ICE and Our Immigrants: Lessons from the Abolitionists

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At last it occurred to me that what I had lost was a country. – Thoreau

Then

I recently reread "Slavery in Massachusetts," the angriest essay that Henry David Thoreau ever wrote, and now I can't get it out of my head. A fugitive slave had been captured in Boston and, despite abolitionist resistance, shipped back to his enslaver in Virginia. Everything about the case enraged Thoreau. He was angry that Federal troops had occupied the city, angry that the governor allowed the President to seize control of the state militia. He was angry that no one enforced state laws giving fugitives their civil rights, and angry at state officials who obeyed the laws of slavery and ignored one of their own that commanded resistance. In the face of a government dominated by slave-holding states, Massachusetts should have defended its sovereignty, even if blood should flow and the Union itself be dissolved. "My thoughts are murder to the State."

Thoreau initially delivered "Slavery in Massachusetts" at a Fourth of July rally in 1854. Even today it gives off enough heat to light the tinder of my own anger and despair. There are too many parallels between the rendition of slaves and the Trump rendition of immigrants, too many similarities between the troops then occupying Boston and the Marines and ICE agents recently deployed to our cities. Behind both of these — the treatment of immigrants and the control of armies — lie questions of states' rights, a term I have long held in contempt but now hold up as a stay against the loss of my country. Can a state that protects its immigrants with sanctuary laws resist a government that sues to quash them? Who, at the end of the day, controls the National Guard, the governors, or the President? Is the structure of the republic robust enough to settle such questions peacefully, or will the current regime's taste for violence lead to settlement by other means?

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The events that got Thoreau so hopping mad began in May in 1854, when the fugitive slave Anthony Burns was jailed in Boston, pending rendition to Virginia. Two days after his arrest, a poorly organized mob tried and failed to free him from the Court House. President Franklin Pierce then ordered five companies of U.S. Marines and artillery to enter the city while the U.S. marshal, authorized by law to command assistance from "bystanders, or posse comitatus," enlisted several hundred "specials," arming them with cutlasses, pistols, and billy clubs.

Boston's mayor called out the state militia to help, encouraged by a telegraph from the White House agreeing to pay all expenses (a sum exceeding $500,000 in today's dollars). The militia, effectively federalized, consisted of a thousand rank and file, eight companies of artillery, eleven of light infantry, and several of calvary — the National Lancers and the Light Dragoons. Federal troops, with permission to fire without warning, mounted a brass cannon by the Court House, loaded it to the muzzle with grapeshot and pointed it at the crowd.

This show of force culminated several days later when the marshal's posse marched Anthony Burns to the ship that would carry him south. With a crowd of over 50,000 people bearing witness, Burns walked surrounded by marshals with drawn swords. Ahead marched the Marines, the infantry, and the National Lancers on horseback. Behind marched more Marines, a horse-drawn cannon, and the mounted Light Dragoons. As they neared the city docks, some of the militia, now drunk, taunted the crowd with a chorus of "Carry Me Back to Ole Virginny."

One witness to the rendition of Anthony Burns wrote that, in meeting "the armed power of the United States," citizens were made painfully aware of "the fact, before unfelt, that they were the subjects of two governments." That would have come as no surprise had they been more familiar with the Constitution, for its framers had indeed bestowed a species of dual citizenship on its subjects. As James Madison explained in Federalist No. 28, published during the debates over the Constitution, the envisioned government would not be "a *national* one"; it would have power over only "certain enumerated objects" and leave "to the several States a residuary and inviolable sovereignty" over all others. Before the Civil War, civil rights laws in Northern states were at times described in just such terms, as in 1857, when a Milwaukee newspaper declared that a law defending fugitive slaves "holds up the shield of State Sovereignty to protect citizens of Wisconsin from the aggressions of Slave Power."

