INTERSTATE EXTRADITION

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ABSTRACT

An interstate extradition crisis is brewing. As states increasingly criminalize conduct whose protection is a core public policy of other states, such as abortion, gender-affirming care, and gun possession, it appears imminent that a governor will receive an unwelcome extradition demand. Under many circumstances, federal law requires that governors arrest and extradite fugitives upon demand of the state from which they fled. This mandate presents a grave and immediate threat to interstate comity and the rule of law.

There is, however, another way forward. The states may, through collective action, provide governors the power to reject unwelcome extradition demands without running afoul of the Constitution or federal law. Surprisingly, this end run would realign extradition practice with nearly two hundred years of history and tradition. From the nation's founding until the Supreme Court decided Puerto Rico v. Branstad *in 1987, the federal government declined to enforce federal extradition law. To fill this vacuum, the states created laws and practices that diverged from federal law in many ways, including allowing governors to refuse extradition demands on equitable grounds.*

How well did this more flexible approach work in actual practice? An original analysis of newspaper coverage of equitable extradition refusals between 1930 and 1987 reveals that governors used this power judiciously: refusing extradition rarely and typically in cases featuring extraordinary facts. Though many of these cases touched on the most polarizing issues of their time—including Black refugees from chain gangs and lynch mobs in the Jim Crow South—even the most contentious refusals engendered only muted responses. Thus, the prior state-driven regime of extradition discretion seemingly succeeded in policing itself. In a moment when the Supreme Court increasingly turns to history and tradition to interpret the Constitution, in the extradition context, the states might turn to history and tradition to circumvent it.

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INTRODUCTION

As partisan tensions rise, it appears likely, even inevitable, that a governor will soon receive an extradition demand from another state that presents her with a political, and perhaps moral, conflict. Consider the following hypotheticals:

A college student in eastern Washington drives to his family home in Idaho for Thanksgiving break. His seventeen-year-old sister confides that she is pregnant and wishes to terminate the pregnancy. The brother drives his sister from Idaho to Washington, where she terminates the pregnancy lawfully under Washington law. Weeks later, their parents, who oppose abortion in all circumstances, discover what happened and contact the authorities. A grand jury indicts the brother on charges that he violated Idaho's abortion trafficking law.[1] Washington Governor Bob Ferguson decries the charges as unethical and unconstitutional. Nonetheless, the governor of Idaho demands that Governor Ferguson arrest and extradite the brother.

Across the country, a Manhattan grand jury indicts Eric Trump for falsifying business records to aid his father's 2024 presidential campaign during a campaign stop in New York. The charges deploy a substantially identical legal theory to the one used in New York's criminal case against President Trump. Florida Governor Ron Desantis blasts the charges as a baseless political witch hunt. Nonetheless, the governor of New York demands that Governor Desantis arrest and extradite Eric Trump.

Must the governors honor these extradition demands? The Constitution's Extradition Clause,[2] the Extradition Act of 1793,[3] and a 1987 Supreme Court decision[4] answer unanimously: Yes. The law in its current form requires that when a defendant commits a crime in one state and then leaves for another state, the second state must arrest and hold the individual for pickup upon the charging state's demand.[5]

The criminal charges underlying an unwelcome extradition demand may relate to conduct whose protection is a core public policy interest of the state, such as reproductive care, gender-affirming care, gun possession, or religious expression. Or the governor may view the underlying criminal case as fundamentally illegitimate, targeting a high-profile political figure on weak facts or a tenuous legal theory.

Federal law's extradition mandate presents a grave and imminent risk to interstate comity and the rule of law. It adds fuel to an ongoing extraterritoriality arms race, with states leveraging extradition to expand the

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[1] IDAHO CODE § 18- 623 (2024).
[2] U.S. Const. art. IV, § 2, cl. 2.
[3] 18 U.S.C. § 3182.
[4] Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987).
[5] Federal extradition law applies only to someone who *leaves* the charging state after committing an alleged crime. Louisiana's well-publicized demand for Dr. Margaret Carpenter, a New York doctor who sent abortion medication into Louisiana, thus fell outside the scope of federal extradition law: Dr. Carpenter never stepped foot in Louisiana in the course of her alleged crime and accordingly, never left. Dr. Carpenter's case and the scope of federal extradition law are discussed *infra* section I.B.

territorial reach of their criminal laws, and states responding with evermore aggressive shield laws to combat that expansion. When a governor does, inevitably, receive an offensive extradition demand, she will face immense pressure from her constituents to resist it. Because federal extradition law is sorely underdeveloped, states have ample room to avoid, obstruct, and delay compliance. Their evasive maneuvers threaten to destabilize a system that quietly and uncontroversially conveys thousands of fugitives each year.

There is, fortunately, another way forward. I propose an amendment to the Uniform Criminal Extradition Act that would require the governor of a state to, as a matter of state law, withdraw her extradition demand to another state upon request of that state's governor if that state had adopted the same amendment.[6]

Surprisingly, this end run around the Constitution is consistent with two hundred years of extradition law and practice, both in its substance—allowing governors to reject unwelcome extradition demands—and its approach—state collective action to nullify undesirable features of federal extradition law. In the context of interstate extradition, federal supremacy is, historically, the exception, not the rule.

Beginning shortly after the nation's founding, governors routinely rejected extradition demands for equitable reasons—that is, reasons not contemplated in federal extradition law. An 1861 Supreme Court decision, *Kentucky v. Dennison*,[7] cemented the practice, holding that the federal government had no power to compel state compliance with the Extradition Clause or Extradition Act.

In the late 19th and early 20th centuries, the states collaborated to build a robust interstate extradition apparatus grounded in state law and informal agreement.[8] Many features of this state-developed system plainly conflicted with or circumvented aspects of federal extradition law.[9] The federal courts acquiesced: blessing state-developed practices as consistent with federal law notwithstanding their tension with the text of the Extradition Clause and Extradition Act. Likewise, Congress and the federal executive branch

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[6] All states except South Carolina and Mississippi have adopted the Uniform Criminal Extradition Act—a uniform state law with procedures that govern contemporary extradition practice. 11 U.L.A. CRIM. LAW & PROC. 51 (Master ed. 1974) [hereinafter UCEA], at Editors' Notes, tbl. of Jurisdictions Adopting the 1936 Act, available on Westlaw, https://www.westlaw.com/Document/NDF01DCC004C211DCBAE7C0FA0144D7AC/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

[7] 65 U.S. (24 How.) 66 (1861).

[8] This process culminated in the creation of the Uniform Criminal Extradition Act in the 1920s and 1930s. *See infra* Section III.C.2.

[9] *See infra* Section III.C.3.

consistently supported state supremacy over interstate extradition law and practice.

Though it papered over many aspects of federal law, the state-developed system left *Dennison* discretion intact. It relied on comity and the expectation of reciprocity, not compulsion, as its enforcement mechanism. Thus, for nearly 200 years following the nation's founding, asylum state[10] governors occasionally exercised discretion to refuse an extradition demand on equitable grounds.

This article presents results from a novel study of newspaper coverage of these equitable extradition refusals between 1930 and 1987,[11] finding 240 instances over that period—roughly than four per year. These cases typically featured evidence of actual innocence or gross procedural error in the underlying criminal case, a sentence that was vastly disproportionate to the severity of the underlying offense, or strong evidence of the alleged fugitive's lack of risk to public safety. Many cases, especially in the first half of the 20th century, concerned Black refugees from chain gangs and lynch mobs in the Jim Crow South. I find that, even in those intensely polarized cases, governors accepted having their extradition demands rejected on occasion as a necessary cost of maintaining their own discretion to do the same. Spurned governors occasionally issued sternly worded press statements, and, a handful of times, refused an extradition request tit-for-tat as reprisal. However, even when *Dennison*—the precedent prohibiting federal enforcement of the Extradition Clause—appeared vulnerable, no state *ever* challenged a governor's extradition refusal in federal court, a move that would have imperiled the state's own authority to reject extradition demands.

In 1987, the Supreme Court abruptly ended the long tradition of federal non-intervention in extradition matters. Puerto Rico—which, as a territory, did not benefit from *Dennison*'s rule that the federal courts lacked the power to compel action by state officers—sought mandamus to compel Iowa Governor Terry Branstad to extradite an Iowan charged with murder in Aguadilla, Puerto Rico. The Supreme Court overruled *Dennison*, holding that the federal courts could enforce states' compliance with federal extradition law.

Even as *Branstad*'s implications grow increasingly concerning, discussion of potential alternatives is absent from the scholarly conversation. This article provides a novel exploration of the history and tradition of domestic extradition law and practice, illustrates the dangerous

[10] Extradition case law and scholarship typically refer to the state that receives an extradition demand as the "asylum" state and the state that issues the request as either the "charging" state or "demanding" state. I follow that convention in this article.

[11] In 1987, the Supreme Court decided *Puerto Rico v. Branstad*, which ended governors' ability to reject extradition demands on equitable grounds. 483 U.S. 219, 222 (1987).

implications of *Branstad*'s break from the tradition of state supremacy, and proposes a solution to realign contemporary practice with its historical norms.

The article proceeds as follows: Part I describes how federal extradition law creates a looming crisis for governors of both parties who, when confronted with an unwelcome extradition demand, will face an intractable conflict between upholding their oath to the U.S. Constitution and commitment to their constituents' values and state's constitution. Part II explores the states' likely responses to extradition conflicts including strategies they might deploy to deny, delay, and prevent offensive extradition demands. These maneuvers contribute to an ongoing extraterritoriality arms race and risk destabilizing the ordinary system of fugitive extradition. Part III proposes a different way forward and justifies it as consistent with the long tradition of state supremacy over extradition law and practice. The states built a system that circumvented the dictates of federal law, and, until 1987, the federal government never intervened to deter or stop them. Restoring gubernatorial discretion through state collective action comports with this history and tradition. Part IV considers the benefits of restoring extradition discretion. A novel study of extradition refusals between 1930 and 1987 finds that governors exercised their equitable discretion to deny extradition demands judiciously and largely without controversy. Part IV concludes by considering explanations for the historical success of extradition discretion, as well as policy alternatives and objections.

I. THE LOOMING CONFLICT

In 1987, the Supreme Court held that federal courts had the authority to issue a writ of mandamus compelling the Governor of Iowa to arrest and extradite Ronald Calder to face murder charges in Puerto Rico.[12] The *Branstad* decision eliminated governors' discretion to refuse an extradition demand on equitable grounds.[13] In doing so, it closed a loophole that had, for almost 200 years, tempered the maximalist implications of federal extradition law.

Post-*Branstad*, a governor may refuse to honor a sister state's extradition demand only if it fails to satisfy the spare requirements in the text of federal law: the demand must be made from the executive authority of the charging state to the executive authority of the asylum state, it must include paperwork showing that the alleged fugitive has been charged with a crime in the

[12] Puerto Rico v. Branstad, 483 U.S. 219, 222 (1987).
[13] *Id.* at 227.

demanding state, and the target must be a fugitive as defined in federal caselaw.[14]

Any other basis for refusing extradition is now impermissible. Caselaw, developed largely in habeas corpus cases,[15] illustrates *Branstad*'s implications: It is no matter if the charges underlying the extradition demand are trivial[16] or if the alleged fugitive spent decades in the asylum state as a pillar of his community and supporter of his family before being discovered.[17] The governor may not refuse extradition even where criminalization of the underlying conduct conflicts with an obligation in the state's constitution that she swore an oath to protect.[18] Whether the fugitive would receive due process or face cruel and unusual punishment upon her return is irrelevant.[19] It is also irrelevant if the fugitive can present a dispositive legal defense to the underlying charges.[20] Governors had historically used discretion to refuse extradition in cases like these.[21] Those past—but today impermissible—refusals to extradite lynch mob escapees[22] and slave liberators[23] illustrate the

[14] 18 U.S.C. § 3182; Michigan v. Doran, 439 U.S. 282, 289 (1978); *infra* note 171 (discussing the definition of "fugitive" in federal law).

[15] The Supreme Court has confronted extradition cases in two different postures: In cases like *Puerto Rico v. Branstad*, a state or territory seeks mandamus to compel the governor to honor its extradition demand. 483 U.S. at 219. The Court has decided only one other case in this posture, *Dennison*, 65 U.S. at 84, and the Sixth Circuit has decided one more. Alabama v. Engler, 85 F.3d 1205 (6th Cir. 1996). The vast majority of extradition cases arrive before the Court when an alleged fugitive challenges her detention with a petition for habeas corpus. *See, e.g.*, *Doran*, 439 U.S. at 284. These challenges materialize after the asylum state's governor agrees to comply with the extradition demand and arrests the alleged fugitive on an extradition warrant. *Id.*

[16] *Dennison*, 65 U.S. at 99 ("The word 'crime' [in the Extradition Clause] of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony."). *See also* Pointer v. Slavin, 25 Conn. Supp. 179 (Super. Ct. 1964); State v. Taylor, 22 S.W.2d 221 (Tenn. 1929); Starks v. Turner, 365 P.2d 796 (Okla. Crim. App. 1961).

[17] *Engler*, 85 F.3d at 1206.

[18] *Branstad*, 483 U.S. at 224–227 (describing the facts of *Dennison*, 65 U.S. 66, and reaffirming its conclusion that the Extradition Clause is not limited to crimes under the law of both the asylum state and demanding state).

[19] New Mexico, *ex rel*. Ortiz v. Reed, 524 U.S. 151, 152 (1998) (parole revoked arbitrarily); Drew v. Thaw, 235 U.S. 432, 440–41 (1914) (inadequate mental state to form mens rea); Hale v. Crawford, 65 F.2d 739, 741–42 (1st Cir.), *cert. denied*, 290 U.S. 612 (1933) (racial discrimination in jury selection); Pacileo v. Walker, 449 U.S. 86, 87 (1980) (Eighth Amendment violation).

[20] California v. Superior Ct. of California, San Bernardino Cnty., 482 U.S. 400, 413 (1987) (Stevens, J., dissenting).

[21] *See infra* section IV.A.

[22] *Infra* notes 218–223 and accompanying text.

[23] PAUL FINKELMAN, AN IMPERFECT UNION 6–7 (1981).

disquieting implications of the courts' assurance that concerns can be resolved in the courts of the demanding state.[24]

Still, *Branstad* received little fanfare at the time it was decided.[25] The 1970s and 1980s marked an unusual peak in state criminal law and policy convergence. As Professor John J. Murphy proclaimed five years before the Supreme Court decided *Branstad*: "There has been a generally unchronicled drive toward uniformity [among the states] in determining what constitutes a crime and what may be done with the offender."[26]

That era is gone. Today, it is immediately obvious why *Branstad*'s maximalist implication—governors must extradite people even to face charges they view as unconstitutional or amoral—presents concerns.

This section explores two developments that create today's fertile ground for extradition conflicts. First, states' substantive criminal laws and enforcement priorities diverge sharply on issues of high polarization and salience, most notably, healthcare activities like abortion and gender-affirming care. Second, states' leaders voice growing skepticism of the integrity of the criminal justice systems in other states, especially in prosecutions against high profile political figures like New York's criminal case against Donald Trump. Each subsection begins with a "near-miss," a case study that illustrates the potential for a future extradition conflict.

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[24] Johnson v. Matthews, 182 F.2d 677, 680–81 (D.C. Cir. 1950) ("If this fugitive's constitutional rights are being violated in Georgia, he can and should protect them in Georgia. . . . Even if we were to assume, upon the basis of this fugitive's allegations, that the state courts are impervious to his assertions, we would make no such assumption concerning the federal courts having jurisdiction in that state."); Sweeney v. Woodall, 344 U.S. 86, 90 (1952) ("Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State."); *Pacileo*, 449 U.S. at 88 (1980) ("[C]laims as to constitutional defects in the Arkansas penal system should be heard in the courts of Arkansas, not those of California.").

[25] A literature review reveals only three academic works—a student note, a student comment, and a short essay—commenting on *Branstad* and its implications in the five years following the decision. Jay P. Dinan, *Note: Puerto Rico v. Branstad: The End of Gubernatorial Discretion in Extradition Proceedings*, 19 U. TOL. L. REV. 649 (1988); Richard Eldon Davis, *Puerto Rico v. Branstad: Restoration of Integrity for the Constitution's Extradition Clause*, 19 CUMB. L. REV. 109 (1988); Kenyon Bunch and Richard J. Hardy, *Continuity or Change in Interstate Extradition? Assessing Puerto Rico v. Branstad*, 21 PUBLIUS 51 (1991). The Court itself devoted only a paragraph to sweeping aside the long tradition of federal non-intervention in extradition law. *Branstad*, 483 U.S. at 228–229 ("Even assuming the existence of this tradition of 'executive common law,' no weight can be accorded to it. Long continuation of decisional law or administrative practice incompatible with the requirements of the Constitution cannot overcome our responsibility to enforce those requirements.")

[26] John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1070 (1983).

A. Conflicts Over What Conduct is Criminal

On January 31, 2025, a grand jury in West Baton Rouge Parish, Louisiana, indicted New York doctor Margaret Carpenter for causing an abortion in violation of Louisiana law.[27] Dr. Carpenter is alleged to have prescribed abortion-inducing medication via telemedicine and mailed it to a Louisiana patient who used it to terminate her pregnancy in April 2024.[28] Shortly after Dr. Carpenter's indictment, Louisiana Governor Jeff Landry demanded that New York Governor Kathy Hochul arrest and extradite her.[29] Governor Hochul had discretion to reject Governor Landry's demand because it was not subject to federal extradition law: Dr. Carpenter's alleged unlawful actions took place entirely outside of Louisiana. Accordingly, Carpenter was not a "fugitive" from Louisiana.[30, 31] Hochul, a strong abortion-rights supporter, vehemently rejected Landry's demand.[32]

Dr. Carpenter's case is a harbinger of the sort of extradition conflict discussed in this article. Access to abortion and gender-affirming care, especially for minors, is the most salient and polarizing area in which states criminalize conduct that is expressly protected in other states. Since the Supreme Court's decision in *Dobbs v. Jackson Women's Health*

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[27] Indictment, *State v. Carpenter*, 18th Jud. Dist. Ct. (W. Baton Rouge Par., La. Jan. 31, 2025), https://abortiondocs.org/wp-content/uploads/indictment.pdf; La. Rev. Stat. Ann. § 14:87.9(B)(1) (West 2025).

[28] Rosemary Westwood, *Louisiana Mother, N.Y. Doctor Indicted for Giving Minor Abortion Pills,* NEW ORLEANS PUBLIC RADIO (Jan. 31, 2025), https://www.wwno.org/public-health/2025-01-31/louisiana-mother-ny-doctor-indicted-for-giving-minor-abortion-pills; Pam Belluck & Emily Cochrane, *New York Doctor Indicted in Louisiana for Sending Abortion Pills There*, N.Y. TIMES (Jan. 31, 2025) https://www.nytimes.com/2025/01/31/health/abortion-louisiana-new-york-prosecution-shield-law.html.

[29] Extradition Warrant for Margaret D. Carpenter, LA. OFFICE OF THE GOVERNOR (Feb. 11, 2025), https://www.scribd.com/document/831069479/Extradition-Warran-Doctor-Margaret-Carpenter; Greg LaRose, *New York Governor Rejects Louisiana Extradition Request for Doctor Accused of Mailing Abortion Pills*, LA. ILLUMINATOR (Feb. 13, 2025), https://lailluminator.com/2025/02/13/new-york-extradition/.

[30] *See infra* note 171 (discussing the fugitivity requirement of federal law).

