have been separated from their parents since the family separation policy officially ended in June 2018.[434] Thousands of young children have been detained in government facilities without adequate access to medical care or basic hygiene.[435]

Several children have died in government custody.[436] Despite at least three deaths attributable to the flu, the government has refused to provide children in ICE detention with the flu vaccine, even when doctors volunteered to provide the vaccinations at no cost to the government.[437] One commentator has characterized the federal government's immigration policy of taking children from their parents as "of a piece with some of the darkest moments of American history," including slavery.[438]

Images of screaming children ripped from the arms of their parents were just as devastating in the nineteenth century as they are

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2019, twenty-seven children remained in government custody as a result of the policy).

[432] The family separation policy was partially withdrawn by the Trump administration on June 20, 2018. *See* Exec. Order No. 13,841, 83 Fed. Reg. 29435 (June 20, 2018).

[433] *See* Aguilera, *supra* note 430; Montoya-Galvez, *supra* note 430.

[434] *See* Aguilera, *supra* note 430; Montoya-Galvez, *supra* note 430.

[435] *See* Lizzie O'Leary, *'Children Were Dirty, They Were Scared, and They Were Hungry*,' ATLANTIC (June 25, 2019), https://www.theatlantic.com/family/archive/2019/06/child-detention-centers-immigration-attorney-interview/592540/; Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Texas*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html.

[436] Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC (May 29, 2019, 4:44 PM), https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316 (noting that at least seven children died in CBP custody between 2018 and May 2019).

[437] *See* Molly Hennessy-Fiske, *After Child Deaths, Doctors Pressure Border Patrol to Let Them Administer Flu Vaccines*, L.A. TIMES (Nov. 19, 2019, 11:32 AM), https://www.latimes.com/world-nation/story/2019-11-19/la-na-border-patrol-migrant-flu; *see* Robert Moore, *CDC Recommended that Migrants Receive Flu Vaccine, but CBP Rejected the Idea*, WASH. POST (Nov. 25, 2019, 3:58 PM), https://www.washingtonpost.com/immigration/cdc-recommended-that-migrants-receive-flu-vaccine-but-cbp-rejected-the-idea/2019/11/25/8aba198e-0fb8-11ea-b0fc-62cc38411ebb_story.html.

[438] Fetters, *supra* note 424.

today. Harriet Beecher Stowe's iconic novel, *Uncle Tom's Cabin*, brought a vivid picture of slavery's destruction of the family into American homes when it was published in March 1852.[439] In one of the novel's early scenes, a mother, Eliza, flees over the frozen Ohio River with her four year-old son, Harry, to avoid separation after Harry was sold to pay the debts of the family who "owned" them.[440] Although Stowe's novel was a work of fiction, it was based on Stowe's investigation of actual events and people caught up in the web of slavery.[441] The book was immensely popular in the free North, where it sold over 300,000 copies in its first year of circulation and helped to turn the tide of public opinion against slavery.[442] Although "[h]istory cannot evaluate with precision the influence of a novel upon public opinion . . . the northern attitude toward slavery was never quite the same after *Uncle Tom's Cabin*."[443] Whether outrage over the Trump administration's family separation policy will have a similarly lasting impact on public opinion regarding federal immigration law remains to be seen.

The family separation policy is one of several executive actions taken by the Trump administration designed to deter and prohibit migrants from seeking asylum in the United States. All of these executive actions have been challenged in court, and some have been enjoined, at least temporarily.[444] In June 2018, Attorney General

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[439] *See generally* HARRIET BEECHER STOWE, UNCLE TOM'S CABIN: A TALE OF LIFE AMONG THE LOWLY (1852); *see also* POTTER, *supra* note 236, at 140 (noting that Stowe "made vivid the plight of the slave as a human being held in bondage").

[440] STOWE, *supra* note 439, at 42, 59–73.

[441] *See* HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM'S CABIN 1 (1853).

[442] *See* POTTER, *supra* note 236, at 140 (noting that the book ultimately sold almost three million copies in the United States, and another three and a half million copies abroad); *see generally* DAVID S. REYNOLDS, MIGHTIER THAN THE SWORD, UNCLE TOM'S CABIN AND THE BATTLE FOR AMERICA (2012).

[443] POTTER, *supra* note 236, at 140.

[444] President Trump has made several additional proposals that, if ultimately implemented, will further burden asylum-seekers and undermine the United States' commitment to the principle of non-refoulement, a fundamental tenet of international law that is embodied in multiple federal statutes. In April 2019, President Trump issued a "presidential memorandum" directing the implementation of regulations that would (1) require the payment of a fee to apply for asylum or a work permit; (2) deny provisional work permits while asylum applications are pending; and (3) mandate that all asylum cases be decided within 180 days. *See Presidential Memorandum on Additional Measures to Enhance Border Security*

Sessions issued a decision overruling and vacating precedent from the Board of Immigration Appeals ("BIA"), finding that victims of domestic abuse in their country of origin generally should not qualify for asylum in the United States.[445] He further noted in dictum that those fleeing gang violence should also "generally" not qualify for asylum.[446] A federal lawsuit challenging Sessions's decision as applied to expedited removal proceedings was filed on behalf of twelve adults and children seeking asylum in the United States, who were found not to have a credible fear of persecution based on Sessions' new policy.[447] The court held that a blanket application of Sessions' ruling at the credible fear stage was inconsistent with the INA and the Administrative Procedure Act.[448] As a result, the policy of subjecting asylum seekers expressing fear of domestic abuse or

and Restore Integrity to Our Immigration System, WHITE HOUSE (Apr. 29, 2019), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/; *see also Trump Working to Stop Abuse of Asylum System*, *supra* note 415; Zolan Kanno-Youngs & Caitlin Dickerson, *Asylum Seekers Face New Restrictions Under Latest Trump Orders*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/us/politics/trump-asylum.html. Proposed regulations have been issued that would charge migrants $50 to apply for asylum, and $490 to apply for a work permit. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,318, 62,320 (Nov. 14, 2019) (proposed). The vast majority of countries do not require payment from asylum seekers; currently, only Australia, Fiji, and Iran impose such a fee. *See* Sasha Abramsky, *Charging for Asylum? It's Unpopular for a Reason*, NATION (Nov. 12, 2019).

[445] *In re* A-B-, 27 I. & N. Dec. 316, 320–21 (A.G. 2018); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (2018) (discussing the implementation of the policy announced *In re A-B-*).

[446] *In re A-B-*, 27 I. & N. at 320 ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.").

[447] Grace v. Whitaker, 344 F. Supp. 3d 96, 104–05 (D.D.C. 2018) (discussing how plaintiffs "alleged accounts of sexual abuse, kidnappings, and beatings in their home countries during interviews with asylum officers").

[448] *Id.* at 125–28.

gang violence to expedited removal was enjoined.[449] The government is appealing this decision.[450]

A few months later, President Trump issued an executive proclamation rendering any individual who did not present himself for inspection at an authorized port of entry ineligible for political asylum.[451] This rule also contravenes the INA, which specifies that "[a]ny alien" who is physically present in the United States or who arrives in the United States, "*whether or not at a designated port of arrival*," may apply for asylum.[452] As a result, another lawsuit was filed in federal court, and implementation of the rule was enjoined.[453] This decision was also appealed; however, the Supreme Court denied review.[454]

In January 2019, the Department of Homeland Security issued the Migrant Protection Protocols ("MPP"), commonly referred to as the "Remain in Mexico" policy,[455] which requires non-Mexican asylum-seekers who enter the United States through Mexico to be "re-

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[449] *Id.* at 105 ("[B]ecause it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal, the Court finds that those policies are unlawful.").

[450] Brief for the Appellants, Grace v. Barr, 344 F. Supp. 3d 96 (D.D.C. 2018) (No. 19-5013), 2019 WL 2354784.

[451] Donald J. Trump, Exec. Office of the President, Addressing Mass Migration Through Southern Border of the United States, 83 Fed. Reg. 57,661 (Nov. 9, 2018) (ordering that "aliens who enter the United States unlawfully through the southern border in contravention of this proclamation will be ineligible to be granted asylum"); *see also* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,939–40 (Nov. 9, 2018) (to be codified at 8 C.F.R. pt. 208).

[452] 8 U.S.C. § 1158(a)(1) (2018) (emphasis added).

[453] E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018) (issuing temporary restraining order against implementation of the policy); E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 780 (9th Cir. 2018) (denying emergency motion to stay district court's order pending appeal). The district court reasoned that "[w]hatever the scope of the President's authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden." *E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 844.

[454] Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (2018), *denying cert.*

[455] Vanessa Romo, *U.S. Supreme Court Allows 'Remain in Mexico' Program to Continue*, NPR (Mar. 11, 2020, 3:38 PM), https://www.npr.org/2020/03/11/814582798/u-s-supreme-court-allows-remain-in-mexico-program-to-continue.

turned to Mexico . . . for the duration of their immigration proceedings," and, with certain limited exceptions, excluded from the United States during that time period.[456] In other words, these asylum applicants must wait in Mexico, typically for several months, while their asylum claims are being adjudicated in the United States.[457] Between January and November 2019, approximately 60,000 asylum applicants were forced back across the border and required to remain in Mexico while their asylum applications are being adjudicated pursuant to this policy.[458] To date, only eleven applicants pursuing asylum claims from Mexico—approximately 0.1 percent—have been granted asylum.[459] Like the family separa-

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[456] *Migrant Protection Protocols*, DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols; *see also* Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019) (discussing the MPP). The United States and Canada have entered into an agreement, the Safe Third Country Agreement ("STCA"), under which asylum-seekers who enter Canada through a land-border with the United States, or vice-versa, are eligible to apply for asylum only in their state of first arrival. Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries art. 4, U.S.-Can., Dec. 5, 2002, T.I.A.S. No. 04-1229; *see also* Cara D. Cutler, *The U.S.-Canada Safe Third Country Agreement: Slamming the Door on Refugees*, 11 ILSA J. INT'L & COMP. L. 121, 128–29 (2004) (critiquing the STCA). A lawsuit was recently filed in Canada, challenging the STCA on the grounds that, under the Trump administration's current immigration policies, the United States is no longer "safe" for refugees. *See* Annie Hylton, *Canada Questions the Safety of Asylum Seekers in the U.S.*, NEW YORKER (May 1, 2019), https://www.newyorker.com/news/news-desk/canada-questions-the-safety-of-asylum-seekers-in-the-us; *see also* Rachel Gonzalez Settlage, *Indirect Refoulement: Challenging Canada's Participation in the Canada-United States Safe Third Country Agreement*, 30 WIS. INT'L L.J. 142, 150–52 (2012).

