Courts, Backlash, and Social Change: Learning from the History of Prigg v. Pennsylvania

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ABSTRACT

Scholars have repeatedly looked to the history of cases like *Dred Scott, Brown, and Roe* for guidance on whether courts should issue broad decisions on contentious issues. Some scholars contend that these cases triggered backlash that undermined the very causes the Court sought to promote, while others minimize the Court's role in creating backlash and emphasize the decisions' positive results. This Article contributes to this debate by providing a new account of the social and political consequences of *Prigg v. Pennsylvania*. The Court in *Prigg* rendered a broad interpretation of the Fugitive Slave Clause that was not necessary to resolve the facts of the case before it. The Court did so because the Justices sought to head off sectional conflict over fugitive slaves. Using original historical research, this Article argues that the decision had the effect, however, of helping to create a national policy on fugitive slaves that provoked an antislavery backlash in the North and strengthened the case for secession in the South. A more restrained decision from the Court could have produced a less divisive regime that provided greater legal protections for people claimed as fugitive slaves. The history of *Prigg* therefore suggests that courts should consider issuing limited and incremental rulings when attempting to produce social change on divisive issues.

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Editor's Note: Many of the nineteenth-century newspapers cited in this article have been imperfectly preserved over the years. These sources are cited according to the information at our disposal, but readers may still find them difficult to obtain. *Penn State Law Review* has retained copies of these sources in the event that any reader should wish to inquire further.

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I. INTRODUCTION

The Supreme Court's ability to produce positive social and political change is at the heart of an ongoing debate over the judicial role. Backlash against controversial cases, many scholars contend, has sometimes undermined the very rights the Court has sought to protect. According to this view, when ruling on divisive issues, the Court should be wary of issuing broad decisions that could engender opposition and create unintended consequences.[1] Other scholars, however, warn that fear of backlash should not unduly limit the Court's decision-making. Disagreement plays an important role in the advancement of constitutional social policy, these scholars contend, and courts should not be too hesitant to participate in the process.[2] This debate over the proper

1. *See, e.g.*, Michael J. Klarman, *Judicial Statesmanship: Justice Breyer's Concurring Opinion in Van Orden v. Perry*, 128 HARV. L. REV. 452, 454 (2014); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 114–15 (1999); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 95 (2006); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381–86 (1985). Under this view, moreover, social movements should focus resources on legislation rather than legal advocacy. *See* David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 593 (2004).

2. *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 YALE L.J. 2028, 2032–33 (2011); Robert Post &

role of the Court typically focuses on the history of cases like *Dred Scott v. Sanford*,[3] *Brown v. Board of Education*,[4] and *Roe v. Wade*.[5]

This Article contributes to this debate by arguing that the history of *Prigg v. Pennsylvania*[6] provides further evidence that courts should issue narrow and constrained rulings when attempting to produce change on contentious social issues. *Roe*, for example, allegedly caused backlash by recognizing a right to choose that was more extensive than public opinion would support.[7] *Prigg*, however, triggered backlash in a very different manner. Rather than directly provoke public outcry, *Prigg* helped to create legislation that disrupted the fabric of the Union on the eve of secession. While scholars like Michael Klarman and Reva Siegel debate whether court rulings are more likely to produce backlash than legislation, the history of *Prigg* adds another layer of complexity. Broad constitutional rulings on important social issues, *Prigg* demonstrates, can increase the likelihood that Congress will enact the type of divisive legislation that triggers backlash.

The Court in *Prigg* attempted to use constitutional law to minimize sectional conflict on the divisive issue of fugitive slaves. When ruling on the Fugitive Slave Clause of the Constitution as a matter of first impression, Justice Joseph Story—the author of the Court's opinion—broadly interpreted federal power to provide for the return of fugitive slaves. He did so because he believed that strong federal enforcement would best facilitate the rendition of fugitives and satisfy Southern demands to enforce the proslavery Constitution.

By offering an original account of *Prigg's* social and political consequences, this Article argues that the Court's unnecessarily broad interpretation of the Fugitive Slave Clause undermined the very goals the

Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007); Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 972–73 (2014); Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 936–38 (2016); James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 FORDHAM L. REV. 2885, 2913–14 (2007).

3. Scott v. Sandford, 60 U.S. 393 (1857).
4. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
5. Roe v. Wade, 410 U.S. 113 (1973).
6. Prigg v. Pennsylvania, 41 U.S. 539 (1842).
7. According to Michael Klarman, although 60% of the public supported a right to choose in the first trimester, only 30% of Americans supported extending that right into the second trimester. *See* Klarman, *supra* note 1, at 452–53.

Court was attempting to achieve. In sum, although the Court sought to preserve the Union, it produced a system that exacerbated the antislavery backlash against rendition and bolstered the Southern case for secession. The history of *Prigg* therefore suggests that courts should issue limited and incremental rulings when attempting to produce social change on divisive issues.

Part of this story is well known.[8] Scholars have detailed how *Prigg* contributed to the nullification of the Fugitive Slave Act of 1793 by cutting the states out of the rendition process.[9] Because few federal officers were available to assist in rendition, state noncooperation effectively nullified the Fugitive Slave Act of 1793.

This Article contributes to the historical understanding of *Prigg* by arguing that the decision also shaped the content of the Fugitive Slave Act of 1850 and Southern opinion on its enforcement. By undermining enforcement of the Fugitive Slave Act of 1793, *Prigg* unwittingly empowered a group of Southern congressmen who, because of unique political circumstances, had every reason to want the fugitive issue to remain divisive. As a result, even though most Southerners believed that the Northern states had a constitutional obligation to assist in rendition,

8. Scholars have also extensively debated whether Justice Story's opinion in *Prigg* was an antislavery decision. For the argument that *Prigg* was proslavery, *see* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 220–21 (Ward M. McAfee ed., 2001) [hereinafter FEHRENBACHER, THE SLAVEHOLDING REPUBLIC]; Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 250–51 (1994) [hereinafter Finkelman, *Story Telling*]; Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1086, 1088–1089 (1993); William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court*, 1820–1860, 65 J. AM. HIST. 34, 46–47 (1978). For the argument that *Prigg* can be seen as consistent with a moderate antislavery viewpoint, *see* Leslie Friedman Goldstein, *A "Triumph of Freedom" After All?* Prigg v. Pennsylvania *Re-examined*, 29 L. & HIST. REV. 763, 766–768 (2011); EARL MALTZ, SLAVERY AND THE SUPREME COURT, 1825–1861, 136–37 (2009) [hereinafter MALTZ, SLAVERY AND THE SUPREME COURT]; Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 273–74 (1988). H. Robert Baker takes a middle route, claiming that *Prigg* was "a conservative attempt to reinstate older constitutional arrangements against an aggressive new Southern constitutionalism." H. Robert Baker, *A Better Story in* Prigg v. Pennsylvania*?*, 39 J. SUP. CT. HIST. 169, 170 (2014) [hereinafter Baker, *A Better Story*].

9. H. ROBERT BAKER, PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION 157–58, 162–65 (2012) [hereinafter BAKER, PRIGG V. PENNSYLVANIA]; H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133, 1134–35 (2012) [hereinafter Baker, *The Fugitive Slave Clause*].

Congress passed a harsh proslavery law and rejected any proposal that would have made its enforcement more acceptable in the North. In large part because of the same political dynamics and the constitutional doctrine announced in *Prigg*, Congress made no attempt to require the Northern states to fulfill what most Southerners saw as a sacred constitutional duty to assist in rendition.

Although some sectional conflict over fugitive slaves was inevitable, the Court's ruling transformed the issue into a major source of sectional animosity in the decade before secession. If the Court had rendered a narrow decision, more closely tied to the facts before it, Congress probably would never have passed the Fugitive Slave Act of 1850. Federal enforcement of the proslavery Fugitive Slave Act, moreover, created an antislavery backlash in the North that made rendition costly and dangerous. Rather than appeasing the South, federal enforcement under such conditions succeeded only in convincing Southerners that slavery was not safe within the Union.

This Article proceeds in four Parts. Part I examines *Prigg* and its legal and political context. Part II argues that *Prigg* played a central role in shaping the antebellum fugitive slave controversy. Part III contends that a more limited decision in *Prigg* could have allowed Congress and the states to develop a less divisive fugitive slave regime. Part IV briefly canvasses the literature on courts and backlash, and explains how the history of *Prigg* can inform the discussion.

II. THE COURT'S DECISION IN *PRIGG*

A. Early Background

Unlike the Constitution's other compromises with slavery, there is little record of the debate over the Fugitive Slave Clause.[10] On August 28, 1787, Charles Pinckney and Pierce Butler "moved 'to require fugitive slaves and servants to be delivered up like criminals.'"[11] The only discussion of the Clause came from James Wilson, who objected that "[t]his would oblige the Executive of the State to do it, at the public expence," and Roger Sherman, who "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse."[12] The next day,

10. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 32, 82–83 (1996).

11. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand ed., 1911).

12. *Id.*

Butler proposed language that, with some minor alterations and no further debate, became the Fugitive Slave Clause.[13] The text of the Fugitive Slave 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.[14]

While the text clearly prohibited the states from liberating fugitives, the remainder is 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. Because the language was proposed in response to Wilson and Sherman's objections to the use of state power, it is entirely plausible, perhaps even probable, that the framers thought the Clause merely prevented states from actively freeing fugitives and imposed no further duties on the states or federal government.[15]

13. *Id*. at 446, 453–54. The Clause also received little attention during Ratification, as it was only mentioned in passing by Southern supporters of the Constitution. *See id*. at vol. 3, 83–85 (North Carolina Delegates to Governor Caswell), 252–55 (speech of delegate Charles Cotesworth Pinckney in South Carolina House of Representatives), 324–25 (debate in the Virginia Convention). The framers either did not anticipate the Clause's importance or found it uncontroversial due to their common law heritage of rendition. At the time of the Convention, none of the states had legislation freeing runaways, and fugitive slaves perhaps only found safety in Massachusetts. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 22–24. Southerners may have nevertheless proposed the Fugitive Slave Clause because, without it, English common law would have allowed the northern states to free any slaves within their borders. *Id.* at 26-27. Southerners were no doubt aware of Somerset v. Stewart (1772) 98 Eng. Rep. 499, 499, 510 (KB). James Somerset was a slave who had been transported by his owner from Virginia to England. While held on a ship in England that was bound for Jamaica, Somerset brought a writ of habeas corpus seeking his freedom. Lord Mansfield, the Lord Chief Justice of the King's Bench, held that slavery was "so odious" that it could only be supported by statute. Because no statute allowed for slavery within England, Somerset's owner had no authority to detain him as a slave. *Id.* The slave codes of America and Jamaica, in other words, had no legal effect within England. By the same reasoning, if a slave escaped from Virginia to Massachusetts at the time of the Constitutional Convention, a Massachusetts court following English common law might hold that no law held the person to slavery. Just as colonial slave law had no force in England, the slave codes of Virginia had no legal effect within Massachusetts. Simply put, without a Fugitive Slave Clause, northern states could free any slave that escaped into their borders.

14. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

15. *See* Baker, *A Better Story*, *supra* note 8, at 171–72.

