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Lords of Lash Loom and Law*: Justice Story Slavery and Prigg v. Pennsylvania

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LORDS OF LASH, LOOM, AND LAW*: JUSTICE STORY, SLAVERY, AND *PRIGG V. PENNSYLVANIA*

Barbara Holden-Smith†

> I met many runaway slaves. Some was trying to get north and fight for [the] freeing of [their] people. Others was [just] runnin' 'way 'cause [they] could. Many of [them] didn't had no idea where [they] was goin', and told of havin' good marsters. But, one and all, [they] had a good strong notion to see what it was like to own your own body.[1]
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> [Last night] about ten o'clock at night, five or six men went to the house of a colored man by the name of John Wilkinson, broke open the door, knocked down the man and his wife, and beat them severely, and seized their boy, aged fourteen years, and carried him off into Slavery. After the father of the boy had recovered himself, he raised the alarm, and with the aid of some of the his neighbors, put out in pursuit of the kidnappers, and followed them to the river; but they were too late. The villains crossed the river, and passed into Virginia. I visited the afflicted family this morning. When I entered the house, I found the mother seated with her face buried in her hands, weeping for the loss of her child. The mother was much bruised, and the floor was covered in several places with blood. I had been in the house but a short time, when the father returued from the chase of the kidnappers. When he entered the house, and told the wife that their child was lost forever, the mother wrung her hands and screamed out, "Oh, my boy! oh, my boy! I want to see my child!" and raved as

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* The title of this article is adapted from Charles Sumner's observation that the interests of New England cotton manufacturers and Southern cotton producers were intertwined. As Sumner put it, there existed a symbiotic relationship between "the lords of the loom and the lords of the lash." 1 C.F. ADAMS, RICHARD HENRY DANA 127 (3d ed. 1891), *quoted in* Leonard W. Levy, *Sim's Case: The Fugitive Slave Law in Boston in 1851*, 35 J. NEGRO HIST. 39, 40 (1950).

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1 Statement of Edward Lycurgas, *quoted in* BULLWHIP DAYS: THE SLAVES REMEMBER 302 (James Mellon ed., 1988).

though she was a maniac. I was compelled to turn aside and weep . . .[2]

I

INTRODUCTION: JUDGES, SCHOLARS, AND MORAL DILEMMAS

The primary characteristic shared by slaves in pre-Civil War America was skin color: only Africans or the descendants of Africans were presumed to be slaves.[3] As a result of this equation of black skin with the potential for enslavement, free blacks in both the North and the South lived under constant threat of being kidnapped and sold into slavery. After the abolition of slavery in the North, the free states became "one vast hunting ground,"[4] as slave catchers went into those states, not only to reclaim runaway slaves but also to kidnap free blacks to sell into bondage in the South. Such kidnapping often involved forcibly abducting free persons or tricking them into voluntarily leaving the free state with the slave catcher.[5]

But a second form of kidnapping also occurred, one made possible by the existence of the 1793 Fugitive Slave Act.[6] By this statute, Congress purported to implement the third clause of Article IV, Section 2, of the Constitution—the so-called Fugitive Slave Clause.[7] The 1793 Act mandated that, before removing an alleged runaway from the state into which he or she had fled, a slave catcher must obtain a certificate of removal from a federal judge or state judicial official.[8] However, the Act contained little else in the way of procedural safeguards for alleged runaways,[9] making it quite easy for a slave catcher to procure a removal certificate for any black person, runaway or not.

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2 Account of William Wells Brown (1844), *reprinted in* 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 246 (Herbert Aptheker ed., 1951).

3 KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 193 (1956).

4 C.W.A. David, *The Fugitive Slave Law of 1793 and its Antecedents*, 9 J. NEGRO HIST. 18, 22 (1924).

5 THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 33-34 (1974).

6 "An Act respecting fugitives from justice, and persons escaping from service of their masters." Act of February 12, 1793, 1 Stat. 302 (1793) [hereinafter cited as Act of 1793].

7 U.S. CONST. art. IV, § 2, cl. 3 provided that:

> 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.

8 MORRIS, *supra* note 5, at 21.

9 *See infra* text accompanying notes 183-93 for a discussion of the provisions of the 1793 Fugitive Slave Act.

In the 1820s, in an effort to eliminate both kidnapping by force and trickery and that facilitated by the 1793 Fugitive Slave Act, some free states—most notably Pennsylvania, New York, and Massachusetts—enacted "personal liberty" statutes.[10] These statutes imposed criminal liability on anyone who removed a black person from the state without complying with a number of procedures not required by the 1793 federal statute. The primary purpose of these state procedures was to protect free blacks from kidnapping,[11] but they also had the effect of providing some measure of due process to those who actually were fugitive slaves.[12]

However, in 1842 the Supreme Court, in *Prigg v. Pennsylvania*,[13] struck down Pennsylvania's personal liberty law as unconstitutional. The decision stripped the states of nearly all authority to regulate the practices of slave catchers.[14] Justice Joseph Story's opinion for the Court was exceedingly proslavery in both its language and effect, and was harshly condemned by antislavery activists.[15]

Justice Story's authorship of such a strongly proslavery opinion has persistently perplexed historians and legal scholars.[16] One reason for their consternation undoubtedly is Story's reputation as one of the greatest jurists ever to serve on the Supreme Court. There is no denying that his contributions to the development of American law were legion. He was appointed to the Supreme Court at a younger age (thirty-two) than anyone before or since,[17] served on the Court for thirty-four years, and wrote some of the Court's most esteemed opinions. A professor at Harvard Law School for sixteen years, he almost single-handedly resurrected the law school in the 1820s.[18] He was also the author of fourteen legal commentaries, an editor of three others, and an anonymous or ghost writer of numerous periodical pieces, encyclopedia articles, and law reports.[19] He

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10 For a thorough examination of the history of the personal liberty laws see, MORRIS, *supra* note 5.

11 *Id.* at 23-41.

12 *Id.*

13 41 U.S. (16 Pet.) 539 (1842).

14 *See infra* text accompanying notes 248-50.

15 For the reaction of antislavery forces to the *Prigg* decision see Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIVIL WAR HIST. 5, 16-19 (1979).

16 *See, e.g.*, ROBERT M. COVER, JUSTICE ACCUSED (1975); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, THE FIRST HUNDRED YEARS: 1789-1888, at 245 (1985); CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD 1836-64, at 530-31 (1974); Christopher L. M. Eisgruber, Comment, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 279 (1988).

17 Gerald T. Dunne, *The American Blackstone*, 1963 WASH. U. L.Q. 321, 322 (1963).

18 *Id.*

19 *Id.*

gave a host of speeches, served as an unofficial consultant to Senators and Congressmen in the drafting of legislation, and even drafted many bills himself.[20] As one commentator summed up Story's contributions: "No figure of Story's era [including John Marshall] even roughly compares with him in terms of impact on the American legal system."[21]

Historians and legal scholars have been troubled by Story's *Prigg* opinion not only because it seems inconsistent with his generally distinguished reputation but, even more so because it does not square with his reputation as a judge morally opposed to slavery.[22] How was it, they have wondered, that this judge renowned for his passionately antislavery stance could have rendered such a proslavery opinion? Many have offered explanations. According to R. Kent Newmyer, for example, the *Prigg* opinion reflects Story's desire to honor the bargain on slavery made between North and South. In the eyes of Newmyer, the opinion was thus for Story a means to preserve the Union.[23] Henry Steele Commager makes this argument as well.[24] David Currie, on the other hand, suggests that Story believed that, by stripping the states of authority to implement the Fugitive Slave Clause, the decision would make the owner's right of recapture more difficult to enforce.[25]

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20 *Id.*

21 Craig Joyce, *Statesman of the Old Republic*, 84 MICH. L. REV. 846, 848 (1986) (reviewing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC). One unrestrained historian said of Story:

> [A]s a teacher and law lecturer without an equal, as a judge urbane and benign, and as a man of spotless purity, he wrought so long, so indefatigably, and so well that he did more, perhaps, than any other man who ever sat upon the Supreme Bench to popularize the doctrines of that great tribunal and impress their importance and grandeur upon the public mind.

HAMPTON L. CARSON, 1 THE HISTORY OF THE SUPREME COURT 234 (photo. reprint 1991) (1891).

22 *See, e.g.*, A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 798 n.7 (1987) ("Story was a strong abolitionist who struggled with his hatred of slavery and the Constitution's sanction of it."); Joyce, *supra* note 21, at 857 ("Story's deep personal aversion to slavery, evidenced from his earliest days on the bench, is beyond doubt."); Eisgruber, *supra* note 16, at 279 (Story was "a profound opponent of slavery"). One scholar has gone so far as to say that "[a]lmost single-handedly Story articulated a constitutional philosophy of moderate civil rights for Negroes during his tenure on the Supreme Court." Morgan D. Dowd, *Justice Story and the Slavery Conflict*, 52 MASS. L.Q. 239, 240 (1967).

23 R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 377 (1985).

24 Henry S. Commager, *The Nationalism of Joseph Story*, *in* THE BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES 1940-1950, at 31, 44 (1953).

25 CURRIE, *supra* note 16, at 245 n.54, quoting Story's son's statement that Justice Story referred to the decision as a "triumph of freedom." *See also* Dowd, *supra* note 22, at 251 ("What [Story's] critics failed to realize was that Story purposely wrote *Prigg v. Pennsylvania* with the avowed purpose of disrupting the entire system of slaveholding.").

Carl Swisher, however, attributes the *Prigg* opinion to Story's sense of judicial duty. According to Swisher, Story felt compelled to uphold the 1793 Fugitive Slave Act because he saw it as a law within Congress' constitutional authority. Similarly, he felt obliged to strike down Pennsylvania's personal liberty statute because it conflicted with the supreme federal law.[26] In his 1975 book *Justice Accused*, Robert Cover offers a sophisticated variation of Swisher's theme.[27] According to Cover, Story was caught in a "moral-formal dilemma" in which he had to choose between his conscience and his duty to follow the law. He resolved this dilemma, Cover argues, by convincing himself that the law gave him no choice.[28]

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26 SWISHER, *supra* note 16, at 541. *See also* 1 LEON FRIEDMAN ET AL., THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 447 (1969) (contending that in his slavery jurisprudence Story "attempted the impossible—to resolve disputed points within a libertarian framework while giving effect to the basic constitutional design and making the Court a composing rather than a disruptive element in the irrepressible conflict."); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1821-1855, at 359 (1922) (asserting that the abolitionists' condemnation of the *Prigg* opinion "could not perturb" a judge such as Story who was merely doing his duty as he saw it); and Finkelman, *supra* note 15, at 15 (suggesting that, although "[t]here is no doubt Story opposed slavery," a likely explanation for *Prigg* is that Story "believed that the Constitution demanded federal protection for masters seeking their fugitive slaves").

27 COVER, *supra* note 16.

28 Cover's study was an attempt to understand the behavior of a number of other nineteenth century judges, in addition to Story, who were reputed to be morally opposed to slavery, yet who upheld proslavery laws. Cover's theory was quite elaborate, bringing to bear jurisprudential, historical, and even psychological notions like "cognitive dissonance" to explain the judges' dilemma and their resolution of it. His theory is primarily set forth in Part III of his study. For a recent distillation of Cover's theory see, Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1835-1839 (1991). For reviews of Cover's book, see Derrick A. Bell, Jr., *Justice Accused: Antislavery and the Judicial Process*, 76 COLUM. L. REV. 350 (1976); James W. Ely, Jr., *Justice Accused: Antislavery and the Judicial Process*, 1975 WASH. U. L.Q. 265; Eugene D. Genovese, *The Political Foundations of Justice*, 85 YALE L.J. 582 (1976); Mark Tushnet, *Justice Accused: Antislavery and the Judicial Process*, 20 AM. J. LEGAL HIST. 168 (1976); Ronald Dworkin, *The Law of the Slave-Catchers*, LONDON TIMES LITERARY SUPPLEMENT, Dec. 5, 1975, at 1437.

Justice Story bimself is to some extent responsible for the scholarly enchantment with the "morality versus duty" theory as a means to reconcile his proslavery position in *Prigg* with his antislavery reputation. He laid the foundation for this view shortly after the decision. Writing to a friend in November of 1842, he argued that he was compelled by his duty as a judge to render decisions upholding the laws, even where those laws upheld the institution of slavery. Story explained:

> I shall never hesitate to do my duty as a Judge, under the Constitution and laws of the United States, be the consequences what they may. That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure. You know full well that I have ever been opposed to slavery. But I take my standard of duty *as a Judge* from the Constitution.

2 THE LIFE AND LETTERS OF JOSEPH STORY 431 (William Wetmore Story, ed., 1851) [hereinafter LIFE AND LETTERS OF JOSEPH STORY]. Similarly, in 1843, he delivered a lecture to his Harvard law School class in which he sought to justify his decision in *Prigg* by argning that:

I think all of the hand-wringing over the conflict between Story's personal position on slavery and his proslavery decision is misdirected. As I hope to demonstrate in Part II, this conflict was much less dramatic than commentators have assumed. I argue that Story's antislavery reputation is seriously overblown. Curiously, though Story's reasoning in *Prigg* has been heavily criticized, and although some scholars have questioned whether his antislavery reputation is well-deserved,[29] none has undertaken an exploration of Story's slave trade opinions so as to ascertain the reputation's validity.

In Part III, I further suggest that the *Prigg* case illustrates that Story cared far more about the protection of property rights and the expansion of federal power than he did about the injustices being done to black people by the fugitive slave law. Like many privileged whites of his era, Story was so far removed from the plight of the black victims of slavery and racism that he was unable to appreciate the harmfulness and depravity of the practices he sanctioned in *Prigg*.

II
STORY'S ANTISLAVERY REPUTATION

Story's reputation as a judge morally opposed to slavery rests primarily on two types of evidence: his public statements opposing the expansion of slavery into the new states of the West and his judicial pronouncements condemning the international slave trade. Relying on this evidence, historians and legal scholars have portrayed Story as a jurist vigorously opposed to slavery who was willing to use his judicial office to undermine the institution whenever possible. However, the accuracy of this portrait is more chimerical than real. It ignores the political context in which Story made his remarks, and it fails to take into account a number of cases in which

> There is a clause in the Constitution which gives to the slaveholders the right of reclaiming a fugitive slave from the free States. This clause some people wish to evade, or are willing wholly to disregard. If one part of the country may disregard one part of the Constitution, another section may refuse to obey that part which seems to bear hard upon its interests, and thus the Union will become a "mere rope of sand"; and the Constitution, worse than a dead letter, an apple of discord in our midst, a fruitful source of reproach, bitterness, and hatred, and in the end discord and civil war.

As recorded in the journal of Rutherford B. Hayes while a student in Story's class, *quoted in* CHARLES R. WILLIAMS, 1 THE LIFE OF RUTHERFORD B. HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES 1834-1860, at 36-37 (1914).

29 *See, e.g.*, Ely, *supra* note 28, at 270-71 (suggesting that Story's "antislavery feelings were rather tepid"); and Tushnet, *supra* note 28, at 169 (criticizing Robert Cover for failing to provide convincing evidence to support the antislavery reputation of the judges he chose for his study).

Story directly confronted issues involving the enforcement of statutes outlawing the slave trade.

In this Part, I first set forth the evidence in support of Story's reputation as an antislavery judge and assess it in light of his concerns about the conflict between North and South. Next, I explore the style and reasoning of some of the slave trade opinions that are usually omitted from discussions of Story's antislavery reputation. Finally, I examine the background of *Prigg* and Story's opinion in that case.

A. Opposition to Expansion of Slavery into the Territories

Justice Story twice joined the perennial national debate over the expansion of slavery into the Western territories. The first instance concerned the Missouri controversy of 1820. According to historian Don Fehrenbacher, this controversy was sparked by a resurgence of antislavery agitation in Congress in 1819. This renewed agitation followed nearly fifteen years of congressional silence on the subject, a silence which was probably the result of the nation's preoccupation with international affairs leading up to the War of 1812.[30]

As Fehrenbacher points out, the explanation for the 1819 resurgence of antislavery activity in Congress is complex. Undoubtedly, part of the explanation is that Northerners morally opposed to slavery were growing impatient, because the institution, rather than withering away, seemed to have become entrenched in the South by 1819.[31] However, any explanation of the renewed antislavery activity in Congress must also include the conflict between North and South for hegemony within the Union, and the attendant belief of many Northern politicians that Southern interests were now dominant in the nation's political life.[32] Some of these Northern politicians attributed Southern political successes to the so-called "three-fifths" clause of the Constitution.[33] This clause required that every five slaves be counted as the equivalent of three free men in apportioning representation in the House of Representatives and in the Electoral College.[34] The clause had the potential for creating a Southern majority in Congress. Moreover, some Northerners argued, the Southern representational advantage had been responsible both for the defeat of John Adams by Thomas Jefferson in the

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30 *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 100 (1978).

31 *See, e.g.*, DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 407 (1971).

32 For expressions of this view, see *id.* at 405; and FEHRENBACHER, *supra* note 30, at 100.

33 ROBINSON, *supra* note 31, at 405.

34 *Id. See also* FEHRENBACHER, *supra* note 30, at 100-02.

1800 presidential election, and for the 1812 election of James Madison (whom many Northerners blamed for the continuation of the War of 1812, a war they opposed).[35]

Indeed, there may have been good reason for Northern concern about the Southern advantage in national politics. In 1819 Southern representation in Congress was on the rise, with Mississippi's 1817 admission as a slave-holding state, followed in 1819 by Alabama, another slave state. Further, slavery threatened to become entrenched in the Arkansas Territory (which then consisted of the present states of Arkansas and Oklahoma); slavery already had a presence there, with slaves comprising about eleven per cent of the population.[36] In addition, although Florida was still a Spanish possession in 1819, it seemed likely to be the next territory acquired by the United States, and its location and culture indicated that it too would be a slaveholding state.[37] Finally, because slavery already existed in that part of the Missouri territory proposed as the new state of Missouri,[38] it was obvious that without a prohibition of slavery as a precondition to its admission as a state, Missouri would join the ranks of the slavery forces in Congress.

Justice Story proved a vigorous opponent of the admission of Missouri as a slaveholding state. At a Salem town meeting held on December 10, 1819,[39] he argued that any extension of slavery into Missouri was against "the spirit of the Constitution, the principles of our free government, the tenor of the Declaration of Independence, and the dictates of humanity and sound policy."[40] At that meeting he also introduced a resolution, adopted and sent to Congress, which declared it to be "the duty of the people and Government of the United States . . . to prevent the extension of so great a political and moral evil as slavery."[41] Moreover, there is evidence that Story

35 ROBINSON, *supra* note 31, at 405.

36 *Id.* at 413.

37 FEHRENBACHER, *supra* note 30, at 100-01.

38 *Id.* at 101.

39 Story's son has asserted that the Missouri controversy was so important to his father that it was the only instance during Justice Story's judicial life in which the Justice publicly engaged in the discussion of a political question. 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 360. Justice Story himself wrote in 1825 that, since ascending to the Supreme Court, he had "carefully abstained" from "mingling in political engagements" because of a desire that his "administration of justice should not be supposed by the public to be connected with political views or attachments." *Id.* at 363. Despite these assertions, it is clear that Justice Story often involved himself in the political questions of his day, actively lobbied Congress, and frequently advised members of Congress, particularly Daniel Webster, in the drafting of federal legislation. *See* GERALD T. DUNNE, JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970); NEWMYER, *supra* note 23.

40 *See* DUNNE, *supra* note 39, at 195.

