

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship


1996

Tragic Irony of American Federalism: National Sovereignty versus State Sovereignty in Slavery and in Freedom, The Federalism in the 21st Century: Historical Perspectives

Robert J. Kaczorowski

Fordham University School of Law, rkaczorowski@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship

 Part of the [Conflicts of Law Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Legal History, Theory and Process Commons](#), [Legislation Commons](#), [President/Executive Department Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Robert J. Kaczorowski, *Tragic Irony of American Federalism: National Sovereignty versus State Sovereignty in Slavery and in Freedom, The Federalism in the 21st Century: Historical Perspectives*, 45 U. Kan. L. Rev. 1015 (1996-1997)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/245

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom

Robert J. Kaczorowski*

A plurality on the Supreme Court seeks to establish a state-sovereignty-based theory of federalism that imposes sharp limitations on Congress's legislative powers.¹ Using history as authority, they admonish a return to the constitutional "first principles" of the Founders.² These "first principles," in their view, attribute all governmental authority to "the consent of the people of each individual state, not the consent of the undifferentiated people of the Nation as a whole."³ Because the people of each state are the source of all governmental power, they maintain, "where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the states enjoy it."⁴ Consequently, "the States can exercise all powers that the Constitution does not withhold from them."⁵

These first principles define the national government, on the other hand, as "entirely a creature of the Constitution."⁶ Its authority is therefore limited to those "few and defined" powers the Constitution delegates to it.⁷ Moreover, even expressly delegated powers, such as the power to regulate interstate and foreign commerce, must be cabined. These essential first principles require the courts to limit even further Congress's expressly delegated powers by interpreting them "as having judicially enforceable outer limits."⁸ Constitutional federalism thus imposes on the Court the duty of preserving "entire areas of traditional state concern"⁹ from national usurpation. This first principle of judicial

* Professor of Law, Fordham University School of Law. B.S.C. Loyola University of Chicago; M.A., DePaul University; Ph.D., University of Minnesota; J.D., New York University.

1. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1133 (1996); *United States v. Lopez*, 115 S. Ct. 1624, 1645-46 (1995); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1898-1900 (1995) (Thomas, J., dissenting); *New York v. United States*, 505 U.S. 144, 166, 177-180 (1992).

2. See *Lopez*, 115 S. Ct. at 1626.

3. *U.S. Term Limits*, 115 S. Ct. at 1877 (Thomas, J., dissenting).

4. *Id.* at 1876 (Thomas, J., dissenting).

5. *Id.* (Thomas, J., dissenting).

6. *Id.* (Thomas, J., dissenting) (quoting *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion)).

7. *Lopez*, 115 S. Ct. at 1626 (quoting *THE FEDERALIST NO. 45* (Clinton Rossiter ed., 1961)).

8. *Id.* at 1633.

9. *Id.* at 1638 (Kennedy, J. and O'Connor, J., concurring).

review attributes to the courts the role of active overseer of legislative policy.¹⁰ According to this view, the Founders mandated this state sovereignty theory of federalism “to ensure protection of our fundamental liberties.”¹¹

Recent scholarship presents a much more complicated picture of the Founders’ first principles, as my colleague Martin Flaherty argues.¹² Jack Rakove has shown that the essence of “revolutionary constitutionalism” was “avowedly experimental” in nature.¹³ He persuasively argues that the Founders did not “[lock] into the Constitution at the moment of its adoption . . . a set of definitive meanings.”¹⁴ It also appears that the Founders did not expect their opinions about the Constitution to control later interpretations.¹⁵ Larry Kramer shares this view of the Founders’ understanding of the Constitution and argues that the real founding occurred when the Founders put the ratified Constitution into practice.¹⁶ David Currie similarly maintains that “[t]he First Congress was practically a second constitutional convention.”¹⁷ He argues, moreover, that Congress and executive officials, no less than judges, interpreted the Constitution and participated in giving the Constitution meaning and definition in the decades following ratification.¹⁸ Unquestionably, the

10. See *id.* at 1629. “[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” *Id.* at 1629 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

11. *Id.* at 1626 (quoting *Gregory v. Ashcroft*, 501 U.S. 452) (1991)).

12. See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); see also INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove, ed., 1990).

13. Jack Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 401, 423 (1997). See also JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

14. Rakove, *supra* note 13, at 422.

15. See RAKOVE, *supra* note 13, at 343-44.

16. Larry Kramer, *Fidelity Through History—and Through It*, 65 FORDHAM L. REV. 501, 512 (1997).

17. David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 606 (1996).

18. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 776-77 (1994). “Before 1800,” he maintains, “nearly all our constitutional law was made by Congress or the President, and so was much of it thereafter.” *Id.* at 776. Currie quotes Congressman Theodore Sedgwick’s 1791 assertion that “[T]he whole business of Legislation . . . was a practical construction of the powers of the Legislature.” *Id.* at 775 n.1 (citing 2 ANNALS OF CONGRESS (quoting Gales & Seaton, eds. 1960) (1791)). See also David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161 (1995). Justice William Johnson expressed a similar view in affirming Congress’s contempt powers on a theory of implied inherent powers:

Constitution created a national government of limited powers. However, the Founders' understanding of the scope of its powers was far less limited than the "few and defined" powers the current Court's state sovereignty plurality asserts.

The Bank of the United States is perhaps the most famous example of executive and congressional constitution-making of the 1790s. The question whether Congress possessed the power to incorporate a bank was thoroughly debated in President George Washington's first administration by his Secretary of State, Thomas Jefferson,¹⁹ his Attorney General, Edmund Randolph, and his Secretary of the Treasury, Alexander Hamilton.²⁰ It was also debated in the first Congress of the United States, which included many of the drafters of the Constitution and those who played leading roles in its ratification.²¹ Interestingly, James Madison argued in opposition to the bank bill that the Framers specifically rejected a proposal to give Congress the power of incorporation, but the Framers' specific intent was not a significant factor in Congress's or the President's decisions.²² Congress passed the bank bill and President Washington signed it into law.

The Supreme Court in 1819 upheld the constitutionality of the National Bank in one of its most important early decisions, *M'Culloch v.*

The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposite it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226 (1821). Larry Kramer and William E. Nelson similarly conceive of the Constitution as a dynamically evolving framework of government. Kramer, *supra* note 16, at 512, 525, 529; William E. Nelson, *Continuity and Change in Constitutional Adjudication* 78 YALE L. J. 500 (1969) (reviewing PAUL EIDELBERG, *THE PHILOSOPHY OF THE AMERICAN CONSTITUTION* (1968)).

19. *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, 19 THE PAPERS OF THOMAS JEFFERSON 275, 279-80 (J. Boyd et al. eds., 1974).

20. See *Opinion on the Constitutionality of an Act to Establish a Bank*, 8 THE PAPERS OF ALEXANDER HAMILTON 63 (H. Syrett et al. eds., 1965).

21. See Currie, *supra* note 18, at 777-78; Stanley Elkins & Eric McKittrick, *THE AGE OF FEDERALISM* 226-32 (1993); Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 JOURNAL OF THE EARLY REPUBLIC 19 (1990).

22. See RAKOVE, *supra* note 13, at 359-65; Klubes, *supra* note 20, at 21, 39-41.

Maryland.²³ The lawyers who argued this case were among the leading constitutional lawyers of the day and included the Attorneys General of the United States and of the state of Maryland.²⁴ They argued the issues on opposing theories of the founding, of federalism, of constitutional delegation, of the nature and scope of Congress's implied powers, of the role of the judiciary in constitutional interpretation, and of the very method of interpreting the Constitution. These arguments elaborated many of the constitutional arguments and theories Jefferson and Hamilton had argued to President Washington in 1791.

Like President Washington and Congress, the Court decided in favor of the bank. In one of the most important opinions written by Chief Justice John Marshall, the Court unanimously and expressly rejected the state sovereignty theories argued on behalf of the state of Maryland: its state compact theory of the founding, its state sovereignty theory of federalism, its narrow interpretation of constitutional delegation, and its text-bound theory of constitutional interpretation. The Court unanimously affirmed the bank's popular sovereignty theory of the founding,²⁵ its dual

23. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). G. Edward White notes that "[t]he *National Intelligencer* identified *M'Culloch* as a 'great case' even before arguments began." See III-G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, HISTORY OF THE SUPREME COURT* 238 (1988) (quoting *Washington National Intelligencer* (Feb. 20, 1819)).

24. WHITE, *supra* note 23, at 243. The case was so important that the Court permitted each side to be represented by three lawyers. See *id.* at 289. The bank's lawyers (*M'Culloch* was cashier of the bank's Baltimore branch) included the incomparable Daniel Webster; William Pinckney, who was characterized by the most eminent contemporary scholar of the Marshall Court as "the most eminent of the Marshall Court advocates" in 1819; and the United States Attorney General, William Wirt. *Id.* Professor White reports that Chief Justice Marshall "called Pinckney 'the greatest man he had ever seen in a Court of justice,' and [Walter] Jones added that 'no such a man has ever appeared in any country more than once in a century.'" *Id.* at 244 (quoting TYLER, *MEMOIR OF TANEY* 141). Maryland was represented by its attorney general, Luther Martin, one of the few surviving members of the Constitutional Convention of 1787; Joseph Hopkinson, a frequent advocate before the Supreme Court who argued *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), with Daniel Webster and was later appointed to the United States Circuit Court; and Walter Jones, who argued more than 169 cases before the Marshall Court and was destined to become United States Attorney for the District of Columbia. See WHITE, *supra* note 23, at 289.