Congress, however, implicitly claimed legislative power under the Clause by enacting the Fugitive Slave Act of 1793.[16] This Act authorized a claimant "to seize or arrest" a fugitive and bring him before a judge or magistrate.[17] 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. The Act, however, did not require the owner to use such legal procedures or provide penalties for false claims.[18]

During the early Nineteenth Century, many Northern congressmen attempted to amend the Act to include a "provision to prevent the apprehension of free persons of color, under pretense of their being slaves."[19] Southern congressmen, however, blocked even the most limited federal anti-kidnapping legislation. They argued both that the Constitution delegated no power to Congress to pass such laws and that the issue could best be resolved by the states.[20] William L. Smith of South Carolina, for example, asserted that the "House ought not to interfere with the individual States on the subject."[21] Congress ultimately delegated the issue to the Commerce Committee, which issued the following: "*Resolved*, That it is not expedient for this House to interfere with any existing law of the States on this subject."[22]

Southerners also attempted to amend the Fugitive Slave Act. Despite earlier pleas to leave the matter to the states, in 1817, Southern congressmen introduced an amendment to the Act that would have made it difficult for Northern states to protect free blacks from kidnapping.[23] Under this amendment, a Southern claimant could obtain a certificate of removal from a judge in the Southern state from which the fugitive had fled.[24] If such a certificate were presented to a Northern judge or justice of the peace, the Northern official was required to issue a warrant for the fugitive named therein.[25] So long as the Northern judge or justice was

16. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864).
17. *Id.*
18. *Id.*
19. 31 ANNALS OF CONG. 830 (1818).
20. *See* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861, at 30 (1974).
21. 6 ANNALS OF CONG. 1734 (1796). He continued: "Let not the General Government intermeddle with the States' policy; it might cause very considerable contests and injury." *Id.* at 1735.
22. *Id.* at 1895–96 (1797).
23. H.R. 18, 15th Cong. (1817).
24. *Id.* § 1.
25. *Id.* § 2.

satisfied that the person apprehended was the person listed in the certificate, he was required to issue a warrant commanding a state officer to deliver the fugitive to the claimant.[26] Penalties would be imposed on any state officer who failed to comply with these procedures.[27] In essence, the amendment would have forced state officers to enforce the Fugitive Slave Act and made it difficult for them to find in favor of freedom.[28]

Many Northern congressmen, however, opposed the amendment because it both interfered with state procedures and made it easier for slave catchers to kidnap free blacks. Some congressmen were concerned that it would emasculate any review of the fugitive's claim to freedom under habeas corpus, effectively suspending the writ.[29] Others complained that "the bill contained provisions dangerous to the liberty and safety of the free people of color,"[30] and thus "freemen might be apprehended as slaves."[31] It was further objected that the federal government could not force state officers to enforce federal law.[32] Northerners therefore proposed several amendments to moderate the bill, but each proposal was rejected.[33] Although the amended bill ultimately passed the House and the Senate, it was then tabled by the House before it could be reconciled and presented to the President.[34]

These congressional debates illustrate the difficulty facing any adjustment to the nation's policy on fugitive slave rendition. Southern congressmen were unwilling to compromise or acknowledge that the North had a legitimate interest in protecting free blacks from kidnapping.[35] The issue was further complicated by the fact that, for many congressmen, "[t]he duty of delivering up the slave is imposed on

26. *Id.* In other words, the Northern judge could not question whether the person listed in the certificate was in fact a slave. *Id.*

27. *Id.* §§ 4–5.

28. The amendment was likely proposed because of concern that Northern courts were interfering with rendition through legal procedures like habeas corpus and favoring claims to freedom. MORRIS, *supra* note 20, at 35.

29. *See* 31 ANNALS OF CONG. 826 (1818).

30. *Id.* at 837.

31. *Id.* at 828. In fact, several amendments were proposed to address the kidnapping issue, but each amendment—except for one particularly toothless provision—was voted down. *See* H.R. 18, 15th Cong. (1818); MORRIS, *supra* note 20, at 39–40.

32. MORRIS, *supra* note 20, at 36–37.

33. 31 ANNALS OF CONG. 829–30 (1818); MORRIS, *supra* note 20, at 36–40.

34. MORRIS, *supra* note 20, at 40.

35. *See id.*

the State."[36] The Southern amendment was thus designed to force the Northern states to aggressively fulfill their duty to return fugitive slaves. Many Northerners, however, were unwilling to give slave catchers free rein in the North. In the early nineteenth century, it seemed that a national compromise on fugitive slaves was unlikely to come from Congress.[37]

With Congress unable to act, many state governments passed legislation meant to supplement the provisions of the Fugitive Slave Act of 1793. Prior to the Supreme Court's decision in *Prigg v. Pennsylvania* in 1842, state legislation typically provided protections to free blacks against kidnapping and offered state assistance to slave catchers who complied with state procedures. These early laws were essentially the type of compromise measures that Congress had been unable to pass.

Pennsylvania's Personal Liberty Law of 1826, which became the subject of *Prigg*, is a good example. Under pressure from neighboring Maryland, Pennsylvania's law required any person claiming a fugitive slave to apply to a state judicial officer for an arrest warrant.[38] After the fugitive's arrest, the judge was required to issue a certificate of removal if he was satisfied that the person claimed owed service.[39] 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.[40] In fact, the law's sponsor advocated it as a compromise measure, and a commissioner from Maryland praised it, "because it is a pledge, that states will adhere to the original obligations of the confederacy."[41] Other states enacted similar legislation.[42]

36. 31 ANNALS OF CONG. 828 (1818) (statement of Rep. Pindall of Virginia). Similarly, Rep. Strong asserted that the Fugitive Slave Clause was "a compact, the mode of executing which the non-slaveholding States had reserved." *Id.*

37. MORRIS, *supra* note 20, at 41.

38. *Id.* at 46, 51–52.

39. *Id.* at 52.

40. *Id.* at 50–52. The law also required the claimant to produce more evidence of ownership than merely his own oath, and it provided the alleged slave with an opportunity to refute the claim. *Id.* at 52.

41. *Id.* at 52–53.

42. Indiana, New Jersey, and New York all passed legislation for fugitive slave recaption in the 1820s. *See* Baker, *A Better Story*, *supra* note 8, at 176. In response to pressure from Kentucky, Ohio also passed such compromise legislation as late as 1839. *See* MORRIS, *supra* note 20, at 90–91. In states without formal legislation, courts often used common law procedures such as the writ of habeas corpus to provide some protections to people claimed as fugitives. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 63–64

Such state legislation operated in concert with the federal Fugitive Slave Act of 1793. Under this system, federal law governed the rendition of fugitive slaves, whereas state law punished unlawful kidnapping of black residents.[43] As Baker argues, the distinction between fugitive rendition and protection from kidnapping "was artificial, but it worked."[44] The distinction was artificial because both regimes involved an initial determination of whether the claimed individual was a fugitive slave.[45] The system nevertheless worked 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.[46]

While this overlapping system of state and federal law prevented major sectional conflict, public opinion on slavery changed dramatically during the 1830s.[47] Among other things, this decade saw the rise of the abolitionist movement, popularization of the idea that slavery was a positive good, the gag rule controversy in Congress, Nat Turner's slave revolt, and South Carolina's nullification controversy. As a result, opinion on the fugitive slave issue became increasingly 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 slave rendition.[48]

Despite these forces, the cooperative system of state and federal fugitive slave laws continued into the 1840s. Although attempts were made to repeal or amend state fugitive slave legislation, moderates blocked such proposals due to a desire to accommodate the South.[49] Moreover, the Ohio act, passed in 1839, demonstrates that the cooperative system of state and federal legislation, though strained, remained viable even in the context of rising sectional polarization on slavery. Before the Supreme Court intervened in *Prigg*, therefore, the states managed to balance competing sectional concerns and implement a

43. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 54.
44. *Id.* at 63.
45. *See id.*
46. *See id.*
47. *See* ALFRED L. BROPHY, UNIVERSITY, COURT, & SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF CIVIL WAR 98–100 (2016).
48. *See generally* MORRIS, *supra* note 20, at 59–93.
49. *See id.* at 84–88.

compromise regime despite congressional gridlock on the issue of fugitive slaves.[50]

Prior to *Prigg*, few courts challenged the nation's fragile regime for the rendition of fugitive slaves.[51] Several cases explicitly declared that the federal act was constitutional, though they provided little or no analysis.[52] 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.[53]

Those few state judges who found elements of the system unconstitutional reached profoundly different conclusions. In *Jack v. Martin*,[54] New York Supreme Court Judge (and future U.S. Supreme Court Justice) Samuel Nelson held that Congress's power to legislate was exclusive and that the Fugitive Slave Clause "prohibits the [s]tates from legislation upon the question involving the owner's right to this species of labor."[55] New York's Court for the Correction of Errors, however, affirmed on narrower grounds, stating that it "expressly declin[ed] to pass upon the *constitutionality* of the law of Congress and of the [s]tatute of this State."[56] In a concurring opinion, Chancellor Walworth stated that he would have held 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.[57] As Pennsylvania's Attorney

50. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 63–64; STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 29–30 (2010).

51. *See* Baker, *The Fugitive Slave Clause*, *supra* note 9, at 1148–1156.

52. *See* Johnson v. Tompkins, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833) (No. 7,416); Commonwealth v. Griffith, 19 Mass. 11, 20–21 (1823); Wright v. Deacon, 5 Serg. & Rawle 62, 63–64 (Pa. 1819); *In re* Susan, 23 F. Cas. 444, 444–445 (C.C.D. Ind. 1818).

53. *See Griffith*, 19 Mass. at 19 (asserting that "a *habeas corpus* would lie to obtain the release of the person seized" under the Fugitive Slave Act); *see generally* 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).

54. Jack v. Martin, 12 Wend. 311 (N.Y. Sup. Ct. 1834).

55. *Id.* at 321. Judge Nelson later served as an associate justice of the United States Supreme Court from 1845 to 1872. *Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited Aug. 5, 2018).

56. Jack v. Martin, 14 Wend. 507, 507 n.a1 (N.Y. 1835) (emphasis added).

57. *See id.* at 524. For a similar conclusion reached by New Jersey Superior Court Chief Justice Joseph Hornblower, see New Jersey v. Sheriff of Burlington (N.J. Super. Ct. 1836) (unpublished opinion), as *reprinted in* Opinion of Chief Justice Hornblower, on the Fugitive Slave Law (on file with author).

General accurately stated in 1842, "[t]he cases, such as they are, unfortunately, are few, conflicting and contradictory."[58]

B. The Facts and Arguments Before the Court

Because Northerners and Southerners were both increasingly unwilling to compromise on fugitive slaves, Congress was unable to pass any amending legislation, and the lower court precedent was unsettled, the border states of Pennsylvania and Maryland asked the Supreme Court to resolve the fugitive slave issue in the case that became *Prigg v. Pennsylvania*.[59] The case arose in 1837 when a group of Maryland slave catchers led by Edward Prigg applied for a warrant for the arrest of Margaret Morgan and her children as fugitive slaves in Pennsylvania.[60] After a justice of the peace issued the warrant, a constable arrested Morgan and her children.[61] Rather than seek a certificate of removal, however, Prigg then spirited Morgan and her children back to Maryland without any further legal process.[62] Once in Maryland, Morgan brought a suit for her freedom, but a Maryland jury found that she was a slave under Maryland law.[63]

Although Morgan was thereafter condemned to slavery, a Pennsylvania grand jury indicted Prigg for removing her without a certificate of removal from a court of record in Pennsylvania, as required under the state's Personal Liberty Law.[64] When the Governor of Pennsylvania requested Prigg's extradition, Maryland negotiated for his surrender as part of a test case for the constitutionality of Pennsylvania's

58. Prigg v. Pennsylvania, 41 U.S. 539, 591 (1842).

59. *Id.* at 539. In the opinion of the Court, Justice Story asserted that the case:

> [H]as been brought here by the co-operation and sanction, both of the state of Maryland, and the state of Pennsylvania, in the most friendly and courteous spirit, with a view to have those questions finally disposed of by the adjudication of this court; so that the agitations on this subject, in both states, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest.

Id. at 609.

60. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 108. Although she was never formally manumitted, Morgan 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 years. *Id.* at 103. When her parents' master died, however, his widow sought to claim Morgan and her children as fugitive slaves. *Id*. at 102–04.

61. *See id.* at 108.

62. Baker speculates that Prigg may have worried that Morgan's husband would raise abolitionist resistance or mount a legal defense. *See id.* at 109.

63. *See id.* at 109–10.

64. *See* Finkelman, *Story Telling*, *supra* note 8, at 249, 252–53.

1826 law.[65] Under this agreement, the parties agreed to a set of facts that were entered into the record as a special verdict.[66] This verdict found that 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.[67] Based on these facts, the Pennsylvania courts convicted Prigg for violating the state's Personal Liberty Law, and a writ of error was taken to the United States Supreme Court.[68]

Both parties urged the Court to use the case as an opportunity to adopt a sweeping interpretation of the Fugitive Slave Clause. As Justice Story's opinion for the Court explains, Pennsylvania and Maryland brought the case "to have those questions finally disposed of by the adjudication of this court; so that the agitations on this subject, in both states, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest."[69] The parties therefore asked the Court to choose between three comprehensive interpretations of the Fugitive Slave Clause, each of which had some basis in the text of the Constitution and lower court precedent.

First, Maryland argued that the Fugitive Slave Clause granted Congress exclusive power to legislate for the rendition of fugitive slaves. Relying on Judge Nelson's opinion in *Jack v. Martin*,[70] Maryland contended that the Clause granted power to Congress because "the idea that the framers of the constitution intended to leave the legislation 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, cannot be admitted."[71] Moreover, Maryland argued that the Fugitive Slave Clause implicitly prohibited state legislation because "if the power of enforcing its execution were left to the states, it could not but have been foreseen, that its whole purpose might be defeated."[72] Using this

65. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 119–22.
66. *See* Prigg v. Pennsylvania, 41 U.S. 539, 557–58 (1842).
67. *See id*. at 556–57.
68. *See id.* at 557–58.
69. *Id.* at 609.
70. Jack v. Martin, 12 Wend. 311 (N.Y. Sup. Ct. 1834).
71. *See Prigg*, 41 U.S. at 565 (quoting Jack v. Martin, 12 Wend. 311, 319 (N.Y. Sup. Ct. 1834)). Maryland also relied on the Fugitive Slave Act of 1793, which was passed by many participants of the Constitutional Convention, as evidence of the framer's intent to give power to Congress. *Id.*
72. *Id*. at 565. Counsel for Maryland further explained that "the mode of proceeding ought to be uniform" because varying state procedures would make rendition difficult. *Id.* at 569.

reasoning, the Court could strike down all state legislation on the subject of fugitive slaves.

