AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Criminal Justice/Habeas Corpus and Due Process/The Fugitive Slave Act of 1793

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

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*Edward Prigg, a professional slavecatcher, was hired in 1837 by Margaret Ashmore to abduct Margaret Morgan, whom Ashmore claimed was an escaped slave. Prigg and his confederates traveled to Pennsylvania, seized Morgan and her children, and forcibly took them back to the Ashmore estate in Maryland. Prigg ignored the Fugitive Slave Act of 1793, which required slaveowners to obtain a certificate from a state or federal official authorizing them to seize an alleged fugitive and return that fugitive to slavery. His actions also violated a Pennsylvania law that forbade persons "by force or violence" to "take and carry away . . . any negro or mulatto" for the purpose of having that person enslaved. At his trial, Prigg claimed the state law was unconstitutional. He first argued that the fugitive slave clause gave masters a right of recapture. Under common law, an owner had the right to enter another person's property to capture an animal that had run away. Prigg claimed the Constitution of the United States vested slaveholders with an analogous right to capture runaway slaves. Prigg then argued that the fugitive slave clause prohibited all state legislation that interfered with the rendition process, the process by which fugitive slaves were returned to their owners. Pennsylvania responded that the state was constitutionally permitted to protect free residents of color from being kidnapped and sold as slaves. A Pennsylvania jury found Prigg guilty of kidnapping. That verdict was sustained by the state supreme court. Prigg appealed those decisions to the Supreme Court of the United States. Pennsylvania and Maryland cooperated with Prigg to create a case testing the constitutionality of Pennsylvania's kidnapping laws and the Fugitive Slave Act of 1793.*

*The Supreme Court overturned Priggs's conviction, but the justices divided on several crucial questions. Justice Story's wrote the opinion for the court in* Prigg v. Pennsylvania. *He declared that Prigg had a right to recapture Morgan without relying on any judicial process, that the Fugitive Slave Act of 1793 was constitutional, and that state personal liberty laws were unconstitutional. Story further ruled that federal power over fugitive slaves was exclusive. States, he declared, had no power to pass any laws regulating the process by which fugitive slaves were returned to their owners. Chief Justice Taney, Justice Thompson, and Justice Daniel disagreed only with this last conclusion. They insisted that states could constitutionally facilitate the rendition process. Justice McLean agreed that federal power over fugitive slaves was exclusive. His opinion maintained that states could pass laws protecting free citizens of color.*

*When reading the opinions in the case, notice how little most justices say about the legal processes necessary for determining the actual status of a person claimed as a slave. What does Judge Story say on that subject? If he does claim that the federal process is adequate, why does he make that claim? Why does Justice Wayne insist that free states cannot hold trials to determine the actual status of a person claimed as a slave? Why does Justice McLean disagree? Imagine you were asked to write a national law that balanced the interests of slaveholders with the interests of free blacks. Would you insist that the judicial proceeding for determining the status of the alleged fugitive be held in a free or slave state? Which conclusion does the Constitution support? Does the Constitution require jury trials for persons claimed as escaped slaves?*

*Judge Story privately claimed that the* Prigg *opinion is a "triumph of freedom."*[1] *Why did he make that claim? Consider two possibilities. First, Story explicitly reaffirmed the holding of* Somerset v. Stewart *(1772) that slavery does not exist in common law. Second, by prohibiting states from participating in the rendition process, Story made the practical rendition of fugitive slaves almost impossible in a society that lacked a substantial federal bureaucracy (although Story proposed laws that increased federal capacity to help slaveholders recover fugitives).*

[1] William W. Story, ed., *Life and Letters of Joseph Story,* vol. II (London: John Chapman, 1851), 392.

*Some scholars challenge claims that* Prigg *is a "triumph of liberty." They claim that Story provided more protection for slavery than was constitutionally required.*[2] *Do you agree with Story or his critics?*

JUSTICE STORY delivered the opinion of the court.

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. . . [T]he object of [the fugitive slave clause] was to secure to the citizens of the slave-holding 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. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed. . . .

