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THE FEDERAL RIGHT TO RECOVER FUGITIVE SLAVES: AN ABSOLUTE BUT SELF-DEFEATING PROPERTY RIGHT

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Modern property scholarship recognizes that "the key to understanding property law" is recognizing that "[p]roperty rights are limited by and exist in conjunction with the rights of others."[1] In the antebellum era, slave owners' property rights in fugitive slaves who had escaped into the North existed in tension with the rights of free blacks who might be wrongfully claimed. At first, the Fugitive Slave Act of 1793 (Act of 1793), as supplemented by the law in most Northern states, limited a slave owner's property rights by providing limited legal protections to free blacks against being erroneously claimed as slaves.[2] As attitudes towards slavery changed, however, state laws in the North became increasingly protective of free blacks, and Southerners became less willing to accept any limitations on the right to recover fugitive slaves. The Supreme Court responded in *Prigg v. Pennsylvania* by striking down state law limitations on slave owners' ability to recapture fugitive slaves.[3] Congress followed suit in the Fugitive Slave Act of 1850 (Act of 1850) by federalizing a strong property right in fugitive slaves that was only marginally limited by the alleged slave's right to freedom.[4] This Article argues that the federal government's one-sided approach to the fugitive slave issue, however, generated an antislavery backlash that undermined Northern support for the rendition of fugitive slaves, making

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[1] ALFRED L. BROPHY, ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW AND RACE 4 (2011).

[2] Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (amended 1850).

[3] *See* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

[4] Fugitive Slave Act of 1850, 31 ch. 60, 9 Stat. 462 (1850) (repealed 1864).

rendition costly and dangerous. The fugitive slave issue, therefore, suggests that property rights that ignore the rights of others are not only unjust, but, in the right circumstances, can also be self-defeating.

This Article proceeds in four sections. Part I discusses the nation's early history on fugitive slave rendition, including the Fugitive Slave Clause, the Act of 1793, and state legislation. Part II analyzes the Supreme Court's decision in *Prigg v. Pennsylvania* and how this decision changed the preexisting legal landscape. Part III details the passage of the Act of 1850 and discusses its contents. Part IV discusses Northern reaction to the Fugitive Slave Act. This Article ultimately concludes that, although federal policy was meant to provide slave owners with virtually absolute property rights in their fugitive slaves, this approach was counterproductive due to the lack of consideration given to the rights of free blacks in the North.

I. Early Fugitive Slave Rendition

Although slavery was a major issue at the Constitutional Convention,[5] the surviving records contain little discussion on the Fugitive Slave Clause. Introduced by Charles Cotesworth Pinckney of South Carolina, the Clause was adopted with little debate, as part of no constitutional deal, and with no serious opposition.[6] The framers probably did not debate the Clause at length because they either did not anticipate the Clause's importance or they found it uncontroversial due to their common law heritage of rendition.[7]

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[5] James Madison famously observed: "The States were divided into different interests not by their difference of size, but . . . principally from [the effects of] their having or not having slaves." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., Yale Univ. Press 1911) (alteration in original).

[6] *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON, 31-32, 81-83 (1996). The only substantive objection given to the Fugitive Slave Clause at the convention was made by James Wilson of Pennsylvania, who protested that it would "oblige the Executive of the State to [return fugitive slaves], at the public['s] expen[s]e." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand ed., Yale Univ. Press 1911). Moreover, the Fugitive Slave Clause was only mentioned in passing by Southern supporters of the Constitution. *See also* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83-85 (Max Farrand ed., Yale Univ. Press 1911) (North Carolina Delegates to Governor Caswell); *id.* at 252-55 (General Charles Cotesworth Pinckney's speech in the South Carolina House of Representatives); *id.* at 324-29 (Debate in the Virginia Convention).

[7] At the time of the Convention, none of the states had legislation freeing runaways, and fugitive slaves perhaps only found safety in Massachusetts. FINKELMAN, *supra* note 6, at 82-83. Southerners may have nevertheless found it necessary due to the English decision of *Somerset*, which held the slave law of the colonies had no application in England. *See* Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772). Under *Somerset*, because colonial law had no effect in England, a master had no legal authority to hold his slaves. H. ROBERT BAKER, PRIGG V. PENNSYLVANIA AND THE AMBIVALENT CONSTITUTION 44 (2012); *cf.* EARL M. MALTZ, FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE 5-6 (2010) (arguing that, although the lack of discussion on the Fugitive Slave Clause at the Constitutional Convention might seem odd to modern observers, the Clause's underlying concept was not novel at the time).

The text of the Fugitive Slave Clause is no more revealing than its history. In full, the Clause states:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[8]

While the text clearly prohibited the states from liberating fugitive slaves, its meaning is otherwise highly ambiguous. By using the passive voice—"shall be delivered up on Claim of the Party"—the text does not clearly indicate which level of government, if any, must "deliver up" the fugitive.[9] The Clause therefore does not explicitly give legislative power to Congress. The word "Claim" also does not clearly convey which procedures, if any, the person claiming the fugitive must follow.

Congress implicitly claimed legislative power under the Clause by passing the Fugitive Slave Act of 1793.[10] The Act of 1793 authorized a Southern claimant "to seize or arrest" a fugitive slave and bring him before a state or federal judge or magistrate.[11] After proving "to the satisfaction of such Judge or magistrate" that the person claimed was a fugitive slave, the claimant would receive a certificate authorizing the removal of the fugitive from the state.[12] The Act of 1793, however, did not explicitly require the owner to use such legal procedures or provide penalties for false claims.[13]

Many state governments also passed legislation designed to supplement the provisions of the Act of 1793. Prior to the Supreme Court's 1842 decision in *Prigg v. Pennsylvania*,[14] such state legislation not only typically provided some protections for free blacks against kidnapping, but also offered state assistance for slave catchers who complied with state procedures. These early laws represented an attempt to balance the property rights of slave owners against the liberty of free blacks.[15]

Pennsylvania's legislation provides a good example. In 1820, Pennsylvania passed a statute that prohibited aldermen and justices of the peace from hearing fugitive slave cases.[16] Under pressure from neighboring Maryland, however, Pennsylvania enacted a compromise statute in 1826.[17] This statute required a Southern claimant to apply to any judge, justice of the peace, or alderman for a

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[8] U.S. CONST. art. IV, § 2, cl. 3.

[9] *Id.*

[10] Fugitive Slave Act of 1793, 9 Stat. 462 (amended 1850).

[11] *Id.* at § 3.

[12] *Id.*

[13] *Id.*

[14] 41 U.S. 539 (1841).

[15] *See* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1134-35 (2012).

[16] THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH: 1780-1861, at 45 (1974).

[17] *Id.* at 46, 51.

warrant for the arrest of a fugitive.[18] After the arrest, the judge would issue a certificate of removal if he was satisfied that the person claimed owed service.[19] The 1826 law therefore provided state assistance in the reclamation of fugitive slaves. However, it also provided protection to free blacks by requiring claimants to obtain a certificate of removal from a state or federal officer before removing an alleged fugitive and by requiring the claimant to produce more evidence than merely his own affidavit.[20] The law's sponsor advocated it as a compromise measure, and a commissioner from Maryland who had been sent to advocate for changes to the 1820 law praised the new legislation "because it is a pledge, that the states will adhere to their original obligations of the confederacy."[21]

Other Northern states followed suit. In 1828, New York passed a law that established procedures for Southern claimants and state officers.[22] While the New York law provided more protections for free blacks, including the possibility of a jury trial, it represented a voluntary state effort to participate in fugitive slave rendition under terms acceptable to the state.[23] Ohio passed a similar law in response to pressure from Kentucky in 1839, though Ohio did not require a trial by jury.[24] Even in states without formal legislation, states often supplemented the Act of 1793 with state common law procedures such as habeas corpus.[25]

These state procedures operated in concert with the Act of 1793. Whereas federal law governed the rendition of fugitive slaves, state law punished unlawful kidnapping of black residents.[26] As historian H. Robert Baker argues, the distinction between fugitive rendition and protection from kidnapping "was artificial, but it worked."[27] The distinction was artificial because both regimes involved an initial determination of whether the claimed individual was in fact a fugitive slave.[28] The system worked, however, because both regimes were enforced by state judges and magistrates. In a typical case, the state judge could use state procedures to determine if the claimed individual was a fugitive slave, and, if appropriate, use federal procedures to remand the fugitive to the South.[29]

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[18] *Id.* at 51-52.