[457] *See* Jonathan Blitzer, *How the U.S. Asylum System is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico.

[458] *See* Juju Chang et al., *Blocked at the Border: Young Families, Pregnant Mothers Struggle for Asylum*, ABC (Dec. 18, 2019, 4:08 AM), https://abcnews.go.com/International/blocked-border-young-families-pregnant-mothers-struggle-asylum/story?id=67777661.

[459] Gustavo Solis, *Remain in Mexico Has a 0.1 Percent Asylum Grant Rate*, SAN DIEGO UNION TRIBUNE (Dec. 15, 2019, 4:42 AM), https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate; *see also Details on MPP (Remain in*

tion policy, the MPP is designed, at least in part, to discourage Central Americans from filing asylum claims in the United States.[460] Hundreds of migrants, most of them fleeing violence in Central America, have been subject to kidnappings, rape, other forms of assault, and even murder while living in makeshift encampments on the Mexican border.[461] Migrant children, in particular, are being further traumatized by the violence they are witnessing and experiencing in Mexico.[462] Though these asylum applicants have a statutory

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Mexico) Deportation Proceedings by Hearing Location and Attendance, Representation, Nationality, Month and Year of NTA, Outcome, and Current Status, TRACC IMMIGRATION, https://trac.syr.edu/phptools/immigration/mpp/ (last visited Mar. 18, 2020) [hereinafter *Details on MPP*].

[460] Molly O'Toole, *Trump Administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn*, L.A. TIMES (Aug. 28, 2019, 12:12 PM), https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases (quoting Mark Morgan, acting head of CBP, as stating that the policy was for immigrants' "own protection" but was also intended to "deter asylum seekers").

[461] As of December 2019, there were 636 publicly documented cases of kidnappings, rapes, and other violent assaults perpetrated against migrants living in Mexico under the MPP, with almost half of those assaults occurring in November 2019 alone. HUMAN RIGHTS FIRST, HUMAN RIGHTS FIASCO: THE TRUMP ADMINISTRATION'S DANGEROUS ASYLUM RETURNS CONTINUE 2, 4–5 (2019) https://www.humanrightsfirst.org/resource/human-rights-fiasco-trump-administration-s-dangerous-asylum-returns-continue ("Vulnerable asylum seekers and migrants, including pregnant women, children, and people with disabilities, are kidnapped, raped, and assaulted in shelters, in taxis and buses, on the streets, on their way to U.S. immigration court, and even while seeking help from Mexican police and migration officers."); Miriam Jordan, *'I'm Kidnapped': A Father's Nightmare on the Border*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/us/border-migrants-kidnapping-mexico.html (describing various cases of abduction, rape, assault, and murder, suffered by asylum applicants forced to live in Mexican border towns under the MPP). According to data collected by the U.S. Immigration Policy Center at the University of California, San Diego, a quarter of asylum seekers subject to the MPP have experienced violence in Mexico. Judy Woodruff, *Asylum Seekers Forced to Remain in Mexico Face Daily Threat of Violence*, PBS (Dec. 20, 2019), https://www.pbs.org/newshour/show/asylum-seekers-forced-to-remain-in-mexico-face-daily-threat-of-violence (interviewing Yamiche Alcindo, a White House Correspondent who traveled to Mexico to experience firsthand the impact of the MPP).

[462] Steven Berkowitz & Alisa R. Gutman, *Trump's 'Remain in Mexico' Policy is Traumatizing Kids. Bring Asylum-Seekers Here to Heal*, USA TODAY (Jan. 6, 2020, 5:00 AM), https://www.usatoday.com/story/opinion/2020/01/06/trump-remain-in-mexico-policy-causing-child-trauma-psychiatrists/2784393001/ (stating

right to seek legal representation,[463] they have little to no access to lawyers while forced to live in Mexico.[464] A district court judge preliminarily enjoined implementation of the policy, holding that it conflicted with the INA.[465] After initially staying implementation of the district court's order,[466] the Ninth Circuit affirmed the injunction, finding that the "individual plaintiffs risk substantial harm, even death, so long as the directives of the MPP are followed."[467] However, less than a week later, the Ninth Circuit temporarily stayed implementation of its own ruling, despite finding that the MPP "clearly violates" federal law.[468] When the Ninth Circuit stay expired, the Supreme Court issued another emergency stay, effectively blocking the injunction until the final resolution of the case.[469] Whether the courts will ultimately determine that the MPP is consistent with the will of Congress, as reflected in the INA, has yet to be determined.

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psychiatrists' opinion that "[t]he children whom the Trump administration is sending back to unspeakable violence in Mexican border towns are at risk for serious traumatic reactions and dysfunction that could impact them for the rest of their lives").

463 *See* 8 U.S.C. § 1158(b)(1)(A) (2018) (cross-referencing 8 U.S.C. § 1101(a)(42)).

464 Miriam Jordan, *In Court Without a Lawyer: The Consequences of Trump's 'Remain in Mexico' Plan*, N.Y. TIMES (Aug. 3, 2019), https://www.nytimes.com/2019/08/03/us/migrants-court-remain-in-mexico.html?action=click&module=RelatedLinks&pgtype=Article. Data shows that migrants subject to the MPP have obtained legal representation in less than one percent of cases. *Details on MPP*, *supra* note 459 (finding that migrants obtained legal representation in 57 immigration cases out of a total of 8,377).

465 Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1115 (N.D. Cal. 2019) (holding that plaintiffs were likely to prove that the MPP does not comply with the Administrative Procedures Act, "because the statute DHS contends the MPP is designed to enforce does not apply to these circumstances, and even if it did, further procedural protections would be required to conform to the government's acknowledged obligation to ensure aliens are not returned to unduly dangerous circumstances").

466 Innovation Law Lab v. McAleenan, 924 F.3d 503, 510 (9th Cir. 2019).

467 Innovation Law Lab v. McAleenan, 951 F.3d 1073, 1093 (9th Cir. 2020).

468 Innovation Law Lab v. Wolf, 951 F.3d 986, 987 (9th Cir. 2020).

469 Wolf v. Innovation Law Lab, 2020 WL 1161432 (Mar. 11, 2020). Justice Sotomayor dissented from the order granting the emergency stay. *Id.*

Even more significantly, in July 2019, the Trump administration proposed and began to implement a federal regulation that constitutes a "new *mandatory bar* for asylum eligibility," applicable to any migrant who fails "to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States."[470] "The effect of the Rule is to categorically deny asylum to almost anyone entering the United States at the southern border if he or she did not first apply for asylum in Mexico or another third country."[471] Immigrant advocacy organizations immediately sued to block enforcement of the rule, arguing that "[t]he Rule is a part of an unlawful effort to significantly undermine, if not virtually repeal, the U.S. asylum system at the southern border, and cruelly closes our doors to refugees fleeing persecution, forcing them to return to harm."[472] Although the district court initially enjoined enforcement of the rule,[473] the injunction was later limited in scope by the Ninth Circuit.[474] However, the Supreme Court, in a one-paragraph opinion, stayed enforcement of the injunction pending final adjudication of the case.[475] In her dissent, Justice Sotomayor lamented that "[o]nce again the Executive Branch has issued a rule that seeks to upend longstanding practices regarding refugees who seek shelter from persecution."[476] The implementation of this rule will effectively preclude Central Americans, Cubans, Haitians, and anyone else who attempts to cross into the United States

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[470] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (to be codified at 8 C.F.R. pt. 208) (emphasis added).

[471] E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 929–30 (N.D. Cal. 2019).

[472] Complaint at 3, E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019).

[473] *E. Bay Sanctuary Covenant*, 385 F. Supp. 3d at 930–31.

[474] E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1028 (9th Cir. 2019).

[475] Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019).

[476] *Id.* at 4 (Sotomayor, J., dissenting). Justice Ginsburg joined Justice Sotomayor's dissent. *Id.*; *see also* Opinion, *The Supreme Court Just Gave Trump Temporary Rein to Play with the Lives of Desperate Migrants*, L.A. TIMES (Sept. 12, 2019, 2:14 PM), https://www.latimes.com/opinion/story/2019-09-12/asylum-supreme-court-trump-mexico-central-americans (decrying the willingness of "the U.S. government and the nation's highest court" to "disregard the health, safety and legal rights of people in desperate need").

through the Southern border from seeking asylum in this country.[477] Although the legal viability of this executive action remains to be determined, while it is enforced, it will effectively deter and outright bar the vast majority of refugees from seeking or obtaining asylum in the United States.[478]

The executive measures discussed above have had the practical effect of precluding asylum seekers from finding refuge in the United States. However, all of them purport to provide some form of legal process for those with legitimate asylum claims. In the throes of the COVID-19 crisis, the Trump administration has, at least temporarily, closed the Southern border to asylum seekers completely. Under this policy, anyone attempting to cross the border without proper documentation, including those attempting to seek asylum, will be removed from the country immediately and without due process.[479] The administration claims that the measures are necessary to protect "migrants, our frontline agents and officers and the American people" from the spread of the coronavirus at Border Patrol stations and detention facilities.[480] Immigration advocates have

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[477] *See* Camilo Montoya-Galvez, *Top Trump Official Ken Cuccinelli Says Asylum Restriction will be a "Deterrent" for Migrants*, CBS: FACE THE NATION (Sept. 15, 2019), https://www.cbsnews.com/news/cuccinelli-says-asylum-restriction-allowed-by-supreme-court-will-be-a-deterrent-for-migrants.