By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. . . . The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Somerset's Case*. . . . It is manifest, from this consideration, that if the constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different states. The clause was, therefore, of the last importance to the safety and security of the southern states, and could not have been surrendered by them, without endangering their whole property in slaves. The clause was accordingly adopted into the constitution, by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.

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The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain. The slave is not to be discharged from service or labor, in consequence of any state law or regulation. Now, certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, *pro tanto*, a discharge of the slave therefrom. . . .

We have said, that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any, which is not expressed, and cannot be fairly implied. . . . Upon this ground, we have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent, this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

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[T]his leads us to the consideration of the other part of the clause, which implies at once a guarantee and duty. It says, 'but he (the slave) shall be delivered up, on claim of the party to whom such service or labor may be due.' . . . The slave is to be delivered up on the claim. By whom to be delivered

[2] See Paul Finkelman, "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story's Judicial Nationalism," *Supreme Court Review* 1994 (1994):247; Christopher L.M. Eisgruber, "Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism," *University of Chicago Law Review* 55 (1988):273; Leslie Friedman Goldstein, "A 'Triumph of Freedom' After All: *Prigg v Pennsylvania* Re-Examined," *Law and History Review* 29 (2011):763.

up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proofs? What shall be the evidence of a rightful reception or delivery? . . . 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. . . . Congress, then, may call that 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 a complete protection and guarantee to the right.

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. . . [I]f congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of compliment to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. . . .

. . .

It is scarcely conceivable, that the slave-holding states would have been satisfied with leaving to the legislation of the non-slave-holding states, a power of regulation, in the absence of that of congress, which would or might practically amount to a power to destroy the rights of the owner.

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Upon these grounds, we are of opinion, that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. 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.

CHIEF JUSTICE TANEY

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I think, the states are not prohibited; and that, on the contrary, it is enjoined upon them as a duty, to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective territories. . . .

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JUSTICE THOMPSON

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. . . I cannot concur in that part of the opinion of the court, which asserts that the power of legislation by congress is exclusive; and that no state can pass any law to carry into effect the constitutional provision on this subject, although congress had passed no law in relation to it. . . . Should congress repeal the law of 1793, and pass no other law on the subject, I can entertain no doubt, that state legislation, for the purpose of restoring the slave to his master, and faithfully to carry into execution the provision of the constitution, would be valid. I can see nothing in the provision itself, nor discover any principle of sound public policy, upon which such a law would be declared unconstitutional and void. The constitution protects the master in the right to the possession and service of his slave, and of course, makes void all state legislation impairing that right; but does not make void state legislation in affirmance of the right. . . .

JUSTICE BALDWIN

[He] concurred with the court in reversing the judgment of the supreme court of Pennsylvania, on the ground, that the act of the legislature was unconstitutional; inasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping. But he dissented from the principles laid down by the court as the grounds of their opinion.

JUSTICE WAYNE

I concur altogether in the opinion of the court, as it has been given by my brother STORY.

. . .

I believe, that the power to legislate upon the provision is exclusively in congress. . . .

. . .

[The fugitive slave clause] provide[s], that delivery of a fugitive shall be made on the claim of the owner—that the fugitive slave owing service and labor in the state from which he fled, and escaping therefrom, shall be decisive of the owner's right to a delivery. It does not, however, provide the mode of proving that service and labor is due, in a contested case. . . . A certificate from an officer authorized to inquire into the facts, is the easiest way to secure the right to its contemplated intent. It was foreseen, that claims would be made, which would be contested; some tribunal was necessary to decide them, and to authenticate the fact, that a claim had been established. Without such authentication, the contest might be renewed in other tribunals of the state in which the fact had been established; and in those of the other states through which the fugitive might be carried, on his way to the state from which he fled. Such a certificate too, being required, protects persons who are not fugitives from being seized and transported; it has the effect of securing the benefit of a lawful claim, and of preventing the accomplishment of one that is false. . . .

