

1-1-2005

The Supreme Court and Congress's Power to Enforce Constitutional Rights: A Moral Anomaly

Robert J. Kaczorowski

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

Follow this and additional works at: http://lsr.nellco.org/fordham_fc

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Legal History, Theory and Process Commons](#), and the [Legislation Commons](#)

Recommended Citation

Kaczorowski, Robert J., "The Supreme Court and Congress's Power to Enforce Constitutional Rights: A Moral Anomaly" (2005). *Fordham Law Faculty Colloquium Papers*. Paper 8.
http://lsr.nellco.org/fordham_fc/8

This Article is brought to you for free and open access by the Fordham University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Fordham Law Faculty Colloquium Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

Fordham University School of Law



Research Paper 72

January 2005

*The Supreme Court and Congress's Power to Enforce
Constitutional Rights: An Overlooked Moral Anomaly*

Robert J. Kaczorowski
Professor, Fordham University School of Law

73 Fordham Law Review 154 (2004)

This paper can be downloaded without charge
from the Social Science Research Network electronic library:

<http://ssrn.com/abstract=677546>

ARTICLES

THE SUPREME COURT AND CONGRESS'S POWER TO ENFORCE CONSTITUTIONAL RIGHTS: AN OVERLOOKED MORAL ANOMALY

*Robert J. Kaczorowski**

INTRODUCTION.....	154
I. FEDERAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS: FROM THE FOUNDING TO THE CIVIL WAR.....	159
A. Fugitive Slaves and the Constitution: Congress's Legislative Powers Under the Fugitive Slave Clause.....	159
B. The Fugitive Slave Act of 1793 Confers Civil Remedies to Enforce Slaveholders' Property Right Secured by the Fugitive Slave Clause.....	164
C. The United States Supreme Court Unanimously Upholds Congress's Plenary Power to Enforce the Right Secured by the Fugitive Slave Clause.....	167
D. Consequences of <i>Prigg</i> : Northern States Assert State Sovereignty and Resist Enforcement of Slaveholders' Constitutional Right.....	188
E. The Fugitive Slave Act of 1850: The Creation of a Federal Law Enforcement Structure to Remedy Constitutional Rights Violations	191
F. Federal Enforcement of Slaveholders' Constitutional Rights.....	193
G. The United States Supreme Court Upholds the Civil Remedies and Criminal Penalties the Fugitive Slave Act of 1850 Imposed on Violators of the Constitutional Right of Slaveholders.....	199
H. <i>Ableman v. Booth</i> : The Supreme Court Reaffirms Congress's Plenary Power to Enforce Constitutional Rights	202
II. FUGITIVE SLAVE ORIGINS OF CONSTITUTIONAL LIBERTY	204
A. The Civil Rights Act of 1866 Is Modeled on the Fugitive Slave Act of 1850.....	205

* Professor of Law, Fordham University School of Law.

B. The Supreme Court's Interpretation of Congress's Power to Enforce the Constitutional Rights of Slave Owners Defines Congress's Power To Enforce the Constitutional Rights of Free Men.....	209
III. THE CIVIL RIGHTS ACT OF 1866.....	230
A. Congress Confers United States Citizenship and Some of the Rights of United States Citizens on All Natural Born Americans.....	230
B. Remedial Provisions of the Civil Rights Act	231
CONCLUSION	241

INTRODUCTION

[T]o hold that the [Fourteenth] amendment remits [the civil rights of United States citizenship] to the States for their protection, primarily, and stays the hands of the nation, until it is assailed by State laws or State proceedings . . . reverses the policy which the general government has pursued from its very organization. . . . Its acceptance would lead to this anomalous result: that whereas, prior to the [Reconstruction] amendments, Congress, with the sanction of this court, passed the most stringent laws—operating directly and primarily upon States and their officers and agents, as well as upon individuals—in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments.¹

The Rehnquist Court has based many of its history-making decisions on its view of constitutional history.² In recent years the Court has interpreted Congress's powers under the Fourteenth Amendment according to its understanding of the intent of the framers of the Fourteenth Amendment. In *City of Boerne v. Flores*,³ the Court struck down the Religious Freedom Restoration Act of 1993⁴ (“RFRA”) because, in the Court's view, it exceeded Congress's power to enforce the rights secured by the Fourteenth Amendment.

1. Civil Rights Cases, 109 U.S. 3, 52-53 (1883) (Harlan, J., dissenting).

2. Many of the Court's history-based opinions are examined in Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J. L. & Pol. 809, 834-83 (1997). Richards discusses the following cases: *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 681 (1997); *Clinton v. Jones*, 520 U.S. 681 (1996); *Seminole Tribe v. Florida*, 520 U.S. 564 (1996); *Rosenberger v. Rector & Visitors of the University of Virginia*, 514 U.S. 819 (1995); *United States Term Limits v. Thornton*, 514 U.S. 779 (1995); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211 (1995); and *Austin v. United States*, 509 U.S. 602 (1993).

3. 521 U.S. 507 (1997).

4. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-4 (2000)).

RFRA exceeded Congress's power in two important respects: it purported to define the rights the Fourteenth Amendment secures; and it attempted to define what constitutes a violation of the rights the Fourteenth Amendment secures. The Court held that the framers of the Fourteenth Amendment intended to give these powers to the courts and not to Congress, and they intentionally restricted Congress's remedial power under the Amendment to remedying state violations of these rights. In *United States v. Morrison*,⁵ decided three years later, the Court clarified Congress's remedial powers when it held that a civil remedy Congress enacted in the Violence Against Women Act⁶ ("VAWA") was unconstitutional because it imposed civil liability on a private individual who assaulted a woman out of gender animus. In other words, *Morrison* held that Congress cannot create a civil remedy between two individuals for an admitted violation of a constitutional right by one of the private individuals. The Court made these legal determinations on the basis of its understanding of the intent of the framers of the Fourteenth Amendment.⁷

The Rehnquist Court failed to consider an essential part of the Fourteenth Amendment's legislative history and its framers' intent, namely, the history of federal constitutional rights enforcement before the Civil War.⁸ Justice John Marshall Harlan's comments quoted at

5. 529 U.S. 598 (2000).

6. Pub. L. No. 103-322, 108 Stat. 1941-42 (1994) (codified as 42 U.S.C. § 13981 (2000)).

7. *Flores*, 521 U.S. at 520-21.

8. Historians have recognized the relationship between the constitutional debate over slavery before the Civil War and the legislative debates related to the Fourteenth Amendment during Reconstruction. However, these historians have focused exclusively on the constitutional theories of the abolitionists and anti-slavery forces in tracing the origins of the Fourteenth Amendment to antebellum constitutional thought. See, e.g., Jacobus Ten Broek, *Equal Under Law: The Anti-Slavery Origins of the Fourteenth Amendment* (1951); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986) [hereinafter Curtis, *No State Shall Abridge*]; William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988); David Richards, *Conscience and the Constitution: History, Theory and the Law of the Reconstruction Amendments* (1993); Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 *UCLA L. Rev.* 1109 (1997); Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 *Chi.-Kent L. Rev.* 1113 (1993); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 *N.C. L. Rev.* 1071, 1110-16 (2000). For an excellent analysis of the constitutional theories of those opposed to slavery, see William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (1977). Scholars have not recognized the important influence the Fugitive Slave Acts and judicial decisions interpreting the Fugitive Slave Clause had on the framers of the Fourteenth Amendment. For exceptions to this generalization, see Robert J. Kaczorowski, *The Inverted Constitution: Enforcing Constitutional Rights in the Nineteenth Century*, in

the beginning of this Article refer to a little appreciated fact of United States constitutional history, namely, that Congress legislated to enforce slave owners' right to recapture runaway slaves, which the founders constitutionally secured with the Fugitive Slave Clause of Article IV,⁹ since the nation's founding. Unfortunately, slave owners' property right of recapture of runaway slaves was the first constitutional right Congress legislated to enforce. Congress legislated to enforce this property right in 1793¹⁰ with the kind of civil remedies which *Boerne* and *Morrison* held Congress could not enact to remedy violations of the human rights secured by the Fourteenth Amendment. In 1850, Congress again legislated to enforce slaveholders' property rights in their slaves and enacted an elaborate enforcement structure, authorized an additional civil remedy, and imposed criminal penalties against anyone who interfered with the slave owners' right.¹¹ The United States Supreme Court, every lower federal court, and, with only one exception,¹² every state appellate court presented with the issue upheld the constitutionality of these statutes and of Congress's plenary power to enact them.

One can understand why historians and constitutional scholars in the twentieth century have overlooked this tragic episode of American constitutional history.¹³ Slavery was the very abnegation of

Constitutionalism and American Culture: Writing the New Constitutional History 29 (Sandra F. VanBurkleo et al. eds., 2002); Robert J. Kaczorowski, *Fidelity Through History And to It: An Impossible Dream?*, 65 Fordham L. Rev. 1663 (1997) [hereinafter Kaczorowski, *Fidelity*].

9. U.S. Const. art. IV, § 2, cl. 3.

10. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302. This statute also included provisions that implemented the Constitutional provision relating to the extradition of fugitives from justice. U.S. Const. art. IV, § 2, cl. 2.

11. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

12. See *infra* notes 47-146, 176-177, 185-237 and accompanying text. The Wisconsin Supreme Court was the only court to deny the constitutionality of the Fugitive Slave Act of 1850. *In re Booth and Rycraft*, 3 Wis. 144 (1854); *In re Booth*, 3 Wis. 13, 49 (1854). But the United States Supreme Court forcefully upheld its constitutionality and ordered the Wisconsin court's compliance with its decision. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); *United States v. Booth*, 59 U.S. (18 How.) 477 (1855); see *infra* notes 227-237 and accompanying text.

13. The best legal histories of fugitive slave recapture and the reaction of the non-slaveholding states are Stanley Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (1970); Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (1975) [hereinafter Cover, *Justice Accused*]; Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981) [hereinafter Finkelman, *An Imperfect Union*]; and Thomas Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (1974). See also Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. Hist. 397 (1990) [hereinafter Finkelman, *The Kidnapping of John Davis*]; Paul Finkleman, *Sorting Out Prigg v. Pennsylvania*, 24 Rutgers L.J. 605, 621 (1993) [hereinafter Finkelman, *Sorting Out Prigg v. Pennsylvania*]; Paul Finkleman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 Sup. Ct. Rev. 247, 259-63 (1994) [hereinafter Finkelman, *Story Telling on the Supreme Court*]; Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 Yale L.J. 1835 (1991).

human rights and individual liberties, which are the substance of the constitutional guarantees that Americans associate with constitutional rights. To equate federal constitutional rights enforcement to the federal enforcement of the constitutionally secured right of property in slaves is both anomalous and abhorrent to anyone concerned with enforcing the constitutional guarantees of human rights. Indeed, scholarly studies of the Fugitive Slave Clause and the Fugitive Slave Acts have focused on the ways this area of federal law was antithetical to the constitutional liberties of the tragic individuals it assisted slave owners to return to slavery. The counterintuitive nature of this constitutional right probably explains why no one has recounted the remedies and enforcement structure authorized by the Fugitive Slave Acts to enforce slave owners' constitutionally secured property rights in their slaves and their enforcement in the courts. Part I of this article examines the history of the Fugitive Slave Acts of 1793 and 1850 and their enforcement in the courts of the United States.

The history of the federal government's enforcement of the Fugitive Slave Clause raises a disturbing moral question of fundamental importance. If the Constitution delegated to Congress plenary power to protect the property rights and privilege of slave owners, how can it not have delegated to Congress the same plenary power to protect the human rights and equality of all Americans?

This precise question troubled the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment in the Thirty-Ninth Congress. Part II of this Article shows that the framers answered this question by insisting that, given the history of Congress's judicially recognized plenary power to enforce the constitutionally secured property rights of slaveholders, Congress had to possess comparable power to enforce the human rights and equality of all Americans. This part shows that the framers of the Civil Rights Act and the Fourteenth Amendment acted on this presumption by enacting the Civil Rights Act of 1866 to enforce the civil rights of United States citizens, and by incorporating into the Civil Rights Act the remedies and enforcement provisions of the Fugitive Slave Acts, particularly the Fugitive Slave Act of 1850. Thus, the Thirty-Ninth Congress perpetuated the remedies and federal enforcement structure earlier Congresses adopted to enforce the constitutionally secured property rights of slave owners and turned them into federal remedies to enforce the fundamental rights secured to all Americans by the Thirteenth Amendment's abolition of slavery and other constitutional provisions. The Thirty-Ninth Congress enacted federal remedies enforceable in federal courts against anyone who violated the civil rights of American citizens, especially when the states were unwilling or unable to redress these violations.

Part II also recounts what previous studies of the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment have not

addressed, namely, the framers' theory of plenary congressional power to enforce Americans' constitutional rights. It will show that the framers applied the Supreme Court's theories of constitutional delegation and implied powers, which the Marshall Court elaborated in *McCulloch v. Maryland*¹⁴ and the Taney Court applied in *Prigg v. Pennsylvania*¹⁵ to uphold Congress's power to enforce the slaveholder's property right in his slaves secured by the Fugitive Slave Clause, to insist that Congress possessed the same plenary power to enforce the human rights of freemen secured by the Thirteenth Amendment and other constitutional provisions. To ensure the constitutionality of the Civil Rights Act, the framers of the Fourteenth Amendment incorporated the Act into section 1 of the Fourteenth Amendment. The framers of the Fourteenth Amendment thus transformed the constitutionalism of slavery into the constitutionalism of liberty, by invoking the plenary congressional power which Congress exercised and the Supreme Court affirmed to enforce the constitutional property rights of slave owners before the Civil War,¹⁶ and exercising this power to enforce the constitutional human rights of all Americans after the Civil War.

Rather than a departure from traditional notions of federal powers, as the Rehnquist Court asserts, Congress's exercise of plenary power to enforce constitutional rights during Reconstruction actually continued a tradition of plenary federal enforcement of constitutional rights that originated at the nation's founding.¹⁷ The Reconstruction Congresses copied the civil and criminal remedies and the enforcement structure of the 1850 statute not only into the Civil Rights Act of 1866,¹⁸ but also into the Enforcement Act of 1870¹⁹ to implement the Fifteenth Amendment, and the Ku Klux Klan Act of 1871²⁰ to enforce the Fourteenth Amendment. Part III of this Article shows how the Civil Rights Act of 1866 incorporated the civil and criminal remedies and enforcement structure of the Fugitive Slave Act of 1850.

The history of the federal government's enforcement of constitutional rights through the Civil War era is essential in assessing the Supreme Court's interpretation of Congress's power to enforce the rights secured by the Fourteenth Amendment and to remedy their violation. Because the Supreme Court has decided that Congress lacks the plenary power to enforce substantive constitutionally secured human rights under the Fourteenth Amendment and that

14. 17 U.S. (4 Wheat.) 316 (1819).

15. 41 U.S. (16 Pet.) 539 (1842).

16. *See id.*; *McCulloch*, 17 U.S. (4 Wheat.) at 316.

17. Civil Rights Cases, 109 U.S. 3, 51 (1883) (Harlan, J., dissenting).

18. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

19. Act of May 31, 1870, ch. 114, 16 Stat. 140.

20. Act of Apr. 9, 1866, ch. 22, 17 Stat. 13.

2004] *AN OVERLOOKED MORAL ANOMALY* 159

Congress could enforce the constitutionally secured property rights of slaveholders, recalling this history confronts the Court with the moral anomaly that challenged Congress at the conclusion of the Civil War: If the Constitution delegated to Congress plenary power to protect the property rights and privilege of slave owners, how can it not have delegated to Congress the same plenary power to protect human rights and equality? The answer provided by the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment offers the Court a way to eliminate the moral anomaly it has created and to reaffirm a constitutionalism of liberty.

I. FEDERAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS: FROM
THE FOUNDING TO THE CIVIL WAR

The current Supreme Court's interpretation of Congress's authority to enforce the constitutional rights secured by the Fourteenth Amendment is substantially narrower than nineteenth century courts' interpretation of the scope of Congress's authority to enforce the Fugitive Slave Clause. In addition to the anomaly created by the Court's attributing greater federal legislative authority to enforce slaveholders' property rights than to enforce citizens' fundamental rights, the Court's interpretation of federal power is narrower than that exercised by Congress and affirmed by federal and state courts during the antebellum period of American history. This part will discuss the history of federal constitutional rights enforcement under the Fugitive Slave Clause from the founding to the Civil War.

A. *Fugitive Slaves and the Constitution: Congress's Legislative Powers Under the Fugitive Slave Clause*

Admittedly, slavery was one of the most controversial issues that confronted the Constitutional Convention in 1787, and the founders put provisions in the Constitution to assure slaveholders that their "peculiar institution" would be secure in the republic they were creating.²¹ The pro-slavery and anti-slavery delegates to the

21. Wiecek, *supra* note 8, at 63-64. Professor Wiecek stated that James Madison noted that "the real difference of interest [in the Constitutional Convention] lay, not between the large & small but between the N[orthern] & Southn. [sic] States. The institution of slavery & its consequences formed the line of discrimination." Hence "the most material [of differentiating interests among the states] resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States." The Constitution embodied a mediation of sectional differences that were based chiefly on slavery.

Id. at 64 (quoting 2 The Records of the Federal Convention of 1787, at 10 (Max Ferrand ed., 1937) (alteration in original)); *see also* 1 The Records of the Federal Convention of 1787, *supra*, at 486. Wiecek discusses the compromises of 1787 and the greater importance of slavery than state size in the divisions among the delegates. *See*

constitutional convention included ten clauses in the Constitution that directly or indirectly recognized or secured slavery.²² Through these clauses, the founders prevented the national government from interfering with slavery within the slave states and provided constitutional guarantees of slavery throughout the nation.²³ The Fugitive Slave Clause was one of, if not the most important, guarantee of slavery the founders included in the Constitution.

However, the precise nature of the Fugitive Slave Clause was not obvious from its language. The Fugitive Slave Clause states:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.²⁴

This provision can be understood in several different ways with significantly different consequences for the federal government's authority to enforce it.²⁵ In light of the Rehnquist Court's approach to constitutional interpretation, any congressional authority to enforce the Fugitive Slave Clause would be remarkable. On its face, the Fugitive Slave Clause, like the Fourteenth Amendment's Privileges and Immunities, Due Process, and Equal Protection Clauses, is a

Wiecek, *supra* note 8, at 62-83.

22. Professor William Wiecek notes that, although "slavery" is never mentioned in the Constitution, the founders inserted ten clauses that directly or indirectly accommodated slavery: Article I, Section 2 (the Three-Fifths Clause); Article I, Section 2 and Article I, Section 9 (direct taxes to be apportioned on the basis of the Three-Fifths Clause); Article I, Section 9 (the Slave Trade Clause); Article IV, Section 2 (the Fugitive Slave Clause); Article I, Section 8 (Militia Clause to suppress uprisings, including slave uprisings); Article IV, Section 4 (duty to protect against domestic violence, including slave insurrections); Article V (clauses relating to slave trade and direct taxes made unamendable); Article I, Section 9 and Article I, Section 10 (prohibition of export taxes, including products of slave labor). *See* Wiecek, *supra* note 8, at 62-63. Although "slavery" is never mentioned in the Constitution, three clauses were drafted with the explicit intention of recognizing and securing the institution: Article I, Section 2 (the Three-Fifths Clause); Article I, Section 9 (the Slave Trade Clause); and Article IV, Section 2 (the Fugitive Slave Clause). *Id.*

23. *Id.* at 82-83.

24. U.S. Const. art. IV, § 2, cl. 3.

25. In his authoritative treatise on the law of freedom and slavery, John Codman Hurd explained four possible interpretations of the Fugitive Slave Clause. *See* 2 John C. Hurd, *The Law of Freedom and Bondage in the United States* 421-424 (Negro University Press 1968) (1862). However, they are reducible to the interpretations described in the text above. Hurd elaborates two interpretations of the Clause as imposing the duty of enforcement on the states, namely, one in which the national government cannot compel the states to perform their duty under the Clause, and the other in which the national government can enforce the state's duty. *Id.* Hurd also posits two interpretations in which the duty to enforce the Fugitive Slave Clause is imposed on the national government: the first is that the rights and duties created by the Clause may only be enforced as claims against the national government, and the second is that these rights and duties are relegated to private individuals to enforce as causes of action in federal or state court. *Id.*

prohibition directed against the states. Unlike the Fourteenth Amendment, the Fugitive Slave Clause does not explicitly delegate any power to Congress to enforce it.

On its narrowest interpretation, the Fugitive Slave Clause can be understood merely as a self-executing prohibition on the free states from interfering with the slave owner's right to recapture his runaway slaves without conferring any power on Congress to enforce it.²⁶ This states rights, strict construction interpretation of the Fugitive Slave Clause is supported by its place in the Constitution: it appears in Article IV rather than among the enumerated powers delegated to Congress in Article I. Moreover, unlike sections 1, 3, and 4 of Article IV, the text of the Fugitive Slave Clause and the other two clauses of section 2,²⁷ do not expressly delegate legislative power to Congress or necessarily imply that Congress possesses any legislative power to enforce it.

Seeking to eliminate federal enforcement power, some abolitionists and anti-slavery leaders in the middle of the nineteenth century insisted that this narrow states rights interpretation defined the scope of the constitutional guarantee.²⁸ On this reading, the Fugitive Slave Clause's command to deliver up the slave was understood as directed to the state into which the slave escaped. The foremost legal defender of fugitive slaves, Salmon P. Chase, who would later be appointed Chief Justice of the United States Supreme Court by President Abraham Lincoln, argued this theory of the Fugitive Slave Clause in the lower federal courts and to the United States Supreme Court. He insisted that, since slavery existed only by the positive law of a state, the Constitution relegated slavery to the exclusive jurisdiction of the states. How to deal with fugitive slaves was for the states alone to decide.²⁹ Chase argued also that the Fugitive Slave Clause merely

26. The right of recapture was an ancient common law right that authorized the owners of chattel property, such as livestock and portable goods, that strayed or were taken away, to recover them through self-help, provided the recapture could be accomplished without a breach of the peace. Indeed, in the eighteenth century, this proprietary right also authorized masters to recapture fugitive servants, fathers to recapture runaway children, and husbands to recapture absconding wives. 3 William Blackstone, *Commentaries on the Common Law* 3-5 (1768).

27. U.S. Const. art. IV, § 2, cls. 1-2. The Privileges and Immunities Clause, states: "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* cl. 1. The Fugitives from Justice, or Extradition, Clause provides:

[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.

Id. cl. 2.

28. Campbell, *supra* note 13, at 29.

29. Salmon P. Chase, *Reclamation of Fugitives From Service: An Argument for the Defendant in Jones v. Van Zandt*, reprinted in *Fugitive Slaves and American Courts: The Pamphlet Literature* 353-93, 415-22 (Paul Finkelman ed., 1988). Chase

established a principle of comity among the states. It did not delegate legislative power to Congress to enforce this provision, because it was not among the enumerated powers of Article I.³⁰ The Supreme Court expressly rejected this narrow states rights, strict construction interpretation of the Fugitive Slave Clause in 1847.³¹

The Fugitive Slave Clause can be interpreted more broadly as an implied delegation of congressional legislative authority to enforce it. The prohibition on the states from interfering with the labor or service owed by the fugitive to the master can be understood as implicitly delegating to Congress the power to remedy state violations of the slaveholders' right to the fugitive's labor or service. If the Fugitive Slave Clause had delegated enforcement power to Congress, this view

was a leader of moderate anti-slavery proponents whose views on the Constitution rejected any federal power to enforce slavery. Their constitutional views complemented their political objective of preventing slavery's expansion beyond the states in which it already existed. Chase argued that slavery was so antithetical to natural law that it existed only by positive law, the positive law of a state within the American federal system. The framers of the Constitution sought to prevent the federal government from having anything to do with slavery, and they carefully avoided conferring any constitutional powers on the federal government to support slavery. A state could either establish slavery or not, as it saw fit. As slavery was wholly a matter of state law, the federal government possessed no constitutional power to abolish slavery in the states in which it existed; but neither could the federal government enforce slavery in the states that refused to recognize it. Consequently, slaves who entered a free state, regardless of how they got there, were free. Moreover, Chase and the moderate anti-slavery forces argued that the Fifth Amendment's guarantee of liberty and property prohibited the federal government from enforcing slavery in the territories of the United States, because slavery violated the slaves' Fifth Amendment-guaranteed rights of liberty and property. This constitutional theory, therefore, also served the anti-slavery political program that insisted that slavery was unconstitutional in the District of Columbia, in the territories of the United States, in short, anywhere outside of the slave states. Confining slavery to the states in which it already existed, this moderate anti-slavery view assumed that, having "quarantined" slavery and blocked its expansion, slavery would eventually stagnate and die. Chase's constitutional theory thus served as the legal basis of the Republican Party's platforms on slavery and the Constitution in 1856 and 1860. See Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* 76-87 (1970); Wiecek, *supra* note 8, at 208-13.

30. Chase, *supra* note 29, at 353-93, 436-46. Chase's argument was predicated on the theory that the clauses relating to slavery constituted a compact between the northern and southern states. He asserted a strict construction interpretation of constitutional delegation with respect to these provisions, arguing that "the clauses of compact confer[red] no powers on the [federal] government: and the powers of [the] [federal] government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact." *Id.* at 439. The Fugitive Slave Act of 1793 was unconstitutional because the Constitution did not delegate any power to Congress to enforce the Fugitive Slave Clause. See Jacobus Ten Broek, *supra* note 8, at 62; Foner, *supra* note 29, at 77; J. W. Schuckers, *The Life and Public Services of Salmon Portland Chase* 114-15 (DaCapo Press 1970) (1874).

31. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 230-31 (1847). In this case, the Court also reaffirmed its decision in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), in which it unanimously held that the Fugitive Slave Clause delegated plenary and exclusive power to Congress to enforce the positive and absolute right of slaveholders which it secured. *Jones*, 46 U.S. (46 How.) at 230-31, 271-72.

would be the most consistent with the state action interpretation of the Fourteenth Amendment as articulated by the Rehnquist Court in cases such as *Boerne* and *Morrison*, which limit Congress's legislative powers to remedying the prohibited state action. It is significant, therefore, that this view of the Constitution and of congressional legislative powers was never argued before the Civil War.

On its broadest reading, the Fugitive Slave Clause can be interpreted as an affirmative constitutional guarantee of the slaveholder's property right of recapture. This view encompassed two substantially different constitutional consequences than the other two interpretations. First, the constitutional recognition of the slaveholder's property right constituted a constitutional guarantee of the slaveholder's property right which delegated to Congress the constitutional authority to enforce it. Second, the constitutional recognition and guarantee of the property right imposed on the federal government the duty to enforce it. On this view, the Fugitive Slave Clause expanded an ancient common law right of property by incorporating a property right in slaves and transformed it into, and conferred on slave owners, a new constitutionally secured right of property, a new nationally enforceable right of property, to recover runaway slaves even though they escaped to a state that did not recognize slavery.

On this reading of the Fugitive Slave Clause, the Constitution conferred on slave owners a new constitutional right enforceable under the authority of the national government, independent of the states. In addition, the Constitution prohibited the states from interfering with this right. This interpretation is wholly inconsistent with the current Rehnquist Court's jurisprudence of states rights-centered federalism, especially as applied to Congress's power to enforce rights secured by the Fourteenth Amendment. However, it is wholly consistent with the Marshall Court's jurisprudence of national sovereignty-based federalism expressed in cases such as *McCulloch v. Maryland*.³² Indeed, the Taney Court adopted and applied *McCulloch*'s constitutionalism when it asserted this broadest interpretation of the Fugitive Slave Clause in the 1840s and 1850s.³³ This view of congressional powers also is most consistent with the federal and state court decisions that interpreted the federal law of fugitive slaves.³⁴

32. 17 U.S. (4 Wheat.) 316 (1819).

33. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Norris v. Crocker*, 54 U.S. (13 How.) 429, 440 (1851); *Jones*, 46 U.S. (5 How.) at 230-231; *Prigg*, 41 U.S. (16 Pet.) 539.

34. See *Jones* 46 U.S. (5 How.) at 229-231; *Miller v. McQuerry*, 17 F. Cas. 335, 338-39 (C.C.D. Ohio 1853) (No. 9583); *Charge to Grand Jury*, 30 F. Cas. 1007, 1008 (C.C.S.D.N.Y. 1851) (No. 18,261); *Oliver v. Kauffman*, 18 F. Cas. 657, 659, 661 (C.C.D. Pa. 1850) (No. 10,497); *Ray v. Donnell*, 20 F. Cas. 325, 326 (C.C.D. Ind. 1849) (No. 11,590); *Giltner v. Gorham*, 10 F. Cas. 424, 425 (C.C.D. Mich. 1848) (No. 5453);

B. *The Fugitive Slave Act of 1793 Creates Civil Remedies to Enforce the Right Secured by the Fugitive Slave Clause*

Evidently, the Second Congress adopted the broadest reading of the Fugitive Slave Clause, because it enacted a statute in 1793 to enforce the property right it secured.³⁵ Significantly, Congress enacted this statute at the behest of President George Washington, after consultations with his Secretary of State, Thomas Jefferson, and his Attorney General, Edmund Randolph.³⁶ The Senate adopted it by a unanimous vote. The House approved it by the overwhelming vote of 48 to 7.³⁷ President Washington signed the bill into law a few days after Congress enacted it.³⁸ No one questioned Congress's power to enact this statute, even though the constitutional provisions it enforced did not expressly delegate legislative authority to Congress.³⁹ Moreover, if the founders' understanding of constitutional federalism and delegation was the states rights-centered, strict construction version that the Rehnquist Court attributes to them, most likely they would not even have considered enacting such a statute.

