AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era—– Criminal Justice/Habeas Corpus and Due Process/The Fugitive Slave Act of 1850

The Booth Cases (expanded)

Sherman Booth was an anti-slavery journalist who lived in Milwaukee, Wisconsin. In March 1854, Booth helped a fugitive slave, Joshua Glover, break out of prison and escape to Canada. On May 26, Booth was arrested by a federal commissioner for violating the Fugitive Slave Act of 1850. Booth immediately asked the Supreme Court of Wisconsin for a writ of habeas corpus. He was being illegally detained by federal officials, Booth's petition asserted, because the Fugitive Slave Act was unconstitutional. Justice Abram Smith granted the writ and his decision was later affirmed by the Supreme Court of Wisconsin (Booth I). *The justices in* Booth I *ruled that state courts could issue writs of habeas corpus to persons being detained by a federal commissioner because federal commissioners had no authority to determine whether a federal law was constitutional. The state court justices then determined that the Fugitive Slave Act of 1859 was unconstitutional and issued the writ. On July 8, a federal grand jury indicted Booth for aiding and abetting the escape of Joshua Glover. Two days later, a federal district judge issued an arrest warrant. Booth again asked the Supreme Court of Wisconsin for a writ of habeas corpus. This time, the Wisconsin Supreme Court (*Booth II) *unanimously rejected issuing the writ. Unlike federal commissioners, the state justices reasoned, federal courts were authorized by the Constitution of the United States to make an independent determination whether the fugitive slave act was unconstitutional. At his federal court trial, Booth was found guilty of helping Joshua Glover escape from federal marshals, but was not found guilty of violating the Fugitive Slave Act of 1850. Once more, Booth appealed to the Wisconsin Supreme Court for a writ of habeas corpus. This time, the Court* (Booth III) *unanimously granted the writ. All three judges insisted that federal courts had jurisdiction only over federal crimes. Helping someone escape from a federal marshal was not a federal crime, they noted, in the crucial absence of evidence that Booth had helped an escaped slave escape from a federal marshal. Federal authorities in Wisconsin appealed this decision to the Supreme Court of the United States.*

Roger Taney, writing for a unanimous court in Ableman v. Booth, *reversed the Supreme Court of Wisconsin's decision. State courts, he declared, had no power to issue a writ of habeas corpus to a person in federal custody on the ground that federal courts had misinterpreted federal law or the federal constitution.*

The Taney court decision did not bring the Booth affair to a halt. The Wisconsin Supreme Court refused to retract the writ of habeas corpus. The Wisconsin legislature passed a resolution nullifying Ableman v. Booth. *Nevertheless, Booth was rearrested. He remained in prison long after his thirty-day sentence ended because he refused to pay the $1,000 fine. President James Buchanan, in his last day in office, pardoned Booth. Litigation over the escape of Joshua Glover did not end until the closing days of the Civil War.*[1]

The following pages excerpt Judge Smith's initial decision to grant the writ of habeas corpus, the Supreme Court of Wisconsin's opinion in Booth I, *the opinion of the Supreme Court of the United States in* Ableman v. Booth, *and the Wisconsin legislature's resolutions nullifying* Ableman v. Booth. *Consider first the questions these materials raise about habeas corpus. The Wisconsin Supreme Court claimed a right to issue writs of habeas corpus to persons imprisoned by a federal commissioner. Why did they make that claim? Did the Taney court in* Ableman *dispute that claim or was* Ableman *directed only at the authority of federal judges? Consider then questions about the Fugitive Slave Act of 1850. Why did Judges Smith and Whiton consider that law unconstitutional? Chief Justice Whiton claimed that the Supreme Court's decision in* Prigg v. Pennsylvania *did not resolve issues presented by the Fugitive Slave Act of 1850. Was he correct?*

---

[1] Readers interested in all the bloody details should consult H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens, OH: Ohio University Press, 2006).

In re Booth [Booth I], 3 Wis. 1 (1854)

JUSTICE SMITH

. . .