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. . . Shall, then, each state be permitted to legislate in its own way, according to its own judgment, and their separate notions, in what manner the obligation shall be discharged to those states to which it is due? To permit some of the states to say to the others, how the property included in the provision was to be secured by legislation, without the assent of the latter, would certainly be, to destroy the equality and force of the guarantee, and the equality of the states by which it was made. This was not anticipated by the representatives of the slave-holding states in the convention, nor could it have been intended by the framers of the constitution. Is it not more reasonable to infer, as the states were forming a government for themselves, to the extent of the powers conceded in the constitution, to which legislative power was given to make all laws necessary and proper to carry into execution all powers vested in it—that they meant, that the right for which some of the states stipulated, and to which all acceded, should, from the peculiar nature of the property in which only some of the states were interested, be carried into execution by that department of the general government in which they were all to be represented—the congress of the United States.

. . .

I understood the provision to mean, and when its object and the surrender by the states of the right to discharge are kept in mind, its obvious meaning to every one must be, that the states are not only prohibited from discharging a fugitive from service, by a law; but that they shall not make or apply regulations to try the question of the fugitive owing service. The language of the provision, is, 'no person, &c., shall, in consequence of any law or regulation therein,' be discharged from such service or labor. The words 'in consequence,' meaning the effect of a cause—certainly embrace regulations to try the right of property, as well as laws directly discharging a fugitive from service. If this be not so, the states may regulate the mode of an owner's seizing of a fugitive slave, prohibiting it from being done except by warrant and by an officer; thus denying to an owner the right to use a casual opportunity to repossess himself of this kind of property, which there is a right to do, in respect to all other kinds of property, where not in the possession of some one else. It may regulate the quantity and quality of the proof to establish the right of an owner to a fugitive, and give compensatory and punitive damages against a

claimant, if his right be not established according to such proof. It might limit the trial to particular times and courts; give appeals from one to other courts; and protract the ultimate decision, until the value in controversy was exceeded by the cost of establishing it. . . .

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Apart from the position that the states may legislate in all cases, where they are not expressly prohibited, or by necessary implication; the claim for the states to legislate is mainly advocated upon the ground, that they are bound to protect free blacks and persons of color residing in them from being carried into slavery by any summary process. The answer to this is, that legislation may be confined to that end, and be made effectual, without making such a remedy applicable to fugitive slaves. There is no propriety in making a remedy to protect those who are free, the probable means of freeing those who are not so. . . .

JUSTICE DANIEL

. . .

I cannot regard the [fugitive slave clause] as falling either within the definition or meaning of an exclusive power. . . .

. . . I hold, then, that the states can establish proceedings which are in their nature calculated to secure the rights of the slave-holder guaranteed to him by the constitution; as I shall attempt to show, that those rights can never be so perfectly secured, as when the states shall, in good faith, exert their authority to assist in effectuating the guarantee given by the constitution. . . .

If there is a power in the states to authorize and order their arrest and detention for delivery to their owners, not only will the probabilities of recovery be increased, by the performance of duties enjoined by law upon the citizens of those states, as well private persons as those who are officers of the law; but the incitements of interest, under the hope of reward, will, in a certain class of persons, powerfully co-operate to the same ends. But let it be declared, that the rights of arrest and detention, with a view of restoration to the owner, belong solely to the federal government, exclusive of the individual right of the owner to seize his property, and what are to be the consequences? In the first place, whenever the master, attempting to enforce his right of seizure under the constitution, shall meet with resistance, the inconsiderable number of federal officers in a state, and their frequent remoteness from the theatre of action, must, in numerous instances, at once defeat his right of property, and deprive him also of personal protection and security. By the removal of every incentive of interest in state officers, or individuals, and by the inculcation of a belief that any co-operation with the master becomes a violation of law, the most active and efficient auxiliary which he could possibly call to his aid is entirely neutralized. Again, suppose, that a fugitive from service should have fled to a state where slavery does not exist, and in which the prevalent feeling is hostile to that institution; there might, nevertheless, in such a community, be a disposition to yield something to an acknowledged constitutional right—something to national comity, too, in the preservation of that right; but let it once be proclaimed from this tribunal, that any concession by the states towards the maintenance of such a right, is a positive offence, the violation of a solemn duty, and I ask what pretext more plausible could be offered to those who are disposed to protect the fugitive, or to defeat the rights of the master? . . . .