The 1793 statute is suggestive of the founders' understanding of the Fugitive Slave Clause and of Congress's powers under it. Its enactment suggests that those who supported it understood that Congress's legislative powers were not limited to those powers

Driskell v. Parrish, 7 F. Cas. 1100, 1101 (C.C.D. Ohio 1845) (No. 4089); Johnson v. Tompkins, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833) (No. 7416); *In re Susan*, 23 F. Cas. 444, 445 (C.C.D. Ind. 1818) (No. 13,632); Charge to Grand Jury, 30 F. Cas. 1015, 1016 (D. Mass. 1851) (No. 18,263); United States v. Scott, 27 F. Cas. 990, 991 (D. Mass. 1851) (No. 16,240); *In re Martin*, 16 F. Cas. 881, 883 (S.D.N.Y. n.d.) (No. 9154) Sims's Case, 61 Mass. (7 Cush.) 285, 296, 298-99, 301, 311 (1851); Commonwealth v. Griffith, 56 Mass. (2 Pick.) 11, 19 (1823); Jack v. Martin, 12 Wend. 311, 321 (N.Y. Sup. Ct. 1834), *aff'd*, 14 Wend. 507 (N.Y. 1835); Glen v. Hodges, 9 Johns. 67, 69 (N.Y. Ct. Err. 1812); Kauffman v. Oliver, 10 Pa. 514, 515 (1849); Wright v. Deacon, 5 Serg. & Rawle 62, 63 (Pa. 1819).

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

36. Justice Joseph Story briefly referred to the incidents that led to the enactment of the 1793 statute in his opinion in *Prigg*, 41 U.S. (16 Pet.) at 616, 620. For a fuller explanation of the factual background of this statute, see Finkelman, *The Kidnapping of John Davis*, *supra* note 13; William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 A. Hist. Rev. 63 (1951).

37. 1 Henry Wilson, *History of the Rise and Fall of the Slave Power in America* 69 (Negro University Press 1969) (1872).

38. See Finkelman, *The Kidnapping of John Davis*, *supra* note 13, at 407-18.

39. Significantly, there seems to be no evidence that any of the parties involved with the adoption of the Fugitive Slave Act of 1793 questioned Congress's power to enact it. Even Professor Paul Finkelman, who recently fervently argued that the founders did not intend to delegate legislative authority to Congress to implement the Fugitive Slave Clause, does not offer any evidence that any of the participants even raised a question concerning Congress's authority to enact the statute. See Finkelman, *Sorting Out Prigg v. Pennsylvania*, *supra* note 13, at 621. Finkelman has also discussed the enactment of the 1793 Act. Finkelman, *The Kidnapping of John Davis*, *supra* note 13. He argues that the founders did not intend the Fugitive Slave Clause to delegate legislative power to Congress. Finkelman, *Story Telling on the Supreme Court*, *supra* note 13, at 259-63.

expressly enumerated or implied in Article I. To the contrary, its framers and supporters must have understood the Fugitive Slave Clause as a guarantee of a constitutional right which delegated to Congress plenary power to enforce the right against anyone who interfered with it.⁴⁰

Section 4 authorized two remarkable civil remedies that most clearly evince the founders' understanding of the Fugitive Slave Clause as a guarantee of a constitutional right—an expanded personal, common law property right of recapture.⁴¹ Both remedies authorized the slave owner to sue anyone “who shall knowingly and willingly obstruct or hinder” the slave owner or his agent or attorney from seizing the fugitive slave, or who “shall rescue” him, or who “shall harbor or conceal such person after notice that he or she was a fugitive from labour.”⁴² The first remedy was a civil fine of \$500.⁴³ Though the statute characterized the fine as a “penalty,” it authorized the slave owner to recover the \$500 in a civil suit: this “penalty may be recovered by and for the benefit of such claimant, by [an] action of

40. Justice Story expressed this view as the founders' understanding. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 616, 621 (1842); see also *infra* notes 98-129 and accompanying text. The Second Congress's legislative action is a stark contradiction to the current states rights-oriented federalism majority on the Supreme Court. For example, Chief Justice Rehnquist predicated the majority's decision in *United States v. Lopez*, 514 U.S. 549 (1995), on what he characterized as the founders' “first principles.” *Id.* at 552. He prefaced his legal analysis with the assertion: “We start with first principles,” and, quoting James Madison's Federalist No. 45, continued: “[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *Id.* (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). It is clear from the language of the Fugitive Slave Clause that it did not expressly delegate any legislative power to enforce it. Had the Second Congress interpreted the Constitution as Chief Justice Rehnquist claims the founders understood it, it would have rejected the 1793 Fugitive Slave Bill as exceeding Congress's enumerated powers. Indeed, it is unlikely that it would have occurred to any of the historical actors to enact such a federal statute.

41. Because the events that led to the enactment of the 1793 Act involved the extradition of fugitives from justice and an alleged fugitive slave, the statute prescribed the process for both the extradition of fugitives from justice and the recapture of fugitive slaves. The statute's first two sections described the process by which fugitives from justice were to be extradited. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302. Section 3 authorized the owner of an alleged fugitive slave, or his agent, to seize the runaway and present her to a federal judge or a local magistrate in the state where the fugitive was seized. The claimant was afforded the opportunity to prove ownership or that the fugitive owed service or labor to the claimant. What constituted satisfactory proof was left to the discretion of the judge or magistrate. On such proof, the statute required the judge or magistrate to issue a certificate authorizing the owner or his agent to remove the alleged fugitive slave to the master's state. The proceeding was often summary, because the statute did not expressly grant to the alleged fugitive slave the right to offer evidence relating to her status as a slave or free person. *Id.* § 3.

42. *Id.* § 4.

43. *Id.*

debt, in any court proper to try the same.”⁴⁴ Thus, this “punishment” for violating the owner’s constitutionally secured property right was actually a private right of action in debt for a civil penalty.⁴⁵

The second civil remedy is equally remarkable: damages recoverable in a tort action. The 1793 Act reserved “to the person claiming such labour or service, his right of action for or on account of the said injuries or either of them.”⁴⁶ This remedy gave the slave owner a tort action for damages against any one who interfered with the claimant’s constitutionally guaranteed right of property in his slave. Thus, this federal statute, enacted four years after the ratification of the United States Constitution by many of its framers and ratifiers in the absence of an express delegation of power, authorized private parties to enforce their constitutionally secured property rights through private causes of action in any court of competent jurisdiction against other private parties who interfered with these rights. The 1793 statute evinces the founders’ conception of constitutional rights as personal rights enforceable in a federal civil action against another private party who violates them, and of their broad understanding of the scope of congressional powers to remedy violations of constitutional rights.⁴⁷ The Fugitive Slave Act of 1793, combined with other federal legislation and Supreme Court decisions, refutes the Rehnquist Court’s view that the founders’ conception of constitutional federalism and delegation was a states rights-centered theory of federalism and a strict construction theory of constitutional delegation.⁴⁸

44. *Id.*

45. *Stearns v. United States*, 22 F. Cas. 1188, 1192 (C.C.N.D. n.d.) (No. 13,341) (holding that private actions for penalties are civil actions).

46. Act of February 12, 1793, § 4.

47. Justice Story considered the 1793 statute and its legislative history as authoritative evidence of the founders’ understanding of Congress’s legislative powers to enforce constitutional rights. He noted that:

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

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 566 (1842) (emphasis added). The distinguished commentator to whom Story referred was none other than himself. 1 Joseph Story, *Commentaries on the Constitution of the United States* 392 (Fred B. Rothman & Co. 1991) (1833). But, Story also cited the Supreme Court’s opinions in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), which he authored, and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), which Chief Justice John Marshall wrote.

48. See Kaczorowski, *Fidelity*, *supra* note 8.

In 1842, the United States Supreme Court unanimously upheld the Fugitive Slave Act, holding that Congress was constitutionally authorized to enact it under the plenary power delegated by the Fugitive Slave Clause.⁴⁹ Indeed, antebellum courts, both before and after the Supreme Court's 1842 decision, universally upheld the Fugitive Slave Act, many of them interpreting the Fugitive Slave Clause as an affirmative constitutional guarantee of the slave owner's property right to recapture his slave, that delegated to Congress constitutional authority to protect and enforce the master's right.⁵⁰ Indeed, it is precisely because this right was a constitutionally secured federal right the states had no authority to enforce on their own that the Supreme Court recognized the freedom of the states to refuse to assist slave owners in reclaiming their slaves.⁵¹

*C. The United States Supreme Court Unanimously Upholds
Congress's Plenary Power to Enforce Slaveholders' Property Right
Secured by the Fugitive Slave Clause*

In 1842, the United States Supreme Court unanimously upheld Congress's plenary power to enforce the right to property secured by the Fugitive Slave Clause in *Prigg v. Pennsylvania*.⁵² Antebellum courts, both before and after the Supreme Court's 1842 decision, universally upheld the Fugitive Slave Act, many of them interpreting the Fugitive Slave Clause as an affirmative constitutional guarantee of the slave owner's property right to recapture his slave that delegated to Congress constitutional authority to protect and enforce the master's right.⁵³ It is precisely because this right was a constitutionally

49. *Prigg*, 41 U.S. (16 Pet.) at 539.

50. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229-31 (1847); *Miller v. McQuerry*, 17 F. Cas. 335, 338-39 (C.C.D. Ohio 1853) (No. 9583); *Charge to Grand Jury*, 30 F. Cas. 1007, 1008 (C.C.S.D.N.Y. 1851) (No. 18,261); *Ray v. Donnell*, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590); *Johnson v. Tompkins*, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833) (No. 7416); *In re Susan*, 23 F. Cas. 444, 445 (C.C.D. Ind. 1818) (No. 13,632); *Charge to Grand Jury*, 30 F. Cas. 1015, 1016 (D. Mass. 1851) (No. 18,263); *United States v. Scott*, 27 F. Cas. 990, 991 (D. Mass. 1851) (No. 16,240); *Oliver v. Kauffman*, 18 F. Cas. 657, 659 (C.C.E.D. Pa. 1850) (No. 10,497); *In re Martin*, 16 F. Cas. 881, 883 (S.D.N.Y. n.d.) (No. 9154); *Sims's Case*, 61 Mass. (7 Cush.) 285, 299 (1851); *Commonwealth v. Griffith*, 56 Mass. (2 Pick.) 11, 19 (1823); *Jack v. Martin*, 12 Wend. 311, 321 (N.Y. Sup. Ct. 1834), *aff'd*, 14 Wend. 507 (N.Y. 1835); *Kauffman v. Oliver*, 10 Pa. 514, 516-17 (1849); *Wright v. Deacon*, 5 Serg. & Rawle, 62, 63 (Pa. 1819).

51. This was one of the controversial conclusions reached by Justice Story in *Prigg*, 41 U.S. (16 Pet.) at 615-16. Justice Story believed that the states could lawfully prohibit their courts from considering any cause of action arising under federal law. *See Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662); *see also Charge to Grand Jury*, 30 F. Cas. at 1008-09; *Miller*, 17 F. Cas. at 338; *Sims's Case*, 61 Mass. (7 Cush.) at 307-308; *Kauffman*, 10 Pa. at 518-519; *In re Booth and Rycraft*, 3 Wis. 157, 196-98 (1854).

52. 41 U.S. (16 Pet.) 539 (1842).

53. *Jones*, 46 U.S. (5 How.) at 229-31; *Miller*, 17 F. Cas. at 338-39; *Charge to Grand Jury*, 30 F. Cas. at 1016; *Ray*, 20 F. Cas. at 329; *Johnson*, 13 F. Cas. at 851; *In re Susan*, 23 F. Cas. at 445; *Scott*, 27 F. Cas. at 991; *Oliver*, 18 F. Cas. at 659; *In re Martin*, 16 F.

secured federal right that federal and state courts recognized the authority of the states to refuse to assist slave owners in reclaiming their slaves.⁵⁴

The United States Supreme Court in *Prigg* based its interpretation of Congress's powers under the Fugitive Slave Clause on the theories of constitutional delegation it had earlier adopted in *McCulloch v. Maryland*.⁵⁵ Chief Justice John Marshall's opinion in *McCulloch*, which explained Congress's implied powers, is one of the canons of American constitutional law.⁵⁶ Distinguishing the nature of a constitution from ordinary law, he explained that a constitution cannot "contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution," for that "would partake of the prolixity of a legal code."⁵⁷ Such a constitution "could scarcely be embraced by the human mind. It would, probably, never be understood by the public."⁵⁸ Consequently, a constitution "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."⁵⁹ Marshall then uttered one of his most famous statements as Chief Justice: "[W]e must never forget that it is a constitution we are expounding."⁶⁰

Having described the nature of the Constitution as marking "only its great outlines" and designating "its important objects," Marshall

Cas. at 883; *Sims's Case*, 61 Mass. (7 Cush.) at 299; *Griffith*, 56 Mass. (2 Pick.) at 19; *Jack*, 12 Wend. at 321; *Kauffman*, 10 Pa. at 518-19; *Wright*, 5 Serg. & Rawle at 63.

54. See *supra* note 51.

55. 17 U.S. (4 Wheat.) 316 (1819).

56. *McCulloch* decided two questions: whether the Constitution authorized Congress to charter a corporation, the Bank of the United States, even though it did not expressly delegate this power to Congress; and whether a state tax imposed on the operation of the bank was constitutional. *Id.* The Court held that the Constitution did delegate this power to Congress as an implied power to accomplish the ends, objects, and purposes which the Constitution prescribed for the federal government and to implement the powers the Constitution expressly delegated to Congress. *Id.* at 326. It held that the state tax was unconstitutional on the principle that states may not tax instrumentalities of the federal government. *Id.* at 436.

57. *Id.* at 407.

58. *Id.*

59. *Id.* Larry Kramer has explained Marshall's statement as the Chief Justice's attempt at reconciling the prevailing theory of popular constitutionalism, on the one hand, and the emerging notion of judicial supremacy, on the other. Marshall thus delineated "spheres for judicial supervision and for popular constitutionalism. . . . suggesting that the Court's role could be confined to articulating and enforcing 'the great outlines' and 'important objects' of the Constitution, while leaving questions of application to the discretion of Congress." Larry D. Kramer, *Foreword: We The Court*, 115 Harv. L. Rev. 4, 114 (2001); see *infra* note 62.

60. *McCulloch*, 17 U.S. (4 Wheat.) at 407. Justice Felix Frankfurter characterized this statement "the single most important utterance in the literature of constitutional law—important because most comprehensive and most comprehending." Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 219 (1955).

asserted a theory of the Constitution as a dynamically evolving, power-enhancing instrument whose scope and meaning were elaborated through the political process, to which the judiciary should defer.⁶¹ Marshall attributed this theory to the founders, to President George Washington and his cabinet, and to the early Congresses, who were all involved in the charter of the national bank in 1791 and its recharter in 1816.⁶² The Court held, therefore, that the Constitution

61. Marshall observed:

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

McCulloch, 17 U.S. (4 Wheat.) at 401. He acknowledged that “[i]t will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this.” *Id.* He went on to state that:

But it is conceived, that a doubtful question, . . . in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; *if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.* An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

Id. (emphasis added).

62. *Id.* at 401-02. Dean Larry Kramer has brilliantly recreated the founders’ “popular constitutionalism” to explain how and why they expected that constitutional meaning and interpretation would flow from the political process and not from the judiciary, and that they expected the people, not the courts and judicial review, to restrain governmental abuse of power. He recounts that the founders and succeeding generations of Americans understood the Constitution and constitutional law as “qualitatively different from (and not just superior to) statutory or common law,” because “[t]heir Constitution remained fundamentally, an act of popular will: the people’s charter, made by the people.” Kramer, *supra* note 59, at 12. Consequently, for them, “it was the people themselves—working through or responding to their agents in the government—who were responsible for seeing that the Constitution was properly interpreted and implemented. The idea of turning this responsibility over to judges was unthinkable.” *Id.*; see also Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) [hereinafter Kramer, *The People Themselves*]; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000). Kramer extends the work of scholars who have shown that courts, including the United States Supreme Court, deferred to the political branches of government through much of the nineteenth century. The principle of judicial supremacy, that is, that the Supreme Court is the ultimate authority in interpreting the Constitution, did not become respectable until the 1830s and, even then, it was not universally accepted. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998); Kramer, *supra* note 59, at 110-11. The Court consequently continued to defer to Congress on most constitutional matters until the end of the nineteenth century. It is only in the last quarter of the nineteenth century that the Supreme Court moved away from its deference to Congress and became more aggressive in reviewing and striking down federal legislation. It is only in this period that the Court

greatly extended its reach, striking down both state and federal laws under the new Reconstruction Amendments, laying the groundwork for

delegated to Congress the authority to expand its legislative powers over time to meet unforeseen situations that might confront the nation.⁶³ Marshall explained that the Constitution was:

intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.⁶⁴

In addition to the powers enumerated in the Constitution, Marshall declared that the national government possessed the implied or inherent powers of all sovereign governments, but limited in their scope to the purposes, ends, and objects for which the federal government was established. As a sovereign legislature, therefore, Congress possessed the sovereign power to charter corporations to perform the duties and accomplish the purposes the Constitution prescribed for it.⁶⁵

substantive due process, increasing its enforcement of the Bill of Rights, and—most significant of all—taking the first tentative steps toward enforcing judicially defined limits on Congress's Article I powers.

Robert L. Clinton, *Marbury v. Madison* and Judicial Review 162 (1989); see Kramer, *supra* note 59, at 110-11; accord Morton J. Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 19 (1992); Christopher Wolfe, *The Rise of Modern Judicial Review* 4, 101-17, 119-20 (rev. ed. 1994).

63. James Madison appears to have been the source of Marshall's conception of the Constitution as a dynamically evolving, power-enhancing instrument. Madison explained in *Federalist No. 44* why the federal government's powers exceeded those expressly delegated by the Constitution in similar terms:

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

The *Federalist No. 44*, at 284-85 (James Madison) (Clinton Rossiter ed., 1961). However, Madison's theory of republican government and his fear of legislative tyranny led him to oppose such a broad construction of the Constitution after it was ratified. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 355 (1996).

64. *McCulloch*, 17 U.S. (4 Wheat.) at 415.

65. *Id.* at 410-11.

The Constitution did not leave Congress's implied powers "to general reasoning," Marshall declared.⁶⁶ He quoted the Necessary and Proper Clause⁶⁷ and proclaimed that it was an express delegation of implied powers to execute the powers enumerated in Article I, in addition to "all other powers vested by this constitution, in the government of the United States, or in any department thereof."⁶⁸ Marshall explained that Congress's constitutional powers are implied not only from the powers enumerated in Article I, but also from the objects, ends, and purposes assigned to it throughout the Constitution. In addition to the powers enumerated in the Constitution, Marshall declared that the national government possessed the implied or inherent powers of all sovereign governments, but limited in their scope to the purposes, ends, and objects for which the federal government was established. As a sovereign legislature, therefore, Congress possessed the sovereign power to charter a corporation to enable the federal government to perform the duties and accomplish the purposes the Constitution prescribed for it.⁶⁹

The first example Marshall used to explain the scope of the Necessary and Proper Clause was not an enumerated power, but a power implied from the sovereign nature of the national government. Thus, Marshall queried, "with respect to the whole penal code of the United States: whence arises the power to punish in cases not prescribed by the Constitution?"⁷⁰ Indeed, he conceded that a general power to punish crimes against the United States "might be denied with the more plausibility because it is expressly given in some cases."⁷¹ Nevertheless, Marshall insisted that "the whole penal code of the United States" is implied from its sovereign powers, except

66. *Id.* at 411.

67. The Necessary and Proper Clause declares that Congress shall have the power, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

68. *McCulloch*, 17 U.S. (4 Wheat.) at 412.

69. *Id.* at 410. Marshall noted that Maryland's argument against the constitutionality of the bank rests "[o]n this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress." Marshall acknowledged that "[t]his is true," and added:

But all legislative powers appertain to sovereignty. . . . And if the government of the Union is restrained from creating a corporation, as *a means for performing its functions*, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws *for the accomplishment of the same objects*.

Id. at 409 (emphasis added).

70. *Id.* at 416.

71. *Id.* Marshall referred to the delegation of penal powers "'to provide for the punishment of counterfeiting the securities and current coin of the United States' and 'to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.'" *Id.* at 416-17 (quoting U.S. Const. art. I, § 8, cls. 6, 10).

where it is expressly given.⁷² On the same principle, the Court recognized Congress's power to charter the national bank as an implied power inherent in the federal government's sovereignty, to accomplish the "objects," "purposes," and "ends" for which the national government was established.⁷³

The Supreme Court also recognized that the Constitution allocated to Congress a principle role of interpreting the Constitution and elaborating its powers under the Constitution.⁷⁴ Admitting "that the powers of the government are limited, and that its limits are not to be transcended," Marshall nevertheless asserted that

we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.⁷⁵

He then uttered the often quoted principle of broad implied powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁷⁶ Thus, the Supreme Court should be deferential to Congress. Indeed, Marshall declared that the proper remedy for an abuse of governmental power, such as the taxing power, was the political process.⁷⁷

72. *Id.* at 416; *accord* *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 233 (1821). Marshall observed that

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

McCulloch, 17 U.S. (4 Wheat.) at 418; *accord* *Anderson*, 19 U.S. (6 Wheat.) at 233.

73. *McCulloch*, 17 U.S. (4 Wheat.) at 411.

74. Larry Kramer argues persuasively that Congress was understood as having a primary role in interpreting the Constitution from the Founding. Kramer, *supra* note 59. David Currie shows that most constitutional law was made by the early Congresses or the President. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. Chi. L. Rev. 775, 776-77 (1994) (maintaining that "[b]efore 1800 nearly all our constitutional law was made by Congress or the President, and so was much of it thereafter") [hereinafter Currie, *First Congress*]. He goes so far as to say that the First Congress was "practically a second constitutional convention." David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 Nw. U. L. Rev. 606, 606 (1996).

75. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

76. *Id.* The framers of the Civil Rights Act of 1866 quoted and applied this principle as authority for Congress's plenary power to enforce citizens' civil rights. See *infra* notes 262-67, 271-72 and accompanying text.

77. *McCulloch*, 17 U.S. (4 Wheat.) at 421. "The only security against the abuse of this [taxing] power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation," Marshall opined. *Id.* Larry Kramer

Congress's power to enforce the Fugitive Slave Clause illustrates the far reaching scope of *McCulloch's* theory of congressional powers implied from the ends, objects, purposes, and powers enumerated in the Constitution. Justice Story, in his opinion for the Court in *Prigg v. Pennsylvania*, applied many of the principles Chief Justice Marshall proclaimed in *McCulloch*. The facts of *Prigg* are straightforward. Edward Prigg and others,⁷⁸ acting as agents of a Maryland slave owner, removed from the state of Pennsylvania certain fugitive slaves after having failed to secure a certificate of removal.⁷⁹ Prigg was indicted and charged with kidnapping under an 1826 Pennsylvania anti-kidnapping statute, certain provisions of which were in direct conflict with the federal Fugitive Slave Act of 1793.⁸⁰ The Maryland governor refused to extradite Prigg to stand trial in Pennsylvania, and the Maryland legislature adopted resolutions declaring that the right of recaption was guaranteed by the United States Constitution and the Fugitive Slave Act, and the states could not abridge it.⁸¹ Maryland attempted to negotiate a dismissal of the indictment and changes in the Pennsylvania statute, but the effort failed. By special agreement between the Pennsylvania and Maryland governments, Prigg stood trial. He was found guilty by a special verdict under an agreement between Prigg's defense counsel and the Pennsylvania Attorney General.⁸² Maryland and Pennsylvania's legislatures sought an expedited hearing before the United States Supreme Court to resolve the urgent issues in dispute.⁸³

makes a powerful case that this was the general understanding of judicial review in the nineteenth century. Kramer, *supra* note 59; *see also* Kramer, *The People Themselves*, *supra* note 62.

78. The other participants, Nathan S. Bemis, Jacob Forward, and Stephen Lewis, Jr., were indicted, but apparently were not tried. *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 543 (1842).

79. Carl Swisher, *The Taney Period, 1836-64, V History of the Supreme Court of the United States* 537 (Paul A. Freund ed. 1974).

80. *Prigg*, 41 U.S. (16 Pet.) at 543, 557-58. The Pennsylvania law required greater evidence and more formal documentation of the claimant's ownership of the alleged fugitive slave than did the federal statute. Act of Mar. 25, 1826 Pa. Laws §§ 3-4. It also prohibited local justices of the peace and aldermen from issuing warrants of removal under the federal statute, and it authorized them to issue such certificates under the state statute only if the claimant complied with its rigorous evidentiary requirements. *See id.* § 9.

81. Morris, *supra* note 13, at 94-95.

82. *Prigg*, 41 U.S. (16 Pet.) at 557-58.

83. Morris, *supra* note 13, at 94-95. Carl Swisher reports that "the Pennsylvania legislature arranged for a trial at which by special verdict Edward Prigg, one of the captors, would be found guilty and the case, challenging the constitutionality of the 1826 statute, would be handled in such a way that it could be taken to the Supreme Court." Swisher, *supra* note 79, at 538. Justice Story acknowledged the origin of this suit by agreement between the states. He stated that, before he addressed

the very important and interesting questions involved in this record, it is fit to say, that the cause . . . has been brought here by the co-operation and sanction, both of the state of Maryland, and the state of Pennsylvania, in the most friendly and courteous spirit, with a view to have those questions

Prigg's defense counsel represented Prigg and the state of Maryland, and Pennsylvania's Attorney General and another lawyer represented Pennsylvania.⁸⁴ Opposing counsel argued the case more as an issue of federalism than one of criminal procedure.⁸⁵ They insisted that the real question before the Court, and the one that the states of Maryland and Pennsylvania urgently asked the Court to resolve, was whether the Fugitive Slave Clause authorized the states to enforce the slaveholder's right of recapture.⁸⁶ They therefore presented conflicting interpretations of the Constitution's text, of the method of interpreting the Constitution, and of the scope of national powers and state rights. The fate of defendant Prigg was incidental to the real questions the states asked the Court to decide.

Justice Joseph Story wrote the opinion of the Court. He prefaced his legal analysis with an acknowledgment of the gravity of the issues presented to the Court: "Few questions which have ever come before this Court involve more delicate and important considerations; and few upon which the public at large may be presumed to feel a more profound and pervading interest. We have accordingly given them our most deliberate examination"⁸⁷ Indeed, six other Justices also wrote opinions in *Prigg*. These opinions provide a primer on American federalism and constitutional rights enforcement in antebellum America.

The Court was unanimous in holding that the Pennsylvania statute was unconstitutional. Consequently, Edward Prigg, and the other defendants prosecuted under it, were to be released. The Court was also unanimous in deciding that the Fugitive Slave Act of 1793 was constitutional. All but three of the Justices held that Congress's power to enforce the Fugitive Slave Clause was exclusive, that the states lacked constitutional power to enforce the Fugitive Slave Clause directly, and that Congress could compel only federal judges and legal officers to enforce the constitutional rights it secured and to

finally disposed of by the adjudication of this Court; so that the agitations on this subject in both states, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest.

Prigg, 41 U.S. (16 Pet.) at 609. Justice McLean was even more explicit. He stated that, "By an amicable arrangement between the two states, judgment was entered against the defendant," and the decision of the Pennsylvania Supreme Court affirming that judgment was "pro forma." *Id.* at 659 (McLean, J., concurring). He added: "Indeed, I suppose, the case has been made up merely to bring the question before this Court." *Id.* at 673 (McLean, J., concurring).

84. *Id.* at 558.

85. Jonathan Meredith and John Nelson, both of Maryland, represented their home state and the defendant Prigg. Pennsylvania's Attorney General, Ovid F. Johnson, and Deputy Attorney General, Thomas C. Hambly, represented Pennsylvania.

86. *Id.* at 559 (arguments of Mr. Meredith).

87. *Id.* at 610. The Court thus agreed with Meredith and Hambly concerning the urgency and importance of the issue the case presented.

perform the federal duties it imposed on the federal government to protect these rights.⁸⁸ Acknowledging that Congress could constitutionally confer concurrent jurisdiction on state courts and legal officials to enforce the 1793 statute, a majority held that the states could prohibit state executive officials and judges from enforcing the federal rights and duties associated with the Fugitive Slave Clause. With these exceptions, the Court was unanimous in upholding the constitutionality of the Fugitive Slave Act of 1793, and in its interpretation of Congress's plenary power to enforce the property right secured by the Fugitive Slave Clause.

