The Antislavery Judge Reconsidered

JEFFREY M. SCHMITT

It is conventionally believed that neutral legal principles required antislavery judges to uphold proslavery legislation in spite of their moral convictions against slavery. Under this view, an antislavery judge who ruled on proslavery legislation was forced to choose, not between liberty and slavery, but rather between liberty and fidelity to his conception of the judicial role in a system of limited government.[1] Focusing on the proslavery Fugitive Slave Act of 1850, this article challenges the conventional view

1. The conventional view is comprehensively presented in: Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975). This view, however, has not gone completely unchallenged. Several book reviews have suggested that Cover may have overstated the antislavery character of antebellum judges or that the judges' claims that they lacked legal discretion to rule against proslavery laws may have been self-serving justifications rather than the actual motivation behind their decisions. See Redmond J. Barnett, "Review: Professionalism and the Chains of Slavery" *Michigan Law Review* 77 (1979): 673–74; Don E. Fehrenbacher, "Review: Proslavery Law and Antislavery Judges" *Reviews in American History* 3 (1975): 454–55; and Mark Tushnet, "Review" *Journal of American Legal History* 20 (1975): 169. However, no one has yet offered a developed argument against Cover's thesis, which seems to have been accepted by most academics in both law and history. See, for example, Paul Finkelman, "Fugitive Slaves, Midwestern Racial Tolerance, and the Value of 'Justice Delayed,'" *Iowa Law Review* 78 (1992): 89; Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution" *The American Journal of Legal History* 36 (1992): 495; Martha Strassberg, "Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics" *Iowa Law Review* 80 (1995): 901; Stuart Streichler, *Justice Curtis in the Civil War Era* (Charlottesville: University of Virginia Press, 2005), 41.

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by arguing that the constitutionality of the fugitive act was ambiguous; meaning that neutral legal principles supported a ruling against the fugitive act as well as a ruling in favor of it, and that prominent antislavery judges were influenced to uphold the act by a belief that doing so was necessary in order to preserve the Union.

Three lines of argument support this thesis. First, the Fugitive Slave Act of 1850, the primary proslavery law cited by the conventional view and perhaps the most important proslavery law brought before Northern judges, was a crucial element of a fragile sectional compromise that was widely perceived to be an essential condition of the Union. The judges were therefore no doubt aware that a ruling against the act would have serious political consequences. Second, the Fugitive Slave Act of 1850 was not clearly constitutional under either constitutional theory or existing legal precedent. Any judge predisposed to render an antislavery ruling would therefore have had ample opportunity to do so without violating formal legal principles. Third, the most prominent antislavery judges to rule on the Fugitive Slave Act of 1850 as a matter of first impression, Justice John McLean and Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, probably supported it as a necessary expedient to save the Union despite their personal feelings against slavery in the abstract. In fact, these judges strained to rule against alleged fugitive slaves on factual and procedural grounds in addition to their proslavery constitutional rulings. Political forces external to judging, legal considerations, and the judges' personal beliefs therefore all support the claim that policy considerations influenced the judges' proslavery decisions.

The conventional view is correct in that antislavery jurists justified their decisions by appealing to judicial positivism: they claimed that the positive law, which trumped morality and natural law, dictated a proslavery result. Judicial positivism, however, probably served as an ex-post justification rather than as an ex-ante motivation for their decisions. The judges had obvious incentives to disclaim any opportunity to render an antislavery opinion, and, even if the judges actually believed that they were constrained by positive law, they in fact had the discretion to rule against the Fugitive Slave Act using formal legal principles. Their decisions to uphold the act were therefore at least somewhat shaped by policy considerations, although perhaps unconsciously. It therefore seems that, even for judges who viewed slavery as morally reprehensible, the political explosiveness of the slavery issue at midcentury fostered proslavery decisions.

Understanding the judges' inclinations regarding the Fugitive Slave Act should change the way we view the United States antislavery judge. Perhaps reading present day morals into the past, the conventional view assumes that antislavery judges were unwaveringly opposed to slavery

and proslavery legislation in moral terms. When viewed in light of the judges' other slavery decisions, however, a different picture emerges. The same judges who upheld the proslavery fugitive act also ruled in favor of freeing slaves voluntarily brought into the North and banning slavery from the territories. Like the moderate political actors of the antebellum era, antislavery judges were probably only inclined to support those antislavery positions that they felt would not endanger the Union.

I. Political Context

In order to appreciate why antislavery judges supported the Fugitive Slave Act of 1850 as a matter of policy, it is necessary to first understand the political context in which they operated. By the late 1840s the economic issues that had played a prominent role in earlier national party struggles had given way to new and more pressing sectional concerns.[2] Following the acquisition of new territory during the Mexican War, David Wilmot, in his famous Wilmot Proviso, moved that slavery be banned from all newly acquired lands. This proviso, which gained the support of most Northerners in Congress, was seen as "an insult to the South" and an official condemnation of Southern institutions as morally undeserving.[3] Southerners also worried that if the national government could use moral condemnation of slavery and disapproval of the antirepublican "slavepower" to contain slaveholders in the South, they could use the same justifications to attack slavery itself once expansion had increased Northern political power.[4]

In addition to the territorial controversy, Southerners demanded a new fugitive slave law, as it was widely believed that the Fugitive Slave Act of 1793 was a dead letter in the North. The Fugitive Slave Act of 1793 authorized state magistrates and federal judges to issue certificates that authorized the removal of alleged fugitive slaves back to the South.[5] In the 1842 case of *Prigg v. Pennsylvania*, however, Justice Joseph Story, in what has been treated as the opinion of the Court, held that the federal government was granted exclusive power under the Fugitive Slave Clause and cast serious doubt on whether Congress could force state officers to enforce

2. See William J. Cooper, *The South and the Politics of Slavery: 1828–1856* (Baton Rouge: Louisiana State University Press, 1978), 229–30.

3. 1 William W. Freehling, *Road to Disunion* (Oxford: Oxford University Press, 1990), 461 (quoting Alexander Stevens).

4. Ibid., 461–62. The "slavepower" was seen as antirepublican because slaveholding states had more political power than their white population would dictate.

5. Fugitive Slave Act of 1793, 2 Stat. 302–5 (1793).

the act.[6] Some Northern states exploited Justice Story's dicta by passing personal liberty laws, which prohibited state officers from enforcing the Fugitive Slave Act, and withdrew all other state assistance, such as the use of state jails, in the rendition of fugitive slaves.[7] Because there were relatively few United States marshals and federal judges available to enforce the law, the withdrawal of state enforcement left it virtually nullified.

When the national political parties failed to resolve these sectional issues, Southern leaders called for action. In Congress, Senator John C. Calhoun wrote an "Address to the People of the Southern States," which listed Northern transgressions against Southern rights and called on the South to unite. Although the address was unable to gain the support of Southern Whigs,[8] many Southern states adopted ominous resolutions threatening action if the Wilmot Proviso passed Congress. In addition, a Southern convention was called in Nashville "to devise and adopt some mode of resistance to [Northern]... aggressions."[9] Before Congress convened in 1850, Southern editorials, mass meetings, and congressmen all warned of the possibility of disunion if the sectional issues were not resolved.[10] According to historian David M. Potter, "most public men were deeply impressed by the gravity of the crisis."[11]

The Compromise of 1850, first proposed by Senator Henry Clay, emerged as a sweeping compromise that was designed to provide a final resolution to the sectional controversy.[12] The territorial concerns were addressed by immediately admitting California as a state on her own terms, which meant without slavery,[13] and establishing territorial governments in the rest of the Mexican Cession without the Wilmot Proviso.[14] The South thus won a symbolic victory by avoiding the humiliation of the Wilmot Proviso, but, as southern California was the only area hospitable

6. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), 615–22.

7. See Thomas D. Morris, *Free Men All* (Baltimore: John Hopkins University Press, 1974), 109, 127.

8. Whigs were suspicious of Calhoun's motives and thought that newly elected Whig President Zachary Taylor could resolve the crisis. David M. Potter, *Impending Crisis* (New York: Harper & Row, 1976), 85–86.

9. Morris, *Free Men All*, 130 (quoting Avery O. Craven, *The Growth of Southern Nationalism 1848–1861* (Baton Rouge: Louisiana State University Press, 1953);64.

10. Potter, *Impending Crisis*, 96.

11. Ibid.

12. Ibid., 97.

13. California was admitted under an antislavery constitution that had already been presented to Congress without going through a territorial phase.

14. The status of slavery was otherwise left ambiguous. It was unclear whether, as Northern Democrats claimed, voters in the territories could ban slavery, or, as Southerners argued, slavery was mandatory until the territory was admitted as a state.

to slavery, this proposal was practically a concession to the North.[15] Next, most of the disputed territory in the slave state of Texas was given to the New Mexico Territory, and the slave trade in the District of Columbia was abolished; both of these actions also obviously favored the North.

The major concession demanded by the South was a new and more effective fugitive slave law. Northern moderates understood that a Southern victory on the fugitive slave issue was needed to induce Southern moderates to accept the Compromise and undermine the position of Southern disunionists.[16] The South was therefore essentially permitted to draft a bill of its own choosing, and the Fugitive Slave Act 1850 emerged as a strongly pro-Southern bill designed to aid Southerners in the reclamation of fugitives despite the inaction of Northern states.[17]

Although the Compromise of 1850 forestalled the threat of Southern secession, enforcement of the Fugitive Slave Act was widely perceived to be a necessary condition of Union. President Millard Fillmore pledged "to bring the whole force of the government" to enforce the Fugitive Slave Act in the North, which he saw as a means to undermine Southern support for disunion and set a precedent of using national force to deter secessionists.[18] In the South, both parties endorsed the Georgia Platform, which pledged that the South "would abide by [the Compromise of 1850] as a permanent adjustment of this sectional controversy" and would resist, even to the point of secession, any attempt to alter it. Its final resolution ominously warned that "upon a faithful execution of the *Fugitive Slave Law* by the proper authorities depends the preservation of our much beloved Union."[19]

II. The Constitutionality of the Fugitive Slave Act of 1850

The conventional account of the antislavery judge largely disregards the political importance of the Fugitive Slave Act and assumes that it was

15. Potter, *Impending Crisis*, 99–100.

16. Freehling, *Road to Disunion*, 486.

17. The content of the Fugitive Slave Act will be discussed in detail in Section II (i).

18. Michael F. Holt, *The Rise and Fall of the American Whig Party* (New York: Oxford University Press, 1999), 598 (quoting Fillmore).

19. Ibid., 614. Proving that such views were shared by the judiciary, Supreme Court Justice Samuel Nelson warned: "My deep conviction and belief are, that [the Union] depends, at this moment, upon the confidence inspired by the late proceedings in congress, and by the indications of public sentiment in the free states that this constitutional obligation [to return fugitive slaves] will be hereafter executed in the faith and spirit with which it was entered into . . . ." *In re Charge to the Grand Jury*, 30 F. Cas. 1007 (S.D.N.Y. 1851), 1012.

clearly constitutional under existing precedent.[20] Under this view, antislavery legal arguments relied on natural law—legal principles based on morality—and conflicted with formal legal principles such as judicial precedent and statutory and constitutional interpretation.[21] These formal legal principles were critical to the nineteenth century conception of the judicial role, as the unelected judiciary had long justified judicial review of the political branches by arguing that formal legal principles constrained judicial discretion.[22] Under this conventional view, because antislavery arguments violated formal legal principles, antislavery judges were forced to choose between their moral convictions against slavery and fidelity to their conception of the judicial role in a system of limited government.[23]

At least with respect to the Fugitive Slave Act of 1850, however, judges who ruled as a matter of first impression were not faced with such a decision.[24] Although antislavery judges claimed that formal legal considerations forced them to uphold the Fugitive Slave Act of 1850, this simply was not true. Most modern scholars agree that strong arguments existed both for and against the constitutionality of the Fugitive Slave Act of 1850.[25] This article does not attempt to render a conclusive determination of the act's validity; rather, it only seeks to establish that the act's constitutionality was open to legitimate debate within a traditional legal framework.

