The Fugitive Slave Clause and the Antebellum Constitution

H. ROBERT BAKER

Among the most long-lasting constitutional controversies in the antebellum era was the interpretation of the fugitive slave clause. It was the subject of repeated legislative and judicial construction at both the state and the federal level. It raised delicate questions about federalism and the balancing of property rights and personal liberty. Slaveholders and abolitionists brought irreconcilable constitutional positions to the table, ultimately dividing Northerners from Southerners. However, it was not just divergent political commitments that made it difficult to fix a stable meaning to the fugitive slave clause. The text itself was ambiguous enough to make it amenable to multiple interpretations. For precisely this reason, an examination of the changing interpretations of the fugitive slave clause uncovers antebellum constitutional praxis, allowing us to see how historical actors interpreted the Constitution and how those interpretations shifted over time.

Scholarship on the fugitive slave law has generally focused on *Prigg v. Pennsylvania* (1842), the Fugitive Slave Act of 1850, and *Ableman v. Booth* (1859). Whereas the scholarship covers a broad ground, the larger historiographical discussion of the past 30 years has addressed the question of whether the Founders' Constitution was intentionally proslavery. Paul Finkelman and William Wiecek laid out the most persuasive version of

H. Robert Baker is associate professor of history at Georgia State University <robertbaker@gsu.edu>. Research funding came from a generous grant from the William Nelson Cromwell Foundation, a Newberry Library Short-Term Fellowship, and the History Department of Georgia State University. An earlier version of this article was presented at the Historical Society's conference in Baltimore, Maryland, in June of 2008. Finally, he thanks (arbitrarily in alphabetical order) Michelle Brattain, Dirk Hartog, Gary Rowe, and David Tanenhaus and the anonymous referees for the *Law and History Review* for their help with this article.

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this thesis in several articles.[1] If the fugitive slave clause represented an imprudent concession on the part of Northerners at the Convention, the Fugitive Slave Act of 1793 was evidence that slaveholders held decisive political influence and could cast the Constitution in proslavery terms. Scholars who opposed this interpretation have conceded that the Constitution protected slavery, but have argued that it was a consensus charter that was (at least potentially) neutral on the subject of slavery. The federal policy that gave the Constitution its proslavery appearance, according to this interpretation, only came in the decades after its establishment. Either way, by the time the Fugitive Slave Act came before the Supreme Court in 1842, the Court and the federal government were firmly in the hands of slaveholders who insisted upon a proslavery construction to the Constitution.[2]

This article takes a different view of the fugitive slave clause's long history of interpretation from 1793 through 1859. One problem with the contemporary literature is that it focuses too much on the Supreme Court's decision in *Prigg v. Pennsylvania*. This betrays our contemporary acceptance of judicial supremacy and our privileging of the Supreme Court as the final arbiter of constitutional meaning. In a regime of judicial supremacy, Congress and the president might play "constitutional politics,"

1. Paul Finkelman, "Making a Covenant with Death: Slavery and the Constitutional Convention," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 188–225; and William M. Wiecek, "'The Blessings of Liberty': Slavery in the American Constitutional Order," in *Slavery and Its Consequences: The Constitution, Equality, and Race* (Washington, DC: American Enterprise Institute for Public Policy Research, 1988), 23–44. These arguments followed two decades of revisionist scholarship that had moved to place slavery at the center of the American constitutional order. See A. Leon Higginbotham, *In the Matter of Color: The Colonial Period* (New York: Oxford University Press, 1978); Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution: Ten Essays* (Westport, CT: Greenwood Press, 1980, c. 1967), 167–213; and Donald L. Robinson, *Slavery in the Structure of American Politics, 1765–1820* (New York: Norton, 1979).

2. Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001); William W. Freehling, "The Founding Fathers and Slavery," *The American Historical Review* 77 (1972): 81–93; Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution," *The American Journal of Legal History* 36 (1992): 466–98; and Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* 17 (1997): 37–59. More recent arguments have pointed to the use of slavery by political actors to buttress other political positions. See Matthew Mason, "Slavery and the Founding," *History Compass* 4 (2006): 943–55. Earl M. Maltz makes the case for the Supreme Court's accommodation of both sides on the subject of slavery in *Prigg v. Pennsylvania*. See Earl M. Maltz, *Slavery and the Supreme Court, 1825–1861* (Lawrence, KS: University Press of Kansas, 2009).

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but the Supreme Court decided, and decided finally, what was "constitutional law." Recent work on the antebellum political order has called this assumption into question by identifying a much broader field of play for the making of constitutional law. Belief in popular sovereignty meant that the Constitution's meaning was, in the last instance, determined by "the People themselves." This did not mean that any one person's interpretation was as good as another's, but rather that democratic procedures governed disputes and that the "People" had ample opportunity to make their will felt through a variety of legal and democratic mechanisms. Recent research suggests just how powerfully these mechanisms played into Madison's constitutional thought, and how those structures were then implemented in the United States Constitution.[3] Fundamental disagreements about the meaning of constitutional limits or divisions of power would be worked out through multiple channels, allowing dissenting views a means of expression. The system resisted finality and instead encouraged compromise and settlement. Within this system, courts played an important role, but in a more circumscribed way than they do presently.[4]

3. On the power of public opinion and, therefore, democratic processes to correct government, see Colleen A. Sheehan, "Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion," *The American Political Science Review* 98 (2004): 405–24; and Colleen A. Sheehan, "Public Opinion and the Formation of Civic Character in Madison's Republican Theory," *The Review of Politics* 67 (2005): 37–48. Sheehan argues that Madison privileged public opinion as a means of guiding the actions of political actors in the executive and legislative branches. This allowed venues for public expressions about constitutional disputes.

4. On the subject of popular sovereignty and democratic constitutionalism, see Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York: Cambridge University Press, 2008); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Wayne D. Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1996); and Gary D. Rowe, "Constitutionalism in the Streets," *Southern California Law Review* 78 (2004): 401–56. For the congressional role in constitutional disputes, see David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801* (Chicago: University of Chicago Press, 1997); David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* (Chicago: University of Chicago Press, 2001); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago: University of Chicago Press, 2005); Neal Devins and Keith Whittington, "Introduction," in *Congress and the Constitution*, ed. Neal Devins and Keith Whittington (Durham: Duke University Press, 2005), 1–17; and Martin H. Quitt, "Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844," *Journal of the Early Republic* 28 (2008): 627–51. On the inability of courts (and the Supreme Court) to exercise a muscular judicial supremacy, see Gordon S. Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less," *Washington & Lee Law Review* 56 (1999): 787–808. For an empirical study showing that judicial review before *Marbury v. Madison* was practiced largely in departmentalist

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Viewed in this light, the history of the fugitive slave clause's changing meaning offers a glimpse at how authoritative interpretations of the Constitution were made. They were not the work of one branch, judicial or otherwise. Rather, they were achieved by a variety of processes that produced a broad enough consensus to be considered a constitutional settlement. Such settlements were necessary when the meaning of the Constitution was elusive, and especially when precisely defining it would result in a redistribution of powers and rights in a federalist system.[5] The making of a settlement did not occur all at once. Controversial questions might be answered in Congress, and then litigated in multiple courts and brought to the attention of state legislatures, meaning that all aspects of a settlement might take years or even decades to work out fully. In the process, the terms of a settlement would be shaped by its interaction with the legal and political order. Importantly, not everyone had to accept the terms of a settlement. The ability of actors on the constitutional stage to articulate opposing viewpoints and attempt to make their viewpoints official was an important means of channeling dissent. One of the strengths of the American constitutional order, then and now, lies in its ability to contain opposing viewpoints and give them avenues for expression, rather than attempting to stamp them out.

Regarding fugitive slaves, the settlement worked out in Congress between 1791 and 1800 had three components. First, it made fugitive

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terms (i.e., in the judicial department defending its institutional prerogatives against legislative encroachment), see William Michael Treanor, "Judicial Review before *Marbury*," *Stanford Law Review* 58 (2005): 455–561.

5. I distinguish here my understanding of constitutional settlement from that of Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007) 17–21. Whittington identified two major problems for simplistic theories that assume judicial supremacy is inherent in our system: first, such theories must be able to explain robust constitutional interpretation outside of the Court; second, they must be able to account for the political foundations of judicial supremacy. He saw supremacy in constitutional interpretation as historically shifting between the presidency and the Supreme Court based on the relative strength of each branch of government. The empirical evidence offered by an examination of the fugitive slave clause suggests a different model for the antebellum era. The authority of Congress in determining constitutional meaning was paramount, but Congress nonetheless admitted of robust outside interpretation. It is notable that I have relied on Whittington's own work in devising this interpretation. See Keith E. Whittington, "An 'Indispensable Feature'? Constitutionalism and Judicial Review," *New York University Journal of Legislation & Public Policy* 6 (2002): 21–33; Keith E. Whittington, "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius* 26 (1996): 1–24; and Keith E. Whittington, "The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions," *Journal of Politics* 63 (2001): 365–91.

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slave reclamation a local affair, determinable by either a state or federal magistrate at a summary judicial hearing. Second, the details of reclamation—what procedure would guide the magistrate or what evidence would be considered sufficient—were left to judges' discretion or further legislative instruction. Third, the transit of slaves, free blacks, and the protection of free blacks from kidnapping were left to the states to decide as internal police matters. Between 1800 and 1842 or thereabouts, this settlement held despite pressure from both abolitionists and slaveholders. The intensification of this pressure in the 1830s undermined the old settlement, and ultimately the judiciary disrupted it permanently in *Prigg v. Pennsylvania* by holding that the power over fugitive slave rendition belonged solely to Congress. Despite the elaborate precedential facade erected to demonstrate continuity in constitutional law, the Supreme Court had nakedly altered the settlement's terms. It could not enforce compliance, however, and it would take the more authoritative interpretation by Congress to give force to the new settlement, which it did with passage of the Fugitive Slave Act of 1850. The resistance to this new settlement also found democratic constitutional channels for its expression, but this time its full-throated nature helped play a part in the union's demise.

The First Constitutional Settlement

It is difficult to pin a precise meaning to the fugitive slave clause, thanks to its frustrating syntax: *No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.* Whereas everyone could agree that the clause prevented bound servants and slaves from gaining legal sanctuary in states sympathetic to their plight, the clause was least clear when it mattered the most. Who was to deliver up the slave? Who bore the responsibility for apprehending him or her: the slaveholder, the state, or the federal government? Who could authorize the rendition of a fugitive across state lines? The clause did not specify how powers or duties were to be distributed.

A border dispute between Virginia and Pennsylvania revealed the problems created by this ambiguity. The final surveying of the two states' common western border led to some confusion over who lived under which jurisdiction. Virginians suddenly found themselves subject to Pennsylvania law, requiring them to register their slaves under the Pennsylvania 1780 Act for the Gradual Abolition of Slavery, or risk losing

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their title. One slave by the name of John Davies was never registered and, despite being rented to a Virginia planter, became free. He escaped servitude by running back to Pennsylvania, but was pursued, captured, and returned by force to Virginia. This informal fugitive slave rendition resulted in a grand jury indictment for kidnapping. Governor Thomas Mifflin of Pennsylvania demanded extradition but Virginia's governor refused.

The legal battle that ensued was over the proper interpretation of the fugitives from justice clause, but it was illustrative of many of the fugitive slave clause's ambiguities. Virginia Attorney General James Innes outlined several procedural and substantive reasons why Virginians charged with kidnapping ought not to be extradited to Pennsylvania, but his central reason had to do with the intersection of state power and personal liberty. "Every free man in Virginia is entitled to the unmolested enjoyment of his liberty," he reasoned, unless taken away by the constitution or laws of either the United States or Virginia. Without a statute to direct them, state officers would be exercising an "undelegated power over the liberties of freemen."[6]

A frustrated Governor Mifflin submitted the matter to President George Washington and prayed for congressional intervention. Washington sought the advice of Attorney General Edmund Randolph, who noted that Governor Mifflin had failed to prove the most crucial fact: that the defendants had indeed fled from justice. "The Governor of Virginia is responsible for the just use of his discretion," explained Randolph, "and if he should yield to informal evidence, he must yield at his peril."[7] But Randolph hardly sided with Virginia. State officers, he argued, could execute the terms of Article IV without an enabling statute, and he flatly rejected Innes's overly formalist analysis. Nonetheless, Randolph urged Washington to be cautious rather than "establish a precedent for assuming the agency in every embryo dispute between States."[8]

Washington submitted the matter to Congress on October 27, 1791. Although we lack any substantive reporting of the debates that occurred there, copies of the proposed bills are a clue to how constitutional scruples mixed with bare politics. A Senate committee composed of George Cabot of Massachusetts, George Read of Delaware, and Samuel Johnston of North Carolina first reported a bill on December 20, 1792. The rendition

6. James Innes to Beverly Randolph, June 20, 1791, *American State Papers: Miscellaneous*, Washington: Gales and Seaton, 1834 1:41.

