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**METHODOLOGICAL INTERVENTIONS AND THE  
SLAVERY CASES; OR, NIGHT-THOUGHTS OF A  
LEGAL REALIST**

56 Md. L. Rev. 1316 (1997)

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I. INTRODUCTION: A NIHILIST QUESTION

My assignment was to say something in commemoration of a great private methodological codification.<sup>1</sup> But recently, my mind has been turning back to the writers we think of as American legal realists.<sup>2</sup> It was as though they were voices of my conscience. Long ago they had convinced me that the intervention of methodological formalisms in the decision of a case would simply conceal its “inarticulate major premise.”<sup>3</sup> I had supposed that the ghosts of the realists would have been satisfied with some of our modern methods. Yet now I was beginning to think that perhaps the realists were saying that we do not need and should not have methodological systems at all. In the field of conflict of laws, Professor Friedrich Juenger has been advancing similar ideas for some time,<sup>4</sup> but I had not internalized that thinking. I had not worried about responding to it.

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1. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

2. I am thinking particularly of Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924), and Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

3. Cook, *supra* note 2, at 487. The phrase is a variant of Holmes’s, of course, from his dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”).

4. See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 151-73 (1993). Taking up this view, see, for example, Luther L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It’s Time for a Real Choice-of-Law Revolution*, 56 ALB. L. REV. 795 (1993). For a similar view in the present Symposium, see William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371 (1997). See also, e.g., Patrick J. Borchers, *The Origins of Diversity*

(1997) 56 Md. L. Rev. 1317 It occurred to me that it would be ideal on this occasion to take a set of cases that could be expected to lend support to a nihilistic view, and to examine those cases in the hope of rescuing conflicts law from its detractors. I had been interested recently in cases in American constitutional history in the antebellum period.<sup>5</sup> So I naturally thought of the perennially interesting cases on the conflict of slavery laws. The slavery cases exhibit to perfection the characteristic I needed. The antebellum conflict of slave laws was so essentially political that the argument for conflicts methodology would have to be severely tested by them. Moreover, those cases have long intrigued writers in American legal and constitutional history,<sup>6</sup> as well as writers in conflicts theory.<sup>7</sup>

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*Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993); Stanley E. Cox, *Back to Conflicts Basics*, 44 CATH. U. L. REV. 525 (1995) (reviewing JUENGER, *supra*); Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law but Forum Law*, 28 VAL. U. L. REV. 1 (1993); Russell J. Weintraub, *Choosing Law with an Eye on the Prize*, 15 MICH. J. INT'L L. 705 (1994) (reviewing JUENGER, *supra*); Joachim Zekoll, *Choice of Law and Multistate Justice*, 69 TUL. L. REV. 1099 (1995) (reviewing JUENGER, *supra*). For a related analysis see Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994).

5. For recent writing, see Symposium, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography*, 17 CARDOZO L. REV. 1685 (1996), especially Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996); James Oakes, “*The Compromising Expedient*”: *Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023 (1996); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711 (1996). See also Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996); Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417 (1993).

6. See, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (1996); JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* (1990); DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* (1981); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977); Paul Finkelman, “*Let Justice Be Done, Though the Heavens May Fall*”: *The Law of Freedom*, 70 CHI.-KENT L. REV. 325 (1994); Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009 (1993); Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985) [hereinafter Finkelman, *Exploring Southern Legal History*]. On the teaching of slavery as part of constitutional law, see Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1993).

7. See, e.g., PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981); ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); A.E. KEIR NASH, *In re Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274 (1983); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571 (1982); Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 75 (1971). For a conflicts-theoretical approach, see Harold W. Horowitz, *Choice-of-Law Decisions Involving Slavery: “Interest Analysis” in the Early Nineteenth Century*, 17 UCLA L. REV. 587 (1970). Use of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), to teach conflicts is seen in the late James Martin’s casebook, now under the distinguished authorship of Lea Brilmayer, and is described in an insightful late-appearing symposium contribution, Jane E. Larson, “*A House Divided*”: *Using Dred Scott to Teach Conflict of Laws*, 27 U. TOL. L. REV. 577 (1996). Some good discussion of the slavery cases in the conflict of laws can also be found in Seth F. Kreimer, *The Law of Choice and Choice of*