Second, Pennsylvania urged the Court to hold that the Fugitive Slave Clause granted no power to Congress and thus must be enforced only by state legislation. Citing the opinion of Chancellor Walworth, Pennsylvania contended that, while other clauses in Article IV explicitly granted enforcement power to Congress, the lack of such a grant in the Fugitive Slave Clause implied that Congress had no such power.[73] The State further argued that state legislation would be more effectual than an exclusively federal regime because, if the federal government were to legislate with the "animosity of deadly foes," it would "produce construction and collision with the free states."[74] According to Pennsylvania, "[t]he states are the best judges of that mode of delivering up fugitive slaves, which will be most acceptable to their citizens."[75]

Pennsylvania's invitation to declare the Fugitive Slave Act of 1793 unconstitutional and turn the issue exclusively over to the states, however, was likely not a viable option for the Court in 1841. The Act had been in place for decades and was enacted by a Congress that included many of the framers of the Constitution. It likely would have been difficult for the Court to rule against this historical practice, especially at a time when judicial review of federal legislation was uncommon.[76] Moreover, from a political perspective, it is difficult to imagine the Taney Court handing down such a strong antislavery ruling.

Perhaps realizing the weakness of its primary argument, Pennsylvania also presented the Court with a third option: the Court could sanction the preexisting history of state and federal cooperation. Pennsylvania argued extensively that, if Congress had power to legislate under the Fugitive Slave Clause, such power was not exclusive. According to Pennsylvania, the Fugitive Slave Act of 1793 was a precedent for federal-state cooperation. By relying on state officers for enforcement, the Fugitive Slave Act of 1793 "contemplated the co-

73. *See id*. at 584–85.
74. *See id*. at 584.
75. *Id*. at 595.
76. *See* Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 811–14 (2011). Nineteenth-century jurists generally believed that, when the Constitution was unclear, deliberate actions from Congress or the judiciary could "fix" or "liquidate" constitutional meaning and thus provide a "permanent exposition of the constitution." Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527–29 (2003) (quoting James Madison).

operative or concurrent aid of state legislation."[77] Pennsylvania asserted that "[t]he acts of [C]ongress and of Pennsylvania form together an harmonious system, neither jarring nor conflicting in any part of its operation."[78]

Given the posture of the case, however, the viability of this third option was also questionable. The cooperative system that had developed under the Fugitive Slave Act of 1793 allowed states to create procedural safeguards to ensure that the individual claimed was a fugitive slave rather than a free black resident.[79] The record before the Court, however, dictated that Margaret Morgan was a slave. Rather than providing legal process to a person claiming freedom, Pennsylvania's Personal Liberty Law operated to punish Prigg for seizing an acknowledged fugitive. The application of Pennsylvania's statute to Edward Prigg therefore would not have fit within the preexisting framework.

This is not to say, however, that the Court was forced to choose between the options presented by the parties. Instead, the Court could have rejected the parties' invitation to pronounce a broad interpretation of the Fugitive Slave Clause. For example, the Court could have narrowly held that the Fugitive Slave Clause prohibited Pennsylvania from punishing Prigg for seizing an acknowledged fugitive slave. Such a narrow ruling would have preserved the existing constitutional order because it would have had no application in the typical case where the alleged fugitive's status was in question. It also would have left the door open for continued state experimentation and congressional legislation.

If forced to confront the issue again in future cases, the Court could have incrementally adopted Pennsylvania's suggestion of allowing for state and federal cooperation. In this way, the Court perhaps could have found a way to strike down state legislation that interfered with the federal law while at the same time uphold state legislation designed to truly prevent the abuse of kidnapping. The Court perhaps also could have incrementally imposed affirmative requirements on the states in appropriate cases, such as a requirement that states place alleged fugitives in custody if requested by the claimant prior to a hearing. Although each party urged the Court to issue a broad settlement of the

77. *Prigg*, 41 U.S. at 599.

78. *Id*. at 600. Pennsylvania further argued that Southern claimants had no constitutional right to reclaim alleged fugitives outside the prescribed state legislative process. *Id*. at 576, 604.

79. *See* BAKER, PRIGG V. PENNSYLVANIA, *supra* note 9, at 63.

fugitive slave issue, the Court could have adopted a more incremental approach.

C. The Court's Opinion

Justice Joseph Story's opinion for the Court, however, accepted the parties' invitation to issue a comprehensive interpretation of the Fugitive Slave Clause.[80] The Court began its analysis by holding that the Fugitive Slave Clause granted a slave owner "entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it."[81] According to Justice Story, however, this private right of recaption would be meaningless without supporting legislation. He 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.[82]

Justice Story further reasoned that the necessity for legislative action implied that the Fugitive Slave Clause must grant legislative power to Congress. He explained that, as a matter of constitutional law, "where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist."[83] 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. This duty must be exclusively federal, Justice Story further reasoned, because the states could not be trusted to enact legislation to aid in rendition.[84] For

80. *See* Baker, *Fugitive Slave Clause*, *supra* note 9, at 1157–60. Chief Justice Taney likely assigned the opinion to Justice Story in part because Story's antislavery credentials would avoid the appearance of a sectional proslavery decision. *Id.* at 1157–58.

81. *Prigg*, 41 U.S. at 613.

82. *Id*. at 613–14.

83. *Id*. at 615.

84. *See id.* at 614–15, 624 (stating that private recaption "may be restricted by local legislation" and that state legislative power would thereby "amount to a power to destroy the rights of the owner"). Justices Wayne and McLean made similar arguments. *Id.* at 644–45, 662. *Prigg's* exclusivity doctrine, however, was rejected by the Court later in *Moore v. Illinois*, which holds that states may pass legislation assisting fugitive slave claimants. *See Moore v. Illinois*, 55 U.S. (14 How.) 13, 15–16 (1852). In fact, Justice Story's argument for implying any congressional power from the Fugitive Slave Clause is questionable, as the text and placement of the Clause in Article IV—which primarily deals with state obligations—more naturally suggests that the states rather than the federal government had the duty to return fugitive slaves.

Justice Story, only congressional legislation could fulfill the promise of the Fugitive Slave Clause.[85]

Justice Story also held that the states could not interfere with fugitive rendition through the guise of anti-kidnapping legislation passed under a state's police powers. "[A]ny state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave," he stated, would violate the owner's constitutional right to private recaption.[86] Justice Story therefore implicitly invalidated all state personal liberty laws designed to give some legal process to individuals claimed as fugitive slaves. In effect, *Prigg* declared unconstitutional the cooperative system of overlapping state and federal laws that had worked as an effective compromise system for decades.

In a precursor to the modern anti-commandeering doctrine, Justice Story also stated that Congress could not require state officers to enforce the federal Fugitive Slave Act. Although he held that the Act was "clearly constitutional, in all its leading provisions," he made an exception for "that part which confers authority upon state magistrates."[87] He further stated that "a difference of opinion" existed as to "whether state magistrates are bound to act under it."[88] Justice Story thus not only held 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 holding that Pennsylvania's Personal Liberty Law was unconstitutional, resulting in a reversal of the judgment against Edward Prigg.[89] Pennsylvania could not

85. Although Justice Story asserted that the Fugitive Slave Clause's presence in the federal Constitution implied that the federal government had a duty to enforce it, this assertion cannot justify his holding. Justice Story's argument appears to be circular, as the 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. *See Prigg*, 41 U.S. at 628–29. For example, Chief Justice 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. *Id.* at 629. Chief Justice 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.*

86. *See id.* at 612.

87. *Id.* at 622.

88. *Id.* The justices, however, agreed that "state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation." *Id.*

89. *See id.* at 625–26.

"interfere with, or . . . obstruct, the just rights of the owner to reclaim his slave" by providing legal protections to persons claimed as fugitives.[90] Moreover, because the jury had found that Margaret Morgan was in fact a fugitive slave, Pennsylvania could not interfere with Prigg's private right of recaption.[91] As Justice Story explained, the Act was unconstitutional because "[i]t purports to punish as a public offence against that state, the very act of seizing and removing a slave, by his master, which the constitution of the United States was designed to justify and uphold."[92]

Although the ultimate disposition of the case was perhaps inevitable, Justice Story's sweeping exposition of the Fugitive Slave Clause was not. As explained above, traditional legal sources supported a range of interpretations, and the record allowed the Court to issue a very narrow holding. Justice Story therefore chose to strike down compromise state legislation, find an exclusive power in Congress, and cast doubt on the need of state magistrates to enforce the law in large part because of policy judgments. In fact, Justice Story's legal conclusions were often based on policy judgments. For example, federal power under the Fugitive Slave Clause, as well as its exclusive nature, were implied from Justice Story's practical judgment that federal legislation was needed to provide for an effective system. Any argument that legal considerations forced the Court to rule as it did is thus incomplete.[93] For the Court, legal considerations and practical considerations were inextricably intertwined.

The Court's federal exclusivity doctrine was especially questionable from a legal standpoint.[94] Southerners had long stressed that the states

90. *Id.* at 625.

91. *See id.* at 565–57, 626. Aside from a brief mention in his statement of the facts, Justice Story makes no mention of Morgan's daughter, who was born in Pennsylvania. *Id.* at 539.

92. *Id.* at 626.

93. For an argument that Justice Story was constrained by positive law, see ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 238–43 (1975).

94. The Court's anti-commandeering holding was also not legally required. Wesley Campbell argues that most in the founding era thought federal commandeering of state officers was a legitimate way to avoid the need for a federal bureaucracy, which anti-Federalists feared as a threat to liberty. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1175 (2013). Although attitudes on commandeering became more hostile over the nineteenth century, the Court could have relied on an impressive array of founding era sources to hold that Congress has the power to force state officers to enforce federal law. *Id.* at 1176–80. Moreover, in his dissenting opinion, Justice McLean stated that the federal government could require state officers to enforce the federal Fugitive Slave Act. *See Prigg*, 41 U.S. at 664–65.

had a constitutional obligation to enforce the Fugitive Slave Clause. In fact, although Chief Justice Taney, Justice Thompson, and Justice Daniel all agreed that state legislation could not "obstruct" fugitive slave reception, they argued that the states had a "duty, to protect and support the owner" during rendition.[95] For example, Chief Justice Taney asserted that the Fugitive Slave Clause was "designed to impose it as a duty upon the people of the several states, to pass laws to carry into execution, in good faith, the compact into which they thus solemnly entered into with each other."[96] Chief Justice Taney presciently warned that "if the state authorities are absolved from all obligation to protect this right, and may stand by and see it violated, without an effort to defend it, the act of congress of 1793 scarcely deserves the name of a remedy."[97] In fact, the Court adopted Chief Justice Taney's view just ten years later in *Moore v. Illinois*.[98]

In a dissenting opinion, moreover, Justice McLean offered an alternative rationale for the constitutionality of state fugitive slave legislation. While McLean agreed that state legislation could not conflict with the federal Fugitive Slave Act, he argued that the states' personal liberty laws posed no such conflict. According to McLean, each level of legislation addressed a different issue: "The [federal] act of 1793 authorizes a forcible seizure of the slave by the master . . . to take him before some judicial officer within it. The law of Pennsylvania punishes a forcible removal of a colored person out of the state."[99] According to McLean, these laws "stand in harmony with each other"[100] because, although the Constitution required the rendition of fugitive slaves, a state could first demand proof that the person claimed was in fact a fugitive.[101] McLean therefore would have largely upheld the preexisting system of

95. *See id.* at 626–36, 650–58.

96. *Id.* at 628. Taney, however, agreed with the Court that any state legislation that interfered with an owner's private right of recaption would be unconstitutional. *Id.* at 627. Taney therefore believed the states could only pass legislation to assist the owner.

97. *Id.* at 630. Justice Daniel likewise argued that the doctrine of federal exclusivity would remove "every incentive of interest in state officers, or individuals, and by the inculcation of a belief that any co-operation with the master becomes a violation of law," any chance of assistance from the public of local officers would be lost. *Id.* at 657.

98. *See Moore v. Illinois*, 55 U.S. (14 How.) 13, 15–17 (1852).