41 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 360.

personally lobbied members of Congress in opposition to the proposed Missouri Compromise.[42]

During the national controversy over the annexation of Texas, Justice Story again spoke out on the question of the territorial expansion of slavery. Texas was a slaveholding republic when it applied for annexation by the United States in 1837, after having won its independence from Mexico in 1836.[43] The antislavery opposition to Texas was intense, and Justice Story supplied the anti-expansionist forces with the constitutional arguments against annexation.[44] In an 1837 letter to his friend Joseph Tuckerman, Story argued that the Constitution did not provide for the admission of a foreign state, such as Texas, into the Union. Thus, Story concluded, Texas could not be admitted into the Union anymore than could Great Britain.[45] Due to the strength of the anti-expansionist forces, the annexation effort was dropped until the 1840s. However, by that time the issue had become, as Kent Newmyer says, "an obsession" with Story.[46] He continued to argue that admission of a foreign state like Texas was "grossly unconstitutional,"[47] and "such an extravagance" that the Framers of the Constitution "never dreamed" it would ever occur, and so did not expressly provide against it.[48]

Whether or not Story's belief in the immorality of slavery informed his objection to its expansion, his opposition, like that of some of the other anti-expansionists, was also grounded in political considerations.[49] In opposing the Missouri Compromise, he indicated more than once that for him the question of the expansion of slavery was rooted in the conflict between New England and the South for hegemony over the national government. For him this

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42 *See* DUNNE, *supra* note 39, at 197 (quoting a South Carolina Senator who said that a judge "had descended from his high station" in order "with no little zeal" to lobby Congress on the Missouri Compromise. Dunne surmises that this judge was Joseph Story).

43 FEHRENBACHER, *supra* note 30, at 124.

44 *See* SWISHER, *supra* note 16, at 560.

45 Swisher, *supra* note 10, at 560 (citing letter to Joseph Tuckerman from Joseph Story, July 25, 1837, in Fulmer Mood & Granville Hicks, *Letters to Dr. Channing on Slavery and the Annexation of Texas,* 5 NEW ENGLAND Q. 593-94 (1932).

46 NEWMYER, *supra* note 23, at 351.

47 *Id.*

48 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 514.

49 It would, perhaps, be a mistake to try to separate the political and personal motives for opposing slavery that drove an abolitionist such as John Quincy Adams, who devoted years of his life to the cause of abolishing slavery. For him, the personal and the political were probably one. (For more on Adams see SWISHER, *supra* note 16, at 191-96.) However, as Newmyer points out, Story was no abolitionist. NEWMYER, *supra* note 23, at 166. Rather, he was a politician who, in my view, used antislavery arguments to advance a political agenda that had far more to do with cementing the federal Union than with freeing African-American people.

was a contest of nationalism against confederation, a struggle for union over dis-union. For example, writing to Professor Edward Everett in 1820, Story complained that the South had gotten its way on the Missouri question by using the tactic of "divide and conquer" against New England. He warned that the various political factions of New England must put their differences behind them and present a united front against the South:

> The spirit of anti-federalism has made but a partial progress among [New Englanders]. But it exists deep and strong, both in its roots and in its branches, at the South and West, and I verily believe that if the East does not send forth its talents to sustain the Constitution, and its legitimate powers in Congress, the Constitution will be frittered away, until it becomes the mere ghost of the confederation.[50]

Likewise, in opposing the annexation of Texas, Story wrote that he believed its admission could "lead to the dissolution of the Union," because it would "forever give the South a most mischievous, if not a ruinous preponderance in the Union."[51] Furthermore, Story lamented, "the non-slaveholding States seem to be utterly unaware of, or indifferent to the dangers."[52] With the battle to keep Texas out of the Union all but over, Story wrote to his wife:

> What could be more disgraceful than the rejoicings in Boston on the vote for Texas in the House of Representatives? It is said that Nero fiddled while Rome was on fire, and Massachusetts men now in like manner rejoice when their own State is to be reduced to perpetual bondage to the slave-holding States. All this is the work of office-holders and office-seekers, and corrupt demagogues.[53]

Thus, Story's private correspondence suggests that his motives in opposing the territorial expansion of slavery were primarily political. His "obsession" with the Texas question, his anger at having lost the battle to keep Texas out of the Union, and his view of the Missouri Compromise as a bitter defeat for New England, all point to less concern with the immorality of slavery than with the ongoing intersectional contest between North and South for dominance in the Union.

At least one scholar has suggested that Story's support for the preservation of the Union stemmed from his belief that the Union represented the best hope for the eventual abolition of slavery.[54]

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50 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 367.

51 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 481.

52 *Id.*

53 *Id.* at 512-13.

54 *See* Mark V. Tushnet, *Translation as Argument*, 32 WM. & MARY L. REV. 105, 117-18 (1990) (reviewing JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL

However, there is no evidence to sustain this view.[55] A more plausible explanation for Story's pro-Union stance was his belief that the Union represented the greatest prospect for the development of commerce and industry, which in turn would lead to the fulfillment of America's potential to be a great nation.[56]

B. The International Traffic In Kidnapped Africans

To support their view of Story as an antislavery jurist, some scholars rely more heavily on Story's statements and decisions in slave trade cases than they rely on his opposition to the territorial expansion of slavery. After briefly sketching the history of the federal legislative effort to outlaw American involvement in the international slave trade, I will examine the evidence usually advanced to support Story's antislavery reputation, as well as his other opinions in this area.

1. *Historical Background*

The attempt by antislavery forces to outlaw American involvement in the trade in kidnapped Africans has a long and complicated history that involves intense intersectional strife, difficult questions of international law and foreign relations, and, until the Civil War, little show of success at ending the traffic. Only a brief outline of that history is necessary here, however, to appreciate the context of Justice Story's slave trade decisions.[57]

The only provision in the Constitution that speaks directly to the issue of the importation of slaves is the first clause of Article I, Section 9. Although this provision prohibited Congress from outlawing the importation of slaves until 1808, it did allow for federal imposition of a tax, not to exceed ten dollars, on each newly imported slave.[58] Almost immediately after George Washington's in-

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AND LEGAL CRITICISM). Tushnet speculates that perhaps Story "believed tbat the survival of the Nation provided the best prospect for the elimination of slavery." *Id.*

55 *See id.* (where Tushet offers no evidence to support his speculations). In contrast to Tushnet's view, Newmyer, who has written the most comprehensive biography of Story, states that Story believed in the "gradual" emancipation of slaves and that slavery would end because it would not be re-supplied by the African slave trade and would not be allowed to expand into new states. NEWMYER, *supra* note 23, at 351.

56 See the discussion of Story's nationalism in Part III of this Article.

57 For a concise treatment of this history, see ROBINSON, *supra* note 31, at 295-346. *See also* W.E.B. DUBOIS, THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES 1638-1870, at 94-150 (1896) for a more detailed chronicle.

58 U.S. CONST. art. 1, § 9, cl. 1 provided that:

> The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

auguration, antislavery forces in Congress sought to take advantage of this federal taxing power as a means of discouraging "this irrational and inhuman traffic."[59] However, because Southern Congressmen vigorously opposed such a tax and because many Northern Congressmen morally opposed to trafficking in human beings thought it would be odious for the federal government to obtain revenue from the slave trade, Congress never passed any legislation imposing the tax.[60]

Despite the Constitution's twenty-year prohibition on any outright ban of the trade, arguments that the federal government had the power to regulate American involvement in the foreign slave trade met with greater, though still quite limited, legislative success. In 1794, Congress passed the first national law to restrict the international slave trade. The act's title—"an act to prohibit [the carrying on of] the slave trade from the United States to any foreign place or country"—succinctly states its limited goal: to outlaw the export of slaves from the United States to other nations.[61] Congress amended the act in 1800 to impose the penalty of forfeiture of any American citizen's interest in a ship engaged in transporting slaves from one foreigu country to another.[62] A further amendment in 1803 banned the importation of slaves into any state that had outlawed such importation.[63]

After 1803, antislavery forces made various attempts to enact legislation desigued to limit American involvement in the African slave trade, but until 1807 none were successful.[64] In that year Congress, anticipating the end of the constitutional prohibition, passed a statute outlawing the importation of slaves into the United States after January 1, 1808.[65] The 1807 Act provided that violators would be fined in amounts ranging from $800 for knowingly buying ille-

59 ROBINSON, *supra* note 31, at 299 (quoting Josiah Parker, Congressman from Virginia).

60 *See generally id.* at 299-312.

61 *Id.* at 312.

62 DUBOIS, *supra* note 57, at 84.

63 *Id.*

64 For a discussion of these efforts, see *id.* at 86-93; ROBINSON, *supra* note 31, at 318-24.

65 Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807). W.E.B. DuBois attributes the passage of this prohibition of the slave trade at the "earliest constitutional moment" not only to the work of anti-slavery forces in the United States, but also to the Haitian revolution, in which African slaves rose up to kill their white masters, striking fear throughout the slave-holding southern United States; the acquisition of the Louisiana territory in 1803, which made possible the extension of cotton and sugar cultivation by the southern planters and hence the greater expansion of slavery; and to the eighteenth century anti-slavery struggle in England which culminated in 1807 with the prohibition of the slave trade by the British. DUBOIS, *supra* note 57, at 94-95. *See also* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 79, 106-08 (4th ed. 1974).

gally imported Africans to $20,000 for equipping a slave ship.[66] In addition, the ship used to commit the crime, as well as any illegally imported Africans, would be forfeited.[67] The "disposition" of these forfeited human beings was left to the states.[68] Responsibility for federal enforcement of the Act fell first to the Secretary of the Treasury, then to the Secretary of the Navy, and at one time even to the Department of State.[69]

In spite of this new federal law, participation by Americans in the slave trade continued after 1808, resulting in calls by President Madison, among others, for better means of suppressing the trade than those provided by the 1807 Act.[70] As a result of this agitation, Congress passed a series of supplementary statutes between 1818 and 1820.[71] These statutes prohibited American citizens from hiring themselves out to foreign ships engaging in the trade;[72] empowered the President to appoint an agent to reside in Africa for the purpose of establishing a colony on the coast to which Africans smuggled into the United States could be "deported";[73] authorized armed ships belonging to the United States to intercept vessels suspected of containing Americans engaging in the slave trade;[74] and increased the penalties by providing for imprisonment and by defining participation in the trade as piracy, punishable by death.[75] Yet, because of the insatiable American appetite for slave labor, the enormous profits to be made from the trade itself, the lax enforcement of the laws by the national government, and the various sub-

66 DuBois, *supra* note 57, at 104.

67 *Id.*

68 *Id.*

69 *Id.* at 111.

70 Historians generally agree that the shifting nature of the federal responsibility for enforcement and the inadequate state laws for "disposing of" the illegally imported Africans, combined with the reluctance of informers (especially in the South where the violations most often occurred) to turn in violators, undermined the Act's effectiveness. *See, e.g.*, DuBois, *supra* note 57, at 110-11 (President Madison informed Congress that "it appears that American citizens are instrumental in carrying on a traffic in enslaved Africans, equally in violation of the laws of humanity, and in defiance of those of their own country."); Franklin, *supra* note 65, at 110 ("New England shipmasters, Middle Atlantic merchants, and Southern planters all disregarded the federal and state legislation when they found it expedient to do so."); Robinson, *supra* note 31, at 338 ("Evasion [of the Act of 1807] was made possible by the connivance of Deep Southerners, the smuggling skills of Northerners and Europeans, and the primitiveness of national governmental machinery.").

71 DuBois, *supra* note 57, at 118-123.

72 Act of Mar. 13, 1819, 3 Stat. 532 (1819).

73 *Id.*

74 Act of May 15, 1820, 3 Stat. 600 (1820).

75 3-4 G. Edward White, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, The Marshall Court and Cultural Change, 1815-1835, at 691 (1988). A thorough review of the legislative history of these supplemental statutes is given in DuBois, *supra* note 57, at 118-23.

terfuges by which Americans circumvented those laws, the traffic in kidnapped Africans persisted.[76]

2. *Basis of Story's Antislavery Reputation*

The efforts of Congress to curb American involvement in the international slave trade would appear to provide fertile ground for those seeking evidence that Story's opposition to slavery was more than mere sermonizing, that in fact he translated his stated moral convictions into the actual use of his judicial office in the struggle against slavery in America. For example, R. Kent Newmyer asserts that in cases involving slavery, Story showed that he was willing

> to enlarge the area of freedom where the law allowed judicial discretion. The international slave trade was one such area. [His] passionate condemnation of the trade in his circuit charges . . . was in fact reflected in his decisions . . . Story's strong antislavery feelings could be seen in his disposition of matters of evidence and proof, questions that allowed him judicial discretion and that abounded in slave-trade litigation.[77]

James McClellan, noting in particular Story's decisions in slave trade cases, contends that "Story's antipathy for slavery was reflected throughout his judgeship."[78] Likewise, Robert Cover points to decisions involving the African slave trade as testimony to Story's antislavery stance, contending that in one such case Story offered the "strongest possible condemnation of the slave trade."[79]

Despite the force of these statements, scholars rely chiefly upon only two pieces of evidence to support their view—Story's 1819 Grand Jury Charge and his opinion in a circuit court case, *La Jeune Eugenie*.[80]

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76 The easiest method of subterfuge was to switch flags on the slaving vessel and procure the corresponding foreign papers, usually of Spain or Portugal, as Spain did not prohibit the trade until 1820 and Portugal not until 1830. ROBINSON, *supra* note 31, at 342. Robinson argues that the weakness of the American navy, which he called "a miserable floating monument to the conviction of the Jeffersonians that navies were both cause and effect of the twin evils of aristocracy and imperialism," was also a significant impediment to the effective enforcement of the slave trade laws. *Id.* at 341.

77 NEWMYER, *supra* note 23, at 347.

78 JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 297 (1971).

79 *See* COVER, *supra* note 16, at 101-02 (discussing United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551)).

80 None of Story's biographers, with the exception of R. Kent Newmyer, even mentions any other slave trade decisions. Even Newmyer merely asserts that other cases exist without analyzing them. For Newmyer's discussion of the evidence to support Story's antislavery reputation, see NEWMYER *supra* note 23, at 345-53, 365-69. Robert Cover points to one other decision, United States v. Amistad, 40 U.S. (15 Pet.) 518 (1841), but recognizes the limited nature of that victory for kidnapped Africans. COVER, *supra* note 16, at 116.

Story delivered the 1819 Grand Jury Charge while fulfilling his circuit court duty to charge New England grand juries.[81] In order to "enlist [the jurors'] sympathies" in the suppression of the "inhuman traffic," Story described in graphic detail the horrors of the international slave trade so that the jurors might know "the vast extent of misery and cruelty occasioned by its ravages."[82] The following passage, in which he describes the conditions on board a slave ship during the voyage from Africa, typifies the frankness with which Story expounded upon the evils of the trade:

> As the slaves, whether well or ill, always lie upon bare planks, the motion of the ship rubs the flesh from the prominent parts of their body and leaves their bones almost bare. The pestilential breath of so many, in so confined a state, renders them also very sickly, and the vicissitudes of heat and cold generate a flux; when this is the case (which happens frequently,) the whole place becomes covered with blood and mucus like a slaughter house, and as the slaves are fettered and wedged close together, the utmost disorder arises from endeavors to relieve themselves in the necessities of nature; and the disorder is still further increased by the healthy being not unfrequently [sic] chained to the diseased, the dying, and the dead![83]

Nor did Story confine his outrage to the condemnation of the slave trade alone, which, after all, had been outlawed as piracy under federal statutes.[84] He also railed against the institution of American slavery itself, arguing that "[t]he existence of slavery under any shape is so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification."[85] After reminding the jurors that the constitutions both of the several states and of the United States declare "that all men are born free and equal, and have certain unalienable rights,"[86] including the right to freedom, Story asked:

> May not the miserable African ask, 'Am I not a man and a brother?' We boast of our noble struggle against the encroachments of tyranny, but do we forget that it assumed the mildest form in which authority ever assailed the rights of its subjects; and

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81 According to his son, Story delivered this charge to the grand juries in Boston, Massachusetts, and Providence, Rhode Island in 1819. 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 336. Story gave this same charge again in 1820, this time to the grand jury for the federal circuit court in the newly-admitted state of Maine. MISCELLANEOUS WRITINGS OF JOSEPH STORY 122 (William W. Story ed., 1852).

82 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 341-42.

83 *Id.* at 345.

84 G. EDWARD WHITE, *supra* note 75, at 691.

85 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 336.

86 *Id.* at 340.

> yet that there are men among us who think it no wrong to condemn the shivering negro to perpetual slavery?[87]

Perhaps, as Newmyer suggests, Story meant by this language to educate New Englanders on the evils not only of the slave trade but also of the institution of slavery.[88] However, just as there are indications that Story's extra-judicial lobbying activities in opposition to territorial expansion were at least in part motivated by his desire that the North not "forever give the South a most mischievous, if not a ruinous preponderance in the Union,"[89] so too there is evidence to suggest that his fiery grand jury charge, though framed in humanitarian terms, was significantly motivated by his political concerns. Story twice delivered the charge while the national debate on the Missouri Compromise was raging, and his own words suggest a political connection. Writing to his friend Jeremiah Mason in November of 1819, Story said, "We are deeply engaged in the Missouri question. 1 have fought against the slave trade in Rhode Island . . . My charge was well received there."[90] Further, although it is unclear whether Story ever delivered the charge during interreguums in the national debate over the territorial expansion of slavery, it is clear that he gave a similar charge in 1838—just after the controversy over the annexation of Texas arose.[91]

Three years after delivery of the 1819 charge, Story repeated its passionate tone in *La Jeune Eugenie*. As previously noted,[92] his opinion in this case is the piece of evidence most often cited to illustrate Story's willinguess to oppose slavery from the bench whenever he could do so without violating his duty to follow the law.[93] The *Euge-*

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87 *Id.* at 340-41.

88 NEWMYER, *supra* note 23, at 166.

89 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 481.

90 *Id.* at 366.

91 NEWMYER, *supra* note 23, at 345. The 1819 Grand Jury Charge was not the first time Story made antislavery pronouncements from the bench. He first did so four years earlier in a circuit court opinion, Fales v. Mayberry, 8 F. Cas. 970 (C.C.D. R.I. 1815) (No. 4,622), a case that inexplicably has been ignored by those who applaud Story's record in slave trade cases. In *Fales*, Story railed against the slave trade, calling it "a most odious and horrible traffic" which was "contrary to the plainest principles of natural justice and humanity" and so, "abstract[ly] speaking, . . . cannot have a legal existence." *Id.* at 971. This case could be seen as early evidence of Story's willingness to use his judicial position to undermine slavery. On the other hand, it might also have been part of Story's effort to enhance "his status among the elite" of New England, NEWMYER, *supra* note 23, at 167, and "to prove his dedication and his value to the conservative cause." *Id.* at 163. As Newmyer points out, the conservatives of New England opposed slavery and the slave trade, and in the early years of Story's judicial career he was anxious to convince conservatives of his loyalty to their principles. *Id.* The conservatives distrusted Story because of his earlier "radicalism" and his enforcement of national commercial regulations that the conservatives opposed.

92 *See supra* notes 79-80 and accompanying text.

93 *See, e.g.*, COVER, *supra* note 16, at 101; NEWMYER, *supra* note 23, at 347-50.

nie case involved the capture of the schooner *Eugenie* by the *Alligator*, an American naval cruiser. Although the *Eugenie* was flying the French flag at the time of its capture off the coast of Africa and had papers on board showing the vessel to be the property of French subjects, the captain of the *Alligator* suspected fraud. He believed that the ship was actually an American slaver. Thus, under authority of the 1807 Slave Trade Act, he and his crew seized the vessel and took it to Boston, where they filed claims for libel in the district court.