**(1997) 56 Md. L. Rev. 1318** One of the more memorable essays on the slavery cases and the conflict of laws,<sup>8</sup> as it happens, appeared on the eve of the promulgation of the *Restatement (Second) of Conflict of Laws*.<sup>9</sup> Its author, Harold Horowitz, was trying to show then exactly what I am trying to show now: the uses of conflicts thinking even in such cases.<sup>10</sup> Professor Horowitz argued that choice-of-law ideas that were very much in the air in 1970 were implicit in the slavery cases. He pointed out that, if the right to the services of a slave was adjudicated in a northern, free state, the slave state and the free state each would have an “interest” in “having its policy prevail.”<sup>11</sup> You would have a “true conflict.”<sup>12</sup> How would the northern court resolve it? He argued that antebellum courts often reached “reasonable accommodation[s]” through reasoning analogous to more modern methods; in his view, the slavery cases thus could provide “a useful background on which courts [could] draw today” in trying to resolve conflicts.<sup>13</sup>

So I thought I could profitably revisit those cases. But from the beginning, it was borne in on me that there was something about the slavery cases that made it almost impossible to analyze them. They seemed political enough to make a legal nihilist out of anyone. I discovered, first, that I was unhappy with my distinguished predecessor’s analyses of them. His analyses were *dispassionate*, uninfluenced by the fact that in the slavery cases there might be a right answer. But of course there *was* a right answer.<sup>14</sup>

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*Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

8. See Horowitz, *supra* note 7.

9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

10. See Horowitz, *supra* note 7; see also HAROLD HOROWITZ & KENNETH KARST, *LAW, LAWYERS AND SOCIAL CHANGE* 1 (1969).

11. Horowitz, *supra* note 7, at 591.

12. Professor Horowitz also considered similar cases in some southern courts as well. See *id.* at 595. Technically, such cases typically would not present “true conflicts,” because the southern state, as the joint domicile, is the only interested state. The fact of past temporary sojourn in a northern state would presumably be an insufficient basis for attributing to the northern state an “interest” in governing the relationship between the parties *inter se* at the time of decision. Let me add, for the nonspecialist, that “true conflict” is a term of art. In a true conflict, the respective laws of two concerned states not only differ, but each also could *rationality* and *constitutionally* govern. Such “governmental interest analysis” follows Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). For the link between rationality and constitutionality, see Gene R. Shreve, *Interest Analysis As Constitutional Law*, 48 OHIO ST. L.J. 51 (1987); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

13. Horowitz, *supra* note 7, at 593, 601. In particular, Professor Horowitz found strong analogies to “comparative impairment” reasoning, a technique for resolution of “true conflicts” described in William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

14. I might qualify this remark in view of cases like *Selectmen v. Jacob*, 2 Tyl. 192 (Vt. 1802) (*per curiam*), in which the court’s abhorrence of slavery was such that it refused to charge the slavemaster with the care of a sick, blind, old slave woman whom he had abandoned. *Id.* at 196-98. The result would be more clearly wrong, perhaps, if the old woman herself had sued; one assumes the decision in this case simply allotted her upkeep to the village of Windsor, Vermont. Cf. *Latimer v. Alexander*, 14 Ga. 259, 262 (1853) (holding that a slaveowner has a duty to care for his slaves, but that the hirer of a slave also takes on

**(1997) 56 Md. L. Rev. 1319** Whether it is generally a good idea to take into account the judgment of history in historical writing, in the case of slavery I do not think it would unduly entangle one in anachronism or whig interpretation to do so. Today's moral position is not merely the triumphalism either of the winning side in the Civil War or of Warren Court enthusiasts. Rather, our shared position today—that law supporting racial slavery was immoral—was also, to a surprising extent, the moral position of the antebellum courts, south as well as north.

How, then, could Professor Horowitz have praised northern “accommodations” to the laws of the slave states? It is true that there were sincere antebellum beliefs, shared even by some abolitionists, that the greater good sometimes required enforcement of slave law. Although we would not remit an American to racial bondage today on any idea of “the greater good,” it was these ideas, I think, that Professor Horowitz read, not inappropriately, as examples of conflicts reasoning. Even so, Professor Horowitz was aware of the moral difficulty,<sup>15</sup> and would have avoided it if he could. His aim was simply to use the slavery cases for the analogies they presented, as a vehicle for demonstrating the usefulness of “reasonable accommodations” in choosing law. Nevertheless, despite his best efforts, he wound up doing just the opposite. How useful is a dispassionate accommodationist approach to choosing between two answers, one of which in the judgment of history is intolerable?