99. *Prigg*, 41 U.S. at 669.

100. *Id.*

101. As noted above, however, because the record stated that Morgan was a fugitive slave, this analysis does not seem to fit the facts of the case before the Court.

cooperative state and federal law.[102] He warned that Court's prohibition on state legislation would undermine state sovereignty and the presumption of freedom in the North.[103] In sum, McLean's opinion demonstrates that, under existing law, the Court realistically could have upheld state compromise legislation like Pennsylvania's Personal Liberty Law. Neutral legal principles therefore did not require the Court to strike down Pennsylvania's law.

III. *PRIGG'S* INFLUENCE ON THE ANTEBELLUM FUGITIVE SLAVE ISSUE

In his argument before the Court, Pennsylvania's attorney general ominously warned: "Deny the right of the states to legislate on this subject . . . and you [will] arouse a spirit of discord and resistance that will neither shrink nor slumber, till the obligation itself be cancelled, or the Union which creates it be dissolved."[104] His warning proved prescient. As Justice McLean had anticipated in dissent, the prohibition on state legislation caused many Northerners to feel that slavery was being forced into the Free States. Moreover, Southerners would never accept the Court's holding that the Constitution imposed a duty only on the federal government to return fugitive slaves. By effectively removing states from the process, *Prigg* made it inevitable that many Southerners would believe that the Northern states had nullified their constitutional duty to return fugitive slaves.

A. The Need for a New Federal Fugitive Slave Act

Although Southerners had sought to amend the Fugitive Slave Act of 1793 before *Prigg*, the Court's decision quickly made the fugitive slave issue a major Southern grievance. As detailed above, before *Prigg*, state officers had enforced federal law while often providing legal protections under state law to prevent the kidnapping of free blacks. As Paul Finkelman and others have demonstrated, many Northern states responded to *Prigg* by withdrawing all state assistance on fugitive slave rendition.[105]

102. McLean feared that the Court's prohibition on such state legislation would undermine state sovereignty and the presumption of freedom in the North.

103. McLean also stated that the federal government could require state officers to enforce the federal fugitive slave act. *Id.* at 664–65.

104. *Prigg*, 41 U.S. at 605–06.

105. *See* Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, *in* ABOLITIONISM AND AMERICAN LAW 199, 216 (John R. McKivigan ed., 1999) [hereinafter Finkelman, *Northern State Courts*].

Not only did *Prigg* strike down Pennsylvania's Personal Liberty Law and implicitly invalidate similar legislation in other states,[106] but it also helped to channel antislavery feeling into noncooperation. Northern judges used *Prigg's* anti-commandeering principle to avoid hearing cases under the federal Fugitive Slave Act.[107] As Finkelman explains: "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."[108] State noncooperation effectively nullified the Fugitive Slave Act of 1793.

Without the precedent of *Prigg*, it is unlikely that most of these state judges would have refused to hear fugitive cases. In *Justice Accused*, Robert Cover explains that antebellum judges felt constrained to follow the dictates of the positive law, even when such law conflicted with their antislavery views.[109] After *Prigg* held that the Act was constitutional, antislavery judges could not realistically disagree while remaining faithful to their judicial role. If *Prigg* had ended there, they 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.[110]

Just as state judges used *Prigg's* anti-commandeering doctrine as an excuse to refuse to hear fugitive cases, state legislatures used *Prigg's* federal exclusivity doctrine as a justification to pass personal liberty laws.[111] These laws codified noncooperation by barring state judges and law enforcement officers from assisting in rendition and by prohibiting

106. Although the Court later ruled that states could pass legislation aiding fugitive claimants in *Moore v. Illinois*, 55 U.S. (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.

107. *See* Finkelman, *Northern State Courts*, *supra* note 105, at 216.

108. *Id*. Although Story had merely suggested that Congress could not require state officers to enforce the federal Act, antislavery lawyers and state judges often distorted this doctrine to claim that state officers lacked the power to hear fugitive cases. *Id.* at 219.

109. *See* COVER, *supra* note 93, 229–38. Antebellum judges justified their role in government by claiming that formal legal principles limited judicial discretion; they therefore rejected any theory of judging that allowed judges to impose their personal beliefs on the nation. *Id.* at 131-148.

110. *See* Finkelman, *Northern State Courts*, *supra* note 105, at 217–19.

111. *Id*. at 215.

the use of state jails. In the six years following *Prigg*, six Northern states passed such laws.[112]

The personal liberty laws reflected growing opposition to slavery in the North. 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.[113] *Prigg*'s direct contribution to the antislavery movement paled in comparison to these larger national events.[114]

Nevertheless, *Prigg* played a major role in channeling 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.[115] For example, 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.[116] However, because *Prigg* had held that the Fugitive Slave Clause placed a duty exclusively on the federal government, noncooperation was constitutionally legitimate in the eyes of many Northerners. If *Prigg* had instead held that states had a concurrent duty to return fugitive slaves, the personal liberty laws may not have drawn as much Northern support.

In sum, although *Prigg* did not directly create significant sectional hostility to slavery, the decision played an important role in directing the rising antislavery impulse of the North into noncooperation on fugitive slaves. Because few federal officers were available in the states, Southern claimants were usually on their own.[117] Although slave catchers sometimes utilized the private right of recaption, local sympathies often

112. *Id*. Massachusetts, Vermont, Connecticut, New Hampshire, Pennsylvania, and Rhode Island all passed legislation prohibiting state officials from assisting federal rendition. *Id.* Moreover, Ohio repealed an act that had required state officials to assist in federal rendition. *Id.* After the Fugitive Slave Act of 1850 was passed, Ohio, Wisconsin, Maine, and the Minnesota Territory also passed such legislation. *Id.*

113. WILLIAM FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 350–53 (1990).

114. Although *Prigg* drew the scorn of abolitionists, most Northerners were not troubled by the decision. MORRIS, *supra* note 20, at 104–05.

115. *Id*. at 112–13.

116. *Id*. at 113.

117. Paul Finkelman, *The Appeasement of 1850*, *in* CONGRESS AND THE CRISIS OF THE 1850S, at 36, 69 (Paul Finkelman & Donald Kennon eds., 2012).

made recovery impractical.[118] Without state cooperation, the Fugitive Slave Act of 1793 was virtually a dead letter.

Northern nullification of the Fugitive Slave Act of 1793 outraged Southerners and provided a strong impetus for a new federal law at midcentury. Henry Clay, for example, 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."[119] Although *Prigg* had held that the Constitution imposed an exclusive duty on the federal government to return fugitive slaves, many Southerners continued to believe that the states had a concurrent obligation.[120] A Virginia legislative committee, for example, called the personal liberty laws a "disgusting and revolting exhibition of faithless and unconstitutional legislation."[121]

Because of its Constitutional dimensions, the importance of the fugitive slave issue was "not to be estimated, as some seem to suppose,

118. *See* Finkelman, *Northern State Courts*, *supra* note 105, at 217. In one famous case, for example, George Latimer was seized as fugitive slave in Boston. *Id.* When his owner was denied the use of the local jail, however, public opposition forced him to sell Latimer to local abolitionists. *Id.*

119. CONG. GLOBE, 31st Cong., 1st Sess. App. 123 (1850) (statement of Sen. Clay); *see also id.* at 79 (statement of Sen. Butler). In 1850, Senator James M. Mason of Virginia exclaimed that "you may as well go down into the sea, and recover from his native element a fish which has escaped you." *Id.* at 1588 (statement of Sen. Mason).

120. Clay, for example, argued that the duty to return fugitive slaves "extends to every State in the Union" and "[t]he Supreme Court of the United States have only decided that the laws of impediments are unconstitutional." *Id.* at 122-23 (statement of Sen. Clay). Butler asserted that the "mere dictum of the court [on federal exclusivity] does not bind me, nor can it, in justice, exonerate the state from their duty." *Id.* at 81 (statement of Sen. Butler); *see also* CONG. GLOBE, 31st Cong., 1st Sess. 946 (1850) (report from the Committee of Thirteen); CONG. GLOBE, 31st Cong., 1st Sess. App. 234-35 (1850) (statement of Sen. Mason); *id.* at 1588 (statement of Sen. Jefferson Davis); *id.* at 1589 (1850) (statement of Sen. Underwood); *id.* at 1616, 1618 (statement of Sen. Turney); *id.* at 1622 (statement of Sen. Yulee). Many prominent Southerners outside of Congress likewise disagreed with *Prigg's* doctrine of federal exclusivity and asserted that the states had an obligation to enforce the Fugitive Slave Clause. *See Message from Gov. Floyd*, FEDERAL UNION (Milledgeville, Ga.), Dec. 31, 1850 (printing a message from Virginia's Democratic Governor, John Floyd).

121. EARL MALTZ, FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE 25 (2010). During the debates over the Fugitive Slave Act, a number of congressmen likewise stated that Northern noncooperation on fugitive slaves was unconstitutional. *See* CONG. GLOBE, 31st Cong., 1st Sess. 234 (1850) (statement of Sen. Mason); CONG. GLOBE, 31st Cong., 1st Sess. App. 81 (1850) (statement of Sen. Butler); *id.* at 122 (statement of Sen. Clay); *id.* at 1588 (statement of Sen. Jefferson Davis); *id.* at 1616, 1618 (statement of Sen. Turney).

by the value of the property, but for the principle which is involved."[122] In the words of Senator Jeremiah Clemens of Alabama, "[i]f a plain provision of the Constitution can be nullified at will, we have no security that other provisions of that instrument will not meet a similar fate."[123] According to Senator George Badger of North Carolina, if "northern fellow-citizens . . . set aside constitutional obligations, and deprive us of the property which we hold . . . it is scarcely desirable that we should remain in the Union."[124] If the Northern states could not be trusted to voluntarily return fugitive slaves, they reasoned, the North also could not be trusted to refrain from interfering with slavery in the South.[125]

B. Passage of the Fugitive Slave Act of 1850

In 1850, unique political circumstances gave Southerners the opportunity to draft a new federal fugitive slave 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.[126] The proviso was seen as "an *insult* to the South" and an official condemnation of Southern institutions as morally undeserving.[127]

122. CONG. GLOBE, 31st Cong., 2d Sess. App. 324 (1851) (statement of Sen. Jefferson Davis).

123. *Id.* at 304 (statement of Sen. Clemens).

124. CONG. GLOBE, 31st Cong., 1st Sess. App. 387 (1850) (statement of Sen. Badger).

125. *See id.* (argument by Sen. Badger of North Carolina that if "northern fellow-citizens, directly or indirectly . . . set aside constitutional obligations, and deprive us of the property which we hold . . . it is scarcely desirable that we should remain in the Union"); CONG. GLOBE, 31st Cong., 2d Sess. App. 304 (1851) (argument by Sen. Clemens of Alabama that "[i]f a plain provision of the Constitution can be nullified at will, we have no security that other provisions of that instrument will not meet a similar fate"); CONG. GLOBE, 31st Cong., 1st Sess. App. 1614 (1850) (argument by Sen. Jefferson Davis of Mississippi that "[o]ur safety consists in a rigid adherence to the terms and principles of the federal compact. If . . . we depart from it, we, the minority, will have abandoned our only reliable means of safety."); *see also* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY 1789–1861: A STUDY IN POLITICAL THOUGHT 141–48 (1930).

126. FREEHLING, *supra* note 113, at 458–61.

127. FREEHLING, *supra* note 113, at 461 (quoting letter from Alexander Stevens to Linton Stevens from 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

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.[128] 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.[129]

In what became known as the Compromise of 1850, Whig Senator Henry Clay proposed a sweeping sectional adjustment.[130] The territorial concerns were addressed by admitting California as a Free State and establishing territorial governments in the rest of the Mexican Cession without mentioning the status of slavery.[131] 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.[132] The South was thus essentially permitted to draft a bill of its own choosing.[133]

While Southern congressmen uniformly supported a new fugitive slave bill, most Southern Democrats bitterly opposed the Compromise.[134] Especially in the Deep South, Democrats were unwilling to admit California without some assurance that slavery would be protected in the

national degradation upon half the states of this Confederacy, I am for disunion . . . ." PLEASANT A. STOVALL, ROBERT TOOMBS: STATESMAN, SPEAKER, SOLDIER, SAGE 70 (1892).

128. FREEHLING, *supra* note 113, at 461–62.

129. DAVID M. POTTER, THE IMPENDING CRISIS: 1848–1861, at 96 (Don E. Fehrenbacher ed., 1976).

130. *Id*. at 96–97.

131. 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. The Compromise also fixed the disputed border of the slave state of Texas and the New Mexico Territory and abolished the slave trade in the District of Columbia. *See id*. at 99–100.

