# Controlling Internal US Borders in the 19th Century

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Abstract: Today, one assumes that the right of mobility into and across US or state territory comes the right to stay there. In US migration federalism history that was not the case during the century of state control over interstate and international migration from the founding to about 1882 (when immigration federalized). This paper assesses the nature of state power directed toward politically powerless groups who wanted to stay in parts of the US. Internal borders functioned as international ones. I detail the state level migration restrictions on foreign and domestic free black people and poor people of every race seeking to move between states and to set roots where they wanted. Because states had limited capacity, they could not ring their borders with guards or deport unwanted populations, they imposed administrative burdens to encourage unwanted migrants to go elsewhere. By contrast, because the management of Native American affairs was with the US government, Indigenous people faced the coercive state power in the form of 80,000 Native people violently deported to the west by the US Army in the 1830s. The fate of Native Americans shows that the level of government in charge of your mobility also dictates the type of government power used to coerce you.

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Americans of European descent, including the most recent arrivals in the nineteenth century, enjoyed not just the freedom of movement into and across the United States, but also the concomitant ability to stay in the place of their choosing. Not every group in the US enjoyed the freedom to stay, or what Samantha Seeley calls the "right to remain." As Seeley explains, "the pursuit of a permanent home mattered deeply to man people. History and the bonds of affection tied people to particular places. Most people in the early national period did not want unfettered migration—they hoped to remain in place."[1] Examining migration policy from today's perspective erases the fact that the right of mobility and to remain were separate in the nineteenth century; being able to enter into a state did not mean that one had the legal right to remain. The lack of the ability to stay was starkest for Native Americans who had lived on their lands for generations. Although the right to move and to remain are distinct, in the nineteenth century, subnational governments controlled both—except for Native Americans and fugitives from slavery who were supervised by the federal government.

Until the Reconstruction Amendments, neither free blacks nor the domestic and foreign poor of any nationality enjoyed the freedom to remain as both were subjected to subnational laws constitutionally permitted by the police powers doctrine. The existence of so many legal barriers to the right to be in a place contradicts the popular notion that the US borders were open before the federalization of migration in the late nineteenth century. Native people especially had been harassed by white settlers coveting their land since Europeans landed in the North American colonies, and there had been many Native American removal efforts. But in the 1830s, the full force and power of the national government on a scope and scale was trained on Indigenous

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[1] Samantha Seeley, *Race, Removal, and the Right to Remain: Migration and the Making of the United States*, (Omohundro Institute of Early American History and Culture and University of North Carolina Press), 7, 8, 14.

people to forcibly deport them to the west. For Native Americans, free black people, and poor people, the freedom to remain was treated by subnational governments as a privilege.

The framers recognized the freedom of movement as important for most white people as far back as the Articles of Confederation. For free black people and poor people, inchoate understandings of legal citizenship and the strong political and legal culture of *salus populi suprema lex est* that prioritized the public welfare, made their right to remain more difficult. The nebulous citizenship status of free blacks led to their vulnerability to colonization efforts seeking to remove them to countries they never saw before and enabled local laws imposing administrative burdens and legal disabilities designed to discourage their entry into and stay in certain states. Exemptions of politically powerless groups in law from the privileges of interstate mobility and remain continued to hamper indigent people's presence as poor and vagrancy laws were disparately enforced not just based on income, but on race and gender.

While the management of poor and free black people was assigned in the federal system to subnational governments, the federal government held authority over the mobility of Indigenous people. That did not mean more robust protections for Native people's right to remain or respect for their sovereignty. As non-citizens, they could not vote, but as members of sovereign Native nations, they were not treated the same way as other members of a foreign independent nation. In the nineteenth century, whether one's desire to remain was subject to the authority of the national or subnational governments determined the nature of the coercive powers deployed against a group.

**Constitutional supports for right to remain**

The freedom of movement and its corollary, the freedom to remain, were included in the package of privileges for most whites in the Articles of Confederation and the Constitution. The

abilities to move about and to stay were reinforced by formal citizenship conferred by the Naturalization Act of 1790 that was denied to the unfree and non-white migrants. The Articles of Confederation in 1781 famously recognized the importance of the right of mobility between states. Article IV of the Articles of Confederation guaranteed to "the free inhabitants of every state" all the "privileges and immunities of the free citizens in several States" including "the freedom of ingress and egress to and from any other State." That passage was followed immediately with a list of those who would not receive the privilege: "paupers, vagabonds, and fugitives from justice."[2] Mobility was so important that the privilege is enumerated in the nation's first founding document.

The US Constitution carried over some of the language from the Articles of Confederation pertinent to the freedom of movement and to remain into Article V Section 2 which read, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In addition to the commerce clause, the privileges and immunities clause is another part of the Constitution that regulates the relationship between the national government and the states by prescribing the way states should treat each other's citizens. As in the Articles of Confederation, the privileges and immunities clause listed categories of people who would not enjoy that protection including "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice." The consequences of these groups' unwanted presence would be that, if "found in another State, [the fugitive] shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Also not guaranteed the freedom of movement or right to remain were black people fleeing enslavement as Article IV Section 2 stipulated, "No Person

[2] Articles of Confederation (1777), Available at: https://www.archives.gov/milestone-documents/articles-of-confederation,

held to Service or Labour in one State, under the Laws therof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." In the nation's founding documents were specifically enumerated groups whose freedom of movement and right to remain could be legally abrogated even as most white migrants moved and settled freely about the country.

The privileges and immunities clause did not require states to provide all the privileges their citizens enjoyed to non-state citizens or residents. In *Corfield v Coryell* in 1823, the circuit court with Justice Bushrod Washington riding circuit, allowed subnational governments to reserve certain rights only for their state citizens. The Supreme Court also legalized the withholding of privileges and immunities guarantees for indigent people's interstate travel and settlement. Poor people would not gain a right to interstate travel until into the twentieth century in the Supreme Court case *Edwards v California* in 1941. Free black people and enslaved black people searching for freedom also did not enjoy the freedom to move or remain until slavery was declared unconstitutional and the passage of the Reconstruction Amendments.[3] Native Americans were not covered under the privileges and immunities clause as non-citizens, but neither were they treated like the citizens of a foreign nation.

The constitutional exemptions of specific classes of people from guarantees of the abilities to mobility and to remain gave subnational governments wide discretion in managing populations they found objectionable. Because of the federal government's general absence from migration policy and the federal courts' indulgence of subnational migration restrictions via police powers, unwanted groups were subjected to the restrictionist whims of a patchwork of

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[3] *Corfield v Coryell*, 6 F. Cas. 546 (1823), and *Edwards v California*, 314 US 160 (1941).

state laws. By contrast, Native Americans, assigned by the Constitution to the national government, did not enjoy respect for their sovereignty or their strong desire to remain because of the convergence of the political goals of the national and state governments to deport them to make way for white families.

The same clauses that gave governments power over people's right to remain were used to resist. Free blacks fought back by appealing to the privileges and immunities clause in the Constitution and their state citizenship. They also pointed to their birth in the US as bestowing rights that included the right to stay. Indigenous peoples in the southeast argued that based on their Native nations' sovereignty and the treaties signed with the federal government, they had the right to stay. The brute fact of limited administrative capacity of the subnational level would mean that African Americans could try to navigate the hostile state laws through their networks while more than 80,000 Native Americans lost their bid to stay in their ancestral lands first due to federal failure to intervene in state aggression and then in federal sponsored mass deportation.

**Native American Dispossession**

Federal land policy

Federal land policy is not migration policy per se, but it shaped the internal migration patterns by white people in the US, at the expense of Native peoples. After the War of 1812, the national government sent treaty proposals to Indians that included removal mechanisms such as land exchange, allotments, and federally contracted migration to persuade them to leave. Among the "most effective" tools in the government's arsenal was "population growth," Samantha Seeley explained. "As our settlements gradually surround them," one federal negotiator wrote, "their minds will be better prepared to receive this proposition."[4] Instead of using the traditional

[4] Samantha Seeley, *Race, Removal, and the Right to Remain*, 295, 304, 315.

tools of a powerful government such as the military, the federal government used land policy to incentivize and channel the migration of white settlers into parts of the west.

The process of using land policy began in the founding era when the national government declared "preemption" by asserting authority over of all territories that had not yet been added as states as it claimed a monopoly of "public" lands (of which a portion was Native territory) to sell at low prices to white settlers. In the nineteenth century, using homestead laws, the federal government channeled large numbers of white settlers into unincorporated western territories at certain periods to secure and occupy territory contested by Native Americans. Federal homesteading laws encouraged "nearly one million people" to move to Indian territory at between 1862 and 1916. Instead of white settlers overwhelming Indians to take their land because the national government was too weak to stop the flood, quite the opposite happened. No passive and weak bystander, the national government, in Paul Frymer's words, "regulated the task of settlement by controlling its direction, pace, scale—moving preferred populations into contested territory in order to engineer the democracy of the region in a manner that both secured and consolidated their territorial control."[5] Federalism arrangements, the separation of powers, and existing treaties with Native peoples were no match against a vision of settler colonialism that dispossessed Native people of their land to clear the way for white families because both national and subnational governments desired that policy result.

Not only were white Americans encouraged to move west to subsidized federal land, but so were overseas Europeans who were encouraged to migrate to the US by land policy. Federal land policy in the form of preemption laws that appeared near the founding had allowed "any settler or occupant" to claim land the national government had not yet sold. Because homestead

[5] Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion*, (Princeton, NJ: Princeton University Press), 9, 12, 23.

laws in the nineteenth century coincided with a rise in international migration, Congress passed a law in 1841 limiting eligibility for preemption to US citizens and those who had declared their intention to become citizens.[6] The inclusion of the provision that an international migrant need only "intend" to become a citizen showed the law was meant to be a recruitment tool for European migration.