. . . [T]he States will never submit to the assumption, that United States commissioners have the power to hear and determine upon the rights and liberties of their citizens, and issue process to enforce their adjudications, which is beyond the examination or review of the state judiciary. They will cheerfully submit to the exercise of all power and authority by the federal judiciary, which is delegated to that department by the federal constitution; but they have a right to insist, and they will insist that the state judiciary shall be and remain supreme in all else, and that the functions of the federal judiciary within the territory of the states shall be exercised by the officers designated or provided for by the constitution of the United States, and that they shall not be transferred to subordinate and irresponsible functionaries, holding their office at the will of the federal courts, doing their duty and obeying their mandates, for which neither the one nor the other is responsible.

. . .

. . . [T]he *status* of the fugitive is essentially different in this state, from his *status* or condition in the state from whence he fled. In the latter, he remained subject to all the disabilities of his class, though he may have escaped from the domicil or premises of his master. Here, he is entitled to the full and complete protection of our laws; as much so as any other human being, so long as he is unclaimed. He may sue and be sued; he may acquire and hold property; he is, to all intents and purposes, a free man, until a lawful claim is made for him; and this claim must be made by the person to whom his service or labor is due, under the laws of the state from which he escaped. No one else can interfere with him. If no *claim* is set up to his service or labor by the person to whom his service or labor is due, there is no power or authority, or person on earth, that can derive any advantage from his former condition, or assert it, to his prejudice. So long as the owner does not choose to assert his *claim,* the cottage of the fugitive in Wisconsin is as much his castle—his property, liberty and person are as much the subject of legal protection, as those of any other person. Our legal tribunals are as open to his complaint or appeal, as to that of any other man. He *may* never be claimed; and if not, he would remain forever free, and transmit freedom to his posterity born on our soil.

. . .

We have seen how the power of legislation was granted to congress in respect to public records, etc. We have seen that no such power is granted in respect to the surrender of fugitives from labor, and that it was not even asked for; and from the known temper and scruples of the national convention, we may safely affirm, that had it been asked it would not have been granted, and had it been granted, no union could have been formed upon such a basis. The history of the times fully justifies this conclusion. Can it be supposed for a moment, that had the framers of the constitution imagined, that under this provision the federal government would assume to override the state authorities, appoint subordinate tribunals in every county in every state, invested with jurisdiction beyond the reach or inquiry of the state judiciary, to multiply executive and judicial officers *ad infinitum,* wholly independent of, and irresponsible to the police regulations of the state, and that the whole army and navy of the union could be sent into a state, without the request, and against the remonstrance of the legislature thereof; nay, even that under its operation, the efficacy of the writ of habeas corpus could be destroyed, if the privileges thereof were not wholly suspended; if the members of the convention had dreamed that they were incorporating such a power into the constitution, does any one believe, that it would have been adopted without opposition and without debate? And if these results had suggested themselves to the states on its adoption, would it have been passed by them, *sub silentio,* jealous as they were of state rights and state sovereignty? The idea is preposterous. The union would never have been formed upon such a basis. It is an impeachment of historic truth, to assert it.

. . .

. . . But it may be asked, how are the rights here stipulated and guaranteed, to be enforced? I answer, that every state officer, executive, legislative and judicial, who takes an oath to support the constitution of the United States, is bound to provide for, and aid in their enforcement, according to the true intent and meaning of the constitution. . . .

. . .

To my mind, therefore, it is apparent that congress has no constitutional power to legislate on this subject. It is equally apparent, that the several states can pass no laws, nor adopt any regulations, by which the fugitive may be discharged from service. . . .

. . .