20. Cover, *Justice Accused*, 207 (stating that the constitutionality of the fugitive slave acts was "well-established by the 1850's").

21. Ibid. 197–98, 131–48.

22. Ibid.

23. Ibid. Cover further explains that "the legal actor did not choose between liberty and slavery. He had to choose between liberty and ordered federalism; between liberty and consistent limits on the judicial function; between liberty and fidelity to public trust; between liberty and adherence to the public corporate undertakings of nationhood; or, as some of the judges would have it, between liberty and the viability of the social compact," 198.

24. After circuit courts upheld the law, however, federal district judges were bound to follow suit.

25. See, for example, Stanley W. Campbell, *The Slave Catchers* (Chapel Hill: University of North Carolina Press, 1970); Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2002), 240; Morris, *Free Men All*; Streichler, *Justice Curtis*, 4; but see Cover, *Justice Accused*, 207; and Allen Johnson, "The Constitutionality of the Fugitive Slave Law" *Yale Law Journal* 31 (1921): 161–82. Alfred Brophy has argued that Allen Johnson's article, the most comprehensive academic writing in support of the constitutionality of the Fugitive Slave Act of 1850, was part of the early twentieth century movement to reargue the South's cause in order to promote reconciliation between the North and South rather than a scholarly examination of the constitutional theories of the 1850s. See Alfred Brophy, "Jim Crow History in the Yale Law Journal," (unpublished manuscript).

A. Content of the Fugitive Slave Act

The Fugitive Slave Act's questionable constitutionality resulted from its strongly pro-Southern content. The fugitive act was passed as part of the Compromise of 1850, but it was not a compromise on the issue of fugitive slaves. Specifically, the act authorized slave owners or their agents to forcefully seize alleged fugitives and return them to the state from which they fled with or without legal process.[26] If the slave owner wished to utilize federal procedures, a Southern judge could issue a certificate that would conclusively establish the slave status of the person mentioned therein for purposes of removal.[27] This certificate could be presented to a federal judge or commissioner in the North who would issue a warrant for the fugitive's arrest. Anyone who interfered with the arrest of a fugitive, attempted to rescue a fugitive, assisted a fugitive's escape, or concealed a fugitive was subject to a fine not exceeding $1000 and imprisonment not exceeding six months.[28]

Once arrested, the alleged fugitive slave faced proceedings before a federal commissioner.[29] The commissioner was paid $5 if the alleged fugitive was found to be free and $10 if found to be a slave.[30] Under no circumstances was the testimony of the alleged fugitive to be admitted, and the fugitive was denied the right to a trial by jury.[31] Finally, the proceedings were deemed summary and final—no appeal or writ of habeas corpus was permitted.[32] The act thus armed the Southern claimant with new procedures designed to aid in rendition and, in response to many Northern states' withdrawal of cooperation, greatly increased the federal government's involvement by utilizing federal commissioners instead of relying on state magistrates.

B. Constitutional Theory and the Fugitive Slave Act

Antislavery advocates attacked the Fugitive Slave Act with at least three major lines of argument. First, the antislavery bar argued that Congress was granted no power to legislate on the subject of fugitive slaves.[33]

26. Fugitive Slave Act, ch. 60, 9 Stat. 462, 463 (1850) (repealed 1864).
27. Ibid., 465.
28. Ibid., 464.
29. Ibid.
30. Ibid., 463–64.
31. Ibid.
32. Ibid., 462.
33. See, for example, Fehrenbacher, *Slaveholding Republic*, 240–41; Salmon Chase, *An Argument for the Defendant in the Case of Wharton Jones v. John VanZandt* (Cincinnati: R. P. Donogh & Co., 1847), 96–102; Robert Rantoul, Jr., *Memoirs, Speeches and*

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Under this argument, the Fugitive Slave Clause of the Constitution was merely an obligation between the states. The clause stated: "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 any service or labor; but shall be delivered up on claim of the party, to whom such service or labor may be due."[34] This clause obviously gave no explicit grant of power to Congress. Moreover, the clause is found not in Article I, which enumerates congressional power, but rather in Section 2 of Article IV, which is a series of interstate comity provisions. Finally, because the framers explicitly granted Congress enforcement power in other sections of Article IV, it could be inferred that the lack of such an explicit grant of power in the Fugitive Slave Clause was intentional.

The second major line of argument against the Fugitive Slave Act of 1850 was that it violated various provisions of the Bill of Rights, including the rights to a trial by jury and due process of law.[35] These arguments focused on the rights of free blacks in the North. Because Northerners were generally presumed to be free and Bill of Rights protections applied to all "persons," rather than being limited to citizens, free blacks were at least arguably entitled to constitutional protections.[36]

Of particular importance, antislavery lawyers often argued that the variable fee paid to commissioners, which was doubled when the commissioner ruled against the alleged fugitive, constituted a bribe and therefore violated due process of law.[37] Supreme Court Justice John McLean,

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Writings of Robert Rantoul, Jr. (Luther Hamilton, ed., Boston: John P. Jewett and Company, 1854), 55–58.

34. U.S.Const. art. IV, § 2, cl. 3.

35. See, for example, Chase, *An Argument for the Defendant* 93; Lysander Spooner, *A Defense for Fugitive Slaves, Against the Act of Congress of February 12, 1793, and September 18, 1850* (Boston: Bela Marsh, 1850), 6–9, 27–43.

36. See, for example, Chase, *An Argument for the Defendant*, 89; and *Trial of Thomas Sims, on an Issue of Personal Liberty, on the Claim of James Potter, of Georgia, Against Him, as an Alleged Fugitive From Service: Arguments of Robert Rantoul, Jr. and Charles G. Loring, with the Decision of George T. Curtis* (Boston: WM. S. Damrell & Co., 1851), 34–36 (argument of Charles Loring).

37. See Lewis Tappan, *The Fugitive Slave Bill: Its History and Unconstitutionality; With an Account of the Seizure and Enslavement of James Hamlet* (New York: William Harned, 1850), 21; "Trial of Henry W. Allen, U.S. Deputy Marshal, For Kidnapping, With Arguments of Counsel & Charge of Justice Marvin, on the Constitutionality of the Fugitive Slave Law" (Syracuse: Power Press of the Daily Journal Office, 1852), 18 (printing the argument of Gerrit Smith), in *Fugitive Slaves in American Courts: The Pamphlet Literature*, Vol. 1 ed. Paul Finkelman (New York & London: Garland Publishing, Inc., 1988), 222; Charles Sumner, *Orations and Speeches*, Vol. (Boston: Ticknor, Reed, & Fields, 1850), 402; *Trial of Thomas Sims*, 25 (argument of Charles Loring); "Fugitive

among others, argued in response that commissioners were paid a higher fee when a fugitive was removed merely "as a compensation to the commissioner" for the extra time needed to write a certificate of removal.[38] In fact, English and state judges were routinely compensated with fee arrangements.[39]

The antislavery argument against variable compensation, however, cannot be dismissed as completely outlandish. The fees paid to English and state court judges were ordinarily triggered at various stages throughout the course of litigation, such as when the court served a summons or empanelled a jury, rather than being dependant upon ruling in favor of a particular party.[40] Moreover, English common law cases, which were routinely used to interpret provisions of the Bill of Rights,[41] held that it was impermissible for a judge to have a financial interest in a case he was deciding, even if that interest was de minimus.[42] Although commissioners were required to perform more work when remanding a fugitive, the higher fee still posed a risk of bias.

Slave Law," *The Liberator* (Boston) October 11, 1850; and *Miller v. McQuerry*, 17 F. Cass. 335 (1853), 339 (discussing the arguments of counsel).

38. *Miller*, 339. Commissioner George T. Curtis, however, ruled that the fee arrangement was permissible if the commissioner chose not to accept the higher fee, as accepting the fee was not mandatory. *Trial of Thomas Sims*, 39.

39. James E. Pfander, "Judicial Compensation and the Definition of Judicial Power in the Early Republic" *Michigan Law Review* 107 (2008): 8; Daniel Klerman, "Jurisdictional Competition and the Evolution of the Common Law" *University of Chicago Law Review* 74 (2007): 1187; and Thomas K. Urdahl, *The Fee System in the United States* (Madison, WI: Democrat Printing Co., 1898), 145, 151–52. The constitutionality of awarding fees to federal judges of "inferior courts," however, was questionable under Article III. In fact, the Process Act, a federal statute that paid federal judicial officers the same as corresponding state judges, specifically excluded fees. Pfander, "Judicial Compensation," 14–19, 19 n.125, 133.

40. See Pfander, "Judicial Compensation," 8, n. 32 (describing early British and colonial fee systems); Klerman, "Jurisdictional Competition," 1187–88 (same); see also *Tumey v. Ohio*, 273 U.S. 510 (1926), 524, 531 ("We have been referred to no cases at common law in England prior to the separation of colonies from the mother country showing a practice that inferior judicial officers were dependent upon the conviction of the defendant for receiving their compensation.").

41. *Murray's Lessee v. Hobokin Land and Improvement Co*., 59 U.S. 272 (1855), 277.

42. See, for example, *Hesketh v. Braddock*, 3 Burr. 1847 (1766), 1856 ("There is no principle the in law more settled than this—that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness, and much more to a juror, or to an officer to whom the jury is returned. . . . The minuteness of the interest will not relax the objection. For, the degrees of influence cannot be measured: no line can be drawn, but that of a total exclusion of all degrees whatsoever."). Although I have been unable to find a record of antislavery advocates citing to such common law cases, these cases were available during the 1850s.

The third major argument against the Fugitive Slave Act, and perhaps the most strenuously argued and persuasive argument put forth by the antislavery bar, was that the act permitted Article III cases to be adjudicated by non-Article III judges.[43] Federal commissioners were empowered to decide cases under the fugitive act and therefore arguably exercised federal judicial power. The Constitution requires Article III judges to "hold their Offices during good Behaviour, and . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[44] Because the commissioners were appointed by federal circuit courts, did not have lifetime tenure, and were paid a variable salary, the constitutional validity of their new powers was questionable.

This argument seems plausible as well. Prior to the passage of the Fugitive Slave Act, federal commissioners were authorized only to set bail, take affidavits and depositions, and arrest and imprison those suspected of violating federal law while they were awaiting trial; commissioners were not empowered to render final decisions in federal cases.[45] The commissioners' new powers were questionable, as fugitive hearings arguably invoked federal judicial power and the Constitution requires such power to be vested only in federal judges. Article III dictates that "the judicial power of the United States, *shall* be vested in one Supreme Court, and such inferior courts as Congress may . . . establish,"[46] and *Martin v. Hunter's Lessee* explicitly holds that Article III requires all federal judicial power to be vested in a federal court.[47] As antislavery lawyers argued, Justice Story asserted in *Prigg* that fugitive slave hearings

43. See, for example, Rantoul, *Memoirs, Speeches and Writings*, 51–53; *Trial of Thomas Sims*, 1–14, 25–34 (arguments of Robert Ranoul and Charles Loring); Tappan, *The Fugitive Slave Bill*, 28; Spooner, *A Defense for Fugitive Slaves*, 9–17; and "Habeas Corpus Trial," *Daily Free Democrat* (Milwaukee, WI) June 7, 1854 (printing the argument of Byron Paine, counsel for the defendant in the case that culminated in *Ableman v. Booth*, 62 U.S. 506 [1859]).