JUSTICE McLEAN

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. . . The nature of the power shows that it must be exclusive. It was designed to protect the rights of the master, and against whom? Not against the state, nor the people of the state in which he resides; but against the people and the legislative action of other states where the fugitive from labor might be found. Under the confederation, the master had no legal means of enforcing his rights, in a state opposed to slavery. A disregard of rights thus asserted was deeply felt in the south; it produced great excitement, and would have led to results destructive of the Union. To avoid this, the constitutional guarantee was essential. The necessity for this provision was found in the views and feelings of the people of the states

opposed to slavery; and who, under such an influence, could not be expected favorably to regard the rights of the master. Now, by whom is this paramount law to be executed?

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I come now to a most delicate and important inquiry in this case, and that is, whether the claimant of a fugitive from labor may seize and remove him by force, out of the state in which he may be found, in defiance of its laws. I refer not to laws which are in conflict with the constitution, or the act of 1793. Such state laws, I have already said, are void. But I have reference to those laws which regulate the police of the state, maintain the peace of its citizens, and preserve its territory and jurisdiction from acts of violence.

. . .

In a state where slavery is allowed, every colored person is presumed to be a slave; and on the same principle, in a non-slave-holding state, every person is presumed to be free, without regard to color. On this principle, the states, both slave-holding and non-slave-holding, legislate. The latter may prohibit, as Pennsylvania has done, under a certain penalty, the forcible removal of a colored person out of the state. Is such law in conflict with the act of 1793? The act of 1793 authorizes a forcible seizure of the slave by the master, not to take him out of the state, but to take him before some judicial officer within it. The law of Pennsylvania punishes a forcible removal of a colored person out of the state. Now, here is no conflict between the law of the state and the law of congress; the execution of neither law can, by any just interpretation, in my opinion, interfere with the execution of the other; the laws in this respect stand in harmony with each other.

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The conflict is supposed to arise out of the prohibition against the forcible removal of persons of color, generally, which may include fugitive slaves. *Prima facie*, it does not include slaves, as every man within the state is presumed to be free, and there is no provision in the act which embraces slaves. Its language clearly shows, that it was designed to protect free persons of color within the state. But it is admitted, there is no exception as to the forcible removal of slaves; and here the important and most delicate question arises between the power of the state, and the assumed but not sanctioned power of the federal government. No conflict can arise between the act of congress and this state law; the conflict can only arise between the forcible acts of the master and the law of the state. The master exhibits no proof of right to the services of the slave, but seizes him and is about to remove him by force. I speak only of the force exerted on the slave. The law of the state presumes him to be free, and prohibits his removal. Now, which shall give way, the master or the state? The law of the state does, in no case, discharge, in the language of the constitution, the slave from the service of his master. It is a most important police regulation. And if the master violate it, is he not amenable? The offence consists in the abduction of a person of color; and this is attempted to be justified, upon the simple ground that the slave is property. That a slave is property, must be admitted. The state law is not violated by the seizure of the slave by the master, for this is authorized by the act of congress; but by removing him out of the state by force, and without proof of right, which the act does not authorize. Now, is not this an act which a state may prohibit? The presumption, in a non-slave-holding state, is against the right of the master, and in favor of the freedom of the person he claims. This presumption may be rebutted, but until it is rebutted by the proof required in the act of 1793, and also, in my judgment, by the constitution, must not the law of the state be respected and obeyed?

. . . The presumption of the state that the colored person is free, may be erroneous in fact; and if so, there can be no difficulty in proving it. But may not the assertion of the master be erroneous also; and if so, how is his act of force to be remedied? . . . This view respects the rights of the master and the rights of the state; it neither jeopardizes nor retards the reclamation of the slave; it removes all state action prejudicial to the rights of the master; and recognizes in the state a power to guard and protect its own jurisdiction, and the peace of its citizen.

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