[478] *See id.*

[479] *See* Zolan Kanno-Youngs, Michael D. Shear, & Maggie Haberman, *Citing Coronavirus, Trump Will Announce Strict New Border Controls*, N.Y. TIMES (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-mexican-border.html ("Under the [proposed] policy, asylum seekers would not be held for any length of time in an American facility nor would they be given due process."); Quinn Owen, *Trump Administration to Impose New Restrictions at Border, Leaving Asylum Seekers in Limbo*, ABC NEWS (Mar. 20, 2020), https://abcnews.go.com/Politics/trump-administration-impose-restrictions-border-leaving-asylum-seekers/story?id=69717143 (quoting Acting Homeland Security Secretary Chad Wolf as stating that those "without proper travel documentation" will face "immediate removal").

[480] Owen, *supra* note 479 (quoting Acting Homeland Security Secretary Wolf). To date, the administration has rejected calls to release some portion of the approximately 37,000 individuals held in crowded immigration detention facilities, to prevent the spread of the virus, even though about half of those detainees have not been charged with any crimes and are being held solely due to alleged civil immigration violations. About 6,000 of those detained are seeking asylum. *See* Joel Rose, *Immigration Grinds to a Halt as President Trump Shuts Borders*, NPR (Mar. 18, 2020), https://www.npr.org/2020/03/18/817965714/immigration-

decried these measures as yet another attempt to "falsely [scapegoat] immigrant communities in the name of public safety," and argue that they "unquestionably violate both domestic and international law" and abdicate the country's "moral responsibility to protect vulnerable people."[481]

The Trump administration has all but repudiated the United States' commitment to the principle of *non-refoulement*. The President's own statements show that he does not value either the historical or humanitarian significance of asylum law, a belief reflected in the policies he has tried to implement. Moreover, the Trump administration's attempts to impose such laws via executive action, rather than through the legislative process, violate basic principles of federalism and separation of powers, which is largely why—to date—many of these policies have been enjoined by federal courts. The Trump administration's failure to seek or obtain Congressional approval for these fundamental changes to asylum law reflects a lack of national consensus sufficient to support them. In this sense, these executive actions lack even the level of democratic legitimacy enjoyed by the Fugitive Slave Act of 1850. That heinous Act—although enacted at a time when vast swaths of the American population were excluded from the franchise—was part of a legislative bar-

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grinds-to-a-halt-as-president-trump-shuts-borders; Michael Edison Hayden, *Nativist Hate Groups Want to Keep People in ICE Detention Despite COVID-19 Threat*, SOUTHERN POVERTY L. CTR. (Apr. 9, 2020), https://www.splcenter.org/hatewatch/2020/04/09/nativist-hate-groups-want-keep-people-ice-detention-despite-covid-19-threat. *See also* Class Action Complaint at 3, Gayle v. Meade, No. 1:20-cv-21553-XXXX (S.D. Fla. Apr. 13, 2020) (seeking court order releasing ICE detainees due to ICE's practice of "cohort quarantin[ing]" in detention); (Complaint at 3, Dawson v. Asher, No. 2:20-cv-00409 (W.D. Wash. Mar. 26, 2020) (seeking court order releasing certain civil detainees from ICE facilities due to increased risk of serious illness resulting from COVID 19).

[481] Rose, *supra* note 480 (quoting Michelle Brané at the Women's Refugee Commission); *see also* Hamed Aleaziz, *The Trump Administration Is Now Deporting Unaccompanied Immigrant Kids Due to the Coronavirus*, BUZZFEED NEWS (Mar. 30, 2020), https://www.buzzfeednews.com/article/hamedaleaziz/coronavirus-unaccompanied-minors-deported?bfsource=relatedmanual (quoting Human Rights First representative as stating that the Trump administration is using a public health crisis "to advance their long-standing goal of overturning U.S. laws protecting vulnerable children and people seeking asylum").

gain and hence adopted by the majority of the nation's elected Congressional representatives. The same cannot be said for the "executive proclamations" and federal regulations promulgated by the Trump administration with regard to asylum. Although the federal government does have broad powers in the immigration arena, at a minimum, those powers are shared by Congress and do not belong to the President alone.

3. FEDERAL SUPREMACY AND THE LIMITS OF STATE POWER TO REGULATE MATTERS CONCERNING FUGITIVE SLAVES AND UNDOCUMENTED IMMIGRANTS

Just as it did with respect to the Fugitive Slave Acts and the personal liberty laws, the U.S. Supreme Court has held that federal law preempts state law in the immigration arena. The Constitutional case for federal supremacy, in the immigration context, is actually much stronger than it was in the case of fugitive slaves. As discussed above, the list of subjects over which Congress has the power to act, as enumerated in Article I, Section 8, does not include any reference to fugitive slaves.[482] This Constitutional provision does, however, address immigration, specifying that Congress shall have the power to create a "uniform Rule of Naturalization."[483] The Supreme Court has observed that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[484] However, although the Executive Branch does have

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[482] *See* U.S. CONST. art. I, § 8; U.S. CONST. art. IV.; U.S. CONST. art. IV, § 1; *see generally* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618 (1842).

[483] U.S. CONST. art. I, § 8. It is worth noting, however, that the Supreme Court originally found that the federal government's right to exclude "foreigners of a different race" came from sovereignty itself rather than the text of the Constitution. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). The Supreme Court has held that the federal government's broad power over immigration matters stems from its "inherent power as sovereign to control and conduct relations with foreign nations." Arizona v. United States, 567 U.S. 387, 395 (2012); *see also* Toll v. Moreno, 458 U.S. 1, 10 (1982) (citing the Federal Government's "broad authority over foreign affairs" as a source of its authority to regulate the status of aliens).

[484] *Arizona*, 567 U.S. at 394–95 ("The federal power to determine immigration policy is well settled."; "Federal governance of immigration and alien status is extensive and complex."); Hines v. Davidowitz, 312 U.S. 52, 62 (1941) ("[T]he supremacy of the national power in the general field of foreign affairs, including

broad powers in this area of the law, it shares that power with the legislative branch, as reflected in the plain language of the Constitution.[485] Most of the changes that the Trump administration has attempted to inflict on the asylum process would almost certainly have been upheld in court if they had been adopted by Congress rather than executive fiat.

The Supreme Court addressed the issue of state authority to regulate immigration matters in *Arizona v. United States*, a case in which it invalidated multiple Arizona state laws on grounds of federal preemption.[486] However, unlike the state personal liberty laws—which often sought to impede the federal government's efforts to expel individuals arrested under the auspices of the federal law—the Arizona laws aimed for the opposite effect. The laws' stated purpose was to "discourage and deter the unlawful entry and presence of aliens and economic activity [in Arizona] by persons unlawfully present in the United States," and thereby to implement a policy of "attrition through enforcement."[487] The Court found that "Arizona bears many of the [negative] consequences of unlawful immigration" based on the factual record in the case.[488]

Most, but not all, of the laws passed by Arizona regarding the immigration process, collectively known as State Bill ("S.B.") 1070, were struck down on grounds of federal preemption.[489] The first state law at issue, section 3 of S.B. 1070, purported to criminalize a

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power over immigration, naturalization and deportation, is made clear by the Constitution . . . and has since been given continuous recognition by this Court."); *Toll*, 458 U.S. at 10 ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.").

485 *See* U.S CONST. art. I § 8, cl. 2.

486 *Arizona*, 567 U.S. at 387; *see also* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 528–39 (5th Cir. 2013) (invalidating, on preemption grounds, a Texas ordinance that purported to criminalize the rental of housing to and by aliens not lawfully present in the United States); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2088 (2013) (noting that "the Supreme Court has consistently and overwhelmingly disapproved of state attempts to regulate immigration, discriminate against noncitizens, or discourage immigrant presence in a particular locality").

487 *Arizona*, 567 U.S. at 393 (quoting Note following ARIZ. REV. STAT. ANN. § 11-1051 (2012)).

488 *Id.* at 397–98.

489 *Id.* at 416.

person's failure to obey federal laws regarding alien registration.[490] The Court held that, because Congress has occupied this entire field, "even complementary state regulation was impermissible."[491] Section 5(C) of S.B. 1070 would have criminalized employment, or efforts to obtain employment, by "unauthorized alien[s]."[492] This law was also struck down as preempted by federal law.[493] Because Arizona's criminal penalties differed from the federal civil penalties imposed for the same conduct regarding employment, the Court held that the Arizona law posed an "obstacle" to the federal regulatory scheme.[494] Finally, section 6 of S.B. 1070 permitted state officers to arrest a person without a warrant if the officer found "probable cause" that he had committed a "public offense" that would render him removable from the United States.[495] This statute was also struck down, because it also posed an obstacle to the comprehensive system of federal laws governing alien removability.[496]

Only one provision in the Arizona statutory scheme was upheld and allowed to co-exist with federal immigration law: Section 2(B).[497] Section 2(B) requires all state and local authorities to contact the federal government and attempt to verify the immigration status of any individual they have lawfully stopped, arrested, or detained, if they have a "reasonable suspicion" that "the person is an alien and is unlawfully present in the United States."[498] Further, the

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490 ARIZ. REV. STAT. ANN. § 13-1509(A) (2012); *see also Arizona*, 567 U.S. at 401–03 (discussing ARIZ. REV. STAT. ANN. § 13-509).

491 *Arizona*, 567 U.S. at 401; *see also* Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941) (finding a similar Pennsylvania alien registration statute invalid on grounds of federal supremacy).

492 ARIZ. REV. STAT. ANN. § 13-2928(C).

493 *Arizona*, 567 U.S. at 403–07.

494 *Id.* at 406–07.

495 ARIZ. REV. STAT. ANN. § 13-3883(A)(5).

496 *Arizona*, 567 U.S. at 407–10.

497 *Id.* at 415.