The libel petition alleged alternative grounds for condemnation and forfeiture of the *Eugenie*: either the *Eugenie* was an American vessel engaged in the slave trade in violation of United States law, or it was a foreign ship captured as a prize because of its involvement in trade "contrary to the law of nations."[94] The French consul, however, filed a claim on behalf of the alleged French owners of the ship, protesting the seizure and the judicial proceedings. The consul argued that the *Eugenie* was a French vessel, owned by French subjects, and therefore subject only to the jurisdiction of a French court.[95]

Addressing the jurisdictional issue first, Story held that, even assuming the *Eugenie* was a French vessel owned by French citizens, an American court would still have jurisdiction if, at the time of its seizure, the vessel was engaged in the slave trade in violation of the law of nations.[96] After finding that the vessel had indeed been engaged in the slave trade,[97] Story turned to the question of whether that trade offended the law of nations. In language echoing the ardor of his 1819 Grand Jury Charge, Story maintained that the slave trade "begins in corruption, and plunder, and kidnapping," destroying "all the ties of parent, and children, [and forcing] the brave to untimely death in defence of their humble homes."[98] Moreover, Story maintained that "[a]ll the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers."[99] This was a traffic, Story said, "beginning in lawless wars, and rapine, and kidnapping, and ending in disease, and death, and slavery."[100]

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94 La Jeune Eugenie, 26 F. Cas. at 834.

95 *Id.* at 835.

96 *Id.* at 845.

97 *Id.* at 840.

98 *Id.* at 845.

99 *Id.*

100 *Id.* at 846.

Nonetheless, because his court sat in a nation in which slavery was lawful, Story had to admit that he was in no position to say that the existence of slavery itself was a violation of the law of nations. The slave *trade*, however, did not enjoy the protection of American law, and Story therefore felt free to say that this trade "stirs up the worst passions of the human soul"[101] and is "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice."[102] It was not enough, Story maintained, to say that war, or slavery, or plunder was lawful, for those arguments did not "advance one jot . . . the proposition, that a traffic, that involves them all, that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations."[103] Since the slave trade combined such a multitude of evils, Story reasoned, it was inconsistent "with any system of law, that purports to rest on the authority of reason," and thus contrary to the law of nations.[104] As a result, he concluded, an American court was bound to "deal with it as an offense carrying with it the penalty of confiscation."[105] Story went on to hold that, because the trade was also illegal under the law of France and because French law provided for the penalty of forfeiture, his court not only had jurisdiction, but also was not required to surrender the ship to the French claimants who had violated French law.[106]

According to Story, the validity of the claim for libel made by the captain of the *Alligator* depended upon whether the ship was American or French. Curiously, Story never directly decided that question. Earlier in the opinion he suggested that the French claimants had failed to show that the ship had been divested of all American ownership, and he seemed convinced that the French papers fraudulently concealed the ship's true American status.[107] Nevertheless, Story implicitly found the ship to be French, not American, for he held that the claims of the *Alligator*'s captain and crew had to be dismissed because "a share in the forfeiture accrues to them only, when the case is reached by our laws."[108] The case could, of course, be reached by American law only if the vessel's owner or its crew were American citizens. Accordingly, Story held that neither

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101 *Id.* at 845.
102 *Id.* at 846.
103 *Id.*
104 *Id.*
105 *Id.* at 847.
106 *Id.* at 850.
107 *Id.* at 840-41.
108 *Id.* at 850.

the claims of the American captors nor those of the French owners could be maintained.[109]

Despite the zealousness of Story's antislavery rhetoric and his novel finding that the slave trade was contrary to the law of nations, the *Eugenie* decision is not as bold as some have argued. First, Story disposed of the case by turning the ship over to the "king of France, to be dealt with according to [the king's] own sense of duty and right."[110] As G. Edward White has pointed out, this disposition hardly seems consistent with Story's finding that forfeiture was the penalty for engaging in the illegal trade.[111] Second, in merely denouncing the traffic, Story was not ahead of his contemporaries. By 1822, when Story decided the case, the international slave trade was widely condemned, as shown by the fact that the United States, Great Britain, and most of the European trading nations, had outlawed it.[112] Third, decisions about the slave trade, unlike those addressing the institution of American slavery itself, involved neither the competition between federal and state authority nor the protection of property rights. As will be discussed later, these two matters were of great importance to Story—much more important than his moral objection to slavery.[113]

3. *Story's Other Slave Trade Cases*

In contrast to the expansiveness of the *Eugenie* opinion, Story's other slave trade opinions were narrow in their reasoning and devoid of any mention of the immorality of the trade. They were also marked by the sedulous application of the same legal rules he applied in non-slave trade cases. The point in saying this is not to damn Story for failing to fashion unique legal rules to govern slave trade cases, nor is it to praise him for a consistency that some might regard as evidence of his "objectivity." Rather, the point is that in slave trade cases, Story applied the same principles that he applied in other kinds of litigation, even though nothing compelled the application of those principles and, most importantly, he did so with-

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109 *Id.* at 850-51.

110 *Id.* at 851.

111 WHITE, *supra* note 75, at 696.

112 COVER, *supra* note 16, at 102.

113 Indeed, the *Eugenie* opinion shows that, far from being a formalist who merely applied the law as he saw it, Story could be expansive when it suited his purposes to do so. Moreover, the argument that the *Eugenie* is evidence of Story's antislavery position is further undermined by the fact that just three years after the decision, Story concurred with Chief Justice Marshall's opinion in The Antelope, 23 U.S. (10 Wheat.) 66 (1825), that the slave trade did not violate the law of nations. For a suggestion that Story's concurrence in the *Antelope* can be explained by a change in the political climate during the three years after the *Eugenie* case, see COVER *supra* note 16, at 104.

out regard to whether the result was favorable or unfavorable to slave traders.[114]

As Kent Newmyer has pointed out, many of the rules and principles that Story used to decide issues arising in slave trade litigation were derivative of his experiences in the prize cases that grew out of the War of 1812.[115] For example, one of the most important legal principles Story used in slave trade cases was to look behind the ship's papers to ascertain the true ownership of a vessel whenever fraud was suspected. Story applied that principle in his most famous slave trade decision, *La Jeune Eugenie*, as well as in the less well-known slave trade case, *United States v. Amistad*.[116] Although some have characterized this willingness to go behind the ship's papers as a bold move on Story's part, he was simply applying a principle that he used in numerous prize cases.[117]

Story's consistency in employing in slave trade litigation the same rules and principles he employed in other types of cases is also apparent in his opinions involving issues of statutory construction. Story adhered to the general rule that statutes were to be construed so as to give effect to the legislature's intent.[118] According to Story, this intent was to be garuered from the words used in the statute, for when "words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation."[119] But, like the Marshall Court generally[120] and modern courts today, Story often resorted to "ex-

114 There were only ten cases which directly confronted Story with issues involving enforcement of the laws against the slave trade, and so his opportunities to address these issues were relatively few. One must be careful in making an assessment based on so sparse a record. However, the foundation of Story's antislavery reputation is itself thin, based, as it is, primarily upon his *Eugenie* opinion and, to a lesser extent, the Grand Jury Charge and his opposition to the territorial expansion of slavery.

115 NEWMYER, *supra* note 23, at 350.

116 40 U.S. (15 Pet.) 518, 594-95 (1891). For a discussion of this case see *infra* text accompanying notes 150-61.

117 *See, e.g.*, The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821); The Dos Hermanos, 15 U.S. (2 Wheat.) 76 (1817); The Ann Green, 1 F. Cas. 958 (C.C.D. Mass. 1812) (No. 414); The Bothnea, 3 F. Cas. 962 (C.C.D. Mass. 1814) (No. 1,686); The Diana, 7 F. Cas. 634 (C.C.D. Mass. 1814) (No. 3,876); The Liverpool Packet, 15 F. Cas. 641 (C.C.D. Mass. 1813) (No. 8,406).

118 JOSEPH STORY: COMMENTARIES ON THE CONSTITUTION 135 (1987). ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.")

119 *Id.* at 136.

120 See John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992), espousing the view that Chief Marshall brought order and consistency to statutory interpretation by resolving the conflict among American jurists as to whether tbe English common law canons of interpretation should be followed to interpret statutes, or whether the courts should use the more American approach, favored by Republicans like Thomas Jefferson, of confining judges to the legislature's intent as expressed by the words actually used in the statute. This Note, which

trinsic" aids in order to divine legislative intent whenever he found statutory terms to be ambiguous. Generally, when Story resorted to extrinsic aids, he employed the common law canons of construction as guides for determining legislative intent.[121] Story used this approach to statutory construction in slave trade cases as well, with results favorable to slave traders on some occasions and unfavorable to their interests on others.

For example, Story followed this method in *The Alexander*,[122] a case involving forfeiture of a vessel that allegedly had been engaged in a voyage to transport slaves from Africa, but which had not yet taken any slaves on board at the time of seizure. The issue in the case was how to construe the first section of the Slave Trade Act of 1800. This section made it unlawful for any citizen of the United States "[to] have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country to another."[123] The owner of the vessel argued that, in order for the forfeiture penalty to apply, the statute required proof that slaves had actually been transported; the mere intention to transport slaves, even though the vessel was on a voyage for that purpose, was insufficient.

In rejecting the owner's argument, Story held that congressional intent controlled. Turning to one of the common law canons of construction in order to ascertain Congress's intent, he held that it was necessary to look to the language used in other sections of the Act of 1800.[124] After examining other parts of the statute, he argued that the words of the first section of the Act "clearly indicate a legislative intent to reach the case of vessels, whose business, employment, or traffic was slave voyages."[125] That being so, he held, mere intention to employ the vessel in the unlawful trade was suffi-

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claims to be the only systematic look at the principles used by the Marshall Court to construe federal legislation, argues that the Marshall Court's guiding principle was to construe statutes according to their "plain meaning" and to resort to the common law principles of construction only where a statute was ambiguous. But, the Note also argues, the Court often employed the canons in order to expand the powers of both the federal judiciary and the federal government. *Id.* at 1615-16. However true this may or may not have been of the Marshall Court in general, it is certainly consistent with the view that expansion of federal power wherever possible was one of the guiding principles of Story's jurisprudence.

121 *See id.* at 1624.

122 1 F. Cas. 362 (C.C.D. Mass. 1823) (No. 165).

123 *Id.* at 362.

124 Story had employed this same principle of statutory construction some eleven years earlier in a smuggling case holding that "in the construction of all statutes, it is a general rule, that the courts are to expound them according to the intention of the framers," and this intent is "to be gathered, not merely from an examination of a single section, but from comparing together different sections of the same statute." The Harmony, 11 F. Cas. 556 (C.C.D. Mass. 1812) (No. 6,081).

125 The Alexander, 1 F. Cas. at 363.

cient to affix the penalty of forfeiture, even though no slaves had actually been transported.[126]

Nonetheless, just as Story was willing to apply the canons of statutory construction where doing so aided the government's ability to prosecute in slave trade cases, he was also willing to employ those principles where doing so inhibited the government's ability to prosecute such cases. Interestingly, two cases demonstrating the latter point involved indictments in which the government sought the death penalty.

The first of these, *United States v. Gooding*,[127] involved an indictment against one of the "most conspicuous and avaricious"[128] slave traders in the city of Baltimore, itself a conspicuous and principal port for fitting out ships for the slave trade.[129] At the trial in the Maryland circuit court, the government produced evidence to prove that Gooding had caused two ships to be outfitted in the port of Baltimore, that the ships had sailed to Africa, and that one of them had brought back 290 kidnapped Africans for sale in Cuba. Upon the request of Gooding's counsel (one of whom was future Chief Justice Roger Taney), the circuit court suspended the trial and certified a number of questions to the Supreme Court.[130]

Gooding had been indicted under sections 2 and 3 of the 1818 Slave Trade Act. Section 2 of the Act provided that no American citizen could "build, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negroes . . . to be transported . . . as slaves."[131] Section 3 provided penal sanctions for the "building, fitting out, equipping, loading, or otherwise preparing, . . . with intent to employ such ship or vessel in such trade or business. . . ."[132] Among the questions certified to the Supreme Court was whether the indictment was technically defective so as to require dismissal. Gooding's lawyers argued that the counts of the indictment charging a violation of sections 2 and 3 ought to have contained an allegation that the vessel was built, fitted out, etc., within the jurisdiction of the United States.

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126 *Id.*

127 25 U.S. (12 Wheat.) 460 (1827).

128 GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 362 (1912).

129 *Id.*

130 *Gooding*, 25 U.S. (12 Wheat.) at 467.

131 *Id.* at 476.

132 *Id.* at 476-77 (emphasis omitted).

In answering this question for the Supreme Court, Story contended that the issue turned on the meaning of "such ship or vessel" as used in the relevant sections of the Act. This phrase, he said, must refer to a ship or vessel built, fitted out, etc. within the jurisdiction of the United States, or else the word "such" would have no meaning and would be mere surplusage. Employing his general rule for construing statutes, Story held that the Court's duty was to "give effect to every word in every enactment, if it can be done without violating the obvious intention of the legislature."[133] But in deciding just what the "intention of the legislature" was on this issue, Story resorted to one of the common law canons. Penal statutes, he said, must be "construed strictly," with "no intendment or extension beyond the import of the words used."[134] Ostensibly applying this rule of strict construction, he then used a surprising hypothetical, one wholly irrelevant to the facts of the case at hand, to hold that the indictment was fatally defective for its failure to allege specifically that the vessel had been fitted out within the jurisdiction of the United States. Story explained:

> There is no certainty that the legislature meant to prohibit the sailing of any vessel on a slave voyage, which had not been built, fitted out, & c. within the jurisdiction of the United States. If a foreign vessel, designed for the slave trade, and fully fitted out for that purpose, were, by accident or design, to anchor in our ports, it would not be reasonable to suppose that the legislature could have intended the sailing of such a vessel from our ports to be an offence within the purview of our laws.[135]

As a result of these defects in the indictment, the government eventually dismissed it, and Gooding escaped further prosecution.

Story's opinion was roundly condemned by antislavery activists.[136] These activists had sought for many years to obtain a conviction and sentence of death of a slave trader under the piracy laws to serve as a strong deterrent to others engaged in the trade, and *Gooding* was one of the few slave trade prosecutions in which the govern-

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133 *Id.* at 477.

134 *Id.*

135 *Id.* On a second issue involving the sufficiency of the indictment, Story's reasoning was even more narrow. With regard to that issue, Story had to decide whether the indictment was deficient because it failed to allege the offense in the same words as those used in the statute. The statute prohibited the outfitting of a ship in an American port if done "with intent to employ [the vessel] in the slave trade." *Id.* at 478. The indictment, however, charged that Gooding outfitted the ship "with intent that [the vessel] *should be employed*" in the slave trade. *Id.* (emphasis added) Using reasoning that bordered on the metaphysical, Story held that there was a clear distinction between the two. The statute applied to the intent of the person doing the act, he said, while the words used in the indictment applied "to the employment of the vessel," whether it was the person charged in the indictment or a stranger who did the employing. *Id.*

136 LOREN MILLER, THE PETITIONERS 34 (1966).

ment had sought the death penalty. Moreover, Gooding was one of the most notorious of the slave traffickers, and the government appeared to have overwhelming proof of his guilt. Gooding's escape from prosecution was thus a significant blow to the efforts of the antislavery forces. Indeed, it was not until 1862 that any American was put to death for violating the antislave trade laws.[137]

In *United States v. Battiste*,[138] an 1835 circuit court case, Story again used common law canons to construe a provision of the slave trade laws strictly, with the result that the accused escaped the death penalty. Battiste was a crew member on the *American*, a ship hired to transport slaves and their owners from one port to another in the Portuguese colonies along the African coast. He was indicted under the provisions of the 1820 piracy act that imposed the death penalty on "any person whatever" who was a member of the crew of "any ship or vessel, owned in whole or in part, or navigated for, or in behalf of any citizen . . . of the United States" who received on board the ship "any negro or mulatto, not held to service or labor by the laws of either of the states or territories, with intent to make such negro or mulatto a slave."[139]

The statute's terms seemed to apply directly to Battiste's conduct. As the evidence at his trial showed, he was a crew member on board an American-owned ship that had landed on a foreign shore and there received on board a number of slaves. The ship had made four stops along the African coast, transporting slaves from one port to another. At each stop, the enslaved Africans "were brought to the shore hand-cuffed, and chained together," and attended by guards.[140] Each time "Battiste assisted in removing the fetters" of the Africans and in "receiving them on board the brig."[141]

In charging the jury, however, Story applied the "strict construction" common law canon with such a vengeance that the jury had no choice but to find that the intent requirement of the statute had not been satisfied. Focusing upon the words "to make the negro a slave," Story interpreted the statute as requiring the government to show that Battiste "had some title or interest in or power over the negroes in question, so as to be able to impress upon them by his own act the character of slaves. . . ."[142] This interpretation is hardly an obvious one, for it ignores the statute's application to "any person" who engaged in the prohibited conduct. Story's inter-

137 DuBois, *supra* note 57, at 191.
138 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).
139 *Id.* at 1044.
140 *Id.* at 1042.
141 *Id.* at 1042-43.
142 *Id.* at 1045.

pretation exempted all lower-echelon participants of a slave trading enterprise from the statute's terms because mere crew members would have no "title or interest" in the slaves per se. Story acknowledged that the statute was intended to prohibit any and all Americans from participating in the traffic in African slaves, however that trade was carried on, and also to suppress the trade along the coast of Africa. Apparently, in Story's view, Battiste had nothing to do with making the Africans slaves or with "perpetuating their state of slavery."[143]

Congress could not have intended, Story argued, that the death penalty be imposed on one who, like Battiste, transported slaves for hire from one port to another in the same jurisdiction. In Story's view, "the mere transportation of a negro slave, as a passenger for hire" was not as morally reprehensible as engaging in the capture of human beings and their subsequent sale as slaves; indeed, mere transportation involved "not the slightest moral turpitude," even though such transportation "may . . . facilitate the operations of the slave dealer."[144] Apparently, Battiste's conduct was, to Story, morally no different than that of a crew member of a ship engaged in the transportation of ordinary merchandise who had helped load the merchandise on and off the ship. Moreover, the "inhuman traffic" of his 1819 Grand Jury Charge[145] became "mere transportation" in *Battiste*. Of course, this change in language does not prove that Story was more concerned about saving the defendant from the punishment of death than he was about vigorous enforcement of the antislave trade laws. However, the change does lead one to question whether the passionate terms Story used in the Grand Jury Charge were mere rhetorical devices rather than reflections of deeply held convictions.

To further buttress his conclusion that Congress had not intended to make "mere transportation" of a slave a capital offense, Story employed two other common law canons: *in pari materia* and *expressio unius est exclusio alterius*.[146] He pointed out that, in the other slave trade acts, Congress had used language that expressly prohibited the transportation of slaves from the coast of Africa and from

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143 *Id.* at 1044.

144 *Id.* at 1045-46.

145 *See supra* text accompanying notes 81-87.