I started all over, determined to bring a fresh interest-analytic eye to these cases. Yet the more I looked at them, the less it seemed to me that I could say anything sensible about them. The “interest analysis” that the better courts today achieve in conflicts cases, with or without the *Restatement (Second)*, seems at best simply beside the point in the slavery cases. It is hard to *care* if the “slave state” is “an interested state.” Today, of course, any “interest” of a state in enforcing slave law **(1997) 56 Md. L. Rev. 1320** would not be a legitimate one.<sup>16</sup> Nevertheless, even if antebellum courts knew that too, even in the south, and to some extent I think they did, we cannot say that therefore all such conflicts were “false.” That would be much too abstract a formulation. Those conflicts were real enough to lead to civil war.

We could not account at all for the persistence in one place of law widely condemned elsewhere, like the law of slavery, if we did not suppose either that it occurs among indoctrinated people, or that it is so entrenched in the political and economic life of a polity that people see it as a necessary or even irreversible evil. The slave states had very strong interests-in-fact. Increasingly, it would have taken courage for southern

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this duty); *Gibson v. Andrews*, 4 Ala. 66, 68 (1842) (holding that the owner may not contract out of the duty to furnish slaves with medical care).

15. See, e.g., Horowitz, *supra* note 7, at 588 (acknowledging that “[s]ome will think it tasteless” to deal with slavery as a problem in accommodation of conflicting laws); *id.* at 592-93 (citing with approval as a reasonable accommodation the decision of the Illinois high court that a resident could be prosecuted for helping a slave to escape, and similarly discussing with approval a decision by the Supreme Court of Connecticut refusing to free a slave in temporary sojourn in the state).

16. See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

judges to set aside slave law, even with the cover of judicial device.<sup>17</sup> Nor could we account at all for the liberalism of some of the northern judges, knowing the north's own racism, and its ties to the south<sup>18</sup>—to southern cotton, to the south's outlets to the sea—without attributing to the northern judges an equally ideological position from which it increasingly would have taken political courage for them to depart. So the northern states had strong interests-in-fact as well.

Suppose, then, that one overlooked technical niceties and took the view that the two-state slavery cases presented true conflicts *in all courts*. How, then, would one solve such a conflict? By preferring forum law? That is the approach I have recommended in my own previous work,<sup>19</sup> but that approach would hardly do in the slavery cases. A goodly number of those cases would be tried in the courts of some slave state, and I did not feel that consistency in application even of my own recommended approach would merit re-enslaving anyone.

Certainly any more formalistic approach would be disastrous. A mandatory resort in any court even to the best imaginable choice rule, on the face of it, would be akin to saying “eeny, meeny, miny, mo”—not a good way to secure someone's release from bondage.

In fact, the judges in the slavery cases did not always treat them as conflicts cases. Despite the respectable body of literature examining the two-state slavery cases as exercises in choice of law,<sup>20</sup> those cases did not always turn on reasoning that we would identify as conflicts (1997) 56 Md. L. Rev. 1321 reasoning or as analogous to conflicts reasoning.<sup>21</sup> What one finds is that the judges quite often refer to the desirability of intercourse between the states, free of penalty to slaveowners or the likelihood of retaliation by an offended sister state. Sometimes they mention the technical rule that ordinarily the domicile should determine the status of persons. But the cases do not hinge on such things. Most tellingly, judges in those days did not seem to have authoritatively laid it down that some particular mode of choice of law would have to be used at the outset in all two-state cases in their courts. Too much was at stake, at least in the slavery cases, to make justice as blind as that. There was an easy access to discretion which our courts today do not enjoy. Most of these cases, whether or not taking the ideal of “comity” into account, were decided as close to their merits as the judges could get.

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17. See generally Finkelman, *Exploring Southern Legal History*, *supra* note 6.

18. See generally Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086 (1993).

19. See Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

20. See, e.g., Horowitz, *supra* note 7.

21. Professor Finkelman employs terminology like “*lex loci*” to describe the results in some of the slave cases throughout his excellent book, *An Imperfect Union: Slavery, Federalism, and Comity*. FINKELMAN, *supra* note 7. But I have found little choice-of-law language of that kind in the slave cases I have read. Sometimes a judge will mention a common understanding about choosing law, but the slave cases I have examined do not seem to turn on choice-of-law reasoning.