7. Edmund Randolph to George Washington, July 20, 1791, *American State Papers: Miscellaneous*, 1:42.

8. Ibid., 1:43.

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of fugitives from justice was left to state executives. Fugitive slaves, however, were reclaimed privately. A slaveholder could present a deposition under oath to a state magistrate to obtain a warrant for a fugitive slave's arrest, which could then be executed by state officers. The bill imposed criminal penalties for harboring and obstruction, which could only be tried in federal court. The bill provoked considerable debate, and was finally recommitted on December 28 to the committee, now enlarged to include Roger Sherman of Connecticut and John Taylor of Virginia. Johnston reported a second bill on January 3, 1793. The new bill had several substantial changes. First, the bill made reclamation the slaveholder's duty, but also gave him recourse to the original procedure outlined in the first bill. Second, the bill substituted "oral testimony or affidavit" certified by a magistrate in the slaveholder's home state for the original bill's requirement of a deposition. Third, a provision was inserted that protected alleged fugitives who were actually natives of the state in which they were claimed, or had been long residents of them. The bill was finally passed on January 18, 1793, then debated in the House 2 weeks later, amended, and returned to the Senate. Importantly, both the provision protecting free blacks and the provision allowing slaveholders recourse to state officers for arresting fugitives were stricken from the final bill.[9]

The "Act respecting fugitives from justice, and persons escaping from the service of their masters," commonly known as the Fugitive Slave Act, was signed by President Washington on February 12, 1793. For fugitives from justice, extradition required a copy of the indictment or sworn affidavit certified by the governor. Once one of these items was produced, it became "the duty of the executive authority" of the state to arrest and return the fugitive. For fugitive slaves, it outlined a slightly different procedure. First, it allowed the slaveholder to seize his fugitive without any kind of legal process. In order to obtain a certificate of removal, a claimant needed only to provide "proof to the satisfaction" of a state or federal judge or magistrate that the person seized was in fact a fugitive slave. The statute's final section authorized the slaveholder to seek civil redress if his slave was rescued in an action of debt for up to $500.[10] Congress had sharply distinguished private fugitive slave reclamation from the public extradition of fugitives from justice. For fugitive slaves, slaveholders themselves asserted a private property right in a summary hearing, giving the impression that its object was merely the question of whether a certificate of removal was warranted rather than a final determination of the

9. Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Baltimore: Johns Hopkins University Press, 1974), 20–21.

10. 1 Stat. 302 (1793).

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status of the alleged fugitive. But nothing in the Act precluded the states from providing their own procedure for arrest and removal of fugitive slaves.[11]

At issue was the question of the extent of government power over someone's body. Attorney General Edmund Randolph had driven this point home when he noted that even the governor of Virginia operated "at his peril" should he extradite an alleged fugitive on the basis of "informal evidence." Theoretically, the slaveholder recapturing his fugitive slave faced the same risk if he mistakenly or opportunistically seized a free black. The difference between these two acts was a matter of the legal status of the person being transported. Both the slaveholder and the kidnapper took unwilling human beings across state lines. If the unwilling human was a slave held by the laws of the slaveholder's state, then the slaveholder was exercising a constitutional right. But if that person was a free resident of another sovereign state, then the slaveholder was a kidnapper. In an age in which citizenship was largely defined by the states and rights were parceled out according to complex local rules, the question of status was paramount.[12] The fact of local status determination complicated the attendant questions of authority and jurisdiction.

Congress addressed the question of fugitive slaves again in the 1790s. Several memorials arrived on the subject, one complaining of two free black seamen being kidnapped from a Baltimore schooner in the West Indies.[13] Another, however, complained of domestic kidnapping in the coastal trade. The memorial originated in the Delaware legislature and was introduced by Albert Gallatin of Pennsylvania on behalf of

11. Paul Finkelman interprets the Fugitive Slave Act as "weak" on the return of fugitives from justice and "strong" on the return of fugitive slaves. See Paul Finkelman, "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *The Journal of Southern History* 56 (1990): 420–21. He draws this interpretation reasonably from the success of slaveholders in eliminating protections for free blacks from the final bill, and from the fact that there was no federal compulsion of the extradition of fugitives from justice, whereas federal courts were given jurisdiction over fugitive slave rendition. Although reasonable, this interpretation is weak, if only because federal courts were scant during that period and had no available law enforcement infrastructure. There is no evidence, on the other hand, that this constitutional process was an assertion of plenary authority by Congress to control fugitive slave rendition, as argued in Robert J. Kaczorowski, "Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted," *Harvard Journal on Legislation* (Winter 2005): 187–283, at 192.

12. William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History* (Princeton: Princeton University Press, 2003), 85–119.

13. *House Journal*, 4th Cong., 1st sess., 482 (March 25, 1796).

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Delaware's representative, John Patten, on April 18, 1796.[14] The petition was committed to the Committee of Commerce and Manufactures, an indication that representatives believed that Congress might derive its power to protect free blacks from the commerce clause. The committee reported back to Congress on December 29, 1796, requesting leave from the House to bring back a limited bill that would require the master of every vessel to have certificates attesting to the status of any person of African descent that he had on board. John Swanwick, Pennsylvania Federalist and chair of the committee, presented the report. He was questioned immediately by Joshua Coit of Connecticut, who recognized that the evil existed, but nevertheless believed that intruding upon state power might be a greater evil. Edward Livingston of New York concurred. His concern, so stated, was not the subject matter but rather the division of power in a federalist system. He wished instead that the states enforce their own laws and instruct Congress in how to aid them. Nathaniel Macon agreed, as did South Carolina Federalist William Smith, who decried this as an "entering wedge" for the enlargement of national power. John Swanwick answered by arguing that any crime committed during interstate commerce and upon the water in the coastal trade fell under the commerce power. He also argued that when state laws were broken with impunity, Congress had a duty to act. Finally, he analogized the subject to international commerce, noting that the United States gave seamen certificates of freedom to protect them from impressments while on the high seas. If Congress had the authority to protect free blacks there, why not on the nation's waterways?[15] After some more sparring and a postponement of the debate, the House recommitted the bill to committee.[16] On January 17, 1797, Swanwick reported back that it was the decision of the Committee on Commerce and Manufactures that this was not a matter for congressional legislation.[17]

However much this was a debate over whether to broadly or strictly construe the Constitution, the key concept was legal status. United States citizenship guaranteed scant rights; it was status that largely determined one's privileges and immunities within the individual states. The power of determining status fell under the aegis of the states' "police" power.[18] This

14. *Annals of Congress*, 4th Cong., 1st sess., 1025 (April 18, 1796).

15. The debate can be found in *Annals of Congress*, 4th Cong., 2nd sess., 1730–37 (December 29, 1796).

16. Ibid., 1767 (January 2, 1797).

17. Swanwick made clear that he thought differently of the matter, but was outvoted on the committee. He did not indicate whether the committee was further split. *Annals of Congress*, 4th Cong., 2nd sess., 1896 (January 18, 1797).

18. See William J. Novak, *The People's Welfare Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996),

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power, inherent to sovereignty, was legally embodied in the mass of state laws that regulated people's life, liberty, and property. In a world where a woman's civil rights (e.g., her liberty to contract or right to appear in court) were determined by whether she was single or married, and where a man's political rights (e.g., his exercise of the suffrage and ability to hold office) were determined by property qualifications and skin color, status was paramount, and the paramount authority for determining what privileges, protections, and restrictions belonged to each person was the sovereign state. This was what William Smith had meant when he referred to the matter as a municipal regulation. Smith may have had ulterior motives in defeating such a bill, representing as he did South Carolina, but he had support from Northerners–Joshua Coit of Connecticut and Edward Livingston of New York—who likewise invoked the authority of states to determine status and protect their residents. Even those who argued fervently for a national antikidnapping law worked within the world of state-determined status. Swanwick, for example, complained that Pennsylvania's free blacks faced danger whenever traveling outside Pennsylvania, a problem that he felt Congress ought to be competent to solve.

Numerous state legislatures already provided protection. Pennsylvania regulated the transit of slaves out of state in 1780 and passed an antikidnapping law in 1785. Connecticut in 1784 and again in 1788 provided statutory protection against kidnapping. In 1785, Massachusetts extended habeas corpus protections to free blacks by statute. Nor were such provisions limited to states above the Mason-Dixon line. Virginia made the kidnapping of a free black a felony in 1787. In that same year, Delaware punished by fine the exporting of a free black from the state, and in 1793 passed a strong antikidnapping law, the impetus for John Patten's request that Congress pass its own antikidnapping law.[19] His opponents argued that the proper constitutional means for dealing with those who

9–17 and Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 47–59.

19. For a list of laws passed in the states north of the Mason-Dixon line, see Morris, *Free Men All*, Appendix, 219–22. Virginia's antikidnapping law can be found in Joseph Tate, *Digest of the Laws of Virginia: Which Are of a Permanent Character and General Operation: Illustrated by Judicial Decisions to which Is Added an Index of the Names of the Cases in the Virginia Reporters*, 2nd ed. (Richmond, VA: Smith and Palmer, 1841), 221, The Making of Modern Law, Gale, Cengage Learning <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F100098295&srchtp=a&ste=14> (November 30, 2010). Delaware's 1787 "Act to prevent the exportation of slaves" and its 1793 "Act to punish the practice of kidnapping free Negroes and free Mulattoes" can be found in *Laws of the State of Delaware* (Samuel and John Adams, 1797), 2: 884–88 and 1093–94, Google Books http://books.google.com/books?id=HMtJAQAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=one page&q&f=false (November 30, 2010). A digest of the antikidnapping laws can be found

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crossed state lines while kidnapping was the fugitives from justice clause, not the commerce clause, and on this point William Smith, Joshua Coit, and Edward Livingston all agreed.[20] The rub, however, was that now kidnappers might use the Fugitive Slave Act as legal cover for kidnapping. Congress investigated this matter upon petition from a number of Philadelphia free blacks in 1799 and referred it to a special committee. The committee concluded that "there is reason to believe that many Blacks & People of Colour entitled to their Freedom … are under color of the Fugitive Law entrapped, kidnapped & carried off." The committee never submitted its report and Congress never addressed the matter. Whether this was because slaveholders succeeded in keeping the matter from the floor or because more pressing business occupied Congress's attention is unclear.[21]

If notions of police and status undermined antislavery actions, they also frustrated proslavery bills. In December of 1801, John Hopper Nicholson from Maryland reported a bill out of a special committee that made anyone who employed a fugitive slave, knowingly or not, liable civilly to the slaveholder in the amount of $500. The bill required that free people of color carry certificates indicating their freedom and that anyone employing a black person who was a stranger to him advertise in two newspapers that he did so.[22] A cadre of Northern representatives complained that both provisions of the bill were onerous to employers and free blacks alike, as they dictated to Northern states how status ought to be determined and verified. The bill failed 43 to 46, with only seven Northerners voting for the bill, and one Southerner voting against.[23]

Therefore, by the first decade of the nineteenth century, a constitutional settlement was in place regarding the rendition of fugitive slaves. Congress

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in John Codman Hurd, *The Law of Freedom and Bondage* (1858; repr. Boston: Little, Brown, 1968), 2:5–6, 74–75.

20. A similar case arose when Congress heard the petition of North Carolina free blacks who were being re-enslaved by force. Madison and others argued consistently that status was to be determined by the states and that the federal government had no role in the matter. *Annals of Congress*, 4th Cong., 2nd sess., 2020 (January 30, 1797).

21. For the 1799 report on kidnapping, see Morris, *Free Men All*, 32.

22. *Annals of Congress*, 7th Cong., 1st sess., 336 (December 18, 1801). The bill was first discussed on January 15, 1802. See Ibid., 423. In requiring free people of color to carry passes attesting to their status, the bill hewed to the tradition of pass laws common in colonial America and still in use in some states. See Christopher L. Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (New York: Cambridge University Press, 2010), 268, 270 n. 129, 323; and Alfred L. Brophy "Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania." *Willamette Law Review* 28 (Winter, 1991): 69–126.

23. *House Journal,* 7th Cong., 1st sess., 53–54 (January 18, 1802).

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had mandated that state and federal judges execute Article IV, Section 2 by issuing certificates of removal to slaveholders seeking to transport fugitive slaves across state lines. Although Congress had specified a summary hearing, it was otherwise vague, in essence inviting the states to set their own procedures for their courts. The 1793 law had been silent on the subject of kidnapping, which by implication left the matter to the states. Although a tacit component of the settlement, it flowed naturally from the contemporary legal order, which had always considered status a matter of local membership and identity. The same plenary power that gave a state the authority to define people as slaves, and thus authorize their re-enslavement if found in a state that forbade slavery, also gave a state the authority to punish a kidnapper for reducing a free person to slavery. State legislatures in the North and South took these duties seriously. In the first two decades of the nineteenth century, Ohio, New York, and Indiana passed laws governing procedure in fugitive slave cases that intended to be fair to slaveholders, but that reinforced the notion that when an alleged fugitive's status was in question, then the determination of his or her status would come from a court in their jurisdiction.[24] Southern states also kept antikidnapping laws on the books, Mississippi would add a law in 1820, and Georgia would add one in 1835.[25]

Holding the Constitutional Settlement in the Early Republic

Judges in the early republic interpreted fugitive slave laws within the boundaries established by Congress and in accordance with the dominant legal principles of the antebellum constitutional order. Not surprisingly, judicial interpretation of the fugitive slave clause was technical and mundane, as judges proved reluctant to allow cases to turn on abstract concepts of rights (whether predicated on liberty or property), and instead turned to the job of defining and limiting authority when weighing the different

24. "An Act to regulate black and mulatto persons," c. 4, sec. 7, *Acts of the State of Ohio*, 1803, 2: 63–66 (January 5, 1804); "An Act to Prevent the Kidnapping of Free people of Colour," c. 96, *Laws of the State of New York* 1808, 300 (April 1, 1808). For Indiana's law, see "An act to prevent manstealing," approved December 30, 1816, reprinted in Stephen Middleton, *The Black Laws in the Old Northwest: A Documentary History* (Westport, CT: Greenwood Press, 1993), 228. These laws were collected and reprinted faithfully in Hurd, *The Law of Freedom and Bondage*, 2: 5–6, 37–38, 74–75.