In explaining the Court's reasoning, Story began with a theory of constitutional interpretation that prescribed not only how the Court should interpret the Constitution, but also the Court's role in interpreting the Constitution. Story observed that, because the provisions of the Constitution were compromises, there is no uniform rule of interpretation. One must instead look to the nature and object of particular provisions and interpret them in light of their contemporary history and their original meaning. Like Chief Justice Marshall's theory in *McCulloch*, Story's theory of the original understanding of the Constitution was that the Constitution is a

88. Justice James M. Wayne summarized the holding of the Court and the positions of the justices on certain key points: All of the justices agreed that the Pennsylvania statute was unconstitutional; that the Fugitive Slave Clause "was a compromise between the slaveholding, and the non-slaveholding states, to secure to the former fugitive slaves as property"; all but Justice Baldwin agreed the 1793 Act was constitutional. *Id.* at 637 (Wayne, J., concurring). Baldwin's view on this point apparently was that the Fugitive Slave Clause was self-executing and did not need legislation to carry it into effect, because it "gives to the owners of fugitive slaves all the rights of seizure and removal which legislation could. . . ." *Id.* Nevertheless, Baldwin agreed that, "if legislation by Congress be necessary, that the right to legislate is exclusively in Congress." *Id.* Justice Baldwin evidently changed his views on the constitutionality of the 1793 Fugitive Slave Act. He upheld its constitutionality in 1833. *See Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416) The court stated that

[p]ursuant to [the Fugitive Slave Clause], the act of congress of the 12th February, 1793, was passed, not to restrain the rights of the master, but to give him the aid of a law to enforce them. This law . . . together with the opinion . . . in the case of *Hill v. Low* . . . , to which we give our entire assent, so far as it affirms the unqualified right of the master to seize, secure and remove his fugitive slave.

Id. at 851. In *Prigg*, Justice Wayne concluded that there was no disagreement "among the judges as to the reversal of the judgment; none in respect to the origin and object of the provision, or the obligation to exercise it." *Prigg*, 41 U.S. (16 Pet.) at 637 (Wayne, J., concurring). The disagreement that did exist among the justices, Wayne explained, related "to the mode of execution." *Id.* Three justices insisted that the states could "legislate upon the [Fugitive Slave Clause], in aid of the object it was intended to secure; and that such legislation is constitutional, when it does not conflict with the remedy which Congress may enact." *Id.* at 637-38. The Court was unanimous regarding the nature of the constitutional rights guaranteed by the Fugitive Slave Clause, and, with the possible exception of Justice Baldwin, that this guarantee delegated plenary legislative authority to Congress to protect and enforce the rights thus guaranteed. *Id.* at 636-38.

power-enhancing rather than a power-limiting instrument of governmental powers. Judges should therefore interpret the Constitution “in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it.”⁸⁹ The Court’s constitutionally prescribed function, which is to “secure and attain the ends proposed”⁹⁰ in the Constitution, required it to defer to the other branches of the government in their efforts to achieve these constitutionally proposed ends. Again, like Chief Justice Marshall’s theory in *McCulloch*, Story’s theory of constitutional interpretation prescribed a theory of judicial review that is deferential to Congress and the legislation it enacts in implementing specific provisions of the Constitution. He admonished: “No Court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”⁹¹ The Taney Court thus affirmed the Marshall Court’s theory of broad implied powers and constitutional delegation.

Story applied this theory of constitutional construction and examined the objectives of the Fugitive Slave Clause in light of its contemporary history to ascertain its meaning and the scope of federal rights and duties it contemplated. “Historically,” Story observed,

it is well known, that the object of this [Fugitive Slave] clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property in every state in the Union into which they might escape from the state where they were held in servitude.⁹²

89. *Id.* at 612. Today, originalism, as a theory of constitutional interpretation, is generally invoked by constitutional and political conservatives to limit the constitutional powers of the federal government, and to restrict the scope of constitutionally protected rights. Contrast the Court’s opinions in *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995) with Justice Story’s opinion.

90. *Prigg*, 41 U.S. (16 Pet.) at 610-11.

91. *Id.* at 612. The Supreme Court’s current judicial activism appears to be in violation of Justice Story’s admonition, because the majority intentionally inhibits Congress from achieving its constitutionally proposed objects and ends as Congress interprets them. *See, e.g., Morrison*, 529 U.S. at 598; *City of Boerne*, 521 U.S. at 507; *Lopez*, 514 U.S. at 552.

92. *Prigg*, 41 U.S. (16 Pet.) at 611. The accuracy of Justice Story’s assertion regarding the importance of the Fugitive Slave Clause to the formation of the Union has been called into question. There is some direct historical evidence that slavery required compromise between the northern and southern delegates to the Constitutional Convention and that the Fugitive Slave Clause was part of that compromise. Edward Coles, James Madison’s Secretary from 1809 to 1815, stated in the 1850s that Madison had told him that “the distracting question of slavery was agitating and retarding the labors of both” the members of the Continental Congress, who were considering the Ordinance of 1787 during the summer of that year, and the delegates to the Constitutional Convention, who were then convened in Philadelphia. The issue of slavery, Coles reported,

The reason the Fugitive Slave Clause was necessary is that slavery was “a mere municipal regulation,” that is, the creature of state law.⁹³ Consequently, without this constitutional guarantee, “every non-slaveholding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and given them entire immunity and protection against the claims of their masters.”⁹⁴ Story concluded, therefore, that the Fugitive Slave Clause

led to conferences and intercommunications of the members, which resulted in a compromise by which the northern or anti-slavery portion of the country agreed to incorporate, into the Ordinance and the Constitution, the provision to restore fugitives; and this mutual and concurrent action was the cause of the similarity of the provision contained in both, and had its influence, in creating the great unanimity by which the Ordinance passed, and also in making the Constitution the more acceptable to the slave holders.

Edward Coles, *History of the Ordinance of 1787*, at 28-29 (1856). That Madison made this statement to Coles more than twenty years after the Convention, and that Coles reported the conversation at a time when the controversy over slavery was at its height, may diminish the probative value of this evidence. Nevertheless, it is unlikely that Madison and Coles’s memories of these earlier events would have gotten the essential points incorrect. Moreover, William Wiecek suggests that the easy acceptance of the Fugitive Slave Clause “can be explained by the fact that Butler opportunistically offered his motion on the heels of one of the [Constitutional] Convention’s most successful horse-trades, the abandonment of the requirement for a two-thirds majority for navigation acts. The convention at that point seemed suffused with an aura of goodwill and conciliation toward the deep South.” Wiecek, *supra* note 8, at 79. Senator Henry Wilson of Massachusetts, in his 1872 two volume history of the South, asserted that the Fugitive Slave Clause was inserted in the Constitution at the insistence of “General Pinckney, the exponent of that class of slave holders who were in favor of the perpetuity of the slavery of the African race, [who] demanded this provision as a condition precedent to the adoption of the Constitution; and the convention yielded.” I Henry Wilson, *History of the Rise and Fall of Slave Power in America* 54 (1872). Regardless of the importance of the Fugitive Slave Clause to the Compromise of 1787 as a matter of historical accuracy, that it was considered by nineteenth century jurists to have been essential to the formation of the Union is beyond cavil. See, e.g., *Giltner v. Gorham*, 10 F. Cas. 424, 432 (C.C.D. Mich. 1848) (No. 5453) (United States Supreme Court Justice John McLean stating that the Fugitive Slave Clause “was deemed so important, that, as a matter of history, we know the constitution could not have been adopted without it”); *In re Martin*, 16 F. Cas. 881, 884 (S.D.N.Y. n.d.) (No. 9154) (United States Supreme Court Justice Smith Thompson stating that “[w]e know, historically, that [rendition of fugitive slaves] was a subject that created great difficulty in the formation of the constitution, and that resulted in a compromise” that obligated northerners “in good faith to carry into execution” the Fugitive Slave Clause); *Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835) (Senator Bishop stating that it was a “moral certainty” that the southern states would never have joined the Union without a constitutional provision authorizing Congress to ensure the recapture of fugitive slaves); *Wright v. Deacon*, 5 Serg. & Rawle 62, 62-63 (Pa. 1819) (Pennsylvania Supreme Court Justice William Tilghman stating that “it is well known that our southern brethren would not have consented to become parties to a constitution . . . unless their property in slaves had been secured.”); *accord* 3 Story, *supra* note 47, at 677 (stating “[t]he want of [a Fugitive Slave Clause] under the confederation was felt, as a grievous inconvenience, by the slave-holding states”).

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

94. *Id.* at 612.

“was indispensable to the security of this species of property in all the slaveholding states.”⁹⁵

Bound by the constitutional duty to interpret the Constitution “in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it”⁹⁶ and by the Court’s constitutional obligation to “secure and attain the ends proposed”⁹⁷ in the Constitution, and guided by the historical context of its adoption, Story broadly interpreted the text of the Fugitive Slave Clause as containing two fundamental guarantees. The first prohibited the states from freeing fugitive slaves.⁹⁸ Significantly, Story interpreted this prohibition against state action as constituting an affirmative guarantee of a positive right. Story declared, “The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain.”⁹⁹ Story defined the right secured by the first guarantee of the Fugitive Slave Clause broadly to include not only an expansion of the common law right of recaption,¹⁰⁰ but “all the incidents to that right,” including “the right to the service or labor.”¹⁰¹ Moreover, the Clause “puts the right to the service or labor upon the same ground and to the same extent in every other state as in the state from which the slave escaped.”¹⁰² The Fugitive Slave Clause also required that the fugitive slave “shall be delivered

95. *Id.* at 611.

96. *Id.* at 612; *see supra* note 88.

97. *Prigg*, 41 U.S. (16 Pet.) at 610-11.

98. The first part of the Fugitive Slave Clause states:

No person held to Service or Labour in one State under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labour.

U.S. Const. art. IV, §2, cl. 3. Story explained the obvious and literal meaning of this language: “The slave is not to be discharged from service or labour, in consequence of any state law or regulation.” *Prigg*, 41 U.S. (16 Pet.) at 612. The Court did not limit the scope of the right thus guaranteed nor the federal government’s duty to enforce the right to the Clause’s plain meaning.

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

100. Justice Story quoted Blackstone as authority for the principle of recaption:

Mr. Justice Blackstone lays it down as unquestionable doctrine. “Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one’s wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.

Id. at 613 (citation omitted). Story then concluded: “Upon this ground we have not the slightest hesitation in holding,” Story proclaimed, “that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence.” *Id.*

101. *Id.*

102. *Id.*

up on Claim of the Party to whom such Service or Labour may be due.”¹⁰³ The Court held that the constitutional guarantee of the right delegated to Congress plenary power to enforce it. Story explained, “If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.”¹⁰⁴

In explaining the Court’s theory of Congress’s plenary remedial powers to enforce constitutionally secured rights, Story again relied on Chief Justice Marshall’s opinion in *McCulloch* and on James Madison’s *The Federalist Nos. 43 & 44*. Story paraphrased Chief Justice Marshall’s opinion in *McCulloch* for the Court’s general principle of constitutional delegation of governmental authority:

The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted.¹⁰⁵

Chief Justice Marshall, in turn, took this principle from James Madison’s *The Federalist No. 44*.¹⁰⁶ Story elaborated how Madison’s and Marshall’s ends/means principle explained Congress’s power to enforce constitutionally secured rights. He asserted that the constitutional recognition of rights makes their enforcement by Congress an end and an object of the federal government, which implies the constitutional authority and duty to enforce the rights and to provide effective remedies to prevent and redress their violation. Story explained: “The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.”¹⁰⁷

Story buttressed this principle of Congress’s plenary remedial powers by quoting Madison’s *The Federalist No. 43* as authority for the proposition that a right recognized in the Constitution is a personal right enforceable against any other party who may violate it, and that the constitutional right implies a delegation to Congress of remedial power to secure and protect it. Story wrote:

103. U.S. Const. art. IV, § 2, cl. 3.

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

105. *Id.*

106. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In explaining the scope of the Necessary and Proper Clause, Madison wrote: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.” *The Federalist No. 44*, at 285 (James Madison) (Clinton Rossiter ed., 1961).

107. *Prigg*, 41 U.S. (16 Pet.) at 619.

The remark of Mr. Madison, in the Federalist, (No. 43,) [sic] would seem in such cases to apply with peculiar force. "A right (says he) implies a remedy; and where else would the remedy be deposited, than where it is deposited by the Constitution?" meaning, as the context shows, in the government of the United States.¹⁰⁸

Story then elaborated a second reason that the Fugitive Slave Clause's recognition of the slave owner's property right necessarily delegated to Congress, and not to the states, the plenary power and duty to enforce it.

The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and 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, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution.¹⁰⁹

Because the right in question was secured by the United States Constitution, the Constitution obligated the federal government to enforce the right through federal institutions. Because the constitutional duty to enforce the constitutionally secured right was a federal obligation, the federal government could not compel the states to perform it.

The Taney Court embraced this theory of plenary congressional power, and it expressly rejected Pennsylvania's states rights, strict construction argument that Congress lacked constitutional authority to enforce constitutional rights and duties "unless the power to enforce these rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution."¹¹⁰ According to this argument, constitutional rights and duties that did not expressly delegate the power to enforce and execute them, such as those of the Fugitive Slave Clause, were self-executing. The Taney Court rejected this interpretation using the same theory of constitutional delegation that the Marshall Court affirmed in *McCulloch v. Maryland* when it rejected the same argument presented

108. *Id.* at 616. Supporters of the Civil Rights Act of 1866 quoted this passage from *Prigg* in arguing that Congress possessed the constitutional authority to protect the civil rights of United States citizens. See *infra* notes 276-80 and related commentary. Contrast this with Chief Justice Rehnquist's articulation of Madisonian first principles in *United States v. Lopez*, 514 U.S. 549, 552 (1995).

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

110. *Id.* at 618.

2004] *AN OVERLOOKED MORAL ANOMALY* 181

by the state of Maryland.¹¹¹ This strict construction interpretation would effectively nullify constitutional rights and prevent Congress from achieving many of the ends the Constitution delegated to the federal government:

[I]n a practical sense, [constitutionally secured rights] may become a nullity, from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true interpretation of the constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights, and a recognition of duties.¹¹²

Moreover, Story observed, “Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or in practice.”¹¹³ Story’s conception of rights and duties “expressly given” and “expressly enjoined” encompassed a very broad theory of implied powers, for he listed as examples of constitutional provisions to which Congress could give effect some that did not delegate legislative power:¹¹⁴ to apportion congressional electoral districts,¹¹⁵ to

111. Story also employed a method of constitutional construction derived from political practice, which was another application of a theory of constitutional interpretation Chief Justice Marshall articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819). Justice Story declared that, “if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would in our judgment entitle the question to be considered at rest; . . . Congress, the executive, and the judiciary have, upon various occasions, acted upon this as a sound and reasonable doctrine.” *Prigg*, 41 U.S. (16 Pet.) at 621. The Court’s application of political practice as a method of constitutional interpretation is consistent with the founders’ actions, once the federal government was established and operating, which defined federal powers that the text of the Constitution left undefined. The Supreme Court early employed political practice as a method of constitutional interpretation in upholding Congress’s authority to require Supreme Court Justices to serve as federal circuit court judges and to ride the circuits. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). The Court’s use of political practice to interpret the Constitution is also consistent with some contemporary scholars’ interpretation of the founders’ understanding of the Constitution. See, e.g., Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996); David P. Currie, *The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161 (1995); Currie, *First Congress*, *supra* note 74, at 776-77; Kaczorowski, *Fidelity*, *supra* note 8, at 1663-73; Larry Kramer, *Fidelity Through History—and To It*, 65 *Fordham L. Rev.* 501, 512 (1997) [hereinafter Kramer, *Fidelity Through History*]; Kramer, *supra* note 59; Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 *Fordham L. Rev.* 1587 (1997). Apart from the founders’ views on political practice as a method of giving meaning to constitutional provisions, this method of interpreting the Constitution has been used by current justices of the Supreme Court. Justice Antonin Scalia relied on political practice in interpreting the scope of Congress’s legislative powers over state executive officers. See *Printz v. United States*, 521 U.S. 898 (1997).

112. *Prigg*, 41 U.S. (16 Pet.) at 618.

113. *Id.*

114. *Id.* at 618-20.

115. The relevant portion reads:

enforce treaties with foreign nations,¹¹⁶ to enforce congressional immunity,¹¹⁷ and to enforce and to suspend the writ of habeas corpus.¹¹⁸ “Where rights are intended to be absolutely secured, and duties are positively enjoined by the Constitution,” Story concluded, Congress possesses the power to enforce the rights and to perform the duties.¹¹⁹

Story advanced a third theory of plenary congressional power to enforce the property right secured by the Fugitive Slave Clause, which he based on the “Arising Under” Clause of Article III.¹²⁰ Story characterized the constitutionally secured property right as a personal right to be enforced by a private individual “against some other person” in a private lawsuit, which constituted a case or controversy:

[I]nasmuch as the right is a right of property capable of being recognised and asserted by proceedings before a Court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case ‘arising under

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. Const. art. I, § 2, cl. 3. However, this Clause expressly extends to Congress the legislative authority to determine the number of representatives to which each state shall be entitled: “The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, *in such Manner as they shall by Law direct.*” *Id.* (emphasis added). A strict constructionist could interpret this Clause as reserving the power of apportionment to the states, because it expressly delegates to Congress the legislative power to determine the number of representatives based on the apportionment, but not the power to make the apportionment itself.

116. No provision in the Constitution expressly grants this power to Congress. This power can be implied from Article I’s delegation of “All legislative Powers” to Congress, U.S. Const. art. I, § 1, cl. 1; the power to regulate commerce among the states and foreign nations, U.S. Const. art. I, § 8, cl. 3; and the power to declare war, U.S. Const. art. I, § 8, cl. 11.

117. Article I, Section 6, Clause 1 of the Constitution states that Senators and Representatives

shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. art. I, § 6, cl. 1.

118. Article I, Section 9, Clause 2 of the Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2.

119. *Prigg*, 41 U.S. (16 Pet.) at 620.

120. Article III, Section 2 of the Constitution provides: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority” U.S. Const. art. III, § 2.

the Constitution' of the United States; within the express delegation of judicial power given by that instrument.¹²¹

Because the slave owners' constitutionally secured right was a private property right enforceable against another private party, any suit to enforce his right or to remedy its violation was a case or controversy arising under the Constitution and triable in a federal court. Therefore:

*Congress . . . may call that [judicial] power into activity for the very purpose of giving effect to that right; and if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford complete protection and guarantee to the right.*¹²²

The Supreme Court was unanimous in these conclusions.¹²³ The conception of constitutional rights as personal rights enforceable in litigation between private parties was the general understanding of constitutional rights and of how they were enforceable in the nineteenth century.¹²⁴ Congress's remedial power under the Fugitive

121. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 616 (1842). The *Prigg* Court's understanding of constitutional rights, of the constitutional delegation of legislative authority to enforce constitutional rights, and of Congress's power to confer civil remedies through private causes of action to vindicate violations of constitutional rights is directly contrary to the positions taken by the current Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). A majority of justices in these cases held that the Fourteenth Amendment, which, like the Fugitive Slave Clause, literally prohibits the states from denying certain constitutional rights, does not delegate to Congress the power to enforce substantive rights or to confer private causes of action and civil remedies to vindicate the violations of constitutional rights. The Amendment only delegates the power to remedy state violations of Fourteenth Amendment rights. The *Prigg* Court, on the other hand, held that the Fugitive Slave Clause's prohibition against the states from infringing the master's right to service or labor constituted an affirmative guarantee of an absolute right that delegated to Congress plenary power, and the duty, to enforce it. *Prigg*, 41 U.S. (16 Pet.) at 612.

122. *Id.* at 616 (emphasis added).

123. Although the Court was unanimous in Justice Story's interpretation of the Fugitive Slave Clause and its delegation of Congress's plenary power to enact the Fugitive Slave Act of 1793, they divided six to three on the questions of whether Congress's power to enforce the Fugitive Slave Clause was exclusive, and whether state and local courts were obligated to exercise the jurisdiction that section 3 of the Act conferred on them to enforce the federal right. The majority held that, because the slaveholder's right of interstate recapture was created by the Constitution, Congress's power to enforce it was exclusive, and the states lacked the constitutional power to enforce it. *Id.* at 623-24. It also held that state judges may exercise the authority Congress conferred on them, but that state legislatures were free to prohibit them from enforcing the federal statute. *Id.* at 622. Only Justice Henry Baldwin did not write an opinion in this case, but, as circuit justice, he had earlier expressed his view that the 1793 statute "affirms the unqualified right of the master to seize, secure and remove his fugitive slave," and upheld its constitutionality. *Johnson v. Tompkins*, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833) (No. 7416). In his concurring opinion in *Prigg*, Justice James M. Wayne summarized the Court's holding and the positions of the justices on central points. *Prigg*, 41 U.S. (16 Pet.) at 636-38 (Wayne, J., concurring).

124. Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of*

Slave Clause thus encompassed the authorization of civil remedies against private individuals who violated another person's constitutional rights. Consequently, the Court affirmed the private causes of action the Fugitive Slave Act conferred on slave owners to enforce their constitutional rights.¹²⁵

The crucial point here is that the Taney Court unanimously held that the enforcement of constitutionally secured rights is one of the ends of the federal government, that being an end of the federal government the constitutional recognition of the rights implicitly delegates to Congress plenary power to enforce them and to remedy all violations, even when the constitutional recognition of a right is in the form of a prohibition against the states from interfering with it. As noteworthy as is this nationalistic constitutional interpretation, equally noteworthy is the fact that every Supreme Court Justice, with the possible exception of Justice Henry Baldwin, but including the allegedly states rights-oriented Chief Justice Roger B. Taney, affirmed Story's views. Equally noteworthy, this view was consistent with the actions of the early Congresses and the Supreme Court's constitutional interpretation in other cases as well.¹²⁶ Indeed, the

1866: *A Legislative History in Light of Runyon v. McCrary*, 98 Yale L.J. 565, 582-83 (1989).

125. The Supreme Court reaffirmed its interpretation of the Fugitive Slave Clause five years later in turning back a challenge to the constitutionality of the Fugitive Slave Act of 1793. *See Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847). Justice Levy Woodbury, speaking for a unanimous Court, reaffirmed *Prigg*, declaring "that the constitution itself, in the [Fugitive Slave] Clause before cited, flung its shield, for security, over such property as is in controversy in the present case." *Id.* at 229. Declining to reexamine the Court's reasoning regarding the constitutionality of the 1793 Act, he insisted that "[a]ll of its provisions have been found necessary to protect private rights, under the cause [sic] in the constitution relating to this subject, and to execute the duties imposed on the general government to aid by legislation in enforcing every constitutional provision, whether in favor of itself or others." *Id.* at 230. Declaring that the Constitution imposed on Congress the duty to enforce "every constitutional provision," he explained: "This grows out of the position and nature of such a [national] government, and is as imperative on it in *cases not enumerated specially, in respect to such legislation, as in others.*" *Id.* at 230 (emphasis added). Woodbury's comments express the Court's understanding that Congress had as much power to enforce constitutional provisions that did not expressly delegate enforcement authority, provisions such as the Contract Clause and the Privileges and Immunities Clause of Article IV, in addition to the Fugitive Slave Act, as those that did specifically delegate enforcement authority. This is a much broader understanding of constitutional delegation than scholars have attributed to the Taney Court, which scholars characterize as adopting a more strict constructionist and states rights view of the Constitution than its predecessor, the Marshall Court.

126. The Taney Court twice affirmed its *Prigg* decision. *See Ableman v. Booth*, 62 U.S. (21 How.) 506, 508 (1858) (upholding the constitutionality of the Fugitive Slave Act of 1850 and federal prosecutions brought under it); *Jones*, 46 U.S. (5 How.) at 229 (affirming the constitutionality of the Fugitive Slave Act of 1793). I have already noted that this broad theory of implied powers was the Court's view in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-17 (1819). *See also Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 226-29 (1821) (noting that Congress's contempt power is not delegated, but is implied from Congress's duty to secure "the safety of the people

Taney Court twice affirmed its *Prigg* decision upholding the Fugitive Slave Acts of 1793 and 1850.¹²⁷

Indeed, Story attributed the Court's theory of implied powers to the founders and the congressional framers of the 1793 Fugitive Slave Act. Story declared that, in enacting the 1793 statute, "Congress has taken this very view of the power and duty of the national government."¹²⁸ The framers of this statute had a "vast influence" on the question of its constitutionality, Story observed, for many of the congressional framers of the Act, and President George Washington, who initiated its legislative adoption and signed it into law, were also framers of the Constitution or were "intimately connected with its adoption."¹²⁹

The Court held "the [Fugitive Slave] act to be clearly constitutional, in all its leading provisions."¹³⁰ There was one doubtful provision, however, which conferred authority on state magistrates to issue certificates of removal. Acknowledging the existence of differing opinions "whether state magistrates are bound to act under it," Story emphatically declared that "none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."¹³¹ Story had earlier acknowledged the power of the states to ignore the slave owner's constitutional right of recaption as an additional reason for the necessity, as well as the constitutionality, of congressional legislation to enforce it.¹³²

The last question the Court addressed was whether the power to enforce this right was exclusive in Congress or concurrent with the states. The Court held that Congress's power was exclusive for several reasons that evinced its view of a national sovereignty-based federalism. First, the Court held that the constitutionally secured right of recaption was an absolute and positive right enforceable throughout the United States independent of the states.¹³³ Second, this right was a new right created by the Constitution. It was

[which] is the supreme law," and its inherent power of self-defense against "rudeness" and "insult"). Professor David Currie has shown that the first Congresses, together with the President, were the primary interpreters of the Constitution and made constitutional law by exercising powers under clauses of the Constitution that, like the Fugitive Slave Clause, did not delegate legislative authority to Congress. Currie, *First Congress*, *supra* note 74, at 776-77; *see also* Kaczorowski, *Fidelity*, *supra* note 8, at 1663-73; Kramer, *Fidelity Through History*, *supra* note 111, at 512.

127. *Ableman*, 62 U.S. (21 How.) at 508; *Jones*, 46 U.S. (5 How.) at 229.

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

129. *Id.* at 621.

130. *Id.* at 622.

131. *Id.*

132. *Id.* at 620.

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

therefore beyond state jurisdiction.¹³⁴ “The natural inference deducible from this consideration,” Story reasoned, “certainly is, in the absence of any positive delegation of power to the state legislatures, that it belongs to the legislative department of the national government, to which it owes its origin and establishment.”¹³⁵ Since the Constitution did not delegate any power to the state legislatures to enforce the constitutional right of recaption, Congress’s power over it was exclusive.

The national character of this right, and the consequent need for national uniformity in enforcing it, reinforced the exclusive character of Congress’s power. Story reasoned that, if the states had the power to enforce this right, they could legislate in ways that actually undermined its effective enforcement.¹³⁶ Indeed, the free states might destroy the right. The Pennsylvania statute presented just such an example. “It 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.”¹³⁷ Consequently, not only was the Pennsylvania statute unconstitutional, null, and void, it demonstrated the need to exclude all state regulation over the rendition of fugitive slaves.

Chief Justice Taney is known as having directed the Supreme Court to embrace a states rights-centered constitutionalism.¹³⁸ The opinion he filed in this case is therefore worth considering, because, while he believed the Constitution authorized the states to enforce the Fugitive Slave Clause, he nevertheless agreed with the Court’s central conclusions and theories of interpretation, and he supported Congress’s plenary power to enforce constitutionally secured rights.

134. Story explained: “It [is], therefore, in a just sense, a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy.” *Id.* The Massachusetts Supreme Judicial Court, in an opinion written by one of the greatest nineteenth century jurists, Chief Justice Lemuel Shaw, held in 1836 that slavery was so repugnant to natural law that it could exist only by positive law, thus justifying his state’s refusal to recognize by comity the property interest in a slave established by another state and brought into Massachusetts by her master. Relying on Lord Mansfield’s opinion in *Somerset’s Case*, *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772), and on the Massachusetts Declaration of Rights, the court concluded that slavery in another state did not extend to Massachusetts and that the master could not compel the slave to return to the slave state from which they came. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 224 (1836); *see also* *Jackson v. Bulloch*, 12 Conn. 38 (1837). It is by virtue of the *Aves* case that the English rule in *Somerset’s Case* became the prevailing rule in American law. *See* Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 68 (1957); Wiecek, *supra* note 8, at 196. This doctrine, that slavery is against natural law and existed only by positive law, was accepted by southern courts and was adopted as a constitutional principle of moderate anti-slavery groups, who also argued that once slaves left a slave state they are free. Wiecek, *supra* note 8, at 213.

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

136. *Id.* at 623-24.

137. *Id.* at 626.

138. *Id.*

Taney joined the other members of the Court in holding that the Constitution placed the slaveholders' property right under the protection of the federal government. Indeed, he applied the Court's constitutional theories to other provisions of the Constitution, asserting that the Contract Clause placed contract rights under federal protection, and that the Comity Clause placed under the federal government's protection the privileges and immunities it secures.¹³⁹ However, he also insisted that the Constitution recognizes concurrent authority in the states to enforce these constitutional rights.¹⁴⁰ Thus, Taney argued that the Fugitive Slave Clause's prohibition on the states from interfering with the slaveholders' right implied the power in the states, as well as in Congress, to enforce it. He asserted that, "according to the settled rules of construction for all written instruments, *the prohibition being confined to laws injurious to the right, the power to pass laws to support and enforce it, is necessarily implied.*"¹⁴¹ Interestingly, the Chief Justice analogized to the Contract Clause in support of his argument. Referring to the right secured by the Contract Clause, Taney said:

*This, like the right in question, is an individual right, placed under the protection of the general government. And in order to secure it, congress have passed a law authorizing a writ of error to the supreme court. . . . Yet no one has ever doubted that a state may pass laws to enforce the obligation of a contract, and may give to the individual the full benefit of the right so guaranteed to him by the Constitution, without waiting for legislation on the part of Congress. . . . Why may not the same thing be done in relation to the individual right now under consideration?*¹⁴²

Taney made the same analogy to the Privileges and Immunities Clause, stating that, "although these privileges and immunities, for greater safety, are placed under the guardianship of the general government; still the states may, by their laws, and in their tribunals, protect and enforce them."¹⁴³

Taney regarded the property right secured by the Fugitive Slave Clause as equivalent to the right one enjoys under a contract, that is, that the contract right was a constitutionally secured individual right

139. *Id.* at 629.

