Cleveland State Law Review

Volume 56 | Issue 1 Article

2008

Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle over Fugitive Slaves

Earl M. Maltz
Rutgers University

SLAVERY, FEDERALISM, AND THE CONSTITUTION: *ABLEMAN V. BOOTH* AND THE STRUGGLE OVER FUGITIVE SLAVES

EARL M. MALTZ*

I. INTRODUCTION

Asked to identify prominent Supreme Court decisions dealing with slavery, most educated Americans would immediately cite *Dred Scott v. Sandford*.[1] Those who are more familiar with the Court's role in the sectional conflict might also remember *Prigg v. Pennsylvania*[2] and *United States v. The Amistad*.[3] However, I suspect that only a few specialists would think of *Ableman v. Booth*.[4] Indeed, even those Constitutional Law textbooks that deal extensively with the law of slavery make at most passing references to the case.[5] Thus, those law students and legal professionals who do have some familiarity with *Ableman* would typically associate the case with the law of federal jurisdiction—the precursor to *Tarble's Case*.[6]

In fact, however, in *Ableman* the Court became involved in one of the most dramatic confrontations in the long-running dispute over fugitive slaves. Widely-discussed at the time, the case involved not only a successful effort by a segment of the Northern populace to prevent the rendition of an escaped slave, but also the outright defiance of the federal government by the judiciary of the state of Wisconsin. Moreover, unlike *Dred Scott*, the doctrinal framework that underlay *Ableman* remains firmly established should be "entrenched" today.

The Article will discuss and analyze the forces that shaped Ableman, the

* Distinguished Professor of Law, Rutgers University (Camden).

[1] 60 U.S. (19 How.) 393 (1857).

[2] 41 U.S. (16 Pet.) 539 (1842).

[3] 40 U.S. (15 Pet.) 518 (1841).

[4] 62 U.S. (21 How.) 506 (1859).

[5] For example, PAUL BREST, ET. AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 229, 217, 213 (5th ed. 2006), features three slavery-related decisions as principal cases: *Dred Scott*, *Prigg*, and *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841). *Ableman*, by contrast, is relegated to a brief discussion in a note. *Id.* at 227. In GEOFFREY R. STONE, ET. AL., CONSTITUTIONAL LAW 451-453 (5th ed. 2005), *Dred Scott* and *State v. Post*, 20 N.J.L. 368 (1845), are principal cases, and *Prigg* is discussed in one short note. *Ableman* is not mentioned.

[6] 80 U.S. (13 Wall.) 397 (1872).

Supreme Court's disposition of the case, and the aftermath of the decision. The Article will begin by describing the state of the dispute over fugitive slaves in the mid-1850s. The Article will then recount the events that brought *Ableman* to the Supreme Court and analyze the Court's opinion. Finally, the Article will discuss the aftermath and significance of the dispute.

II. THE DISPUTE OVER FUGITIVE SLAVES

While it was by no means a novel concept, the Fugitive Slave Clause[7] was the most unambiguously pro-slavery provision to emerge from the Constitutional Convention of 1787. To be sure, many commentators have argued that a number of other sections of the Constitution favored Southern interests.[8] However, the Fugitive Slave Clause was the only provision that explicitly granted slaveowners rights that they had not heretofore possessed. Under the Articles of Confederation, each state could, if it wished, free any putative slave found within its borders. By contrast, the new Constitution both forbade states from declaring escaped slaves free, and guaranteed slaveowners the right to recover runaways.

Despite its clear pro-slavery orientation, at the time that it was adopted, the Fugitive Slave Clause was almost entirely uncontroversial. On August 28, 1787, after the Convention had committed itself to a provision requiring states to extradite fugitives from justice, Pierce Butler and Charles Pinckney of South Carolina moved to require "fugitive slaves and servants to be delivered up like criminals."[9] James Wilson of Pennsylvania observed that "[t]his would [require] the Executive of the State to do it, at public expence,"[10] and Roger Sherman of Connecticut complained that he "saw no more propriety in the public seizing and surrendering a slave or a servant, than a horse."[11] Butler then withdrew his motion "in order that some particular provision might be made apart from [the Extradition Clause]."[12] On August 29, his motion to insert a separate clause was adopted without objection,[13] and on September 12, the Committee of Style and Arrangement produced language that was essentially identical to that which is currently in the Constitution.[14] After a minor change in wording on September 15,[15] the Fugitive Slave Clause became part

---

[7]U.S. CONST. art. IV, § 2, cl. 3.

[8]*E.g.*, Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188-255 (Richard Beeman et al. eds., 1987); William M., Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 167-84 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

[9]2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand ed., rev. ed. 1966).

[10]*Id*.

[11]*Id*.

[12]*Id*.

[13]*Id*. at 453-54.

[14]*Id* at 577.

[15]*Id*. at 628 ("'legally' was struck out, and 'under the laws thereof' inserted").

of the Convention's proposal without apparent dissent.

This new protection for slaveholders was not a major point of contention in the struggle over ratification though some Southern federalists did point to the Clause as a benefit to the South.[16] However, the reaction of Northern antifederalists stands in marked contrast to their treatment of other provisions of the new Constitution that they viewed as pro-slavery. While Northern opponents of the Constitution vociferously attacked both the apportionment of the House of Representatives and the Slave Trade Clause, their reaction to the Fugitive Slave Clause was a resounding silence.

In 1793, after considerable debate, Congress passed a statute designed to implement the constitutional guarantee.[17] The new federal statute allowed a slave owner or his agent to seize an alleged fugitive and bring him before either a federal judge or local magistrate.[18] Upon "proof [of ownership] to the satisfaction" of that official, which could be provided either by affidavit or oral testimony, a certificate would issue that allowed the removal of the alleged slave to the state from which he was purported to have fled.[19] The statute also provided that anyone who knowingly and willingly obstructed a claimant in his effort to recover a slave would be subject to a $500 penalty, payable to the claimant.[20]

The statute left a number of issues in doubt. For example, it was unclear whether the owner retained the common law right of "recaption"—the right to reclaim an escaped slave by self-help and to return the slave to service without the benefit of government intervention or sanction. Moreover, the statute did not address the constitutional status of anti-kidnapping or personal liberty laws—state statutes that imposed additional procedural requirements on those Southerners who sought to remove alleged fugitives from free states. Finally, the constitutionality of parts of the federal law itself remained in doubt for much of the early nineteenth century, as anti-slavery theorists not only claimed that alleged fugitives were constitutionally entitled to jury trials, but also at times denied that Congress possessed any authority to enforce the Fugitive Slave Clause.[21]

---

[16]Kenneth Morgan, *Slavery and the Debate over Ratification of the United States Constitution*, 22 SLAVERY & ABOLITION 40, 53 (2001).

[17]The background and evolution of the Fugitive Slave Act of 1793 are described in detail in 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, *Kidnapping*); William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63 (1951).

[18]Finkelman, *Kidnapping*, *supra* note 17, at 419.

[19]*Id*. at 420.

[20]*Id*.

[21]*See, e.g.*, SALMON P. CHASE, SPEECH OF SALMON P. CHASE, IN THE CASE OF THE COLORED WOMAN, MATILDA, WHO WAS BROUGHT BEFORE THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, BY WRIT OF HABEAS CORPUS: MARCH 11, 1837, at 8-9 (Cincinnati, Pugh & Dodd 1837), *available at* http://dlxs.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery;idno=07838206;view=image;seq=1 (view each page of the manuscript by selecting individual pages in the "go to page" dropdown menu).

In 1842, the Supreme Court confronted these issues in *Prigg v. Pennsylvania*.[22] *Prigg* was a challenge to the constitutionality of the Pennsylvania Anti-kidnapping Law. Speaking through Justice Joseph Story, a deeply divided Court concluded that the right of recaption was guaranteed by the Fugitive Slave Clause; that, notwithstanding the lack of an explicit grant of enforcement authority, Congress possessed the exclusive power to pass legislation implementing the clause, and that state personal liberty laws were therefore unconstitutional; that alleged fugitives were entitled to no greater procedural protections than those established by the 1793 statute; but that state officials could not be compelled to participate in the enforcement of the federal statute.[23]

The Supreme Court's decision in *Prigg* did not still the ongoing disputes over efforts by Southerners to recover alleged fugitive slaves. The decision does not seem to have caused a great stir among the general public. For example, in 1843, the *North American Review* asserted that there was "hardly a whisper against the fidelity and even-handed justice" of the Court's holding and that the ruling was "received by the public with the quiet submission which they usually manifest when ordinary judicial decisions are announced."[24] Those comments that were made immediately after the decision split largely on sectional lines. For example, the *New York Daily Express* complained that "the conclusion to which the Court have arrived involves consequences which can by no means be satisfactory to this part of the country,"[25] and the abolitionist Cincinnati *Philanthropist* described the decision as "revolting" and condemned what the newspaper characterized as an assault on state sovereignty.[26] Conversely, without examining Story's opinion, the *Baltimore Sun* declared that *Prigg* was "all that Maryland can desire, and will be particularly agreeable to the slaveholders of the South."[27]

In some respects, these reactions were entirely understandable. On the specific

---

[22]41 U.S. (16 Pet.) 539 (1842).

