

Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story's Judicial Nationalism

Author(s): Paul Finkelman and Joseph Story

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## STORY TELLING ON THE SUPREME COURT: PRIGG v PENNSYLVANIA AND JUSTICE JOSEPH STORY'S JUDICIAL NATIONALISM

Few scholars dispute Justice Joseph Story's enormous significance for American law. He was unquestionably "one of our greatest jurists and legal theorists."<sup>1</sup> His numerous *Commentaries* on various subjects became fundamental textbooks and reference tools for a generation of lawyers and helped create a national legal system. His vast legal scholarship made him a "one-man West Publication Company."<sup>2</sup> As a Harvard professor he helped train an important segment of the antebellum elite bar and, moreover, set the stage

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Paul Finkelman is Visiting Associate Professor of Law, Chicago-Kent College of Law.

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<sup>1</sup> Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 282 (University of North Carolina Press, 1985). This does not, however, make him the most accurate judicial scholar. For a discussion of the weakness of Story's scholarship, see Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in the Conflict of Laws* (University of Georgia Press, 1992).

<sup>2</sup> Newmyer, *Justice Joseph Story* (cited in note 1).

for the development of serious legal education in America. He is on everyone's all time hit parade of Supreme Court justices.<sup>3</sup>

Story was something of a "lawyer's" justice, whose opinions, as well as his learned treatises, helped revolutionize American law. Most of his important opinions involved technical issues of procedure or commercial law, rather than great issues of statecraft. For better or worse, he spent most of his career on the bench with Chief Justice John Marshall, who assigned most decisions affecting major public policy issues to himself.<sup>4</sup> After Marshall's death, Story usually fared no better when it came to writing politically important opinions. In his last decade on the bench, under Chief Justice Roger B. Taney, Story often found himself in the minority on major policy questions,<sup>5</sup> but was still chosen to write the opinion of the court in major technical cases, such as *Swift v Tyson*,<sup>6</sup> the most important procedure case of the nineteenth century.<sup>7</sup>

One critical exception, where Story wrote a majority opinion on an issue of politics and statecraft, was *Prigg v Pennsylvania*.<sup>8</sup> To understand Story, and mid-nineteenth-century law and politics, one has to come to terms with *Prigg*. This is true whether one likes Story,<sup>9</sup> dislikes him,<sup>10</sup> or is simply ambivalent about him.<sup>11</sup> In coming to terms with Story's *Prigg* opinion, we are faced with a

<sup>3</sup> A. Leon Higginbotham, *An Open Letter to Clarence Thomas from a Federal Judicial Colleague*, 140 U Pa L Rev 1007, citing Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices: Statistical Studies in the Supreme Court of the United States* 35–36 (Archon Books, 1978).

<sup>4</sup> Professor David Currie's iconoclastic statement makes the point: "[T]hanks to John Marshall's insistence on writing everything himself, the Supreme Court was popularly known as 'John Marshall and the Six Dwarfs.'" David Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U Chi L Rev 466, 469 (1983).

<sup>5</sup> For example, *Proprietors of the Charles River Bridge v Proprietors of the Warren Bridge*, 11 Peters (36 US) 420, 581 (1837) (Story dissenting).

<sup>6</sup> 16 Peters (41 US) 1 (1842).

<sup>7</sup> Tony Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* (New York University Press, 1981). Without *Swift*, first year procedure professors would be unable to subject students to weeks of understanding the *Erie* doctrine. See *Erie Railroad Co v Tompkins*, 304 US 64 (1938).

<sup>8</sup> 16 Peters (41 US) 539 (1842).

<sup>9</sup> Christopher L. M. Eisgruber, *Joseph Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U Chi L Rev 273 (1988).

<sup>10</sup> Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975); see more recently Barbara Holden-Smith, *Lords of the Lash, Loom, and Law: Justice Story, Slavery and Prigg v Pennsylvania*, 78 Cornell L Rev 1086 (1993).

<sup>11</sup> Newmyer, *Justice Joseph Story* (cited in note 1).

case in which an otherwise scholarly, judicious, and apparently humane jurist wrote an opinion that was intellectually dishonest, based on inaccurate historical analysis, judicially extreme when it need not have been, and inhumane in its immediate results and in its long-term consequences. Furthermore, we face an extreme proslavery opinion written by a man who, at least on the surface, opposed slavery.<sup>12</sup> Moreover, in looking at the aftermath of *Prigg* we find that either Story, or his filiopietistic son, William Wetmore Story, sought to cast the decision as subtly antislavery, while the justice himself was working hard behind the scenes to help implement the proslavery implications of the decision.<sup>13</sup>

Story's primary goal in *Prigg* was to enhance the power in the national government. Story was willing to accomplish this at the expense of civil liberties, fundamental notions of due process, and accepted concepts of antebellum federalism.

In analyzing *Prigg* it is important to remember that the nationalization of power in the 1840s meant strengthening southern slaveholders and their proslavery northern doughface allies.<sup>14</sup> Story lived in a Union dominated by slaveholding presidents,<sup>15</sup> a proslav-

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<sup>12</sup> Holden-Smith, 78 Cornell L Rev (cited in note 10), challenges the conventional wisdom of Story's opposition to slavery. I think it is clear the Story disliked slavery and found it morally offensive, the way virtually all northerners did. However, this seems to have had little affect on his jurisprudence after the 1820s.

<sup>13</sup> See Story to John Macpherson Berrien, April 29, 1842, in John Macpherson Berrien Papers, Southern Historical Collection, University of North Carolina (hereafter cited as Story to Berrien Letter [cited in note 13]), quoted at length in James McClellan, *Joseph Story and the American Constitution* 262n–63n (University of Oklahoma Press, 1971). This is discussed at note 23.

<sup>14</sup> The term was an insult to describe "northern men with southern principles." In essence, a "doughface" had a face of dough that southern politicians shaped as they wished. "Doughface Democrats" were northern Democrats who voted to support proslavery positions.

<sup>15</sup> By 1842, when Story wrote *Prigg*, the United States had only had three northern presidents—all one-term presidents—and only two—John Adams and John Quincy Adams—had been even mildly antislavery. Martin Van Buren, although a New Yorker, was a classic "doughface." Six presidents (Washington, Jefferson, Madison, Monroe, Jackson, and Tyler)—including all five antebellum two-term presidents—had been slaveowners during their term of office; Harrison, a native of Virginia, had been a slaveowner for much of his adult life, and only ceased owning slaves when he failed, as territorial governor of Indiana, to get Congress to allow slavery in the old Northwest. On Harrison's attempts to bring make slavery legal in the old Northwest, see Paul Finkelman, *Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois*, 9 J Early Republic 21–52 (1989), and Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J Early Republic 343–70 (1986).

ery Supreme Court,<sup>16</sup> and more often than not a Congress controlled by southern politicians.<sup>17</sup> Similarly, states rights in antebellum America often meant the right of northern states to free visiting slaves,<sup>18</sup> to protect free blacks from kidnapping,<sup>19</sup> to prevent the extradition to the South of whites or blacks who helped slaves escape,<sup>20</sup> and even the right of northerners to interfere in the rendition of fugitive slaves, if it could be done under the color of state law.<sup>21</sup> Thus, we must not look at Story's nationalizing jurisprudence through the lens of a late twentieth-century Constitution, with three Civil War amendments (and various other amendments and statutes) that allow or obligate the national government to protect civil rights and civil liberties. On the contrary, Story lived in an age when federal power meant federal support for a proslavery Constitution<sup>22</sup> implemented by a proslavery national regime. Story not only knew all this, but saw ways that the national government

<sup>16</sup> As of 1842, when the Court heard *Prigg*, 19 of the 29 men appointed to the Supreme Court had been southerners. Cumulatively, up to 1842 southern justices had served a total of 209 years on the court, while northerners had served only 149 years. From 1800 to 1861, southerners outnumbered northerners in every term, except for the short period from 1830 to 1837. Significantly, the Court heard no major cases involving slavery during that period. In 1842, Story served on a court with five southerners and four northerners.

<sup>17</sup> From 1789 to 1842, there were 16 northern and 25 southern Presidents Pro Tempore of the Senate; more significantly, from 1801 to 1842, 20 Presidents Pro Tempore were southern, and only 5 were northern. Similarly, before 1801 all 5 Speakers of the House were from the North. But from 1801 until 1842, there were 11 southern Speakers and only 3 northern speakers.

<sup>18</sup> Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (University of North Carolina Press, 1981).

<sup>19</sup> Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Johns Hopkins University Press, 1974).

<sup>20</sup> Paul Finkelman, *States Rights North and South in Antebellum America*, in Kermit Hall and James W. Ely, Jr., eds, *An Uncertain Tradition: Constitutionalism and the History of the South* 125–58 (Athens, Ga., 1989); Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 Civ War History 211–34 (1988); and Paul Finkelman, *States' Rights, Federalism, and Criminal Extradition in Antebellum America: The New York-Virginia Controversy, 1839–1846*, in Hermann Wellenreuther, ed, *German and American Constitutional Thought: Contexts, Interaction, and Historical Realities* 293–327 (Berg, 1990).

<sup>21</sup> See, for example, *In Re Booth*, 3 Wis 1 (1854); *Ex parte Booth*, 3 Wis 145 (1854); *In re Booth and Rycraft*, 3 Wis 157 (1855); Jenni Parrish, *The Booth Cases: Final Step to the Civil War*, 29 Willamette L Rev 237 (1993). For an earlier example, see *Norris v Newton*, 18 F Cases 322 (CCD Ind., 1850); Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of Justice Delayed*, 78 Iowa L Rev 89–141 (1992).

<sup>22</sup> Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in Richard Beeman, Stephen Botein, and Edward C. Carter II, eds, *Beyond Confederation: Origins of the Constitution and American National Identity* 188–225 (University of North Carolina Press, 1987). On the antislavery analysis of the Constitution, see William M. Wiecek, *The Sources of Antislavery Constitutionalism, 1760–1848* (Cornell University Press, 1977).

might use his *Prigg* opinion to further implement the proslavery aspects of the Constitution.<sup>23</sup>

In the end Story favored national power over any other value, even if it meant strengthening slavery. His *Prigg* opinion showed indifference to the civil liberties of northerners and to the fate of free blacks (as well as fugitive slaves) living in the North.

One final caveat is in order. It might be easy to cast this analysis of Story and his *Prigg* opinion as anachronistic—as trying to hold Story to the standards of the late twentieth century. In an age when most scholars have only recently rediscovered the importance of race for American history, it is important to understand that the following analysis is not based on our own contemporary notions of what is either important or correct. Rather, this analysis begins with the assumption that to understand or criticize *Prigg* we must view it within the context of the mid-nineteenth century. In doing so we find that Story's contemporaries and friends condemned the opinion, and that the opinion ran counter to the conclusions of distinguished state judges. The facts of the case, contemporary concepts of justice, and the language of the Constitution itself offered Story an opportunity to write a different opinion. That he chose not to do so—that he shaped both constitutional history and the “facts” of the case to support and even compel the opinion he wrote—suggests that his opposition to slavery, whatever it might once have been,<sup>24</sup> had withered away to a theoretical abstraction that denied the reality of mid-century America.

Despite *Prigg*, it is possible to remain in awe of Story's scholarly productivity, his skills as a mentor, and his significance as a great

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<sup>23</sup> Shortly after the Court decided *Prigg*, Story wrote to Senator John Macpherson Berrien of North Carolina to discuss a draft bill on federal jurisdiction that he had sent to Berrien. He reminded Berrien that he had suggested in that proposed bill

that in all cases, where by the Laws of the U. States, powers were conferred on State Magistrates, the same powers might be exercised by Commissioners appointed by the Circuit Courts. I was induced to make the provision thus general, because State Magistrates now generally refuse to act, & cannot be compelled to act; and the Act of 1793 respecting fugitive slaves confers the power on State Magistrates to act in delivering up Slaves. You saw in the case of *Prigg* . . . how the duty was evaded, or declined. In conversing with several of my Brethren on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers.

Story to Berrien Letter (cited in note 13).

<sup>24</sup> See Newmyer, *Justice Joseph Story* (cited in note 1), and Eisgruber on how Story was antislavery in the beginning of his life.

Supreme Court justice. *Prigg*, however, forces us to reevaluate Story and his nationalistic jurisprudence as well as the role of the antebellum court in shaping the politics of slavery a decade and a half before *Dred Scott*.<sup>25</sup>

### I. A PROSLAVERY DECISION

In 1837, Nathan S. Beemis, Edward Prigg, and two other men traveled to Pennsylvania, where they seized as fugitive slaves Margaret Morgan and her children. They then brought the blacks back to Maryland without first complying with all of the requirements of an 1826 Pennsylvania law regulating the return of fugitive slaves.<sup>26</sup> This statute, known as a personal liberty law, required that anyone removing a black from the state as a fugitive slave first obtain a certificate of removal from a state judge, justice of the peace, or alderman.