140. *Id.*

141. *Id.* at 627-28 (Taney, C.J., dissenting) (emphasis added). Compare Taney's interpretation of the Constitution's prohibition against state violations of constitutional rights as an implied recognition of the federal government's and of the states' power to enforce the right, with the Rehnquist Court's interpretation as a mere federal remedial power to correct a state violation. See *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

142. *Prigg*, 41 U.S. (16 Pet.) at 629 (Taney, C.J., dissenting) (emphasis added).

143. *Id.* Taney's motivation for insisting on concurrent state power to enforce the Fugitive Slave Clause evidently stemmed as much from his concern over the impracticalities of enforcing slaveholders' rights in federal courts as it did from his concerns over states rights. *Id.*

under the Contract Clause and the rights secured under the Privileges and Immunities Clause, which delegated to Congress the authority to enforce these rights. Taney insisted that, as with the states' concurrent power to enforce contract rights and the privileges and immunities of citizens, the states enjoyed concurrent power to enforce the slaveholders' right of recapture: "The individual right now in question, stands on the same grounds, and is given by similar words, and ought to be governed by the same principles."¹⁴⁴ Although Taney was here arguing that the states possessed the power to enforce rights thus secured by the Constitution, the extraordinary and noteworthy aspect of his views is that he considered these constitutional recognitions of individual rights to be delegations of legislative power to Congress to enforce them. Inasmuch as Taney is considered to have been a staunch proponent of states rights-centered constitutional federalism, that he, and the other members of the Court, agreed that Congress possessed the power to enforce these rights suggests that this view was broadly shared. At a minimum, the Court's *Prigg* decision and supporting theories attributed to Congress greater power and more responsibility to enforce the constitutionally secured rights of slaveholders than the Court has recognized that Congress possesses to enforce constitutionally secured human rights of all Americans.

D. *Consequences of Prigg: Northern States Assert State Sovereignty and Resist Enforcement of Slaveholders' Constitutional Right*

Although the Court's decision in *Prigg* was a strong endorsement of the constitutionally secured property right of slave owners, in restricting the duty of enforcement to federal institutions, it impeded the efforts of slave owners to recapture their runaway slaves.¹⁴⁵ Slave owners and their agents continued to sue individuals under the Fugitive Slave Act who assisted runaway slaves to escape, and often with success.¹⁴⁶ But, the free states of the North interpreted *Prigg* as a

144. *Id.*

145. Chief Justice Taney predicted this result in his dissent in *Prigg*. He complained:

[I]f the state authorities are absolved from all obligation to protect this right, and may stand by and see it violated, without an effort to defend it, the act of congress of 1793 scarcely deserves the name of a remedy. . . . It is only necessary to state the provisions of this law, in order to show how ineffectual and delusive is the remedy provided by congress, if state authority is forbidden to come to its aid.

Id. at 630-31.

146. See, e.g., *Jones v. Van Zandt*, 13 F. Cas. 1057 (C.C.D. Ohio 1851) (No. 7505) (granting damage judgment of \$1200 for plaintiff); *Oliver v. Kauffman*, 18 F. Cas. 657 (C.C.E.D. Pa. 1850) (No. 10,497) (dismissing action for damages because of hung jury, and subsequently retried as *Oliver v. Weakley*, 18 F. Cas. 678 (C.C.E.D. Pa. 1853) (No. 10,502)) (awarding verdict of \$2800 in damages to plaintiff for lost slaves defendant assisted to escape); *Jones v. Van Zandt*, 13 F. Cas. 1056 (C.C.D. Ohio 1849) (No. 7504) (holding that action in debt abates with the death of the defendant);

license to refuse to assist slave owners in the recapture of their slaves. northern state legislatures, following the example set by Massachusetts in 1843, enacted statutes that prohibited state officials from assisting in the recapture and detention in any way.¹⁴⁷

The withdrawal of northern state courts from enforcing the Fugitive Slave Act further emphasized the national character of the slave owner's constitutionally secured right of property, because it was enforceable through private litigation only in federal courts. For example, the Pennsylvania Supreme Court in 1849 held that "our [state] courts are interdicted from assuming a voluntary jurisdiction" to try tort actions to recover damages for the value of slaves that escaped to freedom.¹⁴⁸ Justice Richard Coulter explained that slavery "is recognized and enforced [in Pennsylvania] by virtue of [the United States Constitution] alone," because slaves that come into the free states are made free by the common law.¹⁴⁹ Consequently, slave owners "must make the claim in a legal manner and by legal process, according to the constitution and laws of the United States."¹⁵⁰ After considering the question fully, "this court is of the opinion," Justice Coulter declared, "that an action of this kind can only be sustained under the act of Congress of 1793; that our state courts have not jurisdiction of an action under the statute; and the principles of the common law do not sustain any such action in this state."¹⁵¹

Some northern states went further than non-cooperation and enacted statutes that brought state law into direct conflict with federal

Driskell v. Parish, 7 F. Cas. 1095 (C.C.D. Ohio 1849) (No. 4088) (granting judgment of \$500 in damages for plaintiff, the proven value of lost slaves); Ray v. Donnell, 20 F. Cas. 325 (C.C.D. Ind. 1849) (No. 11,590) (awarding verdict of \$1500 in damages to plaintiff for the loss of a woman slave and her four children defendants assisted in escaping to freedom); Jones v. Van Zandt, 13 F. Cas. 1054 (C.C.D. Ohio 1849) (No. 7503) (holding that actions for damage to property survive death of defendant); Giltner v. Gorham, 10 F. Cas. 424 (C.C.D. Mich. 1848) (No. 5453) (awarding verdict of \$2752 in damages to plaintiff, the value of six slaves defendants rescued and assisted to freedom); Driskell v. Parish 7 F. Cas. 1093 (C.C.D. Ohio 1847) (No. 4087) (granting judgment for plaintiff in action in debt for \$1000); Jones v. Van Zandt (unreported case identified in *Jones*, 13 F. Cas. at 1046 note, issuing verdict of \$500 civil penalty awarded to plaintiff), *aff'd*, Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847); Driskell v. Parrish, 7 F. Cas. 1100 (C.C.D. Ohio 1845) (No. 4089) (dismissing action in debt because of hung jury); Jones v. Van Zandt, 13 F. Cas. 1047 (C.C.D. Ohio 1843) (No. 7502) (granting verdict of \$1200 in damages for plaintiff).

147. Morris, *supra* note 13, at 114-23; Swisher, *supra* note 79, at 545. Professor Morris has provided a checklist of personal liberty laws. See Morris *supra* note 13, at 219-22.

148. Kauffman v. Oliver, 10 Pa. 514, 519 (1849).

149. *Id.* at 516. Justice Coulter declared that "by the principles of [the common] law, the fugitives were free the moment when they touched the soil of Pennsylvania." *Id.* at 517. He cited to a circuit court case in the district of Ohio as authority for this proposition and for the conclusion that, but for the Fugitive Slave Act of 1793, the slave owner did not have a legal action for damages against anyone who assisted the slaves to escape. *Id.* at 518.

150. *Id.* at 516.

151. *Id.* at 519.

law.¹⁵² For example, the Pennsylvania 1847 Personal Liberty Law¹⁵³ not only withdrew state cooperation in enforcing the 1793 Fugitive Slave Act,¹⁵⁴ it also subjected to criminal penalties any claimant who exercised his federally secured right of self help seizure of a fugitive slave if he did so in a violent or unreasonable manner;¹⁵⁵ it criminalized the removal of free blacks from the state with the intention of reducing them to slavery;¹⁵⁶ and it authorized state judges to issue the writ of habeas corpus “to inquire into the causes and legality of the arrest or imprisonment of any human being within this commonwealth.”¹⁵⁷ These provisions, and another that removed the legal disability of slaves from testifying in their own behalf,¹⁵⁸ directly interfered with the summary process provided in the federal statute. The Pennsylvania statute, and those in other states with similar provisions, thus interposed the states’ police power to impede the enforcement of the Fugitive Slave Clause, the Fugitive Slave Act of 1793, and the slave owners’ rights they guaranteed and secured.¹⁵⁹

The northern states’ Personal Liberty Laws, as they came to be known, encouraged groups hostile to slavery to interfere openly with the recovery of fugitive slaves and to aid in their escape to freedom. The South viewed the public policy of northern states as encouraging and increasing lawlessness detrimental to the southern interests. By the end of the 1840s, whatever comity existed between the slave states and the free states regarding fugitive slaves was gravely undermined. *Prigg* thus contributed to growing sectional conflict. Indeed, Lincoln’s biographer, Albert J. Beveridge, considered the *Prigg* case to be one of the most important decided by the United States Supreme Court in this regard.¹⁶⁰ The *Prigg* decision and its aftermath led to southern demands for a more effective federal fugitive slave act and more vigorous federal involvement in enforcing slave owners’ constitutional rights.

152. Swisher, *supra* note 79, at 546-48.

153. 1847 Pa. Laws No. 159, 206-08.

154. Section 3 of the Pennsylvania statute denied jurisdiction to any state judge “to take cognizance of the case of any fugitive from labor from any of the United States or territories, under” the Fugitive Slave Act of 1793, and it prohibited them from issuing any “warrant of removal of any such fugitive from labor” under the federal statute under penalty of a fine of from \$500 to \$2000, one half to be paid to the party prosecuting the case and the other half to the state. *Id.* § 3.

155. *Id.* § 4. The penalties included a fine of not less than \$100 nor more than \$1000 and confinement in the county jail for up to 3 months.

156. The penalty prescribed was a fine of not less than \$500 or more than \$2000, one half payable to the party prosecuting the case and one half to the state, and solitary confinement in the state penitentiary at hard labor for not less than five years nor more than twelve. *Id.* § 1.

157. *Id.* § 5.

158. *Id.* § 7.

159. The language of the Pennsylvania statute exudes defiance of the federal Fugitive Slave Acts.

160. II A. Beveridge, Abraham Lincoln, 1809-1858, at 68 (1928).

E. *The Fugitive Slave Act of 1850: The Creation of a Federal Law Enforcement Structure to Remedy Constitutional Rights Violations*

Congress accommodated the South in 1850. The Fugitive Slave Act of 1850¹⁶¹ represented an even more extraordinary exercise of federal power to enforce slaveholders' constitutional rights than its eighteenth century predecessor. With the *Prigg* decision recognizing Congress's plenary power to enforce constitutional rights exclusively through federal legal process, and with the free states of the North withdrawing their law enforcement institutions from participation in the recapture of fugitive slaves, Congress attempted to replace state law enforcement institutions by establishing a federal law enforcement structure more effectively to enforce slaveholders' constitutionally secured property right in their slaves.

The first four sections of the 1850 statute created a federal structure to enforce the constitutionally secured property rights of slave owners that one scholar early in the twentieth century justifiably likened to federal bureaucratic agencies, such as the Interstate Commerce Commission and boards of immigrant inspectors.¹⁶² The Act authorized federal judges to appoint United States commissioners with the power "to exercise and discharge all the powers and duties conferred by this act,"¹⁶³ including the power to authorize the seizure and return of fugitive slaves to the places from which they may have escaped.¹⁶⁴ It imposed on federal marshals and deputy marshals the duty to execute "all warrants and precepts issued under the provisions of this act, when to them directed," under penalty of a \$1000 fine payable to the claimant.¹⁶⁵ Should the fugitive slave escape while in custody of a federal marshal or deputy marshal, they were made liable to the claimant for the full value of the services of the slave.¹⁶⁶ To assist these federal officers, the statute authorized federal commissioners "to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to ensure a faithful observance of" the Fugitive Slave Clause and this statute.¹⁶⁷ And, the statute "commanded" "all good citizens . . . to aid and assist in the prompt and efficient execution of this law, whenever their services may be required" for this purpose.¹⁶⁸

In addition to expanding the corps of federal law enforcement officers, the Fugitive Slave Act also provided a more effective legal

161. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

162. Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 Yale L.J. 161, 181-82 (1921).

163. Act of Sept. 18, 1850, § 1.

164. *Id.* § 4.

165. *Id.* § 5.

166. *Id.*

167. *Id.*

168. *Id.*

process to vindicate slave owners' constitutional rights. The statute expressly recognized the slave owners' right of self-help recapture¹⁶⁹ and to present the fugitive for a summary hearing before a federal judge or commissioner, who, "upon satisfactory proof," was required to authorize the return of the fugitive, with reasonable force if necessary.¹⁷⁰ The statute expressly prohibited the alleged fugitive slave from entering evidence on her behalf, and it expressly provided that the certificate of removal was conclusive proof of the right of the claimant or his agent to remove the fugitive to the state from which she escaped.¹⁷¹ The certificate served as an absolute bar to "any process issued by any court, judge, magistrate, or other person whomsoever."¹⁷² The only concession to state powers Congress included in the 1850 statute was a provision admitting as conclusive evidence of the identity and service owed by the alleged fugitive "satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer . . . of the State or Territory, from which such person owing service or labor may have escaped."¹⁷³

The 1850 Fugitive Slave Act provided additional and presumably more effective remedies to redress violations of slave owners' constitutional rights. It substituted the civil penalty of the 1793 Act with criminal penalties for violating the slave owners' property right in their slaves.¹⁷⁴ The 1850 statute preserved the tort remedy authorized by the 1793 statute and added another civil remedy. Violators were liable for "civil damages" in the amount of \$1000 for each fugitive slave who was lost. These damages were recoverable in an action of debt in a federal district court.¹⁷⁵ The statutory amount of \$1000 doubled the amount of the civil penalty recoverable in an action of debt under the 1793 Fugitive Slave Act. As a damage remedy for the loss of slaves, the statutory amount of \$1000 was greater than the damages generally awarded for lost slaves in tort actions under the 1793 Fugitive Slave Act.¹⁷⁶ So, the 1793 and 1850 Fugitive Slave Acts

169. *Id.* § 6.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*; *see also id.* § 10.

174. *Id.* § 7. The 1850 statute imposed criminal sanctions on anyone who knowingly and willingly hindered the claimant from seizing the fugitive slave, who rescued or attempted to rescue the fugitive slave, who aided, abetted or assisted the fugitive slave to escape, or who harbored or concealed the fugitive slave. On conviction, the defendant was subject to a fine of up to \$1000 and imprisonment for up to six months. *Id.*

175. *Id.* Section 7 provided that persons who prevented or hindered the arrest of a fugitive slave, or who rescued or attempted to rescue a fugitive slave, or who aided a fugitive slave to escape, or who harbored or concealed a fugitive slave would "forfeit and pay, by way of civil damages to the party injured by such illegal conduct," in addition to the criminal penalties it imposed. *Id.*

176. *See e.g.*, *Oliver v. Weakley*, 18 F. Cas. 678, 679 (C.C.E.D. Pa. 1853) (No.

offered the slaveholder alternative federal damage remedies, depending upon whether the slaves escaped or were recovered.¹⁷⁷

The fee structure provided in the 1850 Act also appeared to northern opponents of slavery to favor slave owners. The fees of federal marshals, deputy marshals, and court clerks in fugitive slave cases were set at \$10 if a certificate of removal was issued and only \$5 if the certificate was denied.¹⁷⁸ In addition, the federal officer who executed process was entitled to a fee of \$5 and any other necessary costs incurred, such as food and lodging provided to the fugitive slave during her detention. These costs were to be paid by the claimant. However, on a mere affidavit by the claimant or his agent that he had reason to believe that a rescue would be attempted by force before he could return the fugitive to the state from which she fled, the federal officer who made the initial arrest was required to retain as many persons as necessary to overcome such force and to return the fugitive to the claimant in the state from which she escaped.¹⁷⁹ The fees and costs incurred in this process were to be paid out of the United States treasury. Congress thus provided for the removal of fugitive slaves by federal force at federal expense whenever the return of fugitive slaves was met with local resistance in a free state.

F. *Federal Enforcement of Slaveholders' Constitutional Rights*

Northern opposition to the Fugitive Slave Act of 1850 necessitated federal force to enforce claimants' rights soon after its passage.¹⁸⁰

10,502) (awarding damages of \$2800 for twelve escaped slaves: two husbands, two wives and eight children); *Oliver v. Kauffman*, 18 F. Cas. 657, 658 (C.C.E.D. Pa. 1850) (No. 10,497); *Ray v. Donnell*, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590) (awarding damages of \$1500 for one adult woman slave and her four children); *Giltner v. Gorham*, 10 F. Cas. 424, 427 (C.C.D. Mich. 1849) (No. 5453) (fixing value of six escaped slaves at \$2752); *Driskell v. Parish*, 7 F. Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4088) (fixing value of two escaped slaves at \$500); *Jones v. VanZandt*, 13 F. Cas. 1040, 1041 (C.C.D. Ohio 1843) (No. 7501) (fixing value of escaped slave at \$600).

177. Justice Grier, as circuit justice, ruled that the 1850 Fugitive Slave Act did not repeal the tort action of compensatory damages under the 1793 Fugitive Slave Act, and declared that

in case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort.

Kauffman, 18 F. Cas. at 660.

178. Act of Sept. 18, 1850, § 8.

179. *Id.* § 9.

180. The first case adjudicated under the 1850 Fugitive Slave Act arose in New York City. A week after its enactment, a man by name of James Hamlet, who had been working as a porter there for three years, was seized, brought before the federal commissioner who issued a certificate of removal, and whisked to Baltimore. However, New York businessmen raised the money to purchase his freedom. Morris, *supra* note 13, at 156.

Boston, a center of abolitionist and anti-slavery sentiment, presented the Fillmore administration with the first open opposition to the Fugitive Slave Act. In February 1851, a mob dramatically rescued an alleged fugitive slave, known as Shadrach, from federal custody and sent him to freedom in Canada.¹⁸¹ The dramatic rescue attracted national attention. Congressional leaders, such as Henry Clay, denounced the rescuers on the floor of Congress.¹⁸² Secretary of State, Daniel Webster, called their action an act of treason.¹⁸³ President Millard Fillmore convened a special cabinet meeting to consider the administration's response. The President subsequently issued a proclamation commanding all civilian and military personnel to recapture Shadrach and ordered the United States Attorney to prosecute those responsible for the "scandalous outrage" to federal law.¹⁸⁴

United States District Judge Peleg Sprague, in his charge to the quickly assembled Grand Jury, directed the jurors to place the law above their consciences. He acknowledged that the enactment of the 1850 statute had "produced great excitement and exasperation" in Massachusetts, some openly proclaiming "a determination to resist it by violence, declaring that it was a matter of conscience not to permit it to be executed."¹⁸⁵ Judge Sprague nevertheless instructed the jury that "[t]he constitution commands that fugitives from labor shall be delivered up. The supreme court has decided that it belongs to congress to provide the means," he declared, and "congress has provided a new remedy, by legal process to be executed by a public officer, and has added penal sanctions more effectually to ensure the execution of the law."¹⁸⁶ Proclaiming that "it is our solemn duty faithfully to execute" the law, Judge Sprague admonished the jury to subordinate their individual consciences to the collective conscience of the national political community. The grand jury did its duty as it was explained to them by Judge Sprague, and they returned indictments against those who assisted in Shadrach's escape. There seems to be no published record of ensuing trials, however.¹⁸⁷

181. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 82-83 (1988). Shadrach's full name was Shadrach Minkins, though he also called himself Frederick Wilkins and Frederick Jenkins. See Gary Collison, *Shadrach Minkins: From Fugitive Slave to Citizen* 1 (1997).

182. Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 90 (1957); McPherson, *supra* note 181, at 83.

183. Levy, *supra* note 182, at 89; McPherson, *supra* note 181, at 82-83.

184. Levy, *supra* note 182, at 90. President Franklin Pierce also vigorously enforced the federal fugitive slave laws. McPherson, *supra* note 181, at 119-20; Albert J. Von Frank, *The Trial of Anthony Burns: Freedom and Slavery in Emerson's Boston* 72, 174-75 (1998).

185. *Charge to Grand Jury*, 30 F. Cas. 1015 (D. Mass. 1851) (No. 18,263). This case is discussed in Cover, *Justice Accused*, *supra* note 13, at 217-21.

186. *Charge to Grand Jury*, 30 F. Cas. at 1016.

187. Robert Cover recounts that two of Shadrach's lawyers, Charles Davis and

The Massachusetts Supreme Judicial Court also affirmed the constitutionality of the Fugitive Slave Act of 1850 in an even more notorious case that also arose in Boston. A seventeen year old slave by the name of Thomas Sims was seized and held in the federal court house which was fortified with chains around the entire building and a 300 man guard comprised of federally deputized companies of the Boston police and soldiers.¹⁸⁸ When the U.S. Commissioner rejected their petition for Sims's release, Sims's lawyers petitioned the Massachusetts Supreme Judicial Court for a writ of habeas corpus.

Sims's attorneys presented their arguments on the morning of April 7, 1851 to one of the foremost appellate judges of the nineteenth century, Chief Justice Lemuel Shaw.¹⁸⁹ Some of the nineteenth century's most notable lawyers thus engaged one of the century's greatest jurists in potentially the greatest crisis in federalism of that era. Sims was represented by leading members of the Boston bar: Robert Rantoul, Charles G. Loring, Samuel E. Sewall, and Richard

Robert Morris, were indicted and tried. Cover, *Justice Accused*, *supra* note 13, at 218 n.37 (citing 2 *The Journal of Richard Henry Dana, Jr.* 429, 466-69, 511-13, 531 (Robert Lucid ed., 1968)). Dana's biographer, Charles Francis Adams, reported that Morris was ultimately acquitted, but was silent regarding Davis's fate. Charles Francis Adams, *Richard Henry Dana: A Biography* 210 (1890). However, James McPherson recounts that the grand jury indicted four blacks and four whites, but that petit juries refused to convict all of them. McPherson, *supra* note 181, at 83. Stanley W. Campbell reported that Judge Sprague suspended the cases against Morris and two other defendants, Elizur Wright and James Scott, because of hung juries and that "[t]he other cases were dropped." Campbell, *supra* note 13, at 154. Richard Henry Dana and John P. Hale, United States Senator from the state of New Hampshire, defended Shadrach's attorneys and rescuers. Adams, *supra*, at 212. Before the trials, Dana and Hale challenged the constitutionality of the Fugitive Slave Act of 1850. They raised three issues: (1) that Congress did not have the power to enact the Fugitive Slave Act of 1850; (2) that the Act failed to provide a jury trial in violation of the Seventh Amendment; (3) that the Act conferred on nonjudicial commissioners Article III judicial powers only Article III judges can exercise. *United States v. Scott*, 27 F. Cas. 990-91 (D. Mass. 1851) (No. 16,240). Judge Sprague upheld the statute on all three counts in an opinion that reflected the jurisprudence of earlier cases. *Id.* at 990.

188. Levy, *supra* note 182, at 92; McPherson, *supra* note 181, at 83; Morris, *supra* note 13, at 151. Levy cites Wendell Phillips as estimating the guard "at no less than five hundred!" Levy, *supra* note 182, at 92.

189. *Sims's Case*, 61 Mass. (7 Cush.) 285, 287-91 (1851). Their approach to and interpretation of the Fugitive Slave Clause was very similar to the Rehnquist Court's approach to and interpretation of the Fourteenth Amendment. Sims's attorneys predicated their argument on a theory of federalism and constitutional delegation associated with a states rights-based conception of federalism. *Id.* at 290-91. They characterized the national government as "a government of limited powers. It has no powers that are not expressly delegated to it by the constitution." *Id.* at 290. Paraphrasing the Tenth Amendment, they insisted that, "The powers not expressly delegated to it, are reserved to the states respectively, or to the people." *Id.* They consequently argued that the Fugitive Slave Clause's "prohibition [from being discharged from service or labor], in its form, as well as from its nature, is directed to the states only; and so is the command to deliver up." *Id.* at 291. The Fugitive Slave Clause thus delegated to the states, not to Congress, the substantive rights it secured.

Henry Dana, Jr. ¹⁹⁰Nevertheless, Shaw delivered the court's opinion that very afternoon. The court refused to issue the writ and upheld the constitutionality of the Fugitive Slave Act of 1793 in a strong affirmation of the judicial precedents that had been accumulating up to the mid-nineteenth century.

Shaw rejected Sims's lawyers' approach to constitutional interpretation and instead adopted that of Justice Story and other judges who had addressed the question.¹⁹¹ He concluded that the Fugitive Slave Clause conferred a right, and this constitutionally secured right empowered the Second Congress to enact the 1793 statute whose "manifest intent . . . was, to regulate and give effect to the right given by the constitution."¹⁹² Shaw said that the 1793 statute "conform[ed] strictly to the powers given by the constitution" to

190. See Morris, *supra* note 13, at 151 n.20. Rantoul's argument before the U. S. Commissioner was published in *Trial of Thomas Sims, on an Issue of Personal Liberty, on the Claim of James Potter, of Georgia, Against Him, as an Alleged Fugitive From Service* (1851). It is also reprinted in *Memoirs, Speeches And Writings of Robert Rantoul, Jr.* (Luther Hamilton ed., 1854); and 2 *The Journal of Richard Henry Dana, Jr.*, *supra* note 187, at 420.

191. *Sims's Case*, 61 Mass. (7 Cush.) at 298-310. Shaw began his analysis with the intent of the framers of the Constitution in the historical context of their adoption of the Constitution. He considered the historical context of the adoption of the Constitution so important to a proper interpretation of the document that he included an appendix to elaborate his understanding of this history. *Id.* at 311-19. He observed that, for

a just understanding and exposition of [the Fugitive Slave Clause], and the laws made under it, it is necessary to refer briefly to the circumstances under which the constitution was made, and the great social and political objects and purposes, which the people of the United States had in view, in adopting it.

Id. at 295. Recounting the history of the founding, Shaw observed that, with the expanding abolition of slavery in the northern states, the recapture of slaves escaping into them became an occasion for a border war between slave and free states. *Id.* at 296. Thus, the adoption of the Fugitive Slave Clause became absolutely necessary to the formation of the United States. The Fugitive Slave Clause, "was a solemn compact, entered into by the delegates of states then sovereign and independent, and free to remain so, on great deliberation, and on the highest considerations of justice and policy, and reciprocal benefit, and in order to secure the peace and prosperity of all the states." *Id.* at 297. Like Justice Story, Shaw attributed "great weight of authority" to the following:

[T]hat many of the [framers of the 1793 Fugitive Slave Act] may be well presumed to have been members of the [Constitutional] [C]onvention, and all of them to have been intimately conversant with the great principles of the constitution, and with the views, intentions, and purposes of its framers. This species of contemporaneous construction has ever been regarded as of great weight and importance, and is entitled to the highest respect.

Id. at 300. Justice Shaw regarded "contemporaneous construction" authoritative in regard to two questions:

the power and duty of congress to pass laws to secure and carry into effect a right confirmed by the constitution of the United States; and secondly, as to the fitness of the provisions of law thereby adopted, and their adaptation to the proper and practical assertion of the rights secured by the constitution.

Id.

192. *Id.* at 301.

Congress.¹⁹³ He also said Congress's action "carr[ie]d out the very objects and purposes contemplated by [the Constitution]."¹⁹⁴ Consequently, Shaw applied a broad interpretation of constitutional delegation of implied powers and asserted that a right "given" by the Constitution confers on Congress the power to secure it. He explained that the congressional enforcement of constitutionally secured rights is one of the objects and purposes the United States Constitution assigns to the United States government, and the Constitution delegates implied powers to Congress to carry out all of the objects and purposes it prescribes for the government of the United States. Like the United States Supreme Court, the Massachusetts Supreme Judicial Court rejected the argument that Congress's implied powers were limited to carrying out the powers expressly enumerated in Article I. Shaw announced that it was "the unanimous opinion of the court, that the writ of habeas corpus prayed for cannot be granted."¹⁹⁵ With the federal district court and the Massachusetts Supreme Judicial Court affirming the Fugitive Slave Act so forcefully, no additional fugitive slave cases arose in Boston for several years.¹⁹⁶ The leading pre-Civil War legal authority on the law of slavery and freedom, John Codman Hurd, characterized Shaw's opinion in *Sims's Case* as the most authoritative decision of that time because it was followed in all subsequent cases on the question of the federal commissioner's authority under the Act.¹⁹⁷

Active and passive resistance continued throughout the states of the North. Acting on principles of higher law, divine law, immutable principles of truth and justice, principles of human rights, and principles of due process of law, northerners sought to nullify the federal statute through local acts of civil disobedience.¹⁹⁸ Bills and resolutions were introduced in various state legislatures making state guarantees of individual rights applicable to persons accused of being fugitive slaves, and prohibiting state officers and local citizens from assisting in the enforcement of the Fugitive Slave Acts. These efforts largely failed through the first half of the 1850s, but many northern states enacted Personality Liberty Laws after 1854.¹⁹⁹ Federal judges

193. *Id.* at 304.

194. *Id.*

195. *Id.* at 310.

196. Professor McPherson attributes this hiatus to Boston's mercantile elite who had vindicated law and order. See McPherson, *supra* note 181, at 84.

197. 2 Hurd, *supra* note 25, at 653. However, Professor Thomas Morris argues that Hurd overstated the significance of Shaw's opinion, suggesting that it was not universally followed. Morris, *supra* note 13, at 152.