[19] *Id.* at 52.

[20] MORRIS, *supra* note 16, at 51-52.

[21] *Id.* at 52-53 (quoting Letter from Robert H. Goldsborough to W.M. Meredith (Mar. 29, 1826), Meredith Papers, Historical Society of Pennsylvania).

[22] *Id.* at 53.

[23] *Id.* at 53, 55-57. Indiana passed similar laws in 1816 and 1824. *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 216 (2002).

[24] Ohio had passed a separate anti-kidnapping law in 1819 that required slave catchers to comply with the procedures established in the Fugitive Slave Act of 1793. *See* FEHRENBACHER, *supra* note 23, at 215.

[25] Baker, *supra* note 15, at 1145-46.

[26] BAKER, *supra* note 7, at 54, 63.

[27] *See id.* at 63.

[28] *Id.*

[29] *Id.*

Although this overlapping system of state and federal law successfully prevented any major sectional confrontation on the issue of fugitive slaves, other forces increasingly radicalized national opinion on slavery during the 1830s. Among other things, this decade saw the rise of the abolitionist movement, the gag rule controversy in Congress, Nat Turner's bloody slave revolt, and South Carolina's nullification controversy. As a result, sectional opinion on the fugitive slave issue became more polarized, as Northerners were increasingly insistent on state measures designed to protect free blacks and Southerners were less willing to tolerate any interference with fugitive rendition.[30]

Nevertheless, the system of overlapping federal and state law prevailed into the 1840s. State and federal courts generally upheld the use of both state and federal procedures.[31] While attempts were made in states such as Pennsylvania and New York to repeal or drastically amend state fugitive slave legislation, moderate Northerners blocked such proposals out of a desire to accommodate the South.[32] Moreover, the Ohio act, passed in 1839, demonstrated that the cooperative system of state and federal legislation, though strained, remained viable even in the context of rising sectional tension.[33]

II. *Prigg v. Pennsylvania*

Rising sectional opinion on slavery, however, helped to turn a Pennsylvania kidnapping prosecution into a test case for the constitutionality of the country's fugitive slave regime. In 1837, Edward Prigg, a Maryland slave catcher, entered Pennsylvania and applied for a warrant for the arrest of Margaret Morgan and her children as fugitive slaves.[34] Acting under Pennsylvania's 1826 law, a state

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[30] *See* MORRIS, *supra* note 16, at 59-93.

[31] *See* Baker, *supra* note 15, at 1148-56. Several cases explicitly declared the Fugitive Slave Act of 1793 constitutional, though they provided little or no analysis. *See, e.g.*, Johnson v. Tompkins, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833); Commonwealth v. Griffith, 19 Mass. 11 (1823); Wright v. Deacon, 5 Serg. & Rawl 62 (Pa. 1819); *In re* Susan, 23 F. Cas. 444 (C.C.D. Ind. 1818). A number of cases also upheld state court use of the writ of habeas corpus to determine the status of individuals claimed as fugitive slaves. *See, e.g.,* Commonwealth v. Griffith, 19 Mass. 11, 21 (1823) (asserting that "a *habeas corpus* would lie to obtain the release of the person seized" under the Fugitive Slave Act of 1793); Commonwealth v. Holloway, 2 Serg. & Rawl 305 (Pa. 1816) (examining the status of a person claimed under the Fugitive Slave Act of 1793 under a writ of *habeas corpus*). Those few state judges who found elements of the preexisting system unconstitutional reached profoundly different conclusions. *Compare* Jack v. Martin, 12 Wend. 311, 321 (N.Y. 1834) (holding that Congress's power to legislate was exclusive and that the Fugitive Slave Clause "prohibits the states from legislating upon the question involving the owner's right to this species of labor") *with* Jack v. Martin, 14 Wend. 506, 524 (1835) (Chancellor Walworth, concurring) (stating that that the Fugitive Slave Clause granted no power to Congress and that the states could require legal proceedings such as habeas corpus hearings to determine if a person claimed was in fact a fugitive slave).

[32] MORRIS, *supra* note 16, at 92-93.

[33] *See* BAKER, *supra* note 7, at 63; STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 29-30 (2010).

[34] BAKER, *supra* note 7, at 108. Although Morgan was never formally manumitted, she had lived her life in relative freedom and had never been claimed as a slave. *Id.* at 102-03. In fact, she had openly lived with her free husband in Pennsylvania for about five

justice of the peace issued a warrant, and a state constable arrested Morgan and her children.[35] The 1826 law required Prigg to then bring Morgan before a court of record, which could issue a certificate of removal.[36] Rather than complying with this procedure, however, Prigg spirited Morgan and her children back to Maryland without further legal process.[37] Once in Maryland, Morgan brought a suit for her freedom, but a Maryland jury found that she was a slave under Maryland law.[38]

Soon thereafter, Pennsylvania indicted Edward Prigg for removing Morgan, without first obtaining a certificate of removal, as required under the State's personal liberty law.[39] When the Governor of Pennsylvania demanded the extradition of Prigg, Maryland negotiated for his surrender as part of a challenge to the constitutionality of Pennsylvania's 1826 law.[40] In this agreement, the parties stipulated to a set of facts that were entered into the record as a special verdict.[41] Among other things, the parties agreed to the following: Margaret Morgan was a fugitive slave; Edward Prigg was the legal agent of Morgan's owner; and Prigg had removed Morgan and her children without a certificate of removal.[42] Based on these facts, the Pennsylvania courts convicted Prigg, and a writ of error was taken to the United States Supreme Court.[43]

The Supreme Court's decision in *Prigg v. Pennsylvania* fundamentally altered the preexisting framework for the rendition of fugitive slaves. In an opinion authored by Justice Joseph Story, the Court began its analysis by holding that the Fugitive Slave Clause created a private right of recaption, which gave a slave owner "entire authority, in every State of the Union, to seize and recapture his slave, whenever he can do it."[44] According to Story, however, this private right of recaption would be meaningless without supporting legislation to overcome public and local governmental resistance.[45] The Clause's grant of legislative power therefore derived from Story's practical judgment that private recaption would be impractical without it.

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years. When Morgan's parents' master died, however, the master's heir sought to claim Morgan as a fugitive slave. *Id.* at 103-04.

[35] *Id.* at 108.

[36] *Id*.

[37] Baker speculates that Edward Prigg may have worried that Margaret Morgan's husband would raise abolitionist resistance or mount a legal defense. *Id.* at 109.

[38] *Id.* at 109-10.

[39] Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism,* 1994 SUP. CT. REV. 247, 252 (1994).

[40] Baker, *supra* note 15, at 1156.

[41] *Prigg*, 41 U.S. at 557-58.

[42] *Id.* 556-57.

[43] *Id.* at 558.

[44] *Id.* at 613.

[45] Justice Story explained: "Many cases must arise, in which, if the remedy of the owner were confined to the mere right of seizure and recaption, he would be utterly without any adequate redress. He may not be able to lay his hands upon the slave. He may not be able to enforce his rights against persons, who either secrete or conceal, or withhold the slave. He may be restricted by local legislation . . . ." *Id.* at 613-14.

Story further found that the legislation required by the Clause must be federal.[46] Although he acknowledged that the Clause explicitly conferred no legislative power on Congress, he made a functionalist argument for implying such a power.[47] Story started from the following premise: "[W]here the end is required, the means are given; and where the duty is enjoined, the ability to perform it, is contemplated to exist . . . ."[48] Here, the "end" was the rendition of a fugitive after a master's claim to ownership, and the "duty" was to ensure that such rendition took place. Story held that the Fugitive Slave Clause granted legislative power to Congress because such power was necessary to ensure the return of fugitive slaves.[49]

Although Justice Story failed to acknowledge as much, his argument for implied federal power assumed that state legislation would be inadequate. Simply put, if state legislation could effectively achieve the "end" of the Clause, there would be no necessity to justify implied federal power. Moreover, Story feared that private recaption "may be restricted by local legislation," indicating that he had little confidence in the states' desire to aid in rendition.[50]

Story not only held that Congress had power to legislate, but he also held that the states were prohibited from doing so.[51] According to Story, "the power of legislation upon this subject is exclusive in the national government."[52] This holding is similarly based on an assumption that the states would not faithfully enforce the Fugitive Slave Clause.[53] Justice Story explained that the issue of whether Congress's power should be seen as exclusive required consideration of "the nature of the power, and the true objects to be attained by it."[54] According to Justice Story, exclusivity was necessary because state legislative power would "amount to a power to destroy the rights of the owner."[55] State legislation, he feared, would undermine the rendition process.[56]

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[46] *Prigg*, 41 U.S. at 541-42.