[23]*Id. Prigg* has been the subject of a large body of scholarly comment. Among the more notable treatments are: THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861, at 94-105 (1974); Christopher L. M. Eisgruber, Comment, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988); Paul Finkelman, *Prigg v. Pennsylvania: Understanding Justice Story's Proslavery Nationalism*, 2 J. SUP. CT. HIST. 51 (1997)(hereinafter Finkelman, *Prigg*); Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994)(hereinafter Finkelman, Story); Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS. L.J. 605 (1993)(hereinafter Finkelman, Sorting); Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Joseph Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086 (1993); Earl M. Maltz, *Majority, Concurrence, and Dissent: Prigg v. Pennsylvania and the Structure of Supreme Court Decisionmaking*, 31 RUTGERS L.J. 345 (2000).

[24]5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 543 (1974) (quoting *The Independence of the Judiciary*, 57 N. AM. REV. 400, 419 (1843)).

[25]2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1936-1918, at 86, (rev. ed. 1987) (quoting NEW YORK DAILY EXPRESS, Mar. 8, 1842).

[26]SWISHER, *supra* note 24, at 544 (quoting CINCINNATI PHILANTHROPIST, Mar. 30, 1842).

[27]*Id*. at 543 (quoting BALTIMORE SUN, Mar. 3, 1842).

issue presented by *Prigg* on its facts—the question of whether the Pennsylvania anti-kidnapping law was unconstitutional—the South had indeed won a complete victory. However, Southerners soon became disenchanted with the regime that the Court had established. In 1843, taking advantage of one of the implicit suggestions in Justice Story's opinion the states of Massachusetts, Vermont and Ohio passed laws that prohibited state officials from participating in the process of returning fugitive slaves, and also forbade the use of state jails in the process. Pennsylvania followed suit in 1847, and Rhode Island in 1848.[28] The passage of these statutes led one Southern commentator to complain that "[n]o decision of the Supreme Court of the Union has produced more evil consequences than [*Prigg*]. It has embarrassed the owners of slaves in recovering their property in the free States. It has encouraged the abolitionists in their efforts to increase those embarrassments."[29]

At times, anti-slavery Northerners went even further, mobilizing direct resistance to efforts by slaveowners to reclaim fugitives. The so-called McClintock Riot of 1847 was particularly well-publicized. In that case, James Kennedy, a Maryland slave owner, was killed when a group of Carlisle, Pennsylania residents tried to prevent him and a companion from returning to Maryland with three fugitives who had escaped to Carlisle.[30]

Slaveholders viewed such incidents as evidence of Northern disdain for their constitutional obligations. For example, a Virginia state legislative committee characterized the new round of personal liberty laws as a "disgusting and revolting exhibition of faithless and unconstitutional legislation" and as "palpable frauds upon the South, calculated to excite at once her indignation and her contempt."[31] Similarly, in his *Southern Address*, John C. Calhoun declared that, as a result of the actions of the Northern states "the [Fugitive Slave Clause] is now defunct, except perhaps in [Indiana and Illinois]" and that "the evasion by which it has been set aside may fairly be regarded as one of the most fatal blows ever received by the South and the Union."[32]

Against this background, Southerners insisted that Congress pass a strengthened fugitive slave law as part of the Compromise of 1850. The Fugitive Slave Act of 1850[33] greatly expanded the number of federal officials empowered to act as commissioners for the purpose of issuing certificates of removal and charged these officials with the duty of hearing claims of putative masters "in a summary

---

[28]The response of Northern state legislatures to *Prigg* is described in greater detail in MORRIS, *supra* note 23, at 107-29.

[29]*The Slavery Question, or the Rights and the Union of the States*, AM. L.J. 9, 10 (April 1850).

[30]This incident is described in detail in, *The McClintock Riots (June 2,1847)*, http://chronicles.dickinson.edu/encyclo/m/ed_mcClintockriot.htm (last visited Mar. 10, 2008).

[31]*Quoted in* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 14 (1968)(citation omitted).

[32]6 RICHARD K. CRALLE, THE WORKS OF JOHN C. CALHOUN 290-313 (1851), *available at* http://facweb.furman.edu/~benson/docs/calhoun.htm.

[33]For accounts of the complex legislative history of the statute, *see* CAMPBELL, *supra* note 31, at 15-25; 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854, at 500-08 (1990); MORRIS, *supra* note 23, at 130-47.

manner."[34] Upon receiving "satisfactory proof" of the validity of the claimant's assertion of ownership—defined as either a sworn statement taken by the responsible official himself or a document certifying that appropriate testimony had been given before an official in the state from which the alleged escape had occurred—the federal commissioner was to issue a certificate for removal of the alleged fugitive.[35] The testimony of the alleged runaway himself was explicitly deemed inadmissible.[36] The commissioner was to be paid ten dollars per case if he found for the claimant, but five dollars if he found against the claimant.[37]

Once a certificate of removal was issued, no court was allowed to interfere with the removal of the alleged fugitive.[38] The claimant was entitled to enlist the aid of federal marshals in securing and returning the alleged fugitive to his home state, and the marshals were to be liable for the full value of any fugitive who escaped.[39] Moreover, the commissioners were empowered to summon ordinary citizens to act as a *posse comitatus* to apprehend the alleged fugitive.[40] Finally, the statute increased the penalties for those who interfered with the apprehension of alleged fugitives.[41]

Many Southerners saw passage of the new Fugitive Slave law as the most significant concession to the South in the Compromise of 1850. Indeed, in the Georgia Platform of 1851, a state convention specifically declared that "[i]t is the deliberate opinion of this Convention that upon a faithful execution of the *Fugitive Slave Law* . . . depends the preservation of our much beloved Union."[42] By contrast, anti-slavery Northerners were outraged by the statute—particularly by its specific rejection of the use of the writ of *habeas corpus* and its failure to provide for a jury trial, even after the alleged fugitive had been returned to the home state of the claimant.[43] To be sure, early in the 1850s most fugitive slaves were recovered under the procedures established by the statute without incident.[44] Nonetheless, Northern resentment was at times reflected in efforts to free alleged fugitives held pursuant to the statute, even when the validity of the master's claim was clear. For example, in 1851 mobs facilitated the escape of Shadrach Minkins in Boston and William Henry, a fugitive slave held in a Syracuse, New York jail.[45] An attempt by the Vermont

---

[34]MORRIS, *supra* note 23, at 146.

[35]*Id*.

[36]*Id*.

[37]*Id*.

[38]*Id*.

[39]*Id*.

[40]*Id*. at 145.

[41]*Id*. at 146.

[42]DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 128 (1976)(citation omitted).

[43]*See, e.g.*, MORRIS, *supra* note 23, at 163-65.

[44]FREEHLING, *supra* note 33, at 536.

[45]CAMPBELL, *supra* note 31, at 154-57.

state legislature to nullify the statute further infuriated Southern representatives.[46]

Although on its face dealing only with the issue of slavery in the territories, the acrimonious dispute over the Kansas-Nebraska Act in 1854 further emboldened the critics of the Fugitive Slave Act in the North. The passage of the statute permanently transformed the national political structure, leading to the dissolution of the Whig party and the formation of a broad-based coalition of former Whigs, Democrats and Free Soilers in the North, organized around opposition to slavery and the so-called "Slave Power," which soon became known as the Republican party.[47] The creation of this organization and the anti-Southern feeling that it embodied provided additional impetus for those who opposed enforcement of the Fugitive Slave Act. These events provided the backdrop for the dispute that ultimately reached the Supreme Court in *Ableman v. Booth*.

III. THE ROAD TO *ABLEMAN V. BOOTH*[48]

The prelude to the consideration of *Ableman* began prosaically when a slave, Joshua Glover, escaped from Bennami S. Garland, his master in Missouri. Glover then came to live and work in Racine, Wisconsin in 1852. On Friday, March 10, 1854, after receiving the requisite authorization from United States District Judge Andrew G. Miller, Garland came to Glover's home in Racine and, with the aid of two Deputy United States Marshals and four assistants, captured Glover after a struggle and brought him to the county jail in Milwaukee. Glover was held in the jail pursuant to a Wisconsin statute that required county jails to provide facilities to detain persons held under federal law.

On March 11, a large group of residents gathered in Racine to protest Glover's capture. A committee was chosen to draft resolutions. Among other things, these resolutions condemned the "kidnapping" of Glover, demanded that he receive a trial by jury and, asserting that the Kansas-Nebraska Act had repealed "all compromises heretofore adopted by the Congress of the United States," characterized the "Slavecatching law of 1850" as "disgraceful and *also repealed*." Copies of the resolutions were sent by telegraph to Sherman M. Booth, an abolitionist newspaper editor in Milwaukee. After first printing a run of inflammatory handbills, Booth rode through the streets of Milwaukee shouting "a man's liberty is at stake!" and also reportedly exhorting "freemen to the rescue!"