25. "An act, to regulate black and mulatto persons," c. 45, sec. 7 "Manstealing," *Laws of the State of Mississippi*, 1820, 68; and "An Act More effectually to protect free persons of colour, and to point out the mode of trying the right of freedom," *Acts of the General Assembly of the State of Georgia* 1835, 101–3. See also Hurd, *The Law of Freedom and Bondage,* 2:5, 74, 106, 146.

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claims of states, the United States, slaveholders, and alleged fugitives. Read properly, the judicial record reveals judges more concerned with implementing the terms of the constitutional settlement negotiated in the legislature than with attempting to alter them.

The first interpretive test of the clause came before the New York Supreme Court in 1812. The case originated a year earlier when a New York slaveholder sued a Vermonter for $300 in the Albany Circuit Court. The fugitive, a black man named Harry, had fled to Vermont and lived there as a freeman for several years before being pursued and captured by Jacob S. Glen, the son of Harry's owner. But before Glen could return with Harry, a Vermont man claimed the slave owed him money on a contract and had the constable seize Harry under a writ of attachment. Whether this was a legitimate claim or an ingenious ploy by one of Harry's friends to keep him in Vermont is unclear. The Albany Circuit Court dismissed the case for want of jurisdiction as the trespass had taken place in Vermont. The plaintiff moved for a new trial, was denied, and appealed. In 1812, the New York Supreme Court reversed the circuit court in *Glen v. Hodges*. Glen's right to his fugitive slave was guaranteed by the United States Constitution, the Court declared, and as such he could pursue his property right in any court within the United States. The court briefly took judicial notice of the Fugitive Slave Act of 1793 but maintained that the basis for the plaintiff's action flowed from the Constitution, not from the act of Congress.[26]

Thus, the New York Supreme Court declared in 1812 that the master's right of recaption was a private right guaranteed by the Constitution, enforceable in the courts. However, the Court had not taken jurisdiction under the Fugitive Slave Act and never suggested that Congress held plenary power on the subject. Moreover, the Court described this private right in relational rather than absolute terms. Had Harry committed a public offense in Vermont and the state subsequently arrested him, the Court explained, then "the right of the master must have yielded to a paramount right."[27] Vermont's police power would trump the slavemaster's property right, even if guaranteed by the United States Constitution.

Cases before Pennsylvania courts added further substance to the settlement, broadly reaffirming the power of states to determine status through habeas corpus proceedings and privileging state laws over the Fugitive Slave Act when the law was unclear. Two cases decided in 1816 dealt

26. *Glen v. Hodges*, 9 Johns. 67 (N.Y., 1812) at 69. This explains, perhaps, why the plaintiff maintained an action of trespass *vi et armis* rather than the action of debt allowed by section 4 of the Fugitive Slave Act of 1793.

27. Ibid., 70.

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specifically with the problem of the status of fugitive slaves' children if they were born on free soil. Slaveholders claimed the children as their property, arguing that their status was determined by the civil law principle of *partus sequitur ventrem* (status follows the mother). It was not an unreasonable argument. The fugitive slave clause, one might argue, stamped fugitives with slave status according to the laws of their home state, and, as such, their issue would be subject to that law as well. But Pennsylvania judges disagreed, ruling instead that Pennsylvania law applied to anyone born on Pennsylvania soil. Writing *seriatum* in *Commonwealth v. Holloway*, the justices of the Pennsylvania Supreme Court each read the fugitive slave clause narrowly and held that state law controlled in the matter.[28]

As *Commonwealth v. Holloway* demonstrated, slaveholders seeking certificates of removal before one judge frequently had their cases interrupted by writs of habeas corpus, and the habeas hearings would become the means of resolving the question of status. Habeas hearings were a favorite tactic of the Pennsylvania Abolition Society, although they did not always end well for fugitives. In *Wright v. Deacon*, the Pennsylvania Supreme Court quashed a writ *de homine replegiando* to free a fugitive who was about to be taken, under certificate of removal, to Maryland.[29] The certificate of removal, however, had been granted by a judge during a habeas corpus proceeding that had interrupted an application in another court for a certificate of removal. Abolitionist lawyers argued that this was a breach of procedure, but Chief Justice William Tilghman rejected the argument, instead ruling that the habeas corpus hearing was in conformity with the Fugitive Slave Act of 1793.[30] Tilghman's ruling bolstered what had been standard practice in Pennsylvania for more than a decade: the use of habeas corpus proceedings to determine status in cases in which identity was disputed.

To press their cause, slaveholders turned to Congress. In December of 1817, Representative James Pindall of Virginia reported a bill out of committee that would have made two important changes to the Fugitive Slave Act. First, it clarified the process of rendition by requiring slaveholders to obtain, from a court of record in their home state, a certificate attesting to the fact of ownership and escape of a runaway. Presentation of the

28. *Commonwealth v. Holloway*, 2 Serg. & Rawl 305 (Pa., 1816). Although unreported, a United States District Court ruled similarly in 1815 in *Kitty's Case*. See Neuman, *The Transformation of American Abolitionism*, 78–79.

29. *Wright v. Deacon*, 5 Serg. & Rawle, 62 (Pa., 1819).

30. *Wright v. Deacon*, 63. This contravenes Robert Cover's famous analysis of the ruling as suggesting that a state court could not interpose itself in the rendition process. See Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 163.

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certificate to a state magistrate then obligated him to issue a warrant for the arrest of a fugitive slave. If state magistrates refused to take jurisdiction, they were held both civilly and criminally liable. Second, Section 4 of the bill exempted any holder of this process (from the constable to the slaveholder) from the jurisdictions of state courts. Habeas corpus proceedings, ostensibly, would be disallowed in the process.

The bill's opponents attacked it on three different grounds. First, they argued that Congress lacked the power to compel state officers under threat of penalty. Second, they argued that the law effectively suspended habeas corpus in violation of Article I, Section 9. Third, they argued that Congress should not upset the existing constitutional settlement without providing muscular antikidnapping provisions. The first complaint was well grounded in constitutional doctrine and raised, as Senator David Lawrence Morril of New Hampshire pointed out, the problem of Congress granting a major jurisdiction to petty officers (such as city constables) who normally had no jurisdiction over serious crimes or civil actions.[31] Pindall countered these arguments by arguing that the long operation of the Fugitive Slave Act of 1793 indicated that Congress could direct state officers.[32] The complaint that the bill effectively suspended habeas corpus was just as prickly, with slaveholders claiming that such hearings violated their Seventh Amendment rights.[33] Senator Morril of New Hampshire answered this claim by pointing out that the bill enabled slaveholders to use certificates (procured without a proper oath) in essence as warrants.[34] At the heart of his objection, however, was the problem posed by allowing the question of identity and status to be determined in a foreign venue. At least one Northern congressman thought this necessary to secure slave property.[35] But another was under the impression that the bill did not disallow habeas corpus proceedings to protect free blacks from kidnapping.[36] Whereas this may have been simple confusion on the part of congressmen, it also spoke to the efficacy of the legal concepts that underlay the constitutional settlement on fugitive slave rendition.

The third objection, that the bill did not do enough to prevent kidnapping, did force compromise. In the House, Vermont Republican Charles

31. *Annals of Congress*, 15th Cong., 1st sess., 242–55 (March 9, 1818). See also the remarks of Clagett, Ibid., 826 (January 28, 1818) and the remarks of Whitman, Ibid., 839 (January 30, 1818).

32. Ibid., 827–28 (January 28, 1818).

33. Ibid., 232 (March 6, 1818).

34. Ibid., 245–46 (March 9, 1818).

35. See the remarks of Jonathan Mason of Massachusetts, Ibid., 838 (January 30, 1818).

36. See the remarks of John Holmes of Massachusetts, Ibid., 838 (January 30, 1818), and the remarks of John Rhea, Ibid., 838–39 (January 30, 1818).

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Rich sought to amend the bill to include a substantial antikidnapping section, but was overcome by New York Federalist Henry Storrs, who moved instead that the counterfeiting of a certificate or the obtaining of a legitimate certificate through fraud be punished with a substantial penalty. The Virginian James Pindall supported the amendment, and it became part of the House's final bill.[37] The Senate also amended its version of the bill, although not as substantially.[38] If either bill had passed both houses, it would have represented a substantial alteration of the terms of the constitutional settlement by subordinating state process to federal process. Importantly, slaveholders proved unable to secure passage of the bill in 1818 and in subsequent years.

The failure of slaveholders to revise the settlement meant that state and federal courts continued to work under its terms. Associate Justice Bushrod Washington explained that status determination was still determinable locally (and by a jury), even in a case brought in federal district court under the Fugitive Slave Act.[39] In another case, Washington critiqued the Fugitive Slave Act for not giving federal judges the authority to issue warrants for the arrest of fugitives, although he averred that he had always felt free to jail alleged fugitives, thus delaying a hearing so that their friends might amass evidence of their status as free blacks.[40] In 1823, Chief Justice Isaac Parker of the Massachusetts Supreme Court brushed aside abolitionist challenges to the constitutionality of the Fugitive Slave Act, but he took care to distinguish the case from that of a free black kidnapped under cover of federal law. Kidnapping might happen, he admitted, "but this would be attended with mischievous consequences to the person making the seizure, and a habeas corpus would lie to obtain the release of the person seized."[41] This reasoning directly limited the holding by suggesting that free blacks had rights that state courts could

37. Ibid., 825 (January 29, 1818).

38. Ibid., 242–55 (March 2, 1818).

39. *Hill v. Low*, 12 F. Cas. 172 (C.C.E.D., Penn., 1822) (Case No. 6,494). Washington overruled a judge who instructed a jury that the matter of the fugitive's status was for the magistrate rather than the jury to decide. Washington conceded that in the case before him the fact of the fugitive's status was beyond doubt, but it was "misapprehension" that this was "a general principle of law applicable to all cases."

40. *Worthington v. Preston*, 30 F. Cas. 645 (C.C.E.D. Pa., 1824) (Case No. 18,055). Status determination was of clear importance to Bushrod Washington, as was a rather strict reading of the Fugitive Slave Act. Washington also took care to distinguish slave-in-transit cases from fugitive cases, holding that Pennsylvania law rather than the Fugitive Slave Act controlled in such cases. See *Ex Parte Simmons*, 22 F. Cas. 151 (1823). These were all cases in which a broader reading of federal power might have been possible, but Washington nonetheless read the law in accordance with the constitutional settlement.

41. *Commonwealth v. Griffith*, 19 Mass. 11 (1823), 18–19.

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protect even if they were seized as fugitive slaves. As these cases demonstrate, the first concern of judges at any level was to work out the terms of the constitutional settlement within the boundaries supplied by the national and state legislatures. It was thus settled that only a summary procedure was necessary to grant certificates of removal, and that state habeas corpus proceedings were a legitimate part of this procedure.[42]

Not all judicial construction regarding the respective spheres of state and national law went so peacefully, especially when state law conflicted with the constitutional settlement. Indiana's 1816 antikidnapping statute required nonresidents making fugitive slave claims to obtain a certificate of removal from a state judge who could, at his discretion, order a jury trial.[43] After such a jury trial freed a fugitive named Susan, a Kentucky slaveholder petitioned a federal judge for a certificate of removal. In opposition, lawyers for Susan made two arguments. In the first, they suggested that the Fugitive Slave Act was unconstitutional because there was no specific grant of authority to Congress to legislate on the subject. In the second argument, they admitted the law's constitutionality but claimed that state law took precedence. The district judge admitted no doubt of the law's constitutionality. Citing *Glen v. Hodges* (although not by name), he noted that state courts had considered the law valid, although he did not address the argument on its merits.[44] He then decided the case as narrowly as possible, taking into account only the question of whether the state's requirement of a jury trumped the federal law's summary procedure. Citing the Supremacy Clause, he concluded that the court need not examine which mode was best suited to return a just result because "it is sufficient that congress have prescribed the mode."[45]

This was a fairly simple application of the constitutional settlement's principles. Given that there was no appeal allowed of the district court's ruling, the conflict moved to other channels. The fugitive returned to Kentucky with the slaveholder under federal process, and an Indiana grand jury indicted the master for kidnapping because he had failed to

42. Spencer Roane had put forth the argument that habeas corpus proceedings in free states could not be conclusive concerning a slave's status, or they would render the Fugitive Slave Act a nullity; see *Lewis v. Fullerson*, 1 Rand. 15 (1821). But this was *obiter dicta*. The case concerned slave transit and conflict of laws, and Roane's written opinion proceeded from the assumption that the subject of judicial proceedings was a slave held lawfully under Virginia law, not a free black kidnapped under cover of the Fugitive Slave Act.