132. *See* FREEHLING, *supra* note 113, at 486; STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860, at 5 (1970); CONG. GLOBE, 31st Cong., 1st Sess. App. 385 (1850) (argument by Sen. Badger of North Carolina 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.").

133. *See* FEHRENBACHER, THE SLAVEHOLDING REPUBLIC, *supra* note 8, at 227.

134. MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 484, 503–04, 532 (1999).

territories.[135] Many even continued to threaten disunion if an adjustment were not reached on more favorable terms.[136]

In this explosive political context, Senator James Mason, an anti-Compromise Democrat from Virginia, introduced a bill for the "more effectual execution" of the Fugitive Slave Clause on January 4, 1850.[137] Mason's bill authorized a claimant to seize a fugitive slave and bring her before any federal judge, commissioner, clerk, marshal, postmaster, or customs collector. Upon proof "to the satisfaction" of such federal officer, he was obligated to issue a certificate of removal, "which certificate shall be a sufficient warrant for taking and removing such fugitive from service or labor to the State or Territory from which he fled."[138]

Mason's bill contained two key features that would be incorporated into the Fugitive Slave Act of 1850. First, because state officers often refused to cooperate, Mason's bill empowered lower federal officials, including commissioners, to enforce the law. The bill was therefore designed to strengthen the federal government's role in rendition rather than force the states to take part.[139] Second, the bill made the certificate of removal final, thus prohibiting further inquiry into any claim to freedom on appeal or under the writ of habeas corpus.

The congressional debates over Mason's bill revolved around two major issues. First, New York Senator William H. Seward introduced an amendment that, among other changes, would have secured alleged fugitive slaves a trial by jury in the North.[140] Arguing that hostile Northern juries would nullify such a law, Southerners united in opposition to Seward's amendment.[141]

Although Southern congressmen did not seriously contemplate a jury trial in the North, Southerners who favored the Compromise argued

135. *See id*.

136. *See id*. Southern Whigs, however, shared a deep commitment to the Union and largely supported the terms of the Compromise. *See id*.

137. CONG. GLOBE, 31st Cong., 1st Sess. 103 (1850).

138. CONG. GLOBE, 31st Cong., 1st Sess. App. 79 (1850).

139. Shortly after deciding *Prigg*, Justice Story had actually suggested such an approach to Senator John Berrien of Georgia. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT, 262–63 n. 94 (1971).

140. CONG. GLOBE, 31st Cong., 1st Sess. 236 (1850).

141. *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess. 236 (1850) ("this amendment was designed to cap the climax of southern wrongs, to cause that cup of our oppression at once to overflow, and to force us of the South . . . to secede from the Union.").

that the law should allow for a jury trial in the South.[142] Recognizing that "[t]he trial by jury is what is demanded by the non-slaveholding states," Senator Clay urged that Southern rights "ought to be asserted and maintained in a manner not to wound unnecessarily the sensibilities of others."[143] Senator Underwood, also a pro-Compromise Whig from Kentucky, asked: if there is no trial by jury in the South, "may it not be urged by our northern friends that the examination shall be made abroad, where the fugitive is arrested?"[144] Senator Solomon W. Downs, a pro-Compromise Democrat from Louisiana,[145] asserted that since all Southern states already provide for a trial by jury in the South, if the South rejected the proposal, then "our northern friends will say that nothing reasonable will satisfy us."[146] 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.

Congress rejected the jury trial amendment, however, because of opposition from anti-Compromise Southern Democrats. Louisiana Senator Pierre Soule attacked the jury amendment on the grounds that it would "greatly embarrass, delay, and add to the expenses of reclamation."[147] Moreover, Jefferson Davis 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."[148] These Southerners had the Court on their side, as any requirement for a jury trial would have violated the private right of reception recognized in *Prigg*.

The second major issue in the debates arose over Maryland Senator Thomas G. Pratt's amendment to have the federal government indemnify slave owners if it failed to return a claimed fugitive. Pratt asserted that, because of Northern opposition, indemnification was "the only means in the power of the Government by which the [Fugitive Slave Clause] . . .

142. The Committee of Thirteen proposed the amendment on May 8. CAMPBELL, *supra* note 132, at 19-20.

143. CONG. GLOBE, 31st Cong., 1st Sess. App. 572 (1850).

144. CONG. GLOBE, 31st Cong., 1st Sess. App. 1611 (1850). Southerners often argued that a trial by jury was not required in the North because one was guaranteed in the state from which the alleged slave fled.

145. HOLT, *supra* note 134, at 625 (explaining that Downs campaigned on his defense of the Compromise in the 1851 Louisiana elections).

146. CONG. GLOBE, 31st Cong., 1st Sess. App. 638 (1850).

147. *Id.* at 631.

148. *Id.* at 1588; *see also* CONG. GLOBE, 31st Cong., 1st Sess. App. 1610–11 (1850) (providing a similar statement by Sen. Mason).

can be executed."[149] He further contended that, because Northerners would not confront rendition and slave owners would be compensated, his amendment would "settle now and forever the agitation upon the subject of fugitive slaves."[150] Pratt's amendment gained the support of every Border State senator, as well as some other pro-Compromise senators.[151]

The indemnification amendment did not pass, however, due to opposition from most Southern senators outside of the Border States. Raising constitutional concerns, 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 anti-slavery feeling will suggest?"[152] Senator Hopkins L. Turney of Tennessee worried 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."[153] With votes splitting along partisan and sectional lines, Congress therefore rejected both major attempts to make the law more acceptable to the North or appealing to the Border States.

A number of harsh proslavery amendments, however, passed with little discussion. Mason, for example, proposed an amendment that prohibited the fugitive's testimony from being admitted into evidence and provided stiff penalties for anyone who obstructed enforcement.[154] Moreover, Davis proposed to authorize federal marshals to call on a posse of ordinary citizens to assist in rendition.[155]

Congress ultimately passed a law that—although brazenly proslavery in its terms—did nothing to address the South's core constitutional grievance: the failure of Northern states to enforce the Fugitive Slave Clause. Instead of requiring state participation, the Act empowered the federal government to return fugitives without the need for help from the states. In fact, the law seems almost designed to discourage state participation. Not only did Congress reject all

149. *Id.* at 1592.
150. *Id.*
151. *Id.* at 1609.
152. *Id.* at 1614. Similarly, 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 compensation was beyond its enumerated powers. *Id.* at 1608.
153. *Id.* at 1616.
154. CONG. GLOBE, 31st Cong., 1st Sess. 210 (1850).
155. Davis further proposed a civil remedy against anyone who concealed a fugitive or interfered with rendition. CONG. GLOBE, 31st Cong., 1st Sess. App. 1619 (1850).

moderating amendments that would have made enforcement more palatable to Northerners, but it also adopted unnecessarily proslavery terms. As Fehrenbacher contends, terms such as the *posse comitatus* were "gratuitously provocative, as though antislavery noses were being rubbed in the legitimacy of the peculiar institution."[156]

Congress's seemingly counter-productive actions were the result of a combination of legal and political factors. Constitutional doctrine steered Congress away from adopting a regime that would have encouraged or required state participation in enforcement. Moreover, because most Southern Democrats opposed the Compromise, they stood to benefit politically if the Act failed to address Southern grievances. Together, these forces resulted in a fugitive slave law that seemed designed to alienate the North and incapable of satisfying the South.

The influence of political considerations is demonstrated by the fact that, even before the Act was enacted, opinion on its utility aligned perfectly with support for the Compromise. Pro-Compromise Southern congressmen, typically Whigs, stated that successful federal rendition would be a victory for the South, even if Northerners sought to interfere.[157] Whig Senator George Badger, for example, asserted that "[t]his law may fail of execution in some instances—every law does. . . . [B]ut I believe that such a law, passed by Congress, will be faithfully and generally executed in the New England States, as any law on our statute book."[158] Directly after its passage, Whig newspapers were also optimistic that the law would be "highly satisfactory to the South."[159]

156. *See* FEHRENBACHER, THE SLAVEHOLDING REPUBLIC, *supra* note 8, at 231–32.

157. *See* CONG. GLOBE, 31st Cong., 1st Sess. App. 1591(1850) (statement of Sen. Pratt); CONG. GLOBE, 31st Cong., 1st Sess. App. 386, 1594 (1850) (statement of Sen. Badger).

158. CONG. GLOBE, 31st Cong., 1st Sess. App. 387 (1850); *see also* CONG. GLOBE, 31st Cong., 1st Sess. App. 123–24 (1850) (statement of Sen. Clay); CONG. GLOBE, 31st Cong., 1st Sess. App. 527 (1850) (statement of Sen. Underwood); CONG. GLOBE, 31st Cong., 1st Sess. App. 1615, 1617 (1850) (statement of Sen. Foote). Although Foote was a Democrat, he was an ardent unionist and supporter of the Compromise. HOLT, *supra* note 134, at 615–16.

159. *The Peace Measures*, RALEIGH REGISTER, Sept. 15, 1850; *see also* RICHMOND WHIG, Sept. 17, 1850 (finding the law "highly acceptable"); *Congressional*, VICKSBURG WHIG, Sept. 25, 1850 (predicting that "quiet and harmony will be restored to the country"). These Southerners sometimes even questioned the motives of who failed to support the act. *See The Fugitive Slave Bill*, VICKSBURG WHIG, Oct. 24, 1850 ("It may be expected, consequently, that the disunionists will clamor for the building of an immense wall, . . . or, probably, they would prefer a law of Congress declaring it unconstitutional for slaves to be born with legs to run."). Upper South Democrats, most of whom were much more supportive of the Compromise than their Deep South allies, generally shared

Anti-Compromise Democrats, however, predictably asserted that the Fugitive Slave Act—the South's major prize in the Compromise—was of little value. James Mason, the Democratic senator from Virginia who sponsored the Fugitive Slave Act, declared: "pass what law we may, such law will be found inoperative."[160] Andrew Pickens Butler, of South Carolina, asserted that "the States are the parties who should carry out this provision as an *extradition* treaty; and until they give their cooperation, it cannot be carried out. Until that is done, the clause is a dead letter."[161] Similarly, David Yulee, a Democrat from Florida, declared that "[n]o law which can be made here can have much effect. The evil can only be reached by the public opinion and public faith of the northern States."[162] Moreover, before the first fugitive was claimed under the Act, Democratic newspapers predicted that it "can not be executed."[163] Opinion on the value of the Fugitive Slave Act perfectly aligned with prevailing political incentives.

These political incentives help explain why Southern Democrats pushed for a "gratuitously" proslavery fugitive act rather than a practical solution.[164] Although Whigs largely supported the jury trial and indemnification amendments, Southern Democrats voted against them in large part because they had no interest in watering down the law to make it easier to enforce in the North. As Jefferson Davis warned Congress: "Our safety consists in rigid adherence to the terms and principles of the federal compact."[165] Politically, proslavery terms made sense to Democrats, as Northern resistance to enforcement would help convince the South that they were right to oppose the Compromise.

While politics help to explain why the Act was aggressively proslavery, constitutional law was a major factor in Congress's decision

the Whigs' optimisim. *See The Future*, RICHMOND ENQUIRER ("the stringent provisions of this law must have a salutary influence on the prospects of the country,"), *reprinted in* THE LIBERATOR (Boston, Mass.), Oct. 4, 1850; *Slavery Agitation*, NASHVILLE UNION, Oct. 9, 1850 (predicting that the law would be "efficient and reliable.").

160. CONG. GLOBE, 31st Cong., 1st Sess. 233 (1850). Jefferson Davis similarly stated that he had "no hope that it will ever be executed to any beneficial extent." CONG. GLOBE, 31st Cong., 1st Sess. App. 1589 (1850).

161. CONG. GLOBE, 31st Cong., 1st Sess. App. 81 (1850).

162. CONG. GLOBE, 31st Cong., 1st Sess. App. 1622 (1850).

163. *The Late Act of Congress*, CHARLESTON MERCURY, Oct. 23, 1850; *see also The Fugitive Slave Bill*, GEORGIA TELEGRAPH, Sept. 10, 1850 ("The bill is not worth the parchment upon which it is written."); *Gov. Quitman's Message*, FEDERAL UNION (Milledgeville, Ga.), Dec. 3, 1850 (printing a message from Mississippi Governor Quitman asserting that he had little hope that the North would enforce the fugitive act).

164. *See* FEHRENBACHER, THE SLAVEHOLDING REPUBLIC, *supra* note 8, at 232.