By two-thirty p.m., a crowd of several thousand people had gathered outside the jail where Glover was being detained. The crowd passed resolutions which, among

---

[46]*See, e.g.*, CONG. GLOBE, 32d Cong., 1st Sess. 1950-53 (1851).

[47]There is a vast literature dealing with the passage of the Kansas-Nebraska Act and its impact on the structure of the American political system, particularly in the North. For different perspectives, see, *e.g.*, WILLIAM GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856 (1987); MICHAEL HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 804-834 (1999); POTTER, *supra* note 42, ch. 7; and SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 671-704 (2005).

[48]The account of the rescue of Joshua Glover is taken from ROBERT H. BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION AND THE COMING OF THE CIVIL WAR (2006); SWISHER, *supra* note 24, at 650-73; and A. J. Beitzinger, *Federal Law Enforcement and the* Booth *Cases*, 41 MARQ. L. REV. 7 (1957).

other things, demanded that Glover receive a trial by jury. A vigilance committee was also appointed. In the interim, attorneys who had been contacted by Booth persuaded a local circuit judge to issue a writ of *habeas corpus*, demanding that those who held Glover in custody bring him before the judge and justify the decision to hold Glover. The writ initially was served on Sheriff Herman Page, the county official who had charge of the jail. Page, however, responded that while Glover was in the county jail, he was not in Page's custody. The attorneys then returned to the circuit judge and persuaded him to issue a second writ of *habeas corpus*, this time directed to Deputy Federal Marshal Charles Cotton, who had charge of Glover.

On instructions from Judge Miller, Cotton ignored the writ. Miller also informed the representatives of the protesters that a hearing on Glover's status would be held on Monday morning at ten o'clock, and that "no power on earth could take Glover from his jurisdiction." Soon thereafter, one hundred men arrived on a steamboat from Racine and joined the crowd at the jail, which was addressed by Booth and other speakers, all of whom stressed the necessity of opposing the enforcement of the Fugitive Slave Law, but counseled the crowd against breaking the law.

Booth and the remainder of the vigilance committee then left to take tea. In their absence, the crowd demanded that the jailer surrender the keys. When he refused, the crowd broke down the door with pickaxes and an improvised battering ram. They led Glover from the courthouse and, with Booth at his side, Glover was taken in a buggy to the underground railway station in Waukesha, from where he escaped to Canada.

Soon after Glover escaped, Garland and the officials who had originally participated in the seizure of Joshua Glover were charged by the sheriff of Racine County with assault and battery, and Garland was jailed. Judge Miller ordered Garland freed on a writ of *habeas corpus*, concluding that Garland "was aiding the marshal in the service of a warrant, at the [marshal's] request."[49] Miller's anger at the entire sequence of events was apparent from the language of his opinion, in which he declared that "I view this [arrest] warrant . . . to have been obtained by an officious intermeddler, for the same purpose as the habeas corpus—to effect the rescue of the fugitive Glover"[50] and "I cannot but consider the imprisonment of [Garland], or of the marshal [who was also named in the warrant] a greater outrage than the rescue."[51]

United States District Attorney John R. Sharpstein then lodged criminal complaints against Booth and nine other leaders of the Glover rescue, alleging that they had violated the Fugitive Slave Act by aiding Glover in his escape from custody. When Booth was brought for arraignment before Winfred Smith, a commissioner for the federal district court, bail was set at $2,000. Booth initially posted bail through a surety; however, on May 26, at Booth's own request, the surety delivered him to the federal authorities, and Booth was remanded to the county jail in Milwaukee.

By returning to the custody of the commissioner, Booth placed himself in a position to challenge the constitutionality of the Fugitive Slave Act of 1850 in state

---

[49] Garland v. Morris, 26 F. Cas. 1318, 1319 (D.C. Wis.1854) (No. 15811).

[50] *Id*. at 1319.

[51] *Id.*

court. On May 27, he successfully petitioned Justice Abram D. Smith of the Wisconsin Supreme Court for a writ of *habeas corpus*. Fearing that ignoring the writ might provoke another confrontation with the citizenry of Milwaukee, Sharpstein chose instead to appear before Justice Smith and mount a defense at a hearing on May 29.

At the hearing, Booth was represented by the abolitionist attorney Byron Paine. Paine first dismissed the claim that the state courts should not under any circumstances intervene to free a person who was in federal custody. Paine relied heavily on the justification for nullification initially articulated in the 1790's by Thomas Jefferson in the Virginia and Kentucky Resolutions. In his argument, Paine declared that "when the evil spirits of usurpation and oppression enter into and possess the Federal Power, the States may interpose with such powers as they have to arrest the progress of the evil."[52] Apparently seeking to distance himself from the position taken by South Carolina during the nullification crisis of the early 1830s, Paine also contended that "whatever objections might be urged against the actual exercise of the right of resistance by the legislative and executive departments of the State, cannot be urged with equal force against the actions of its Judiciary."[53] He concluded by asserting that "even if we have no judicial precedents in favor of the right of the States to protect their people against tyranny and usurpation, it is time such a precedent should be made."[54]

Turning to the merits, Paine relied on the standard anti-slavery critiques of the Fugitive Slave Act. He argued that Congress lacked constitutional authority to pass enforcement legislation, that the statute unconstitutionally delegated judicial authority to commissioners, and that the procedures mandated by the statute violated the Bill of Rights. Paine also excoriated the *Prigg* Court, condemning what he described as "the violence they . . . perpetrate[d] on the established rules of construction"[55] and that Story "labor[ed] to arrive at such a construction as shall best suit the convenience and accomplish the purpose of the slave-owners."[56]

Payne could not have found a more sympathetic ear for his arguments. On June 7, Justice Smith issued a lengthy opinion which concluded that Booth should be released from federal custody.[57] Smith began his opinion by confronting the assertion that state courts lacked the authority to intervene in favor of a person who was in federal custody. His response to this argument was two-fold. First, he asserted that "every citizen has a right to call upon the state authority for protection" and that "it is the duty of the judicial officer, when applied to, to see that no citizen is imprisoned within the limits of the state . . . except by proper legal and constitutional authority."[58] In addition, Smith noted that, while he might have been reluctant to

---

[52]*Argument of Byron Paine*, *in* 3 FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE, 347-82, at 349 (Paul Finkelman ed.,1988).

[53] *Id.*

[54]*Id.*

[55]*Id.* at 355.

[56]*Id.* at 357.

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

[58]*Id.* at 21.

release a prisoner from the custody of a federal judge, he had no such hesitation about asserting his authority over federal commissioners, whom Smith characterized as "subordinate and irresponsible functionaries, holding their office at the will of the federal courts."[59]

Turning to the merits of the *habeas* petition, Smith initially argued that the arrest warrant under which Booth was being held was fatally defective because it failed to allege that Garland had claimed Glover, and that Booth was entitled to be released for that reason alone. Nonetheless, describing the state courts as "sentinel[s] to guard the outposts as well as the citadel[s] of the great principles and rights which [the Constitution] was intended to declare, secure and perpetuate"[60] and proclaiming a duty "to interpose a resistance . . . to every assumption of power on the part of the general government, which is not expressly granted or necessarily implied in the federal constitution,"[61] Smith also mounted a detailed assault on the constitutionality of the Fugitive Slave Act.

The bulk of the opinion focused on the contention that Congress lacked authority to provide a mechanism for the enforcement of the Fugitive Slave Clause. Smith began by decrying increases in federal power generally, declaring that "the last hope of free representative and federative government rests with the states. Increase of influence and patronage on the part of the federal government naturally leads to consolidation, consolidation to despotism and ultimate anarchy, dissolution and all its attendant evils."[62] After reviewing the sparse discussions of the fugitive slave issue during the drafting and ratification process, he juxtaposed the Fugitive Slave Clause with the Full Faith and Credit Clause, with its explicit grant of power to Congress, concluding that there was not "one word of grant, or one word from which a grant [of power to legislate with respect to fugitive slaves] may be inferred or implied"[63] and also that "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."[64]

Smith also concluded that the Fugitive Slave Act ran afoul of the procedural requirements outlined in the Bill of Rights. He distinguished sharply between proceedings to extradite fugitives from justice and efforts to recover fugitive slaves, asserting that in the former, "[j]udicial proceedings have already been commenced, and [extradition] is but a species of process to bring the defendant into court,"[65] while the Fugitive Slave Clause "contemplates a judicial determination of the lawfulness of the *claim* which may be made."[66] The latter, he insisted, required the

---

[59] *Id.* at 24.

[60] *Id.* at 31.

[61] *Id.* at 32.

[62] *Id.* at 33.

[63] *Id.* at 41.

[64] *Id.* at 40.

[65] *Id.* at 45.

[66] *Id.* at 44 (emphasis added).

full panoply of protections normally associated with due process of law, including a trial by jury.