The York County prosecutor immediately sought indictments against the four men for kidnapping and failing to follow the Pennsylvania law. After protracted negotiations between Maryland and Pennsylvania, the governor of Maryland agreed to allow the extradition of one of the four slave catchers, Edward Prigg. Prigg was subsequently convicted of kidnapping for removing Margaret Morgan and her children from Pennsylvania without obtaining a certificate of removal from a state magistrate. Prigg appealed to the U.S. Supreme Court, and in 1842 the Court overturned his conviction.

In his Opinion of the Court, Justice Joseph Story reached five major conclusions: (1) that the federal fugitive slave law of 1793<sup>27</sup> was constitutional; (2) that no state could pass any law adding additional requirements to that law which could impede the return of fugitive slaves; (3) that the Constitution provided a common law right of recaption—a right of self-help—which allowed a slave-

<sup>25</sup> *Dred Scott v Sandford*, 19 How (60 US) 393 (1857).

<sup>26</sup> "An Act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent Kidnapping," ch L, Pennsylvania Session Law, 1826 150 (1826) (hereafter Pennsylvania Personal Liberty Law); on the passage of the act itself, see William R. Leslie, *The Pennsylvania Fugitive Slave Act of 1826*, 13 J Southern History 429 (1952), reprinted in Paul Finkelman, ed., 6 *Articles on American Slavery: Fugitive Slaves* 211 (Garland, 1989).

<sup>27</sup> "An Act Respecting Fugitives from Justice and Persons Escaping from the Service of Their Masters," 1 Stat 302 (1793) (Hereafter cited as Fugitive Slave Act).

owner (or an owner's agent) to seize any fugitive slave anywhere and bring that slave back to the master without complying with the provisions of the federal fugitive slave law, and that no state law could interfere with such a removal; (4) that state officials ought to, but could not be required to, enforce the federal law of 1793; (5) that no fugitive slave was entitled to any due process hearing or trial beyond a summary proceeding to determine if the person seized was the person described in the affidavit or other papers provided by the claimant. However, a claimant did not have to comply with even this minimal procedure if he exercised a right of common law recaption, under Story's notion of self-help.

This sweeping opinion undermined the security of free blacks living in the North, endangered the liberty of fugitive slaves who had escaped to freedom, and threatened the public peace and stability of northern society. These results stemmed from two prongs of Story's opinion. First, by striking down Pennsylvania's Personal Liberty Law, and by extension the personal liberty laws of other states, Story left the northern states without the weapons or the legal authority to prevent the kidnapping of blacks. Second, Story further endangered blacks in the North by asserting that the Constitution gave a master a right of self-help, "to seize and recapture his slave" anywhere in the nation regardless of state or federal statutory law.<sup>28</sup>

Story claimed that the fugitive slave clause "manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain."<sup>29</sup> Story declared:

we have not the slightest hesitation in holding, that under . . . the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.<sup>30</sup>

This conclusion was extraordinary. It meant that any southerner could seize any black and remove that person to the South without

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<sup>28</sup> *Prigg* at 613.

<sup>29</sup> *Id* at 612.

<sup>30</sup> *Id* at 613.

any state interference or even a hearing before either a state or federal magistrate. This removal without any judicial superintendence or the need to show any proof of the slave's status to anyone was legal as an act of self-help, as long as no "breach of the peace" occurred. One might presume that a "breach of the peace" would always occur when a black, especially a free one, was seized as a fugitive slave. However, for both logical and practical reasons, this was not always the case.

In his dissent, Justice McLean pointed out the theoretical problems of limiting Story's right of self-help to instances in which there was no breach of the peace. McLean noted that under Story's opinion, "the relation of master and slave is not affected by the laws of the state, to which the slave may have fled, and where he is found." Thus, McLean reluctantly concluded that "[i]f the master has a right to seize and remove the slave, without claim, he can commit no breach of the peace, by using all the force necessary to accomplish his object."<sup>31</sup> In other words, McLean feared that under Story's opinion no amount of violence against an alleged slave would be illegal. Using Story's logic, it would never be a breach of the peace for a master to take his slave by brutal force, nor could this force be considered "illegal violence" as long as it was directed against a slave or an alleged slave.

There was also a practical problem. Seizures at night or in isolated areas could be accomplished without anyone observing a breach of the peace. Once a black was shackled, intimidated, and perhaps beaten into submission, travel from the North to the South could be accomplished without any obvious breach of the peace. If state officials could not stop a white transporting a black in chains, then kidnapping of any black could always be accomplished. Under such a rule anyone, especially children, might be kidnapped and enslaved. Kidnapping of this sort had led to the enactment of Pennsylvania's 1826 Personal Liberty Law.<sup>32</sup> By requiring state judicial supervision of fugitive slave rendition, Pennsylvania hoped to prevent such abuses. But by striking down Pennsylvania's law, and by extension similar laws in other states, Story

<sup>31</sup> *Id* at 668 (McLean dissenting).

<sup>32</sup> Leslie, 13 *J Southern History* at 429 (cited in note 26). Leslie notes that shortly before the adoption of this law, five black children were kidnapped in Philadelphia and sold as slaves. Three were eventually returned to their families, but two died.

left the North powerless to prevent this type of kidnapping. Moreover, by deciding that masters had a right of self-help, Story allowed whites to seize any blacks and bring them south without any proof of their status as slaves.

Story's opinion effectively made the law of the South the law of the nation. In the South, race was a presumption of slave status,<sup>33</sup> and by giving masters and slave hunters a common law right of recaution, Story nationalized this presumption. As a result, slave catchers could operate in the North without having to prove the seized person's slave status. The consequences for the nearly 175,000 free blacks in the North could have been dire.

In *Prigg*, Justice Story shaped both the history of the Constitution, relevant precedents, and the facts of the case to justify his opinion. He created a mythological origin of the fugitive slave clause that legitimized his harsh interpretation of it. He misstated the existing case law, or ignored it, to bolster his opinion. Similarly, he ignored or misstated important facts about Margaret Morgan and her children that might have compelled a different result in the case. These were the stories the justice from Massachusetts told. By examining these tales, we see there were viable alternatives to Story's sweeping opinion upholding the 1793 Fugitive Slave Law and simultaneously striking down Pennsylvania's 1826 Personal Liberty Law.

## II. THE FIRST STORY: THE FUGITIVE SLAVE CLAUSE AND THE BARGAIN OF 1787

After summarizing its procedural history, Story acknowledged the importance of the case. "Few questions which have ever come before this Court" he wrote "involve more delicate and important considerations; and few upon which the public at large may be presumed to feel a more profound and pervading interest."<sup>34</sup> For Story the greatest danger of this constitutional minefield was its potential for disruption of the Union. His lifetime goal as a jurist, scholar, teacher, and politician was to preserve national harmony and to strengthen the national government.

In *Prigg* he could accomplish both goals if he could give the

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<sup>33</sup> See generally, Paul Finkelman, *The Crime of Color*, 67 Tulane L Rev 2063 (1993).

<sup>34</sup> *Prigg* at 610.

South a result it wanted and somehow convince the North that the Constitution dictated this result. The result was a creative, but historically inaccurate, original intent analysis of the Constitution's Fugitive Slave Clause.

#### A. STORY'S HISTORY OF THE FUGITIVE SLAVE CLAUSE

Story hoped to persuade the North that his opinion was correct by elevating the Fugitive Slave Clause to a matter of the highest constitutional order. To do this, he made two important historical arguments. First, he asserted that the Fugitive Slave Clause was central to the compromises over slavery necessary for the adoption of the Constitution. Second, Story argued that this was well understood during the debates over ratification. In fact, both of these arguments are historically suspect. But, before considering what actually happened at the Convention and during the ratification process, it is necessary to examine Story's arguments.

1. *Story's history of the drafting of the clause.* With a tone of authority Story wrote:

Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.<sup>35</sup>

He then elaborated on this argument. He compared the Fugitive Slave Clause to the Three-Fifths Clause and the protection of the African slave trade as one of the fundamental bargains over slavery at the Convention. Story argued that at the Convention "several" of the states "required as a condition, upon which any constitution should be presented to the states for ratification, a full and perfect security for their slaves as property, when they fled into any of the states of the Union."<sup>36</sup> He asserted that the southern demand

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<sup>35</sup> Id at 611.

<sup>36</sup> Id at 638–39.

for a Fugitive Slave Clause, along “with an allowance of a certain portion of slaves with the whites, for representative population in Congress, and the importation of slaves from abroad, for a number of years; were the great obstacles in the way of forming a constitution.”<sup>37</sup> The compromises on these issues, Story asserted, were central to the constitutional bargain, and “without all of them . . . it was well understood, that the Convention would have been dissolved, without a constitution being formed.”<sup>38</sup> Story offered this, not as interpretation, but as inconvertible fact: “I mention the facts as they were. They cannot be denied. . . . I am satisfied with what was done; and revere the men and their motives for insisting, politically, upon what was done. When the three points relating to slaves had been accomplished, every impediment in the way of forming a constitution was removed.”<sup>39</sup> Thus, according to Story’s history, the Fugitive Slave Clause was both essential to the writing of the Constitution and the work of men who Story “revere[d].”

2. *Story’s history of ratification.* Tied to his history of the Convention was Story’s briefer history of ratification. First he asserted that the “provision in respect to fugitives from service or labour” was “a guarantee of a right of property in fugitive slaves, wherever they might be found in the Union.” This simple statement seemed to preclude any analysis that might have led to a more subtle and complex interpretation of the clause. Then Story asserted that this was well understood at the time of ratification.

The Constitution was presented to the states for adoption, with the understanding that the provisions in it relating to slaves were a compromise and guarantee; and with such an understanding in every state, it was adopted by all of them. Not a guarantee merely in the professional acceptation of the word, but a great national engagement, in which the states surrendered a sovereign right, making it a part of that instrument, which was intended to make them one nation, within the sphere of its action.<sup>40</sup>

3. *The implications of Story’s history.* These arguments—that the Fugitive Slave Clause was “a fundamental article” of constitutional

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id at 638–39.

compromise and that this was well known during the ratification struggle—set the stage for the rest of Story's opinion. If the clause was indeed *fundamental*, then perhaps it required extraordinary—and exclusive—enforcement by the federal government. Thus Story continued and extended his original intent analysis to assert that the framers must have intended not only federal enforcement of the clause, but exclusive federal jurisdiction. Story argued that if the clause allowed state legislation on the subject, "The right" of the master to capture a runaway slave "would never, in a practical sense be the same in all the states. It would have no unity of purpose, or uniformity of operation. The duty might be enforced in some states; retarded, or limited in others; and denied, as compulsory in many, if not in all."<sup>41</sup> Story argued that "It is scarcely conceivable that the slaveholding states would have been satisfied with leaving to the legislation of the non-slaveholding states, a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner."<sup>42</sup> If Congress did not have exclusive jurisdiction, then each state would have the power "to dole out its own remedial justice, or withhold it at its pleasure and according to its own views of policy and expediency."<sup>43</sup> This, Story believed, could not have been in the intentions of the framers.

Story's argument about the historic importance of the clause and the intentions of its framers deviated somewhat from his analysis of a decade earlier. In *Commentaries on the Constitution of the United States*<sup>44</sup> he had asserted—erroneously—that the Convention had considered the clause necessary because the lack "of such a provision under the [Articles of] confederation was felt, as a grievous inconvenience by the slave-holding states, since in many states no aid whatsoever would be allowed to the masters; and sometimes indeed they met with open resistance."<sup>45</sup> There was little truth to this position. In 1787 no state prevented southern masters from recovering runaways. But when writing his *Commentaries*, Story

<sup>41</sup> Id at 624.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Gray & Co., 1833).

<sup>45</sup> Id at § 952.

had not considered the clause a key part of the constitutional bargain. In the *Commentaries*, he noted only that the clause was a boon “for the benefit of the slaveholding states” to indicate northern good will toward the “peculiar interests of the south.”<sup>46</sup> He thought the clause was evidence that the South “at all times had its full share of benefits from the Union.”<sup>47</sup> Significantly, Story did not argue in *Commentaries* that the clause was part of a bargain, was a quid pro quo for something in the Constitution that the North wanted.<sup>48</sup> Nor did he argue that it was a “a fundamental article, without the adoption of which the Union could not have been formed.”<sup>49</sup>

#### B. THE REAL HISTORY OF THE FUGITIVE SLAVE CLAUSE

Story’s assertion that the clause was an essential element of the constitutional bargain of 1787, and that it was equivalent to the three-fifths compromise or the slave trade compromise, was his first “story” in the *Prigg* decision. It was a strong argument in favor of his proslavery opinion, but it was also an argument that did not comport with the available evidence from Madison’s *Notes of the Federal Convention*.<sup>50</sup>

Late in the Constitutional Convention, Pierce Butler and Charles Pinckney of South Carolina proposed that a fugitive slave clause be added to the article requiring the interstate extradition of fugitives from justice. James Wilson of Pennsylvania objected to the juxtaposition because “This would oblige the Executive of the State to do it, at the public expence.” Butler discreetly “withdrew his proposition in order that some particular provision might be made apart from this article.” A day later the Convention, without debate or formal vote, adopted the fugitive slave provision as a separate

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<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Without any evidence to support his position, Mr. Jonathan Meredith, counsel for *Prigg*, argued before the Supreme Court that “it is well known” that “the fugitive slave clause was the result of mutual concessions in reference to the whole subject of slavery. On the one hand the south agreed to confer upon Congress the power to prohibit the importation of slaves after the year 1808. On the other, the north agreed to recognise [sic] and protect the existing institutions of the south.” *Prigg* at 565.