43. "An Act to Prevent Manstealing," §3, Laws of Indiana, 1816. Reprinted in Stephen Middleton, *The Black Laws in the Old Northwest: A Documentary History* (Westport, CT: Greenwood 1993), 228–29.

44. This was arguably a misreading of the case, as the Fugitive Slave Act was not properly before the court in *Glen v. Hodges*.

45. *In re Susan*, 23 F. Cas. 444 (C.C.D. Ind. 1818) (No. 13,632).

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comply with state law. The governor of Indiana demanded his extradition, and Kentucky's legislature responded by passing resolutions claiming Indiana's law was unconstitutional. Indiana's legislature referred the matter to its judiciary committee. The committee's report explained Indiana's understanding of the constitutional settlement on fugitive slave rendition. Noting the constitutional directive to return fugitive slaves and the Fugitive Slave Act's lack of an antikidnapping provision, the report concluded that federal law could not be binding upon state officers who were also pledged to protect the constitutional liberties of Indiana's residents. It was the "right and the duty of our state" to pass antikidnapping laws.[46] But the report was silent on the question of whether Indiana might defy the federal government and require a jury trial. The legislature opted not to, passing in 1824 a new personal liberty law providing for a summary procedure for rendition. Indiana's law allowed evidence to be submitted on behalf of the fugitive and provided for an appeal by either party. This balanced the protection of free blacks with the slaveholder's right to his fugitive. By 1824, the conflict of laws problem in *In re Susan* had been solved legislatively. The solution was not to bow to plenary national authority in the matter of rendition, but to bring state laws in line with the constitutional settlement. Indiana continued to take responsibility for preventing kidnapping, even when done under cover of law.

The same argument can be made for Pennsylvania's celebrated 1826 personal liberty law.[47] It established procedures for a summary hearing to determine status, gave alleged fugitives the time necessary to prove their freedom, and authorized Pennsylvania justices to issue warrants for arrest. It balanced this with the stiff antikidnapping provisions of the law of 1820, thus using legal process to distinguishing kidnapping from legitimate reclamation. Speaking in support of the bill, William Meredith explained that this would not come into conflict with the Fugitive Slave Act of 1793. Although he understood that slaveholders might exercise recaption under federal law, he argued that few would, given that by resorting to the state procedures, the slaveholder "will avoid all the contumely and difficulty to which he is at present subjected."[48] Meredith felt it

46. "Report of the Judiciary Committee of the House for the State of Indiana on the Governor of Indiana and the Acting Governor of Kentucky." Reprinted in Middleton, *The Black Laws in the Old Northwest*, 228–29.

47. "An Act to give effect to the provisions of the constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping," *Acts of the General Assembly and the Commonwealth of Pennsylvania*, 1825, 150–55 (March 25, 1826).

48. "Miscellany, Legislature of Pennsylvania, Speech of Wm. M. Meredith," *Aurora and Franklin Gazette* (Philadelphia, PA), February 24, 1826, 19th Century U.S. Newspapers

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necessary to apologize to those constituents who felt that the bill was a step back from the strong antislavery bill of 1820, reflecting just how much this was a true legislative compromise that has been described (then and now) as both proslavery and antislavery in its makeup.[49] Many of the other personal liberty laws passed in the 1820s and 1830s met these requirements, in essence acquiescing to the constitutional settlement. The same could not be said for New York's personal liberty law, which specifically revived the writ *de homine replegiando* and its use of a jury trial.[50] The point, however, was not that the constitutional settlement held in all cases, but rather that it provided the standard against which opposing arguments would be judged. The case of the Indiana law is instructive in this regard. Although the state legislature reacted harshly to the federal district court's setting aside of its law, it nonetheless found a compromise that worked within the terms of the settlement.

Unsettling the Constitutional Settlement

The personal liberty laws of the 1820s marked the successful efforts of antislavery societies to work favorably within the existing constitutional settlement, even if some of these laws tested its outer limits. Slaveholders may have failed in Congress to strengthen the Fugitive Slave Act, but Maryland's lobby paid dividends in Pennsylvania. Events in the 1830s, however, would alter the political context in which the Fugitive Slave Act operated. With the memory of Denmark Vesey's conspiracy and Nat Turner's rebellion fresh in their minds, slaveholders encountered an increasingly active antislavery movement. Abolitionists took to the road with evangelical zeal, spreading their message and seeking converts in an ambitious reform effort.[51] This would crystallize with the establishment of the American Anti-Slavery Society (AASS) in 1833, an organization that explicitly called for waging a constitutional war on slavery with a view to its ultimate extinction. Although the AASS recognized in its constitution that Congress could not directly legislate slavery away, it could restrict the interstate slave trade, prevent slavery in the territories, and

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Database (hereafter 19th Century U.S. Newspapers) Gale, Cengage Learning, http://infotrac.galegroup.com/itw/infomark/532/950/97997372w16/purl=rc1_NCNP_0_GT3007138163&dyn=26!ehelp?sw_aep=atla29738 (July 20, 2010),

49. Morris, *Free Men All*, 53; and Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill: University of North Carolina Press, 2002) 44–46.

50. These legislative actions are thoroughly covered in Morris, *Free Men All*, 52–56.

51. Newman, *The Transformation of American Abolitionism*, 152–75.

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repeal the Fugitive Slave Act. The society additionally called for efforts to awaken the hearts and minds of all Americans to the true nature of slavery, leading to an all-out pamphlet attack dedicated to undermining support for the institution both in the North and in the South.[52]

Slaveholders closed ranks. Led by John C. Calhoun, slaveholders demanded assurance of their property rights in Congress. In a remarkable set of skirmishes over the substantive meaning of the First Amendment, slaveholders demanded that Congress refuse petitions touching on the subject of slavery. In the Senate, Calhoun reported a bill out of a special committee that would give state postmasters the right to remove abolitionist pamphlets from the mail in states where such pamphlets were illegal. The latter was an unsuccessful effort, but it demonstrated just how central the question of slavery was in constitutional discourse.[53] Comity was crumbling, and free states began ratcheting down the laws against slavery.[54] Abolitionists put personal liberty laws to good utilitarian use in attempting to free fugitives. United States Supreme Court Justice Henry

52. On the AASS and its reforming mission, see David Brion Davis, "The Emergence of Immediatism in British and American Antislavery Thought," *Mississippi Valley Historical Review* 49 (1962): 209–30. Scholarship since Davis has worked to locate the deeper roots of immediatism in the Early Republic. See David W. Blight, "Perceptions of Southern Intransigence and the Rise of Radical Antislavery Thought, 1816–1830," *Journal of the Early Republic* 3 (1983): 139–63; Anne C. Loveland, "Evangelicalism and 'Immediate Emancipation' in American Antislavery Thought," *The Journal of Southern History* 32 (1966): 172–88; and Bertram Wyatt-Brown, "Prelude to Abolitionism: Sabbatarian Politics and the Rise of the Second Party System," *The Journal of American History* 58 (1971): 316–41. On the ways in which popular notions of popular constitutionalism informed the debate over abolitionist pamphlets, see Jeannine Marie DeLombard, *Slavery on Trial: Law, Abolitionism, and Print Culture* (Chapel Hill: University of North Carolina Press, 2007), 1–34.

53. On the postal campaign, see Bertram Wyatt-Brown, "The Abolitionists' Postal Campaign of 1835," *The Journal of Negro History* 50 (1965): 227–38; Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge: Harvard University Press, 1995), 257–80; William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977), 172–73; and Susan Wyly-Jones, "The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy over the Abolition Postal Campaign," *Civil War History* 47 (2001): 289–309. On the "gag rule" see David C. Frederick, "John Quincy Adams, Slavery, and the Disappearance of the Right of Petition," *Law and History Review* 9 (1991): 113–55. On the straining of comity, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981).

54. Paul Finkelman, "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North," *Rutgers Law Journal* 17 (1986): 415–82. This did not necessarily mean good news for Northern free blacks, who contended with an increasingly self-conscious white-supremacist order. See James Brewer Stewart, "The Emergence of Racial Modernity and the Rise of the White North, 1790–1840," *Journal of the Early Republic* 18 (1998): 181–217; and James Brewer Stewart, "Modernizing 'Difference': The Political

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Baldwin vented his frustration in 1833 while riding circuit in Pennsylvania. Reacting to the charge of kidnapping leveled by abolitionists, Baldwin rhetorically asked the jury whether the Pennsylvania legislature had passed "a law which would put on a level the man who reclaimed his own property by lawful means, and the wretch who would drag a freeman into bondage?"[55]

Despite such bluster, the old settlement held. In 1835, the recorder of Pittsburgh heard evidence on the status of an alleged fugitive named Charles Brown in a proceeding in conformity with both Pennsylvania's 1826 personal liberty law and the Fugitive Slave Act. Despite professing his personal abhorrence of slavery, the recorder judged Brown a fugitive slave and granted the certificate of removal.[56] Instances such as these, however, marked the difficulties. Court proceedings that took seriously claims to freedom raised costs, and the penalties for kidnapping raised the stakes on fugitive slave reclamation. In addition, abolitionists aggressively brought questions of the Fugitive Slave Act's constitutionality before judges.

Led by the Pennsylvania Abolition Society, abolitionists had advanced constitutional arguments against the Fugitive Slave Act before, and by the early 1820s they consisted largely of two complaints. First, the law violated the Sixth Amendment's guarantee of a trial by jury when liberty was at stake. Second, Congress had no warrant to legislate. This argument hinged on the fact that Article IV, Section 2 contained no enabling clause. Given that the other sections of Article IV explicitly granted Congress power, legal rules of interpretation would suggest that the omission was intentional. In 1834, lawyers for an alleged fugitive named Jack sued out a writ *de homine replegiando*. Antislavery lawyers averred Jack's status as a fugitive slave and instead argued that the Fugitive Slave Act was unconstitutional because Congress lacked the authority to legislate. The defendant demurred and the trial judge sustained the demurrer. Jack's lawyers appealed, and the case came before the New York Supreme Court as *Jack v. Martin*, where Justice Samuel Nelson upheld the lower court's ruling.

Nelson penned an extraordinary opinion sweeping away the old constitutional settlement. He began not by referencing the established procedure for fugitive slave reclamation or state protections of free blacks from

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Meanings of Color in the Free States, 1776–1840," *Journal of the Early Republic* 19 (1999): 691–712.

55. *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7,416) at 848.

56. *Report of the Case of Charles Brown, A Fugitive Slave, Owing Labour and Service to William C. Drury, of Washington County, Maryland* (Pittsburgh: Alexander Jaynes, 1835), reprinted in Paul Finkelman, ed., *Fugitive Slaves and American Courts: The Pamphlet Literature* (New York: Garland, 1988), 1:41–95.

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kidnapping, but rather by fully endorsing congressional power under the Supremacy Clause. Citing *Sturges v. Crowninshield,* among other cases, Nelson applied the rule of exclusivity.[57] A power that belonged to Congress necessarily excluded all state legislation. If the power was concurrent, then the states could legislate only if Congress had not. Once Congress did, the power was "exhausted," and the states were prohibited from passing their own laws.[58] This, however, begged the question of why there was no express warrant for Congress to legislate, a question Nelson answered by resorting to instrumentalist reasoning. If fugitive slave reclamation were left to the states, Nelson argued, then the "purpose of the provision might be defeated, in spite of the Constitution." States might decline to legislate at all, or might "incumber and embarrass" slaveholders prosecuting their rights. "The idea that the framers of the Constitution intended to leave the regulation of this subject to the states, when the provision itself obviously sprung out of their fears of partial and unjust legislation by the states in respect to it," Nelson observed, "cannot readily be admitted."[59] This was a muscular application of judicial power and a palpable break with the precedents. Judges had repeatedly applied the basic principles of the settlement and worked flexibly with both state and federal laws. Through creative use of Marshall Court precedents, Nelson changed the terms of the jurisprudence.

Scholars have missed the novelties of Nelson's opinion in *Jack v. Martin*.[60] It was the first fugitive slave decision to draw from a wide body of constitutional law precedents. It anticipated Story's opinion in *Prigg v. Pennsylvania* (1842), and gave an indication of just how powerful courts could be as vehicles of constitutional nationalism. Justice Baldwin had not gone so far in *Johnson v. Tompkins*, and Justice Smith Thompson, also riding circuit, would not either in *In re Martin*. Thompson affirmed the Fugitive Slave Act's constitutionality on an instrumentalist reading of the fugitive slave clause, but stopped short of endorsing any kind of exclusivity principle.[61] Nor would Nelson's reasoning be left unchallenged in New York. The case was appealed to the New York

57. *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

58. *Jack v. Martin*, 12 Wend. 311 (1834), 317.

59. Ibid., 319.

60. See, for example, Paul Finkelman, "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story's Judicial Nationalism," *Supreme Court Historical Review* (1994): 247–94; and Barbara Holden-Smith, "Lords of Lash, Loom, and Law: Justice Story, Slavery, and *Prigg v. Pennsylvania*," *Cornell Law Review* 78 (1993) 1086–151.