[31] The exchange devolved into harsh words between the governors and a New York policy change designed to obscure the identities of New York's telemedicine abortion medication providers moving forward. LaRose, *supra* note 29 ("So you're telling me @GovKathyHochul is protecting criminals over victims?!" Landry wrote. "And they wonder why people and businesses are fleeing the state."); *Governor Hochul Signs Legislation Protecting Reproductive Freedom,* GOVERNOR KATHY HOCHUL (May 10, 2022), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-protecting-reproductive-freedom-governor-hochul-signs

[32] *Id.* ("Never, under any circumstances will I sign an extradition agreement that sends our doctor into harm's way to be prosecuted as a criminal for simply following her oath.")

Organization,[33] many states have passed or pledged to enforce criminal statutes aimed at limiting abortions.[34] At the same time, many states have made it a crime to provide gender-affirming care to a minor.[35] Any alleged violation of these laws in which the defendant was physically present in the charging state at any point while committing the alleged crime would bring it within the ambit of federal extradition law.[36]

Some states' laws are particularly ripe to create extradition conflicts: They can be violated in such a way that federal extradition law attaches even though the gravamen of the events—the provision of the abortion or gender-affirming care—occurs in a state where it is legal. For example, Idaho's abortion trafficking law prohibits transporting minors seeking abortions to other states—a service that organizations like the Northwest Abortion Access Fund proudly provide.[37] Other statutes prohibiting healthcare activity are written so broadly as to permit prosecution when that activity occurs outside the state. In Alabama, it is a felony for any individual to "cause" a minor to receive gender-affirming care.[38] Read to its limits, this permits Alabama prosecutors to charge a parent who drives his transgender child from Alabama to another state to receive treatment, or a doctor in Alabama who

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[33] 597 U.S. ___ (2022).

[34] *Tracking Abortion Bans*, N.Y. TIMES, https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html (last visited July 7, 2025); *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited July 25, 2025).

[35] United States v. Skrmetti, 145 S. Ct. 1816, 1825 (2025) ("In the last three years, more than 20 States have enacted laws banning the provision of sex transition treatments to minors, while two have enacted near total bans."); Equality Maps: Bans on Trans Youth Medical Care, GLMA: HEALTH PROFESSIONALS ADVANCING LGBTQ+ EQUALITY (last visited July 25, 2025), https://www.glma.org/equality_maps_bans_on_trans_y.php.

[36] Had Dr. Carpenter prescribed or delivered the pills to her patient while she herself was in Louisiana, or had she prescribed or delivered puberty-blocking medication in Tennessee for the purpose of treating her minor patient's gender dysphoria, Governor Hochul would not have had the discretion to refuse her extradition.

[37] IDAHO CODE § 18- 623; Matsumoto v. Labrador, 122 F.4th 787, 805, 816 (9th Cir. 2024) (holding that the law's challengers are not likely to succeed with their argument that portion of the law criminalizing the transportation and of minors seeking abortions to other states is unconstitutional); *Id.* at 809 (discussing the Northwest Abortion Access Fund's activities). *See also* TENN. CODE ANN. § 39-15-201 (2024).

[38] ALA. CODE § 26-26-4 (2024) ("no person shall engage in or cause any of the following practices to be performed upon a minor if the practice is performed for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex as defined in this chapter [including] . . . administering puberty blocking medication to stop or delay normal puberty . . . [p]erforming surgeries that artificially construct tissue with the appearance of genitalia . . . ")

refers her patient to a clinic in a different state.[39] Alternatively, a state may prosecute this parent or this doctor as in-state facilitators of out-of-state conduct using traditional derivative liability theories.[40] We may expect states to attempt maneuvers like these to regulate extraterritorial conduct given recent frustrations at unsuccessful attempts to do so through other channels like civil "bounty" laws.[41]

Alternatively, extradition conflicts may arise from cases in which the prosecution of conduct occurring entirely *within* the charging state shocks the conscience. In these cases, the tension emerges from the charges themselves, rather than the weak territorial relationship between the charging state and the charged conduct. Examples in this category include demanding the extradition of abortion providers to face capital murder charges or people who allegedly contributed to their own miscarriages by skipping a pre-natal doctor's appointment and have since left the state.[42]

Some of the more provocative theories of prosecution may eventually be vacated as unconstitutional or beyond the reach of the charging statute.[43] However, it is critical to emphasize that challenges to the underlying criminal charges may only be made *post*-extradition in the courts of the demanding state.[44] In the course of her arrest, extradition, trial, conviction, and appeal, a fugitive-defendant may spend years in custody before vindicating her rights—even when the case's constitutionality was dubious from the start.[45]

Substantial public attention has been focused on interstate tension in the domains of abortion and gender-affirming care because of the Carpenter case and rapid developments in states' anti-abortion laws and shield laws. However, the structural features discussed above—some states criminalize conduct that others protect as a core public policy value—exist in other domains with reversed political polarity, such as gun possession.

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[39] *See also*, Jonathon J. Booth, *A New Satanic Panic*, 36 YALE J. L. & FEMINISM 1, 49–56 (forthcoming 2025) (discussing state laws that criminalize gender-affirming care, using a bathroom consistent with one's gender identity, and other actions likely to be undertaken by transgender people).

[40] *See infra notes 107*–110*,* 113–114 and accompanying text (discussing charges via derivative theories of liability).

[41] *See infra* notes 111–112 and accompanying text.

[42] Eve Hanan, Miscarriages and Manufactured Confessions 1–2 (unpublished manuscript) (on file with the author); Valena E. Beety & Jennifer D. Oliva, *Policing Pregnancy "Crimes"*, 98 N.Y.U. L. REV. ONLINE 29, 49 (2023).

[43] Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 399, 416–439 (2024); Joseph W. Singer, *Conflict of Abortion Laws*, 16 NORTHEASTERN L. REV. 313, 418–19 (2024).

[44] *See supra* note 24 (illustrating the federal courts' animosity toward pre-extradition challenges).

[45] Or, like most defendants in the criminal justice system, she may lack the means or wherewithal to mount a sophisticated legal challenge.

In New York, it is a Class C Violent Felony to possess a loaded firearm outside of one's home or business.[46] New York law also prohibits possession of certain firearm parts including silencers, high capacity magazines, and bump stocks regardless of whether one owns or has access to a weapon that could use them.[47]

By contrast, twenty-nine states presumptively permit adults to carry concealed, loaded handguns outside their homes.[48] Tellingly, supporters of laws permitting unlicensed concealed carry refer to them as "constitutional carry" laws—reflecting their view that the Second Amendment of the U.S. Constitution and analog state constitutional provisions mandate allowing permitless carry.[49] These supporters include state governors.[50]

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[46] N.Y. Penal Law § 265.03 (McKinney). New York felonies are graded A through E, with A being the most serious. A first offense C Violent Felony carries a mandatory minimum sentence of 3.5 years incarceration. *Id.* at § 70.02. New York law provides an exemption from prosecution for individuals licensed to carry a firearm. *Id.* at § 265.20. *See also* N.Y. Penal Law § 400.00 et seq. (McKinney). Notwithstanding the Supreme Court's requirement that New York replace it's once restrictive limitations on licensure with a "shall issue" presumption, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. ___, 142 S. Ct. 2111 (2022), each year, thousands of people continue to be prosecuted and sentenced to prison for simple possession of a firearm in New York. New York State Division of Criminal Justice Services, *New York State Adult (18+) Convictions by County 2014-2024*, https://www.criminaljustice.ny.gov/crimnet/ojsa/tableau_adult_convictions.htm (last visited July 25, 2025) (navigate to convictions under "PL Article 265"). Many states have similar laws under which possession of a firearm is presumptively illegal. *Concealed Carry Permit Required*, EVERYTOWN FOR GUN SAFETY (updated Jan. 15, 2025), https://everytownresearch.org/rankings/law/concealed-carry-permit-required/.

[47] N.Y. Penal Law §§ 265.02, 265.01-C. In New York City, it is also a crime to possess firearm ammunition without a license to carry the type of weapon that could fire it. N.Y.C., N.Y., Admin. Code § 10-131(i)(3).

[48] Tyler R. Smotherman, *More Rights, More Responsibilities: A Post-Bruen Proposal for Concealed Carry Compromise*, 2024 WIS. L. REV. 343, 362.

[49] *Id.* at 345; Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 68 ("For proponents of 'constitutional carry' in particular, the idea that the only permit necessary to carry a firearm was signed in 1791 is not a slogan, it's a legal and historical reality.")

[50] In remarks accompanying his signing of Georgia's constitutional carry law, Governor Kemp stated, "SB 319 makes sure that law-abiding Georgians—including our daughters and your family, too—can protect themselves without having to ask permission from state government. The Constitution of the United States gives us that right—not the government." Governor Brian P. Kemp, *Remarks at the Signing of the Georgia Constitutional Carry Act* (Apr. 12, 2022), https://gov.georgia.gov/press-releases/2022-04-13/gov-kemp-signs-georgia-constitutional-carry-act-law. *See also*, "You don't need a permission slip from the government to be able to exercise your constitutional rights." Guy J. Sagi, *Constitutional Carry Gaining Steam*, AM. RIFLEMAN (Apr. 16, 2023), https://www.americanrifleman.org /content/constitutional-carry-gaining-steam/ (quoting Florida Governor Ron Desantis).

Extradition requests charging conduct in either healthcare or gun possession domains would present governors with a moral, legal, and political conflict. Extraditing someone to face criminal charges for receiving abortion care would seem to conflict with the sworn duties of the California Governor not to "interfere with an individual's reproductive freedom"[51] or the Colorado Governor's not to "discriminate against the exercise of [the right to abortion]."[52] The conflict would be particularly pronounced when the alleged fugitive was the governor's constituent, when most of the conduct in question occurred inside the governor's own state (where it was legal), or when the charges relied on dubious legal reasoning. For governors who understand the U.S. constitution to provide a positive right to concealed carry, an extradition demand for an adult to face criminal charges for carrying a handgun creates a similar problem.

Governors in these situations would be caught between their oaths to uphold their state's constitution and the U.S. Constitution. They would also face political blowback. State constitutional amendments protecting reproductive rights passed by ballot measure recently and with overwhelming support.[53] Similarly, many states' legislatures approved constitutional carry provisions recently and overwhelmingly.[54]

B. Skepticism of the Integrity of Other States' Criminal Justice Systems

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[51] Cal. Const. art. I, § 1.1.

[52] Colo. Const. art. II, § 32.

[53] *See, e.g.*, Cal. Const. art. I, § 1.1 (added by Prop. 1, approved Nov. 8, 2022, eff. Dec. 21, 2022) ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion . . ."). The amendment passed in 2022 with 67% support. Ballotpedia, *California Proposition 1, Right to Reproductive Freedom Amendment (2022)*, https://ballotpedia.org/California_Proposition_1,_Right_to_Reproductive_Freedom_Amendment_(2022) (last visited July 24, 2025); Vt. Const. ch. I, art. 22. The amendment passed in 2022 with 77% support. Ballotpedia, *Vermont Proposal 5, Right to Personal Reproductive Autonomy Amendment (2022)*, https://ballotpedia.org/Vermont_Proposal_5,_Right_to_Personal_Reproductive_Autonomy_Amendment_(2022) (last visited July 24, 2025); Colo. Const. art. II, § 32. The amendment passed in 2024 with 62% support. Ballotpedia, *Colorado Amendment 79, Right to Abortion and Health Insurance Coverage Initiative (2024)*, https://ballotpedia.org/Colorado_Amendment_79,_Right_to_Abortion_and_Health_Insurance_Coverage_Initiative_(2024) (last visited July 24, 2025). *See also* Ballotpedia, *2022 Abortion-Related Ballot Measures*, https://ballotpedia.org/2022_abortion-related_ballot_measures (last visited July 24, 2025); Ballotpedia, *2023 and 2024 Abortion-Related Ballot Measures*, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures (last visited July 24, 2025).

[54] Smotherman, *supra* note 48, at 362.

On March 30, 2023, a New York County grand jury voted to indict then-former President Donald Trump on thirty-four counts of Falsifying Business Records in the First Degree.[55] One of the indictment's loudest critics was Ron DeSantis, Governor of Florida, where Trump resided.[56] The day after the Grand Jury voted the indictment, DeSantis wrote, "Florida will not assist in an extradition request given the questionable circumstances at issue with this Soros-backed Manhattan prosecutor and his political agenda," seemingly inviting an extradition showdown.[57] However, before the controversy played out any further, Trump and the New York County District Attorney's office negotiated his voluntary surrender, mooting the issue.[58]

The Trump case illustrates a second class of challenging extradition requests, arising from criminal charges that the asylum state's governor perceives to be an illegitimate exercise of the charging state's criminal justice powers. In recent years, confidence in the criminal justice system has eroded on both the political left and right. Republican leaders, most notably President Trump, attack state prosecutions as illegitimate, based on fabricated or absent

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[55] Indictment, *People v. Trump*, Indictment No. 71543-23 (Sup. Ct. N.Y. Cnty. Mar. 30, 2023), https://manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf; Press Release, Manhattan Dist. Att'y's Off., *District Attorney Bragg Announces 34-Count Felony Indictment of Former President Donald J. Trump* (Apr. 4, 2023), https://manhattanda.org/district-attorney-bragg-announces-34-count-felony-indictment-of-former-president-donald-j-trump/.

[56] "[D.A. Bragg], like other Soros-funded prosecutors, they weaponize their office to impose a political agenda on society at the expense of the rule of law and public safety." Maggie Haberman & Jonathan Swan, *DeSantis, Breaking Silence on Trump, Criticizes Manhattan Prosecutor*, N.Y. TIMES (Mar. 20, 2023), https://www.nytimes.com/2023/03/20/us/politics/desantis-trump-indictment.html.

[57] Ron DeSantis (@GovRonDeSantis), TWITTER (Mar. 30, 2023, 6:55 PM), https://twitter.com/GovRonDeSantis/status/1641575007552778243.

[58] Brooke Singman, *Trump Surrender Delayed After Manhattan DA Indictment Due to Secret Service Involvement: Source*, FOX NEWS (Mar. 31, 2023), https://www.foxnews.com/politics/trump-surrender-delayed-manhattan-da-indictment-secret-service-involvement; Becky Sullivan & Rachel Treisman, *Trump Traveling to New York for Arraignment; What's Next for the Trial?*, NPR (Apr. 3, 2023), https://www.npr.org/2023/04/03/1167756756/trump-traveling-new-york-arraignment-whats-next-trial.

evidence,[59] and a grossly inappropriate use of prosecutorial discretion and resources.[60, 61]

To President Trump's adherents, it is demonstrably true that someone could be indicted on politically motivated charges for which there was "no evidence" and convicted in a "rigged" trial in a New York state criminal court.[62] In the event that a Republican politician, Trump administration official, or other Trump supporter is indicted in a jurisdiction they perceive

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[59] *See, e.g.*, Donald Trump Addresses His Club 47 Fan Club in West Palm Beach, Florida, FACTBA.SE (October 11, 2023), https://rollcall.com/factbase/trump/transcript/donald-trump-speech-club-47-fans-west-palm-beach-florida-october-11-2023/#211 ("You know I'm innocent, and that that's the nice thing. These things are—these are made up. I call them Biden indictments. They're not indictments. They're Biden indictments. These are crooked people. I did that mugshot for Atlanta, and they also control the local AGs and they control the DAs . . . "); Press Gaggle: Donald Trump Speaks to Reporters Before Court in Manhattan, FACTBA.SE (May 9, 2024), https://rollcall.com/factbase/trump/transcript/donald-trump-press-gaggle-before-court-day-14-new-york-may-9-2024/ ("There's no evidence of any crime whatsoever. This is a sham.").

[60] A report by the Republican controlled Judiciary Committee of the U.S. House of Representatives referred to the Manhattan prosecutions against Trump as "weaponiz[ing] the criminal justice system" and "unprecedented and shocking prosecutorial conduct." U.S. House Comm. on the Judiciary**,** *An Anatomy of a Political Prosecution: The Manhattan District Attorney's Office's Vendetta Against President Donald J. Trump* (interim staff report, Apr. 25, 2024), https://judiciary.house.gov/media/press-releases/judiciary-republicans-release-report-manhattan-district-attorneys-offices. *See also* Press Release, Office of Texas Att'y Gen. Ken Paxton (Nov. 4, 2024), https://www.oag.state.tx.us/news/releases/attorney-general-ken-paxton-files-amicus-brief-supporting-president-trump-arguing-special-prosecutor (referring to the prosecutions against Donald Trump as "blatantly unconstitutional… weaponizing partisan lawfare against him.").

[61] At the same time, the political left has grown increasingly concerned about weaponized arrests, investigations, and criminal charges from Republican-led administrations. In the first six months of the Trump administration, numerous Democratic lawmakers and judges have been arrested, and some charged with crimes. Rebecca Schneid & Solcyré Burga, *The U.S. Elected Officials Who Have Been Arrested or Approached by Authorities While Protesting Trump's Immigration Crackdown*, TIME (June 18, 2025), https://time.com/7295823/elected-officials-arrests-confrontations-immigration-protests; Mark Prussin, *U.S. Attorney Drops Case Against Newark Mayor Ras Baraka, Charges Rep. LaMonica McIver for ICE Protest*, CBS NEW YORK (May 20, 2025), https://www.cbsnews.com/newyork/news/ras-baraka-charge-dropped-alina-habba/. While President Trump's direct authority is limited to the federal government, his supporters in state government—many of whom operate in politically homogenous districts and might be eager to generate notoriety—could pursue their own politically motivated investigations and criminal charges.

[62] *See supra* notes 59–60 and accompanying text; Leah Sarnoff, *Donald Trump Calls Hush Money Trial 'Rigged' After Being Found Guilty On All Counts*, ABC NEWS (May 30, 2024), https://abc7.com/post/trump-hush-money-verdict-donald-trump-calls-criminal/14892383/.

to be hostile, and the President and his supporters decry the charges as illegitimate, a conservative governor would face immense pressure not to extradite them to face those charges.[63] In these cases, blocking extradition would seem to be the *only* means to insulate someone from a rigged trial and wrongful conviction: An indictment and extradition request based on sham charges indicate a fundamental breakdown in the demanding state's rule of law, suggesting that the person would not receive a fair trial if they were extradited.

C. Political Implications Across the Ideological Spectrum

A review of potential extradition conflicts reveals that they do not have a clear political valence. It may seem, at first glance, that Democratic governors are most likely to receive an unwelcome extradition demand: Recent laws criminalizing gender-affirming care and abortion in conservative states have received considerable attention in popular media and legal academic literature. Threats and actions by President Trump and his allies to weaponize the criminal legal system against their political opponents have as well. However, prosecutions for conduct related to gender-affirming care and abortion care remain rare.[64] Similarly, there are not recent high-profile examples of politically motivated prosecutions against progressive political leaders in Republican states.[65] Meanwhile, conservatives have for years

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[63] A progressive governor would face similar pressure if she received what she perceived to be a politically motivated extradition demand based on a tenuous legal theory. *See, e.g.*, Patrick Marley, *Texas Governor Threatens to Seek Removal of Democrats Who Fled State, Escalating Tensions*, WASH. POST (AUG. 4, 2025), https://www.washingtonpost.com /politics/2025/08/04/texas-democrats-redistricting-maps-abbott-trump/ (discussing threats by Texas Governor Gregg Abott to request the extradition of Texas Democratic lawmakers who left the state in protest). Cases the likes of those brought against James Comey and Letitia James, had they been brought by a state rather than the federal government, would have formed the basis for a similarly challenging extradition demand. Molly Roberts, *Comey, James, and the 'Animus Through a Megaphone'*, LAWFARE (Nov. 20, 2025), https://www.lawfaremedia.org/article/comey--james--and--animus-through-a-megaphone.