<sup>49</sup> Id at 611.

<sup>50</sup> See note 48 supra.

article of the draft constitution.<sup>51</sup> Eventually the two clauses emerged as succeeding paragraphs in Article IV, Section 2 of the Constitution.<sup>52</sup>

The paucity of debate over the Fugitive Slave Clause is remarkable because by the end of August 1787, when the Convention adopted the clause, slavery had emerged as one of the major stumbling blocks to a stronger union. While morally offensive to a number of the northern delegates, some southerners defended slavery with an analysis that anticipated the "positive good" arguments of the antebellum period. Nevertheless, unlike the debates over the slave trade, the Three-Fifths Clause, the taxation of exports, and the regulation of commerce, the proposal for a fugitive slave clause generated no serious opposition.<sup>53</sup> Story made much of this. He noted that the clause "was proposed and adopted by the unanimous vote of the Convention."<sup>54</sup> This unanimity should have alerted Story to the relative unimportance of the clause. Every other slavery-related clause at the Convention led not only to debate but opposition. Story's elevation of the importance of the Fugitive Slave Clause is not supported by the Convention debates. Some of the longest and most acrimonious debates at the Convention occurred over the Three-Fifths Clause and the slave trade provision. On the other hand, the Convention delegates barely discussed the Fugitive Slave Clause, not because there was generally agreement on what the clause meant or on its necessity, but more likely because the northern delegates simply failed to appreciate the legal problems and moral dilemmas that the rendition of fugitive slaves would pose.

The relationship between slavery and the Constitution generated

<sup>51</sup> The only other response to Butler's proposal was Roger Sherman's sarcastic observation that he "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse." Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* (Yale University Press, 1966) 443, quotations at 453–54. The history of this clause is discussed in Finkelman, *Slavery and the Constitutional Convention* at 219–24 (cited in note 22). See also William M. Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, in Leonard W. Levy and Dennis J. Mahoney, eds., 167–84 *The Framing and Ratification of the Constitution* (Macmillan, 1987).

<sup>52</sup> The clause reads: "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."

<sup>53</sup> Finkelman, *Slavery and the Constitutional Convention* at 219–24 (cited in note 22).

<sup>54</sup> Prigg at 638–39.

a great deal of debate during the ratification struggle. Northerners objected to the Three-Fifths Clause and the migration and importation clause, which prevented Congress from ending the slave trade before 1808. Some of this debate was extremely emotional and vivid. For example, "A Countryman from Dutchess County" thought that Americans might become "a happy and respectable people" if the Constitution were "corrected by a substantial bill of rights" and, among other changes, the states were forced into "relinquishing every idea of drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants."<sup>55</sup> In the New Hampshire Convention Joshua Atherton complained:

The idea that strikes those, who are opposed to this clause, so disagreeably and so forcibly, is, hereby it is conceived (if we ratify the Constitution) that we become consenters to, and partakers in, the sin and guilt of this abominable traffic . . . .

We do not think ourselves under any obligation to perform works of supererogation in the reformation of mankind; we do not esteem ourselves under any necessity to go to Spain or Italy to suppress the inquisition of those countries; or of making a journey to the Carolinas to abolish the detestable custom of enslaving the Africans; but, sir, we will not lend the aid of our ratification to this cruel and inhuman merchandise, not even for a day. There is a great distinction in not taking a part in the most barbarous violation of the sacred laws of God and humanity, and our becoming guaranties for its exercise for a term of years.<sup>56</sup>

Similarly, "A Friend of the Rights of People" asked, "Can we then hold up our hands for a Constitution that licences this bloody practice? Can we who have fought so hard for Liberty give our consent to have it taken away from others? May the powers above forbid."<sup>57</sup>

Yet, despite the vigorous attacks on the slave trade provision and complaints about the Three-Fifths Clause, no antifederalists seem

<sup>55</sup> "Letters from a Countryman from Dutchess County" (letter of Jan 22, 1788), in Herbert Storing, ed, 6 *The Complete Anti-federalist* 62 (University of Chicago Press, 1981).

<sup>56</sup> Fragment of Debate at New Hampshire Convention, in Jonathan Elliot, ed, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 203–04 (J. B. Lippincott, 1881).

<sup>57</sup> "A Friend to the Rights of the People," in Storing, 4 *The Complete Anti-federalist* (cited in note 55), 234, 241.

to have publicly discussed the fugitive slave provision.<sup>58</sup> They did not see it as obligating either themselves, or the federal government, to become involved in the dirty business of capturing runaway slaves. The authors of *The Federalist* discussed the three-fifths provision and the slave trade, but ignored the Fugitive Slave Clause.<sup>59</sup> Contrary to Story's telling, if the Fugitive Slave Clause was an important provision of the Constitution, few in the North, on either side of the ratification debate, seemed to notice it.

In the South, supporters of the Constitution pointed to the Fugitive Slave Clause as a boon to their interests, but not as either a major component of the constitutional bargain or as something that would lead to federal enforcement.

In the Virginia Ratifying Convention, for example, the antifederalist George Mason complained that the Constitution might threaten slavery. James Madison replied by defending the various clauses that protected slavery. He asserted that the Fugitive Slave Clause "was expressly inserted to enable owners of slaves to reclaim them."<sup>60</sup> Madison noted that under the Articles of Confederation if a slave escaped to a free state "he becomes emancipated by their laws. For the law of the States are uncharitable to one another in this respect." But under the Fugitive Slave Clause this could not happen, and this was "a better security than any that now exists."<sup>61</sup> Had Madison believed the clause guaranteed federal enforcement, he probably would have made this point because it would have

<sup>58</sup> The only northern opposition to this clause that I have encountered is found in correspondence from and to the Rhode Island merchant and Quaker abolitionist Moses Brown. In private correspondence, Brown expressed concern that the Fugitive Slave Clause was "designd to Distroy the Present Assylum of the Massachusets from being as a City of Refuge for the poor Blacks, many of whom had resorted there on Accounjt of their Constitution or Bill of rights declaring in the first Article 'That all men are born free & Equal &c.' and there being no Laws in that State to support slavery, the Negroes on Entering that state are as free as they are on Entering into Great Brittan and the southern people have not been able by Applycation of the Goverour, Judges or other Authority to Recover those they had held as Slave, who Chose to Stay there." Moses Brown to James Pemberton, 17 Oct 1787, reprinted in John P. Kaminski and Gaspare J. Saladino, eds, 14 *The Documentary History of the Ratification of the Constitution by the States: Commentaries on the Constitution, Public and Private* 506–07 (State Historical Society of Wisconsin, 1983). See also William Rotch, Sr. to Brown, 8 Nov, 1787, in id at 521; Brown to James Thornton, Sr., 13 Nov 1787, in id at 522–23; Edmund Prior to Brown, 1 Dec 1787, in id at 526.

<sup>59</sup> *Federalist* 42 and *Federalist* 54.

<sup>60</sup> James Madison, in the Virginia Ratifying Convention, 17 June 1788, in John P. Kaminski and Gaspare J. Saladino, eds, 10 *The Documentary History of the Ratification of the Constitution by the States: Virginia* [3] 1339 (State Historical Society of Wisconsin, 1993).

<sup>61</sup> *Id.*

strengthened his argument in favor of ratification by Virginia. But, he did not make such a point because he did not believe it accurate. Similarly, when Patrick Henry asserted that the Constitution would lead to an abolition of slavery, Edmund Randolph, who had been at the Philadelphia Convention, pointed to the Fugitive Slave Clause to prove that this was not so. He said that under the clause "authority is given to owners of slaves to vindicate their property."<sup>62</sup>

In other states the debate was much the same. The North Carolina delegates told their governor that "the Southern States have also a much better Security for the Return of Slaves who might endeavour to Escape than they have under the original Confederation."<sup>63</sup> Similarly, Charles Cotesworth Pinckney told the South Carolina House of Representatives, "We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before."<sup>64</sup>

None of the supporters of the Constitution who at been at the Convention intimated that the Fugitive Slave Clause was a fundamental part of the bargain. Rather, they pointed to it as a plus for the South, but not as a major clause. Similarly, none of these framers anticipated that the federal government would enforce the clause. The structure of the Constitution supported this interpretation of the clause.<sup>65</sup>

#### C. JUSTICE STORY'S HISTORY AND THE PROSLAVERY CONSTITUTION

Story's history of the origin of the Fugitive Slave Clause does not comport with either the records of the Constitutional Convention or with the discussion of the clause during the ratification process. Significantly, both sources were available to him in 1842 when he wrote the decision. The history he gave did, however,

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<sup>62</sup> Edmund Randolph in the Virginia Ratifying Convention, June 24, 1788, in Kaminski and Saladino, 10 *Documentary History* 1484 (cited in note 60).

<sup>63</sup> North Carolina Delegates [William Blount, Rich'd D. Spaight, Hugh Williamson] to Governor Caswell, Sept 1787, reprinted in Farrand, ed, 3 *Records* 83 at 84 (cited in note 51).

<sup>64</sup> Charles Cotesworth Pinckney, Speech in South Carolina House of Representatives, Jan [17], 1788, reprinted in 3 Farrand, *Records* 252 at 254.

<sup>65</sup> The Fugitive Slave Clause is in Art IV, § 2 of the Constitution. Sections 1, 3, and 4 of Art IV all give specific enforcement powers to the federal government. Because § 2 is the only part of that article which *does not* explicitly grant authorize federal implementation, it is reasonable to argue that the framers did not intend to grant Congress such power.

support his goal of nationalizing the law. By reshaping the clause into a fundamental part of the bargain over the Constitution, he could argue for exclusive federal jurisdiction over the return of fugitive slaves.

At another level, the *Prigg* opinion brought Story's jurisprudence closer to the true meaning of the Constitution, if not to the meaning of this particular clause. It seems clear that one goal of the Constitutional Convention was to protect the South's interest in slavery. Throughout the Convention, southerners explicitly demanded such protection. They gained it in a variety of clauses dealing with representation, taxation, the slave trade, and the power of the national government to suppress rebellions and insurrections. Most important of all, from the perspective of slaveowners, was the limited nature of the national government, which precluded a general emancipation. As General Charles Cotesworth Pinckney of South Carolina told his state's house of representatives:

We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>66</sup>

Significantly, at the Convention and in its aftermath, no one considered the Fugitive Slave Clause to be a particularly important part of the constitutional bargain over slavery. But, by the 1830s, southerners felt that their peculiar institution was under attack. In his *Commentaries on the Constitution of the United States*,<sup>67</sup> Story tried to assuage the South by describing the clause as a gift from the North to the South; then in *Prigg* Story tried to further please the South by elevating the Fugitive Slave Clause to a central part of the constitutional bargain, and then protecting expanded southern claims under this elevated clause.

In *Commentaries on the Constitution of the United States*, published a decade before *Prigg*, Story had erroneously asserted that the Fugitive Slave Clause was necessary because the lack "of such a provision under the [Articles of] confederation was felt, as a grievous

<sup>66</sup> Charles Cotesworth Pinckney, Speech in South Carolina House of Representatives, Jan [17], 1788, reprinted in 3 Farrand, *Records* 252 at 254–55 (cited in note 51).

<sup>67</sup> Story, *Commentaries on the Constitution* (cited in note 44).

inconvenience by the slave-holding states, since in many states no aid whatsoever would be allowed to the masters; and sometimes indeed they met with open resistance.<sup>68</sup> There was only a little truth to this position. Had the lack of such a clause been "felt as a grievous inconvenience" it would not have taken southerners until late August to propose the clause. Indeed, the stumbling nature of Pierce Butler's initial proposal of the clause suggests that he had not thought of it until just that moment. This record of the Convention (which was not available to Story in 1833 but was in 1842) surely undermines Story's contentions. So too did the state statutes existing at the time of the Convention. These statutes were of course available to Story in 1833.

In 1787, no state specifically prevented southern masters from recovering runaways. Only in Massachusetts does it appear that runaway slaves found asylum.<sup>69</sup> Pennsylvania, Connecticut, and Rhode Island recognized the right of a master to recover a fugitive slave even while they were dismantling slavery themselves.<sup>70</sup> New York and New Jersey were still slave states, and willing to participate in the return of runaways. But, in his *Commentaries* Story ignored this history because it suited his nationalistic purpose to elevate the fugitive slave provision to a key constitutional clause, in order to prove that the Constitution gave the South special protection for its most important social and economic institution. For Story the clause was a boon "for the benefit of the slaveholding states" to indicate northern good will toward the "peculiar interests of the south."<sup>71</sup> Thus in his *Commentaries*, Story had offered the Fugitive Slave Clause "to repress the delusive and mischievous notion, that the south has not at all times had its full share of benefits from the Union."<sup>72</sup>

<sup>68</sup> Id at § 952.