25. See *M'Culloch*, 17 U.S. (4 Wheat) at 419. Marshall noted that "the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States." *Id.* The importance they attached to this view of founding, he noted, is that "[t]he powers of the general government . . . are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion." *Id.* Marshall expressly rejected this state compact theory of the founding and declared that "the constitution derives its whole authority . . . directly from the people." *Id.* at 420. He further stated: "The government of the Union . . . is, emphatically and truly, a government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *Id.* at 420-21 (emphasis added).

sovereignty theory of federalism,²⁶ its theory of the supremacy of national sovereignty,²⁷ its theory of implied inherent powers²⁸ and implied enumerated powers,²⁹ and its “gloss on the Constitution”³⁰ approach to

26. *See id.* at 423. In rejecting Maryland’s argument against the bank’s constitutionality, Marshall observed that it was based “[o]n this alone: [t]he power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress.” *Id.*

Conceding that this was true, Marshall dismissed the argument with the observation that “all legislative powers appertain to sovereignty.” *Id.* He then affirmed the bank’s theory of dual sovereignty, which recognized the national government as a sovereign government with powers implied from its sovereignty to achieve the objects entrusted by the Constitution to the government of the United States: “the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.” *Id.* at 424. Thus, Congress possessed the sovereign power of incorporation as a power inherent in its sovereignty which it could use to carry into effect the great objects and vast powers the Constitution conferred on it.

27. *See id.* at 420. Virtually stating a “first principle” in so many words, Chief Justice Marshall declared:

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all But this question is not left to mere reason: the people have, in express terms, decided it, by saying, “this constitution, and the laws of the United States, which shall be made in pursuance thereof,” “shall be the supreme law of the land,” and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

Id. at 421.

28. *See, e.g.,* *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Chief Justice Marshall articulated as a distinct theory of implied powers those powers that are inherent in the sovereign nature of the national government which it may exercise to achieve the purposes, ends, and objectives for which the government of the United States was established, broadly conceived. *See id.* at 628.

29. *See M’Culloch*, 17 U.S. (4 Wheat.) at 422-23. Having affirmed the bank’s theory that Congress possessed the implied power to incorporate as a power inherent in all sovereign governments, Chief Justice Marshall also asserted that certain other powers are implied from those specifically enumerated in Article I and in the other constitutional provisions that expressly delegate legislative power to Congress:

Although, among the enumerated powers of government, we do not find the word “bank,” or “incorporation,” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies [I]t may, with great reason be contended, that a government, intrusted [sic] with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution

It is not denied, that the powers given to the government imply the ordinary means of execution.

Id.

constitutional interpretation which looks to political practice to derive constitutional meaning.³¹

30. This theory of constitutional interpretation, which the Court adopted in Chief Justice Marshall's opinion, became a recurring theme in constitutional litigation and practice. See, for example, its application in fugitive slave cases, *supra* notes 56-133. Justice Felix Frankfurter's "gloss on the Constitution" theory of constitutional interpretation is an extension of this approach to constitutional interpretation. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). He argued that history and political practice were essential factors in interpreting the Constitution. Justice Frankfurter, citing *M'Culloch* as authority for "a spacious view" of the Constitution, opined:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard *the gloss which life has written upon them*.

Id. (Frankfurter, J., concurring) (emphasis added). Justice Robert Jackson derived his tripartite approach to examining the constitutionality of executive powers based on the history of political practice from the same theory of constitutional interpretation:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

Id. at 635 (Jackson, J., concurring). Justice Jackson offered this approach to constitutional interpretation as a more realistic alternative to originalism and textualism, which he regarded as futile methods of defining the scope of governmental powers. See *id.* at 634-35 (Jackson, J., concurring). Although he was examining the scope of presidential powers, his comments are applicable generally to constitutional interpretation:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Id. (Jackson, J., concurring) (footnote omitted).

31. Marshall began his analysis of the question whether Congress possessed the power to incorporate a bank by saying:

It has been truly said that [the bank's constitutionality] can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

M'Culloch, 17 U.S. (4 Wheat.) at 418. He conceded that "a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this." *Id.* at 418-19. However, Marshall admonished that in a "doubtful question" that does not involve "the great principles of liberty," but the powers of

the representatives of the people . . . ; *if not put at rest by the practice of the government, ought to receive a considerable impression from that practice*. An exposition of the

The Court thus adopted a conception of the Constitution as a dynamically evolving, power enhancing document whose scope and meaning was defined through political practice, a malleable instrument that delegated to Congress the authority to expand its legislative powers over time to meet unforeseen situations that might confront the nation.³² The Court therefore conceived of the Constitution as an organism whose substance would evolve over time through the workings of the political system.

constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

Id. at 419 (emphasis added). He attributed particular importance to the fact that this power “was exercised by the first congress elected under the present constitution,” and that “[i]ts principle was completely understood, and was opposed with equal zeal and ability,” both in Congress “and afterwards in the executive cabinet,” and, having “convinced minds as pure and as intelligent as this country can boast, it became a law.” *Id.* at 419. He noted that after the original law was allowed to expire, “a short experience of the embarrassments to which the refusal to revive it exposed the government. . . and induced the passage of the present law.” *Id.* at 419. Marshall concluded that, “It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.” *Id.*

32. *See generally id.* Marshall seems to have taken his explanation of his conception of the Constitution as a dynamically evolving, power-enhancing instrument from James Madison, who explained in *Federalist* 44 why the powers conferred on the United States government were not limited to those expressly delegated in the Constitution, as Article II provided in the Articles of Confederation. Madison explained:

Had the [constitutional] convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.

THE FEDERALIST NO. 44, at 284-85 (James Madison) (Clinton Rossiter ed., 1961). This is not to suggest that Madison favored the broad interpretation the Court affirmed in *M'Culloch*. His theory of republican government coupled with his fear of legislative tyranny led him to oppose a broad construction of the Necessary and Proper Clause after the Constitution was ratified. *See, e.g.,* RAKOVE, *supra* note 13, at 355. Nevertheless, Marshall certainly intended a broad interpretation:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

M'Culloch, 17 U.S. (4 Wheat.) at 427. It is here that Marshall admonished: “we must never forget that it is a constitution we are expounding.” *Id.* at 422.

Marshall's analysis has been understood as an argument for a broad interpretation of the Necessary and Proper Clause, authorizing Congress to use "convenient, or useful, or essential" means to carry out its delegated powers. This exegesis certainly was part of Marshall's analysis. Overlooked, however, is the more significant meaning of Marshall's analysis, namely, that he interpreted the Constitution as authorizing Congress to exercise implied inherent powers to accomplish the "objects," "ends," and "purposes" for which the national government was established, in addition to implied enumerated powers. A unanimous Court, therefore, adopted the broad theory of inherent implied powers of sovereignty that the bank's lawyers attributed to Congress and which they argued the Necessary and Proper Clause expressly delegated to Congress.³³ In explaining this inherent sovereign power, Marshall cited Congress's penal power as an example of an implied inherent power that, he said, everyone concedes, but "is not among the enumerated powers of congress."³⁴ He asserted that "the whole penal code of the United States" is implied from its sovereign powers, except where it is expressly given

33. Marshall explained the Necessary and Proper Clause as an *express* delegation of implied powers to Congress:

But the constitution of the United States has not left the right of congress to employ necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

M'Culloch, 17 U.S. (4 Wheat.) at 411-12 (quoting U.S. CONST., art. I, § 8, cl. 18). Like the bank's attorneys, Marshall distinguished the theory of inherent or incidental powers from the theory of implied enumerated powers and asserted that the Necessary and Proper Clause expressly conferred both kinds of implied powers on Congress. *See id.* at 427. He asserted that "the whole penal code of the United States" is implied from its sovereign powers, except where it is expressly given:

The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary.

Id. at 427.

34. *Id.* at 427. "It is a right incidental to the power, and conducive to its beneficial exercise." *Id.* at 428, 4 Wheat. at 418; *accord* *Anderson v. Dunn*, 19 U.S. 204, 233 (1821). Indeed, Marshall noted that Congress's general power of punishing infractions of its laws "might be denied with the more plausibility, because it is expressly given in some cases." *Id.* at 427. Marshall referred to the express delegation of the powers "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and Offenses against the law of nations." *Id.* at 427 (quoting U.S. CONST. art. I, § 8, cls. 6, 10). In an opinion written by Justice William Johnson, a unanimous Court rejected the theory that an express delegation to punish specific offenses "raises an implication against the power to punish any other," because it would "lead to the annihilation of almost every power of Congress." *Anderson*, 19 U.S. at 233. Justice Johnson also noted that Congress's penal powers generally are "derived from implication." *Id.*

to punish counterfeiting and treason.³⁵ He was referring here to Congress's power to punish counterfeiting and treason.³⁶

Two years after *M'Culloch*, the Supreme Court upheld Congress's contempt power on the same theories of implied inherent power and implied enumerated power. In an opinion written by Justice William Johnson, the Court unanimously held that Congress's contempt power derived from its paramount duty to secure "the safety of the people [which] is the supreme law,"³⁷ and Congress's inherent power of self defense, to defend itself against "rudeness" and "insult."³⁸ Justice Johnson also implied Congress's contempt power from its enumerated powers to punish counterfeiting and treason, which he asserted implicitly delegated to Congress the power to punish violations of federal law generally.³⁹

It is significant that these opinions identify the "objects," "purposes," and "ends" of the national government, as distinguished from expressly enumerated powers, as sources of Congress's implied or incidental powers. They suggest that Congress's implied powers derived not only from the powers enumerated in Article I. They also derived from the general purposes identified in the Preamble to the Constitution,⁴⁰ from various provisions of other articles of the Constitution, from the governmental structure created by the Constitution, and from the sovereign nature of the United States government established by the Constitution. Moreover, the Court defined for itself a very restricted scope of judicial review and a deferential role regarding congressional legislative discretion.