The clause as finally adopted reads, "but shall be delivered up on claim of the party *to whom such service or labor is* DUE." Here is a fact to be ascertained, before the fugitive can be legally delivered up, viz: that his service or labor is really due to the party who claims him. How is the fact to be ascertained? A claim is set up to the service of a *person.* He who makes the claim is denominated by the constitution a party. The claimant is one party, the person who resists the claim is another party. If he really owes the service according to the laws of the state from which he is alleged to have escaped, and has in fact escaped, he must be delivered up. If the claim is unfounded, he cannot be delivered up. The constitution itself has made up the issue, and arranged the parties to it. Can any proposition be plainer, than that here is suspended a legal right upon an issue of fact, which can only be determined by the constitutional judicial tribunals of the country? . . . .

Here there is a fact, an issue, to be judicially determined, before a right can be enforced. What authority shall determine it? Clearly the authority of the state whose duty it is to deliver up the fugitive when the fact is determined. Until the issue which the constitution itself creates, is decided, the *person* is entitled to the protection of the laws of the state. When the issue is determined against the fugitive, then the constitutional compact rises above the laws and regulations of the state, and to the former the latter must yield.

To my mind, this seems very clear and simple. The whole proceeding is clearly a judicial one, and I will not stop here to demonstrate what, from the preceding remarks, appears so obvious. The law of 1850, by providing for a trial of the constitutional issue, between the *parties* designated thereby, by officers not recognized by any constitution, state or national, is unconstitutional and void.

It has been already said, that until the claim of the owner be interposed, the fugitive in this state is, to all intents and purposes, a free man.

. . . Therefore the trial thereof must not only be had before a judicial tribunal, but whether proceedings be commenced by the fugitive to resist the claimant, or by the claimant to enforce, and establish his claim, it would seem that either party would be entitled to a jury. . . .

. . .

Again, the constitution provides that no person shall be deprived of life, liberty or property, without *due process of law.* This last phrase has a distinct technical meaning, viz: regular judicial proceedings, according to the course of the common law, or by a regular suit commenced and prosecuted according to the forms of law. An essential requisite is due process to bring the party into court. It is in accordance with the first principles of natural law. Every person is entitled to his "day in court," to be legally notified of the proceedings taken against him, and duly summoned to defend. The passing of judgment upon any person without his "day in court;" without due process, or its equivalent, is contrary to the law of nature, and of the civilized world, and without the express guaranty of the constitution, it would be implied as a fundamental condition of all civil governments. But the tenth section of the act of 1850, expressly nullifies this provision of the constitution. It provides that the claimant may go before any court of record, or judge, in vacation, and without process, make proof of the escape, and the owing of service or labor; whereupon a record is made of the matters proved, and a general description of the person alleged to have escaped; a transcript of such record made out and attested by the clerk with the seal of the court, being exhibited to the judge or commissioner, must be taken and held to be conclusive evidence of the fact of escape, and that service or labor is due to the party mentioned in the record, and *may* be held sufficient evidence of the identity of the person escaping.

Here is a palpable violation of the constitution. Can that be said to be by due *process* of law which is without process altogether? Here the *status* or condition of the person is instantly changed in his absence, without process, without notice, without opportunity, to meet or examine the witnesses against him, or rebut their testimony. A record is made, which is conclusive against him, "in any state or territory in which he may be found." It is not a process to bring the person before the court in which the record is made up, but it is to all intents and purposes, a judgment of the court or judge, which commits the person absolutely to the control and possession of the claimant, to be taken whithersoever he pleases, to be dragged from a state where the legal presumption is in favor of his freedom, to any state or territory where the legal presumption is against his freedom.

. . .

By the Court, CHIEF JUSTICE WHITON

. . .

. . . We do not see how these commissioners can properly be called officers of the *courts* of the United States. It is true that they are appointed by the judges of those courts, but neither the courts nor the judges are responsible for their acts. On the contrary, their duty and power are prescribed with particularity in acts of congress. The courts have no power to direct them as to the mode in which the duties imposed upon them by law shall be performed, and it seems to us to be a great misuse of language to call them officers of the courts. Nor do we think that they can, with any propriety, be called judicial officers. . . . We therefore do not see how these commissioners can be regarded as a part of the judicial organization of the United States. . . .

