

Federalism and the Fugitive Slave Act: the Making and Unmaking of Constitutional Nationalism

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This paper is a work in progress. Among other problems, the citations are not yet complete, and the writing at certain points may be, well, rough.

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The Fugitive Slave Act affords one of the best opportunities to witness antebellum constitutionalism in action. Passed by Congress originally in 1793, it was one of the oldest contiguous congressional laws on the books by the Civil War. It had been the subject of lengthy congressional debate, interpretation by state and federal courts, and constitutional challenge from abolitionists who demanded the law's repeal or negation by the courts. Nor was the law a static letter. Despite only being amended once in 1850, the statute's meaning shifted over time in relationship to the changing nature of federalism, the rise of judicial power, and the expansion of slavery in the antebellum republic. No federal law was the subject of more sustained constitutional interpretation and controversy.

Despite this, there remains no book length study of the Fugitive Slave Act. Most analyses have proceeded piecemeal, asking specialized questions. One of the most brilliant was Robert Cover's 1975 *Justice Accused*, a book that sought to understand why antislavery judges consistently overcame natural law principles and supported slavery.¹ For Cover, the failure of nearly every court to find the Fugitive Slave Act in violation of the Constitution or of the natural law revealed judges' predilection for positivist principles of interpretation. In the face of the command of the legislature and Constitution, judges refused to resort to natural law to rule against slave interests in the courtroom. But Cover's assumption was that judges across time coveted the authority to set aside congressional law as in conflict with the Constitution (or with natural law). This

¹ Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

assumption led him to misread the early court cases entirely. His parsing of judicial decisions for references to natural law also caused him to overlook constitutional understandings implicit in the text and rooted in time. Cover's analysis falls short because he does not imagine the constitutional role of courts, legislators, and people as changing over time.

Scholarship since Cover has done much to illuminate the Fugitive Slave Act's operation and interaction with the personal liberty laws of the states. Paul Finkelman's several analyses of the Fugitive Slave Act have tended to emphasize the proslavery nature of the Constitution.² He described the fugitive slave clause as a new and unnecessary concession to slave interests who gave nothing in return. The Fugitive Slave Act itself was evidence of slaveholders' ability to project power by overextending the terms of the fugitive slave clause, and Supreme Court Justice Joseph Story willfully wrote a proslavery opinion in *Prigg v. Pennsylvania* (1842) to extend federal power even further. None of this, intimates Finkelman, would have been possible had the

² Paul Finkelman's work came in a series of articles: "Making a Covenant with Death: Slavery and the Constitutional Convention," in *Beyond Confederation: Origins of the Constitution and American National Identity*, edited by Richard Beeman, Stephen Botein, and Edward C. Carter II, 188-225 (Chapel Hill: University of North Carolina Press, 1987); "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *Journal of Southern History* 56 (August 1990): 397-422; "Sorting Out *Prigg v. Pennsylvania*," *Rutgers Law Journal* 24 (Spring 1993): 605-65; "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story's Judicial Nationalism," *Supreme Court Review* 1994: 247-94; "Fugitive Slaves, Midwestern Racial Tolerance, and the Value of 'Justice Delayed,'" *Iowa Law Review* 78 (October 1992): 89-141; "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North," *Rutgers Law Journal* 17 (Spring and Summer 1986): 415-82.

Other scholars have advanced similar arguments. See William M. Wiecek, "'The Blessings of Liberty': Slavery in the American Constitutional Order," in Robert A. Goldwin and Art Kaufman, eds., *Slavery and its Consequences: The Constitution, Equality, and Race* (Washington, DC: AEI Press, 1987): 23-44; James Oakes, "'The Compromising Expedient?': Justifying a Proslavery Constitution," *Cardozo Law Review*, 17 (1996): 2023-56.

Constitution not been a proslavery document. This revisionist assault pushed several scholars, Earl Maltz and Don Fehrenbacher chief among them, to emphasize the Constitution as more of a consensus charter.³ Fehrenbacher's meticulous research on the federal government's relationship to slavery demonstrated that it increased over time. Slaveholders became so dependent on federal protection that in 1860 the mere loss of an election to a party that had, for all its alliance with abolitionists, promised not to meddle with slavery was enough to prompt secession. None of these scholars disputed the importance of slavery—merely the shape of the narrative that began with the Constitution's enigmatic command that fugitive slaves “shall be delivered up” upon claim of their owners. As such, each of these narratives shares a certain “originalist” purpose in their attempt to recover the true place of the Fugitive Slave Act in constitutional history. This is certainly true of the most recent recasting of this narrative by Robert J. Kaczorowski. In a blatantly originalist argument, Kaczorowski makes the Fugitive Slave Act into evidence that Congress possessed plenary authority to protect rights and that this was a model for the Fourteenth Amendment's true purpose—to provide federal protection of liberty.⁴ This argument, while stunningly original, only works when the vast majority of conflict over the law is ignored. And it is the conflict which is most important.

³ Earl M. Maltz, “The Idea of the Proslavery Constitution,” *Journal of the Early Republic* 17 (Spring 1997): 37-59; Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001).

⁴ Robert J. Kaczorowski, “Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted,” *Harvard Journal on Legislation* 42 (Winter 2005): 187-283; Robert J. Kaczorowski, “The Inverted Constitution: Enforcing Constitutional Rights in the Nineteenth Century,” in *Constitutionalism and American Culture: Writing the New Constitutional History*, ed. Sandra F. VanBurkleo, Kermit L. Hall, and Robert J. Kaczorowski, 29-63.

A more comprehensive understanding of the Fugitive Slave Act's history must begin with a fresh set of questions. Scholars have placed too much emphasis on the question of the law's constitutionality as tested against the original Constitution, a proposition which has often been viewed in static terms. The Fugitive Slave Act, despite only being revised by Congress once in 1850, was not a static law. Its operation changed as the republic changed, and the same pressures brought to bear on other aspects of federal relations affected the Fugitive Slave Act. Thus, despite the temptation of some antebellum jurists (and modern scholars) to analyze the Fugitive Slave Act according to universal and timeless constitutional principles, such treatment is impossible. Perhaps more importantly, the power of appellate courts to assess a law's constitutionality was itself changing in the antebellum period. Simply put, a constitutional regime predicated on popular sovereignty and legislative superiority was coming to grips with the new power of judicial review, if not judicial supremacy just yet. And whatever the theory of the judicial primacy in constitutional interpretation, the antebellum practice was to settle the most serious of constitutional disputes in Congress. This was where the Alien and Sedition Acts were allowed to expire, where the Missouri Compromise was reached, where the Bank debate found its resolution, where Nullification was diverted, and where the Union-saving, multi-faceted sectional settlement of 1850 was brokered. The Supreme Court's incursions into these constitutional conflicts—such as when it attempted to settle forever the question of whether Congress could ban slavery in the territories—almost never solved them. So too with fugitive slaves. Scholars have placed far too much stock in the forced construction given by the Supreme Court in *Prigg v. Pennsylvania* (1842) and thus missed the law's longer, richer history. It is nothing less than the long view of

how constitutional settlements were created in the early republic; how they were negotiated, interpreted, and enforced; how pressures led to their alteration and, ultimately, demise.

Constitutional nationalism—the use of the Constitution to create a stronger nation out of diverse and powerful states—was a project dear to Federalists and to the new nationalist Democratic-Republicans of Clay’s generation. Their projects met with mixed success, but never included plans to centralize fugitive slave reclamation. Rather, the fugitive slave question had been resolved with a truly federal constitutional settlement brokered in Congress, the accepted balance wheel for interstate conflict. It interpreted fugitive slave rendition as expressive of a constitutional right of slaveholders, protected by the national Constitution and thus enforceable by both federal and state officers. It also concerned the problem of kidnapping, which Congress decided on several occasions was within the province of the state’s unsundered police power. This settlement worked quite well until upset by outside factors, namely the rise of militant antislavery and conservative reaction in the South in the 1830s. This coincided with a decline in national power vis-à-vis the states, and it was only then that jurists began asserting plenary national authority in the matter of fugitive slave rendition by invoking the collateral doctrine of exclusivity. *Prigg v. Pennsylvania* and its calculated constitutional nationalism thus represented the unsettling of an old federal settlement, and the disruptions that followed it indicated the unsatisfactory nature of the direction taken by the Supreme Court. Congress’s revision of the Fugitive Slave Act in 1850 fared no better, and ultimately encountered resistance from the states strong enough to make the law virtually unenforceable in key states. Once again, a congressional settlement was

unsettled by circumstances. This time, however, the stakes were too high. Resistance to the Fugitive Slave Act would play its part in unmaking the nation in 1861.

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There is no definitive originalist interpretation of the fugitive slave clause's meaning, certainly not one persuasive enough to end academic debate on the subject. The clause is frustratingly in the passive voice—fugitive slaves *shall be delivered up on claim of the party to whom such service or labor may be due*. Its framers forgot to include instructions as to who would do the delivering and who might, in the final instance, compel it. This would lead later antislavery lawyers to argue the maxim *expressio unius est exclusio alterius*—in short, because the clause did not empower Congress, it must be assumed that Congress had no power to act. This comported well with the Madisonian understanding of the United States as a limited government that could only exercise the powers directly granted to it. This argument was bolstered by the sections surrounding the fugitive slave clause, all of which included specific grants of power to the United States government. Why was it missing from Article IV, section 2? Maddeningly, the introduction of and debate about the fugitive slave clause do not resolve this problem—another bar to locating a definitive originalist interpretation of the fugitive slave clause.

The delegates to the convention who introduced the fugitive slave clause understood the problem of runaways as an international problem. The Spanish crown had offered in 1693 freedom to any fugitive slave who reached its colony of St. Augustine in

Florida.⁵ This edict attracted little interest from Carolina slaveholders or, for that matter, Carolina slaves. Excepting one failed attempt, slaves did not begin arriving in Spanish Florida in earnest until after 1725. By 1738, enough slaves had fled that the Spanish governor established a colony of free blacks just north of St. Augustine which he named Gracia Real Santa Teresa de Mosa.⁶ Mosa's presence disturbed South Carolina slaveholders and created a stir among its slaves. The so-called Stono Rebellion of 1739 had been a mass exodus to Mosa which very nearly succeeded. The Spanish surrender of Florida after the Seven Years' War and evacuation of St. Augustine had provided a respite, but in 1784 the Spanish recovered Florida. Memory of Mosa's enticement to Lowcountry slaves must have accompanied South Carolina and Georgia delegates to the Convention.⁷

The Spanish were always more of a perceived than an actual threat, of course, to South Carolina's slaveholders. Nonetheless, it had raised awareness of the necessity for including a recognition of slave property in a frame of government that would preserve the sovereignty of the states. This was made all the more urgent by the revolutionary critique of slavery. The notion that slavery was contrary to national law was rapidly gaining traction. In the newly founded American states, Massachusetts and then Pennsylvania made plans for the extinction of slavery.⁸ Massachusetts, of course, never

⁵ Royal edict of Charles II, November 7, 1693. Cited in Jane Landers, "Gracia Real de Santa Teresa de Mose: A Free Black Town in Spanish Colonial Florida," *American Historical Review* 95 (Feb. 1990): 14.