My purpose in examining the national bank and *M'Culloch* is to suggest that what I am about to say about the Fugitive Slave Clause⁴¹ was not an aberration, limited to the peculiar institution of slavery. Congress and the Court applied the same broad theories of constitutional interpretation to the Fugitive Slave Clause. The legal and constitutional history of the Fugitive Slave Clause, and the statutes Congress enacted in

35. *M'Culloch*, 17 U.S. at 427. Thomas Jefferson argued this very proposition in his Kentucky Resolution of 1798.

36. *See id.*

37. *Anderson*, 19 U.S. at 227.

38. *Id.* at 228-29.

39. *See id.* at 233.

40. The Preamble states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbi.

41. U.S. CONST. art. IV § 2, cl. 3.

1793 and 1850 to implement it, shows that the state and federal judges who tried cases under these provisions affirmed the same theories of the Constitution as a power enhancing document based on a national sovereignty theory of federalism.

The Fugitive Slave Clause states:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁴²

This provision recognized an obscure common law property right of recaption. This right authorized the owner of chattel, such as livestock and portable goods, that strayed or were taken away, to recover them through self-help, provided it could be done without a breach of the peace.⁴³ In the eighteenth century, this proprietary right also authorized masters to recapture fugitive servants, fathers to recapture runaway children, and husbands to recapture absconding wives.⁴⁴

The common law, however, did not recognize a slave owner's right to recapture a fugitive slave. The apparent reason is that the property right to slaves was unlike the right to other kinds of property. It did not exist by natural law, by customary law, or by common law.⁴⁵ Slavery existed only by positive law. The slaveowners' property right in their slaves, including the right of recapture, was thus created by and existed only under state statutory law.

As northern states abolished slavery while southern states retained it, two conflicting legal systems emerged in the United States. This troubled slave holders. The legal effect of any state's law did not go beyond its territorial jurisdiction. A state that did not recognize slavery was under

42. *Id.*

43. See 3 W. BLACKSTONE, COMMENTARIES ON THE COMMON LAW 3-4 (1765-69).

44. See *id.* This right encompassed an extrajudicial remedy, Sir William Blackstone explained in his *Commentaries on the Common Law*:

This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; . . . it is provided, that *this natural right of recaption* shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society.

See *id.* at 4-5 (emphasis in original).

45. This was Lord Mansfield's holding in *Somerset v. Stewart*, Loft (G.B.) 1 (1772); 20 Howell St. Tr. (G.B.) 1 (1772). Jurisdictions in the United States affirmed this principle as authoritative precedent. See, e.g., *Commonwealth v. Aves*, 18 Mass. 193 (1836).

no obligation to give effect to the master's right in his slave, should either or both come within the state's jurisdiction. Nor were nonslaveholding states under any legal obligation to return runaway slaves to their owners in another state. Under the Articles of Confederation, then, the recapture of fugitive slaves who escaped from the state in which they owed labor or service to another state was a matter of comity among the states. The state to which a slave fled was free to emancipate her or to return her, as it saw fit.⁴⁶

In adopting the Fugitive Slave Clause, therefore, the Founders expanded an ancient common law right of property to include property in slaves and elevated it into a new constitutional right that authorized slaveholders to pursue and to recover their slave property even when their slaves escaped to a state that did not recognize slavery.⁴⁷ The significance of the Fugitive Slave Clause is that it conferred on slaveowners a new constitutional property right enforceable under the authority of the national government, independent of the states, and the states were prohibited from interfering with this right.⁴⁸

In 1793, Congress enacted a statute to enforce this constitutional right. Like the Bank of the United States, the legislative history of the Fugitive Slave Act of 1793 involved many of the framers and ratifiers of the Constitution, and it was discussed in Washington's cabinet as well as in Congress.⁴⁹ At the request of the Washington Administration, Congress

46. See *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229-30 (1847); *Jones v. Van Zandt*, 13 F. Cas. 1040, 1042 (C.C.D. Ohio 1843) (No. 7,501); THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861*, at 15-16 (1974); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848*, at 78-79 (1977).

47. See *Miller v. McQuerry*, 17 F. Cas. 335, 337-39 (C.C. Ohio 1853) (No. 9,583); *Oliver v. Kauffman*, 18 F. Cas. 657, 659, 661 (C.C.ED. Pa. 1850) (No. 10,497); *Ray v. Donnell*, 20 F. Cas. 325, 326 (C.C.D. Ind. 1849) (No. 11,590); *Giltner v. Gorham*, 10 F. Cas. 424, 425 (C.C.D. Mich. 1848) (No. 5,453); *Driskill v. Parrish*, 7 F. Cas. 1100, 1101 (C.C.D. Ohio 1845) (No. 4,089); *Charge to Grand Jury--Fugitive Slave Law*, 30 F. Cas. 1015, 1016 (D. Mass. 1851) (No. 18,263); *Sims's Case*, 61 Mass. (7 Cush.) 285, 296-98, 301, 311 (1851); *Glen v. Hodges*, 9 Johns. 66, 68-69 (N.Y. 1812); *Kauffman v. Oliver*, 10 Pa. 514, 516 (1849); *Wright v. Deacon*, 5 Serg. & Rawle 62, 63 (Pa. 1819). See MORRIS, *supra* note 46, at 17.

48. During the ratification of the Constitution, James Madison acknowledged this when he explained that the Fugitive Slave Clause "secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws." "The fugitive slave clause, he concluded 'was expressly inserted, to enable owners of slaves to reclaim them.'" Quoted in MORRIS, *supra* note 46, at 19.

49. The problem of fugitive slaves became entwined with the problem of extraditing fugitives from justice. The governor of Pennsylvania petitioned President Washington to assist with both problems. Congress dealt with both problems in the 1793 statute. The first two sections provide for the extradition of fugitives from justice, and the last two sections with the rendition of fugitive slaves. For a history of the statute, see Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 397 (1990); William Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63 (1951).

exercised plenary power under the Fugitive Slave Clause when it enacted a statute in 1793 to enforce it.⁵⁰ Unlike the bank bill, no one questioned Congress's legislative power,⁵¹ even though the constitutional provision it enforces is in Article IV and not in Article I which enumerates Congress's legislative powers, and it did not delegate legislative authority to enforce it even though other sections of Article IV do expressly delegate power to Congress to enforce them.⁵²

In addition to prescribing a summary process for the rendition of fugitive slaves in which the alleged runaway had no rights to defend herself,⁵³ this 1793 statute conferred on slaveholders two remarkable remedies against anyone who knowingly interfered with the owners' recapture of a fugitive slave or assisted in her escape. The first was a "penalty" of five hundred dollars recoverable by the claimant or his agent in an action of debt.⁵⁴ This "punishment" was actually a private right of action for a civil fine.⁵⁵ Even more remarkable was the second remedy: a tort action for damages.⁵⁶ This federal statute, enacted in consultation with President Washington, Secretary of State Jefferson, and Attorney General Randolph just four years after the ratification of the United States Constitution by a Congress comprised of many of its Framers and ratifiers, provided for private parties to enforce their constitutionally secured property right through private causes of action! It presents important evidence not only of the Founders' conception of constitutional rights, but of their understanding of the scope of congressional powers to enforce them. Moreover, the 1793 statute is a significant example of constitution-making by executive and legislative branches of the

50. See Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

51. Significantly, there seems to be no evidence that any of the parties involved with the adoption of the Fugitive Slave Act of 1793 questioned Congress's power to enact it. Even Professor Paul Finkelman, who recently fervently argued that the Founders did not intend to delegate legislative authority to Congress to implement the Fugitive Slave Clause, does not offer any evidence that any of the participants even raised a question concerning Congress's authority to enact the statute. On the contrary, in an earlier article he wrote that, after Congress enacted the bill and sent it to President Washington, "[w]ithout any hesitation, President Washington signed this bill into law." Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L. J. 605, 621 (1993). Finkelman discusses the enactment of the 1793 Act in Finkelman, *supra* note 49. He argues that the founders did not intend to delegate legislative power to Congress in *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 259-63 (1994).

52. See, e.g., U.S. CONST., art. IV, §§ 3, 4.

53. See Act of Feb. 12, 1793, ch. 7, § 3; 1 Stat. 302, 302-03.

54. See Act of Feb. 12, 1793, ch. 7, § 4; 1 Stat. 302, 305.

55. *Stearns v. United States*, 22 F. Cas. 1188, 1192 (C.C. 1827-1840) (No. 13,341) (private actions for penalties are civil actions).

56. See Act of Feb. 12, 1793, ch. 7, § 4, 1 Stat. 302, 305.

government, and it constituted the exercise of a federal police power that overrode the police powers of the states, as we shall see.