. . .

. . . The principal question discussed by the justices of the court who gave opinions [in *Prigg v. Pennsylvania*], was, the power of congress to legislate upon the subject of the reclamation of fugitives from labor; and they were all of opinion that congress had the power; a majority holding that the power was exclusive, and that the state could not pass laws even in aid of the legislation of congress. In the course of this discussion, nothing was said in relation to the powers of commissioners, for those officers did not exist at the time when the act of congress was passed; nor of the right of the alleged fugitive to a trial by jury to decide the question of fact upon which his surrender depends. . . .

. . .

We are of opinion that so much of the act of congress in question, as refers to the commissioners for decision, the questions of fact which are to be established by evidence before the alleged fugitive can be delivered up to the claimant, is repugnant to the constitution of the United States, and therefore void for two reasons: First, because it attempts to confer upon those officers judicial powers; and second, because it is a denial of the right of the alleged fugitive to have those questions tried and decided by a jury, which we think is given him by the constitution of the United States. . . .

. . .

We are aware that it has been said that slaves are not persons in the sense in which that term is used in [due process clause of the fifth] amendment. . . . But this, admitting it to be true, does not affect the question under consideration, as persons who are free are liable to be arrested and deprived of their liberty by virtue of this act, without having had a trial by a jury of their peers. . . . [W]e propose to examine the operation of the act upon a free citizen of a free state, and to show that by it such a person may be deprived of his liberty without "due process of law." It will be observed that the claimant can go before any court of record, or any judge thereof, in vacation, and make satisfactory proof to such court or judge, in vacation, of the escape, and that the person escaping owes service or labor to such party. . . . This testimony is taken, and this record is made, in the absence of the person to be affected by the proceeding. He has no opportunity to cross examine the witnesses who depose to the facts which are thus conclusively proved; but without his knowledge, evidence is manufactured, which, by virtue of this act, proves beyond question that he is a slave and that he has escaped from servitude. We are at a loss to perceive how this proceeding, by virtue of which a freeman becomes a slave, can be justly called "due process of law," in the sense in which that language is used in the constitution. We are aware that it has

been said that the proceedings before the commissioner do not determine the question of freedom or slavery, that the fugitive is only sent back to the state from which he is alleged to have escaped, and that when he reaches there, he is a freeman or a slave as his *status* shall be determined by the local law. . . . We think this is a mistaken view of the question. [In the case of an alleged fugitive slave], there is an adjudication before the commissioner that he owes service or labor, and that he has escaped. By force of the act of congress under consideration, the record made in the state from which he is said to have escaped is conclusive evidence that his *status* is that of a slave.

. . .

JUSTICE CRAWFORD, dissenting

. . .

I also believe, with the majority of the court, that when a writ of habeas corpus *cum causa* has been directed to the marshal of the United States, and he has by his return thereto set forth a writ or process, by virtue of and in obedience to which he claims to detain the person by whom or in whose behalf the writ of habeas corpus has been applied for, it is within the province of the state court or magistrate before whom the hearing is had, to look into the process by which the marshal justifies the detention, so far as may be necessary to enable the court or officer to determine whether the process is such as might have been issued by the tribunal from which it emanated, and whether that tribunal had jurisdiction of the subject matter or offense set up in the warrant or process, but beyond this I cannot go. . . . [W]hen the inquiry into the process is carried thus far, and it is discovered that it is a valid process, of the issuing of which the federal court or officer had jurisdiction, and that the subject matter, or offense named therein, is within the control or jurisdiction of the court or officer issuing it, then, I believe, a just and proper regard for the laws of the general government, and for the due administration of them in their own courts, demands that the state court or officer should decline to proceed any farther, and refer the applicant to the federal court for the relief which he seeks.