What the slavery cases *do* show is one of the things legal realists like Walter Wheeler Cook<sup>22</sup> would later discover: conflicts cases are not very different from domestic cases.<sup>23</sup> In fact, legal conflicts tend to be *internal* to the forum state, even in two-state cases. What we think of as *conflicts* are likely to be internal policy clashes, not just conflicts between two states' laws.<sup>24</sup> These cases show that, whatever courts may say they are doing, if the result is dispositive it is a decision on the merits. In this sense there are no "conflicts cases"—there are only *cases*.

Understanding this, it becomes clear that rules that purport to select a place to "govern" in supposed ignorance of what the law is at that place are somewhat beside the point. If the policies that are in (1997) 56 Md. L. Rev. 1322 conflict are forum policies, there is no other "place" that is going to govern. More fundamentally, if the conflict is among internal forum policies, then "forum preference" is obviously not an answer; *it is the question*.

It is true that the slavery cases are extraordinary cases, at the extreme limits of morality. One might want to think of them as exceptions,<sup>25</sup> from which little of general application can be learned. Yet Professor Horowitz's essay was right in presuming that no principled line could be drawn between the slavery conflicts in antebellum courts and the workaday conflicts that are adjudicated under any choice-of-law method. Whether or not there is a clear right answer in a given case, as there is in the slavery cases, courts adjudicate substantive rights and obligations. Every such litigated issue of law is important to the parties. And results matter. Cases are commonly judged by their outcomes; and formal reasoning, however elegant, cannot save from condemnation a foolish or unjust result. In any event, as long as there are still laws discriminating, for example, against homosexuals, we cannot say that seriously wrong law in this country is a thing of the past.

Reading the slavery cases in this light, I found myself, quite stunned, asking the heretical and in fact nihilistic question whether having a special body of law for the conflict of laws has not been a mistake. Perhaps we should abandon the enterprise. The

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22. See Christopher Shannon, *The Dance of History*, 8 YALE J.L. & HUMAN. 495, 501 (1996) (book review) (referring to Cook, the critic of conflicts laws, as "the greatest of the realists").

23. Cf. Cook, *supra* note 2, at 469, 475, 478 (arguing that a court "enforces not . . . foreign right[s] but a right created by its own law").

24. For analogous analyses, see Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1756 (1992), arguing that the Supremacy Clause requires reconceptualization of the federal-state conflict of laws as a clash of national policies; Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 836 (1989) (same); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1225-26 (1977) (same). For an analogous discussion of internal conflicts among domestic courts as problems in the conflict of laws, see Jeffrey L. Rensberger, *Domestic Splits of Authority and Interstate Choice of Law*, 29 GONZ. L. REV. 521 (1994).

25. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 260-61 (1992) (arguing that it "would be a serious error to design choice-of-law rules around slavery and abortion, instead of around the thousands of routine conflicts between ordinary laws," because ordinary cases require no "escape hatches").

whole enterprise.<sup>26</sup> I am reminded of my beloved old copyright professor, Ben Kaplan, who, during lectures, used to confess, a little helplessly, from time to time, “Well, you know, boys, I don’t *believe* in copyright.” But, however devastating the slavery cases may be to current theory, they also persuade me that it would be a mistake for courts to deny themselves access to choice-of-law solutions, even if it were possible to do so.

I will make some necessary preliminary remarks and then try to tell, from my own point of view, the general story of the slave cases as they evolved significantly over time. I will then come back to the challenges (1997) 56 Md. L. Rev. 1323 the slavery cases present to theories of deciding how to decide cases.

## II. THE INTERNALIZED NATURE OF A CONFLICT OF (SLAVERY) LAWS

The conflict of slavery laws was essentially the same in all courts. A legal realist would say that a conflict of slavery laws played out at the forum as an internal conflict of *domestic* policies. A legal realist would also say that, in this, a conflict of slavery laws was no different from other conflicts cases.

Suppose, for example, a slavery case in a southern court. A woman born as a slave asserts that she became “free” by residing in a free state, by operation of its laws. From the point of view of the court—a court in a slave state—the free state might seem to have only the remotest “interest” in the liberty of this freedwoman who had become free while temporarily residing on its territory. The southern state is the joint domicile of the parties. The freedwoman no longer resides in the north. She stands now at the southern bar of justice. Her “owner” has valuable rights of property in her under the law of this state.