Slave owners and their agents enforced their constitutionally secured right of recaption in private lawsuits which they brought under the 1793 Fugitive Slave Act in federal and state courts.⁵⁷ Slaveowners and their agents brought many civil suits under the 1793 statute, and they succeeded in recovering the civil fine and tort damages more often than they failed.⁵⁸

State and federal judges universally enforced the Fugitive Slave Act of 1793. In contrast to the judicial activism of the current Supreme Court's state sovereignty plurality in setting aside acts of Congress which they conclude violate principles of federalism and state sovereignty,⁵⁹ antebellum state and federal judges felt obligated to enforce the Fugitive Slave Clause and the Fugitive Slave Act of 1793, notwithstanding their

57. The best legal histories of fugitive slave recaption and the reaction of the nonslaveholding states are STANLEY CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1970); ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981); MORRIS, *supra* note 46. However, these histories focus on the recaption provision and ignore the civil actions of debt and tort.

58. See, e.g., *Vaughan v. Williams*, 28 F. Cas. 1115, 1118 (C.C.D. Ind. 1845) (No. 16,903) (verdict for defendant); *Jones v. VanZandt*, 13 F. Cas. 1040, 1046 (C.C.D. Ohio 1843) (No. 7,504) (verdict for plaintiff for \$1200) *aff'd* 46 U.S. (5 How.) 215 (1847); *Stearns*, 22 F. Cas. at 1192 (verdict for plaintiff for \$500 penalty reversed for error in jury charge); *Hill v. Low*, 12 F. Cas. 172, 174 (C.C.E.D. Pa. 1822) (No. 6,494) (verdict for plaintiff for \$500 penalty reversed for error in jury charge and new trial ordered). For tort actions, see, e.g., *Driskill v. Parish*, 7 F. Cas. 1068, 1068-69 (C.C.D. Ohio 1851) (No. 4,075) (per diem and travel expense costs retaxed from defendant to plaintiff for witness who was not summoned, but appeared voluntarily); *Driskill v. Parish*, 7 F. Cas. 1069, 1069 (C.C.D. Ohio 1851) (No. 4,076) (per diem and travel expense costs retaxed from defendant to plaintiff for two witnesses who were not summoned, but appeared voluntarily); *Oliver v. Kauffman*, 18 F. Cas. 657, 664 (C.C.E.D. Pa. 1850) (No. 10,497) (action on the case for harboring and concealing fugitive slaves, jury disagreed); retried as *Oliver v. Weakley*, 18 F. Cas. 678, 679 (3d Cir. 1853) (No. 10,502) (verdict and judgment for plaintiff for \$2800); *Ray v. Donnell*, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590) (verdict and judgment for plaintiff for \$1500); *Giltner v. Gorham*, 10 F. Cas. 424, 433 (C.C.D. Mich. 1848) (No. 5,453) (verdict and judgment for plaintiff for \$2,752); *Driskill v. Parrish*, 7 F. Cas. 1100, 1104 (C.C.D. Ohio 1845) (No. 4,089) (jury could not agree); retried as *Driskill v. Parish*, 7 F. Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4,088) (verdict and judgment for plaintiff for \$500, "the proved value of slaves in question"); *Jones*, 13 F. Cas. at 1042 (verdict for plaintiff of \$1200); *Worthington v. Preston*, 30 F. Cas. 645, 647 (C.C.E.D. Pa. 1824) (No. 18,055) (jailor not liable for fugitive slave's escape if he was not negligent); *Daggs v. Frazer*, 6 F. Cas. 1112, 1113-14 (D. Ia. 1849) (No. 3,538) (action of trover will not lie in Iowa to recover the value of slaves); *Glen v. Hodges*, 9 Johns. 66, 70 (N.Y. 1812) (action of trespass vi et armis by slave owner under 1793 Fugitive Slave Act affirmed and new trial ordered); *Kauffman v. Oliver*, 10 Pa. 514, 518 1849 (an action at common law does not lie for harboring runaway slaves or for aiding in their escape, and state courts do not have jurisdiction under the 1793 Act to try such cases; plaintiff amended his declaration and the cause continued at the costs of the plaintiff).

59. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 115 S. Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992).

personal abhorrence to slavery and the existence of conflicting state law.⁶⁰ Federal and state appellate judges generally asserted that the constitutional recognition of the slaveholder's right to recapture runaway slaves inherently delegated legislative power to Congress to enforce the right. When judges did not expressly assert this theory, they simply assumed it. Through the first half of the nineteenth century, every state and federal court that decided the question of the 1793 Fugitive Slave Act's constitutionality upheld it.⁶¹ Moreover, they universally concluded that the Supremacy Clause required them to enforce this federal constitutionally and statutorily secured property right over any state constitutional, statutory, or common law to the contrary. State and federal judges were deferential to Congress, not only recognizing its power to enforce the Fugitive Slave Clause, but also in refusing to decide on the justice, fairness, and policy considerations of the legislation.⁶²

Judges also admonished jurors faithfully to perform their legal duty under the Fugitive Slave Act even though they might find the statute morally repulsive. For example, in 1833 United States Supreme Court Justice Henry Baldwin, as circuit justice, instructed a federal jury in Philadelphia, Pennsylvania, to set aside their personal feelings about slavery and to vindicate the "personal rights which are made inviolable under the protection" of the Fugitive Slave Clause and the Fugitive Slave

60. See, e.g., *Charge to Grand Jury--Fugitive Slave Law*, 30 F. Cas. 1015, 1016 (D. Mass. 1851) (No. 18,263); *Johnson v. Tompkins*, 13 F. Cas. 840, 851, 855 (C.C.E.D. Pa. 1833) (No. 7,416); *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11, 18 (1823); *Wright v. Deacon*, 5 Serg. & Rawle 62, 63 (Pa. 1819).

61. As late as 1853 Supreme Court Justice John McLean observed that not a single judge or court had held the Fugitive Slave Act unconstitutional. Justice McLean asserted:

The act of 1793 has been in operation about sixty years. During that whole time it has been executed as occasion required, and it is not known that any court, judge, or other officer has held the act, in this [summary process to determine right to remove alleged fugitive slave], or in any other respect, unconstitutional.

Miller v. McQuerry, 17 F. Cas. 335, 340 (C.C.D. Ohio 1853) (No. 9,583).

62. For example, Massachusetts Supreme Court Chief Justice Isaac Parker noted that the people of Massachusetts were especially troubled that the 1793 statute gave slaveowners the legal power to seize an alleged fugitive slave without judicial process. Nevertheless, he declared that he was constrained by his judicial function to dismiss this concern, commenting that "[w]hether the statute is a harsh one, is not for us to determine." *Griffith*, 19 Mass. (2 Pick.) at 18. See also *In re Martin*, 16 F. Cas. 881, 884 (C.C.S.D.N.Y. 1827-1840)(No. 9,154); *Johnson* 13 F. Cas. at 851; *In re Susan*, 23 F. Cas. 444, 445 (C.C.D. Ind. 1818) (No. 13,632); *Jack v. Martin*, 12 Wend. 311, 321 (N.Y. Sup. Ct. 1834), *aff'd on other grounds*, *Jack v. Martin*, 14 Wend. 507 (N.Y. 1835); *Glen*, 9 Johns. at 69; *Wright*, 5 Serg. & Rawle at 63. The United States Supreme Court upheld Congress's legislative authority to enforce the Fugitive Slave Clause in the first constitutional challenge it decided. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 568 (1842). Justice Story acknowledged that state courts universally upheld the Fugitive Slave Act of 1793. See *id.* at 567.

Act of 1793.⁶³ The jury did its duty and returned a verdict of \$4,000 for the false arrest of slave catchers who sued a justice of the peace, a local constable, and private citizens of Montgomery County, Pennsylvania.⁶⁴

Consequently, when litigants challenged the constitutionality of the Fugitive Slave Act, they did not ordinarily question Congress's authority to legislate to implement the Fugitive Slave Clause.⁶⁵ Rather, when they attacked the statute, they argued that it violated the alleged fugitive slave's Bill of Rights guarantees or her rights under state legal process.⁶⁶ However, the fact that blacks were unable to defend themselves at summary fugitive slave hearings by testifying or entering evidence in their behalf gave rise to the practice of kidnapping blacks and selling them into slavery.⁶⁷ Several free states responded to this practice in the early decades of the nineteenth century by enacting antiskidnapping or personal liberty statutes that attempted to repeal the federal right of self-help recaption and to provide some procedural protections to the alleged fugitive slave before the magistrate could issue a certificate of removal.⁶⁸

Moreover, these antiskidnapping statutes also imposed heavy penalties against anyone who illegally seized a person with the intention of enslaving her or of selling her into slavery.⁶⁹ If a claimant exercised his federally secured right to self-help recaption and seized an alleged runaway slave under the 1793 Act, without a warrant from a local magistrate or a federal judge, he could be prosecuted as a kidnapper under state law.⁷⁰ Designed to protect the personal liberty of free Blacks, these personal liberty laws interposed state legal process between the national government and individuals claiming rights under the Constitution and laws of the United States. Thus, federal constitutional

63. *Johnson*, 13 F. Cas. at 855. See also *Charge to Grand Jury*, 30 F. Cas. at 1016-17 (jurors must enforce the law even though they find it morally repugnant).

64. *Johnson*, 13 F. Cas. at 855.