498 ARIZ. REV. STAT. ANN. § 11-1051(B). In upholding the constitutionality of section 2(B), the Supreme Court noted the three limitations embodied in the statute: (1) an officer implementing the statute cannot consider the race, ethnicity, or national origin of the person arrested, except to the extent permitted by the Arizona and United States constitutions; (2) the statute requires that it be "implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens"; and (3) any person presenting an officer with a valid form

law provides that "*[a]ny* person who is arrested shall have the person's immigration status determined [by contacting the Federal Government] before the person is released."[499] In upholding the constitutionality of the law, the Court noted that, under 8 U.S.C. § 1357(g)(10)(A), the federal government welcomes this type of cooperation, and therefore a state law requiring it does not frustrate the purpose or pose an obstacle to the federal scheme.[500]

Critically, the federal law referenced in the *Arizona* opinion, Section 1357(g)(10)(A), permits—but does not mandate—the type of federal/state cooperation required by the Arizona law.[501] Section 1357(g) authorizes the federal government to enter into written agreements with the states allowing state employees to implement federal immigration law; however, it specifies that such agreements cannot be required.[502] In addition, it clarifies that, even in the absence of a written agreement, state officers may communicate with the federal government "regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States," or otherwise to cooperate with the government regarding the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[503] However, even though the federal statute *allows* communication and cooperation between federal and state governments regarding immigration matters, it does not, and, for reasons addressed below, cannot *compel* it.[504]

Although the Supreme Court's opinion in *Arizona v. United States* did not cite or otherwise reference *Prigg v. Pennsylvania*—in which the Court struck down the Pennsylvania personal liberty law on grounds of federal supremacy—the decisions are consistent. As discussed, the Supreme Court in *Prigg* invalidated Pennsylvania's efforts to regulate the process by which the federal government de-

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of identification (including an Arizona driver's license) is presumed not to be an alien unlawfully present in the United States. *Arizona*, 567 U.S. at 411.

499 ARIZ. REV. STAT. ANN. § 11-1051(B) (emphasis added).

500 *Arizona*, 567 U.S. at 411–12.

501 *See* 8 U.S.C. § 1357(g) (2018).

502 8 U.S.C. §§ 1357(g)(1)–(9).

503 8 U.S.C. § 1357(g)(10).

504 *See infra* notes 516–549 and accompanying text.

termined whether individuals were removable from the state as fugitive slaves on grounds of federal supremacy.[505] Similarly, the Court largely struck down Arizona's efforts to regulate alien removability and other aspects of immigration law, also on grounds of federal supremacy.[506] Both decisions also addressed the question of federal/state cooperation in their respective contexts.[507] However, in *Prigg*, the federal law at issue, the Fugitive Slave Act of 1793, at least indirectly required state cooperation to enforce it.[508] In *Arizona*, state law, rather than federal law, directed state officials to assist the federal government in achieving its aims.[509]

In both *Prigg* and *Arizona*, the Supreme Court held that the Constitution permitted the state to cooperate with the federal government, even in areas deemed to be exclusively within the control of the federal government.[510] The Court distinguishes permission from compulsion, however. In *Prigg*, Story concluded that the states could not be compelled to enforce the Fugitive Slave Law: "it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the constitution."[511] However, he entertained no doubt that state magistrates could, "if they choose, exercise that authority [in Fugitive Slave Act cases], unless prohibited by state legislation."[512] In sum, Story's opinion meant that "[s]tates could . . . either assist in enforcing federal law or refuse to aid in enforcement if they so desired."[513] In *Arizona*, the Court upheld the constitutionality of a state statute requiring state officers to

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505 *See supra* Section I.C.

506 *See supra* notes 486–496 and accompanying text.

507 *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 600 (1842); Arizona v. United States, 567 U.S. 387, 416 (2012).

508 *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; *see also Prigg*, 41 U.S. at 565.

509 *Arizona*, 567 U.S. at 416.

510 *Prigg*, 41 U.S. at 656; *Arizona*, 567 U.S. at 411–13.

511 *Prigg*, 41 U.S. at 615–16.

512 *Id.* at 622.

513 *See* Kraehenbuehl, *supra* note 6, at 1477; *see also* Finkelman, *The Roots of* Printz, *supra* note 22, at 1408–09 (interpreting Story's opinion as finding "that state officials should, but could not be required to, enforce the Fugitive Slave Law").

provide such aid and assistance in the immigration context.[514] However, it did not hold or suggest that the *federal* government could similarly compel state officers to assist in the enforcement of federal immigration law. As discussed below, the federal government's inability to coerce the states to carry out its mandates—known as the anti-commandeering principle—was and is a critical tool of states' resistance to federal policies that they do not support, both in the antebellum era and today.

C. *The Anti-Commandeering Principle as a Vehicle of State Resistance*

In the modern era, unlike the mid-nineteenth century, the concept of federal supremacy and judicial review are well established. States that disagree with federal immigration policy cannot directly change the way in which it is being implemented, and, as a general matter, they do not attempt to do so. As discussed above, the Supreme Court has invalidated even indirect attempts to legislate in the immigration arena by the states on grounds of federal supremacy.[515] However, the states do have one legal recourse: they can refuse to cooperate and choose not to assist the federal government in enforcing federal immigration law. This precedent was set by the Supreme Court in 1844, in *Prigg v. Pennsylvania,*[516] and reaffirmed by the Court in *Printz v. United States*[517] in 1997. The "non-cooperative" personal liberty laws, discussed *supra*, utilized this means of resistance.[518] States that have followed this model in the modern era are often referred to by the misnomer of "sanctuary" jurisdictions, implying that immigrants cannot be prosecuted for violating federal immigration law within their borders.[519] States do not provide true sanctuary in this sense. Rather, these states have insisted that the

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514 *Arizona*, 567 U.S. at 411–13.

515 *See supra* Section II.B.3.

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

517 Printz v. United States, 521 U.S. 898, 933 (1997).

518 *See supra* notes 147–187 and accompanying text.

519 *See* City of Chicago v. Sessions, 888 F.3d 272, 281 (7th Cir. 2018) (characterizing the term "sanctuary" city as "commonly misunderstood"); *see also* RABBEN, *supra* note 302, at 95 ("Sanctuary was and is a predominantly religious institution, and it often flourishes outside the law.").

federal government retain responsibility for the implementation and enforcement of federal immigration laws within their borders.[520]

1. THE LIMITS OF FEDERAL COERCIVE POWER

As discussed above, the Supreme Court scouted the boundaries of federalism in the context of both slavery and immigration in its decisions in *Prigg* and *Arizona*. However, the Court has not addressed the precise question of whether and to what extent the federal government can compel the states to execute the nation's immigration laws—particularly when the states do not wish to do so. The Court has, however, ruled on the question of whether the federal government can direct state actors to effectuate a federal regulatory scheme in a different context: gun control.[521] In *Printz v. United States*, the Court held that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[522] The rule articulated in *Printz* and a case that preceded it, *New York v. United States*,[523] has come to be known as the anti-commandeering doctrine, which forbids the federal government from "commandeering" state actors to enforce federal laws and regulations.[524]

Although the anti-commandeering doctrine explicated in *Printz* and *New York* follows the Court's reasoning in *Prigg*,[525] neither case cites this opinion. In *Printz*, Justice Scalia cites the 1793 Fugitive Slave Act as an example of an early federal statute that imposed a

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520 *See City of Chicago*, 888 F.3d at 281.

521 *Printz*, 521 U.S. at 935.

522 *Id.* at 924 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

523 New York v. United States, 505 U.S. 144 (1992).

524 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475–76 (2018) ("The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."; noting that "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States"); *Printz*, 521 U.S. at 925 (referring to the "[f]ederal commandeering of state governments"); *New York*, 505 U.S. at 175 (noting federal action that would "'commandeer' state governments into the service of federal regulatory purposes . . . would . . . be inconsistent with the Constitution's division of authority between federal and state governments.").

525 *See Printz*, 521 U.S. at 925; *New York*, 505 U.S. at 175.

duty on state judges "to enforce federal prescriptions," which in this case related to hearing the claims of slaveholders and issuing certificates authorizing the "forced removal" of alleged fugitives to the states where they were enslaved.[526] In doing so, Justice Scalia distinguished the compulsion of state judges from that of the state executive power.[527] However, he never mentions that the Court—at the very least—called into question the constitutionality of this part of the Act in *Prigg*.[528] As discussed at length above, this reasoning in *Prigg* was significant, as it led to the enactment of a slew of state laws that attempted to capitalize on it.[529] Congress avoided this constitutional issue when it changed the enforcement provisions of the 1850 Act.[530]

The anti-commandeering doctrine is grounded in the history of the Founding. Both the form of government adopted at the Constitutional Convention and the process by which the Constitution was ratified derived their authority directly from "We the People."[531] In this respect, the nation's new form of government diverged significantly from the Articles of Confederation, under which the national government was required to act through the states and had no power to enact legislation that regulated the conduct of individuals.[532] Alexander Hamilton characterized this limitation under the Articles of Confederation as "a great evil," the cure for which lay in enabling "the national laws to operate on individuals, in the same manner as those of the states."[533] Because the Constitution conferred upon

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526 *Printz*, 521 U.S. at 906.

527 *Id.* at 907.

528 Finkelman, *The Roots of* Printz, *supra* note 22, at 1401 (discussing the omission in the majority opinion in *Printz*).

529 *See supra* notes 242–44 and accompanying text.

530 Finkelman, *The Roots of* Printz, *supra* note 22, at 1410.

531 *See* U.S. CONST. pmbl. ("*We the People of the United States* . . . do ordain and establish this Constitution for the United States of America.") (emphasis added).

532 *Compare id.*, *with* ARTICLES OF CONFEDERATION of 1781.