But who would re-enslave her?<sup>27</sup> The judge at the slave state would feel the weight of the property claims of her alleged “owner,” but he would feel also the force of her claim that she is free. The fascinating thing is that the courts of the slave states in such cases typically *did* rule in a slave’s favor, at least until near the close of the antebellum period, as we shall see shortly. They sometimes said they were extending “comity” to the laws of the “free” state.

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26. Cf. Rensberger, *supra* note 24, at 534 n.55 (“Significantly, the demise of a particular choice of law theory has never [led] to the rejection of the choice of law enterprise. Instead, motivated by a desire for uniformity, scholars have always provided a replacement for rejected choice of law theories.”).

27. Cf. Lord Mansfield’s remarks before decision in *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772): “Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law . . . . Contract for sale of a slave is good here. . . . But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference.” *Id.* at 509 (Mansfield, C.J.). On the other hand, *The Slave, Grace*, 166 Eng. Rep. 179, 183 (Adm. 1827) (Stowell, J.), held that a slave who had lived as a slave in England, but sued for freedom upon her return to the West Indies, had lost her rights, the status of slavery having reattached to her. The Taney Court also was of the view that a slave state could re-enslave a returning freedwoman. See *Strader v. Graham*, 51 U.S. (10 How.) 82, 93-94 (1850) (Taney, C.J.) (dictum).

Now, a realist would also point out that there is no difference between the case just described and one in which a slave had any other ground for claiming freedom. Why should it matter that she had resided in a free state? All that was required was that she assert any colorable ground on which the court could hold her free. The two-state configuration was not the only configuration that would engage a southern court's *internal policy struggle* between its interests in (1997) 56 Md. L. Rev. 1324 enforcing slave law and its interests in liberty. In a conflicts case, courts would attribute the interest in liberty to a free state; but in wholly domestic cases, the slave states would find other ways of ruling for the slave, although there was no sovereign but their own to whom the interest in liberty could be ascribed.<sup>28</sup>

The existence of liberty interests in a slave state should not really surprise us. The ideals of the Revolution,<sup>29</sup> after all, must have been, to some extent, the ideals of Virginia and South Carolina as well as of Massachusetts and Pennsylvania. They became the ideals of Missouri and Texas as well as of Ohio and Wisconsin. Even if one does not read the antebellum Constitution as embracing this “higher law,” it existed in other founding documents: the Declaration of Independence of 1776 and the Northwest Ordinance of 1787.<sup>30</sup> It existed most usefully in judicial language, as we shall see, language that courts both north and south freely adopted as expressing their own policies. As these expressions became embedded in authoritative judicial opinions, they became positivistically identifiable as the policy of the state. So, notwithstanding the racism and racial laws of those times, the ideal of personal liberty was widely shared, north and south.

The ideal of personal liberty failed to become *national* policy—and this is part of the tragedy of the antebellum era—only because it was crowded out by the emergence of an apparent strong national policy pointing the other way.<sup>31</sup> It is one of the wrenching turns in the story of the slavery cases that an apparent proslavery national policy emerged in the antebellum period and came increasingly to transcend every other ideal in the minds of some of the northern judges: the imperative of appeasing the south and holding the Union together.<sup>32</sup> The Taney Court did nothing to delegitimize this policy and in fact did

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28. See *infra* notes 55-57 and accompanying text.

29. See generally Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

30. Ordinance of July 13, 1787, *reprinted in* I CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, at 168 (Merrill Jensen ed., 1976). The Ordinance was enacted by the Confederation Congress, which was sitting in New York during the Constitutional Convention in Philadelphia. Among other things, the Ordinance abolished legalized slavery in all of the old Northwest Territory, an area occupied today by Ohio, Indiana, Illinois, Wisconsin, Michigan, and part of Minnesota.

31. See *infra* notes 139-220 and accompanying text.

32. This is substantially the view of FEHRENBACHER, *supra* note 6, who argues that the southern courts' insistence on northern “comity” was paralleled by John C. Calhoun's demand for exclusive federal protection for the rights of slaveowners. See *id.* at 139-41. These issues emerged in Supreme Court cases and eventually, fatefully, in the Civil War.

everything it could to appease the slave interest. This was (1997) 56 Md. L. Rev. 1325 the nature of the northern proslavery “interest” that competed for vindication at a “free” forum.