[64] J. David Goodman, *Texas Arrests Midwife and Associate on Charges of Providing Abortions*, N.Y. TIMES (Mar. 17, 2025), https://www.nytimes.com/2025/03/17/us/texas-midwife-abortion-arrests.html (quoting Marc Hearron of the Center for Reproductive Rights: "This is, as far as I know, the first allegation that someone in a ban state is providing an abortion in direct violation of abortion laws"); Pregnancy Justice, *Pregnancy as a Crime: 2023 Year-End Report* 2 (Sept. 2024), https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf (finding 210 related prosecutions nationwide between June 2022 and June 2023).

[65] The prosecutions of James Comey and Letitia James would fit this mold, but were brought by the federal, rather than a state government. *See* Roberts, *supra* note 63.

decried prosecutions by Democratic-led administrations as illegitimately politically motivated—most notably, the prosecutions of Donald Trump in New York and Georgia. In sum, while the risk of an extradition conflict is rising, it is far from clear where or how it will materialize. Republican governors have as much to worry about as their Democratic peers.

Federal law is clear and rigid: There is no legal mechanism for the asylum state governor or alleged fugitive to challenge extradition on the basis of state policy difference, defects in the underlying charges, or deficiencies in the demanding state's criminal process. The unavailability of pre-extradition relief in the courts concentrates pressure on the asylum state governor as the only actor in a position to intervene. Governors presented with an unwelcome extradition demand therefore face an intractable problem. Honoring the demand will offend their constituents, their state's public policy values, and their own sensibilities. Pressure to resist the demand through whatever means available will be more influential than pressure to comply with federal law: Calls to resist will come from the governor's own constituents, and often those who are most politically engaged. The governor may even have a personal stake in the issue, having run on, or endorsed, legislation promoting, for example, protecting gun rights or reproductive rights. This political pressure will be local and immediate. By contrast, the imperative to comply with another state's demand is remote and impersonal. No immediate constituency demands it; no election turns on it.

II. THE RISKS OF MANDATORY EXTRADITION

This section explains that enforcing—or even attempting to enforce—mandatory extradition may undermine, rather than advance, the objectives of simplicity, uniformity, and interstate harmony that it intends to achieve.[66]

First, achieving universal enforcement may not be possible. Governors are unlikely to simply acquiesce to carrying out extradition demands they view as politically toxic and morally repugnant. Forcing them to do so is no easy task. Federal extradition law, as it pertains to the actions of states' executives, is sorely underdeveloped. State law, which developed pre-*Branstad* with the assumption that states could reject unwelcome extradition

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reflect a policy limited to the U.S. Department of Justice or the beginning of a trend of politically motivated prosecutions by other conservative prosecutors.

[66] *See, e.g.*, *Doran*, 439 U.S. at 287 ("The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed."); *id.* at 288 ("The Extradition Clause, like the Commerce Clause[,] served important national objectives of a newly developing country striving to foster national unity."); *Branstad*, 483 U.S. at 227 ("The Framers of the Constitution perceived that the frustration of these objectives would create a serious impediment to national unity, and the Extradition Clause responds to that perception.")

demands, lacks safeguards against exploitation by asylum states seeking to avoid, delay, and resist compliance. States' maneuvers to prevent some extraditions and substantially delay others have the potential to cause considerable collateral damage, upsetting the ordinary extradition of fugitives, of which there are thousands each year.[67] Moreover, it is unclear whether the Trump administration would take actions to compel a state to carry out an extradition that it objected to, even if the Supreme Court ordered it to do so.

Second, even if states *could* be compelled to carry out every constitutionally required extradition demand, that might harm, rather than advance, the objectives underlying the Extradition Clause. It would embolden states to extend attempts at enforcing their laws beyond their borders, contributing to an extraterritoriality arms race. Finally, it is not clear that, even as a matter of principle, mandating extradition would actually promote states' sovereignty interests or interstate harmony more than a policy allowing extradition discretion would.

A. Ineffectiveness at Overcoming States' Resistance

The current state of the law raises serious doubts over the plausibility of achieving compliance with federal extradition law's mandate. All contemporary interstate extraditions are carried out under state law, supplemented by informal agreements, comity, and courtesy. The state law system, codified as the Uniform Criminal Extradition Act, was designed in the 1920s and 1930s, well before the Supreme Court decided *Branstad*.[68] Accordingly, the current system was designed without safeguards against exploitation by asylum states seeking to avoid, delay, or resist unwelcome extradition demands: Before *Branstad*, when the asylum state did not wish to carry out an extradition, it simply refused to do so.[69]

Branstad purported to require states to comply with the letter of federal extradition law, but it created no federal mechanism to carry out that requirement. Federal extradition law as it pertains to states' executive action remains sorely underdeveloped.[70] The federal courts have never adjudicated nuanced strategies designed to prevent, respond to, or retaliate against an offensive extradition demand—any such maneuvers would present issues of

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[67] *See infra* note 98.
[68] *See infra* Section III.C.2.
[69] *See infra* Section IV.A.
[70] The Supreme Court has decided only two cases, *Branstad*, 483 U.S. at 222 and *Dennison*, 65 U.S. at 84, in which a demanding state sought to compel an asylum state to comply with its extradition demand. In these cases, the only issue before the Court was whether the federal government could constitutionally compel state action of this sort. *See supra* note 15; *infra* note 72.

first impression. As this subsection explains, states may attempt many such maneuvers.

1. Deny

The governor of an asylum state might refuse an extradition demand on the grounds that the demand does not satisfy the statutory or constitutional prerequisites for extradition.[71] The federal courts have never confronted a case in which the demanding state contests such a denial.[72] Indeed, the Supreme Court has expressed uncertainty about whether a governor's determination that the accused is (or is not) a "fugitive from justice" is subject to judicial review at all.[73] Complicating the picture, no constitutional, statutory, or decisional authority requires a governor to detail her reasons for refusing extradition. Consequently, if a governor were to deny extradition on the grounds that the target was not a fugitive[74]—regardless of whether or not there was a good faith basis for believing that to be true—and the demanding state challenged that finding, the dispute would present a question the Court has yet to resolve and has expressed some apprehension about resolving.[75]

Alternatively, the asylum state governor might, consistent with past cases,[76] reject an extradition request for an extra-constitutional reason, or no reason at all. In a post-*Branstad* survey of states' extradition officials, several were open to rejecting an unwelcome extradition request, with the hope that the specter of protracted litigation would encourage the demanding state to negotiate the terms of its request.[77] If the demanding state nonetheless sued in federal court to compel extradition, the asylum state might challenge the

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[71] *Doran*, 439 U.S. at 289; UCEA § 4.

[72] All three federal cases in which the demanding state sought an order compelling the asylum state to comply with its extradition demand responded to a governor's refusal were cases in which the governor conceded his decision was equitable, rather than legal, in nature. *Branstad*, 483 U.S. at 222; *Dennison*, 65 U.S. at 84; Alabama v. Engler, 85 F.3d 1205, 1207 (6th Cir. 1996).

[73] Biddinger v. Comm'r of Police, 245 U.S. 128, 132–33 (1917) ("Doubt as to the jurisdiction of the courts to review at all the executive conclusion that the person accused is a fugitive from justice has more than once been stated in the decisions of this Court.") (citing *Ex parte* Reggel, 114 U.S. 642 (1885); Roberts v. Reilly, 116 U.S. 80 (1885); Appleyard v. Massachusetts, 203 U.S. 222 (1906)).

[74] Under federal law, only someone physically present in the demanding state during the commission of the crime for which he is charged is a fugitive. *See infra* note 171 (discussing the fugitivity requirement of federal law).

[75] State courts have employed creative theories in order to reach that conclusion. *See, e.g.*, New Mexico *ex rel*. Ortiz v. Reed, 524 U.S. 151 (1998) (reversing the New Mexico Supreme Court which had granted habeas corpus relief on the grounds that "respondent was not a 'fugitive' from justice . . . he was a 'refugee from injustice.'")

[76] *Branstad*, 483 U.S. at 222; *Dennison*, 65 U.S. at 84; *Engler*, 85 F.3d at 1207.

[77] Bunch & Hardy, *supra* note 25, at 65.

holding in *Branstad* before a Supreme Court that is not shy about reversing its precedent and whose composition is considerably different than it was in 1987.[78]

2. Delay

An asylum state might delay compliance with a valid extradition demand, potentially indefinitely. Neither the Extradition Clause nor the Extradition Act prescribe any timeframe for the asylum state's governor to respond to an extradition demand. Nor does the Uniform Criminal Extradition Act, which expressly allows for the asylum state governor to "investigate" an extradition demand before complying (without providing a timeframe or criteria for such an investigation).[79]

A more flagrantly defiant delay tactic exploits the principle that an asylum state may "hold" an alleged fugitive "until he has been tried and discharged or convicted and punished in [the asylum] state."[80, 81] An asylum

[78] Even if the court affirmed its decision in *Branstad*, enforcement is not certain. The federal courts have never been tasked with effecting an extradition over the persistent intransigence of a state's governor. Perhaps the most straightforward avenue to relief would task the federal executive branch with carrying out the extradition. However, it is far from clear that the Trump administration would obey such a court order where it supported the asylum state's governor in refusing the extradition—for instance, if the fugitive in question were one of Donald Trump's family members or high-profile supporters. *Cf.* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 1 HARV. L. REV. 685, 693 (2018) (noting that federal courts' enforcement of their orders typically requires the support of part the federal executive branch such as the U.S. Marshals Service.).

[79] UCEA § 4. This issue has never been litigated in federal court. The California Supreme Court considered the question in South Dakota v. Brown, 20 Cal. 3d 765, 768 (1978); *id.* at 786 (Mosk, J., dissenting). In that pre-*Brandstad* case, the Court determined that the Governor of California must respond to South Dakota, either granting or denying its extradition demand: "What he may not do is say nothing." *Id.* at 780. The Court implied, though did not say explicitly, that the two years the governor had spent investigating the matter exceeded time allowable under California law (which mirrored the relevant portion of the Uniform Criminal Extradition Act). *Id.*

[80] This common law principle has been recognized by the Supreme Court as part of federal law, Taylor v. Taintor, 83 U.S. 366, 370–71 (1872) and codified in the UCEA § 19. The principle and its history are discussed further *infra* note 189.

[81] The meaning of "hold" in the UCEA is consequential: it could be interpreted to mean "hold in custody" or "hold in the asylum state." If it were the asylum state's intention that the alleged fugitive remain at liberty in spite of the extradition demand, a requirement that they be held in jail in order to keep them in the asylum state would defeat the purpose. States are split on their interpretation and the federal courts have not addressed the issue. Leslie W. Abramson, *Extradition in America: Of Uniform Acts and Governmental Discretion*, 33 BAYLOR L. REV. 793, 806–08 (1981); Application of Carden, 291 Or. 515, 522 (1981) (release after issuance of the governor's warrant is allowed under Oregon law).

state may indefinitely prolong pre-trial proceedings on local charges in order to stave off extradition. Where no local charges exist, the asylum state could, with the consent of the alleged fugitive in a maneuver akin to a collusive suit, initiate them for the purpose of delaying extradition.

These delays flow from the state's executive's actions. A state could manufacture even more extensive delays if its legislature, in anticipation of a potential conflict, modified state law. The legislature might facilitate indefinite holding on local charges by creating a charge in the state criminal code specifically tailored for this circumstance.[82] It might also modify extradition procedure to extend statutory timelines or require that certain fugitives remain at liberty during extradition proceedings where those proceedings relate to charges of a particular type.[83]

After sufficient delay, the demanding state would, presumably, sue to compel action by the asylum state. Even if the asylum state lost in federal court, this litigation would succeed insofar as it further delayed the extradition—contested extraditions typically take years to wind through the courts.[84] In the meantime, the administration in one state or the other may change, political winds may shift, or the specter of lengthy delays and litigation costs may create negotiating leverage.[85]

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[82] An example provision: A person is guilty of destruction of government property in the third degree when a) the person intentionally destroys a document entitled "Special Circumstance Extradition Document" bearing the signature and seal of the state's governor b) the person has been charged with a crime in another state for acts that, had they occurred in this state, would constitute protected healthcare activity and that state has issued a purported extradition demand for that person to answer those charges. All statutory speedy trial provisions are inapplicable to cases charged under this subsection. The punishment for this charge is a ten-year term of no-report probation.

[83] *See* UCEA § 15 (allowing bail pre-requisition); *id.* at § 10 (describing habeas corpus proceedings). *See also* Application of Carden, 291 Or. at 524 (articulating Oregon's law allowing bail or other securing order during habeas corpus proceedings and referencing other states that share this approach). While the Supreme Court has repeatedly overruled state courts' improvident grants of habeas corpus in extradition proceedings, it has never ruled on the procedural nuances of these proceedings, including their timeline.

[84] *See, e.g.*, *Branstad*, 483 U.S. at 221 (six years between initial demand in 1981 and resolution in 1987); California v. Superior Ct. of California, San Bernardino Cnty., 482 U.S. 400, 404 (1987) (3 years between initial demand and resolution); *Engler*, 85 F.3d at 1207 (just under 3 years between demand and resolution); New Mexico, *ex rel*. Ortiz v. Reed, 524 U.S. 151, 151 (1998) (three and a half years).

[85] *See, e.g.*, Francis J. Flaherty, *When Can a State Refuse an Extradition Request?*, 5 NAT. L. J. 14 ("when conservative Republican George Deukmejian won the California gubernatorial election last November, he vowed to extradite Mr. Banks" to whom the prior administration had granted asylum."); *Georgia Frees Burns,* N.Y. TIMES, Nov. 2, 1945, at 21, col. 3 (newly elected Georgia Governor Arnall secured Burns' freedom after two previous Georgia governors had demanded Burns's extradition and reimprisonment); Kevin Sack, *New York Transfers Killer to Oklahoma to Await Execution*, N.Y. TIMES (Jan.

3. Prevent

Federal extradition law's stringent requirements attach only upon demand of the charging state.[86] In contemporary practice, however, the asylum state initiates most extradition proceedings: In the course of an ordinary traffic stop or processing for an arrest, law enforcement checks for warrants in the National Crime Information Center database—an FBI database of arrest warrants commonly referred to as "NCIC."[87] If an out-of-state warrant appears, the officer contacts the jurisdiction that lodged the warrant to verify its existence and determine whether that state wishes for the alleged fugitive to be held for extradition.[88]

Accordingly, in most instances, if the asylum state did not notify the charging state that an alleged fugitive was in their custody, the charging state could not initiate extradition proceedings for that individual because they would not know that individual had been located.

Asylum states may create policies that exploit this arrangement to head off challenging extradition requests. In response to conservative states' enactment of laws imposing civil[89] and criminal[90] liability for providing or facilitating abortion and gender-affirming care, reproductive rights states enacted countermeasures known as "shield" laws. As their name suggests, these laws attempt to insulate people from extraterritorial effects of other

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12, 1995), https://www.nytimes.com/1995/01/12/nyregion/new-york-transfers-killer-to-oklahoma-to-await-execution.html (new gubernatorial administration in New York ends yearslong extradition standoff).

[86] *See infra note* 128 and accompanying text (discussing federal law's demand requirement).

[87] NAT'L ASS'N OF EXTRADITION OFFICIALS, NAT'L MANUAL ON EXTRADITION & INTERSTATE RENDITION 8, 42 (2009) [hereinafter NAEO MANUAL] ("As a general rule, the extradition process begins when a local law enforcement officer in the asylum state learns that there is an out-of-state warrant against a person whom he has located within his jurisdiction."). The author's own practice experience, as well as conversations with numerous extradition officials in several states confirms this. *See also* Alejandra Caraballo, Cynthia Conti-Cook, Yveka Pierre, Michelle McGrath & Hillary Aarons, *Extradition in Post-Roe America*, 26 CUNY L. REV. 1, 46 (2023); Note, *Indigents' Right to Appointed Counsel in Interstate Extradition Proceedings*, 28 STANFORD. L. REV. 1039, 1042–44 (1976). SEC. OF THE COMMONWEALTH OF VA., VA. EXTRADITION MANUAL 17 (2025)

[88] NAEO MANUAL, 8, 42; NATIONAL CRIME INFORMATION CENTER OPERATING MANUAL 1005–08 (2017) [hereinafter NCIC MANUAL]; David M. Bierie & Kristen M. Budd, *Banishing Justice: Extradition Limits in the United States*, 20 CRIMINOLOGY & PUB. POL'Y 595, 616 n.1–7 (2021). These documentary sources are supplemented by interviews with current and former extradition officials. Names of these officials and notes on the interviews are on file with the author and available upon request.

[89] *See infra* note 105 and accompanying text.

[90] *See supra* notes 33–41 and accompanying text.

states' restrictive healthcare laws.[91] Extradition is one of these targeted extraterritorial effects.[92] Some shield law provisions appear to prohibit state officials from updating NCIC or otherwise notifying an out-of-state jurisdiction that they have located a person with an outstanding warrant when that warrant relates to protected healthcare activity.[93] Many shield laws also explicitly prohibit officers from arresting a suspected fugitive when the underlying charges relate to protected healthcare activity.[94]

This approach is not foolproof, however. First, it may not always be clear to an officer or state official when an out-of-state warrant relates to protected

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[91] Similarly, in laws known as Second Amendment protection acts, or "SAPA laws," states committed to protecting individual gun rights have passed legislation insulating residents from federal and other states' gun regulations. *See, e.g.*, MO. REV. STAT. §§ 1.420–1.470 (2021); W. VA. CODE §§61-7B-1 to 10 (2021); Gun Owners of Am., *Second Amendment Sanctuary States,* https://www.gunowners.org/state-sapas/ (last visited July 31, 2025). This section's discussion of shield laws focuses on healthcare shield laws, however, the argument could easily be adapted to SAPA laws or other contexts.

[92] A common feature of many shield laws is to expressly prohibit the governor from arresting and extraditing someone charged with a crime related to protected healthcare activity where, as was the case for Dr. Margaret Carpenter, the extradition is not mandated by federal law. *See, e.g.*, 725 MASS. GEN. LAWS ch. 276, § 13 ("Except as required by federal law, the governor shall not surrender a person charged in another state as a result of engaging in legally-protected health care activity"); COLO. REV. STAT. § 16-19-107(2) (2024) ("Except as required by federal law, the governor shall not surrender a person charged in another state as a result of the person engaging in a legally protected health-care activity. . ."); ILL. COMP. STAT. 225/6 (2024); WASH. REV. CODE § 10.88.250(2) (2024).

[93] *See, e.g.*, MASS. GEN. LAWS ch. 147, § 63(b) (2025) ("…no officer or employee of a law enforcement agency of the commonwealth, while acting under color of law, shall provide information or assistance to . . . any other state's law enforcement agency . . . in relation to an investigation or inquiry into services constituting legally-protected health care activity . . ."); WASH. REV. CODE 7.115.020 ("A state or local agency . . . or any employee thereof . . . shall not cooperate with or provide information to any individual, agency, commission, board, or department from another state . . . for the purpose of enforcing another state's law or an investigation related to another state's law that asserts criminal or civil liability for . . . protected health care services that are lawful in the state of Washington."). *See also* COLO. REV. STAT. § 24-116-102(1); ME. REV. STAT. tit. 14, § 9006(2) (2024). It not yet clear whether states have issued guidance to law enforcement concerning the applicability of these provisions to NCIC entries. For an example of legislation explicitly directing law enforcement activity with respect to NCIC, *see, e.g.*, OH. REV. STAT. § 2935.10(g) ("Any warrant issued for a tier one offense shall be entered, by the law enforcement agency requesting the warrant . . . [into] the national crime information center (NCIC) . . . .").