In pursuing this course, I do not perceive that the state tribunals yield anything which may be properly included in their rights or independence; but, on the contrary, they thereby evince a desire to preserve a clear distinction between subjects over which the federal courts have jurisdiction, *and are in the exercise thereof,* and subjects beyond the jurisdiction of the federal courts, and over which the state tribunals have the exclusive control. Nor can I see how the person whose liberty is invaded by color of process, is deprived of the writ of habeas corpus, if, indeed, his case be one in which that writ ought to be allowed, because the courts and judges of the United States are as fully empowered to allow such writ, where the detention or imprisonment is found in a case within their jurisdiction, as are the courts of the state. . . .

. . .

. . . I am satisfied that congress has the constitutional power to legislate upon the subject of fugitives from service or labor, in order to give effect to the third clause of section two of article four of the constitution of the United States. . . .

. . .

. . . [T]he decisions of the supreme court of the United States have settled the question; and until that court shall find occasion to review and change its own view of the subject, it is neither becoming nor proper on my part to disobey the official requirements involved in the decisions of that court, or to test their correctness by a recurrence to the history of the times or events which produced the constitutional provisions, or the intention of the framers of the constitution, and the rules of interpretation by which it should be construed.

. . .

The right of trial by jury is highly and justly esteemed, and is expressly protected and preserved by our state constitution; and it cannot be denied that this right extends to all persons within the state, regardless of color, and to the fugitive from labor or slavery as to the freeman, in all that relates to or affects his life, liberty or property, subject to the several provisions of the constitution of the United States. But suppose that a demand by the executive of any other of the states of this Union upon the

governor of this state has been made to surrender any citizen, whether he be white or black, upon a charge of felony committed in the state from which the requisition comes. It may be that, as in the case of an unfounded claim upon the labor and service of the alleged fugitive slave, the person demanded as a fugitive from justice ought not to be delivered over; and yet if the requisition be in due form of law, and accompanied by the proper evidence that the person is charged with the offense, the right of trial of the fact is not afforded to him here, but he is apprehended, deprived of his liberty, and transported to another and perhaps a distant state for trial. Could this be done except by virtue of a provision of the constitution, or a treaty? There would seem to be no real difference between the demand of a fugitive from justice, and the claim of a party to whom it is alleged labor or service is due.

. . . .

JUSTICE SMITH, concurring

[omitted]

Ableman v. Booth, 62 U.S. 506 (1858)

CHIEF JUSTICE TANEY delivered the opinion of the court.

. . . .

. . . [N]o one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.

. . . [N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. . . .

. . . The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

. . .

We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode

of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, a grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. . . . No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. . . .

. . . .

Resolutions of the Wisconsin Legislature, March 19, 1859[2]

Whereas, The Supreme Court of the United States has assumed appellate jurisdiction in the matter of the petition of Sherman M. Booth for a writ of habeas corpus, presented and prosecuted to final judgment in the Supreme Court of this State, and has, without process, or any of the forms recognized by law, assumed the power to reverse that judgment in a matter involving the personal liberty of the citizen, asserted by and adjusted to him by the regular course of judicial proceedings upon the great writ of liberty secured to the people of each State by the Constitution of the United States:

And, whereas, Such assumption of power and authority by the Supreme Court of the United States, to become the final arbiter of the liberty of the citizen, and to override and nullify the judgments of the state courts' declaration thereof, is in a direct conflict with that provision of the Constitution of the United States which secures to the people the benefits of the writ of habeas corpus: therefore,

Resolved, The Senate concurring, That we regard the action of the Supreme Court of the United States, in assuming jurisdiction in the case before mentioned, as an arbitrary act of power, unauthorized by the Constitution, and virtually superseding the benefit of the writ of habeas corpus and prostrating the rights and liberties of the people at the foot of unlimited power.

Resolved, That this assumption of jurisdiction by the federal judiciary, in the said case, and without process, is an act of undelegated power, and therefore without authority, void, and of no force.

Resolved, That the government, formed by the Constitution of the United States was not the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

. . .

[2] Herman Ames, *State Documents on Federal Relations* (New York: Longmans, Green & Co., 1911), 304–5.