Smith conceded that his conclusions were inconsistent with the views expressed by the Supreme Court in *Prigg* and its progeny. At this stage, however, he was not defying the Court's authority. Instead, Smith simply urged the Court to revisit its holding in *Prigg* in view of the antipathy toward the Fugitive Slave Act in the North and what Smith saw as the deficiencies of the reasoning in Justice Story's opinion in *Prigg* itself.[67]

Justice Smith's decision was noted widely,[68] and, not surprisingly, hailed as a great victory by abolitionists and more radical elements of the mainstream anti-slavery movement. The *National Era*, for example, expressed the hope that "this example of judicial independence and integrity [will be] followed in all the State Courts."[69] However, the legal battle in Wisconsin was still in its early stages. Sharpstein, acting on Ableman's behalf, quickly petitioned the full Wisconsin Supreme Court for a writ of certiorari to review the order to release Booth. When the court agreed to hear the case, Sharpstein enlisted the services of Edward G. Ryan, a distinguished Wisconsin attorney, to represent the federal government.

Ryan mounted a far more sophisticated defense of the federal government's position than Sharpstein had originally presented before Justice Smith. Nonetheless, on July 19, in *In re Sherman M. Booth* (*Booth I*),[70] the full court affirmed the order mandating Booth's release. Justice Smith delivered a long opinion reaffirming the views that he had expressed on June 7 in even more emphatic terms.[71] Chief Justice Edward V. Whiton and Justice Samuel Crawford joined Smith in concluding that being held under the authority of a commissioner was not equivalent to being under the jurisdiction of a federal court, and that therefore the state courts could appropriately issue a writ of *habeas corpus* in Booth's case.[72] They also agreed that the warrant under which Booth was held was fatally defective.[73] By contrast, the court was deeply divided on the question of the constitutionality of the Fugitive Slave Act.

While agreeing with Smith that the statute was unconstitutional, Chief Justice Whiton emphasized different considerations. Unlike Smith, who focused primarily on the argument that Congress lacked authority to pass any enforcement legislation, Whiton relied entirely on two other contentions: that the statute unconstitutionally delegated federal judicial power to commissioners, and that it denied alleged fugitives what Whiton viewed as their constitutionally-protected right to a trial by jury.[74] Whiton asserted that since the Fugitive Slave Act of 1793 had not provided

---

[67] *Id.* at 52.

[68] *See, e.g.*, *The Fugitive Slave Law Decided Unconstitutional*, N.Y. TIMES, June 14, 1854, at 1.

[69] *Decision of Judge Smith*, NAT'L ERA, June 22, 1854, at 98.

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

[71] *Id.* at 87-144.

[72] *Id.* at 53-56 (opinion of the Court); *id.* at 70-72 (Crawford, J., dissenting).

[73] *Id.* at 58 (opinion of the Court); *id.* at 87 (Crawford, J., dissenting).

[74] *Id.* at 63-70 (opinion of the Court).

for the appointment of federal commissioners, the *Prigg* majority did not explicitly pass on the first point. By contrast, Whiton conceded that the jury trial argument had been implicitly rejected when the Court upheld the constitutionality of the 1793 statute in *Prigg* and *Van Zandt*. At the same time, he observed that the specific issue before the Court in *Prigg* was the constitutionality of Pennsylvania's Personal Liberty Law and declared that "it would be most unjust to [the Supreme] court to hold that it has decided questions which its judges have not even discussed, and which have not even been before it for adjudication."[75]

Crawford, on the other hand, would have rejected the constitutional challenge to the Fugitive Slave Act. For constitutional purposes, he saw the reliance on commissioners in the 1850s as indistinguishable from the use of state officials that was challenged in *Prigg*.[76] While observing that as an original matter he would have held that the states and the federal government possessed concurrent authority to enforce the Fugitive Slave Clause,[77] he contended that the constitutional issues surrounding the Fugitive Slave Act of 1850 had been "definitely settled" by *Prigg* and its progeny.[78]

Despite Crawford's dissent, the order freeing Booth from the custody of the commissioner was affirmed. Not surprisingly, abolitionists were jubilant about the decision. Predicting that the case would ultimately find its way to the United States Supreme Court, the New York *Evangelist* optimistically speculated that "[w]e have good reasons for expecting that if the decision of the Supreme Court can be procured, it will make a decided rent in this oppressive and cruel, if not wholly unconstitutional enactment."[79] The Boston *Commonwealth* was more cautious, but nonetheless upbeat. On the one hand, the *Commonwealth* described the Supreme Court as "the agent of the slaveholding power, [which] must be expected to conform in its decisions to the will of that power." But the same newspaper hailed *Booth I* as the "decision of a highly respectable state court . . . evidence of a tendency towards a healthy state on this subject" and predicted that "before long the Northern courts generally will come to the same conclusion; and then, in the face of the mass of judicial opinion in the largest section of the country, the [fugitive slave law] cannot stand, but must be materially modified or repealed."[80]

It soon became clear, however, that the state court's decision *Booth I* would be only a skirmish in the legal conflict set in motion by the escape of Joshua Glover. On September 11, noting that similar clashes between state and federal authorities had occurred in other states, United States Attorney General Caleb Cushing of Massachusetts wrote that he had decided that the decision should be appealed to the Supreme Court.[81] After the papers were filed, Chief Justice Roger Brooke Taney

---

[75]*Id.* at 63.

[76]*Id*. at 82 (Crawford, J., dissenting).

[77]*Id.* at 73-75.

[78]*Id*. at 80.

[79]*The Fugitive Law Unconstitutional*, N.Y. EVANGELIST, July 27, 1854.

[80]*Quoted in* LIBERATOR (Boston), Aug. 10, 1854.

[81]Constitutionality of the Law for the Extradition of Fugitives, 6 Op. Att'y Gen. 713, 714 (1854).

issued a writ of error to the Wisconsin Supreme Court, and the state court complied with the demands of the writ.[82]

In the interim, it had become clear that, despite its doctrinal and symbolic importance, the decision in *Booth I* had not materially changed the legal situation faced by Booth. On Saturday, July 8, even before the Wisconsin Supreme Court had rendered its decision, a federal grand jury returned an indictment against Booth for aiding and abetting the escape of Joshua Glover. The grand jury also indicted John Ryecraft and John Messenger for their roles in the affair. On July 10, Judge Miller himself issued arrest warrants based on the indictments. Booth was promptly rearrested on the basis of these warrants.

Now represented by James H. Paine, the father of Byron Paine, Booth once again petitioned the Wisconsin Supreme Court for a writ of *habeas corpus*. However, in *Ex parte Sherman M. Booth* (*Booth II*),[83] the state supreme court unanimously declined to issue the writ. In his concurring opinion, Justice Abram Smith explained the difference between the two cases, observing that "in [*Booth I*, Booth] was held under the process of an officer who had no power to hear and determine upon the validity of the law, or the allegations of the defendant against its validity. But now he is held under process of . . . a judicial tribunal, having full power and authority to decide upon all the questions and allegations presented in his behalf."[84] Under those circumstances, the court reasoned, considerations of comity required that the action in the federal court be allowed to proceed to its conclusion without interference from the state court.

Southerners and their allies were greatly relieved by the decision in *Booth II*. A correspondent of the *Washington Union*, the official organ of the administration of President Franklin Pierce, praised the Wisconsin Supreme Court for recognizing the exclusive jurisdiction of the federal courts to deal with cases arising under the Fugitive Slave Law.[85] Not surprisingly, those who had supported the decision in *Booth I* took a quite different view. On July 15, the *Milwaukee News* complained that "[i]t was easy to sit on the bench and solemnly decide the [Fugitive Slave Act was] unconstitutional and void . . . . But, when . . . Booth applies for the practical fruits of this solemn adjudication in his favor, the two Judges are seized with a solemn spasm of 'comity.' Although the law is wholly 'void,' they can't venture to grant a *writ of habeas corpus*! the unhappy victim must lie in prison as an act of courtesy!"[86]

Because Booth was ill, Ryecraft was tried alone in November, 1854. Edward Ryan once again represented the federal government. Defending Ryecraft, attorneys George Lakin and Michael Steever appealed to the higher law doctrine, and also insisted that the burden was on the prosecution to plead and prove that Glover had in

---

[82]SWISHER, *supra* note 24, at 659; Beitzinger, *supra* note 48, at 14.

[83]3 Wis. 145 (1854).

[84]*Id*. at 152-53.

[85]*Fugitive Slave Law and Writ of Habeas Corpus in Wisconsin*, DAILY UNION (Wash., D.C.), Aug. 6, 1854.