⁶ John TePaske, "The Fugitive Slave: Intercolonial Rivalry and Spanish Slave Policy, 1687-1764," in Samuel Proctor, ed., *Eighteenth-Century Florida and Its Borderlands*, 7.

⁷ This remains, at present, an inference only. I am presently conducting research on the subject.

⁸ David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Ithaca, N.Y.: Cornell University Press, 1975).

had a large slave presence and abolishing the institution occurred almost by popular acclamation. Pennsylvania, however, was a state with a major slave population, making its abolition both complicated and significant. The statute's preamble, contemplating "our abhorrence of that condition to which the arms and tyranny of Great Britain were exerted to reduce us," extended the same privilege to people of African descent.⁹ Those born after the passage of the act would serve 28 years before being freed, and the statute made explicit prohibitions against removing blacks to other states without license or making life indentures to replace the condition of slavery.

This antislavery movement exhibited a healthy respect for property rights. Gradual abolition, after all, was a process of compensating owners for their property while granting liberty. Thus, while the law went to great lengths to protect blacks by requiring their registration with the state (section 5), forbidding the entrance of new slaves except in transit (section 10), and preventing their enslavement-by-another-name in the form of an indenture (section 13), the law also made clear that fugitives did not enjoy the same rights. Section 11 provided that nothing in the act should "give any relief or shelter to any absconding or runaway Negro or Mulatto slave or servant." Likewise, the Northwest Ordinance's banning of slavery went hand-in-hand with a section providing for the return of any fugitive slaves found in the territory. Fugitive slave clauses were part and parcel of antislavery measures in the revolutionary era.

This helps explain why few northern delegates balked at the fugitive slave clause's introduction, or demanded concessions in return. Nonetheless, it did not represent a complete victory for slaveholders. On August 28, the Convention took up

⁹ An Act for the Gradual Abolition of Slavery. Pennsylvania, 1780, section 1.

Articles XIV and XV which were, respectively, the privileges and immunities clause and the fugitives from justice clause. Charles Cotesworth Pinckney of South Carolina expressed dissatisfaction with Article XIV and, according to Madison, “he seemed to wish some provision should be included in favor of property in slaves.” One can only assume that he wished that the Constitution recognize—and compel the states to recognize—slaveholding as a privilege not to be abridged by any state. Whatever his intent, he moved no amendment and the article passed 8-1 with the Georgia contingent divided and South Carolina voting in the negative. The Convention then turned to Article XV. Charles Pinckney and Pierce Butler moved to add a clause requiring that fugitive slaves and servants be delivered up “like criminals.” James Wilson protested that this would be too cumbersome, obliging the executive of the state to track down fugitive slaves at the public expense. Somewhat glibly, Roger Sherman said the better analogy was to seizing and returning a horse than a criminal. Butler and Pinckney withdrew their proposal, indicating to the Convention that he would make a new proposal separate from Article XV.¹⁰ The following day, August 29, the South Carolina delegation introduced the fugitive slave clause. It went to a vote and was unanimously adopted.¹¹ Shortly after, the Convention took up again the issue of commercial regulation. Pinckney renewed his argument that a supermajority ought to be required to pass commercial regulations and made explicit that this was to protect the interests of the slave states.¹² South Carolina lost this point when the Convention adopted a simple majority for the regulation of commerce.

¹⁰ Max Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), 2:443.

¹¹ Farrand, *The Records of the Federal Convention of 1787*, 2:446.

¹² Farrand, *The Records of the Federal Convention of 1787*, 2:450.

The adoption of the fugitive slave clause was bookended by two failed attempts to provide slavery with additional constitutional recognition and protection. Commercial regulation was bound up with the slave trade, making it an even more complicated matter. But the ease with which the Convention accepted the fugitive slave clause and rejected slavery's presence in the privileges and immunities clause is instructive. Fugitive slaves and servants were part of an eighteenth-century world of master-servant laws that bound labor in ways that were distinctively backward looking. This had been tacitly recognized in the laws of colonial America, where fugitives had been returned as a matter of course rather than by legislative fiat. Something of this peeks out behind Sherman's equation of fugitive slaves with horses. It was not meant to denigrate blacks, but rather to call attention to the entrenched custom of respecting property rights and labor laws. South Carolina's insistence on its inclusion smacks of reactionary fear driven by the example of the Spanish, who refused to recognize the law of property and encouraged slaves to run to its borders, and by the doctrine of *Somerset*. It could easily appear to a South Carolinian in 1787 that the law of nations was turning against slavery. If it could only be protected by positive law, then it became necessary at least to prohibit the states from passing laws that might divest slaveholders of their fugitive property.¹³

The proposed clause's lack of an enforcement mechanism is more difficult to explain. As mentioned before, Madison and others conceived of the federal government

¹³ In general, see Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," 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); William M. Wiecek, "The Witch at the Christening: Slavery and the Constitution's Origins," in *The Framing and Ratification of the Constitution*, ed. Leonard W. Levy and Dennis J. Mahoney (New York: Macmillan, 1987).

as one of limited sovereignty which could only exercise powers expressly delegated. This was one reason Madison initially opposed a bill of rights—the powers mentioned therein not being expressly delegated made a prohibition superfluous and inelegant. Nonetheless, Madison helped midwife the bill of rights, including the tenth amendment’s reminder that *the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people*. The Constitution did speak to federal and interstate conflict. Article III granted jurisdiction to the courts of the United States in any case where the United States was a party and to controversies between the states. Should conflict arise over the return of a fugitive slave and someone file suit, the Constitution allowed federal courts to take jurisdiction.¹⁴ In terms of everyday enforcement, however, one thing remains clear—this was a directive aimed at the states. By making the return of fugitive slaves a matter of interstate compact, state officers would be bound by the supremacy clause to uphold the Constitution and, thus, to return fugitive slaves even from jurisdictions that did not recognize the law of slavery.

Problems over fugitive slave rendition arose early. The uncertain position of the border between Virginia and Pennsylvania led to some confusion over who lived in which jurisdiction. After the two states settled their border problem, several people who believed themselves Virginians suddenly found themselves to be Pennsylvanians, and thus required to register their slaves under the Pennsylvania 1790 gradual abolition law,

¹⁴ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997), 176. This did not mean that the Constitution contained any affirmative grants of jurisdiction. Justice Samuel Chase ruled on circuit in *United States v. Worrall*, 2 Dallas 384 (1798) that there was no national common law—only a local one. This was affirmed by the whole bench in *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812) when the court unanimously ruled that the United States courts could only take jurisdiction when a specific statute allowed them to do so.

or lose title to their slaves. One slave by the name of John Davies was never registered and, despite being rented to a Virginia planter, became free. He escaped back to Pennsylvania, was pursued by three Virginians, captured, and returned to Virginia. Pennsylvania's governor demanded their extradition on charges of kidnapping, but Virginia's governor refused. Pennsylvania submitted the matter to President George Washington and asked for congressional settlement of the problem.¹⁵

The congressional solution was the "Act respecting fugitives from justice, and persons escaping from the service of their masters," signed by President Washington on February 12, 1793 [Hereafter: Fugitive Slave Act of 1793].¹⁶ For fugitives from justice, extradition required a copy of the indictment or sworn affidavit certified by the governor. Once these items were 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 process. In order to remove a fugitive from one state to another, a claimant needed only to go before a state or federal judge or magistrate and produce "proof to the satisfaction of such judge or magistrate" that the person seized was in fact a fugitive slave. The judge was then empowered to issue a certificate of removal. 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. It is significant that the matter was submitted not to the courts, but to President Washington and then to Congress for resolution. In terms of the ability of the national government to broker a deal that would insure comity, the universally respected

¹⁵ Paul Finkelman, "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *Journal of Southern History* 56 (1990).

¹⁶ 1 Stat. 302 (1793).

Washington and the voice of the nation expressed in Congress was a far more authoritative voice than the Supreme Court.

Paul Finkelman interprets the Fugitive Slave Act of 1793 as the first fruits of the proslavery Constitution. Congress's construction of Article IV, section 2 generously construed the fugitive slave clause by giving jurisdiction to federal courts concurrently with state courts. Finkelman further characterizes the law as "weak" on the return of fugitives from justice. Given that the law came up for passage after the "federal consensus" was established, Finkelman argues that northern congressmen felt no reason to use the proposed fugitive slave bill as leverage against the southern states.

Fehrenbacher in general agrees that the bill's passage demonstrated an uncanny ability of the southern senators to act as a bloc in protecting their interests.¹⁷ Robert Kaczorowski argues that this was an assertion of plenary authority by Congress over the matter of fugitive slave rendition and, because of the criminal penalties provided for interference with recaption, evidence of public enforcement of a private right. The originalist principle we ought to extract, he argues, is that Congress had the power to enforce Article IV rights against the states.¹⁸ It is a given that this first instance of legislation concerning slavery and the Constitution demonstrated the success of southerners in protecting their interests by giving the Constitution a proslavery construction. The Senate committee which drafted the bill was composed of two southerners and one northerner, and southerners consistently defeated any attempt to weaken the bill, or to provide any protection for free

¹⁷ Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001), 214-16.

¹⁸ Robert J. Kaczorowski, "Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted," *Harvard Journal on Legislation* 42 (Winter 2005): 192.

blacks who might be mistakenly or intentionally claimed as fugitive slaves. Southern congressmen proved adept at coming together on this single issue.