44. U.S. Const. art. III, § 1.

45. See Charles A. Lindquist, "The Origin and Development of the United States Commissioner System" *American Journal of Legal History* 14 (1970), 6–8; An Act in addition to an act, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States" 3 Stat. 350 (1817); An Act further supplementary to an act entitled, "An act to establish the judicial courts of the United States," 5 Stat. 516 (1842).

46. U.S. Const. art. III, § 1 (emphasis added).

47. *Martin*, 14 U.S. 304 (1816), 331 ("The whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority."). For antislavery use of this argument, see Thomas H. Talbot, *The Constitutional Provision Respecting Fugitives From Service or Labor, and the Act of Congress, of September 18, 1850* (Boston: Bela Marsh, 1852), 78; *Trial of Thomas Sims*, 1, 15, 26 (arguments of Robert Rantoul and Charles Loring).

constituted cases "within the express delegation of [federal] judicial power."[48] Antislavery advocates thus argued that because fugitive hearings were a part of the federal judicial power, the Constitution required them to be heard by, or appealable to, a federal judge meeting the requirements of Article III. [49] Because the commissioners' decisions could not be appealed or otherwise reviewed, their new powers were arguably unconstitutional.

Defenders of the act replied to the last two objections by claiming that hearings before federal commissioners were preliminary, ministerial, and therefore analogous to the initial seizure of a fugitive from justice.[50] Under this argument, commissioners did not make final decisions regarding the alleged fugitives' status; instead, they merely authorized the extradition of alleged fugitives back to the state from which they fled, where a Southern court could make a final determination. As the hearing was ministerial, the right of trial by jury did not apply, the process due was minimal, and commissioners did not exercise final federal judicial power. [51]

48. *Prigg*, 616; Spooner, *A Defense for Fugitive Slaves*, 9; Talbot, *Fugitives From Service or Labor*, 77–78, 105; *Trial of Thomas Sims*, 4–5, 34 (arguments of Robert Rantoul and Charles Loring). In addition to Justice Story's declaration in *Prigg*, it seems plausible to think that commissioners in fugitive slave hearings exercised federal judicial power under the test announced in *Murray's Lessee v. Hobokin Land and Improvement Co*., 59 U.S. 272 (1855). In *Murray's Lessee*, the court held: "we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination," 284. In *Jones v. Van Zandt*, the Supreme Court stated that the Fugitive Slave Act of 1793 "was only carrying out, in our confederate form of government, the clear right of every man *at common law* to make fresh suit and recapture of his own property within the realm." 46 U.S. 215 (1847), 229 (emphasis added).

49. See Spooner, *A Defense for Fugitive Slaves*, 15; Talbot, *Fugitives From Service or Labor*, 77–84; and *Trial of Thomas Sims*, 5–6 (argument of Robert Rantoul). Although other federal officers, such as federal marshals, may have exercised quasi-judicial powers, their actions were reviewed by, or appealable to, a federal court. Federal judicial power was thus vested in the court to which the decision was appealed, just as state decisions involving a federal question could ultimately be appealed to the Supreme Court.

50. See, for example, Fehrenbacher, *Slaveholding Republic*, 242–43; *Miller v. McQuerry*, 17 F. Cass. 335 (1853) (McLean, J); "The Fugitive Slave Law," *Boston Daily Advertiser*, November 2, 1850 (printing an exchange between Charles Gibbons and Supreme Court Justice Robert Grier); *In re Charge to the Grand Jury*, 1011 (Nelson, J); "The Constitutionality of the Fugitive Slave Law," *Boston Daily Advertiser*, November 19, 1850 (printing a speech of Benjamin Curtis, a lawyer who would be appointed to the Supreme Court in 1851); "Argument of George Comstock in the Kidnapping Case at Syracuse, upon the Constitutionality of the Fugitive Slave Law" (Syracuse, 1852), 11, in vol. 2 *Fugitive Slaves in American Courts*, 336; and *Trial of Thomas Sims*, 42 (opinion of Commissioner George T. Curtis).

51. Jury trials are required only in criminal trials and those at common law. U.S. Const. amend. VI, VII.

This response, however, was by no means conclusive. The decision of the commissioner was final in a way that extradition of a fugitive from justice was not. Whereas extradition of a fugitive from justice was merely the first step in a constitutionally regulated trial, the rendition of a fugitive slave was followed by no further legal proceedings, as the fugitive was remanded to the owner's private custody as a slave.[52] Moreover, the commissioner's decision could not be appealed or questioned under habeas corpus proceedings.[53] As Thomas H. Talbot argued, the commissioner's hearing was "preliminary to no other proceeding, ancillary to no other trial, [and] ministerial to no other court."[54] Moreover, unlike in a scenario involving a fugitive from justice, the act authorized the removal of a person "held to service or labor" rather than a person *charged* with being held to service, implying that the fugitive hearing determined the alleged fugitive's status.[55] In fact, the only possible future proceeding—a suit brought by the alleged slave for his freedom in the South—would seem to be a wholly

52. See, for example, Asa Rand, *The Slave-Catcher Caught in the Meshes of Eternal Law* (Cleveland: Steam-Press of Smead and Cowles, 1852), 24–25; "Trial of Henry W. Allen," 14–16. In the trial of Thomas Sims, Charles Loring described the commissioner's decision as follows: "[T]he immediate result is, that you adjudge the captive to be a slave; that you adjudge that he belongs, as a slave, to this claimant; and that you order him to be delivered up directly to the claimant's hands, as a slave—not delivered over to the officers of the law, but to the person claiming ownership, and of course delivered to him as owner . . . and without qualification or limitation of such right of ownership." In response, Commissioner George T. Curtis argued: "My view of it is this; that it is my duty, if satisfied, to make out a certificate, not certifying that he is a slave, but certifying what are the facts; First, that somebody escaped and owed service; and second, that this individual is the identical person. But there is a difference between that and certifying that a man is a slave." *Trial of Thomas Sims*, 28.

53. Fugitive Slave Act, ch. 60, 9 Stat. at 464.

54. Talbot, *Fugitives From Service or Labor*, 52. Talbot further explained that, for a proceeding to be preliminary, "[t]he officer must know what the tribunal is, before which the final proceeding is to be had; and his decision, or whatever act or paper closes the proceeding before him, must recognize that tribunal, and his relation to it," 43. Similarly, Robert Rantoul argued that "the decision of the commissioner is final on this question; his decree is the last act of judicial power." *Sims's Case*, 61 Mass. 285 (1851) (printing Rantoul's argument for the defendant).

55. Rantoul, *Memoirs, Speeches and Writings*, 53; *Trial of Thomas Sims*, 8 (argument of Robert Rantoul); and Horace Mann, *Slavery: Letters and Speeches* (Boston: B.B. Mussey & Co., 1851), 308. As antislavery advocates pointed out, this argument especially seems to refute any argument that the commissioner's decision was limited or preliminary when combined with the Supreme Court's determination in *Prigg*, discussed below, that a master's rights over his fugitive slave are absolute and unqualified, even while the parties are still in transit to the state from which the fugitive fled. See Talbot, *Fugitives From Service or Labor*, 41–42, 107; and *Trial of Thomas Sims*, 31 (argument of Charles Loring).

separate trial, much like a prisoner bringing a habeas corpus petition.[56] The commissioner's decision was thus arguably both final and judicial, and therefore in violation of Article III and the Bill of Rights.[57]

C. Legal Precedent

Although several plausible constitutional arguments against the fugitive acts were available, antislavery judges did not review the Fugitive Slave Act of 1850 on a clean slate, and it is therefore necessary to consider whether legal precedent may have constrained their decisions. *Prigg v. Pennsylvania* was the leading case on the subject of fugitive slaves. In *Prigg*, the jury found by special verdict that Edward Prigg had removed Margaret Morgan and her children from Pennsylvania as fugitive slaves without complying with the removal provisions of Pennsylvania's personal liberty law, which established procedures for the recovery of fugitive slaves and punished the kidnapping of black residents.[58] The jury also specifically found that Margaret Morgan was in fact a fugitive slave.[59] Relying on these findings, the Pennsylvanian courts found that Prigg was guilty of kidnapping under Pennsylvania's personal liberty law because he had failed to comply with its removal procedures.

On appeal to the Supreme Court, Justice Joseph Story, in what has been treated as the opinion of the Court, ruled that it was unconstitutional for Pennsylvania to punish a master for recovering his fugitive slaves.[60] Justice Story's ruling was based on two lines of argument. First, Story held that the Constitution secures a master's private right of recaption, which empowers a master "in every State of the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or illegal violence."[61] Story further found that "any state law or state

56. Talbot, *Fugitives From Service or Labor*, 48–49; and *Trial of Thomas Sims*, 9 (argument of Robert Rantoul).

57. It is interesting to note that, during the debates over the Fugitive Slave Act, Senator Joseph R. Underwood of Kentucky asked: if there is no requirement for a trial by jury in the South, "may it not be urged by our northern friends that the examination shall be made abroad, where the fugitive is arrested?" Cong. Globe, 31st Cong., 1st Sess. App. 1611 (1850). This seems to imply that Senator Underwood believed that the hearings under the fugitive act were a final judicial determination of the alleged fugitive's status.

58. *Prigg*, 556–57.

59. Ibid.

60. Ibid., 626. Although there is some scholarly disagreement regarding whether Story spoke for a majority on all points, his opinion was treated as the Court's by judges who subsequently looked to *Prigg* as precedent. See *Sims Case*, 304–8 (Shaw, J); and *Miller*, 337–40 (McLean, J).

61. *Prigg*, 613.

regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave" conflicts with the master's right of private reception.[62] Because the Pennsylvanian courts had interpreted the state's personal liberty law to require a master to comply with its procedures and therefore punished Prigg for independently removing his fugitive slave, Story found that the personal liberty law conflicted with Prigg's constitutional right of reception.[63]

The procedural posture of the case, however, drastically limited the implications of the right of reception recognized in *Prigg*. In *Prigg*, the jury had already found that Margaret Morgan was in fact a fugitive slave, and therefore the right arguably applied only to admitted fugitives. Anything in Story's opinion that suggested that states could not protect their free black residents was therefore dictum. The right of reception was thus arguably consistent with alleged fugitives having legal rights, such as due process rights and the right to a jury trial, when their status was in dispute.

In Story's second line of reasoning, he found that the federal Fugitive Slave Act of 1793 pre-empted any state legislation on the subject of returning fugitive slaves, including Pennsylvania's personal liberty law.[64] In order to reach this conclusion, Story also held that the Fugitive Slave Act of 1793 was constitutional.[65]

Prigg's ruling in favor of the constitutionality of the Fugitive Slave Act of 1793 clearly eliminated the first antislavery argument explained previously: that Congress was granted no power under the Fugitive Slave Clause and also called into question the applicability of Bill of Rights protections.[66] The Fugitive Slave Act of 1793 commanded a judge or magistrate to authorize the removal of a person claimed as a fugitive slave "upon proof to the satisfaction of such Judge or magistrate" that the person claimed was in fact a fugitive slave.[67] As the determination was made by the judge or magistrate, the act clearly did not contemplate a trial by jury. *Prigg* thus seems to preclude one of the antislavery bar's most popular arguments.