[47] *Id.*

[48] *Id.* at 541.

[49] *Id.* at 604.

[50] *Id.* at 614.

[51] *Prigg*, 41 U.S. at 542.

[52] *Id.* at 622.

[53] Although Justice Story asserted that the Fugitive Slave Clause's presence in the Federal Constitution implied that the federal government had an exclusive duty to enforce it, this assertion cannot justify his holding. Story's argument appears to be circular, as the Fugitive Slave Clause just as easily could be seen as imposing a duty on the states. As Chief Justice Taney argued in his concurring opinion, the Constitution grants many federal rights, which may be protected by both levels of government. *Prigg*, 41 U.S. at 628-29. For example, Taney explained that the Contract Clause's presence in the Constitution does not imply that the states are prohibited from passing legislation to enforce contracts. Taney asserted: "I cannot understand the rule of construction by which a positive and express stipulation for the security of certain individual rights of property in the several states, is held to imply a prohibition to the states to pass any laws to guard and protect them." *Id.* at 629.

[54] *Id.*

[55] *Id.* at 624.

[56] Justices Wayne and McLean made similar arguments. *See Prigg*, 41 U.S. at 612.

Story further held that the states could not interfere with fugitive rendition through the guise of anti-kidnapping legislation passed under the state's police powers.[57] He stated that "any state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave" would violate the owner's constitutional right to private recaption.[58] This was so, Story asserted, because the right of recaption was an "unqualified right . . . , which no state law or regulation can in any way qualify, regulate, control or restrain."[59] Story therefore implicitly invalidated all state personal liberty laws designed to give some legal process to individuals claimed as fugitive slaves.

In a precursor to the modern anti-commandeering doctrine, the Court also indicated in dictum that Congress could not require state officers to enforce the Fugitive Slave Act of 1793. Justice Story stated that the Act of 1793 was "clearly constitutional, in all its leading provisions, . . . with the exception of that part which confers authority upon state magistrates."[60] He further stated that "a difference of opinion" existed as to "whether state magistrates are bound to act under it."[61] Story thus not only found that Congress had exclusive power to legislate, but he further indicated that federal officers must have primary responsibility for enforcement.

Given these doctrines, the Court had no trouble finding that Pennsylvania's law was unconstitutional, resulting in a reversal of the judgment against Edward Prigg. Because the jury had found that Margaret Morgan was a fugitive slave, Pennsylvania could not punish Prigg for reclaiming her.[62]

III. Nullification of the Fugitive Slave Act of 1793

Prigg helped bring about nullification of the Fugitive Slave Act of 1793 by undermining Northern cooperation in fugitive slave rendition. Because few federal officers were available in the states, Southern claimants were usually on their own if they were unable to obtain state assistance.[63] Although slave catchers sometimes utilized the private right of recaption, local sympathies often made recovery impractical.[64] Without state cooperation, the Act of 1793 was virtually a dead letter.

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[57] *Id.* at 588.

[58] *Id.*

[59] *Id.* at 540.

[60] *Prigg*, 41 U.S. at 622.

[61] Story asserted, however, that the justices agreed that "state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation." *Id.*

[62] Aside from a brief mention in his statement of the facts, Story makes no mention of Morgan's daughter, who was born in Pennsylvania. *Id.* at 608-09.

[63] PAUL FINKELMAN, *The Appeasement of 1850, in* CONGRESS AND THE CRISIS OF THE 1850S 69 (Paul Finkelman & Donald R. Kennon eds., 2012).

[64] *See* Paul Finkelman, Prigg v. Pennsylvania *and Northern Courts: Anti-Slavery Use of a Proslavery Decision*, 25 CIVIL WAR HISTORY 5 (1979). In one famous case, for example, George Latimer was seized as a fugitive slave in Boston. When his owner was denied the use of the local jail, however, public opposition forced him to sell Latimer to local abolitionists. *See id.* at 23.

Prigg contributed to Northern noncooperation in at least three ways. First, the decision declared Pennsylvania's 1826 law unconstitutional and implicitly invalidated similar compromise legislation throughout the North. After *Prigg*, claimants could no longer take advantage of legislation in states such as Pennsylvania and New York that offered state assistance in the recovery of fugitive slaves.[65]

Second, Northern state courts used *Prigg's* anti-commandeering principle to avoid hearing cases under the Act of 1793.[66] Although Justice Story had merely suggested that Congress could not require state officers to enforce the Act, antislavery lawyers and state judges often distorted this doctrine to claim that state officers lacked the power to hear fugitive cases.[67] As Paul Finkelman has demonstrated: "State judges were able to declare that they had no authority to hear cases involving fugitives, and to suggest claimants ought to seek a remedy in a federal court. Such a court might be hundreds of miles away and perhaps not even in session."[68] For all practical purposes, the Act of 1793 was often therefore rendered a nullity.

Without the precedent of *Prigg*, it is unlikely that most of these state judges would have refused to hear these cases or otherwise would have reached an antislavery result. In *Justice Accused*, Robert Cover explains that antislavery judges felt constrained to follow the dictates of the positive law, even when such law conflicted with their views of morality.[69] These judges justified their role in government by claiming that formal legal principles limited judicial discretion. These judges therefore rejected any theory that allowed judges to impose their personal beliefs on the nation.[70] In fact, prior to *Prigg*, antislavery judges generally did not declare that the Act of 1793 was invalid because it was immoral; instead, they found that it conflicted with the Constitution.[71] After *Prigg* held that the Act of 1793 was constitutional, antislavery judges could not realistically disagree while remaining faithful to their judicial role. If *Prigg* had ended there, antislavery judges may have had no option but to enforce the law. *Prigg's* anti-commandeering principle, however, gave antislavery judges a way out—they could reach an antislavery result while still complying with the positive law by refusing to take jurisdiction in fugitive cases.[72]

Prigg resulted in nullification of the Act of 1793 for a third reason as well: it contributed to the passage of the North's personal liberty laws.[73] These laws

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[65] Although the Court later ruled that states could pass legislation aiding fugitive claimants in Moore v. Illinois, 14 How. 13 (1852), compromise legislation meant to provide procedural protections for free blacks remained unconstitutional under *Prigg*. Consequently, most Northern states did not pass such legislation.

[66] FINKELMAN, *supra* note 63, at 22.

[67] *Id.*

[68] *Id.*

[69] *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

[70] *Id.*

[71] *See supra* note 31 and accompanying text.

[72] *See* Finkelman, *supra* note 64, at 23-25.

[73] *Id.* at 21.

codified noncooperation by barring state judges and law enforcement officers from assisting in rendition and by prohibiting the use of state jails to hold fugitives. In the six years following *Prigg*, six Northern states passed such laws.[74]

The personal liberty laws reflected growing opposition to slavery in the North. As explained above, sectional hostility was on the rise in the early 1840s for a number of reasons, including sectional controversies over the gag rule in Congress and the annexation of Texas.[75] *Prigg's* direct contribution to the antislavery movement paled in comparison to larger national events.[76]

Nevertheless, *Prigg* played a major role in channeling this rising antislavery feeling into support for the personal liberty laws. Just as antislavery judges felt that their judicial role forced them to follow the positive law, most mainstream politicians argued that any antislavery impulse must be tempered by strict adherence to the Constitution.[77] When Charles Francis Adams wrote a committee report on Massachusetts' proposed personal liberty law, he acknowledged that the constitutional duty to return fugitive slaves could not be violated because "forms of law, legal precedents, and constitutional arrangements" mattered.[78] Like with Northern judges, however, *Prigg* gave state legislatures a way to nullify the Act of 1793 while still remaining faithful to the Constitution. Under *Prigg's* anti-commandeering and federal exclusivity principles, it was constitutional for a state to refuse to take part in fugitive slave rendition. *Prigg* therefore legitimized the personal liberty laws in the eyes of many Northerners who would never have approved of nullification. Although *Prigg* did not directly create significant sectional hostility to slavery, the decision played an important role in the creation of the personal liberty laws by directing the antislavery impulse of the North into noncooperation on fugitive slaves.