[94] *See, e.g.*, WASH. REV. CODE § 10.88.330(3); CAL. PENAL CODE § 819(b); COLO. REV. STAT. § 16-3-102(2). Shield laws also prohibit judges from issuing pre-requisition warrants—a legal device to hold an alleged fugitive pending the issuance of a governor's warrant—where the underlying charges relate to protected healthcare activities. *E.g.*, WASH. REV. CODE 10.88.320(3); CAL. PENAL CODE § 847.5(b).

conduct,[95] though nuanced state policy could mitigate this problem.[96, 97] Second, while most extraditions arise from spontaneous NCIC hits, if a state indicted a high-profile political figure, we might expect that it would proactively demand her extradition.

B. Disruption to Ordinary Extraditions

These strategies have the potential to disrupt not just the unwelcome extradition demands they target—they threaten to disrupt the ordinary rendition of fugitives, of which there are tens of thousands each year that proceed almost entirely without incident.[98] The smooth operation of this

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[95] NCIC warrants include approximately 400 codes corresponding to common criminal charges and a space for notes by the requesting jurisdiction. NAT'L CRIME INFO. CTR., NCIC CODE MANUAL 416–438 (2023), https://wilenet.widoj.gov/sites/default/files/public_files-2023-04/nciccodemanual.pdf [hereinafter NCIC Code Manual]. Five of these codes are explicitly related to criminalization of abortion. *Id.* at 424. Frequently, but not always, details about the underlying charges are included in the notes section. Author's conversation with NCIC staff. However, in practice, NCIC codes do not always accurately reflect the underlying criminal charges, especially in less common circumstances. *Id. See also* Caraballo et al., *supra* note 87, at 20–21, 49.

[96] State policy could require that officers ask in every circumstance, upon encountering an NCIC warrant, if the alleged fugitive believed the warrant related to protected healthcare activity, and if so, contact the governor's extradition office to begin an investigation before notifying the requesting jurisdiction. Or the state could create a political refugee registry—inviting individuals fleeing persecution in another state to proactively register in a state database such that, upon entering that person's information into a computer terminal, law enforcement would receive a notification to contact the state's extradition office before responding to any potential NCIC hit.

[97] The state may encourage officer care and conservatism by enforcing penalties to redress violations. Shield laws already include action and penalties, though none, for the moment, appear to have been applied to law enforcement acting in their official capacity. For example, Maine created a cause of action for "tortious interference with legally protected health care activity," authorizing relief against "another person that, whether or not acting under color of law, files or prosecutes hostile litigation." ME. REV. STAT. tit. 14, § 9002 (2024). "Hostile litigation" is defined to include criminal charges that "…sanction or punish any . . . [person who] aids or assists legally protected health care activity." *Id.* at §9002(6). *See also* ILL. 735 COMP. STAT. CH. §§ 40/28-11, 28-12 (2023) (creating a cause of action against government officials who violate rights afforded under the state's shield law); N.Y. CIV. RIGHTS LAW § 70-B (McKinney 2022) (creating a cause of action to redress "Unlawful interference with protected rights").

[98] There is no presently available nationwide data on the volume of interstate extraditions. Through public records requests and interviews with state extradition officials, I have estimate that there have been 20,000 to 60,000 interstate extraditions each year in recent years. In forthcoming scholarship, I compile and analyze these datasets.

system relies on extensive cooperation and comity.[99] Still, even with full cooperation, extradition is so costly and burdensome that jurisdictions routinely refuse to pick up wanted individuals when they are found in another state, even individuals charged with serious and violent offenses.[100] Any marginal decline in cooperation or increase in costs associated with extradition could throw the entire system into disarray.

Attempts to circumstantially limit NCIC notifications could devolve into a broad deterioration of the NCIC system, the method through which most extraditions are initiated. Officers who lack legal training may, out of an abundance of caution to avoid violating their state's shield law, refrain from issuing NCIC notifications in many cases, especially where violation of the state's shield law incurs financial or legal liability.[101] States may circumvent officers' side-of-the-road judgement by creating a centralized apparatus to screen NCIC hits. Or, frustrated by the cost or difficulty of screening cases using only the limited information contained in NCIC, states may adopt a self-serving policy: refusing to notify unless the alleged fugitive appears to present a threat to public safety in the asylum state. In turn, states affected by restrictions in other states' shield laws might adopt their own retaliatory measures. Florida might instruct its officials to avoid NCIC codes likely to attract scrutiny in other states—for example, coding violations of its law prohibiting gender-affirming care for children as child endangerment. Or Texas may instruct its officers not to issue NCIC notifications for gun possession warrants. These measures and countermeasures would broadly deteriorate the volume of fugitive notifications and the integrity of the data in the NCIC system, interfering with its functionality writ large.

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[99] Even the UCEA's procedure, which was designed to standardize a once bewilderingly complex process, remains costly and complicated. Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 372 (2022) ("In Pennsylvania, for example, interstate extradition requires [up to] two warrants, three hearings, and twenty-two distinct steps."). *See also infra* notes 249–251 and accompanying text.

[100] A 2014 study of the NCIC database—which includes only felonies and "serious misdemeanors," found that 34% of warrants in the database indicated that the issuing jurisdiction would not extradite across state lines under any circumstances, and 64% had geographic limits on extradition. David M. Bierie, *Fugitives in the United States*, 42 J. CRIM. JUST. 327, 330 (2014). A study of warrants for serious violent crimes added to NCIC between 2017 and 2019 found that 36% had extradition limits. David M. Bierie & Kristen M. Budd, *Banishing Justice: Extradition Limits in the United States*, 20 CRIMINOLOGY & PUB. POL'Y 595, 602 (2021). Resource burdens associated with extradition, especially in counties with limited police resources, may explain these surprisingly high non-extradition rates. *Id.*

[101] *See supra* note 97 (discussing shield laws' penalties and causes of action).

A similarly substantial impact could arise from states' pursuing costs they are entitled to under federal law.[102] States' mutual agreement not to pursue extradition costs from one another is a clever accounting trick. Because states do not pursue costs from one another, the costs of holding and processing other states' fugitives are quietly absorbed into corrections department and police budgets. Meanwhile, the costs of holding and processing the state's own fugitives are entirely off the books—borne by the corrections and police departments of other states. If states began to account for and collect these costs from one another, extradition-related expenses would become more visible and subject to political pressure.[103] In a cost-cutting environment, politicians might argue to reduce the state's extradition spending—demanding reimbursement from other states and almost certainly engendering a tit-for-tat response.

C. Extraterritoriality Arms Race

Even if *Branstad* did secure universal compliance with the Extradition Clause, there would be a problematic irony to this success: it would incentivize states to grasp at evermore audacious assertions of extraterritorial power, undermining the very territorial sovereignty that the Extradition Clause seeks to promote.[104]

The specter of extraterritorial enforcement looms over many conservative states' anti-abortion lawmaking. For example, in 2021, prior to the Supreme Court's decision in *Dobbs*, Texas passed a "bounty law,"

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[102] States are entitled to collect from one another "All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority." 18 U.S.C. § 3195. *See also* Colfax Cnty. Bd. of Cnty. Comm'rs v. State of N.H., 16 F.3d 1107, 1110 (10th Cir. 1994) [hereinafter *Colfax Cnty*.]; Monroe Cnty. v. State of Fla., 678 F.2d 1124, 1126 (2d Cir. 1982). However, as a matter of comity, states have agreed not to pursue these costs except under extraordinary circumstances. NAT'L ASS'N OF EXTRADITION OFFICIALS, Resolution No. 31, in *Nat'l Manual on Extradition & Interstate Rendition* app. R (2009) [hereinafter NAEO Resolution 31] (on file with author); *Colfax Cnty.*, 16 F.3d at 1109.

[103] These costs are substantial. The 926 fugitive cases opened in the five counties comprising New York City in 2023 accounted for a total of 41,136 days of incarceration. At a cost of $1,389 per day to incarcerate someone at New York City's Rikers Island jail complex, New York City absorbed over $57 million in costs. Data concerning the number of extraditions from New York was received via freedom of information request to the New York Office of Court Administration; Office of New York City Comptroller Brad Lander, *Longer Court Case Processing Times Inflate NYC's Jail Population & Cost Taxpayers Nearly $1 Billion Annually, Comptroller Lander's Report Reveals* (July 16, 2024), https://comptroller.nyc.gov/newsroom/longer-court-case-processing-times-inflate-nycs-jail-population-cost-taxpayers-nearly-1-billion-annually-comptroller-landers-report-reveals/ (reporting cost of incarceration at Rikers Island).

[104] *See infra* Section II.D.

creating a private right of action against anyone who "knowingly engages in conduct that aids or abets the performance or inducement of [an abortion prohibited under Texas law]."[105] The law has no stated territorial restrictions, and scholars have speculated that it could be applied to conduct with the slimmest connection to Texas.[106] Louisiana's statute that criminalizes "abortion by means of abortion-inducing drugs" similarly has no territorial restriction.[107] It is well established that states may prosecute crimes like homicide and child abuse with even a minimal territorial nexus to the state.[108] States charging abortion and pregnancy crimes under these general-purpose statutes—a common and growing practice[109]—can import their extraterritorial principles.[110]

So far, however, states have struggled to apply their anti-abortion laws to regulate extraterritorial conduct. As discussed above, Louisiana cannot hale Dr. Carpenter to court, at least while she stays in New York and

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[105] TEX. HEALTH & SAFETY CODE ANN. §§ 171.201 to .21, amended by 2021 Tex. Sess. Law Serv. ch. 62 (West) [hereinafter Texas SB8]. The law awards statutory damages of $10,000 per violation along with costs and attorney's fees. *Id.* at § 171.208(b). *See also* Paul Schiff Berman, Roey Goldstein, & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 398, 480 (2024) (discussing SB8).

[106] Texas SB8, *supra* note 105. For instance, an out of state doctor providing an abortion to a Texas woman, or an out of state chaperone accompanying a Texas woman to an out of state abortion clinic could be subject to liability in Texas having never stepped foot in Texas. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 48–49 (2023).

[107] LA. REV. STAT. ANN. § 14:87.9(B)(1) (West 2025). *See also supra* note 38 and accompanying text (discussing the potential for Alabama's law criminalizing provision of gender-affirming care to be applied extraterritorially).

[108] Cohen et al., *supra* note 106, at 30–33; Kaufman, *supra* note 99, at 376–380. Scholars argue that the application of these principles to chill out of state travel or speech may not withstand constitutional scrutiny. Berman et al., *supra* note 43, at 416–439; Singer, *supra* note 43, at 103. However, as explained above, a challenge to the constitutionality of the prosecutor's theory of liability may only be challenged post-extradition in the courts of the charging state. *See supra* note 24 (citing relevant cases).

[109] Beety & Oliva, *supra* note 42, at 46–51; Laura Huss et al., *Self-Care Criminalized: The Criminalization of Self-Managed Abortion from 2000 to 2020*, IF/WHEN/HOW (2023), at 38, https://ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf (the plurality of cases prosecuting alleged self-managed abortions from 2000 to 2020 were charged "under a range of crimes, including those related to fetal remains, child abuse, felony assault or assault of an unborn child, practicing medicine without a license, or homicide and murder); Jessica Shuran Yu & Hayden Betts, *Texas Capital Murder Case Attempts to Severely Punish Abortion Pill Use by Treating a Fetus as a Person*, TEXAS TRIBUNE (June 30, 2025), https://www.texastribune.org/2025/06/30/texas-abortion-pill-capital-murder-charge-fetal-personhood/.

[110] For example, a doctor who refers a patient to an out of state abortion provider, or a brother who accompanies his sister to an out of state abortion provider may be charged as co-conspirators, accessories, or other derivative liability theories.

Governor Hochul remains in power.[111] Texas has also failed to reach Dr. Carpenter: though a Texas court issued a monetary judgement in a case alleging that Dr. Carpenter sent abortion-inducing medication to Texas in violation of Texas law, New York's courts have prevented Texas from filing and seeking to collect on the judgement in New York.[112] Abortion-protective states' shield laws have so far succeeded at stymying anti-abortion states' efforts to enforce their laws extraterritorially.

If federal law were enforced to its limits, however, states might try another tact. Federal extradition law attaches whenever any portion of the alleged crime is committed within the territorial bounds of the demanding state.[113] Bootstrapping states' broad jurisdiction to prosecute crimes in which any portion was committed within the state to federal extradition law requiring extradition whenever the defendant committed any portion of the alleged crime in the state provides states with a powerful extraterritorial tool.[114]

But the story does not end there. States' evermore audacious grasps at extraterritorial enforcement would almost certainly be met with evermore expansive shield laws—fueling a burgeoning extraterritoriality arms race. Shield laws themselves include unprecedented assertions of extraterritorial power. For example, Washington businesses that provide "electronic communication services" are categorically barred from taking actions that advance civil or criminal proceedings concerning healthcare activity that would have been legal had it occurred in the state of Washington.[115] The law

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[111] *Supra* notes 27–32 and accompanying text.

[112] Pam Belluck, *New York Steps In to Block Texas' Abortion Penalty on Doctor Under Shield Law*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/health/new-york-texas-abortion-shield-law.html; Phillip Pantuso, *Ulster County Clerk Rejects Texas' Second Attempt to File Abortion Judgment*, ALBANY TIMES UNION (July 14, 2025), https://www.timesunion.com/hudsonvalley/news/article/ulster-county-abortion-shield-law-texas-second-try-20766543.php

[113] *Strassheim v. Daily*, 221 U.S. 280 (1911) (holding that a defendant who did any part of the criminal act in the state and later left is a fugitive, even if the crime was completed elsewhere).

[114] At its furthest reaches, the state could prosecute and demand extradition of anyone who commits or facilitates conduct out of state that would constitute a crime within the state, so long as some part of the alleged crime, including its planning or the beginning of travel, occurred in the state. In the words of Justice Stevens, states could "exercise criminal jurisdiction over a person anywhere in the Union regardless of the extent of that person's culpable connection with the State." *San Bernardino Cnty*., 482 U.S. at 418–419 (Stevens, J., dissenting).

[115] WASH. REV. CODE § 7.115.020(2)(d)(i) (2024) ("A business entity that is incorporated, or has its principal place of business, in Washington that provides electronic communication services as defined in RCW 9.73.260 may not . . . (B) Comply with a subpoena, warrant, court order, or other civil or criminal legal process for records,

even prohibits "comply[ing] with … court order[s]" in connection to such proceedings.[116] Notably, the law includes no territorial limits: taken at face value, the law prohibits the Arkansas office of a Washington corporation from obeying an Arkansas court order in a case concerning a violation of Arkansas law in Arkansas. Across the country, in response to Louisiana's extradition request for Dr. Carpenter, New York amended its law to allow doctors prescribing mifepristone and misoprostol to put the name and address of their practice instead of their own name and address on prescription labels, as is required for all other prescriptions under New York law.[117] The law insulates New York doctors from liability when they facilitate abortions in states where such abortions are illegal, arguably encouraging the facilitation of felony activity in other states.[118]

These audacious assertions of extraterritorial power, along with the anti-abortion and anti-gender-affirming care laws to which they respond, are a remarkable and deliberate affront to sister states' sovereignty. Even if unenforceable or unconstitutional at their furthest reaches, they create regulatory concerns for businesses and may chill conduct or travel by individuals seeking to avoid legal jeopardy.[119]

At worst, this tit-for-tat progression could devolve into a status quo akin to that between hostile nations—with states' policies designed to target and frustrate the policies of other states, heightened burdens for out-of-state visitors and businesses, and even prisoner swaps—precisely the status quo the Extradition Clause was designed to avoid.[120]

D. State Sovereignty

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information, facilities, or assistance related to protected health care services that are lawful in the state of Washington . . .").

[116] *Id.* It is worth noting that Microsoft and Amazon are headquartered in Washington.

[117] N.Y. EDUC. L. § 6807(1)(b), (b-1) (McKinney 2025).

[118] GOVERNOR KATHY HOCHUL, *supra* note 31 ("And you know how they found this doctor? The doctor's name was on the prescription bottle. The doctor's name was on the prescription bottle. That's what they were looking for to identify this individual. After today, that will no longer happen.") *See also* Pam Belluck, *A Day with One Abortion-Pill Prescriber*, N.Y. TIMES (June 9, 2025), https://www.nytimes.com/2025/06/09/health/a-day-with-one-abortion-pill-prescriber.html (describing a nurse's decision to move to New York because its shield laws better insulate her from liability related to her provision of reproductive care to patients in abortion-restrictive states).

[119] The law facilitates its own enforcement by requiring that out of state individuals requesting any subpoena in Washington attest that the underling litigation does not concern a protected healthcare activity. The law imposes $10,000 statutory penalties for any attestations found to be false. WASH. REV. CODE § 5.51.020; *id.* at § 10.96.040.

[120] *See supra* notes 131 and accompanying text.

Stepping back from the practical implications of enforcing mandatory extradition, it is not at all clear that such a policy, even in theory, promotes state sovereignty.

Maximal state sovereignty would permit states to exercise absolute authority over both conduct and individuals within their territory. But something must give in a federalist system: States cannot have it both ways. Full authority to regulate conduct within the state's bounds implies the broadest possible power to create laws and prosecute those who violate them, including the ability to recall lawbreakers when they flee. Full authority over the territory also includes total control over the people in it, including the power to dictate when another sovereign takes someone away.[121] The Extradition Clause, which requires extradition under all circumstances, resolves the tension by prioritizing states' interests in regulating *conduct* within their borders. Allowing extradition discretion settles on the opposite, but equally valid, equilibrium: prioritizing states' sovereignty interest in regulating *people* within their borders.[122]

The conflict between these two policy regimes is an expression of the familiar problem of horizontal federalism: a tension inherent to a union of co-equal sovereign states. But-for the Extradition Clause, both discretionary and mandatory extradition would, each in their own way, be consistent with the Constitution's fundamental principles and values. But that is a big "but-for." Typically, a constitutional provision forecloses debate over policy alternatives.[123]

The rest of this article argues that is not the case in this context. The states can circumvent the Extradition Clause and restore gubernatorial discretion over interstate extradition. Doing so would be constitutional and consistent with the lengthy history of state supremacy over interstate extradition practice.

III. THE FUTURE AND PAST OF DISCRETIONARY EXTRADITION

A. A Model State Law to Restore Discretionary Extradition

Through collective action, states can revive extradition discretion without transgressing federal law. They may amend the Uniform Criminal Extradition Act—already adopted in forty-eight states[124]—to incorporate a

[121] Kaufman, *supra* note 99, at 381.
[122] As relevant here, by shielding them from prosecution in other states.
[123] Except in the context of a debate over a constitutional amendment.
[124] South Carolina and Mississippi are the two states that have not adopted the Uniform Criminal Extradition Act. Editors' Notes, *Unif. Crim. Extradition Act* tbl. of Jurisdictions

model provision that applies reciprocally to all other states that have adopted the same provision.[125] My proposed model provision requires that, upon request of the governor of the asylum state, a governor who had issued an extradition demand shall withdraw that demand.[126, 127] Because the obligations of federal law attach only upon a demand by the charging state's governor, withdrawing the demand removes those federal law obligations.[128] Adopting this model provision treats federal law as a penalty default that controls until and unless the states themselves collectively adopt an alternative. As the remainder of this section explains, taking collective action to circumvent federal law is consistent with the lengthy history of states' supremacy over extradition law and practice.

