A "Triumph of Freedom" After All? *Prigg v. Pennsylvania* Re-examined

LESLIE FRIEDMAN GOLDSTEIN

I. Perplexity over Prigg v. Pennsylvania

Prigg v. Pennsylvania (1842),[1] has puzzled scholars for generations. Law professor David Currie has called it "perplexing."[2] It is a case over which scholars have come to a wide array of conflicting conclusions.

The decision upheld the Fugitive Slave Act of 1793, an act attacked for years by abolitionists, principally because it lacked procedural protections to ensure that free blacks were not wrongly abducted, and also because the Constitution contained no explicit authorization of federal power to regulate this matter.[3] The decision also struck down the state-based personal liberty laws—specifically Pennsylvania's—that aimed to provide such procedural protections. Therefore, the *Prigg* decision immediately received many attacks from abolitionist newspapers and speakers.[4]

On the other hand, the decision was an equal opportunity offender. It also offended slaveholders and their allies because it declared

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

2. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* (Chicago: University of Chicago Press, 1985), 241–45, quote at 245.

3. William Wiecek, "Slavery and Abolition before the U.S. Supreme Court 1820–1860," *Journal of American History* 65 (1978): 34–59. See also, Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* 25(1979): 5–35.

4. Wiecek, ibid., 47. Finkelman, ibid., 16–19.

Leslie Friedman Goldstein is Morris Professor of Political Science and International Relations at the University of Delaware and worked on this article while a visiting research associate at the University of Pennsylvania Center on Democracy, Citizenship, and Constitutionalism and University of Pennsylvania Law School <Lesl@udel.edu>.

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unconstitutional, in principle, Southern state laws that aimed at strengthening the Fugitive Slave Act by authorizing seizure of blacks and holding them on suspicion of being runaways until their supposed owners could be located.[5] It also legitimated the practice of Northern state governments of forbidding state employees to cooperate in executing the federal law. As many whole states had no more than one or two federal judges, this ruling made the 1793 Fugitive Slave Act largely unenforceable. This unenforceability outcome was openly predicted in two of the dissents in the case, both of which insisted that the result of *Prigg* would be to render the Fugitive Slave Rendition Clause a dead letter.

William Wetmore Story's 1851 biography of his father then stressed these publicly foreseen practical consequences in his effort to rebut the abolitionist critique of *Prigg*.[6] There he insisted that Justice Story himself characterized the *Prigg* opinion as a "triumph of freedom" repeatedly to family and friends. Moreover, W.W. Story insisted that in two additional respects, so far as the strictures of the Constitution would permit, the decision was a triumph for freedom: (1) The decision had localized slavery, showing it to be protected outside of each state only to the extent that the Rendition Clause specifically demanded, and thus, for example, allowing Northern states to set free slaves brought in voluntarily by purported owners.[7] (2) The decision, by giving exclusive jurisdiction to Congress over rendition, enabled Northerners living in the free states to have a voice in shaping a remodeled version of the 1793 Act, such that protections including trial by jury could be added nationwide to forestall the chance of wrongful capture of free blacks accused as runaways.

Writing privately in 1847, prior to the publication of the biography, Charles Sumner, too, observed in a letter to fellow antislavery activist Salmon P. Chase that Story had used the label "triumph for freedom" for the opinion. Sumner stressed the pride Story took in his use of the opinion to establish that nothing outside of "municipal law" upheld slavery, such that without the express command of the slave rendition clause in the Constitution, slavery would be forbidden as contrary to the law of nations.[8] At this point Sumner was a lawyer who had lectured at

5. The case presented no such law but Taney and Daniel in dissent complained of this legal outcome.

6. William Wetmore Story, *Life and Letters of Joseph Story*, Vol. 2 (Boston: Little and Brown, 1851), 392–95.

7. Ibid., 292–93.

8. Carl Swisher, *The Taney Period 1836–1864*, Vol. V of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1974), 542–543, and Wiecek, "Slavery and Abolition," 46, n. 47, both citing letter to Chase of March 12, 1847, Chase Papers, Library of Congress.

Harvard Law School, not yet an office holder, but he was active in politics as a leading critic of slavery and was about to become one of the founders of the Free Soil Party.[9] William Wiecek calls Sumner a "protegé and confidante" of Joseph Story.[10] From Sumner's and W.W. Story's descriptions one can infer that Joseph Story was expressing pride that the *Prigg* opinion put into United States law the rule from Lord Mansfield's Somerset opinion that slavery is unlawful wherever it is not expressly affirmed by positive law, as it is contrary to both natural and international law.[11] This part of *Prigg* insisting that slavery existed only as "municipal" law did (as the biography predicted) get cited in support of laws and rulings in Northern states that set free slaves of travelers within the state, and also was to reverberate in the antislavery slogan, "Freedom national, slavery local."[12] Samuel Chase, the recipient of the Sumner letter, is credited by Richard L. Aynes with the invention of the slogan.[13]

In the immediate aftermath of the decision, Charles Sumner himself responded to *Prigg* somewhat along the lines of the federal remodeling argument later made by W.W.Story. Sumner wrote to his friend Charles Francis Adams early in 1843 that the *Prigg* decision was "legally correct" and that the solution had to be political; Congress needed to "abrogate the [1793] law immediately, or add to it provisions in harmony with the Spirit of the Constitution."[14] William Ellery Channing wrote similarly within the month immediately following the decision that Congress now needed to modify the law in accord with the principle "that it is infinitely more important to preserve a free citizen from being made a slave than to send back a fugitive slave to his chain."[15] This optimism about a Congressional move to correct procedural improprieties in the 1793 law in the immediate aftermath of *Prigg* was also echoed in an essay in the Ohio abolitionist newspaper, *Philanthropist*.[16]

9. *Biographical Directory of the U.S.Congress*. http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001068; Robert C. Kennedy, "Charles Sumner," in *The Impeachment of Andrew Johnson: Biographies* http://www.impeach-andrewjohnson.com/11BiographiesKeyIndividuals/CharlesSumner.htm (June 22, 2009).

10. Wiecek, "Slavery and Abolition," 46, n. 47.

11. Prigg, 41 U.S. at 611. *Somerset v. Stewart*, 98 English Reports 499, 510 (King's Bench, 1772).

12. Wiecek, "Slavery and Abolition," 56; *Lemmon v. The People*, 20 N.Y. 562 (1860), cited in Wiecek at 57.

13. Richard Aynes, "Bradwell v. Illinois: Chief Justice Chase's Dissent and the 'Sphere of Women's Work'," *Louisiana Law Review* [59 (1999): 521–41, at 522.

14. Thomas Morris, *Free Men All: The Personal Liberty Laws of the North 1780–1861* (Baltimore: Johns Hopkins University Press, 1974), 106, citing letter of March 1, 1843.

15. Ibid., citing essay of March 1842, "The Duty of the Free States."

16. *Philanthropist*, March 9, 1842, cited in Finkelman, "Anti-Slavery Use," 17.

With nineteenth-century views on the import of the decision thus divided, Charles Warren, writing in the early twentieth century, summed up the situation: "The decision was equally unsatisfactory to both pro-slavery and anti-slavery men."[17] This remained the consensus view up through the early 1970s.[18] Unless one were willing to adopt the standard of the abolitionists that everyone's human duty was to free the slaves, period, one could not adjudge *Prigg v. Pennsylvania*, simply a proslavery opinion.[19]

Then, in 1971, Story's biographer James McClellan made public a passage from a letter Story had written to Georgia Senator John Macpherson Berrien (chair of the Senate Judiciary Committee) on April 29, 1842, just eight weeks after the Prigg decision.[20] Berrien was a firmly proslavery Whig and former Jacksonian Democrat who had served as Jackson's attorney general.[21] In this passage Justice Joseph Story recommends to Berrien what Story stresses must be a "*general*" provision for federal law enforcement, namely, that the federal courts appoint a federal commissioner "in every county" to act "*in all cases*, where by the laws of the U.States, powers were conferred on state magistrates." Story expresses hope in the letter that this *universality* of coverage will minimize opposition, enabling the provision to "pass without observation" and "without creating the slightest sensation in Congress." This proposal, wrote Story in a passage that would have outraged abolitionists and is evidently calculated to appeal to Berrien's proclivities, would "meet the practical difficulty" that 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.… [O]n the Supreme Court we all thought it would be a great improvement, & would tend

17. Charles Warren, *The Supreme Court in U.S. History*, Vol. II (of III) (Boston: Little, Brown, 1923), 358.

18. Swisher, *The Taney Period*, 541–44, 547, basically echoes Charles Warren's conclusion and shows no awareness of the Berrien letter described in text following note 19.

19. Biographer Gerald T. Dunne frankly does adopt this standard. Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon and Schuster, 1970), 402.

20. James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman: University of Oklahoma Press, 1971), 262–63, n. 94. This copy of the letter, from the papers of Berrien in the Southern Historical Collection, University of North Carolina, is available on microfilm reel no.1 via loan. The general topic of the letter is the need for a federal law applying the common law of crimes to admiralty and maritime jurisdiction.

21. "John M. Berrien," *Biographical Directory of the U.S. Congress* http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000413 (June 25, 2009).

much to facilitate the recapture of slaves, if commissioners of the [federal] circuit court were clothed with like powers." The passage concludes with a statement that "these suggestions . . .are dictated solely by the desire to further a true administration of public justice."[22]

Prior to McClellan's biography, the only available version of this letter was a lengthy excerpt in *Life and Letters of Joseph Story* by Story's son, William W. Story published in 1851.[23] This version had replaced with an ellipsis this discussion of making slave recapture more efficient, and the biography itself had emphasized Joseph Story's antislavery inclinations and, as noted, included a lengthy discussion of why *Prigg v. Pennsylavania* should be viewed as antislavery.