65. For an exception see *In re Susan*, 23 F. Cas. at 445.

66. See, e.g., *Wright*, 5 Serg. & Rawle at 63 (defendant argues that the Fugitive Slave Act is unconstitutional because it denies him the right to jury trial guaranteed by the United States and Pennsylvania constitutions); *Griffith*, 19 Mass. (2 Pick.) at 14-15 (Massachusetts attorney general argues that the Fugitive Slave Act is unconstitutional because it violates the alleged fugitive slave's Fourth Amendment right against unreasonable seizures); *In re Martin*, 16 F. Cas. at 883 (defendant argues that the 1793 Act is unconstitutional because it deprives him of Seventh Amendment right to jury trial).

67. See MORRIS, *supra* note 46, at 23-34.

68. See *id.* at 27-29. Some statutes also required a jury trial to determine the status of an alleged fugitive slave. See *id.* at 83. Although the fugitive slave was not permitted to testify on her own behalf, she was nonetheless permitted to enter evidence relating to her status. *Id.* at 51-53.

69. See, e.g., the Pennsylvania 1826 Antiskidnapping Law. The best account of these statutes is, MORRIS, *supra* note 46, at 27-29.

70. However, Justice Baldwin affirmed the claimants' right of self-help in *Johnson v. Tompkins*, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833) (No. 7,416).

and statutory rights directly conflicted with the traditional state police power and function of protecting the personal safety and the personal liberty of its citizens and inhabitants. Recognizing that these state statutes and judges posed serious deterrents to the recapture of fugitive slaves, proslavery Southerners turned to the United States Supreme Court to resolve the resulting conflicts between state and federal law and the impending crisis in American federalism.⁷¹

The states of Maryland and Pennsylvania contrived a test case which afforded the Court the opportunity to resolve the conflicting theories of federalism in 1842.⁷² It is cited in *Prigg v. Pennsylvania*.⁷³ The specific issue presented to the Court was the constitutionality of the Pennsylvania Personal Liberty Law of 1826.⁷⁴ The Court unanimously held that the

71. See MORRIS, *supra* note 46, at 94.

72. See *Id.* at 94-95; V CARL B. SWISHER, HISTORY OF THE SUPREME COURT, THE TANEY PERIOD, 1836-64, at 436 (1974). Edward Prigg and others, acting as agents of a Maryland slaveowner, secured from a local justice of the peace in Pennsylvania a warrant for the arrest of certain fugitive slaves. They seized the runaways under authority of this warrant and presented them to the justice of the peace who had issued the warrant. However, he refused to hold a hearing or to issue a certificate of removal as required by federal statute which would have authorized the fugitive slaves' removal from Pennsylvania to Maryland. The agents simply returned the slaves to their owner in Maryland. The agents were subsequently indicted and charged with kidnapping by a Pennsylvania grand jury under an 1826 Pennsylvania antiskidnapping statute. The Pennsylvania governor applied to the governor of Maryland to extradite the accused kidnappers, but was refused. Instead, the Maryland governor referred the matter to the state legislature which passed resolutions declaring that the right of recaption was guaranteed by the Constitution and laws of the United States and could not be abridged by the states. After a commissioner sent by Maryland to Pennsylvania failed to obtain a dismissal of the indictments and modifications to the Pennsylvania antiskidnapping statute, the Maryland and Pennsylvania legislatures sought to have an expedited hearing brought before the United States Supreme Court to resolve the issues in dispute. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). Carl Swisher reports that "the Pennsylvania legislature arranged for a trial at which by special verdict Edward Prigg, one of the captors, would be found guilty and the case, challenging the constitutionality of the 1826 statute, would be handled in such a way that it could be taken to the Supreme Court." SWISHER, *supra*, at 436. In his opinion for the Court, Justice Story acknowledged the origin of this suit by agreement between the states. He stated that, before he addressed

the very important and interesting questions involved in this record, it is fit to say, that the cause has been conducted in the Court below, and has been brought here by the co-operation and sanction, both of the state of Maryland, and the state of Pennsylvania, in the most friendly and courteous spirit, with a view to have those questions finally disposed of by the adjudication of this Court; so that the agitations on this subject in both states, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest.

Prigg, 41 U.S. (16 Pet.) at 609. Justice McClean was even more explicit. Asserting that the decision of the Pennsylvania Supreme Court "was pro forma," he added: "Indeed, I suppose, the case has been made up merely to bring the question before this Court." *Id.* at 673 (McLean, J., concurring); see also *id.* at 659.

73. 41 U.S. (16 Pet.) 539 (1842).

74. See *id.* at 558.

Pennsylvania statute was unconstitutional.⁷⁵ It also unanimously held the Fugitive Slave Act of 1793 was constitutional in every respect save one.⁷⁶ The constitutional infirmity of the 1793 statute was the jurisdiction Congress attempted to confer on state magistrates.⁷⁷ All but three of the Justices held that Congress's power under the Fugitive Slave Clause was exclusive and that Congress could enforce constitutional rights and federal statutes only through federal courts.⁷⁸ The three dissenters, although concurring in the judgment of the Court and its theories of constitutional rights and congressional powers in other respects, insisted that the states possessed concurrent jurisdiction to enforce this constitutional right.⁷⁹

Justice Joseph Story wrote the opinion for the Court.⁸⁰ Story's opinion reaffirmed and attributed to the Founders the conception of the Constitution as a dynamically evolving, power-enhancing framework of government whose meaning was largely defined by political practice.⁸¹ Judges should therefore interpret the Constitution "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it."⁸² As a general rule of interpretation, Story opined, "[n]o Court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and

75. *See id.* at 625-26.

76. *See id.* at 596-601.

77. *See id.* at 598.

78. Justice James M. Wayne summarized the holding of the Court and the positions of the Justices on certain key points: All of the Justices agreed that the Pennsylvania statute was unconstitutional; that the Fugitive Slave Clause "was a compromise between the slaveholding, and the non-slaveholding states, to secure to the former fugitive slaves as property." *Id.* at 637 (Wayne, J., concurring). Wayne concluded that there was no disagreement "among the judges as to the reversal of the judgment; none in respect to the origin and object of the provision, or the obligation to exercise it." *Id.* (Wayne, J., concurring). The disagreement that did exist among the Justices, Wayne explained, related "to the mode of execution." *Id.* (Wayne, J., concurring). Three Justices insisted that the states could "legislate upon the [Fugitive Slave Clause], in aid of the object it was intended to secure; and that such legislation is constitutional, when it does not conflict with the remedy which Congress may enact." *Id.* at 637-38 (Wayne, J., concurring). Justice Wayne's summary reveals the positions taken by the silent Justices on critical issues. The Court was unanimous regarding the nature of the constitutional rights guaranteed by the Fugitive Slave Clause, and that this guarantee delegated plenary legislative authority to Congress to protect and enforce the rights thus guaranteed. *See id.* at 636-38 (Wayne, J., concurring).

79. The three Justices were Chief Justice Taney, Justice Thompson, and Justice Daniel. *See id.* at 626 (Taney, C.J., dissenting); *id.* at 633 (Thompson, J., dissenting); *id.* at 650 (Daniel, J., dissenting).

80. *See id.* at 608. But six of his brethren filed concurring and dissenting opinions. *See id.* at 626-74.

81. *See id.* at 606-26.

82. *Id.* at 612.

protect them."⁸³ The Court's deference to the law-making decisions of the people's representatives was the judicial norm, whether the decisions were made by a constituent assembly or a legislative assembly.

Story therefore broadly interpreted the Fugitive Slave Clause as containing two fundamental guarantees.⁸⁴ The first constitutional guarantee prohibited the states from freeing fugitive slaves.⁸⁵ Significantly, Story interpreted this prohibition against state action as an affirmative recognition of "a positive and absolute right."⁸⁶ Thus, the Court unanimously held that the Constitution nationalized the slaveowner's property right to his slave.⁸⁷

The Fugitive Slave Clause contains a second provision which requires that the fugitive slave "shall be delivered up on Claim of the Party to whom such Service or Labour may be due."⁸⁸ Story interpreted these two provisions as a constitutional guarantee of the slave owners' property

83. *Id.*

84. *See id.* at 611.

85. The first part of the Fugitive Slave Clause states: "No person held to Service or Labour in one State under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labour." U.S. CONST. art. IV, § 2, cl. 3; *see also Prigg*, 41 U.S. (16 Pet.) at 611. Story explained the obvious and literal meaning of this language: "The slave is not to be discharged from service or labour, in consequence of any state law or regulation." *Id.* at 612.

86. *Id.* at 613. Story declared: "The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain." *Id.* at 612.

87. *See id.* at 613. Story noted that it "puts the right to the service or labour upon the same ground and to the same extent in every other state as in the state from which the slave escaped, and in which he was held to the service and labour." *Id.* "If this be so," Story concluded, "then all the incidents to that right attach also." *Id.* at 613. Story identified the common law origin of this constitutionally secured right of slave recaption:

[T]his is no more than a mere affirmation of the principles of the common law applicable to this very subject. Mr. Justice Blackstone (3 Bl. Comm. 4) lays it down as unquestionable doctrine. "Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.

Id. Story asserted that this common law property right had been elevated to a federally enforceable constitutional right.

Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence.

Id.