146 The *in pari materia* canon allows the judge to look to other statutes dealing with the same subject matter in determining legislative intent. *See* 2B JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51-03, at 468 (Norman J. Singer ed., 5th ed. 1992). Under the *expressio unius est exclusio alterius* canon, which roughly translated means "a statement of one is an exclusion of another," the judge must infer that, where the statute expressly includes certain acts or persons within its terms, the legislature did not intend that the statute reach any act or persons not included in the statutory language. 2A JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 216.

one foreign country to another. Therefore, Story concluded, if Congress had intended the 1820 statute to increase the penalty and to make "mere transportation" a capital offense, one would expect to find explicit langnage to that effect in the 1820 statute. Such an omission, he reasoned, "furnishes a presumption, that the legislature had some other and different offence in their view."[147] Not surprisingly, given this charge, the jury acquitted Battiste.[148]

The decisions in *Gooding* and *Battiste* are difficult to reconcile with the prevailing view of Story as a judge willing to use his discretion whenever possible to rule against slave traders. After all, flexibility is the hallmark of canons of statutory construction. Having their genesis in equity, they equip the judge with discretion to render "strict" or "liberal" interpretations of a statute depending on the judge's view of how the statute ought to be applied to the particular case at hand. Yet in deciding *Gooding* and *Battiste*, two of the rare instances in which the federal government actually prosecuted slave traders, let alone sought the death penalty, Story employed that discretion to construe statutes "strictly" and allow the slave traders to escape the death penalty. Perhaps the results in these two cases are partly explained by the rule that, in capital cases, statutes ought to be strictly construed against the government.[149] This rule, however, is merely another common law canon of statutory construction, not a "meta-canon" to be used to gnide applications of the common law canons discussed above.

These cases are not somehow aberrant, rare instances in which a staunchly antislavery jurist felt compelled by duty to adhere to the "letter of the law," even though he found doing so morally repugnant. Rather, Story did not go out of his way, not even in the famous *Eugenie* case, to render a decision adverse to proslavery forces. Typically, Story was quite consistent in applying certain legal rules and principles across a spectrum of cases, even when it was the enforcement of the slave trade laws that was at stake. As a result, he sometimes decided issues in slave trade cases against those clearly implicated in the slave trade and sometimes he decided issues in their favor.

Moreover, the tone and reasoning of the other slave trade opinions are far different from the passionate rhetoric and expansive reasoning of the *Eugenie* opinion. More typical is Story's 1841 opin-

147 Battiste, 24 F. Cas. at 1046.

148 *Id.*

149 Story did not expressly employ this rule in either *Gooding* or *Battiste*. However, he indicated in *United States v. Smith* that different rules ought to apply in capital cases than in criminal cases in which the death penalty is not sought: "If the present were a capital case, it would be our duty to adhere to the very letter of established doctrines in favorem vitae." United States v. Smith, 27 F. Cas. 1167, 1169 (C.C.D. Mass. 1820) (No. 16,338).

ion for the Court in *United States v. The Amistad*.[150] The issue in this case was the proper disposition of a group of approximately fifty Africans recently kidnapped from their homelands and taken to Cuba as slaves. This abduction violated Spanish law enacted in accordance with an 1817 treaty between Spain and Great Britain that abolished the slave trade throughout the dominions of Spain. Under this law, an African imported into any of the Spanish colonies contrary to the treaty would be declared free in the first port at which the African arrived.[151]

During a voyage in which the fifty kidnapped Africans were being transported from one Cuban port to another, the Africans on board the Amistad mutinied, killed the ship's captain, and took control of the vessel.[152] The "mutineers" directed the two Spaniards who had purchased them to sail the vessel back to Africa. Unfortunately, the Spaniards were able to trick the Africans and sail the vessel to a port in the United States. The Spaniards were then rescued by an American ship's captain, who eventually took the Amistad to New London, Connecticut and filed a claim for libel of the vessel and its cargo in the District Court of Connecticut.[153]

The United States Attorney for the District of Connecticut filed a conflicting libel claim, asserting that the Spanish minister had officially presented a claim upon the United States for return of the vessel, cargo, and kidnapped Africans as property of Spanish subjects.[154] The United States argued that a 1795 treaty between the United States and Spain required that the Africans be returned to the Spanish claimants. The ninth article of this treaty provided that "all ships and merchandise" rescued on the high seas "out of the hands of any pirates or robbers" and brought into a Spanish or United States port were to be restored to the owners "as soon as due and sufficient proof shall be made concerning the property thereof."[155] The district court found the treaty inapplicable and the Africans to be free men and women. After a pro forma affirmance by the circuit court, the United States appealed to the Supreme Court.

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150 The Amistad, 40 U.S. (15 Pet.) 518 (1841). This is the only slave trade case, other than the *Eugenie* case, discussed in any depth by scholars who explore Story's anti-slavery reputation. *See, e.g.*, NEWMYER, *supra* note 23, at 368-69, and COVER *supra* note 16, at 109-116 discussing the *Amistad* case.

151 The Amistad, 40 U.S. (15 Pet.) at 563.

152 JOHN R. SPEARS, THE AMERICAN SLAVE TRADE 184 (1900).

153 1 HENRY WILSON, THE HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 457 (1872).

154 The Amistad, 40 U.S. (15 Pet.) at 588.

155 *Id.* at 592.

In an opinion for the Court, Story affirmed the district court. Following the reasoning of the lower court, he held that, under the 1817 treaty between Britain and Spain and the Spanish statute of the same year, the Africans were never slaves under Spanish law. Therefore, Story said, they were not "merchandise" as that term was used in the 1795 treaty between the United States and Spain. Moreover, since the Africans were free, they could not be "pirates or robbers" under the treaty. Thus, the libel claim filed by the Spanish government had to be denied, and the Africans were entitled to their freedom.[156]

Story's decision was a victory for the abolitionists who represented the Africans in the litigation,[157] to say nothing of the Africans themselves. The victory, however, was a limited one because Story's holding rested on a close reading of the terms of the treaty and, more importantly, because it relied on the fact that the slave trade was prohibited by Spain. Indeed, at one point in the opinion, Story said that, if the Africans had been lawfully enslaved under the law of Spain and "capable of being lawfully bought and sold," then there was "no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise. . . ."[158] These are rather cold, not to mention gratuitous, words from a judge who supposedly had a burning opposition to slavery. Further, there is not one word in the opinion about the immorality of either slavery or the slave trade.

Commentators have speculated about the reasons for Story's narrow holding in *The Amistad* and for his failure to address the question of the morality of slavery in that case. Newmyer argues that perhaps Story was acting as "spokesman for an increasingly divided Court, in a period of explosive sensibilities. . . ."[159] According to Swisher, it may have been because he was speaking for a Court that included slaveholders.[160] Cover suggests that Story's strong stance against the slave trade "cooled a bit" in later years as a result of the influence of "his idol," Chief Justice John Marshall.[161]

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156 *Id.* at 593-96.

157 The Africans were represented by John Quincy Adams, who at seventy-four years old came out of virtual retirement to do so, Roger Baldwin and Lewis Tappan, among other antislavery activists. COVER, *supra* note 16, at 110-11.

158 The Amistad, 40 U.S. (15 Pet.) at 593.

159 NEWMYER, *supra* note 23, at 368. Newmyer's argument may have validity given the increasing heat with which Americans were debating the slavery question by 1841.

160 SWISHER, *supra* note 16, at 194. With the exception of Justice Baldwin, Story's opinion for the Court was joined by all six of the other Justices who sat for the arguments. It is unlikely that the southerners Taney, Wayne, and Daniels would have joined an opinion which rested on expansive notions about the unlawfulness of the slave trade.

161 COVER, *supra* note 16, at 239. The problem with Cover's explanation is that Story's work in cases involving the slave trade cannot be neatly divided into early-Story

In my view, Story's narrow decision in *The Amistad* and his failure to mention the immorality of the slave trade is merely consistent with the style and substance of his opinions in most of the other slave trade cases. There is simply nothing remarkable here. For example, in *The Plattsburgh*,[162] a slave trade case decided sixteen years before *The Amistad*, Story exhibited the same restraint in rendering an opinion without articulating any expansive general principles of law, and without commenting on the immorality of slavery or the slave trade.

The case involved the forfeiture of the schooner *Plattsburgh*, which had been seized by an American warship off the coast of Africa in 1820 and taken to the port of New York where a libel was filed under the Slave Trade Acts of 1794 and 1800. The vessel, which was originally registered in Baltimore as an American ship, had set sail from the port of Baltimore ostensibly for Cuba. The claimants of the ship contended that, once in Cuba, the vessel was sold to a Spanish national in a bona fide purchase, and that it was only at the new Spanish owner's behest that the ship embarked on the voyage to Africa for the purpose of engaging in the slave trade. The government contended that the purchase was a fraud and that the purpose of the voyage from the time it left Baltimore was to sail to Africa.[163]

It was undisputed that the vessel had been engaged in the slave trade at the time of its seizure. There were only two issues. The first issue was whether the purchase by the Spaniard was genuine. The second issue was whether the voyage had been originally undertaken in the United States or instead had been undertaken by the Spanish national after he purchased the vessel in Cuba in a transaction totally unconnected to the voyage from Baltimore to Cuba. The Spanish claimant argued that no matter how immoral or inhumane the slave trade might be, the Court was required to decide these issues upon "principles of law, and not merely upon principles of justice or morality."[164]

The Supreme Court affirmed the district court's decision condemning the vessel. In his opinion for the Court, Story addressed

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and late-Story periods. Some of Story's earlier decisions, like United States v. Smith, 27 F. Cas. at 1167 and United States v. La Coste, 26 F. Cas. 826 (C.C.D. Mass. 1820) (No. 15,548), as well as such mid-career decisions as *United States v. Gooding*, showed the same lack of passion as *The Amistad*. Moreover, the 1819 Grand Jury Charge was also given in 1838, after Story had been on the bench for twenty-seven years, and Marshall was dead. Nevertheless, I do agree with Cover that whatever passion Story may once have felt against the slave trade certainly seemed spent by 1841.

162 23 U.S. (10 Wheat.) 133 (1825).

163 *Id.* at 134-39.

164 *Id.* at 142.

only the narrow factual issue and said nothing about the evils of the slave trade. In response to the claimant's argument, Story said that "the Court [will] have nothing to do with the conscience of the Spanish claimant, if he has established a *bona fide*, legal ownership."[165] But ownership was the very question at issue and Story concluded that the proof was insufficient to establish that the sale had been *bona fide*. The proof, moreover, showed that "the unlawful enterprise had its origin at Baltimore."[166]

In two circuit court cases decided in 1820 involving the sufficiency of indictments brought for violations of the slave trade laws, Story similarly stuck closely to technical issues and said nothing about the immorality of the slave trade. In the first of these cases, *United States v. La Coste*,[167] the defendant argued for the reversal of his conviction and the dismissal of the indictment because the indictment failed to allege with specificity some of the material allegations against him. Citing such hoary English authorities on criminal pleading as Hawkins[168] and Hale,[169] Story rejected the defendant's argument.[170] The mere "wanting in technical accuracy and precision" in the wording of an indictment was not fatally defective, Story held, so long as the indictment's averments followed the language of the statute under which the defendant was charged.[171]

So too, in the second case, *United States v. Smith*,[172] Story rejected the defendant's contention that the indictment was defective because it failed to state the precise time when the offense had been committed. Story asserted that he was "no friend to over curious and nice exceptions in mere matters of form, either in civil or criminal proceedings." Such pleading technicalities were, he said, "a blemish and inconvenience in the law and the administration thereof," resulting too often in the escape of the guilty from punishment.[173] Story allowed that "the defendant is entitled to the benefit of these niceties wherever the law is settled in favour of them."[174] Yet, because there was no settled rule requiring that an indictment set forth the specific date on which the offense occurred, Story held that the indictment's failure to allege the specific date was not a fatal error.[175] In this case, just as in *La Coste*, there is no mention of the

165 *Id.*
166 *Id.* at 146.
167 26 F. Cas. 826 (C.C.D. Mass. 1820) (No. 15,548).
168 WILLIAM HAWKINS, PLEAS OF THE CROWN (1716).
169 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN (1680).
170 United States v. La Coste, 26 F. Cas. at 830.
171 *Id.*
172 *Smith*, 27 F. Cas. 1167.
173 *Id.* at 1168.
174 *Id.*
175 *Id.* at 1169.

evils of the slave trade. Indeed, nothing in either opinion indicates that the fact that the cases involved indictments against slave traders had anything to do with Story's analysis. Thus, despite the rhetoric of a few sporadic cases, Story's antislavery reputation has been exaggerated. As demonstrated in the next section, his opinion in *Prigg* confirms my argument.

C. The *Prigg* Decision

1. *Background of the Case*

Northern attempts to regulate the capture and return of fugitive slaves apparently date back to 1629.[176] The first inter-jurisdictional regulation addressing the problem came in 1643.[177] The Fugitive Slave Act of 1793 was the first national legislation to regulate the interstate reclamation of putative runaways. Like *Prigg*, the 1793 Act grew out of a controversy between Pennsylvania and a neighboring slaveholding state, and involved the apprehension and return of slavehunters accused of having removed an alleged slave from Pennsylvania in violation of Pennsylvania law.[178] In May of 1788 three white citizens of Virginia, acting for hire, went into Pennsylvania and captured a black man named John Davis. They took him back into Virginia on the alleged ground that Davis was a slave who had run away from his Virginia master. Unfortunately for the three slave catchers, Pennsylvania had passed a statute in March of 1788 making it a crime to take a black person "by force or violence" from the state of Pennsylvania with the "desigu and intention of

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176 The earliest regulation is probably that found among the freedoms and exemptions granted by the West India Company in 1629 to the settlers of the colonies of New Netherlands. The Company promised that its authorities would "do all in their power to return to their masters any slaves or colonists fleeing from service." MARION GLEASON MCDOUGALL, FUGITIVE SLAVES 2, 89 (1971).

177 The first such agreement was made in 1643 by the New England Confederation of Plymouth, Massachusetts, Connecticut, and New Haven. The Articles of Confederation of these States contained a provision for the return of a "servant" who had run away from the master "[u]pon the Cert[i]ficate of one Ma[g]istrate in the Jurisdi[cti]on out of which the said servant fled, or upon other due proof[], the said servant shall be deli[v]ered either to his Master or any other that pursues and brings such Certificate or proof[]." *Id.* at 7.

178 Extended treatments of the history of the controversy leading to adoption of the Fugitive Slave Act of 1793 are set forth in MORRIS, *supra* note 5, at 19-22; Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 50 J. S. HIST. 397 (1990); William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63 (1951). Leslie and Finkelman differ in their accounts, with Leslie arguing that, in addition to the conflict over the kidnappers of John Davis, an earlier controversy between Pennsylvania and Virginia involving the rendition of fugitives accused of having murdered several members of the Delaware Indian Nation also prompted the passage of the Fugitive Slave Act. Finkelman disagrees, arguing that the John Davis affair was the sole trigger.

selling and disposing" of that person as a slave.[179] The 1788 statute was Pennsylvania's first legislative attempt to protect the state's free black citizens from being kidnapped and sold south into slavery.[180] The problem of the kidnapping of free blacks was especially acute in Pennsylvania because three of the states bordering it (Virginia, Maryland, and Delaware) were slave states.

After the three slave catchers were indicted for kidnapping John Davis, Pennsylvania's governor requested that they be returned to Pennsylvania for trial. However, despite the fugitive-from-justice provision of Article IV, Section 2 of the Federal Constitution,[181] the governor of Maryland refused the extradition request. The two states appealed to President George Washington to settle the conflict, and he in turn referred the whole matter to Congress.[182] After a lengthy legislative process, Congress enacted the Fugitive Slave Act of 1793.[183] The Act provided procedures for both the interstate return of fugitives from justice and the interstate capture and return of fugitive slaves.[184]

The 1793 Act contained two sections regulating reclamation of runaway slaves. Section 3 of the Act authorized the putative owner of an alleged fugitive slave, or the owner's agent, to seize the person and to take him or her before any federal judge "residing or being within the state" or before any magistrate of the county, city or incorporated town where the fugitive had been seized.[185] Upon "proof to the satisfaction" of the judge or magistrate that the person seized was really a fugitive and was owned by the claimant, the

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179 Leslie, *supra* note 178, at 67 n.18.

180 Pennsylvania was the first state to abolish slavery when in 1780 it enacted "An Act for the Gradual Abolition of Slavery." A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 299 (1978). At the same time, the statute conferred on owners of runaways a general right of recapture. *See* MORRIS, *supra* note 5, at 26 (citing Pennsylvania decisions to that effect).

181 "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." U.S. CONST. art. IV, § 2, cl. 2.

182 Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161, 163 (1921).

183 For an account of the legislative history of the Act of 1793, see Finkelman, *supra* note 178, at 410-18.

184 Act of February 12, 1793, 1 Stat. 302 (1793) [hereinafter Act of 1793]. The legislative history of the Act of 1793 does not show why Congress included provisions addressing both clauses in the same statute. Perhaps it did so because both clauses appear together in the Constitution and had been adopted together at the Convention. Or perhaps it did so because the dispute between Pennsylvania and Virginia involved criminal fugitives accused of kidnapping a black man whom the fugitives contended was a runaway slave.

185 *Id.* at 303. The Act of 1793, like the clause itself, nowhere uses the term slave, preferring instead the euphemism used in the Constitution, "Person held to Service or Labor." U.S. CONST. art. IV § 2, cl. 3.

judge or magistrate was to issue a certificate authorizing the claimant to remove the fugitive to the state from which he or she had allegedly fled.[186] Proof could be oral in the form of the sworn testimony of the claimant or the claimant's agent.[187] It could also be an "affidavit taken before and certified by a magistrate" of the state from which the seized person had allegedly escaped from bondage.[188] Section 4 of the Act authorized the imposition of criminal penalties on any person who obstructed the capture of a fugitive, or who rescued, aided, or concealed the fugitive.[189]

The terms of the Act did not prohibit the judicial official from either conducting a hearing if the fugitive lodged a competing claim of freedom or taking the testimony of the captured person on such a claim. There was no explicit provision in the Act, however, encouraging the official to do either. Nor did the Act contain any other procedural protections for an alleged runaway who disputed the validity of the claim.[190] Thus, the Act appeared to provide no more than a summary ministerial proceeding—one not designed to render a final adjudication on the status of the person seized.[191]

The 1793 Act proved to be an inadequate solution to the conflict over the return of fugitive slaves,[192] and it did nothing to deal with the problem of the kidnapping of free blacks. Indeed, it may have exacerbated the latter problem.[193] Pennsylvania's subsequent experience, discussed below, illustrates the predicament.

After the 1793 Act became the law of the land, the practice in Pennsylvania was for a slave catcher to seize the alleged fugitive (or

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186 Act of 1793, 1 Stat. 302, 303-05.

187 *Id.*

188 *Id.* at 304.

189 *Id.* at 305.

190 MORRIS, *supra* note 5, at 21.

191 Proslavery forces and antislavery forces in Congress disagreed about whether adjudication of the claim to freedom had to take place in the state of seizure. The proslavery forces argued that reclamation procedures in the free states were summary ministerial proceedings to be followed by a full adjudication of the putative owner's claim to the captured person once the person was returned to the state from which he or she had fled. On the other hand, the antislavery forces contended that reclamation procedures were, for all practical purposes, final, as the Southern states provided no further adjudication of the validity of a claim once the captured person was removed to a Southern state. *See* MORRIS, *supra* note 5, at 31-41; MCDOUGALL, *supra* note 176, at 20-23; Joseph Nogee, *The Prigg Case and Fugitive Slavery, 1842-1850*, 39 J. NEGRO HIST. 185, 189-91 (1954).