Once the Berrien letter became widely known, the modern view of *Prigg* shifted dramatically; it is now seen as "emphatically proslavery."[24] This revisionist consensus is led by the scholarship of Barbara Holden-Smith and Paul Finkelman, who see Story's extreme devotion to nationalism as undercutting his opposition to slavery (and treat the page in the Berrien letter as compelling evidence for this conclusion).[25] Two counter-revisionist scholars, Chris Eisgruber and Earl Maltz, continue to depict the decision as moderately antislavery, as does this article. They see Story's nationalism as ultimately compatible with his opposition to slavery, and see his compromises with slavery in *Prigg* as in service of the national power that would be needed to end slavery.[26] Neither Eisgruber nor Maltz, however, directly confronts this damning section of the Berrien letter.

The purpose of this essay is to engage in this direct confrontation and to offer an explanation of Story's desire for a federal enforcement

22. McClellan, *Joseph Story*, emphases in the original.

23. William W. Story, *Life and Letters*, Vol. 2, 404–5. The ellipsis also omits a paragraph on a proposed Judicial Act of 1842.

24. Don E. Fehrenbacher and Ward M. McAfee, *The Slaveholding Republic: An Account of the United States Government's Relation to Slavery* (New York: Oxford University Press, 2001), 221 (source of quote); Barbara Holden-Smith, "Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania," *Cornell Law Review* 78 (1993):1086–1151; Paul Finkelman, "Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism," *The Supreme Court Review*, 1994: 247–94; and Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 243.

25. Holden-Smith, "Lords," 1133, 1137–138; Finkelman, "Story Telling," 249, 251, 282–83, 286, 290, 291–93.

26. Christopher L.M. Eisgruber, "Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism," *University of Chicago Law Review* 55 (1988): 273–327; Earl Maltz, "The Problem of Fugitive Slaves," pp. 83–113 in *Slavery and the Supreme Court, 1825–1861* (Lawrence: University of Kansas Press, 2009); see also Maltz, "Majority, Concurrence, and Dissent: Prigg v. Pennsylvania and the Structure of Supreme Court Decisionmaking," *Rutgers Law Journal* 31 (2000): 345–98.

bureaucracy that contextualizes it in mid-nineteenth century United States politics and legal development. This contextualization, granted, does not reveal *Prigg* to have been a pro-abolition decision, but it reveals it as more of a "triumph for freedom," as Joseph Story repeatedly claimed it was, than modern scholarship generally recognizes.

To develop this contextualization, this article elaborates (in Section IV) the following: (1) the dynamic regional shift of national power from South toward North in the 1820–1840 period (the observation of which would have encouraged Story's hopes for reforming the procedural fairness of the Fugitive Slave Act); (2) the import of Story's desire to expand the enforcement power of the national judiciary for protecting the rights of Native Americans; and (3) also the import of this desire for protecting free black seamen incarcerated in Southern states. The article frames this linkage between Story's nationalism and his concerns for Native Americans and black seamen by highlighting the American perception of political ties between the cause of the Cherokee and of the slaves around the time of *Prigg*. The conclusion will be that in light of these connections, the Court opinion appears as more of an antislavery decision than the revisionist view would have it and falls broadly in line with Story's antislavery sentiments.

The basic argument of this article is that attention to the Cherokee cases helps the modern reader see why a need for federal habeas control of persons wrongfully held in state custody—including free black seamen and wrongly accused fugitives—would be salient for Justice Story at the time of the *Prigg* decision, and therefore why antislavery Northerners such as Story and Sumner would have looked to a federal remodeling of the Fugitive Slave Act that could provide procedural protections for all such persons. These Cherokee cases not only were of high political salience at the time they were decided, but they also were widely discussed as relevant to the slavery issue within the New England antislavery community; Justice Story's local political milieu.

Around the time of the *Prigg* decision, Massachusetts politics exhibited a lively concern both with the problem of blacks wrongly imprisoned in Southern jails as slaves and with free black seamen unconstitutionally being forced to spend time in Southern jails while their boats were docked. Both of these are problems that a general federal judicial enforcement bureaucracy could have alleviated. The same habeas problem that made it impossible for federal judges to order Georgia to release Worcester after the Cherokee decision[27] had blocked Justice Johnson ruling on circuit in 1823, from being able to order the release of a free black seaman

27. *Worcester v. Georgia*, 31 U.S. 515 (1832).

unconstitutionally held in a South Carolina jail.[28] Story himself was still expressing concern about the latter problem in letters as late as 1845.[29]

Admittedly, the degree to which *Prigg* moved in an antislavery direction was checked by what Story saw as the mandates of the Constitution. He directly condemned abolitionist proposals that the demands of the Fugitive Slave Clause should be ignored and all runaway slaves simply set free in Northern states. He saw this as a recipe for disaster because it would produce secession and/or civil war, and no ending of slavery. He argued in a lecture at Harvard Law School the year after *Prigg* that if one part of the country chose to ignore the piece of the constitutional compromise that it disfavored, the rest of the country could do the same, and destruction of the Union (with no help for the slaves) would be the predictable outcome.[30] Moreover, in private letters in the months after the decision, he defended against abolitionist criticism of his action on the bench, by insisting that, however much he might personally oppose slavery, his role was to interpret the law as he found it, whether he agreed with that law or not. "I take my standard of duty as a judge from the Constitution"; "I cannot forget or repudiate my solemn obligations at pleasure."[31]

II. Justice Story, Slavery and Nationalism

The core of the puzzle created by the *Prigg* opinion is that even apart from the Berrien letter, the opinion contains certain passages whose tone seems distinctly proslavery, which fact seems to clash with three aspects of the historical context of the case: (1) Justice Story's well-known personal history as a staunch critic of both slavery and the slave trade; (2) the defense of the opinion as a "triumph of freedom" by Story himself; and (3) the actual profreedom sequelae of the decision, sequelae both foreseen and openly predicted by the two of the three dissenting justices.

28. *Elkison v. Deliesseline*, 8 F. Cas. 493, 496.

29. See text for note 36 below.

30. Swisher, *Taney Period*, 544; Newmyer, *Supreme Court Justice*, 378. Both cite Story's discussion of the rendition clause recorded verbatim in notes by student Rutherford B. Hayes on December 21, 1843. See also Story's Letter to Simon Greenleaf, January 4, 1845, to the effect that "if Texas is annexed" (something Story dreaded as strengthening the slave power), in part "we owe it to the Abolitionists." William W. Story, *Life and Letters*, Vol. 2, 511–12

31. Newmyer, *Supreme Court Justice*, 377, citing letter to Ezekiel Bacon, November 19, 1842.

A. Story as Antislavery

On the one hand, there is ample evidence that Story would have gone as far in the opinion to promote freedom as he believed his constitutional duty permitted. First, both before and after *Prigg*, beginning well before the abolitionist movement first erupted, Justice Story publicly condemned slavery. For example, at a public meeting in Salem in 1819, Story insisted that the principles of the Declaration of Independence and the spirit of the Constitution demand that Congress ban slavery in the territories.[32] In his charges to juries in Boston; in Providence; and in Portland, Maine; he censured slavery as "repugnant to the natural rights of man and the dictates of justice."[33] As to the slave trade, on circuit in *U.S. v. La Jeune Eugenie*, 26 F. Cas. 832 (1822), Story went on for pages condemning it as "breach[ing] all the maxims of justice, mercy and humanity," as involving "corruption, plunder and kidnapping" of "the young, the feeble, the defenceless and the innocent," as "desolat[ing] whole villages and provinces," as resulting in massive numbers of deaths in transit caused by the "cold blood[ed]" and "inhuman" treatment of the captives, and as "incurably unjust and inhuman."[34]

In private, he remained consistent. In 1839, for instance, three years before *Prigg*, Story complained in letters that the use of gag rules in Congress against antislavery petitions violated the Constitution.[35] Similarly, as noted above, both his son and Charles Sumner reported that Story bragged of his own *Prigg* opinion as a "triumph of freedom."

Story's concern about blacks' being mistreated in the South extended beyond slaves to the situation of free black seamen who were forced under the laws of several Southern states to be incarcerated while their ships docked in Southern ports. Although this issue had gone to the federal courts in 1823, it simmered for decades and boiled up again in Massachusetts right around the time of *Prigg*. In 1842, 150 merchants of Massachusetts petitioned Congress to deal with the plight of these sailors, all of whom were persons employed in interstate or foreign commerce. In 1843 the Massachusetts legislature commissioned Samuel Hoar to go to

32. Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975) 238–43; and Daniel Roper, "In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery," *Stanford Law Review* 21 (1969): 532–39.

33. William W. Story, *Life and Letters*, Vol. 1, 336; William W, Story, ed. *The Miscellaneous Writings of Joseph Story* (Boston: C.C. Little and J. Brown, 1852), 122–47, cited in Wiecek, "Slavery and Abolition," 36, n. 13.

34. *U.S. v. La Jeune Eugenie* 26 F. Cas.832, 845–48.

35. Story to Harriet Martineau, January 19, 1839, in William W. Story, *Life and Letters*, Vol. 2, 307–8. He also expressed fear there that "the question of slavery. . .will, if it continues to extend its influence, lead to a dissolution of the union."

Charleston, South Carolina, which he did in 1844, to challenge these laws as unconstitutional. Hoar was forced out of town by mob threats. In the final year of his life, Joseph Story wrote a friend to complain that the report of the Massachusetts legislature (penned by Charles Francis Adams) about its failed attempt to take South Carolina to court to correct this situation was insufficiently harsh on the South Carolinians: "I find it somewhat too cold and courtly." "I wished it to be . . .full of spirit."[36]

Finally, for years before and after *Prigg*, right up until the year of his death, Justice Story railed in letters to friends and relatives against the danger of the growth in the slavery power. He called the admission of Texas to the Union "grossly unconstitutional" and feared, alternatingly, that it would give the South a "ruinous preponderance in the Union," which in turn could produce "dissolution," or that states such as proud Massachusetts would be "reduced to perpetual bondage to the slave-holding states." Kent Newmyer's prize-winning biography of Story describes Story's feelings on this issue during the 1840s as reaching the level of "an obsession," and concludes finally, "Story's record against slavery was clear."[37]

B. Weaknesses in Story's Anti-Slavery Commitments?

On the other side, there are a couple of pieces of evidence that appear to damn Justice Story for, if not insincerity on opposition to slavery, at least such weakness in commitment that he was willing to subordinate it not only to his oath to uphold the Constitution, but more damningly, to his preference for a strong national government, even if that meant consigning people back into slavery.