Withholding Federal power

The usual measures of government capacity consist of assessments of the exercise of power, but to goad Indians to leave, the federal government in the ninetieth century withheld its protection to Native people and failed to enforce treaties that subnational government violated. In much of early republic and antebellum migration policy history, the national government either chose not to do much so as not to overextend their power or was blocked by states from carrying out policy because of the inability to implement federal laws. By the 1830s, the federal and state authorities came into alignment about the desirability of Native expulsion and set about carrying it out reflecting an "audacious act by an emboldened American state", as Frymer described it.[7]

The US military had not greatly expanded by the early nineteenth century, but a mind shift among elites toward Native people and power differentials changed. Thomas Jefferson for example, in a letter in 1803 to Governor Harrison, believed he had Indians, which he called "clear pests" on the defensive as they were on the verge of "termination", or their sovereignty clipped as they "incorporate with our citizens." Noting the  difference between the power of the US relative to Native people, Jefferson wrote, it "is now so visible that they must see we have

[6] Paul Frymer, *Building an American Empire*, 9, 12, 17-18, and Kate Masur, *Until Justice Be Done: America's First Civil Rights Movement, From the Revolution to Reconstruction*, (New York, W.W. Norton and Company, 2023), 252-253.
[7] Paul Frymer, *Building an American Empire*, 77.

only to shut our hand to crush them."[8] Indians were also weakened because by the War of 1812 marked the defeat of the last Indigenous military confederation and the end of the hope of Native people that an alliance with England (which had a presence in the area) would come to their aid.[9]

Federal administrative capacity, which was superior compared to the states, could be effective either in its deployment or its withholding. When Native Americans petitioned the federal government for protection from belligerent states and pleaded with federal authorities to enforce existing treaty obligations, national officials told Indigenous people the government would not help and that they should leave. When Native people did not leave quickly enough, the federal government at the urging of the southern states, organized, funded, and staffed the violent deportation of more than 80,000 Native Americans from the southeast in the 1830s in the largest deportation in US history.[10] Mass Native deportation is the most graphic illustration of how the federal system's assignment of authority on the right of mobility and to remain determined the coerced tactics directed at a disfavored group.

The framers' theoretical expectations were that the separate branches of government and counterpoised levels of authority would check one another's excesses and that none would be able to invade individual rights. That mechanism did not anticipate the situation when national

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[8] Paul Frymer *Building an American Empire*, 77-78, quotations from 78.
[9] Ned Blackhawk, *The Rediscovery of America: Native People's and the Unmaking of U.S. History*, (New Haven, Yale University Press, 2023), 212-213, 229, 241.
[10] I use the word "deportation" and not the sanitized "removal" when describing Native American policy, following the lead of Claudio Saunt. Saunt deliberately refers to what the national government did in the early 1800s as "deportation" and not the euphemistic "removal" or other words with twentieth-century meanings. He explained, "Deportation is conducted by states, and the term therefore captures the administrative and bureaucratic process that underpinned the federal government's expulsion of native people." Claudio Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory*, (New York, NY: W.W. Norton and Company, 2020), xiii-xiv.

and subnational units and multiple branches of government would be arrayed against a disfavored group.

Proponents of Indian expulsion were driven by an array of motivations including racism and land lust, although some had humanitarian concern for the survival of Native people and believed that Native people moving to the west was their only hope of survival. Removals had been happening in the early republic, but the push toward a "formal and systematic Indian removal policy" gathered steam after the War of 1812. By 1830, the pro-deportation forces, irrespective of their motivations, believed that after a series of smaller and ad hoc removals in the early republic era, the US government could either do more of the same or undertake what Stuart Banner described as "one final, major, permanent removal that would be the Indians' only hope of survival."[11]

The deportation of Native Americans, as opposed to prior approaches of treaty negotiations or attempts to "civilize" them, became possible in the nineteenth century given the federal government's willingness to use its administrative capacity and resources for state sponsored deportation. While the English, Americans, and Spanish had been driving off Native people for centuries, the nineteenth-century US effort was unprecedented in that it drew upon the full administrative powers the national government had been amassing.[12]
The Constitution had given Congress the power to raise a standing army, planting the seeds of the Native deportation in the 1830s. It had taken time for Congress to build up its military and broader administrative capacity to take on Native alliances. But in the first quarter of the nineteenth century, Congress would be able and willing to pay for and marshal "thousands of

[11] Paul Frymer, Building and American Empire, 115Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier*. (Cambridge, MA: Belknap and Harvard University Press, 2007), 208-209.
[12] Claudio Saunt, *Unworthy Republic*, xiii, xv, and Paul Frymer, *Building an American Empire*, 117-119.

soldiers to do the work of removal" and to field a potent enough US military "to rival Native federationists." In the deportation of Cherokee Nation alone, 7,000 troops were organized.[13] The resources deployed were unprecedented and woefully inadequate. Unlike the previous 200 years of smaller removal efforts, the federally organized and executed the deportation of Native people in the 1830s would be different in the scale of the operation and human suffering.

The goals of slave states to expand cotton growing and slavery and of the national government to nation-build for white settler families converged in the early 1800s. The southern states' desire for Indian deportation grew into a national issue when Georgia and Alabama became impatient with the pace at which the federal government was persuading Indians to vacate and sell their land. In 1802, the national government had promised Georgia it would purchase and extinguish Indian title as soon as reasonable terms could be reached. In exchange, Georgia ceded to the national government the land that would become the states of Alabama and Mississippi. Georgia's planters greedily eyed the seventy-seven million acres of Native land as the world-wide demand for cotton soared. Cherokee land was especially valuable because the Cherokee nation was already producing cotton with slave labor.[14]

Persuasion and negotiation turned into compulsion. In 1821-1827, after the Creeks had sold half of their land in Georgia to the national government, the state wanted more. Federal

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[13] Samantha Seeley, *Race, Removal, and the Right to Remain*, 98 and Gregory Ablavsky, "The Savage Constitution," *Duke Law Journal*, Vol. 63 No. 5, (February 2014), 1007-1008, and Ned Blackhawk, *The Rediscover of America*, 211.

[14] Samantha Seeley, *Race, Removal, and the Right to Remain*, 280-281, and Ethan Davis, "The Administrative Trail of Tears", *The American Journal of Legal History*, Vol. 50, No. 1 (January 2008-2010), 98. Paul Frymer, *Building an American Empire*, "It is not incidental that many of the most violent acts of Indian removal took place in the heart of the expanding slave economy.", 17, Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South*, (Cambridge, MA: Harvard University Press, 2007), 37-72 especially 57, 69-70, and Ned Blackhawk, *The Rediscovery of America: Native Peoples and the Unmaking of U.S. History*, (New Haven, CT: Yale University Press, 2023), 239-240.

commissioners soon arrived to persuade the Creeks to sell their remaining land. The officials' messages were a threat and a warning that if Indians wanted peace and to survive, they had better leave. As the Creeks wondered whether the national government would protect them from belligerent Georgia, federal land commissioners unequivocally informed Native people, "You must be sensible that it will be impossible for you to remain for any length of time in your present situations distinct Society or Nations, within the limits of Georgia...Such community is incompatible with our Systems and must yield to it."[15] The signs were ominous for Native nations.

Federal administrative capacity by the nineteenth century had strengthened, thus, the threat to withhold it was a significant one. Among the strategies used by the national government to coerce Native people to exchange their lands and move west was the explicit threat to withhold its protection from Native nations against state laws. Federal land commissioners told the Choctaws in Mississippi that Andrew Jackson, the "Great White Father," would not stand in the way of Mississippi enacting its harsh laws on Native people. Choctaws were given a "choice" between giving up their sovereignty and moving west or being subject to Mississippi laws as the national government stood aside. Commissioners promised "liberal provisions" and "peace" if they voluntarily removed, but if they chose to remain in Mississippi, they would be "be tried and punished for any [state] offence you may commit" and "be subjected to taxes, to work upon roads and attend in musters..."[16] In the US federal system of government, the national government in this instance failed to restrain states acting in a belligerent manner toward a minority.

[15] Ethan Davis, "Administrative Trail of Tears: Indian Removal", 51, and Stuart Banner, *How the Indians Lost Their Land*, 197-200, quotes from pg. 197 and 196, Samantha Seeley, *Race, Removal, and the Right to Remain*, 280-28, and Claudio Saunt, *Unworthy Republic*, 28.
[16] Ethan Davis, "The Administrative Trail of Tears", 67.