The Framers had good reason to bestow sovereignty on the states. Well acquainted with monarchy, the generation that brought this nation into being was exceedingly wary of what we now describe as a unitary executive. Influential men, wrote one New England minister in 1775, have "an insatiable lust of power"; in every age they lead "their blind confiding country-men into the very jaws of slavery, vassalage, and ruin."

The divided nature of American federalism was designed to check that grievous appetite. "Federalism was our Nation's own discovery," wrote Justice Anthony Kennedy in 1995. "The Framers split the atom of sovereignty." Indeed, I would say that they split it twice over, not just into the triarchy of the legislature, the executive, and the judiciary, but also into the diarchy of state and federal power, all with the explicit intention of destroying the monarchy of their youth.

The rendition of Anthony Burns vividly demonstrates the tension inherent in the split atom of state and federal power. Early in his angry essay, Thoreau calls the reader's attention to two laws with which Massachusetts intended to express its sovereignty, and which, had they been obeyed, might have prevented Burns's removal. The first of these was a statute in 1837 meant to guarantee trial by jury to an alleged fugitive; the second, from 1843, made it illegal for state officials to help detain anyone claimed as a fugitive slave.

These two laws are typical of the many "personal liberty laws" that all Northern states adopted before the Civil War in response to the Constitution's fugitive slave clause:

> No Person held to … Labour in one State. . ., escaping into another,
> shall . . ., be discharged from such … Labour, but shall be delivered up
> on Claim of the Party to whom such . . . Labour may be due.

Written in the passive voice, the clause says nothing about how or by whom the fugitive should be "delivered up;" it simply grants "the Party" a general right of recaption by self-help alone. As for fugitives themselves, they appear only as the objects of capture; no mention is made of their rights or those of free blacks who might be kidnapped into slavery. Personal liberty laws broke that silence, drawing their substance from the rights elsewhere enumerated in the Constitution: the right to trial by jury, to testify on one's own behalf, to habeas corpus, to the assistance of counsel, and so forth.

The 1837 law cited by Thoreau — an "Act to restore the Trial by Jury, on questions of personal freedom" — specifically addressed the jury question. It declared that any person "imprisoned, restrained of his liberty, or held in duress . . . shall be entitled to the writ of

personal replevin." A writ of replevin is a legal mechanism whereby, in normal circumstances, a hearing is held to return an unlawfully seized good to its owner. In the days of chattle slavery, when the 'good' in question was a slave, that hearing would be before a jury, and in Massachusetts, where slavery had been illegal since 1783, no jury could be trusted to honor the claim of the fugitive's 'owner.'

Today there are parallel examples of state laws adopted in the face of federal power. To take just two of the many recently passed: Illinois' recent Bivens Act empowers individuals to sue and seek damages against ICE agents who violate their constitutional rights, and California's "No Secret Police Act" bans law enforcement from wearing masks while on duty. Illinois passed its law December 9, 2025; the Justice Department sued to block it on December 22. California passed its anti-mask law September 20, 2025; the Justice Department filed suit against it on November 17. Regardless of whether either law survives, both are well worth having public fights over. If the states win, they are rewarded with an affirmation of their rights. If they lose, the voters get clear confirmation that ICE is a paramilitary force operating outside the Constitution and that the masking of agents means they answer to no one but the President.

Back in the nineteenth century, when Northern states got into fights over personal liberty laws, they lost. The Supreme Court struck them all down in 1842. The case leading to that decision began when one Edward Prigg, agent for a slaveholder in Maryland, arrested the alleged runaways Margaret Morgan and her children and brought them before a justice of the peace in York County, Pennsylvania, seeking a warrant for rendition. The justice, however, pursuant to Pennsylvania's own personal liberty laws, refused to consider the matter. Finding he had no recourse to law, Prigg then took his captives back to Maryland, whereupon a Pennsylvania grand jury indicted him for kidnapping.