First, there is the question of what sense to make of his letter to John Berrien and of its omission from the record, whether by Justice Story himself, or by his son, or by sheer accident.[38] Second, there is the matter of his

36. These laws had been declared unconstitutional at the federal circuit level but were continuing to be enforced. See text at citation for note 29 above. Howell Meadoes Henry, "The Seamen Acts," in "The Police Control of the Slave in South Carolina" (PhD diss., Vanderbilt University, 1914), 124–33; W.W. Story, *Life and Letters*, Vol. 2, 514–15, Letter to Simon Greenleaf, February 2, 1845; and United States Congress, 27th Congress, 3rd Session, January 20, 1843, *Majority and Minority Report* Committee No. 80.

37. Newmyer, *Supreme Court Justice*, 350–51, and nn. 21, 22, and 24, citing letters by Story from 1837, 1844, and 1845.

38. Berrien's copy of the letter is handwritten; the inflammatory part of the passage omitted by William Story, but for its first line, falls entirely upon page three, and but for the last line of page three, the page is filled with the section. Joseph Story's own hand-copied version of the letter would have been used by the son as the basis for the collection in the biography. If in that copy, which is no longer extant (per email communication with James

language in the *Prigg* opinion itself concerning the urgency of expeditious process in the recapture of a fugitive slave. From the perspective of the twenty-first century, it appears chillingly cold-blooded in its willingness to insist on immediacy, apparently even to the degree of denying fair judicial process for sorting out errors in allegations of the identity of runaway slaves. The language makes Justice Story appear eager to return alleged runaway slaves to their purported owners. What he wrote warrants a close look:

> How, then, are we to interpret the language of the clause? The true answer is, in such a manner as, consistently with the words, shall fully and completely effectuate the whole objects of it. If, by one mode of interpretation, the right [to retake a runaway] must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them. . . .
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> The 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. . . .[A]ny state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, pro tanto, a discharge of the slave therefrom. The question can never be, how much the slave is discharged from; but whether he is discharged from any, by the natural or necessary operation of state laws or state regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a positive and absolute right.[39]

In the context of a clash between a state law providing for a trial to sort out cases of mistaken or trumped-up identity from actual cases of runaway slaves and a federal law providing for summary process based on a sworn affidavit, this passage makes it appear that Justice Story is leading the Court into abandoning fair process for free blacks in order to assuage Southern slaveowners. Reference to the recapture of a runaway slave as a "just end" and as a "positive and absolute right" underline this chilling impression.[40]

McClellan, 2008), Story had put the entire section one line further down, it would have comprised page three. This page may have been lost or destroyed by Joseph Story.

39. *Prigg v. Pennsylvania*, 41 U.S. 539, 612–13.

40. The implications become even more abhorrent if one reads them in light of Story's statement from his *Commentaries* published nine years earlier, to the effect that the words

On the other hand, Justice Story himself, if his son is to be believed, specifically insisted "on his return from Washington" after the decision, that the question of whether the Act of 1793 implicitly prohibited trial by jury for such situations and if so was unconstitutional, had not been argued by counsel in the case nor considered by the Court and that he, Justice Story, considered it an open question.[41] Is there a way to make sense of this claim in the face of this passage from the opinion and the correspondence with Berrien? A more detailed look at the facts of, and opinions in, the case will be useful for sorting out the answer to this question.

One thing can be said about this passage, however, before an examination of the case details of *Prigg*. Justice Story did *not* believe that his own words precluding every "*state* regulation[] which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave" (41 U.S., 612. Emphasis added.) applied to *federal* law or *federal* judicial procedures.[42] We know this because of Justice Story's *own* actions in the late October to early November, 1842 case of George Latimer, seized in Boston by, and claimed as a runaway slave of, James B. Gray, of Norfolk, Virginia.

Gray presented a request for a removal certificate under the federal law to Justice Story, but Story did not then grant "the immediate possession of the slave, and the immediate command of his service and labor" (41 U.S., 612) merely on the sworn word of Gray, which this passage from his *Prigg* opinion along with the earlier phrase "ministerial proceedings" might have been thought to require. Instead, Story ordered a two-week delay, during which the putative slave would be held in custody and the putative owner could return to Norfolk to gather evidence of his claim that might amount to "proof to the satisfaction" of Justice Story. In other words, delay of "immediate command of the service of" a putative slave, could in Story's view legitimately be ordered under federal, as distinguished from state, law.[43] Viewed in the context of the Latimer case, the passage stands out not as saying that the right of the slave owner to recaption

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of the Fugitive Slave Clause "contemplate summary ministerial proceedings and not the ordinary course of judicial investigation." Melville Bigelow, ed., *Commentaries on the Constitution of the United States*, Vol. 2 (first published in 1833), 5th ed. (Boston: Little, Brown and Co., 1891), 588, 589; sections 1811, 1812 cited in Newmyer, *Supreme Court Justice*, 352. W.W. Story, *Life and Letters*, Vol. 2, 396.

41. W. W. Story, *Life and Letters*, Vol. 2, 396. Also cited in Morris, *Free Men All*, 102.

42. Nor, by 1842, did he take literally his own words from the *Commentaries*, years before, about "summary ministerial proceedings." See note 40 above.

43. Eventually, the Boston jailor yielded to antislavery pressure and released Latimer to the custody of Gray, rather than continuing to hold him for Gray. Then, uncertain that he

must go unregulated. Rather it says that every *state* law attempting "in any way [to] qualify [or] regulate reception" was unconstitutional in that it violated the exclusive national power to regulate these matters.

III. Case Facts and Judicial Opinions in *Prigg*

At this point, a more detailed look at the *Prigg* decision is in order, to sort out the competing pieces of evidence. The case dealt with a clash between two statutes. The Fugitive Slave Act of 1793, adopted under power Congress inferred from Article IV, Section 2, clauses two and three,[44] allowed a claimant of a runaway slave, on affidavit sworn before the home county justice of the peace, to obtain a certificate of removal, from any local or federal judge wherever the slave was taken,[45] authorizing transport of the slave back to the home county. Congress specified no procedures to let the accused claim mistaken identity. The sworn word of the claimant of ownership became, in effect, the law, so long as it contained enough detail to amount to "proof to the satisfaction" of the judge where the alleged runaway was taken.[46] The federal law treated an accused runaway slave essentially the same as a runaway horse.

Pennsylvania law as of 1826 prohibited (as a felony) using "force or fraud" to take any "negro or mulatto" out of Pennsylvania in order to sell or put that person into slavery.[47] For allegations of fugitive slave status, this law both specified detailed procedures for obtaining an arrest warrant and for the trial to determine the truth of the allegation. At this trial, the law mandated, "[T]he oath of the owner or owners, or other person interested,

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could maintain control against the antislavery mob, Gray sold the slave to abolitionists. Morris, *Free Men All*, 109–11.

44. Located in Article IV, which describes interstate relations, the clauses read as follows: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

"No person held to service or labor 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 labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

45. In the 1840s, Pennsylvania had two federal judges; states often had only one. *Prigg*, 41 U.S. 539, at 631, (Taney, CJ, dissenting); Swisher, *Taney Period*, 536.

46. "An Act respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters," 1 Stat. 302 1793.

47. Facts here and below, unless otherwise indicated, are taken from case records in the United States Supreme Court Reports, *Prigg v. Pennsylvania*, 41 U.S. 539–58.

shall in no case be received in evidence before the judge, on the hearing of the case." Thus, the state law excluded from evidence precisely the sworn testimony deemed decisive by federal law.

Beyond these procedural protections, the Pennsylvania law directly flouted federal authority. It prohibited all Pennsylvania magistrates (by hefty fine) from taking jurisdiction to hear a case or issue any warrant under the federal act of 1793 concerning "persons escaping from the service of their masters" . . . "or under any other law, authority or act of the Congress of the United States."

Both these sorts of interferences with the federal scheme for slave recapture—supplemental procedural protections and prohibition on state participation—were being enacted in many Northern states besides Pennsylvania in the period 1824–1859. These included Indiana, Massachusetts, Connecticut, Vermont, Rhode Island, New Hampshire, Michigan, Ohio, Maine, Wisconsin, and Kansas.[48]

The facts by which these contending laws reached the Supreme Court have been detailed elsewhere.[49] Margaret Morgan, enslaved under Maryland law but treated as free by her owner, married a free black man and moved with him to nearby Pennsylvania. Years later, the widow Ashmore, who had inherited Morgan and her slave progeny, sent Edward Prigg and three other men, all of whom had a face-to-face acquaintance with Morgan, to retrieve her. The men followed Pennsylvania law to get the arrest warrant but when the justice of the peace refused to hold a trial to give the transport certificate, they simply took Morgan and her children to Maryland by force. Back in Maryland, a jury trial found them to be slaves of Ashmore.[50]

In Pennsylvania, authorities indicted the four men for kidnapping; interstate negotiations ensued for extradition. Per the negotiated settlement, Pennsylvania legislated that the jury would have to issue a special verdict based on a stipulated set of facts, agreed to by both Pennsylvania and the defendants, and that this verdict would be appealed to the United States Supreme Court to settle the constitutional issues.[51]

The United States Supreme Court record of the case lists the following among the stipulated facts: Margaret Morgan, a slave for life in Maryland owing service to Margaret Ashmore, a Maryland citizen, "escaped" to Pennsylvania in 1832 without Ashmore's permission; Edward Prigg in

48. For details see Leslie F. Goldstein, *Constituting Federal Sovereignty* (Baltimore: Johns Hopkins Press, 2001), 165–71; Finkelman, "Anti-Slavery Use," 21.