But historians of the Fugitive Slave Act have generally neglected the fact that the constitutional settlement regarding fugitive slaves did not end at that point. After passage of the Fugitive Slave Act, Congress debated on several occasions whether it owed any constitutional protection to free blacks who complained of kidnapping. Several memorials were presented to Congress in the 1790s complaining of kidnapping. One concerned impressment, as two free black seamen were taken from a Baltimore schooner in the West Indies.¹⁹ Another, however, concerned the kidnapping of free blacks by citizens of the United States, and led the House of Representatives to commit the matter to the Committee of Commerce and Manufactures. The memorial came from the Delaware legislature and was introduced by Albert Gallatin on behalf of Delaware's representative, John Patten on April 18, 1796.²⁰

Congress had no direct warrant to legislate against kidnapping. Commitment to the Committee of Commerce and Manufactures indicated that this would fall under the commerce clause. Given that the memorial from Delaware complained of free blacks being kidnapped and removed by vessels used in both interstate and international commerce, this seemed an appropriate place for it. 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 presented the report. He was questioned immediately by Joshua

¹⁹ House Journal, 4th Cong., 1st sess., 482 (March 25, 1796).

²⁰ *Annals of Congress*, 4th Cong., 1st sess., 1025 (April 18, 1796).

Coit of Connecticut, who wondered if this did not intrude upon the legislative province reserved to the states. While he carefully stated that he was not speaking out against the bill, and recognized that the evil existed, Coit nevertheless believed that extending federal power in this case might be a greater evil.²¹ Edward Livingston of New York concurred. His concern, so stated, was not so much what the states could not do but what the United States could do. He wished the states to enforce their laws and then explain to Congress how the United States were to aid them.²² John Swanwick answered both these arguments. The state laws, he said, were broken with impunity, meaning that Congress had a duty to act. He also argued that the states had no power over these crimes being committed in interstate commerce and upon the water in the coastal trade.²³

William Smith, South Carolina Federalist, then rose and stated that this was altogether a municipal regulation. He stressed his unease with allowing such a jurisdiction to arise under the commerce power, calling this an “entering wedge” for the enlargement of national power at the expense of the states. Smith further stated that he believed the states could punish crimes on water as well as on land, provided the water fell within its jurisdiction.²⁴ Isaac Smith of New Jersey retorted that the proposed bill would only make it harder for kidnappers to take free blacks to the West Indies and sell them which, he said was a matter to which United States power only extended. Nathaniel Macon of North Carolina rose to support William Smith, hoping that the whole matter would be dropped as improper for Congress to consider.²⁵ Samuel Sitgreaves of

²¹ *Annals of Congress*, 4th Cong., 2nd sess., 1730 (December 29, 1796).

²² *Annals of Congress*, 4th Cong., 2nd sess., 1730-31 (December 29, 1796).

²³ *Annals of Congress*, 4th Cong., 2nd sess., 1731 (December 29, 1796).

²⁴ *Annals of Congress*, 4th Cong., 2nd sess., 1731 (December 29, 1796).

²⁵ *Annals of Congress*, 4th Cong., 2nd sess., 1732 (December 29, 1796).

Pennsylvania reacted harshly to this debate. Hoping that the House would treat this question of humanity with the dignity it deserved, he suggested that a proper bill reported back by the committee was the only solution. Swanwick jumped to his defense, pointing out that the United States gave seamen certificates of freedom to protect them from impressments while on the high seas. Why could they not protect the rights of their free blacks who, by their very color, were exposed to various injuries? In any case, Swanwick felt this constitutional sparring premature. the House could only consider the bill's constitutionality when it had a bill before it.²⁶ After some more sparring and a postponement of the debate, the House recommitted it on January 2, 1797 to the committee with leave to bring back a bill.²⁷ On January 17, 1797, Swanwick as chair of the Committee on Commerce and Manufactures reported back that it was the decision of the committee that this was not a matter for congressional legislation.²⁸

Constitutionally, several positions had been staked out. All admitted that antikidnapping provisions were within the powers of the states to provide. The question, then, was whether Congress could claim some kind of concurrent jurisdiction on the subject. Because kidnapping often involved the transport of slaves across state lines or out of the country, some members believed that the commerce power gave Congress authority. This was hotly disputed, and clearly many representatives were uncomfortable extending to Congress such a police power under the commerce clause. Another concept was that Congress could aid the states in effectual enforcement of their own laws,

²⁶ *Annals of Congress*, 4th Cong., 2nd sess., 1733 (December 29, 1796).

²⁷ *Annals of Congress*, 4th Cong., 2nd sess., 1767 (January 2, 1797).

²⁸ Swanwick made clear 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., 1895 (January 18, 1797).

although this suggestion was never taken up by the committee. The breakdown of arguments and votes also makes it difficult to say with any consistency why people voted the way they did. The memorial had been presented by a Pennsylvanian on behalf of the representative of Delaware, a slave state. Northerners such as Livingston and Coit joined with southerners who opposed the law. A congressional antikidnapping bill might help increase the power of the federal government, a goal dear to Federalists, and the Pennsylvania representatives who spoke in favor of the committee returning a bill were Federalists. But so too was William Smith of South Carolina, who opposed it. Two conclusions seem warrantable. The first is that representatives from the southernmost states were unified in their opposition to an antikidnapping bill, no matter how limited that bill. The second is that representatives both north and south were concerned that the commerce power did grant police power to the federal government.

There was another legal principle at play that guided the thinking of congressmen. The rights and privileges owed to residents of states were determined by their status and only the state could properly adjudge status. The protection of free blacks, themselves occupying a status not akin to full membership in their communities, was something states had provided for. In 1785, Massachusetts extended habeas corpus protections to free blacks by statute. Virginia in 1787 made the kidnapping of a free black a felony and Delaware punished by fine the exporting of a free black from the state. The following year, Connecticut included anti-kidnapping measures in its anti-slave trade statute and Pennsylvania amended its 1780 gradual abolition statute to make kidnapping illegal. This statutory outpouring in the 1780s added teeth to what was already a crime—to reduce a free person to slavery, or to carry away someone on pretended authority was not legal in

the first place. Importantly, it was universally perceived as a state matter because it flowed from state power.²⁹ This helps explain why northerners joined with southerners on the issue of congressional power to expand the U.S.'s criminal jurisdiction under the commerce clause. Since it had not been proven that state laws did not fully cover the subject, then there was no warrant for Congress to act. The Tenth Amendment reserved power to the states not explicitly granted to the federal government. In the present case, as William Smith, Joshua Coit, and Edward Livingston all argued, kidnapping was an offense against state laws. If a crime was committed there and the criminal was found in another state, then he could be extradited to stand trial in the original state.³⁰

This was certainly the conclusion reached “nearly unanimously” by the Committee on Commerce and Manufactures. But the Fugitive Slave Act presented a different problem. Kidnappers could now seize free blacks as fugitives and, after receiving a certificate of removal, reduce freemen to slavery under color of law. 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

²⁹ John Codman Hurd, *The Law of Freedom and Bondage* (1858; repr. Boston: Little, Brown, 1968), 2:5-6, 74-75.

³⁰ A similar case arose when Congress heard the petition of North Carolina free blacks who were being reenslaved 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).

slaveholders succeeded in keeping the matter from the floor or because more pressing business occupied Congress's attention is unclear.³¹

Slaveholders did try to strengthen the Fugitive Slave Act. In the debate over an antikidnapping bill in 1796 and 1797, William Vans Murray of Maryland objected to Congress passing an antikidnapping measure without strengthening the Fugitive Slave Act. It was very difficult, he said, to recover civil penalties from those who aided fugitive slaves because it was near impossible to prove that the offending party knew the black person was a runaway. On the same day that the House agreed to recommit the antikidnapping question to committee with leave to bring back a bill, Murray succeeded in having a special committee of himself, William Cooper of New York and John Wilkes Kittera of Pennsylvania appointed to consider amendments to the Fugitive Slave Act.³² The committee never reported to Congress. In December of 1801, however, a bill was proposed addressing this same problem.³³ The bill 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. A cadre of northern representatives complained that both provisions of the bill were onerous, although the reports mention nothing of constitutional objections.³⁴ Southerners jumped to the defense of the bill, suggesting that it be passed in the name of

³¹ *Annals of Congress*, 4th Cong., 1st sess., 1025 (April 18, 1796); 2d. sess., 1731-32 (December 1796). For the 1799 report on kidnapping see Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore: Johns Hopkins University Press, 1974).

³² *Annals of Congress*, 4th Cong., 2nd sess., 1767 (January 2, 1797).

³³ *Annals of Congress*, 7th Cong., 1st sess., 336 (December 18, 1801).

³⁴ *Annals of Congress*, 7th Cong., 1st sess., 423 (January 15, 1801).

humanity. Fugitivity, they claimed, was making slaves harder to govern and that led slaveholders no choice but to be more severe. To benefit their own slaves, they were saying, northerners ought not to encourage fugitives by giving them employment. Twisted though the logic was, the bill very nearly passed, losing 43-46 on a vote split by the Mason-Dixon line. Seven northerners voted for the bill, and one southerner against.³⁵

The failure to amend the Fugitive Slave Act either to make its terms more favorable to slaveholders or to protect free blacks from kidnapping meant that congressional interpretation of Article IV, section 2 had sought a balance between state and national power regarding fugitive slaves. On the one hand, slaveholders now had state and federal courts open to them to aid in reclaiming their fugitives, and a somewhat weak civil action they could bring to recoup the value of their slave should someone be found aiding him or her. On the other, Congress had recognized the states' plenary authority to protect their free black populations. States north and south continued to pass laws doing so. As the final states north of the Mason-Dixon line passed gradual abolition statutes in the first half-decade of the 1800s, many passed more antikidnapping laws. Ohio, New York, and Indiana passed laws not unfavorable to slaveholders, but that effectively reinforced the notion that when an alleged fugitive's status was in question, then the answer would come from a court in their jurisdiction.³⁶ Southern states also kept antikidnapping laws on the books. Virginia and Delaware, as mentioned before, had laws

³⁵ *House Journal*, 7th Cong., 1st sess., 53-54 (January 18, 1802).

³⁶ See John Codman Hurd, *The Law of Freedom and Bondage* (1858; repr. Boston: Little, Brown, 1968), 2: 5-6, 37-38, 74-75.

in place at the time of the Constitution's ratification. Mississippi would add a law in 1820 and Georgia in 1835.³⁷

The constitutional settlement regarding fugitive slave rendition was firmly in place by 1800. Congress had declared rendition to be a constitutional duty that enjoined officers both state and federal to perform. Formally the process was to proceed judicially in a summary matter when a fugitive was taken. The protection of free blacks was left up to the states, many of which passed statutes to protect their persons. Congress had rejected national antiskidnapping legislation by resolution as inexpedient—leaving open the constitutional question but determining in the short run that states had plenary authority to prevent the matter.