Prigg's challenge to that charge made its way to the U.S. Supreme Court, where Justice Joseph Story delivered the opinion. *Prigg v. Pennsylvania* upheld an absolute right of recaption and declared void all state laws interfering with that right. The Constitution's fugitive slave clause, Story wrote, extended "a new and positive right…, confined to no territorial limits, and bounded by no State institutions or policy." Any law that "interrupts, limits, delays, or postpones" the enjoyment of that right "is repugnant to the provisions of the Constitution of the United States, and is therefore void."

Sweeping away all rights that Northern states had sought to secure for free blacks and fugitives, Story's decision closed out the pro-civil rights phase of this history and initiated a new one, the noncooperation phase, well exemplified by second of the two laws that Thoreau cited: in 1843, Massachusetts passed a statute explicitly "making it penal for any officer of the 'Commonwealth' to 'detain or aid in the . . . detention . . . of any person . . . claimed as a fugitive slave.'"

Behind the dry language of that law lay a case that began only a few months after Justice Story issued his opinion. In Boston, on October 19, 1842, a certain constable Stratton arrested a young black man, George Latimer, claimed as a runaway by one James Gray of Virginia. Both Stratton's and Latimer's jailer, a man named Cunningham, were paid to act as Gray's agents.

At first, despite the *Prigg* decision, Latimer's defenders sought to use the powers of the 1837 law guaranteeing a jury trial on questions of personal freedom. That went nowhere. Jailer Cunningham refused to deliver his prisoner and Massachusetts Chief Justice Lemuel Shaw, following *Prigg,* declared that Latimer had no rights under that or any other state law.

Turning the tables in hopes of making their own use *Prigg*, Latimer's defenders then sought to have all local officials — the constable Stratton and the jailer Cunningham — stripped of their powers, given that, following Justice Story's logic, actions taken under color of state authority no longer had any place in fugitive slave cases.

During the weeks when all of this was going on, a tremendous outcry arose against the possible rendition. When Latimer was first detained, a crowd of hundreds of mostly black men almost immediately gathered and threatened to rescue him from the Court House. At the end of the month, at a mass bi-racial meeting in Faneuil Hall, curses were laid upon the Constitution while Frederick Douglass, William Lloyd Garrison, and others set about inciting the crowd to rescue the captive. A special *Latimer Journal* began to circulate, the editors declaring that "the slave shall never leave Boston even if…our streets pour with blood." Finally, a petition circulated demanding that the Suffolk County sheriff order his subordinate, jailer Cunningham, release his prisoner. The sheriff did so.

That did not make Latimer a free man, but it put the enslaver Gray in a fix. True, Massachusetts law could no longer help the fugitive, but that didn't mean anyone in the state was obliged to help the claimant. Quite the opposite. If James Gray wanted to take Latimer back to Virginia, he would have to do so by self-help alone in a city fully primed to rescue him by force.

Finally, on November 18, Gray released his claim for $400 ($15,000 today) and George Latimer walked free.

What became obvious during the Latimer case was an ironic consequence of *Prigg*: if personal liberty laws were "repugnant to the Constitution," if these laws were "void," then perhaps it was time to turn an inability to act into a refusal to act. Four months after Latimer was released, Massachusetts passed its first noncooperation law. In three brief paragraphs, "An Act to further protect Personal Liberty" prohibited the use of state jails to hold fugitives, forbade judges from issuing certificates of rendition, and made it punishable by fines and imprisonment for any state officer to aid in the detention of a runaway. A later extension of this act added more penalties: state officers could be impeached if they granted certificates of rendition, attorneys could no longer practice in Massachusetts if they helped claimants, and jailers who imprisoned alleged fugitives were themselves to be imprisoned and fined. These statutes do not merely suggest noncooperation with the laws of slavery, they require it. They are a codification of civil disobedience.

Two seemingly inevitable steps followed the shift in the 1840s to noncooperation. First, a new Federal Fugitive Slave Law was enacted in 1850, a forced-cooperation mirror image of the Latimer Law. "All good citizens are hereby commanded to aid and assist" in the rendition of slaves, it reads, and those who hinder that process "shall" be subject to fines and imprisonment.