165. CONG. GLOBE, 31st Cong., 1st Sess. App. 1614 (1850).

to adopt a purely federal regime. Absent constitutional law, a purely federal regime makes little sense. Most Southerners (and especially Democrats) believed that Northern states had a constitutional obligation to return fugitive slaves, even after *Prigg* held that the duty was exclusively federal.[166] Moreover, Southern calls for a new fugitive law often focused on the purportedly unconstitutional Personal Liberty Laws of the North. The most natural way to have structured the Act, therefore, would have been a federal law that invalidated the Personal Liberty Laws by requiring the Northern states to assist in rendition. In fact, as detailed above, when Southern congressmen attempted to strengthen the fugitive act in 1818, they proposed just such an amendment.[167]

Southern congressmen, however, asserted that *Prigg's* anti-commandeering and federal exclusivity doctrines prevented them from passing legislation that would have required the states to fulfill their constitutional obligations. Mason, the author of the Fugitive Slave Act, stated that, although the states had a duty to return fugitive slaves, "[t]he Supreme Court [had held] . . . that there were no means under the Constitution of coercing the states to provide by law for the delivery of this class of fugitives."[168] Butler asserted that "Congress has no way of compelling the States to perform this duty, which faith to the Constitution would enjoin."[169] Although Badger argued that the use of state officers to enforce the Fugitive Slave Act of 1793 was consistent with the Constitution and past practices, he recognized that, under *Prigg's* anti-commandeering principle, "the obligation to enforce this clause of the Constitution rests upon the United States, and upon the United States alone."[170] In short, constitutional doctrine had changed since the 1818 amendment, and, in 1850, a federal law requiring states to take part would have violated Supreme Court precedent.

Southerners, however, would not have meekly submitted to Justice Story's opinion in *Prigg* if they had been sufficiently committed to a solution that required the states to participate.[171] The Republican Party,

166. *See supra* notes 83–85, 118 and accompanying text.
167. *See supra* notes 21–26 and accompanying text.
168. CONG. GLOBE, 31st Cong., 1st Sess. 234 (1850).
169. CONG. GLOBE, 31st Cong., 1st Sess. App. 81 (1850); *see also* CONG. GLOBE, 31st Cong., 1st Sess. App. 123 (1850) (statement by Sen. Clay that the Court in *Prigg* had held that "the General Government had no right to impose obligations upon the state officers that were not imposed by the authority of their own constitutional laws.").
170. CONG. GLOBE, 31st Cong., 1st Sess. App. 1595 (1850).
171. I would like to thank Michael Klarman for making this point on a prior draft.

for example, never accepted the *Dred Scott* decision.[172] Political forces were again at play. Anti-Compromise congressmen (predominantly Deep South Democrats) probably predicted that they stood to gain politically if the North was seen as violating the Compromise, and some even hoped to build a case for disunion. By keeping the states out of the process, anti-Compromise congressmen ensured that, no matter how successful federal rendition may prove to be, they could argue that the Act was a failure and that the Constitution could never protect Southern rights.

Constitutional law and political forces thus deterred Congress from pursuing a more moderate law that involved the states. These political forces, in turn, had been set in motion by Northern use of *Prigg* to undermine state cooperation on the return of fugitive slaves. The Court's decision therefore not only resulted in Northern noncooperation, as Paul Finkelman has argued, and upended the preexisting system of state and federal cooperation, as Robert Baker contends, but it also heavily influenced the content of the Fugitive Slave Act. Rather than push for a law that would encourage or require Northern states to fulfill their constitutional obligations to return fugitive slaves, Southern Democrats proposed a purely federal system of enforcement and voted down every attempt to make the Act more acceptable in the North.

C. Southern Reaction to Cases under the 1850 Act

Southern reaction to the early fugitive slave cases strongly suggests that, because of political circumstances and the structure of the Fugitive Slave Act, no amount of federal enforcement would have proven satisfactory. The same Southerners who had predicted that the law would be of little value interpreted each case—regardless of its facts—as evidence of the law's failure. Even when the federal government managed to successfully return fugitive slaves, anti-Compromise Democrats proclaimed that rendition without state assistance and cooperation was worthless. The early cases therefore did little to change Southern opinion on the value of the Fugitive Slave Act; instead, much of the South had already made up its mind.

This article canvasses Southern reaction to the highly-publicized cases of Shadrach Minkins, Thomas Sims, and Anthony Burns. Federal marshals arrested Shadrach Minkins as a fugitive slave in Boston, the intellectual capital of abolitionism, just months after the passage of the

172. *See, e.g.*, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS, 4-5 (1978).

Fugitive Slave Act of 1850.[173] Because the Massachusetts Personal Liberty Law forbid the use of a state jail to hold a person claimed as a fugitive slave, a dozen U.S. marshals stood guard over Shadrach in the Boston courthouse while antislavery lawyers prepared his defense.[174] The U.S. 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.[175] Following the rescue, President Millard Fillmore, a Northern Whig, 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."[176] The U.S. district attorney aggressively charged a number of individuals for aiding in the rescue effort.[177]

Less than two months after the Shadrach rescue, in early April of 1851, Thomas Sims was arrested under the Fugitive Slave Act in Boston.[178] 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.[179] Despite the efforts of Sims' attorneys, he was escorted to a ship in Boston harbor by three hundred armed guards and sent back to a life of slavery in Georgia.[180]

Perhaps the most famous fugitive slave case is the rendition of Anthony Burns, who was arrested in Boston in 1854.[181] After learning of Burns' arrest, anti-slavery leaders called a mass meeting at Faneuil Hall, where famous abolitionists such as Wendell Philips and Theodore Parker

173. *See* GARRY COLLISON, SHADRACH MINKINS: FROM FUGITIVE SLAVE TO CITIZEN 110–14 (1997).

174. *See id.* at 115, 121.

175. *See id.* at 124–33, 169.

176. CONG. GLOBE, 31st Cong., 2nd Sess. App. 292–93 (1851). Fillmore also unsuccessfully sought authorization from Congress to call out the federal military and state militia to enforce the law. *See* CONG. GLOBE, 31st Cong., 2nd Sess. 828 (1851); 31st Cong., 2nd Sess. App. 292–326 (1851).

177. *See* COLLISON, *supra* note 173, at 141–48; JOHN D. GORDAN, III, THE FUGITIVE SLAVE RESCUE TRIAL OF ROBERT MORRIS: BENJAMIN ROBBINS CURTIS ON THE ROAD TO DRED SCOTT, 30–34 (2013).

178. Leonard Levy, *Sim's Case: The Fugitive Slave Law in Boston in 1851*, 35 J. OF 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.*

179. *Id.* at 46, 52.

180. *Id.* at 70.

181. *See* MALTZ, SLAVERY AND THE SUPREME COURT, *supra* note 121, at 181; ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS 1 (1998).

denounced the Fugitive Slave Act and implicitly encouraged violent resistance to its enforcement.[182] The meeting ended with an unsuccessful assault on the courthouse. While attempting to enter, members of the anti-slavery meeting knocked down the door with a battering ram and fatally stabbed one of the deputies protecting the courthouse.[183] To protect against any further violence, the mayor of Boston called out two companies of the state militia and the U.S. marshal summoned two companies of Marines.[184] Democratic President Franklin Pierce wrote to the marshal: "Your conduct is approved. The law must be executed."[185] 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.[186]

Contrary to the traditional narrative, Southern newspapers did not uniformly view such cases as evidence that the Fugitive Slave Act of 1850 was unenforceable. Instead, Southern Whigs consistently argued that the cases demonstrated the willingness and ability of the federal government to return fugitives under the Act. Following the Shadrach rescue, Whig papers argued that President Fillmore's determination to enforce the law, the prosecution of the "few villainous outbreakers" who had violated it,[187] and "the united sentiment of condemnation" against the rescue proved that "the law will be enforced, and the harmony of the Union ultimately restored."[188] Whigs further maintained that the Sims case proved that the people of Boston were "in favor of a full and perfect administration of the law."[189] The *Southern Recorder*, for example, asserted: "We hope we shall hear no more croakings of the impotency of the laws of the Union, to maintain the constitutional rights of [its]

182. VON FRANK, *supra* note 181, at 52–61. Parker, for example, addressed the crowd as "[f]ellow-subjects of Virginia" and asked, "are we to have deeds as well as words?" *Id.* at 58–59.

183. STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL, 173–74 (2010).

184. VON FRANK, *supra* note 181 at 71–72.

185. *Id.* at 72.

186. *Id.* at 206–18.

187. *Violent Rescue of a Fugitive Slave*, REPUBLICAN BANNER AND NASHVILLE WHIG, Feb. 18, 1851.

188. *Debate on the Boston Mob*, RICHMOND WHIG, Mar. 4, 1851; *see also The President's Message: Sequel to the Boston Insurrection*, DAILY PICAYUNE (New Orleans. La.), Mar. 4, 1851; *Boston Doings*, SOUTHERN RECORDER (Milledgeville, Ga.), Mar. 4, 1851; VICKSBURG WHIG, Mar. 19, 1851.

189. *Mr. Webster In Boston*, DAILY PICAYUNE (New Orleans, La.), Apr. 26, 1851; *see also* RICHMOND WHIG, Apr. 11, 1851.

citizens . . . . The wisdom of Congress . . . has been vindicated by the case before us."[190]

Whigs generally viewed the rendition of Burns in a positive light as well. The *Southern Recorder* asserted that the "great mass of the citizens of Boston are not directly responsible [for the attack on the courthouse], . . . [and] [m]any of them aided in maintaining law and order."[191] The *Nashville Whig* praised the mayor, police, and people of Boston for their "execution of the law and preservation of the public peace."[192] The New Orleans *Picayune* asserted that "[t]he law of the land has been vindicated, the spirit of disorder and riot has been rebuked, and the peace has been preserved."[193]

Democrats, however, generally viewed the cases as evidence that the Fugitive Slave Act was of no value to the South.[194] The *Federal Union* asserted that the Shadrach rescue "demonstrates conclusively the hopelessness of any effort to enforce the fugitive slave law in that community."[195] The *Richmond Enquirer* called it "the most monstrous outrage that has ever stained our history's annals" and warned that "[t]he Union cannot survive many such shocks."[196] When rendition was proven

190. *The Fugitive Case in Boston*, SOUTHERN RECORDER (Milledgeville, Ga.), Apr. 15, 1851; *see also Washington Republic*, RICHMOND WHIG, Apr. 15, 1851.

191. *The Late Boston Excitement—Decision of the Commissioner*, SOUTHERN RECORDER (Milledgeville, Ga.), June 13, 1854; *see also Spirit of the Press*, RICHMOND DISPATCH, June 8, 1854, at 1 (quoting the RICHMOND WHIG).

192. *A Question of Accuracy*, REPUBLICAN BANNER AND NASHVILLE WHIG, June 12, 1854.

193. *The Authors of the Riot*, DAILY PICAYUNE (New Orleans, La.), June 4, 1854. While not commenting directly on whether the Fugitive Slave Act had been successful, the *Louisville Journal* argued that, "as nearly the whole of the $40,000 in the case mentioned has to be paid by the State of Massachusetts and the city of Boston," the expenses of the rendition would not deter future claims. LOUISVILLE JOURNAL, June 6, 1854.

194. Some Democratic papers in the Upper South, however, viewed the cases in a more positive light. *See Resistance to the Law in Boston—Action of the President*, NASHVILLE UNION, June 10, 1854, at 2; *The Riot and Justice to Boston*, BALTIMORE SUN, June 5, 1854. Because Upper South Democrats were typically more supportive of the Compromise of 1850 and the Union, these papers may have faced the same political incentives as Whig papers.

195. *See The Riot in Boston*, FEDERAL UNION (Milledgeville, Ga.), Mar. 4, 1851 (Milledgeville, Georgia)., at 1.

196. *The Second Boston Outrage*, RICHMOND ENQUIRER, Feb. 21, 1851, at 2; *see also The "Bleeding Wounds" Still Open*, CHARLESTON MERCURY, Feb. 24, 1851; *Another Slave case in Boston*, FEDERAL UNION (Milledgeville, Ga.), Feb. 15, 1851;, at 3; *The 'Higher Law' Triumph in Boston*, FEDERAL UNION (Milledgeville, Ga.), Feb. 25, 1851; *The Source of the Evil*, CHARLESTON MERCURY, Feb. 28, 1851; CONG. GLOBE, 31st Cong., 2d Sess. 598 (1851) (statement by Sen. Davis).

possible in the Sims case, Democrats asserted that public opposition made rendition so costly and dangerous for Sims' owner that the law was practically worthless. For example, the *Georgia Telegraph* asked: "Who will go to Boston hereafter with the view of reclaiming his slave when he can succeed only by the aid of muskets, and an outlay of $1,000 to $2,000, to say nothing of the risks and chances at his own life[?]"[197] Democrats similarly saw the Burns case as an example of the Northern "fanaticism" which they claimed nullified the Fugitive Slave Clause.[198] In sum, Southern Democrats thought the North had "virtually repeal[ed] the fugitive slave law, and den[ied] to the citizens of the South their constitutional rights. . . ."[199]

Southern debate over the fugitive slave cases was fundamentally about whether an exclusively federal law, as required by *Prigg*, could fulfill the obligations of the Fugitive Slave Clause. Both sides of the debate recognized that the federal government had vigorously enforced the law. Although Shadrach had been rescued, President Fillmore's subsequent pledge to enforce the law at all costs was fulfilled in the Sims and Burns cases. As Justice Story had predicted in *Prigg*, the federal government could be trusted to return fugitive slaves. Some Southerners—typically Whigs—were satisfied that the federal government had forced the North to respect Southern rights, even if rendition proved expensive for the owner.