* * *

The settlement would hold for a time, but would be strained by the growth of slavery. In the first decades of the nineteenth century, planters relocated along the southwestern frontier in search of new profits to be made by sugar and cotton cash crops. Very few of these planters carried their slaves with them, creating a labor demand that ushered in a new era in American history. The international slave trade—universally despised, closed by all the states and reopened only by South Carolina in 1803 in an attempt to provide a new supply of slaves for the Louisiana territory—was officially banned by the United States on January 1, 1808.³⁸ Although smugglers continued to bring

³⁷ Hurd, *The Law of Freedom and Bondage*, 2:5, 74, 106, 146.

³⁸ Jed H. Shugerman, "The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803," *Journal of the Early Republic* 22 (Summer 2002): 263-64.

slaves in, the restriction on supply combined with the new demand would raise prices of slaves and create a market for surplus labor in the Upper South. The switch from tobacco to less-labor intensive wheat after 1790 had left slaves idle in Virginia and Maryland. In one of history's tragic ironies, idle slaves did not force the state to consider a gradual emancipation as Thomas Jefferson had hoped, but rather became a lucrative commodity. One million slaves would make the journey across the Appalachians into the southern interior and through the Mississippi valley between 1810 and 1861.³⁹

Kidnapping could not supply the want, but rising prices and an active market made the unscrupulous practice tempting. We can never know with certainty how many free blacks were stolen, reduced to slavery, and forced to toil in fields west of the Mississippi. Nonetheless, there are indications that kidnapping was on the rise. Joseph Stanton of Rhode Island raised the issue in Congress in 1806, complaining that "some people" of his state had been tempted by the high price of slaves to steal free blacks.⁴⁰ With the abolition of the African slave trade completed in 1808, nascent antislavery societies and Quakers began petitioning state legislatures for more protection for free blacks and expending their resources protecting them from kidnapping.⁴¹ Even in Ohio, hostile to free blacks, kidnapers found themselves under pursuit.⁴² Delaware, a slave

³⁹ Ira Berlin, *Generations of Captivity: A History of African-American Slaves* (Cambridge, Mass.: Harvard University Press, Belknap Press, 2003), 161-68; Steve Deyle, "The Ironies of Liberty: Origins of the Domestic Slave Trade," *Journal of the Early Republic* 12 (Spring 1992): 41-45.

⁴⁰ *Annals of Congress*, 9th Cong., 2nd sess., 240 (December 30, 1806).

⁴¹ Matthew Mason, *Slavery & Politics in the Early American Republic* (Chapel Hill: University of North Carolina Press, 2006), 132.

⁴² Mason, *Slavery & Politics in the Early American Republic*, 152.

state, actively prosecuted kidnappers beginning in 1802.⁴³ Abolitionists continued to combat kidnapping at the local level even as they petitioned Congress on the subject.

Slaveholders became ever more confident in the permanency of their institution and demanded ever more for its protection. In 1817-18, Congress considered another round of amendments to the Fugitive Slave Act that would have strengthened slaveholders' ability to retrieve fugitives. The bill would have allowed southerners to obtain certificates of removal in southern courts which would then be binding on northern officers. Slaveholders, who had always expressed concern about the overreaching power of the national government, rather shamelessly suggested that in this case the execution of the fugitive slave clause overrode all other concern. The duty to return fugitives, asserted James Pindall of Virginia, was by the Constitution "imposed on the State." The state "acts by the intervention of its officers."⁴⁴ This was a case where the federal government might direct the states to fulfill their constitutional obligations. Pindall did not balk when New York Federalist Henry Storrs proposed a mild antislavery amendment which would have punished with fine or imprisonment anyone convicted of procuring a certificate with fraud for the purpose of kidnapping. The amendment passed. But an attempt by Vermont Republican Charles Rich to attach a stronger antikidnapping provision to the bill failed for "the want of necessary connexion."⁴⁵ In addition, slaveholders resisted an attempt to outlaw recapture—a warrantless procedure that had

⁴³ *State v. Tindal*, 2 Del. Cas. 169 (1802); *State v. Clark*, 1 Del. Cas. 549 (1818); *State v. Jones*, 1 Del. Cas. 546 (1818); *In re Jones*, 2 Del. Cas. 622 (1821); *State v. Whaley*, 2 Del. 538 (1837); *State v. Whitaker*, 3 Del. 549 (1840); *State v. Griffin*, 3 Del. 560 (1841); *State v. Harten*, 4 Del. 582 (1847); *State v. Jeans*, 4 Del. 570 (1847); *State v. Updike*, 4 Del. 581 (1847).

⁴⁴ *Annals of Congress*, 15th Cong., 1st sess., 827-28 (January 28, 1818).

⁴⁵ *Ibid.*, 830 (January 29, 1818).

the effect of nullifying habeas corpus proceedings. William Smith of South Carolina explained that habeas corpus hearings were never meant to be final. They existed to test the legality of detention, but could not decide the fate of an alleged fugitive. To do so would remove a case that belonged before a jury and decide it in a summary hearing, in violation of the Sixth and Seventh Amendments.⁴⁶ This privileging of the slaveholders' right to property over the freeman's right to liberty—the heart of the conflict—passed with little comment. The bill, however, did not become law. The House passed it but the Senate passed another version. The two houses never reached agreement, and the coming of the Missouri question overshadowed the subject in years to come. Legislatively, at least, the settlement remained secure through 1820.

The federal and state appellate courts that encountered the Fugitive Slave Act in the first decades of the early republic rarely entertained questions of the law's constitutionality, and even when they did made clear that they deferred to Congress on that question. Judicially, they construed the Fugitive Slave Act within the bounds of the constitutional settlement—granting congressional authority to prescribe the mode of fugitive slave rendition but exercising a healthy respect for the sovereign powers of the states.

The first interpretive test of the law came before the New York Supreme Court in 1812. The case originated when a New York slaveholder filed suit in 1811 in the Albany Circuit Court against a Vermont resident for \$300 damages. 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

⁴⁶ *Ibid.*, 231-33 (March 6, 1818).

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. It is unclear whether this was a legitimate claim—if Harry owed the debt—or if this was an ingenious ploy by one of Harry’s friends to keep him in Vermont. It is not even clear from the record what happened to Harry. But Jacob Glen sued the Vermont man in the New York Circuit Court for trespass vi et armis in the amount of \$300, which was Harry’s purchase price several years earlier. The circuit court judge 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.⁴⁷ In 1812, the New York Supreme Court decided the case of *Glen v. Hodges*. In a per curiam decision, the court granted the plaintiff’s motion for a new trial on the grounds that the New York court did have jurisdiction. Jacob Glen’s right to his fugitive slave was guaranteed by the U.S. Constitution, and as such his right was protected in any court within the United States. The court briefly took judicial notice of the Fugitive Slave Act of 1793 as prescribing the mode for recaption, but went no further than this. The court maintained that the right flowed from the Constitution, not from the act of Congress.⁴⁸

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. But the court had not even operated under the Fugitive Slave Act and never suggested that Congress held plenary authority. Moreover, the court described this private right in relational rather than absolute terms. The court clearly limited its holding to private

⁴⁷ *Glen v. Hodges*, 9 Johns. 67 (N.Y. Sup. Ct. 1812).

⁴⁸ *Glen v. Hodges*, 9 Johns. 67 (N.Y. Sup. Ct. 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.

actions. Had Harry committed a public offense in Vermont and the state subsequently arrested him, the court said, then “the right of the master must have yielded to a paramount right.”⁴⁹ Vermont’s plenary police power trumped the master’s constitutionally secured right to a fugitive.

Glen v. Hodges did not have to concern itself with conflict of laws, but rather only with the question of jurisdiction. Conflict came before the Pennsylvania Supreme Court in *Wright v. Deacon* in 1819 when abolitionists asked the court to intervene with a writ *de homine replegiando* to free a fugitive who was about to be taken, under a certificate of removal, to Maryland.⁵⁰ The Pennsylvania Supreme Court quashed the writ, noting that it had been sought only to arrest the process of removal “and thus defeat the constitution and law of the United States.” Robert Cover in *Justice Accused* read this case as demonstrating that antislavery justices rejected natural law arguments in favor of enforcing the positive law.⁵¹ For evidence, he cited part of Tilghman’s opinion which, out of context at least, appears apologetic: “whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a constitution under which the *United States* have enjoyed so much prosperity, unless their property in slaves had been secured.”⁵²

But this reasoning in *Wright v. Deacon* did not answer a natural law argument. Abolitionists had argued that the certificate of removal was irregular because it had been issued *during a habeas corpus proceeding*. The application for a certificate of removal

⁴⁹ *Glen v. Hodges*, 9 Johns. 67 (N.Y. Sup. Ct. 1812) at 70.

⁵⁰ *Wright v. Deacon*, 5 Serg. & Rawle, 62 (1819).

⁵¹ Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn.: Yale University Press, 1975).

⁵² *Wright v. Deacon*, 5 Serg. & Rawle 62 (1819) at 63.

was pending before another justice of the peace when abolitionists petitioned for habeas. The judge in the habeas corpus proceeding ruled that the fugitive was in fact a fugitive and granted a certificate of removal. Only then did abolitionists resurrect the writ *de homine replegiando* and ask the Pennsylvania Supreme Court to correct this breach of procedure. Tilghman declined. The habeas corpus hearing, he held, had been in conformity with the Fugitive Slave Act of 1793.⁵³ To rule that a habeas corpus proceeding in a state court was in conformity with the Fugitive Slave Act of 1793's mandate for a summary procedure *even with the certificate of removal hearing pending before another justice* meant that the Pennsylvania Supreme Court understood the settlement as protecting relational rights. The question of the alleged fugitive's status could be determined in a habeas proceeding. It may not have been final—the alleged fugitive might still have rights to press under Maryland law—but it ended the process in Pennsylvania. Importantly, Tilghman recognized habeas corpus proceedings as a legitimate exercise under the Fugitive Slave Act of 1793.