192 Because of the ineffectiveness of the 1793 Act, Southern slaveholders continually agitated in Congress for a new fugitive slave law, but their efforts proved unsuccessful until 1850. William R. Leslie, *The Pennsylvania Fugitive Slave Act of 1826, reprinted in* ARTICLES ON AMERICAN SLAVERY 211, 213 (Paul Finkelman, ed., 1989).

193 *See* FEHRENBACHER, *supra* note 30, at 41 (noting that the lack of any procedural protections for the alleged fugitive in the 1793 Act made it "an invitation to kidnapping").

have that person arrested by local authorities) and then immediately take him or her to the nearest judge or justice of the peace, if such an official could be found. If the claimant was able, by oral testimony or affidavit, to satisfy the judge or justice of the peace that the seized person was the claimant's slave, then the official, in accordance with the 1793 Act, granted the certificate authorizing the claimant to remove the person from the state. The certificate served as conclusive proof against any claim to freedom by the captured person.[194]

However, it was frequently difficult for slave catchers to find an official to adjudicate their claims. There were only two United States district judges for all of Pennsylvania, and the Supreme Court Justice riding circuit in Pennsylvania was there only part of the time.[195] As a result, slave catchers often resorted to seizures by force or subterfuge.[196] At the same time, the Act's limited requirements made it relatively easy for a slave hunter to kidnap a free black person, obtain the necessary removal certificate, and carry the person south to be illegally sold into slavery. Some of these false claims were successful because of the use of trickery and fraudulent testimony.[197] Others succeeded, however, because some of the justices of the peace who adjudicated claims colluded with the slave catchers to send free blacks into slavery.[198]

During this period, kidnappings in the Northern states were becoming more frequent. Several factors contributed to this increase. First, although the laws enacted after 1807 banning the importation of new slaves into the United States did not end American involvement in the slave trade, they did decrease the number of new persons kidnapped from Africa and brought into the United States. Second, because the Jefferson Embargo and the War of 1812 interrupted the flow of immigrants from Europe to the United States, the demand for other sources of labor increased throughout the whole

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194 Nogee, *supra* note 191, at 191.

195 SWISHER, *supra* note 16, at 536.

196 Nogee, *supra* note 191, at 187.

197 *See* PA. HOUSE OF REPRESENTATIVES, REP. OF THE COMMITTEE ON THE JUDICIARY (March 7, 1850). *See also* MORRIS, *supra* note 5, at 33-34, quoting an 1817 account of the interstate slave traffic in which the author reports that, while some of the people unlawfully sold into slavery had been kidnapped outright, others had been the victims of false claims made under the 1793 Act:

> They [slave traders] have lately invented a method of attaining their objects . . . through the instrumentality of the laws;-Having selected a suitable free coloured person, to make a *pitch* upon, the *conjuring* kidnapper employs a confederate, to ascertain the distinguishing marks of his body and then claims and obtains him as a slave, before a magistrate, by describing those marks, and proving the truth of the assertions, by his well-instructed accomplice.

198 Nogee, *supra* note 191, at 186-87.

country. Third, the newly established cotton plantations of the Old Southwest added to the overall demand for slave labor.[199]

Faced with these developments, on March 27, 1820, Pennsylvania made its second legislative attempt to deal with the kidnapping problem by enacting "An Act to Prevent Kidnapping."[200] The 1820 Act increased the penalties for kidnapping to a maximum of twenty-two years at hard labor. It also stripped aldermen and justices of the peace of the authority to enforce the federal Fugitive Slave Act of 1793, reserving that authority to state judges.[201] Although the 1820 Act was meant to thwart kidnappers of free blacks, it also had the additional, and perhaps unintended, effect of making it difficult for slave catchers to remove persons who actually were fugitive slaves.[202] This came about because, with aldermen and justices of the peace no longer authorized to issue removal certificates, there simply were not enough officials to adjudicate the large number of claims made under the Fugitive Slave Act.

Soon, Maryland complained that the 1820 Act was tantamount to "an act of emancipation itself" and demanded that Pennsylvania repeal the law.[203] Following extensive negotiations between the Pennsylvania legislature and delegates from Maryland, the two states resolved their dispute. This resolution required Pennsylvania to enact a new statute entitled "An Act to give effect to the provisions of the Constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping."[204] This 1826 enactment preserved the 1820 Act's prohibitions on and penalties for the kidnapping of free blacks, and also contained new provisions to regulate the capture and removal of putative runaways.[205]

More specifically, the 1826 Act widened the categories of jurists qualified to adjudicate slave claims, but also codified safeguards for persons seized. It authorized the claimant to apply to any judge, justice of the peace, or alderman for a warrant to arrest an alleged

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199 GARY B. NASH ET AL., FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH 197 (1991).

200 Nogee, *supra* note 191, at 191.

201 The 1793 Act gave federal judges authority to enforce the Act's provisions. Act of 1793, 1 Stat. 302 § 3 (1793).

202 Nogee, *supra* note 191, at 191-92. *See also* NASH, *supra* note 199, at 200.

203 Nogee, *supra* note 191, at 192. The tensions between Maryland and Pennsylvania, which Maryland slaveholders saw as involving the aiding and abetting of runaways by Pennsylvania citizens, and which many Pennsylvanians viewed as involving the right of their state to protect its free black citizens from kidnapping, were ongoing and neither began nor ended with the controversy surrounding the enactment of the 1820 anti-kidnapping statute. *See* Leslie, *supra* note 178, at 213-220 for an account of the history of the relations between the two states.

204 Finkelman, *supra* note 15, at 7.

205 MORRIS, *supra* note 5, at 51-52.

fugitive.[206] The warrant directed the sheriff of the relevant city or county to arrest the person named in the warrant and bring him or her before a judge of that jurisdiction.[207] Further, the Act specifically repealed that part of Pennsylvania's 1780 Gradual Emancipation statute[208] that authorized self-help in the seizure of an alleged fugitive. Another provision of the 1826 Act prohibited officials from issuing warrants solely on the application of an agent of the claimant, unless the agent both swore by oath or affirmation that the person named was the slave of the claimant and produced the claimant's affidavit.[209] In the affidavit, the putative owner had to affirm title to the alleged fugitive, describe him or her, and supply his or her age and name.[210] Further, the affidavit had to be certified by an official authorized to administer oaths in the claimant's state.[211]

After seizure of an alleged fugitive, the judge before whom the person was brought was to issue the certificate of removal if satisfied of the validity of the claim.[212] Neither the testimony of the owner nor that of any other interested party could be received in evidence to substantiate the claim.[213] In addition, the Act required the judge to give the seized person time to obtain evidence challenging the claimant's allegations.[214] A seized person who opted to take advantage of this opportunity was required to give security for his or her appearance. If, however, the person could afford no security, the judge could commit the person to jail instead, at the expense of the claimant, with a hearing to be held after a "reasonable and just period" to determine whether the certificate of removal should be issued.[215] If the claimant wished a continuance of the hearing, then the claimant had to give bond to secure his or her own appearance at the final hearing.[216]

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206 *Id.*

207 *Id.*

208 For information on Pennsylvania's 1780 Gradual Emancipation statute see HIGGINBOTHAM, *supra* note 147, at 299-305.

209 MORRIS, *supra* note 5, at 51-52.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 As Leslie argues, the various accounts of the history of the 1826 Act are a "maze of contradictions." Leslie, *supra* note 192, at 211 n.1. Leslie's own view of the history is suggested by his statement that the 1826 Act "was a precursor to later interference by northern states with . . . the national administration of laws for the protection of property in fugitive slaves," *id.* at 211, by what he calls "antislavery extremists." *Id.* at 226. For a more balanced historical analysis, see MORRIS, *supra* note 5, 1 at 42-53, and Nogee, *supra* note 191, at 190-92, on whom I have primarily relied.

Thus, unlike the 1793 federal fugitive slave law, Pennsylvania's 1826 Act contained evidentiary barriers to the success of a claim lodged by the putative owner and provided some measure of procedural protection for the alleged runaway. It was this 1826 Act that Edward Prigg violated when he failed to obtain the necessary certificate before removing Margaret Morgan and her children from Pennsylvania.

Prior to her abduction by Prigg, Margaret Morgan had lived in virtual freedom all of her life.[217] She and her parents had been owned by a man named Ashmore, who allowed them to live on a corner of his Maryland estate in practical—though not legal—freedom for a number of years.[218] Margaret married Jerry Morgan, a free black man from Pennsylvania, and ultimately moved with him to Lower Chanceford Township, York County, Pennsylvania. The Morgans had a number of children, perhaps as many as six. Some were born before the family left Maryland, but at least one was born more than a year after the move to Pennsylvania. The Morgan family lived in York County for five years unmolested by Ashmore, but in 1837, with Ashmore now dead, his niece and heiress, Margaret Ashmore, hired four prominent Maryland citizens—Nathan S. Bemis, Jacob Forward, Stephen Lewis, and Edward Prigg—to bring Margaret Morgan back to Maryland and into bondage.

Pursuant to the 1826 Act, Prigg and his three fellow slave catchers obtained from Thomas Henderson, a York County justice of the peace, a warrant to arrest Margaret Morgan as a fugitive slave. With warrant in hand, Prigg arrested Mrs. Morgan and brought her back to Henderson for a certificate of removal. For unexplained reasons, Henderson "refused to take further cognizance of the case."[219] Subsequently, Prigg and his cohorts, apparently unable to find a judge to issue the certificate of removal, abducted Mrs. Morgan and

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217 Account taken primarily from *The Great Slavery Case*, N.Y. TRIB., Mar. 14, 1842, at 1. *See also* Nogee, *supra* note 191, at 185; SWISHER, *supra* note 16, at 537-38.

218 None of the accounts of the *Prigg* case explain why Ashmore allowed Margaret Morgan's parents to live in virtual freedom. Maryland, like the other slave-holding states, discouraged the outright emancipation of slaves by their owners by requiring that certain conditions were met before the slave could be freed. *See* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 95-189 (1986). Maryland's manumission statute allowed masters to free their slaves only if the persons to be emancipated possessed "healthy constitutions," and were "sound in mind and body," could "gain a sufficient livelihood," and were no more than forty-five years old. GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 151-52 (1827). In addition, the manumission could not occur if it would result in the "prejudice of creditors." *Id.* at 152. Perhaps Ashmore was unable to meet one of these conditions for emancipating Margaret Morgan and her parents.

219 Finkelman, *supra* note 15, at 8 (contending that Prigg was unable to meet the requirements of the law). The Supreme Court's report of the case does not say why Henderson refused to deal further with the matter.

her children one night while her husband was away and forcibly took them over the Pennsylvania state line into Maryland.

Little is known about what happened to Margaret Morgan and her children after they were kidnapped. Some accounts say that the kidnappers took them to Harford County, Maryland—some seven or eight miles from the Morgan's Pennsylvania home—and that after three days of investigation the county court certified that they were slaves.[220] Other accounts report that Mrs. Morgan was given over to Margaret Ashmore, who retained her in slavery.[221] And one newspaper of the period reports that, after arriving in Maryland, Mrs. Morgan and her children were sold to a slave driver to be taken further South.[222] In any event, what does seem certain is that a woman who had lived her entire life in near-freedom became a slave and saw her children also taken into bondage, and that her husband, Jerry Morgan, lost his entire family to slavery.

In due course, Bemis, Forward, Lewis, and Prigg were indicted in a Pennsylvania state court.[223] Subsequently, Governor Ritner of Pennsylvania demanded that Maryland return them for trial. Rather than comply with Governor Ritner's demand, Maryland's Governor Veazey sent Thomas Culbreth, secretary of the Maryland Council, to Harrisburg to negotiate, with the hope of getting the prosecutions dropped.[224] The mission proved unsuccessful, however, as Pennsylvania refused to make any concessions. Governor Veazey then agreed to the extradition.[225] The matter became more complicated, however, when the Maryland legislature, in December 1837 enacted a resolution calling for the appointment of a commission to go to Harrisburg, Pennsylvania, with three objectives in mind: secure the dismissal of the pending prosecutions; make whatever agreements might be necessary to ensure that all issues between the two states would eventually be decided by the Supreme Court of the United States; and obtain "such modification of the Laws of Penn-

220 SWISHER, *supra* note 16, at 537 (citing *Delicate and Interesting Case*, 56 NILES' NAT'L REG. 298 (1838)).

221 Johnson, *supra* note 182, at 166.

222 THE LIBERATOR, March 31, 1837, at 2, col. 5. Aside from the obvious tragedy of being enslaved at all, life might have been even worse for the Morgans if they were in fact sold further south, for the conditions of a slave's life on the large sugar and cotton plantations of the Deep South were often much harsher than conditions in the Upper Southern states of Maryland, Virginia and Delaware. *See* KENNETH STAMPP, THE PECULIAR INSTITUTION, ch. 2 (1956). For example, slave laborers on sugar plantations were driven to "the point of complete exhaustion," normally working sixteen to seventeen hours a day, seven days a week during harvest time. *Id.* at 85.

223 SWISHER, *supra* note 16, at 538.

224 *Id.* at 538.

225 *Id.*

sylvania as will preserve the rights of slave holders and cherish good will between the two states."[226]

As a result of this second set of negotiations, Maryland and Pennsylvania agreed to work together to ensure United States Supreme Court review. Their agreement called for the Pennsylvania legislature to pass a law that would require that a jury try one of the kidnappers, Edward Prigg, by special verdict. Prigg and the State of Pennsylvania would then stipulate to a statement of facts to be presented to the jury, and the special verdict would be returned solely on the basis of the stipulated facts. If Prigg lost at trial, he would have the right to appeal to the Pennsylvania Supreme Court; if he lost there, he would have six months to appeal to the United States Supreme Court, and no action would be taken to carry out his sentence until after the Court's decision.[227]

On May 22, 1839, the Pennsylvania legislature enacted a statute embodying the agreement. The statute's express purpose was to ensure that "all questions touching the constitutionality" of Pennsylvania's 1826 statute would be aired before and eventually decided by the United States Supreme Court.[228] Within less than a year of the agreement between the two states, Prigg was found guilty by special verdict of kidnapping Margaret Morgan, his conviction was upheld pro-forma by the Pennsylvania Supreme Court, and the case was appealed to the United States Supreme Court.[229]

2. *Story's Opinion*

According to Story's "opinion of the Court,"[230] the issue in *Prigg* was the "constitutionality of the statute of Pennsylvania."[231]

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226 *Id.* at 538 & n. 25 (quoting message of Governor Thomas W. Veazey to the Maryland legislature, January 2, 1839, at 19).

227 FINKELMAN, *supra* note 15, at 8.

228 *Id.*

229 *Id.* For unexplained reasons, the special verdict made no mention of whether the kidnapping of the Morgan children was also unlawful. As early as 1816, Pennsylvania courts had ruled that a child conceived and born in Pennsylvania was free even though the child's mother was a runaway slave. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 65 (1981). At an earlier point in the course of this controversy, the Maryland legislature claimed that one of the issues in the case was "[t]he right of a master to the produce of his fugitive slave, born of her in a non-slaveholding state." MORRIS, *supra* note 5, at 94 n.3 (*quoting* NILES' REGISTER, May 25, 1839). None of the accounts of the background of *Prigg* show why Pennsylvania and Maryland dropped this question from the case.

230 *Prigg*, 41 U.S. (16 Pet.) at 608.

231 *Id.* at 609. As historians have noted, Story did not command a majority of the Court on most of the propositions advanced in his opinion. *See, e.g.*, Joseph C. Burke, *What Did the Prigg Decision Really Decide?*, 93 PA. MAG. OF HIST. & BIOGRAPHY 73 (1969). However, the official reporter states that Story delivered the opinion of the Court, and several of the Justices who wrote separately referred to Story's opinion as the opinion of the Court or as the majority's opinion.

The ambiguities of the federal Fugitive Slave Clause, coupled with Pennsylvania's argument that its 1826 statute was a sincere effort to comply with both its constitutional duty to return fugitive slaves and its obligations to its free black citizens, should have allowed an able judge to decide in favor of the Pennsylvania law. It is virtually inconceivable that a jurist as exceptionally able as Story genuinely thought the clause required him to rule in favor of slavery. For example, Story reasonably might have compared the terms of the Fugitive Slave Clause to the provisions of the 1826 Act and held that the Act was in harmony with the literal language of the clause.[232] Because the Act did not free any slaves and provided a mechanism for sending a fugitive back to the state from which he or she had fled, Story could have held that the Pennsylvania law did not violate Article IV.[233] Alternatively, Story could have found that the federal scheme for effecting the reclamation and removal of an alleged fugitive articulated in the 1793 Act had many gaps that the states were free to fill.[234]

Although a decision upholding the 1826 Act would have indirectly affirmed the legality of slavery, it would have had two important virtues from an antislavery perspective. First, it would have preserved the procedural protections that Pennsylvania and other Northern states had devised to protect free blacks from fraudulent claims made under the 1793 Fugitive Slave Act. Second, it also would have acknowledged state power to enact laws giving procedural protection to actual fugitives.[235]

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232 Indeed, Dworkin suggests that, had the judges in Cover's study remained true to the traditional formal style of judging (which he defines as a mechanistic, legalistic style of judging that was popular among English jurists) they would have looked to the literal language of the Fugitive Slave Clause and concluded that it was the *federal* 1793 Act that was unconstitutional. *See* Dworkin, *supra* note 20. Thus, in a sense, Dworkin argues that these judges suffered from too little formalism rather than, as Cover contends, too much. *Id.*

233 CURRIE, *supra* note 16, at 242-43 makes this point.

234 Of course, this resolution of the question would still have contained the germ of moral contradiction, as it would have required Story to recognize the legality of slavery in the United States—after all, there could be no valid law, state or federal, regnlating the return of fugitive slaves if slavery was itself unlawful. Some of the more radical abolitionists argued that slavery was unconstitutional despite the Fugitive Slave Clause and the other constitutional provisions recoguizing the existence of slavery. See WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 253-75 (1977) for a discussion of the arguments of the "radical constitutionalists." *Prigg* did not present any issue that would have allowed a judge to strike a direct blow at the legality of the institution of slavery. Thus, a decision which made more difficult the enforcement of those laws that enabled slavery to exist was probably the most the Court could have done in *Prigg*. *But see* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 152 (1988) (arguing that Story could have used the Ninth Amendment to hold that slavery was unconstitutional).

235 Of course, if the person really was a fugitive slave owned by the claimant, these protections in some cases might ultimately have done the person no good. But, at least,

Even assuming, for purposes of argument, that Story sincerely believed that the Fugitive Slave Clause of the Constitution gave him no choice but to reach a decision favoring slavery, he was not compelled to strike down the Act if he truly found slavery morally repugnant. Rather, in keeping with the advice of many abolitionists, including his former pupil Wendell Phillips, he could have resigned.[236] Alternatively, he could have engaged in a conscious act of civil disobedience and refused to interpret the constitutional provision in the way that he believed was morally reprehensible, although legally correct.[237]

a. *What Story Decided*

Justice Story chose neither to resign nor to defy the law. Nor did he attempt to justify a resolution favorable to the forces of freedom. Instead, he struck down the 1826 Act. He held that it was unconstitutional because "[i]t purports to punish as a public offence against that state, the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold."[238] In attempting to support this holding, Story articulated principles and conclusions that went far beyond what was necessary to justify invalidating the law. In doing so, he rendered an extremely proslavery opinion; one which effectively stripped the states of all constitutional authority to regulate the reclamation of fugitives and left little room for legislation to protect free blacks.