88. U.S. CONST. art. IV, § 2, cl. 3.

right which delegated to Congress plenary power to enforce it.⁸⁹ Story declared: "If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted,) the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."⁹⁰ Story reaffirmed *M'Culloch's* theory of powers implied from the ends for which the national government was established as distinguished from powers implied from those enumerated in Article I and other constitutional provisions, stating:

The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted.⁹¹

Story supported his interpretation of the Constitution's text by attributing it to the Founders.⁹²

He also relied on the political practice of the Founders who enacted the 1793 statute and of the federal and state judges and other governmental

89. See *Prigg*, 41 U.S. (16 Pet.) at 615. This language, Story observed, "contemplated some farther remedial redress than that, which might be administered at the hands of the owner himself." *Id.* This remedial assistance must come from the United States government. *Id.*

90. *Id.*

91. *Id.*

92. See *id.* at 621. Story cited the Founders' understanding and political practice to support his reading of the rights and legislative powers implicit in the Constitution's text. See *id.* He attributed his interpretation of the Constitution's text and "this very view of the power and duty of the national government" to the Founders and the congressional framers of the 1793 Fugitive Slave Act. See *id.* at 616. The framers of the statute had a "vast influence" on the question of its constitutionality, Story observed, for many of the congressional framers of the Act and President George Washington, who initiated its legislative adoption and signed it into law, were also framers of the Constitution or were "intimately connected with its adoption." *Id.* at 621. Justice Story noted that:

It was passed only four years after the adoption of the Constitution. In that Congress were many of the leading and most distinguished men of the convention. The act was not passed hastily; for it was reported in 1791, and finally acted on in 1793. It was not passed without full consideration; for the Virginia case, and the different opinions, looking to federal or state legislation upon a kindred subject, were communicated to Congress in 1791. Here, then, is a contemporaneous exposition of the constitutional provision in the act itself, which has been always regarded by this Court as of very high authority. A practical exposition, which, in the language of a distinguished commentator, approaches nearest to a judicial exposition.

Id. at 566. The distinguished commentator to whom Story referred was none other than himself. His citation was to "1 STORY'S COMM. ON THE CONST. 392." But, Story also cited the Supreme Court's decisions in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

officers who universally accepted and acted upon it and considered it "a binding and valid law."⁹³

A majority of the Court held that Congress's power to enforce the slaveholders' constitutional right was exclusive. The Court held that Congress's power was exclusive for several reasons that evince the Court's view of a national sovereignty based theory of federalism. First, the right of recaption was an absolute and positive right enforceable throughout the United States independent of the states.⁹⁴ Second, this right was a new right created by the Constitution and beyond state jurisdiction.⁹⁵ Justice Story reasoned that "[t]he natural inference deducible from this consideration certainly is, in the absence of any positive delegation of power to the state legislatures, that it belongs to the legislative department of the national government, to which it owes its origin and establishment."⁹⁶ Consequently, Congress could enforce federal rights and duties only through federal agencies.

Although the Court's decision in *Prigg* affirmed in principle the constitutional and federally secured right of slave owners, by restricting the duty of enforcement to federal institutions the Court largely

93. *Prigg*, 41 U.S. at 621. Nevertheless, "independent of the vast influence," which "a contemporaneous exposition of the provisions [of the Constitution] by those, who were its immediate framers, or intimately connected with its adoption" should have in constitutional interpretation, Story, like Marshall, Johnson, and other state appellate and federal judges, assumed political practice defined the Constitution. *Id.* Indeed, Story cited Supreme Court precedents in support of this method of constitutional interpretation. *See id.* Citing *Cohens*, 19 U.S. (6 Wheat.) 264, *Martin*, 14 U.S. (1 Wheat.) 304, and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), Story declared: "Especially did this Court in [these cases] rely upon contemporaneous expositions of the Constitution, and long acquiescence in it, with great confidence, in the discussion of questions of a highly interesting and important nature." *Prigg*, 41 U.S. (16 Pet.) at 621. He noted that Congress had acted on a "rule of interpretation" which assumed the Constitution delegated "the right as well as the duty" to Congress to legislate on the subject of fugitive slaves. *Id.* at 620. He also noted that all of the provisions of the 1793 statute had been universally accepted and acted upon by judges and other governmental officials who "uniformly recognized [it] as a binding and valid law." *Id.* at 621. Story thus invoked political practice as a theory of constitutional interpretation.

[I]f the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would in our judgment entitle the question to be considered at rest; . . . Congress, the executive, and the judiciary have, upon various occasions, acted upon this as a sound and reasonable doctrine.

Id. However, Story quickly added that the Court did not consider the constitutionality of the 1793 Act to be a doubtful question. *See id.* at 622.

94. *See id.* at 623. Story stated: "Under the Constitution it is recognized as an absolute, positive, right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by state sovereignty or state legislation." *Id.*

95. *See Prigg*, 41 U.S. (16 Pet.) at 623. Story explained: "It is, therefore, in a just sense a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy." *Id.*

96. *Id.*

undermined in practice the ability of slaveowners to enforce their right. Northern free states interpreted *Prigg* as a license to refuse to assist slaveowners in recapturing their slaves.⁹⁷ They enacted new personal liberty laws to enforce the due process rights of alleged fugitive slaves and prohibited state officials from assisting their recapture in any way.⁹⁸ These actions added to an increasing pattern of lawlessness in which groups hostile to slavery interfered with the recapture of fugitive slaves and aided in their escape. In nullifying state authority to aid in recapturing runaway slaves, the *Prigg* decision encouraged the organization of groups to assist runaways' escape to freedom. *Prigg* thus contributed to growing sectional conflict.⁹⁹

Northern resistance led to Southern demands for a more effective federal statute. Congress complied in 1850. As in 1793, Congress in 1850 enacted legislation to enforce the constitutional right of slaveholders and to obviate the conflicts between the slave and free states.¹⁰⁰ The Fugitive Slave Act of 1850¹⁰¹ represented an even more remarkable exercise of national authority to enforce constitutional rights than its 1793 counterpart. Congress authorized federal judges to appoint commissioners with "the powers that any justice of the peace, or other magistrate of any

97. See, e.g., *Kauffman v. Oliver*, 10 Barr 514 (Pa. 1849) where the Pennsylvania Supreme Court held there was no common law action for the recaption of slaves who escaped to Pennsylvania from another state; that Pennsylvania state courts "are interdicted from assuming a voluntary jurisdiction" in such cases, *id.* at 519; "that an action of this kind can only be sustained under the act of Congress of 1793; that our state courts have not jurisdiction of an action under the statute; and the principles of the common law do not sustain any such action in this state." *Id.* Echoing the Supreme Court's opinion in *Prigg*, the court also asserted that:

Congress has power to pass all laws necessary to make the claim efficacious and commensurate with the constitutional provision. But it must be done through the court over which Congress have power, and through their instrumentality; otherwise, the claim might be rendered abortive by the decisions of the state courts, pursuing their own local policy The provisions of the act of Congress must be pursued in the tribunals of the United States. There they meet with no warfare by local legislation, or municipal peculiarities. And the person claiming the services of the fugitive is in the forum of that sovereignty and jurisdiction under which his claim is made.

Id. at 517. After the Pennsylvania Supreme Court dismissed Mrs. Cecilia Oliver's common law action for damages against Daniel Kauffman and others for assisting certain of her slaves to escape, she and members of her family sued in federal court under section four of the 1793 Act. The first suit ended in a hung jury. See *Oliver v. Kauffman*, 18 F. Cas. 657 (C.C.E.D. Pa. 1850) (No. 10,497). Their second suit resulted in a jury verdict awarding them \$2,800 in damages. See *Oliver v. Weakley*, 18 F. Cas. 678 (3d Cir. 1853) (No. 10,502).

98. See MORRIS, *supra* note 46, at 114-23; SWISHER, *supra* note 72, at 545.

99. See SWISHER, *supra* note 72, at 546-48. Indeed, Lincoln's biographer, Albert J. Beveridge, considered the *Prigg* case as one of the most important decided by the Supreme Court in this regard. See III ALBERT J. BEVERIDGE, ABRAHAM LINCOLN, 1809-1858 67, 67 n.4 (1928).

100. See MORRIS, *supra* note 46, at 130-47.

101. Act of Sept. 18, 1850, ch. X, 9 Stat. 462 [hereinafter Fugitive Slave Act of 1850].

of the United States" had to arrest, imprison, or bail offenders of any crime against the United States.¹⁰² It gave these commissioners concurrent jurisdiction with federal circuit, district, and territorial court judges to grant certificates of removal to claimants of fugitive slaves "upon satisfactory proof being made."¹⁰³ A scholar early in this century correctly analogized this enforcement structure to federal administrative commissions, such as the Interstate Commerce Commission and boards of immigrant inspectors.¹⁰⁴

Moreover, the 1850 statute imposed upon federal legal officers the duty to enforce its provisions under penalty of heavy fines of \$1,000 payable to the slave owner.¹⁰⁵ Should the fugitive slave escape from the custody of federal officials, they were made liable for the full value of the slave.¹⁰⁶ The statute also imposed on private citizens the duty to enforce the slaveholder's constitutional and statutory rights. It authorized commissioners to call a posse comitatus and *commanded* "all good citizens" to assist in the execution of the statute whenever their aid was required.¹⁰⁷

The Fugitive Slave Act of 1850 combined the right of self-help recapture with compulsory federal summary legal process.¹⁰⁸ It expressly prohibited the alleged fugitive slave from entering evidence on her behalf, and it expressly provided that the certificate of removal shall be conclusive of the right of the claimant or his agent to remove the fugitive to the state from which she escaped.¹⁰⁹ It expressly invoked the Supremacy Clause¹¹⁰ by making the certificate an absolute bar to "any

102. *Id.* at § 1.