<sup>69</sup> See the correspondence of Moses Brown on this issue. Moses Brown to James Pemberton, 17 Oct 1787, reprinted in Kaminski and Saladino, eds, 14 *Documentary History* 506–07 (cited in note 58); William Rotch, Sr. to Brown, 8 Nov, 1787, in id at 521; Brown to James Thornton, Sr., 13 Nov 1787, in id at 522–23; Edmund Prior to Brown, 1 Dec 1787, in id at 526. There is no evidence of runaway slaves reaching New Hampshire and the putative state of Vermont at this time. Recovery of slaves from those regions would have been difficult, but it would have been even more difficult for southern slaves to reach them.

<sup>70</sup> On the rights of masters in those states, see Finkelman, *An Imperfect Union* (cited in note 18).

<sup>71</sup> Story, *Commentaries* at § 952.

<sup>72</sup> Id.

In *Prigg*, Story expanded and shifted the argument. The U.S. government would guarantee the interests of the South, prevent the North from interfering with the rendition of fugitive slaves, and even allow masters to seize and remove alleged fugitives without any due process procedure at all. All this was necessary, Story argued in *Prigg*, because the Constitution required it.

There is an obvious explanation for the difference between Story's analysis of the Fugitive Slave Clause in his *Commentaries* and his later analysis of it in *Prigg*. In the *Commentaries*, Story was trying to provide a nationalistic interpretation of the Constitution that would be accepted in all sections of the country. Story was writing just after the emergence of the militant abolitionist movement, in the wake of the Webster-Hayne debate, and at the time of the nullification crisis. The South was the section most likely to reject his nationalist interpretation of the Constitution. Thus, his assertion that the Fugitive Slave Clause was inserted in the Constitution solely "for the benefit of the slaveholding states"<sup>73</sup> was designed to garner support in the South for Story's constitutional nationalism. The result of this would be to renew southern faith in the fundamental spirit of the Constitution—that the Constitution protected slavery. In *Prigg*, however, Story did not have to appeal to the South. The opinion was overwhelmingly favorable to the interests of slavery. Rather, Story had to convince the North to accept his proslavery opinion. Thus, he put a new spin on his constitutional history, arguing that the Constitution required both the federal law of 1793 and his harsh interpretation of it in *Prigg*. Story doubtless hoped the North would accept *Prigg* because he asserted it was dictated by the Constitution itself and because the Fugitive Slave Clause was an essential part of the constitutional bargain of 1787. In effect, Story accepted a proslavery interpretation of the Constitution as a vehicle for strengthening the federal government. Although Story's son would later argue that the opinion was antislavery because it localized slavery, in fact, the opinion was significantly proslavery because it actually nationalized slavery.<sup>74</sup>

<sup>73</sup> Id.

<sup>74</sup> For a discussion of the "localization" argument, see Part V, A, of this article. Ironically, by nationalizing the return of fugitive slaves, and making the Fugitive Slave Clause a central part of the constitutional bargain, Story gave support to the antinationalist position of William Lloyd Garrison and Wendell Phillips that the Constitution was a proslavery "covenant with death."

### III. THE SECOND STORY: THE RELEVANT PRECEDENTS

In upholding all aspects of the Fugitive Slave Law of 1793, Story naturally looked for precedents to support his position. Story argued that the existing case law, consisting of three state cases, totally supported his position. In doing so, the justice and legal scholar created his second story. In fact, one of the cases he cited for authority held the opposite of what Story claimed it held. Furthermore, Story ignored two state cases that did not support his position.

Although the Fugitive Slave Act had been in force for a half century when the Supreme Court heard *Prigg*, the existing case law on the issue was hardly noticeable. A few lower federal courts had heard cases under the law, but the district judges offered little guidance or intellectual support of Story.<sup>75</sup> While riding circuit, Justice Henry Baldwin had delivered one opinion on the law.<sup>76</sup> Although offering perfunctory support for the constitutionality of the law, Baldwin did not analyze it. The case was a suit for damages against Pennsylvanians who helped a slave escape, and Baldwin easily found for the plaintiff slave owner.<sup>77</sup>

More important than any federal cases were the discussions of the 1793 law in the state courts. By the time *Prigg* reached the Supreme Court, there were five state precedents involving the Fugitive Slave Law of 1793.<sup>78</sup> Three, from Pennsylvania, Massachusetts, and New York, had been officially reported. A case from New Jersey was not officially reported, but the case and the opinion by Chief Justice Joseph Hornblower were widely reported in

<sup>75</sup> *In re Susan*, 23 F Cases 444 (US DC, Ind, 1818) (Fugitive slave Susan returned to slavery with no opinion of the court); *Case of Williams*, 29 F Cases 1334 (US DC, Pa, 1839) (court discharges a black (Williams) seized by professional slave catcher because court determines that Williams is not a fugitive slave); *In re Martin*, 16 F Cases 881 (US DC, NY, 1827–1840) (in this case of an unknown date, the Federal District Judge in New York declared that the act of 1793 was constitutional and a New York official then issued a certificate of removal under the law).

<sup>76</sup> *Johnson v Tompkins et al.*, 13 F Cases 840 (US C C Pa, 1833) (Justice Baldwin, riding circuit, upholds damages for a fugitive slave rescued by Tompkins).

<sup>77</sup> Id. The fact that Baldwin was an extremely weak justice undermined the value of any opinion he wrote. More importantly, perhaps, many observers believed Baldwin was insane. Carl B. Swisher, *History of the Supreme Court of the United States: The Taney Period, 1836–64* 51 (Macmillan, 1974). His opinion in *Prigg* supports both observations.

<sup>78</sup> *Wright v Deacon*, 5 Serg & Rawle 62 (Pa 1819); *Commonwealth v Griffith*, 19 Mass (2 Pick) 11 (1823); *Jack v Martin*, 14 Wend 507 (NY 1835); *State v Sheriff of Burlington*, No 36286 (NJ 1836); *Pennsylvania v Prigg* (unreported, Pa, 1841) reversed, *Prigg v Pennsylvania*, 16 Peters (41 US) 1 (1842).

newspapers and cited by an important Ohio abolitionist lawyer a few years before *Prigg*.<sup>79</sup> The fifth case was the Pennsylvania Supreme Court's opinion in *Prigg*, which had not been reported. But of course Story had the full benefit of the view of that Court.

#### A. THE JUSTICE'S STORY ABOUT THE RELEVANT CASE LAW

Despite the mixed response of state courts to the 1793 law, Justice Story argued that all states supported his position. Story wrote that the law had:

naturally been brought under adjudication in several states in the Union, and particularly in Massachusetts, New York, and Pennsylvania, and on all these occasions its validity has been affirmed. The cases cited at the bar . . . are directly in point.<sup>80</sup>

He noted in passing that no federal court had ever denied the validity of the law, although he did not examine any federal opinions.<sup>81</sup>

Story used this sweeping assertion of support from state cases to bolster his assertion that the 1793 act was "clearly constitutional in all its leading provisions."<sup>82</sup> Story argued that if the interpretation of the Fugitive Slave Clause and the law of 1793 "were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would in our judgment entitle the question to be considered at rest."<sup>83</sup> To the extent that constitutional interpretation was designed to give Americans certainty, then following

<sup>79</sup> *State v Sheriff of Burlington*, No 36286 (NJ 1836) (also known as *Nathan, Alias Alex. Helmsley v State*). For newspaper accounts of the case, see "Upholding Slavery," 20 Friend 281–82 (June 11, 1836). Portions of this article are reprinted as *Important Decision*, Liberator (July 30, 1836), at 124. *Important Decision*, Newark Daily Advertiser (Aug 18, 1836). The case was cited by Salmon P. Chase in *Salmon P. Chase, Speech of Salmon P. Chase in the Case of the Colored Woman, Matilda* 18–19 (Pugh and Dodd, 1837), reprinted in Paul Finkelman, ed., *2 Southern Slaves in Free State Courts 1* (Garland, 1988). For a discussion of the Hornblower decision, see Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law of 1793*, 23 Rutgers L J 753 (1992).

<sup>80</sup> *Prigg* at 621.

<sup>81</sup> Id. "So far as the judges of the Courts of the United States have been called upon to enforce it, and to grant the certificate required by it, it is believed that it has been uniformly recognised as a binding and valid law; and as imposing a constitutional duty." Id.

<sup>82</sup> Id at 622.

<sup>83</sup> Id at 621.

the state cases supported that goal. Story argued that the alternative was that “the interpretation of the Constitution is to be delivered over to interminable doubt throughout the whole progress of legislation, and of national operations.”<sup>84</sup>

#### B. THE REAL CASE LAW

Story’s use of state cases to bolster his opinion was logical and constitutionally sound. However, it was neither historically correct nor jurisprudentially honest. There were five important state decisions on the Fugitive Slave Law by 1842. Two supported it,<sup>85</sup> two did not.<sup>86</sup> The fifth case, the Pennsylvania Supreme Court’s decision in *Prigg* itself, did not question the constitutionality of the 1793 law, but also did not support Story’s other conclusions.

This division is not simply a 2–2–1 split among state jurists. The supportive opinions were short, analytically weak, and decided *before* the northern states began to pass personal liberty laws in the mid-1820s. On the other hand, the state opinions attacking the federal law and upholding state authority to legislate on the subject were newer and analytically stronger than either of the cases upholding the 1793 law.

In 1819, Pennsylvania’s Chief Justice, William Tilghman, enforced the federal law while denying that a fugitive slave had the right to a jury trial. However, he did not otherwise examine the constitutionality of the federal act.<sup>87</sup> In 1823, Chief Justice Isaac Parker of Massachusetts also upheld the 1793 law but limited his analysis to “a single point: whether the statute of the United States giving power to seize a slave without a warrant is constitutional.”<sup>88</sup> Parker upheld this warrantless seizure because “slaves are not parties to the constitution, and the [Fourth] [A]mendment has [no] *[sic]* relation the parties.”<sup>89</sup> Parker noted, without any citation or

<sup>84</sup> *Id.*

<sup>85</sup> *Wright v Deacon*, 5 Serg & Rawle 62 (Pa 1819); *Commonwealth v Griffith*, 19 Mass (2 Pick) 11 (1823).

<sup>86</sup> *Jack v Martin*, 14 Wend 507 (NY 1835); *State v Sheriff of Burlington*, No 36286 (NJ 1836) (also known as *Nathan, Alias Alex. Helmsley v State*).

<sup>87</sup> *Wright*, 5 Serg & Rawle at 62.

<sup>88</sup> *Griffith*, 19 Mass (2 Pick) at 11, 18.

<sup>89</sup> *Id* at 19.

reference to a specific constitutional provision, that “[t]he constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by Congress.”<sup>90</sup>

Parker might have reached a different conclusion if he had bothered to analyze the 1793 law or the Fugitive Slave Clause of the Constitution. A structural analysis of the Constitution might have led Parker to conclude that because the Fugitive Slave Clause was placed in Article IV, Section 2, the clause was in fact not subject to Congressional enforcement. Sections 1, 3, and 4 of the Article have specific provisions giving Congress enforcement power. For example, in Section 1 Congress was specifically authorized to “proscribe the Manner in which” acts, records, and court decisions in one state might be proved in another.<sup>91</sup> Similarly, Section 3 empowered Congress to admit new states to the Union and “to dispose of and make all needful Rules and Regulations” for the Territories.<sup>92</sup> Indeed, Section 2 was the only part of Article IV that did not empower the national government to enforce its provisions. Logically, fugitive slave rendition was part of the comity provisions of this section of Article IV, and should have been left to the states to enforce as a matter of comity.<sup>93</sup>

The opinions of Chancellor Reuben Walworth of New York and Chief Justice Joseph C. Hornblower stand in marked contrast to the meager analysis of Tilghman and Parker. Both judges offered a careful analysis of the constitutional issues involved in the 1793 law and Fugitive Slave Clause. Both opinions were relatively recent, and reflected concepts of federalism as they were understood in Jacksonian America. Moreover, both judges thought the 1793 law was unconstitutional.

Hornblower's opinion was unreported, and although Story prob-

<sup>90</sup> *Id.*

<sup>91</sup> US Const, Art IV, § 1, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

<sup>92</sup> US Const, Art IV, § 3. Section 4 of this Article empowered “The United States” to guarantee a “Republican Form of Government” in every state. Thus, Congress, along with the other branches of government, could act to enforce this clause. See generally, William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Cornell University Press, 1972).

<sup>93</sup> See the discussion in note 95.

ably had access to it,<sup>94</sup> it is possible he was either unaware of the decision or felt that because it was unreported he could ignore it.<sup>95</sup>

Chancellor Reuben Walworth's decision in *Jack v Martin*,<sup>96</sup> however, was well known to Story and was cited in argument. Speaking for New York's highest court, Walworth found the Fugitive Slave Act unconstitutional because Congress lacked the power to pass such a law. Walworth had

looked in vain among the powers delegated to congress by the constitution, for any general authority to that body to legislate on this subject. It is certainly not contained in any express grant of power, and it does not appear to be embraced in the general grant of incidental powers contained in the last clause of the constitution relative to the powers of congress.<sup>97</sup>

After careful consideration of the Constitution's text and the state statutes existing in 1787, Walworth applied a version of original intent analysis to conclude that the 1793 law was unconstitutional.