Although *Prigg* announced a strong right on behalf of slave owners to recover fugitive slaves without state interference, in practice the Court's decision only made it more difficult for owners to recover their property. Many Northerners refused to participate after the Court prohibited them from ensuring that rendition followed a fair process that respected the rights of local residents. Because most Southern claimants needed support from local populations and authorities in the North, noncooperation made rendition costly, dangerous, and often impractical.

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[74] Finkelman, *supra* note 64, at 21. Massachusetts, Vermont, Connecticut, New Hampshire, Pennsylvania, and Rhode Island all passed legislation prohibiting state officials from assisting federal rendition. Moreover, Ohio repealed an act that had required state officials to do so. After the Fugitive Slave Act of 1850 was passed, Ohio, Wisconsin, Maine, and the Minnesota Territory also passed such legislation. *Id.*

[75] WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854, at 350-53 (1990).

[76] Although *Prigg* drew the scorn of abolitionists, most Northerners were not troubled by the decision. MORRIS, *supra* note 16, at 104-05.

[77] *Id.* at 112-13.

[78] *Id.* at 113.

IV. The Fugitive Slave Act of 1850

Northern nullification of the Fugitive Slave Act of 1793 outraged Southerners and provided a strong impetus for a new federal law. In Virginia, for example, a legislative committee called the personal liberty laws a "disgusting and revolting exhibition of faithless and unconstitutional legislation."[79] In 1850, Senator James M. Mason of Virginia exclaimed that "you may as well go down into the sea, and endeavor to recover from his native element a fish which had escaped from you."[80] Henry Clay asserted that, because "the existing laws for the recovery of fugitive slaves . . . [are] inadequate and ineffective, it is incumbent of Congress . . . to make the laws more effective."[81]

In 1850, unique political circumstances gave Southerners the opportunity to draft a new federal fugitive law. In the late 1840s, the United States waged a highly successful war against Mexico, raising the question of what to do with the territory acquired from the war. The issue became sectionalized when David Wilmot of Pennsylvania, in his famous "Wilmot Proviso," moved that slavery be banned from all newly acquired lands. This proviso, which gained mainstream Northern support and even passed the House, unified the South in opposition. The proviso was seen as "an insult to the South" and an official condemnation of Southern institutions as morally undeserving.[82] Southerners worried that if the national government could use moral condemnation of slavery to contain slaveholders in the South, they could use the same justifications to attack slavery itself once expansion had increased Northern political power.[83] Before Congress convened in 1850, Southern editorials, mass meetings, and congressmen all warned of the possibility of disunion if the sectional issues were not resolved.[84]

In what became the Compromise of 1850, Whig Senator Henry Clay proposed a sweeping plan to resolve all sectional issues.[85] The territorial concerns were addressed by admitting California as a Free State and by establishing territorial governments in the rest of the Mexican Cession without

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[79] MALTZ, *supra* note 7, at 25.

[80] CONG. GLOBE, 31st Cong., 1st Sess. app. 1583 (1850), [hereinafter CONG. GLOBE, 1st Sess. app.].

[81] *Id.* at 123; *see also id.* at 79 (Andrew Butler). Senator Jefferson Davis asserted: "I wish that the provision of the Constitution had stood unaided by Congressional legislation till the present day, . . . instead of hedging it round by acts of Congress, which serve, it seems, but little other purpose than to relieve from the moral obligation to preserve and maintain that Constitution." *Id.* at 1588 (Senator Jefferson Davis).

[82] FREEHLING, *supra* note 75, at 461 (quoting Alexander Stevens to Linton Stevens, January 21, 1850). In his characteristically fiery tone, Robert Toombs, a senator from Georgia, told the proponents of the Wilmot proviso: "[I]f by your legislation you seek to drive us from the territories purchased by the common blood and treasure of the people, and to abolish slavery in the District, thereby attempting to fix a nation degradation upon half the states of this confederacy, I am for disunion." PLEASANT A, STOVALL, ROBERT TOOMBS: STATESMAN, SPEAKER, SOLDIER, SAGE 70 (Cassell Publishing Co. 1892).

[83] FREEHLING, *supra* note 75, at 461-62.

[84] DAVID M. POTTER, THE IMPENDING CRISIS: 1848-1861, at 96 (Don E. Fehrenbacher, ed., 1976).

[85] *Id.* at 97.

mentioning the status of slavery.[86] Since Southern California was seen as the only area hospitable to slavery, this proposal was perceived as a concession to the North.[87] Although the South had avoided the humiliation of the Wilmot Proviso, Northern moderates understood that a Southern victory on the Fugitive Slave Act was needed both to induce Southern moderates to accept the Compromise and to undermine the position of Southern disunionists.[88] The South was thus essentially permitted to draft a bill of its own choosing.[89]

Senator James Mason of Virginia introduced a strongly proslavery bill on January 3, 1850, which was designed to empower the federal government to return fugitive slaves even when the Northern states refused to cooperate. New York Senator William H. Seward, a well-known antislavery leader, first proposed an amendment that would guarantee a jury trial in the state in which the fugitive was claimed and require judges to issue writs of habeas corpus when asked to inquire into the status of an alleged fugitive.[90] Connecticut Senator Roger Sherman Baldwin explained that the amendment was needed to protect "the liberty of an individual who has a right to remain where he is, and to assert his freedom in the State where he happens to be."[91] Southerners opposed the amendment, however, out of fear that Northern juries would nullify the law and that jury trials would increase the expense of rendition.[92] The issue was then given to a committee to resolve the sectional disagreement.

The committee proposed requiring a jury trial after rendition in the Southern state from which the fugitive had fled. As Senator Clay told his Southern colleagues, guaranteeing a trial in the state from which the fugitive fled was a compromise because "[t]he trial by jury is what is demanded by the non-slaveholding States."[93] Senator Solomon W. Downs of Louisiana, for example,

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[86] The status of slavery was otherwise left ambiguous. It was unclear whether, as Northern Democrats claimed, voters in the territories could ban slavery, or, as Southerners argued, slavery was mandatory until the territory was admitted as a state. Since Southern California was seen as the only area hospitable to slavery, this proposal was practically a concession to the North. POTTER, *supra* note 65, at 99-100. Moreover, most of the disputed territory in the slave state of Texas was given to the New Mexico Territory, and the slave trade in the District of Columbia was abolished, both of which also obviously favored the North.

[87] POTTER, *supra* note 84, at 99-100.

[88] FREEHLING, *supra* note 75, at 486; *see also* CONG. GLOBE, 1st Sess. app. 385 (Senator George Badger of North Carolina asserting that "an effectual bill for the recapture of fugitive slaves . . . must lie at the foundation of any pacification of feeling between the North and the South."). *But see* FINKELMAN, *supra* note 63 (arguing that the Compromise of 1850 overwhelmingly favored the South).

[89] FEHRENBACHER, *supra* note 23, at 227.

[90] STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 16 (1970). Other senators would later propose similar amendments attempting to guarantee the right to a jury trial or the writ of habeas corpus. *See id.* at 19-21.

[91] *Id.* at 18.

[92] *Id.* at 18-19.

[93] CONG. GLOBE, 1st Sess. app. 572; *see also id.* at 1611 (argument by Senator Joseph Underwood).

asserted that, because Southern states already provided jury trials to slaves that claimed their freedom, if the South rejected the proposal, "our northern friends will say that nothing reasonable will satisfy us."[94] These senators recognized that offering some concessions to the North may have actually made the law more effective by making it more acceptable to the Northern public.