49. The most well-documented account is found in Finkelman, "Story Telling," 274–78.

50. Ibid., 278 n.123.

51. Finkelman, "Anti-slavery Use," 8; Holden-Smith, "Lords," nn.223–29

February of 1837 was lawfully appointed by Ashmore to seize and arrest Margaret Morgan to bring her back to Maryland for delivery to Ashmore.[52]

Having produced its "special verdict" that these were the facts, the jury found Prigg guilty of kidnapping under Pennsylvania law and requested higher court guidance as to the constitutionality of this law. The Pennsylvania Supreme Court affirmed, and the United States Supreme Court took the case on a writ of error.

In terms of later disputes about the import of the case these are its salient facts: (1) the Pennsylvania law declared unconstitutional did not itself require a jury trial as to fugitive slave status; and (2) Margaret Morgan had been adjudged a slave in two different jury trials, one in Pennsylvania (wherein, granted, the facts had been stipulated in advance by Pennsylvania authorities and the defendants) and one in Maryland.

Prigg v. Pennsylvania produced a highly splintered Supreme Court decision; differing justices combined to form majorities around separate pieces of Justice Story's Court opinion. Seven justices wrote opinions; Justices Catron and McKinley concurred silently.

As to specific result, the justices agreed unanimously to declare void the Pennsylvania law altering the federally mandated procedures for Pennsylvania magistrates issuing fugitive slave transport certificates. But as to reasoning, even for this one result, they splintered.

Justice Story and five of his colleagues (in the face of dissents from Chief Justice Taney and Associate Justices Thompson and Daniel) concur on the point that the power to legislate the method of recapture of runaway slaves rested exclusively in Congress. The Constitution implicitly forbids states to legislate concerning the return of fugitive slaves because the power to enforce the Fugitive Slave Clause was, per Story, in its nature exclusively a federal power (41 U.S., at 614–25). And even these six were not fully in accord: Justice Baldwin (as explained not by his own cryptic, two-sentence opinion [41 U.S., at 636] but by his colleague, Justice Wayne [41 U.S., at 637]), believed neither Congress nor the states were allowed to legislate on the subject (and that the Constitution authorizes and obliges the claimant slave-owner to use self-help recaption), but Baldwin did agree that because the majority of his colleagues were upholding the federal law of 1793, state legislation on the same subject was certainly forbidden. This left a bare majority of five in support of this important aspect of Story's reasoning.

The three dissenters all challenged the exclusivity ruling. Only one of the three, however, Chief Justice Taney (forecasting his strongly proslavery views of the later Dred Scott decision[53]) insisted (41 U.S., at 627) that all

52. 41 U.S. 539, at 556.

53. Earl Maltz agrees. "Majority, Concurrence, and Dissent" 396–97.

states *must* legislate in aid of Congress for the recapture of slaves, in order to execute the implicit command of the fugitive slave clause.

As to a second concrete result of the Court holding, the justices were more unified; all but one concurred that the conviction of Edward Prigg and his associates for kidnapping had to be declared void, as the state courts of Pennsylvania had ruled that the accused fugitive was a slave under Maryland law, and that Prigg was authorized by her owner to recapture this slave. The lone dissenter on this point was Justice McLean. He insisted (941 U.S., at 672–73) that under the states' right to assure peaceful and orderly processes, once state judges were forbidden to assist, Prigg's duty was to take Margaret Morgan and her children before one of the two federal judges of Pennsylvania to obtain a certificate of removal. Because he had not, he could be punished as a kidnapper.

On the question of whether the states could legislate (as Pennsylvania and some other Northern states had done) that no state official may, in official capacity, cooperate in the congressionally mandated activity of returning fugitive slaves, surprisingly, only one justice explicitly dissented, Justice McLean (41 U.S., at 664–66). The rest, except for Chief Justice Taney, all appeared to align silently with the view expressed by Justice Story that the federal government may not coerce state officialdom to do its bidding in executing federal law. In contrast to the Taney dissent's insistence that states were constitutionally obligated to legislate in support of slave recapture, Justice McLean, the most nationalist and most antislavery on the Court,[54] conceded that federal power to regulate the modes for capture and return of slaves was exclusive, but he maintained that the federal government could certainly order states to cooperate in the enterprise, just as it could order governors to extradite criminals.

As to federal authority to regulate fugitive slave rendition, Justice Story wrote for all but Justice Baldwin that, although this was not explicit, it was necessarily implied: (41 U.S., at 615)

> If, indeed, the constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it

54. One can infer his antislavery position both from his being the only justice willing to let Prigg be punished as a kidnapper and from his solo opinion in *Groves v. Slaughter*, 40 U.S. 449 (1841), in which he insisted that under the Constitution freedom is national and slavery is local, permitted only if created by positive, state law: "The [national] Constitution acts upon slaves as persons, and not as property." *Groves*, 507.

> is contemplated to exist. . . . The clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect.

Story's move here, both establishing an important federal power that is not explicitly set forth in the Constitution and in making sweeping claims as to its exclusivity, follows the model set forth by John Marshall in the Cherokee case, *Worcester v. Georgia*.[55] There, the Court, working only with the clauses giving Congress the power to make treaties with the tribes and to regulate commerce with them, had also asserted an implied national power to regulate "[t]he whole intercourse between the United States and [the Indians]," a power that was "committed exclusively to the government of the Union."[56]

Story's *Prigg* opinion also suggested that it was unconstitutional for Congress to commandeer the cooperation of state judges.[57] His language on the point, however, was tentative: "The states cannot, therefore, be compelled to enforce [the 1793 Act]; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist [as Taney and the act were doing], that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the constitution" (41 U.S., at 615–16).

By contrast, Story's language on the state's right to legislate against its officials' executing federal law was not tentative:

> We hold the [1793 federal] act to be clearly constitutional, in all its leading provisions, and, indeed, *with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt. . . . As to the authority so conferred upon state magistrates, while a difference of opinion . . . may exist . . . in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose*, *exercise that authority, unless prohibited by state legislation* [emphasis added] (41 U.S., at 622).

The court majority, then, treats the federal law as an invitation to individual state judges to cooperate, but as one that they may individually decline, and

55. 31 U.S. 515 (1832).

56. The expansive quality of Marshall's reasoning in *Worcester* is noted by Gerard Magliocca, "Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott," *University of Pittsburgh Law Review* 63 (2002) 487, 538 n.233.

57. That this part of the federal law was unconstitutional had been the argument of Deputy Attorney General for Pennsylvania, Thomas Hambly. *Prigg*, 41 U.S. 539, 582–83. He quoted Justice Story back to himself from the case of *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816): "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin*, 330–31. See also Swisher, *Taney Period*, 539–41.

that they may be ordered to decline by their own legislature. Story seems here silently to allow for the possibility that legislatures could order their own judges to help Congress with its request, despite the exclusivity of the power, but he nowhere actually mentions a state power to mandate cooperation of its judges. All that he mentions is a state power to forbid its judges from cooperating.[58]

This asymmetry in announcing that state law could forbid state officials to enforce the federal scheme but not saying that state legislatures could order their judges to execute the federal law (albeit allowing judges a personal choice in the face of state legislative silence) is perhaps intentional. That it may be intentional is suggested by the dissent from Justice Story in *Houston v. Moore*, 5 Wheaton 1 (1820), in which he argued for the unconstitutionality of a Pennsylvania law authorizing state judges to impose penalties for shirking the federal militia duty that had been established in the Act of Congress of 1795. (The Federal Militia Law did not mention a role for state judiciaries, differing in this respect from the Fugitive Slave Act of 1793.) In *Houston*, Story (writing in dissent) does not even allow for an individual option by state judges to cooperate with the federal scheme:

> It does not follow, because Congress have neglected to provide adequate means to enforce their laws, that a resulting trust is reposed in the State tribunals to enforce them. If an offence be created of which no Court of the United States has a vested cognizance, the State Court may not, therefore, assume jurisdiction, and punish it. It cannot be pretended that the States have retained any power to enforce … penalties created by the laws of the United States in virtue of their general sovereignty, for that sovereignty did not originally attach on such subjects.[59]

This language is closely echoed in Story's insistence in *Prigg*, "The natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive … to carry into effect all the rights and duties imposed upon it by the constitution" (41 U.S., at 616).

This reading of the *Prigg* majority's sense of exclusivity of the federal power as hostile to even potential state legislation mandating cooperation in the federal law is supported by Justice Daniel's dissent (41 U.S., at 657), for he accused the majority of "the inculcation of a belief that any co-operation with the master becomes a violation of law."

58. Justice Wayne presents a similar analysis, 41 U.S., 636, 444.
59. *Houston v. Moore*, 5 Wheaton 1, 68 (Story, J, dissenting).

Chief Justice Taney, on the other hand, treats the majority's silence as to a state power to require judicial enforcement of the federal law as inconsequential. He reads the majority opinion as allowing state legislatures either to prohibit or to mandate that their own officials cooperate.[60] The three dissenters also divide in their critiques of the exclusivity of federal power. Justice Thompson (at 633–36) limited himself to a preemption principle: if Congress had not yet acted or if Congress were to repeal the 1793 law, then states should be allowed to pass laws to execute the rendition and extradition clauses.