It is impossible to bring my mind to the conclusion that the framers of the constitution have authorized the congress of the United States to pass a law by which the certificate of a justice of the peace of the state, shall be made conclusive evidence of

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<sup>94</sup> Ohio attorney Salmon P. Chase had cited it while arguing a case in 1837. Chase, *Speech of Salmon P. Chase* at 18 (cited in note 79).

<sup>95</sup> In his analysis of Article IV, Hornblower compared the Full Faith and Credit Clause, which explicitly gives Congress the power to pass laws, with the Fugitive Slave Clause. Since no such explicit language exists in § 2, the court concluded that "no such power was intended to be given" to Congress for implementation of the clauses in that section of the Constitution. Indeed, Hornblower argued that Congressional legislation over the Privileges and Immunities Clause or over interstate rendition "would cover a broad field, and lead to the most unhappy results." Such legislation would "bring the general government into conflict with the state authorities, and the prejudices of local communities." Hornblower asserted that Congress lacked the "right to prescribe the manner in which persons residing in the free states, shall be arrested, imprisoned, delivered up, and transferred from one state to another, simply because they are claimed as slaves." Consistent with the northern states' rights arguments of the antebellum period, Hornblower warned the "American people would not long submit" to such an expansive view of Congressional power. Although this analysis seemed to lead to the conclusion that the Fugitive Slave Act was unconstitutional, Hornblower declined "to express any definitive opinion on the validity of the act of Congress." He could avoid this grave responsibility because the case before him had been brought "in pursuance of the law of this state." However, Hornblower's position on the unconstitutionality of the federal law was unambiguous. *Opinion of Chief Justice Hornblower on the Fugitive Slave Law* at 4–5 (1851), reprinted in Paul Finkelman, ed., *1 Fugitive Slaves and American Courts: The Pamphlet Literature* 97 (Garland, 1988).

<sup>96</sup> 14 Wend 507 (NY 1835).

<sup>97</sup> Id at 526.

the right of the claimant, to remove one who may be a free native born citizen of this state, to a distant part of the union as a slave; and thereby to deprive such person of the benefit of the writ of *habeas corpus*, as well as of his common law suit to try his right of citizenship in the state where the claim is made, and where he is residing at the time of such claim.<sup>98</sup>

Walworth's opinion in *Jack v Martin* was not aimed at preventing the rendition of fugitive slaves. Walworth upheld Martin's claim to Jack and firmly supported the obligation of state officials to return fugitive slaves, asserting that every "state officer or private citizen, who owes allegiance to the United States and has taken the usual oath to support the constitution" was obligated to enforce the Fugitive Slave Clause of the Constitution.<sup>99</sup> Nevertheless, he categorically denied the constitutionality of the Fugitive Slave Law.

Before the Supreme Court, both counsel for Pennsylvania, Thomas Hambly and Attorney General Ovid F. Johnson, cited the case. Hambly noted that

the question of constitutionality was debated [in *Jack v Martin*], and in my judgment not a single solid reason was given for that construction, but, on the contrary, Chancellor Walworth says, 'I have looked in vain among the delegated powers of congress for authority to legislate upon the subject,' and concludes that state legislation is ample for the purpose.<sup>100</sup>

Attorney General Johnson noted that the states were divided on the constitutionality of the Fugitive Slave Act. He pointed out that *Commonwealth v Griffith*<sup>101</sup> and *Jack v Martin* "exhibit[ed] a most striking illustration of the 'uncertainty of the law.'"<sup>102</sup> In these two cases "the courts were divided in opinion," while in various Pennsylvania cases "the question did not properly arise, and the Court, without examination, declared its opinion on the constitutionality of the act of Congress of 1793."<sup>103</sup>

Despite Story's reputation as a great legal scholar, he ignored the

<sup>98</sup> Id at 528.

<sup>99</sup> Id.

<sup>100</sup> *Prigg* at 584.

<sup>101</sup> 19 Mass (2 Pick) 11 (1823).

<sup>102</sup> *Prigg* at 591.

<sup>103</sup> Id at 591–92.

arguments of Hambly and Johnson while unblushingly distorting Walworth's opinion. Walworth found the 1793 act unconstitutional but, citing Walworth's opinion, Story wrote, "it has naturally been brought under adjudication in several states in the Union, and particularly in Massachusetts, New York, and Pennsylvania, and on all these occasions its validity has been affirmed."<sup>104</sup>

This statement is flatly wrong. Chief Justice Hornblower of New Jersey had found the law unconstitutional. The Pennsylvania Supreme Court, in *Prigg*, completely disagreed with Story's interpretation of the law, and of course *Jack v Martin* did not affirm the constitutionality of the 1793 law; rather, it totally rejected its constitutionality. It is hard to imagine how Story could have written this with a straight face. Determined, however, to let nothing stand in his way, he did more than ignore countervailing precedents: he rewrote them to support his own opinion. This was the Justice's second story.

#### IV. THE THIRD STORY: THE LIFE OF MARGARET MORGAN

The cost of Story's rewriting of constitutional history and reinterpreting the Fugitive Slave Clause would be borne mostly by black Americans, free and fugitive, who lived in the North. After *Prigg*, a master or her agent could seize any black, and if done without a breach of the peace, remove that person to the South. No state court could intervene; no state official could question the actions of the slave catcher. The facts of *Prigg* illustrate the dangers of Story's opinion.

##### A. THE TRAVELS AND TRAVALS OF MARGARET MORGAN AND HER CHILDREN

When Prigg seized her, Margaret Morgan made no claim of "mistaken" identity. She was the child of people who were born slaves, and thus Prigg had at least a *prima facia* claim to her, both under the federal law of 1793 and Maryland law. Nevertheless, Morgan's life as a slave, and the circumstances of her arrival in Pennsylvania, reveal the problems caused by the Fugitive Slave Clause and the

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<sup>104</sup> Id at 621.

1793 law Congress adopted to enforce it.<sup>105</sup> These facts also suggest that Morgan and some or all of her children may have had viable claims to freedom, under Pennsylvania law and perhaps under Maryland law. In other words, although once a slave, by 1837 Morgan may have been legitimately free; certainly "several" of her children had been born free,<sup>106</sup> and were not subject to the federal law of 1793. In his opinion, Justice Story glossed over these possibilities in his desire to write a sweeping nationalistic opinion striking down Pennsylvania's personal liberty law of 1826, despite the fact that the circumstances of Morgan's life underscore the necessity of such laws to protect free blacks who might be enslaved under the color of federal law.

In the early years of the nineteenth century—probably before 1812—a Maryland slaveowner named John Ashmore allowed two of his slaves—an aged married couple—to live in virtual freedom.<sup>107</sup> Although Ashmore never formally freed the two slaves, thereafter he "constantly declared he had set them free."<sup>108</sup> The two slaves raised a daughter named Margaret.<sup>109</sup> Because she was born in Maryland, to a slave mother, Margaret was technically Ashmore's slave, even though Ashmore never asserted any authority over her.

In 1820, John Ashmore was a sixty-year-old farmer and mill owner, with extensive land holdings in Harford County. He also owned ten slaves, although neither Margaret nor her parents were among them. However, shortly after that he began disposing of his slaves. In March 1821, the sixty-one-year-old Ashmore sold two male slaves to his neighbor Jacob Forward for eight hundred dollars.<sup>110</sup> By 1824, when he died, Ashmore owned only two young

<sup>105</sup> On the history of the adoption of the law, see Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 *J Southern History* 397–422 (1990).

<sup>106</sup> Thomas C. Hambly, *Argument of Mr. Hambly, of York, (Pa.) in the Case of Edward Prigg* 8 (Baltimore, Lucas & Dever, 1842), reprinted in Paul Finkelman, ed., 1 *Fugitive Slaves and American Courts: The Pamphlet Literature* 128 (Garland, 1988) (hereafter *Argument of Hambly* [with original page numbers and reprint page numbers in parentheses]).

<sup>107</sup> Information about this case comes from the printed report in *Prigg* at 608–10.

<sup>108</sup> *Argument of Hambly* at 8 (128) (cited in note 106).

<sup>109</sup> We have no record of what her last name was before she married Morgan.

<sup>110</sup> John Ashmore to Jacob Forward, Bill of Sale, March 6, 1821, in Harford County Historical Society manuscripts. In 1837 Forward would join Edward Prigg and Nathan S. Bemis in their quest for Margaret Morgan. Forward was one of the four men indicted for the kidnapping, but only Prigg was returned for trial. Ashmore's total slave property in 1820 is based on the US Manuscript Census, 1820, Harford County, Maryland, p 380 (also

male slaves. In May 1821, Ashmore sold his considerable real estate holdings to his daughter, Susanna Ashmore Bemis, for "the consideration of natural love and affection" and a nominal sum.<sup>111</sup> Three years later Ashmore died intestate. All his remaining property went to his wife, Margaret Ashmore. By this time the estate, which included no real property, was relatively small, and valued at only \$509. The most valuable assets were two slave boys, Tommy, age 12, and James, age 11.<sup>112</sup> There is nothing to indicate that he owned, or claimed to own, a teenaged slave girl named Margaret at his death or before. At the time of his death Ashmore was living at his old home, which by this time he had deeded to his daughter, Susanna Bemis. His widow, Margaret Ashmore, continued to live there as well.<sup>113</sup>

Sometime after John Ashmore's death, Margaret, the daughter of his former slaves, married Jerry Morgan, a free black from Pennsylvania. They continued to live in Harford County, in the same neighborhood as Margaret Ashmore and her daughter and son-in-law, Susanna and Nathan S. Bemis. It is possible that Margaret Morgan lived with her aged parents on land once owned by John Ashmore and given to Susanna Bemis.<sup>114</sup> In 1830, the county sheriff, who was also the census taker, recorded Jerry Morgan as the head of a family consisting of one free black woman (Margaret) and their two "free black" children.<sup>115</sup> In 1832, after the death of Margaret's parents, the Morgans moved to York County, Pennsylvania, apparently with the knowledge of Margaret Ashmore and Nathan S. Bemis.

What happened next is unknown. But, in February 1837, Ashmore's son-in-law, Nathan S. Bemis, went to Pennsylvania to bring

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noted as p 76). Ashmore's birthdate, Jan 22, 1760, is found in Bill and Martha Reamy, *St. George's Parrish Registers, 1689–1793* (Family Line Publications) 85.

<sup>111</sup> Deed of Conveyance from John Ashmore to Susanna Bemis, May 11, 1821, in Harford County Historical Society manuscripts. Edward Prigg was one of the two witnesses to this deed.

<sup>112</sup> John Ashmore Inventory, Sept 28, 1824, Harford County, Register of Willis, # 1672.

<sup>113</sup> US Manuscript Census, 1830, Harford County, Maryland, p 387. On April 22, 1845, Margaret Ashmore manumitted her slave Jim, who she had inherited when her husband died. Nathan S. Bemis served as the "agent and attorney" for Margaret Ashmore in this transaction. "Margaret Ashmore and Negro Jim, Manumission Deed, recorded May 10, 1845." Harford County Historical Society manuscripts.

<sup>114</sup> This claim is made by Thomas Hambly, counsel for Pennsylvania, in his Supreme Court brief. Hambly, *Argument of Mr. Hambly* at 8 (128) (cited in note 106).

<sup>115</sup> US Census, 1830, Manuscript Census for Harford County, Maryland, p 394.

Margaret and her children back to Maryland. Accompanying Bemis were three neighbors, Edward Prigg, Jacob Forward, and Stephen Lewis, Jr. Prigg and Forward had long ties to the Ashmore family. Prigg witnessed John Ashmore's deed of land to his daughter and later witnessed the inventory of his estate; Forward had purchased slaves from Ashmore and Ashmore had been a witness to the will of Forward's father.<sup>116</sup> The four neighbors easily located Margaret Morgan and secured an arrest warrant from Thomas Henderson, a York County, Pennsylvania, justice of the peace, as required by the Pennsylvania law of 1826. A local constable then accompanied the four Marylanders to the Morgan home, arrested the family, and brought them back to Justice of the Peace Henderson. When Henderson actually saw the Morgan family, however, he refused to grant Bemis and Prigg a certificate of removal to take the Morgans back to Maryland. It was clear that Morgan's husband was a free-born native of Pennsylvania, and that at least two of her children had been born in that free state as well. Perhaps on hearing Margaret Morgan's story, Henderson concluded that the entire family was really free. Bemis and Prigg were not deterred, and without process took Margaret Morgan and her children back to Maryland. They were subsequently indicted for kidnapping, but only Prigg was returned for trial.<sup>117</sup>

#### B. THE JUSTICE'S STORY ABOUT MARGARET MORGAN

In *Prigg*, Justice Story did not tell Margaret Morgan's story. Rather, he repeated, in the barest details, the findings of the lower court. He noted that the Pennsylvania trial court had found Prigg guilty "for having, with force and violence, taken and carried away from that county to the state of Maryland, a certain negro woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March, 1826."<sup>118</sup> He recounted Prigg's response "that the negro woman, Margaret Morgan, was a slave for life, and held to labour and service under and according to the laws of Maryland, to a certain

<sup>116</sup> *Bible Records of Harford County, Maryland Families*, 133, typescript in Maryland Historical Society, Baltimore. See also notes 110, 112.