In setting forth his reasoning, Story began by stating that the Fugitive Slave Clause conferred upon the slave owner "a positive, unqualified right" to possession and ownership of the slave that "no state law or regulation can in any way qualify, regulate, control, or restrain."[239] According to Story, "any state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave" effectively operated as a discharge of the slave.[240] Since the Pennsylvania law necessarily resulted in delay, it was unconstitutional.[241]

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the existence of those protections might have discouraged many owners from trying to reclaim fugitives, and undoubtedly would have given many runaway persons more time in freedom.

236 NEWMYER, *supra* note 23, at 378.

237 Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1655-56 (1986) (observing that while judicial civil disobedience raises the specter of "complete dissolution of the legal order, [some] regimes . . . do not warrant continued existence.").

238 *Prigg*, 41 U.S. (16 Pet.) at 626.

239 *Id.* at 612.

240 *Id.*

241 *Id.* at 625-26.

Next, Story maintained that, not only did the clause confer upon the owner the right of recapture without necessity of resort to legal process,[242] it also conferred upon the federal government the authority to enact legislation to enforce the right. This was so, Story asserted, for two reasons: as a practical matter, the master would often be unable to recapture the fugitive without the assistance of public officials; and, since the right of recapture is conferred by the national Constitution, the "natural inference" is that authority to enact legislation enforcing the owner's right must be vested in the national government as well.[243]

Story then turned to the question of whether the federal government had exclusive power to legislate with regard to the return of fugitive slaves. He concluded that federal power was exclusive, because if states could legislate in this area chaos would reign, with each state presumably enforcing the rights of slaveholders according to its own views and interests. The resulting disuniformity with regard to the nature and enforcement of the right would be intolerable in light of the importance of the right at stake.[244]

Finally, Story held that Pennsylvania's law was preempted because it conflicted with the 1793 Act. Story made no attempt to point out specific conflicts between the federal and state statutes.[245] Instead, he found Pennsylvania's law preempted because the federal legislation "points out fully all the modes of attaining those objects, which Congress, in their discretion, have as yet deemed expedient

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242 *Id.* at 613.

> [W]e have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent this clause of the Constitution may properly be said to execute itself; and to require no aid from legislation, state or nation."

Id. at 615.

243 *Id.* at 615. Story also attempted to find support for federal legislative authority in Article III. Given that the clause uses the term "claim," he argued, it obviously contemplates a judicial proceeding for giving effect to the owner's right. Moreover, the controversy surrounding the claim was a case arising under the Constitution and, therefore, was within the express delegation of judicial power to the national government given by Article III. That being so, Story argued, Congress could implement the judicial power to give effect to the right by prescribing "the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guaranty to the right." *Id.* at 616. Interestingly, in the 1833 edition of his COMMENTARIES, which was published before *Prigg*, Story called recoveries under the Fugitive Slave Clause "summary ministerial proceedings, and not the ordinary course of judicial investigations." *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 677 (DaCapo Press 1970) (1833).

244 *Prigg*, 41 U.S. (16 Pet.) 623-24.

245 CURRIE, *supra* note 16, at 243-44.

or proper to meet the exigencies of the Constitution."[246] Hence, even if there were gaps in the federal scheme, the states had no authority to enact legislation to "complement" the federal law, for "the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther [sic] legislation to act upon the subject-matter."[247]

b. *Critique of the Decision*

Story's opinion is an exhaustive explication of the nature and means of enforcement of a slaveholder's right to the return of a runaway. At the same time, the opinion inexplicably fails to give any consideration to Pennsylvania's competing right—indeed, its duty—to protect its free black citizens from kidnapping. Because slavery was based primarily on color, all blacks, whether free or enslaved, were in danger of being claimed as runaways by slave catchers. Obviously, then, it was nearly impossible for the states to protect their free black citizens, unless they could regulate slave catchers with regard to reclamation of actual fugitives. Pennsylvania's counsel strenuously argued this point.[248] Yet Story completely ignored the argument, never addressed Pennsylvania's right and duty to protect its free black citizens, and never mentioned the possibility that one of Mrs. Morgan's children, born in Pennsylvania, might have been free under the laws of that state[249] and thus have been made a slave unlawfully. Story's failure to address the inevitable effect of his decision on free blacks calls into question the validity of his reasoning in striking down the Pennsylvania statute, but it is hardly the only basis for questioning his reasoning. David Currie, among others, points out that upon close examination Story's reasoning does not stand up well.[250]

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246 *Prigg*, 41 U.S. (16 Pet.) at 617.

247 *Id.* at 618.

248 *See id.* at 573 where Hambly argues: "under this clause a power is contained, in virtue of which, any one may step into a crowd and seize and carry off an alleged slave, 'just as he would a stray horse,' or any other article of personal property."

249 FINKELMAN, *supra* note 178, at 47. Indeed, under Pennsylvania's Gradual Abolition Act of 1780, Margaret Morgan and her other children may have been free as well. The 1780 Act contained a provision that granted instant freedom to any slave kept in Pennsylvania for longer than six months. This provision was an act of comity on Pennsylvania's part to slaveholding visitors or travelers from other states. Such visitors and travelers were allowed to bring their slaves with them into Pennsylvania, but if the slave remained for longer than six months, he or she was automatically deemed free under the law. *Id.* at 46-69. Although the six-month rule did not apply to fugitives, Mrs. Morgan and her children were arguably not fugitives, as Ashmore had allowed them to remain in Pennsylvania for five years. Thus, under the six-months rule, they were free. It is not known why Pennsylvania did not press such an argument in *Prigg*. Perhaps the explanation is that Pennsylvania wanted the issue of the constitutionality of its kidnapping statute definitively decided by the Supreme Court.

250 *See* CURRIE, *supra* note 16, at 242.

First, Story's entire decision is based upon a dubious characterization of the purpose of the Fugitive Slave Clause: "to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude."[251] Thus, in Story's view, the Fugitive Slave Clause was designed to make the slave states' laws on the right of reclamation of fugitives operative throughout the entire nation, effectively nullifying the laws of free states.[252] To support this characterization of the purpose of the clause, Story relied on a then-popular belief: that the guarantee of the return of fugitive slaves was so vital to the South that the Union could not have been formed without it.[253] In fact, said Story, the clause was so important to the southern states that it was "adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity."[254]

Story's characterization of the clause is not supported by historical evidence. Indeed, there is scant evidence in the historical record as to what the Framers intended to accomplish with the Fugitive Slave Clause. The clause is not mentioned in the *Federalist Papers*.[255] The references to the clause in James Madison's *Notes of Debates in the*

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251 *Prigg*, 41 U.S. (16 Pet.) at 611.

252 Near the outset of the opinion Story sets forth the following rule for construing the Constitution:

> [P]erhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

Prigg, 41 U.S. (16 Pet.) at 610-11. Interestingly, this rule of interpretation was absent from his first edition of Story's COMMENTARIES but was added to the second edition, published after the *Prigg* decision. *See* 2 JOHN C. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 461 n.1 (1862).

253 Story argued that:

> The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.

Prigg, 41 U.S. (16 Pet.) at 611. This "historical necessity" argument apparently was first made by Chief Justice William Tilghman of the Pennsylvania Supreme Court in an 1819 case, Wright v. Deacon, 5 Serg. & Rawle 61 (Pa. 1819). MORRIS, *supra* note 5, at 42. "Our southern brethren," he declared, "would not have consented to become parties to a constitution . . . unless their property in slaves had been secured." *Id.* Because, in Tilghman's view, the Fugitive Slave Clause contemplated a summary proceeding for the return of fugitives, he held that the delay of a trial to adjudicate a slave catcher's claim would be contrary to the Constitution. *Id.*

254 *Prigg*, 41 U.S. (16 Pet.) at 612.

255 *See generally*, THE FEDERALIST (especially Nos. 42, 54 and 55, the three papers discussing slavery, none of which even mentions the Fugitive Slave Clause).

Federal Convention show that, unlike the other clauses related to slavery, the Fugitive Slave Clause was the source of little debate.[256] According to Farrand's records of the Convention, the clause was discussed at the Convention on only one occasion: when Pierce Butler and Charles Pinckney of South Carolina moved to "require fugitive slaves and servants to be delivered up like criminals."[257] The motion triggered objections on the Convention floor by Roger Sherman of Connecticut and James Wilson of Pennsylvania. Wilson said that such a provision would wrongly require a state's executive to aid the slave catcher at public expense, while Sherman argued that there was "no more propriety in the public seizing and surrendering a slave or servant, than a horse." Butler then withdrew his proposal "in order that some particular provision might be made apart from this article."[258] The next day, Butler proposed a new provision for the return of fugitive slaves.[259] His proposed provision was accepted without discussion or objection. With no material changes in wording, it became the clause as it was ultimately adopted.[260]

Story's claim that the Fugitive Slave Clause was vital to the formation of the Union not only lacks supporting evidence, but is, as Don Fehrenbacher notes, actually belied by the fact that the First Congress in 1789 did not pass any legislation to implement the clause.[261] In 1789 the First Congress was engaged in a vigorous, wide-ranging effort to enact laws fundamental to the new federal government. One might have expected that a provision of the Constitution so "vital" to the South, one without which the Union could not have been formed, would have been implemented by federal legislation at the first available opportunity. Not until 1793, however, did Congress enact any legislation on the return of fugitive slaves, and then only at President Washington's behest.

Story's contention that Pennsylvania's proceeding for determining the validity of a claim amounts to a "discharge" within the meaning of Article IV also fails on close examination. This conclusion is far from a natural reading of the language of Article IV. The

256 NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (W.W. Norton & Co. 1987) (1893). Madison's *Notes* were available to Story, and they were cited by Thomas C. Hambly, Pennsylvania's counsel in *Prigg*, in his argument to the Court. According to the reporter of the *Prigg* case, Hambly cited Madison's Notes for the proposition that the matter of the recovery of fugitive slaves "was expected to be left to state legislation; and that the south was not united itself upon the subject." *Prigg*, 41 U.S. (16 Pet.) at 587.

257 EDWARD DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 415 (1964).

258 *Id.* at 416.

259 ROBINSON, *supra* note 31, at 229 (quoting Farrand's records).

260 *Id.*

261 FEHRENBACHER, *supra* note 30, at 40.

terms Story used—"interrupt," "limit," "delay" and "postpone"—cannot be sensibly collapsed into the word "discharged" without draining these words of their separate and established meanings.[262] What is more, as even Story admitted in his opinion, the language of the clause contemplates some kind of proceeding to adjudicate the validity of a purported owner's "claim" before the alleged fugitive is to be "delivered up."[263] This is exactly what Pennsylvania's law required.

In addition, Story's argument proves too much. If the clause really created an unqualified right to the return of the fugitive without even the delay required to determine the validity of the claim, then Story was obliged to strike down not only the Pennsylvania law but the Federal Fugitive Slave Act as well. Like the Pennsylvania law, the Federal Act required the claimant to comply with certain procedures in order for the alleged fugitive to be reclaimed.[264]

Story's view that the Fugitive Slave Clause confers legislative power on the national government is also suspect. Story went out of his way to express this view, since he had already held that the Pennsylvania statute was unconstitutional because it effected an impermissible discharge of the slave from labor. His interpretation here is at odds with the structure of the Constitution. The clause is contained in Article IV, which sets forth the rights and duties of the states relative to one another. Article IV is generally not concerned with the powers of the national government, which are the subject of Articles I through III. The fact that Article IV, in the Full Faith and Credit Clause,[265] specifically gives the national government au-

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262 As one commentator has observed, "[b]ut this is an impossible diction, in which the distinctions between 'interrupt,' 'limit,' 'delay,' 'postpone,' and 'discharge' are all erased." James Boyd White, *Constructing a Constitution: "Original Intention" in the Slave Cases*, 47 MD. L. REV. 239, 248 (1987). *Cf.* Mark V. Tushnet, *Translation As Argument*, 32 WM. & MARY L. REV. 105, 116 (1990) (book review) (criticizing White's analysis and arguing that in ordinary discourse some people might "occasionally want to distinguish among [these terms]," but

> [a]s John Marshall understood . . . the language of the Constitution was a language of condensation which used general terms to express authority to deal with subjects that, in a more refined form of discourse, people treat separately. Story might well have thought that the fugitive slave clause was exactly of this nature.).

My own view is that White has the better of this argument. However "unrefined" the language of the Constitution may be, Story's collapse of these terms robs them of any distinction the different words convey.

263 *Prigg*, 41 U.S. (16 Pet.) at 615.

264 As Thomas Hambly pointed out to the Court, if the Pennsylvania law was unconstitutional because it caused a delay in the owner's enjoyment of his or her right to possession of the slave, so too should the federal law be unconstitutional. *Id.* at 582. Taney also makes this argument in his separate opinion. *Id.* at 626-33 (Taney, C.J., concurring).

265 U.S. CONST. art. IV, § 1.

thority to enact legislation to aid the states in fulfilling their obligations to each other does not undermine this point. Rather, it suggests that when prescribing powers for the national government outside the confines of Articles I through III, the Framers were careful to make clear what they were doing. By implication, if the Framers intended to confer upon the national government the power to enact legislation to aid the states in fulfilling their duties to return fugitive slaves, it is fair to assume that they would have explicitly said so in the Fugitive Slave Clause.

Story attempted to buttress his view of implicit congressional power with two arguments. He argued first that the Constitution and the 1793 Act were "nearly contemporaneous[]" (and thus the legislators were probably familiar with what the Framers intended by the clause). This argument is unpersuasive. In making the argument, Story did not rely on the formal legislative history of the Fugitive Slave Clause. He could not, for that history sheds little light on either the Framers' intent or on what the participants in the state ratifying conventions understood to be the purposes and effects of the clause. Instead, Story's argument rests on the assumption that the members of the First Congress, being intimately familiar with the views of the Framers, would not have enacted legislation they believed to be outside the scope of Congress' constitutional authority. But, as Justice Brennan observed when addressing the same argument about the Establishment Clause, this assumption is questionable. Members of the First Congress, like any other legislators, "influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business . . . [may not have] always pass[ed] sober constitutional judgment on every piece of legislation they enact[ed]."[266]

Story's second supporting argument was that long-term state acquiescence to an exercise of federal power reflects a general understanding implicit in the Constitution.[267] But if long-term acquiescence is the test, then Story was obliged to uphold not only the Federal Act but the Pennsylvania law as well. After all, the federal government had also long acquiesced to the view held by state legislators that the states possessed the authority to enact legislation to implement the Fugitive Slave Clause and to pass legislation to aid in the enforcement of the 1793 Act.

This last point raises a more general question: even if Congress had authority under the Fugitive Slave Clause to pass legislation to enforce the right of the owner to the return of the fugitive, why does it follow that this power existed exclusively in Congress? No prece-

266 Marsh v. Chambers, 463 U.S. 783, 814 (1983) (Brennan, J., dissenting).
267 *Prigg*, 41 U.S. (16 Pet.) at 620-21.

dent required a finding that the mere existence of a power in the federal government deprived the states of all authority over the same subject matter.[268] And, as Justice Daniel noted in his concurring opinion, the Court had previously held that the bankruptcy power, one explicitly vested in Congress, was not exclusive.[269] Why, then, should a power that was merely implied be deemed exclusive? As David Currie has pointed out, Story neither addressed Daniels' argument nor explained why it would not have been sufficient for Congress simply to have enacted legislation preventing the states from making laws that unduly interfered with the return of fugitives.[270]

Story's holding of federal preemption is also open to question. First, preemption analysis was completely unnecessary once Story said that the power to legislate belonged exclusively to Congress. More importantly, the conflict between the 1793 Act and the Pennsylvania law was not as obvious as Story claimed. Both the federal and the state legislation required a proceeding in which some official could pass, at least preliminarily, on the validity of a claim before the alleged fugitive could be removed from the state.

Admittedly, Pennsylvania's statute imposed certain requirements that the Fugitive Slave Act did not, including a higher burden of proof on the claimant, as well as particular methods of proof. But the 1793 Act arguably left it to the adjudicating official to decide the methods and standard of proof. This argument would emphasize that the Federal Act authorized the issuance of the removal certificate only upon "proof to the satisfaction" of the presiding official that the person seized was actually the slave of the claimant.[271] Moreover, as Thomas Morris points out, under the Judiciary Act of 1789, the laws of the several states were to be the rules of decision in federal courts; thus a federal judge in a free state could, if he chose, bring the 1793 Act into harmony with state law by allowing proof in the form accepted by state courts.[272]

In sum, Story's failure even to mention the problem of the kidnapping of free black citizens, the various respects in which he went out of his way to write an expansive, strongly proslavery opinion, and the relative ease with which he might have justified upholding the Pennsylvania law despite the Fugitive Slave Clause and imple-

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268 Indeed, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819), Chief Justice Marshall established the principle that the mere grant of a power to the federal government by the Constitution does not deprive the states of the right to exercise a similar power.

269 *Prigg*, 41 U.S. (16 Pet.) at 653-54 (Daniel, J., concurring).

270 This argument is made more fully in CURRIE, *supra* note 16, at 244 nn.50 and 52.

271 Act of Feb. 12, 1793, 1 Stat. 302 (1793).

272 MORRIS, *supra* note 5, at 21.

menting statute, all make it difficult to credit the contention that Story agonized over choosing between fidelity to his conscience and fidelity to his duty under the law. Rather, as discussed below, Story may have had his mind on very different concerns when he wrote the *Prigg* opinion.

III

NATIONALISM, PROPERTY RIGHTS, AND FUGITIVE SLAVES

A. The Expansion of Federal Power

Among the jurists of his time, Story was perhaps the most vocal and active advocate of expanding federal power at the expense of the states.[273] Guiding his judicial philosophy was a vision of the future suffused with the belief that, if America was to become a great nation, it had to take advantage of its abundant resources and broad opportunities for the expansion of trade and commerce. In Story's view, a strong national government, rather than a mere confederation of states, was the obvious way to do this. Story's most explicit articulation of this belief came in an 1815 letter he wrote to his friend, Congressman Nathaniel Williams. In the letter he extolled the virtues of a strong central government:

> Let us extend the national authority over the whole extent of power given by the Constitution. Let us have great military and naval schools; an adequate regular army . . . [and] a permanent navy; a national bank; a national system of bankruptcy; a great navigation act; a general survey of our ports, and appointments of port wardens and pilots; Judicial courts which shall embrace the whole constitutional powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States. By such enlarged and liberal institutions, the Government of the United States will be endeared to the people, and the factions of the Great States will be rendered harmless. Let us prevent the possibility of a division, by creating great national interests which shall bind us in an indissoluble chain.[274]

Story's nationalistic vision is also reflected in his judicial opinions. On the bench, he was a longtime champion of expansive national power. Some of his opinions evidencing this commitment are recognized as quite important to the evolution of constitutional law,

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273 Commager, *supra* note 24, at 33-35.