For Justice Daniel (dissent at 650–58), it was wrong-headed for the majority to rule that even state laws "undeniably in aid of" the rendition clause were unconstitutional (at 652). Both he and Taney (dissent at 626–33) elaborated this point, and did so in a way that stressed the practical consequences of (1) the majority's federal exclusivity ruling; (2) its ruling that state officials were free to disregard Congress's command of their enforcement assistance; and (3) the new authorization for states to mandate this disregard. Both these justices read the majority opinion as producing the conclusion that free-state judges will inevitably stop executing this federal law. This inevitable tendency would produce the first practical difficulty: "The most active and efficient auxiliary" available to a master attempting slave recapture is now eliminated, and therefore "the inconsiderable number of federal officers in a state, and their frequent remoteness from the theatre of action, must, in numerous instances, at once defeat his right of property, and deprive him also of personal protection and security" (against anti-slavery mobs).[61]

Both of these dissenters went on for pages elaborating the practical dilemma (at 630–31; 656–57). With only one or two federal judges per state, recapture would no longer be feasible. Because of "the hazard and expense of taking the fugitive, in all cases, to the distant residence of one of the judges of the courts of the United States," the remedy of Congress was being rendered "ineffectual and delusive" (631).

Their accurate predictions seriously undercut Story's claim to be providing the obligatory constitutional interpretation, one that would "fully and completely effectuate the whole objects" of the Rendition Clause (612). He offered no rebuttal to their predictions. *One thing his Berrien letter (written within eight weeks of the decision) reveals is that he knew their predictions were accurate.*

Both these justices described a second practical problem for slave recapture created by the Court's interpretation: it immediately negated the

60. 41 U.S. 539, 630 (Taney, CJ, dissenting).
61. 41 U.S. 539, 656–657 (Daniel, J, dissenting).

validity of the Southern state laws that assisted in recapture before the claimant master or his agent arrived on the scene. These laws mandated the arrest and imprisonment of suspected runaways until their claimant masters came along, and also provided for efforts to notify the masters. Taney complained that now "the territory of the state must soon become an open pathway for the fugitives escaping from other states," as the fugitives "would be beyond its borders (if they are allowed to pass through without interruption) before the master is able to learn the road they had taken" (at 632).

Story's opinion replied to this scenario with the suggestion (41 U.S., at 625) that despite federal exclusivity as to the delivery of fugitives "on claim," the state police power would allow states to arrest and deport fugitive slaves in order to secure domestic peace and good order against their "depradations and evil example." Justice Daniel responded to Story's proposed "solution" with the observation that it worsened rather than solved the slavemaster's dilemma (at 658): for a state to arrest and then deport the slave might well carry him farther from the clutches of his master. Both Taney (at 632) and Daniel (at 658) pointed out also that the standard meaning of the police power would probably not cover the arrest of a fugitive slave so long as he was behaving peaceably and not violating any local laws. Story offered no rebuttal on this point.

Once Story retired from the Court and more proslavery justices joined it, the Supreme Court did silently reverse itself on this exclusivity rule, upholding a conviction of someone for violating a state law against harboring a runaway slave.[62] Only Justice McLean dissented (on double jeopardy grounds).

IV. Beyond Perplexity

A. Jury Trials for Alleged Fugitives

One thing that emerges from a close look at the facts and opinions in *Prigg*, is that the Court was dealing with a situation where the alleged fugitive had already been through a jury trial (indeed, through two jury trials, one in Maryland and one in Pennsylvania) in which the juries had concluded unanimously both that the fugitive was an escaped slave held under the laws of Maryland and that the man who had captured her had been authorized to do so by the woman who owned the slave under Maryland law. The Supreme Court in this situation was being asked to decide whether the Pennsylvania law (which did not require juries in trials of fugitive slave

62. *Moore v. Illinois*, 55 U.S.14 (1852).

status) might punish Prigg as a kidnapper for failure to comply with all the procedures required by the state law. It ruled that all state laws regulating the recapture of fugitive slaves were unconstitutional, but this ruling emerged from a setting in which the putative fugitive had *already* had a jury trial. There remained no reasonable doubt as to, nor was the accused slave even claiming, mistaken identity. This fact renders problematic the criticism from some scholars of the Story opinion for its failure to bring up the question of jury trials for blacks claiming to be free persons.[63] In this context, such a statement would have seemed peculiarly extraneous. Moreover, the specific legal context of this trial, in which there had already been a jury verdict as to slave status, does render plausible William W. Story's assertion that his father maintained that the questions were still open whether the 1793 law precluded [federal] jury trials for persons claiming non-slave status and whether, if so, it would be unconstitutional under Article III and the Sixth Amendment.[64]

B. Practical Consequences of Prigg *and the Berrien Letter*

The second thing that becomes clear from this closer look is that dissenters Taney and Daniel demonstrated the inevitable practical consequences of the exclusivity doctrine: given the paucity of federal judges, this decision would make the 1793 law utterly ineffectual. The five justices endorsing federal exclusivity, then, were familiar with these predictions, and they nonetheless went ahead with the decision. Moreover, the Berrien letter reveals that Justice Story, within eight weeks of the decision, understood this non-cooperation to be already the general practice of Northern state officialdom.[65] It seems fair to conclude from the Berrien letter that Joseph Story acted not in disagreement with the predictions of Daniel and Taney but rather in full knowledge that these were indeed the foreseeable consequences of his acts. Therefore, the claim made by William Story in the biography, that his father later spoke of the decision as having "promised practically to nullify the Act of Congress"[66] is supported by the Berrien letter. What the letter undercuts is William Story's implicit suggestion that this unenforceability of the federal law itself was praised by his father as "a great point … gained for liberty."[67]

63. Newmyer, *Supreme Court Justice*, 352, 374; Morris, *Free Men All*, 104.

64. See pp. 2–3 above on remodeling the 1793 Act to require the safeguard of trial by jury for determining slave status and text for note 41.

65. The first new law to forbid state cooperation issued from Massachusetts in 1843, many months after the Berrien letter. Newmyer, *Supreme Court Justice*, 373.

66. W. W. Story, *Life and Letters*, Vol. 2, 392–94.

67. Ibid.

Justice Story's letter to Berrien indicates that the justices had discussed the practical impact of exclusivity and had agreed on the assessment that the Fugitive Slave Law would go virtually unenforced unless federal enforcement magistrates were created for every county. Whereas it is debatable whether McLean agreed with the rest that specifically improving the efficiency of slave recapture "would be a great improvement," there can be no doubt that all the justices would have welcomed the enforcement help of a low-level federal magistrate in every county. The appointment of such commissioners, to handle federal law enforcement in *general*, as Story stressed, (not merely for fugitive slaves) would have eased the justices' burdens on circuit, a burden about which they had been complaining since the eighteenth century.

C. The Omitted Page from the Berrien Letter

How then should one interpret the omission from William Story's biography of the page of the Berrien letter suggesting a new federal judicial bureaucracy that would inter alia make the recapture of fugitive slaves more efficient? The biographer writes the following in a defensive tone: "I appeal to every letter in this book in which the subject of slavery is alluded to, as proof that his judgment and feelings were steadily hostile to that institution."[68] One must object. To call the appointment of federal commissioners who would facilitate slave recapture a "great improvement," as Story's letter to Berrien did in the passage William Story omitted, hardly reads as "steadily hostile" to slavery.[69]

So, it is now plain: if William knew of this page of the letter and purposely omitted it, he would seem to be lying outright. Of course, the page of letter may have been simply lost by his father. Alternatively, and perhaps most plausibly, Joseph Story himself destroyed the controversial page out of embarrassment; not because the pro-federal-power page showed him to be proslavery but because it revealed that he knew that the predictions of Taney and Daniel were accurate about the practical import of his decision. This practical import ran *directly counter* to what he had announced in *Prigg* as the proper guide to constitutional interpretation: "No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them. . .."[70]

68. Ibid., 398.
69. See notes 20–22 and text therefor.
70. *Prigg*, 41 U.S., 612.

The letter to Berrien makes plain both that Justice Story did indeed construe the Rendition Clause of the Constitution in a way that, at least in the immediate short run, would indeed, "defeat its obvious ends," and that he *knew* he was doing so. The letter concedes his awareness of the accuracy of Taney's claim in dissent that if interpreted in Story's way, "The act of congress of 1793 scarcely deserves the name of a remedy."[71] This fact certainly gave Story a motive to remove the inculpatory page from the copy of the letter that he retained in his own papers. It showed that whereas the practical outcome of the *Prigg* decision would accord with his personal moral views about the outrageousness of slavery, he knew that it would run counter to his expressed views on the propriety of effective law enforcement.

D. Prospects for Federal "Remodeling" of 1793 Act

Irrespective of how the page of the letter came to be omitted from the William Story collection, there remains the question of Joseph Story's own view of his *Prigg* decision in light of the letter he wrote to Berrien. William Story's and Charles Sumner's responses to his description of the case would suggest that he understood his efforts to propose a new federal bureaucracy that would, inter alia, judge slave recaptures, if not as a blow to slavery (for surely it was not that), at least as a protection for free blacks. As matters stood, after *Prigg*, the North increasingly was getting out of the business of slave recapture, but Southern states ignored the prohibition in the *Prigg* decision. They continued to arrest suspected runaways, hold them in jail, and attempt to contact their owners.[72] These states had no particular interest in strengthening procedural justice for free blacks who might be captured erroneously. If the federal government increased its slave rendition activities, it is true that more runaways would be sent back into unjust servitude. This, there is reason to believe, Story would regret on a personal moral level. On the other hand, once federal officials were in charge of the rendition process, there was substantial reason to hope that trial by jury and habeas corpus protections could be instituted for those blacks who claimed to be free persons under the laws. After all, the Constitution did specify these protections for the federal judiciary.