In 1826 subnational governments, impatient with the pace at which the national government was acquiring Indian land, forced the hand of federal officials. It precipitated a constitutional crisis. Georgia, which had bickered with the federal government through the 1820s, threatened to extend its laws and jurisdiction into Indian land as the state began an aggressive campaign against the Cherokee and Creeks to force them to sell and leave. The Georgia legislature claimed the right to do with Indian land what it wanted based on the argument that Native nations were on Georgia's land, ignoring the nation's sovereign status. "Georgia owns exclusively the soil and jurisdiction of all the territory within her present chartered and conventional limits...," the legislature declared, "and, with the exception of the right to regulate commerce among Indian tribes, claims the right to exercise, over any people white or red within those limits, the authority of her laws." This reading was a narrow interpretation of the Constitution and inconsistent with treaty obligations Natives had signed with the US government.[17]

Georgia's move also violated the Constitution's delegating management of all aspects of Indian affairs to the federal government. The state soon followed with legislation to harass Native people to come to the bargaining table by imposing legal disabilities such as banning them from testifying in court and prohibiting them from going into non-Indian parts of the state without a permit. Georgia's actions spilled into national politics as people wondered if Georgia could take such a position against the federal government, whether the national government would defend Indians, and if and how Native American deportation to the west of the Mississippi would happen.[18]

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[17] Ethan Davis, "The Administrative Trail of Tears",52 and cited in Stuart Banner, *How the Indians Lost Their Land*, 195, 198, 200-201, quote from page 200.
[18] Ethan Davis, "The Administrative Trail of Tears", 52 and, cited in Stuart Banner, *How the Indians Lost Their Land*, 195, 198, 200-201 (Quote from page 200)

Native people would find no friend in the executive branch. Andrew Jackson was an ardent supporter of Indian expulsion, campaigned on it, and had risen to the Presidency by 1829. From the beginning of his presidency, he stated he would not interfere with Georgia's aggressive behavior toward the Cherokee. The Cherokees, who had a sophisticated understanding of American politics, had written to Jackson for help against Georgia's encroachments on their sovereignty. Jackson claimed that the president of the had no power to protect the Cherokee from the laws of Georgia. Jackson's message was reinforced by his Secretary of War John Eaton in an April 1829 letter to the Cherokees. "This can never be done," Eaton wrote. "The president cannot, and will not, beguile you with such an expectation. The arms of this country can never be employed to stay any state of the union from exercise of those legitimate powers which attach and belong to their sovereign character." The national government, Native people's ally in the past, now sided with Georgia.[19] Madison's federal system, in which he envisioned the national and state governments checking each other, failed owing by racism and land lust.

Failing to make headway with Jackson, the Cherokees turned to the Supreme Court for help in 1831. With their extensive contacts to missionary organizations such as the American Board of Commissioners for Foreign Missions (ABCFM), the Cherokees approached the Supreme Court, as Alison LaCroix points out, not "as naïve, unsophisticated, or friendless provincials" but as sophisticated and connected political actors. They hired William Wirt, a former attorney general in the Monroe and Quincy Adams administrations. As attorney general,

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[19] Alison L. LaCroix, *The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms*, (New Haven, CT, Yale University Press, 2024), 194, and Ned Blackhawk, *The Rediscovery of America*, 243, Jackson's statement is in *Cherokee Nation v Georgia* (1831) 30 U.S. 1 at 8, and Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Amar, and Riva B. Siegel, *Processes of Constitutional Decisionmaking*, (New York, NY: Aspen Publishers, 2006), 158-159.

Wirt had been present for cabinet debates about the status of the Cherokees and met many of their leaders. He was considered one of the leading Supreme Court litigators of his day.[20]

In *Cherokee Nation v Georgia* (1831), the Cherokees asked for the Supreme Court's ruling on the ability of Georgia officials to enforce their state's laws in Cherokee territory in a homicide case. The Cherokee Nation argued that its sovereignty, stipulated by past treaties with the US, was being infringed upon by Georgia's enforcement of states laws. Through Wirt, they argued that the Cherokees were an independent sovereign nation and the Supreme Court had original jurisdiction to hear the case. Tied to the question of the status of the Cherokee Nation was a separation of powers question of which branch of the federal government had the power to even decide this question. Through informal communications, John Marshall indicated to Cherokee leaders that he was aware the judicial and executive branches "had thought differently" on Indian removal.[21]

Marshall's decision in *Cherokee Nation* did not reach the substantive question of whether Georgia could legislate for the Cherokee because the Court stated it had no jurisdiction. "They may, more correctly, perhaps, be denominated domestic dependent foreign nations, Marshall concluded. "They occupy a territory to which we assert a title independent of their will...Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian." Marshall dismissed the Cherokees' jurisdictional arguments but, in a signal for framing future litigation, he hinted that this case was not the right vehicle and that "The mere question of right might be perhaps decided by this court in a proper case with proper parties." Marshall also acknowledged his institution's lack of enforcement, writing that the

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[20] Alison L. LaCroix, *The Interbellum Constitution*, 181.
[21] *Cherokee Nation v Georgia*, 30 U.S. 1, 20, 63 (1831) and Alison L. LaCroix, *The Interbellum Constitution*, quote from 186, 189-190.

Supreme Court had no power to "control the legislature of Georgia."[22] The Court's lack of enforcement power would be laid bare soon.

One year after *Cherokee Nation*, the Supreme Court found a case to exercise its original jurisdiction. In *Worcester v Georgia*, the Court held that the state's attempt to punish two non-Cherokees residing on Cherokee land was unconstitutional because Georgia was substituting its own law for Cherokee law, in violation of federal treaties. Chief Justice Marshall wrote:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force...The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void...The acts of the Legislature of Georgia interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the Government of the Union.[23]

Georgia took a different view, in which, as LaCroix summarizes, the state "asserted the power to act like a nation, and to deal with the Cherokee Nation as though the Nation were something less than a state." Georgia insisted it had the power to ignore federal treaties and declared that it had unrestrained power to do what they wished with all persons and land within its borders.[24]

The Supreme Court decisively sided with the Cherokees against the state of Georgia in *Worcester v Georgia*, but its decision was stillborn because it was not self-executing. Jackson continued to claim that he did not have the ability to protect Indians presented the southeastern nations. =In abrogation of treaties, he also withheld payments of an annual annuity to the Cherokees that had been given as compensation for previous land they had given up. This case prompted the infamous although most assuredly apocryphal declaration by Jackson, "John Marshall has made his decision; now let him enforce it." Jackson well knew the highest court in

[22] Alison L. LaCroix, *The Interbellum Constitution*, 189-190, Stuart Banner, *How the Indians Lost Their Land*, 216-217, and Ned Blackhawk, *The Rediscovery of America*, 243, 245.
[23] *Worchester v GA* (1832), 31 U.S. 515 at 520 and Ethan Davis, "The Administrative Trail of Tears", 56.
[24] Alison L. LaCroix, *The Interbellum Constitution*, 195.

the United States lacked enforcement power. Where the executive branch of the national government and the state of Georgia agreed that the Indians had to go, a ruling by the federal judiciary was dead letter.[25]

In late 1832, the political landscape shifted, weakening the Cherokees' efforts to fight against Georgia. Jackson was re-elected as South Carolina was forming its nullification convention to reject federal tariffs of 1828 and 1832. In February of 1834, the Cherokee lost one of their biggest allies when William Wirt died after a sudden illness. Jackson vigorously fought South Carolina, regarding its actions as challenges to federal authority and the union's existence. He threatened military action against South Carolina, but to avoid a wider conflict, he appeased Georgia. Soon the Cherokees lost the support of the ABCFM and the public for their fight against Georgia in the federal courts. "The might of the federal government had finally been brought to bear against a rebellious state," as LaCroix notes. "But that state was South Carolina, not Georgia. Georgia remained free to claim that its defiance had been vindicated, and that it had bested Marshall and the Court."[26] The federal government selectively used its power to benefit and punish states and unpopular minorities.

In December 1835, Cherokee leaders signed the Treaty of New Echota to cede their lands to the federal government and move west of the Mississippi. By agreeing to removal by treaty, they would supposedly hold land fee simple in perpetuity and guaranteed by a federal patent. The Nation would also gain a $5 million payment and a delegate in Congress. The move was, in the view of many Cherokee leaders, the only way the Nation would survive because being subject to the power of the state made an independent existence within Georgia impossible. But sixteen

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[25] Alison L. LaCroix, *The Interbellum Constitution,* 195- 196. Historians says the incident was apocryphal, but it captures the sentiment of Jackson who was pro-deportation. Ethan Davis, "The Administrative Trail of Tears", 50.
[26] Alison L. LaCroix, *The Interbellum Constitution*, 200.

thousand Cherokees signing a petition opposing the treaty. In the summer of 1838, sixteen thousand Cherokee began the forced "Trail of Tears." One fourth, or "at least four thousand" of those who made the journey, would die. Many Native people did not desire rights from the US, they simply wanted to be left alone.[27]

Native Deportation

Congress passed laws to fund Native deportation and to staff the effort. The violent deportation of 80,000 of southeastern Native Americans in the 1830s could never have been carried out by the subnational governments themselves. The tragedy also most starkly illustrated a failure of constitutional design to protect a disfavored minority group, a group whose relationship to the constitution was unclear and whose land was coveted by whites. Andrew Jackson, who had been reelected, made Indian removal a major priority. Although executed and funded by US officials and the US army the expulsion was given the cover of legality by the passage of the federal Removal Act of 1830. In the treaty process that followed to enact its provisions, ostensibly to gain the assent of Native peoples for their removal, the separation of powers safeguards collapsed. As Ethan Davis indicated, Congress "faded into the background. Judicial review was nowhere to be seen," and it was left to Commissary General Gibson, a US Army official, with "moderate guidance from the War Department" to carry out the removal.[28] In the instance of Indian deportation, not only did the federal system fail, the separation of powers also crumbled against the powerful draw of settler colonial land lust.

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[27] I consulted Professor LaCroix to verify the number of Cherokee who opposed the treaty was the same number as those deported on the Trail of Tears. She confirmed that the number of 16,000 is stated in multiple primary and secondary sources she consulted. (Email communication, June 3, 2024, on file with author.) Alison L. LaCroix, *The Interbellum Constitution*, 199-200, 203, 205-206, 209 and Samantha Seeley, *Race, Removal, and the Right to Remain*, 16.