The Massachusetts Supreme Court reached a similar conclusion in the case of *Commonwealth v. Griffith* in 1823.⁵⁴ Antislavery lawyers in this case directly challenged the Fugitive Slave Act as unconstitutional because recaption without a warrant (authorized by the statute) violated the Fourth Amendment. Chief Justice Isaac Parker disagreed. Slaves were not parties to the Constitution and could claim no rights under the Fourth Amendment. The summary procedure was thus also constitutional. But he noted the objection that the law could serve as cover for kidnappers. “It may be so,” he wrote, “but this would be attended with mischievous consequences to the person making the

⁵³ Wright v. Deacon, 5 Serg. & Rawle 62 (1819) at 63.

⁵⁴ Commonwealth v. Griffith, 19 Mass. 11 (1823).

seizure, and a habeas corpus would lie to obtain the release of the person seized.” This reasoning directly limited the holding by suggesting that free blacks had rights that state courts could protect even if they were seized as fugitive slaves.

These three decisions, coming from three of the leading state supreme courts between 1812 and 1823, did not give an unqualified judicial endorsement to the Fugitive Slave Act. Rather, all three perceived the right established by Article IV, section 2 as relational rather than absolute. *Hodges* had suggested that slaveholders’ right to their fugitive property took a backseat to the state’s sovereign authority to prosecute criminals. *Wright* held that habeas corpus proceedings were legitimate under the Fugitive Slave Act and *Griffith* argued in the ratio decidendi of the holding that this was so. Nor was it merely the state courts that provided such protections for liberty. Supreme Court Justice Bushrod Washington admitted on circuit in Pennsylvania that, despite the lack of any statutory authority, he jailed alleged fugitives during hearings in order to give them “time to get his witnesses to disprove the claim of the asserted owner, should he have any.”⁵⁵ For the most part, the Fugitive Slave Act’s constitutionality was not considered by these courts. Only in *Griffin* did lawyers raise a serious question about the Fugitive Slave Act’s constitutionality by suggesting it violated the bill of rights, but this was easily turned aside. Antebellum judges did not make a habit of challenging congressional legislation, and especially not before the 1830s. Judicial review was an extraordinary power, one

⁵⁵ *Worthington v. Preston*, 30 F. Cas. 645 (C.C.E.D. Penn., 1824) (Case No. 18,055). Washington also construed the Fugitive Slave Act narrowly in two 1823 decisions, both decidedly not in favor of the slaveholder’s right to recovery. See *Ex Parte Simmons*, 22 F. Cas. 151 (C.C.E.D. Penn., 1823) (Case No. 12,863) and *Hill v. Low*, 12 F. Cas. 173 (C.C.E.D., Penn., 1822) (Case No. 6,494).

exercised with tremendous caution and viewed suspiciously in an increasingly democratic republic.⁵⁶

It was more likely that challenges to congressional law would come from state legislatures. This had been the format used by Democratic Republicans to challenge the Alien and Sedition Acts of 1798 and to seek their repeal. Something similar occurred concerning a fugitive slave case in Indiana in 1818 which, although falling short of a constitutional challenge to the Fugitive Slave Act, nonetheless asserted strongly the place of the states in reclamation. Indiana's 1816 antikidnapping law 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.⁵⁷ This put the Indiana law in direct conflict with the Fugitive Slave Act, which extended jurisdiction jointly to federal courts and provided only for a summary hearing. After such a jury trial set a fugitive named Susan free, a Kentucky slaveholder petitioned a federal judge for a certificate of removal.⁵⁸ 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. Regarding the question of conflict of laws, the judge

⁵⁶ There is a healthy scholarly debate over whether judicial supremacy was an accepted facet of antebellum jurisprudence. But even those who have asserted that antebellum Americans bowed to judicial supremacy, there was still no consistent *practice* of judicial review, at least not until the 1850s at the state level and the 1870s at the federal level.

⁵⁷ 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, Conn.: Greenwood 1993), 228-29.

⁵⁸ Double check this story, please.

relied on the supremacy clause to end the matter. “It is unnecessary to inquire whether one or the other is best calculated to promote the ends of justice,” wrote the judge, explaining why the matter stopped there. “It is sufficient that congress have prescribed the mode.”⁵⁹ The judge in *In re Susan* did not go further to explain if state laws would operate differently on a free black claiming to be kidnapped. Nor did the judge examine the Fugitive Slave Act on its merits. He was concerned solely with the question of how to resolve a conflict between two laws as narrowly as possible, and this was easy enough: state law that conflicted with federal law on a subject in which Congress had legislated was null and void.

This was not the end of the case, however. The fugitive returned to Kentucky with her master under color of federal process, and an Indiana grand jury indicted him for kidnapping because he had failed to 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 considered the matter and referred it to the 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.⁶⁰ This Indiana did in 1824 when it passed a new law providing for a summary procedure for

⁵⁹ *In re Susan*, 23 F. Cas. 444 (C.C.D. Ind. 1818) (No. 16,632).

⁶⁰ “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.

rendition. Indiana's law allowed evidence to be submitted on behalf of the fugitive and provided for an appeal by either party. Perhaps recognizing that the demand for a trial by jury was the only aspect of its law in conflict with the Fugitive Slave Act, Indiana's new law balanced the protection of free blacks with the slaveholder's right to his fugitive. By 1824, the conflict of laws problem in *Susan* had been solved not by the Supreme Court, but by the legislature of Indiana. The solution was to bow not to plenary national authority in the matter of recaption, but to bring state laws in line with the constitutional settlement regarding fugitive slaves that had been approved in Congress. Indiana continued to take responsibility for preventing kidnapping, even when done under color of law.

Indiana's solution—defying the federal court in its pronouncement that the state's antikidnapping measures could be easily superceded and likewise bowing to the constitutional settlement over fugitive slaves—was characteristic of the new personal liberty laws that emerged from northern free states. Pennsylvania, which passed an antislavery-influenced antikidnapping bill in 1820 withdrawing its judicial officers from the enforcement of the Fugitive Slave Act of 1793, revised its laws under pressure from Maryland. The resultant personal liberty law, passed in 1826, maintained antikidnapping penalties, outlawed recaption, and set standards for evidence. Slaveholders seeking fugitives had to produce a sworn affidavit sealed by a court in their home jurisdiction. Likewise, questions of status would be determined in Pennsylvania courts by Pennsylvania officers. Also in 1826, New Jersey passed a personal liberty law that achieved remarkably the same thing as Pennsylvania's. New York passed its own

personal liberty law in 1828 that secured the writ de homine replegiando for alleged fugitives who wished to contest their status in New York.⁶¹

The first round of personal liberty laws followed in the tradition of antikidnapping laws. They also worked within the Fugitive Slave Act of 1793's parameters to give substance to the rendition process. This had been curtailed somewhat by the negation of Indiana's requirement for a trial by jury in the case of *Susan*, but Indiana revised its own laws by 1824 to come into conformity with the Fugitive Slave Act. But even if the personal liberty laws had been curtailed, the entreaties of the state of Maryland when Pennsylvania withdrew from the duty of fugitive slave recaption indicated precisely why the settlement worked. Without a federal police power or enforcement infrastructure to insure the return of fugitives, slaveholders were dependent on state officers.⁶²

* * *

The constitutional settlement would not hold. The increasing activity of the antislavery movement would crystallize with the turn to immediacy in the 1830s.⁶³ Immediate abolitionism demanded direct attacks on the institution of slavery that would proceed politically, legally, constitutionally, and culturally. It strained interstate comity and permeated congressional debates. Abolitionists petitioned in earnest for

⁶¹ These legislative actions are thoroughly covered in Morris, *Free Men All*, 45, 52-56. See also John Codman Hurd, *The Law of Freedom and Bondage* (1858; repr. Boston: Little, Brown, 1968), volume 2.

⁶² This point was made forcefully by Bushrod Washington in his charge to the jury in *Worthington v. Preston*, 30 F. Cas. 645 (C.C.E.D. Penn., 1824) (Case No. 18,055).

⁶³ David Brion Davis, "The Emergence of Immediatism in British and American Antislavery Thought," *Mississippi Valley Historical Review* 49 (September 1962): 209-30.

congressional action against the interstate slave trade and flooded the states with antislavery pamphlets. Slaveholders responded by imposing the gag rule on Congress which tabled any antislavery petitions which arrived and attempting unsuccessfully to pass laws making it illegal to mail incendiary materials to slaveholding states. The constitutional debates these actions prompted raised questions about the extent of congressional power in an age when states' rights was clearly in ascendancy. Even John Marshall had signaled a retreat from his nationalistic jurisprudence.

Abolitionists turned the personal liberty laws to their advantage, securing writs of habeas corpus for alleged fugitives and charging slavecatchers with kidnapping. This, of course, had long been abolitionist strategy, but circumstances were greatly changed in the 1830s, and the conflict readily surfaced in ordinary legal proceedings. U.S. Supreme Court Justice Henry Baldwin vented his frustration in 1833 when, while riding circuit in Pennsylvania, he heard a case where members of the Pennsylvania Antislavery Society had used every possible means to frustrate legitimate reclamation. He charged the jury in the case that the abolitionists had perverted the law. He asked the jury rhetorically 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?" Baldwin hoped the answer was obvious. In the process, he had suggested that personal liberty laws served a distinct purpose and were constitutional within their limits.⁶⁴ Baldwin's written opinion was a furtive plea that people recognize the constitutional settlement and leave it undisturbed. In some cases, the old settlement held. In 1835, the recorder of Pittsburgh heard evidence on the status of an alleged

⁶⁴ Johnson v. Tompkins, 13 F. Cas. 840, 848 (E.D. Pa. 1833) (No. 7,416).

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.⁶⁵ But even instances like these marked the difficulties. Court proceedings that took seriously claims to freedom raised costs, and the penalties for kidnapping raised the stakes on legitimate fugitive slave reclamation.

It was under these circumstances that Samuel Nelson, judge of the New York Supreme Court, took stock of the Fugitive Slave Act in the 1834 case of *Jack, a Negro Man v. Martin*. The case was, in several ways, a perfect test case. Antislavery lawyers for the fugitive Jack, averred his status as a fugitive slave and, as one of their arguments attempting to get the case dismissed, argued that Article IV, section 2 contained no warrant for Congress to legislate. Without the express delegation of power, the Tenth Amendment reserved the matter to the states. As such, the fugitive slave clause could only be read as a directive to state officers and it was incumbent on state officers to comply with the Constitution and provide for fugitive slave reclamation.