Because of common practice both in the Southern states and the District of Columbia regarding arrests of free blacks as supposedly "suspected" fugitive slaves, the problem of wrongful capture was far more serious than might be imagined. In Mississippi, any black unable to prove free

71. *Prigg*, 41 U.S. 539, 630–31 (Taney, CJ, dissenting).
72. Swisher, *Taney Period*, 545.

status was liable to be sold into slavery. In Florida, the crime of being "idle and dissolute" was grounds to sell a black person into slavery. A variety of Southern states as well as the District of Columbia had laws allowing any person jailed as a "suspected" runaway slave who was *not* claimed after twelve months to be sold into slavery. As to the District of Columbia, members of Congress tried to have this practice forbidden both in 1843 and 1844 but failed in their efforts.[73]

Of the hopes expressed in response to *Prigg*, by people like Joseph Story, Charles Sumner, and William E.Channing, for national-level reforms of the 1793 Act,[74] Paul Finkelman writes the following: "Realistically. . .[they] were impossible. In 1842, . . .slaveholders and their northern allies dominated the American political system. One half of the United States 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 []either a slaveholder, former slaveholder, []or a northern [D]emocratic doughface who owed his political survival to the South."[75]

But Finkelman writes as though politics is simply a static slice of time, circa 1842. In fact, the decades of 1820 through 1860 were a period of a rapidly shifting power balance with respect to slavery.[76] By the 1830s, both the economic growth of the country and its population base had discernibly shifted from South to North.[77]

Mark Graber traces the political import of this shift: In 1790, Virginia had double the population of New York. By 1850, New York had triple the population and representation of Virginia. States of the former Northwest Territory, such as Ohio and Wisconsin, now were larger than the original slave states. In 1790, the balance of slave (49) and free (57) representation in the House was roughly equal; by 1820, free states had 123 to slave 90; by 1850, the balance was 147 free to 90 slave. This shift, of course, affected the electoral college, rendering the election of

73. Carol Wilson, *Freedom at Risk: The Kidnapping of Free Blacks in America 1776–1865* (Lexington: University Press of Kentucky, 1994), 63–66.

74. See above pp. 2–3 on remodeling the 1793 Act to require the safeguard of trial by jury for determining slave status.

75. Finkelman, "Story Telling," 290–91.

76. Louise Weinberg, "Dred Scott and the Crisis of 1860," *Chicago-Kent Law Review* 82 (2007): 97–139 (claiming, 109, that by 1850 "it was reasonably foreseeable that no new slave state would ever be admitted again.")

77. Weinberg, "Dred Scott," 103–8; Carole Marks, *Moses and the Monster and Miss Anne* (Urbana: University of Illinois Press, 2009), 137; and David B. Davis, *Challenging the Boundaries of Slavery* (Cambridge: Harvard University Press, 2003), 58, 77–78.

an antislavery president increasingly likely.[78] By 1850, the balance in the Senate had shifted, too. Rather than the original predominance by slave states, the senators from free states now outnumbered those from slave states by two.

Justice Story (1779–1845), nearing the end of his life by the time of *Prigg*, had lived long enough to observe this trend, and therefore had reason to be hopeful that a shift in the national political tone was possible. During his lifetime, in 1844, Congress did end the egregious gag rule on antislavery petitions.

Unfortunately, the 1850 Fugitive Slave Act turned out to have no better procedures that the one of 1793; the accused slave was not allowed to testify, and the magistrate judging the case received twice as much pay if he found for the slaveowner rather than against.[79] Not only did this act create federal bureaucratic machinery for each county to make slave recapture efficient, but also it permitted the federal commissioners to insist that the general citizenry enroll in a posse to assist in recaptures.[80] This act focused solely on slave recapture; and therefore was a far cry from the general federal bureaucracy urged in Story's letter to Berrien. As it happens, the leading figure in federal Indian removal of the 1830s, Lewis Cass, was the Senator who suggested the Fugitive Slave Act of 1850.[81]

78. Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 126–28.

79. Philip A. Klinker, with Rogers Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999), 43–44; and Morris, *Free Men All*, 134.

80. See note 79.

81. Senator Berrien had no apparent role in the 1850 act. First introduced in spring of 1848 by Senator Arthur Butler [South Carolina], it went nowhere, and was re-introduced in an amended version in 1850. Butler's version would have simply given judging powers for fugitive slave cases to such federal officials as customs collectors and postmasters. The 1850 version (which passed) called on federal district judges to appoint officials called "federal commissioners" for each county. This version was suggested by Senator Lewis Cass (Democrat) of Michigan. Cass had risen to political fame as Jackson's Secretary of War directing Native American removal in the 1830s, missing by just two months an overlap with John Berrien who in June of 1831 resigned from the post of supervising that removal in his role as Attorney General in the Jackson administration. Mary Hershberger characterizes both Cass and Berrien as "ardent proponents" of Native American removal. There is more to the linkage between Native American politics and slavery politics than the personal role of Lewis Cass. See Section E below. The Fugitive Slave Act was formally introduced by Senator James Mason of Virginia, who credited Lewis Cass with having given him the plan and an anonymous "Northerner" with having drafted it. Mary Hershberger, "Mobilizing Women, Anticipating Abolition: The Struggle against Indian Removal in the 1830s," *Journal of American History*, 86 (1999): 15–40. Marion Gleason McDougall, *Fugitive Slaves 1619–1865*, Fay House Monographs, No.3 (Boston: Ginn, 1891), 28; Morris, *Free Men All*, 130–35; Amy H. Sturgis, *The Trail of Tears and Indian Removal* (Westport,

Still, what may seem impossible or even unthinkable from the retrospective perch of modern historians, was not unthinkable to senators of 1850. Both jury trial provisions and habeas corpus provisions were debated at some length in the development of that bill in the United States Senate.

A substitute proposal that would add to Senator Mason's 1850 bill both jury trial and habeas corpus for anyone seized as a runaway came initially from Senator William Seward (NY). Historian Thomas D. Morris says that this bill had no chance in a Senate with so many Southerners; even printing it was opposed and it was "never seriously discussed."[82]

On the other hand, jury trial remained a heated issue. Not only abolitionists but also free-soilers and antislavery moderates in the Senate, and in Northern newspaper editorials and lectures, continued to hammer the issue of such trials and the premise of the legal system that a person was free until proven otherwise.[83] This group included the same Charles Francis Adams to whom Sumner had written in 1843 about the need for a national reform of the Fugitive Slave Law in apparent response to his discussions of the case with Story. Although Whig Daniel Webster had heartily endorsed the need for efficient return of fugitive slaves in a March 7 speech that caused him to be widely castigated by antislavery leaders, he then himself proposed adding a jury trial provision for those accused fugitives who claimed that they were not persons held to service or labor. Unlike his earlier speech, this reformist one drew little attention.[84] Fellow Whig Henry Clay of Kentucky was moved to try to shape a compromise, offering jury trial in the home, Southern state, as a way of avoiding the expected jury nullification by Northerners. This proposal was popular with neither Northerners nor Southerners and was defeated overwhelmingly. Debate on it included claims by Southerners (and by Clay) that no one complained about the accuracy of Southern jury trials concerning claims of freedom. Still, the repeated efforts by moderate Whigs to build in some sort of jury trial or habeas protection for those persons claiming mistaken capture indicates a widespread concern at least among Northern Whigs that such Southern trials were not stopping the genuine problem of kidnapping in the guise of slave recapture. They insisted that federal law needed to address it.[85]

CT: Greenwood Press, 2007), 4, 40; and Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman:University of Oklahoma Press, 1932 and 1953).

82. Morris, *Free Men All*, 133.

83. Ibid., 133–45 traces the 1850 debates in detail.

84. Ibid., 138–39.

85. Ibid., 139–40, 144.

Later a New Jersey Whig (William L. Dayton) again proposed amending the bill to add jury trial at the place of capture for persons claiming they were not slaves, and this proposal was actively supported by the Massachusetts Whig, Robert Winthrop, who had replaced Webster in the Senate after he left to join the cabinet. This amendment was defeated. Southerners en masse opposed it and most of its support came from Northern Whigs. One more ambitious attempt at amendment—a jury for every accused fugitive—came from the free-soil Senator Chase but that one was quickly voted down. Senator Winthrop then tried adding a habeas corpus amendment that would state that the certificate issued by commissioners could not serve as conclusive answer to a writ of habeas corpus and that each person certified as removable back to slavery would have to be alerted of the right to this writ, that is, to claim wrongful imprisonment. As before, the provision was supported by moderate Whigs. Northern Democrats, including their leader Lewis Cass, silently acquiesced in the Southern argument that slaveowners should not have to face burdensome procedural hurdles to reclaiming runaways.[86]

To assert with confidence the impossibility of inserting such procedures into, not a law that targeted only slaves, but a *general* federal enforcement law (such as Story proposed to Berrien) from the distant vantage point of today seems unwarranted. Moreover, there remained the possibility that federal judges would rule that the federal fugitive slave act had to include, if not jury trials, then legitimate habeas procedures for alleged slaves claiming mistaken identity, in order to avoid unconstitutionality.