198. See McPherson, *supra* note 181, at 88-91; Morris, *supra* note 13, 157-85.

199. Morris, *supra* note 13, at 156-65. Professor Morris shows that northern state legislatures between 1850 and 1853 are best characterized as having accepted the Compromise of 1850, although the state legislative efforts to defeat the Fugitive Slave Act of 1850 reflected opposition to it. But, in the aftermath of events of the mid-1850s, such as the enactment of the Kansas-Nebraska Bill and the Supreme Court's

extended the jurisprudence of the Fugitive Slave Act of 1793 to the Fugitive Slave Act of 1850 in admonishing grand juries to enforce federal law, in upholding the constitutionality of the Act, in trying criminal prosecutions it authorized and civil actions for the damages remedy it provided, and in turning back constitutional challenges by defense lawyers in prosecutions brought under it in the federal courts.²⁰⁰

decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), many New England states (Connecticut, Maine, and Massachusetts) and some Midwestern states (Michigan, Ohio, and Wisconsin) enacted personal liberty laws. Morris, *supra* note 13, at 156-65.

200. See, e.g., *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9583) (Justice McLean upheld the constitutionality of the 1850 Act and remanded fugitive slave to master for removal to Kentucky); *Charge to Grand Jury*, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261) (Justice Nelson upheld the constitutionality of the 1850 Act and its supremacy over contrary state legislation and legal process); *United States v. Buck*, 24 F. Cas. 1289 (E.D. Pa. 1860) (No. 14,680) (Judge Cadwalader charge to petit jury in prosecution under section 7 of 1850 Act for attempting to rescue a fugitive slave from custody of a federal marshal; verdict of guilty to first count and not guilty as to second count as instructed); *United States v. Cobb*, 25 F. Cas. 481, 482 (N.D.N.Y. 1857) (No. 14,820) (Judge Conkling upheld indictment under the 1850 Act for aiding and abetting a fugitive slave to escape, condemning "gross delusion" and "wanton contempt of law and social order" by "bigots and fanatics" who jeopardized human life in resisting slavery); *Weimer v. Sloane*, 29 F. Cas. 599 (D. Ohio 1854) (No. 17,363) (Judge Leavitt charged jury in civil action for damages brought under section 7 of the 1850 Act; jury verdict for plaintiff for \$3000 and motion for new trial denied); *Van Metre v. Mitchell*, 28 F. Cas. 1042 (W.D. Pa. 1853) (No. 16,865a) (Judge Irwin denied motion in arrest of judgment ruled that an action will lie at common law for recovery of damages for harboring and concealing a fugitive slave); *Van Metre v. Mitchell*, 28 F. Cas. 1036 (W.D. Pa. 1853) (No. 16,865) (Justice Grier charge to civil jury under the Fugitive Slave Act of 1793; judgment for Plaintiff for \$500); *Ex parte Jenkins*, 13 F. Cas. 445 (E.D. Pa. 1853) (No. 7259) (Justice Grier issued a federal writ of habeas corpus to discharge from state custody federal deputy marshals who had been arrested by state officers and charged with assault and battery with intent to kill while arresting a fugitive slave under the 1850 Act); *United States v. Williams*, 28 F. Cas. 631 (E.D. Pa. 1852) (No. 16,705) (Judge Kane instructed jury on the meaning of criminal provisions of the 1850 Act in a prosecution brought under section 7 and issued a verdict of not guilty); *Charge to Grand Jury*, 30 F. Cas. 1015 (D. Mass. 1851) (No. 18,263) (Judge Sprague admonished grand jury to enforce the 1850 Act); *United States v. Scott*, 27 F. Cas. 990 (D. Mass. 1851) (No. 16,240) (Judge Sprague upheld the constitutionality of the 1850 Act in a federal prosecution under section 7). *But see Ex Parte Van Orden*, 28 F. Cas. 1060 (C.C.S.D.N.Y. 1854) (No. 16,870) (Judge Betts ruled district court cannot issue a writ of certiorari to U.S. commissioner appointed by the court to return to the court the record of proceedings in a case brought under the 1850 Act); *United States v. Stowell*, 27 F. Cas. 1350 (C.C.D. Mass. 1854) (No. 16,409) (Justice Curtis quashed indictment brought under the 1850 Act for interfering with federal marshal serving legal process under the Act); *Campbell v. Kirkpatrick*, 4 F. Cas. 1174 (C.C.D. Ohio 1850) (No. 2363) (circuit court does not have jurisdiction under the Fugitive Slave Act of 1850).

G. The United States Supreme Court Upholds the Civil Remedies and Criminal Penalties the Fugitive Slave Act of 1850 Imposed on Violators of the Constitutional Right of Slaveholders

The United States Supreme Court had its first opportunity to examine the Fugitive Slave Act of 1850 a year after it was enacted.²⁰¹ An action in debt was brought in the United States Circuit Court at Indianapolis, Indiana under section 4 of the Fugitive Slave Act of 1793.²⁰² While this case was pending, Congress enacted the Fugitive Slave Act of 1850.²⁰³ The defendants demurred, claiming that section 7 of the 1850 Act, providing for a criminal fine and “civil damages” for \$1000 in an action of debt, repealed section 4 of the 1793 statute, under which this action was brought, and that repeal barred this lawsuit.²⁰⁴ The circuit court sustained the demurrer and dismissed the case. Plaintiff appealed to the United States Supreme Court.

In an opinion written by Justice John Catron, the Court unanimously held for the defendants and dismissed the case, but only on the grounds that the 1793 Act’s civil penalty was repealed by section 7 of the 1850 Act. Justice Catron explained that section 7 of the 1850 Act added criminal penalties and provided “civil damages” of \$1000, but only if “the owner has lost his slave.”²⁰⁵ Interestingly, Justice Catron explained the reason for the statutory damages was that, even if the claimant fully proved “illegal conduct, and loss,” he might still be unable to secure compensation because “the wide range of proof, as to value, could still, in effect, defeat the suit by a verdict for low damages.”²⁰⁶ It was for this reason that, in the 1850 statute, “Congress fixed the value [at \$1000] in every case of loss, and took the assessment of damages from the jury.”²⁰⁷ This provision repealed the civil penalty of \$500 provided by the 1793 Act. However, the \$1000 “civil damages” applied only if the slave was not recaptured, “loss being the ground of action.”²⁰⁸ For injuries sustained other than the actual loss of the slave, the slave owner still had his action in tort under the 1793 Act. Thus, the slave owner still had two federal civil remedies.²⁰⁹ The Court concluded, therefore, that section 7 of the 1850 Act repealed only the \$500 civil penalty provided in section 4 of the 1793 Act.²¹⁰ The repeal consequently “deprived the court of

201. *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851).

202. *Id.* at 430.

203. *Id.*

204. *Id.*

205. *Id.* at 439.

206. *Id.* at 439-40.

207. *Id.* at 440.

208. *Id.*

209. *Id.*

210. *Id.*

jurisdiction over the subject-matter of the suit,” and the Court dismissed the case.²¹¹

The Court also explained the states’ jurisdiction over fugitive slaves the following year in *Moore v. Illinois*.²¹² In this case the Court upheld the constitutionality of provisions of the Illinois criminal code that defined as a misdemeanor and imposed penalties of a \$500 fine or imprisonment for up to six months against anyone who harbored or secreted any fugitive slave, whether they owed service in Illinois or in any other state, or who “in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them”²¹³ One Doctor Richard Eells was convicted under the Illinois statute for “harboring and secreting a negro slave,” and his estate challenged the constitutionality of the Illinois provision after he had died.²¹⁴ In an opinion written by Justice Robert C. Grier, the Court rejected Salmon P. Chase’s argument on the petitioner’s behalf, that the Supreme Court in *Prigg v. Pennsylvania* had held that Congress’s power over the subject of fugitive slaves was exclusive. It also rejected Chase’s fall-back argument that, even if the states enjoyed concurrent power, the 1793 Act “supercedes [sic] all state legislation” and rendered the state provision void.²¹⁵

Justice Story’s opinion in *Prigg* asserted that “the power of legislation on this subject [of fugitive slaves] to be exclusive in Congress.”²¹⁶ However, he cautioned that this power did not diminish the states’ police power in other respects. He asserted that:

[W]e are by no means to be understood, in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states, and has never been conceded to the United States.²¹⁷

According to the Court, this police power was inherent in state sovereignty:

211. *Id.* After the Supreme Court decided this case, suits brought under the civil penalty provisions of the 1793 Act were still adjudicated to final appeal. *See, e.g.,* *Van Metre v. Mitchell*, 28 F. Cas. 1042 (C.C.W.D. Pa. 1853) (No. 16,865a) (denying motion in arrest of judgment and granting judgment for plaintiff for common law tort damages affirmed); *Van Metre v. Mitchell*, 28 F. Cas. 1036 (C.C.W.D. Pa. 1853) (No. 16,865) (granting verdict for plaintiff for \$500 civil penalty pursuant to 1793 Act).

212. 55 U.S. (14 How.) 13, 13 (1852).

213. *Id.* at 17.

214. *Id.* at 16.

215. *Id.* at 14, 16. This case involved the 1793 Fugitive Slave Act because it was an appeal from an 1843 Illinois Supreme Court decision, *Eells v. Illinois*, 5 Ill. (4 Scam.) 515 (1843). Professor Finkelman explains that this case was appealed when the defendant, an anti-slavery proponent named Dr. Eells, died and his executor, Thomas Moore, sought to relieve Eells’s estate of the \$400 fine. Finkelman, *An Imperfect Union*, *supra* note 13, at 151, 152 & n.16.

216. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842).

217. *Id.*

We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with, or regulated by such a course; and in many cases, the operations of this police power, although designed generally for other purposes, for protection, safety and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with, or to obstruct, the just rights of the owner to reclaim his slave, derived from the constitution of the United States, or with the remedies prescribed by congress to aid and enforce the same.²¹⁸

The Court in *Prigg* thus recognized the states' jurisdiction over fugitive slaves as a class of indigents or as threats to the public peace, provided state law in no way interfered with the enjoyment of the slave owner's constitutional right or conflicted with federal law.

In *Moore*, the Court affirmed *Prigg*'s recognition of state police power and upheld the Illinois criminal provisions which punished the harboring of fugitive slaves and the interference with their recapture by their owners.²¹⁹ These were actions the 1793 Fugitive Slave Act made civilly liable and the Fugitive Slave Act of 1850 explicitly criminalized. Nevertheless, Justice Grier characterized the Illinois statute merely as

a rule of conduct for the citizens of Illinois. It is but the exercise of the power which every State is admitted to possess, of defining offences and punishing offenders against its laws. The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the United States. In the exercise of this power, which has been denominated the police power, a State has a right to make it a penal offense to introduce paupers, criminals, or fugitive slaves, within their borders, and punish those who thwart this policy by harboring, concealing, or secreting such persons.²²⁰

The Court thus accepted the argument of Illinois' Attorney General, which he based largely on the Court's decision in *City of New York v. Miln*,²²¹ "[t]hat a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial

218. *Id.*

219. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1852).

220. *Id.*

221. *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (affirming state's police power to prevent influx of paupers and vagabonds through the Port of New York, notwithstanding Congress's exclusive power over interstate and foreign commerce).

limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States.”²²² The Court considered fugitive slaves as only one class of undesirables, along with paupers and criminals, from the influx of which the states “have found it necessary to protect themselves against . . . and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals.”²²³ The state code therefore was not directed at enforcing a constitutionally secured right and was not a state usurpation of a power the Constitution conferred exclusively on Congress. Justice Grier asserted that the Illinois statute “acts neither on the master nor his slave; on his right or his remedy.”²²⁴

H. *Ableman v. Booth: The Supreme Court Reaffirms Congress’s Plenary Power to Enforce Constitutional Rights*

State interposition, nullification of federal law, and the state sovereignty theory of the Constitution are associated with the South and secession. However, by the middle of the 1850s, many northern states’ legislatures adopted these constitutional theories and interposed their authority in an effort to nullify the Fugitive Slave Acts’ personal liberty laws.²²⁵ In addition, mobs sometimes resisted the recapture and removal of fugitive slaves.²²⁶ Wisconsin presented the most notorious example, for the state’s executive, legislative, and judicial branches joined its citizens in strenuous efforts to nullify federal law in a defiant assertion of state sovereignty. They openly defied federal authorities attempting to recapture a slave by the name of Joshua Glover, who had escaped from his Missouri owner.

The Wisconsin incident brought state legal process and law enforcers into open conflict with those of the federal government. Abolitionists who assisted Glover to escape were prosecuted in the United States District Court for Wisconsin.²²⁷ One of the defendants, Sherman M. Booth, applied to a justice of the Wisconsin Supreme

222. *Id.* at 139. The Attorney General quoted this passage in *Moore v. Illinois*, 55 U.S. (14 How.) 13, 15 (1852).

223. *Moore*, 55 U.S. (14 How.) at 19.

224. *Id.* at 18. The Court evidently meant that the statute did not “impede the master in the exercise of his rights.” *Id.*

225. Many of these statutes are summarized in Morris, *supra* note 13, at 166-218.

226. See *supra* notes 162-84; Morris, *supra* note 13, at 166; see also McPherson, *supra* note 181, at 119-25; Jane H. Pease & William H. Pease, *The Fugitive Slave Law and Anthony Burns* (1975); Von Frank, *supra* note 184, at 72, 174-75; Samuel Shapiro, *The Rendition of Anthony Burns*, 44 J. of Negro Hist. 34 (1959).

227. State authorities arrested Glover’s owner, Benammi S. Garland, and charged him with kidnapping and assault and battery. United States District Court Judge, Andrew G. Miller, ordered Garland’s release on a writ of habeas corpus, upholding the owner’s right under the Fugitive Slave Act of 1850 “to apprehend his fugitive slave either with or without a warrant, and to take him before a judge or commissioner for a hearing.” United States *ex rel.* Garland v. Morris, 26 F. Cas. 1318, 1319 (D. Wis. 1854) (No. 15,811).

Court for a writ of habeas corpus when he was initially arrested for violating the Fugitive Slave Act of 1850. The Wisconsin judge issued the writ and ordered Booth's release from federal custody, ruling that he was held illegally because the Fugitive Slave Act of 1850 was unconstitutional.²²⁸ The United States Marshal, Stephan A. Ableman, appealed the ruling to the full Wisconsin Supreme Court. But, the court affirmed the judge's decision, agreeing that the Fugitive Slave Act of 1850 was unconstitutional.²²⁹

Federal authorities released Booth, but they arrested him again. Booth, and another defendant by the name of John Rycraft, was tried and convicted of violating the 1850 Fugitive Slave Act.²³⁰ After his conviction, Booth again petitioned for a writ of habeas corpus, and the Wisconsin Supreme Court again ordered his release, holding that the Fugitive Slave Act of 1850 was unconstitutional.²³¹ Booth was released from federal custody, but the federal government appealed this decision, along with the Wisconsin Supreme Court's original ruling, to the United States Supreme Court. The Wisconsin Supreme Court refused to certify the court records to the Supreme Court of the United States, denying the latter's appellate jurisdiction. The United States Supreme Court, speaking through Chief Justice Roger B. Taney, vehemently asserted its appellate jurisdiction,²³² reversed the Wisconsin Supreme Court's decisions, and upheld the constitutionality of the Fugitive Slave Act of 1850 "in all of its provisions," declaring that it was "fully authorized by the Constitution of the United States."²³³

However, the Wisconsin Supreme Court persisted in its refusal to accept the Supreme Court's appellate jurisdiction. It rejected the Court's order requiring further proceedings consistent with the Court's decision.²³⁴ Public opinion in Wisconsin supported the state's highest court. A resolution passed by the state legislature and approved by Wisconsin's Governor accused the United States Supreme Court of usurping the state's authority to determine the liberties of state inhabitants and of sacrificing the people's rights and liberties to the unlimited power of the federal government.²³⁵

President James Buchanan and his attorney general, Jeremiah S. Black, were determined to carry out the Court's decision and to require Booth to serve out his sentence and pay the fine imposed. The federal marshal re-arrested Booth in March 1860, almost a year

228. *In re Booth*, 3 Wis. 1 (1854).

229. *In re Booth*, 3 Wis. 49 (1854).

230. *United States v. Rycraft*, 27 F. Cas. 918 (D. Wis.) (No. 16,211).

231. *In re Booth and Rycraft*, 3 Wis. 179 (1854).

232. *United States v. Booth*, 59 U.S. (18 How.) 476 (1855).

233. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858).

234. *Ableman v. Booth*, 11 Wis. 498 (1859).

235. Swisher, *supra* note 79, at 668; S. S. Gregory, *A Historic Judicial Controversy and Some Reflections Suggested by It*, 11 Mich. L. Rev. 179, 191 (1913).

after the Supreme Court had affirmed his conviction, and held him in the federal customs house. Booth filed another petition for a writ of habeas corpus in the Wisconsin Supreme Court, but the court split over whether to issue the writ, and Booth's petition was not granted.²³⁶ Federal authorities kept Booth in custody after his jail term expired, because he refused to pay the \$1000 fine. After the election of 1860, Booth applied for a presidential pardon, and President Buchanan granted the pardon shortly before his term expired.²³⁷

When President Buchanan granted Booth's pardon, seven states of the deep South had already seceded and four more states soon followed them out of the Union. Secession led to the Civil War, which determined whether the states had a legal and constitutional right to withdraw from the United States, as the South maintained, or whether the Union was indestructible, as the North insisted.²³⁸ When he issued the Emancipation Proclamation, President Abraham Lincoln expanded the North's Civil War aims to emancipate the slaves of the South. The Civil War resolved militarily that the United States is indestructible. The Civil War also led directly to the abolition of slavery.

II. FUGITIVE SLAVE ORIGINS OF CONSTITUTIONAL LIBERTY

The people of the northern states exercised their sovereign power to achieve in law perhaps the most significant consequence of the Civil War: They changed the Constitution by abolishing slavery and adopting federal guarantees of citizens' rights. The Republican-controlled Thirty-Eighth Congress adopted a solution to the most divisive constitutional questions of American federalism which had led to the Civil War: whether the United States would remain a nation dedicated to slavery or become a nation dedicated to freedom; and which government, the national or the state, possessed the ultimate authority to decide the status of American inhabitants as free persons or as slave property. Their solution was the Thirteenth

236. *Ableman*, 11 Wis. at 524, note. Justice Byron Paine, who was elected to the court to replace Justice Abram D. Smith in 1859, recused himself because he had represented Booth in his earlier petitions. The other two justices divided on the question. *Id.*

237. Swisher, *supra* note 79, at 670-72; A. J. Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 Marq. L. Rev. 7, 28-32 (1957).

238. For the South's assertion of the right to secede and the underlying theory of secession, see *Mississippi Resolutions on Secession* (Nov. 30, 1860), reprinted in 1 Documents of American History 371 (Henry Steele Commager ed., 3d ed. 1947), and *South Carolina Declaration of Causes of Secession* (Dec. 24, 1860), reprinted in 1 Documents of American History, *supra*, at 372. For the North's rejection of the constitutional right to secede and theory of the indestructibility of the Union, see Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), reprinted in 1 Documents of American History, *supra*, at 385, and Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), reprinted in 1 Documents of American History, *supra*, at 393.

Amendment.²³⁹ This Congress also abolished federal executive and judicial authority to enforce the Fugitive Slave Clause by repealing the Fugitive Slave Acts of 1793 and 1850.²⁴⁰

The Thirteenth Amendment was ratified in short order by the legislatures of the states that remained loyal to the Union.²⁴¹ Whereas before the Civil War the United States was a nation dedicated to protecting slavery, with the adoption of the Thirteenth Amendment, the United States became a nation dedicated to protecting freedom. Schuyler Colfax, the Speaker of the Republican-dominated Thirty-Ninth Congress, declared the Thirteenth Amendment ratified in December 1865.²⁴² He announced that, pursuant to the promise of freedom proclaimed in the Declaration of Independence, President Lincoln's Emancipation Proclamation, and the Thirteenth Amendment, a principle objective of this session of Congress was to make the nation's promise of freedom a practical reality for all Americans.²⁴³ Congress fulfilled this objective in the spring of 1866 when it enacted the Civil Rights Act of 1866,²⁴⁴ and adopted the proposed Fourteenth Amendment and sent it to the states for ratification. Congress drafted the Fourteenth Amendment, in part, to ensure the constitutionality of the Civil Rights Act it had just enacted over President Andrew Johnson's veto. The Civil Rights Act largely defined the scope of Congress's legislative powers under the Fourteenth Amendment. Congress fully debated the nature of United States citizenship, the rights of United States citizens, and Congress's constitutional authority to enforce citizens' rights when it considered the Civil Rights Act of 1866, prior to its consideration of the Fourteenth Amendment.

A. The Civil Rights Act of 1866 Is Modeled on the Fugitive Slave Act of 1850

Proponents of the Civil Rights Act and the Fourteenth Amendment asserted a view of Congress's remedial powers to enforce citizens' rights that the Rehnquist Court has overlooked in its considerations of

239. U.S. Const. amend. XIII. The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Id.

240. Campbell, *supra* note 13, at 194-95; Morris, *supra* note 13, at 218; 3 Henry Wilson, *History of the Rise and Fall of the Slave Power in America* 395-402 (1877). Congress repealed the Fugitive Slave Acts on June 28, 1864. *Id.*

241. Ratification of the Thirteenth Amendment by the former Confederate States of America was a condition for their readmission to the Union.

242. Cong. Globe, 39th Cong., 1st Sess. 5 (1865) (Rep. Colfax).

243. *Id.*

244. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

the legislative history of the Fourteenth Amendment. These proponents insisted that, if Congress had the constitutional power to enforce the property rights of slave owners, Congress unquestionably possessed the constitutional power to enforce the human rights of free men. Thus, Representative James Wilson of Iowa, the Civil Rights Bill's floor manager in the House of Representatives, introduced the bill to that chamber, proclaiming that its objective was to enforce the constitutionally secured right of freedom through the power Congress had previously exercised to enforce the constitutionally secured right of slavery. He stated that the enforcement provisions of the Bill "are based on the act of September 18, 1850, commonly known as the 'fugitive slave law,' the constitutionality of which has been affirmed over and over again by the courts."²⁴⁵ He sarcastically commented that "we have had an indorsement of" the enforcement structure of the Civil Rights Bill "by our Democratic friends for very many years. Those provisions are made up of the several sections of the old fugitive slave law."²⁴⁶ Wilson announced that he was

not willing that all of these precedents, legislative and judicial, which aided slavery so long, shall now be brushed into oblivion when freedom needs their assistance. Let them now work out a proper measure of retributive justice by making freedom as secure as they once made slavery hateful. I cannot yield up the weapons which slavery has placed in our hands now that they may be wielded in the holy cause of liberty and just government. We will turn the artillery of slavery upon itself.²⁴⁷

Senators and representatives widely acknowledged the Fugitive Slave Act origins of The Civil Rights Act of 1866. Senator Lyman Trumbull of Illinois was the 1866 statute's principle author and Senate floor manager. Senator Thomas A. Hendricks, Democrat from Indiana and a member of the Senate Judiciary Committee which drafted the bill, noted that Trumbull's Civil Rights Bill "was heralded to the country" during Congress's Christmas break. The nation was told:

that a great achievement was to be expected from the Senator from Illinois; that he was going to introduce a bill as soon as Congress reassembled recognizing the civil rights of the colored people as

245. Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson).

246. *Id.* at 1295.

247. *Id.* at 1118. Wilson repeated these sentiments a little over a week later. *Id.* at 1295. Republican Representative Burton C. Cook of Illinois, who was also a member of the House Judiciary Committee, proclaimed that the nation was morally obligated to fulfill its wartime pledge to secure the freedom of the former slaves. Cook stated that "the faith of this nation, when we asked [the freedmen] to take up arms in our defense, was pledged to guaranty freedom to them." *Id.* at 1124 (Rep. Cook). Cook trusted that Congress would say to the freedmen that "the honor and faith of the nation were pledged for your protection, we will maintain your freedom, and redeem that pledge" by enacting the Civil Rights Act. *Id.* at 1125.

equal to the civil rights of the white people; that he was going to *so frame his bill as that these rights should be positively and certainly secure, and that to accomplish this he had adopted the framework and the fashion of the former fugitive slave law.* That was regarded as a great achievement, and much credit was claimed for the Senator because when he came to prosecute and follow white men he had adopted the language and framework of a law which was intended to recapture runaway slaves – a law which in its framework and details was denounced as most unjust and dangerous. And yet it was regarded as a feat and an accomplishment for the Senator from Illinois to incorporate into this bill the language of that law.²⁴⁸

Senator Trumbull readily acknowledged that the Fugitive Slave Act of 1850 was the source of many of the Civil Rights Bill's provisions:

Most of [its provisions] are copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again. The act that was passed at that time for the purpose of punishing persons who should aid negroes to escape to freedom is now to be applied by the provisions of this bill to the punishment of those who shall undertake to keep them in slavery.²⁴⁹

Congressional Democrats opposed the federal enforcement of civil rights. They used the antebellum Republicans' opposition to the Fugitive Slave Acts against them. Senator Hendricks, for example, attacked Republican supporters of the Civil Rights Bill, stating:

[W]e are to reenact a law that nearly all of you said was wicked and wrong; and for what purpose? Not to pursue the negro any longer; not for the purpose of catching him; not for the purpose of catching the great criminals of the land; but for the purpose of placing it in the power of any deputy marshal in any county of the country to call upon you and me and all the body of the people to pursue some white man who is running for his liberty because some negro has charged him with denying to him equal civil rights with the white man.²⁵⁰

Hendricks predicted that the Civil Rights Bill would resurrect the same agitation that the Fugitive Slave Acts engendered, and that it would produce even greater resistance because it authorized the use

248. *Id.* at 601 (Sen. Hendricks) (emphasis added).

249. *Id.* at 475 (Sen. Trumbull). Senator Trumbull repeated that the genesis of the enforcement provisions of the Civil Rights Act was in the Fugitive Slave Act of 1850 when Congress was deciding to pass the Civil Rights Act over President Johnson's veto. *See id.* at 1759-60. Proponents and opponents of the Civil Rights Act on several occasions referred to its Fugitive Slave Act origins. *See id.* at 475, 476; *id.* at 480 (Sen. Saulsbury); *id.* at 500 (Sens. Cowan and Fessenden); *id.* at 505 (Sen. Johnson); *id.* at 601 (Sen. Hendricks); *id.* at 602-03 (Sen. Lane of Indiana); *id.* at 604 (Sen. Cowan); *id.* at 604 (Sen. McDougall); *id.* at 605 (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.* at 1158 (Rep. Eldridge); *id.* at 1158-59 (Rep. Windom); *id.* at 1294 (Rep. Wilson); *id.* at 1759-60 (Sen. Trumbull).

250. *Id.* at 601 (Sen. Hendricks).

of federal military force to prevent violations of, and to enforce, the 1866 statute.²⁵¹

Republicans used the Democrats' support of the Fugitive Slave Act against them, arguing that the power of the federal government, which was so odious when used to enforce the property rights of slave owners, had become "highly meritorious" now that Congress sought to use it to protect the human rights of freemen.²⁵² Senator Hendricks' comments prompted a rejoinder from his senatorial colleague from Indiana, Republican Henry S. Lane.²⁵³ Acknowledging the reversal of positions taken by Republicans and Democrats on the policy of federal enforcement of constitutional rights, Lane retorted that he had not heard any objections from Hendricks, "or from any of those associated with him, of the provisions of that fugitive slave law which was enacted in the interest of slavery and for purposes of oppression."²⁵⁴ Moreover, Lane proudly admitted that he had never allowed "a suitable opportunity to escape [him] to denounce the monstrous character of that fugitive slave act of 1850... [whose] provisions were odious and disgraceful... when applied in the interest of slavery, when the object was to strike down the rights of man."²⁵⁵ It is true that Republicans "have pressed into the service the machinery of the fugitive slave law" and that many of the provisions of the Civil Rights Bill were taken from the Fugitive Slave Act of 1850, Lane readily conceded. But he now supported the remedies and enforcement framework he had earlier opposed because "the purpose is changed. These provisions are in the interest of freemen and of freedom, and what was odious in the one case becomes highly meritorious in the other."²⁵⁶ Lane adamantly proclaimed: "I stand by every provision of this bill, drawn as it is from that most iniquitous fountain, the fugitive slave law of 1850."²⁵⁷

251. *Id.*

252. *Id.* at 602.

253. *Id.*

254. *Id.* (Sen. Lane of Indiana). In the House of Representatives, Republican William Windom of Minnesota similarly challenged Democratic Representative Charles Eldridge of Wisconsin. Windom rebuked Eldridge and the Democrats for opposing the Civil Rights Act when they had given such strong support to the Fugitive Slave Act of 1850:

the entire Democratic party, with which the gentleman acts, has always, I believe, indorsed that law; and if I am not mistaken the gentleman himself indorsed it, for he voted in the last Congress against its repeal. There certainly has been no law which the Democratic party has commended more than that same fugitive slave law, and since I have been in Congress the southern wing of the party declared the non-execution of it as sufficient cause to disrupt this Union.

Id. at 1158-59 (Rep. Windom).

255. *Id.* at 602 (Sen. Lane of Indiana).