[28] Ethan Davis, "Administrative Trail of Tears,", 98, Ned Blackhawk, *The Rediscovery of America*, 243.

The process of persuading the federal government to use its administrative capacity to deport Indians was driven by members of Congress from slave states who wished to expand cotton production and slavery. Because of the small numbers of Native people in the northeastern coastal states, that politicians of that region had little interest in Indian policy and were passive.  But members of the congressional delegation from Georgia, Alabama, and Mississippi all supported Indian deportation. They were joined by others from New York and New Hampshire, two states where the Democratic party dominated. When these numbers were not enough to pass a bill, President Andrew Jackson personally pressured several wavering members to vote for the bill. The result was a bill for Native American deportation that Martin Van Buren described as a thoroughly "southern measure." The economic dimensions of Indian expulsions reveal the profit motive behind the mass expulsion. By the end of the 1830s Indian deportations, "160 million pounds of ginned cotton in 1850," which was 16 percent of the entire national crop, was from appropriated lands formerly owned by Native people.[29] Native Americans lost their ability to stay in their territory because whites wanted their land, and that goal was shared by the subnational and national governments.

By 1830, among the majority population, some people believed it was the best way to ensure the survival of Native peoples and others who were not concerned about Indians but only coveted their land. Andrew Jackson himself pitched it to Native people as in their own interest to leave, writing, "It would enable [the Indians] to pursue happiness in their own way and under their own rude institutions...[and] retard the progress of decay, which is lessening their numbers."[30] Congress passed the Removal Act of 1830, spurred by the federalism confrontation in Georgia with the Cherokees. The act narrowly passed along sectional lines by only a margin

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[29] Claudio Saunt, *Unworthy Republic*, 28, 30, 33, 43, 75-77, 209-310.
[30] Cited in Ethan Davis, "The Administrative Trail of Tears", 58.

of five votes. It would have failed had it not been for the enhanced representation of the slave states due to the 3/5ths compromise in the Constitution.[31] The act authorized President Jackson to trade land west of the Mississippi to Indians in exchange of their current land in the southeast. The executive already had the authority to conduct such an action, but the law secured funding. Removal of that many Indigenous people was beyond the Office of Indian Affairs ordinary budget without the additional funding. Thomas McKenney explained in 1828 that the office was using most of its funds for other things like food, clothing, and medicine for Indians' care. He suggested Congress create funds "specifically, to defray the cost of the movement." The Removal Act of 1830 did so by appropriating $500,000 for Indian deportation.[32]

The deportation of Native people after 1830 required a scope and scale of financial and human resources that only the national government could supply. It necessitated an "assembling of a corps of federal removal agents, the purchase of hundreds of thousands of pounds of supplies and provisions, and the construction of supply depots along the road to the west," enough resources that Ethan Davis called it the nineteenth century's "version of a self-contained administrative agency." Simultaneously, because of the strong resistance of the Cherokee and Choctaw nations, the federal government's capacity "was stretched thin and exposed for its severe limitations." The episode also exposed the weakness of the separation of powers. To the extent the Senate provided minimal oversight, it did so with concern only to save money on the operation, not because the senators cared about Indigenous people's welfare even when reports of suffering from early groups got back to DC. When the House and Senate fought over details, it was over the cost as the elected branches, not out of concern to alleviate Native Americans'

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[31] Michael McLean's, "The 3/5ths Clause and Indian Removal," *W_e_'r_e_ _H_i_s_t_o_r_y_ _*(November 12, 2015), https://werehistory.org/indian-removal/
[32] Stuart Banner, *How the Indians Lost Their Land*, 217.

suffering.[33] These national officials were responsive to voters, not Native people who could not vote (and were in the minority even if they could) whose relationship to the polity was unclear.

With no separation of powers or federalism checks in place, Jackson enjoyed "untrammeled authority" since the Senate had accepted every treaty with the five tribes without amendment and very little debate, except the Cherokee treaty. Ethan Davis enumerated the many problems with the administrative apparatus in 1831 which was:

> haphazard, inexperienced, assembled on an ad hoc basis, and insufficiently instructed. At every level, confusion reigned supreme. Due to political pressure to prove that a removal could be successfully, rapidly, and cheaply accomplished, official did not standardize the process, instead leaving almost every important decision to agents on the ground" which had its advantages for a more flexible response. A desire for a nimbler response and "obsession with thrift and economy" along with an unusually harsh winter caused many "administrative difficulties and much human suffering.

Just one example of the consequences of the disorganization was a group of Choctaw who were deported in the fall and winter of 1832-1833. When they reached Memphis, cholera was coming from the north and with heavy rain and impassible swamps, they died in "substantial numbers." By November 20, 1832, there were "thirteen wagons...filled with the sick Indians and baggage." Although the actual death toll remains unknown, one estimate indicated that 20 percent of the Choctaw died in the fall of 1833. The Creeks suffered similarly with only 2,459 survivors by 1833 after small groups of an initial 3000 had left. In the north, the Shawnees, Odawas, and a mixed group of Senecas and Shawnees were expelled during a cholera outbreak. Of the 808 who left, only 626 arrived, "an attrition rate of over 20 percent."[34] The federal withholding of humanitarian concern and care was a policy decision and was not due to a lack of federal administrative capacity.

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[33] Paul Frymer, *Building an American Empire*, 234, and Ethan Davis, "An Administrative Trail of Tears", 49, 74, 77, 84, 96.
[34] Ethan Davis, "An Administrative Trail of Tears", 49, 74, 77, 84, 96 and Claudio Saunt, *Unworthy Republic*, 153-159.

While foreign migrants sought to enter the US to improve their lives, Native Americans in the southeast in the nineteenth century fought for and lost their right to stay. Federal officials used homestead acts to encourage white people to pour into contested territory, denied protection to Indians from subnational government's harassment, executed, staffed, and funded a mass forced deportation, and set aside less lucrative western lands for the removed Indians. By the end of the 1830s deportation, the federal government had spent "about $75 million," the equivalent today of "a trillion dollars, or about $12.5 million for each deportee." That vast expenditure was not used to compensate Native people for their confiscated land or to hire enough staff or to fund medical care for the journey. It was used to provide insufficient provisions, steamboat captains, and other materiel support for removal. Native lands, which the federal government then called "public lands," were sold to white settlers. In the end, the passage of the Removal Act persuaded the Indians that the national government would not protect them from the states.[35]

It is a myth that Native expulsion was inevitable because the federal government was too weak to stop the flood of settlers who overwhelmed Native communities, or that Indigenous people were too unsophisticated to help themselves. As "William Penn", the pen name of a writer opposing Indian removal, wrote in the *Western Recorder* in 1830, "If Indians are removed, let it be said in an open and manly tone, that they are removed because we have the power to remove them, and there is a political reason for doing it; and they will be removed again, whenever the whites demand their removal, in a style sufficiently clamorous and imperious to make trouble for the government."[36] The expulsion of 80,000 southeastern Native people in 1830 makes clear the American government did not have to be as robust and developed as its

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[35] Claudio Saunt, *Unworthy Republic*, 232, 308-309, 320, and Ethan Davis, "The Administrative Trail of Tears", 98.
[36] Claudio Saunt, *Unworthy Republic*, 316-318, and cited in Ethan Davis, "The Administrative Trail of Tears", 64.

European counterparts to inflict profound devastation on vulnerable populations. Even before federal military power was used, the national government took steps to dispossess Native peoples by the passage of homestead laws and removal laws.[37] The federal system and the separations of powers failed in protecting Native sovereignty and Indians' desire to stay on their land as subnational and national interests and executive and legislative branch priorities converged around racism and the commercial incentives of expanding the growth of cotton and slavery.

**Restrictions on black mobility and ability to remain**

The political and legal geography for free black people wanting to travel between states and to remain was daunting in the early republic and nineteenth century before the Reconstruction Amendments. One effect of the lack of clarity on the citizenship status of free black people was to leave this group without the privileges and immunities protections that most white people enjoyed. The US federal system's decentralized authority on migration and remain policy meant that free black people faced a gauntlet of laws either banning their entry to a state, mandating their departure, or imposing legal disabilities and administrative burdens on their ability to stay in a location of their choosing. All of these impediments were constitutionally allowable under the police powers doctrine.

Fugitive slave and personal liberty laws

While slavery remained legal so too did black people's continued attempts to gain freedom. Federalism repeatedly came into play as slave states insisted that they did not have to accept any free black migration and free states countered that they were not obligated to recognize the human property of enslavers when they traveled to or through free states. With slave and free states both claiming the right to treat migrating free and enslaved black people

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[37] Paul Frymer, *Building an American Empire*, 13, 14, 18.

according to state laws, the only kind of migration that the federal government had authority over was the mobility of black people alleged to have fled slavery.[38] Even as slave states claimed states' rights in determining their treatment of any black migration into their states, they also expected the federal government to help them apprehend fugitives in free states.

The federal Fugitive Slave Act of 1793 had legalized enslavers and hired catchers to go into free states to retrieve alleged fugitives. But the law did not specify whether it would be local or federal officials that would be enforcing the law. For that reason, enslavers thought the law was weak and ineffective. The practical effect of that law was to subject all black people, whether enslaved or free, to "forced removal and sale" given the lack of due process protections for those apprehended.[39] In the 1820s and 1830s, free states tried to shield black populations from the Fugitive Slave Act by passing "personal liberty laws" granting procedural due process protections to arrested black people, including, in some cases, a jury trial.[40] With federal fugitive slave laws and state personal liberty laws colliding, the Supreme Court was asked to rule. The Court upheld the ability of enslavers to seize their human property over the due process rights of black people in 1841 and again in 1842.