The late Robert Cover’s 1975 book, *Justice Accused*,<sup>33</sup> set out to blame the antebellum judges who enforced the laws of slavery for their too-rigid positivism.<sup>34</sup> But Cover’s work became more nuanced than that. He understood that some of the judges who struggled to satisfy the claims of slaveowners did so from a conviction that this was their solemn obligation under the Constitution, the embodiment of the bargain that held the Union together.<sup>35</sup>

This was the firm belief of Chief Justice Shaw of Massachusetts. Although Shaw found ways of freeing those slaves who had been brought into the Commonwealth with the consent of their masters, he felt quite different about runaway slaves. To his mind, the Fugitive Slave Clause of Article IV<sup>36</sup> was part of a constitutional compromise without which the south would never have ratified the Constitution.<sup>37</sup> As the Civil War approached, some northern judges persisted in extending comity, where they could, to southern law, from a naive but sincere belief that by doing so they could appease the south and save the Union. And some judges in the south, who hitherto had extended a humane comity to liberating northern law, came to believe that it was essential to the survival of the south’s social system to support it more consistently.

So it is possible to view the conflict of slave laws in all courts as a conflict between proslavery policies, reflecting some supposed greater good (whether to preserve the slave system, as in the south, or, as in the north, to obey the commands of law,<sup>38</sup> or to encourage interstate commerce (1997) 56 Md. L. Rev. 1326 by protecting the property of visitors,<sup>39</sup> or, eventually, to save the Union), and policies reflecting the *ideal of liberty*.<sup>40</sup>

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33. COVER, *supra* note 7.

34. *Id.* at 226, 235.

35. *Id.* at 119.

36. The Fugitive Slave Clause provides: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. CONST. art. IV, § 2, cl. 3, *superseded* by U.S. CONST. amend. XIII.

37. See LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 91 (1957).

38. For some judges the “greater good” was simply fidelity to law. See, for example, *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416), an action for damages for harboring a fugitive slave, in which Justice Baldwin, sitting on circuit, instructed the jury not to indulge their “humane and benevolent feelings,” or to forget that “the first duty of citizens of a government of laws [is] obedience to its ordinances.” *Id.* at 844. The jury awarded damages of \$4000. *Id.* at 855.

39. Cf. *In re Booth*, 3 Wis. 13 (1854), *rev’d sub nom.* *Ableman v. Booth*, 62 U.S. (20 How.) 506 (1858). In *In re Booth*, Justice Smith, concurring, complained: “The rights, interests, feelings, . . . of the free states are as nothing, while the mere pecuniary interests of the slaveholder are everything.” *Id.* at 122.

40. See the remark of William Lloyd Garrison: “With us, the forms of law, legal precedents, and constitutional arrangements are nothing, in opposition to the claims of our common humanity, the instincts

One can often see on the living page this struggle between claims of legal right and the impulse toward basic decency. Consider one federal judge's attempt at an evenhanded summary of the situation:

On the one side we have a citizen of a sister state . . . claiming . . . certain property, . . . and insisting upon her right to my order to have this property delivered to her by the injunctions of the constitution of the United States, which I am bound to obey. In the other party, . . . we have an individual who has lived among us for more than twenty-three years; has a wife and family of children depending upon him, and a home, from all which he must be separated, if the claimant has made good her right. These are considerations that make it peculiarly incumbent on the judge, who is to decide the question, and to decide it by the evidence. . . . He is to yield nothing, on the one side to the power and patriotism of the state of Maryland, which have been strongly invoked for the cause of the claimant; nor, on the other, to any feeling for the consequence of his judgment to the respondent and his family; much less to any opinions of his own on the question of slavery.<sup>41</sup>

In these slavery cases, then, as in all litigated cases raising questions of law, there was a choice, in all courts, between two arguable positions that reasonable people could and did maintain, notwithstanding that then as now there was a "right" answer.

### III. *SOMERSET'S CASE* AND THE EMERGENCE OF THE MORAL ARGUMENT

It is a mistake to suppose that moral argument does not figure in the decision of cases. Few judicial pronouncements have had the resonance of Lord Mansfield's declaration in *Somerset's Case*,<sup>42</sup> as it was (1997) 56 Md. L. Rev. 1327 remembered, that slavery is "so odious, that nothing can be suffered to support it, but positive law."<sup>43</sup> Lord Mansfield could say this even while acknowledging that slavery did not, in his day, violate international law.<sup>44</sup> American judges both north<sup>45</sup> and south<sup>46</sup> adverted to Lord

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of eternal justice, and the commands of God." THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, at 111 (1974).