533 *The Debates in the Convention of the State of New York*, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 205, 233 (Jonathon Elliot ed., 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS] (remarks by Alexander Hamilton during New York ratifying convention). In lamenting the federal government's inability to collect moneys owed from the states under the Articles of Confederation, Massachusetts delegate Rufus King observed that "[l]aws, to be effective, . . . must

Congress a list of enumerated powers as to which it may issue laws binding directly upon the people, it may not instead command or "commandeer" the states to implement these powers on its behalf.[534] To do so infringes on the sovereignty of the States, reducing them, in Justice Scalia's words, to "puppets of a ventriloquist Congress."[535]

The anti-commandeering doctrine also seeks to preserve the notion of dual sovereignty that lies at the heart of federalism itself. "Residual state sovereignty" is inherent in the structure of the Constitution, which grants "discrete, enumerated" powers to Congress in Article I, Section 8, but reserves the remainder to the States and the people via the Tenth Amendment.[536] "This separation of the two spheres [of government] is one of the Constitution's structural protections of liberty."[537] The division of sovereignty created by the Constitution is intended to prevent either state or federal governments from accumulating too much power over the people: "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[538] As the Court noted in *Printz*, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—at no cost to itself—the police officers of the 50 States."[539]

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not be laid on states, but upon individuals." *Debates in the Convention of the Commonwealth of Massachussetts*, *in* THE DEBATES IN THE SEVERAL STATE CONVENTIONS 1, 56 (remarks by Rufus King at the Massachusetts ratifying convention); *see also* THE FEDERALIST NO. 15, at 67 (Alexander Hamilton) (Terrence Ball ed., 2003) (describing this limitation as a "great and radical vice in the construction of the existing Confederation," rendering its laws "mere recommendations which the States observe or disregard at their option"); New York v. United States, 505 U.S. 144, 165–66 (1992); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018).

534 *See* Printz v. United States, 521 U.S. 898, 935 (1997).

535 *Id.* at 928 (quoting Brown v. Envtl. Prot. Agency, 521 F.2d 827, 839 (9th Cir. 1975)).

536 *Id.* at 919; *see also Murphy*, 138 S. Ct. at 1476 ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved to the States, as the Tenth Amendment confirms.").

537 *Printz*, 521 U.S. at 921.

538 *Id.* (citation omitted); *see also Murphy*, 138 S. Ct. at 1477.

539 *Printz*, 521 U.S. at 922; *see also* Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM.

Although the anti-commandeering doctrine primarily derives from the structure of the Constitution, it also has public policy implications. First, it "promotes political accountability" by requiring each political sovereign—either the state or federal government—to take responsibility for the policies that it enacts.[540] When states are forced to implement a federal program, they are "put in the position of taking the blame for its burdensomeness and for its defects."[541] As Justice Scalia noted in *Printz*, if the federal government were to require state police officers to conduct background checks for gun purchasers, a state police officer would be "stand[ing] between the gun purchaser and immediate possession of his gun, . . . not some federal official," leading the purchaser to direct his ire about the policy to the state rather than the federal government.[542] Second, the anti-commandeering policy forces each sovereign to shoulder the financial burden, as well as the political consequences, of its own policy choices.[543] If state governments are compelled to "absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."[544] In sum, the anti-commandeering doctrine forces

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L. REV. 1, 5–6, 67 (2019) ("Historically, Americans have . . . insisted that the federal government keep its distance from local police institutions . . . .[T]he American public has traditionally rejected the prospect of the local beat cop serving as an agent of the federal government."); Louis Freeh, *Former FBI Director Says U.S. Doesn't Need a National Police Force*, WALL ST. J., https://www.wsj.com/articles/SB117529284571255075 (last updated Mar. 31, 2007, 12:01 AM) ("For over 200 years, Americans have thoroughly rejected the notion of a national police force.").

[540] *Murphy*, 138 S. Ct. at 1477; *see also Printz*, 521 U.S. at 929–30; New York v. United States, 505 U.S. 144, 168–69 (1992).

[541] *Printz*, 521 U.S. at 930; *see also New York*, 505 U.S. at 168–69 (noting that if the Federal Government makes a "detrimental or unpopular" decision, state officials "will bear the brunt of public disapproval" if forced to implement that decision).

[542] *Printz*, 521 U.S. at 930. The Court added that, if the purchaser were mistakenly rejected in his attempt to purchase a firearm, he would likely direct his ire at the state rather than the federal government. *Id.*

[543] *See Murphy*, 138 S. Ct. at 1477 ("[T]he anticommandeering principle prevents Congress from shifting the costs of regulation to the States.").

[544] *Printz*, 521 U.S. at 930; *see also Murphy*, 138 S. Ct. at 1477 (reasoning that, if Congress were allowed to shift the cost of implementing its programs onto the State, then Congress would avoid the responsibility of weighing the expected

the federal government to bear the costs—both in terms of dollars and constituent displeasure—of legislating in fraught policy arenas, rather than push those burdens onto the States.

Not surprisingly, the anti-commandeering doctrine tends to arise in controversial arenas. The temptation for Congress to "commandeer" the States to enforce its policy choices is especially high when the policy itself is polarizing and, hence, deeply unpopular among some groups. As discussed *supra*, the roots of the doctrine trace to the fugitive slave crisis, one facet of the system of slavery that ultimately brought about the Civil War. It resurfaced when Congress attempted to legislate responsible gun control[545] and the safe disposal of low-level radioactive waste.[546] These laudable goals were thwarted when the Court invalidated both statutes due to the federal government's attempt to compel state cooperation on these issues.[547] In *Printz*, the Court observed that the result in these cases may seem "formalistic" to "partisans of the [federal statute] at issue," because these legislative efforts are "typically the product of the era's perceived necessity."[548] However, "the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[549] In the eyes of many, the current "crisis of the day" is immigration.

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benefits of these programs against their costs); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360 (2001) ("If our system of political checks is to rest on a foundation of popular loyalty, the people need to know when to get upset and at whom . . . . It must be clear when the national government has acted, as opposed to the states, so that the people can provide feedback to the political process that resulted in the action.").

545 *Printz*, 521 U.S. at 902–04 (describing the Brady Act).

546 *New York*, 505 U.S. at 149–54 (describing the Low-Level Radioactive Waste Policy Act). The doctrine also resurfaced in the arena of sports gambling. *Murphy*, 138 S. Ct. at 1477.

547 *Printz*, 521 U.S. at 933, 936; *New York*, 505 U.S. at 149.

548 *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 187).

549 *Id.* (quoting *New York*, 505 U.S. at 187).

2. STATES AND CITIES PUSH BACK: THE PERSONAL LIBERTY LAWS OF TODAY

Conflicts between states and the federal government over immigration policy are nothing new. As discussed above, the Reagan Administration's policies regarding Salvadorans gave rise to the Sanctuary Movement in religious institutions across the United States.[550] President Obama's immigration policies generated dissatisfaction on the right as well as the left, as he was attacked for both under- and over-enforcement of federal immigration laws.[551] However, the Trump administration's stance on immigration is unique, at least in the post-World War II era, in terms of its overall hostility to refugees and its rejection of the nation's asylum laws, which the President has called "ridiculous."[552] The administration's hostile stance towards asylum-seekers and immigrants in general has inspired numerous states and municipalities to enact laws that seek to resist implementation of these federal policies within their borders.[553] Like the personal liberty laws that sprang up in the wake of the Fugitive Slave Act of 1850, these so-called "sanctuary laws" seek to fill the space created for state action—more accurately characterized as state *in*action—by the anti-commandeering doctrine discussed above.

The Sanctuary Movement of the 1980s, as discussed, was primarily fueled by a religious and moral imperative that operated outside of federal immigration law, rather than within it.[554] However, even during this time period, some states and municipalities enacted

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[550] *See supra* notes 317–22 and accompanying text.

[551] *Compare* Lasch, *supra* note 6, at 234 (arguing that the "federal government's promise [under the Obama administration] to prioritize the deportation for so-called 'criminal aliens' has been largely myth"; critiquing the Secure Communities program), *with supra* notes 486–504 and accompanying text (discussing Arizona's efforts to legislate in the immigration field, to increase enforcement of federal immigration laws during the Obama Presidency).

[552] Ian Kullgren et al., *Trump Weighs Plan to Choke off Asylum for Central Americans*, POLITICO, https://www.politico.com/story/2019/05/30/asylum-restrictions-trump-central-america-1489012 (last updated May 30, 2019, 9:00 PM) ("The asylum procedures are ridiculous . . . . No place in the world has what we have in terms of ridiculous immigration laws.") (quoting President Trump).

[553] *See, e.g.*, *infra* notes 560–578 and accompanying text (discussing the California Values Act); S.F. ADMIN. CODE § 12H.2 (2019) (prohibiting use of City or County funds or resources to assist federal immigration officers).

[554] *See supra* notes 316–322 and accompanying text.

laws that attempted to thwart the enforcement of federal immigration laws within their borders.[555] These measures aimed to create a safe space for refugees.[556] One tool for doing so—similar to both the antebellum era and today—involved prohibiting local police from reporting the presence of refugees seeking sanctuary to federal authorities.[557] However, these statutes were adopted without the full benefit of the Court's anti-commandeering jurisprudence, which primarily emerged during the 1990s with the Court's decisions in *New York* and *Printz*.[558] During the Trump era, the vast majority of states and municipalities that have attempted to exert independence in the immigration arena have attempted to do so within the confines of the modern anti-commandeering doctrine.[559]

California has taken the strongest stance against the federal immigration policies of the Trump administration. California has enacted multiple statutes that seek to minimize the impact of the Trump administration's immigration policies within the borders of the state.[560] The U.S. government has sued California, claiming that these statutes are preempted by federal immigration law and are thus

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[555] During this period, four states and twenty-three cities adopted some type of sanctuary measure, ranging from enacted state laws to municipal resolutions and ordinances, state executive orders, and proclamations. *See* Begaj, *supra* note 302, at 145; *see also* Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 297–98 (1989) (discussing various municipal and state sanctuary laws passed during the 1980s); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1383 (2006).

[556] *See* Munson, *supra* note 316, at 52–53.

[557] Carro, *supra* note 555, at 311–12.

[558] *See supra* notes 524–549 and accompanying text.

[559] *See* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 557–58 (2017); Davide Macelloni, Note, *A Violation of the Anti-Commandeering Principle and Spending Powers Jurisprudence or a Valid Exercise of Federal Powers? Executive Order 13768 and Its Effects on Florida Localities*, 42 NOVA L. REV. 95, 104–05 (2017).