E. National Authority and People of Color

Ten years prior to *Prigg*, in one of the Cherokee cases, *Worcester v. Georgia*, Justice Story had been in the Supreme Court majority when, consequent to its 8-1 decision, it ordered a special mandate to be issued to Georgia to release the prisoners being held under a Georgia law that the Court was declaring unconstitutional. Two days after handing down its decision, on March 5, 1832, the United States Supreme Court issued the mandate to the Georgia court to reverse itself and to release the two prisoners, Worcester and Butler, missionaries seized from tribal land. (They had been arrested for refusing to leave Cherokee territory pursuant to the Georgia laws that were, inter alia, abrogating all tribal laws and all Indian property rights.) The Court sent a messenger to Georgia, because the Court needed to receive an official document from Georgia indicating the refusal of the Georgia court to comply before the Supreme Court could

86. Ibid., 143–44.

order the federal marshal to free the two missionaries. Georgia authorities refused to cooperate in any way, and therefore issued no such document. The lawyer for Worcester, Butler, and the Cherokee tribe, William Wirt (who had served as United States attorney general from 1812 to 1829), in the intervening period between the Court's having ended its session in March 1832 and the opening of its session in January of 1833, unsuccessfully attempted to develop an enforcement mechanism for the Court's order. For federal courts to command enforcement of their orders upon state officials holding prisoners unconstitutionally in this sort of situation of utter non-cooperation by the state, they would need to issue a writ of habeas corpus. Unfortunately, however, the federal habeas corpus law applied only to prisoners held in *federal* custody. Years earlier, Wirt had bumped against the same habeas problem as attorney general for President Monroe; on May 8, 1824 he had issued an executive opinion announcing the unconstitutionality of the South Carolina laws ordering the lockup of free black sailors (but could not order their release).[87] Now, to help Worcester and Butler he contacted a friendly congressman who attempted to persuade Congress to amend the federal habeas law to extend it to state prisoners. The attempt proved unsuccessful.[88]

Justice Story harbored strong feelings about the cause of the Cherokee, and therefore had to have been aware of this habeas problem. The habeas problem would extend to all persons wrongly held by any state authorities contrary to federal law. This would include the situation of free black sailors being held unlawfully in Southern jails while their ships were in harbor, a situation getting political attention in Massachusetts around the time of *Prigg v. Pennsylvania*, and one that Story's letters showed him

87. H.M. Henry, "Police Control of the Slave," 127–28.

88. The historical account of *Worcester v. Georgia* in this paragraph derives from Charles Warren, *The Supreme Court*, 213–29, 234–37; Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review* 21 (1969): 500–31; and Edwin A. Miles, "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," *The Journal of Southern History* 39 (1973):519–44.

Whereas the attempt was unsuccessful for the Cherokee missionaries, the ensuing South Carolina nullification crisis pushed the Jackson administration to persuade the Georgia governor to settle the Cherokee matter via pardons, and pushed Congress to adopt the Force Act on March 2, 1833. The latter's Section Seven grants federal district court judges and Supreme Court justices power to grant writs of habeas corpus for the release of any persons held by state authorities in "jail or confinement, where he or they shall be . . . confined . . . for any act done or omitted to be done in pursuance of a law of the United States, or . . . any order [of a federal judge], anything in any act of Congress to the contrary notwithstanding." Ch. 57, 4 Stat. 632, 634–35. The final phrase indicates that the words "law of the U.S." covers treaty law and constitutional law, so would seem to apply to both the Cherokee situation and the black seamen problem. Daniel Webster personally denied that concerns with the Cherokee situation motivated the Force Act. Burke, "The Cherokee Cases," 531.

heeding.[89] It would also apply to free blacks being erroneously or fraudulently held as runaway slaves. All three of these problems involving mistreatment of persons of color in Southern states might have been ameliorated by a general (not merely slave-focused) federal bureaucracy of the type Story was trying to get Berrien to launch.

Granted, there is no "smoking gun" evidence that Story said to himself, "Now that I have seen how state governments wrongly imprison Indians and their friends, I want to make sure that federal judges gain control of these wrongly imprisoned people, along with wrongfully jailed fugitive slaves and free black sailors; the way to do this will be to establish a federal judicial bureaucracy subject to the habeas provisions of the Constitution." On the other hand, there is evidence that Story felt strongly about the unjust treatment of the Native Americans; that Native American removal, which was linked to Georgia's and other Southern states' egregious treatment of the Native Americans, was a high profile issue in the years leading up to *Prigg*; and that a large sector of the public, the press, and Congress saw the question of Native Americans and of slaves as related. It would certainly not have been unusual for Justice Story to draw this connection.

1. Justice Story on the Cherokee

Justice Story was one of the Supreme Court's staunchest defenders of the rights of Native Americans. He alone had joined a dissent by Justice Thompson in the prior Cherokee case, *Cherokee v. Georgia*, 30 U.S. 1 (1831), against the Supreme Court's refusal to hear a challenge to a set of Georgia laws (quickly matched by laws in Mississippi, Alabama, and Tennessee) that defied federal treaties with the Cherokee, abrogated Cherokee authority over tribal lands, permitted whites to take the Cherokee land with impunity, and removed from Native Americans the right to testify against a white person in Court.[90] These were the same state laws that the Supreme Court would declare unconstitutional in the 1832 case *Worcester v. Georgia*.

Story expressed strong feelings about the Native Americans. Publicly, he joined the Thompson dissent in *Cherokee v. Georgia* and Marshall's

89. See note 36 above and text therefor.

90. Forrest McDonald, *A Constitutional History of the United States* (New York: Franklin Watts, 1982), 109; Foreman, *Indian Removal*, 44 and 107; Michael Green, "The Expansion of European Colonization to the Mississippi Valley, 1780–1880," in *The Cambridge History of the Native American Peoples of the Americas, Vol. I North America, Part 1*, ed. Bruce Trigger and Wilcomb Washburn (New York: Cambridge University Press, 1996), 517; Burke, "The Cherokee Cases," 503–506, 512; Jill Norgren, *The Cherokee Cases* (Norman: University of Oklahoma Press, 2004), 81–86; Hershberger, "Mobilizing Women," 21.

majority opinion in *Worcester*, but also privately he expressed sympathy for their cause in letters over a period of many years. While the Worcester case was pending, he wrote his wife of the Cherokee, "I feel as an American, disgraced by our gross violation of the public faith toward them."[91] Upon hearing the arguments of the attorneys for the Cherokee in *Worcester v. Georgia*, he wrote to his wife, "I confess that I blush for my country, when I perceive that such legislation, destructive of all faith and honor towards the Indians, is suffered to pass [in Georgia] with the silent approbation of the present Government of the United States."[92] Years later when the theft of Cherokee land by force and fraud and unconstitutional laws in Georgia were not enough to drive the Native Americans out, President Jackson concluded a removal treaty, The Treaty of New Echota, with a rump group lacking tribal authority. As this treaty was pending ratification in the United States Senate, Story wrote to his son, "The Europeans were always the aggressors of the natives in America, in all their contest. . .[T]he sins of all the murders and desolations on these shores are attributable to their baseness and avarice and detestable passions. I never think on the subject without bitter regret and undisguised indignation."[93]

2. Story and the Pro-Native American Petition Campaign

Moreover, Story believed, probably correctly, that his strong feelings about the illegality and injustice of Georgia's treatment of the Cherokee were shared throughout New England. He wrote the following to praise Richard Peters for publishing in book form the arguments of the attorneys for the Cherokee along with the various judicial opinions from *Cherokee v. Georgia*:[94] "The publication will do a great deal of good—the subject unites the *moral* sense of all New England. . . .It . . . sinks to the very bottom of their sense of justice."[95]

The Native American question was of high salience during the 1829–1842 period, especially in centers of antislavery activism, such as Boston and its environs. Boston's Jeremiah Evarts published a set of essays summarizing treaty-based arguments against Native American removal in the summer of 1829, and their readership was estimated by contemporaries

91. Letter to Mrs. Joseph Story, Washington, January 13, 1832, in W.W. Story, *Life and Letters*, Vol. 2, 79.

92. Letter to Mrs. Joseph Story, Washington, February 26, 1832, ibid., 84.

93. Letter to William W. Story, Washington, February 21, 1836, ibid., 229.

94. 30 U.S. 1 (1831).

95. Letter from Story to Peters, June 24, 1831, Richard Peters Papers, Pennsylvania Historical Society, cited in Burke, "The Cherokee Cases," 518, n. 111.

at half a million, more than any pamphlet since Tom Paine's *Common Sense*.[96]

Georgia's laws that aimed at taking Native American land were passed in 1828–1929 once gold had been discovered in Native American territory. From the Northern antislavery perspective, apart from the treaty violation and injustice involved, there was also a recognition that Native American removal would open up millions of acres for settlement by proslavery voters. The situation intensified when Mississippi and Alabama immediately passed laws similar to Georgia's. Antislavery newspapers and lecturers became mobilized against federal Native American removal as soon as Andrew Jackson asked Congress in 1829 for funds to pay the costs of Native American removal to the west of the Mississippi. Through the 1820s and 1830s the question of Native American policy received more newspaper and periodical attention than either the bank issue or the tariff question. Although the Indian Removal Act of May 28, 1830 on paper said that Indian treaties were to be honored, and although it did pass by one vote, the petition campaign launched against it was the largest popular mobilization to take place in the United States up until that time. For the first time, women participated in a political cause in massive numbers by working on this petition campaign to block the Indian Removal Act. The northern clergy were heavily involved in stimulating the petitions partly because of their connection to missionaries in Native American territories. The campaign launched into a second phase in 1832, to request Congress to grant legislative relief from the anti-Cherokee laws of Georgia, Mississippi, and Alabama while the Court was considering the *Worcester* case. Martin Van Buren, looking back twenty years later, maintained that the issue had significant electoral impact; he estimated that concern over Native American removal had, in New York alone, swayed 8,000 to 10,000 votes in the presidential election of 1832.[97]

96. Hershberger, "Mobilizing Women," 23–24.

97. Ibid., 15–21, 32. Indian Removal Act of May 28, 1830. U.S. Statutes at Large, Vol. IV, Ch. CXLVIII, 411–12, Twenty-first Congress, 1st Session. Much of the removal of tribes in Northern states occurred peaceably and by legitimate treaties. Green, "Expansion," 529–33. Useful sources on the antiremoval campaigns and their linkage to the antislavery movement also include Linda Kerber, "The Abolitionist Perception of the Indian," *Journal of American History* 62 (1975): 271–95; Alysse Portnoy, *Their Right to Speak: Women's Activism in the Indian and Slave Debates* (Cambridge: Harvard University Press, 2005); Mary Hershberger, "Review of Portnoy, Their Right to Speak," *Journal of American History* 93 (2006): 528–29; Natalie Irene Joy, "Hydra's Head: Fighting Slavery and Indian Removal in Antebellum America," (PhD diss., University of California, Los Angeles, 2008); and Gerard Magliocca, "The Cherokee Removal And The Fourteenth Amendment," *Duke Law Journal* 53 (2003): 875–965.