Most Southern Democrats, however, asserted that no exclusively federal system of rendition could fulfill the obligations of the Fugitive Slave Clause without the cooperation and assistance of the states. Even though the federal government had vigorously enforced the law, Shadrach had been rescued by a mob. The renditions of Sims and Burns, though successful, created disorder in the streets of Boston, required massive displays of force, and required the owners to incur great expense and risk physical harm. Regardless of how effective federal officials

197. *The Fugitive Slave Sims*, GEORGIA TELEGRAPH, Apr. 22, 1851, at 2; *see also The Boston Fugitive Case*, CHARLESTON MERCURY, April 21, 1851; *The Boston Case*, FEDERAL UNION, April 22, 1851, at 3; *The Fugitive Slave Case in N. York*, FEDERAL UNION (Milledgeville, Ga.), Jan. 21, 1851, at 2 (similarly interpreting the rendition of Henry Long).

198. *What shall be done with Massachusetts?*, FEDERAL UNION (Milledgeville, Ga.), June 6, 1854, at 3 ("Massachusetts is now overrun by all sorts of fanatics . . . . The Constitution and Laws of the land . . . are all denounced"); *see also Slavery Agitation*, CHARLESTON MERCURY, June 3, 1854; *The Surrender of Burns—Shall the South Rejoice?*, RICHMOND ENQUIRER, June 5, 1854.

199. *Democratic Convention*, SOUTHERN RECORDER (Milledgeville, Ga.), June 12, 1855, at 3 (printing resolutions from the Democratic Convention in Georgia).

were at securing fugitives, it seems likely that Southern Democrats would have viewed any exclusively federal system as a misguided enterprise.

Just as political incentives shaped the content of the Fugitive Slave Act, they further influenced Southern reaction to its enforcement in at least two ways. First, Southern Democrats benefited politically from the perception that a Whig president and Whig state officials in Massachusetts were unable or unwilling to enforce the law.[200] Second, many Democrats, especially in the Deep South, bitterly opposed the Compromise even after its passage and thus wished to convince Southerners that one of the South's major concessions, the Fugitive Slave Act, was worthless.[201] Similarly, those influential few who wished to achieve disunion made their case stronger by demonstrating that the North had nullified the Act.[202] The Whig *Southern Recorder*, for example, asserted that Democrats "did not desire to see the law executed. They desired to keep rebellious Boston in the fore-ground—to point to her as . . . a precedent an [sic] example for lawlessness and disunion at the South."[203] In short, from the moment of its passage, political and

200. *See A Question of Accuracy*, REPUBLICAN BANNER AND NASHVILLE WHIG, June 12, 1854 (stating that the Whigs of Boston turned out to enforce the law during the rendition of Burns and that a Democratic paper had written that "the Whigs of New England 'seem to be fully occupied in organizing mobs to resist the fugitive slave law'). Using the defense of slavery as a political tool was a common tactic in antebellum politics. *See* WILLIAM J. COOPER, THE SOUTH AND THE POLITICS OF SLAVERY: 1828–1856, at xi–xv (1978).

201. For more on the importance of opinion on the Compromise to Southern politics in the early party of the decade, *see* HOLT, *supra* note 134, at 608–632.

202. Starting in the 1830s, a small but growing number of Southerners became convinced that slavery's future required an independent Southern republic. *See* CARPENTER, *supra* note 125, at 171–194. Disunionists operated as a pressure group inside the Democratic Party in the South, inducing it to pass legislation that outraged the North and consolidated Southern support for slavery. *See generally*, FREEHLING, *supra* note 98.

203. *See Triumph of the Law in Boston*, SOUTHERN RECORDER (Milledgeville, Ga.), Apr. 29, 1851, at 2; *see also Public Feeling at the North*, FEDERAL UNION (Milledgeville, Ga.), Dec. 24, 1850, at 2 (citing S.C. SUN) (arguing that Northern condemnation of the Fugitive Slave Act teaches "one important lesson—the house that is divided against itself must fall, and the sooner we get out of it the better for our own safety."). For more examples of the political use of the fugitive slave issue in Southern political debates, see *From the Nashville American*, FEDERAL UNION (Milledgeville, Ga.), Jan. 14, 1851, at 2 ("It is one of the tenets of the submission creed, that if the Fugitive law is repealed or modified, or rendered inoperative, they are for resistance, even to the dissolution of the Union. We assert that it is nullified by the Northern people, and is as dead as Julius Caesar, so far as its practical effects are concerned."); *The Way the Fugitive Slave Law Works*, FEDERAL UNION (Milledgeville, Ga.), Jan. 7, 1851, at 3 (mocking the "Submission

legal factors ensured that federal enforcement of the Fugitive Slave Act of 1850 had no hope of satisfying the South.

D. The Debates over Secession

Southern dissatisfaction with the Fugitive Slave Act of 1850 culminated in the constitutional argument for secession. Disunionists cited the Fugitive Slave Clause as a primary example of Northern violation of the Constitution, relieving them of any duty to abide by the constitutional compact.[204] Secessionists often acknowledged that the federal government was doing everything in its power to enforce the law; however, they believed that it was impossible for the federal government to successfully enforce the law in the face of Northern hostility. Disunionists also maintained that Northern states were violating a concurrent obligation to enforce the Fugitive Slave Clause.[205] These disunionists therefore rejected *Prigg's* doctrine of federal exclusivity and cited the inaction of the Northern states—which had been encouraged by *Prigg* and left unaddressed by the Fugitive Slave Act—as a legal justification for secession.

Secessionists also warned that Lincoln's Republican administration would stop all federal enforcement of the Act. The *Charleston Mercury* argued that if the South submitted to a Republican administration: "[W]hose creed it is, to repeal the Fugitive Slave Laws, the . . . tenure of slave property will be felt to be weakened; and the slaves will be sent down to the Cotton States for sale, and the Frontier States *enter on the policy of making themselves Free States*."[206]

papers at the South" for commenting favorably on the fugitive cases when only "six or seven" out of "thirty thousand" runaways had been returned under the law); *Letter from Hon. C. Murphy*, SOUTHERN RECORDER, Mar. 18, 1851, at 2; VICKSBURG WHIG, Mar. 5, 1851; *Another*, WASHINGTON UNION, *reprinted in* REPUBLICAN BANNER AND NASHVILLE WHIG, March 5, 1851; *President Fillmore*, REPUBLICAN BANNER AND NASHVILLE WHIG, Mar. 10, 1851; *Vagaries of Ultraism*, DAILY PICAYUNE (New Orleans, La.) Mar. 5, 1851.

204. *See, e.g.*, WILLIAM W. FREEHLING & CRAIG M. SIMPSON, SECESSION DEBATED: GEORGIA'S SHOWDOWN IN 1860, 23–24, 36 (1992) (discussing speeches by Thomas R. R. Cobb and Sen. Robert Toombs); *The Constitution—the Union—the Laws*, NEW ORLEANS DAILY CRESCENT, Nov. 13, 1860, *reprinted in* PETER SMITH, SOUTHERN EDITORIALS ON SECESSION 235, 238 (Dwight Lowell Dumond ed., 1964).

205. *See, e.g.*, FREEHLING & SIMPSON, *supra* note 204, at 77–78 (discussing speech by Henry L. Benning); CONG. GLOBE, 36th Cong., 1st Sess. App. 260 (1860); FEHRENBACHER, THE SLAVEHOLDING REPUBLIC, *supra* note 8, at 251.

206. *The Terrors of Submission*, CHARLESTON MERCURY, Oct. 11, 1860, *reprinted in* SMITH, *supra* note 204, at 178–79. Many in the Deep South were paranoid about the termination of slavery in the Upper South. These Southerners reasoned that, if slaves

In Congress, Senator Robert Toombs charged that Republicans had "annulled and made of no effect" of the Fugitive Slave Clause in several states, and, as a result, he "had no doubt [Republicans] will treat the Constitution in the same way if they get power [in Washington]; and for that reason [he] trust[ed] they will never get it while there is a drop of blood in a true heart from here to the Rio Grande."[207] Disunionists thus used the fugitive slave issue to convince Southerners that secession was both constitutionally legitimate and practically desirable.

The fugitive slave controversy was an important issue in the debates over secession. In Georgia, for example, Alexander Stephens, the future Vice President of the Confederacy, proposed strict enforcement of the Fugitive Slave Act and repeal of the Personal Liberty Laws as conditions of staying in the Union.[208] Northern states also extensively discussed repealing their Personal Liberty Laws to appease the South.[209]

IV. ASSESSING *PRIGG*

The first two Sections of this Article have argued that *Prigg* deeply influenced the course of the antebellum fugitive slave controversy. *Prigg* both created a need for the 1850 Act and played a large role in shaping its content. This Section addresses two lingering questions: Because political forces played such a large role, would a different decision have mattered? And, if the decision was not legally required, why did the Court create constitutional doctrine that had such a destabilizing effect on the nation?

were sold from the Upper South, slavery would become more concentrated in the Deep South. With slave states thus outnumbered in the national government, it would have only been a matter of time until slavery was abolished. Outnumbered by emancipated slaves at home, they feared racial conflict like the gruesome scenes of Santa Domingo. *See* FREEHLING, *supra* note 113, at 16, 35, 121–26, 503.

207. CONG. GLOBE, 36th Cong., 1st Sess. App. 90 (1860). Toombs made much the same argument during Georgia's debates over secession. *See* FREEHLING & SIMPSON, *supra* note 204, at 31–41. Representative Albert Jenkins made similar comments in Congress. *See* CONG. GLOBE, 36th Cong., 1st Sess. App. 260 (1860); *see also The Constitution—The Union—The Laws*, NEW ORLEANS DAILY CRESCENT, Nov. 13, 1860, *reprinted in* SMITH, supra note 204, at 238 ("The Black Republican Party . . . . ha[s] robbed us of our property, they have murdered our citizens while endeavoring to reclaim that property by lawful means, . . . [and] they have nullified the laws of Congress.").

208. *See* FREEHLING & SIMPSON, *supra* note 204, at 51–55.

209. *See, e.g.*, JOEL PARKER, PERSONAL LIBERTY LAWS AND SLAVERY IN THE TERRITORIES (1861) (printing letters which advocated repeal of Massachusetts' personal liberty law).

A. Would a Different Decision Have Mattered?

This Article's claim that *Prigg* significantly influenced the course of the fugitive slave controversy assumes that a different decision could have produced a different result. Although this counterfactual issue is impossible to resolve with any certainty, it seems likely that a more limited decision would have at least made a less divisive fugitive slave regime possible.

Rather than providing a sweeping interpretation of the Fugitive Slave Clause, the Court could have decided the case on very narrow grounds. As noted above, because the record demonstrated that Margaret Morgan was in fact a fugitive slave and that Edward Prigg was the authorized agent of Morgan's owner, the Court could have narrowly held that a state may not punish an owner or his agent for removing his fugitive slave. Such a ruling could have left Pennsylvania's 1826 law intact in the ordinary case where the status of the alleged fugitive was in question. Although the Court certainly would have been forced to hear more fugitive cases in the future, it may have been able to incrementally address the issue.

Alternatively, the Court could have adopted a different interpretation of the Fugitive Slave Clause that would have allowed for more state involvement. For example, the Court could have adopted Chief Justice Taney's argument that the Constitution affirmatively required Northern states to aid rendition. Rather than using the sledgehammer of federal exclusivity, the Court then could have invalidated only those state policies that crossed the line between aiding and impermissibly hindering rendition. Finally, like the proponents of the 1818 Amendment and Justice McLean's dissenting opinion, the Court could have found that state officers were required to enforce the federal Fugitive Slave Act of 1793.