62. Ibid., 612.

63. Ibid., 625–26.

64. Ibid., 617–18.

65. Ibid., 622. Story further held that Congress was granted exclusive power under the fugitive clause. Federal exclusivity could be seen as Story's third line reasoning, although it is not relevant to the topic of this article.

66. See Paul Finkleman, "*Sorting Out Prigg v. Pennsylvania*" *Rutgers Law Journal*, 24 (1993): 630.

67. Fugitive Slave Act of 1793, 2 Stat. 302 (1793).

However, the Fugitive Slave Act of 1793 did not utilize federal commissioners or pay variable fees to federal officers, and therefore, despite some argument to the contrary, no ruling on the 1793 act could prejudice these two remaining antislavery arguments. Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, among others, argued that because *Prigg* upheld the use of state magistrates under the Fugitive Slave Law of 1793, it upheld the use of federal commissioners by analogy.[68] He reasoned that although both positions were given similar quasi-judicial powers, neither satisfied Article III standards. Article III's requirements, however, apply only to federal judges. It therefore could be argued that the Constitution requires Congress to either use state officers to enforce its laws or create federal judges with Article III protections.[69] There was thus ample room for the argument that state officers were not strictly analogous to federal commissioners. *Prigg* therefore did not necessarily control the issue.

D. The Judicial Role in the Nineteenth Century

Although the constitutionality of the Fugitive Slave Act was ambiguous, it may be that nineteenth century constraints on the judiciary foreclosed a ruling against it. As explained previously, the traditional view is that the nineteenth-century judiciary upheld proslavery legislation because it rejected antislavery arguments based on natural law or morality.[70] However, even though antislavery advocates did frequently argue in terms of natural law,[71] many of their arguments were based solely on positive law. In fact, none of the three arguments set out relies on natural law or rules of interpretation based on morality; instead, each utilizes only traditional legal sources such as constitutional text and interpretation. The reluctance of eighteenth-century jurists to accept natural rights arguments therefore does not challenge the contention that the fugitive act was of questionable constitutionality.

Another possible judicial constraint was the prevailing conception of judicial review. According to conventional wisdom, by the mid-nineteenth

68. *Sim's Case*, 61 Mass. 285 (1851), 304–8. See also, *In re Charge to the Grand Jury*, 1011 (Nelson J); and *Trial of Thomas Sims*, 42–43 (opinion of Commissioner Curtis).

69. Although there was no precedent on this point in the 1850s, it is interesting to note that the modern Court would almost certainly find this argument persuasive under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

70. See above note 21 and surrounding text.

71. See, for example., "Argument of William H. Seward on the Laws of Congress Concerning the Recapture of Fugitive Slaves," in *Fugitive Slaves in American Courts*, Vol. 1, 485.

century the Supreme Court had found only one act of Congress to be unconstitutional, and the law in question was merely a law regarding the Court's own jurisdiction.[72] It therefore could be argued that the courts did not exercise meaningful review of federal legislation.[73]

In the first several decades of the Court's existence, judicial review was a limited practice that bears little resemblance to the modern doctrine. Judicial review was initially viewed by many as a political and revolutionary act that relied on fundamental principles of law that were embodied in the Constitution rather than the constitutional text itself.[74] As a result of Chief Justice John Marshal's interpretation of the Constitution as supreme written law, however, distinctions between ordinary law and the Constitution blurred.[75] Judicial review of legislation therefore became widely accepted and was often used against state legislation, although jurists generally restricted its scope to the "concededly unconstitutional act."[76]

The scope and perceived legitimacy of judicial review, however, expanded dramatically during the first half of the nineteenth century.[77] The Court first moved beyond the concededly unconstitutional act in cases involving the Supremacy Clause and the Contract Clause. In these cases, Chief Justice Marshal interpreted the constitutional text as ordinary law and enforced this interpretation even against plausible alternative interpretations made by state legislatures.[78] At first, other justices on the Court joined in Chief Justice Marshal's opinions only because they agreed with his ultimate holdings. The justices used the legal doctrine of vested rights, which they viewed as fundamental law, to reach Chief Justice Marshal's Contract Clause conclusions and agreed that the Court was given unique authority to resolve certain disputes with the states in the

72. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 213. The Supreme Court's exercise of judicial review was, of course, in *Marbury v. Madison*, 5 U.S. 137 (1803).

73. See H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens: Ohio University Press, 2006), 37, 56.

74. Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), 3–4.

75. See Ibid., 3–6; and Kramer, *The People Themselves*, 150.

76. See Snowiss, *Judicial Review*, 6. See also Kramer, *The People Themselves*, 150–54; and Christopher Wolfe, *The Rise of Modern Judicial Review* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1994). Even this early limitation in scope did not completely eviscerate judicial review, however, because, as Chief Justice Marshall explained in *Ogden v. Sanders*, a law was sometimes "in the opinion of one [judge], clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it." 12 Wheaten 213 (1827), 339 (Marshal, J, dissenting).

77. Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" *New York University Law Review* 73 (1998): 340, 431.

78. See Snowiss, *Judicial Review*, 119; and Kramer, *The People Themselves*, 177.

Supremacy Clause.[79] Although the Court may have shown more deference to Congress than the states and tended to avoid politically divisive issues,[80] by mid-century Chief Justice Marshal's practices had begun to take root and the stage was set for meaningful judicial review outside the vested rights and federalism contexts.[81]

Dred Scott v. Sanford, decided merely seven years after the passage of the Fugitive Slave Act, proves that judicial review was sufficiently robust by mid-century to allow judges with sufficient motivation to strike down constitutionally ambiguous federal legislation. In *Dred Scott*, the Supreme Court ruled that federal legislation passed in the Missouri Compromise was unconstitutional.[82] The judges who formed the proslavery majority certainly did not rule against a "concededly unconstitutional act," as the decision has historically been condemned as unreasoned and even its modern defenders admit that the constitutional law involved was ambiguous.[83] If judges who preferred a proslavery ruling could use ambiguous constitutional doctrine to strike down federal legislation in *Dred Scott*, then it is hard to understand why antislavery judges could not have done the same regarding the Fugitive Slave Act.

The public reaction to *Dred Scott* is also revealing. Although countless critics attacked the constitutional merits of the decision, few questioned the Court's power to render it.[84] Indeed, many of the decision's supporters self-servingly asserted that the Court had the power to render a final interpretation of all constitutional issues that came before it.[85] If the prevailing view in the legal community had been that judicial review of federal legislation was improper or only justified in extreme cases, this probably would have been a common criticism of the decision. The lack of such criticism seems to imply that judicial review of congressional legislation, even constitutionally ambiguous and politically divisive legislation, was a generally accepted function of the judicial role at mid-century.

Nor can *Dred Scott* merely be dismissed as an outlier. The traditional account of judicial review of congressional legislation before the Civil War—that of nearly complete deference to Congress—has recently come

79. See Snowiss, *Judicial Review*, 119, 161, 171.

80. Kramer, *The People Themselves*, 150, 209.

81. See Snowiss, *Judicial Review*, 119; 176–77.

82. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

83. See, for example, Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006), 17, 76–77.

84. Friedman, "Countermajoritarian Difficulty," 417 n.343; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 419, 439–40.

85. Fehrenbacher, *The Dred Scott Case*, 418.

under attack.[86] This revisionist scholarship demonstrates not only that the Court invalidated several statutes prior to the 1850s,[87] but, more importantly, that the Court also regularly reviewed the constitutionality of federal legislation and often limited or rewrote statutes to avoid constitutional boundaries.[88] As with the Court's review of state legislation, most of these cases involved the institution of the judiciary or federalism issues; however, the Court's review occasionally extended to matters relating to individual rights as well.[89] Even though few statutes had been wholly invalidated on constitutional grounds, by the 1850s the Court had become an established forum for raising constitutional issues and imposing constitutional limitations on federal legislation.[90]

Although the judicial role in the nineteenth century cannot explain why antislavery judges upheld the fugitive act, it may explain why they claimed that they were helpless to rule against it. Much more than is the case today, the judicial function was perceived to be one of an oracle of the law, in which judges identified timeless and immutable legal principles and applied them to specific cases.[91] Under this view, a judge could not be held morally responsible for his decisions, as he merely found rather than made the law. As modern legal thought has made clear, however, judges do have discretion when legal issues are ambiguous. Their decisions are thus often influenced by policy preferences, even if unconsciously. The judges' claims that the positive law forced them to uphold the Fugitive Slave Act therefore merely reflect the nineteenth-century conception of the judicial role and should not be seen as particularly convincing.

E. Respectability of Arguments Against the Fugitive Slave Act

Even if a logical case could be made against the Fugitive Slave Act, social mores could have prevented a serious inquiry.[92] In other words, social

86. See Keith E. Whittington, "Judicial Review of Congress Before the Civil War" *Georgetown Law Journal* 97 (2009): 1257–332 ("The U.S. Supreme Court was more active in exercising its power to interpret the Constitution and limit the legislative authority of Congress than is conventionally recognized.").

87. See *Pollard v. Hagan*, 44 U.S. 212 (1845); *United States v. Cantril*, 8 U.S. 167 (1807); and *United States v. Yale Todd* (1792), reported in *United States v. Ferreira*, 54 U.S. 40 (1852).

88. Whittington, "Judicial Review of Congress," 1326–28.

89. Ibid., 1267.

90. Ibid., 1259.

91. See G. Edward White, *The American Judicial Tradition, Profiles of Leading American Judges*, 3rd ed. (Oxford: Oxford University Press, 2007), viii–xi; Wolfe, *The Rise of Modern Judicial Review*, 13, 40–41.

92. See White, *The American Judicial Tradition*, xxv–xxvi.

rather than legal factors may have constrained the judges. For example, it would be unrealistic to expect an antebellum judge, even one strongly committed to antislavery values, to have accepted Lysander Spooner's argument that the Constitution prohibited slavery. Given the social practices of the antebellum era, Spooner's argument was simply not in the realm of available options.

For several reasons, however, the Fugitive Slave Act was not so socially accepted that arguments against it could be discountenanced as unrealistic or out of touch with reality. First, striking down the Fugitive Slave Act would not have been out of step with prevailing moral sentiment in the North. Although most Northerners accepted slavery as a fundamental institution, fugitive slaves that managed to escape into the North were viewed sympathetically and slave catchers were generally viewed as morally corrupt profiteers.[93] In fact, given the massive demonstrations against fugitive slave renditions such as those of Anthony Burns and Joshua Glover, it is clear that many Northerners morally opposed the return of fugitive slaves and some even rejected the legal duty despite its explicit mention in the Constitution.[94]

Second, the Fugitive Slave Act conflicted with traditional Northern legal norms. As explained previously, the Fugitive Slave Act denied anyone accused of being a fugitive slave even the most fundamental of legal protections, effectively creating a presumption of slavery in the North.[95] The law was therefore at odds with the common Northern presumption that all men, regardless of race, were free.[96] Moreover, the act flew in the face of decades of state legislation designed, at least in part, to protect free blacks from kidnapping.[97] Many Northerners had long been angered over Southern kidnapping of free black residents.[98] An antislavery judge that demanded some protection for free blacks in the North would only have been extending existing Northern legal principles.[99]

93. See, for example, William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977), 197.

94. See, for example, Campbell, *The Slave Catchers*, 49.

95. See Fehrenbacher, *Slaveholding Republic*, 231, 244.

96. Although most blacks in the North were free, and courts typically presumed them to be so, see, for example, *Prigg*, 671 (McLean, J, dissenting), slaves brought in transit with a Southern master or subject to the last grasps of gradual emancipation remained enslaved.