In *Groves v Slaughter* in 1841, the Court authorized Robert Slaughter, a slave trader, to go into another state to retrieve a group of enslaved people because he had not been paid for the sale. But the state of Mississippi had a law banning the sale and importation of enslaved people. This law existed not out of humanitarian concern but because Mississippi was guarding their own trade from other competing states. Slaughter challenged that state law as a violation of the

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[38] Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, (New York, NY: Oxford University Press, 2023), 84-86.
[39] Samantha Seeley, *Race, Removal, and the Right to Remain*, 274.
[40] Kate Masur, *Until Justice be Done*, 232-233, Brest, Levinson, Balkin, Amar, Siegel, *Processes of Constitutional Decisionmaking*, 217, 225.

Constitution's commerce clause that gave the federal government authority over the sale. The Court did not address the constitutional question about federal jurisdiction over black people moving between states as interstate commerce, preferring to uphold the sale on a technicality by ruling that the Mississippi had not passed a law activating the provision.[41] The Court ran away from the real fight which was about whether the interstate movement of black people fell under its jurisdiction based on the commerce clause.

A year later, in *Prigg v Pennsylvania* (1842), the Supreme Court ruled that a Pennsylvania law specifically designed to guard against the kidnapping of free black people, was unconstitutional. The ruling held that enslavers could go into free states to apprehend people who they believe had fled slavery. As in *Groves v Slaughter*, one of the justifications for the majority's ruling was preserving the privileges and immunities clause of enslavers. Even though the Constitution's Fifth Amendment provided an alternative textual basis for due process before a person is deprived of liberty existed, the conflict between it and the Fugitive Slave Clause was tidily resolved by construing enslaved people as property. As property, not citizens, they were entitled to no rights. Justice Story wrote the majority opinion, but six justices each wrote separate opinions. Story wrote:

> The Court entertains no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and to remove them from their borders and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.[42]

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[41] 40 U.S. 449 (1841), 515, 516.

[42] *Prigg v Pennsylvania*, 41 U.S. 539, 542-543 (1842), and Kristin O'Brassill-Kulfan, *Vagrants and Vagabonds: Poverty and Mobility in the Early American Republic*, (New York, NY: New York University Press, 2019), 91.

Police powers appeared again in support of slavery. If slave rendition was to be carried out legally, the Supreme Court stated, it would have to be supervised by federal, not state magistrates.

The *Prigg* ruling reinforced the Articles of Confederation and Constitution's withholding of the rights to the liberty of movement and to remain for all black Americans. The practical implication of *Prigg* is that any black person believed to be fleeing enslavement, whether they actually were or not, did not enjoy due process rights in contesting their capture and rendition. Slave patrols roved and were authorized to stop anyone they thought was suspicious and to demand that they show proof of their freedom. Escaped slave ads abounded in local papers, a reminder that someone was searching. The *Prigg* ruling prompted the passage of the Fugitive Slave Act of 1850, which created a crisis in black communities. Even those who had always been free were now under threat of kidnapping because the process was abetted by unscrupulous commissioners who were financially incentivized to uphold claims of enslavers. The 1850 Act did not provide a jury trial or other due process guarantees for black people who were arrested in free states on suspicion of being a fugitive. Free states strengthened their personal liberty laws in light of *Prigg*, forbidding cooperation between local and national officials.[43] The continued clash of the fugitive slave law and state personal liberty laws would be one factor spurring the nation towards civil war.

[Section omitted for length on the challenges to the regulation of mobility with the territorial expansion of the US.}

<u>Regional restrictions on free black people</u>

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[43] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 87, Kate Masur, *Until Justice Be Done*, 235, and Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, 91-92

In the first three decades of the nineteenth century, many free African Americans lost the right to mobility due to the tightening of state laws regulating their movement and stay. Between 1780 and 1804, northern and mid-Atlantic states had increasingly implemented either immediate or gradual emancipation and the population of free black people increased. Former slave states and current slave states in the east responded with exile laws mandating that newly freed people had to depart by a deadline or be re-enslaved.[44] As the population of free African Americans grew, so too did the types of laws restricting their mobility and right to enter or stay in a state.

The federal system allowed a wide range of subnational laws regulating the freedom of movement and the right to remain of black Americans. In slave states and border states, these restrictions took the form of exile laws, labor laws, poor and vagrancy laws, and black codes. The laws followed the logic of slavery jurisdictions which sought to surveil and control the movement of black people with the burden on black people to prove why they were free and authorized to move about.[45] Black people in northern states were presumed to be citizens of their state and in most state, could vote and enjoyed other political rights such as testifying in court against white people. They still faced discrimination and segregation, but their mobility and ability to remain in the state was not restricted by passes and other administrative requirements.[46]

A rejection of a multi-racial democracy and a fear of insurrection also drove a host of subnational laws restricting the mobility and ability to remain of black Americans as a free black population grew. Beginning in the post-Revolutionary War decades, as former slave states like Virginia, Maryland, and Delaware abolished slavery, the population of manumitted people and people who had purchased their own freedom grew. Driven by fear of the successful insurrection

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[44] Samantha Seeley, *Race, Removal, and the Right to Remain*, 14, 17, 240, 284, 286.
[45] Kristin O'Brassill-Kulfan, *Vagrants and Vagabonds*, 85 and Samantha Seeley, *Race, Removal, and the Right to Remain*, 211, 222
[46] Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, 70.

in Saint-Dominique in 1791, Virginia passed a law in 1793 that required free blacks to register with the town or county clerk and be issued a certificate. That same year Virginia passed a law banning outright the entry of free black people into the state. Maryland banned free black migration in 1807. By 1820, there were laws restricting black migration in Maryland, Kentucky, South Carolina, and Georgia. In 1806 the Virginia Assembly passed a law saying that newly freed black people must leave the state within a year of manumission. Nearby Delaware and Maryland responded similarly and sealed their borders to the entrance of any black people. These laws also tried to reduce the size of black communities by first restricting the further importation of enslaved people into the state in 1783 with taxes and criminal penalties.[47]

As northern states passed laws restricting the mobility and right to remain of black Americans, so too did states in the upper south. Ohio responded to its neighboring states' restrictions by passing a law in 1807 requiring black people to post a $500 bond with the local courts when they crossed into Ohio territory. As Seeley has shown, Illinois, Indiana, Iowa, Ohio, Michigan, and Wisconsin attempted to "form a bloc that would not accept African American migrants." Christopher Bonner attributed these states' motivations to racist assumption that more African Americans would mean increased "criminality, poverty, and general misconduct."[48] Without a national migration policy in place or clarity on the citizenship status of free black people, states could erect legal barriers to internal migration.

In addition to bans and exile laws, states also imposed administrative requirements on black people who wished to stay. In 1806, Maryland imposed a ten dollar a day fine on free

[47] Kate Masur, *Until Justice Be Done*, 16-17, 19,40, 44, 48, 73, Samantha Seeley, Race, *Removal, and the Right to Remain*, 210, and Martha Jones, *Birthright Citizens*, 25.
[48] In Samantha Seeley, *Race, Removal, and the Right of Remain*, 236, 212 and Christopher James Bonner, *Remaking the Republic: Black Politics and the Creation of American Citizenship*, (Philadelphia, PA: University of Pennsylvania Press, 2020), 24.

black people who migrated with the additional sanction that those who did not pay the fine would be sold. By 1820, Maryland had closed its borders to free African Americans. Seeley observed "a domino effect" as these laws spread from Virginia to Delaware, Maryland, Ohio, Kentucky, Indiana, and Illinois.[49] As with the public charge laws in the northeastern states and the negro seamen laws in the south, exile and restrictions on free black settlement proliferated among geographically contiguous states, each fearing being too lax would encourage a large free black population.

States' legal justifications for restrictions on free black people claimed that they were neither state nor national citizens and thus not entitled to either mobility or to stay. The main motivation of these laws was to deter the growth of a free black population growing in their state. In 1796, legal expert St. George Tucker of [insert state] explained, "I wish not to encourage their further residence among us. By denying them the most valuable privileges which civil government affords, I wished to render it their inclination and their interest to seek those privileges in some other climate."[50] While most white people had been guaranteed their freedom of movement and right to remain with the privileges and immunities clause, the silence about the citizenship of free black people left them vulnerable to this discrimination.

Regional pressures from horizontal federalism caused clusters of states in the northeast and upper south that were geographically contiguous to each other to adopt similar policies in race-to-the-bottom fashion. No state wanted to be more generous than its neighbors and risk inviting a large free black population. Some of these laws, such as those in the upper south states, were grafted onto existing poor and vagrancy laws, thus ensuring their constitutionality under the

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[49] Martha Jones, *Birthright Citizens*, 25, Samantha Seeley, *Race, Removal, and the Right to Remain*, 210, and Kate Masur, *Until Justice Be Done*, 40, 44, 210.
[50] Cited in Samantha Seeley, *Race, Removal, and the Right to Remain*, 231.

police powers doctrine. The upshot was that free black people in the early national and antebellum period faced a hostile geography that foisted legal disabilities and administrative requirements on their interstate travel and settlement.