B. Illustrative Vignette[129]

Adopting 1936 Act, *U.L.A. Crim. Extrad. Act Refs & Annos* (West 2025), available on Westlaw. Those states may adopt the model provision as a modification to the relevant portions of their states' laws.

[125] The Supreme Court has approved of reciprocity conditions in similar uniform state laws. *See*, *e.g.*, N.Y. v. O'Neill, 359 U.S. 1, 4 (1959) (upholding the constitutionality of the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, which contains a reciprocity condition).

[126] The model provision reads as follows:

The governor of this state shall withdraw his or her demand for the extradition of a person charged with a crime in this state if a) the laws of the state to which the demand was issued include a provision substantially similar to this section and b) the governor of that state delivers to the governor of this state a written memorandum under the state seal which states that honoring the extradition demand would conflict with the public policy of that state.

[127] In many states, the governor's responsibility to withdraw an extradition demand under this provision would be enforceable in state court. *See, e.g.*, South Dakota v. Brown, 20 Cal. 3d 765, 769 (1978) ("mandamus will issue to compel performance of a Governor's ministerial duties"); Blalock v. Johnston, 180 S.C. 40, 56 (1936) ("mandamus will lie against the Governor to compel the performance of such ministerial act"); State *ex rel*. Hartman v. Thompson, 627 So. 2d 966, 971 (Ala. Civ. App. 1993) ("[the] governor is no more immune to mandamus than any other public official who refuses to perform a ministerial duty imposed upon him"); Hanabusa v. Lingle, 119 Haw. 341, 350–51 (2008) ("a governor's nondiscretionary duty can be compelled by mandamus"); *see also Mandamus to Governor,* 105 A.L.R. 1124. *But see*, *e.g.*, *Kelly v. Curtis*, 287 A.2d 426, 429 (Me. 1972) ("one co-ordinate branch of government must refrain from ordering another [branch] to perform its official duty.")

[128] U.S. CONST. art. IV., § 2, cl. 2 ("A Person charged in any State . . . who shall flee from Justice, and be found in another State, *shall on Demand* . . . be delivered up, to be removed to the State having Jurisdiction of the Crime" (emphasis added); 18 U.S.C. § 3182 ("Whenever the executive authority of any State or Territory *demands* any person as a fugitive from justice . . .") (emphasis added).

[129] This vignette is fictional. Any resemblance to real individuals or cases is coincidental.

Last year, Michael Johnson was pulled over by a Pennsylvania state trooper, Mary Smith, for driving 15 miles per hour over the posted speed limit. Trooper Smith took Johnson's license and, consistent with routine procedure, entered his information into the NCIC computer terminal in her police cruiser. The terminal showed that Mr. Johnson had an outstanding warrant related to a 2019 theft charge in Alpena, Michigan. Trooper Smith entered a notation in the computer indicating that she had located Mr. Johnson. That notation triggered an alert to authorities in Alpena. Trooper Smith handcuffed Mr. Johnson, put him in her police cruiser, and drove him back to the police station. Several hours later, the authorities in Alpena called to confirm that they had verified the warrant and wished to extradite Mr. Johnson. After two days in county jail, Mr. Johnson met with a public defender who showed him a copy of the warrant: it indicated that he had missed a court date on May 18, 2020 in a case charging him with felony larceny for stealing property valued at $1,000 or more. His identity had been confirmed by fingerprint. The attorney advised Mr. Johnson that his best course of action was to "waive extradition," agreeing to forgo any legal challenges to his arrest and extradition, so that he would be picked up and brought to Michigan as quickly as possible—usually in about two weeks, during which time he would remain in custody.

Mr. Johnson's case is typical of most contemporary extraditions, of which there are thousands each year: It emerged out of an otherwise ordinary encounter with local law enforcement; local law enforcement notified the authorities of the jurisdiction that lodged the warrant; those local authorities in turn confirmed they wished to arrange for extradition; the wanted person waived his rights to contest extradition; and neither state's governor was involved in any capacity.

That process is starkly inconsistent with the extradition procedure articulated in federal law: instead, as this section explains, since the nation's founding, the states have co-opted extradition law. They resisted and circumvented rigid enforcement of federal law and instead developed their own laws, procedures, and relationships to accomplish extraditions.

C. Development of Extradition Law

1. Federal Law, Slavery, and the Path Not Taken

The framers drafted the Extradition Clause of the U.S. Constitution against the backdrop of the law of nations.[130] It was understood that, among

[130] U.S. Const. art. IV, § 2, cl. 2 ("A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of

true sovereigns, extradition could be accomplished only as an expression of comity or through a negotiated treaty.[131] The Extradition Clause of the U.S. Constitution thus functioned as one of Constitution's limitations on states' sovereignty.[132]

States refused to comply with their obligations under the Extradition Clause immediately after ratification. In 1791, Governor Randolph of Virginia rejected Pennsylvania's extradition demand for a group of Virginians charged with kidnapping a Black man they asserted was a runaway slave.[133] Governor Randolph based his refusal on his purported legal determination that the Extradition Clause was not self-executing.[134]

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the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.")

[131] Murphy, *supra* note 26, at 1107–1109; *O'Neill*, 359 U.S. at 17 (Douglas, J., dissenting) ("The power of extradition was an expression of a policy of mutual support, in bringing offenders to justice; and to substitute a system of law, superior to state authority, for the system of comity prevailing among sovereign nations") (internal citations and quotations omitted); Biddinger v. Comm'r of Police, 245 U.S. 128, 132 (1917) ("The [Extradition Clause] was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another."); Innes v. Tobin, 240 U.S. 127, 130–131 ("[P]rior to the adoption of the Constitution fugitives from justice were surrendered between the States conformably to what were deemed to be the controlling principles of comity"); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840) ("it is the comity of one nation to another, acting upon the laws of nations, and determining, for itself, how far it will assist a foreign nation in bringing to punishment those who have offended against its laws.") The New England Colonies established an extradition treaty among themselves as early as 1643. Fred Somkin, *The Strange Career of Fugitivity in the History of Interstate Extradition*, 1984 UTAH L. REV. 511, 511 (1984) (citing DOCUMENTS OF AMERICAN HISTORY 27–28 (H. Commager ed. 8th ed. 1978).

[132] A subtle but consequential change between the Constitution's Extradition Clause, and a near identical clause in the Articles of Confederation underscores this point. Murphy, *supra* note 26, at 1107. Under the latter, the states were regarded as a "league of sovereign entities." *Id.* at 1109. The change from the Articles of Confederation to the Constitution "was intended to establish a different basis for extradition law among the states than mere comity." *Id.* at 1107.

[133] Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 172 (2013).

[134] Gregory K. Wanlass, *Interstate Extradition: Should the Asylum State Governor Have Unbridled Discretion*, 1980 BYU L. REV. 376, 378; 2 J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 531 (1891); Roberts v. Reilly, 116 U.S. 80, 94 (1885) ("There is no express grant to congress of legislative power to execute this provision, and it is not, in its nature, self-executing; but a contemporary construction contained in the act of 1793, 1 Stat. 302, ever since continued in force . . . has established the validity of its legislation on the subject.")

In response, in 1793, Congress passed *An Act respecting Fugitives from Justice, and persons escaping from the Service of their Masters.*[135] The component of the law concerning interstate extradition, now known as the Extradition Act (codified as 18 U.S.C. § 3182 and 18 U.S.C. § 3195), added barebones procedure to implement the constitutional provision.[136, 137]

The Virginia-Pennsylvania dispute and the 1793 Act were not the first or the last times that interstate extradition was ensnared in the politics of slavery.[138] However, and critically, the federal government's approach to regulating state action as it concerned runaway slaves and the extradition of alleged criminals diverged sharply. In the decades leading up to the Civil War, free states adopted laws and policies prohibiting state officials from authorizing the rendition of fugitive slaves from their states, effectively nullifying enforcement of federal fugitive slave law.[139] Congress responded with the Fugitive Slave Act of 1850, authorizing a federal bureaucracy through which slaveholders could petition for the return of their slaves.[140]

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[135] 1 Stat. 302 (1793) (capitalization in original); William J. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63, 73 (1951).

[136] "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged." 18 U.S.C. § 3182. "All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority. . . ." 18 U.S.C. § 3195 (portions relevant only to international extradition omitted). The Extradition Act has remained substantially unchanged since its original enactment. *Branstad*, 483 U.S. at 223 n.2. In each of its cases interpreting the Extradition Clause, the Supreme Court has considered the constitutional provision in tandem with the Extradition Act. *See, e.g.*, *id.* at 223; *Doran*, 439 U.S. at 288; *Dennison*, 65 U.S. at 68.

[137] Notwithstanding the passage of the Extradition Act, the Virginia kidnappers were never returned to Pennsylvania to stand trial. Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397, 422 (1990).

[138] The Constitution's Fugitive Slave Clause immediately follows its Extradition Clause, mimicked its structure, and borrowed its language. U.S. Const. art. IV, § 2, cl. 3 (Fugitive Slave Clause); U.S. Const. art. IV, § 2, cl. 2 (Extradition Clause). *See also* Lasch, *supra* note 133, at 170. The language of the Extradition Clause was copied nearly verbatim from a clause in the Articles of Confederation, which had no Fugitive Slave provision. *Id.*

[139] *Id.* at 175, 178; Mark Voss-Hubbard, *The Political Culture of Emancipation: Morality, Politics, and the State in Garrisonian Abolitionism, 1854-1863*, 29 J. AM. STUD. 159, 172–73 (1995).

[140] Lasch, *supra* note 133, at 179.

The federal executive branch staffed and ran this bureaucracy, federalizing the issue of fugitive slave return and thereby circumventing the abolition states' resistance.[141]

By contrast, the federal government did not create an apparatus to facilitate interstate extraditions, even though, during the same time period, states flouted their obligations under federal extradition law.[142] One extradition dispute culminated in the Supreme Court's landmark decision in *Kentucky v. Dennison*.[143] In *Dennison*, Kentucky petitioned the court for a writ of mandamus compelling the governor of Ohio to extradite a free Black man who allegedly assisted in the escape of a Kentucky slave. Consistent with a plain language reading of the Extradition Clause, the Court held that the asylum state's obligation to extradite is irrespective of "the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled."[144] Nonetheless, the court refused to issue the writ, concluding that "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."[145] This latter holding, which articulated the limited view of federal authority pervasive in the 1800s,[146] provided governors with unchecked authority to reject unwanted extradition requests.

Despite states' flouting their obligations under federal extradition law, and, following *Dennison*, the federal government's inability to directly compel state compliance, Congress and the Executive Branch declined to create a federal mechanism to accomplish the mandate of federal extradition law as it had done in the context of federal fugitive slave law just years before.[147]

2. State Law and the Uniform Criminal Extradition Act

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[141] *Id.*

[142] *Id.* at 180; Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1508 (2007); Paul Finkelman, *Sorting out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 618–19 (1993).

[143] 65 U.S. (24 How.) 66 (1860).

[144] *Id* at 103. The Court roundly rejected Ohio's argument that the Extradition Clause and Extradition Act required only extradition of someone whose conduct violated the laws of both the asylum state and charging state. *Id.* at 69.

[145] *Id.* at 107.

[146] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 666 (1842) (McClean, J., concurring) ("where the Constitution imposes a positive duty on a state or its officers to surrender fugitives, that Congress may prescribe the mode of proof, and the duty of the state officers. This power may be resisted by a state, and there is no means of coercing it"); Leslie Friedman Goldstein, *A Triumph of Freedom after All - Prigg v. Pennsylvania Re-Examined*, 29 LAW & HIST. REV. 763, 777 (2011).

[147] *See supra* notes 140–141 and accompanying text.

With all three branches of the federal government unwilling or unable to enforce federal law, the states took formal control of extradition law and practice after the Civil War. An initial spiderweb of state laws in "distressing variation" inspired an effort to create a uniform, nationwide set of laws and practices.[148] Between 1922 and 1936, a committee of the Conference of Commissioners on Uniform State Laws prepared and debated drafts of what became the Uniform Criminal Extradition Act, now adopted in 48 states and many territories.[149] The UCEA codified best practices that had developed in state statutes and common law over the preceding decades.[150]

The UCEA creates a comprehensive and uniform procedure governing every step of an interstate extradition case—a stark contrast to the sparse procedural elements of the federal Extradition Act.

First, the UCEA establishes who may be extradited. The UCEA authorizes extradition of individuals charged with a crime in the demanding state, regardless of whether the crime was committed within or outside the territorial bounds of that state.[151] The asylum state may arrest and extradite individuals whose departure from the demanding state was involuntary.[152] Post-conviction fugitives, such as alleged prison escapees and probation and parole violators, are also subject to extradition.[153]

Second, the UCEA creates a detailed procedure for initiating an extradition case. The UCEA permits a judge to issue an arrest warrant for an alleged fugitive "on the oath of any credible person,"[154] and for "a peace officer or a private person" to make a warrantless arrest "upon reasonable information" that the arrestee is a fugitive.[155] Following such an arrest, the

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[148] Somkin, *supra* note 131, at 524, quoting HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE 32D ANNUAL MEETING 362 (1922). Roscoe Pound described the pre-UCEA landscape as characterized by "extreme decentralization, the want of organization or cooperation, the overgrowth of checks and hindrances, and the hypertrophy of procedure which embarrass the administration of criminal justice in the economically unified land of today." ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 175 (1930).

[149] South Carolina and Mississippi are the only states that have not adopted the Uniform Criminal Extradition Act. UCEA, editors' notes, tbl. of Jurisdictions Adopting the 1936 Act.

[150] UCEA, Prefatory Note.

[151] UCEA § 6.

[152] UCEA § 5, cl. 2.

[153] UCEA § 6.

[154] UCEA § 13.

[155] UCEA § 14. Private persons may only arrest suspected fugitives charged with felony offenses. The law further requires that, following a warrantless arrest, the captor must bring the arrestee before a judge with "with all practicable speed." *Id.*

demanding state's governor formally initiates an extradition demand by submitting authenticated copies of statutorily prescribed documentation.[156]

Third, the UCEA details the asylum state's role in evaluating an extradition demand and completing the extradition. In cases with a pre-requisition arrest, a judge or magistrate sets a securing order, either incarceration or bond, and adjourns for 30 days.[157] Within this 30 day window for warantless arrest cases, or to initiate the extradition process in all other cases, the charging state's executive submits a formal demand to the asylum state's governor.[158] If, following an investigation,[159] the asylum state governor determines that the alleged fugitive "ought to be surrendered," the asylum state governor issues a "governor's warrant of arrest."[160] Once the fugitive is arrested pursuant to the governor's warrant, she is taken before a judge in the asylum state, and should she wish to challenge her extradition, may apply for a writ of habeas corpus.[161] If the writ is denied, an agent of the demanding jurisdiction picks up and transports the fugitive.[162] Alternatively, an alleged fugitive arrested and held pre-requisition may waive her right to service of a governor's warrant and habeas corpus and consent to transport as soon as the requesting jurisdiction can send an agent.[163] However, the asylum state may "hold" an alleged fugitive, notwithstanding an otherwise valid extradition request, "until he has been tried and discharged or convicted and punished in this state."[164]

Two additional, extra-legal developments deserve note because of their effect on modern practice. First, in 1966, states' extradition officials joined to create the National Association of Extradition Officials.[165] Pursuant to an

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[156] UCEA § 3.
[157] UCEA §§ 15-16. The time period may be extended up to 90 days. *Id.* at § 17.
[158] UCEA §§ 3, 23.
[159] UCEA § 4.
[160] UCEA § 7. In practice, the "governor's warrant of arrest" is commonly referred to as a "governor's warrant."
[161] UCEA § 10. An alleged fugitive may petition for a writ of habeas corpus in either state or federal court. Roberts v. Reilly, 116 U.S. 80, 94 (1885). However, in practice, petitions typically proceed in state court. Neville v. Cavanagh, 611 F.2d 673, 675 (7th Cir. 1979) ("Despite the existence of jurisdiction, however, federal courts are reluctant to grant pre-trial habeas relief.")
[162] UCEA § 12. Under federal law, the asylum state may release the fugitive if the demanding state's agent does not arrive within thirty days. 18 U.S.C. § 3182.
[163] UCEA § 25-A. In practice, this is commonly referred to as "waiving extradition."
[164] UCEA § 19 ("If a criminal prosecution has been instituted against such person under the laws of this state and is still pending the Governor, in his discretion, either may surrender him on demand of the Executive Authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.")
[165] The organization hosts trainings, publishes caselaw reviews, and promulgates resolutions that guide extradition practice around the country. Homepage, National

agreement known as NAEO Resolution 31, states have agreed not to pursue extradition costs that they are entitled to collect from one another.[166] Second, in 1967, the FBI launched the National Crime Information Center (NCIC), a nationwide database of wanted persons.[167] NCIC quickly and permanently revolutionized law enforcement's ability to find wanted persons. In 2022, 2.5 billion name queries were submitted to NCIC.[168] At the end of 2022, there were just under 3,000,000 active records in NCIC's wanted person file, roughly one for every 100 people over five years old.[169] Due to the costs associated with extradition and the overwhelming frequency of NCIC hits, a considerable majority of wanted files in the NCIC database—including many for serious and violent cases—contains a notation that the charging jurisdiction will not seek extradition.[170]

3. Tensions between Federal Law and State Law

Many of these laws and practices fundamentally invert core principles of federal law. Federal extradition law concerns only "fugitives": individuals who, while physically inside the territory of a state, allegedly committed all or part of a crime against the laws of that state, and later left the state voluntarily.[171] State law, by contrast, is characterized by breadth. The UCEA

Association of Extradition Officials (last visited July 24, 2025), https://www.extraditionofficials.org/; National Association of Extradition Officials, *Evlyn Holt Award*, https://www.extraditionofficials.org/evlyn-holt-award/ (last visited July 24, 2025) (describing the organization's origins).

[166] *See supra* note 102 and accompanying text (describing the federal law requirement that the demanding state pay extradition-related costs and the states' collective agreement not to pursue those costs).

[167] JOHN J. MURPHY, ARREST BY POLICE COMPUTER 4 (1975). Local law enforcement and courts enter warrant information for individuals wanted in connection to "felony or serious misdemeanor" charges, prison escape, or community supervision violation. *Id.* NCIC also contains records related to "missing persons, other persons who pose a threat to officer and public safety, and various property files." U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2022* (Feb. 2024). https://www.ojp.gov/pdffiles1/bjs/grants/309360.pdf.

[168] Fed. Bureau of Investigation, *2022 NCIC Missing Person and Unidentified Person Statistics* (2023), https://www.fbi.gov/file-repository/2022-ncic-missing-person-and-unidentified-person-statistics.pdf/view.

[169] Survey of State Criminal History Information Systems, *supra* note 167, at tbl. 3. Entries and queries into the NCIC system increased exponentially in the years after its' creation. There were 64,878 entries in 1968 and 214,534 by 1973. MURPHY, *supra* note 167, at 4. There were 12,838 queries in 1969 and 52,144 by 1973. *Id.*

[170] Bierie, *supra* note 100, at 330; Bierie & Budd, *supra* note 100, at 602.