[560] The three statutes enacted by the California legislature are (1) The California Values Act ("S.B. 54"), (2) the Immigrant Worker Protection Act ("A.B. 450"), and (3) Inspection and Review of Facilities Housing Federal Detainees ("A.B. 103"). *See* CAL. GOV'T CODE § 7282; *id.* § 7282.5 (West 2017); *id.* § 7284.2; *id.* § 7284.6; *id.* § 7285.1; *id.* § 7285.2; *id.* § 7285.3; *id.* § 12532.

unenforceable.[561] The statute at the heart of the controversy is the California Values Act ("S.B. 54"), [562] which evokes the noncooperative personal liberty laws of the nineteenth century as it directs state officials not to assist or support federal officers in carrying out a policy that is inconsistent with the values of the people of the state of California. Also echoing the personal liberty laws, the California Values Act does not permit the use of state resources, specifically state facilities, to detain individuals for immigration purposes.[563] The words of historian Thomas Morris, used to describe the post-*Prigg* personal liberty law in Pennsylvania, are equally apt in describing the California Values Act, as "an experiment in the possibilities left open by [Supreme Court precedent], as well as an effort at containment."[564]

The California Values Act delineates the policies that support it: (1) immigrants are "valuable and essential" members of society in California; (2) state and local officials need to have a "relationship of trust" with immigrant communities; and (3) that relationship of

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[561] *See* United States v. California, 921 F.3d 865, 873 (9th Cir. 2019) (affirming in part and reversing in part the district court's decision regarding motion for preliminary injunction). The government has filed a petition for a writ of certiorari, seeking review of this decision by the U.S. Supreme Court. *See* Petition for Writ of Certiorari, United States v. California, 921 F.3d 865 (9th Cir. 2019), No. 19532. The federal government has also recently filed a similar lawsuit against the state of New Jersey, arguing that a New Jersey state law limiting state and local cooperation with ICE also conflicts with 8 U.S.C. § 1373(a) and is preempted by federal law. *See* Complaint, United States v. New Jersey, No. 20-CV-01364-FLW-TJB (S.D.N.J. Feb. 10, 2020). On the same day, the federal government filed an additional lawsuit against California, challenging a new state law banning the operation of private detention facilities in the state. *See* Complaint, United States v. California, No. 20-CV-0154-MMA-AHG (S.D. Cal. Feb. 10, 2020).

[562] CAL. GOV'T CODE § 7284.

[563] *Id.* §§ 7284.6 (a)(5)–(6) (prohibiting the dedication of office space within a city or county law enforcement facility exclusively for use by federal immigration authorities; barring state law enforcement agencies from entering into contracts with the federal government to use state law enforcement facilities to detain individuals under federal immigration laws); *see also* City of Phila. Exec. Order 5-16 (2016), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/eo0516.pdf (prohibiting use of Philadelphia prison facilities to detain prisoners pursuant to ICE civil detainer requests, unless the detainer is supported by a judicial warrant, or the person is being released after conviction for a violent felony).

[564] Morris, *supra* note 41, at 118.

trust is threatened such that members of the immigrant community may be reluctant to contact these officials to report crimes, attend school, or seek health services if the officials are "entangled with federal immigration enforcement."[565] The statute also states a policy objective that derives directly from the anti-commandeering doctrine: "[e]ntangling state and local agencies with federal immigration enforcement programs diverts already limited resources and blurs the lines of accountability between local, state, and federal governments."[566]

The California Values Act bars state law enforcement agencies from using resources or personnel to "investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes."[567] In directing its law enforcement personnel in this manner, the California statute is the inverse of Arizona statute 2(B).[568] The law instructs California law enforcement agencies *not* to assist federal immigration authorities in the manner permitted under 8 U.S.C. § 1357(g), whereas the Arizona law compels such cooperation.[569] As discussed *supra*, the Supreme Court upheld the Arizona law; however, the Court's ruling in *Arizona* in no way suggested that any state was *required* to enact such a law, or that the federal statute compelled such cooperation.[570]

Two key provisions of the INA are addressed in the California Values Act. INA section 287(g), cross-listed at 8 U.S.C. § 1357(g)

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[565] CAL. GOV'T CODE §§ 7284.2(b)–(c). Studies have shown that "fear of police inquiring into immigration status" reduces the likelihood that undocumented immigrants will contact police to report a crime, either as a victim or a witness, by seventy percent. San Francisco v. Sessions, 349 F. Supp. 3d 924, 951–52 (N.D. Cal. 2018). Even for Latinos who were born in the United States, and thus are citizens of this country, the rate of reporting drops by twenty-eight percent. *Id.* at 964. The California Values Act also seeks to preserve the constitutional rights of the people of the state, specifically under the Fourth Amendment and the Equal Protection Clauses. CAL. GOV'T CODE § 7284.2(e).

[566] CAL. GOV'T CODE §§ 7284.2(d), (f); *see also supra* notes 540–544 and accompanying text (discussing this policy justification for the anti-commandeering doctrine).

[567] CAL. GOV'T CODE § 7284.6(a).

[568] *Compare* ARIZ. REV. STAT. ANN. § 11-1051 (2012), *with* CAL. GOV'T CODE § 7284.6.

[569] *Compare* ARIZ. REV. STAT. ANN. § 11-1051, *with* CAL. GOV'T CODE § 7284.6.

[570] See *supra* notes 502–0504 and text accompanying.

permits the Attorney General to "enter into a written agreement with a State," pursuant to which officers of that state may carry out the duties of a federal immigration officer, including apprehending and detaining aliens, "at the expense of the State . . . and to the extent consistent with State and local law."[571] The statute specifies that such agreements are strictly voluntary.[572] However, section 1357(g) also specifies that an officer or an employee of a State may do the following *without* a written agreement between the state and federal government: (1) "communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States," or (2) "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[573] Unlike the provisions outlined in 1357(g), section 1373(a) is couched in mandatory terms: "a Federal, State, or local government entity or official *may not* prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service *information regarding the citizenship or immigration status, lawful or unlawful*, of any individual."[574]

The California Values Act prohibits any law enforcement officer from entering into an agreement with the federal government to perform the functions of a federal immigration officer, "whether formal or informal."[575] In doing so, it declines to enter into the type of written agreement described in section 1357(g), as it is permitted to do pursuant to the terms of the federal statute.[576] The Values Act also goes further and, in doing so, declines to provide the federal government with the type of cooperation that is described in section 1357(g)(10).[577] Specifically, it instructs California law enforcement officers not to (1) detain an individual based on an immigration hold request from the federal government; (2) transfer an individual to

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571 8 U.S.C. § 1357(g)(1) (2018).

572 *Id.* § 1357(g)(9).

573 *Id.* § 1357(g)(10).

574 *Id.* § 1373(a) (emphasis added).

575 CAL. GOV'T. CODE § 7284.6(a)(1)(G) (West 2017).

576 *See* 8 U.S.C. § 1357(g)(9) ("Nothing in this subsection shall be construed to require any State . . . to enter into an agreement with the Attorney General under this subsection.").

577 *Compare* CAL. GOV'T. CODE § 7284.6(a)(1), *with* 8 U.S.C. § 1357(g)(1).

federal immigration authorities, "unless authorized by a judicial warrant or judicial probable cause determination"; (3) provide personal information about an individual to the federal government, including home and work address, unless that information is publicly available; or (4) notify the federal government of a person's release date from state custody, unless that information is publicly available.[578] The federal government has argued that federal law preempts these state law provisions.[579]

The government contends that the California Values Act conflicts with the plain language of sections 1373(a) and 1357(g).[580] Particularly as to section 1357(g), this argument is weak. As noted above, the portions of section 1357(g) that permit cooperation between the federal and state governments in the immigration arena do not mandate any state action.[581] Both the Ninth and the Fifth Circuits have held that section 1357(g) "does not require cooperation at all."[582] The federal statute that does compel state action is section 1373(a), which, as discussed above, bars states from prohibiting or restricting state and local officials from exchanging information with the federal government regarding a person's citizenship or immigration status.[583]

The California Values Statute directly addresses section 1373(a), specifying that it does not prohibit any state entity or official from complying with it.[584] California and the federal government, however, disagree as to the meaning of the statute's reference

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[578] CAL. GOV'T. CODE §§ 7284.6(a)(1)(B)–(D), (G)(4). The law also bars state law enforcement officers from (1) inquiring into an individual's immigration status; (2) arresting any individual based on a civil immigration warrant; and (3) using federal immigration officers as interpreters in state law enforcement matters. *Id.* at §§ 7284.6(a)(1)(A), (E), (G)(3).

[579] *See* United States v. California, 921 F.3d 865, 876–77 (9th Cir. 2019).

[580] *See id.* at 887.

[581] *See* 8 U.S.C. § 1357(g)(9); *see also California*, 921 F.3d at 887.

[582] *California*, 921 F.3d at 887; City of City of El Cenizo v. Texas, 890 F.3d 164, 178 (5th Cir. 2018).

[583] 8 U.S.C. § 1373(a).

[584] CAL. GOV'T. CODE § 7284.6(e). The statute also purports to comply with 8 U.S.C. § 1644, which contains the same language as 1373(a), except to apply more narrowly to any "alien in the United States" instead of "any individual." *See id.*; *compare* 8 U.S.C. § 1644, *with* 8 U.S.C. § 1373(a).

to "information regarding the citizenship or immigration status, lawful or unlawful, of an individual."[585] The federal government contends that this language encompasses data such as an individual's release date from state custody and her personal information (e.g., an address), both of which the Values Act prohibits state officials from sharing with federal immigration officers.[586] Both the district court and the Ninth Circuit rejected this argument, finding that the plain meaning of the statute referenced only "a person's legal classification under federal law," consistent with the state's interpretation.[587]

The government also argues that California's failure to cooperate with it—specifically by refusing to provide "personal information" like addresses and release dates from state custody—poses an "obstacle" to the federal immigration scheme.[588] The government claims that the "cooperation" provisions of section 1357(g) imply a duty to provide these types of information.[589] While the Ninth Circuit agreed that California's failure to cooperate made enforcement of the federal law more burdensome, it rejected the conclusion that the government's frustration constituted obstacle preemption: "[R]efusing to help is not the same as impeding. If such were the rule, obstacle preemption could be used to commandeer state resources and subvert Tenth Amendment principles."[590]

The anti-commandeering rule and the Tenth Amendment principles that it embodies are, at least in part, built into the plain language of the INA. As the federal courts have, at least to date, recognized, 8 U.S.C. § 1357(g) uses non-compulsory language in terms

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585 *California*, 921 F.3d at 891.