Second, when northerners refused to honor that law, as they did in the Burns and many other cases, slaveholding states seceded from the Union, some directly citing personal liberty laws as a cause. South Carolina's "Declaration of Immediate Causes" is typical: "We assert that fourteen of the States have deliberately refused, for years past, to fulfill their constitutional obligations, and we refer to their own Statutes for the proof."

That was dated December 20, 1860. A month later the newly formed Confederate States bombarded Fort Sumter, and the Civil War began.

Now

The threat of violence has always shadowed the promise of divided sovereignty. In describing the state-federal diarchy, Madison warned that fights would surely arise "between the two jurisdictions," and that "an appeal to the sword and a dissolution of the compact" could

easily follow. When it came to the fight over slavery, those were exactly the appeals regularly heard, decade after decade, with states on both sides promising blood in the streets and civil war should their sovereignty be challenged.

Thoreau's speech after the rendition of Anthony Burns places him among those willing to call for violence in defense of states' rights. Abolitionists had failed to get Burns before a jury, not for want of effort, he said, but "for want of sufficient force": the state should have faced Federal troops with troops of its own and met violence with violence. A Northern anti-slavery doctrine of states' right was pitted against a Southern pro-slavery doctrine of states' rights.

Thoreau was never an advocate of nonviolent action. He was an unapologetic defender of John Brown, saying, in regard to the raid on Harpers Ferry, "for once the Sharp's rifles and revolvers were employed in a righteous cause." In the Burns case, a deputy U.S. marshal had been killed by the mob trying to free Burns from the Court House, and Thoreau called their actions "heroic" and never mentioned the homicide. He strikes the same note toward the end of "Slavery in Massachusetts," framing it there in opposition to his more peaceful pursuits: "We walk to lakes to see our serenity reflected in them . . . Who can be serene in a country where both the rulers and the ruled are without principle? The remembrance of my country spoils my walk. My thoughts are murder to the State."

I doubt that Madison thought of his warning about violence and secession as prophetic; in context it appears mostly to highlight his optimistic suggestion that, when it came to conflicts between the sovereignties, some "tribunal" would be found to "impartially" adjudicate their differences. In the fullness of time that task has fallen to the Supreme Court which, before the Civil War, took the Constitution's Fugitive Slave Clause as the warrant for consistently ruling against the Northern states in conflicts over slavery.

In today's conflicts, the Trump administration has gone to great lengths to find some similar Constitutional basis to legitimize its encroachments on state sovereignty. To begin with the President's federalizing the National Guard, an Executive Order issued on his first day in office declared that "a national emergency exists at the southern border of the United States" and that it was Trump's duty "to protect each of the States against invasion," a phrase lifted (oddly without attribution) from the Constitution.

In addition, a clause in Article I gives Congress the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." In fact, that is one of the enumerated powers of Congress, not of the executive; but in an act in 1903 and its later amendments, Congress delegated their power to the President whenever there is "danger of invasion by a foreign nation," or "a rebellion or danger of a rebellion" against the government, or when the President "is unable with the regular forces" to execute the law.

Last year, with the day-one "emergency" and "invasion" in hand, and with permission seemingly granted by that 1903 statute, it was a small step for a memorandum on June 7 to state that the "violence and disorder" of the protests against ICE "constitute a form of rebellion" and thus require federalizing the National Guard (nationwide!). On the very next day Trump directed cabinet officials to take any action necessary "to liberate Los Angeles from the Migrant Invasion," and soon, over Governor Gavin Newsom's objections, U.S. Marines and the California National Guard were active in the city.

Newsom quickly filed suit, whereupon a federal District Judge issued a restraining order and returned control of the National Guard to the Governor. The President's "actions were illegal," he wrote, "both exceeding the scope of his statutory authority and violating the Tenth Amendment . . ." The protests in question "fall far short of 'rebellion,'" and to claim otherwise "is untenable and dangerous." In December, the Supreme Court issued its own narrow ruling: Trump failed "to show that [the 1903 statute] permits the President to federalize the Guard…"

Score one for states' rights.