256. *Id.*

257. *Id.*

2004] *AN OVERLOOKED MORAL ANOMALY* 209

Senator Trumbull affirmed Senator Lane's distinction between the use of plenary federal power to enforce the constitutional rights of free men, which Republicans approved, from its use to enforce the constitutional rights of slaveholders. Acknowledging "[the] great achievement" that was "heralded to the country" of incorporating "the same provisions" of "the old fugitive slave law" into his Civil Rights Bill, he rejected the argument:

[T]hat if those provisions of law were odious and wicked and wrong which provided for punishing men for aiding the slave to escape, therefore they must be wicked and wrong now when they are employed for the punishing a man who undertakes to put a person into slavery. Sir, that does not follow at all.²⁵⁸

It is the nature of the constitutional right and the consequences of its enforcement and the purposes to which the law is applied which makes it wicked or righteous, not the structure of its enforcement by the federal government, Trumbull exhorted.

A law may be iniquitous and unjust and wrong which undertakes to punish another for doing an innocent act, which would be righteous and just and proper to punish a man for doing a wicked act. . . . True, the features of the fugitive slave law were abominable when they were used for the purpose of punishing, not negroes as the Senator from Indiana [Hendricks] says, but white men. The fugitive slave law was enacted for the purpose of punishing white men who aided to give the natural gift of liberty to those who were enslaved. Now, sir, we propose to use the provisions of the fugitive slave law for the purpose of punishing those who deny freedom, not those who seek to aid persons to escape to freedom. The difference was too clearly pointed out by the colleague of the Senator [Mr. Lane] to justify me in taking further time in alluding to it.²⁵⁹

Republicans vehemently adhered to their condemnation of the Fugitive Slaves Acts, because they were immoral and wrong, not because of their underlying principles of federal power. It was not the exercise of plenary congressional power Republicans found objectionable. Rather, it was the purposes for which Congress's plenary power was used that made the Fugitive Slave Acts wicked.

B. The Supreme Court's Interpretation of Congress's Power To Enforce the Constitutional Rights of Slave Owners Defines Congress's Power To Enforce the Constitutional Rights of Free Men

As the framers modeled the remedies and the enforcement structure of the Civil Rights Act of 1866 on the Fugitive Slave Acts of 1793 and 1850, so they used the theory of broad implied power that

258. *Id.* at 605 (Sen. Trumbull).

259. *Id.*

the Marshall Court adopted in *McCulloch v. Maryland*²⁶⁰ and the Taney Court applied in *Prigg v. Pennsylvania*²⁶¹ as a theory of plenary congressional power to enforce the human rights secured by the Constitution.

As principal author and Senate floor manager of the Civil Rights Bill, Senator Trumbull applied the *McCulloch* and *Prigg* theories of constitutional interpretation and delegation to explain how the Thirteenth Amendment delegated plenary power to Congress to enact the Civil Rights Bill. Trumbull interpreted the first section of the Thirteenth Amendment as the *Prigg* Court interpreted the first clause of the Fugitive Slave Clause. Recall that *Prigg* interpreted the Fugitive Slave Clause's negative prohibition against the states from discharging a slave from the service or labor owed to the master as a guarantee of a positive and absolute property right of slave owners, which delegated to Congress plenary power to enforce this property right.²⁶² Trumbull likewise interpreted the Thirteenth Amendment's section 1 prohibition against slavery as a positive and absolute guarantee of liberty which delegated plenary power to Congress to enforce liberty and the natural rights of free men.²⁶³ Having served on the Senate Judiciary Committee of the Thirty-Eighth Congress which drafted the Thirteenth Amendment, Trumbull authoritatively proclaimed that civil rights "are rights which the first clause of the constitutional amendment meant to secure to all; and to prevent the very cavil which [opponents argue], that Congress would not have power to secure them, the second section of the amendment was added."²⁶⁴ Consequently, he did not think the amendment's second

260. 17 U.S. (4 Wheat.) 316, (1819); accord Steven A. Engel, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 Yale L.J. 115, 117 (1999) (arguing that the framers of the Fourteenth Amendment "expected courts to review acts of Congress under the deferential standard [of judicial review] laid out by Chief Justice Marshall in *McCulloch v. Maryland*," deferring to Congress's broad powers to enforce the Amendment's substantive rights whenever in its discretion these rights were infringed). For a discussion of *McCulloch*'s theory of implied powers, see *supra* notes 55-76, 104 and accompanying text.

261. 41 U.S. (16 Pet.) 539 (1842). See *supra* notes 78-144 and accompanying text for a discussion of the *Prigg* case.

262. Justice Story declared for a unanimous Court that the Fugitive Slave Clause "manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain." *Prigg*, 41 U.S. (16 Pet.) at 612. Asserting that the Fugitive Slave Clause guaranteed "a positive and absolute right," Story proclaimed the doctrine of constitutional delegation of plenary power to enforce the right: "If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted) the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it." *Id.* at 615; see *supra* note 102 and accompanying text.

263. Cong. Globe, 39th Cong., 1st Sess. 43 (1865) (Sen. Trumbull). I discuss this part of Justice Story's opinion in *supra* notes 98-102.

264. Cong. Globe, 39th Cong., 1st Sess. at 43. Senator Jacob Howard also served

2004] *AN OVERLOOKED MORAL ANOMALY* 211

section was necessary, because, as the Supreme Court had held in *McCulloch* and *Prigg*, “wherever a power was conferred upon Congress there was also conferred authority to pass the necessary laws to carry that power into effect under the [Necessary and Proper] clause.” Consequently, Trumbull maintained that “Congress would have had the power, even without the second clause, to pass all laws necessary to give effect to the provision making all persons free.”²⁶⁵ Section 2 of the Thirteenth Amendment “was intended to put it beyond cavil and dispute.”

Trumbull applied *McCulloch*’s theory of constitutional delegation as the Taney Court had applied it in *Prigg*, and explained how section 1 of the Thirteenth Amendment specifically delegated plenary power to Congress to define and secure the civil liberties of all Americans, not only the civil rights of the former slaves. “Liberty and slavery are opposite terms; one is opposed to the other,” Trumbull stated.²⁶⁶ In prohibiting slavery, “the Constitution secures freedom to all Americans.”²⁶⁷ “That amendment declared that all persons in the United States should be free. This [civil rights] measure is intended to

on the Senate Judiciary Committee that drafted the Thirteenth Amendment and “recollect[ed] very distinctly what were the views entertained by members of that committee at the time it was under consideration before them.” *Id.* at 503 (Sen. Howard). He insisted “that it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under our consideration.” *Id.* He said they foresaw that emancipation in the rebel states “would encounter the most vehement resistance on the part of the old slaveholders.” *Id.* It was easy to see that they would use all of the powers of the state governments to restrain and circumscribe “the rights and privileges which are plainly given by . . . [the Thirteenth Amendment] to the emancipated negro.” *Id.* Senator Howard then expressed his understanding of the civil rights bill as securing “the ordinary rights of [freemen].” *Id.* at 504. Howard’s expressed intention of securing “the ordinary rights of [freemen]” elaborates his conception in the Fourteenth Amendment debates of securing the fundamental rights of United States citizens, and is consistent with his understanding that the privileges and immunities of United States citizens include the rights guaranteed by the Bill of Rights. *See id.* at 2765 (stating that the privileges and immunities of United States citizens secured by the Fourteenth Amendment include the privileges and immunities secured by the Comity Clause, to which “should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution”). Representative Thayer stated, “I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee.” *Id.* at 1151 (Rep. Thayer). Specifically, Thayer stated that he believed he had “given to Congress ability to protect and guaranty the rights which the first section gave them,” by which he meant “the rights of free citizens.” *Id.*

265. *Id.* at 43 (Sen. Trumbull).

266. *Id.* at 474.

267. *Id.*; *see also id.* at 504 (Sen. Howard) (declaring that the “intention [of the Thirteenth Amendment] was to make [the freedman] the opposite of a slave, to make him a freeman.”); *id.* at 1124 (Rep. Cook) (stating that under the Thirteenth Amendment “Congress shall have power to secure the rights of freemen to those men who had been slaves.”); *id.* at 1152 (Rep. Thayer) (stating that “[t]he amendment to the Constitution gave liberty to all”).

give effect to that declaration and secure to all persons within the United States practical freedom.”²⁶⁸

He admonished that Congress had to have the same plenary power to enforce the constitutional rights that inhere in a state of freedom as it had to enforce the constitutional rights of slave owners: “Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country.”²⁶⁹ Trumbull insisted that:

under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure *freedom to all people in the United States*.²⁷⁰

He confidently predicted that, “With this bill passed into a law and efficiently executed we shall have secured freedom in fact and equality in civil rights to *all persons in the United States*.”²⁷¹ The Thirteenth Amendment delegates to Congress plenary power to secure to every American the fundamental rights of free men because it is a universal guarantee of liberty. In addition, since the Thirteenth Amendment guarantees liberty to all Americans, the enforcement of the fundamental rights which inhere in liberty is one of the ends the Constitution delegates to Congress to achieve, and to that end the Constitution delegates the requisite power to achieve it.

As the Civil Rights Bill’s floor leader in the House, Representative Wilson made the most detailed arguments from Supreme Court precedents in support of Congress’s power to define the rights of free men and to provide federal remedies for their enforcement. Quoting the Thirteenth Amendment, Wilson proclaimed, “Here, certainly, is an express delegation of power” to enact the Civil Rights Bill.²⁷² Asking rhetorically, “How shall it be exercised? Who shall select the means,” Wilson answered, “Happily, sir, we are not without light on these questions from the Supreme Court.” He quoted from “the celebrated case of *McCulloch vs. The State of Maryland*,” in which Chief Justice Marshall stated that, though “the powers of the Government are limited, and that its limits are not to be transcended,” the Constitution nevertheless “allow[s] to the national Legislature that discretion” to exercise the powers it confers “to perform the high duties assigned to it in the manner most beneficial to

268. *Id.* at 474 (Sen. Trumbull).

269. *Id.* at 475.

270. *Id.* (emphasis added).

271. *Id.* at 476 (emphasis added).

272. *Id.* at 1118 (Rep. Wilson).

the people.”²⁷³ It is here that Chief Justice Marshall uttered his famous principle of implied powers, which Wilson quoted: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [sic] with the letter and spirit of the Constitution, are constitutional.”²⁷⁴ Applying Marshall’s interpretation of constitutional delegation to interpret the Thirteenth Amendment, which the *Prigg* Court applied to interpret the Fugitive Slave Clause, Wilson asserted that no one can question that the Civil Rights Bill is an appropriate “enforcement of the power delegated to Congress” by the Thirteenth Amendment. “The end is legitimate,” he proclaimed, “because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen.”²⁷⁵ Thus, Wilson concluded that the enforcement of constitutionally secured rights is one of the ends for which Congress possesses plenary power.

Wilson repeated and elaborated this theory in arguing that the Bill of Rights also delegated to Congress constitutional authority to enact the Civil Rights Act. He made this argument in response to Representative John A. Bingham’s expressed belief that the Civil Rights Bill was unconstitutional precisely because it purported “to enforce in its letter and its spirit the bill of rights as embodied in [the] Constitution.”²⁷⁶ Wilson answered Bingham and others who

273. Contrast Chief Justice Marshall’s and Representative Wilson’s understanding of Congress’s legislative powers with that of Justice Kennedy’s narrow interpretation of Congress’s powers under *McCulloch* in *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

274. Cong. Globe, 39th Cong., 1st Sess. at 1118 (Rep. Wilson) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 319, 420 (1819)). Marshall derived this principle from James Madison’s *The Federalist No. 44*.

275. Cong. Globe, 39th Cong., 1st Sess. at 1118 (Rep. Wilson). Wilson was here defending section 2 of the Civil Rights Bill, which imposed criminal penalties on persons who deprived a citizen of any civil right secured in the bill’s section 1.

What means more appropriate could be selected than that which punishes a man by commonly inflicted punishments through the ordinary channels of the law and the courts for depriving the citizen of those rights which, while he enjoys them, are his sure defense against efforts to reduce him to slavery?

A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery.

Id. Wilson defined citizens’ rights as “the absolute rights of individuals [which] may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property” which the people of the United States have “frequently declared . . . to be natural, inherent, and inalienable.” *Id.* (citation omitted). Wilson included the Bill of Rights guarantees within his definition of the absolute and inalienable rights of United States citizens. *Id.* at 1119; see *infra* notes 278-85 and accompanying text.

276. Cong. Globe, 39th Cong., 1st Sess. at 1291 (Rep. Bingham). Bingham agreed with his Republican colleagues that “civil rights” included the rights guaranteed in the Bill of Rights and that these rights are rights of United States citizenship. He also agreed “that the enforcement of the bill of rights is the want of the Republic.” *Id.* However, he did not share his Republican colleagues’ view that, because civil rights are the rights of United States citizens, Congress possessed the power to enforce

questioned Congress's power to enforce the Bill of Rights, quoting liberally from *Prigg v. Pennsylvania* to show that Congress possessed

them. *Id.* Because of judicial precedents interpreting the Bill of Rights as limitations upon the powers of Congress, but not upon the states, Bingham believed that Congress did not possess the power to enforce the Bill of Rights without a constitutional amendment delegating this power to Congress. *Id.* Although he supported Wilson's objective of enforcing the Bill of Rights, he could not support the Civil Rights bill because Congress did not possess the power to enact it, in Bingham's judgment. *Id.* He intended his constitutional amendment to empower Congress to secure citizens' constitutionally secured rights, including the rights guaranteed by the Bill of Rights, by compelling state officials to perform their constitutionally imposed duty to enforce the guarantees of the Bill of Rights. Bingham declared that he could not support the Civil Rights Bill precisely because it attempted to enforce the Bill of Rights, which he believed the Supreme Court had ruled Congress did not possess the power to enforce. *Id.* Some of the earliest studies of the origins of the Fourteenth Amendment concluded that its framers intended the amendment to secure the Bill of Rights against discriminatory state action. See 1 John W. Burgess, *Political Science and Comparative Constitutional Law* 224-25 (1890); John W. Burgess, *Reconstruction and the Constitution* 70-77, 252-58 (Negro University Press 1970) (1902); Horace Flack, *The Adoption of the Fourteenth Amendment* 19-22, 40, 45, 57, 68-69, 94, 152-53 (1908); William D. Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States* 58-59 (1898). Ever since Justice Hugo Black surveyed the intent of the framers of the Fourteenth Amendment and asserted his view that the framers intended to incorporate the Bill of Rights into the Fourteenth Amendment, this issue has been debated by scholars. Justice Black asserted his view in his dissenting opinion in *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting). Scholarly debate on this issue quickly ensued. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 *Stan. L. Rev.* 5 (1949) [hereinafter Fairman, *Does the Fourteenth Amendment*]. Charles Fairman disputed Justice Black's analysis and conclusion. *Id.* He was rebutted by William Crosskey. William Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 *U. Chi. L. Rev.* 1 (1954). Fairman offered a brief response. Charles Fairman, *A Reply to Professor Crosskey*, 22 *U. Chi. L. Rev.* 144 (1954). The issue was the dormant for almost a quarter of a century. The publication of Raoul Berger, *Government By Judiciary* (1977), revived the debate. Berger surveyed the Fourteenth Amendment's legislative history and concluded that the Warren Court interpreted the Fourteenth Amendment far more broadly than its framers intended. He adamantly—one might say, polemically—insisted that the framers did not intend to incorporate the Bill of Rights into the Fourteenth Amendment. To the contrary, they sought to enforce only the specific rights enumerated in the Civil Rights Act of 1866, in Berger's view. Michael Kent Curtis answered Berger with a strong assertion of the incorporation theory, and a debate in law reviews between Curtis and Berger ensued. Michael K. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 *Wake Forest L. Rev.* 45 (1980); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 *Ohio St. L.J.* 435 (1981); Michael K. Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 *Conn. L. Rev.* 237 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis's Response*, 44 *Ohio St. L.J.* 1 (1983). These scholars subsequently published their views on the subject of incorporation in books. Raoul Berger, *The Fourteenth Amendment and The Bill of Rights* (1989) [hereinafter Berger, *The Fourteenth Amendment*]; Curtis, *No State Shall Abridge*, *supra* note 8. More recently, Akhil Reed Amar has worked out a "refined incorporation" theory of the Fourteenth Amendment which argues that the Fourteenth Amendment incorporated and transformed the original Bill of Rights between individual rights provisions and structural guarantees. Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

the power to enforce the Bill of Rights. “And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights,” Wilson began. “In the case of *Prigg vs. The Commonwealth of Pennsylvania*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case.”²⁷⁷ Wilson read from Story’s opinion in *Prigg*, where Story paraphrased Chief Justice Marshall’s opinion in *McCulloch* and argued that enforcing constitutionally secured rights is one of the ends the Constitution relegated to the federal government:

“[T]he fundamental principle applicable in all cases of this sort would seem to be that where the end is required the means are given; and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.”²⁷⁸

The critical point for Story, and for Wilson, was that “‘The [Fugitive Slave] clause is found in the national Constitution and not in that of any State. It does not point out any State functionaries or any State action to carry its provisions into effect.’”²⁷⁹ Consequently, the duty to enforce the Fugitive Slave Clause and the property right it secured was a federal duty which must be performed by federal officials in federal institutions.

Wilson, like Story, ultimately relied on James Madison’s *Federalist No. 43* as authority for, and as the description of Congress’s plenary remedial power, to enforce constitutionally secured rights. Wilson proclaimed the *Prigg* Court’s conclusion, which Justice Story derived from Madison’s *Federalist No. 43*, that it is Congress’s constitutional right and duty to prescribe the remedies for violations of constitutional rights, unless the Constitution expressly prohibits the federal government from acting.²⁸⁰ Wilson quoted Justice Story quoting Madison’s assertion that the remedies for constitutional rights violations must be provided by the federal government:

277. Cong. Globe, 39th Cong., 1st Sess. at 1294 (Rep. Wilson). Chief Justice Taney reached the same conclusion in *Dred Scott* with respect to the property right guaranteed by the Due Process Clause of the Fifth Amendment. He concluded that Congress not only could not exclude slavery from the territories of the United States, but that Congress was also duty-bound to enforce the slave owners’ right to slave property. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

278. Cong. Globe, 39th Cong., 1st Sess. at 1294 (Rep. Wilson) (quoting *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 612, 615 (1842)).

279. *Id.*

280. Clearly, the framers of the Civil Rights Act of 1866 and of the Fourteenth Amendment asserted a different conception of Madisonian first principles than that affirmed by the Rehnquist Court in *United States v. Lopez* 514 U.S. 549, (1995) (quoting *The Federalist No. 45*). Chief Justice Rehnquist there stated that the federal government’s powers are “‘entirely the creature of the Constitution,’” and that Congress’s powers are limited to those “‘few and defined’” powers the Constitution delegates to it. *Id.* at 551. Congress could not legislate unless the Constitution clearly delegated the power to do so. *Id.*

“The remarks of Mr. Madison, in the *Federalist*, (No. 43), would seem in such cases to apply with peculiar force.’ ‘A right,’ says he, ‘implies a remedy: and where else would the remedy be deposited than where it is deposited by the Constitution?’ meaning, as the context shows, in the Government of the United States.”²⁸¹

Wilson then quoted Story’s understanding of *Federalist No. 43*:

“[T]he natural, if not the necessary, conclusion is, that the national Government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution.”²⁸²

Wilson then applied Madison’s and Story’s understanding of Congress’s constitutional powers to the Bill of Rights and proclaimed:

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine . . . as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy. The citizen is entitled to the right [sic] of life, liberty, and property. . . . The power is with us to provide the necessary protective remedies. . . . They must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government.²⁸³

Other legislators acknowledged the intent of supporters of the Civil Rights Bill to enforce rights guaranteed in the Bill of Rights, especially the rights to life, liberty, and property guaranteed by the Fifth Amendment’s Due Process Clause.²⁸⁴

281. *Id.* (quoting *Prigg*, 41 U.S. (16 Pet.) at 615).

282. Cong. Globe, 39th Cong., 1st Sess. at 1294 (Rep. Wilson) (quoting *Prigg*, 41 U.S. (16 Pet.) at 616).

283. *Id.* Wilson may also have been asserting a principle declared by Kent in the lecture on personal rights from which Wilson quoted in defining the rights of United States citizens. Kent asserted that “Bills of rights are part of the muniments of freemen, showing their title to protection.” I James Kent, *Commentaries on American Law* 607 (8th ed. 1854). This succinct statement is precisely the principle Wilson asserted as a basis for the federal government’s power to protect the fundamental rights of freemen as rights of United States citizens.

284. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. at 1291-92 (Rep. Bingham) (stating that he did “not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic,” but expressing the view that Congress did not possess the power to do so without a constitutional amendment authorizing it, such as the proposed amendment he advocated); *id.* at 1152, 1153 (Rep. Thayer) (arguing that Congress had the power to enforce the Bill of Rights and that the Civil Rights Bill was intended to do so); *id.* at 1270 (Rep. Kerr) (acknowledging supporters’ intent to enforce the Bill of Rights, but arguing that the Supreme Court’s decision in *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) held that the Bill of

As Wilson's arguments demonstrate, the framers did not rely exclusively on the Thirteenth Amendment as the source of Congress's power to enact the Civil Rights Act and to secure the fundamental rights of Americans. Many of the proponents of the Civil Rights Act argued that Congress was also authorized to enact the statute by the Privileges and Immunities Clause of Article IV, known as the Comity Clause, in addition to the Bill of Rights generally, and the Fifth Amendment's Due Process Clause specifically. Applying *McCulloch's* and *Prigg's* theories of constitutional interpretation and delegation, they argued that, since these constitutional provisions secured the fundamental rights of all Americans, they also delegated constitutional power to Congress to enforce these rights by enacting statutes like the Civil Rights Act.

For example, Senator Trumbull argued that the Comity Clause authorized Congress to enforce the privileges and immunities of United States citizens. Although he cited a number of authorities to make this point,²⁸⁵ he considered Justice Bushrod Washington's

Rights were only limitations on Congress's legislative powers, and maintaining that "[t]here are no guarantees in these limitations in the Constitution and therefore no congressional power to enforce them"); *id.* at 1270 (Rep. Thayer) (answering Kerr by distinguishing the *Barron* decision as speaking only to limitations on the powers granted to Congress, but not addressing the question of Congress's power to enforce the Bill of Rights); *id.* at 1833 (Rep. Lawrence) (arguing that the Civil Rights Bill secures the rights guaranteed in the Bill of Rights, explicitly the rights of life, liberty, and property "which the Constitution solemnly declares every citizen shall have."); *id.* at 476 (Sen. McDougall) (asking whether "this bill does not go further than to give protection to the enjoyment of life and liberty and the pursuit of happiness and the protection of the courts, and to have justice administered to all"?); *id.* at 478 (Sen. Saulsbury) (suggesting that the Civil Rights Bill was intended to protect life, liberty, and property); *id.* at 500 (Rep. Cowan) (stating that the Constitution needs to be amended before Congress can secure to all men the rights to life, liberty, and property); *id.* at 1120 (Rep. Rogers) (stating that the purpose of the Civil Rights Bill is "to extend to the negro all the rights of life, liberty, and property . . . [a]nd extend to him every privilege that ought to be guaranteed [sic] to any man in the United States for the protection of his liberty, his life, and his property"); *id.* at 1156-57 (Rep. Thornton) (acknowledging that proponents claimed authority to enact the Civil Rights Bill "by virtue of the fifth amendment, which provides that no man shall be deprived of life, liberty, and property without due process of law"). Representative Delano referred to his proposed constitutional amendment as, "requiring each State to provide for the security of life, liberty, and property, and the rightful pursuit of happiness, and giving to Congress power to enforce these rights where the States withheld them," and concluded that his proposed amendment

is a better theory of proceeding on this subject than the one introduced by my colleague, which proposes to vest that power in Congress at once; because I want Congress to exercise no more power than is absolutely necessary, and I would not allow it to go in the first instance to secure these rights, but allow it to go only when the States refuse to apply and give such security under the fundamental law of the nation.

Id. at app. 158-59 (Rep. Delano).

285. *Id.* at 474 (Sen. Trumbull). Senator Trumbull quoted Justice Joseph Story's Commentaries on the Constitution of the United States and stated that the Comity Clause secures to United States citizens

opinion in *Corfield v. Coryell*²⁸⁶ the most authoritative interpretation of the Comity Clause, characterizing it as the “most elaborate [decision] upon this clause of the Constitution . . . because it will be seen that he enumerates the very rights belonging to a citizen of the United States which are set forth in the first section of this bill.”²⁸⁷ Significantly, Justice Washington stated that Americans were to exercise and enjoy these rights subject “to such restraints as the Government may justly prescribe for the general good of the whole.”²⁸⁸ He thus attributed to the national government the police power to regulate the manner in which citizens were to enjoy and exercise these fundamental rights.

Relying on *Corfield v. Coryell* and the broad theory of implied powers the Supreme Court adopted in *McCulloch* and applied in *Prigg*, Trumbull interpreted the Privileges and Immunities Clause as delegating to Congress the power to secure to United States citizens “such fundamental rights as belong to every free person.”²⁸⁹

[s]uch fundamental rights as belong to every free person. Story, in his Commentaries, in commenting upon this clause of the Constitution of the United States, says: “The intention of this clause was to confer on citizens, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the [citizens] of the same State would be entitled to under the like circumstances.”

Id. (quoting 3 Story, *supra* note 47, at 674-75). Trumbull also noted that there had been several judicial decisions interpreting the Comity Clause. He paraphrased the decision in *Campbell v. Morris*, 3 Md. (3 H. & McH.) 535 (1797), and declared that the Maryland court decided that this clause:

meant that the *citizens of all the States* should have the peculiar advantage of acquiring and holding real as well as personal property and that such property should be *protected and secured* by the laws of the State in the *same manner* as the property of the citizens of the State is protected.

Cong. Globe, 39th Cong., 1st Sess. at 474 (Sen. Trumbull) (emphasis added). He also referred to an Indiana court decision of 1797 and quoted a Massachusetts court opinion, *Abbott v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827), which interpreted the Comity Clause in the same way as the Maryland court.

286. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

287. Cong. Globe, 39th Cong., 1st Sess. at 474-75 (Sen. Trumbull). It should be noted that Trumbull quoted precisely that part of Justice Washington’s opinion in *Corfield* to describe the privileges and immunities individuals possessed as citizens of the United States that Justice Samuel F. Miller, in the *Slaughter-House Cases*, quoted to describe the privileges and immunities of state citizenship. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-76 (1873). *Corfield* was the primary legal authority on which Justice Miller based the Court’s decision in *Slaughter-House* that the framers of the Fourteenth Amendment did not intend to protect the fundamental rights of citizens, but rather left these rights to the exclusive jurisdiction of the states. *Id.* at 73-76. Later in the debates Trumbull explicitly said that *Corfield*, and the other cases he presented, “held that the *rights of a citizen of the United States* were certain great fundamental rights, such as the right to life, to liberty, and to avail one’s self of all the laws passed for the benefit of the citizen to enable him to enforce his rights.” Cong. Globe, 39th Cong., 1st Sess. at 600 (Sen. Trumbull).

288. Cong. Globe, 39th Cong., 1st Sess. at. 475 (Sen. Trumbull) (quoting *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)).

289. *Id.* at 474.

However, the Privileges and Immunities Clause secures citizens' rights only when a citizen of one state claims these rights when in another state. Thus, Senator Trumbull declared that the Privileges and Immunities Clause authorizes Congress to protect a United States citizen of one state to travel to another state to exercise the fundamental rights it secures.²⁹⁰ This provision does not authorize Congress to protect the rights of citizens within the states in which they are domiciled. Although Trumbull did not rely on the Privileges and Immunities Clause as constitutional authority for Congress to enforce citizens' rights in their states of residence, he nevertheless asserted that this provision authorized Congress to enforce citizens' rights when in another state.²⁹¹ He declared that, under the legal authorities he cited to interpret the rights secured to United States citizens by the Privileges and Immunities Clause,²⁹² Congress "manifest[ly]" possessed the power to protect Samuel Hoar of Massachusetts in his right to go to South Carolina for the purpose of filing a suit in the South Carolina courts.²⁹³ Under these authorities, it

290. See, e.g., *id.* at 600.

291. Even some opponents of the Civil Rights Bill thought the Privileges and Immunities Clause authorized Congress to enforce the fundamental rights of United States citizens when in a state other than their state of residence. For example, Senator Garrett Davis, Democrat from Kentucky and a vigorous opponent of the Civil Rights Bill, maintained that the only power Congress possessed to enforce citizens' rights was delegated by the Privileges and Immunities Clause. He therefore proposed a bill to enforce the Privileges and Immunities Clause by imposing civil liability and criminal penalties against anyone who violated the privileges or immunities secured by the Constitution. Davis's proposal quoted the Privileges and Immunities Clause and imposed a civil remedy of damages and a criminal penalty of a fine of up to \$1000 and/or imprisonment for up to one year against "any person or persons who shall subject or cause to be subjected a citizen of any of the United States to the deprivation of any privilege or immunity in any other State to which such citizen is entitled under the Constitution and laws of the United States." *Id.* at 595 (Sen. Davis). Davis explained that his bill was

to embody [the Privileges and Immunities Clause] of the Constitution in the law, and to declare that *the rights secured by this provision of the Constitution* shall be made good to each citizen of the United States by legislative enactment, and by an enactment having the sanction of the *same penalty which the Honorable Senator from Illinois has proposed to attach to his [Civil Rights] bill.*"

Id. (emphasis added).

Like Trumbull, Davis quoted at length from Justice Washington's opinion in *Corfield*, agreeing with Trumbull that Justice Washington "enumerates the very rights belonging to a citizen of the United States which are set forth in the first section of [the civil rights] bill." *Id.* at 597.