61. *In re Martin*, 16 F. Cas. 881 (undated) (No. 9,154) at 884. Most likely decided between 1834 and 1835.

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Court for the Correction of Errors (CCE) where the result was upheld, but the written opinions rejected Nelson's reasoning. The CCE was an odd court, consisting of the New York Senate and either the chancellor (if the case was appealed from the Supreme Court) or the justices of the Supreme Court (if the case was appealed from the chancery). Members of this court voted on the outcome, but there was no opinion of the court. Any opinions were delivered *seriatim*.[62] Only two opinions were delivered, and one explicitly rejected Judge Nelson's reasoning. Chancellor Reuben Walworth's opinion made clear that no act of Congress could abrogate free blacks' right to liberty.[63] The second opinion, authored by Senator Bishop, was more sympathetic to Nelson's opinion. Nonetheless, he cited judicial precedents that had validated state legal procedures in determining status. In New Jersey, Chief Justice Joseph Hornblower of the Superior Court issued a similar ruling in 1836 declaring that a habeas corpus proceeding authorized by state law could interrupt a hearing for a certificate of removal.[64]

The settlement, in short, was holding. Read properly, *Jack v. Martin* was an anomaly among a tide of opinions that worked within the confines of the old settlement. And Nelson's reasoning was, at best, left in a disputed state. Likewise, Hornblower's opinion may have questioned the constitutionality of the Fugitive Slave Act, but he stopped short of directly confronting the law, and instead worked within the settlement's parameters. Legitimate reclamation efforts had been vindicated, and Southern states enforced anti-kidnapping statutes. The most dramatic evidence of this came when the state of Virginia refused to extradite a kidnapper to Massachusetts not to shelter him, but rather to exact justice itself. Widely reported in Northern

62. Bryan Camp, "Law and Politics and Judicial Reform in the 1846 New York Constitutional Convention" (paper presented at the 25th Annual Conference on New York State History, Skidmore College, Saratoga Springs, NY, June 10–12, 2004).

63. *Jack v. Martin*, 14 Wend. 507 (N.Y. C.C.E. 1835) at 528. This is at variance with Paul Finkelman's interpretation of Chancellor Walworth's opinion as "categorically" denying the constitutionality of the Fugitive Slave Act. This is not quite the case. Walworth was responding to the question of national preemption and the Supremacy Clause, and his reading of the Constitution spoke more to an argument in favor of the old constitutional settlement regarding fugitive slaves than it did to the question of the constitutionality of a law of Congress. Finkelman, "Story Telling on the Supreme Court," 271–72.

64. *State v. Sheriff of Burlington* (1836), reprinted in Paul Finkelman, ed., *Slavery, Race, and the American Legal System 1700–1872: Fugitive Slaves and American Courts* (New York: Garland, 1988), 1:97–104. Although unreported, the decision was circulated among abolitionists and reprinted as a pamphlet. It can be found in Finkelman, *Fugitive Slaves and American Courts* 1:97–103. See Also Paul Finkelman, "State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law," *Rutgers Law Journal* 23 (1992).

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papers, the kidnapped boys were restored to their families and the kidnapper received a 7 year sentence for his crime in Virginia.[65]

But even as the law appeared to be operating successfully, events were unfolding in Pennsylvania that would set in motion the first Supreme Court interpretation of the Fugitive Slave Act. In 1837, agents of Maryland slaveholder Margaret Ashmore arrested Ashmore's fugitive slave Margaret Morgan, living in Pennsylvania. She had lived there for some time as a free woman and had given birth to at least one child in Pennsylvania. Ashmore's agents—Edward Prigg among them—brought both the fugitive and her children before the justice of the peace who had initially granted the slavecatchers warrants for Margaret's arrest. That same justice of the peace refused to have anything to do with the case, and the slavecatchers suddenly were without a certificate of removal. Nevertheless, they took Margaret and her children to Maryland. Pennsylvania subsequently tried Prigg for kidnapping and, without his actual presence at trial, convicted him under the Pennsylvania personal liberty law of 1826. The conflict of laws question was significant enough to draw the attention of both legislatures, and the decision was made to bring the case through a pro forma appeal to the United States Supreme Court for resolution.

At oral arguments, Maryland's attorney rehearsed the exclusivity principle first laid out by Samuel Nelson, essentially arguing that any state law defining rendition procedure or otherwise interposing state process was void. Attorneys for Pennsylvania spent their arguments tearing down the legal scaffolding of exclusivity and advocated maintaining the old settlement. The state and national governments, Pennsylvania's attorney general observed, formed "one consistent, harmonious, beautiful system of government."[66] This was true in the operation of fugitive slave rendition also: "the acts of Congress and of Pennsylvania form together a harmonious system, neither jarring nor conflicting in any part of its operation."[67] He proceeded to list all the elements of the constitutional

65. The kidnappers were discovered and jailed in 1839, and tried the following year. "From the Boston Post," *The North American* (Philadelphia), October 21, 1839, 19th Century Newspapers http://infotrac.galegroup.com/itw/infomark/524/745/190248470w16/purl=rc1_NCNP_0_GT3007853588&dyn=10!lnk_2+401+NNWA+GT3007853588?sw_aep=atla29738 (July 20 2010); and "By the Eastern Mail," *Pennsylvania Inquirer and Daily Courier* (Philadelphia), February 01, 1840, 19th Century U.S. Newspapers http://infotrac.galegroup.com/itw/infomark/288/535/190247635w16/purl=rc1_NCNP_0_GT3010971410&dyn=16!lnk_2+401+NNWA+GT3010971410?sw_aep=atla29738 (July 20, 2010).

66. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), 592.

67. Ibid., 600.

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settlement: its summary procedure, the shared responsibility, and the necessity of protecting both property rights and liberty.

Pennsylvania's arguments bore no fruit. The Supreme Court reaffirmed the Fugitive Slave Act's constitutionality and struck down Pennsylvania's personal liberty law. Perhaps in a bid to stress the nonsectional aspect of the Court's decision, Chief Justice Roger B. Taney assigned the opinion of the court to Joseph Story. Story eviscerated the decades-old constitutional settlement and replaced it with a new regime predicated on national supremacy. He papered over this enormous rupture by sketching a historical narrative that feigned continuity. The fugitive slave clause, he surmised, was a matter of historical necessity given the "doctrines and principles prevalent in the non-slaveholding states" at the time of the drafting of the Constitution.[68] This was a presentist reading of the framing, one that gave Story the advantage in contending that the framers contemplated the use of national power to execute necessary agreements. Upon this foundation, he then read a line of precedents concerning the Fugitive Slave Act as unanimously upholding the constitutionality of the law.[69] The Constitution, he said, created a new right of reclamation, independent of comity, and because it was in the national constitution, it made sense that Congress ought to enforce it.[70] "In the absence of any positive delegation of power to the state legislatures," he wrote, standing the Tenth Amendment on its head, "it belongs to the legislative department of the national government, to which it owes its origin and establishment."[71] Although Story made clear that he believed the power exclusive (thus necessarily prohibiting the states from passing any legislation), he nonetheless provided a second line of reasoning (also taken from *Jack v. Martin*) that once Congress had legislated on the subject, the power was exhausted and any state legislation on the subject was necessarily superseded and thus void.[72] This included any antikidnapping law that specified the procedure for fugitive slave rendition. It did not include the plenary power of states to arrest fugitive slaves, paupers, and other undesirables and expel them from state borders, provided exercise of this power did not interfere with fugitive slave rendition.[73]

Although the Court unanimously agreed that Pennsylvania's Personal Liberty Law of 1826 was unconstitutional, the justices divided over

68. Ibid., 611.

69. Ibid., 621. Finkelman, "Story-Telling on the Supreme Court," 267–73. Finkelman's assessment that Story deliberately misread the precedents is sound.

70. *Prigg v. Pennsylvania* 41 U.S. 539 (1842), 612.

71. Ibid., 623.

72. Ibid., 617.

73. Ibid., 625.

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Story's opinion. Only Justice Wayne wholly endorsed the exclusivity principle in his concurring opinion. Chief Justice Roger B. Taney wrote a concurrence in which he attempted to salvage a proslavery version of the old settlement, suggesting that states could pass laws assisting slaveholders in recovering their property, provided such laws did not conflict with congressional law, a point in which Justice Peter Daniel wholeheartedly concurred.[74] Justice Smith Thompson also proved unwilling to endorse exclusivity, even though he seemed to endorse the idea of preemption. He nonetheless spelled out several areas in which state legislative action would be appropriate.[75] Baldwin failed to submit an opinion, although the Court reporter recorded that he dissented from the grounds of the opinion. Justices Catron and McKinley chose to remain silent, leaving future generations to wonder whether they merely agreed with the outcome of the case, or if they fully supported Story's opinion. Justice McLean offered the lone dissent, arguing that the personal liberty laws had their place within this framework, and, as such, athough Pennyslvania's personal liberty law was invalid, this did not mean that states were prohibited from punishing kidnappers.[76]

As complicated a case as *Prigg* may be analyzed and judged in many ways.[77] For the purposes of this article, however, it is the magnitude of

74. Neither Taney nor Daniel found much solace in Story's claim that the state might arrest fugitive slaves under the auspices of their police power. As Taney pointed out, the police power might not necessarily extend to a fugitive "travelling peaceably along the public highway [in company with a white man]. And it could hardly be maintained that the arrest and confinement of the fugitive in the public prison, under such circumstances, until he could be delivered to his owner, was necessary for the internal peace of the state; and therefore a justifiable exercise of its powers of police." *Prigg v. Pennsylvania,* 633. Daniel concurred in this point. Ibid., 658.

75. Ibid., 627. Thompson's opinion: Ibid., 633.

76. Paul Finkelman claims that Story had a solid majority on every point. See Paul Finkelman, "Sorting out *Prigg v. Pennsylvania*," *Rutgers Law Journal* 24 (1992): 605–66, at 634. He stands in tension with Joseph C. Burke, "What Did the Prigg Decision Really Decide?" *The Pennsylvania Magazine of History and Biography* 93, (1969): 73–85. The disagreement rests primarily over how to count the two silent justices in the case.

77. Paul Finkelman, "Story Telling on the Supreme Court," 256–59. For a more favorable view of Story, see R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985). All historians have emphasized Story's judicial nationalism. Certainly, part of Story's opinions regarding slavery were gambits to raise the authority of the Supreme Court as an impartial body that slaveholders could trust to carry out the Constitution's "sacred bargains" regarding slavery. Story had gone out of his way to do this in slavery cases. See Smith, "Lords of Lash, Loom, and Law," 1101–16. Earl M. Maltz challenges this interpretation, instead arguing that *Prigg* was slavery neutral rather than proslavery. See Maltz, *Slavery and the Supreme Court*, 109–10. This argument depends upon a reading of the Fugitive Slave Act as accommodating Northern interests, and on reading *Prigg* along with *U.S. v. Amistad* 40 U.S. 518

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the overturning of the old constitutional settlement that stands out. Taney's concurrence and McLean's partial dissent both referenced the old constitutional settlement, albeit from different perspectives; Taney was concerned that state sovereignty had suffered as a result of the exclusivity principle (about which he was largely correct) and McLean wondered aloud why a state could not pass a law outlawing the kidnapping of a free black.[78] These doubts of the justices reflected the unease over the use of the exclusivity principle to overturn the constitutional settlement that had functioned for several decades. Wayne admitted this point in his concurrence when he complained that "a mistaken, doubtful, and hesitating exercise of power [by state legislatures] in the commencement, becomes, by use, a conviction of its correctness."[79] Wayne recognized that the Supreme Court was upsetting long-standing practice, although his insistence that the precedents were all on his side gave the argument a have-your-cake-and-eat-it-too appearance. Perhaps this was why he anticipated trouble. He sincerely hoped that "the judgment of this Court" would be met "with the same patriotic acquiescence which the tribunals of the states and the people of the states have heretofore accorded its decisions."[80] In his dissent, McLean put his finger on the limits of the Supreme Court's authority. "This power may be resisted by a State, and there is no means of coercing it," he wrote. "So the Supreme Court of a State may refuse to certify its record on a writ of error to the Supreme Court of the Union, under the twenty-fifth section of the Judiciary Act."[81]

Joseph Story's judicial nationalism had triumphed in the Supreme Court, but in the end, it proved an insufficient means of overturning the old

(1841) and *Groves v. Slaughter* 40 U.S. 449 (1841) as part of a judicial program. This reading downplays the union of judicial nationalism in Story's opinion with a proslavery result.

78. Paul Finkelman contends that Taney misread Story's opinion. See Finkelman, "*Prigg v. Pennsylvania* and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Opinion," *Civil War History* 25 (March 1979): 5–35. Cf. William Wiecek, "Slavery and Abolition Before the United States Supreme Court, 1820–1860," *The Journal of American History* 65 (1978): 46. John McLean would later write that a majority of justices held in *Prigg* that the power was exclusive in the federal government and only "some of the judges thought that a state might legislate in aid of the act of congress." *Miller v. McQuerry*, 17 F. Cas. 335 (C.C. Ohio, 1853), 337. Earl Maltz contends that free blacks did not suffer under the ruling, because it did not deprive them of the protection of the state. He distinguishes between the procedural devices located in the personal liberty laws (including the writ of habeas corpus) and the general criminal statutes that forbid imprisoning someone against their will. See Maltz, *Slavery and the Supreme Court*, 110. The evidence cited in the latter part of this article suggests that procedural remedies, and in particular the writ of habeas corpus, were more important than Maltz maintains.