[171] The Constitution and Extradition Act concern someone "who shall flee from justice," who is to be returned to the "State from which he fled." Courts have consistently read these

permits extradition of a defendant or convict without concern for where he was alleged to have committed the crime or how he left the state.[172] Federal law places all burdens on the demanding state and positions the asylum state in a purely responsive posture.[173] State law reverses these roles. Under the UCEA, the asylum state may (and, in practice today, typically does)[174] initiate extradition proceedings and investigate extradition demands,[175] and the asylum state's courts are charged with overseeing many procedural aspects of the arrest and extradition process.[176] Critically for purposes of this article, the UCEA describes the responsibilities of the asylum state's executive in *discretionary* terms, rather than the mandatory language of federal law.[177] In

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phrases to exclude individuals charged with an extraterritorial crime—one cannot "flee" from a place he never stepped foot. 18 U.S.C. § 3182; U.S. Const. art. IV, § 2, cl. 2. Biddinger v. Comm'r of Police, 245 U.S. 128 (1917) ("the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed"); Roberts v. Reilly, 116 U. S. at 97 (defining fugitivity as "[h]aving within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.". Although the words "fugitive" and "flee" seem to imply an intent to avoid prosecution, there is no such intent requirement. In fact, the person need not even have been aware of the charges in the charging state. *See* Hogan v. O'Neill, 255 U.S. 52, 56 (1921); Appleyard v. Commonwealth of Massachusetts, 203 U.S. 222, 232 (1906); Hyatt v. People *ex rel*. Corkran, 188 U.S. 691, 712 (1903).

[172] *See supra* notes 151–153 and accompanying text. The states developed these laws in response to several high-profile incidents in which the limits of federal law precluded extradition. In 1843, Joseph Smith, founder of the Church of Jesus Christ of Latter-day Saints, was charged in Missouri as a co-conspirator in a plot to assassinate former Missouri Governor Lilburn Boggs. Smith was in Illinois at all times during the alleged conspiracy. Smith successfully challenged his extradition from Illinois to Missouri on the grounds that he was not a fugitive. Somkin, *supra* note 99, at 512–514 (discussing *Ex Parte* Smith, 22 F. Cas. 373 (C.C.D. IM. 1843) (No. 12,968)). In another remarkable episode, defendants William Hall and John Dockery, accused of committing a murder by shooting across state lines from North Carolina into Tennessee, escaped prosecution in both states because they were not fugitives of Tennessee having never stepped foot there and because North Carolina followed the common law rule that criminal jurisdiction lay only in the state in which the final act consummating the crime took place. *Id*. at 518–519 (discussing State v. Hall, 20 S.E. 729, 730 (1894)).

[173] The Extradition Clause and Extradition Act reference the asylum state only obliquely and in passive voice. U.S. Const. art. IV, § 2, cl. 2; 18 U.S.C. § 3182.

[174] NAEO MANUAL, *supra* note 87, at 8.

[175] UCEA § 4.

[176] *See supra* notes 154, 157, 161 and accompanying text.

[177] *Compare* U.S. Const. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, *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" (emphasis added)); 18 U.S.C. §

still other circumstances, state law and policy circumvent the sparse procedural elements explicitly written into federal law. Though federal law provides that states recover extradition costs from one another, the states have agreed not to do so.[178] State law includes a mechanism through which an alleged fugitive arrested pre-requisition—a process not contemplated in federal law—may waive all rights and process she is entitled to under federal law.[179] Finally, state law relaxes certain documentary criteria required under federal law.[180]

D. Federal Acquiescence to State Supremacy

3182 (upon receiving an extradition demand, "the executive authority of the State, District, or Territory to which such person has fled *shall* cause him to be arrested and secured, and notify the executive authority making such demand . . ." (emphasis added)) *with* UCEA § 7 ("*If* the Governor decides that the demand should be complied with, he shall sign a warrant of arrest . . ." (emphasis added)). *See also id.* at § 4 (". . . the Governor may call upon . . . ") (emphasis added); UCEA § 5 ("The governor of this state may also surrender . . . "); *id.* at § 6 ("The Governor of this state may also surrender . . ."); *id.* at § 19 (granting the asylum state governor discretion to withhold extradition where the accused faces charges or has not completed punishment in the asylum state).

[178] *Compare* 18 U.S.C. § 3195 ("All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority"), *with* NAEO Resolution 31, *supra* note 102 ("[T]he Association recommends that asylum states, their political subdivisions, departments and agencies continue to bear the routine and non-extraordinary expenses associated with the interstate extradition of fugitives and that they not seek reimbursement for such expenses from the demanding states, their political subdivisions, agencies or departments.") *See also Colfax Cnty*., 16 F.3d at 1109 (indicating that states adhere to Resolution 31).

[179] UCEA § 25-A (the alleged fugitive may "waive the issuance and service of the warrant provided for in sections 7 and 8 [of the UCEA] and *all* other procedure incidental to extradition proceedings . . . ") (emphasis added). When a fugitive executes a waiver, she obviates any involvement by the governors of the asylum and charging states—the only state officials whose involvement is expressly prescribed by federal law. U.S. Const. art. IV, § 2, cl. 2; 18 U.S.C. § 3182.

[180] The UCEA allows, for instance, that the charging state submit an information rather than an indictment or affidavit made before a magistrate. *Compare* 18 U.S.C. § 3182 *with* UCEA § 3. State courts have upheld the constitutionality of this practice. Application of Hanson, 103 Idaho 609, 612 (Ct. App. 1982); Stark v. Livermore, 3 N.J. Super. 94, 98 (App. Div. 1949); Smith v. Nye, 176 Kan. 679, 681 (1954); People *ex rel*. v. Baker, 306 N.Y. 32, 37 (1953). *Ex parte* Peairs, 283 S.W.2d 755 (Tex. Crim. App. 1955), appeal dismissed for want of a substantial federal question, 350 U.S. 858 (1955). *But see id.* at 252 (Davidson, J., dissenting) ("We have always held that extradition could not be accomplished when the charge in the demanding state is by information only."). Federal courts appear to have addressed the issue only in dicta. Matter of Strauss, 197 U.S. 324, 332–33 (1905).

With the lone exception of the Supreme Court's decision in *Puerto Rico v. Branstad*,[181] all three branches of the federal government have consistently acceded to, and even endorsed, state executive and legislative supremacy over extradition law.[182]

In the second half of the 19th and first half of the 20th centuries, Supreme Court doctrine morphed to conform to state law and practice. In 1842, the Supreme Court had held in *Pennsylvania v. Prigg* that the Constitution and federal statutes concerning fugitive slaves and extradition granted the federal government exclusive authority to regulate in those fields.[183] Even read narrowly, *Prigg* prohibited states from creating rights and processes that interfered with federal law.[184]

And yet, when states did just that, the Supreme Court acquiesced: adopting the states' innovations as principles of federal law rather than striking them down. In the early 19th century, the states allowed alleged fugitives to challenge their arrest and extradition by writ of habeas corpus in the asylum state's courts[185]—a process nowhere contemplated in federal law, and closely resembling provisions ruled unconstitutional in *Prigg*.[186] Instead

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[181] *See supra* notes 12–26 and accompanying text.

[182] In this article, I argue that the federal government has not enforced federal extradition law to supersede state executive and legislative action. The federal courts have imposed federal law to reverse the decisions of state courts where those courts granted alleged fugitives' petitions for habeas corpus. Applying federal law in that context, however, supports the objectives of the asylum state's executive: an alleged fugitive petitions for habeas corpus in the asylum state's courts only after that state's executive has authorized her extradition. UCEA § 10. *See, e.g.*, Pacileo v. Walker, 449 U.S. 86 (1980); New Mexico *ex rel*. Ortiz v. Reed, 524 U.S. 151 (1998); California v. Superior Ct. of California, San Bernardino Cnty., 482 U.S. 400 (1987); Michigan v. Doran, 439 U.S. 282 (1978).

[183] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618 (1842) ("where Congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."). Read most strongly, *Prigg* stood for a form of field preemption: categorically prohibiting states from legislating in these areas. *Id.* at 617 ("… [I]t would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it.")

[184] Metzger, *supra* note 142, at 1489.

[185] *See, e.g.*, Voss-Hubbard, *supra* note 139, at 172–73; FINKELMAN, *supra* note 23, at 172–173 (describing habeas corpus proceedings in the case of *Ohio v. Forbes and Armitage*). *See also* THE STATE OF OHIO VS. FORBES AND ARMITAGE, ARRESTED UPON THE REQUISITION OF THE GOVERNMENT OF OHIO ON CHARGE OF KIDNAPPING JERRY PHINNEY, AND TRIED BEFORE THE FRANKLIN CIRCUIT COURT OF KENTUCKY 3 (1846) (describing the Ohio case); *id.* at 11 (describing the habeas corpus proceeding brought by an alleged fugitive in South Carolina state court).

[186] *Prigg*, 41 U.S. at 570–571 (describing the procedure Pennsylvania instituted for slave

of striking down state court habeas procedures as an unconstitutional interference with the states' federal extradition obligations, the federal courts *blessed* these procedures as a federally guaranteed right that state courts could appropriately administer.[187] The federal courts similarly acquiesced to the state-developed common law[188] doctrine that the asylum state may retain custody of an alleged fugitive until all criminal charges and sentences in that state had been adjudicated and completed. Like state court habeas corpus challenges to extradition, this policy has no textual basis in federal law and conflicted with the states' unqualified federal responsibility to honor extradition demands.[189] Later, at the turn of the 20th century, in response to high-profile incidents in which alleged criminals escaped accountability because federal law did not authorize their extradition, states created a state-law mechanism to expand eligibility for extradition.[190] Contemporary commentators viewed these laws as startling departures from the federal

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catchers to follow to perfect a fugitive slave claim and holding that such a procedure was unconstitutional).

[187] Robb v. Connolly, 111 U.S. 624, 637–38 (1884) ("The recognition, therefore, of the authority of a state court, or of one of its judges, upon writ of *habeas corpus*, to pass upon the legality of the imprisonment, within the territory of that state, of a person held in custody . . . cannot be denied merely because the proceedings involve the determination of rights, privileges, or immunities derived from the nation, or require a construction of the constitution and laws of the United States."); Roberts v. Reilly, 116 U.S. 80, 94 (1885). Because, in fact, the practice originated in state law, federal courts have struggled to identify a federal origin for this supposed federal right. *See* Crumley v. Snead, 620 F. 2d 481, 483 n. 7 (5th 1980) ("Almost 100 years ago, in *Roberts v. Reilly* 116 U.S. 80 . . . the Supreme Court recognized that individuals have a federal right to challenge their extradition by writ of habeas corpus . . . The exact source of this right was not identified in *Roberts*. . . Regardless of the source, the right is certainly a federal one.") *See also* Hyatt v. People of N.Y., 188 U.S. 691, 710 (1903) (citing a New York Court of Appeals case for the proposition that "courts have jurisdiction to interfere by writ of habeas corpus, and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another state is issued, and, in case the papers are defective and insufficient, to discharge the prisoner.");

[188] *Prigg* held that state legislation authorizing state courts to interfere with the state's federal extradition and fugitive slave law responsibilities was unconstitutional, it did not, strictly speaking, address state common law doctrines.

[189] *See, e.g.*, Troutman's Case, 26 N.J.L. 634, 639 (N.J. 1856) ("The language of the constitution, I admit, is absolute and peremptory. The fugitive shall be delivered up on demand. But the constitution and the laws alike, must have a reasonable construction. And in the first place I take it to be clear, that if the prisoner was held in custody here to answer a criminal charge, Pennsylvania could not be permitted to take him out of our jurisdiction until he had made satisfaction to our laws.") Citations for this principle near universally refer to the Supreme Court's opinion in Taylor v. Taintor, 83 U.S. 366 (1872), notwithstanding that opinion's references to earlier common law decisions, including state court decisions like *Troutman's Case*. *Id.* at 370–71. *See, e.g.*, State v. Robbins, 590 A.2d 1133 (N.J. 1991); Abramson, *supra* note 81, at 808.

[190] *See supra* note 172 (discussing the mechanism and its origins).

statutory and constitutional scheme that defined eligibility for extradition narrowly; many expected that they would be barred by the federal courts.[191] Yet, once again, the Supreme Court upheld the permissibility of the state laws, this time as expressions of interstate comity not inconsistent with federal law.[192]

Congress and the federal executive branch similarly did not interfere with state control over extradition law. As discussed above, the federal government did not create its own enforcement apparatus to circumvent the states' dereliction of their duties under federal law in the antebellum period.[193] It similarly refrained from doing so after the Civil War, while states continued to, on occasion, refuse to carry out extraditions required under federal law.[194]

By contrast, Congress *encouraged* state cooperation and innovation in the area. In 1934, Congress passed the Crime Control Consent Act, broadly authorizing states to enter into agreements and compacts to cooperatively advance "enforcement of their respective criminal laws and policies."[195] At that time, the Commissioners on Uniform State Laws and Proceedings had published near-final draft language of the Uniform Criminal Extradition Act.[196] As discussed above, the UCEA included many policies in tension with, or contradicting, principles of federal extradition law. Apparently, Congress was unconcerned. In 1948, Congress provided further support to state-led extradition efforts with the Fugitive Felon Act—a mechanism to direct federal resources to assist state-led extradition enforcement.[197]

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[191] Somkin, *supra* note 99, at 527–531 (discussing the multi-decade debate over the constitutionality of extradition as an expression of interstate comity); Charles P. McCarthy, *A Constitutional Question Suggested by the Trial of William D. Haywood*, 19 GREEN BAG 636 (1907); N.Y. v. O'Neill, 359 U.S. 1 (1959) (the constitution does not prohibit comity-based extraditions); *id.* at 14 ("limitation on the right of free movement applies only when the citizen is a fugitive from the law [as defined in the Extradition Clause]") (Douglas, J., dissenting).

[192] Innes v. Tobin, 240 U.S. 127, 134–135 (1916); *In re* Cooper, 53 Cal. 2d 772 (1960) (citations omitted), *cert. denied*, 364 U.S. 294 (1960) (approving of the constitutionality of comity-based extraditions).

[193] *See supra* notes 139–141 and accompanying text.

[194] Governors' refusals to extradite fugitives in the 20th century are discussed *infra* Section IV.A.

[195] 48 Stat. 909 (1934) (codified as amended at 4 U.S.C. § 112(a)). The Uniform Criminal Extradition Act is not, strictly speaking, an "agreement or compact" among the states. *Id.* But Congress's broad and unqualified language suggests a general encouragement of interstate cooperation in criminal enforcement across state lines.

[196] Somkin, *supra* note 99, at 527; UCEA Prefatory Note, *supra* note 150.

[197] Fugitive Felon Act, ch. 304, § 1, 48 Stat. 782 (1934) (codified as amended at 18 U.S.C. § 1073). Though the law nominally makes it a federal crime to flee from justice in any state—a type of federalization mechanism reminiscent of the Fugitive Slave Act of 1850,

IV. THE CASE FOR RESTORING EXTRADITION DISCRETION

The previous sections illustrated the risks of requiring states' compliance with the Extradition Clause and showed that restoring extradition discretion would be not only possible but consistent with the tradition of state supremacy over extradition law. The question remains—should states undertake such an effort today?

A. A Study of Historical Extradition Refusals

Until 1987, governors retained unchecked discretion to deny the extradition requests of other states. A comprehensive review of documented refusals between 1930 and 1987 suggests that governors used this power judiciously. I identified 240 equitable extradition refusals—refusals in cases where federal extradition law would have required extradition—between 1930 and 1987.[198, 199] The bulk of these were from the earlier decades: eighty-

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supra notes 139–141 and accompanying text,—Justice Department policy has long maintained that the law is not "intended to provide an alternative for state extradition proceedings . . . normally, the federal complaint will be dismissed when the fugitive has been apprehended and turned over to state authorities [in the asylum state] to await interstate extradition." U.S. Dep't of Justice, *United States Attorneys' Manual* I*,* Title 2, at 74 (1961), https://www.justice.gov/archive/usao/usam/1961/title2criminaldivision.pdf. I am aware of only one instance in which the Fugitive Felon Act was used to carry out an extradition over the objection of the governor of the state in which the fugitive was found. *Ryals Case*, N.Y. AMSTERDAM NEWS, Feb. 25, 1939, https://www.proquest.com/docview/226098419

[198] Overview of study methodology: The following query was run through all U.S. newspapers in the ProQuest database for the years 1930 to 1990: "(governor OR governors) NEAR/10 (refuse OR refusal OR denies OR denial OR denied OR block OR blocks OR blocked OR "will not extradite" OR "won't extradite" OR "will not sign" OR "won't sign" OR "will not honor" OR "won't honor") NEAR/10 (extradition OR extradite OR extradited OR rendition OR requisition)." The query returned the following results by decade: 1,170 results from 1930–1939, 413 results from 1940–1949, 310 results from 1950–1059, 158 results from 1960–1969, 157 results from 1970–1979 and 113 results from 1980–1990. All results were then reviewed by the author and research assistants to extract information related to extraditions made by the governor on equitable grounds. I exclude refusals made on the grounds that the extradition demand failed to meet the legal requirements of the Extradition Clause or Extradition Act.

[199] This study is the most extensive examination of equitable extradition refusals, both in its time horizon and scope of its sources. Studies in the pre-internet era noted the difficulty of identifying extradition refusal cases: *See, e.g.*, Dinan, *supra* note 24, at 672 ("The documentation is rather sparse, however, because many extradition cases do not ever reach a court and are completely disposed of in pre-trial extradition hearings which often go unreported."); *Note*, *Interstate Rendition: Executive Practices and the Effects of Discretion*,

four in the 1930s, sixty in the 1940s, forty-five in the 1950s, twenty-one in the 1960s, twenty in the 1970s, and ten in the 1980s.[200] This amounts to an average of less than 4.25 per year in the entire study period (0.088 per state per year)[201], and 8.4 per year (0.18 per state per year) at its peak in the 1930s.[202] These findings are consistent with past, more limited studies, which found that states refused extradition on equitable grounds at most a handful a times per year and often went decades without doing so.[203]

I find that governors exercise equitable discretion to deny extradition as a mechanism to remove cases from the ordinary machinery of the criminal justice system. In some instances, this resembled a form of diversion or means to facilitate alternative dispute resolution: refusing extradition in order to facilitate civil justice or extra-legal resolution of a dispute. Governors

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66 YALE L.J. 97, 107 n.52–53, 109 n.63 (1956); Bunch & Hardy, *supra* note 25, at 55; DAVID KAIRYS, PHILADELPHIA FREEDOM: MEMOIR OF A CIVIL RIGHTS LAWYER 21 (2008) ("This body of law can't be found in appellate decisions"); Eric W. Rise, *Crime, Comity and Civil Rights: The NAACP and the Extradition of Southern Black Fugitives*, 55 AM. J. LEGAL HIST. 119, 120 n.2 (2015) ("Precise figures on the number of extradition cases handled by the NAACP are difficult to ascertain . . .").

[200] The decade-over-decade decline may be explained by a number of factors including increased convergence in state criminal law and policy, the demise of de jure segregation and Jim Crow laws, a decline in escapes from incarceration, and increased interest in interstate extradition cooperation following the creation of the Uniform Criminal Extradition Act in 1936.

[201] Following the Supreme Court's decision in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), there were no equitable refusals. Accordingly, I use 47 (1940 to 1987) as the denominator for these calculations. For simplicity and conservatism I count 48 states for the per-state calculations, though Hawaii and Alaska became states partway through the study period.

[202] A reliable determination of the rate of rejections as a portion of total demands was not possible. The best available historical data on the volume of extradition demands appears in a 1956 study: several states reported the number of demands they received annually as: "Cal. (435), Ga. (250), Ind. (196), Md. (100), Mass. (80), Mich. (150), N.M. (130), Tex. (200)." *Interstate Rendition*, *supra* note 199, at 100 n.17. However, these values are likely an undercount as state-level officials are frequently not apprised of extradition cases in which the fugitive does not contest his extradition.