<sup>117</sup> *Prigg* at 543.

<sup>118</sup> *Id* at 608.

Margaret Ashmore, a citizen of Maryland; that the slave escaped and fled from Maryland into Pennsylvania in 1832.”<sup>119</sup> Almost as an afterthought, Story added that “The special verdict [of the Pennsylvania trial court] further finds, that one of the children was born in Pennsylvania, more than a year after the said negro woman had fled and escaped from Maryland.”<sup>120</sup>

This is all Justice Story has to say about Margaret Morgan, her husband Jerry, and their children. This limited summary of facts, while not untrue, is surely misleading. The facts, as Story presents them, raise three important questions, which the Justice never addressed. First, was Morgan in fact a “slave for life” under Maryland law? Second, had Morgan in fact “escaped and fled from Maryland into Pennsylvania?” Third, what was the status of the child—and was it only one child—who “was born in Pennsylvania?”

Had Story addressed these issues he would have been unable to so easily create a right of self-help for slave hunters. He similarly might have been less able to strike down Pennsylvania’s personal liberty law. In his opinion Story asserted, “we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent this clause of the Constitution may properly be said to execute itself; and to require no aid from legislation, state or national.”<sup>121</sup>

Because he did not consider the facts of Margaret Morgan’s life, Story did not address how a state would be able to protect the liberty of its free-born citizens, such as Margaret Morgan’s child. He ignored the free status of the child and the possible free status of Morgan herself. Only by doing so could he justify the right of self-help and the striking down of the state protections for free blacks who might otherwise be claimed as fugitive slaves.

#### C. MARGARET MORGAN’S CLAIMS TO FREEDOM

Margaret Ashmore based her claim to Morgan on the fact that Morgan’s mother had never been legally emancipated, and thus

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<sup>119</sup> Id at 608–09.

<sup>120</sup> *Prigg* at 609.

<sup>121</sup> Id at 613.

Morgan herself was born a slave, and continued to be owned by the Ashmores. On its face this was a valid claim. However, Morgan may have had a legitimate claim to freedom, both in Maryland and Pennsylvania. As a slave who was allowed to travel to a free state and live there with the knowledge of her master, Morgan may have become legally free.<sup>122</sup>

There is no evidence that anyone raised this potential claim to freedom, either in the trial court or at the appellate level. This is in part because Morgan's status was never brought before any Pennsylvania court.<sup>123</sup> Nevertheless, Story might have addressed these issues in his opinion, had he been interested in finding a way to uphold the Pennsylvania law. Indeed, these facts could have been enough to send the case back to trial in Pennsylvania, to determine if Morgan had in fact been free all along. After all, if Margaret Morgan was entitled to freedom under Pennsylvania law, it would not have been unreasonable for the Court to assert that she had a right to prove that freedom in a Pennsylvania court. Even if the Supreme Court had decided it could not consider Morgan's claims to freedom because she was not a party to the case, this potential claim to freedom should have alerted Story to the importance of allowing states to protect the liberty of their residents.

<sup>122</sup> As the daughter of slaves abandoned by their owner, she might have claimed some common law right to be free. Ashmore, the original owner, had clearly abandoned his claim to Margaret Morgan's parents. They lived and acted like free persons. Moreover, Ashmore seems to have never asserted any claim over Margaret. In 1832, the South Carolina courts held that "Proof that a negro has been suffered to live in a community for years, as a free man, would *prima facie*, establish the fact of freedom. Like all other *prima facie* shewing, it may be repelled, and shewn that, notwithstanding it, he is a slave, not legally manumitted, or set free. But until this is done, the general reputation of freedom would . . . establish it. . . ." *State v Harden*, 2 Spears (SC) 151 n (1832). Maryland case law appears to have been hostile to the notion that a slave could gain freedom through reputation, through something akin to adverse possession of one's self. In *Walkup v Pratt*, 5 Har and John 51, at 56 (1820), the Court held that "general reputation of the neighbourhood, that the petitioner, or his . . . maternal ancestors, were free negroes" was not admissible to prove freedom. Similarly, in 1837 the Maryland court also held that a slave was not free even though he "went at large and acted as a free man, by keeping an oyster house, and boot-black shop, and otherwise acted as a free man, his own master. . . .", *Bland v Negro Beverly Dowling*, 9 Gill and John 19 (1837). This case did not directly raise the freedom issues under consideration *Prigg*. In *Bland* the slave unsuccessfully claimed his freedom on the grounds that he had purchased it from his owner Bland.

<sup>123</sup> In May 1837, Margaret Morgan sued for her freedom in a Harford County court. On August 28, a jury was sworn, which two days later decided that she was still a slave. More than a dozen witnesses appeared on behalf of the defendant, Margaret Ashmore. Margaret Morgan, on the other hand, does not seem to have been represented by counsel. Docket Book, Harford County Civil and Criminal Court, 1837, in Harford County Historical Society. Margaret and her children were subsequently sold South. *Argument of Hambly* at 10 (130) (cited in note 106).

Morgan's strongest claim to freedom rested on the law of slave transit and interstate comity. By 1837, most of the North accepted the principle that a slave became free if brought into a free jurisdiction.<sup>124</sup> As early as 1780, Pennsylvania had accepted the principle that any slave voluntarily brought into the state became free. However, in order to preserve interstate comity, Pennsylvania also granted masters a six months grace period before freeing their slaves.<sup>125</sup>

Clearly Margaret Ashmore knew that Margaret had gone to Pennsylvania. Yet she did nothing to stop her or retrieve her. Indeed, she acquiesced in the actions of Margaret.<sup>126</sup> A Pennsylvania court could easily have found Margaret free under Pennsylvania's 1780 law on the theory that Ashmore had implicitly consented to her taking up residence in a free state and allowed her to live there for more than six months. A Maryland court might have agreed as well. In 1799 a Maryland court had upheld the freedom claim of a slave because his master had hired him to work in Pennsylvania.<sup>127</sup>

Morgan may also have had a claim to freedom under Maryland law. Technically Morgan was a slave because her mother was a slave, and neither had ever been formally manumitted. Maryland, like all other slave states, did not allow a master to accomplish a manumission *de facto*. Rather, manumissions required specific acts and actions. However, in 1837 a Maryland court seemed to imply that a slave might become free because "he appeared at all times openly, and it was notorious to his neighbors" that he resided in Pennsylvania.<sup>128</sup> This was analogous to the concept of adverse possession in real property law. Because Ashmore had allowed

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<sup>124</sup> For a full discussion of freedom through transit, see Finkelman, *An Imperfect Union* (cited in note 18).

<sup>125</sup> "An Act for the Gradual Abolition of Slavery," Act of March 1, 1780, *Pennsylvania Laws, 1780*.

<sup>126</sup> This might be because Margaret Ashmore did not claim Margaret Morgan as her slave. She was not part of John Ashmore's estate, and considered free by the local authorities who took the 1830 census.

<sup>127</sup> *Negro David v Porter*, 4 Harr & McH 418 (1799).

<sup>128</sup> *Pocock v Hendricks*, 8 Gill and John (Md) 421 (1837). However, later that month (June 1837) the same court also held that a slave was not free even though he "went at large and acted as a free man" and had been allowed to travel to New York and work there. *Bland v Negro Beverly Dowling*, 9 Gill and John 19 (1837). Neither case directly raised the freedom issues under consideration here. *Pocock* involved a suit between two whites, while in *Bland* the slave unsuccessfully claimed his freedom on the grounds that he had purchased it from his owner *Bland*.

Margaret to adversely possess herself by living free in both Maryland and Pennsylvania for her entire life, she might have had a claim to freedom. The finding of the 1830 census that she was free would certainly have bolstered this claim. This reasoning, and the few Maryland cases on the issue, suggest that Margaret might have been free under Maryland law, as well as under Pennsylvania law.

#### D. THE CLAIM TO FREEDOM OF MARGARET MORGAN'S CHILDREN

By 1837, Margaret Morgan was the mother of a number of children. The existing record is unclear about how many she had. It is also not clear how many of these children were born in Pennsylvania,<sup>129</sup> and how many were born in Maryland. It was undisputed, however, "that one of the children was born in Pennsylvania, more than a year after the said negro woman had fled and escaped from Maryland."<sup>130</sup>

Under Pennsylvania's Gradual Emancipation Act of 1780, all children born of slave mothers in Pennsylvania after March 1, 1780 were free,<sup>131</sup> but could be indentured until age twenty-eight.<sup>132</sup> Pennsylvania courts, both before and after *Prigg*, supported the notion that any child born in the Commonwealth was free, even if the child's mother was a runaway slave.<sup>133</sup> Pennsylvania law furthermore prohibited the removal from the state of any minor child born to a slave.<sup>134</sup> Thus, under Pennsylvania law at least one, and perhaps more than one, of Morgan's children was a free person.

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<sup>129</sup> "The children were born in Pennsylvania. . . .", *Prigg* at 539.

<sup>130</sup> *Id* at 609.

<sup>131</sup> "An Act for the Gradual Abolition of Slavery," Act of March 1, 1780, *Pennsylvania Laws, 1780*, § III, "All persons as well Negroes and Mulattoes as others, who shall be born within this state from and after the passing of this act, shall not be deemed as considered servants for life, or slaves; and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within this state from and after the passing of this act as aforesaid, shall be, and hereby is, utterly taken away, extinguished, and for ever abolished."

<sup>132</sup> *Id* at § IV.

<sup>133</sup> *Commonwealth v Holloway*, 2 S & R (Pa) 305 (1816); *Commonwealth v Auld*, 4 Clark (Pa) 507 (1850). This issue is discussed in Finkelman, *An Imperfect Union* at 64–65 (cited in note 18).

<sup>134</sup> "An Act to Explain and Amend An Act, Entitled 'An Act for the Gradual Abolition of Slavery,'" Act of March 29, 1788, *Pennsylvania Acts, 1788*, § II.

#### E. THE CLAIMS TO FREEDOM AND THE PENNSYLVANIA PERSONAL LIBERTY LAW OF 1826

If either Margaret Morgan or any of her children were entitled to their freedom under Pennsylvania law, then Prigg had no right to seize them and remove them from the state. Similarly, the Commonwealth of Pennsylvania had a presumptive right to protect them from kidnapping. Shortly before the legislature adopted the 1826 law, five free black children were kidnapped from Philadelphia and sold as slaves. While three of the young boys were returned to Philadelphia after “they fell into the hands of a humane protector” in Mississippi, the other two died during their illegal captivity.<sup>135</sup>

Thus, while the 1826 law might have been used to frustrate the return of a fugitive to a slave state, the act had been adopted to both prevent kidnapping and avoid conflicts between Pennsylvania and her slave-holding neighbors. At the time of its adoption, “it is unlikely that many, except the militant antislavery people, understood that the law was subject to interpretations which would virtually deny the recovery of runaways in Pennsylvania.”<sup>136</sup> The first section of the 1826 act was aimed at kidnappers, not slave catchers. This section punished anyone

who by force and violence, take and carry away, or cause to be taken or carried away, and shall by fraud or false pretence, seduce, or cause to be seduced, or shall attempt so to take, carry away, or seduce any negro or mulatto from any part or parts of this commonwealth, to any other place or places, whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever. . . .<sup>137</sup>

If Margaret Morgan had a reasonable claim to freedom under Pennsylvania law, then she surely had a right to try that claim under Pennsylvania law. Even if she could not have maintained her claim,

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<sup>135</sup> This is described in Leslie, *The Pennsylvania Fugitive Slave Act of 1826* at 221 (cited in note 26).

<sup>136</sup> Id at 440.

<sup>137</sup> *Pennsylvania Act of 1826*, § 1.

Morgan's Pennsylvania-born children should have been able to prove their freedom in the courts of the state in which they were born.<sup>138</sup>

Certainly other blacks claimed as fugitive slaves would in fact be free. Thus, the Supreme Court should have upheld at least some parts of the Pennsylvania law, *as it related to free blacks*. In dissent Justice John McLean argued for precisely this position. Justice Story, however, writing for the majority, had no interest in protecting the liberty of Pennsylvania's substantial free black population. By striking down the Pennsylvania law, the Court seemed to leave Pennsylvania powerless to prevent the kidnapping of its own citizens.