103. *Id.* at § 4.

104. Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161, 181-182 (1921); see also, MORRIS, *supra* note 46, at 132 ("The primary purpose of the bill was to increase the number of officials involved in adjudicating claims under the federal law by spreading the responsibility to nonjudicial officers, such as postmasters and collectors of customs.").

105. Fugitive Slave Act of 1850 §§ 1, 5.

106. *Id.* at § 5.

107. *Id.*

108. *Id.* at § 6. The statute authorized slave owners and their agents to reclaim runaway slaves either by warrant issued by a federal judge or commissioner or by seizing the fugitive without legal process and bringing her before a federal judge or commissioner "whose duty it shall be to hear and determine the case of such claimant in a summary manner," and, on "satisfactory proof being made," to issue a certificate authorizing the claimant or his agent to remove the slave with "such reasonable force and restraint as may be necessary [sic]" back to the state in which she owed service.

109. *Id.*

110. U.S. CONST., art. VI, cl. 2.

process issued by any court, judge, magistrate, or other person whomsoever."¹¹¹

The Fugitive Slave Act of 1850 superseded the civil penalty provided in the Fugitive Slave Act of 1793 with criminal penalties for knowingly and willingly violating the statute. On conviction, the defendant was subject to a fine of up to \$1,000 and imprisonment for up to six months.¹¹² This provision doubled the amount of the civil penalty recoverable under the Fugitive Slave Act of 1793. Violators were also subject to "civil damages" in the amount of \$1,000 for each fugitive slave lost, payable to the owner.¹¹³ The statutory "civil damages" of \$1,000 in the 1850 Fugitive Slave Act benefitted slaveholders, since it was greater than the damages awarded in tort actions under the 1793 Fugitive Slave Act.¹¹⁴ The courts interpreted these damages as a tort remedy that claimants might seek as an alternative to the tort action provided in the Fugitive Slave Act of 1793.¹¹⁵

The fee structure provided in the 1850 Act also appeared to favor slaveowners. The fees of federal marshals, deputy marshals, and court clerks in fugitive slave cases were set at \$10 if a certificate of removal

111. Fugitive Slave Act of 1850 § 6. The only concession to state powers Congress included in this Act was a provision permitting as conclusive evidence of the identity and service owed by the alleged fugitive "satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory, from which such person owing service or labor may have escaped," with a certificate of the authority of the officer and the seal of the proper state court or officer. *Id.* The last section of the statute elaborated the state process permitted as conclusive evidence of the fact of escape and the service owed to the claimant as "satisfactory proof" recorded in a court transcript authenticated by the clerk and court seal. *Id.* at § 10. The claimant or his agent could present this record to a federal officer in any state or territory in which the slave had escaped, and, being conclusive evidence, the federal officer was obliged to issue the certificate of removal. *Id.*

112. *Id.* at § 7.

113. *Id.*

114. *See, e.g.,* *Oliver v. Weakley*, 18 F. Cas. 678, 679 (3d. Cir. 1853) (No. 10,502) (damages of \$2,800 awarded for twelve escaped slaves, two husbands, two wives and eight children); *Jones v. Vanzandt*, 13 F. Cas. 1040 (C.C.D. Ohio 1843-51) (Nos. 7501-7505) (value of escaped slave was fixed at \$600); *Ray v. Donnell*, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590) (damages of \$1,500 awarded for one adult woman slave and her four children); *Driskill v. Parish*, 7 F. Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4,088) (value of two escaped slaves fixed at \$500); *Giltner v. Gorham*, 10 F. Cas. 424, 427 (C.C.D. Mi. 1848) (No. 5,453) (value of six escaped slaves fixed at \$2,752).

115. *Norris v. Crocker*, 54 U.S. (13 How.) 429, 440 (1851). Justice Grier held that the Fugitive Slave Act of 1850 did not repeal the tort action of compensatory damages under the Fugitive Slave Act of 1793. Indeed, he declared that "[i]n case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort." *Oliver v. Kauffman*, 18 F. Cas. 657, 660 (C.C.E.D. Pa. 1850) (No. 10,497).

was issued and only \$5 if the certificate was denied.¹¹⁶ However, the federal officer who executed process was entitled to a fee of \$5 and any other necessary costs incurred, such as food and lodging during the fugitive slave's detention, which were to be paid by the claimant. Should the return of fugitive slaves be met with local resistance in a free state, Congress provided for the removal of the fugitive by federal force at federal expense.¹¹⁷

The Fugitive Slave Act of 1850, although part of the famous Compromise of 1850 intended by Henry Clay and Daniel Webster to ease sectional feelings over slavery, actually heightened those tensions. The summary process culminating in the certificate of removal of the alleged fugitive slave became the focus of antislavery political opposition in the North.¹¹⁸ The denial of the right to a jury trial, the right of the accused to testify in his own behalf, and the right to habeas corpus combined with the summary nature of the proceeding based exclusively on the claimant's evidence relating to the alleged fugitive's status, effectively prevented the free states' presumption of freedom and other personal liberty guarantees from interfering with the slaveholder's right of recaption. Moreover, the disparity in fees appeared to abolitionists and antislavery sympathizers as a bribe to ensure that the commissioner or judge would issue the certificate of removal.¹¹⁹ Abolitionists, such as Wendell Phillips, urged Northerners to resist and disobey the statute.¹²⁰ Even more moderate antislavery societies declared that moral and religious people could not obey such an immoral and irreligious law.¹²¹

116. Fugitive Slave Act of 1850 § 8.

117. *Id.* at § 9. However, on mere affidavit by the claimant or his agent that he had reason to believe that a rescue would be attempted by force before he could return the fugitive to the state from which she fled, the federal officer who made the initial arrest was required to retain as many persons as necessary to overcome such force and to return the fugitive to the claimant in the state from which the fugitive slave escaped. *See id.* The fees and costs of this process were to be paid out of the United States Treasury.

118. *See* MORRIS, *supra* note 46, at 137-38. Professor Allen Johnson of Yale Law School observed decades ago that contemporary critics of the 1850 Act focused their criticisms on three points: the failure of the accused to testify in her own defense; the summary procedure or absence of a jury trial; and the denial of the privilege of habeas corpus. He also quoted additional criticisms of Charles Sumner which included the *ex parte* evidence, the absence of cross-examination, the denial of the Fourth Amendment guarantee against unreasonable searches and seizures, the denial of the Fifth Amendment guarantee of due process of law, the exercise of Article III judicial powers by commissioners, and the "bribe" of a double fee to the commissioners for issuing the certificate of removal. *See* Johnson, *supra* note 104, at 171-73.

119. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 80 (1988).

120. *Id.* at 82.

121. *Id.* at 82-86.

Northerners did resist federal legal process with varying degrees of force and violence.¹²² Presidents Millard Fillmore in 1851 and Franklin Pierce in 1854 personally intervened with federal force against mobs that attempted to rescue fugitive slaves who were held in federal custody.¹²³ The Kansas-Nebraska Act of 1854, the open warfare instigated by John Brown in -Kansas, and the Supreme Court's *Dred Scott* decision¹²⁴ produced a fierce Northern backlash. By the middle of the 1850s, many Northern state legislatures and judiciaries interposed their police powers to nullify the Fugitive Slave Acts.¹²⁵

Wisconsin presented the most notorious example of state interposition, for the state's executive, legislative, and judicial branches joined its citizens in strenuous efforts to nullify federal law.¹²⁶ Indeed, the Wisconsin Supreme Court rejected precedents of the United States Supreme Court and lower federal courts¹²⁷ and declared the Fugitive Slave Act of 1850 unconstitutional; it issued writs of habeas corpus directing a federal marshal to release defendants arrested under the statute

122. See, e.g., Charge to Grand Jury--Fugitive Slave Law, 30 F. Cas. 1015 (D.C. Mass. 1851) (No. 18,263); *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851); *Sims's Case*, 61 Mass. (7 Cush.) 285 (1851); ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 217-221 (1975); LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 89-97 (1957); MCPHERSON, *supra* note 119, at 80-91; MORRIS, *supra* note 46, at 151-85.

123. See LEVY, *supra* note 122, at 89-90; MCPHERSON, *supra* note 119, at 82-83, 104-05; MORRIS, *supra* note 46, at 166. Professor McPherson recounts that federal marshals appealed to President Franklin Pierce for help in returning fugitive slave Anthony Burns from Boston to Virginia when his capture in Boston triggered riots in which a man was killed in an assault on the courthouse where Burns was being held. President Pierce sent several companies of marines, cavalry, and artillery to Boston, and admonished federal officers to spare no expense to ensure that federal law was enforced. They were joined by Massachusetts militia and Boston police in an effort to keep the peace. This single incident, McPherson concludes, cost the government \$100,000, which is "equal to perhaps two million in 1987 dollars." MCPHERSON, *supra* note 118, at 120.

124. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

125. The New England states and the states of Ohio, Michigan, and Wisconsin enacted Personal Liberty Laws in the years 1854 through 1861 designed to undermine the Fugitive Slave Acts. MORRIS, *supra* note 46, at 166-68, 219-22.