586 *Id.*; *see also* San Francisco v. Sessions, 349 F. Supp. 3d 924, 951 (N.D. Cal. 2018) (Justice Department argued that 8 U.S.C. § 1373 required disclosure of an immigrant's "address, location information, release date, date of birth, familial status, contact information, and any other information that would help federal immigration officials perform their duties.").

587 *California*, 921 F.3d at 891.

588 *Id.* at 880.

589 *Id.* at 874.

590 *Id.* at 888 (citing United States v. California, 314 F. Supp. 3d 1077, 1104 (E.D. Cal. 2018)).

of its direction to the states—because it must.[591] Otherwise, the statute would run afoul of the anti-commandeering doctrine.[592] Congress cannot satisfy the anti-commandeering rule by using non-compulsory language in a statute, but nevertheless compelling compliance by the states; to do so would subvert the rule entirely. Congress's expectation of state cooperation in the federal immigration regime does not engender a duty on the part of the state to comply: "when questions of federalism are involved, we must distinguish between expectations and requirements. In this context, the federal government was free to *expect* as much as it wanted, but it could not *require* California's cooperation without running afoul of the Tenth Amendment."[593]

3. FEDERAL TOOLS FOR INDUCING STATE COOPERATION

Although both the plain language of the INA and the anti-commandeering doctrine prohibit the federal government from compelling state cooperation with federal immigration authorities, the government has sought to utilize exceptions to the anti-commandeering rule to achieve the same end. The level of federal/state interaction today far exceeds that which existed in the nineteenth century, when Northern states enacted personal liberty laws to avoid implementation of the federal Fugitive Slave Acts. The federal government's provision of grants to the states to fund certain programs, and its ability to attach conditions to those grants, provides the federal government with a potential vehicle to persuade where it cannot compel compliance by the states. Whether the federal government's attempts to assert control over the states in this manner will succeed remains to be seen.

a. *Is Information Sharing an Exception to the Anti-Commandeering Rule?*

One provision of the INA orders, rather than permits, state cooperation: 8 U.S.C. § 1373(a), which forbids states from adopting laws that bar information sharing with the federal government.[594] In

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591 *See, e.g.*, *id.* at 888–91.

592 *See* Lasch, *supra* note 6, at 219–24 (reaching similar conclusions as to federal immigration detainer requests).

593 *California*, 921 F.3d at 891 (emphasis in original).

594 8 U.S.C. § 1373(a) (2018).

United States v. California, the government has argued that section 1373 does not violate the prohibition against commandeering, because it merely mandates information sharing.[595] In dicta, the Court in *Printz* distinguished statutes that force a state to administer a federal program—which it held invalid under the Tenth Amendment—from those statutes that "require only the provision of information to the Federal Government."[596] The Court did not indicate whether such statutes would survive scrutiny under the anti-commandeering doctrine, other than to discount their significance as part of a "constitutional tradition" of federal/state interaction based on their relatively recent vintage.[597] As noted above, California, like many other states and municipalities, has attempted to comply with the information-sharing provisions of section 1373(a), although it disputes the federal government's broad interpretation of the plain language of the law.[598] However, the constitutional question remains: does a federal information-sharing requirement imposed upon the states constitute commandeering?

Some federal courts have held that the answer to this question is "yes."[599] The government's broad interpretation of section 1373 is critical to the constitutional analysis. The Department of Justice has argued that section 1373 compels states to disclose to federal immigration officers far more than an individual's legal immigration or citizenship status, including "address, location information, release date, date of birth, familial status, contact information, and any other information that would help federal immigration officials perform

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595 *California*, 921 F.3d at 889.

596 Printz v. United States, 521 U.S. 898, 917–18 (1997); *see also id.* at 936 (Thomas, J., concurring) ("[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.").

597 *Id.* at 918 (majority opinion). In doing so, the Court cited *INS v. Chadha*, which held the legislative veto to be unconstitutional, despite its enshrinement in hundreds of federal statutes that were enacted between 1932 and the 1970's. INS v. Chadha, 462 U.S. 919, 958 (1983).

598 *See supra* notes 584–587 and accompanying text.

599 *See*, *e.g.*, San Francisco v. Sessions, 349 F. Supp. 3d 924, 950–53 (N.D. Cal. 2018); Chicago v. Sessions, 321 F. Supp. 3d 885, 865–66 (N.D. Ill. 2018).

their duties."[600] By forcing state officials to provide federal immigration officers with any information they have that would help federal officers perform their duties, the federal government essentially seeks to compel the type of broad cooperation that it is free to permit or expect, but not *require*, as discussed above.[601] The district court in *City and County of San Francisco* noted that, to comply with section 1373 as the federal government interprets it, a state or municipality would "need to submit control of their own officials' communications to the federal government" and "allocate their limited law enforcement resources to exchange information with the federal government whenever requested," rather than provide essential services to their communities.[602] In doing so, the federal government effectively "shifts a portion of immigration enforcement costs onto the States," a result that contravenes the anti-commandeering doctrine.[603]

Section 1373, especially as it has been interpreted by the Trump administration, directly targets and seeks to invalidate the "personal liberty laws" of today. In doing so, section 1373 "effectively thwart[s] policymakers' ability to extricate their state or municipality from involvement in a federal program," which is the statute's goal.[604] The anti-commandeering doctrine does not permit the federal government to compel participation by the States in the federal immigration system.

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600 *San Francisco*, 349 F. Supp. 3d at 951; *see also* Chicago v. Sessions, 888 F.3d 272, 277 (7th Cir. 2018), *vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated en banc on other grounds*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (stating that "[t]he Attorney General in this case used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement").

601 *See supra* notes 590–593 and accompanying text.

602 *San Francisco*, 349 F. Supp. 3d at 951 ("The statute undermines existing state and local policies and strips local policy makers of the power to decide for themselves whether to communicate with INS.").

603 *See id.* at 952; *see also supra* notes 543–544 and accompanying text.

604 *San Francisco*, 349 F. Supp. 3d at 953 (quoting *Chicago*, 264 F. Supp. 3d at 949)).

b. *Can Cooperation Be Compelled via the Attachment of Conditions to the Provision of Federal Funds to the States?*

Another purported exception to the anti-commandeering doctrine relates to funding provided to the states via federal programs. The Court in *New York* recognized that "Congress may attach conditions on the receipt of federal funds."[605] Such funding can function as a "method of influencing a State's policy choices."[606] However, Congress cannot use the power of the purse as a means of "outright coercion" on the States.[607] For this reason, conditions placed upon the receipt of federal funds must "bear some relationship to the purpose of the federal spending"; otherwise, "the spending power could render academic the Constitution's other grants and limits of federal authority."[608] In addition, the exercise of the Congressional spending power, via grant conditions, must further the "general welfare"; in other words, it must be "intended to serve general public purposes."[609] Finally, if Congress wishes to impose a condition on the States' ability to receive federal funds, "it must do so unambiguously," so that States can make a fully informed decision as to whether they wish to participate in the federal program.[610]

The Trump administration embraced the funding-related exception to the anti-commandeering doctrine when it issued Executive Order 13,768, *Enhancing Public Safety in the Interior of the United States*, on January 25, 2017, five days after President Trump was inaugurated.[611] The Order targets so-called "sanctuary jurisdic-

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[605] New York v. United States, 505 U.S. 144, 167 (1992) (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)); *see also* Printz v. United States, 521 U.S. 898, 917–18 (1997) (distinguishing federal statutes that impose "conditions upon the grant of federal funding" from those that act as "mandates to the States").

[606] *New York*, 505 U.S. at 166.

[607] *Id.*

[608] *Id.* at 167; *see also* South Dakota v. Dole, 483 U.S. 203, 208 n.3 (1987). (affirming constitutionality of federal statute that withheld highway funds from states that chose not to adopt the minimum drinking age established by Congress).

[609] *Dole*, 483 U.S. at 207.

[610] *Id.* (internal quotation marks and citation omitted).

[611] Exec. Order No. 13,76, 82 Fed. Reg. 8799 (Jan. 25, 2017); *see also* San Francisco v. Trump, 897 F.3d 1225, 1232–33 (9th Cir. 2018) (discussing the Executive Order); Lai & Lasch, *supra* note 559, at 557–63 (discussing efforts to defund "Sanctuary Cities" during the Trump presidency).

tions," claiming that they "willfully violate Federal law in an attempt to shield aliens from removal from the United States," and, in so doing, have "caused immeasurable harm to the American people and to the very fabric of our Republic."[612] The Order gives the Secretary of Homeland Security the authority to decide whether a state or municipality is a "sanctuary jurisdiction," defined as a jurisdiction that "willfully refuse[s] to comply with 8 U.S.C. § 1373."[613] If a state is deemed a sanctuary jurisdiction, then the Order instructs that the state is "not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes."[614] Remarkably, at a campaign rally, President Trump proclaimed that "nobody who supports sanctuary cities should be allowed to run for President of the United States."[615]

Although the Supreme Court has recognized that conditions may attach to the States' receipt of federal funds, the power to impose such conditions lies with Congress, not the Executive.[616] Implementation of President Trump's Executive Order 13,768 was therefore enjoined because it violates the Constitution's separation of powers doctrine.[617] Congress exclusively holds the power of the purse, which is directly tied to its power to legislate.[618] No provision in the

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612 82 Fed. Reg. 8799, 8799.

613 *Id.* at 8801.

614 *Id.* The Attorney General or the Secretary of Homeland Security are empowered to decide whether grant funding is necessary for law enforcement purposes. *Id.*

615 Amy Davidson Sorkin, *In Orlando, Trump Kicks Off His Reelection Campaign with an Old, Divisive Message*, NEW YORKER (June 19, 2019), https://www.newyorker.com/news/daily-comment/in-orlando-trump-kicks-off-his-reelection-campaign-with-an-old-divisive-message.