Nelson rejected the antislavery argument and 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 kidnapping, but rather by referencing the supremacy clause. Citing among other cases, *Sturges v. Crowninshield*, Nelson repeated a familiar holding. In cases in which Congress had constitutional warrant to legislate, the states could exercise a concurrent

⁶⁵ *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.

power only if Congress had not legislated on the subject. Once Congress did legislate, the power was “exhausted,” and the states could no longer legislate on the subject.⁶⁶ But this of course only begged the question. If it was accepted that Congress could only legislate on matters for which it held a specific constitutional warrant and the Tenth Amendment truly reserved all other powers to the states, then a strict reading of the fugitive slave clause revealed no grant of power to Congress. To overcome this objection, Nelson resorted 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 it 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.”⁶⁷

The novelty of Nelson’s opinion was the introduction of the *Sturges* principle of exclusivity into fugitive slave clause jurisprudence. It was certainly creative, and it did not go undisturbed. The case was appealed to the New York Court for the Correction of Errors (CCE) where the result was upheld, but the written opinions did not comport with 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

⁶⁶ Jack v. Martin, 12 Wend. 311 at 317.

⁶⁷ Jack v. Martin, 12 Wend. 311 at 319.

seriatum.⁶⁸ Only two opinions were delivered, and both rejected soundly Judge Nelson's reasoning. Both suggested that personal liberty laws served the important purpose of protecting free blacks' right to liberty. Chancellor Walworth's opinion made clear that no act of Congress could abrogate this right.⁶⁹ In an unrelated case (with a confusingly similar name), U.S. Supreme Court Justice Smith Thompson essentially came to this same determination while riding circuit in New York. His decision in *In Re Martin* also reasoned instrumentally that "it cannot be presumed" that the framers intended to leave fugitive slave reclamation legislation up to the individual states. Noting that there was no express command to the states as well, he supposed it "an extravagant construction" that the framers intended "it to be left discretionary in the states to comply with it or not, as they should think proper." Compliance, Thompson was arguing, was not optional. But he did not rule out habeas corpus proceedings, nor did he suggest that Congress had an exclusive right to legislate on the matter. This left considerable latitude for state legislation regarding fugitive slave rendition and did not attempt to overrule the personal liberty laws unless, on their face, they contradicted federal law.⁷⁰

Even as Judge Nelson of the New York Supreme Court rocked the constitutional settlement regarding kidnapping and fugitive slaves by suggesting that only fugitive slave reclamation was important, the Superior Court of New Jersey rocked it from the other end when Chief Justice Joseph Hornblower issued a ruling in 1836 declaring that New Jersey's personal liberty law took precedence over the Fugitive Slave Act. The case came

⁶⁸ 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, N.Y., June 10-12, 2004).

⁶⁹ *Jack v. Martin*, 14 Wend. 506 (N.Y. C.C.E. 1835) at 538.

⁷⁰ *In re Martin*, 16 F. Cas. 881 (undated) (No. 9,154) at 884. Most likely decided between 1834 and 1835.

from a habeas corpus petition for an alleged fugitive, and Chief Justice Hornblower had to address the question of whether the certificate of removal obtained by the slaveholder was a bar to the habeas corpus case proceeding. Hornblower thought not. Echoing antislavery arguments, he noted that the fugitive slave clause contained no grant of power to Congress and as such was a duty imposed on the state governments. Although his arguments may have pointed to a ruling that the Fugitive Slave Act was unconstitutional, Hornblower did not presume to hold so. His arguments were merely part of his reasoning, demonstrating why the habeas corpus petition took precedence over a certificate granted under a federal law of dubious standing.⁷¹

Just as these opinions on the Fugitive Slave Act were circulating in New York and New Jersey, events were unfolding in Pennsylvania that would set in motion the first Supreme Court assessment 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 removed Margaret and her children to Maryland. Pennsylvania subsequently tried Prigg for kidnapping and, without his actual

⁷¹ 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 (Summer 1992).

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 U.S. Supreme Court. In 1842, the decision in *Prigg v. Pennsylvania* was handed down.⁷² For the first time, the full bench of the U.S. Supreme Court considered the conflicts between the states' personal liberty laws and the Fugitive Slave Act. The result, quipped John Quincy Adams, was "seven judges, every one of them dissenting from the reasoning of all the rest."⁷³ Adams had, in characteristic style, captured the confusion that now characterized fugitive slave reclamation.⁷⁴

Story's opinion was a muscular attempt to salvage some sense of constitutional nationalism in the age of Jacksonian politics.⁷⁵ He announced outright that the Supreme Court would consider the matter according to immutable constitutional principles, the same as if the "act of Congress were of recent enactment" rather than part of a federal constitutional settlement with five decades of history. It was, in part, a rhetorical ploy. He rejected the interpretive canons of "contemporaneous exposition" and "long acquiescence" only after demonstrating that they were both in favor of the statute's constitutionality. By diminishing their importance in favor of judicial exposition, he was

⁷² 41 U.S. (16 Pet.) 539 (1842).

⁷³ Charles Francis Adams, ed., *Memoirs of John Quincy Adams* (Philadelphia: J. B. Lippincott, 1876), 11:336.

⁷⁴ Paul Finkelman claims that Story had a solid majority on nearly every point. See Paul Finkelman, "Sorting Out *Prigg v. Pennsylvania*," *Rutgers Law Journal* 24 (Spring 1993), 634. He stands in some tension with Don Fehrenbacher and Earl Maltz on this point. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 43-47; Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution," *American Journal of Legal History* 36 (October 1992): 474-76.

⁷⁵ Paul Finkelman, "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story's Judicial Nationalism," *Supreme Court Review* 1994: 256-59.

placing the Supreme Court in the position of constitutional arbiter. During times of sectional conflict where parties disputed the power of the federal government to allow or ban slavery in the territories, interfere with the interstate slave trade, an impartial body would be needed to decide these matters complete. Story's opinion was, in part, a gambit to elevate the Supreme Court to meet these challenges.⁷⁶

Story's holdings depended on a legal analysis that mixed originalism with instrumentalism. The Constitution, he said, created a new right of reclamation, independent of comity.⁷⁷ Because the right was created in the national constitution, he deduced, it made sense that it was a power enforceable by the national legislature. "In the absence of any positive delegation of power to the state legislatures," he wrote, standing the Tenth Amendment on its head in the process, "it belongs to the legislative department of the national government, to which it owes its origin and establishment."⁷⁸ Story then applied Nelson's exclusivity rule, adopted from *Sturges*. Once Congress had legislated on the subject, the power that contained it was exhausted and any state legislation on the subject was necessarily superceded and void.⁷⁹ This included any antiskidnapping law that specified 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, but even this power could not interfere with fugitive slave rendition.

⁷⁶ And, of course, a bit part of this for Story was convincing slaveholders that the Constitution would be construed in their favor by a northern justice on the Supreme Court. Story had gone out of his way to do this in slavery cases. See Barbara Holden-Smith, "Lords of Lash, Loom, and Law: Justice Story, Slavery, and *Prigg v. Pennsylvania*," *Cornell Law Review* 78 (September 1993): 1101-16.

⁷⁷ *Prigg v. Pennsylvania* 41 U.S. (16 Pet.) 539 (1842) at 612.

⁷⁸ *Ibid.* at 623.

⁷⁹ *Ibid.*, at 622.

In one fell swoop, Story had dispensed entirely with nearly five decades of constitutional law. Story interpreted every court case upholding the old settlement as expressing unqualified support for the Fugitive Slave Act, an almost deliberate misreading of a very tenuous line of cases. He interpreted this as judicial acquiescence to the judgment of Congress. This, along with the fact that the Fugitive Slave Act was adopted so quickly after the Constitution's ratification, was more evidence of its constitutionality. Still, his reasoning did not rely on precedent or on comity or on judicial deference to Congress. Rather, it was instrumentalist. The plain meaning of Article IV and the Tenth Amendment did not support Story's claim of national exclusivity. Citing *Sturges v. Crowninshield*, he had to argue that the interpretive rule of exclusivity enunciated by the Court (although only obiter dicta in *Sturges*) applied to the case of fugitive slaves. In addition to suggesting that any right created by the national constitution "naturally" meant that it would be nationally enforced, Story argued that state-by-state regulations would be inconvenient and amount to an act of abolition. There was in this opinion one antislavery qualification: the Fugitive Slave Act of 1793 might extend jurisdiction to state magistrates, but it could not command them to act. Only the states could do that and, because they were prohibited from passing laws defining procedure in fugitive slave cases, states could only pass laws withdrawing their officers from fugitive slave rendition.

This fantastic constitutional reasoning, ignoring the plain language of the Constitution and proposing an assertion of plenary authority analogous to the interstate commerce clause or bankruptcy clause on the basis of expediency, drew fire from other quarters of the Court. Chief Justice Roger B. Taney hotly contended that the Supreme

Court had not the power to relieve the states of their constitutional duties.⁸⁰ Paul Finkelman has contended that Taney misread Story's opinion, insofar as Finkelman believes Story did not expressly forbid the states to pass legislation aiding in fugitive slave reclamation.⁸¹ If Taney misread Story, then so did McLean. And so did anyone else who understood the full potential of the exclusivity doctrine, which did not allow for the concurrent exercise of power on the same subject. For his part, Justice John McLean directly referenced the old constitutional settlement when he complained that free blacks had no protections under Story's opinion. In what can only be described as a dissent, McLean would have both the Fugitive Slave Act and the personal liberty laws operating within their own spheres. If a free black was kidnapped under color of the Fugitive Slave Act, then the remedy of habeas corpus would lie.⁸²

Ironically, McLean's reliance on the old constitutional settlement was a lonely voice. Justice Story had not been known for his reverence for case-law authority, and *stare decisis* competed with instrumentalism as the prevalent judicial philosophy.⁸³ It was thus innovation rather than tradition that marked *Prigg v. Pennsylvania*. And this innovation swept away free blacks' right to liberty in favor of national power to protect slaveholders' rights. The Supreme Court would reaffirm its decision against Salmon P. Chase's natural law argument in the case of *Jones v. Van Zandt* in 1847. Justice

⁸⁰ *Ibid.*, at 627.

⁸¹ Paul Finkelman, "*Prigg v. Pennsylvania* and Northern State Courts," 10. Cf. William Wiecek, "Slavery and Abolition Before the United States Supreme Court, 1820-1860," *Journal of American History* 65 (June 1978): 46.

⁸² *Ibid.*, at 663.

⁸³ Craig Evan Klafter, *Reason over Precedents: Origins of American Legal Thought* (Westport, Conn.: Greenwood, 1993); R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985).