79. *Prigg v. Pennsylvania* 41 U.S. 539 (1842), 649.

80. Ibid.

81. Ibid., at 666.

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constitutional settlement. Certainly some state legislatures immediately complied with the Court's instructions. Ohio repealed its personal liberty law. Pennsylvania, Massachusetts, and Rhode Island passed new personal liberty laws withdrawing state aid for fugitive slave reclamation.[82] Many states, however, did not comply. Most laws securing habeas corpus and *de homine replegiando* for fugitives stayed on the books. In several noteworthy instances, writs of habeas corpus issued by state courts interfered with fugitive slave recaption. A New Jersey magistrate refused to suspend a jury trial for an alleged fugitive on the grounds that he did not feel empowered to overturn an act of the state legislature, regardless of the Supreme Court's ruling in *Prigg*.[83] In New York, a habeas corpus proceeding led to an alleged fugitive's release.[84] A Kentucky slaveholder and his entourage returning from Michigan with fugitive slaves in 1849 found himself confronted in South Bend, Indiana by a party armed with, among other weapons, a writ of habeas corpus. The presiding judge heard the case and, when no evidence was presented that the alleged fugitives were in fact slaves, discharged the fugitives.[85] A similar case occurred in Iowa in 1848. State courts refused, in other words, to cede jurisdiction over the writ of habeas corpus to the process of reclamation described in the Fugitive Slave Act.[86] The Supreme Court did not have the power to declare the end of the old constitutional settlement.[87]

82. See Morris, *Free Men All*, 116–29.

83. "A Letter from Princeton—A Fugitive Slave Case," *Pennsylvania Inquirer and National Gazette* (Philadelphia), August 4, 1843, 19th Century U.S. Newspapers http://infotrac.galegroup.com/itw/infomark/201/655/98004407w16/purl=rc1_NCNP_0_GT3011477546&dyn=6!lnk_23+401+NNWA+GT3011477546?sw_aep=atla29738 (July 20, 2010).

84. "An Interesting and Important Fugitive Slave Case," *The Liberator* (Boston), November 6, 1846 (from *The Anti-Slavery Standard*), 19th Century Newspapers http://infotrac.galegroup.com/itw/infomark/532/950/97997372w16/purl=rc1_NCNP_0_GT3005859039&dyn=42!xrn_8_0_GT3005859039&hst_1?sw_aep=atla29738 (July 20, 2010); "The Slave Case— The Fugitive Freed!" *The Liberator* (Boston), (from *The Anti-Slavery Standard*) November 20, 1846, 19th Century U.S. Newspapers http://infotrac.galegroup.com/itw/infomark/532/950/97997372w16/purl=rc1_NCNP_0_GT3005859113&dyn=38!xrn_4_0_GT3005859113&hst_1?sw_aep=atla29738 (July 20, 2010).

85. *The South Bend Fugitive Slave Case, Involving the Right to a Writ of Habeas Corpus* (New York: Anti-Slavery Office, 48 Beekman Street, 1851), Samuel J. May Anti-Slavery Collection, Cornell University, http://ebooks.library.cornell.edu/cgi/t/text/text-idx?c=mayantislavery:idno=20869804 (October 15, 2012).

86. Morris, *Free Men All*, 109–27; and James Brewer Stewart, "From Moral Suasion to Political Confrontation: American Abolitionists and the Problem of Resistance, 1831–1861," in *Passages to Freedom: The Underground Railroad in History and Memory,* ed. David W. Blight (Washington, DC: Smithsonian Books, 2004), 81–86.

87. The Supreme Court reaffirmed its position in 1847, over the arguments of Salmon P. Chase. Justice Woodbury chided Chase for asking the Court to overturn the Fugitive Slave Act, given that it was a constitutional compromise of the highest importance. It was

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The Rise and Fall of the Second Constitutional Settlement

Justice Joseph Story was too intelligent to believe that his decision in *Prigg* would have solved the problems of fugitive slave rendition. *Prigg* was a legal attack on state sovereignty for the benefit of slaveholders, but it left those slaveholders without adequate law enforcement apparatus to reclaim their fugitives. It remained for Congress to pass new legislation that expanded national power to enforce the Fugitive Slave Act.[88] When the 31st Congress met in 1849, fugitive slave reclamation was one of several smoldering embers that congressmen hoped to extinguish. It was not the most important; for that, the question of slavery in the territories had to take prominence, but it was the most visible.[89] And because the 31st Congress met just as Southern radicals were planning a conference in Nashville to contemplate, among other things, secession as a possible remedy for perceived wrongs, the issue was particularly urgent. As with the other major constitutional controversies of the antebellum era—the Bank of the United States, internal improvements, and slavery in the territories—this one had to find its settlement in Congress.

The congressional debate on the new Fugitive Slave Act indicated just how different matters were in 1850 than in 1793, or even in 1817. Old arguments took on new meaning. Concern about congressional power over the states (and slavery) permeated the debate. In the first long speech about the subject, James Mason rose to support the initial bill reported to the floor by Andrew P. Butler. After announcing that he was following the instructions of the Virginia legislature in supporting the bill, he spoke pessimistically about the ability of any "ordinary legislation" to secure the rights of slaveholders in the non-slaveholding states. He admitted that the states could not be coerced by the federal government, "unless the Federal legislation can operate mediately upon their people." However, the inability to

to be decided, he reminded Chase, by the political branches and the Supreme Court had "no authority as a judicial body to modify or overrule" the compromise. *Jones v. Van Zandt*, 46 U.S. 215 (1847), 231.

88. Story was in communication with John McPherson Berrien, the chairman of the Senate Judiciary Committee, in 1842. He wrote him a letter suggesting that Congress endow commissioners with the jurisdiction to hear fugitive slave cases and give them the power to issue certificates of removal. See Barbara Holden-Smith, "Lords of the Loom, Lash, and Law," 1137. But whether this was a proslavery pitch is disputed by Leslie Friedman Goldstein, "A 'Triumph of Freedom' After All? Prigg v. Pennsylvania Re-examined," *Law & History Review* 29 (2011): 763–96.

89. Michael F. Holt, *The Political Crisis of the 1850s* (New York: W. W. Norton, 1978), 82–87. For an excellent analysis of the Senate debate in context, see Fehrenbacher, *The Slaveholding Republic*, 228.

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coerce the states did not mean that the states had no duty to enforce the fugitive slave clause. Responding to the notion that *Prigg* prevented the states from passing laws in aid of the fugitive slave clause, Mason responded that the Court's justices had rendered no such holding: "first, because they have not the power so to decide; and secondly, because the case did not call for it."[90] This was a position that held the line on a states' rights basis for any new fugitive slave law: Congress could not coerce the states, nor could the Supreme Court usurp the states of their rights *or* duties. There would have to be a new settlement, but within very particular confines.

Nearly everyone seemed aware, despite Story's and Nelson's attempts to write national exclusivity into the original intent of the fugitive slave clause, that this was a significant reinterpretation of the clause. Mason identified the "true intent" of the fugitive slave clause as devolving the authority upon the states.[91] Daniel Webster also acknowledged that he had "always been of the opinion" that the fugitive slave clause acted directly upon the states. Although he allowed that *Prigg* "may not have been a fortunate decision," he intended to defer to the Court.[92] Salmon P. Chase manifested no such deference. He excoriated *Prigg* for undoing the old constitutional settlement: "before that decision, every State, I believe, had legislated upon the subject, and very little complaint had been made of difficulties in the way of the reclamation of fugitives. Most of the States had very summary remedies. They had legislated quite as far as any one claimed they ought to legislate."[93] When George Edmund Badger of North Carolina spoke up in favor of Story's notion that the clause originally comprehended an exclusive national authority, he was interrupted by Andrew P. Butler: "I am willing to assent that there are concurrent duties; but to say that it is exclusively the duty of the United States, it is against the Constitution, and against the statute commentaries in the different States upon the Constitution."[94] Badger offered a long and able defense of his position that followed Story's reasoning in *Prigg*, but he was unable to convince Butler, or for that matter George Edmund Underwood, who also challenged the holding in *Prigg*.[95]

Even if most admitted the change in constitutional law that they were effecting, no one in Congress seriously entertained returning to the original settlement. Rather than suggest that the old system be restored, opponents of the bill offered amendments to introduce trial by jury or reinstate habeas

90. *Congressional Globe*, 31st Cong., 1st sess., 234 (January 28, 1850).
91. Ibid., 235.
92. Ibid., 481 (March 7, 1850).
93. *Appendix to the Congressional Globe*, 31st Cong., 1st sess., 1587 (August 19, 1850).
94. Ibid., 1595 (August 20, 1850).
95. Ibid., 1598.

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corpus proceedings. They were soundly rebuffed at every turn.[96] Those who raised the specter of kidnapping under cover of federal process found their claims ridiculed, or were told that antikidnapping laws in Southern states would suffice to protect free blacks.[97] The sound defeat of all such amendments indicated just how non-negotiable were the terms of the new settlement, locked as they were into the larger Compromise of 1850.

The Fugitive Slave Act of 1850 made rendition wholly a federal matter, constitutionalizing *Prigg* by forbidding the interruption of federal process by state officers. In order to provide the judicial infrastructure necessary to execute rendition, the Act authorized federal district judges to appoint commissioners with the authority to issue warrants for arrest, hear fugitive slave rendition cases, and issue certificates of removal. The new law had sharper teeth. Civil penalties for interference by private citizens were doubled over those in the 1793 law, and a criminal penalty of $1000 and 6 months' imprisonment were added. Federal marshals were made liable for any failure to deliver fugitives once taken into custody. Marshals were also given the power of *posse commitatus*, the ability to call on all those present to help execute the law.[98] Summary procedure was preserved, and judges or commissioners were instructed to require a deposition or affidavit taken either before the commissioner (or whoever was hearing the claim), or by a court in the slaveholder's home district to grant a certificate removal. The fugitive's testimony was expressly disallowed. The certificate of removal, once granted, was to be "conclusive of the right" of the slaveholder to remove the alleged fugitive to his or her home state, and would protect him or her from "molestation … by any process issued by any court, judge, magistrate, or other person whomsoever."[99]

96. Even William Seward's attempt to introduce petitions praying for a trial by jury for alleged fugitives met strong opposition, although they were eventually received and tabled. See *Congressional Globe*, 31st Cong., 1st sess., 524–27 (March 14, 1850). A subsequent amendment proposed by William Lewis Dayton suggested giving commissioners the power to issue *venire* writs to empanel a jury. Robert Charles Winthrop further suggested that a jury trial would be necessary in extradition cases if the case was more than 2 years old. Dayton's amendment got nowhere. *Appendix to the Congressional Globe*, 31st Cong., 1st sess., 1583–88 (August 19, 1850).

97. See the remarks of Jefferson Davis, *Appendix to the Congressional Globe*, 31st Cong., 1st sess., 1588 (August 19, 1850).

98. On the novelties of the *posse comitatus* doctrine, see Gautham Rao, "The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," *Law and History Review* 26 (2008): 1–56.

99. "An Act to amend, and supplementary to … the Act entitled "An Act respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters," 9 Stat. 462 (1850).

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Judges proved almost uniformly reluctant to challenge the specific terms of this constitutional settlement, repeatedly declaring that they lacked the power to question Congress. When pressed on the specific points of constitutionality of the Fugitive Slave Act, judges invoked long-standing precedent and contemporaneous practice, thus adopting many of the more specious legal and historical arguments advanced in *Prigg*. In the first constitutional challenge to the Fugitive Slave Act, Judge Lemuel Shaw of the Massachusetts Supreme Court refused to grant a writ of habeas corpus that would interfere with Thomas Sims's rendition as a fugitive slave because the prisoner was held by United States process. He brushed aside arguments about the law's unconstitutionality by referring to the long operation of the 1793 law.[100] Judge Peleg Sprague of the federal district court of Massachusetts echoed this sentiment, arguing that "to overturn the construction of the constitution so established would be a most dangerous violation of principle and duty." He concluded that "if a court may do this, it may overturn established rules of property, of personal rights, and of evidence, upon which the community have for a long time acted."[101] John McLean—the lone dissenter in *Prigg*—rejected out-of-hand abolitionist arguments that Congress lacked the power to pass a fugitive slave law, by noting that the power had been in operation since 1793. This was "no unsatisfactory evidence that the construction is correct."[102] McLean also refused to consider the statute's substance, insisting that to do so "would undermine and overturn the social compact. If the law be injudicious or oppressive, let it be repealed or modified. But this is a power which the judiciary can not reach."[103] Judge Humphrey H. Leavitt refused to entertain questions of the law's constitutionality at all.[104] Such cautious treatment by judges spoke to the special nature of the Fugitive Slave Act as part of a Union-saving constitutional compromise that was, in the end, much bigger than fugitive slave rendition.[105] It also revealed the limits of judicial power, which in the American system largely meant explaining whether Congress or the state legislatures had absolute (or concurrent) authority over a particular subject.[106]

100. Leonard W. Levy, "Sims' Case: The Fugitive Slave Law in Boston in 1851," *Journal of Negro History* 35 (1950): 39–74.