[86]MILWAUKEE NEWS, JULY 15, 1854, *quoted in Backing Out*, LIBERATOR (Boston), Aug.4, 1854.

fact been a slave.[87] In addition, like the defense in the *Morris* case in 1851, Lakin and Steever contended that the jury had the right to determine the law as well as the facts.[88]

Judge Miller's charge to the jury on November 18 rejected these contentions and also left no doubt regarding his views about Ryecraft's guilt and the actions of those who had broken into the jail and freed Glover more generally.[89] Miller began by defending not only the constitutionality of the Fugitive Slave Act but also the policy underlying the law, asserting that it was "effective in carrying out the provisions of the constitution [and] is equally so in protecting free colored persons from secret or criminal deportation."[90] He evinced nothing but disdain for the appeal to the higher law, declaring "[i]f a man willfully violates the laws of his country by the commission of an offence against those laws, he comes with a poor grace before a jury of honest men, sworn to render a true verdict according to evidence, with a plea of 'higher law' or 'rights of conscience.'"[91] Miller also brushed aside the assertion that the members of the jury could act on their own independent interpretation of the law, stating simply that "[u]nder the judicial system of the United States, [the members of the jury] take the law from the court in all cases both civil and criminal, whether it comports with their individual opinions or not."[92]

Turning to the facts of the case, Miller stated flatly that the testimony demonstrated that Ryecraft had been a member of the vigilance committee[93] and that he was "at the jail, working and assisting to break the door of the jail-yard and the door of the jail."[94] Miller also decried the actions of the members of the committee in inciting the crowd by describing Garland and the deputy marshals as "kidnappers." He noted the following:

> If I had ordered the marshal to bring up Glover for hearing, at that time, it certainly could not have been done. Under the cry of kidnapper the rescue would have been effected by that excited crowd, and the personal safety of the officer periled. An offer to the judge of protection would be of little avail, after a mob was got up by the cry of rescue, and inflamed by that of kidnapper . . . . This committee was probably the primary cause of that outrage, and if so, each member of it is responsible for the escape.[95]

Against the background of this charge, the jury convicted Ryecraft on November 19.

Despite Ryecraft's conviction, the assertion that the prosecution was required to

---

[87]BAKER, *supra* note 48, at 97.

[88]*Id*. at 97-98.

[89]United States v. Rycraft, 27 F. Cas. 918, 922-23 (D. Wis. 1854)(No. 16,211).

[90]*Id.* at 920.

[91]*Id.* at 921.

[92]*Id.*

[93]*Id.* at 922-23.

[94]*Id.* at 922.

[95]*Id.* at 923.

plead and prove the fact that Glover was a slave in an action under the Fugitive Slave Act created some uneasiness among the representatives of the federal government. Accordingly, in early January 1855, prior to bringing Booth to trial, prosecutors voluntarily dismissed the indictment against Booth and reindicted him, this time adding a count charging him with obstructing, resisting and opposing the execution of federal process more generally. Booth struck back by filing complaints for false imprisonment in state court against both Miller and Sharpstein, forcing them to post bail in order to avoid being taken into custody.[96]

The trial of Booth himself took place in a crowded Milwaukee courtroom from January 10 through January 13, 1855. Despite Miller's earlier ruling that issues of law were matters for the judge rather than the jury, Paine appealed openly to the concept of jury nullification in his summation. Analogizing the Glover escape to the rescue of Peter from Herod's prison by an angel, Paine identified the slave power as Herod and asserted that "[m]en are now indicted . . . for imitating Angels of God"[97] and also proclaimed that "I charge upon this prosecution that they have come into court before you and confessed that they are engaged in the execution of an infamous law."[98]

Miller, however, was having none of it. He charged the jurors that they would be committing "moral perjury" if they disregarded his instructions on the law, and also reiterated his view that the government was not required to prove that Glover had in fact been a slave.[99] Based on this charge, the jury convicted Booth after only eight hours of deliberations. Booth was not, however, found guilty on all counts of the indictment; instead, the jury concluded only that he was guilty of aiding and abetting the escape of Joshua Glover from the custody of the deputy marshals. The jurors also appended a statement declaring that the following:

> *Resolved*, That while we feel ourselves bound by a solemn oath to perform a most painful duty, in declaring the defendant guilty of the above charge, and thus making him liable to the penalties of a most cruel and odious law, yet, at the same time, in so doing we declare that he performed a *most noble, benevolent and humane act*, and we thus record our condemnation of the Fugitive Slave law, and earnestly commend him to the clemency of the Court.[100]

Based on the verdict, after denying defense motions for a new trial, on January 23, Miller sentenced Booth to thirty days imprisonment in the county jail and a fine of $1,000, and Ryecraft to a term of ten days in jail and a fine of $200.

Assessments of the verdict against Booth and Ryecraft differed widely. Some saw the decision as a victory for the principle of the rule of law. For example, the *Milwaukee News* declared that:

---

[96]Beitzinger, *supra* note 48, at 14-15.

[97]BAKER, *supra* note 48, at 104.

[98]*Id.* at 107.

[99]SWISHER, *supra* note 24, at 659 (discussing Ryecraft's trial).

[100]*The Fugitive Act,* N.Y. DAILY TIMES, Feb. 2, 1855.

> [w]e rejoice at this verdict, not because this defendant is made to suffer, but because it is calculated to teach men a fact which they have been too prone to forget, that we live under a government of law, that our institutions of freedom rest upon the observance of law, that the rampant spirit of mob law shall not be tolerated with impunity in the free State of Wisconsin, that the doctrine of a higher law to justify the disregard of the allegiance which every citizen owes to his country, is a false doctrine, and that he who attempts to put it into practical operation is taking a straight road and a short one to the penitentiary.[101]

Not surprisingly, anti-slavery activists had a quite different view, characterizing Booth in particular as a martyr to the cause who was being punished unjustly. On February 1, the New York *Independent* proposed that its readers each contribute one dollar to a fund that would pay Booth's fine.[102] Contributors to the fund included a number of prominent anti-slavery members of Congress.[103]

Subsequent events soon raised the profile of the case still further. Seeking to have their clients freed from custody, on January 26, the attorneys for Booth and Ryecraft once again petitioned the Wisconsin Supreme Court for writs of *habeas corpus*. The following day, the court granted the petition, and the writs were served on both Ableman and Samuel Conover, the sheriff of the county jail where the two convicted activists were being held. While specifically declining to acknowledge the jurisdiction of the court, Ableman replied that he could not produce Booth and Ryecraft because they were now in the custody of the county sheriff. Conover, on the other hand, agreed to bring the prisoners to appear before the court in Madison, Wisconsin.[104] On January 30, a crowd of 2,000 supporters marched with Booth and Ryecraft as they were being taken to the Milwaukee train station for their trip to Madison.[105]

The hearing on the petition to free the prisoners was set for February 2. Sharpstein was notified, but did not appear, apparently unwilling to recognize the authority of the Wisconsin court to issue the writ.[106] After hearing arguments from the attorneys for the prisoners, in *In re Booth and Rycraft* [*sic*] (*Booth III*), [107] the three justices of the state supreme court concluded unanimously that both prisoners should be freed.

The opinions of Chief Justice Whiton and Justice Smith were largely devoted to defenses of the general proposition that the state courts possessed the power to interpose their authority to free prisoners held in federal custody. Whiton proclaimed that "[w]ithout this power, the state would be stripped of one of the most essential attributes of sovereignty, and would present the spectacle of a state

---

[101] *Case of Mr. Booth-Suffering for Freedom*, INDEPENDENT (New York), Feb. 1, 1855.

[102] *Id.*

[103] NEW YORK TIMES, Feb. 2, 1855.

[104] *In re Booth*, 3 Wis. 157, 18 (1854).

[105] Beitzinger, *supra* note 48, at 16.

[106] *In re Booth*,, 3 Wis. at 159.

[107] *Id.* at 157 (1855).

proclaiming the allegiance of its citizens, without the power to protect them in the enjoyment of their personal liberty upon its own soil."[108] Simlarly, Smith declared that "[t]he power to guard and protect the liberty of the individual citizen is inherent in every government; one which it cannot relinquish, which was reserved to the states [and] without which they could not exist, because it is obvious that they could claim no allegiance or support from their citizens whom they had not the power to protect."[109]

It fell to Justice Crawford to provide the justification for the decision to free Booth and Ryecraft under the specific circumstances of *Booth III*. Crawford, who had voted to sustain the constitutionality of the Fugitive Slave Act in *Booth I*, was careful to limit the scope of his analysis in *Booth III*. He first emphasized that the state court could intervene only in a case in which the federal court lacked jurisdiction, noting that "if it had such jurisdiction, it matters not how illegal, unjust or arbitrary the proceedings in that court may have been, nor how many errors may have been committed upon the trial; if the court had jurisdiction . . . it is by no means my duty as a judicial officer of this state, to revise the decision or correct the errors."[110] Second, he emphasized that, rather than being common law courts of general jurisdiction, the federal courts had only the "special and limited" jurisdiction established by statute, and thus that "the facts necessary to give them jurisdiction must appear affirmatively on the face of their proceedings, and cannot be presumed."[111]

Crawford conceded that some of the counts of the indictments had alleged facts sufficient to provide the court with jurisdiction to determine if Booth and Ryecraft had violated the Fugitive Slave Act of 1850.[112] However, they had not been convicted under these counts. Instead, their confinement rested solely on the counts of the indictments that charged that they had assisted Joshua Glover in escaping from federal custody, but did not specify that allege that Glover had owed service and labor to Garland. Crawford contended that the statute required such allegations and that the relevant portions of the indictment had therefore not charged the two defendants with a federal crime. Analogizing *Booth III* to a case in which the federal court had lacked personal jurisdiction over the defendant, Crawford reasoned that only such a charge could vest the federal courts with jurisdiction to try the cases, and that therefore the Wisconsin Supreme Court could free Booth and Ryecraft in a *habeas corpus* proceeding.[113]

Crawford was able to characterize his opinion as limited in scope only by conflating the jurisdictional inquiry with an examination of the merits. The gravamen of a jurisdictional objection is the claim that the court lacks power to adjudicate the legal issues that have been brought before it. Yet Crawford did not assert that the federal district court had no authority to determine whether the

---

[108]*Id.* at 175 (opinion of Whiton, C. J.).