Woodbury's opinion reminded Chase and others that the Fugitive Slave Act was part of a compromise over slavery that belonged to the political branches, not to the courts, to execute. The Supreme Court, continued Woodbury, had "no authority as a judicial body to modify or overrule" the compromise.⁸⁴ Not even McLean on circuit—where the case first came before him in 1843—would tamper with Story's opinion in the case. The Supreme Court decided it would hold the line on the new constitutional interpretation.

Prigg would prove unworkable in practice. It is true that some states complied with *Prigg*'s terms. Ohio repealed its personal liberty law. Pennsylvania, Massachusetts, and Rhode Island passed new personal liberty laws withdrawing state aid for fugitive slave reclamation.⁸⁵ This recognized the antislavery potential of *Prigg* but immediately strained relations within the federal union. 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 in the Midwest, writs of habeas corpus issued by state courts interfered with fugitive slave recapture. 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.⁸⁶ A similar case occurred

⁸⁴ Jones v. Van Zandt, 46 U.S. 215 (1847) at 231.

⁸⁵ Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* 25 (March 1979).

⁸⁶ *The South Bend Fugitive Slave Case, Involving the Right to a Writ of Habeas Corpus* (New York: Anti-Slavery Office, 48 Beekman Street, 1851). From the Samuel J. May Anti-Slavery Collection, Cornell University.

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.⁸⁷

The solution, just as Story had planned it, would require new congressional legislation that expanded national power to enforce the Fugitive Slave Act.⁸⁸ When the 31st Congress met in 1849, this 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 all the issues that divided south from north and that had raised serious calls for secession revolved around slavery, and the most strikingly visible was the fugitive slave question.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 their 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 nullification—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 1849-50 than in 1791-1800. Gone were the careful constitutional scruples about to what extent Congress could assume plenary authority on

⁸⁷ Baker, *The Rescue of Joshua Glover*, 48-49; Morris, *Free Men All*, 109-27; 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, D.C.: Smithsonian Books, 2004), 81-86.

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.

⁸⁹ Michael F. Holt, *The Political Crisis of the 1850s* (New York: W. W. Norton, 1978).

the subject. Daniel Webster urged deference to the Supreme Court, despite his own constitutional misgivings. Andrew P. Butler of South Carolina—the man who had reported the Fugitive Slave Act out of committee to the Senate floor—refused to bow to the notion that Congress held plenary authority on fugitive slave reclamation. James Mason iterated strongly that the constitutional duty of reclamation was imposed upon the states and the Supreme Court lacked the authority to relieve states of their constitutional duties. While this did not impact the constitutionality of the bill before the Senate, it did suggest that slaveholders had few scruples enlarging national power to protect their peculiar institution.

The Fugitive Slave Act of 1850 created the federal police power necessary to carry out fugitive slave reclamation without the aid of the states.⁹⁰ Rendition became entirely a federal matter, and in order to make up for the small number of federal judges dispersed throughout the free states, the act authorized the creation of court commissioners whose sole responsibility would be fugitive slave rendition. Where the 1793 Fugitive Slave Act had prescribed only a summary proceeding for rendition, the Fugitive Slave Act of 1850 spelled out it out in detail. A sworn affidavit testifying to ownership, escape, and a description of the fugitive certified by a magistrate in the slaveholder's home state would amount to proof. The alleged fugitive's testimony was excluded, as was any evidence on his or her behalf. The law furthermore prevented "any molestation . . . by any process issued by any court, judge, magistrate, or other person whomsoever." This, in effect, suspended the writ of habeas corpus if it were sued out by

⁹⁰ 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) (hereafter Fugitive Slave Act of 1850).

a free black captured as a fugitive slave. The law prescribed tougher civil and criminal penalties for those who obstructed the law's execution. Civil liability was raised to \$1000 and criminal penalties added an additional \$1000 fine and six months in jail. U.S. marshals were given the power of posse comitatus to call out the local militia and anyone present to help enforce the law. And, with a final flourish adding insult to injury, commissioners were to earn their keep by fees rather than by salary. And the commissioner earned double in fees if he remanded a fugitive than if he released him. The Fugitive Slave Act of 1850 had turned even the judge into an interested party.

* * *

The Compromise of 1850 thus adopted the essentials of *Prigg v. Pennsylvania*, thus subordinating the old federal constitutional settlement to a national assertion of plenary authority on fugitive slave reclamation. This compromise would not fare as well as the first. It inspired immediate and willful disobedience. Enforcement came only at great cost and—although fugitives were returned—the law itself did not deter the underground railroad from running refugees north to Canada. Perhaps more damaging, the law operated amidst great doubts about its constitutionality. These doubts were raised in courts as antislavery lawyers demanded that courts refuse to enforce the unconstitutional law, but few courts took seriously these claims. Unlike the courts of the early republic, these courts readily admitted the power of judicial review, but almost always refused to practice it. Nearly unanimously, judges invoked the arguments of long-standing precedent, contemporaneous practice, and judicial deference to congressional

interpretation to avoid examining the substance of the Fugitive Slave Act. It was this latter claim that really carried the most weight. Both the enforcement of the Fugitive Slave Act and its light treatment by justices spoke to the special nature of the law as part of a Union-saving constitutional compromise.

The earliest test of the law came before the antislavery justice Lemuel Shaw of the Massachusetts Supreme Court. Lawyers for Thomas Sims, a fugitive slave detained under the new law, sued out a writ of habeas corpus. In the hearing that followed, Shaw refused to interpose the state into the federal matter. If the prisoner was held by U.S. process, Shaw reasoned, then he could not interfere. He brushed aside arguments about the law's unconstitutionality by referring to the long operation of the 1793 law.⁹¹

Other judges echoed this sentiment. Judge Peleg Sprague of the federal district court of Massachusetts admitted the “necessity” of courts deciding upon the constitutionality of congressional law. But in doing so, he cautioned that “we must remember that we are sitting in judgment upon the action of another great co-ordinate department of the government, every member of which was under oath to support the constitution. We must begin the inquiry, then, with the presumption that their legislation is rightful.”⁹² Sprague refused to admit that the Fugitive Slave Act of 1850 was any different from the 1793 act, and limited his analysis to relying on undisturbed precedent, contemporaneous exposition, and long acquiescence. “To overturn the construction of the constitution so established would be a most dangerous violation of principle and duty,” he concluded. “If a court may do this, it may overturn established rules of property, of

⁹¹ Leonard W. Levy, “Sims’ Case: The Fugitive Slave Law in Boston in 1851,” *Journal of Negro History* 35 (January 1950).

⁹² *United States v. Scott*, 27 F. Cas. 990 (D.C.D. Mass.) (No. 16240b).

personal rights, and of evidence, upon which the community have for a long time acted.”⁹³ Justice John McLean, on circuit in Ohio, dealt with the Fugitive Slave Act’s denial of a trial by jury. “This question,” he noted, “has been largely discussed in congress, in the public press, and in conventions of the people. It is not here raised as a question of expediency or policy, but of power.” And the power, he concluded, had been exercised by Congress and acquiesced to for sixty years. This was “no unsatisfactory evidence that the construction is correct.”⁹⁴ But after a long-winded discourse demonstrating that the framers of the Constitution had intended to put this power into the national government, McLean then disavowed the power of the judiciary to inquire into Congress’s interpretation of how to exercise that power. To ask the judiciary to reach further than this—to explore the substance of legislation “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.”⁹⁵ Judge Humphrey H. Leavitt refused to entertain questions of the law’s constitutionality at all. “The act referred to, whatever views may be entertained of its necessity and expediency, is a valid and constitutional law,” he wrote.⁹⁶ What he meant was that the law had been passed by Congress and signed by the president. “No judge or other officer of the state or national government” he continued, “has a right to act on his private and individual views of the policy and validity of laws passed in conformity with the forms of the constitution.”⁹⁷

⁹³ *United States v. Scott*, 27 F. Cas. 990 (D.C.D. Mass.) (No. 16240b) at 997.

⁹⁴ *Miller v. McQuerry*, 17 F. Cas. 335 (C.C. of Ohio, 1853) at 340.

⁹⁵ *Miller v. McQuerry*, 17 F. Cas. 335 (C.C. of Ohio, 1853) at 339.

⁹⁶ *Ex Parte Robinson (Robinson II)*, 20 F. Cas. 965 (C.C.S.D. Ohio) at 969.

⁹⁷ *Ex Parte Robinson (Robinson II)*, 20 F. Cas. 965 (C.C.S.D. Ohio) at 969.

The only redress, he intimated, was to seek repeal or to appeal to the proper judicial tribunal.

This evidence of judicial restraint was not evidence of widespread belief in judicial supremacy but more an acknowledgment that the courts lacked the authority to tamper with the constitutional settlement decided in Congress. Judge Sprague may have suggested that courts “necessarily” decided upon the question of constitutionality, but he limited his decision to examining one question—whether the Constitution gave the power to Congress. The exact exercise of that power, he intimated, was up to Congress. This followed the interpretive rule of Marshall’s in *McCulloch v. Maryland*—the notion that it was the Supreme Court’s duty to police the *boundaries* of federalism but not to pass on the content of laws. McLean was even more forceful in his refusals, letting it be known that for the judiciary to interpose itself when Congress exercised its own powers of constitutional interpretation was in essence to usurp the lawmaking role. This was evidence of the limited nature of judicial review in a constitutionalism that supported “co-ordinate departmentalism.”

If the courts were steadfastly to refuse arguments on the Fugitive Slave Act’s constitutionality, then the real debate took place outside the courtroom and in the law’s enforcement. The first avenue was to seek repeal, and this the people did by petition. Within four months of the law’s passage, Congress had received eleven petitions for its repeal. Antislavery societies formed vigilance committees. Fugitives arrested in New York, Pennsylvania and Massachusetts in 1850-51 were rescued from legitimate proceedings by huge crowds, sometimes numbering in the thousands. Unionist northerners recoiled in the face of such violence to legal process. Secretary of State

Daniel Webster accused rescuers of treason and zealously pursued their prosecution. President Fillmore requested of Congress clarifying legislation allowing him to deploy the Army and the Navy to aid in the return of fugitives. Henry Clay wanted congressional investigation of the Shadrach rescue in Boston (the first of them).