[203] A 1937 newspaper article reporting on an equitable refusal by Massachusetts's governor indicated it was that state's first in twenty years. *Hurley Frees Fugitive: Massachusetts Refuses to Return Negro to Georgia Chain Gang,* N.Y. TIMES, July 28, 1937, at 9, col. 2. A 1990 survey of states' extradition officials indicated that before *Branstad*, twenty-one of thirty-four had denied a request on equitable grounds "occasionally." Bunch & Hardy, *supra* note 25, at 66. Of the thirteen states that did not, eight had internal policies prohibiting the governor from exercising discretion. *Id.* Other datapoints indicate the total volume of extradition refusals, of which equitable refusals are a portion (and likely a small one). In 1978, California reported that eighty-four of its extradition demands were declined between 1959 and 1976—roughly five per year. South Dakota v. Brown, 20 Cal. 3d 765, 778 (1978). A 1956 study found that the states of Arizona, Michigan, and Tennessee rejected extradition demands at 5%, 9%, and 5% respectively. *Interstate Rendition*, *supra* note 199, at 100 n.17.

commonly exercised equitable rejection in spousal abandonment and child kidnapping cases where they were convinced that the present state of affairs was satisfactory and should not be disrupted.[204] The frequency of this type of case declined over time as statutory developments including the Uniform Reciprocal Enforcement of Support Act (1958) and The Uniform Child-Custody Jurisdiction Act (1968) created alternative mechanisms to resolve these disputes.[205] However, even into the 1960s, 1970s, and 1980s, governors cited preservation of family order in refusing extradition in cases charging parental kidnapping and other family-related offenses.[206] In another sizeable tranche of cases, governors refused extradition after determining that the criminal case underlying the extradition demand was filed as a pretext to facilitate a civil action, usually a debt collection or tort suit.[207] In other instances, governors cited the resolution of a related civil matter as the reason they refused extradition to face criminal charges arising out of the same incident.[208]

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[204] I include cases charging abandonment and kidnapping in the study because they necessarily include a territorial nexus between the alleged fugitive and the charging state that satisfies federal law's fugitivity requirement. *See supra* note 171. Because the elements of crimes relating to failure to pay child support or spousal support may be satisfied through actions taken entirely outside the charging state, I exclude these cases absent a clear indication that the fugitive took allegedly criminal actions inside the demanding state.

[205] William F. Fox, *The Uniform Reciprocal Enforcement of Support Act*, 12 FAMILY L. Q. 113 (1978); Brigitte M. Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977).

[206] *See, e.g.*, *Askew Refuses Extradition Bid*, HERALD-NEWS, Aug. 12, 1977, at 6, https://www.proquest.com/docview/2818006495; *Rockefeller Rejects Plea to Return Countian to Florida*, POUGHKEEPSIE JOURNAL, Nov. 18, 1960, at 15, https://www.proquest.com/docview/2799695738; *Nevada Governor Refuses to Extradite Mrs. Byington; Criticizes Ohio Officials*, COSHOCTON TRIBUNE, May 2, 1962, at 1, https://www.proquest.com/docview/2345831890; *Governor Thanked in No Extradition*, SENTINEL STAR, Mar. 25, 1974, at 7, https://www.proquest.com/docview/2483213969

[207] *See, e.g.*, *Turk's Extradition Is Denied by Leslie*, MUNCIE MORNING STAR, Feb. 24, 1930, at 2, https://www.proquest.com/docview/2393000799 ("Turk was alleged to have been the driver of an automobile which collied with another causing the injuries. The governor, in setting out his reasons for refusing to grant the papers, said that the request appeared to be a criminal action to make a civil suit easier."); *Extradition Request Denied by Governor*, CLARION-LEDGER, May 8, 1941, at 18, https://www.proquest.com/docview/2134426985; *Governor Says "No" to Extradition Plea*, SPOKESMAN-REVIEW, Nov. 11, 1939, at 19, https://www.proquest.com/docview/2361579474.

[208] *Coast Resident Stays in State*, DAILY CLARION-LEDGER, Oct. 26, 1938, at 14, https://www.proquest.com/docview/2133986235; *Extradition Denied After Agreement*, CLARION-LEDGER, Mar. 19, 1947, at 7, https://www.proquest.com/docview/2134493182; *Extradition Request Denied by Governor*, GREEN BAY PRESS-GAZETTE, Mar. 21, 1932, at 2, https://www.proquest.com/docview/2025843461.

Many more equitable extradition refusals resembled a form of gubernatorial clemency or political asylum. These cases featured one or many equitable factors commonly cited by judges, prosecutors, and governors in granting leniency or clemency,[209] such as evidence of actual innocence,[210] flagrant procedural error in the underlying criminal case,[211] a sentence (imposed or threatened) that was grossly disproportionate to the underlying offense,[212] feebleness or ill health,[213] strong family and community support,[214] or evidence of non-dangerousness demonstrated by years of good

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[209] *See, e.g.*, Kimberly Kaiser and Cassia Spohn, *Why Do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, 19 CRIMINOLOGY CRIM. JUST. L. & SOC'Y 44, 49–54 (2018); Daniel T. Kobil, *Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 604–611, 624–633 (1991).

[210] *Refuse Extradition*, MARSHFIELD NEWS-HERALD, Oct. 27, 1932, at 5, https://www.proquest.com/docview/2369451988 ("Governor Rolph said he was convinced after hearing the case yesterday that Glavin . . . did not misrepresent facts when he sold the stock."); *Extradition of Detroit Man Denied by Governor*, BATTLE CREEK ENQUIRER & NEWS, Sept. 25, 1940, at 8, https://www.proquest.com/docview/2091598870. ("the attorney general's office had investigated the charge and had found that Moore 'had no intent to rob when accosted by the special officer.'")

[211] KAIRYS, *supra* note 198, at 37 (grossly deficient legal representation at trial); *Jersey Haven Is Given Georgian Fleeing 48-Year Burglary Term*, N.Y. TIMES, Aug. 24, 1969, at 67, https://www.proquest.com/docview/118582768 (defendant was "convicted and sentenced on the same day . . . without a jury or lawyer to represent him."); *Hughes Refuses Second Extradition in Two Days*, HERALD-NEWS, Aug. 22, 1962, at 1, https://www.proquest.com/docview/2817168780 ("King had not been represented by counsel at his trial and the trial had proceeded in somewhat arbitrary fashion.").

[212] Philip S. Gutis, *Arkansas Balks at Extradition in New York Case*, N.Y. TIMES, June 9, 1985, at 48 ("Gov. Bill Clinton refused to extradite Miss Cowan . . . citing the severity of the penalty she would receive if found guilty."); *Standoff: Area Man's Extradition Challenged*, GREEN BAY PRESS-GAZETTE, Nov. 17, 1984, at 1, https://www.proquest.com/docview/2028480941 ("this case is special because . . . the prosecuting attorney in Missouri is determined to seek excessive punishment") *Driscoll Refuses to Extradite Man*, VINELAND TIMES-JOURNAL, Apr. 29, 1950, at 1, https://www.proquest.com/docview/2384291688 ("Governor Driscoll today refused to send back to Georgia a 21-year-old fugitive who was sentenced to 20 years in prison for stealing a radio.").

[213] *Cancer "Saves" Slayer from Bucks Trial*, PHILA. DAILY NEWS, Aug. 19, 1964, at 17, https://www.proquest.com/docview/2069040005; *Fugitive Dad of 7 to Go Free*, MIAMI NEWS, Sept. 30, 1969, at 10, https://www.proquest.com/docview/2075898726 (recent heart attack).

[214] *Governor Helps Murder Suspect*, SPOKESMAN-REVIEW, July 28, 1939, at 10, https://www.proquest.com/docview/2361759351 ("A delegation of Sanders county, Montana, citizens who attended the hearing testified to Kelly's good character");
Ryals Case, N.Y. AMSTERDAM NEWS, Feb. 25, 1939, https://www.proquest.com/docview/226098419 ("As soon as Ryals was arrested and held for extradition the Defense Committee, composed of public spirited lawyers and other citizens in Harlem, rushed to his defense. They aroused community interest by holding mass

behavior in the asylum state.[215] [216] In many more cases, governors cited these factors along with a nominally, but seemingly pretextual, lawful reason to refuse extradition such as unspecified paperwork errors.[217]

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meetings . . ."); *Man Who Fled Prison Wins Jersey Mercy: Edison Cites Exemplary Life of Escaped Missouri Convict*, N.Y. TIMES, July 12, 1941, at 28, https://www.proquest.com/docview/105534411 ("[O]fficials of Kearny and other persons had a good word for him, including Bishop Francis J. McConnell of the Methodist Church."); *King Grateful for Extradition Victory*, L.A. Sentinel, Sept. 9, 1948, at 9, https://www.proquest.com/docview/562144823 ("King thanked the hundreds of volunteer workers organized by [groups including] . . . the Alameda County CIO, the NAACP, the Independent Progressive party of California, Communist party, East Bay Civil Rights Congress, and numerous churches.")

[215] *S.F. Taylor, Sought 21 Years for Prison Escape, Freed by Olson*, S.F. EXAMINER, Feb. 11, 1941, at 3, https://www.proquest.com/docview/2163949656 ("Spreitzer came to San Francisco [21 years ago] and from that date to the present, he has been a law abiding resident of that community."); *"Jean Valjean" Wins Battle for Freedom: Extradition on 22-Year-Old Crime Refused*, CHI. DAILY TRIB., Sept. 1, 1936, at 5, https://www.proquest.com/docview/181861744; *19-Year Fugitive Free Man Again*, INDIANAPOLIS STAR, May 14, 1941, at 24, https://www.proquest.com/docview/1890581980. The delay between flight and discovery was, in some cases, decades long. *See, e.g.*, *Extradition of Man Denied by Governor Warren*, SALINAS CALIFORNIAN, Sept. 3, 1948, at 2, https://www.proquest.com/docview/3075980627 (twenty-one years between flight and discovery of Jesse Stewart aka Wiley King who resettled as a law abiding Californian with a wife and two kids); *36-Year Shadow of Prison Is Lifted*, EVANSVILLE PRESS, Apr. 14, 1978, at 1, https://www.proquest.com/docview/2689693898 (twenty-seven years between Lizzy Williams's escape and discovery, in which time she settled in Michigan, worked hard and became deeply religious); *Refusal to Extradite Closes 1915 Murder*, PITTSBURGH PRESS, Oct. 1, 1959, at 9, https://www.proquest.com/docview/2274682616 (thirty years between resettlement and discovery of Peter Kasanovich).

[216] Two other, less common explanations for extradition refusal deserve note. A small number of cases concerned refugees from political persecution. *See, e.g.*, *Brown Rejects Extradition of Banks to South Dakota*, L.A. TIMES, Apr. 20, 1978, at B1 (California refuses to extradite Native American leader for fear of political persecution in South Dakota); *Roosevelt Blocks Two Extraditions*, N.Y. Times, Feb. 19, 1929, at 36, cols. 1–2 (extradition of labor leader Frederick Biedenkapp refused on belief that the underlying charges were an attempt at union busting). Another handful of cases appear to have resulted from political favoritism. *Memphis Woman Safe in Nevada*, COMMERCIAL APPEAL, Sept. 24, 1964, at 26, col. 1 (wife of former deputy sheriff); *Dye Extradition Denied By Idaho*, SPOKESMAN-REVIEW, June 23, 1943, at 23, col 7 (Idaho refuses to extradite president of Eastern Idaho Mining association); *IU President, Gov. Bowen, Defend Knight*, CLARION-LEDGER, Aug. 24, 1979, at 46, https://www.proquest.com/docview/2203301396 (Indiana Governor Otis Bowen refuses to extradite Indiana University and Team USA men's basketball coach Bobby Knight).

[217] *See, e.g.*, *Negro Freed After Hearing*, STATE JOURNAL (Lansing, Mich.), Nov. 6, 1941, at 1, https://www.proquest.com/docview/2031740239; *Urge Van Wagoner, Hear Negro's Case*, State JOURNAL (Lansing, Mich.), Oct. 31, 1941, at 2, https://www.proquest.com/pagelevelimagepdf/2031738600; *Extradition of Oklahoma Game Warden Denied*, ALBUQUERQUE JOURNAL, Feb. 28, 1930, at 6,

A substantial number of these clemency-style extradition refusals featured Black men who fled the Jim Crow South.[218] This pattern was in part the product of a concerted effort by the NAACP beginning in the 1930s, which saw interstate extradition cases at the intersection of its two top agenda items: "the eradication of lynching and the expansion of due process protections for black criminal defendants."[219] The fugitives the NAACP supported had been arrested or convicted under suspect circumstances, sentenced to outrageous terms, confined under inhumane conditions, or all three, and received support from civil rights activists in the northern states they fled to.[220] Though the NAACP's campaign formally concluded in 1940, Black refugees from the Jim Crow south continued to appeal to northern-state governors to for asylum.[221] My study identifies thirty-eight cases in which racial animus in the criminal justice systems of the Jim Crow South appeared to play a role in a northern state governor's decision to refuse extradition. Thirty-four of these occurred after the NAACP ended its campaign in 1940.[222]

James Jiles's case is illustrative.[223] Mr. Jiles, a Black man, was convicted of murder by an all-white jury in Georgia in 1944.[224] He had a strong self-defense claim but received grossly deficient legal representation at his trial.[225] He escaped a chain gang a year after his conviction and resettled in Philadelphia for twenty-five years before being discovered.[226] In that time, he married, had four children, and supported his family as a union construction worker.[227] The union, his family, and his broader community

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https://www.proquest.com/docview/2122796231; *Blind Mother's Plea Saves Son*, MANSFIELD NEWS-JOURNAL, Feb. 8, 1933, at 2, https://www.proquest.com/docview/2272435147. Because the governor cited a lawful, albeit likely pretextual, reason for their refusal, these cases were not included in the study's counts.

[218] *See, e.g.*, *Refuse to Extradite Soldier to South Carolina*, CHI. DEFENDER, May 31, 1941, at 2 (Andrew Harmon Ford); *Hurley Frees Fugitive: Massachusetts Refuses to Return Negro to Georgia Chain Gang*, N.Y. TIMES, July 28, 1937, at 9, col. 2 (James Cunningham); *Ohio Governor Refuses Ala. Demand to Extradite Negro*, CHI. DEFENDER, Nov. 6, 1943, at 6 (Samuel W. King). *See generally*, Rise, *supra* note 199.

[219] *Id* at 121.

[220] *Id.* at 126, 136–37.

[221] *Id.*

[222] {Appendix A.} This is likely an undercount: I count only those cases in which it is clear that race played a role, excluding many in which it was possible but not plainly so.

[223] David Kairys, Mr. Jiles's attorney, recounted Mr. Jiles's story in detail in Chapter One of his memoir. KAIRYS, *supra* note 198, at 7–40.

[224] *Id.* at 37.

[225] *Id.*

[226] *Id.* at 9.

[227] *Id.*

successfully lobbied Pennsylvania Governor Shafer to reject Georgia's extradition demand in 1969.[228]

Though many extradition refusals engaged their moment's most politically polarizing issues, documented instances of backlash to extradition refusals are vanishingly rare. If the spurned governor made any public response, it was almost always limited to a combative statement.[229] On exceedingly rare occasions, a governor stated or implied that his decision to refuse an extradition was a tit-for-tat retaliation.[230] There is no documented instance of a policy-level consequence to an extradition refusal.[231] Most cases

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[228] *Id.* at 37–40.

[229] *See, e.g.*, Bunch & Hardy, *supra* note 25, at 56 (Governor of South Carolina filled with "indignant scorn" after Governor of Massachusetts rejected his extradition demand); *Refusal of Extradition Stirs Georgia Anger*, TWO RIVERS REPORTER, Aug. 18, 1955, at 10, col. 7 (refusal to extradite Edward Brown was "an open invitation for every convict to seek refuge in Pennsylvania."); *Sparks Charges Bias, Animosity*, BIRMINGHAM POST, Apr. 24, 1943, at 2, col. 6 (Alabama Governor Sparks stated that Wisconsin's refusal to extradite Lively Lewis "suggested prejudice, bias, and animosity toward the state of Alabama."); *Ohio Governor Won't Extradite Negro to Ala.*, PHILA. TRIB**.**, May 18, 1946, at 3, https://www.proquest.com/docview/531862224 ("Governor Sparks said the Ohio governor was 'flouting the sovereignty' of Alabama and violating the U.S. Constitution.") The harsh public statements by Governor Landry following Governor Hochul's refusal to extradite Dr. Carpenter is typical of this species of reaction. LaRose, *supra* note 29.

[230] *See, e.g.*, *Michigan Fights Illinois Delay on Extraditions*, CHICAGO DAILY TRIBUNE, Mar. 26, 1941, at 13 ("I have ordered this request for extradition held up, said Gov. Van Wagoner in Lansing, until Illinois decides to cooperate with us [on extradition request pending since January]" (internal quotations omitted); *Georgia Frees Negro as Blow at Bay State*, N.Y. TIMES, Sept. 2, 1937, at 8, col. 4–5 (in retaliation for prior extradition refusal, Georgia paroles prisoner on condition he goes to Massachusetts); *Georgia Hits at Comstock*, BATTLE CREEK MOON-JOURNAL, July 26, 1933, at 1, https://www.proquest.com/docview/3052728117 ("The refusal of Governor William A. Comstock to grant extradition papers to the state of Georgia for the return of a negro Prisoner to a Georgia chain gang was cited yesterday afternoon as Georgia's reason for the counter refusal to send officers after an escaped prisoner from a Cedartown, Georgia chain gang arrested in Detroit.") *Promise Negro a Fair Trial*, KNOXVILLE NEWS-SENTINEL, Aug. 30, 1936, at 18, https://www.proquest.com/docview/2659627043 (Governor J. M. Futrell of Arkansas quoted as recalling "retaliation has already happened to some extent between states.")

[231] Such as a state's withdrawal from an interstate agreement, dissolution of an otherwise progressing negotiation, or chain of back-and-forth extradition refusals. In one instance, Tennessee threatened to refuse all future extradition demands from New York if it refused to extradite John Virgil Hudson. However, there is no indication that this threat ever materialized. *Carry Plea to Lehman on Extradition*, ELMIRA STAR-GAZETTE, Oct. 3, 1941, at 17, https://www.proquest.com/docview/2348829067. Granted, consequences that may have manifest only behind closed-doors are impossible to identify. Nonetheless, it is telling that critics of discretionary extradition, including two whose studies included interviews with dozens of current and former senior state extradition officials, were not able to cite any of policy-level consequences, and instead, gestured only at their possibility. *Interstate Rendition*, *supra* note 199, at 97 n.1; Bunch & Hardy, *supra* note 25, at 55.

evoked no public comment or reaction by the demanding state. In some instances, the demanding state's governor accepted or even applauded the asylum state's rejection.[232] In short, there is not empirical support for the oft-repeated proposition that governors exercising their discretion, especially in controversial cases, would destabilize the system of interstate extradition.[233]

Taken together, the historical record indicates that governors used their discretion judiciously, refusing extradition on equitable grounds rarely and in cases that tended to present extraordinarily compelling facts. In turn, spurned state's responses were typically measured, even in high-profile cases covered in the media. It appears that governors' exercise of discretion was part of a functional interstate dispute resolution protocol. Crucially, this mechanism proved resilient even in the most combustible setting of the 20th century—racially charged cases involving asylees from the Jim Crow South. Gubernatorial discretion's demonstrated ability to preserve comity amid those factional hostilities offers a compelling model for managing the tensions among politically opposed states today.