41. *Case of Williams*, 29 F. Cas. 1334, 1341 (E.D. Pa. 1839) (No. 17,709) (ultimately ruling against rendition of the alleged fugitive slave).

42. *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

43. *Id.* at 510 (Mansfield, C.J.). For a review of a controversy over what Lord Mansfield said, see William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974). The controversy is interesting but irrelevant; the language has had a life of its own.

44. To the same effect on this point, see *The Antelope*, 23 U.S. (10 Wheat.) 66, 74 (1825) (Marshall, C.J.).

45. See, e.g., *Ex parte Bushnell*, 9 Ohio St. 77, 115 (1859) (stating that "every court of every state, lave and free, has echoed and re-echoed these immortal words"); *Anderson v. Poindexter*, 6 Ohio St. 475, 506

Mansfield's language, as did members of the Supreme Court.<sup>47</sup> Under the impetus of that language, judges in both north and south, for much of the period, could be found administering law if feasible in such a way as to free a slave. This was so even though the moral argument for liberating slaves sojourning in free states must have been compromised by the Constitution's provision for the rendition of "fugitive" slaves.<sup>48</sup>

#### IV. TECHNIQUES OF EVASION OF (SLAVE) LAW AT COMMON LAW

Judges can and do use all sorts of devices to avoid disfavored law<sup>49</sup> or unjust results:<sup>50</sup> the procedural point;<sup>51</sup> the sidestep; the distinguishing (1997) 56 Md. L. Rev. 1328 or excepting or narrowing<sup>52</sup> construction; the literalistic reading;<sup>53</sup> and, if all else fails, that biggest of guns and mightiest of judicial thunderbolts, the "striking down" as

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(1856) (Swan, J., concurring) (reprinting in full the opinion of Lord Mansfield); *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 212 (1836) (Shaw, C.J.) (quoting the "odious" segment in *Somerset's Case*).

46. See, e.g., *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820) (Mills, J.) ("Slavery is sanctioned by the laws of this state, and the right to hold [slaves] under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law."). Adverting to Lord Mansfield's language in *Somerset's Case*, as well as to the Thirteenth Amendment, in an 1870 opinion refusing to provide relief in an action for the contract price of slaves, see *Osborn v. Nicholson*, 18 F. Cas. 846, 846-48, 850, 854-55 (C.C.E.D. Ark. 1870) (No. 10,595), *rev'd*, 80 U.S. (13 Wall.) 654 (1871).

47. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 498 (1856) (Campbell, J., concurring); *cf. id.* at 624 (Curtis, J., dissenting) ("[S]lavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." (quoting *Prigg v. Pennsylvania*, 41 U.S. (1 Pet.) 345, 543 (1842) (Story, J.))); *Dred Scott*, 60 U.S. (19 How.) at 534 (McLean, J., dissenting) ("[S]lavery can exist only within the territory where it is established.").

48. This was a point made by Benjamin Curtis, arguing for the slaveowner in *Aves*, 35 Mass. (18 Pick.) at 201.

49. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (discussing a range of judicial strategies for avoiding harmfully obsolescent statutes).

50. See Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1959 (1987) (suggesting common law strategies that might have been used in certain slave cases).

51. See, e.g., *Case of Williams*, 29 F. Cas. 1334 (E.D. Pa. 1839) (No. 17,709) (refusing rendition of an alleged fugitive slave because conflicting testimony could not satisfy the burden of proof of the alleged slave's identity, which burden was on the master).

52. For a narrow construction of a pleading in a case against a would-be rescuer of a slave, see *Hill v. Low*, 12 F. Cas. 172 (C.C.E.D. Pa. 1822) (No. 6494) (Bushrod Washington, Circuit Justice), which held that it was error to instruct the jury that an attempt to rescue a slave after his arrest was an obstruction of the arrest. *Id.* at 173.