101. *United States v. Scott*, 27 F. Cas. 990 (D.C.D. Mass.) (No. 16240b), 997.

102. *Miller v. McQuerry*, 17 F. Cas. 335 (C.C. of Ohio, 1853), 340.

103. Ibid., 339.

104. *Ex Parte Robinson*, 20 F. Cas. 965 (C.C.S.D. Ohio), 969.

105. Jeffrey M. Schmitt, "The Antislavery Judge Reconsidered," *Law and History Review* 29 (2011): 797–834.

106. This, in essence, followed the interpretive rule laid down by John Marshall in *McCulloch v. Maryland*. See Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (Lawrence, KS: University Press of Kansas, 2006), 118–20.

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Public meetings across the North condemned the Fugitive Slave Act as immoral, un-Christian, and unconstitutional. Attended by hundreds and sometimes more than 1000 people, these meetings embodied the raw elements of popular sovereignty in action, a popular resistance predicated on the notion that violations of the Constitution could be resisted directly by the people.[107] John McLean recognized their importance in an 1853 legal opinion, in which he noted that the constitutionality of the Fugitive Slave Act had been "largely discussed in congress, in the public press, and in conventions of the people."[108] These conventions passed resolutions that laid out the following propositions: first, the Fugitive Slave Act violated the principles of justice and due process laid out in the Constitution, primarily by denying a trial by jury and the writ of habeas corpus to alleged fugitives; second, the Fugitive Slave Act violated God's law and simple principles of morality; third, resistance was a duty of all good citizens; fourth, those present pledged to aid fugitives in any way possible; fifth, they pledged to seek repeal of the law. The order of these resolutions sometimes changed, and their substance and style differed in particulars, but the general import was the same. Thus at a meeting at Faneuil Hall, the appointed president Charles Francis Adams counseled no violence, but "earnestly" prayed that the assembly would adopt "such a course of measures as shall give effective security to the houses of many our citizens whose hearts have been filled with anguish; and above all, that you nerve yourself to the duty of laboring without ceasing for the repeal of this odious Law, Even though it were shown to be of no effect, from the very impossibility of inducing our citizens to execute its shameful provisions."[109] At Minerva Hall in New York, a meeting resolved that the Fugitive Slave Act was "not binding, and void" and held its members duty bound "positively to *disobey* it." The resolutions continued to pledge resistance "until fines consume our means and prisons confine our bodies."[110] A meeting at Empire Hall in Cleveland, Ohio resolved the Fugitive Slave Act unconstitutional, and deemed it "the

107. In general, see Fritz, *American Sovereigns*, passim. Popular resistance gained legitimacy by adhering to these procedures.

108. *Miller v. McQuerry*, 17 F.Cas. 335, 340.

109. "Faneuil Hall Mass Meeting," *Emancipator & Republican*, (Boston) October 17, 1850, 19th Century U.S. Newspapers http://infotrac.galegroup.com/itw/infomark/648/964/131303597w16/purl=rc1_NCNP_0_GT3008979985&dyn=9!xrn_10_0_GT3008979985&hst_1?sw_aep=atla29738 (November 10, 2010).

110. "The Fugitive Slave Law," *North Star*, (Rochester, NY) October 24, 1850, 19th Century U.S. Newspapers http://infotrac.galegroup.com/itw/infomark/648/964/131303597w16/purl=rc1_NCNP_0_GT3013083335&dyn=12!xrn_5_0_GT3013083335&hst_1?sw_aep=atla29738 (November 10, 2010).

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duty of every good citizen to denounce, oppose and resist by all proper means the execution of said law, and that we demand its immediate and unconditional repeal, and will not cease to agitate the question and use all our power to secure that object until it is accomplished."[111]

Seeking repeal was the first step to removing obnoxious laws in a constitutional democracy, and petitions flooded Congress.[112] However, meetings in opposition to the new law had called for more active resistance, and this would raise the specter of violence. The formation of vigilance committees and committees of safety, pledging to sound the alarm should slavecatchers appear in their communities, provided ample opportunity for confrontation. Spectacular rescues occurred in New York, Pennsylvania, and Massachusetts in 1850 and 1851 that would forever draw the public gaze and brand the Fugitive Slave Act as unenforceable.[113] Unionists recoiled in horror at this rejection of what many believed to be a critical component of the Compromise of 1850. Secretary of State Daniel Webster, fresh off his appearances at "Union Meetings" supporting the Fugitive Slave Act in Northern cities, accused rescuers of treason, and zealously pursued their prosecution.[114] Although the charge of treason might seem overwrought (the Fugitive Slave Act carried its own criminal penalties), Justice Benjamin Robbins Curtis defended this charge on circuit: "if

111. "Public Meeting," *Cleveland Herald*, (Cleveland, OH) October 12, 1850, 19th Century U.S. Newspapers http://infotrac.galegroup.com/itw/infomark/648/964/131303597w16/purl=rc1_NCNP_0_GT3004929342&dyn=19!xrn_4_0_GT3004929342&hst_1?sw_aep=atla29738 (November 10, 2010).

112. See, for example, *Senate Journal*, 31st Cong. 2nd Sess., January 15 and 16, 1851, 85–88.

113. See Gary Collinson, "Anti-Slavery, Blacks, and the Boston Elite: Notes on the Reverend Charles Lowell and the West Church," *New England Quarterly* 61 (September 1988): 419–29; Gary Collinson, *Shadrach Minkins: From Fugitive Slave to Citizen* (Cambridge, MA: Harvard University Press, 1997), 138–43; Fehrenbacher, *Slaveholding Republic*, 234; Angela Murphy, "'It Outlaws Me, and I Outlaw it'! Resistance to the Fugitive Slave Law in Syracuse, New York," *Afro-Americans in New York Life and History* 28 (2004): 43–72; Chris Padgett, "Comeouterism and Antislavery Violence in Ohio's Western Reserve," in *Antislavery Violence: Sectional, Racial, and Cultural Conflict in Antebellum America*, ed. John R. McKivigan and Stanley Harrold (Knoxville: University of Tennessee Press, 1999), 206–7; Jean Richardson, "Buffalo's Antebellum African-American Community and the Fugitive Slave Law of 1850," *Afro-Americans in New York Life and History* 27 (2003): 29–46; and Thomas P. Slaughter, *Bloody Dawn: The Christiana Riot and Racial Violence in the Antebellum North* (New York: Oxford University Press, 1991).

114. On Webster and the treason charges, see Gary Collinson, "'This Flagitious Offense': Daniel Webster and the Shadrach Rescue Cases, 1851–1852," *New England Quarterly* 68 (1995): 609–25; and Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism* (Charlottesville: University of Virginia Press, 2005), 52–60.

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process of arrest issue under a law of the United States, and individuals assemble, forcibly to prevent an arrest under such process, pursuant to a design to prevent any person from being arrested under that law, and with such intent, force is used by them for that purpose, they are guilty of treason."[115] Justice Nelson charged juries in both the northern and southern federal district of New York, defending the treason count because rescuers, he claimed, had attempted to abrogate a portion of the Constitution. "The example of breaking the compact upon any motive is dangerous," said Nelson. "With what face can one state rebuke another for want of allegiance, when she has thrown it off herself? Her rebuke would be 'laughed to scorn.'"[116] Put another way, the Fugitive Slave Act was not merely ordinary law, but constitutional law and nothing less.

Despite lengthy lectures on the subject of treason and the nature of the Compromise of 1850, juries uniformly refused to convict rescuers on that count, and the government gave up such attempts. For a while, after tempers had cooled, the Fugitive Slave Act began to work well enough in court to develop some substantive case law. The federal district court of Ohio placed limits on the act of recaption, ordering that the employment of violence could be punishable if it transgressed certain boundaries.[117] The Indiana Supreme Court heard an action of assault and battery against a federal marshal executing a warrant. The court refused to dismiss the case on the grounds that the marshal was protected under the provisions of the Fugitive Slave Act, noting that the "assault and battery, and the extorting of money were no part of [the marshal's] official duty. . . . We perceive no conflict between any provision of the fugitive slave law, and the common law right to maintain an action for a personal injury."[118] One New York federal judge ruled that the Fugitive Slave Act of 1850 did not have retroactive application, therefore limiting the jurisdiction of commissioners to fugitives who escaped after September 18, 1850.[119] In addition, there were some protections afforded alleged fugitives whose freedom was provable. Justice

115. *Charge to the Grand Jury on the Neutrality Laws and Treason*, 30 F. Cas. 1024 (C.C. D. Mass., 1851) (Case No. 18,269), 1025.

116. *Charge to the Grand Jury on the fugitive slave law*, 30 F. Cas. 1007 (C.C.S.D. N.Y., 1851) (Case No. 18,261), 1012.

117. *Weimer v. Sloane*, 29 F. Cas. 599 (D.C.D. Ohio 1854) (Case No. 17,363).

118. *Freeman v. Robinson*, 7 Ind. 321 (Indiana, 1855), 323. This followed the basic legal principle that illegal acts done in the name of authority were not covered by that authority, but that those who exercised them did so at their peril, and could be sued privately or prosecuted for their illegal acts.

119. *Ex parte Davis*, 7 F. Cas. 45 (D.C.N.D. New York, 1851) (Case No. 3,613). This is the only ruling of its kind that I have found, and it is contradicted by virtually all the other case law. It hinged on Judge Conkling's assertion that the Fugitive Slave Act of 1850 created a new right, which conflated the creation of a new jurisdiction with a new right.

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John McLean insisted that judges were bound to hear the evidence establishing an alleged fugitive's freedom. In this sense, the official records certified in the slaveholder's jurisdiction were not conclusive evidence of the alleged fugitive's status. "If [the official record] were produced, the identity of the fugitive would still be an open question," wrote McLean. And on that question "anything which conduced to prove that the person described in the judgment was not the one before the judge or commissioner, would be admissible."[120] McLean's policy was not echoed by other judges and commissioners who, unless under intense local scrutiny, did not usually consider evidence on behalf of the fugitive.[121]

These interpretations were generous to alleged fugitives, but they also signaled just how much power was now in the hands of federal judges and commissioners. Not all courts, however, would hold the line on this constitutional settlement. The highest judges in two states—Wisconsin and Ohio—would challenge the constitutionality of the Fugitive Slave Act. They did so with mixed success, but in each case the impetus for the challenge (and its robustness) came from the traditional wellsprings of democratic constitutionalism: elections and legislative fiat. Judges either rode this wave or struggled futilely against its force.

The timing of the challenges was, predictably, connected to other momentous political events. The unsettling of the constitutional compromise over slavery in the territories occurred in January of 1854, when Senator Stephen Douglas reported out of committee a bill to organize the Kansas–Nebraska territory on the principle of popular sovereignty. This threat to the Missouri Compromise and its role in determining the future of western soil invigorated opposition in free states. Nebraska societies formed almost immediately, keeping tabs on the bill's progress in Congress and soliciting support amongst Whigs, Free-Soilers, and abolitionists that would crystallize, ultimately, into the Republican Party. The Republican Party would prove ambivalent about the constitutionality of the Fugitive Slave Act in its national platform, but at the state level, resistance to the law intensified.[122] Despite the Fugitive Slave Act's explicit

120. *Miller v. McQuerry*, 17 F. Cas. 335, 340.

121. Justice Robert Grier, in one of the first applications of the law in Pennsylvania, applied similar rules in favor of the fugitive. He also warned that if the resident black population attempted to obstruct officers of the law, "the first officer killed would be the signal for the extermination of the black race." "Fugitive Slave Case" *Cleveland Herald*, (Cleveland) October 26, 1850, 19th Century Newspapers http://infotrac.galegroup.com/itw/infomark/648/964/131303597w16/purl=rc1_NCNP_0_GT3004929754&dyn=22!xrn_2_0_GT3004929754&hst_1?sw_aep=atla29738 (November 10, 2010).

122. On the rise of the Republican Party and the construction of Republican ideology, I have used broadly Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the*

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provisions, federal marshals found themselves harassed with kidnapping and assault and battery charges. The Underground Railroad operated with increasing impunity, making a mockery of the handful of fugitives who were successfully returned to slavery.[123] And abolitionists marshaled state sovereignty against the federal government's invocation of the exclusivity doctrine. By 1860, sixteen of eighteen Northern states had personal liberty laws on the books, many of which interposed state authority against the federal government.[124]

This was the larger context of judicial challenge to the Fugitive Slave Act. The specific context of each of these cases further illustrates how judges positioned themselves within the antebellum democratic constitutional order. The first case occurred in Wisconsin in 1854. The fugitive slave Joshua Glover was rescued by a crowd of several thousand from a Milwaukee jail on March 10 and the federal government responded by charging several vocal abolitionists with rescue under the Fugitive Slave Act. After one of the Wisconsin Supreme Court justices issued a writ of habeas corpus and freed the abolitionist Sherman Booth, the full bench upheld his ruling on appeal.[125] In the opinion of the court, Chief Justice Whiton rested on two principles that had been features in antislavery arguments against the Fugitive Slave Act of 1850. First, Whiton held that the court commissioner created by the Act was not a judicial officer within the meaning of Article III of the Constitution and, therefore, could not exercise the powers Congress granted to him. Second, he held that the law explicitly abrogated the right of trial by jury that was guaranteed by the state constitution to its residents. As Whiton put it, the true test of the law's constitutionality was its operation "upon a free citizen of a free state," to see if by that process "such a person may be deprived of his liberty without 'due process of law.'"[126] Over one dissent—with the dissenting judge admitting that the 1850 amendments "raised doubts" about the

Republican Party before the Civil War (1970; repr. with new introduction, New York: Oxford University Press, 1995); and William E. Gienapp, *The Origins of the Republican Party, 1852–1856* (New York: Oxford University Press, 1987).