The jury trial amendment, however, failed due in large part to opposition from Southern extremists who wanted the Act to provide owners with an absolute right to reclaim their fugitive slaves without any limitations based on the competing rights of free blacks in the North.[95] Senator Pierre Soule of Louisiana, for example, attacked the jury amendment on the grounds that it would "greatly embarrass, delay, and add to the expenses of reclamation."[96] Similarly, Senator James Mason of Virginia opposed the amendment on the grounds that it would infringe on the owner's right to sell a runaway without delay.[97]

Maryland Senator Thomas G. Pratt next offered an amendment to indemnify slave owners when the federal government failed to return a claimed fugitive slave. Pratt argued that, due to Northern hostility, his amendment was "the only means in the power of the Government by which the [Fugitive Slave Clause] . . . can be executed."[98] He also argued that, since Northerners would not be forced to violate their consciences and slave owners would be compensated, his amendment would "settle now and forever the agitation upon the subject of fugitive slaves."[99] Pratt's amendment gained the support of every Border State senator, as well as a few senators from the Deep South who were strongly supportive of the Compromise of 1850.[100]

The indemnification amendment, however, failed to pass due to opposition from most Southern senators outside of the Border States. Raising constitutional concerns, Senator Davis asked: "If we admit that the Federal Government has power to assume control over slave property . . . where shall we find an end to the action which antislavery feeling will suggest?"[101] Moreover, Senator John M. Berrien of Georgia, among others, argued at length that the Constitution authorized Congress only to provide for the return of fugitive slaves, and that

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[94] CONG. GLOBE, 1st Sess. app. 638. Downs was a Democrat from Louisiana who strongly supported the Compromise of 1850. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY 625 (1999).

[95] These congressmen were primarily Democrats from the Deep South, and they all opposed the Compromise of 1850. *See* HOLT, *supra* note 94, at 625-27.

[96] CONG. GLOBE, 1st Sess. app. 631.

[97] *Id.* at 1610-11. Some congressmen also opposed the proposal on constitutional grounds. Senator Jefferson Davis of Mississippi argued that requiring a jury trial in the South would be "an assumption of power not granted to the federal government, [and] a violation of state rights, by attempting to direct their legislation and forms of proceeding." *Id.* at 1588; *see also id.* at 1610-11 (argument by Senator James Mason). Congressmen like Davis were unwilling to provide a precedent for interference with state governments on matters of slavery, even if such interference would arguably bolster enforcement of the fugitive law.

[98] *Id.* at 1592.

[99] *Id.*

[100] *Id.* at 1609.

[101] CONG. GLOBE, 1st Sess. app. 1614.

compensation was beyond its enumerated powers.[102] Finally, Senator Hopkins L. Turney of Tennessee asserted that the amendment was "neither more nor less than a scheme of emancipation, the effect of which will be to emancipate the slaves of the Border States and to have them paid for out of the Treasury of the United States."[103] Although the amendment would have provided an effective remedy to slave owners, these Southerners worried that it would set a precedent for federal interference with all property rights in slaves.

In sum, Southern extremists struck down all attempts to make the Act more acceptable to the North or appealing to the Border States. They rejected the jury trial amendment because they believed it conflicted with the absolute right of recapture. They also rejected a practical remedy in the indemnification amendment because of fear that the amendment could undermine the right of property in slaves. Southern congressmen designed the Act to represent a strong statement of Southern rights rather than a watered-down compromise.[104]

After the rejection of each moderating amendment, the Fugitive Slave Act of 1850 emerged from the debates as an uncompromisingly proslavery law that both accommodated *Prigg's* "unqualified" private right of recaption and provided federal procedures that gave little respect to any alleged fugitive's liberty rights.[105] The Act of 1850 authorized the owner or his agent to seize and remove an alleged fugitive without any legal process.[106] Alternatively, the owner could enlist the aid of federal authorities.[107] Using these procedures, the owner first obtained a certificate of removal from a Southern judge before following the fugitive to the North.[108] This certificate was then presented to a federal judge or commissioner in the North who issued a warrant for the fugitive's arrest.[109] Harsh penalties were given to a federal officer who refused to aid in the recapture of a fugitive or who allowed a fugitive placed in his custody to escape.[110] Moreover, under the *possee comitas* provision, ordinary Northern citizens could be compelled to aid the marshals in securing fugitives.[111] Once arrested, the alleged fugitive slave had "summary" proceedings before a federal commissioner with no opportunity for appeal.[112] In these proceedings, the commissioner was to determine only if the alleged fugitive was the person mentioned in the certificate of removal, because the certificate constituted conclusive evidence that the person mentioned therein was a slave.[113] The commissioner was paid five dollars if the alleged fugitive was found to be free

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[102] CONG. GLOBE, 1st Sess. app. 1608.
[103] *Id.* at 1616.
[104] *See* FEHRENBACHER, *supra* note 23, at 232.
[105] Fugitive Slave Act of 1850, 9 Stat. 462 (repealed 1864).
[106] *Id.* at 463.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 464.
[111] Fugitive Slave Act of 1850, 9 Stat. 463 (repealed 1864).
[112] *Id.*
[113] *Id.* at 465.

and ten dollars if found to be a slave.[114] Under no circumstances was the testimony of the alleged fugitive to be admitted.[115]

Just as the Supreme Court had recognized an unqualified private right of recaption in *Prigg*, Congress designed the Act of 1850 to create an absolute property right in fugitive slaves. According to prominent historian Don E. Fehrenbacher, the Act of 1850 was "utterly one-sided, lending categorical federal protection to slavery while making no concession to the humanity of African-Americans or to the humanitarian sensibilities of many white Americans."[116]

V. Northern Reaction to the Fugitive Slave Act of 1850

Despite its strongly proslavery content, most Northerners initially accepted the Fugitive Slave Act of 1850 as necessary to appease the South and avoid sectional conflict.[117] In Congress, moderates allowed the Act of 1850 to pass because they understood that a Southern victory on fugitive slaves was needed to appease extremists. Daniel Webster, for example, argued that support for the Act of 1850 would "rebuk[e] that spirit of faction and disunion" that imperiled the country.[118] Thirty-one Northern congressmen ultimately voted for the Act of 1850, while thirty-two abstained and seventy-six voted against it.[119] The Act passed because of unanimous Southern support.[120] After its passage, both major political parties in the South endorsed the Georgia Platform, which pledged to "abide by [the Compromise of 1850] as a permanent adjustment of this sectional controversy" and warned that "upon a faithful execution of the *Fugitive Slave Law* by the proper authorities depends the preservation of our much beloved Union."[121] Because of fear of disunion, Northern politicians, clergy, and businessmen all urged the people to accept the law.[122]

Acceptance of the Act of 1850, however, was not universal. After its passage, the Act was condemned in mass meetings and editorials throughout the North.[123] Abolitionists formed the core of this opposition. Theodore Parker, for

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[114] Fugitive Slave Act of 1850, 9 Stat. 464 (repealed 1864).

[115] *Id.* at 463.

[116] *See* FEHRENBACHER, *supra* note 23, at 232.

[117] *See* MORRIS, *supra* note 16, at 55.

[118] Letter from Daniel Webster to the Citizens of Newburyport, (May 15, 1850), *in* 12 DANIEL WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER, 235-37 (Boston, Little, Brown & Co., 1903).

[119] H. JOURNAL, 31st Cong., 1st Sess., 1452 (1850) [hereinafter H. JOURNAL]; POTTER, *supra* note 84, at 113, 130 n. 17. According to historian David M. Potter, "there was really no compromise—a truce perhaps, an armistice, certainly a settlement, but not a true compromise." POTTER, *supra* note 84, at 113.

[120] H. JOURNAL, 1452; FEHRENBACHER, *supra* note 12 at 230; MORRIS, *supra* note 9, at 145.

[121] *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY 614 (1999).

[122] CAMPBELL, *supra* note 90, at 66-75.

[123] *See* Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 816 (2011).

example, pledged "to rescue any fugitive slave from the hands of any officer who attempts to return him to bondage."[124] William Lloyd Garrison's abolitionist newspaper, *The Liberator*, declared: "[W]e rejoice to learn that there is a very strong and almost universal expression of detestation of the Fugitive Bill on the part of our citizens [in Boston], many of whom openly avow their readiness and fixed purpose to prevent its operation here, even though blood should flow like water."[125] Ralph Waldo Emerson asserted: "As long as men have bowels, they will disobey."[126] Frederick Douglass predicted that, if the people would "make a dozen or more dead kidnappers," the South would lose interest in enforcing the law.[127] Finally, Massachusetts Senator Charles Sumner declared: "Let this public opinion be felt in its might, and the Fugitive Slave bill will become everywhere among us a dead letter."[128]

Although most Northerners did not initially share this abolitionist sentiment, enforcement of the harsh and one-sided terms of the Act of 1850 helped to mobilize opposition to it and slavery throughout the 1850s. Fugitive slaves who were seized in Northern cities put a human face on the slavery issue in a way that disputes over far-off territories never could.[129] Northerners who were initially willing to accept the Act of 1850 in the abstract were therefore persuaded to change their minds when they personally witnessed courageous fugitives fighting for—and often losing—their freedom. As Northern opinion turned against the Act of 1850, enforcement of the Act became increasingly difficult.