[109]*Id.* at 193 (opinion of Smith, J.).

[110]*Id.* at 179 (opinion of Crawford, J.).

[111]*Id*. at 180.

[112]*Id.* at 182.

[113]*Id*. at 187-89.

indictment sufficiently alleged a violation of the Fugitive Slave Law. Instead, he simply concluded that the district court had interpreted the statute incorrectly by not requiring that Glover's status be pleaded and proven—a quintessential issue of the merits.

Moreover, Crawford's approach was flatly inconsistent with the Supreme Court's decision in *Ex Parte Watkins*.[114] There, in holding that the Court would not entertain a collateral attack on a criminal judgment from a District of Columbia court, Chief Justice John Marshall had asserted that "[i]t is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error...The judgment of [a federal] court in a criminal-case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded."[115]

Not surprisingly, analysis of these legal niceties found little place in the commentary that followed *Booth III*. The New York *Journal of Commerce*, closely allied with the Democratic party, described the decision as an "utter subversion of the powers of the Federal Judiciary,"[116] and Judge Miller himself warned that "some state or county judge or state court commissioner may follow this precedent, and upon some vague notion of the unconstitutionality of acts of Congress, or of error in the proceedings in this court . . . discharge all the United States convicts and prisoners from the prisons and jails of the State."[117] By contrast, the staunchly anti-slavery New York *Tribune* declared that "[t]he Judges of [Wisconsin] have won a lasting title to regard and admiration by their late decision in [*Booth III*] . . . . The example which Wisconsin has set will be as rapidly followed as circumstances admit . . . we anticipate a race among the other Free States in the same direction, till all have reached the goal of State independence."[118]

Against this background, federal government officials considered their options. Since Ryecraft had already been confined in the county jail for ten days, *Booth III* had no practical impact on his situation. By contrast, Booth had not yet served the full thirty day sentence that had been imposed by Judge Miller. In theory, the federal marshals could have made an effort to rearrest Booth immediately. But this course of action would quite likely have engendered violent resistance, and in any event the federal authorities would have had to find some alternative venue in which to incarcerate him. Thus, the Pierce administration chose instead to appeal *Booth III* to the United States Supreme Court.[119]

The effort to prosecute the appeal met resistance from the Wisconsin Supreme Court, whose attitude had hardened considerably since the appeal of *Booth I* the year before. When the Supreme Court sent its writ of error to the Wisconsin Supreme Court, the state court judges instructed their clerk to ignore the writ and not to record

---

[114]28 U.S. 193 (1830).

[115]*Id*. at 207.

[116]Beitzinger, *supra* note 48, at 18.

[117]*Id*. at 17.

[118]2 WARREN, *supra* note 25, at 260-61.

[119]Beitzinger, *supra* note 48, at 17-18.

it in the official records of the court.[120] This action was far more extreme than the actual decision in *Booth III* itself.[121] By refusing to honor the writ of error, the Wisconsin court essentially asserted the authority to nullify section 25 of the Judiciary Act of 1793, which provided for appeals by writ of error. The refusal also implicitly challenged the premises of the Supreme Court's famous 1816 decision in *Martin v. Hunter's Lessee*,[122] which had established the Court's authority to hear and definitively resolve appeals from state courts. Nonetheless, the Wisconsin courts continued to receive support and encouragement from at least some elements of the national anti-slavery movement. For example, the *Chicago Tribune* declared that "[w]e owe to the Supreme court of Wisconsin the respect and reverence due to a judicial tribunal which has had the courage to avow, and will have the virtue to maintain, the fundamental principles of State Rights and Personal Liberty."[123]

The Wisconsin Supreme Court's maneuver ultimately failed in its intended effect because the Pierce administration had anticipated the ploy and acted in advance to counteract it. Prior to the issuance of the writ of error Sharpstein, following instructions from Washington, had approached the clerk of the Wisconsin Supreme Court and requested an authenticated copy of the record in *Booth III*. Sharpstein did not disclose the motivation for his request, and the clerk complied.[124] After the state court refused to honor the mandate of the writ of error, Attorney General Cushing petitioned the Court to act on the copy of the record that Sharpstein had obtained.

Cushing's motion provided the Southern justices and their allies with a clear opportunity to strike a rhetorical blow at those who opposed the enforcement of the Fugitive Slave Law. Taney and his allies could have proceeded based on the copy of the record that had been obtained by Sharpstein and justified their action with an opinion that branded Booth and the members of the Wisconsin Supreme Court as lawless nullifiers who were prepared to defy even the Supreme Court of the United States. Instead, the justices proceeded more cautiously.

Speaking for a unanimous Court in May, 1856, Taney did note that the refusal of the clerk to comply with the writ of error could not prevent the exercise of the Court's appellate jurisdiction.[125] However, he also concluded that "in a matter of so much gravity and importance," the Court should not proceed to the merits without first giving the clerk another opportunity to provide an official copy of the record of the lower court proceedings.[126] Accordingly, the Court issued an order directly to the clerk of the Wisconsin Supreme Court, mandating that he provide a copy of the state court record. In a companion opinion, the Court also postponed consideration of the appeal in the *Booth I* so that the two cases could be considered together.[127] As a result, the Court would not consider the merits of either case during its 1856 term.

---

[120]*Id*. at 18.

[121]*Id*.

[122]14 U.S. (1 Wheat.) 304 (1816).

[123]*More Southern Vaporing*, LIBERATOR (Boston), November 23, 1855.

[124]Beitzinger, *supra* note 48, at 18.

[125]*In re* United States v. Booth, 59 U.S. (18 How.) 476, 478 (1855).

[126]*Id.*

[127]Ableman v. Booth, 59 U.S. (18 How.) 479, 479 (1855).

The decision of the Southern-dominated Court to proceed cautiously in early 1856 may well have been influenced by the uncertainty of the political situation, particularly in the North. At the time that the Court postponed the decision in *Booth*, the emergence of the Republican party as the primary opposition party in the North was far from certain. The performance of self-identified Republicans in the state and local elections of 1855 had been uneven at best, and the future of the party seemed heavily dependent on the course of events in Kansas. While Congress continued to wrangle over the future of the territory, the winter of 1855-56 failed to produce the kind of dramatic events that would further galvanize the anti-slavery faithful and convince wavering Northerners to put aside their previous political differences and join together in a crusade against the influence of the slave power. If anti-slavery sentiment could be subsumed in some reconstitution of Whiggery or a Northern party devoted to nativism, temperance or some other political issue, the possibility of a renewed accommodation between the sections no doubt seemed very real to some contemporary observers.[128] Against this background, the decision to postpone the reckoning in *Booth* may well have been influenced by a desire to avoid roiling the political waters unduly.

In any event, the arguments in *Ableman v. Booth*[129] were not heard until January 19, 1859, after sectional tensions had been further exacerbated by events such as the caning of Charles Sumner,[130] the decision in *Dred Scott* and the conflict over the Lecompton constitution.[131] The United States was represented by Jeremiah S. Black, who served as Attorney General during the Buchanan administration. By contrast, although the Court was provided with a written copy of Byron Paine's argument before the Wisconsin Supreme Court, no counsel appeared on behalf of either Booth or the state of Wisconsin.

Black was a particularly apt choice to make the case against the intervention of the Wisconsin Supreme Court. Four years earlier, while serving on the Pennsylvania Supreme Court, he had delivered a strongly worded opinion refusing to issue a writ of *habeas corpus* on the petition of Passmore Williamson, who had been imprisoned by a federal court after having been alleged to have unlawfully aided in the escape of a slave.[132] Although the full text of his argument in *Ableman* was never published, Black was reported to have denounced the actions of the Wisconsin Supreme Court in the strongest terms, darkly suggesting that the state judges could be cited for contempt but "magnanimously" indicating that the government would not pursue such a course.[133]

---

[128]*See* GIENAPP, *supra* note 47, at 273.

[129]62 U.S. (21 How.) 506 (1859).

[130]The impact of the Sumner caning is described in GIENAPP, *supra* note 47, at 299-302; POTTER, *supra* note 42, at 209-11; WILENTZ, *supra* note 47, at 690-92.