97. Ohio, New York, Pennsylvania, and Massachusetts had all adopted anti-kidnapping legislation dating back to the early nineteenth century. See Morris, *Free Men All*, 28; and Stephen Middleton, *The Black Laws: Race and the Legal Process in Early Ohio* (Athens: Ohio University Press, 2005), 164.

98. See, Middleton, *The Black Laws*, 175, 211–13.

99. Cf. *Prigg*, 668–74 (McLean J, dissenting). In his dissent in *Prigg*, McLean argued that Pennsylvania's personal liberty law, which protected black residents from kidnapping, was a logical extension of the Northern presumption of freedom.

Third, in the early 1850s, when the judges first considered the law, the Fugitive Slave Act was not so politically popular as to be beyond examination. The act had passed only because of strong Southern support; thirty-one Northerners voted for the act in the House, whereas seventy-six voted against it.[100] After the act's passage, many prominent Northerners, comprising a majority in some geographical areas, violently condemned the law.[101] And although the deeply unpopular abolitionists formed the core of this opposition, many mainstream political leaders and newspapers also took part.[102] In fact, a large number of Northern Whigs opposed the law, including a majority of Whigs from states such as Ohio and New York.[103] Daniel Webster, one of the most powerful politicians in the country, devastated his reputation in the North, and especially in his home state of Massachusetts, by endorsing the law.[104]

Due to the influence of many Northern politicians, urban businessmen, and clergymen, however, most Northerners probably found the law's harsh provisions distasteful but ultimately acquiesced in order to avoid conflict with the South.[105] Political leaders such as Daniel Webster argued that support for the Fugitive Slave Act would "rebuk[e] that spirit of faction and disunion" that imperiled the country, and Congress even passed a resolution declaring the Compromise measures to be a final adjustment of sectional issues.[106] Most Northern ministers also supported the law, and many urged their congregations to abide by its terms for the sake of the Union.[107] Moreover, urban businessmen, many of whom disapproved of slavery and the terms of the fugitive act, organized mass Union meetings and otherwise

100. House Journal, 31st Cong., 1st Sess., 1452 (1850).

101. See, for example, Campbell, *The Slave Catchers*, 49–55.

102. Ibid.

103. Ibid., 77. The small Free Soil Party also obviously opposed the law.

104. See, for example, Maurice G. Baxter, *One and Inseparable: Daniel Webster and the Union* (Cambridge: Belknap Press, 1984), 427, 484; and Robert V. Remini, *Daniel Webster: The Man and His Time* (New York: W.W. Norton & Co., 1997), 697, 706–7.

105. Campbell, *The Slave Catchers*, 49, 66. See also, for example "The Fugitive Slave Case," *The Cincinnati Daily Times*, August 18, 1853 ("The feeling among our citizens generally, is that in such cases the law should be obeyed, however much the system of slavery is to be deprecated.").

106. Letter from Daniel Webster to the Citizens of Newburyport, dated May 15, 1850, in Daniel Webster, *The Writings and Speeches of Daniel Webster*, Vol. 12 (Boston, Little, Brown & Co., 1903), 235–37. Webster also called the necessity of any fugitive slave law "a misfortune and an evil," suggesting that he supported the fugitive act only as a means to appease the South.

107. Campbell, *The Slave Catchers*, 69–71 (collecting sermons on the Fugitive Slave Act). A second major argument used by the clergy was that disobedience to the Fugitive Slave Act would undermine respect for all laws.

exerted their influence in favor of the act out of fear that disobedience to the law could disrupt commercial ties with the South.[108]

Public opinion in the North was thus not overwhelmingly supportive of the fugitive act; instead, while many opposed the law, others found it distasteful and accepted it only as a necessary expedient to reduce the risk of disunion. A judge who ruled against the law therefore would not have been completely out of step with Northern public opinion. In fact, in Massachusetts and Ohio, the states in which the judges examined in this article lived, they probably would have received substantial mainstream political support.

In sum, although a majority of Northerners accepted the law, many found it to be immoral, against traditional legal principles, and acceptable only because they thought it was necessary to appease the South. It therefore seems that, unlike a ruling against the institution of slavery, striking down the fugitive act would not have been socially untenable in the North. The only social obstacle to such a ruling was therefore the judges' own inclinations, which of course were influenced by the same forces that shaped public opinion, including the political reality that a failure to enforce the fugitive act could have threatened the Union.

F. State Court Rulings Against the Fugitive Acts

The conclusion that prominent antislavery judges had the ability to rule against the Fugitive Slave Act of 1850 is reinforced by the fact that several relatively obscure state judges used traditional legal principles to rule against it. In 1854, the Wisconsin Supreme Court ruled that the Fugitive Slave Act of 1850 was unconstitutional and released a federal prisoner accused of rescuing a fugitive slave.[109] Writing for the court, Chief Justice Edward V. Whiton held that the fugitive act violated the right to a trial by jury and gave judicial powers to commissioners in violation of Article III.[110] In a concurring opinion, Justice Abraham D. Smith also argued that Congress lacked power to legislate under the Fugitive Slave

108. Ibid., 71–75. At such meetings, prominent politicians and lawyers spoke in favor of the act in both moral and constitutional terms. Future Supreme Court Justice Benjamin Robbins Curtis, for example, defended the act at a Union meeting in Boston and argued that if the law's detractors were successful, "the end [is] that the government must be destroyed." Benjamin Curtis, *A Memoir of Benjamin Robbins Curtis*, Vol. 1 (Boston: Little, Brown, 1897), 127–28.

109. *In re Booth*, 3 Wis. 1 (1854). *In re Booth* was later appealed to the Supreme Court, resulting in the case of *Ableman v. Booth*, 62 U.S. 506 (1858).

110. *In re Booth*, 30.

Clause.[111] In addition, two dissenting Ohio Supreme Court judges adopted each of the arguments used by the Wisconsin judges in the 1859 case of *Ex parte Bushnell*.[112]

Some commentators have incorrectly argued that the Wisconsin and Ohio judges ruled against the Fugitive Slave Act only by ignoring established legal doctrine.[113] This is because Justice Smith and the Ohio dissenters justified their decisions with a states' rights view of federalism that permitted state courts to reach constitutional decisions independently of federal precedent.[114] However, although this states' rights doctrine did violate established legal principles, it was not directly related to the courts' rulings against the fugitive act or even mentioned in Chief Justice Whiton's opinion for the Wisconsin Supreme Court. In fact, Chief Justice Whiton went to great lengths to distinguish his opinion from *Prigg* and other fugitive slave precedents.[115]

Justice Smith and the Ohio dissenters likely employed the doctrine of states' rights only because, by the time they encountered the Fugitive Slave Act, it was clear that the Supreme Court would probably uphold it.[116] The state judges therefore probably used states' rights as a way to justify their decisions despite nearly certain reversal.[117] Contrary to the traditional account, these judges were thus forced to violate formal legal principles only because prominent antislavery judges such as Justice

111. Ibid., 1–2.

112. *Ex parte Bushnell*, 9 Ohio St. 77, (1859), 184–85.

113. See for example, Cover, *Justice Accused*, 189–90.

114. See Jeffrey Schmitt, "Rethinking *Ableman v. Booth* and States' Rights in Wisconsin" *Virginia Law Review* 93 (2007): 1315–16, 1330–31, 1335. Justice Smith argued that no "one department of the government is constituted the final and exclusive judge of its own delegated powers," and therefore "every State officer . . . is bound to provide for, and aid in their enforcement, according to the true intent and meaning of the Constitution." *In re Booth*, 23–24, 34 (Smith, J, concurring). The Ohio dissenters made similar arguments. See *Ex parte Bushnell*, 184–85.

115. Chief Justice Whiton asserted that, because of the differences between the fugitive acts, "[i]t can hardly be claimed, we think, that any adjudication upon the act of 1793 could decide all the questions involved in the act of 1850." *In re Booth*, 29. He argued that, in *Prigg*, "nothing was said in relation to the powers of commissioners, for those officers did not exist at the time when the act of congress was passed," and "the question of trial by jury to determine the facts of the case, was not raised by the record and was not discussed by the court in giving its opinion."

116. Justices McLean, Grier, and Nelson had already upheld the law while riding circuit, and Justice Curtis had also already made his views public. See *U.S. v. Hanway*, 26 F. Cas. 105 (1851), 124 (Grier, J); *In re Charge to the Jury*, 1010 (Nelson, J); *Miller v. McQuerry*, 339 (McLean, J); and "The Constitutionality of the Fugitive Slave Law," *Boston Daily Advertiser*, November 19, 1850 (printing a speech made by Justice Curtis).

117. See Schmitt, "Rethinking *Ableman v. Booth*," 1315–16, 1330–31, 1335.

McLean had already chosen to uphold the act. The actions of these state court judges therefore demonstrate that an antislavery judge who had the desire to do so could have ruled against the Fugitive Slave Act using traditional legal principles.

III. Inclination of the Antislavery Judges

No prominent antislavery judge who encountered the Fugitive Slave Act as a matter of first impression, however, had the inclination to strike it down. The two most significant antislavery jurists of the 1850s, Justice John McLean and Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, probably personally supported the act as a matter of public policy.[118] In fact, after upholding the act, they even went out of their way to remand fugitives to slavery. Given the political context of the era, the positions of their respective political parties, and their own statements, it is likely that the justices' decisions were influenced by a belief that the act's enforcement was necessary to preserve the Union.[119]

A. Justice John McLean

There is no question that John McLean, who served as an Associate Justice of the Supreme Court from 1830 to 1861, was morally opposed to slavery.[120] Before being appointed to the Supreme Court in 1830, and while not a wealthy man, he purchased and freed several slaves with his personal

118. Although Justice Joseph Story is perhaps the most prominent antislavery jurist in United States history, his slavery jurisprudence will not be examined. Story left the Court before the passage of the Fugitive Slave Act of 1850, and the debate over his antislavery credentials is already comparatively well established. See, for example, 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" *Supreme Court Review* 1994 (1994): 247–94.

119. Cover, who uses McLean and Shaw as primary examples throughout *Justice Accused*, argues that the judges' statements about the risk of disunion were merely an "elevation of the formal stakes." He claims that antislavery judges, after having already decided to uphold the act because of legal considerations, made their decisions easier to live with by unconsciously exaggerating the importance of the formal values at stake. See Cover, *Justice Accused*, 238–56. In contrast, this article argues that these statements instead reveal a powerful influence on the judges' decisions.