<u>The nature of subnational restrictions</u>

Free black people experienced the power of the government restricting their movement and ability to stay in very different ways than Native Americans who were assigned to the management of the federal government and deported by the US Army. Unlike the federal government, subnational governments did not have the administrative capacity to carry out the wholesale deportation of free blacks or to ring the state with local border patrol officials. Nor did state governments control land policy to be able to flood Native American areas with white settlers. Instead, African Americans' mobility and right to remain were subjected to states and local governments creating legal disabilities and weaponizing their limited administrative capacity. The latter requirements were designed to be onerous, stressful, and to send the message that black people did not belong. While it would have been impossible for these measures to be widely enforced, their existence provided a pretext to surveil a population. Even though some requirements were scaffolded on top of state laws to prevent the presence of persons "likely to become a public charge" they were not attempts to protect the public coffers. These laws' intent was to minimize the size of the free black population and to make black people uneasy by making their mobility and very presence precarious.

Without the power to deport a large free black population or to physically police their borders, state governments turned especially to administrative burdens to control and harass with the hope of deterring free black from staying. The types of restrictions black Americans were subjected to resemble the "administrative burdens" in contemporary politics that Pam Herd and

Donald Moynihan have written about. Their concept is useful for understanding the strategies of many state laws aimed at free black people's migration and right to remain. They define administrative burdens as "the costs that people encounter when they search for information about public services (learning costs), comply with rules and requirements (compliance costs), and experience the stresses, loss of autonomy, or stigma that come from such encounters (psychological costs)." Free black people on the move were not looking to access public services but sought to be left alone. Yet with every move to new locations or even the desire to stay in one place required finding out what the laws were and attempting compliance. Herd and Moynihan note that while some government oversight of programs to ensure accuracy and decrease fraud is essential, sometimes governments use these requirements to achieve an ideological goal, thereby undertaking "policy by other means."[51] Legal disabilities and administrative burdens for free black people were the policies and laws of hostile states in lieu of mass deportation, border patrol, and land policy used as a migration incentive.

Examining subnational restrictions on black mobility and the right to remain sheds light on why these restrictions took certain forms and how black communities fought back. Many slave states banned their own people from returning or collected revenue in fees for remaining in their jurisdiction when they became free. Before barring free black people from entry in 1793, Virginia required newly arriving blacks to "register their certificates of freedom" with the county clerk's office and, in many instances, to put up bonds ranging "from $500 to $1,000." Although there was little evidence that people were regularly prosecuted for failing to register in a jurisdiction, the fact that states and localities passed these laws reveals their intent to monitor and control the movement of this population. Some localities and counties went further such as DC

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[51] Pam Herd and Donald Moynihan, *Administrative Burden: Policymaking by Other Means*, (New York: Russell Sage Foundation, 2018), 2, 14, 243, 245.

with an 1821 ordinance requiring free blacks who wanted to stay to obtain a "license" to stay which required three "respectable white inhabitants" to verify their financial independence and a white person to put up a $20 bond.[52]

These tactics used by states fit the definition of Herd and Moynihan's administrative burdens. Instead of governments existing in the service of their citizens, states used racially targeted legal disabilities and administrative burdens to turn government into "a hindrance rather than help." Like the ideological goal of contemporary administrative burdens, these laws aimed to turn free black people into "supplicants" and made clear they were "not entitled to the protection and help that rich and more powerful fellow citizens enjoyed."[53] Part of the package of citizenship benefits for whites, the free mobility and right to remain for free black people were abridged through these measures.

These state laws subjected all black people, regardless of their slave or free status, to white surveillance, harassment, and possible incarceration. Jack Forten, an African American born to free parents, predicted this situation. He argued in *Letters from a Man of Color, on a Late Bill Before the Senate of Philadelphia* (1813) against Philadelphia laws against free black people. Such laws, he predicted, would provide pretext for police "to apprehend any black, whether a vagrant or a man of reputable character, who cannot produce a Certificate that he has been registered." The laws also meant that black people had to preserve and often carry on their person physical proof of their free status. Many whites considered free blacks "homeless and suspect" and assumed them to be runaway slaves. Slave patrols and vigilante groups could at any time inquire about the legality of their presence. Some people carried wills by former enslavers

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[52] Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, 69, and Kristin O'Brasill-Kulfan, *Vagrants and Vagabonds*, 85.
[53] Pam Herd and Donald Moynihan, *Administrative Burdens*, 14, 245,

documenting their manumissions, others presented written testimonials of freedom issued by a county clerk of a slave holding jurisdiction. A few had birth certificates. Local records show that black people were forced to make repeated trips to the courthouse to establish their legal bonafides to move around and to stay, making clear the toll of the administrative burdens. They had to make their identities "portable in the form of a pass or free papers" while moving internally through the country when most whites did not have to.[54] At time when there was no xerox or scanning technology, black people's freedom rested on fragile papers that were vulnerable to loss, theft, damage, and disbelief by local officials.

While the privileges and immunities clause of the Constitution protected the free mobility and settlement rights of most whites, the police powers doctrine supported subnational restrictions on free black people's interstate mobility and ability to stay. The Supreme Court upheld these state policies in *Moore v People of the State of Illinois* (1852). In the majority opinion, Justice Grier referenced police powers and agreed that free states adjacent to slave states had valid reasons for excluding black people. "Some of the states, coterminous with those who tolerate slavery," he wrote, "have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious either as paupers or criminals."[55] The Supreme Court once again sided with slave interests at the expense of African Americans.

The American Colonization Society

Free African Americans not only faced subnational restrictions on their mobility and threat of harassment, but also threats to their ability to stay in the US and not be "repatriated" to

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[54] Kristin O'Brassill-Kulfan, *Vagrants and Vagabonds*, 87, Christopher Bonner, *Remaking the Republic*, 24, 27, and Kate Masur, *Until Justice be Done*, Forten cited at 22, 25.
[55] Samantha Seeley, *Race, Removal, and the Right to Remain*, 222, 224, Martha Jones, *Birthright Citizens*, 106, and *Moore v People of the State of Illinois*, 55 US (14 How.) 13 (1852) at 18.

foreign lands. Political leaders like Thomas Jefferson and other elites had voiced support for the colonization or shipping off free black people to Africa or other foreign countries they had never seen before. The American Colonization Society (ACS), founded in 1819, and the movement it spearheaded led garnered much public and elite support. Colonization supporters rejected the idea of a multiracial society in which free black people were a political and social part. Many abolitionists except the most radical also endorsed colonization and black removal. More worrying to free black people, including many native-born, was that the national and subnational governments earmarked funds to carry out their removal to Africa, Central America, or parts outside of the US.

The unclear legal citizenship status of free black people heightened black fears that they would be deported. The Naturalization Act of 1790 excluded all non-white people from attaining national citizenship. Various northern states treated their black residents differently, with some considering them citizens and granting them some political rights. Slave states often placed a comparable number of restrictions on the political and social rights of free African Americans as on enslaved ones. Without a clear definition of their status until the Fourteenth Amendment's birthright citizenship clause, free black people fell into a liminal legal space. Lucy Salyer described their status as, "Stateless" because "both slaves and free blacks existed outside the logic of nineteenth-century citizenship, owning allegiance to the government because they lived within its jurisdiction but unable to claim the protection that allegiance was supposed to require." Martha Jones similarly pointed out that free black people were "not slaves or aliens," but "nor [were they] the equals of free white men." With their citizenship status ambiguous, the US

Department even refused to issue passports to native-born free black Americans.[56] What legal rights did free black people have to stay in the US?

Many politicians including Lincoln believed that colonization would further emancipation by assuring slave states that newly free blacks would not intermix with whites or the remaining enslaved or pose a financial burden. Border state Republicans backed colonization to assure southerners who manumitted that the end of slavery would not mean "the beginning of racial equality." States, especially ones bordering slave states, in late 1862, supported colonization for the same reasons. The House Select Committee on Emancipation, made up of members from border and Midwestern states, also linked emancipation and colonization. They investigated whether colonization was "a necessary concomitant of their freedom" in Delaware, Maryland, Virginia, Kentucky, Tennessee, and Missouri. The committee believed that only a national government subsidized black removal would allay the slave states' fears and counter the "serious resistance" of whites to abolition who worried mass manumissions would result in black people being an economic burden on the states.[57]

The only group that consistently opposed colonization were enslavers. Unlike the agreement between the national and subnational governments about Native American deportation, many southerners though did not support colonization. Although slavers opposed federal homestead laws fearing an infusion of antislavery migrants into western territories, they opposed colonization. Paul Frymer reports that enslavers acted to "prevented colonization at

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[56] Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, 3, 70, 126, Lucy Salyer, *Under the Starry Flag: How a Band of Irish Americans Joined the Fenian Revolt and Sparked a Crisis of Citizenship*, (Cambridge, MA: The Belknap Press of Harvard University Press, 2018), 130, and Martha Jones, *Birthright Citizenship*, 1.
[57] Paul Frymer, *Building an American Empire*, 235, cite from 245.

every turn" even after they seceded from the Union. To this group, colonization would have been a blow to their economy and society's racial hierarchy.[58]

Colonization was supported by prominent politicians from the founding into the nineteenth century and both subnational and the national governments earmarked financial resources for it. Prominent members attending an 1816 meeting included Henry Clay, Daniel Webster, Bushrod Washington, and Andrew Jackson supported it. At that meeting, Henry Clay explained why African Americans should be removed:

> Can there be a nobler cause than that which, whilst it proposed to rid out country of a useless and pernicious, if not dangerous portion of its population, contemplates the spreading of the arts of civilized life, and the possible redemption from ignorance and barbarism of a benighted quarter of the globe?[59]

State legislatures in Delaware, Maryland, Kentucky, Tennessee, and Virginia allocated money for it. In 1831, the Maryland State Colonization Society (that had split off from the national group), obtained $1000 from the City of Baltimore and chartered a schooner named Onion to sale for Monrovia, Liberia with thirty passengers. In 1832, Maryland allocated $200,000 for colonization removals and authorized the establishment of a colony in Cape Palmas, offering black people free passage to Liberia or Trinidad. The federal government also supported and funded colonization. James Monroe's administration in 1819 used federal funds for stopping the international slave trade and money from a private organization to finance a colonization operation. In 1820, 86 people left for the west coast of Africa. By 1823, 150 people lived in Monrovia, the capital of Liberia.[60]

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[58] Paul Frymer, *Building an American Empire*, 261.
[59] Paul Frymer, *Building an American Empire*, 230, Kunal Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600-2000* (New York, NY: Cambridge University Press, 2015) quote from 78, 97, and Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, 74.
[60] Samantha Seeley, *Race, Removal, and the Right to Remain*, 2, 311, Martha Jones, *Birthright Citizens*, 37-38, and Paul Frymer, *Building an American Empire*, 230, 235.