If the Court had followed one of these paths, it is possible that Southerners would not have been so insistent that a new federal fugitive law be included in the sectional adjustment of 1850. The Court in *Prigg* invalidated all state compromise legislation like Pennsylvania's 1826 law and opened the door to noncooperation as an outlet for Northern antislavery feeling. Under a different ruling, the states might have been much more proactive in assisting Southern claimants (while using Northern procedures), thus reducing Southern demands for a new law. Moreover, the Compromise of 1850 was realistically the only time during the 1850s when the South could garner the votes for a proslavery

fugitive slave law. The Act passed only because enough Northerners abstained in exchange for other, pro-Northern portions of the Compromise.[210] Without *Prigg*, the Fugitive Slave Act of 1793 might never have been amended.

If a new fugitive law had nevertheless been enacted, it may have looked very different. Most Southerners in Congress thought the Constitution imposed the duty to return fugitives on the states rather than the federal government. They therefore may have passed legislation similar to the proposed 1818 Amendment that would have required state officers to enforce the federal act. While forcing state officers to enforce the act may have angered Northerners, these officers may have found ways to enforce the law more in line with local sympathies.[211] Moreover, if the Court had required states to assist in rendition, Congress could have passed measures to supplement state enforcement. While there is no guarantee that any of these systems would have worked any better at preventing sectional conflict than the Fugitive Slave Act of 1850, it is hard to imagine that they could have been any worse.[212] Moreover, if the Northern states had played a more active role in rendition, the fugitive slave issue may have been less of an asset to secessionists.

B.Why did the Court Miscalculate?

Because the justices had a deep commitment to the Union, *Prigg's* effects were almost certainly unintentional. The question, then, is why the Court miscalculated so badly. While it is impossible to know for sure, the Court's mistake was likely caused by the confluence of a number of factors.

Justice Story was predisposed to favor congressional power. Story was an ardent nationalist, and his jurisprudence generally reflected a desire for strong federal power.[213] In fact, Leslie Goldstein argues that Story may have been influenced to support federal power in *Prigg* by a

210. *See* POTTER, *supra* note 129, at 113.

211. Historically, many favored state enforcement of federal law for this very reason. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L. J. 1104, 1175 (2013).

212. I do not mean to imply that a system which remanded more fugitives to slavery would have been "better" from a normative perspective. I mean only to say that a different decision may have made the fugitive slave issue less divisive.

213. *See* MCCLELLAN, *supra* note 139, at 140–41.

desire to create a federal bureaucracy that could help enforce federal orders in others areas.[214]

Story also may not have fully appreciated why the fugitive slave issue was so important to the South. While Story's opinion is infused with practical judgments about how fugitives could best be returned, it contains little concern for how to best encourage the North to participate in the rendition process. The opinion therefore seems to be blind to the symbolic importance of the fugitive slave issue as a test for determining whether the North would protect Southern rights. The opinion appears almost unaware that, for many Southerners, successful federal enforcement would do little to appease the South if Northerners resisted the law.

Similarly, the Court may have overestimated its ability to change popular Southern attitudes towards the Constitution.[215] Even after *Prigg* held that the Fugitive Slave Clause imposed duties exclusively on the federal government, most prominent Southerners continued to argue that the Constitution imposed a duty on the Northern states and people to return fugitive slaves. The Court was wrong to think that it could change Southern constitutional opinion on the Fugitive Slave Clause.

Political chance also greatly contributed to the failure of the Court's vision for an effective federal regime. In 1842, when *Prigg* was decided, there may have been reason to believe that Northerners would be in a position to help set federal policy.[216] The heightened influence that the Compromise of 1850 would give to Southern extremists simply could not have been anticipated.[217]

These factors all suggest that the Court's greatest error may have been its judicial maximalism.[218] In *Prigg*, the Court announced a doctrine

214. *See* Goldstein, *supra* note 8, at 790. According to Goldstein, Story may have wanted a federal bureaucracy to help enforce federal orders to release state prisoners held in violation of federal law. *Id.* Goldstein documents Story's experiences with state courts ignoring federal orders to release black sailors held under Southern law and state resistance to federal orders in Indian removal. *Id.*

215. For more on popular sovereignty in this era, *see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

216. *See* Goldstein, *supra* note 8, at 785–86.

217. However, given Congress's failure to reach a compromise in 1818, the Court may have been naïve to think that an increasingly polarized Congress could reach an acceptable solution.

218. A maximalist decision is one that rules broadly and provides a theoretical defense of its ruling. By contract, judicial minimalism is the practice of deciding cases on narrow grounds without taking a stand on foundational debates in law and politics. Minimalist decisions allow for greater flexibility and change in future cases. *See* Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123 (2005).

that was far more comprehensive than was required by the facts of the case before it. While political circumstances may be impossible to predict, such unpredictability is itself predictable. Exercising judicial restraint through incremental decision-making would have given the Court greater flexibility to adapt constitutional doctrine to changing political circumstances. Moreover, such incrementalism would have perhaps given the Court a better chance to slowly persuade the public to accept its views and adjust in response to popular reaction. The Court probably would have done far less political damage if it had ruled on the narrow facts before it instead of expounding an all-inclusive interpretation of the Fugitive Slave Clause.[219]

V. THE COURT, BACKLASH, AND SOCIAL CHANGE

The history of *Prigg* should inform the larger debate over the Supreme Court's ability to produce positive social and political change. Much of this debate has revolved around the contested history of backlash against controversial decisions. According to many scholars, Court decisions that step too far outside of public opinion produce backlash that undermines the very goals the Court sought to advance.[220] This battle over the proper role of the Court is often fought in the minutiae of the legal history.

Dred Scott v. Sanford, *Brown v. Board of Education*, and *Roe v. Wade* are prominent examples. Although the Court in *Dred Scott* sought to resolve the explosive issue of slavery in the territories, many scholars assert that the decision destabilized the Union by provoking an antislavery backlash in the North and fracturing the national Democratic Party.[221] *Brown*, moreover, engendered massive resistance to racial desegregation and radicalized politics in the South along racial lines.[222] And *Roe v. Wade* arguably mobilized the pro-life movement and fueled the rise of the New Right in part by providing a unifying symbol for attack.[223]

219. Similar criticism has been leveled against the Court's unnecessarily broad ruling in *Roe v. Wade*. *See supra* note 2.

220. *See supra* note 1.

221. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI. KENT L. REV. 49, 90 (2007); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI. KENT L. REV. 97 (2007); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (2001).

222. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 348–50 (2004).

223. *See supra* note 1.

Other scholars refute this history. For example, Mark Graber contends that *Dred Scott* was a centrist decision that actually helped the Democratic Party at the polls.[224] Reva Siegel and Linda Greenhouse, among others, argue that conflict over abortion had escalated and become politicized long before the Court's intervention in *Roe*.[225]

The debate over courts and backlash matters. Fear of backlash may explain why the courts were so slow to recognize the constitutional right to marriage equality and why Justice Kennedy's opinion in *Obergefell* does not stake a clear position on LGBT rights.[226] Justice Ginsburg in particular seems to have feared that decisive action on marriage equality could have triggered a counterproductive backlash, just as she has argued that *Roe* engendered backlash against the right to choose.[227]

One prominent issue within this debate is whether court decisions are unique in producing backlash or whether legislative action produces similar results. Michael Klarman, for example, argues that court decisions uniquely contribute to backlash because they "incite anger over 'outside interference' or 'judicial activism,' and they alter the order in which social change would otherwise have occurred."[228] In *Brown*, for example, Klarman argues that, although African-Americans were more interested in voting rights, ending police violence, economic opportunity, and securing educational resources, the Court forced "to the forefront an issue—racial segregation of public schools—on which most white Southerners were unwilling to compromise."[229] Scholars who downplay the courts' role in creating backlash, however, contend that social change inevitably produces conflict regardless of whether the courts are

224. *See generally* MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (Cambridge U. Press, 2008); Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C. L. REV. 1229 (2005).

225. *See supra* note 2.

226. *See* Adam Deming, Comment, *Backlash Blunders: Obergefell and the Efficacy of Litigation to Achieve Social Change*, 19 U. PA. J. CONST. L. 271, 292–94 (2016); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, 208, 212–17 (2013).

227. *See* Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. S52, S56 (2015).

228. Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431, 473 (2005) [hereinafter Klarman, *Brown & Lawrence*]. Gerald Rosenburg, moreover, argues that courts decisions do more to mobilize the opposition than produce significant social reform. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 234–40 (1991).

229. Klarman, *Brown & Lawrence*, *supra* note 228, at 477–78.

involved.[230] Just as courts can mobilize opposition, they further contend, constitutional law can help to move the content of social ideas in a positive direction as well.[231]

The history of *Prigg v. Pennsylvania* provides another example of counterproductive judicial decision-making on a contentious social issue. Like the backlash reading of *Dred Scott*, *Brown*, and *Roe*, the Court's opinion in *Prigg* undermined the very goals that Justice Story sought to achieve. Justice Story believed that strong federal enforcement would most effectively return fugitives, and therefore satisfy Southern demands to enforce the Fugitive Slave Clause. In hindsight, however, *Prigg's* unnecessarily broad interpretation of the Fugitive Slave Clause undermined the very goals the Court was attempting to achieve. Just as *Roe* arguably went too far in declaring a right to choose that was stronger than public opinion would support, the fugitive slave policy that resulted from *Prigg* created an antislavery backlash in the North. Resistance to federal enforcement in the North, moreover, outraged Southerners who demanded constitutional protections for slavery.

This history also informs the debate over whether court decisions are unique in producing backlash. The backlash examined in this Article was in response to the Fugitive Slave Act of 1850, not the Court's decision. However, the history of *Prigg* demonstrates that court decisions and legislation are not mutually exclusive. Court decisions, in other words, can help create the conditions needed for backlash-inducing legislation. The Court's ruling in *Prigg* took more moderate legislative approaches off the table and empowered radical Southern congressmen who could have never passed such proslavery legislation under ordinary circumstances.

The history of *Prigg* also suggests that courts can be uniquely predisposed to produce controversial results on socially divisive issues. Precisely because the issue of fugitive slaves was so polarizing, Congress had long been unable to agree on any amendments to the Fugitive Slave Act of 1793. The Court, however, was able to take bold action where Congress could not. The Court's action, moreover, was misguided because it was largely driven by the political miscalculations of Justice Story, a Northerner who believed in strong national power and perhaps

230. *See* Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From Roe to Perry*, 60 UCLA L. REV. DISCOURSE 240, 245–46 (2013); James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 FORDHAM L. REV. 2885, 2913–14 (2007).

231. *See* Post & Siegel, *supra* note 2, at 394–95.

did not fully appreciate the importance of the fugitive slave issue in the South. Nothing similar could have happened in Congress, where every major region, faction, and constituency had representation. *Prigg* therefore demonstrates why Court decisions on controversial social and political issues so often produce unintended and counterproductive effects.

VI. CONCLUSION

The history of *Prigg* should inform the debate over court decisions, backlash, and social change. Even when Court decisions do not directly provoke public outcry, they can produce social and political change on controversial issues by steering the country towards divisive national policy. In fact, there is reason to believe that judicial intervention on a contentious issue is especially likely to be counterproductive when the Court sets broad national policy rather than incrementally deciding the cases that come before it.

Prigg created a new national policy on fugitive slaves by disrupting the existing system of state and federal cooperation and setting the stage for the Fugitive Slave Act of 1850. Justice Story's opinion not only used constitutional law to foreclose the type of legal process favored by Northerners, but it also prevented Congress from encouraging the Northern states to act, as Southerners had sought to do in the past. By enabling Northern noncooperation, moreover, *Prigg* practically required new federal legislation.

The proslavery federal policy envisioned by Justice Story, however, exacerbated sectional conflict over fugitive slaves. Northern states stopped participating in rendition after *Prigg* invalidated state protections for free blacks, and federal enforcement without fair process produced an antislavery backlash in many Northern cities. Southerners, moreover, never accepted Story's doctrine of federal exclusivity and continued to believe that the Constitution placed primary responsibility for the return of fugitive slaves on the states. For them, vigorous federal enforcement of the type envisioned by the Court in *Prigg* meant nothing when the Northern people vehemently protested and attempted to block rendition. Fugitive slave cases were thus seen as gross violations of Southern constitutional rights, even when the federal government vigorously enforced the law. Ultimately, the fugitive regime that *Prigg* helped create fueled the movement for disunion and helped to legally justify secession.

If the Court in *Prigg* had rendered a narrower decision tied to the facts of the case before it, political actors may have had the flexibility to

create a more just and workable system. Instead, *Prigg* invalidated the preexisting system of state and federal cooperation, undermined Northern participation, and pushed Southerners into an unworkable framework of federal exclusivity. In doing so, the Supreme Court played an integral role in creating the antebellum fugitive slave controversy.