A. Enforcement of the Act in Boston

The history of fugitive slave rendition in Boston, the center of the abolitionist movement, illustrates this pattern of initial acceptance of the Fugitive Slave Act of 1850, federal enforcement, and antislavery backlash. Prior to the Act's enforcement, a number of rallies were held to convince the public that enforcement was necessary.[130] In November of 1850, for example, future Supreme Court Justice Benjamin Curtis warned a large audience at Faneuil Hall that, if the Act of 1850 were not enforced, "the end [is] that the government

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[124] Campbell, *supra* note 90, at 50.

[125] *The Slave-Catching Law*, THE LIBERATOR (Oct. 4, 1850). The article further states that, because the Fugitive Slave Act of 1850 was "palpably unconstitutional[]," it was "[i]n no aspect binding." *Id.*

[126] FEHRENBACHER, *supra* note 23, at 233.

[127] CAMPBELL, *supra* note 90, at 52.

[128] *Id.* at 51-52.

[129] *See* LUBET, *supra* note 33, at 1; POTTER, *supra* note 84, at 130; *see also*, *From the Nashville American*, FEDERAL UNION, Jan. 14, 1851 (quoting the *Hillsborough Gazette*) ("The South has overacted in this matter, it will find to its sorrow. There will be ten [a]bolitionists where was one before, and the word slavery will soon be in reality a synonymous term for the 'sum of villainies.'").

[130] *See* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW: 1850-1860, at 55 (1968).

must be destroyed."[131] He further explained that "without an obligation to restore fugitives from service, Constitution or no Constitution, Union or no Union, we could not expect to live in peace with the slave-holding States."[132] Even abolitionist leaders lamented that public opinion in Boston supported enforcement in 1850.[133]

When Bostonians were forced to watch as actual fugitives were torn from their lives and forced to return to slavery, however, many decided to ignore Justice Curtis's warnings. One of the most dramatic cases arose just months after the passage of the Act of 1850 when U.S. marshals arrested Shadrach Minkins as a fugitive slave.[134] Shadrach had been working in Boston as a waiter for about three months prior to his arrest.[135] His case caused a stir in Boston, and the initial hearing drew an audience that crowded the courthouse.[136] Because the Massachusetts personal liberty law forbid the use of State jail to hold a person claimed as a fugitive slave, about ten U.S. marshals stood guard over Shadrach in the courthouse while antislavery lawyers prepared his defense.[137] The marshals, however, were overpowered when a group of about twenty free blacks forced the courthouse doors open and sent Shadrach on his way to Canada.[138]

Following the rescue, President Millard Fillmore issued a proclamation in which he promised that he would "see that the laws shall be faithfully executed, and all forcible opposition to them suppressed."[139] The Fillmore Administration sought to make an example of Shadrach's rescuers, and nine individuals were charged with violating the Act of 1850.[140] At this time, most Bostonians backed the President and condemned the rescue.[141]

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[131] 1 BENJAMIN CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS 127-28 (1897).

[132] *Id.* at 134. *See also The Constitutionality of the Fugitive Slave Law*, BOSTON DAILY ADVERTISER (Nov. 19, 1850) (publication of a speech by Justice Curtis defending the constitutionality of the Fugitive Slave Act of 1850).

[133] *See* CAMPBELL, *supra* note 130, at 63-64.

[134] *See* GARRY COLLISON, SHADRACH MINKINS: FROM FUGITIVE SLAVE TO CITIZEN 91-99 (1997).

[135] *An Alleged Fugitive Slave Captured and Afterwards Rescued by a Mob*, NEW YORK DAILY TRIBUNE (Feb. 17, 1851) (reprinting article from the *Boston Traveler* of Feb. 15).

[136] *Id; see also Great Excitement in Boston*, THE SPIRIT OF DEMOCRACY (Woodsfield, OH), Feb. 26, 1851, at 2 ("The news of the arrest spread rapidly, and the Court room was speedily filled by a large crowd of rather excited spectators.").

[137] COLLISON, *supra* note 134, at 121.

[138] *Id.* at 124-33.

[139] CONG. GLOBE, 31st Cong., 2d Sess. app. 292-93 (1851) [hereinafter CONG. GLOBE, 2d Sess. app.]. President Fillmore also unsuccessfully sought authorization from Congress to call out the federal military and state militia to enforce the Fugitive Slave Act of 1850. *See id.* at 828; CONG. GLOBE, 2d Sess. app. 292-326.

[140] JOHN D. GORDAN, III, THE FUGITIVE SLAVE RESCUE TRIAL OF ROBERT MORRIS: BENJAMIN ROBBINS CURTIS ON THE ROAD TO DRED SCOTT, 30-35 (2013). After the Fugitive Slave Act of 1850 was finally enforced in the Sims case, Daniel Webster, the Secretary of State, wrote to President Fillmore: "Now, we need one thing further, viz, the conviction and punishment of some of the [Shadrach] rescuers." *Id.* at 35 (quoting Webster Papers 232-33).

[141] *See Boston on Her Knees*, THE LIBERATOR (Feb. 28, 1851).

Rather than deter future resistance, however, the trials of Shadrach's rescuers gave antislavery lawyers a public stage from which to attack slavery and the legitimacy of the Fugitive Slave Act of 1850. In the trial of one of Shadrach's alleged rescuers, for example, John Parker Hale, a prominent antislavery leader and United States Senator from New Hampshire, told the jury that slavery "comes into your Court House today, with a brazen face, and asks you to declare that a human being is a slave."[142] In doing so, Hale declared, the Government's case rested on the testimony of a man whose "business is catching and whipping negroes" and who is not "very scrupulous how he gets them."[143] Hale continued: "The Government asks you to give up one of your citizens, because *such* a man says he is a slave."[144] When the crowd in the courtroom reacted, the marshal ordered silence, and Hale responded: "Yes! silence in the Court! Silence the beating of your hearts when you hear such things."[145] In the end, Morris was acquitted, and each of the other prosecutions related to Shadrach's rescue resulted in acquittal or a hung jury.[146] Enforcement of the Act of 1850 did not deter violations; instead, it gave antislavery leaders an opportunity to recruit support to their cause.

In early April of 1851, less than two months after the Shadrach rescue, Thomas Sims was arrested under the Act of 1850 in Boston.[147] Like Shadrach, Sims was held in the Boston courthouse. This time, however, the courthouse was barricaded by ropes and chains, the entire Boston police force, reinforced by three military companies, patrolled the scene, and two hundred and fifty U.S. troops were kept on alert nearby.[148] With rescue impractical, Sims' attorneys mounted an exhaustive attack against the constitutionality of the Act of 1850.[149] When the legal challenge proved unsuccessful, antislavery leaders called a meeting where the Act of 1850 and its enforcement were denounced in the harshest of terms, but the abolitionists took no further action.[150] Sims was ultimately escorted to a ship in Boston harbor by three hundred armed guards, and Sims was ultimately returned to a life of slavery in Georgia.[151]

Although the law was successfully enforced with the backing of Boston officials and much of the public, the affair likely helped draw support to the

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[142] GORDAN, *supra* note 140, at 59.
[143] *Id.* at 60.
[144] *Id.* (emphasis in original).
[145] *Id.*
[146] *Id.* at 72.
[147] Leonard Levy, *Sim's Case: The Fugitive Slave Law in Boston in 1851*, 35 J. NEGRO HIST. 39, 44-45 (1950). Sims managed to alert the abolitionist community of his arrest by stabbing one of the arresting officers and calling for aid. *Id.*
[148] *Id.* at 46, 52.
[149] *See* TRIAL OF THOMAS SIMS, ON AN ISSUE OF PERSONAL LIBERTY, ON THE CLAIM OF JAMES POTTER, OF GEORGIA, AGAINST HIM, AS AN ALLEGED FUGITIVE FROM SERVICE: ARGUMENTS OF ROBERT RANTOUL, JR. AND CHARLES G. LORING, WITH THE DECISION OF GEORGE T. CURTIS (Boston: WM. S. Damrell & Co., 1851).
[150] *See* GORDAN, *supra* note 140, at 36.
[151] *See* Levy, *supra* note 147, at 70.