Why charge rescuers with treason rather than rescue, or with the more prosaic charge of removing a prisoner from a marshal's custody? Justice Benjamin Robbins Curtis defended this charge on circuit, when he presented his charge to the grand jury on the Shadrach rescue cases. For Curtis, it was a simple formula: "if 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." Curtis then rejected the notion that treason was a question of degree: "The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws."⁹⁸ Justice Nelson charged juries in both the northern and southern federal district of New York regarding treason trials. He made it clear that the rescuers of fugitives had not merely broken federal law, they had violated the Constitution. In doing so, they threatened the Union not merely because the 1850s were dangerous times, but because if one part of the compact could be thrown off with impunity, so could another. "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

⁹⁸ Charge to the Grand Jury on the Neutrality Laws and Treason, 30 F. Cas. 1024 (C.C.D. Mass., 1851) at 1026.

herself? Her rebuke would be laughed to scorn.”⁹⁹ No one would have spoken such of taking timber from federal lands, or for robbing the mail. The Fugitive Slave Act was a constitutional compromise and nothing less. Protesting it meant treason.

It turned out to be bad policy. Despite lengthy lectures on the subject of treason and the nature of the Compromise of 1850, juries uniformly refused to convict rescuers of treason. The government afterwards would only charge rescuers with rescue. And for a while, after tempers had cooled, the Fugitive Slave Act began to work well enough in court to develop some substantive case law. Courts made clear that violence in the arrest of fugitives could be punishable if it transgressed certain boundaries even if the act of recapture was valid.¹⁰⁰ In 1855, 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.”¹⁰¹ In addition, there were some protections afforded alleged fugitives whose freedom was readily provable. Justice John McLean emphatically stated that the fugitive slave’s hearing was not an *ex parte* proceeding and that he was bound to hear the evidence establishing an alleged fugitive’s freedom. McLean further deduced that the

⁹⁹ Charge to the Grand Jury by Justice Nelson, 30 F. Cas. 1007 (C.C.S.D. N.Y., 1851) at 1012.

¹⁰⁰ *Weimer v. Sloane*, 29 F. Cas. 599 (D.C.D. Ohio 1854) (No. 17,363).

¹⁰¹ *Freeman v. Robinson*, 7 Ind. 255 (1855) at 256. This followed the basic legal principle that illegal acts done under color of authority were not covered by that authority, but those who exercised them did so at their peril, and could be sued privately (or prosecuted) for such behavior.

lack of an official record showing the status of a fugitive was not necessary to prove the claimant's right and also not conclusive of the alleged fugitive's status. "If it were produced, the identify 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."¹⁰² This was rather an extraordinary revelation. The Fugitive Slave Act itself called for an ex parte hearing in which the fugitive was forbidden from speaking and denied counsel. McLean's policy was not echoed by other judges and commissioners who, unless under intense local scrutiny, did not consider evidence on behalf of alleged fugitives.

Inchoate protest would crystallize in 1854. Predictably, it was the unsettling of another constitutional compromise over slavery that provided the impetus for organization. When in January of 1854 Senator Stephen Douglas reported out of committee a bill to organize the Kansas-Nebraska territory on the principle of popular sovereignty, thus overturning the Missouri Compromise, free soilers banded together under the new banner of the Republican Party. In key states, Republicans joined the fugitive slave issue with the territories issue and pledged stout constitutional resistance. This, when joined with abolitionist action on the ground and in the courts, made the law almost unenforceable. In the courts, resistance was a matter of conflict of laws and the manipulation of procedure. The usual pattern was to interpose the state in the rendition process by securing writs of habeas corpus for alleged fugitives and charging marshals and slavecatchers with assault and battery and kidnapping. In this respect, little had changed in strategy since abolitionists began their militant resistance to the Fugitive

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

Slave Act in the 1830s. What was different was the more trenchant assertion of state sovereignty in the face of federal power. Federal courts almost always reinserted themselves to complete the pattern, freeing marshals, slaveholders, and their agents on writs of habeas corpus and continuing to return fugitives to slavery.

The success of federal courts in protecting federal officers and slaveholders proved pyrrhic. Constitutional resistance did not end with the suing out of writs of habeas corpus, but rather with the interposition of all branches of government. This began with personal liberty laws passed in defiance of the Fugitive Slave Act and Story's holding in *Prigg*. By 1860, sixteen of eighteen northern states had personal liberty laws on the books. In many states, vigilance committees dedicated to aiding fugitives operated openly and in direct defiance of the law, helping hundreds of fugitives on their path to freedom. Given that the Fugitive Slave Act returned fewer than 300 slaves to southern masters, it was fairly clear that this resistance was working.

The first appellate court to take seriously the question of the Fugitive Slave Act's constitutionality was the Wisconsin Supreme Court 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 in vacation and freed the abolitionist Sherman Booth, the full bench upheld his ruling on appeal and, surprisingly, declared the Fugitive Slave Act a nullity. The federal grand jury returned an indictment anyway, and Booth's trial went forward. While a jury refused to convict him of rescue and instead found Booth 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 free again. This time it did so unanimously because all three justices could rest on a defective indictment. The Wisconsin court took one more step. It refused to acknowledge the writ of error from the Supreme Court of the United States.

The story of resistance in Wisconsin is often told solely as a judicial narrative. But electoral politics had also intervened. In November of 1854, after the supreme court had issued its opinion declaring the Fugitive Slave Act unconstitutional, the newly formed Republican party swept state elections, including those for congressmen. The only Democrat to win was an anti-Nebraska man, giving an indication of the tenor of Wisconsin's voters on the slavery questions. Directly after the Wisconsin court released Booth on the defective indictment, a judicial election occurred for Crawford, the lone dissenter in the 1854 case. He was thrown out in favor of 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 U.S. Supreme Court. In short, the trenchant resistance of the Wisconsin Supreme Court depended on popular support. The enunciation of these constitutional principles would continue to take place by legislative resolution, judicial elections, and executive fiat. This was the height of popular constitutional resistance, and Wisconsin would sustain it through the election of Lincoln.¹⁰³

For its part, the U.S. Supreme Court reacted anything but swiftly. Frustrated in its attempt to get the genuine record of the case, the Court heard the case on a copy and unanimously reversed the Wisconsin court in 1859. Taney authored the opinion and

¹⁰³ H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens, Ohio: Ohio University Press, 2006).

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."¹⁰⁴ Conventions met and denounced the decision. The Wisconsin legislature issued on March 19, 1859 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."¹⁰⁵ The Wisconsin Supreme Court never took judicial notice of the Supreme Court's ruling.

A similar set of circumstances arose to Glover's rescue in Wisconsin with the Oberlin-Wellington rescue in Ohio in 1858. At first blush, very little appeared different between the events in Wisconsin and Ohio. The fugitive John Price was apprehended by a party of slave catchers. Abolitionists sounded the alarm and brought hundreds of men from 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 similar restraint as in Wisconsin, although it had not acted to protect state legal procedure or in defense of habeas corpus. Nonetheless, the rescue had prevented the Fugitive Slave Act from operating in Ohio and would not be enforced. The

¹⁰⁴ *Ableman v. Booth*, 62 U.S. 506 (1859) at 526.

¹⁰⁵ Joint Resolution relative to the decision of the United States supreme court, reversing decision of the supreme court of Wisconsin, 1859 Wis. Laws 247.

Buchanan administration reacted much more harshly than in Wisconsin, ordering a massive grand jury investigation and charging dozens of people with rescue. Convictions were returned on several, notably on Simeon Bushnell and Charles Langston, who sued out writs of habeas corpus. The cases were joined in *ex parte* Bushnell one week after the federal district court handed down sentences in the cases.

The result would be both similar and different from Wisconsin's. Most commentators have focused on the difference—the fact that the Ohio Supreme Court ruled 3-2 against granting habeas corpus. The surprise was that Chief Justice Joseph Swan, an antislavery man and a 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; 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 supreme 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.” This, however, was not such a case.¹⁰⁶

Notably, Justices Brinkerhoff and Sutliff dissented from this reasoning by referencing the old constitutional settlement that *Prigg* had decimated. Brinkerhoff openly called Swan’s reading 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 authority from the states of its 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,” raged 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.¹⁰⁷

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

¹⁰⁶ Ex Parte Bushnell II, 9 Ohio St. 77 (1859).

¹⁰⁷ Ex Parte Bushnell II, 9 Ohio St. 77 (1859).

Wisconsin, Sherman Booth's lawyer ran for associate justice of the Supreme Court and won in a landslide. The people of Wisconsin and Ohio were now exercising a method of constitutional interpretation at the polls that solidified their states' resistance to the Fugitive Slave Act as unconstitutional. That both the executive and the legislatures of these states moved in concert was significant—constitutional resistance that threatened a collision of state and national authorities had to carry the full weight of government in order to succeed.

* * *

The Supreme Court's decision in *Ableman v. Booth* was not the high point of constitutional nationalism, but rather its nadir. However confident Taney could sound announcing that the states had no authority to defy the federal government, Wisconsin remained defiant until the end. Had the election not gone Republican in 1860, the likelihood of Ohio radicalizing on the principle of state sovereignty was high as well.

The history of the Fugitive Slave Act as a series of constitutional settlements determined primarily by the legislative branches and acquiesced to by the judiciary gives us a glimpse of how relations between those branches changed over time. In terms of power, the legislature remained supreme. Deference was the order of the day. Yet by the 1850s, courts were much more confident in their pronouncements on constitutional matters. Despite continued displays of deference, the courts did assert themselves as having a tacit power of review, even if they refused to exercise it.

Even the court that did exercise the awesome power of nullification relied on popular support rather than its own inherent power. Buttressed by legislative and executive support as well as judicial elections, the Wisconsin Supreme Court never could have committed itself to resistance without the sustained support of the Republican Party and the people of Wisconsin. The same was true of Ohio, although the result was still in the future. The state's governor, legislature, and the people at the polls were setting up Ohio to resist the Fugitive Slave Act with any constitutional means at their disposal. This was part of antebellum federal practice. Resistance to laws believed unconstitutional often went through the states.

Constitutional nationalism thus depended on true consensus, and such consensus depended still on the ability to balance constitutional rights and duties in a federalist system. In the 1850s there was no "final arbiter" of the Constitution, except for the people at the polls—and even then constitutional conflicts were notoriously difficult to settle. The inability of the federal government to mediate the constitutional problems wrought by slavery was both an indication of how deeply the issue divided America and a testament to the limitations of the Constitution as a nationalizing instrument. With no accepted final arbiter and with the old compromise torn to shreds by an overreaching Supreme Court and Congress, the fugitive slave question revitalized resistance through state sovereignty and played a significant role in driving the country toward Civil War.