274 The letter is quoted in MCCLELLAN, *supra* note 78, at 252-53.

but others have fallen into relative obscurity, apparently overshadowed by the contributions of John Marshall.[275]

For example, in his dissenting opinion in *Brown v. United States*,[276] a case decided five years before Chief Justice Marshall articulated his implied powers doctrine in *McCulloch v. Maryland*,[277] Story proved himself an early advocate of broad implied powers. In his *Houston v. Moore*[278] dissent, Story advanced expansive views of federal preemption and exclusive federal jurisdiction. In *New York v. Miln*,[279] again writing in dissent, he passionately called for an interpretation of the Commerce Clause that would substantially enlarge federal lawmaking powers at the expense of state police powers.[280] And in his two most famous opinions for the Court, *Martin v. Hunter's Lessee*[281] and *Swift v. Tyson*,[282] he confirmed sweeping notions of federal judicial power.[283]

The nationalistic doctrines set forth in these opinions were also reflected in Story's opinion in *Prigg*. For example, his conclusion that the 1793 Act was within Congress' constitutional authority was grounded in the expansive notion of implied powers that he expressed in *Brown* and elsewhere. By the same token, in holding that the federal government had exclusive, rather than concurrent, jurisdiction over the interstate recovery of fugitive slaves, Story exhibited a mistrust of state legislatures and state courts that is also evident in his nationalistic opinions. In his view, the states could have no role in the interstate reclamation of runaways because, if they did, each state would be "at liberty to prescribe just such regulations as suit its own policy, local convenience, and local feelings."[284] As a result, the owner's right to return of the fugitive "would have no unity of purpose, or uniformity of operation."[285]

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275 *See, e.g.*, CURRIE, *supra* note 16, at 194-95 (arguing that Marshall dominated the work of his Court to the point that the other Justices were "nearly invisible" and that Story was a "minor figure.").

276 12 U.S. (8 Cranch) 110 (1814). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827). *See* Commager, *supra* note 24, at 40.

277 17 U.S. (4 Wheat.) 316 (1819). *See* Commager, *supra* note 24, at 40.

278 18 U.S. (5 Wheat.) 1 (1820).

279 36 U.S. (11 Pet.) 102 (1837).

280 *See also* United States v. Coombs, 37 U.S. (12 Pet.) 72 (1838) (where Story found authority in the Commerce Clause for Congress to make it a federal crime to steal goods from a ship wrecked or stranded); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1873) (Story, J., dissenting).

281 14 U.S. (1 Wheat.) 304 (1816).

282 41 U.S. (16 Pet.) 1 (1842).

283 For an argument that there were seeds of *Swift* in some of Story's earlier circuit court cases, see Commager, *supra* note 24, at 49. As several scholars have pointed out, Story was far more solicitous of federal judicial power than of legislative or executive power. *See, e.g., id.* at 41; MCCLELLAN, *supra* note 78, at 263.

284 *Prigg*, 41 U.S. (16 Pet.) at 623.

285 *Id.* at 624.

His language and reasoning here were reminiscent of his opinion in *Martin v. Hunter's Lessee*. There, arguing that the need for national uniformity required that federal courts be the final arbiters of the meaning of federal law, Story maintained: "[S]tate attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control . . . the regular administration of justice."[286]

Story was not merely being consistent in his nationalism when deciding *Prigg*. In *Prigg*, he actually carried his nationalistic views further than in his other opinions.[287] In one of the most misunderstood passages in the *Prigg* opinion, Story suggested that Congress had no authority to require state officials to exercise the authority to dispose of fugitive slave rendition claims given to them in the 1793 Act. Indeed, Story said, it "might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government."[288] Moreover, Story went on to suggest that state legislatures could, if they chose, forbid their judicial officials from enforcing the Fugitive Slave Act of 1793.[289]

This dictum has caused confusion partly because many Northern state legislatures seized upon it as justification for enacting legislation forbidding their magistrates and judges from taking cognizance of cases arising under the 1793 Act.[290] Even in the absence of legislation, Northern state judges used this dictum as an

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286 *Martin*, 14 U.S. (1 Wheat.) at 348-49. *See also Swift*, 41 U.S. (16 Pet.) 1; Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). McClellan makes the point that this same distrust of state courts is seen in the *Swift* decision. *See* MCCLELLAN, *supra* note 78, at 261.

287 The only other contender might be dictum in *Houston v. Moore*, where Story argued that the states had no authority to enact laws as a "sort of process in aid" of the federal government's exercise of its constitutional authority to make criminal law. *Houston*, 18 U.S. (5 Wheat.) at 68.

288 *Prigg*, 41 U.S. (16 Pet.) at 616.

289 *Id.* at 622. As Story stated: "while a difference of opinion has existed . . . on the point . . . whether state magistrates are bound to act under it; none is entertained by this Court that state magistrates may, if they chose, exercise that authority, unless prohibited by state legislation." *Id.* Note that these statements were inconsistent with Story's own view of the supremacy clause and that the Supreme Court later ruled that states did have an obligation to enforce federal law.

290 As discussed earlier in this Article, *see supra* text accompanying notes 204-11, the 1826 Act at issue in *Prigg*, like its 1820 precursor, contained a provision prohibiting the state's quasi-judicial officials from administering the 1793 Act. After *Prigg*, the antislavery forces in Pennsylvania and other states extended this prohibition to judicial officials as well. Finkelman, *supra* note 15, at 21-22. But long before *Prigg*, antislavery forces argued that Congress had no authority to empower state officials to administer federal fugitive slave laws. Ironically, they based their argument on Story's holding in *Martin v. Hunter's Lessee* that the Constitution expressly required that the judicial power of the United States be vested in federal courts. That being so, the abolitionists argued, Congress could not invest state judicial officials with authority to issue removal certificates under the 1793 Act. Leslie, *supra* note 192, at 214.

excuse for refusing to hear rendition cases.[291] Because there were so few federal judges, these post-*Prigg* state statutes, along with the refusal of state judges to take cognizance of reclamation claims, made the 1793 Act much more difficult to enforce.[292] Justice Story's son argued that this was exactly the effect his father intended, and his attempt to salvage his father's reputation in face of the proslavery *Prigg* decision has helped give rise to the confusion surrounding Story's dictum.[293] But it is doubtful Justice Story had any such subversion of the law in mind, for he was one of the chief architects of the 1850 Fugitive Slave Act, a law far more draconian and effective than the 1793 Act in aiding slave catchers.

Evidence of Story's participation in drafting the 1850 Act is contained in a letter that he wrote on April 29, 1842 to John McPherson Berrien, then Chairman of the Senate Judiciary Committee. The letter primarily concerned proposed legislation dealing with the bankruptcy and criminal jurisdictions of the federal government on which Story and Berrien had been collaborating. In the letter, Story also addressed the problem of enforcement of the 1793 Fugitive Slave Act. He first noted that state magistrates could not be compelled to aid in the return of fugitive slaves even though the 1793 Act authorized them to do so. The *Prigg* case, Story argued, showed how state magistrates either evaded the duty imposed by the Act or refused to exercise the power given them "to act in delivering up Slaves."[294] Story then suggested as a solution to the problem of state recalcitrance that Congress adopt a provision giving Federal Commissioners the same power to enforce the 1793 Act that the Act already conferred on state officials. Story explained his idea as follows:

> In conversing with several of my Brethren on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers. . . . The Courts would appoint commissioners in every county, & thus meet the practical difficulty now presented by the refusal of State Magistrates. . . . [These commissioners could be given the authority to] exercise all the powers, that any State judge, Magistrate, or Justice of the Peace may exercise under any other Law or Laws of the United States. . . .[295]

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291 Finkelman, *supra* note 15, at 22.

292 *Id.* at 35.

293 *See* COVER, *supra* note 16, at 241.

294 The letter is quoted in MCCLELLAN, *supra* note 78, at 262 n.94.

295 MCCLELLAN, *supra* note 78, at 262-63 n.94. McClellan found this letter among the John McPherson Berrien Papers of the Southern Historical Collection at the University of North Carolina. As McClellan reports, while this letter is reprinted in 2 THE LIFE

Moreover, Story contended, if the provision could be worded generally, it might be enacted "without creating the slightest sensation in Congress" and indeed could "pass without observation."[296] After asking the Senator's pardon for taking the liberty of making these suggestions, Story explained that he had done so because of a "desire to further a true administration of public Justice."[297]

This letter is of interest not because it shows that Story's son was either wrong or intentionally deceptive about his father's motives. More importantly, it makes plain that what mattered to Story was not the freedom of enslaved blacks but the expansion of national power. There is nothing in Story's scheme that even hints at acknowledging the need to restore any of the due process rights that alleged fugitives were certain to lose if state law were wiped out in favor of the 1793 Act—an act with no procedural protections for alleged runaways. Perhaps, as some have argued, Story was chiefly concerned with finding a workable solution to the controversy between North and South and averting a possible break-up of the Union.[298] But even if this was so, the fact remains that the solution that he urged required sacrificing the right of black people to their freedom.

B. Reverence for the Rights of Property

Nationalism was very likely not the only value driving Story's decision in *Prigg*, for that case also involved another value of prime importance to him—the sanctity of property rights. Early in the opinion, Story made it clear that what was at stake in the case for slaveholders were their property rights. Explaining his version of the history of the Fugitive Slave Clause, Story asserted that the object of the Fugitive Slave Clause was to secure to slaveholders "the complete right and title of ownership in their slaves, as property" and that "[t]he full recognition of this right and title was indispensable to the security of this species of property in all slaveholding states."[299] Further, in discussing the national character of this right, he argued that throughout the whole of the Union, the clause guaranteed to the slaveholder all of the rights to the slave's labor "which the local laws of his own state confer upon him as property."[300] Because the right of recapture was one such right conferred by the

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AND LETTERS OF JOSEPH STORY 404-05 (William W. Story ed., 1851), Story's son omitted the part having to do with the Fugitive Slave Act.

296 *Id.* at 262.

297 *Id.* at 263.

298 *See, e.g.*, NEWMYER, *supra* note 23, at 352.

299 *Prigg*, 41 U.S. (16 Pet.) at 611.

300 *Id.* at 613.

laws of the slaveholding states, the slaveholder was vested with the right to this "property" in non-slaveholding states as well.[301]

Story's reverence for the rights of property owners may be less well-known than his nationalism. But the fact that he was a champion of property rights should hardly be surprising. He was a member of the propertied and commercial classes of New England, and had served their interest for most of his legal career prior to his ascension to the Supreme Court. Thus, as a young lawyer he developed close professional ties to the wealthy Crowninshield family of Salem,[302] and, upon being elected to the Massachusetts legislature, lobbied successfully on the family's behalf for legislation chartering the Merchants' Bank of Salem.[303] Soon after the Bank received its charter, Story was appointed as one of its directors and later became the Bank's President.[304] As a member of Congress, he solicited votes on legislation favorable to New England land speculators, and acted as their counsel in the great "Yazoo" land fraud case that culminated in the Supreme Court's decision in *Fletcher v. Peck*.[305] Even after taking his seat as a Justice of the Supreme Court, he continued to associate with the commercial and manufacturing leaders of New England.[306]

But Story had more than a material connection to the interests of the owners of property. Although he lived most of his adult life in the nineteenth century, he was primarily a product of the eighteenth, the century in which he was born and came of age, and in which the theories of republicanism prevailed.[307] Story subscribed to the republican belief that "property was the foundation of the social order, basic to republican citizenship and inseparably connected with liberty."[308] For Story and other republicans government's primary purpose was to secure to its citizens the "natural right" to acquire property and to hold that property unfettered by government interference with the enjoyment of its use. This belief was reflected throughout Story's life, in his speeches, writings, and

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301 *Id.*

302 *See* NEWMYER, *supra* note 23, at 47-51.

303 MYERS, *supra* note 128, at 267.

304 *Id.* at 268.

305 10 U.S. (6 Cranch) 87 (1810). As co-counsel, Story represented these same interests before the Supreme Court in *Fletcher*. NEWMYER, *supra* note 23, at 66.

306 NEWMYER, *supra* note 23, at 165.

307 NEWMYER, *supra* note 23, *passim* (especially xiii-xvii). Republicanism has taken various forms throughout American history, and the literature on it is extensive. See the sources listed in Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119, 1134 n.75 (1988). *See also* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

308 NEWMYER, *supra* note 23, at 169.

judicial opinions.[309] Two speeches from the 1820s are particularly illustrative of his views in this regard. One is a speech Story gave at the Massachusetts Constitutional Convention of 1820-21. Having taken leave from his Rhode Island circuit court duties, Story was in nearly constant attendance during the two months of the convention. One of the items on the convention's agenda was consideration of a proposal to revise the state's constitution so as to provide for more popular control over the state legislature. The majority of delegates favored a proposal changing the basis of apportionment in the state senate from what one delegate termed the "aristocratical [sic] principle" of property representation to representation based on population by districts.[310] Story was a member of the committee assigned to resolve the senate representational issue.

In their presentations to the committee, many of the proponents of the population-based proposal stressed the natural antagonisms between the rich and the poor and the failure of the propertied class to represent adequately the interests of the poor.[311] In a long and impassioned address to the committee, Story objected to this dichotomizing between the interests of the rich and those of the poor.[312] The dichotomy was "an odious" one, Story argued, for in Massachusetts there was no "class of very rich men . . . whose wealth is fenced in by hereditary titles." Rather, there existed a "harmony of interests" between the rich and the poor, a harmony derived from their common desire for the security of property.[313] "When I look round," Story said, "and consider the blessings which property bestows, I cannot persuade myself, that gentlemen are serious in their views that it does not deserve our utmost protection,"

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309 *See* MCCLELLAN, *supra* note 78, at 194-237 on Story's defense of property rights.

G. Edward White's explanation of the eighteenth-century republican belief that civic virtue stemmed from the holding of property perhaps gives some insight into Story's views:

> [T]he possession of property was an index of one's worth to society. Those possessed of freeholds were felt to be, because of their disinterestedness, worthy participants in civic affairs. Their economic independence made them less susceptible to demagoguery or corruption; their wealth gave them the leisure to concentrate on virtuous pursuits. The association of a propertied status with civic-mindedness can be seen in the suffrage requirements of the late eighteenth and early nineteenth centuries: the model voter in the early American republic was an owner of a freehold, and unpropertied persons had difficulty convincing others that they could be trusted to participate in civic affairs.

WHITE, *supra* note 75, at 598.

310 MCCLELLAN, *supra* note 78, at 228 (quoting Republican Henry Dearborn's speech before the Massachusetts Constitutional Convention (1820-1821)).

311 *Id.* at 228.

312 *See* Joseph Story, *Speech on the Apportionment of Senators, Before the Convention of Massachusetts Assembled to Amend the Constitution* (November 1820), *reprinted in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 180 (William W. Story ed., 1852).

313 *Id.* at 182.

as property is "the sour[c]e of all the comforts and advantages we enjoy."[314] Moreover, he said, property rights were just as important, if not more so, than liberty itself. What "is life worth," Story asked, "if a man cannot eat in security the bread earned by his own industry? [I]f he is not permitted to transmit to his children the little inheritance which his affection has destined for their use?"[315] Furthermore, it was the ownership of property by some in the society, he argued, that allowed them to lift up those less fortunate.[316]

A second speech illustrative of Story's strong views on property rights is his inaugural address as Dane Professor of Law at Harvard University given in 1829. One passage of this speech, in particular, captures Story's life-long republican reverence for the rights of property:

> The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary. What is personal liberty, if it does not draw after it the right to enjoy the fruits of our own industry? What is political liberty, if it imparts only perpetual poverty to us and all our posterity? What is the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to gratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporary popularity?[317]

Story's Supreme Court opinions also provide abundant evidence that he was an ardent defender of property rights. Only two opinions—*Terrett v. Taylor*[318] and *Wilkinson v. Leland*[319]—need be ex-

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314 *Id.* at 182-83.

315 *Id.* at 184.

316 *Id.*

317 STORY, *supra* note 81, at 519. The most important surviving evidence that Story remained a lifelong champion of property rights comes from Story's 1836 article "Natural Law," which is reprinted in MCCLELLAN, *supra* note 78, at 313-24. In this long and philosophical discourse, Story discusses a wide range of topics, from the duties human heings owe to God, to the institution of marriage, which Story calls an "institution derived from the law of nature," and the origins of political society. *Id.* at 316. But Story reserves the longest part of his essay to an exploration of the institution of property. "One of the great objects of political society," he said, "is the protection of property." *Id.* at 319. Interestingly, as this essay also shows, for Story the sacred rights of property were not confined to traditional forms, such as land and chattels, but included "property in *actions*" as well. That is, contracts were also a specie of property, which in "modern times constitute the bulk of the fortunes and acquisitions of many persons." Story viewed the ohligation to perform these contracts as "indispensable to the social intercourse of mankind" and as "conformable to the will of God." *Id.* at 321.

318 13 U.S. (9 Cranch) 43 (1815).

319 27 U.S. (2 Pet.) 627 (1829). For other opinions in which Story championed the protection of property rights see Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (Story, J., dissenting); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (Story, J., concurring).

amined, however, to illustrate the point, for they contain, perhaps, the most unequivocal judicial assertions of his belief in the sanctity of property rights.

Terrett, Story's first opinion for the Court on a constitutional issue, grew out of the following facts. In 1770, the Episcopal church of Arlington, Virginia purchased from Daniel Jennings certain land located in Fairfax County, Virginia.[320] In 1776, after the Revolution, the Virginia legislature passed a statute that "confirmed and established" the church's title to the Jennings land.[321] In 1784, the legislature enacted a further law that made the church a "corporation . . . to have, hold, use and enjoy" all church property.[322] Later, in 1786, it repealed the church's corporate charter, but made sure that the church's right to its property was preserved and confirmed. In 1798, however, the Virginia legislature repealed both the 1776 and the 1784 statutes "as inconsistent with the principles of the constitution and of religious freedom."[323] Finally, in 1801, after the Jennings land had become part of the District of Columbia, the legislature enacted another statute asserting the legislature's right to all church property. The 1801 statute also directed that the church's land be sold, with the proceeds to be used for the welfare of the poor members of the church's parishes.[324] Members of the church then brought suit to enjoin the sale.

On these facts, the Court's decision that the church, and not the state of Virginia, owned the Jennings land should have been relatively simple. The 1786 statute repealing the prior confirming legislation merely left the church where it had been before all of this legislative activity: as owner of the land purchased from Jennings in 1770. Moreover, the 1801 statute was a nullity. At the time it was enacted, Virginia had no authority to enact laws with respect to that land, since, as part of the District of Columbia, the land was within the exclusive legislative jurisdiction of Congress, as prescribed by Article I, Section 8 of the Constitution.

Story's opinion suggests that the Court based its decision, at least in part, on similar reasoning.[325] But, in a confusing passage, Story appears to reason much more broadly:

> [T]hat the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the

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For a thorough examination of Story's judicial defense of property rights see McCLELLAN, *supra* note 78, at 194-226; *see also* Commager, *supra* note 24, at 64-73.

320 *Terrett*, 13 U.S. (9 Cranch) at 43.

321 *Id.* at 47.

322 *Id.*

323 *Id.* at 48.

324 *Id.*

325 CURRIE, *supra* note 16, at 138.

> faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same . . . as they may please . . . we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.[326]

It is not apparent whether Story intended this passage as dictum, as the holding of the Court, or as an alternative holding.[327] If Story intended either of the latter possibilities, one would have expected him to cite either the relevant constitutional provisions or the decisions of the "respectable judicial tribunals" on which he relied. That he did nothing of the sort has led David Currie to observe that Story went far beyond the grounds necessary to decide the case. According to Currie, Story addressed novel constitutional issues in a vague and conclusory manner and ignored relevant precedent to set aside state laws contrary to Story's personal views of "natural justice."[328] Currie seems to suggest that these shortcomings in Story's opinion were primarily the result of bad writing. I think, though, that they largely reflect Story's outrage over what was to him a grossly unjust invasion of property rights by the Virginia legislature.[329]

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326 *Terrett*, 13 U.S. (9 Cranch) at 52. G. Edward White points out that the legal basis of Story's decision is unclear. The language of the opinion, White argues, suggests that the Court invalidated the 1801 statute because it was an example of the legislature "dispos[ing] of vested property . . . as [it] may please," and so "was contrary to 'natural justice,' the 'fundamental laws of every free government,' and the Constitution's 'spirit and letter.'" WHITE, *supra* note 75, at 609 (*quoting Terrett*, 13 U.S. (9 Cranch) at 52). As to the constitutional part of this assertion, White argues that neither the Takings Clause nor the Contracts Clause seemed to apply. *Id.* at 609. Moreover, White argues that Story did not rely on Article I, Section 8's provision giving to Congress all power to make laws for the District of Columbia. Yet, as White further notes, Story, as well as other commentators, have taken the view that the Court based its decision on the Contracts Clause. *Id.* at 610.