616 *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987).

617 City and County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018) (affirming summary judgment in favor of plaintiffs but vacating nationwide injunction and remanding for further factual findings).

618 *Id.* at 1231 n.2. The Constitution grants Congress the power to "lay and collect Taxes," pay debts, and to borrow money on behalf of the United States, so as to "provide for the common Defence and general Welfare of the United States." U.S. CONST., Art. I, §§ 8 (1), (2); *see also* THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terrence Ball ed., 2003) (Congress "commands the purse.").

Constitution enables the President to enact, amend, or repeal statutes, or to cancel appropriations passed by Congress.[619] As Justice Kennedy observed, if spending decisions are "determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened."[620] Therefore, President Trump exceeded his authority as President in issuing the Executive Order.

The Trump administration's second attempt to influence state policy choices regarding immigration via the power of the purse targeted the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG"). The Byrne JAG program, which is administered by the Justice Department, awards grants to state and local governments to "support law enforcement efforts by providing additional personnel, equipment, supplies, training, and other assistance."[621] The Byrne JAG is the "leading source of federal [criminal] justice funding to state and local jurisdictions."[622] The Byrne JAG is a "formula grant" program, meaning that the statute creating the program establishes a formula to calculate the amount of grant funding for all applicants.[623] The statute identifies eight program areas for the use of funding under the Byrne JAG; immigration enforcement is not included.[624] In 2017, the Department of Justice announced that it

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[619] *San Francisco*, 897 F.3d at 1232, 1235 (quoting Clinton v. New York, 524 U.S. 417, 438 (1998)) (holding that, without Congressional approval, "the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals").

[620] *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

[621] City and County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 935 (N.D. Cal. 2018) (citing 34 U.S.C. § 10152). California uses Byrne JAG funds to support education and crime prevention, as well as court and law enforcement programs. *Id.* at 936. California expected to receive 28.3 million dollars in JAG funding for fiscal year 2017. *Id.*; *see also* Chicago v. Sessions, 321 F. Supp. 3d 855, 861 (N.D. Ill. 2018) (noting that, in 2016, Chicago used Byrnes JAG funding to buy police cars and to support non-profits working in high-crime areas).

[622] *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, DEP'T OF JUSTICE, https://bja.ojp.gov/program/jag/overview (last visited Mar. 19, 2020).

[623] *See* 34 U.S.C. § 10156(a) (2018); *see also San Francisco*, 349 F. Supp. 3d at 935–36, 945.

[624] The program areas included are law enforcement, prosecution and courts, crime prevention and education, corrections, drug treatment and enforcement, technological improvements, crime victims and witnesses, and mental health. 34 U.S.C. §§ 10152(a)(1)(A)–(H); *see San Francisco*, 349 F. Supp. 3d at 936.

would be imposing three new conditions on any state or city applying for funds under the Byrne JAG: (1) the grant applicant must provide ICE with "access to their correctional facilities for immigration enforcement purposes"; (2) the applicant must notify ICE of the release dates for any individual detained by the applicant; and (3) the applicant must certify compliance with 8 U.S.C. § 1373 under penalty of perjury.[625] Two of these three provisions directly conflict with the California Values Act.[626]

Like President Trump, the Department of Justice is not Congress. Therefore, it also does not hold the power of the purse. As a result, its attempt to impose new prerequisites for receipt of federal funding by the States under the Byrne JAG was challenged under the separation of powers doctrine.[627] The Ninth Circuit held that the statute authorizing the Byrne JAG program did not empower the Attorney General to precondition receipt of funding on federal immigration cooperation.[628] It noted that Congress has previously imposed conditions on Byrne JAG grant funding related to various policy objectives, but it tried and failed to enact "anti-sanctuary" legislation as a funding-related proviso to the Byrne JAG program.[629] Because Congress did not statutorily authorize the Attorney General to tie Byrne JAG grant funding to immigration-related conditions,

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[625] *San Francisco*, 349 F. Supp. 3d at 933–34. The Department of Justice attempted to impose similar conditions as part of the community-oriented policing ("COPS") grant program, which provides funds to police departments to hire more officers to increase their capacity for community policing. City of Los Angeles v. Sessions, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018). The conditions were challenged on various grounds and the district court entered a nationwide injunction barring their enforcement. *Id.*

[626] *See* CAL. GOV'T. CODE § 7284.6(a).

[627] *San Francisco*, 349 F. Supp. 3d at 944–49.

[628] *Id.* at 946; *see also* Philadelphia v. Sessions, 309 F. Supp. 3d 271, 281 (E.D. Pa. 2018); Chicago v. Sessions, 888 F.3d 272, 282, 293 (7th Cir. 2018).

[629] *San Francisco*, 349 F. Supp. 3d at 946 (citing Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2(b)(2) (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3(b)(2) (2015)); *see also* San Francisco v. Trump, 897 F.3d 1225, 1234 (9th Cir. 2018) ("Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order."); Lai & Lasch, *supra* note 559, at 550–53 (discussing various failed attempts by Congress to legislate the defunding of "Sanctuary" states and cities).

the court enjoined the Trump administration from imposing these requirements on grant recipients.[630]

To date, Congress has not yet amended the statute authorizing the Byrnes JAG grants, or any other statute, to condition a state's receipt of federal funds on that state's participation in the enforcement of federal immigration laws. If Congress were to impose such a restriction, it would have to show that the conditions being imposed bear some relationship to the purpose of the federal law.[631] The government could not readily show that compelling states to open their jails to ICE and provide ICE with the release dates for all state inmates furthers the purpose of the Byrne JAG.[632] As noted above, the statute identifies eight program areas for these grants, none of which include immigration enforcement.[633] A federal program more directly tied to immigration issues would be a better fit in terms of justifying the imposition of any grant condition similar to the ones being pushed by the Department of Justice today. Whether Congress will eventually pass such legislation remains to be seen and will turn, in part, on the results of federal elections in 2020 and beyond.

The anti-commandeering doctrine, as applied in the nineteenth century and today, allows the safety valve of federalism to function as the drafters of the Constitution intended it. The Trump administration is attempting to compel state participation in the enforcement of federal immigration law.[634] The Constitution permits the states to volunteer this type of cooperation. It does not permit the federal government to require it. If Congress cannot pass legislation and appropriate funds to pay for the type of immigration enforcement that the Trump administration seeks, then these policies do not enjoy sufficient support to warrant their implementation.

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630 *San Francisco*, 349 F. Supp. 3d at 953.

631 *See* New York v. United States, 505 U.S. 144, 166 (1992)

632 The Ninth Circuit has noted that, even if Congress had authorized the Department of Justice to impose the challenged conditions on the Byrne JAG, they would still be unenforceable because they fail the relatedness requirement. *San Francisco*, 349 F. Supp. 3d at 958–61.

633 *See supra* note 624 and accompanying text.

634 *See* Gardner, *supra* note 539, at 76 (noting that President Trump's executive order regarding immigrant sanctuary "makes clear that, with respect to the enforcement of federal immigration law, the federal executive, commandeering rule or not, is demanding rather than requesting compliance").

CONCLUSION

"Our Federalism" is central to the Constitution as the foundation of the American government. The Supreme Court has described it as follows:

> [federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[635]

In both the nineteenth century and today, political crises test the resilience of the system of government established by the Framers of the Constitution. In the nineteenth century, the fundamental contradiction of slavery in a nation founded on the principle that "all men are created equal" triggered one such crisis. The demarcation between slavery and freedom, North and South, became more distinct over time, widening the gulf between the values of the people in the free states and those reflected in the federal Fugitive Slave Acts. The federal government's determination to rigidly enforce the fugitive slave laws, without responding to the Northern states' legitimate concerns regarding the rights of the accused fugitives, hardened rather than softened the resolve of the people who resisted implementation of the federal laws. The chasm between North and South was ultimately resolved via the Civil War, which almost ended the United States as we know it.

Today, the Trump administration's approach to immigration—often described as "zero tolerance"[636]—is also tone-deaf as to the

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635 Younger v. Harris, 401 U.S. 37, 44 (1971).

636 *See* Catherine E. Shoichet, *Zero Tolerance a Year Later: How the U.S. Family Separations Crisis Erupted*, CNN, https://www.cnn.com/interactive/2019/04/us/immigrant-family-separations-timeline/ (last updated Apr. 8, 2019).

concerns of states like California, where about half of all children have at least one parent who is an immigrant.[637] As the Supreme Court has recognized, the federal government must respect the legitimate interests of the states, even when it is anxious to vindicate an important national interest.[638] Attempts to force compliance with a federal law in a manner that ignores legitimate state concerns—e.g., as to the due process rights of asylum applicants who reside within the borders of the state—inevitably invite resistance, just as in the antebellum era. Moreover, the Trump administration's heavy reliance on executive orders and proclamations, rather than the legislative process, has generated policies that lack widespread support among the national citizenry, not just that of an individual state. Like dual federalism, separation of powers is a central pillar of the government framework created by the Constitution.

The United States may learn some valuable lessons by reflecting on its past, specifically the history of the federal laws that sought to force the free states to recognize slavery within their borders. Heavy-handed attempts to compel compliance with federal law tend to engender resistance rather than cooperation, especially when, in the eyes of many citizens, the federal law lacks both moral and democratic legitimacy. Ideally, the legislative process should resolve this problem: if the voters dislike the laws enacted by Congress or the executive proclamations issued by their President, they can elect new politicians who more closely reflect their views. However, this process may take years, and federalism plays a critical role in the interim. At a minimum, California and similar states should not be commandeered by the federal government to implement federal immigration policies that are misaligned with the mores of the majority of their citizens. Until Congress enacts an immigration law that enjoys support in both Red and Blue states, especially those states where the laws will be implemented, the federal government should not demand or expect state cooperation.

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637 CAL. GOV'T. CODE § 7284.2(a) (West 2017).

638 *Younger*, 401 U.S. at 44.