The colonization plan to send people to Liberia also was meant to address the "problem" of Africans captured by the US who were trafficked on illegal slave ships that were outlawed by Congress in 1809. After the US beefed up its resources to stop the illegal international slave trade in the 1850s, the US navy sent captives from interdicted ships to Liberia. John Harris explained that this policy of sending detainees to West Africa after a brief stay in the US emerged earlier in the nineteenth century. It was an opening for Congress to remove black people from intercepted ships in the 1850s to early 1860s, because "the permanent settlement of Africans on American soil was considered out of the question (at least by most whites)." Liberia proved to be "a convenient solution to the 'problem' of these Africans." Africans from intercepted ships were went to Liberia regardless of whether they originated from West Africa.[61]

While the removal of Africans on interdicted illegal slave ships was not voluntary, to black Americans in the US it was not always clear to whether colonization was voluntary. In the 1780s, as a backlash to black Americans demanding rights after the Revolutionary War and the liberalizing of manumission laws in Virginia, Maryland, and Delaware. Calls for colonization accompanied the first wave of gradual emancipation beginning in the 1780s. Black communities debated for a decade about whether they should leave the US or fight for inclusion. By the mid 1790s, colonization had failed because African Americans rejected it. Around the US, black institutions like African American churches and schools provided structures to organize black communities to fight to stay and for them to work at the state and national levels to secure their rights.[62]

[61] John Harris, *The Last Slave Ships: New York, and the End of the Middle Passage*, (New Haven, CT: Yale University Press, 2020), 130-131. Harris notes that in the 1850s, the US Navy recaptured "6,452 Africans."
[62] Samantha Seeley, *Race, Removal, and the Right to Remain*, 171, 173, 189.

By the 1830s, even fewer black people wanted to leave the US because many had far lengthier and deeper ties to the country than recent European migrants. Free blacks saw the movement as part of white attempts to limit their mobility, and to simply "access to space in the United States." They were also suspicious of the timing of the resurgence of colonization in the early nineteenth century since it coincided with a growing free black community's desire to move around and stay in some locations. State colonization schemes did not always make clear the move would be voluntary such as the plan drafted in Maryland in 1832 by Octavius Taney, brother of Roger Taney. The scheme to fund colonization had "no such conditional language in his resolution, no hint that removal would be voluntary."[63] With the American Colonization Society directing the effort and the zeal for removal, African Americans felt insecure about their ability to remain in the US.

While the forced expulsion of Native Americans was inept in deporting tens of thousands to clear the way for whites, the desired removal of black people was not. The two removal attempts are a study of administrative capacity. For colonization, the national government lacked the necessary resources to forcibly deport the much larger free black population and there was consistent political opposition from slave states in Congress. Colonization was also unpopular and roundly rejected by African Americans by the 1830s. In the end, only "about 15,000 blacks were actually repatriated" to Africa and scholars are skeptical about whether they actually wanted to go.[64]

The unsuccessful "repatriation" of black people is also due to the sequencing of government sponsored removal efforts. The nineteenth century renewed push for black

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[63] Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic*, 74, Christopher James Bonner, *Remaking the Republic*, 15, Samantha Seeley, *Race, Removal, and the Right to Remain*, 189, 309, and Martha Jones, *Birthright Citizens*, 47.
[64] Kunal Parker, *Making Foreigners*, 97.

colonization followed Native American deportation by 30 years. At first, some African Americans were willing to consider colonization, but the community did not agree about it. By 1831, even superficial support among blacks disappeared and organizing against it began in earnest. Black people organized themselves through churches and community groups and, with other allies, they built interstate political infrastructure to combat colonization and forced removal. Activists who had organized to oppose Indian removal but were unsuccessful at preventing the devastation on Native communities now had time to organize and create networks to defeat black deportation. Activists built on the public outrage over the tragedy and horror of Indian deporation. The actions of the ACS at the state level galvanized black people to travel between states and to create expansive networks to share information. They well knew that the ACS would not stop at removing people from Maryland and Ohio alone. Whites may not have believed black people were entitled to the right to mobility and to remain, but black people insisted on it and exercised their civil rights to do so whenever they could.[65]

In part because antebellum citizenship was unclear, free black people were able to resist the many restrictions placed on them. Black communities and their supporters vigorously challenged these laws and asserted their right to move about and stay in the country. Their arguments took several tacks including pointing to their birthright as qualifying them to be rights bearing citizens. Northern black Americans argued that their state citizenship entitled them to constitutional guarantee of privileges and immunities that allowed them to travel and stay freely. Realizing that states held primary power for defining migration and settlement, African

[65] Paul Frymer, *Building American Empire*, 77, 125, 261, Christopher James Bonner, *Remaking the Republic*, 9, 32, 39-40, 48, 51-52, 57, 68, 75, 105, and Martha Jones, *Birthright Citizens*, 90,

Americans argued that they were members of the nation and set out to establish a relationship with the national government to mitigate and superseded state-level restrictions.[66]

[Section omitted for length on an analysis of the nebulousness of black citizenship and *Dred Scott v Sanford*.]

**Restrictions on the poor**

The police powers doctrine undergirding federalism also allowed states and localities to restrict the ability of poor people of all backgrounds to move or remain in place. Repeatedly subnational officials cited police powers to defend their aggressive targeting and policing of the foreign and domestic poor to prevent them from entering, traveling through, or staying in their jurisdictions. Subnational governments like Massachusetts disavowed indigent people who were not legally settled in their jurisdiction and tried to prevent them from coming in or staying. One's legal place of settlement was the last location that a person was economically productive or where a local government had recognized them as a resident for legal purposes of settlement. Therefore, one's place of legal settlement could be either a foreign country or a domestic location.[67] The policing of the mobility and right to remain of the poor gave local officials tremendous power.

US immigration historians do not usually conceive of laws directed at poor people as part of immigration policy history, but as Kristin O'Brassill-Kulfan indicated, "Vagrancy statues functioned as forms of antimigratory policing that contravened the rights of free ingress and regress afforded to residents of the United States." Vagrancy encompassed a range of behavior including "homelessness, working as a huckster, begging, and scavenging." Vagrancy laws

[66] Christopher James Bonner, *Remaking the Republic*, 3.
[67] Hidetaka Hirota, *Expelling the Poor: The Atlantic Seaboard States and the Origins of American Immigration Policy*, (New York, NY: Oxford University Press, 2017), 43.

criminalized and limited the mobility and ability to remain of poor people, even if they were searching for work but had gone outside of their place of legal settlement. People who had not paid poor taxes in a jurisdiction, obtained government recognition of their residence, or contributed to the local economy in a government recognized way, "were sent back to the last place where they had done so" by subnational officials.[68] The native- and foreign-born poor were subject to this treatment. Indigent people seeking better economic opportunities or moving to be near family or friends who would be a supportive community were criminalized.

Before national and state welfare and social safety net programs were created in the twentieth century, localities were equally unwelcoming of the foreign and domestic poor since either could drain limited local coffers and almshouses. The northeastern states that received the largest number of foreign migrants had especially harsh punishments for the mobile poor, including corporal punishment in the form of whippings. Massachusetts was particularly concerned about the Irish who arrived between 1846 and 1855. In that period, Irish workhouses, institutions set up to provide for the elderly, orphans, sick, and those lacking jobs and money, helped finance 20,000 people to emigrate to the US. Landlords in Ireland also helped pay for 50,000 to 100,000 poor tenants who could not pay rent to migrate to the US. These two groups of Irish "assisted paupers" comprised only a small percentage of the 1.8 million Irish who left Ireland for North America, but they shaped New York and Massachusetts's legal mechanisms and policies. Americans believed that the assisted paupers were not voluntary migrants but were burdens who would not contribute to society useful ways. Layered on top of the classist views toward the poor was nativism and anti-Catholicism. Especially in Massachusetts, "'Irish,'

[68] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond: Poverty and Mobility in the Early American Republic*, (New York: New York University Press, 2019), 17, 9, 15, 29, 19, 45.

'immigrant,' and 'pauper' became virtually synonymous."[69] Being native born or having US citizenship did not provide protection against the enforcement of poor and vagrancy laws.