327 *See, e.g.*, CURRIE, *supra* note 16, at 139 (expressing the view that Story's reliance on natural justice was, at most, an alternative holding). *But see* WHITE, *supra* note 75, at 609 (suggesting that the natural justice argument was Story's holding in the case). Lawrence Tribe also points to Story's reliance on natural justice as the basis upon which Story struck down the statute. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 562 (1988).

328 CURRIE, *supra* note 16, at 141.

329 In a discussion of Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837), Story showed just how darkly he viewed governmental interference with property rights. The majority opinion, from which Story vigorously dissented, confirmed a Massachusetts statute that chartered the Warren Bridge as a free bridge, thereby wiping out the value of the Charles River bridge, which had received an earlier charter from the legislature. Writing about the Court's decision, Story wailed that "[a] case of grosser injustice, or more oppressive legislation, never existed. I feel humiliated, as I think

In terms of gratuitous property rights polemics, Story's opinion in *Wilkinson v. Leland*[330] may even outdo his opinion in *Terrett*. In *Wilkinson*, Jonathan Jenckes, a resident of New Hampshire, bequeathed to his infant daughter Cynthia certain land located in Rhode Island. Because Jenckes was insolvent at his death, his executrix obtained a license from the New Hampshire probate court to sell enough of his estate's real property to satisfy the debts. Pursuant to this license, the executrix sold the Rhode Island property in 1791. The purchasers were unsure, however, whether the executrix had the authority to make the sale, so she agreed to obtain a statute ratifying and confirming the title from the Rhode Island legislature. In 1792, the legislature passed such a statute. But years later, the heirs of Cynthia Jenckes sued to void the sale on the ground that the 1792 statute was beyond the authority of the legislature. They maintained that the statute wrongly divested Cynthia Jenckes of her vested rights in the property.[331]

Writing for the Court in *Wilkinson*, Justice Story held that the 1792 statute did not divest Cynthia of her property rights because this had already been done by operation of the testamentary laws of Rhode Island.[332] Before stating this holding, however, Story launched into an unnecessary discourse on the question of whether the Rhode Island charter (which Rhode Island had received from Charles II while still a colony and which, despite the Revolution, continued to serve as Rhode Island's fundamental law)[333] conferred upon the legislature the authority to "transfer the property of A. to B. without his [A's] consent."[334] Of course, in *Wilkinson* there had been no such transfer of A's property. Rather, the legislature had merely confirmed the validity of a transaction between two private parties. Nevertheless, Story railed against the mere possibility that a legislature could make a transfer of A's property to B without A's consent. That such authority could exist in any American government after the Revolution was unimaginable, Story said:

> [G]overnment can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative

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every one here is, by the Act [of the state legislature] which has now been confirmed [by the Court]." 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 28, at 268.

330 27 U.S. (2 Pet.) 627 (1829).

331 *Id.* at 656.

332 *Id.* at 658-60. Story reasoned that the property rights Cynthia Jenckes acquired were encumbered by the debts of the estate; the laws of Rhode Island required that the estate be charged with those debts; those laws further allowed the discharge to be made by the sale of so much of the estate's real estate as necessary to satisfy the creditors; and, once such a sale occurred, the devisee was divested of her rights in the property by operation of law.

333 *Id.* at 656.

334 *Id,* at 658.

> body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. . . . [T]he power to violate and disregard [such rights] . . . [is] a power . . . repugnant to the common principles of justice and civil liberty . . . .[335]

But what does all this have to do with *Prigg*? After all, Story's ardent defense of property rights does not show that he personally viewed either Margaret Morgan or any other slave as property. Arguably, Story's references in *Prigg* to slaves as property simply recognize the fact that some states had by law created a right in some of their citizens to own other human beings as property. Moreover, the only express indication in all of Story's voluminous writings as to whether he personally regarded slaves as property or as human beings suggests the latter: in his 1819 Grand Jury Charge he called black people "brothers," and argned that they too have a right to liberty.

On the other hand, the Grand Jury Charge may be much less probative than it appears, in light of Story's political goals with respect to the Missouri Compromise, so it is difficult to distinguish between his true feelings and mere peroration. More broadly, given that Story wrote so prolifically,[336] and given the vigor with which he involved himself in the effort to enlarge federal court jurisdiction and the scope of federal law,[337] it seems strange that he agitated so little on behalf of slaves in particular and black people in general.[338] Indeed, in view of Story's enthusiastic extra-judicial activities in defense of national power and property rights, it may be fair to say with regard to his relative silence on the rights of blacks that "the failure of a dog to bark can be every bit as meaningful as the most anguished howl."[339]

According to Derrick Bell, nothing in Story's record "forecloses the possibility" that he shared the view prevalent at the time that black people were subhuman and inferior to whites.[340] I am willing to go somewhat further and suggest that his record intimates that he

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335 *Id.* at 657.

336 The volume and range of Story's writings were so great that it is perhaps a gross understatement to call Story's writings prolific. For more on Story as a publicist see NEWMYER, *supra* note 23, at 271-304.

337 *See* Commager, *supra* note 24, at 51 (detailing these activities).

338 Indeed, in a case decided early in his career on the bench, Story showed his lack of concern for the freedom of black people by joining with the majority of the Court in applying wooden evidentiary rules against a black family claiming freedom. *See* Mima Queen & Child v. Hepburn, 11 U.S. (7 Cranch) 290 (1813).

339 Here I borrow Sanford Levinson's use of Sherlock Holmes's observation. *See* Sanford V. Levinson, *Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal be a Great Man?)*, 27 STAN. L. REV. 1185, 1186 n.4 (1975).

340 Bell, *supra* note 28, at 357.

in fact shared this view. In making this suggestion, I rely, in part, on the striking lack of attention in his writings and public statements to the rights of blacks, but I rely even more so on his treatment in *Prigg* of Margaret Morgan and her children, the human beings whose passions, dreams, and deepest fears were poised so tenuously at the center of the conflict being played out between Pennsylvania and Maryland. As previously noted, he only referred to them in the opinion as property. Not a word is spoken about their humanity or about the tragedy of their having forever lost their liberty after spending the whole of their lives in virtual freedom.[341]

Furthermore, Story ignored completely the status of the child born in Pennsylvania, under whose laws the child was entitled to freedom. Admittedly, the case did not present the Court with an opportunity to render a binding judgment as to the child's status. The parties having apparently contrived to eliminate that aspect of the case from the Court's review, nothing that Story had to say on the matter could have restored the child's freedom. But whether or not the child should have been regarded as free was quite relevant to the case: Pennsylvania's counsel argued vigorously that the state's 1826 Act protected its free black residents from kidnapping while fulfilling its constitutional obligation to return those lawfully claimed as slaves. Story could have used the child's tragic story—born a free person, yet because of the color of her skin, unlawfully kidnapped into a life of slavery—as an illustration of the need of the states to enact laws protecting free blacks from kidnapping.[342] But Story chose to ignore this tragedy. He had a different agenda, one that subordinated the claims of black people to human dignity to the claims of slaveholders to their property.

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341 As James Boyd White notes, perhaps the recognition of the humanity of Mrs. Morgan and her children would not have led to a different result in the case, but it might have resulted in "substantial difficulties, emotional and intellectual" with the Court's decision—difficulties that at least may have "tended to erode . . . that part of [the law] which maintained slavery." White, *supra* note 262, at 270.

342 James Boyd White argues:

> To focus . . . upon the circumstances of Mrs. Morgan's freeborn child in a way that recognized that the child was a person, entitled to freedom but needing his or her family, would have been to realize that Mrs. Morgan and indeed her unfree children were people too; a realization, which, if articulated with sufficient clarity, would have tended to erode, not the discourse of law, which it would have exemplified, but that part of it which maintained slavery.

Id. at 270.

IV
CONCLUSION: SHOULD JUSTICE STORY BE JUDGED?

In this Article I have attempted to demonstrate that the scholarly effort to reconcile Justice Story's antislavery reputation with his strongly proslavery opinion in *Prigg* is misguided. In my view, Story's antislavery reputation has been exaggerated. Thus, the proslavery position he took in *Prigg* may not have caused him the moral agony that some scholars have ascribed to him.

Story's antislavery reputation rests on a thin foundation: one circuit court opinion in a slave trade case, his 1819 Grand Jury Charge, and his opposition to the expansion of slavery into the territories. But my examination of Story's opinions in slave trade cases presents a picture of a judge who merely consistently applied the same legal rules to slave trade cases that he applied to other cases, regardless of whether the results of doing so aided or thwarted the government's efforts to enforce the antislave trade laws. The 1819 Grand Jury Charge, in which he passionately spoke out against slavery and the slave trade, was given during a time of heated debate in America over the expansion of slavery into the territories. I have tried to show that Story's opposition to this expansion had as much to do with his fear that the expansion of slavery would increase the political power of the South, at the expense of New England, as it did with any qualms he had about the immorality of slavery.

I have further argued that protection of property rights and expansion of federal power were very high in Story's hierarchy of values. Story wrote extensively in defense of both property rights and nationalism. He also used his political connections to push his nationalist agenda. In contrast, Story was relatively silent on the question of slavery and the status of blacks in either the North or the South. In my view, Story's own emphasis suggests that both property rights and nationalism took precedence over the plight of slaves and free blacks. Thus, when *Prigg* confronted Story with a choice between the expansion of federal power and the protection of property rights, on the one hand, and recoguition of a state's duty to protect free blacks from kidnapping as well as an opportunity to undermine the system of slavery, on the other hand, it is not surprising that Story chose nationalism and property rights over the interests of black people.

The attempt of scholars to "explain away" *Prigg* while accepting Story's antislavery reputation at face value raises a question that goes beyond an historical assessment of what Story did in *Prigg*. In my view, the attempts to explain *Prigg* seem to be tinged with apology for the decision rather than clothed with the condemnation the opinion deserves for the immorality of what Story decided. I must

admit that it is tempting to view Story merely in terms of his own "mental universe"[343] and from this perspective, not condemn him for his decision in *Prigg*. One cannot help but be impressed by Story's talent and his contributions to the development of the law and the legal profession. Further, in light of so many nineteenth century judges' indifference to, if not active support for, the institution of slavery, one almost cannot help but be captivated by Story's 1819 Grand Jury Charge and his stirring rhetoric in *La Jeune Eugenie*. Indeed, it is difficult not to admire him for feeling a need to defend his role in upholding an unjust law. Certainly this need was not felt by many of his contemporaries, such as Roger Taney, who gave us *Dred Scott*, or Samuel Nelson, whose "judicial laxness" as the Justice with circuit duties for the Second Circuit "made the port of New York a haven for slave traders."[344]

Moreover, why should we condemn Justice Story if nationalism and property rights—matters close to his own self-interests—were more important to him than freedom and equality for blacks? After all, he was no different in this regard than Northern state legislatures that abolished slavery not so much out of humanitarian concerns, but rather out of fear of slave insurrections and concern over the competition between slave and free labor in an economic climate that depended upon free labor for growth.[345] Many abolitionists, too, were motivated by self-interest. Fear of retribution in the Hereafter moved them as much as concern for the rights of blacks to liberty and equality. It is tempting, then, to say Story's stance on slavery was no worse, indeed a good bit better, than many of these others, and leave it at that.

Indeed, some might argue that the very enterprise of trying to assess the morality of Justice Story's position in *Prigg* is illegitimate. Under this view, our primary task instead ought to be to come to an "understanding [of] the past in its own terms."[346] Fortunate to live in a more enlightened age, we should not presume to pass moral judgment on one, such as Story, who had the misfortune to live in a benighted time when the prevailing values and norms deemed slavery legitimate and gave to it the protection of law.[347] In keeping with one of "the old-fashioned rules of historiography," we should

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343 Tushnet, *supra* note 54, at 114.

344 NEWMYER, *supra* note 23, at 349.

345 For a comprehensive treatment of the abolition of slavery in the North see LEON F. LITWACH, NORTH OF SLAVERY (1961). *See also* ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION, THE ABOLITION OF SLAVERY IN THE NORTH 46-52 (1967).

346 A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7, 217 (1979).

347 Nash, *supra* note 199, at 218. *But see* Sanford Levinson, *supra* note 234, at 153-54 (arguing that even in Story's times slavery was immoral and Story knew it).

judge the past by past standards not present ones.[348] Even Cover, who set out to try to come to some judgment about the peace his "antislavery" judges made between their perceived duty to the law and their duty to their own conscience, apparently felt obliged to pay substantial deference to this time-honored rule: he was unwilling to say clearly whether he believed that these judges should be condemned for upholding laws they knew were unjust or exonerated because they were caught in a moral-formal trap not of their own making.[349]

Nonetheless, while I do not completely agree with Oscar Wilde's assertion that our only duty to history is to rewrite it, I think we who live in the present do have a responsibility, not only to reexamine the past, but also to make moral judgments about that past.[350] Indeed, when assessing the history of law and legal institutions, especially as regards oppressive laws, there are at least two reasons why we have a particular responsibility to try to come to terms with the morality of decisions made by judges. First, because the law builds upon its past and looks to that past to legitimize the present. Without moral judgments about the traditional resolutions of legal problems, we are apt to rely unquestioningly upon those past resolutions, even though their underlying values and norms are wrong and oppressive.[351]

Second, the predominant values that shape both our legal institutions and the decisions made by judges are often constructed without the participation of those who are victimized by those decisions and institutions. Listening to the past only in the voices of those sounding the prevailing theme deprives us of the vital opportunity to learn from the experiences of the oppressed in our quest to understand and learn from our history.

How then should we judge Justice Story for his *Prigg* decision? To me, the answer is straightforward. Story was a member of the

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348 *See also* NEWMYER, *supra* note 23, at xiii. Writing of his involvement with Story's life while researching his biography, Newmyer observed: "What I discovered as I struggled to understand him . . . was the wisdom of the old-fashioned rules of historiography: the need for historians to get out of their own skin, to avoid anachronism, to judge by past, not present, standards." *Id.*

349 Bell, *supra* note 28, at 356.

350 As Meier and Rudwick note, African-American scholars face a dilemma when writing about the history of race relations in America: on the one hand they must avoid, in John Hope Franklin's phrase, "the temptation to pollute . . . scholarship with polemics," while on the other hand refuting "the mispresentations propagated by so many white historians . . . ." AUGUST MEIER & ELLIOTT RUDWICK, BLACK HISTORY AND THE HISTORICAL PROFESSION, 1915-1980, at 277 (1986).

351 For a striking example of the use of the morality of the past as the basis for judicial resolution of a question of individual rights in the present see Chief Justice Burger's concurring opinion in Bowers v. Hardwick, 478 U.S. 186, 196-97 (Burger, C.J., concurring).

ruling elite at a time when one of the cornerstones of American society was the perpetual enslavement of kidnapped Africans and their descendants. As a member of that elite, Story, like most nineteenth century jurists, upheld the laws that allowed slavery to exist. Story had a choice, and the choice he made was to participate in the perpetuation of slavery. In so doing, he made himself a part of what Cover once called the federal judiciary's "long tradition as executors of immoral law."[352] No assessment of Story would be complete without taking into account that fact, and his moral failure relegates him to less than the place of honor he has heretofore assumed in the history of American law. Instead, he joins the ranks of those other jurists, past and present, who have participated in the shame of oppression.[353]

Silence on the morality of judicial participation in fostering the slavery system "inculcates tolerance for a vicious and all too familiar trait: complacency in the face of injustice."[354] It is the now-dead black victims who suffered under that system who we dishonor by our silence on the immorality of what happened to them. Fear of that dishonor, rather than fear of demeaning the reputation[355] of

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352 Robert M. Cover, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression (1856)*, 68 COLUM. L. REV. 1003, 1005 (1968) (reviewing book of the same name by Richard Hildreth). A useful comparison can be made between the actions of American judges confronted with laws upholding slavery and the reactions of German judges who were called upon to enforce the laws of the Nazi regime. Apparently, only one judge, Dr. Lothar Kreyssig, refused to serve Hitler from the bench, while "the overwhelming majority of [German judges] shared responsibility for the terror." INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 196 (1991).

353 I leave myself open to the charge of engaging in "presentism"—a term historians use to describe historical analysis which views the past through the lens of the present, often with a political point of view. I do not mind pleading guilty to such a charge. The presentist view allows historians to approach accepted conceptions and conventions from a new perspective, bringing new insights and fresh energies to established historical "truths." As one historian of the "New Left" of the 1960s put it:

> When a man is digging up facts to support traditional and accepted interpretations . . . he may, without too much difficulty, prevent himself from becoming impassioned. . . . On the other hand when a scholar arrives at a radical or unconventional interpretation, he may very well become excited by what he is doing. For the act of contradiction involves emotions more tumultuous than those aroused by the state of acceptance. Scholarly dispassion is the true medium of the scholar satisfied with (or browbeaten by) things as they are.

The Radicalism of Disclosure, STUDIES ON THE LEFT 2 (Fall 1959), *quoted in* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 425 (1988). *See also* Alexander, *supra* note 307, at 279 & n.16 (defending presentism). For a discussion of the "perils" of presentism, see Douglas L. Wilson, *Thomas Jefferson and the Character Issue*, THE ATLANTIC MONTHLY, November 1992, at 57.

354 Kennedy, *supra* note 237, at 1631. Kennedy argues that the United States has instances in its past that "pose problems for historical and moral analysis that are hauntingly similar" to the Holocaust, the Gulag, and Apartheid. *Id.* at 1631 n.37.

355 *See* Bell, *supra* note 28, at 357 (qualifying his remarks about Story by suggesting he did not mean to dishonor him).

"great" judges, should be our concern as we look back over our past and try to draw from it lessons for our present and for our future.[356]

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356 This Article's conclusion is for George Moses Horton, a slave and a poet, who published his poems to try to raise money to purchase his freedom and settle in Liberia. Horton did not know freedom until the Civil War, when in 1865 he escaped to Union lines. He died after only three years of freedom. Here is an excerpt from one of his poems, *On Liberty and Slavery*:

> Alas! and am I born for this,
> To wear this slavish chain?
> Deprived of all created bliss,
> Through hardship, toil and pain!
>
> How long have I in bondage lain,
> And languished to be free!
> Alas! and must I still complain—
> Deprived of liberty.
>
> Oh, Heaven! and is there no relief
> This side the silent grave—
> To soothe the pain—to quell the grief
> And anguish of a slave?
>
> Come Liberty, thou cheerful sound,
> Roll through my ravished ears!
> Come, let my grief in joys be drowned,
> And drive away my fears. . . .
>
> Bid Slavery hide her haggard face,
> And barbarism fly:
> I scorn to see the sad disgrace
> In which enslaved I lie.
>
> Dear Liberty! upon thy breast,
> I languish to respire;
> And like the Swan unto her nest,
> I'd to thy smiles retire.

George Moses Horton, *On Liberty and Slavery, reprinted in* ROBERT STAROBIN, BLACKS IN BONDAGE: LETTERS OF AMERICAN SLAVES 113-15 (1974).