123. Stanley W. Campbell argues convincingly that the Fugitive Slave Act became "unenforceable" only after passage of the Kansas–Nebraska Act. See Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860* (New York: W. W. Norton, 1970).

124. Finkelman, "Prelude to the Fourteenth Amendment," 425. For a detailed analysis of these laws, see Morris, "Free Men All," 166–201.

125. *In re Booth*, 3 Wis. 13 (1854). The original opinion by Justice Abram Smith and counsel Byron Paine can be found in Byron Paine, *Argument of Byron Paine, Esq. and Opinion of Hon. A. D. Smith on the Unconstitutionality of the Fugitive Slave Act* (Milwaukee: Sherman Booth, 1854).

126. *In re Booth*, 43.

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Fugitive Slave Act's constitutionality—the Wisconsin Supreme Court declared the Fugitive Slave Act unconstitutional.[127]

Even as the Wisconsin Supreme Court was issuing its opinion, a federal grand jury had convened and would return an indictment on the rescuers. Booth's trial, despite the Wisconsin opinion, went forward.[128] So too did the trial of John Ryecraft, the only other man charged with the rescue in which dozens had directly participated. Juries in both cases refused to convict the men of rescue but instead found them guilty of removing a prisoner from the marshal's custody. The federal government celebrated the victory nonetheless. It was short lived. In January of 1855, the Wisconsin court set Booth and Ryecraft free again. This time it did so unanimously because all three justices could rest on a defective indictment.[129] The United States Supreme Court issued a writ of error; however, in July of 1855, the Wisconsin Supreme Court refused to acknowledge it.[130]

The story of resistance in Wisconsin is often told solely as a judicial narrative, and has long puzzled modern legal scholars.[131] The judges' decisions, however, make sense when they are plotted with other political and constitutional events. In November of 1854, after the Wisconsin Supreme Court had issued its opinion declaring the Fugitive Slave Act unconstitutional but had refused to interfere with the federal criminal trial, the newly formed Republican party swept state elections, including those for national office. The only Democrat to win was an anti-Nebraska man, giving an indication of the tenor of Wisconsin's voters on the slavery questions. When the Wisconsin Supreme Court acted again in January 1855, two separate juries had refused to convict rescuers of the crime of rescue. The judges were able to pen opinions as narrowly or broadly as they chose, given that the point of agreement was that the counts

127. Ibid., 44.

128. Booth's lawyers asked the Wisconsin Supreme Court to intervene again, but the court refused, citing the doctrine of comity of courts. See *Ex Parte Booth*, 3 Wis. 134 (1854).

129. *In re Booth and Ryecraft,* 3 Wis. 144 (1854).

130. See in general, H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens, OH: Ohio University Press, 2006).

131. A. J. Beitzinger called the opinions indefensible in "Federal Law Enforcement and the Booth Cases," *Marquette Law Review* 41 (1957): 18. His analysis was generally appropriated in Jenni Parrish, "The *Booth* Cases: Final Step to the Civil War," *Willamette Law Review* 29 (1993): 237–78. Louise Weinberg referred to the Wisconsin court's actions as "surreal" in "Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist," *Maryland Law Review* 56 (1997): 1355–59. In a departure from this historiographic tradition, Jeffrey Schmitt makes the case that both the Wisconsin Supreme Court position was indicative of a use of legal theory to effect social change. See Jeffrey Schmitt, "Rethinking *Ableman v. Booth* and States' Rights in Wisconsin," *Virginia Law Review* 93 (2007): 1336–37.

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of the indictment under which the defendants had been convicted did not specify a statutory offence. The next significant event was not the court's refusal to acknowledge the United States Supreme Court's writ of error, but a judicial election. The available seat was occupied by the sole dissenter from the 1854 decision that had declared the Fugitive Slave Act unconstitutional. He was defeated by a candidate who expressly endorsed the Republican platform that the Fugitive Slave Act was unconstitutional. Then, and only then, did the Wisconsin Supreme Court refuse to acknowledge the writ of error by the United States Supreme Court.[132]

The trenchant resistance of the Wisconsin Supreme Court had depended upon popular support. Crowds, political parties, the people at the ballot box, and juries had all sent specific constitutional signals that the Court interpreted carefully. For its part, the United States Supreme Court reacted anything but swiftly. Frustrated in its attempt to obtain the genuine record of the case, the Court heard the case on a copy and unanimously reversed the Wisconsin court in 1859, 4 years after the initial ruling. Taney authored the opinion and although his clear and logical prose seemed muscular and confident, it was analytically weak, and transparently so. After thirteen pages of proving the abstract premise of the supremacy of federal laws and claiming for the Supreme Court the full power of judicial review of congressional statutes, Taney's decision dismissed the Wisconsin Court's opinion with one sentence: "the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States."[133] Conventions of the people in Wisconsin met and denounced the decision. On March 19, 1859, the Wisconsin legislature issued a joint resolution taking notice of the decision and then rejecting it. "Such assumption of power and authority by the supreme Court of the United States to become the final arbiter of the liberty of the citizen . . . is in direct conflict with that provision of the constitution of the United States which secures to the people the benefits of the writ of habeas corpus."[134] The Wisconsin Supreme Court refused to take judicial notice of the Supreme Court's ruling.

The counterpoint to this successful constitutional resistance was the Oberlin-Wellington rescue in Ohio in 1858. At first blush, very little appeared different between the events in Wisconsin and those in Ohio. The fugitive John Price was apprehended by a party of slavecatchers. Abolitionists sounded the alarm and brought hundreds of men from

132. Baker, *The Rescue of Joshua Glover*, 135–61.

133. *Ableman v. Booth*, 62 U.S. 506 (1859), 526.

134. Joint Resolution relative to the decision of the United States Supreme Court, reversing decision of the Supreme Court of Wisconsin, 1859 Wis. Laws 247.

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Oberlin to Wellington, where Price was being held. They surrounded him and, after a period of negotiation in which the slavecatchers refused to produce the fugitive, rescued him. The crowd had shown restraint similar to that in Wisconsin, although it had not acted to protect state legal procedure or in defense of habeas corpus. The Buchanan administration reacted swiftly, ordering a massive grand jury investigation and charging dozens of people with rescue. Convictions were returned on several, including Simeon Bushnell and Charles Langston, who sued out writs of habeas corpus. The cases were joined in *ex parte Bushnell* 1 week after the federal district court handed down sentences in the cases.[135]

Most commentators have focused on the difference between this case and that of Wisconsin: the fact that the Ohio Supreme Court ruled 3 to 2 against granting habeas corpus and interposing between Ohio citizens and the federal government. The surprise was that Chief Justice Joseph Swan, an antislavery Republican, not only voted to deny the writ of habeas corpus, but penned an extensive opinion in favor of the constitutionality of the Fugitive Slave Act. His opinion sounded all the usual notes: judicial deference to congressional interpretation, the issue of settled precedent, and long acquiescence as prima facie evidence of the law's constitutionality. His first appeal, however, was to the audience beyond the bar. He carefully explained that the Court could not go behind the indictment and jury conviction to void the proceedings. He did so not to answer the argument of counsel—no lawyer suggested such a thing—but because "those who are unacquainted with the limitations upon the power of this court, are not probably aware, that a judge would be guilty of high-handed usurpation, and would deserve impeachment, if he undertook, in such a proceeding as this, to discharge the relators on any assumed ground that they were not, in fact, guilty of rescuing fugitives from labor." Interestingly, one of his last appeals was also to the people at large, and about the legitimate bounds of resistance. He conceded that it was "the duty of a state to deny the authority of the supreme court of the United States to enforce upon a state an interpretation of the constitution which palpably and clearly violated reserved rights or state sovereignty."[136] But after endorsing this last "appeal to the People," Swan made clear that this was not such a case.

Justices Jacob Brinkerhoff and William Sutliff dissented from this reasoning by referencing the old constitutional settlement that Justice Story had decimated in *Prigg*. Brinkerhoff openly called Swan's reading

135. See, in general, Steven Lubet, "Slavery on Trial: The Case of the Oberlin Rescue in Symposium: Of John Brown: Lawyers, the Law, and Civil Disobedience," *Alabama Law Review* 54 (2003): 785–829.

136. *Ex Parte Bushnell II*, 9 Ohio St. 77 (1859), 182–183, 197.

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of precedents so much mythmaking, and pointed to the opinions of Justice Hornblower of New Jersey and Chancellor Walsworth in *Jack v. Martin* as evidence that the law was far less settled than was admitted. He denied that Congress had ever asserted plenary authority, noting that the states had always legislated on the subject of the removal of fugitive slaves as well as provided protection for free blacks under their police powers. The federal judiciary, claimed Brinkerhoff, could not "through the medium of reasonings lame, halting, contradictory, and of far-fetched implications" sanction the usurpation of the states' police power. As for the argument that the Fugitive Slave Act had long been acquiesced in, Brinkerhoff unashamedly pointed to *Dred Scott* and the Supreme Court's casting off of the constitutional compromise concerning slavery and the territories. "We are thus invited by that court," said Brinkerhoff, "back to the consideration of first principles; and neither it nor those who rely on its authority have a right to complain if we accept the invitation." Sutliff echoed Brinkerhoff's assessment. He turned Story's rules of interpretation back on Story, demonstrating how *Prigg* did violence to almost every settled rule of construction. The gauntlet was cast.[137]

For his part, Swan would pay dearly. A man with a promising judicial career found his seat up for election in 1859 but was not renominated. In the same year in Wisconsin, Sherman Booth's lawyer ran for associate justice of the Supreme Court and won in a landslide. In both cases, the ballot box reaffirmed the massive constitutional resistance to the Fugitive Slave Act. In Wisconsin, it ran in support of the judiciary; in Ohio, against it. The import, however, was clear. Constitutional resistance that had begun with the people in conventions had spread to the highest level of state governments on the eve of Civil War. The revised constitutional compromise over fugitive slaves had foundered on the shoals of state sovereignty.[138]

Conclusions

Disputes over the precise meaning of the Constitution involve a broad array of constitutional mechanisms to resolve them, only one of which is recourse to the Supreme Court. The history of the fugitive slave clause's meaning is instructive in this regard. For five decades, a constitutional settlement reached in Congress and fleshed out in the state legislatures and state and federal courts operated fairly successfully. Although two opposing ends of the spectrum fought the law—abolitionists and

137. Ibid., 227, 228.
138. Baker, *The Rescue of Joshua Glover*, 159–61.

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Southern "ultras"—a broad consensus supported the law's operation and interpreted the law within the terms of the settlement. The clause's meaning underwent significant change (from establishing a concurrent jurisdiction over fugitive slave rendition to one held exclusively by the federal government) when nationalist judges exploited an opportunity to shore up federal power in an age in which states' rights were on the march. Congress reworked the terms of the settlement, effectively creating a new regime for fugitive slave rendition as part of the Union-brokering Compromise of 1850. Although abolitionists proved unsuccessful in achieving repeal of the law, they did forcefully assert the right of states to pass personal liberty laws. Even in Wisconsin, which took the most muscular of stances against the constitutionality of the Fugitive Slave Act, the fugitive slave clause was interpreted in such a way that respected both state and federal guarantees of liberty and property. These were moderate antislavery positions that acknowledged the rights of slaveholders under the United States Constitution. Importantly, in both states. it was not the judiciary that led the charge against the Fugitive Slave Act (as has often been assumed). Rather, it was effected through a variety of political and legal mechanisms that gave expression to "the People's" constitutional position.

The temptation from a modern perspective is to count as "official" the interpretations of the Supreme Court regarding constitutional law and to discount resistance as illegal or, at best, extralegal. But this ignores several important aspects of the American antebellum constitutional regime. First, official interpretations depended for their success on settled usage and consent as much as they did on their own authority. As such, the overturning of an accepted constitutional settlement that had operated for nearly half a century met with violent responses precisely because many refused to accept the overturning of precedent. This was just as true for slaveholders as for abolitionists, many of whom were alarmed that the Supreme Court was claiming the power to dictate to the states their constitutional duties and rights. Second, the constitutional system of divided sovereignty necessarily created multiple interpretations that might war with each other. This provided legitimate channels for dissent in which the Tenth Amendment might be pitted against the Supremacy Clause, for example. It was a system that resisted finality and could be quite messy. Finally, we ought not to be taken in by the Supreme Court's attempt to control the constitutional narrative. Joseph Story proclaimed in *Prigg* that the precedents were entirely with him. Scholars have taken him to task for his faulty reading, but the point is not that Story got it wrong. Rather, it is that the process of making constitutional law is more complicated than merely citing a line of cases.

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