292. *Id.* at 475 (Sen. Trumbull) (citing Justice Bushrod Washington's opinion in *Corfield*, *Campbell v. Morris*, 3 Md. (3 H. & McH.) 535 (1797), and *Abbott v. Bayley*, 23 Mass. (6 Pick.) 89 (1827)).

293. *Id.* Senator Trumbull was referring to an incident that occurred in 1843. Political leaders in Massachusetts sent Samuel Hoar to South Carolina to seek the repeal, and to challenge the constitutionality of the state's Seaman's Act, which required the arrest and incarceration of any free black seaman who debarked from a ship in any South Carolina port, until the ship cleared. His constitutional challenge apparently was grounded on the theory that the South Carolina statute violated the

was competent “for Congress to have passed a law punishing any person who should have undertaken to deprive him of this right, and to have vested the proper authorities with power if necessary to call upon the Army and Navy of the United States to protect him in this right.”²⁹⁴ Trumbull insisted that the Thirteenth Amendment delegated the same authority to protect citizens in their fundamental rights within their own states.²⁹⁵

In the House, Wilson cited the same authorities and interpreted the Comity Clause in the same way as Trumbull. Wilson concluded that the Privileges and Immunities Clause recognizes a “general citizenship” which “entitles every citizen to security and protection of personal rights” by the federal government.²⁹⁶ In addition to securing the rights themselves, Wilson observed that the Civil Rights Bill also secures “the equality of all citizens in the enjoyment of civil rights and immunities, [which] merely affirms existing law.”²⁹⁷ He then went on to declare that the rights of United States citizens are those fundamental rights secured by the Comity Clause as privileges and immunities of citizens in the several states. Since the states were failing to protect the personal rights of United States citizens, Wilson admonished, “we must do our duty by supplying the protection which the States deny. . . . We must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.”²⁹⁸

Comity Clause and the Supremacy Clause of the United States Constitution. South Carolinians verbally attacked Hoar as a dangerous rabble-rouser, and they forced him to flee the state to avert violent attacks. See Wiecek, *supra* note 8, at 132-40.

294. Cong. Globe, 39th Cong., 1st Sess. at 475 (Sen. Trumbull). Senator John Sherman agreed that the civil rights of United States citizens are defined by the Privileges and Immunities Clause of Article IV, section 2, and that the Thirteenth Amendment delegated to Congress the constitutional authority to enforce these fundamental rights. *See id.* at 41-42 (Sen. Sherman).

295. *Id.* at 475 (Sen. Trumbull).

296. *Id.* at 1118 (Rep. Wilson) (quoting 3 Story, *supra* note 47, at 674-75). Republican legislators’ understanding of the Privileges and Immunities Clause is at odds with the interpretation the Supreme Court handed down three years later in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), which held that the Comity Clause secures sojourners in a state other than their state of residence only certain rights extended by the other state to its own citizens. However, earlier cases, such as Chief Justice Taney’s opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422-23 (1857), and the Court’s opinion in *Conner v. Elliott*, 59 U.S. (18 How.) 591 (1856), appear to support the congressional Republicans’ understanding. Charles Antieau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967) and Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 Emory L.J. 785 (1982) argue that *Paul* was wrongly decided and that the Republicans’ interpretation of the Comity Clause was correct. For a discussion of Chief Justice Taney’s opinion, see Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 886-87 (1986).

297. Cong. Globe, 39th Cong., 1st Sess. at 1117 (Rep. Wilson).

298. *Id.* at 1118.

Supporters of the Civil Rights Bill used the Privileges and Immunities Clause to define the generic rights of United States citizens as the fundamental rights of free men and to identify another constitutional provision that secures the rights of United States citizens and delegates to Congress legislative power to protect and enforce citizens' fundamental rights.²⁹⁹ Interpreting the Privileges and Immunities Clause as a delegation of legislative power to Congress is another example of congressional Republicans' constitutional theories of implied powers and delegation of federal power to enforce constitutionally secured rights derived from *McCulloch v. Maryland* and *Prigg v. Pennsylvania*. Indeed, the text of the Privileges and Immunities Clause is a clearer delegation of legislative authority to enforce citizens' rights than the Fugitive Slave Clause was a delegation of power to enforce the slaveholder's right of recapture. The former is an affirmative guarantee of citizens' privileges and immunities, stating that citizens "shall be entitled to all Privileges and Immunities of Citizens in the several States,"³⁰⁰ and the latter is a prohibition against the states from infringing the right to service or labor owed.³⁰¹ Moreover, both the Privileges and Immunities Clause

299. See, e.g., *id.* at 600 (Sen. Trumbull) (stating that the Privileges and Immunities Clause authorizes Congress to protect a United States citizen of one state to travel to another state to exercise rights secured by the Privileges and Immunities Clause). Representative Bingham expressed the view that the Comity Clause secured to United States citizens, as such, all of the privileges and immunities of citizenship, including the rights secured by the Bill of Rights. However, he also believed that, because of judicial decisions such as *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), Congress lacked the authority to enforce the Bill of Rights and, therefore, the Comity Clause. Bingham understood that these constitutional guarantees secured fundamental rights by prohibiting the states from infringing them. A constitutional amendment delegating to Congress the power to enforce citizens' rights was necessary before Congress could enact a statute to enforce and protect citizens' rights, such as the Civil Rights Act. Cong. Globe, 35th Cong., 2nd Sess. 982-84 (1859) (Rep. Bingham). Representative Bingham stated that

[t]he citizens of each State, all the citizens of each State, being citizens of the United States shall be entitled to 'all privileges and immunities of citizens in the several States.' Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States.

Id. at 984. Bingham also stated that the Comity Clause's "meaning is self-evident that it is 'the privileges and immunities of citizens of the United States in the several States' that it guaranties." *Id.*; see also Cong. Globe, 39th Cong., 1st Sess. at 1034, 1089-90, 1291-92 (Rep. Bingham) (stating that the rights secured by the Comity Clause to United States, as such, include the Bill of Rights, but that Congress lacks the power to enforce these rights). See the colloquy between Representatives Wilson and Bingham discussed in the text accompanying *infra* notes 335-50.

300. U.S. Const. art. III, § 2, cl. 1.

301. Contrast the Privileges and Immunities Clause, which states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," *id.*, with the Fugitive Slave Clause, which states 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

and the Fugitive Slave Clause are in Article IV, section 2, of the Constitution. The Extradition Clause also is part of Article IV, section 2, and is situated between these two provisions, and no one doubted Congress's power to implement the Extradition Clause.³⁰² Indeed, the statute Congress enacted in 1793 to enforce the Fugitive Slave Clause also enforced the Extradition Clause.³⁰³ It should not be surprising that supporters of the Civil Rights Bill cited the Privileges and Immunities Clause as a constitutional delegation of legislative power to enforce citizens' fundamental rights, albeit only when they are in a state other than their state of residence.³⁰⁴ Indeed, Representative Samuel Shellabarger of Ohio introduced a bill to enforce the Privileges and Immunities Clause,³⁰⁵ citing the Fugitive

Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." *Id.* cl. 3.

302. The Extradition Clause provides:

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.

Id. cl. 2.

303. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302, §§ 1-2.

304. Chief Justice Taney asserted that "the privileges and immunities, for greater safety, are placed under the guardianship of the general government." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 629 (1842) (Taney, C.J., dissenting). His central point, however, was to argue that, even so, "the states may, by their laws, and in their tribunals, protect and enforce them." *Id.*

305. Representative Shellabarger, a supporter of Trumbull's Civil Rights Bill, proposed a bill of his own to enforce the Privileges and Immunities Clause to supplement Trumbull's bill. Letter from S. S. Shellabarger to Lyman Trumbull (April 7, 1866), in 65 Lyman Trumbull Papers (collection available in Library of Congress). Shellabarger explained to Trumbull that his bill differed from Trumbull's in that Trumbull's bill imposed criminal penalties on persons who violated citizens' rights under color of law:

[While] [m]ine punishes any private wrong against any enumerated "privilege or immunity" provided it be against one coming from another State and provided the wrong proceeds from the intent to deprive the citizen of the enjoyment of that privilege within one of the "several States." What gives the federal court jurisdiction is not the mere fact that the right is violated for that would be to give the federal courts jurisdiction of an ordinary larceny or assault. But it is the intent to deprive one from another state of the particular right or of all rights in the state or part of it where he has come. It is to secure this very right to come there and to be there and to 'have privileges and immunities' there that the clause of the Const [sic] was made. And where this clause is invaded it is no invasion of state rights to punish the invasion by Federal law and thus to secure a Federal right.

Id. Consideration of Shellabarger's bill was postponed until the second session of the Thirty-Ninth Congress. When it came up, Shellabarger distinguished it from the Civil Rights Act Congress had enacted in the first session, stating that the statute secured only certain civil rights, whereas his bill "protects all the fundamental rights of the citizen of one State who seeks to enjoy them in another State." Cong. Globe., 39th Cong., 1st Sess. app. at 294 (1866) (Rep. Shellabarger). However, his bill limited federal criminal jurisdiction over rights violations to those "done with the criminal intent of preventing the injured party from enjoying the invaded right in the State where he is injured" because the proposed statute "does not attempt to punish an

Slave Acts of 1793 and 1850 and judicial precedents upholding their constitutionality as “utterly conclusive” authority for Congress’s power to enforce the Privileges and Immunities Clause.

In addition to specific provisions in the Constitution, the framers of the Civil Rights Bill insisted that Congress possessed both the authority to protect American citizens’ rights as part of its sovereign powers, and the duty to do so imposed by the social contract proclaimed in the Declaration of Independence.³⁰⁶ Representative Wilson offered the most elaborate statement of the social contract principle, not once, but several times. Introducing the Civil Rights Bill in the House, Wilson proclaimed:

If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family.³⁰⁷

ordinary wrong, such as murder, assaults . . . of which the States have jurisdiction.” *Id.* at 295. Representative Wilson reported that the Judiciary Committee proposed a substitute bill without explaining how it differed from Shellabarger’s bill. He informed the House that he did not want any action on either proposal, preferring to postpone consideration until the next session of Congress. The House acceded to Wilson’s request to postpone. *Id.* at 4148 (Reps. Wilson & Shellabarger). Shellabarger again introduced his bill on January 2, 1867, and it was read a first and second time and referred to the House Judiciary Committee. Cong. Globe, 39th Cong., 2nd Sess. 442 (1867) (Rep. Shellabarger). About one week later, Rep. Wilson proposed the same substitute for Shellabarger’s bill that he had proposed in the first session, and the House agreed to Wilson’s substitute bill, which he recommitted to the Judiciary Committee. *Id.* at 686 (Rep. Wilson). I was unable to find any further mention of the bill.

306. See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temp. L. Rev. 361, 363 (1993) (arguing that the Fourteenth Amendment’s framers “united [the Declaration of Independence] with the Constitution in the enactment of the Fourteenth Amendment. . . . Section 1 of the Fourteenth Amendment is the Declaration of Independence”).

307. Cong. Globe, 39th Cong., 1st Sess. at 1118 (Rep. Wilson). Representative M. Russell Thayer, a vocal supporter of the Civil Rights Bill, also expressed these views:

The sole purpose of the bill is to secure to that class of persons the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law, as they are equal in the scales of eternal justice and in the eyes of God.

Id. at 1152 (Rep. Thayer). Senator Reverdy Johnson of Maryland expressed the same theory of Congress’s power to enforce citizens rights, although he changed his position after President Andrew Johnson vetoed the Civil Rights Bill. Early in the Senate debates, Senator Johnson declared that Congress possessed the power to authorize [Negroes] to sue, authorize them to contract, authorize them to do everything short of voting, it is not because there is anything in the constitution of the United States that confers the authority to give the negro the right to contract, but it is because *it is a necessary incidental function of a*

Wilson defined the rights that individuals possess as United States citizens generically, as “the absolute rights of individuals.” Quoting Chancellor Kent’s “lecture on the absolute rights of persons,” Wilson proclaimed that ““The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable.””³⁰⁸ Wilson reiterated the social contract principle of Congress’s power to enact the Civil Rights Bill: “Now, sir, I reassert that the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them.”³⁰⁹

Wilson argued that American citizens were entitled to the natural rights of citizenship prior to the Constitution, and they did not surrender any of these rights by the adoption of the Constitution and the formation of the national government. To the contrary, he insisted that the three departments of the federal government were established to secure more perfectly the enjoyment of these natural rights:

Before our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family. No one surrendered a jot or tittle of these rights by consenting to the formation of the Government. The entire machinery of government as organized by the Constitution was designed, among other things, to secure a more perfect enjoyment of these rights. A legislative department was created that laws necessary and proper to this end might be enacted. A judicial department was erected to expound and administer the laws. An executive department was formed for the purpose of enforcing and seeing to the execution of these laws. And these several departments of Government possess the power to enact, administer, and enforce the laws “necessary and proper” to secure these rights which existed anterior to the ordination of the Constitution.³¹⁰

Government that it should have authority to provide that the rights of everybody within its limits shall be protected and protected alike.

Id. at 530 (Sen. Johnson) (emphasis added). Representative Shellabarger stated that: It does seem to me that the Government which has the exclusive right to confer citizenship, and which is entitled to demand service and allegiance, which is supreme over that duty to any State, may, nay, must, protect those citizens in those rights which are fairly conducive and appropriate and necessary to the attainment of his ‘protection’ as a citizen.

Id. at 1293 (Rep. Shellabarger).

308. *Id.* at 1118 (Rep. Wilson) (quoting I James Kent, *supra* note 283, at 599). Senator Trumbull also quoted Blackstone and the same passage from Kent. *See id.* at 1757 (Sen. Trumbull).

309. *Id.*

310. *Id.* at 1119 (Rep. Wilson). Representative Bingham also asserted this social contract theory of the government’s relationship to its citizens, but believed that

Wilson expressly stated that Congress's power to enact the Civil Rights Bill flows from the nature of the rights it is designed to protect, that is, from the fact that the rights it protects are natural rights of United States citizenship, and from the sovereign nature of the national government whose duty it is to protect the rights of its citizens, as social contract theory requires. He said:

Upon this broad principle I rest my justification of this bill. I assert that *we possess the power to do those things which Governments are organized to do*; that we may protect a citizen of the United States against a violation of his rights by the law of a single State; that by our laws and our courts we may intervene to maintain the proud character of American citizenship; that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; that *the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect*; that we possess the same latitude in respect to the selection of means through which to exercise *this power* that belongs to us when a power rests upon express delegation; and that the decisions which support the latter maintain the former. And here, sir, I leave the bill to the consideration of the House.³¹¹

Congress did not have the power to enforce the natural rights articulated in the Declaration of Independence without a constitutional amendment delegating this power to Congress. *Id.* at 429 (Rep. Bingham). Representative Bingham argued that the right of the federal government to amend the Constitution to “furnish better guarantees in the future for the rights of each and all” is a right

proclaimed in your imperishable Declaration by the words, all men are created equal; they are endowed by their Creator with the rights of life and liberty; to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed; and by those other words, these States may do what free and independent States may of right (not of *wrong* but of *right*) do.

Id. It was for the purpose of conferring this power “to enforce all the guarantees of the Constitution” that Bingham and the Joint Committee on Reconstruction proposed section 1 of the Fourteenth Amendment. *Id.*

311. *Id.* at 1119 (Rep. Wilson); *see also id.* at 1295 (stating that “[t]he highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights”). Representative Samuel Shellabarger of Ohio affirmed Congress's authority to enact the civil rights bill under this theory of implied powers, although he expressed uncertainty whether it authorized Congress to secure all of the rights enumerated in section 1. Shellabarger stated:

[T]he only doubt I have as to the constitutionality of this first section arises out of the question whether all these rights, to testify . . . which are enumerated in this section, can be said to come within the rule laid down by the Supreme Court in unnumberable cases, that in order to entitle this Government to assume a power as an implied power of this Government it ‘must appear that it is appropriate and plainly adapted to the end.’ If each one of these rights, to testify . . . are thus necessary to secure that which must, as we have seen, be within the powers of the Government, to wit, the security of the ‘protection’ of an American citizen, then the bill is constitutional.

Id. at 1294 (Rep. Shellabarger) (citation omitted). Senator Morrill asserted that the Civil Rights Bill is based upon

general process of nations and of nature by which every man, by his birth, is entitled to citizenship, and that upon the general principle that he owes allegiance to the country of his birth, and that country owes him protection. That is the foundation, as I understand it, of all citizenship, and these are the essential elements of citizenship, allegiance on the one side and protection on the other.

Id. at 570 (Sen. Morrill). Representative Thayer argued that the Civil Rights Bill secures the inalienable rights of citizenship, “those rights which constitute the essence of freedom, and which are common to the citizens of all civilized states; those rights which secure life, liberty, and property, and which make all men equal before the law,” that the bill only declares “a rule of universal law,” that persons born in a state “owe allegiance to the State, and are entitled to the protection of the State.” *Id.* at 1152 (Rep. Thayer). Representative Broomall argued that the Civil Rights Bill declares who are citizens and secures to them “the protection which every Government owes to its citizens,” a power inherent in governments “as such, without which they would cease to be Governments. . . . The rights and duties of allegiance and protection are corresponding rights and duties.” *Id.* at 1262, 1263 (Rep. Broomall). Representative Shellabarger argued

that the Government which has the exclusive right to confer citizenship, and which is entitled to demand service and allegiance, which is supreme over that duty to any State, may, nay, must, protect those citizens in those rights which are fairly conducive and appropriate and necessary to the attainment of his ‘protection’ as a citizen

Id. at 1293 (Rep. Shellabarger). Representative Lawrence stated that the power to confer citizenship

is an exercise of authority which belongs to every sovereign Power, and is essentially a subject of national jurisdiction. . . . There is, then, a national citizenship, . . . [a]nd citizenship implies certain rights which are to be protected, and imposes the duty of allegiance and obedience to the laws. . . . [i]t has never been deemed necessary to enact in any constitution or law that citizens should have the right to life, or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions. Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.

Id. 1832-33 (Rep. Lawrence). Representative Thayer insisted that Congress’s authority to “guaranty and protect the rights of citizens of the United States” flows from the fact that these are rights of United States citizenship, and asking,

[D]oes it not seem at the first blush to be a very singular proposition to say that the United States under the Constitution have no right to guaranty to its own citizens, by positive law, those great fundamental rights of citizenship which are enumerated in this bill? . . . Would it not be an extraordinary circumstance if the framers of the Constitution had made a Constitution which was powerless to protect the citizens of the United States in their fundamental civil rights, their rights of life, liberty, and property? And yet to that position are these gentlemen driven who deny the existence of any power which authorizes Congress to pass this bill.

Id. at 1151-52 (Rep. Thayer). Although Thayer argued that specific provisions in the United States Constitution authorize Congress to secure the rights of citizens, he nonetheless maintained that, if

the freedmen are citizens, or if we have the constitutional power to make them such, they are clearly entitled to those guarantees of the Constitution

2004] *AN OVERLOOKED MORAL ANOMALY* 227

In a colloquy with Representative Columbus Delano a week later, Representative Wilson elaborated this social contract theory of congressional delegation and explicitly grounded it on the Supreme Court's theory of delegation affirmed in *McCulloch v. Maryland*. Delano demanded that Wilson cite the constitutional provision that authorized Congress to secure the right to testify in a state court, and to subject "the judges of State courts to punishment in the way pointed out in the bill, if they, under the laws of the States, refuse to let black men be witnesses."³¹² Wilson answered that it was the same power Congress possessed:

[T]o provide protection for the fundamental rights of the citizen commonly called civil rights, so that if the presence of a citizen in the witness box of a court is necessary to protect his personal liberty, his personal security, his right to property, he shall not be deprived of that protection by a State law declaring that his mouth shall be sealed and that he shall not be a witness in that court. That is one of the protective remedies which must run with these great civil rights belonging to every citizen.³¹³

When Delano retorted that Wilson had failed to identify "the clause of the Constitution in which he finds the power,"³¹⁴ Wilson specified the Thirteenth Amendment. However, Wilson restated that he placed Congress's power:

[U]pon a broader ground, and it was this: that these people, being entitled to certain rights as citizens of the United States, were entitled to protection in those rights, and that power thus to protect them is necessarily implied from the entire body of the Constitution, which was made for the protection of these rights, and upon the duty of the Government to enforce and protect all those rights. I based the power of Congress to select the means in accordance with the doctrines laid down in the case of *McCulloch, vs. The State of Maryland*.³¹⁵

of the United States which are intended for the protection of all citizens. They are entitled to the benefit of that guarantee of the [Fifth Amendment] which secures to every citizen the enjoyment of life, liberty, and property, and no just reason exists why they should not enjoy the protection of that guarantee of the Constitution.

Id. at 1153.

312. *Id.* app. at 157 (Rep. Delano).

313. *Id.* (Rep. Wilson).

314. *Id.* (Rep. Delano).

315. *Id.* (Reps. Delano & Wilson). Delano persisted in arguing that: "The duties of this Government rest upon the power of the Government. The duties of this Congress rest upon its constitutional powers, and those powers are to be derived from the Constitution if found at all." *Id.* Wilson admonished Delano, asking him whether he

believe[d] that persons as citizens of the United States are entitled to any rights? If they are entitled to any rights, are the great fundamental civil rights of life, liberty, and property involved among them? And if they are entitled, as citizens of the United States, to those rights, are they entitled to

Senator Trumbull also supported Congress's power to secure the fundamental rights of American citizens by asserting Congress's obligation under the social contract as proclaimed in the Declaration of Independence and incorporated into the United States Constitution. He explicitly stated that the "civil liberty" secured by the Thirteenth Amendment is "the liberty which a person enjoys in society," and is, "the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the amendment which has recently been adopted."³¹⁶ Trumbull thus suggested that the Thirteenth Amendment's universal guarantee of liberty is a more explicit expression of the social contract described in the Declaration of Independence and generally secured by the Constitution. The government's duty to secure the inalienable rights to life, liberty, and property proclaimed in the Declaration of Independence empowered, indeed, obligated the federal government to protect the fundamental rights that individuals enjoy as United States citizens in return for their allegiance to the United States.

Trumbull thus explained that the Civil Rights Bill was authorized by, and was intended to give practical effect to, the principles of the Declaration of Independence and to the Constitution's guarantees of inalienable rights. The abstract truths and principles of the Declaration of Independence are of little value, he exhorted, unless they are made effective:

There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits. Of what avail was the immortal declaration "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness," and "that to secure these rights Governments are instituted among men," to the millions of the African race in this country who were ground down and

protection of those rights from the hands of the Government? And should a State enact laws and attempt to enforce them which will deprive the citizens of the United States of those rights, may we not intervene to protect them in spite of those laws of the State?

Id. (Rep. Wilson). Delano answered that he understood that citizens of the states are entitled to many rights which

are to be guaranteed and sustained and enforced by the laws of the States under the constitutions of the States, and by the Congress of the United States when there is power given by the Constitution of the United States to enforce those rights. But I do not believe that the rights of the States are utterly overwhelmed and dethroned.

Id. (Rep. Delano).

316. *Id.* at 474 (Sen. Trumbull).

degraded and subjected to a slavery more intolerable and cruel than the world ever before knew?³¹⁷

He declared that “[i]t is the intention of this bill to secure those rights [which are essential to free men].”³¹⁸ Equating the guarantee of liberty provided by the Thirteenth Amendment to the principles of the Declaration of Independence, Trumbull declared that the Thirteenth Amendment, in effect, put the Declaration’s principles into the Constitution by establishing the status of all Americans as that of free men, that is, as citizens, and securing to them as United States citizens the rights that all free men enjoy, namely, the inalienable rights to life, liberty, property, and equality before the law.³¹⁹

It is clear, then, that the Republican leaders and supporters of the Civil Rights Act of 1866 applied to various provisions of the Constitution the theory of broad constitutional delegation of congressional power that Chief Justice Marshall proclaimed in *McCulloch* and Justice Story applied in *Prigg*. The same Republican leaders insisted that Congress had as much constitutional authority to protect and enforce human rights and equality as it had exercised to

317. *Id.* (quoting the Declaration of Independence para. 2 (U.S. 1776)).

318. *Id.*; see also *id.* at 504 (Sen. Howard) (stating “that in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else”).

319. *Id.* at 474 (Sen. Trumbull). At the opening of the Thirty-Ninth Congress, Senator John Sherman of Ohio quoted section 1 of the Thirteenth Amendment and proclaimed: “This section secures to every man within the United States liberty in its broadest terms.” *Id.* at 41 (Sen. Sherman). Quoting section 2, Sherman added, “Here is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation.” *Id.* Senator Lane of Indiana similarly argued that the Thirteenth Amendment has made the former slaves freemen “and entitled to all the privileges and immunities of other free citizens of the United States.” *Id.* at 602 (Sen. Lane). It has also imposed upon Congress “the duty . . . to protect them in all rights as free and manumitted people. . . . To secure them in all their rights and privileges,” which Lane equated to “equality before the law.” *Id.* He expressed his belief

that the provisions of this bill are admirably calculated to secure to these colored persons their rights under the [thirteenth] constitutional amendment, and I think the provision contained in the last section of the bill more important than any other, and that is, that the President shall have a right with the strong arm of military authority to see that his law is carried out; and I say without that provision this act would be a mockery and a farce.

Id. at 603. Senator Lane’s statement is important both because he characterizes the bill as securing substantive rights and because he emphasizes the importance of authorizing federal force to execute the statute, which reflects his conception of the enforcement provisions giving federal legal and judicial officers the power to enforce the rights the bill secures by supplanting state civil and criminal law enforcement. Senator John B. Henderson of Missouri curtly argued that it was unnecessary to declare that Negroes are citizens of the United States. “I hold that every man born within the United States, and who has been liberated by the constitutional amendment, is a citizen of the United States.” *Id.* at 571 (Sen. Henderson).

protect and enforce the property right in slaves. They insisted that the Thirteenth Amendment, the Privileges and Immunities Clause of Article IV, the Bill of Rights, and the Fifth Amendment's explicit guarantee of life, liberty, and property delegated to Congress the power to enforce the fundamental rights of United States citizens.³²⁰ They also argued that the principles of the Declaration of Independence were incorporated into the Constitution through these provisions and that the Declaration of Independence and the Constitution imposed a duty on Congress to enforce citizens' rights. Armed with this broad understanding of citizens' rights and of Congress's constitutional power to enforce them, the Thirty-Ninth Congress enacted the Civil Rights Act of 1866. This statute conferred United States citizenship on all Americans, defined and conferred some of the rights that United States citizens shall enjoy, criminalized certain violations of citizens' rights, conferred jurisdiction on the federal courts to dispense civil and criminal justice when persons were unable to enforce or were denied their civil rights in the states, and established a federal structure to enforce the statute patterned on the Fugitive Slave Act of 1850. It is to the provisions of the Civil Rights Act that we now turn.

III. THE CIVIL RIGHTS ACT OF 1866

A. *Congress Confers United States Citizenship and Some of the Rights of United States Citizens on All Natural Born Americans*

Although the remedies and enforcement structures of the Civil Rights Act of 1866 were copied primarily from the Fugitive Slave Act of 1850, the two statutes were not identical. The 1866 statute was more explicit in stating the rights it secures and the legal predicate for Congress's constitutional authority to enforce these rights, namely, that the civil rights it secures are rights of United States citizenship. Section 1 contained three provisions: it conferred on all native-born Americans the status of United States citizenship; it enumerated some of the civil rights and immunities United States citizens are to enjoy in every state and territory of the United States; and, preserving

320. Thus, Representative Bingham acknowledged that many of his colleagues held this view when he stated: "I understand very well, Mr. Speaker, that there are gentlemen for whom I have the profoundest respect . . . that the Congress of the United States has the power, implied necessarily, to enforce all the guarantees of the Constitution." *Id.* at 429 (Rep. Bingham). However, he disagreed with them, but expressed his intention, and that of the Joint Committee on Reconstruction, to propose an amendment to the Constitution delegating such power to Congress: "In my judgment, unless some such general provision [as the general provision the Joint Committee was then considering which became section one of the Fourteenth Amendment] be adopted, . . . no such power is vested in the Federal Government." *Id.*

concurrent state jurisdiction over civil rights, it guaranteed that all U.S. citizens shall enjoy these civil rights and immunities on the same bases as the most favored citizens enjoy them, that is, on the same bases as whites enjoy them.³²¹

Senator Trumbull regarded section 1 as “the basis of the whole bill.”³²² The only question, he declared, “is, will this bill be effective to accomplish the object, for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect.”³²³ Proclaiming he intended to make the bill effective in protecting the civil rights of all Americans, Trumbull explained that “[t]he other provisions of the bill contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section.”³²⁴

B. Remedial Provisions of the Civil Rights Act

Like the framers of the Fugitive Slave Acts of 1793 and 1850, the framers of the Civil Rights Act of 1866 imposed criminal penalties and provided civil remedies to redress civil rights violations. Section 2 imposed criminal sanctions on persons who violated the civil rights secured by section 1 as one of the remedies to enforce the constitutional rights it secured. Asserting that “[a] law is good for nothing without a [criminal] penalty,” Senator Trumbull characterized section 2 as “the valuable section of the bill.”³²⁵ To preserve state jurisdiction over ordinary crimes, Congress did not exercise its full penal powers, for section 2 limited federal criminal sanctions to civil rights violations committed under color of law or custom and motivated by racial animus.