B. Mutual Interest and Other Structural Factors Supporting Stability

States shared a mutual interest in preserving the status quo that allowed them to both receive wanted fugitives without much hassle and continue exercising their own discretion to, on occasion, reject extradition demands on equitable grounds. This helps explain both governors' caution in exercising discretion and states' muted responses to having their demands rejected.

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[232] *See, e.g.*, *Fugitive to Stay Free: Dewey Bars Extradition From Florida of Escaped Convict*; N.Y. TIMES, March 15, 1952, at 30, col. 3 (New York Governor withdraws demand on request of Florida Governor) ; *Dewey Gets Alabama Fugitive Free Of 100-Year Sentence in $70 Theft*, N.Y. TIMES, Nov. 28, 1951, at 1 (Alabama withdraws demand on request of New York Governor); *Man Who Fled Prison Wins Jersey Mercy: Edison Cites Exemplary Life of Escaped Missouri Convict*, N.Y. TIMES, July 12, 1941, at 28, https://www.proquest.com/docview/105534411 ("[I]f you , after considering the facts and circumstances of his conduct for the past twenty years, shall conclude that the extradition should be denied, it will meet my approval for you to deny such extradition."); *Fugitive's Fate Still Undecided*, STATE JOURNAL (Lansing, Mich.), Mar. 8, 1932, at 4, https://www.proquest.com/docview/2031570102 ("Governor Brucker has indicated that he would welcome a refusal of the governor of California to grant extradition in view of Wysocki's record while a resident there."); *Prison Fugitive Gets New Chance in Colorado*, N.Y. HERALD TRIB., July 21, 1939, at 30, https://www.proquest.com/docview/1319986350 ("Governor Dixon . . . agreed Barnwell should be given every chance to make good."); Bunch & Hardy, *supra* note 25, at 65.

[233] KAIRYS, *supra* note 198, at 22; *Interstate Rendition*, *supra* note 199, at 110–11; Bunch & Hardy, *supra* note 25, at 56; Dinan, *supra* note 24, at 675–76; Wanlass, *supra* note 134, at 398–399; South Dakota v. Brown, 20 Cal. 3d 765, 787 (1978) (Mosk, J., dissenting).

The history of states' individual and collective efforts to preserve extradition discretion supports this inference. In the early 18th century, southern states refrained from pressing for federal intervention to compel extradition of accessories to slave escape.[234] In the 1930s, at the same time that their governors regularly, and often controversially, refused extradition demands for extra-constitutional reasons, states collaborated to develop the Uniform Criminal Extradition Act. The drafters of the Act did not limit gubernatorial discretion, but rather, used language that explicitly and implicitly preserved state discretion.[235] Throughout the 1930s, 1940s, and early 1950s, states, including southern states frustrated by northern governors' refusals to extradite Jim-Crow refugees, adopted the Act as drafted.[236] Most notably, no state *ever* challenged *Dennison* in federal court, even when it was clear that its doctrinal foundation—that the federal courts lacked power to compel action by state officials—had been repudiated.[237] In fact, states litigated strategically in order to preserve *Dennison*: For example, in 1978, South Dakota did not petition for certiorari to challenge the California Supreme Court's sharply divided decision upholding its governor's unchecked authority to refuse extradition demands.[238] The

[234] Finkelman, *supra* note 142, at 619 (noting that in the early 19th century, southern states resisted expanding federal power to compel state compliance with extradition law "fear[ing] that a stronger law might ultimately work against them." This stands in contrast to their support for a federal bureaucracy to assist in the recovery of fugitive slaves. *Id.; supra* notes 140–142 and accompanying text.

[235] *See* UCEA § 7 ("*If* the Governor decides that the demand should be complied with, he shall sign a warrant of arrest . . .") (emphasis added); *supra* note 177 (describing discretionary provisions of the UCEA).

[236] Alabama, Florida, Georgia, and Tennessee adopted the Act in 1932, 1941, 1951, and 1951 respectively. P. Warren Green, *Duties of the Asylum State Under the Uniform Criminal Extradition Act*, 30 AM. INST. CRIM. L. & CRIMINOLOGY 295, 295 n. 2 (1939); UCEA at Table of Jurisdictions Wherein 1936 Act Had Been Adopted. *See supra* notes 218–220 and accompanying text.

[237] *Branstad*, 483 U.S. at 227–28 ("It would be superfluous to restate all the occasions on which this Court has imposed upon state officials a duty to obey the requirements of the Constitution, or compelled the performance of such duties . . . the fundamental premise of the holding in *Dennison*—that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today") (citing *Ex parte* Young, 209 U.S. 123, 155–56 (1908); Brown v. Board of Education, 345 U.S. 294 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); FERC v. Mississippi, 456 U.S. 743, 761 (1982)); Bunch & Hardy, *supra* note 25, at 60 ("…[T]hat no demanding state authorities upset by an asylum governor's rejection of an extradition request recognized the inconsistency between *Dennison*'s second pronouncement and the U.S. Supreme Court's 'modern' holdings on federalism is too implausible to be taken seriously.")

[238] Bunch & Hardy, *supra* note 25, at 60; South Dakota v. Brown, 20 Cal. 3d 765 (1978). In at least two other instances, states threatened, but appeared not to ultimately pursue, federal court action. *See Extradition Denied, Battle May Continue*, APPLETON POST-CRESCENT,

eventual federal court challenge to *Dennison* was brought by Puerto Rico, which, as a territory, did not benefit from *Dennison*'s rule that the constitution prohibited the federal government from compelling a state to comply with federal extradition law.[239]

A number of structural factors further explain governors' restraint in exercising, and responding to, equitable extradition refusals.

First, political incentives discourage governors from harboring fugitives in their states. A governor who refuses to extradite an individual accused of serious criminal conduct risks being portrayed as indifferent to public safety. History provides some empirical support for this intuitive proposition: Governors tended to issue equitable refusals only in cases where the alleged fugitive presented a demonstrably low risk to public safety.[240] They took measures to mitigate the risk associated with harboring fugitives, for instance, by conditioning the refusal to extradite a fugitive on his accepting supervision by parole or probation in their state.[241] Still, a number of governors faced political backlash in connection to their extradition refusals.[242]

The other side of this coin is equally significant: When an asylum state refuses extradition, the accused is effectively banished from the demanding state. Although the demanding state forfeits an in-person trial and its preferred sentence, banishment itself vindicates core penal objectives. Formal

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Sept. 1, 1936, at 17, https://www.proquest.com/docview/3274313225; *Georgia Pushes Convict Drive*, MIAMI DAILY NEWS, Aug. 7, 1937, at 7, https://www.proquest.com/docview/2073072617.

[239] *Dennison*, 65 U.S at 107 ("[W]e think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.").

[240] *Supra* notes 210–215 and accompanying text.

[241] *See, e.g.*, *Hughes Saves Two from South's Jails*, THE RECORD, Aug. 22, 1962, at 3, https://www.proquest.com/docview/2683021294; *Governor of Washington Refuses to Extradite Negro to Georgia*, APPLETON POST-CRESCENT, Mar. 17, 1964, at 1, https://www.proquest.com/docview/2513670622.

[242] George Pataki successfully painted his opponent, incumbent Governor Mario Cuomo, as soft-on-crime on the basis of his refusal to extradite Thomas Grasso to Oklahoma where he was eligible for the death penalty. Sack, *supra* note 85; *Woodward Trial Begins Today*, HATTIESBURG AMERICAN, Apr. 20, 1987, at 1, col. 1, https://www.proquest.com/docview/2119189034 (Thompson Clark, running for governor against incumbent Bill Waller, charged that Waller was "responsible for the death" of a girl allegedly killed by a man who Waller had refused to extradite). *See also Interstate Rendition* at 111 n.78 (noting that two former governors faced political consequences for their extradition refusals while campaigning to be President); Dinan, *supra* note 24, at 676–77 (discussing political consequences). In addition, my analysis of cases between 1930 and 1987 shows that governors typically exercised their discretion only where the fugitive faced non-violent charges, when there was strong evidence of his actual innocence, or when he had demonstrated rehabilitation and good character in the asylum state. *See supra* section III.A.

exclusion from the community delivers a tangible sanction. It has been a form of criminal punishment since antiquity.[243] Expressively, the act of banishment publicly affirms the community's moral judgment and communicates that the offender has forfeited the right to remain within its territory. Under some circumstances, the state may also conduct a trial and secure a conviction in absentia.[244] Finally, public safety aims are fully achieved. The offender is physically removed from the locus of prior harm, and the state retains the ability to arrest and try him should he ever return. Denying extradition, far from nullifying accountability, secures substantial retributive, symbolic, and public safety benefits.[245]

Finally, the federal and state criminal systems in the United States operate under a dual sovereignty framework. So long as a person's conduct constitutes a federal offense, federal authorities may investigate, arrest, and prosecute that individual—regardless of the state in which the conduct occurred, or to which the person flees. While not all state crimes have federal analogues, the categories of offenses most likely to provoke concern in a discretionary extradition regime—such as terrorism, trafficking offenses, environmental harm, and political interference—are comprehensively addressed in the federal criminal code. Moreover, interstate flight to avoid prosecution for a state felony is itself a federal crime, providing the federal executive wide latitude to intervene in state extradition disputes, should it want to do so.[246] The federal criminal system is a powerful safeguard against attempts by one state to shield individuals from accountability for serious or politically charged offenses in another state.

C. Practical Considerations and Policy Alternatives

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[243] WILLIAM CHESTER JORDAN, FROM ENGLAND TO FRANCE, FELONY AND EXILE IN THE HIGH MIDDLE AGES 7–10, 14, 27–28 (2015); ELIZABETH PAPP KAMALI, FELONY AND THE GUILTY MIND IN MEDIEVAL ENGLAND 22, 28 (2020); Matthew J. Gibney, *Banishment and the Pre-History of Legitimate Expulsion Power*, 24 CITIZENSHIP STUD. 277 (2020). Though formally disallowed as a criminal sanction in the U.S., banishment has persisted in some forms. Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758 (1963).

[244] Many states permit trial in absentia for defendants who voluntarily fail to appear in court following an initial court appearance that included warnings describing the consequences of failing to appear for future appearances. *See, e.g.*, 725 ILL. COMP. STAT. 5/115-4.1 (2024); People v. Baynes, 162 A.D.3d 897 (N.Y. App. Div. 2018), *leave denied* 32 N.Y.3d 1002 (2018).

[245] It might also impose certain aspects of a punishment, such as attaching assets within the state and creating a felony record that would appear on background checks nationwide.

[246] 18 U.S.C. § 1073. *See also supra* note 197 (discussing the law and relevant Justice Department's policy).

1. Feasibility

Is it realistic to expect ideologically opposed states to work collectively toward restoring extradition discretion? At first glance, one may expect conservative-led states to be hesitant. The most recent interstate extradition conflict—involving Dr. Margaret Carpenter[247]—makes progressive states' interest in extradition discretion seem more immediately salient. However, conservative states stand to benefit equally, if not more, from restoring discretionary extradition. Political conservatives point to the convictions of Donald Trump and the January 6th rioters as concrete examples that Democrats weaponize the criminal justice systems under their control against political opponents. Moreover, progressive jurisdictions criminalize conduct that is constitutionally protected and culturally valued in conservative states, including gun possession and acts that could be viewed as protected forms of religious expression.[248]

Discretionary extradition provides strategic advantages across the political spectrum. It allows governors to claim victory when shielding a constituent from an unpopular out-of-state prosecution, while deflecting blame when their own extradition request is rebuffed—denouncing the asylum state while extracting the symbolic price of banishment. The extraordinary longevity of *Dennison* suggests that earlier governors valued such flexibility enough to tolerate occasional reciprocal losses.

2. Enforceability

Restoring extradition discretion with a withdrawal-on-request provision must rely on interstate comity as its frontline enforcement mechanism. This is consistent with nearly all aspects of the contemporary extradition process. States accept many burdens in the interest of achieving reciprocal benefits in return: States refrain from billing one another for extradition costs; [249] contact one another voluntarily upon discovery of a potential fugitive;[250] and voluntarily facilitate the extradition of individuals they are not required to.[251] At the broadest level, states follow the prescriptions of the UCEA, which, as a state law, is subject to unilateral modification or withdrawal at any time. Notably, as recounted above, *Dennison* went unchallenged for decades after

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[247] *See supra* notes 27–32 and accompanying text.
[248] *See supra* note 46 and accompanying text (regarding gun possession). Colorado, for example, criminalizes many forms of protest activity within eight feet of abortion clinics. COLO. REV. STAT. § 18-9-122; Hill v. Colorado, 530 U.S. 703 (2000) (holding that the law is not facially unconstitutional).
[249] *See* NAEO Resolution 31, *supra* note 102.
[250] *See supra* notes 87–88 and accompanying text.
[251] *See supra* note 172 and accompanying text.

its doctrinal foundation had long since been repudiated and in spite of the fact that governors engaged in occasionally high-visibility extradition fights.

Nonetheless, it is plausible that the courts would not foil a state-led attempt to restore extradition discretion. State high courts have shown a willingness to stray from rigid textualism in interpreting the Extradition Clause.[252] And with the critical exception of *Branstad*, the Supreme Court has traditionally shown great deference to practices developed by the states to govern interstate extradition.[253] A withdrawal-on-request provision could receive similar treatment.[254] Congress could provide further support, recognizing a version of a withdrawal-on-request provision as an interstate compact under the Compact Clause,[255] thereby giving it the force of federal law and easing Supremacy Clause concerns.[256] Congressional assent for the provision would effectively rewrite the Extradition Act—creating a novel question of constitutional and statutory construction not squarely foreclosed by *Branstad*.[257]

3. Policy Variation

The simplest version of a discretionary extradition policy restores the unfettered gubernatorial authority that existed under *Dennison*. An alternative policy could limit extradition discretion to circumstances in which

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[252] *See, e.g.*, South Dakota v. Brown, 20 Cal. 3d 765 (1978); New Mexico *ex rel*. Ortiz v. Reed, 524 U.S. 151 (1998); California v. Superior Ct. of California, San Bernardino Cnty., 482 U.S. 400 (1987); Michigan v. Doran, 439 U.S. 282 (1978). Cf. *supra* note 127 (discussing state courts' authority to issue a writ of mandamus to compel gubernatorial action).

[253] See *supra* notes 183–192 and accompanying text.

[254] For example, invoking the adequate-and-independent-state-grounds doctrine, the Court could reason that—once both jurisdictions have enacted parallel "withdraw-on-request" statutes—the demanding governor's duty to rescind the requisition is created and defined entirely by state law, so no federal question remains for the Court to decide. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); Fox Film Corporation v. Muller, 296 U.S. 207, 210 (1935).

[255] U.S. Const. art. 1, § 10, cl. 3.

[256] Cuyler v. Adams, 449 U.S. 433, 442 (1981).

[257] It may, in fact, completely resolve the issue. Though the six Justice majority opinion in *Branstad* grounded its holding in both the Extradition Clause of the Constitution and the Extradition Act, three justices (O'Connor, Powell, and Scalia) explained that they joined in the opinion only insofar as it applied the Extradition Act. *Branstad*, 483 U.S. at 231 (O'Connor, J., concurring in part and concurring in the judgement); *id.* (Scalia, J., concurring in part and concurring in the judgement). If Congress modified the Extradition Act and the current Court adopted those justices' constitutional avoidance approach, it could avoid the conflict entirely.

criminalizing the conduct in question conflicted with a public policy value identifiable in the state's constitution or positive statutory law. As applied to the potential conflicts discussed above, this would allow discretion in cases related to abortion, gun possession, gender expression, and religious rights. It would not, by contrast, allow discretion in cases where the asylum state was suspect of the demanding state's criminal process or the motives underlying the prosecution.

This narrower policy limits the risk of abuse by the asylum state governor by cabining her discretion. However, this restriction may also endanger the policy's feasibility and viability. Republican-led states may view inappropriate politically motivated prosecutions in Democratic-led states as the most likely source of a potential extradition conflict. Moreover, the lack of transparency and ability to challenge governors' exercise of discretion under *Dennison* may have been essential to its longevity: Plenary gubernatorial authority to reject extradition demands supported a norm that these issues would be resolved in the sphere of interstate relations rather than in the courts.

4. Court-Led Reforms

The most direct path to re-establishing the pre-*Branstad* equilibrium would be for the Supreme Court to overrule *Puerto Rico v. Branstad*. A full exploration of that possibility is beyond the scope of this article. It is worth observing, however, that the Court's composition has changed considerably since 1987 and that the present court has demonstrated a willingness to repudiate even relatively recent precedent.

A narrower course would be for the Court to permit alleged fugitives to challenge their extradition on the grounds that the statute under which they are charged is facially unconstitutional. The Court has previously rejected challenges to extradition alleging Fourth amendment, Eighth amendment, and due process defects in the underlying criminal case, reasoning that these issues should be addressed in the state and federal courts of the demanding state upon a fully developed factual record.[258] Because a claim of facial unconstitutionality turns solely on the statute's text, it would not require a factual record—the extradition court would be as well positioned as any to

[258] *Reed*, 524 U.S. at 152 (due process—parole revoked arbitrarily); *Thaw*, 235 U.S. at 440–41 (due process—inadequate mental state to form mens rea); *Crawford*, 65 F.2d at 741–42, *cert. denied*, 290 U.S. 612 (1933) (due process—racial discrimination in jury selection); *Doran*, 439 U.S. at 290–91 (Blackmun, J., dissenting) (Fourth Amendment); Pacileo, 449 U.S. at 87 (Eighth Amendment).

conduct that analysis.[259] This avenue to relief would resolve a limited but especially concerning subset of potential extradition conflicts.

CONCLUSION

Should governors have discretion to reject the extradition demands of their sister states? With this article, I hope to shift scholars', legislatures', and courts' view of that question from an easy legal question—the Constitution and Supreme Court doctrine plainly prohibit extradition discretion—to a challenging policy question. In the context of interstate extradition, federal law has never been inviolable canon, but rather a default rule that controlled only if the states themselves failed to adopt an alternative.

In this moment of growing divergence among the states as to what constitutes a crime and who should be prosecuted, policymakers should strongly consider overriding that default. An interstate extradition conflict threatens the stability of the entire interstate extradition apparatus. Worse, the mere specter of a conflict contributes to the growing arms race of states' attempting to enforce their laws and effect their policies extraterritorially.

Against the backdrop of this looming conflict, it is hard to ignore over a century of evidence indicating that extradition discretion succeeded in policing itself, even during the tumultuous Jim Crow period of interstate relations in the early 20th century. Equitable refusals were uncommon and carefully considered. Even the most contentious cases engendered only muted responses. States took substantial steps to preserve this status quo. They built a system of extradition law and policy—the system that controls extradition to this day—that relies essentially on the asylum state's willing participation. Tellingly, no state ever sought to upset the 1860 precedent that allowed for extradition discretion, even when that precedent was obviously vulnerable.

Today, as the Supreme Court increasingly turns to history and tradition to interpret the Constitution, in the extradition context, the states might turn to history and tradition to circumvent it.

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[259] United States v. Salerno, 481 U.S. 739, 745 (1987) (describing the Court's "no set of circumstances" test for facial unconstitutionality); Richard H. Fallon, Jr., *Fact and Fiction in Facial Challenges*, 99 CAL. L. REV. 915, 922–925 (2011) (distinguishing facial and as-applied constitutional challenges).