[131]For discussions of the dispute over the Lecompton constitution, see, *e.g.*, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 458-84 (1978); MICHAEL A. MORRISON, SLAVERY AND THE AMERICAN WEST: THE ECLIPSE OF MANIFEST DESTINY AND THE COMING OF THE CIVIL WAR 196-201 (1997); POTTER, *supra* note 42, at 302-25.

[132]*In re* Williamson's Case, 3 Am. Law Reg. 741, 1855 WL 7059, at *6, *14 (Pa. 1855).

[133]SWISHER, *supra* note 24, at 662.

With the Court dominated by Southerners and Northern Democrats, the outcome of the case was never really in doubt. In the abstract, Justice Peter V. Daniel of Virginia might have found the Wisconsin Supreme Court's perspective on federalism attractive.[134] However, given his strong pro-slavery and anti-Northern views, Daniel was hardly likely to countenance state interference in a prosecution under the Fugitive Slave Act. Conversely, despite the fact that Justice John McLean was strongly opposed to the expansion of slavery and had been a major contender for the Republican presidential nomination in 1856, he had consistently resisted efforts to undermine the enforcement of the Fugitive Slave Act.[135] Indeed, as recently as 1855, in *Ex Parte Robinson*,[136] McLean had incurred the wrath of more radical elements of the anti-slavery movement by ordering the release of a federal marshal who had been jailed by Ohio officials for rearresting fugitive slaves whom the state courts had ordered released on a writ of *habeas corpus*. Thus, in marked contrast to *Dred Scott*, Taney was able to rally a unanimous Court behind an opinion reversing the judgments of the Wisconsin court.[137]

Taney began by assailing the basic premises underlying both *Booth I* and *Booth III*. Observing that "the paramount power of the State court lies at the foundation of [both] decisions,"[138] he contended:

> It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no 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.[139]

Taney then turned specifically to the claim that the Wisconsin court possessed the authority to free Booth from federal custody. On this point, he asserted:

> [T]he 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 indepently [sic] 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. And the State of Wisconsin had no more power to authorize these proceedings of its

---

[134]Daniel's life and philosophy are described in detail in JOHN P. FRANK, JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784-1860 (1964); *see also* EARL M. MALTZ, *DRED SCOTT* AND THE POLITICS OF SLAVERY 78-83 (2007).

[135]*See* MALTZ, *supra* note 134, at 95-97 (describing McLean's perspective).

[136]3 Ohio Dec. Reprint 51 (Prob. Ct. 1858).

[137]Ableman v. Booth, 62 U.S. 506, 526 (1859).

[138]*Ableman*, 62 U.S. at 514.

[139]*Id.* at 515.

> judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.[140]

Taney conceded that the state courts had authority to issue writs of *habeas corpus* in order to inquire into the reasons that a person was being held in custody and that the responsible federal officials should provide an explanation in writing. But Taney also asserted:

> [A]fter the return is made, and the State judge or court judicially apprized [sic] 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.[141]

Any errors in the federal proceeding—including jurisdictional errors—could be corrected only on appeal. Moreover, Taney declared that it was the duty of federal officials to resist—by force if necessary—any effort to remove a prisoner from their custody to bring the prisoner before a state court in a *habeas* proceeding.[142]

Taney's critique of the state court's decision to free Booth from custody did not rest on a theory of federal supremacy. Instead, the critique was based on what might be described as a theory of concurrent sovereignty—the view that the state and federal governments should be viewed as coequal sovereigns, and that, under principles of comity, each should respect the judicial proceedings of the other. The same theory would suggest that the federal courts should also generally refrain from interfering with ongoing state criminal proceedings, even in the face of allegations that the proceedings somehow implicated federal rights.

By contrast, Taney's response to the Wisconsin Supreme Court's failure to comply with the writ of error emphasized the place of the United States Supreme Court in the judicial hierarchy. After noting that the Constitution's grant of appellate jurisdiction by its terms applied to cases from *all* courts–not simply federal courts[143]–he argued that:

> it is manifest that [the establishment of] ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.[144]

---

[140] *Id.* at 516.

[141] *Id.* at 523.

[142] *Id.* at 524.

[143] *Id.* at 518.

[144] *Id.* at 518-19.

Taney also observed that, when the Constitution was drafted in 1787, "it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal."[145] Finally, after stating flatly that the Fugitive Slave Act was constitutional and that the actions of the commissioner in taking Booth into custody were entirely lawful, Taney averred that "if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise."[146]

Taney also denied that recognizing the ultimate authority of the Supreme Court in any way denigrated the sovereignty of the states. He first observed that:

> [n]either this Government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another.[147]

He then argued that:

> the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes.[148]

He further stated that:

> no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.[149]

Despite its powerful reassertion of the Supreme Court's authority over state courts, *Ableman* should not be read as an endorsement of a strong vision of federal power more generally. Indeed, observing that the Court also had the power to invalidate federal statutes, Taney explicitly noted that "[the] judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government."[150] Thus, although the Supreme Court

---

[145] *Id.* at 519-20.

[146] *Id.* at 526.

[147] *Id.* at 524.

[148] *Id.* at 525.

[149] *Id.*

[150] *Id.* at 520.

was clearly a department of the federal government that derived its power solely from the federal Constitution, Taney conceptualized the Court as a neutral arbiter that was well positioned to mediate conflicts between the state governments and the other branches of the federal government. It was this function that he viewed as having been compromised by the actions of the Wisconsin Supreme Court in the *Booth* cases.

Legal scholars have generally heaped lavish praise on Taney's performance in *Ableman*. For example, Charles Warren characterizes *Ableman* as "the most powerful of all [of Taney's] notable opinions,"[151] while Carl B. Swisher asserts that the opinion "marked the Chief Justice at his best"[152] and was "thoughtful, measured, and disciplined to the last degree."[153]

By contrast, contemporary responses to the decision were far less uniform. Not surprisingly, Southerners and Northern Democrats unanimously supported Taney. Describing the actions of the government of Wisconsin as "totally illegal and virtually revolutionary," the *Cleveland National Democrat* stated, "[W]e trust that [*Ableman*] will be read with careful, and in the case of men willing to violate the law with prayerful attention, for the sound law and truthful doctrines it teaches."[154] Similarly, *The States* of Washington, D.C. declared that, while Taney had "lived long and done much for honor and fame," *Ableman* was "the summit. He will never surpass the wisdom and value of [that] opinion."[155] Republicans, on the other hand, were split. While the *Philadelphia North American* averred that "[t]he conduct of the Wisconsin Court was such as to preclude any other decree,"[156] the *New York Evening Post* complained that "[n]othing more fatal to the reserved rights of the States, nothing more dangerous to the securities of the individual, can well be conceived, than the authority claimed for [the federal courts] in the recent decision of Judge Taney."[157] Predictably, some of the strongest reaction came from the state of Wisconsin itself. On March 19, the state legislature adopted a resolution characterizing the decision in *Ableman* as "an act of undelegated power, and therefore without authority void and of no force" and declaring that the states "being sovereign and independent have the unquestionable right to judge [the Constitution's] infraction; and that a positive defiance of those sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument, is the rightful remedy."[158] Attempts to enforce the Court's judgment would meet with much the same defiant attitude.

---

[151] 2 WARREN, *supra* note 25, at 336.

[152] SWISHER, *supra* note 24, at 662.

[153] *Id.*

[154] 2 WARREN, *supra* note 25, at 339 (quoting CLEVELAND NATIONAL DEMOCRAT, May 2, 1859; CLEVELAND NATIONAL DEMOCRAT, April 25, 1859; CLEVELAND NATIONAL DEMOCRAT, March 17, 1859).

[155] *Id.* at 338 (quoting THE STATES (D.C), March 11, 1859).

[156] *Id.* at 339 (quoting PHILADELPHIA NORTH AMERICAN, March 10, 1859).

[157] *Id.* at 339-40 (quoting N.Y. EVENING POST, March 21, 1859).

[158] *Id.* at 341 (emphasis removed from original) (citing HERMAN V. AMES, STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES (1911)).