120. See, for example, Paul Finkelman, "John McLean: Moderate Abolitionist and Supreme Court Politician" *Vanderbilt Law Review* 520 (2009): 540.

funds.[121] Like many Northerners, he was also an ardent opponent of slavery's expansion in the territories.[122] Salmon P. Chase, an important antislavery leader in the antebellum era, called McLean "the most reliable man, on the slavery question, now prominent in either party."[123]

McLean's judicial decisions also reveal his antislavery credentials. In *Ohio v. Carneal*, while serving as a Justice of the Ohio Supreme Court in 1817, McLean called slavery "an infringement upon the sacred rights of man" and ruled that any slave whose labor was used for profit in Ohio was made free under the Ohio Constitution.[124] McLean is perhaps best known for his dissent in *Dred Scott v. Sanford*, in which he argued that blacks could be United States citizens and that Congress could ban slavery in the territories.[125]

McLean also issued the sole dissent in *Prigg*, in which he argued that Pennsylvania's personal liberty law was a valid inquiry into whether the person claimed was in fact a fugitive slave.[126] He argued that there was "no conflict between the law of the state and the law of congress" because the Fugitive Slave Act of 1793 reached only fugitive slaves, whereas the personal liberty law applied to free blacks.[127] He reasoned that because all people in Pennsylvania were presumed to be free, the slave owner had no legal rights under the Fugitive Slave Clause or Fugitive Slave Act of 1793 until he had proven that the alleged fugitive was in fact a slave, using the proper legal procedures.[128]

After his dissent in *Prigg*, however, McLean issued a number of opinions while riding circuit on a federal appellate court that upheld the fugitive slave acts and returned fugitive slaves to bondage. Most of these

121. Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (Columbus, OH: The Ohio State University Press, 1937), 188–89; Salmon Chase, Letter to Charles Sumner, April 24, 1847, in *The Salmon Chase Papers*, Vol. 2 John Niven (Kent, OH: The Kent State University Press, 1994), 149.

122. Weisenburger, *The Life of John McLean*, 122–23.

123. Paul Finkelman, "John McLean," in *Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices*, ed. Melvin I. Urofsky (Washington, D.C.: CQ Press, 2006), 351 (quoting Chase); see also Chase, Letter to Charles Sumner, 149 ("his sympathies are with the enslaved").

124. Ervin H. Pollack, ed., *Ohio Unreported Judicial Decisions Prior to 1823* (Indianapolis: Allen Smith Company, 1952), 133, 135, 140–41. McLean expressly reserved the issues of slaves brought into Ohio while in transit to a slave state and slaves sent to Ohio on a mere errand, 140.

125. *Dred Scott*, 529 (McLean, dissenting).

126. *Prigg*, 658 (McLean, dissenting).

127. Ibid., 669.

128. Ibid., 666–74.

cases were decided under the old Fugitive Slave Act of 1793,[129] which had been upheld in *Prigg*. As the conventional view points out, McLean was obligated to follow *Prigg* as binding precedent and therefore had no discretion to rule against the Fugitive Slave Act of 1793.

McLean also comprehensively upheld the constitutionality of the Fugitive Slave Act of 1850 while riding circuit in *Miller v. McQuerry*.[130] Prominent antislavery lawyers John Jolliffe and James Birney raised each major argument discussed previously while representing the alleged fugitive.[131] Not only did McLean hold that *Prigg* precluded many of these arguments, such as the lack of congressional power and the right to a trial by jury, but he also defended the Court's reasoning.[132] McLean also adopted the standard response to the arguments against the new role of federal commissioners discussed previously. He argued that commissioners were not Article III judges because they rendered only preliminary determinations, and that the variable fee was merely compensation for the extra work required to remand fugitives.[133]

The traditional explanation for this decision is that legal considerations forced McLean to uphold the act despite his personal views.[134] Although McLean did appeal to positivism to defend his opinion,[135] as explained previously, legal factors such as precedent did not compel a proslavery ruling. Based on the language used in his opinions, his personal correspondence, his eagerness to rule in favor of Southern claimants, and his political affiliations, McLean was probably inclined to uphold the Fugitive Slave Act of 1850 because he believed strict enforcement was necessary to preserve the Union.

129. *Norris v. Newton*, 18 F. Cass. 322 (1850); *Ray v. Donnell*, 20 F. Cass. 325 (1849); *Giltner v. Gorham*, 10 F. Cass. 424 (1848); *Vaughan v. Williams*, 28 F. Cass. 1115 (1845); and *Jones v. VanZandt*, 13 F. Cass. 1047 (1843).

130. *Miller*, 17 F. Cass. 335 (1853).

131. Ibid., 335, 337, 339; accord "The Fugitive Slave Case," *Cincinnati Daily Enquirer* (August 18, 1853) (summarizing several of counsels' arguments); "A Fugitive Precedent," *The Columbian Great West* (Cincinnati) August 27, 1853 (same); "Fugitive Slave Case," *Cincinnati Daily Times*, August 17, 1853 ("The usual Constitutional objections to the law were urged with clearness and ability.").

132. Miller, 337–40.

133. See above notes 38, 50.

134. See Cover, *Justice Accused*, 243–49. Finkelman goes so far as claim that McLean "support[ed] freedom where he could" and "used all the tools available to him to challenge slavery." Finkelman, "John McLean," 540–41, 550–52.

135. McLean declared that "[i]t is for the people . . . to consider the laws of nature, and the immutable principles of right. This is a field which judges cannot explore. . . . They look to the law, and to the law only." *Miller*, 339.

Throughout his fugitive slave opinions, McLean extolled the value of the Union and suggested that observance of the Fugitive Slave Act was essential to its preservation. For example, in *Miller*, McLean explained that the framers "understood the federal and state powers too well, not to know that without some effective [federal] provision on this subject, the superstructure which they were about to rear would soon be overthrown."[136] Moreover, while urging the jury to follow the provisions of the Fugitive Slave Act in *Ray v. Donnell*, McLean declared: "The constitution has made us one people, a nation—a great nation; . . . if we shall maintain its principles in the same spirit which led to its formation, our country will be advanced to a height of prosperity . . . . If the guarantees of this fundamental law [including the Fugitive Slave Clause] be disregarded, all our hopes for the future, as regards the prosperity, the greatness, and the glory of our country must perish."[137] Other cases contain similar appeals to the value of the Union and warn of the risk of its disruption posed by Northerners who disregarded the duty to return fugitive slaves.[138]

McLean's view of the importance of the fugitive clause at the constitutional convention lends further insight into his fugitive slave decisions. McLean repeatedly asserted in his opinions that "without a provision on the subject [of fugitive slaves] no constitution could have been adopted."[139] This was a common belief among nineteenth century jurists.[140] In reality, however, the fugitive clause was not an important provision at the convention. It was adopted with little debate, as part of no constitutional deal, and with no serious opposition.[141] The framers were either too tired to debate the issue or simply did not anticipate its importance.[142] McLean and other antebellum jurists probably adopted such a

136. *Miller*, 339.

137. *Ray*, 329.

138. See *Vaughan*, 1116; *Giltner*, 432.

139. See, for example, *Miller*, 338.

140. See, for example, Fehrenbacher, *Slaveholding Republic*, 244.

141. See Fehrenbacher, *Slaveholding Republic*, 244; Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (New York: M.E. Sharpe 1996) 32, 82–83. The only substantive objection given to the clause at the convention was made by James Wilson of Pennsylvania, who protested that it would "oblige the Executive of the State to do it [return fugitive slaves], at the public expense." Max Farrand, ed., *The Records of the Federal Convention of 1787*, Vol. 2, Rev. ed. (New Haven: Yale University Press, 1966), 443. Moreover, the clause was only mentioned in passing by Southern supporters of the Constitution. See ibid., Vol. 3, 83–85 (North Carolina Delegates to Governor Caswell), 252–55 (Charles Cotesworth Pinckney: Speech in South Carolina House of Representatives), 325 (Debate in the Virginia Convention).

142. Finkelman, *Slavery and the Founders*, 82–83.

clear historical error only because they understood that the clause had become an essential term of the Union in 1850.[143]

McLean's personal letters are also revealing. In one particularly telling letter written in November of 1850, McLean responded to a seemingly hostile minister who argued that returning fugitive slaves to their masters was immoral.[144] McLean defended the morality of the new Fugitive Slave Act by arguing that remanding fugitive slaves was necessary to preserve the Union.[145] He started with the familiar refrain that "the constitution could not be adopted without the clause requiring the surrender of fugitives from labor. . . . Had this great measure failed, the fruits of the revolution would have been lost." Calling the Constitution "the parent of many blessings to our country," he asked, "[i]f we disregard its provisions, how can we of the free states require obedience to it from the South[?]" He finally stated that he would not object to "a modification of [the Fugitive Slave Act of 1850's] objectionable provisions which shall not defeat or impair efficiency in carrying out the provisions of the constitution. [However,] [i]f this object shall not be attained, I have no doubt that the ruin of our government and country will follow." It thus appears that McLean felt that an effective fugitive law was essential to preserving peace and Union, which outweighed the harm of returning fugitives to slavery.

It is important to stress that, unlike in his judicial opinions, McLean was arguing in moral rather than legal terms in this letter. Although McLean did appeal to positivism, such as claiming that "enforcement of th[e] 'higher law' caused more wars and bloodshed in the world, than all other causes united," it is hard to view this statement as motivating his conclusion. Not only did McLean's letter offer no legal argument for the constitutionality of the Fugitive Slave Act, but he also asserted that, at the time he wrote the letter, he had "scarcely read" the act. It is telling that he was predisposed to support the act before he had even bothered to read its provisions.[146] Therefore, although he occasionally appealed to the values of legal positivism, McLean's overriding argument was that adherence to the new fugitive act was desirable as a matter of policy.

143. Cf. Fehrenbacher, *Slaveholding Republic*, 244.

144. The following discussion relies on: John McLean, Letter to Reverend Jona Ward, November 10, 1850, John McLean Papers, Folder 17, University of Virginia Library, Charlottesville, Virginia.

145. Although Reverend Ward focused on biblical arguments, McLean responded with predominately moral and pragmatic arguments.

146. This especially seems to undermine Cover's argument that McLean's talk of disunion was an ex post elevation of the stakes meant to justify a decision he had already made. See above note 119.

The claim that McLean personally supported enforcement of the Fugitive Slave Act is reinforced by the fact that he stretched to enforce its provisions even when not required to do so by law. In *Norris v. Newton*, a fugitive slave case in which McLean ruled while riding circuit in 1850, John Norris, a Kentucky slave owner, seized Lucy Powell and her three sons as fugitive slaves, without the use of legal process.[147] While traveling near South Bend, Indiana, a sheriff, accompanied by a large group of armed men, served Norris with a writ of habeas corpus and, after a brief armed standoff, escorted him to a state court in South Bend. In his return of the writ, Norris justified his detention of the Powells by alleging that he held them as his fugitive slaves. The Powells excepted to the sufficiency of Norris' return—meaning that they claimed that Norris' return, even if taken as true, did not justify their detention—on the grounds that a master could only remove his fugitives after taking them before a judge or magistrate and obtaining a certificate of removal as specified in the Fugitive Slave Act.[148]

Apparently unaware of the private right of recaption established in *Prigg*, the state judge ruled in favor of the Powells. Upon hearing this ruling, Norris and his companions grabbed the Powells, drew their weapons, warned the crowd in the courthouse not to approach, and arrested the Powells under Indiana's personal liberty law. The state judge subsequently discharged the Powells on the grounds that *Prigg* invalidated Indiana's personal liberty law, and a crowd escorted them out of the city. Rather than pursue the Powells or attempt to obtain a certificate of removal, Norris sued the Powells' attorney and several others in federal court for the loss of his slaves.[149]

In his charge to the jury, McLean bent both the law and the facts to ensure that the jury imposed severe financial penalties on the citizens of South Bend who had aided the Powells.[150] In a questionable statement of law, McLean instructed the jury that "the discharge of the fugitives by the judge was void, and, consequently, can give no protection to those who acted under it."[151] McLean reached this conclusion by reasoning that, in failing to deny Norris' claim of ownership in their exception to the sufficiency of Norris's return of the writ, the Powells had admitted to being his slaves. As a master has the right to arrest and hold his slaves, the state judge "could exercise no further jurisdiction in this case."[152] McLean

147. *Norris*, 18 F. Cas. 322 (C.C.D. Ind. 1850).
148. Ibid., 322–24.
149. Ibid.
150. See Finkelman, "Fugitive Slaves," 108.
151. *Norris*, 325.
152. Ibid., 325.

therefore ultimately concluded that any person who "aided, by words or actions, the movement which resulted in the escape of the fugitives" was liable even if they were merely enforcing the orders of the state court.