State and local "sanctuary" policies make for a second site of conflict "between the two jurisdictions," and a more critical one, given that the deportation crusade, with its haste, its shackles, and its daily body count, is so central to Trump's domestic policy.

Adopted by states from New York to California and cities from Chicago to New Orleans, sanctuary policies echo the antebellum personal liberty laws in several ways: their purpose is to protect a vulnerable population, and their tactics amount to noncooperation. "Not" is the ruling modifier of their verbs. Law enforcement shall not stop, arrest, or search anyone solely on their immigration status; schools shall not ask students about their status; counties shall not lease out their jails to hold federal detainees, and so on.

One important legal distinction limits the range of this noncooperation. Contrary to Trump's propaganda, *sanctuary policies offer no sanctuary to actual criminals*. Being in the

country unlawfully is a civil, not a criminal, offense, and the policies therefore always have one proviso added to their negatives: "don't do this, don't do that," they say, "*except in response to a criminal warrant*." California's sanctuary law, the "Values Act," even includes a long list of the crimes that might trigger such warrants, everything from assault and battery to torture and mayhem. The lesser violations of immigration law, however, are federal matters; locally, no action need be taken just because someone is an undocumented alien.

But why not cooperate? Why resist joining forces with Homeland Security and ICE? The answer is plain: both experience and research have shown, and common decency demands, that when it comes to community safety, health, and economic wellbeing, trust and common purpose make better foundations than cruelty and fearmongering. It matters that immigrants are not afraid to seek medical help, report a crime, go to church or send their children to school. On the law enforcement side, it matters that scarce resources stay focused on local crime and that the lines of accountability and liability between the two sovereignties remain clear.

It is an added benefit that sanctuary policies protect the labor and taxes that immigrants contribute to the community. In 2022, nationwide, over $37 billion tax dollars from the undocumented helped fund schools, hospitals and social services. In communities that adopt sanctuary policies, employment and income are higher, and poverty and public assistance needs are lower. Above all, crime is lower — a fact that should come as no surprise given that, sanctuary or not, crime rates of the undocumented are well below those of native-born Americans.

In one executive order, Trump claimed that sanctuary policies amount to "a lawless insurrection," ignoring the fact that, by constitutional design, the states have no role to play in immigration enforcement. (Arizona once tried to write its own immigration laws and the Supreme Court struck them down.) The federal government may request help from the states, but it cannot command it. As Justice Antonin Scalia wrote in 1997, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." Last year a U.S. District Judge agreed when dismissing the Justice Department's suit against the state of Illinois: "…the Sanctuary Policies reflect Defendants' decision to not participate in enforcing civil immigration law—a decision protected by the Tenth Amendment …"

Score two for states' rights.

In any defense of states' rights, we need always ask, what is the right in question? Is it worth upholding? For the South before the Civil War, it was the right to own slaves; in the North it was the right to defend civil liberty on their own terms. Since then, it has been everything from the right to make voters pay poll taxes to the right to force state judges to retire at the age of seventy — the former struck down in 1966, the latter upheld in 1991.

Taken one at a time, these rights are but samples of the broad range of powers reserved to the states, as Madison pointed out when he returned to the issue in Federalist No. 45. The federal government's powers are "few and well defined," he wrote, while those left to the states "are numerous and indefinite…, extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . ." That rather nicely summarizes the "objects" that sanctuary policies are meant to defend and, when contrasted with the terror-tactics of immigrant removal, makes a twenty-first century defense of state's rights almost mandatory.

It would not be hard to make a list of conflicts worth setting that defense in motion, but, with the abolitionists in mind, I will focus only on four that I find suggested by the old personal liberty laws, especially by a law that Massachusetts adopted in 1855 in the wake of the Anthony Burns affair.