#### V. THE FOURTH STORY: THE MYTH OF THE "TRIUMPH OF FREEDOM"

According to his son William Wetmore Story, Justice Story "repeatedly and earnestly spoke" of his *Prigg* opinion as a "triumph of freedom."<sup>139</sup> Whether Story actually said this is not clear. It does not appear in any of his letters, and except for his son's assertion, there seems to be no independent evidence on the subject.<sup>140</sup> It seems doubtful that Story actually thought he was writing

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<sup>138</sup> Authorities in Maryland privately acknowledged that Bemis, Prigg, Forward and Lewis were probably guilty of kidnapping for taking Morgan's Pennsylvania-born children to Maryland, but they nevertheless objected to the extradition of the men from Harford County. When he received a letter from the Governor of Pennsylvania indicating that there would be an extradition requisition for the four men, Thomas Culberth, the Clerk of the Governor's Council, told Maryland's governor that "The part of the case involved in the most difficulty, and danger of producing collision and excitement, relates to the children which it seems, were born in Pennsylvania. They were free by the Law of Pennsylvania, and according to my reading and understanding of the constitutional and legal provisions for reclaiming fugitives, do not come within their provisions, and, consequently, the seizing and taking of *them* away, (if Esquire Henderson or some other authorized magistrate, did not give authority) was the 'crime' of kidnapping." Yet, Culberth urged the Governor to avoid any cooperation on the issue because it was so politically sensitive in Maryland. Thom. Culberth, Clerk of Council, to His Excellency, Gov Thomas W. Veazey, March 27, 1837, Maryland State Archives; MSA NO S1075; Governor and Council Letterbook, 1834-38, pp 553-54.

<sup>139</sup> William Wetmore Story, ed, 2 *Life and Letters of Joseph Story* at 392 (Charles C. Little and James Brown, 1851).

<sup>140</sup> In his prize-winning biography of Story, R. Kent Newmyer wrote: "Upon his return to Massachusetts in the spring of 1842, he spoke of opinion in *Prigg* 'repeatedly and earnestly' to his family and friends as a 'triumph of freedom.'" Newmyer, *Justice Joseph Story*, at 372 (cited in note 1). In the note to this sentence, Newmyer cites to William Wetmore's discussion in 2 *Life and Letters* at 392 (cited in note 139), and then Newmyer writes, "'Triumph of Freedom' was Story's phrase, not his son's." But, Newmyer provides no other evidence that it was the justice's phrase. Ordinarily, I would accept William Wetmore Story as a

an opinion that was a “triumph of freedom” in any easily recognizable way. Neither did his assertion make the opinion such a triumph. The “triumph of freedom” seems, in the end, to be just one more story, told by the justice and/or his son, to defend what was a triumph of proslavery judicial nationalism.

William Wetmore Story made the best defense he could of his father’s opinion. The defense was in the end neither credible nor persuasive. Made after his father’s death, it was a pathetic attempt to reverse in the court of northern public opinion the correct assessment of Story’s opinion of the court as fundamentally a triumph over freedom for the South.

#### A. THE STORYS TELL THEIR TALE

The younger Story, himself an accomplished legal scholar,<sup>141</sup> defended *Prigg* as a “triumph of freedom” on three grounds.

First, William Wetmore argued that *Prigg* “was a ‘triumph of freedom,’ because it localized slavery, and made it a municipal institution of the States, not recognized by international law, and except, so far as the exact terms of the clause relating to fugitive slaves extend[ed], not recognized by the Constitution.”<sup>142</sup> This was a fair summary of one of the initial premises of the opinion. Citing to *Somerset v Stewart* (1772),<sup>143</sup> Story declared that under “the general law of nations, no nation is bound to recognize the state of slavery.”<sup>144</sup> Story further declared that “The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws.”<sup>145</sup> Had Story stopped his opinion here, it would have indeed “localized” slavery.

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good source for what Justice Story said. But William Wetmore was clearly embarrassed by his father’s opinion, and by his father’s attempt to hide the proslavery force of the opinion. Thus, William Wetmore edited out a key section of a letter to Senator Berrien, in which Justice Story set out a way that the South could avoid any aspects of the opinion that might make it a triumph of freedom. Newmyer’s own compelling analysis of Story, combined with William Wetmore’s less than honest editing of his father’s papers, undercuts the credibility of William Wetmore’s attribution of the “triumph of freedom” statement to the justice. See Story to Berrien Letter (cited in note 13).

<sup>141</sup> William Wetmore Story, *Treatise on the Law of Contracts* (Charles C. Little and James Brown, 1844).

<sup>142</sup> William Story, ed., 2 *Life and Letters of Story* at 392 (cited in note 139).

<sup>143</sup> Loftt 1 (GB, 1772).

<sup>144</sup> *Prigg* at 611.

<sup>145</sup> Id.

Second, Story's son argued that the decision favored freedom "because it promised practically to nullify the Act of Congress,—it being generally supposed to be impracticable to reclaim fugitive slaves in the free States, except with the aid of State legislation, and State authority."<sup>146</sup> This analysis was based on the assumption that without the active aid of state authorities—justices of the peace, sheriffs, and the like—masters would have been unable to actually remove a slave from the North. Story's assertion that the federal government had exclusive jurisdiction over fugitive slave rendition and that state officials could not be compelled by the federal government to enforce the law thus set the stage for state withdrawal from aiding in the implementation of the Fugitive Slave Clause or of enforcing the federal law. William Story's point here was again correct as far as it went. In his opinion Story conceded that there was a "difference of opinion" as to "whether state magistrates are bound to act under [the Fugitive Slave Act]," but did not decide the issue.<sup>147</sup> It was certainly possible to conclude, therefore, that the states could withdraw their support for the law. However, in his opinion Story also affirmed that no "difference of opinion" was "entertained by this Court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."<sup>148</sup> William Wetmore Story's argument for the "triumph of freedom" was tied to this last point. If state officials did not enforce the federal law, no one could, and thus fugitive slaves could be secure in their freedom. Some northern judges and legislators would in fact take advantage of this part of Story's opinion to withdraw their support for enforcement of the federal law. Indeed, whether Story intended the opinion to be a triumph of freedom or not, this part of the opinion allowed some northerners to shape it into such a triumph.<sup>149</sup>

Third, William Wetmore argued that by "giving exclusive jurisdiction to Congress, power was put in the hands of the whole people to remodel the law, and establish, through Congress, a legislation in favor of freedom; while, to permit a concurrent or exclu-

<sup>146</sup> William Story, ed., 2 *Life and Letters of Story* at 393 (cited in note 139).

<sup>147</sup> *Prigg* at 622.

<sup>148</sup> *Id.*

<sup>149</sup> Paul Finkelman, *Prigg v Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 Civ War History 5 (1979).

sive jurisdiction to the States, would not only deprive all the free States of a voice in establishing a uniform rule throughout the country, guarded by the strictest legal processes, but would enable each slave State to authorize recaption, within its own boundaries, under the most odious circumstances, without any legal process, . . ."<sup>150</sup> The faithful son praised his father's opinion because "[b]y this decision, the question, as to fugitive slaves, was made a national one, and open for discussion on the floor of Congress. To the North was given a full voice on it."<sup>151</sup>

#### B. THE FAMILY STORY UNMASKED

The claims of Joseph and William Wetmore for the antislavery thrust of *Prigg* do not comport with the text of Story's opinion, his career as a judge, or his actions after the decision.

1. *The localization of slavery.* The argument that *Prigg* localized slavery is inconsistent with the essence of William Wetmore Story's very defense of the opinion and with the justice's career. As a lawyer, scholar, and judge, Story was a committed nationalist. His important *Commentaries on the Constitution*<sup>152</sup> was "the most influential statement of constitutional nationalism made in the Nineteenth Century."<sup>153</sup> One aspect of Story's nationalism was his desire to create a uniform federal common law. In *Prigg*, Story discovered a federal common law right to recapture a slave. To understand the continuity of *Prigg* with the rest of Story's jurisprudence, it is necessary to briefly examine his lifelong commitment to a federal common law.

In 1812, Story silently opposed<sup>154</sup> the outcome in *United States v Hudson and Goodwin*,<sup>155</sup> where a bare majority of the Court found that the national government could not enforce the common law of crimes. A year later, in *United States v Coolidge*,<sup>156</sup> Story, acting as a Circuit Justice, deftly avoided *Hudson and Goodwin* in applying

<sup>150</sup> William Story, ed., 2 *Life and Letters of Story* at 394–95 (cited in note 139).

<sup>151</sup> *Id.* at 101.

<sup>152</sup> Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Gray, & Co., 1833).

<sup>153</sup> Newmyer, *Justice Joseph Story* at 182 (cited in note 1).

<sup>154</sup> *Id.* at 101.

<sup>155</sup> *United States v Hudson and Goodwin*, 7 Cranch (11 US) 32 (1812).

<sup>156</sup> *U.S. v Coolidge*, 25 F Cases 619 (CCD Mass 1813).

federal common law to admiralty cases. The Supreme Court remained unpersuaded by Story's arguments, and reversed Story's circuit court decision in *Coolidge*, on the basis of *Hudson and Goodwin*.<sup>157</sup> This reversal underscores Story's early commitment to a federal common law, in spite of the Court majority.

Unable to convince the Court of the importance of a federal common law, Story turned to the Congress. After *Hudson and Goodwin*, Story urged Congress to pass legislation to "give the Judicial Courts of the United States power to punish all crimes and offenses against the Government, as at common law."<sup>158</sup> That year Story sent a draft of such legislation to the Attorney General, and in 1818 sent a similar proposal to Senator David Daggett of Connecticut.<sup>159</sup> In 1825, Congress amended the federal criminal code, based on a draft that Story provided.<sup>160</sup> In 1842, he wrote Senator John Macpherson Berrien urging a recodification of all federal criminal law and the extension of the common law to all federal admiralty jurisdiction.<sup>161</sup>

Story's attempts at creating a federal common law of crimes parallel his efforts in creating a federal common law for commercial cases. In 1812, while riding circuit, Story applied general common law to a diversity case.<sup>162</sup> Thirty years later, in *Swift v Tyson*,<sup>163</sup> Story would gain the support of the Court to create a general federal common law for civil litigation. Significantly, Story wrote the opinion in that case in the same term that he wrote the Court's opinion in *Prigg*. *Swift* is the first case reported in that volume of Peters' reports, and *Prigg* is the last case reported in the volume.

<sup>157</sup> *United States v Coolidge*, 1 Wheat (14 US) 415 (1816).

<sup>158</sup> Story to Nathaniel Williams, Oct 8, 1812, reprinted in William Story, ed, 1 *Life and Letters of Story* at 243 (cited in note 139).

<sup>159</sup> Story to Daniel Webster, Jan 4, 1824, reprinted in William Story, ed, 1 *Life and Letters of Story* 435 at 437; 2 *Life and Letters* at 401 (cited in note 139). Newmyer, *Justice Joseph Story* at 103 (cited in note 1).

<sup>160</sup> William Story, ed, 1 *Life and Letters of Story* at 437, 439–41; 2 *Life and Letters of Story* at 403–04 (cited in note 139); "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," Act of March 3, 1825, 4 Stat 115.

<sup>161</sup> Story to Berrien, Feb 8, 1842, William Story, ed, 1 *Life and Letters of Story* at 402–03 (cited in note 139); but see also Story to Berrien Letter (cited in note 13).

<sup>162</sup> See *Van Reimdyk v Kane*, 28 F Cases 1062 (CCD RI, 1812), discussed in Newmyer, *Justice Joseph Story* at 100 (cited in note 1).

<sup>163</sup> *Swift v Tyson*, 16 Peters (41 US) 1 (1842).

Thus, *Prigg*, which nationalized slavery and made it part of a federal common law, is consistent with Story's lifelong commitment to a nationalistic approach to law. Despite his dislike for slavery, in *Prigg* he could not resist an opportunity to nationalize slavery and create a federal common law right of recaption for slaves, just as he had tried throughout his career to expand federal common law in other areas. Thus, in defending his discovery of a constitutionally protected common law right of recaption, Justice Story declared:

We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or regulation whatsoever, because there is no qualification or restriction of it to be found therein. . . . If this be so, then all the incidents to that right attach also; the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding states.<sup>164</sup>

This is hardly a localization of slavery. On the contrary, it is a specific declaration that some aspects of the law of slavery should be imposed on the North. This dovetailed with his assertion that "the state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws."<sup>165</sup> Having made this point in his opinion, Story then noted that the Constitution fundamentally altered this principle of law. "The [fugitive slave] clause was, therefore, of the last importance to the safety and security of the southern states; and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity."<sup>166</sup>

Ironically, William Wetmore Story's own praise for his father's decision undercut his localization argument. William's third argument was that by making the debate over fugitive slaves "a national one," his father gave the North "a full voice on the debate."<sup>167</sup>

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<sup>164</sup> *Prigg* at 612.

<sup>165</sup> *Id* at 611.

<sup>166</sup> *Id* at 612.

<sup>167</sup> William Story, ed., 2 *Life and Letters of Story* at 395 (cited in note 139).

In defending *Prigg*, William Wetmore Story explained that the opinion

conforms to those principles of interpretation in favor of the Federal Government, which appear in his family letters, and are developed in all his other constitutional opinions. It affirms the doctrine, that the Constitution creates, not a mere confederation of States, but a government of the people, endowed with all powers appropriate or incidental to carry out its provisions, although not expressly surrendered by the States.<sup>168</sup>

Here the younger Story is correct. But, in recognizing his father's lifelong commitment to judicial nationalism, the son undercut his argument that *Prigg* localized slavery.