The state court's orders, however, at least arguably should have shielded the defendants from liability. The weight of nineteenth-century legal authority seems to indicate that an order from a court of valid subject matter and personal jurisdiction was a conclusive defense to any suit arising from its enforcement, even if the decision was later found to be erroneous.[153] Although McLean couched his ruling in terms of jurisdiction, the Powells' supposed admission went to the merits of the case rather than the court's power to adjudicate the dispute. McLean actually admitted that the court had jurisdiction by stating that the state judge had the power to issue the writ of habeas corpus and discharge the prisoners if the master presented insufficient proof.[154] The Powells' admission perhaps should have immediately resolved the case in Norris' favor, but it is hard to see how it could have defeated the state court's power to render a judgment. Moreover, Indiana law was not even clear on the issue of whether a fact not refuted in an exception to a return of habeas corpus should be treated as an admission.[155] Consequently, McLean could have instructed the jury that the state court's orders, although erroneous, served as a complete defense.

McLean also presented a critical factual issue in a biased manner. McLean went out of his way to discredit the Powells' claim to freedom based on principles of interstate comity. By the 1850s it was established law in Kentucky, Norris's home state, that a slave who was permitted by his master to enter a free state was liberated under its laws.[156] Credible evidence was presented at trial that Norris had allowed the Powells to raise their own crops and sell them in Indiana, including admissions made by Norris to citizens of South Bend, in order to show that he was a kind master.[157] While commenting on the evidence, however, McLean made

153. See, Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown & Co., 1868), 408–10; *Ex Parte Kellogg*, 6 Vt. 509 (1834), 509; *Edgerton v. Hart*, 8 Vt. 207 (1836), 207; *Taylor v. Moffatt*, 2 Blackford 305 (Ind.) 306; and *Currie v. Henry*, 2 Johns. 433 (N.Y. Sup. 1807), 433.

154. *Norris*, 324–25.

155. Finkelman, "Fugitive Slaves," 100 n.49.

156. Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), 9–19.

157. See *The South Bend Fugitive Slave Case, Involving the Right to Habeas Corpus* (New York: Anti-Slavery Office, 1851) 7; and *History of St. Joseph County* (Chicago: Chas. C. Chapman & Co., 1880), 618.

it clear that he thought the evidence was insufficient to support the Powells' claim.[158]

In a mixed issue of law and fact, McLean also failed to allow the jury to consider whether Norris' custody of the Powells complied with the requirements of *Prigg*. Under *Prigg*, a slave owner could reclaim a fugitive without the aid of legal process only if done "without any breach of the peace or any illegal violence."[159] Instead of instructing the jury on this issue, McLean accepted Norris's assertion that the Powells were willing to peacefully return to slavery at face value despite substantial evidence to the contrary.[160] Moreover, McLean completely ignored the armed confrontations that occurred both when Norris was initially served with the writ of habeas corpus and when the judge announced his decision. Any of these incidents perhaps could have been found to constitute a breach of the peace, thus negating Norris' private right of recaption.[161]

In *Norris*, McLean thus stretched both the law and the facts to insure that the jury rendered a verdict that both appeased the Southern claimant and discouraged Northerners from lending aid to fugitive slaves in the future, including legal representation. Following the conventional view, one commentator concludes that McLean "did not choose between liberty and slavery," but rather was forced to choose between liberty and formal principles of law.[162] As explained previously, however, formal principles of law favored freedom at least as much as slavery. In fact, McLean seems to have distorted formal legal principles in order to rule in favor of the Southern claimant. McLean's decision therefore must have been influenced by non-legal considerations. Given his opposition to slavery, McLean probably took into consideration the political consequences of a Supreme Court justice ruling against the Southern claimant.

McLean's approval of the Fugitive Slave Act should not be surprising given his political affiliations. Referred to as a "Politician on the Supreme Court" by his biographer, McLean maintained presidential

158. See *Norris*, 325–26; Finkelman, "Fugitive Slaves," 114. For example, McLean stated that there was "no express evidence" that Norris had given the Powells permission to travel to Indiana and that Norris's alleged admissions were "disproved by persons who were present, and who give an entirely different construction to the words of the plaintiff."

159. *Prigg*, 613.

160. Norris and his companions allegedly broke into the Powells' residence and violently seized and bound them at gunpoint while armed men prevented other residents from leaving the house to raise an alarm. *The South Bend Fugitive Slave Case*, 1; Finkelman, "Fugitive Slaves," 108.

161. See Finkelman, "Fugitive Slaves," 101.

162. Finkelman, "Fugitive Slaves," 115. Finkelman, however, agrees that McLean "virtually directed the jury to return a verdict for the plaintiff" in a case that could have been decided for either party based on factual and procedural issues. Ibid., 116.

ambitions throughout his life.[163] In 1848 McLean identified with the Whig Party and strongly desired the Whig presidential nomination.[164] The Whig Party was split on the subject of the Fugitive Slave Act in the early 1850s, but the majority favored supporting it to maintain sectional unity.[165] When the Republican Party formed in the mid 1850s, McLean joined its ranks and received strong conservative support for the Republican presidential nomination in 1856.[166] And although public opinion in the North became much more hostile to the Fugitive Slave Act after the passage of the Kansas–Nebraska Act in 1854,[167] the national Republican Party never officially called for its nullification or repeal. In fact, Lincoln, himself a moderate Republican, pledged to see it enforced.[168] McLean's desire to see the Fugitive Slave Act enforced because of considerations of union therefore fit well with the moderate elements of the political parties that he hoped to lead.

There is one piece of evidence, however, that seems to support the traditional view that McLean upheld the Fugitive Slave Act of 1850 for legal reasons: his dissent in *Prigg* when the Supreme Court first interpreted the Fugitive Slave Clause. It could be claimed that McLean's dissent demonstrates that he opposed the fugitive act as a matter of first impression but was forced to later uphold the act because of stare decisis.[169] There are at least two reasons to think, however, that McLean may have been influenced by policy considerations despite his dissent in *Prigg*.

First, it is important to recognize the limited nature of McLean's dissent. At no point did he question the constitutionality of the Fugitive Slave Act of 1793; instead, he merely refused to recognize a master's right to seize an alleged fugitive without legal process in violation of a state law designed to prevent kidnapping.[170] In fact, McLean rejected one of the most persuasive arguments against the fugitive slave acts by agreeing with the Court that Congress was given the power to legislate under the Fugitive Slave Clause.[171] Moreover, whereas Story had cast doubt on whether Congress could enlist state officers to enforce the act, McLean unambiguously stated that "in the case of fugitives from labor and from justice, they have the

163. Weisenburger, *The Life of John McLean*, 80.
164. Ibid., 123–38.
165. Campbell, *The Slave Catchers*, 76–77.
166. Weisenburger, *The Life of John McLean*, 144–52.
167. Campbell, *The Slave Catchers*, 94.
168. Ibid., 189.
169. I thank Michael Klarman for this point.
170. See above notes 126–128.
171. *Prigg*, 663.

power to do so."[172] If McLean's position on the enlistment issue had prevailed, the North's personal liberty laws, which withdrew state assistance in the rendition process, would have been invalidated. Because McLean's dissent was so limited, his subsequent support for the Fugitive Slave Act of 1850 was not a major change in opinion.

Second, McLean's dissent in *Prigg*, written in 1842, was written in a very different political context than were his later fugitive slave opinions. Sectional tensions had reached a new height in 1850, and the fugitive slave issue was a major point of contention. Because the South threatened disunion in the Georgia Platform if the new fugitive act were not strictly enforced, McLean was probably much more impressed with the political significance of the issue in the early 1850s. As a prominent public official who spent time in the nation's capital and had strong political ambitions, McLean was surely well aware of this political reality. McLean even received a letter from an acquaintance from Charleston, South Carolina, who warned that "if the agitation is continued, the days of the republic are numbered."[173] In response, McLean asserted that he had "observed with great anxiety, the rise in progress of this agitation [on slavery]."[174]

B. Chief Justice Lemuel Shaw

Lemuel Shaw, who served as the Chief Justice of the Supreme Judicial Court of Massachusetts from 1830 to 1860, is one of the most famous and influential state judges in United States history.[175] His influence on United States slavery jurisprudence was no exception. In the case of *Commonwealth v. Aves*, Shaw, setting an antislavery precedent that would be adopted throughout much of the North, ruled that slaves voluntarily brought into Massachusetts "for any temporary purpose of business or pleasure" were entitled to their freedom.[176] He reasoned that slavery, "being contrary to natural right, and effected by local law, is dependant upon such local law for its existence and efficacy."[177] His slavery

172. Ibid., 665.

173. Donald Mackintosh, Letter to John McLean, February 8, 1850, John McLean Papers, Folder 17, University of Virginia Library, Charlottesville, Virginia.

174. John McLean, Letter to Donald Mackintosh, November, 10, 1850, John McLean Papers, Folder 17, University of Virginia Library, Charlottesville, Virginia.

175. See Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard University Press, 1957); and Elijah Adlow, *The Genius of Lemuel Shaw: Expounder of the Common Law* (Boston: Massachusetts Bar Association, 1962).

176. *Commonwealth v. Aves*, 35 Mass. 193 (1836), 207, 217.

177. Ibid., 217.

jurisprudence was shaped by his belief that slavery was "utterly irreconcilable with any notions of natural justice" and "an evil of great magnitude."[178]

Alhough Shaw was an avowed opponent of slavery, he consistently upheld the provisions of the fugitive slave acts and returned fugitives to bondage.[179] According to his biographer, Leonard Levy, "Shaw felt duty bound to enforce the Constitution as law regardless of whatever moral twinges he may have experienced" and regarded the return of runaways as a "legal necessity."[180] Shaw's explanation of his own decisions therefore conforms to the conventional account of a judge forced to uphold proslavery legislation in order to be faithful to his judicial role.

However, as Levy explains: "There exists no statement from Shaw that he, like Webster, Choate, and Curtis, approved of the Fugitive Slave Law as an expedient to cement sectional differences that menaced the Union; yet there is nothing in the cast of the man's mind, temperament, or associations suggesting that his judicial obligation to enforce Congressional law necessarily conflicted with his personal opinions."[181] In fact, there is much reason to think that Shaw personally approved of the Fugitive Slave Act as a matter of public policy.