The first step in the process was to file the mandate of the *Ableman* Court with the Wisconsin Supreme Court. Jeremiah Black's efforts to obtain a copy of the opinion and mandates from the Court for this purpose provoked a mini-controversy. When Black requested such a copy from the Clerk's office on April 26, he was at first informed that Taney had directed that no copies be given out until the opinion was officially published.[159] Black responded by sending a written protest to the Clerk demanding the document "[i]n the name and by the direction of the President and for the public use in a matter of great and pressing importance" and declaring that "[r]egarding this as a public record I respectfully suggest that I have a legal right to have it for the purpose referred to."[160] The matter was referred to Taney, who authorized the release of the opinion to Black on condition that it be used for official purposes only.[161]

Black then sent a copy of the mandates to Don A. J. Upham,[162] who had succeeded John R. Sharpstein as district attorney in Wisconsin.[163] On September 22, Upham moved to have the state supreme court file the mandates.[164] The makeup of the Wisconsin court was entirely different from that which had decided the original *Booth* cases. In the election of 1855, Orestes Cole had unseated Samuel Crawford–the lone dissenter in *Booth I*[165] who had written the majority opinion in *Booth III*.[166] In the spring of 1859, Chief Justice Edward Whiton died, and Republican Governor Alexander Randall chose Luther S. Dixon to replace him. Finally, in the elections of 1859, the voters chose Byron Paine, who had represented Booth,[167] to replace Abram Smith, who had declined to seek reelection. Thus constituted, the court declined to grant Upham's motion.[168] Only Dixon voted to file the mandate, defending his position in a long opinion.[169] Cole voted not to file the mandate, while Paine recused himself.[170]

The significance of this action was largely symbolic; in practical terms, the critical issue was whether Booth would be rearrested and forced to serve the remainder of the sentence that had been imposed on him by the federal court. Upham was leery of provoking renewed unrest and the possibility of provoking a new confrontation with the Wisconsin Supreme Court. Thus, it was not until March 1, 1860 that Booth was rearrested on Judge Miller's orders and confined in the

---

[159]SWISHER, *supra* note 24, at 665.

[160]*Id*.

[161]*Id*. at 666.

[162]*Id*. at 667.

[163]*Id*.

[164]Ableman v. Booth, 11 Wis. 498, 499 (1859).

[165]*In re* Booth, 3 Wis. 1, 48 (1854).

[166]*In re* Booth, 3 Wis. 157, 179 (1854).

[167]*Ableman*, 11 Wis. at 498.

[168]*Id.*

[169]*Id*.

[170]*Id*.

federal customs house in Milwaukee.[171] Now represented by Carl Schurz, a young Republican activist, Booth once again petitioned the Wisconsin Supreme Court for a writ of *habeas corpus*,[172] raising the specter of another potential clash between state and federal authorities.

Ironically, such a crisis was averted in part because Byron Paine had been elected to the state court.[173] With Paine forced to disqualify himself because of his prior involvement with the case, the Wisconsin court once again split evenly, with Cole supporting Booth and Dixon voting to deny the petition.[174] As a result, the court took no action on Booth's behalf.[175]

By March 21, Booth had served the full term of imprisonment to which he had been sentenced.[176] Nonetheless, he remained confined in the customs house because he adamantly refused to either pay the fine which had been imposed or to allow his supporters to pay the fine for him.[177] Seeking to use his imprisonment as a focal point for continued agitation against the Fugitive Slave Act, Booth penned a series of widely published letters that bitterly protested both the fact of his imprisonment and the conditions under which he was being held.[178] Adding to the outcry, the *Wisconsin Free Democrat* complained that "[Booth] is kept in prison now solely because the State has failed to vindicate its authority and honor, and redeem the pledges it has made to protect his liberty" and that "every hour he remains in prison, while no steps are taken for his release, is a reproach to the Republican party of Wisconsin."[179]

Spurred on by such appeals, a group of armed men forcibly removed Booth from Federal custody on August 1.[180] Booth did not go into hiding; instead, he continued to address anti-slavery gatherings, at times brandishing a pistol that he referred to as his "little *habeas corpus*."[181] After a number of efforts by federal officials to recapture Booth were thwarted by crowds of armed men,[182] he was finally taken back into custody on October 8, and remained confined in the customs house until, over the bitter objections of Jeremiah Black, Booth was granted a pardon by President

---

[171]SWISHER, *supra* note 24, at 671; Sherman M. Booth, *Letter from Mr. Sherman M. Booth*, LIBERATOR (Boston), May 11, 1860 [hereinafter Booth, *Letter*].

[172]2 WARREN, *supra* note 25, at 343.

[173]*Ableman*, 11 Wis. at 498.

[174]*Id.*

[175]*Id.*

[176]SWISHER, *supra* note 24, at 671.

[177]*Id.*

[178]Booth, *Letter*, *supra* note 171; Sherman M. Booth, Letter to the Editor, *Is Wisconsin a Free State?*, WIS. FREE DEMOCRAT, *reprinted in* LIBERATOR (Boston), Aug. 3, 1860.

[179]Editorial, *The Case of S.M. Booth*, WIS. FREE DEMOCRAT, *reprinted in* LIBERATOR (Boston), Aug. 3, 1860.

[180]*Sherman M. Booth at Liberty*, N.Y. TIMES, Aug. 8, 1860, at 3.

[181]*Mr. Booth Not Yet Out of Trouble*, N.Y. TIMES, Aug. 13, 1860, at 3.

[182]*Id.*; Beitzinger, *supra* note 48, at 30.

Buchanan on the day before the inauguration of Abraham Lincoln.[183]

IV. EPILOGUE: *ARNOLD V. BOOTH*

The pardon did not end the legal saga of Sherman Booth. In 1854, Benammi Garland had instituted a civil suit against Booth for damages under the Fugitive Slave Act.[184] The suit first came to trial before Judge Miller in April, 1855, but the jury could not agree on a verdict and was dismissed on April 23.[185] A new jury was impaneled on July 5.[186] After hearing arguments for two days, the jury was charged by Miller in terms that essentially directed them to return a verdict for the plaintiff.[187] On August 6, Miller entered a judgment against Booth for $1000 plus costs.[188]

On February 24, 1857, acting on this judgment, the United States marshal seized a printing press and a portable steam engine belonging to Booth.[189] This property was then sold to Jonathan Arnold, and the proceeds delivered to Garland in order to satisfy the judgment.[190] Booth then brought suit in the state court, seeking to recover the property.[191] Apparently relying on the state supreme court's decision in *Booth III*, the trial court ruled in Booth's favor, concluding that the judgment could not legally be enforced because the Fugitive Slave Act was unconstitutional and the federal district thus had had no jurisdiction over Garland's original suit.[192]

When the decision was appealed to the state supreme court, Booth was once again represented by James H. Paine, who relied heavily on the reasoning of *Booth III* in his argument.[193] However, in *Arnold v. Booth*, Orasmus Cole joined Luther Dixon in holding that the judgment of the lower court should be reversed.[194] Speaking for the court, Cole observed that, even without the Fugitive Slave Act, the federal district court had jurisdiction over Garland's initial action by virtue of diversity of citizenship.[195] Thus, Cole concluded that, unlike the earlier *Booth* cases, the action to recover the property was nothing more than a collateral attack on the merits of judgment of the federal district court which should not have been entertained in the state court.[196]

---

[183]Beitzinger, *supra* note 48, at 31-32.

[184]BAKER, *supra* note 48, at 80.

[185]*Id.* at 141.

[186]*Id*.

[187]*Id*.

[188]*Id.*

[189]Arnold v. Booth, 14 Wis. 180, 183 (1861).

[190]*Id*.

[191]*Id*.

[192]*Id.* at 188.

[193]*Id.* at 180.

[194]*Id*.

[195]*Id.* at 188.

[196]*Id*.

The argument on which Cole relied in *Arnold* was doctrinally unexceptionable. However, the decision to distinguish *Booth III* was also no doubt influenced by the dramatically different political contexts of the two cases. In the middle and late 1850s, when the travails of Sherman Booth had previously been before the Wisconsin Supreme Court, Republicans had viewed the aggrandizement of state power as their best defense against a federal government that that they saw as dominated by pro-slavery interests. By contrast, in the summer of 1861, Republican Abraham Lincoln held the presidency and was by slave state governments that defended the right to secede by relying on the same theory of state sovereignty that had animated the Wisconsin courts in their previous *Booth* decisions. With secession now the primary issue facing the country, to have had a state supreme court dominated by Republicans rely on similar principles in *Arnold* would have been awkward at best.

V. CONCLUSION

The long-running clash over the fate of Sherman Booth illustrates the central reality of the sectional conflict in the late antebellum era. As Carl Schurz would later recall that, in the late 1850s, "in the North, as well as in the South, men's sympathies with regard to slavery shaped and changed their political doctrines and their constitutional theories."[197] Thus, in *Dred Scott*, the Southern justices adopted the state-centered common property doctrine in order to argue that slavery must be allowed in the territories.[198] But in the dispute over fugitive slaves, it was the anti-slavery forces that exalted the power of the states in the federal union. The actions of the Wisconsin Supreme Court in *Ableman* reflect the lengths to which some Republicans were willing to go in resisting the power of the federal government in this context.

Of course, the decision of the Southern states to secede after the election of Lincoln dramatically changed this dynamic. With Lincoln determined to hold the Union together, the Republican party became known as the party of nationalism. But this transformation was almost a historical accident; it did not reflect the basic ideology of either the party itself, or the anti-slavery movement more generally.[199]

---

[197]2 WARREN, *supra* note 25, at 343-44 (quoting 2 CARL SCHURZ, REMINISCENCES OF CARL SCHURZ 105-115 (1907)).

[198]Scott v. Sandford, 60 U.S. 393 (1856). The common property doctrine is described in POTTER, *supra* note 42, at 60.

[199]ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970). This work remains the classic study of Republican ideology.