The decentralization of the migration bureaucracy in the states and the lack of procedural protections provided frontline officials charged with enforcing poor and vagrancy laws with broad discretion. It resulted in exclusions and deportations based on a presumption of indigence. This situation was the most acute during the brief ascendency of the Know-Nothings beginning in 1854 when the nativists' main contribution to migration policy was to create the unlimited power of removal by public officials in New York and Massachusetts. In those two states, Irish paupers were summarily expelled without court orders or even the minimum procedural due process. In Massachusetts, the law simply stated that Alien Commissioners could deport paupers from the state. But as Hidetaka Hirota found, "Destinations were determined based on an officer's perception of where the pauper 'belonged.'" A poor Irish person could be deported to "New York, Canada, or Ireland" depending on the officer's assessment. If the person had relatives or friends in another US state or Canada, they were usually returned there. Similarly, vagrancy laws were also highly discretionary. Local Massachusetts police were authorized to arrest vagrants "at the request of *any person* or upon their *own information or belief*."[70] Where a poor person was expelled to was arbitrary.

Poverty did not only limit one's mobility and right to remain. Kristin O'Brassill-Kulfan argued that one's social class also determined one's worthiness to be present in a community, determined one's likelihood of being arrested, ability to receive poor relief, and susceptibility to general state surveillance and restriction. Pass systems, first used in the colonial period to

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[69] Hidetaka Hirota, *Expelling the Poor—Atlantic Seaboard States & the 19th-Century Origins of American Immigration Policy*, (New York: Oxford University Press, 2017), 17, 40, 42, 51, 59.
[70] Hidetaka Hirota, *Expelling the Poor*, 101, 106, 107-108, 147 (original emphasis).

monitor the movement of indentured servants, were developed by local authorities to manage the poor in the early nineteenth century in the northern states. In early nineteenth-century New Jersey, for example, residents who had legally recognized settlement were issued a pass by judges. Those not having a pass were subject to "force removal" by the local constables.[71]

Like the horizontal federalism pressures in the upper south states regarding laws regulating free black people, there was a similar race to the bottom among northeastern states in controlling the foreign and domestic poor. Through the nineteenth century, New York officials frequently accused Massachusetts of sending its paupers to New York when these transients seemingly had no ties to that state and had never been there before. New York was upset that many new arrivals had no provisions at all, making them public charges immediately.[72] Similarly, in 1817, Members of the Philadelphia Society for the Promotion of Public Economy complained that the charitable organizations in the city "induce the poor to come from all quarters." Baltimore almshouse officials were convinced that poor Marylanders had heard about the spaciousness of their facilities and the quality of the food and were being incentivized to walk over a hundred miles to go to almshouses there. Likewise, free black people entering Ohio were not welcomed. One Ohioan complained [in 1818?] that the state would "suffer seriously" from the policies of Virginia and Kentucky "driving all their free negroes upon us" and urged lawmakers to strictly regulate their entry.[73] Instead of laboratories of democracy, in policing the poor, states adopted competing approaches to do the least for the poor as possible to insulate themselves from having to care of unwanted populations.

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[71] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 12, 23.
[72] Hidetaka Hirota, *Expelling the Poor,* 150-152.
[73] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 41, and Kate Masur, *Until Justice Be Done*, 29, 131.

The primary goal of poor and vagrancy laws was to expel indigents from communities. These policies also magnified their reach by allowing average citizens to accuse people of poverty and vagrancy. Laws that were textually neutral were applied in disparate ways, not just by law enforcement officials, based on race, ethnic, and gender. Gendered disparities in enforcement also abounded as single and pregnant women, women with children, or children drew suspicion. Given the wide discretion to local officials and the lack of procedural protections, poor and vagrancy laws were a means for a community to define its membership. For whites who were not destitute, including recent European migrants and middle-class people, moving around the country was the path to economic advancement and to go to be near family and other community support. For migrating poor and free black people, their movement was restricted and "excessive mobility" of these two classes was policed and criminalized.[74]

African Americans faced especially harsh policing and penalties under poor and vagrancy laws. In the early republic and antebellum periods, poor and vagrancy laws were used to augment or replace slave laws to restrict the movements of black people. With the wave of manumissions after the Revolutionary War, northeastern states also became concerned about another allegedly indigent population. They were afraid of an influx of free black people from the southern states as manumissions and people buying their own freedom became more frequent. Virginia, Maryland, and Delaware took a racialized approach to enforcement. Each followed the same strategy of banning free black people from the state if they "were not registered and without legal settlement" and requiring those who remained in the state to carry paper passes on their person at all times when traveling outside of their legal settlement location.[75]

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[74] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 26, 61, 118-119, 157.
[75] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 85, 91.

Failure to abide by these laws meant a heightened level of threat to black poor people than for poor whites because of the disproportionate punishments for each group. In Maryland in 1839, policies required constables to be vigilant in especially looking for "vagrant blacks and their neglected children." If constables determined African Americans to be unable to support themselves and lacking a work ethic, they would be auctioned as a slave for that year.[76] While poor whites could be jailed or whipped for their poverty, if local officials determined they were not legally settled faced much more severe penalties.

The restrictions on free blacks in midwestern states in the antebellum period were amplified by vigilante violence. White mobs burning down black homes and business that caused a wave of ex-migration to Canada. In 1828, after white Ohioans demanded their state strictly enforce it restrictive migration laws, the black community realized their livelihoods and safety were being threatened. They sent scouts to Canada to look for a place to stay. In August of 1829, rioting white mobs forced "as many as fifteen hundred Black Cincinnatians" to flee and "several hundred" went to Candida to form the colony of Wilberforce in 1830.[77] Official poverty statistics showed the toll of the violence and the legalized discrimination on black communities. In the 1820s, African Americans were overrepresented among the indigent transient population but "almost completely absent by 1850." O'Brassill-Kulfan attributes this steep reduction in indigent black people in almshouses to "the increase in racially motivated violence from the 1830s to 1850s, especially in border regions."[78] Whether through black codes or racism layered on to vagrancy and poverty laws, states tried to expel free black communities.

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[76] Hidetaka Hirota, *Expelling the Poor*, 43 and Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 24, 40-42, 101-102.

[77] Samantha Seeley, *Race, Removal, and the Right to Remain*, 32.

[78] Kristin O'Brassill-Kulfan, *Vagrants and Vagabond*, 53, 116, 118.

At certain points in US immigration history, the United States became a nation that people left, not migrated to, owing to the harsh laws on mobility and remain against politically unpopular groups. During the 1850s, "thousands" of African Americans fled to Canada, out of the reach of national fugitive-slave commissioners. But many black communities weathered the violence and discrimination and stayed. Registration records show "at least forty independent settlements" in Indiana before the Civil War and "dozens more Black landowners" in Ohio, Indian, and Illinois.[79]

While the ability of most white people to move to or remain in the place of their choice was part of their citizenship benefits, those same actions were treated by states as a privilege to be bestowed by white people for politically powerless groups. States and localities continued to legally restrict the freedom of movement and right to remain of poor people until *Edwards v California* in 1941, a case arising out of California's desire to restrict poor people fleeing the Great Depression. Only then did the Supreme Court invalidate these state laws.

**Conclusion**

The myth that there were open borders before federal enforcement began in the late nineteenth century does a disservice to US migration policy history. It obfuscates more than it reveals. The myth suggests that once one successfully entered the United States, one was free to move about and stay where one wanted at will. The simplistic duality of open and closed borders does not explain why certain groups' internal migration and right to stay was restricted, while others were allowed and even encouraged to move around the nation via federal land policy. The open borders myth not only ignores the interstate barriers but does not comprehend the nature of government power used to restrict unwanted groups.

[79] Samantha Seeley, *Race, Removal, and the Right to Remain*, 300-301, Kate Masur, *Until Justice Be Done*, 84, 238.

Interstate travel and the ability to remain in a place of one's choice was not universally enjoyed. US founding documents guaranteed the freedom to move and assumed the right to remain for most white people. Those same documents laid out exceptions, categories of people whose privileges and immunities to move and stay would not be protected. Undefined definitions of citizenship in this period meant that neither the national nor subnational governments saw politically powerless groups as having any right to move or remain; they could stay only as a matter of privilege allowed by the white majority so determined. The federal system and police powers encouraged blocs of states to erect internal barriers.

For some, including individuals who were born in the US, internal borders abounded to impede their reunification with friends and family, to pursue better economic opportunities, or to remain where they were to embed themselves in a welcoming community. Enslaved people searching for freedom, free black people, and poor people in general faced racism, class discrimination, or both in moving through and across the US and especially in trying to set roots. 80,000 Native Americans wanted to be left alone in their ancestral lands but were forcibly deported by the national government to make way for white settlers and recent European migrants who had no ties to the nation. In multiple ways, the freedom of movement and right to remain for politically powerless groups were shaped by both slavery and settler colonialism whose logic operated on the prioritizing of land, mobility, and the right to remain for whites.

The open borders binary also hides how different unwanted groups experienced the power of the state. Administrative capacity varied considerably by the nineteenth century between the federal government, states, and localities. Understanding how politics assigned the mobility and right to remain to a level of government is a beginning to understand the lived experiences of unwanted groups. A closer look at how the federal system channeled mobility

and remain restrictions reveals the nature of the coercive government powers inflicted on a group. Black and poor people experienced a crazy quilt of legal disabilities and administrative burdens foisted on them without due process protections. Indigent and free black people faced state and local laws, fees, paper passes, income assurances, and registration.  Native people in the southeast faced a flood of white settlers channeled into their homelands by federal land policy and the federal financing and staffing of brute military power in deporting them to the west. That inadequate effort caused great suffering while forcing people west. While Indigenous people lost their fight to remain, black Americans were able to organize networks to contest and navigate the discriminatory regime of state laws. Their numbers were so large that even the federal government lacked the resources to carry out their deportation. The Constitution not only created federal system where politics determined which group was assigned to which level of government's supervision, but in that system, it determined the magnitude and nature of administrative capacity to circumscribe one's ability to remain.