126. See, SWISHER, *supra* note 72, at 654-56; Vroman Mason, *The Fugitive Slave Law In Wisconsin, With Reference to Nullification Sentiment*, in PROCEEDINGS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 117 (1896).

127. The United States Supreme Court analyzed the Fugitive Slave Act of 1850 in *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851). It did not formally decide its constitutionality because that question was not before it. However, the Court's discussion assumed the Act's constitutionality. For related opinions of the lower federal courts, see *Miller v. McQuerry*, 34 F. Cas. 335 (C.C. Ohio 1853) (No. 9,583); Charge to Grand Jury--Fugitive Slave Act, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261); *United States v. Scott*, 27 F. Cas. 990 (D. Mass. 1851) (No. 16,240B). Federal District Court Judge Andrew G. Miller upheld the slave owner's right under the 1850 statute to seize his fugitive slave, with or without a warrant, and issued a writ of habeas corpus directed to the sheriff who held him on a charge of kidnapping and assault and battery for exercising his federal right of recapture. *United States ex rel. Garland v. Morris*, 26 F. Cas. 1318 (D. Wis. 1854) (No. 15,811).

for leading a mob that stormed a Milwaukee jail and freed an alleged fugitive slave; and it refused to recognize the Supreme Court's appellate jurisdiction over its decisions.¹²⁸ The United States Supreme Court vehemently asserted its appellate jurisdiction,¹²⁹ but the state did not appear when the appealed cases were argued on their merits.

The United States Supreme Court reversed the Wisconsin Supreme Court's decisions in a remarkably nationalistic opinion written by Chief Justice Roger B. Taney which dramatically affirmed the supremacy of national sovereignty over state sovereignty.¹³⁰ He asserted that a state is sovereign only "to a certain extent," for its "sovereignty is limited and restricted by the Constitution of the United States"¹³¹ and by the need for national uniformity in federal law.¹³² The Court reaffirmed its appellate jurisdiction over the state's highest court in all federal questions. It also unanimously affirmed the constitutionality of the Fugitive Slave Act of 1850, "in all of its provisions,"¹³³ in an unequivocal rejection of Wisconsin's attempted interposition and nullification of federal law.

The Civil War ended the struggle of the Northern states to protect the personal liberties of alleged runaway slaves from federal efforts to enforce the constitutional and statutory rights of slaveowners. However, the constitutional crisis in federalism relating to individual liberty reemerged after the Civil War. The Thirteenth Amendment abolished slavery in December 1865. Republicans in the Thirty-Ninth Congress ironically asserted the broad theories of constitutional rights and congressional power to enforce them developed in cases such as *M'Culloch v. Maryland*, *Prigg v. Pennsylvania*, and the other Fugitive Slave Clause cases. They therefore interpreted the Thirteenth Amendment's abolition of slavery as an affirmative guarantee of freedom and the rights of freemen which delegated to Congress plenary power to secure the status and enforce the rights of all United States citizens.¹³⁴

128. *In re Booth*, 3 Wis. 1, *aff'd*, 3 Wis. 49 (1854) (habeas granted); *Ex parte Booth*, 3 Wis. 145 (1854) (habeas denied while case is within jurisdiction of another court); *In re Booth and Rycraft*, 3 Wis. 157 (1855) (habeas granted).

129. See *United States v. Booth*, 59 U.S. (18 How.) 477 (1855).

130. See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

131. *Id.* at 516.

132. *Id.* at 518.

133. *Id.* at 526.

134. Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 567-70, 581 (1989) [hereinafter Kaczorowski, *Enforcement Provisions*]; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 895-99 (1986) [hereinafter Kaczorowski, *Revolutionary Constitutionalism*]. For example, Senator Lyman Trumbull, the principal author of the Civil Rights Act of 1866, introduced the bill to the Senate with the declaration: "Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it

Again, ironically, they used the Fugitive Slave Act of 1850 as a model when they exercised plenary power to enforce the civil rights of American citizens by enacting the Civil Rights Act of 1866.¹³⁵ The Civil Rights Act of 1866¹³⁶ criminalized certain violations of the civil rights¹³⁷ the statute conferred on United States citizens,¹³⁸ and it conferred primary civil and criminal jurisdiction on the federal courts to enforce these rights whenever the citizen was unable to enforce them through state law enforcement institutions.¹³⁹ It provided for the judicial appointment of commissioners and imposed on them and on United States Attorneys, Marshals, and Deputy Marshals the duty, "at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act."¹⁴⁰ Federal attorneys and marshals who failed "to obey and execute all warrants and precepts issued under the provisions of this act" were subject to a fine of up to \$1,000 payable to "the person upon whom the accused is alleged to have committed the offence."¹⁴¹ This section also authorized commissioners "to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary" to enforce this act and to ensure its "faithful observance" and that of the Thirteenth Amendment.¹⁴² It also imposed a fine of up to \$1,000 and imprisonment of up to six months on anyone convicted of "knowingly and wilfully obstruct[ing], hinder[ing], or prevent[ing] any officer, or other person" authorized to execute process under this act

from arresting any person . . . or [who] shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, . . . or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person . . . , or shall harbor or

prevailed in a portion of the country." CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). House floor manager of the Civil Rights Act of 1866 expressly cited *M'Culloch* and *Prigg* as authority and declared that "The possession of the rights [of free men] by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy." *Id.* at 1294 (remarks of Rep. Wilson). *See also, id.* at 1118 (remarks of Rep. Wilson); *id.* at 1836 (remarks of Rep. Williams).

135. Act of April 9, 1866, ch. 31, 14 Stat. 27.

136. *Id.* *See also* Kaczorowski, *Enforcement Provisions*, *supra* note 133, at 599-90; Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AMER. HIST. REV. 45, 59 (1987) [hereinafter Kaczorowski, *To Begin the Nation Anew*].

137. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27.

138. *See id.* at § 1.

139. *See id.* at § 3.

140. *Id.* at § 4.

141. *Id.* at § 5.

142. *Id.*

conceal any person who whose arrest a warrant or process shall have been issued. . . .¹⁴³

It also provided that all fees and other expenses incurred in the execution of this statute, such as food and lodging for those detained for violating the statute's provisions, were to be paid out of the United States treasury, but were made "recoverable from the defendant as part of the judgment in case of conviction."¹⁴⁴

This same Congress drafted the Fourteenth Amendment with the understanding that it incorporated into the Constitution their interpretation of the Thirteenth Amendment and the plenary power to enforce citizens' rights that they had just exercised in enacting the Civil Rights Act under the Thirteenth Amendment.¹⁴⁵ Indeed, they incorporated section one of the Fourteenth Amendment to ensure the constitutionality of the Civil Rights Act of 1866. Many of the Framers of the Fourteenth Amendment enacted more far-reaching civil rights enforcement statutes in 1870,¹⁴⁶ which reenacted sections of the 1866 Civil Rights Act, and in 1871.¹⁴⁷ However, unlike the framers of the Fugitive Slave Act of 1850, the framers of these civil rights guarantees consciously sought to preserve concurrent state jurisdiction over citizens' fundamental rights.¹⁴⁸

The lower federal courts upheld these statutes and affirmed Congress's theory of its plenary power to secure citizens' rights.¹⁴⁹ With the election of Ulysses S. Grant to the presidency, all three branches of the national government were united in protecting citizens' personal liberties from terrorists' violence.¹⁵⁰ In a stunning rejection of this national sovereignty-based constitutional federalism, the United States Supreme Court quickly reversed the lower federal courts, rejected Congress's plenary power to enforce citizens' rights under the Thirteenth and Fourteenth Amendments, and eliminated most of the legal authority of the Department of Justice to protect citizens' fundamental rights.¹⁵¹

143. *Id.* § 6.

144. *Id.* at § 7.

145. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 134, at 910-13.

146. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140.

147. *See* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

148. Kaczorowski, *Enforcement Provisions*, *supra* note 134, at 572-73; Kaczorowski, *To Begin the Nation Anew*, *supra* note 136, at 56-58.

149. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1866-1876* 1-25 (1985); Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 133, at 900-03, 935-38.

150. *See* KACZOROWSKI, *supra* note 149, at 49-134.

151. *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1875); *The Civil Rights Cases*, 109 U.S. 3 (1883); KACZOROWSKI, *supra* note 149, at 135-229; Kaczorowski, *Enforcement Provisions*, *supra* note 134, at 590-94.

In asserting a state sovereignty theory of federalism after the Civil War, the Supreme Court rejected the national sovereignty theory of federalism characteristic of the Court before the Civil War. It substituted the Court's earlier conception of the Founders' Constitution as a power-enhancing document with one of a power-limiting document. It substituted a clause-bound literal textual interpretation of the Constitution for the Court's earlier theories of implied inherent power and implied enumerated power. The Court engrafted onto the Fourteenth Amendment a state action limitation that defeated the Framers' understanding of the Amendment as a plenary guarantee of citizens' fundamental rights. Although the Court glanced at the political practice of the Reconstruction Congresses in interpreting the effect of their actions on the Constitution, it rejected the Framers' constitutional theory for its textual literalism and eliminated significant aspects of the changes the Reconstruction Congresses made on American federalism. Therefore, when today's state sovereignty plurality applies its state sovereignty theory of constitutional federalism, it is not enforcing the Founders' First Principles. Rather, it is applying the late nineteenth century Supreme Court's rejection of the Founders' Constitution and the Framers' understanding of the Reconstruction Amendments.