First, remember that the volunteer militia, federalized by President Pierce, had willingly joined the posse enforcing the Fugitive Slave Act. One section of the 1855 law is a direct response to that cooperation: "The volunteer militia … shall not act in any manner in the seizure, detention or rendition of any person" claimed as a fugitive slave, and any member of the militia who does so shall be fined and imprisoned.

Today, states should similarly command noncooperation from the National Guard in cases related to civil immigration enforcement. Given that Trump's federalization of the Guard has been judged illegal, and given that all soldiers have the right to disobey illegal orders, states could now command members of the National Guard not to act in any manner in the seizure, the detention, or the rendition of an immigrant (absent a judicial warrant, of course).

Second, another section of the 1855 law commands the "Governor to appoint commissioners in each county to defend fugitives," and provides for the "Commissioners to be paid by State treasurer." Today, states should underwrite the defense of due process for

immigrants, for children especially. New York State has done so, allotting $29 million in 2025 to add to $30 million previously budgeted to give legal support to immigrants fighting deportation.

Third, the first section of the 1855 law expands on the earlier Latimer Law which forbade the use of "any jail or other building belonging to this Commonwealth" to detain anyone "claimed as a fugitive slave." Today, the states should likewise draw the line as to federal use of state property. Until recently, many states partnered with ICE and let their local jails be used to hold individuals suspected of immigration violations. Since Trump was elected, about a dozen states have banned this practice.

And fourth, the 1855 bill threatens prison sentences of one or two years and fines of $1,000 or $2,000 for those who cooperate with the apparatus of slavery (that would be about $35,000 or $70,000 today).

Sanctuary policies never state direct punishments for individuals who cooperate with immigration enforcement, nor should they do so. Intended to build communities of trust, their practices are about cooperation, not about law and punishment. The policies could, however, be more declarative about the financial consequences awaiting municipalities that get entangled with immigration enforcement. ICE agents often violate the civil rights of immigrants (and citizens), and while it is nearly impossible to extract damages from the federal government, with states and municipalities it is a different matter. In 2024, New York City paid $92.5 million in damages for collaborating with ICE by holding thousands of prisoners in city jails long after their proper release dates.

Thoreau ends "Slavery in Massachusetts" with a description of the white waterlily which, like the lotus, feeds on muck to form a fine and fragrant flower. It is an invocation of hope. It is also a mistake. 1854 was not a time for transcendental cheer. Things were dire, and "murder to the State" was the proper ending.

Things today are dire in different ways, but dire still. Cities may hold the line in the attacks on sanctuary, but what then? Sanctuary policies seek to form communities of trust, but trust is slow to build and easy to destroy. In all the neighborhoods terrorized by ICE, it has already been destroyed and it will certainly not reappear in my lifetime.

Besides, right now immigrants are the target, but the target is not the point. Power is the point. Should Trump ever run out of immigrants to harass, he will find fresh victims and the

theater of cruelty will play on. In one executive order, Trump instructed the Secretary of Defense "[to] ensure the availability of a standing National Guard quick reaction force . . . available for rapid nationwide deployment." That will come in handy if the happy No Kings parades get too much traction, or if "rebellions" arise during the midterm elections.

The leaders of two great liberation movements of the last century, Mahatma Gandhi and Martin Luther King, Jr., shared the daring assumption that nonviolent action could wake the conscience of a nation. In Gandhi's case, as King once pointed out, the British had "some degree of moral conscience," and King himself would regularly invoke the conscience "of millions of white Americans."

I stand in awe of the faith of these men, but my own has been shaken. I am haunted by a remark made by Nadezhda Mandelstam, writing about Stalin's decades of terror: "Strange to say, the word 'conscience' had gone out of ordinary use."

To wake and school the conscience of a nation is a long-term affair, and right now much of the country is chaos-weary and eager for sleep. The current authoritarian oligarchy keeps eating away at the Framers' divisions of power, and it remains to be seen whether the sovereignty promised to the states is truly inviolable and able to hold the line.