Shaw's opinion in *Sims' Case*, in which he upheld the constitutionality of the Fugitive Slave Act of 1850 against an exhaustive attack by Robert Rantoul, is instructive.[182] Rather than merely justifying his decision with legal positivism and expressing his regret at being forced to uphold the act, he defended the country's policy regarding fugitive slaves as necessary to preserve the Union. Shaw explained: "The constitution, therefore, is not responsible for the origin or continuance of slavery. The provision it contains [the Fugitive Slave Clause] was the best adjustment which could be

178. Lemuel Shaw, "Slavery and the Missouri Question," *The North American Review* (Boston, January 1820), 143–44.

179. Levy, *The Law of the Commonwealth*, 60, 70. Shaw first upheld the attempted rendition of George Latimer under the Fugitive Slave Act of 1793. In two habeas corpus hearings, Shaw returned Latimer to the custody of his master, ruling that he could be held without a warrant or evidence of his status as a slave for a reasonable period of time and that the Massachusetts Personal Liberty Law of 1837, which guaranteed a right to a trial by jury, was unconstitutional under *Prigg*. Ibid., 78–82. In *Sims' Case*, 61 Mass. 285 (1851), Shaw upheld the constitutionality of the Fugitive Slave Act of 1850 on a writ of habeas corpus, ruling that Congress had power to pass legislation on the subject of fugitive slaves and that the power given to commissioners did not violate Article III of the Constitution.

180. Levy, *The Law of the Commonwealth*, 72.

181. Levy, *The Law of the Commonwealth*, 91. This is as close as Levy comes to addressing the issue. Levy's biography was published well before Cover's book, and therefore before the conventional view emerged.

182. *Sims' Case*, 661 Mass. 285 (1851).

made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification, by which harmony and peace should take the place of violence and war."[183]

Unpacking this passage reveals three of Shaw's fundamental beliefs on fugitive slaves. First, Shaw, like most prominent jurists of the antebellum era, believed that the fugitive clause was "absolutely necessary" for the formation of the Union. As explained previously, it is likely that this historical error was reinforced, and perhaps motivated, by an awareness that the fate of the Union did depend on enforcement of the fugitive clause in 1850.[184] Second, he reveals a high valuation of the Union in asserting that it was necessary to avoid "violence and war" between the states.

Third, by arguing that the fugitive clause was the "best adjustment which could be made" between the interests of the free and slave states, Shaw seems to be asserting that, given the existence of slavery at the time of the founding, the fugitive clause was a normatively desirable provision at that time. Given the rising sectional tensions in the 1850s that made "violence and war" between the states much more likely than in the eighteenth century, there is little reason to believe that Shaw would have changed his mind about the desirability of the Fugitive Slave Clause. Although support for the Fugitive Slave Clause is not necessarily the same as support for the Fugitive Slave Act of 1850, it does reveal that Shaw believed that the duty to return fugitive slaves was a necessary compromise with the South.

Shaw's extra-judicial statements also support the conclusion that he approved of the Fugitive Slave Act as a matter of policy. Although Shaw's personal papers reveal no extra-judicial statement on the issue during his service as a judge, an article in the *North American Review*, published before his term on the Court, lends rare insight into Shaw's moderate antislavery viewpoint. In this article, Shaw asserted that "[s]lavery, though a great and acknowledged evil, must be regarded, to a certain extent, as a necessary one, too deeply interwoven into the texture of society to be wholly or speedily eradicated."[185] He thus argued against immediate abolition and counseled that the government should instead focus on "attainable good" and "not blindly overlook the only practicable means of arriving at it."[186] Although he did not directly address the issue of fugitive

183. Ibid., 318.

184. See above notes 139–43 and surrounding text.

185. Shaw, "Slavery and the Missouri Question," 137, 138. He further stated: "In states where slavery has long continued and extensively prevailed, a sudden, violent, or general emancipation, would be productive of greater social evils than the continuance of slavery. It would shake if not subvert the foundations of society." Ibid., 143.

186. Ibid.

slaves, from these passages it is clear that Shaw favored a moderate antislavery approach that would not threaten the established order. It is therefore reasonable to infer that, as a matter of policy, he might have supported the duty to return fugitive slaves as a necessary condition of union with the slave states, just as he viewed slavery itself as a necessary institution in the South to prevent violence and social disruption.

Soon after Shaw retired from the Court, at the height of the secession crisis in 1860, he signed an appeal to the people of Massachusetts, asking that they repeal the state's personal liberty law. Shaw and his co-signers urged repeal of the law and compliance with the Fugitive Slave Act, claiming that they acted "under [their] own love of right; under [their]own sense of the sacredness of compacts; [and] under [their] own conviction of the inestimable importance of social order and domestic peace . . . ."[187] Shaw thus advocated adherence to the Fugitive Slave Act as a matter of policy in order to stop the threat of Southern secession. It is reasonable to infer that he may have supported the act during the turbulent 1850s for the same reason.

Moreover, like McLean, Shaw not only upheld the Fugitive Slave Act on constitutional grounds, but he also stretched to reach proslavery results in specific fugitive cases. In 1851, just months after the passage of the Fugitive Slave Act, federal officials arrested Frederick Jenkins, also known as Shadrach, as a fugitive slave in Boston, a city that had yet to remand a single fugitive slave to the South. Just as the Southern claimant wished to use this as a test case for enforcement of the Fugitive Slave Act, Richard Henry Dana and other prominent antislavery lawyers in Boston hoped to use it as a test case for the act's constitutionality.[188] After Shadrach was placed in federal custody at the Boston courthouse, Dana drafted writs of habeas corpus and *de homine replegiando* and personally delivered them to Chief Justice Shaw.

Shaw denied Dana's attempt to challenge the act by insisting on unnecessarily strict adherence to procedural formalities. According to Dana, Shaw at first refused to act on the writs because the petition was not personally signed by Shadrach.[189] After Dana pointed out that the statute did not require a signature, Shaw protested that there was no evidence that the petition had been approved by Shadrach.[190] After refusing to tell

187. "Address to the Citizens of Massachusetts," in Curtis, *A Memoir of Benjamin Robbins Curtis*, 332 (emphasis removed).

188. Charles Francis Adams, *Richard Henry Dana: A Biography*, Vol. 1 (Boston and New York: Houghton, Mifflin & Co., 1890), 178–80.

189. Ibid., 180; Robert F. Lucid, ed., *The Journal of Richard Henry Dana, Jr.*, Vol. 2 (Cambridge: The Belknap Press of the Harvard University Press, 1968), 411.

190. Adams, *Richard Henry Dana*, 181; Lucid, *Journal of Richard Henry Dana*, 411.

Dana what proof of authority was required, Shaw next denied the writs because the petition showed "that the man is in legal custody of a United States marshal."[191] To this, Dana correctly replied that the government has the burden of proving legal detention, and therefore the fact of custody could not defeat the writs. Finally, Shaw denied the writs because "the petition should contain a copy of the warrant, or state that a copy had been applied for and could not be had."[192] Shortly after Shaw's refusal to grant the writs, Shadrach was forcibly rescued from the marshals' custody and escaped to the North, rendering the case moot.

Shaw's actions indicate that he may have preferred to deny Shadrach's claim to freedom rather than antagonize sectional relations. It is, of course, possible that Shaw simply disliked Dana for some unrelated reason or that Dana inaccurately reported the encounter. However, Shaw's shifting excuses, inaccurate and prejudicial statements of law, and strict insistence on procedural formalities all provide at least some evidence that the Chief Justice may not have been inclined to question the fugitive's rendition.[193] Judges often use procedural ruling to reach results with which they agree.[194] By going beyond the requirements of the law to rule against Shadrach, Shaw may have denied at least one fugitive's claim to freedom for non-legal reasons.

Although obviously a biased party, Dana summed up his encounter with Shaw by writing:

> The conduct of the Chief Justice, his evident disinclination to act, the frivolous nature of his objections, and his insulting manner to me, have troubled me more than any other manifestation. It shows how deeply seated, so as to effect, unconsciously I doubt not, good men like him, is this selfish hunkerism of the property interest on the slave question.
>
> . . . .
>
> . . . Judge Metcalf was present at my interview with Judge Shaw, and expressed himself very much disturbed by the conduct of the chief.[195]

As a conservative or "Cotton" Whig and strong supporter of Daniel Webster,[196] Shaw's support for the Fugitive Slave Act should come as

191. Ibid.

192. Ibid.

193. Historian Gary Collison likewise concludes that "the real objection was Shaw's unwillingness to interfere. Perhaps Shaw saw himself as helping Webster to the presidency." Gary Collison, *Shadrach Minkins: From Fugitive Slave to Citizen* (Cambridge: Harvard University Press, 1997), 120.

194. See Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 42–43.

195. Adams, *Richard Henry Dana*, 183–84.

196. Levy, *The Law of the Commonwealth*, 91.

no surprise. Although Webster condemned slavery as a moral and political evil, he was above all a champion of the Union. In his famous Seventh of March speech on the Compromise of 1850, in which he claimed that his "sole motive" was "the preservation of the Union,"[197] Webster emerged as the preeminent champion of the Fugitive Slave Act in the North. He asserted that, on the subject of fugitive slaves, "as a question of morals and a question of conscience, . . . the South is right, and the North is wrong."[198] He therefore pledged "to support, with all its provisions, to the fullest extent" the Fugitive Slave Act.[199] Moreover, Whig support for the Fugitive Slave Act in Boston was not limited to politicians, as Supreme Court Justice Benjamin R. Curtis, also a Bostonian Cotton Whig and strong supporter of Webster, publicly defended both the constitutionality and morality of the Fugitive Slave Act.[200]

IV. Conclusion

The prevailing view of the antislavery judge should be reconsidered. The conventional wisdom—that the law forced antislavery judges to uphold proslavery positive law or abandon their judicial role—is analytically incomplete. Although the traditional view holds true for many lower court trial judges, it fails to fully explain the motivation behind those antislavery judges who ruled as a matter of first impression. At least with regard to the Fugitive Slave Act of 1850, the most important and commonly invoked proslavery law in the North, legal factors did not at first dictate a proslavery result. Rather than limit these judges' discretion, the judicial role forced them into an anguishing dilemma. In their constitutional jurisprudence, antislavery judges were probably influenced to rule against the plight of fugitive slaves by a fear that ruling against the fugitive act could result in disunion and sectional conflict.

The conventional account also finds little support in slavery jurisprudence beyond the fugitive slave issue. Instead of following the proslavery majority in *Dred Scott*, Justices McLean and Curtis ruled that Congress could prohibit slavery in the territories and that blacks could be United States citizens. Additionally, as explained previously, Shaw and McLean rescinded comity with the South on issues involving slaves voluntarily

197. Cong. Globe, 31st Cong., 1st Sess. 476 (1850).

198. Ibid., 481.

199. Ibid.

200. See "The Constitutionality of the Fugitive Slave Law," *Boston Daily Advertiser*, November 19, 1850; Streichler, *Justice Curtis in the Civil War Era*, 34; Curtis, *A Memoir of Benjamin Robbins Curtis*, Vol. 1, 122, 132–36.

brought into the free states by their masters. It is probably no accident that these antislavery rulings were applauded by most conservative Republicans and were not widely perceived to threaten sectional stability. In their slavery jurisprudence, prominent antislavery judges, like moderate Republican politicians, thus were willing to embrace antislavery arguments that would have contained slavery in the South; however, they fell short of accepting those that they feared would threaten the Union.