antislavery cause. The *Boston Mercantile Journal*, for example, though praising the rendition, explained that it forced the people to choose between following the Constitution and "their feelings of humanity."[152] Echoing a common feeling amongst supporters of the law, the paper further stated that "we cannot but remark that pity for the fugitive who is returned to thralldom."[153] Moreover, the *Boston Commonwealth* predicted that Sims' rendition would "prove a disastrous triumph to the Slave Power, and mightily serve to augment and extend that popular agitation which alone is destined to effect the utter overthrow of the slave system."[154]

Perhaps the most famous fugitive slave case is that of Anthony Burns, who was arrested in Boston in 1854.[155] After learning of Burns' arrest, antislavery leaders called a mass meeting at Faneuil Hall. One printed appeal for the meeting called on Bostonians to help a man "awaiting the mockery of a trial which shall doom him to all the unutterable misery, horror, and blackness of darkness faintly shadowed beneath the word—SLAVERY!—without once allowing him to see the face of a judge [or] the face of a jury."[156] Thousands of Bostonians attended the meeting where famous abolitionists such as Wendell Philips and Theodore Parker denounced the Act of 1850.[157]

Parker, for example, addressed the crowd as "[f]ellow subjects of Virginia" and said that, through the Act of 1850, slavery "reaches its arm over the graves of our mothers, and it kidnaps men in the city of the Puritans, over the graves of Samuel Adams and John Hancock."[158] He continued: "Slavery tramples on the Constitution; it treads down State rights . . . Where is the trial by jury? . . . Where is the sacred right of *habeas corpus*?"[159] The answer, Parker asserted, was that the federal officer "can crush [these rights] in his hands, and Boston does not say anything against it."[160] Although Parker tried to steer the crowd from immediate action, a large crowd from the meeting assaulted the courthouse in an unsuccessful attempt to rescue Burns.[161] While attempting to enter, several hundred protestors knocked down the door with a battering ram, and a U.S. Deputy Marshal was fatally stabbed in the ensuing conflict.[162]

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[152] *Refuge of Oppression. The Slave Case*, THE LIBERATOR (Apr. 25, 1851) (quoting the *Boston Mercantile Journal*).

[153] *Id.*

[154] *The Fugitive Slave Law*, THE LIBERATOR (April 18, 1851) (quoting the *Commonwealth*).

[155] *See*, MALTZ, *supra* note 7; ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS (1998).

[156] MALTZ, *supra* note 7, at 62 (quoting ANTHONY BURNS, BOSTON SLAVE RIOT, AND TRIAL OF ANTHONY BURNS 22 (1854)).

[157] *See* VON FRANK, *supra* note 155, at 55-59.

[158] CHARLES EMERY STEVENS, ANTHONY BURNS: A HISTORY 289-90 (1856).

[159] *Id.* at 291-92.

[160] *See* STEPHENS, *supra*, note 158, at 292.

[161] *See* GORDON, *supra* note 140, at 12-13.

[162] *Id.* at 62-71.

To prevent further violence, the Mayor of Boston called out two companies of the State Militia, and the U.S. Marshal summoned two companies of Marines.[163] When Burns finally received his hearing, hundreds of military personnel stood guard at the courthouse, forcing a crowd of protestors numbering in the thousands to stay in a nearby town square.[164] At the hearing, Burns' attorneys sharply criticized slavery, the Act of 1850, and the City's participation in slave catching.[165]

After the conclusion of arguments in the removal hearing, Boston prepared for the public outcry that would result if Burns were remanded to slavery. The U.S. Marshal warned the Mayor of Boston that "the whole military and police force of the city would be required to preserve the peace of the city and prevent riot and assaults upon the officers of the law in the discharge of their duty."[166] Thousands of Bostonians gathered outside the courthouse, which was protected by a company of U.S. infantry armed with a cannon.[167] The Mayor of Boston issued a proclamation warning the citizens of Boston that the police were "clothed with full discretionary powers to sustain the laws of the land" and asking the people "to leave those streets which it may be found necessary to clear temporarily."[168] When Burns was ordered back to Virginia, hundreds of soldiers, including cavalry and a horse drawn cannon, escorted him through a jeering mass of some 50,000 Bostonians who had emerged to protest the rendition.[169] Black banners were hung from windows along the streets to mourn the death of liberty, and the crowd booed and harassed the military escort.[170]

Although serious violence was averted, the rendition served as a public spectacle that rallied the citizens of Boston against slavery and the Fugitive Slave Act of 1850.[171] One formerly conservative Bostonian wrote that, after the rendition, "I put my face in my hands and wept. I could do nothing less."[172] Another Bostonian famously asserted: "We went to bed one night old-fashioned, conservative, compromise Union Whigs and waked up stark mad Abolitionists."[173] Perhaps sensing the change in public opinion and the counterproductive nature of federal enforcement, Justice Curtis dismissed all

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[163] *Id.* at 71-72.
[164] *See* MALTZ, *supra* note 7, at 72.
[165] *Id.* at 75-78.
[166] *Id.* at 84-85.
[167] *Id.* at 85.
[168] *Id.* at 85-86.
[169] *See* VON FRANK, *supra* note 155, at 206-18.
[170] *See* MALTZ, *supra* note 7, at 90-94.
[171] *See e.g.*, MALTZ, *supra* note 7, at 93-94.
[172] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 120 (1989) (quoting Letter from George S. Hilliard to Francis Lieber (June 1, 1854) Francis Lieber Papers, Henry E. Huntington Library); *see also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 179 (1975) ("Public opinion in Massachusetts was virtually unanimous in its sympathy with Burns.").
[173] MCPHERSON, *supra* note 172, at 120 (quoting Letter from Amos Lawrence to Giles Richards (June 1, 1854)).

charges against those involved in the failed courthouse rescue based on a technicality.[174] As conservative political leader Edward Everett explained, because no Boston jury was likely to convict, "[t]he trial would only have afforded the defendants a new chance to insult the Court and defy the law."[175] Further demonstrating the growing public distaste for enforcement, the Federal Commissioner who issued the certificate of removal for Burns, Edward G. Loring, was removed from office as a Massachusetts probate judge because of his role in the rendition.[176]

The progression of cases in Boston demonstrates that, as federal authorities attempted to enforce the Fugitive Slave Act of 1850, they met with increasing resistance, making the law costly and dangerous to enforce.[177] Much of the increase in opposition to the Act was likely attributable to rising antislavery sentiment in the North, especially after the Kansas-Nebraska Act was introduced in 1854.[178] However, many Bostonians, including prominent antislavery leaders, believed that the increase in popular support was also due in part to the compelling drama of the cases themselves, which pitted sympathetic fugitives against unscrupulous slave catchers and a draconian federal law. Moreover, those who spoke out against rendition condemned not just the fact of slavery, but also the proslavery terms of the Act of 1850. Because most Bostonians would not support violation of the Constitution, antislavery leaders forcefully argued that the Act of 1850 was unconstitutional since it failed to respect traditional Northern legal principles like the trial by jury or habeas corpus that would have protected the interests of free blacks. These arguments no doubt helped to justify resistance in the eyes of many moderate and conservative Northerners. Many others who did not accept the legal arguments against the Act of 1850 were forced to confront the reality that liberty in the North was becoming inconsistent with a Union permitting slavery in the South.

B. Enforcement in Wisconsin

Enforcement of the Fugitive Slave Act of 1850 had a similar effect in Wisconsin. On March 10, 1854, a Kentucky slave owner and three U.S. marshals arrested Joshua Glover as a fugitive slave outside of Milwaukee, Wisconsin.[179]

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[174] MALTZ, *supra* note 7, at 105-06; GORDON, *supra* note 140, at 92-95.

[175] MALTZ, *supra* note 7, at 106.

[176] *See* COVER, *supra* note 172, at 179-82.

[177] *See, e.g.*, CAMPBELL, *supra* note 90, at 80-81. In a recent book, Gordon Barker persuasively argues that most Bostonians desired to abide by the Compromise of 1850 and enforce the Fugitive Slave Act of 1850. *See* GORDON, *supra* note 140, at 60. However, to the extent Gordon argues that the case failed to generate opposition to future enforcement of the Act, the materials cited and discussed in this Article contradict his position. Although the *Shadrach*, *Sims*, and *Burns* cases did not convert the majority of Bostonians to abolitionism, this Article argues that these cases did generate opposition to enforcement of the Fugitive Slave Act of 1850.