2. *The practical nullification of the federal law.* The argument for practical nullification the fugitive slave law is the strongest one in Story's favor. Indeed, the decision, in the end, did lead to a practical nullification of the federal law. After *Prigg*, many northern judges refused to hear fugitive slave cases, free state officials refused to help claimants, and some legislatures actually prohibited state support for the federal law.<sup>169</sup> However, it is important to make a distinction between what state officials *did* after *Prigg* and what Story intended in his decision.

It would have been completely out of character for Story to have tried to sabotage his own decision. This simply was not his style. As Robert Cover has argued, this would have been "a truly extraordinary ameliorist effort."<sup>170</sup> Similarly, as Kent Newmyer noted, "there are serious problems" with this analysis.<sup>171</sup> It is hard to believe that someone who devoted his entire life to the law—and most of it to constitutional law and the Supreme Court—would late in his career sabotage one of his most important nationalist opinions in hopes of achieving a secret goal.

Second, Story did not necessarily want to remove all state participation in the return of fugitive slaves. It is true that Story argued for exclusive federal power to legislate about fugitive slave rendition. But, Story did not rule out active, and even legislatively

<sup>168</sup> *Id.* at 392.

<sup>169</sup> Finkelman, *Prigg v Pennsylvania and Northern State Courts* (cited in note 149), and Morris, *Free Men All* (cited in note 19).

<sup>170</sup> Cover, *Justice Accused* at 241 (cited in note 10).

<sup>171</sup> Newmyer, *Justice Joseph Story* at 377 (cited in note 1).

creative, state participation in the capture and incarceration of runaway slaves. He wrote:

We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.<sup>172</sup>

In other words, Story hoped the states would act as slave catchers, arresting and incarcerating fugitives until they could be claimed under the federal law by some putative master or master's agent.

Tied to this invitation for state legislative action, Story made clear his hope that state officers would enforce the federal law. He declared: "As to the authority so conferred upon state magistrates, while a difference of opinion has existed . . . none is entertained by this [C]ourt, that state magistrates may, if they choose, exercise that authority . . ."<sup>173</sup> This is consistent with his career of favoring a strong national government and hoping that the states would support the federal government, especially on this issue. Story was a thoroughgoing judicial nationalist. *Prigg* could be a triumph of freedom only if northern states refused to enforce federal laws and then passed legislation in opposition to the national government.<sup>174</sup> But everything in Story's judicial and earlier political career suggests that he hated states' rights claims more than even slavery, because states' rights claims were even a greater threat to the Union and the constitutional nationalism he held dear. *Prigg* may have pitted Story's hostility to slavery against his lifelong commitment to constitutional nationalism. If so, his nationalism easily won.

Third, the "triumph of freedom" analysis assumes that Story not only disliked slavery, but was somehow rather a secret abolitionist. Any abolitionist thoughts Story had were surely kept secret. Story's biographer argues for the justice's "hatred of slavery" and "his sincere belief in Christian morals and his general sense of

<sup>172</sup> *Prigg* at 625.

<sup>173</sup> Id at 622.

<sup>174</sup> This would in fact happen, and would lead to northern assertions of states' rights. See the arguments of *Ableman v Booth*, 62 US (21 How) 506 (1859). See also Finkelman, *Prigg v Pennsylvania and Northern State Courts* (cited in note 149), and Paul Finkelman, *States Rights North and South in Antebellum America*, in Kermit Hall and James W. Ely, Jr., eds, *An Uncertain Tradition: Constitutionalism and the History of the South* 125–58 (Athens, Ga, 1989).

decency,”<sup>175</sup> which slavery offended. Surely Story disliked slavery, as did most northerners. But Story was not an abolitionist; rather, he opposed the abolitionists because their movement undermined the Union.

Fourth is the suspect source of this analysis. It does not come from Story himself, or a disinterested second party to whom Story made such a claim. Rather, the claim began with the writings of Justice Story’s son, William Wetmore. The dutiful son was more committed to antislavery than his father, and may have hoped to salvage the justice’s reputation by this posthumous cleansing of the interpretation of *Prigg*. As Kent Newmyer notes, when looking at the evidence there is “the suspicion that a biographer must have of an *apologia* written by a loving son.”<sup>176</sup>

The remaining evidence undermining the “triumph of freedom” argument heightens these suspicions. The same evidence demolishes the third leg of the “triumph of freedom” argument: that *Prigg* provided the North with an opportunity to help shape the federal government’s relationship to slavery by remodeling the law in favor of freedom. This evidence suggests both that Story’s goal in *Prigg* was to nationalize fugitive slave rendition, and that his son deliberately hid information which undermined the “triumph of freedom” argument.

3. *The power to remodel the law in favor of freedom.* Technically, William Wetmore Story was right. *Prigg* opened the door for a reconsideration of the federal role in the return of fugitive slaves. An abolitionist-dominated Congress could have repealed the 1793 law without replacing it, and left slaveowners with neither state nor federal law at their disposal. Or, a more moderate Congress could have provided due process protections for free blacks, while supporting the right of masters to capture runaways. A new federal law might even have created a statute of limitations on the capture of fugitive slaves, thus protecting people like Margaret Morgan. Theoretically, Congress could have done all those things.

Realistically, all of these things were impossible. In 1842, as I have already noted, slaveholders and their northern allies domi-

<sup>175</sup> Newmyer, *Justice Joseph Story* at 373 (cited in note 1). Barbara Holden-Smith argues that “Story’s antislavery reputation has been exaggerated.” Holden-Smith, 78 Cornell L Rev at 1086 (cited in note 10).

<sup>176</sup> Newmyer, *Justice Joseph Story* at 373 (cited in note 1).

nated the American political system. One half of the U.S. Senate came from slave states. This alone made it impossible to pass any antislavery legislation. On top of this, between 1800 and 1860 every president but John Quincy Adams was neither a slaveholder, former slaveholder, nor a northern democratic doughface who owed his political survival to the South.

Eventually William Wetmore Story's hope that his father's opinion could lead to a remodeling of federal law did occur. But it was not until after 1861, when eleven slave states had left the Union and antislavery was tied to Civil War policy.

Even if the politics of mid-century America had allowed a pro-freedom remodeling of the fugitive slave law, Joseph Story did not want this to happen, and his son knew this to be true when he compiled his father's letters.

Shortly after the Court decided *Prigg*, Story wrote to Senator John Macpherson Berrien of North Carolina about various legislative matters. The letter began with a discussion of their collaboration on pieces of legislation involving federal criminal law and bankruptcy. This evidence suggests the close relationship Story had with Berrien, and thus makes his next suggestion even more important. Story then turned to a draft bill on federal jurisdiction that he had sent to Berrien. He reminded Berrien that he had suggested in that proposed bill

that *in all cases*, where by the Laws of the U. States, powers were conferred on State Magistrates, the same powers might be exercised by Commissioners appointed by the Circuit Courts. I was induced to make the provision thus general, because State Magistrates now generally refuse to act, & cannot be compelled to act; and the Act of 1793 respecting fugitive slaves confers the power on State Magistrates to act in delivering up Slaves. You saw in the case of *Prigg* . . . how the duty was evaded, or declined. In conversing with several of my Brethren on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers.<sup>177</sup>

Essentially, Story presented Senator Berrien with the solution to the debate over federal exclusivity and the role of the states in enforcing the Fugitive Slave Act. The federal government would

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<sup>177</sup> Story to Berrien Letter (cited in note 13).

supply the enforcement mechanism, through the appointment of commissioners, and the enforcement would be uniform throughout the nation. The fundamental problem with this idea was how to enact it in a Congress where northerners, who were at least somewhat opposed to slavery, controlled the House of Representatives. Story, the justice, had the answer for Berrien, the politician:

This might be done without creating the slightest sensation in Congress, if the provision were made general . . . It would then pass without observation. The Courts would appoint commissioners in every county, & thus meet the practical difficulty now presented by the refusal of State Magistrates. It might be unwise to provoke debate to insert a Special clause in this first section, referring to the fugitive Slave Act of 1793. Suppose you add at the end of the first section: “& shall & may exercise all the powers, that any State judge, Magistrate, or Justice of the Peace may exercise under any other Law or Laws of the United States.”<sup>178</sup>

This was not the letter of a man hoping for a triumph of freedom. This was the letter of a justice committed to the aggrandizement of federal power and the return of fugitive slaves. Here he could have both.

This letter is doubly damning for Story and the “triumph of freedom” analysis. In the collection of his father’s letters, Story’s son reprinted the first part of this letter, which dealt with bankruptcy law, but failed to reprint the material quoted above.<sup>179</sup> William Wetmore Story deliberately hid the evidence which proved that his father neither thought *Prigg* was a “triumph of freedom” nor wanted it to be such. *Prigg* was a triumph of slavery, and the author of the opinion of the court knew so. He also wanted to insure that his handiwork would be implemented.

## VI. JOSEPH STORY AND JUDICIAL NATIONALISM

Joseph Story was never a friend of slavery. During the debates over the Missouri Compromise—more than a decade before the abolitionists appeared on the national scene—Story had spoken out against the expansion of the institution west of the Mississippi.

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<sup>178</sup> Id.

<sup>179</sup> William Story, ed., 2 *Life and Letters of Story* at 404–05 (cited at note 139).

In the 1820s “no other New England statesmen . . . was more fearful of Southern aggression or more determined to resist it.”<sup>180</sup> His circuit court opinion in *United States v La Jeune Eugenie*,<sup>181</sup> a case involving the illegal African slave trade, and his charges on the slave trade to New England grand juries,<sup>182</sup> “revealed Story’s deep abhorrence of the slave trade and slavery.”<sup>183</sup> In the 1830s he privately opposed Texas annexation, and secretly advised public opponents of the annexation,<sup>184</sup> considered it “grossly unconstitutional,”<sup>185</sup> and continued this opposition right up until the annexation took place in 1845. Similarly, although no supporter of the abolitionist movement, Story privately argued that the Gag Rules passed by Congress to prevent the reading of abolitionist petitions were “in effect a denial of the constitutional right of petition.”<sup>186</sup>

As Story’s best biographer has amply demonstrated, the justice “had spoken out consistently on and off the bench against slavery and the slave trade.”<sup>187</sup> He was not an abolitionist—indeed, the Garrisonians often vilified him<sup>188</sup>—but he would happily have seen the institution come to an end.

Why then, did this justice from Massachusetts—who personally found slavery abhorrent—take an unnecessarily pro-slavery position in both *Prigg* and his treatise *Commentaries on the Constitution*?<sup>189</sup>

The answer is rooted in Story’s profound constitutional nationalism. In his defense of *Prigg*, Justice Story’s son noted that the Fugitive Slave Clause “is in the national Constitution, and is a national guarantee.”<sup>190</sup> Story himself made the same point in *Prigg*, noting that the claim to a fugitive slave was a “a case ‘arising under the Constitution’” more or less obligating Congress to “prescribe

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<sup>180</sup> Newmyer, *Justice Joseph Story* at 350–51 (cited in note 1).

<sup>181</sup> 46 F Cases 832 (CCD Mass., 1822).

<sup>182</sup> Joseph Story, *A Charge to the Grand Juries in Boston, and Providence, 1819* (Boston, 1819), reprinted in Paul Finkelman, ed., 1 *The African Slave Trade* (Garland, 1988). For the discussion of a similar charge in 1838, see Newmyer, *Justice Joseph Story* at 345 (cited in note 1).

<sup>183</sup> Newmyer, *Justice Joseph Story* at 348 (cited in note 1).

<sup>184</sup> Id at 350–51.

<sup>185</sup> Story to Ezekiel Bacon, April 1, 1844, in 2 *Life and Letters of Story* at 481.

<sup>186</sup> Story to Harriet Martineau, Jan 19, 1839, in William Story, ed., 2 *Life and Letters of Story* at 307 (cited in note 139).

<sup>187</sup> Newmyer, *Justice Joseph Story* at 346 (cited in note 1).

<sup>188</sup> Id at 345–46.

<sup>189</sup> William Story, ed., 2 *Life and Letters of Story* at 386 (cited at note 139).

the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guaranty to the right.”<sup>190</sup> In essence, the justice believed that the Constitution required him to protect the right of masters to recover fugitive slaves. In *Prigg*, Story found that Congress had the exclusive power to regulate the rendition of fugitive slaves. This is one of the earliest examples we have in constitutional law of the preemption doctrine.<sup>191</sup> *Prigg* gave Story an opportunity to use this doctrine to further strengthen the national government. It was an opportunity he could not pass up. The cost of that gain was the freedom of some free blacks and fugitive slaves. But, it was a cost Story was willing to pay, as long as he could explain it by retelling in his own way the stories he told about the Constitutional Convention, the precedents of the state courts, the life of Margaret Morgan, and his own decision.

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<sup>190</sup> *Prigg* at 616.

<sup>191</sup> Another example might be *Gibbons v Ogden*, 22 US (9 Wheat) 1 (1824). In a slightly different context, T. Alexander Aleinikoff notes a connection between “the early conflict over the scope of the commerce power” and “the explosive question of Congress’s power to regulate the internal slave trade.” He believes this “helps establish linkages between the nationalist opinions of Chief Justice Marshall in *Gibbons v Ogden* and Justice Story in *Prigg v Pennsylvania*. . . .” T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Colum L Rev 1060 at 1086–87 (1991).