The agitation did not die out in 1832 after the *Worcester* decision. Yet another massive petition drive was launched after Andrew Jackson convinced a rump group of Cherokee to sign the removal treaty at New Echota in 1836, which the Senate ratified by one vote. This second drive, in 1838, urged that the treaty be undone so that the large number of Georgia Cherokee not in agreement with it would not be removed by force. Forcible eviction took place in 1838–1839. Meanwhile the United States government was fighting the removal question on a second front in a Seminole War in Florida in the years 1835–1842. The antislavery link to Florida was not acreage as such, in contrast to Georgia. Rather, in Florida, the link to slavery was concern that Seminole territory for decades had served as a haven for runaway slaves.[98]

In sum, the Native American issue stayed on the political front burner up until the time that *Prigg* was decided. There is good reason to think that Story was aware of the agitation surrounding it. His letters show at least a specific awareness of the 1832 clergy-stimulated petition campaign. Right after the Court handed down *Worcester*, he wrote to Professor George Ticknor, "Probably [Georgia] will resist our judgment, and if she does, I do not believe the President will interfere, unless public opinion among the religious of the Eastern and Western and Middle States, should be brought to bear strong upon him."[99]

3. Political Links Between the Cause of the Native American and the Slave

The petition campaign against Native American removal came from essentially the same population who either were or later became antislavery activists.[100] Not only did antislavery newspapers actively support the campaign, but the fact of participating in the campaign against Native American removal actually transformed many antislavery colonizationists into antislavery immediatists, stimulating the abolitionist movement.[101] The similarity between removing slaves to Africa and removing Native Americans westward was too similar to escape notice.

The two Congress members who fought most avidly against the gag rule on antislavery petitions, Joshua Giddings and John Quincy Adams, often used the tactic of bringing up slavery by discussing its relation to Native

98. Kerber, "Abolitionist Perception." 275–76; Joy, "Hydra's Head," "Introduction,"10.

99. W. W. Story, *Life and Letters*, Vol. 2, 83, Letter from Washington, D.C., March 8, 1832. The sense of what Story says after this passage is obscure. He seems to believe that the president will pay at the polls for failing to enforce the ruling, for he says we will "look to the consequences." Jackson did, however, get re-elected.

100. Christine Bolt, *American Indian Policy and American Reform* (New York: Routledge, 1990), 58.

101. Kerber, "Abolitionist Perception," 274, 288; Hershberger, "Mobilizing Women," 35.

American removal. Their claim that Native American removal would create more land for the spread of slavery was a favorite for this. John Quincy Adams also linked the violent conflict over removing Southern Native Americans to a potential for "servile insurrection," warning that the combination could produce civil war. Two abolitionist newspapers, the *Boston Liberator* and the *New York Emancipator* reprinted this 1836 speech.[102]

4. Tying the Causes Together

There are links among these three types of wrongful imprisonment by states. *Worcester* was tied to the issue of free blacks jailed in Southern ports through the role of William Wirt in both causes. Story's letters show him following the cause of the Cherokee at least through 1836, and the cause of the black sailors up through 1845. The latter issue was actively debated in both the Massachusetts and national legislatures around the time of *Prigg*. The Native American removal question was prominently linked to the slavery issue in many quarters throughout the 1832–1842 period.

Story's strong feelings about injustices toward Native Americans and the injustices toward jailed black sailors both would have heightened his awareness of the problems posed by the absence of a readily enforceable federal habeas remedy against state officials wrongfully holding someone.[103] There is, therefore, reason to believe that his insistence on federal, as against state, authority for dealing with captures of persons erroneously accused of being runaway slaves was strengthened by, rather than at odds with, his antislavery inclinations. Blacks kidnapped into slavery or wrongly assumed to be runaways would have more hope of obtaining fair procedures under federal law subject to the Constitution's requirements of habeas corpus and trial by jury.

There is a bitter irony in the fact that Justice Story was not the only person likely to have deduced a need for federal enforcement power from the Cherokee situation. A man on the opposite side from Story on both the Native American removal issue and on the slavery question, the man who really was responsible for introducing the Fugitive Slave Act of 1850 into the Senate, Lewis Cass, who was in charge of Indian removal while serving as Secretary of War, wrote the official response to a memorial

102. Hershberger, "Mobilizing Women," 278–82. Gerard Magliocca (in "Cherokee Removal") has made the case that the struggle over Native American removal not only was linked to the antislavery movement from 1829 to the 1840s, but that it continued to have this impact into the postbellum period. He identifies a number of concepts and characteristic phrases from the antiremoval campaign that endured among key members of Congress, who then later deployed these terms in the shaping of the Fourteenth Amendment.

103. The Force Act of 1833 created a legal remedy (see note 88 above) but the paucity of federal magistrates around the country made it not so readily enforceable.

sent to President Andrew Jackson from the American Board of Commissioners for Foreign Missions requesting presidential intervention against Georgia on behalf of their two missionaries just prior to the Court's decision in *Worcester*. The President, he wrote, was of the firm opinion that he had no legal authority to interfere with the operation of the laws of Georgia.[104]

V. Conclusions: Part Slave and Part Free

The ugly, unfortunate and well-known fact is that the United States Constitution from the beginning was not simply a charter of freedom; from the start it was a compromise; half slave and half free, to paraphrase Abraham Lincoln. Justice Story, himself antislavery but conscientiously sworn to uphold the Constitution as he best understood it, therefore produced an opinion in *Prigg* that can aptly be characterized as itself "part slave and part free." The decision did not free any slaves; it upheld the slave Margaret Morgan's return to slavery. But the decision did allow Northern sheriffs and court personnel to stop cooperating in sending slaves back to their owners, a consequence of which Story was fully aware, and in his antislavery self had to have welcomed.

But Story also had a pro-law-and-order self, and this part of him lamented the massive unenforceability of federal law in general in the absence of a federal bureaucracy. This problem had recently proved particularly wrenching for him in the context of a federal judicial desire to protect Native Americans in Southern states. His private suggestion to Senator Berrien that the country would benefit from having federal commissioners to enforce federal laws was framed to appeal to the Southern Senator by the reminder that Northern state officials were refusing to help in slave recapture and that a federal bureaucracy mandated for every county could prove useful in this regard. It did not persuade the states-rights-oriented Berrien.[105] Eight years passed before something resembling such a law

104. Miles, "After John Marshall's Decision," 526, citing letter from Cass to William Reed, November 14, 1831. Cass, nonetheless, once the nullification crisis with South Carolina arose, bringing urgency to the need to avoid a violent conflict between the federal government and authorities of Georgia, worked behind the scenes to encourage the governor of Georgia to offer attractive terms of clemency to Worcester and Butler so that they would accept a gubernatorial pardon, 537.

105. Federal commissioners had existed since 1812. These were appointed on an as-needed basis by the circuit courts and paid on a fee-for-services basis, with fees set by state law. Prior to 1842 their duties were limited to taking affidavits and bail and depositions from witnesses, but pending in Berrien's Judiciary Committee as of January (and having

was adopted, pushed by Southerners finally desperate enough for help catching their runaways that they were willing to rely on federal power. But they did not adopt the kind of *general* enhancement of federal power that Story had suggested; they narrowed the reach of the newly created federal officials to adjudicating only for slave catching.

Story did have reason to hope that, even if jury trial and habeas protections were not written into a potential new federal law appointing federal commissioners, once the issue was posed directly before the Supreme Court, he and his colleagues might insist that the Constitution required these procedural safeguards in all federal jurisdictions. And he had reason to hope that federally appointed commissioners might be more able to uphold the rights of persons wrongly accused of being slaves than would elected Southern judges.

It is true that the scheme he had in mind would have firmed up the hold of slaveholders over their slaves, and in this the decision really was partly proslavery. He was willing to swallow this bitter medicine in order to hold together the Union with the goal of eventually ending slavery, which goal would become impossible with sectional secession. It is nonetheless true that his scheme was partly profreedom, if one considers the situation of captures of persons wrongfully accused to have been slaves; a sizable problem in light of the widespread Southern state practice of selling *unclaimed* but nonetheless "suspected" fugitives. For the wrongfully accused, imposing federal authority nationwide with protections of jury trial and habeas would enhance their chances of securing their freedom. Such a federal law would provide a minimal guarantee of due process across the country. In the South, although biased juries might still pose a problem, the wrongfully accused would have at least some chance at a fair verdict; something that the summary process of the 1793 law did not provide.

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been re-introduced after a failure to be acted upon since February of 1841) was a bill to add the enforcement powers of arrests and imprisonment. With the federal tariff highly controversial in the South and the Fugitive Slave Act highly controversial in the North, this commissioners act, as adopted in August of 1842, extended these powers in a carefully worded phrase, to "all the powers that any justice of the peace, or other magistrate, of any of the states may now exercise for … any crime or offence against United States…; and all the powers that any judge or justice of the peace may exercise under …[the law regulating] seamen in the merchant service." Apparently, this federal law allowed that if a given state did not permit its magistrates to enforce a particular federal law, the federal commissioners would follow the *same* rule. The bill passed into law without substantial debate and without a slavery-influenced alignment. John C. Calhoun, for instance voted against it and Berrien for it. Charles Lindquist, "The Origin and Development of the U.S. Commissioner System," 14 *American Journal of Legal History* (1970) 1, 5–8; 5 Stat. 516; 11 *Congressional Globe* (27th Cong. 2d Sess.) 168, 718, 723, 728; 37 *Journal of the House of Representatives* 1283, 1400.