321. As adopted, the first clause of section 1 declared “[t]hat all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” Civil Rights Act of 1866, ch. 31, 14 Stat. 27. This was the first time in the nation’s history that Congress defined United States citizenship. Section 1 then declared:

[S]uch citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. See generally Robert J. Kaczorowski, *The Rehnquist Court and Congress’s Power to Enforce Fourteenth Amendment Rights: The History of Federal Civil Remedies the Court Overlooked*, 42 Harv. J. on Legis. (forthcoming 2004) (discussing the framers’s understanding of section 1 and the Act’s other provisions).

322. Cong. Globe, 39th Cong., 1st Sess. at 474 (Sen. Trumbull).

323. *Id.* at 475. Senator Trumbull was here referring to the Thirteenth Amendment.

324. *Id.* at 474.

325. *Id.*

This penal section defined two federal crimes against citizens' civil rights. The first provided that "any person" who subjected or caused to be subjected "any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act" was "guilty of a misdemeanor," but only if he acted "under color of any law, statute, ordinance, regulation, or custom" and because the person whose right was being deprived had been "held in a condition of slavery or involuntary servitude . . . or by reason of his color or race."³²⁶ The second crime consisted of imposing "different punishments, pains, or penalties" on any such persons. These crimes were punishable by a fine of up to \$1000 or imprisonment for up to one year, or both, at the discretion of the court.³²⁷

Although the drafters of the Civil Rights Bill limited criminal sanctions to persons who acted under color of law or custom and out of racial animus, they asserted that Congress possessed plenary power to remedy violations of citizens' rights by imposing criminal sanctions on anyone who violated them.³²⁸ *McCulloch* again provided the legal precedent. Chief Justice Marshall, in articulating the scope of Congress's implied powers to effectuate the objects, purposes, and ends the Constitution delegated to the federal government, proclaimed that:

The good sense of the public has pronounced, without hesitation that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary.³²⁹

Senator Trumbull applied *McCulloch*'s theory of Congress's penal powers, without attribution, and explicitly declared that "The right to punish persons who violate the laws of the United States cannot be

326. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. Section 2 provides:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Id.

327. *Id.*

328. See, e.g., Cong. Globe, 39th Cong., 1st Sess. at 475 (Sen. Trumbull); *id.* at 1758; *id.* at 1155 (Rep. Thayer).

329. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819); accord *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 233 (1821). For my analysis of Marshall's discussion of Congress's penal powers, see *supra* text accompanying notes 65-67.

questioned.”³³⁰ Under the Thirteenth Amendment, he reasoned, “we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.”³³¹ Trumbull expressed the belief that prosecuting the leaders of local communities was the most effective way of stopping the bias-motivated civil rights violations that pervaded the southern states after the Civil War:

[W]hen it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease.

I think it will only be necessary to go into the late slaveholding States and subject to fine and imprisonment one or two in a State, and the most prominent ones I should hope at that, to break up this whole business.³³²

Not a single supporter of the Civil Rights Bill denied that Congress possessed the plenary penal powers that its principle author attributed to Congress, even though opponents argued that the bill represented the exercise of such plenary power to the complete destruction of the states’ police powers.³³³

330. Cong. Globe, 39th Cong., 1st Sess. at 475 (Sen. Trumbull). Trumbull illustrated this point by analogizing to Congress’s penal powers under the Comity Clause. Apparently referring to an incident that occurred before the Civil War, Senator Trumbull queried:

[I]s it not manifest that it was competent for the Congress of the United States to have passed a law that would have protected Mr. Hoar, who went from Massachusetts to South Carolina for the purpose of testing a question in the courts? Would it not have been competent, under [judicial constructions of the Comity Clause], for Congress to have passed a law punishing any person who should have undertaken to deprive him of this right, and to have vested the proper authorities with power if necessary to call upon the Army and Navy of the United States to protect him in this right?

Id.

Reflecting *McCulloch’s* and *Prigg’s* theories of constitutional delegation, Trumbull concluded, “I apprehend it would.” *Id.*

331. *Id.* (emphasis added).

332. *Id.* Members of the Forty-Second Congress shared this view and included in the Ku Klux Klan Act of 1871 a section that imposed third-party civil liability on members of local communities who could have, but failed to try to prevent personal injuries and property damage by mobs, such as the Ku Klux Klan. Their strategy was to force local community leaders publicly to oppose Klan violence in the expectation that community leaders could bring the violence to an end. See Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, 15; see also Robert J. Kaczorowski, *Reflections on Monell, Analysis of the Legislative History of § 1983*, 31 Urb. Law. 407 (1999).

333. Civil Rights Bill proponents did not deny that it supplanted state civil and criminal justice systems. Indeed, they defended these invasions of state police powers as necessary to enforce and protect the rights of United States citizens. See Kaczorowski, *supra* note 321. I also explain how section 2 was applicable to the

To the contrary, section 3 authorized federal courts to supplant states' civil and criminal justice systems whenever individuals were unable to enforce or were denied their civil rights in state courts. Section 3 was an even fuller exercise of Congress's remedial powers to redress civil rights violations than the penal provisions of section 2. It authorized federal courts to order civil remedies and criminal penalties against anyone who violated a citizens' civil rights. Section 3 applied Congress's remedial powers to redress violations of citizens' rights committed by private individuals and public officials. And, it explicitly extended these remedies to whites who were unable to enforce or were denied their civil rights in state courts.

Section 3 conferred civil and criminal jurisdiction on the federal courts in three distinct situations.³³⁴ First, like the Fugitive Slave Act of 1850, it conferred exclusive criminal and civil jurisdiction on federal district courts to try "all crimes and offences committed against the provisions of this act."³³⁵ Second, section 3 conferred concurrent jurisdiction on federal district and circuit courts to try "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."³³⁶ Third, it provided for the removal of:

any suit or prosecution, civil or criminal, that has been or shall be commenced in any State court against such person [who is denied or cannot enforce rights secured by this act], for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or" the Freedmen's Bureau Acts, "or for refusing to do any act upon the ground that it would be inconsistent with this act."³³⁷

Section 3 of the Civil Rights Act of 1866 provided a federal system of civil and criminal justice whenever any American could not enforce

actions of private individuals who violated civil rights under color of law or custom in *id.* (manuscript at 61-68).

334. For an explanation of section 3 in greater detail, see *id.* (manuscript at 68-89).

335. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *c.f.* Fugitive Slave Act of 1850, ch. 60, § 3, 9 Stat. 462. For example, this part of section 3 conferred jurisdiction on the federal courts to try all prosecutions brought under section 2 and all civil actions involving the denial of the civil rights secured in section 1. It therefore authorized federal courts to try civil actions brought by claimants who alleged that another private party violated one of her civil rights secured in section 1 and to order appropriate civil remedies if the claim was proven.

336. Civil Rights Act of 1866, § 3. An obvious example of how this jurisdictional provision differs from the first is where a black party to a contract with a white promisor seeks to enforce the contract, but state law does not permit blacks to testify in cases in which a white person is a party. A federal court would have jurisdiction to try the contract claim under this provision, because the black party is denied the right to testify on the same basis as whites as secured by section 1. *Id.*

337. *Id.*

or was denied his or her civil rights within a state's system of civil or criminal justice. On its face, section 3 authorized the federal courts to supplant state and local courts and to try civil actions and criminal prosecutions that ordinarily were within the exclusive jurisdiction of state courts whenever any person could not enforce his or her civil rights in, or was denied his or her civil rights by, state courts. It authorized federal courts to try these civil suits and criminal prosecutions according to federal law, to the extent that federal law provided remedies and penalties applicable to these cases. Where federal law did not provide such remedies and penalties, federal courts were to try these civil and criminal cases according to the common law of the states in which they sat, as modified by the state's constitution and statute law, provided they were not inconsistent with federal law.³³⁸ This provision thus afforded persons a federal forum whenever they were unable to enforce or were denied their rights in the states' systems of civil and criminal justice. Section 3 most specifically provided the federal remedies Representative Wilson proclaimed the United States government was obliged to extend to citizens when he said that, since the states were failing to enforce and protect the "personal rights" to life, liberty, and property guaranteed by the Bill of Rights to which "every citizen" is entitled, Congress "must do our duty by supplying the protection which the states deny."³³⁹ Wilson later clarified that he meant by this that Congress possesses the power to remedy violations of these rights, and that the necessary "protective remedies . . . must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government."³⁴⁰

338. *Id.* Part of section 3 provides:

The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Id.

339. Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson). Congress acted on this very theory when it enacted the civil and criminal remedies of the Violence Against Women Act; however, the Supreme Court struck down the Act's civil remedy, holding that it exceeded Congress's remedial powers under the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598 (2000).

340. Cong. Globe, 39th Cong., 1st Sess. at 1294. Representative Wilson argued that the citizen being possessed of [the bill of rights] is entitled to a remedy. . . . The power is with us to provide the necessary protective remedies. If not, from whom shall they come? From the source interfering with the right? Not

The Civil Rights Act thus authorized the federal courts to supplant the state and local courts and to try civil and criminal cases that the state and local courts otherwise would have tried.³⁴¹ An obvious example is a case in which someone deprives a black citizen of the same right to contract or property or one of the other civil rights secured by the statute's first section as white citizens enjoyed them.³⁴² A less obvious section 3 case is one in which a private individual deprives a black person of the same section 1 right that the state extended to whites.³⁴³

at all. They must be provided by the government of the United States whose duty it is to protect the citizen [in his right to life, liberty, and property] in return for the allegiance he owes to the Government.

Id. Senator Lane, in answering an objection to the bill posed by his colleague from Indiana, Senator Hendricks, explained that the Civil Rights Bill authorizes "the power of the military to enforce" it because

[n]either the judge, nor the jury, nor the officer as we believe is willing to execute the law. . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the [Thirteenth] constitutional amendment; but because we believe they will not do that, we give the Federal officers jurisdiction.

Id. at 602 (Sen. Lane). It is because "the body of the whole people [of the South], a body of rebels steeped in treason and rebellion" will not execute the Civil Rights Bill, that the bill authorizes federal legal officers with the assistance of the military to ensure that the statute is faithfully enforced. He reminded the Senate that the military "were called in to execute the fugitive slave law and to suppress a riot growing out of the attempt to enforce it" in Boston. *Id.* at 603.

341. Senator Davis insisted that the Civil Rights Bill was unconstitutional, in part, because it transferred "all penal prosecutions and civil suits instituted in the State courts for offenses and trespasses committed under color of it into the Federal courts." *Id.* at app. 184 (Sen. Garrett Davis).

342. Referring to the civil remedies, for example, Senator Cowan objected that in those states where certain persons are not permitted to make legally enforceable contracts, "this bill is to give them a right to enforce them, to give them a right to go into a court where the judges say they cannot go, and he has no jurisdiction to determine their causes." *Id.* at 1783 (Sen. Cowan). Modern examples of federal courts enforcing section 1 rights in civil suits between private parties include: *Jones v. Alfred Mayer*, 392 U.S. 409 (1968) (holding that the section 1 guarantee of the same right to property as white citizens enjoy bars all racial discrimination, private as well as public, in the sale or rental of property); *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that the section 1 guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens prohibits private, commercially-operated, nonsectarian schools from denying admission to prospective students because they are black); and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that the section 1 guarantee of the same right to make and enforce contracts as is enjoyed by white citizens prohibits racial discrimination in the making and enforcement of private contracts).

343. *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247). Chief Justice Salmon P. Chase upheld the claim of a black apprentice who petitioned for a writ of habeas corpus on the grounds that her apprenticeship contract with her former master violated her right to the same full and equal benefit of all laws and proceedings for the protection of person and property as is enjoyed by white citizens secured by section 1 of the Civil Rights Act of 1866 because it did not provide the same benefits and protections extended to white apprentices by Maryland's apprenticeship statutes. *Id.*

The most startling jurisdiction section 3 conferred is the authority to prosecute in federal courts crimes committed against the criminal laws of the states, and civil actions brought under state statutory and common law, whenever a party to the “cause” was denied or was unable to enforce in the state courts section 1 civil rights. Shortly after the Civil Rights Act was enacted, Justice Noah H. Swayne, as circuit Justice for Kentucky, upheld the federal courts’ section 3 jurisdiction to prosecute state crimes committed against black victims because they were not permitted to testify in state proceedings in which a white person was a party. In this case, the United States Attorney prosecuted in the federal court a burglary committed by white defendants who broke into the home of a black woman who was denied the right to testify by Kentucky statutes.³⁴⁴ From 1866 to 1871, the federal court in Louisville administered criminal justice to black Kentuckians who were the victims of crimes committed against them by whites who would have gone unpunished but for the criminal jurisdiction section 3 conferred on the federal court and the determination of the United States Attorney in Louisville, Benjamin H. Bristow, and the Federal District Court Judge, Bland Ballard.³⁴⁵ In *Blyew v. United States*,³⁴⁶ the United States Supreme Court upheld section 3 jurisdiction over state crimes, but it limited this jurisdiction to crimes committed by black defendants who were unable to enforce or were denied a civil right secured by section 1. The federal court stopped trying state criminal cases after the Kentucky legislature repealed the testimony statute and permitted black witnesses to testify on the same basis as white witnesses.³⁴⁷ In addition, section 3 authorized the removal to federal courts of civil suits and criminal prosecutions initiated in state courts against federal and state officials and any other person for enforcing the Civil Rights Act or the Freedmen’s Bureau Act or for refusing to perform any act inconsistent with these statutes whenever such a party was unable to enforce or was denied a section 1 right.

The drafters of the Civil Rights Act of 1866 copied most of the rest of the “necessary machinery to give effect to” civil rights protection from the Fugitive Slave Act of 1850. Section 4 of the Civil Rights Act authorized federal courts to appoint U.S. commissioners to enforce

344. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

345. Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*, at 52 (1985); Victor B. Howard, *The Black Testimony Controversy in Kentucky, 1866-1872*, 58 *J. of Negro Hist.* 140, 146-53 (1973).

346. 80 U.S. (13 Wall.) 581 (1871). Professor Robert D. Goldstein has produced the most thorough discussion of this case in a work that is a model of legal historical scholarship. See Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 *Stan. L. Rev.* 469 (1989).

347. Kaczorowski, *supra* note 345, at 141, 165; Howard, *supra* note 345, at 164.

the provisions of, and the rights secured by, the statute.³⁴⁸ Perhaps more importantly, section 4 imposed a duty on all federal officers, “at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act,” and to arrest violators for the purpose of trying them in the appropriate federal court.³⁴⁹

Emulating the Fugitive Slave Act of 1850, section 5 imposed the duty on all federal marshals and deputy marshals “to obey and execute all warrants and precepts issued under the provisions of this act . . . and to use all proper means diligently to execute the same.” If they failed to do so, they were subject to a fine “in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense.”³⁵⁰ Congress thus imposed a \$1000 fine payable to the victim of a civil rights violation on federal officials who failed diligently to execute the statute. Section 5 of the Civil Rights Act of 1866,³⁵¹ like section 5 of the 1850 Fugitive Slave Act,³⁵² authorized federal commissioners “to summon and call to their aid the bystanders or posse comitatus” of the county as may be necessary to perform their duties under the Act. The 1866 statute also

348. Civil Rights Act of 1866, ch. 31, §4, 14 Stat. 27; *c.f.* Fugitive Slave Act of 1850, ch. 60, §§ 1-4, 9 Stat. 462. Opponents attacked this provision as deputizing anybody to arrest a state judge who refused to admit the testimony of a black witness or a white man who infringed the civil rights secured to Negroes under this bill and to try them in federal court. Cong. Globe, 39th Cong., 1st Sess. 479 (1866) (Sen. Saulsbury).

349. Civil Rights Act of 1866 § 4. Senator Davis of Kentucky interpreted section 4 “of this unconstitutional, void, and iniquitous act” as requiring federal legal officers to institute both civil suits and criminal prosecutions on behalf of black victims of civil rights violations. He reasoned that, under section 4, if:

a free negro’s rights are infringed, the attorneys and marshals of the United States are required to institute both civil and penal proceedings for the benefit of the negro, to bring a criminal prosecution on behalf of the United states, and also a [civil] suit in the name of the negro, against the white officers who infringe his rights under this act, and these suits, civil and penal, are to be prosecuted for the benefit of the negro at the cost of the Treasury of the United States.”

Cong. Globe, 39th Cong., 1st Sess. at 599 (Sen. Davis). Senator Cowan characterized the U.S. commissioners authorized by the bill as “paid and hired informers” and “public prosecutors” who were commissioned “to pry about, and they are to see that this law is executed and that all lawgivers, all Governors, all judges, all juries, everybody who has anything to do with the administration of the State law are punished if this law be violated.” *Id.* at 1784 (Sen. Cowan). He objected: “There is no necessity whatever that you should exhaust the Treasury and overload the people with office-holders in order to procure for him the vindication of these rights, if he is ever to have them.” *Id.* at 1784-85.

350. Civil Rights Act of 1866 § 5; *c.f.* Fugitive Slave Act of 1850 § 5. Senator Davis again objected that the Civil Rights Bill empowered, and imposed the duty on United States marshals, commissioners, and other federal agents and legal officers, “to institute both penal and civil proceedings at the cost of the United States, against all persons who may be charged to have violated it.” Cong. Globe, 39th Cong., 1st Sess. at app. 184 (Sen. Garrett Davis).

351. Civil Rights Act of 1866 § 5.

352. Fugitive Slave Act of 1850 § 5.

2004] *AN OVERLOOKED MORAL ANOMALY* 239

authorized the summoning of a posse comitatus “to insure faithful observance of” the Thirteenth Amendment.³⁵³

Section 6 of the 1866 Act subjected to federal criminal penalties any one who “shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person” from executing any warrant or process under this act, or from arresting any person for whose apprehension such warrant or process may have been issued.”³⁵⁴ This section also imposed criminal penalties on anyone who

shall rescue or attempt to rescue such person from [federal] custody . . . , or shall aid, abet, or assist any person so arrested . . . to escape from [federal] custody . . . , or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person.³⁵⁵

The penalties for such offenses were “a fine not exceeding one thousand dollars and imprisonment not exceeding six months, by indictment and conviction [before the federal district court or territorial court of criminal jurisdiction in the district or territory in which the offense was committed].”³⁵⁶ This provision was almost identical to section 7 of the Fugitive Slave Act of 1850, which imposed penalties on anyone who prevented the arrest or harbored, concealed, rescued, or assisted the escape of fugitive slaves.³⁵⁷

353. Civil Rights Act of 1866 § 5; *c.f.* Fugitive Slave Act of 1850 § 5.

354. Civil Rights Act of 1866 § 6.

355. *Id.*

356. *Id.*; *c.f.* Fugitive Slave Act of 1850, § 7. Referring to the civil fine of section 5 and the criminal fine of section 6, Senator Davis complained that, under the Civil Rights Act, “All persons who violate the rights of the negro under this act are subjected by it to two penalties of \$1000 each, one for the benefit of the United States, and the other for the benefit of the injured negro in the form of liquidated damages.” Cong. Globe, 39th Cong., 1st Sess. at 599 (Sen. Davis). He also complained that a federal legal officer was subject to the two penalties, noting that the Civil Rights Bill

creates two separate penalties on a defaulting officer, . . . one for the benefit of the United States, and the other for the benefit of the free negro whose rights, according to the letter of this monstrous and unconstitutional law, have been violated; and the penalty in favor of the free negro is assessed in the form of liquidated damages, and the mandate of the court goes inexorably to the marshal to pay to the negro his \$1,000 liquidated damages.

Id.

357. Fugitive Slave Act of 1850 § 7. Section 7 of the 1866 Act also provided that federal attorneys, marshals, and deputy marshals were to be paid “the like fees as may be allowed to them for similar services in other cases,” and that commissioners receive a fee of \$10 for his services for each proceeding and others who execute process under the act be paid \$5 for each person arrested and brought for examination plus “such other fees” for other services deemed reasonable by the commissioner. Civil Rights Act of 1866 § 7; *c.f.* Fugitive Slave Act of 1850 § 8. These fees, and the costs of arresting, housing, and feeding prisoners were to be paid out of the United States Treasury. Civil Rights Act of 1866 § 7; *c.f.* Fugitive Slave Act of 1850, § 7.

Section 8 authorized the President of the United States to reassign federal judges and legal officers to locations where they were needed to vindicate violations of the Civil Rights Act. It provided that whenever the President “shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district,” he shall direct the judge, the United States attorney, and the marshal of such district to attend such place for such time as he shall designate “for the purpose of the more speedy arrest and trial of persons charged with a violation of this act.”³⁵⁸ Section 9 of the Civil Rights Act authorized the President of the United States “to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the execution of this act.”³⁵⁹ The 1850 Fugitive

358. Civil Rights Act of 1866 § 8. There was no directly analogous provision in the Fugitive Slave Act. However, the 1850 statute did direct federal officers, whenever a slave owner had “reason to apprehend” that his fugitive slave “will be rescued by force,” to return the fugitive slave to the state from which he fled and “to employ so many persons as he may deem necessary to overcome such force” with expenses to be paid by the United States treasury. Fugitive Slave Act of 1850 §9.

359. Civil Rights Act of 1866 § 9. Senator Lane of Indiana defended the bill’s authorization of “the power of the military to enforce” it because

[n]either the judge, nor the jury, nor the officer as we believe is willing to execute the law. . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the constitutional amendment; but because we believe they will not do that, we give the Federal officers jurisdiction.

Cong. Globe, 39th Cong., 1st Sess at 603 (Sen. Lane). It was because “the body of the whole people [of the South], a body of rebels steeped in treason and rebellion” will not execute the Civil Rights Bill, that the bill authorizes federal legal officers with the assistance of the military to ensure that the statute is faithfully enforced. *Id.* He reminded the Senate that the military “were called upon to execute the fugitive slave law and to suppress a riot growing out of the attempt to enforce it” in Boston. *Id.* Lane was referring to the struggle to return Anthony Burns from Boston to Virginia. Lane expressed his belief

that the provisions of this bill are admirably calculated to secure to these colored persons their rights under the constitutional amendment, and I think the provision contained in the last section of the bill more important than any other, and that is, that the President shall have a right with the strong arm of military authority to see that this law is carried out; and I say without that provision this act would be a mockery and a farce.

Id. However, opponents protested that this provision set up a military despotism to enforce the Civil Rights Bill. Military enforcement was authorized to punish state judges and other legal officers who enforced racially discriminatory state laws as well as to prevent the execution of legal process under such laws. *Id.* at 604 (Sen. Cowan). Senator Trumbull defended the military provision of section 9, insisting that Congress had “the authority to call in the military in aid of the execution of the law through the courts” Trumbull elaborated:

the militia and the military may be called out whenever there is a combination of persons in any of the rebellious States so powerful that the marshals and civil officers in the ordinary course of judicial proceedings cannot execute the law. . . . [W]henver there shall be a combination there to protect a man who has violated this law, and the marshal is driven off, he may call a file of soldiers to go with him and seize the individual who sets at defiance the process of the court.

Slave Act included an analogous provision, where it authorized federal legal officers to remove fugitive slaves by force and at government expense to the states from which they fled if the claimant made an affidavit that he had reason to believe that the fugitive would be rescued by force.³⁶⁰ The final section of the Civil Rights Act of 1866 authorized final appeal to the United States Supreme Court of all questions of law arising under this statute.³⁶¹

CONCLUSION

The framers and supporters of the Civil Rights Act of 1866 were troubled that the national government had exercised virtually the full extent of its powers to protect and enforce the property right of slaveholders in their slaves before the Civil War. Having brought the war to a successful conclusion, congressional Republicans radically changed the Constitution by eliminating the property right in slaves and creating a constitutionally secured right to liberty. They believed that, if Congress had the constitutional power to enact the Fugitive Slave Acts of 1793 and 1850 to protect and enforce the property rights of slave owners, it surely must have the constitutional authority to enact the Civil Rights Act of 1866 to secure the fundamental rights of

Id. at 605 (Sen. Trumbull). Senator Hendricks pressed Trumbull to explain whether the Civil Rights Bill provides for calling out the militia and the military before the law has been violated, to prevent its violation, before a crime is committed, to prevent a crime. “How is that in aid of the courts of the country,” Hendricks, asked. *Id.* (Sen. Hendricks). Trumbull answered, “Yes, sir; that is in aid of the execution of this law.” *Id.* (Sen. Trumbull). Reading the Militia Clause of Article I, which authorizes Congress “to provide for calling forth the militia to execute the laws of the Union,” Trumbull insisted Congress could call out the militia to execute the law, and when persons combined together to prevent its execution, Congress could authorize the President to use the militia to execute the law by preventing its violation. *Id.* “For the purpose of preventing [combinations of county authorities to deny civil rights to black men], before they have done any act, I say the militia may be called out to prevent them from committing an act. We are not required to wait until the act is committed before anything can be done.” *Id.* Trumbull said that the federal government could have used this power in 1860 to prevent rebellion. He also referred to the Militia Acts of the 1790s, which called on the militia to “be called forth to cause the laws to be duly executed; that is, to prevent persons from preventing their execution.” Trumbull then announced that section 10 of the Civil Rights Bill is taken verbatim from the Act of March 10, 1836, which supplemented federal statutes for the punishment of certain crimes against the United States relating to the collection of revenue. But Trumbull noted that the act was passed in 1838 and signed into law by President Martin Van Buren, a good Democrat. *Id.* Moreover, Trumbull argued that President Johnson was himself using the military to protect the rights of Americans in the South, which represented a precedent for the Civil Rights Bill. *Id.* at 1760. Representative Lawrence conceded that in ordinary times it may be better to await the Supreme Court’s ultimate decision on constitutional questions regarding the constitutionality of discriminatory state law and legal process. But, he noted, “we now employ military power to reach the same results, to secure civil rights,” because the need to secure civil rights was so immediate and urgent. *Id.* at 1837 (Rep. Lawrence).

360. Fugitive Slave Act of 1850 §§ 6, 9.

361. Civil Rights Act of 1866 § 10.

free men. Citing such canonical cases as *McCulloch v. Maryland* and such infamous cases as *Prigg v. Pennsylvania*, supporters of the 1866 statute insisted that Congress possessed the same plenary power to secure citizens' civil rights and equality as it had to secure property and privilege.

In enacting the 1866 Civil Rights Act, the framers of the Fourteenth Amendment exercised the very powers that the Rehnquist Court held Congress could not exercise under the Fourteenth Amendment: it defined some of the rights of United States citizens and it provided civil remedies whenever anyone violated these civil rights. It did more. The Civil Rights Act conferred United States citizenship on all Americans and enumerated some of the rights individuals are to enjoy equally with other United States citizens. It created substantive protections of citizens' civil rights by imposing civil liability on anyone who violated a citizen's civil rights and by imposing criminal penalties on anyone who violated these rights under color of law or custom and out of racial animus. It conferred exclusive jurisdiction on federal courts to try criminal violations of the Act as well as to try all civil actions between private individuals arising under the statute; it conferred original civil and criminal jurisdiction on the federal courts to prosecute any state criminal offense and to try any state civil action whenever the states' criminal and civil justice systems failed to do so in violation of the Civil Rights Act. It authorized the removal from state courts to the courts of the United States of all cases brought against individuals acting under its authority or for refusing to act inconsistently with the Act and directed federal courts to try the original suit. It also adopted the enforcement structure Congress created in 1850 to enforce the Fugitive Slave Act of 1850.

They then drafted and adopted the proposed Fourteenth Amendment two months after they enacted the Civil Rights Act. All historians agree that the framers of the Fourteenth Amendment intended section 1 to put the guarantees of the Civil Rights Act into the Constitution in order to ensure the statute's constitutionality.³⁶² According to the framers' intent, therefore, the Fourteenth

362. See, e.g., Amar, *supra* note 276, at 216-18, 271-74; Berger, The Fourteenth Amendment, *supra* note 276, at 36, 150-52, 413; Curtis, No State Shall Abridge, *supra* note 8, at 71-72; Flack, *supra* note 276, at 94, 153, 154; Joseph B. James, The Framing of the Fourteenth Amendment 128, 161, 164, 179 (1956); Robert J. Kaczorowski, The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866-1883, at 102-05 (1987); Fairman, *Does the Fourteenth Amendment*, *supra* note 276, at 5, 44-45, 80, 138; Nelson, *supra* note 8, at 104-08. However, other scholars have essentially limited their consideration to section 1 of the 1866 Civil Rights Act and the evidence it presents of the rights the framers intended the Fourteenth Amendment to secure. I examine the significance of the Fourteenth Amendment's incorporation of the Civil Rights Act for Congress's remedial powers under the Amendment in Kaczorowski, *supra* note 321 (manuscript at 93-116).

2004] *AN OVERLOOKED MORAL ANOMALY* 243

Amendment must authorize Congress to enforce and protect the rights it secures at least to the extent provided by the 1866 statute.³⁶³

The history presented in this Article shows that the Supreme Court has unwittingly decided that the Constitution today does not authorize as much federal protection for the human rights and equality of all Americans as it provided in the nineteenth century to protect the property rights and privilege of slave owners. It consequently raises anew the moral anomaly the framers of the Fourteenth Amendment confronted and resolved in 1866. The Rehnquist Court may wish to ignore that the framers of the Fourteenth Amendment insisted that Congress must have as much power to enforce human rights and equality that it had previously exercised to enforce property and privilege. But, if the Court chooses to ignore this history, it will proclaim the morally problematic principle that the Supreme Court of the United States affirmed greater constitutional protection of the property rights of slave owners in the nineteenth century than it is willing to affirm to protect the human rights of all Americans today.

363. I demonstrate this original intent in Kaczorowski, *supra* note 321 (manuscript at 93-114).