[178] *See* CAMPBELL, *supra* note 90, at 83.

[179] Jeffrey M. Schmitt, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1323-24 (2007); *see also* H. ROBERT BAKER, THE RESCUE OF

When Sherman Booth, an antislavery newspaper editor in Milwaukee, learned of the arrest, he published the following handbill:

> Last night a colored man was arrested near Racine, on a warrant of Judge Miller, by Deputy-Sheriff Cotton, and making some resistance, was knocked down and brought to this City, and incarcerated in the County Jail.
>
> Marshal Cotton denied knowing anything about it at 9 o'clock this morning. The object evidently is to get a secret trial, without giving him a chance to defend himself by counsel.
>
> Citizens of Milwaukee! Shall we have Star Chamber proceedings here? and shall a Man be dragged back to Slavery from our Free Soil, *without an open trial of his right to Liberty?*[180]

"That afternoon, Booth and his associates organized a mass meeting at the Court House Square in Milwaukee."[181] Booth helped gather the crowd by riding through the streets on horseback, "calling on all Free Citizens, who were not willing to be made slaves or slave-catchers."[182] At the meeting, the people pledged to "stand by this prisoner, and do [their] utmost to secure for him a fair and impartial Trial by Jury."[183] After a number of speeches were given on the unconstitutionality of the Act of 1850, Glover's attorney told the crowd that the U.S. marshals, acting under the advice of a federal judge, refused to obey any writ of habeas corpus issued by a state court.[184] Upon hearing this, members of the crowd broke down the door to the jail, rescued Glover, and helped him flee to Canada.[185]

Soon thereafter, federal authorities arrested Booth for aiding and abetting Glover's rescue in violation of the Act of 1850.[186] Booth's prosecution prompted an extended conflict between state and federal authorities. In perhaps the greatest success of antislavery constitutionalism, the Wisconsin Supreme Court issued a writ of habeas corpus and released Booth from federal custody on the grounds that the Act of 1850 was unconstitutional.[187] The Wisconsin Court held

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JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR 120-22, 136-61 (2006).

[180] *See* Schmitt, *supra* note 179, at 1323-24 (quoting *Kidnaping Case!—Man-Hunters on our Soil!!*, DAILY FREE DEMOCRAT (Milwaukee), Mar. 13, 1854) (emphasis in original).

[181] *Id.* at 1324.

[182] *Id.* (quoting *Great Meeting at Racine*, DAILY FREE DEMOCRAT (Milwaukee), Mar. 13, 1854).

[183] *Id.*

[184] *Id.*

[185] *Id.* at 1325 (citing *The Rescue Case*, DAILY WIS. (Milwaukee), Mar. 13, 1854).

[186] *Id.* at 1328.

[187] *Id.* at 1334 (citing *In re* Booth, 3 Wis. 1 (1854)). Wisconsin Supreme Court Justice Abraham D. Smith asserted that "no Union could have been formed" if the North had understood the Fugitive Slave Clause to give the federal government the power to arrest Northern citizens and send them to slavery without the protection of state courts. *Id.* at 1332. He further explained that, the regime created by *Prigg* and the federal fugitive slave legislation made "[t]he slave code of every state in the union engrafted upon the laws of

the Act was unconstitutional because it denied the right to a trial by jury and gave judicial power to commissioners in violation of Article III.[188] The U.S. District Court nevertheless proceeded with the trial, and the Milwaukee jury convicted Booth. The Wisconsin Supreme Court, however, again intervened and released Booth under a writ of habeas corpus.[189] The case was not resolved until the U.S. Supreme Court rendered its opinion in *Ableman v. Booth*, which upheld Booth's conviction and the constitutionality of the Act of 1850.[190]

The conflict between the state and federal courts in Booth's case galvanized public opinion against slavery and enforcement of the Act of 1850 in Wisconsin. The *State Journal*, for example, explained: "We are sometimes told that the institution of slavery should be let alone . . . that its 'agitation' can do no good. But here it is rampant, aggressive, [and] at our very thresholds."[191] In his newspaper, Booth reported that "[t]here never was half the sympathy felt for us that there has been since this trial."[192] In fact, Booth's attorney, Byron Paine, was elected to the Wisconsin Supreme Court, and enforcement of the Act of 1850 was a major campaign issue for the Republican Party in Wisconsin, which swept into power during the late 1850s.[193] No doubt influenced by Booth's case and the rulings of the Wisconsin Supreme Court, the Wisconsin legislature even passed a resolution declaring the U.S. Supreme Court's decision in *Ableman* "an arbitrary act of power . . . and therefore without authority, void and of no force."[194] In sum, enforcement of the Act of 1850 in Wisconsin gave a voice to abolitionists like Sherman Booth and mobilized popular opposition to proslavery law.

Glover's rescue and the subsequent judicial conflict likely only occurred because of the proslavery terms of the Act of 1850. The people of Milwaukee did not oppose Glover's rendition merely because they opposed slavery; instead, they gathered to see that he be treated fairly and receive a trial by jury before being returned to slavery.[195] Rather than attempt to nullify the constitutional duty to return fugitive slaves, most Wisconsinites merely sought to moderate the draconian provisions of the Act of 1850.[196] When the Wisconsin Supreme Court intervened and held that the Act of 1850 was unconstitutional, it was likely

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every free state." *Id.* at 1334. The Wisconsin court therefore seems to have been motivated not just by opposition to slavery, but also by opposition to the harsh proslavery terms of the Fugitive Slave Act of 1850. *Id.* at 1335.

[188] *In re* Booth, 3 Wis., at 64-66. Under Article III of the Constitution, judicial power must be vested in federal judges who are appointed by the President, confirmed by the Senate, and have lifetime tenure. U.S. CONST. art. III, § 1; *see also id.* art. II, § 2.

[189] *See* Schmitt, *supra* note 179, at 1340.

[190] 62 U.S. 506 (1859).

[191] *See* Schmitt, *supra* note 179, at 1339-40 (quoting *Booth and Ryecraft Sentenced*, MILWAUKEE SENTINEL, Jan. 27, 1855 (reprinting Madison)).

[192] *Id.* at 1340 (quoting *Shameful Misrepresentations,* DAILY FREE DEMOCRAT (Milwaukee), Jan. 19, 1855).

[193] *See* Schmitt, *supra* note 179.

[194] *Id.*

[195] *See* Schmitt *supra* note 179, at 1325-28.

[196] *Id.*

motivated by the same desire to restore traditional legal protections like the trial by jury to presumptively free people claimed as fugitives.[197] If the Act of 1850 had given greater protections for the liberty interests of free blacks, the Booth case and resulting antislavery backlash likely would not have occurred.

Conclusion

Federal fugitive slave policy in the late antebellum era was blind to the fact that a slave owner's right to recover a fugitive slave conflicted with the liberty rights of free blacks who might be falsely claimed as fugitives. Before the Supreme Court intervened, state law had limited the claimant's right to recover fugitive slaves by providing legal protections for the competing rights of free blacks in the North. In *Prigg*, the Supreme Court held that any state effort to respect the liberty interest of free blacks was unconstitutional because it conflicted with a slave owner's constitutionally protected right of recaption. After losing the power to consider the liberty rights of free blacks, many Northerners, including state law enforcement officers and judges, lost interest in assisting in rendition. Without the assistance of state officials, Southerners found it difficult to recover their fugitive slaves. By effectively cutting the states out of the rendition process, *Prigg* undermined enforcement of the Fugitive Slave Act of 1793.

Empowered by unique political circumstances in the Compromise of 1850, Southern extremists similarly designed the Fugitive Slave Act of 1850 to assist slave catchers, while providing minimal protections for the rights of free blacks. Enforcement in the North followed a predictable pattern. While most Northerners initially accepted the Act of 1850 as a necessary condition of Union, federal enforcement provoked an antislavery backlash that in turn made future enforcement increasingly difficult. Not only did the Act of 1850 bring slavery to the doorstep of Northerners in areas like Boston and Milwaukee, but, for many Northerners, enforcement was incompatible with the legal traditions of a free country. Just as *Prigg* gave Northerners a way to channel antislavery feeling into noncooperation, the proslavery content of the Act of 1850 legitimized interference with its enforcement. By insisting on uncompromisingly proslavery terms that did not account for the competing interests of free blacks, the federal fugitive slave regime created by Congress and the Supreme Court was self-defeating.

[197] *Id.* at 1335.