53. See, e.g., *Van Metre v. Mitchell*, 28 F. Cas. 1036, 1038 (C.C.W.D. Pa. 1853) (No. 16,865) (dismissing two counts of an action for a statutory penalty for harboring and concealing fugitive slaves, on the ground that although the slaves might have been harbored they were not concealed but kept in "avowed, concerted and systematic defiance of law").

unconstitutional.<sup>54</sup> But, in view of the political weakness and silence of the Marshall Court, and the silence, punctuated by disastrous rulings, of the Taney Court, this last technique did not always seem available to antebellum judges; they characteristically deployed the resources of the common law.

We find cases in southern courts using these sorts of devices to free slaves.<sup>55</sup> I am thinking of an 1833 case in which the Supreme Court of Virginia, in adjudicating a slave's right to freedom, disregarded the letter of a will to effectuate the presumed manumitting intent of the testator.<sup>56</sup> In another 1833 case, the Supreme Court of South Carolina held that a secret trust to manumit a slave did not violate South Carolina's antimanumission statute.<sup>57</sup> Although ordinarily there is nothing surprising in permitting a trust to trump legal arrangements, a judge bent on vindicating the state's policy against manumission could have given the statute a broader interpretation and could have been less hospitable to the hidden trust. Similarly, in 1830 a Georgia court refused to apply, but could have applied, Georgia's (1997) **56 Md. L. Rev. 1329** antimanumission law retroactively to a will directing out-of-state manumission.<sup>58</sup>

It is evident that a court can attempt to avoid disfavored law by remitting the parties to another jurisdiction for their litigation, but it is also possible that a court could require the parties to go to another place to perform their underlying transaction. In 1835, the Supreme Court of South Carolina imposed a duty on executors of an emancipating will to carry out the terms of the will, notwithstanding state law forbidding emancipation of a slave by will, and held that in order to execute the will the executors *must remove the*

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54. See *infra* notes 191-203 and accompanying text for cases finally striking down the Fugitive Slave Act of 1850 as unconstitutional.

55. Indeed, as late as 1855 there is a North Carolina case granting liberty based upon the intention of the manumitting testator "to confer upon [his slaves] the boon they hold most dear." *Mayo v. Whitson*, 47 N.C. (2 Jones) 231, 239 (1855).

56. See *Elder v. Elder's Ex'r*, 31 Va. (4 Leigh) 252 (1833). As southern attitudes hardened, manumission by will became more difficult in Virginia. See *Bailey v. Poindexter's Ex'r*, 55 Va. (14 Gratt.) 132, 152 (1858) (rejecting *Elder* and holding that when a will leaves emancipation to the slave's option, the slave having no capacity to elect, the provision is void and of no effect). *But see Jones Adm'r v. Jones Adm'r*, 24 S.E. 255 (Va. 1896). The *Jones* court stated:

[W]e would not consider [*Bailey*] as precluding us from a re-examination of that question, since [it is] in conflict with the prior decisions of this court during a period of more than 50 years, [was] decided by a bare majority of the court, two judges dissenting . . . , and [is] so contrary to reason and to justice that we would hesitate long before we would hold that a slave could not elect to be free when that right was given him by his owner.

*Id.* at 256.

57. See *Cline v. Caldwell*, 19 S.C.L. (1 Hill) 423, 427 (1833) (*per curiam*).

58. See *Jordan v. Bradley*, 1 Ga. 443 (1830). Later Georgia cases decline to follow *Jordan*. See, e.g., *Sanders v. Ward*, 25 Ga. 109, 117-18 (1858); *Cleland v. Waters*, 19 Ga. 35, 38 (1855); *Bryan v. Walton*, 14 Ga. 185, 206 (1853). For a useful survey of cases in a range of southern states, see A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979). The courts of Tennessee and Texas, in Nash's view, were consistently the most liberal. *Id.* at 132.

*slave from the state to free territory.*<sup>59</sup> In another case, in Mississippi, the court held that a master could lawfully manumit his slaves by taking them outside the state, although he could not lawfully take them back into the state.<sup>60</sup> In the same case, the court held also that, although a freedman could neither enter nor leave Mississippi, if out of the state he could receive a pecuniary legacy of Mississippi property there.<sup>61</sup>

Such decisions may be less liberal than they appear. Particularly in late examples, such cases can reflect what was to become a fixture of deep south ideology: the policy of absolute adherence to the will of the slavemaster. This is one way of explaining from a southern point of view why, when a slave sojourned in a free state against the will of the master, comity to the free state's law would be withheld.<sup>62</sup> This policy could prevail notwithstanding the fact that in the antebellum period, as in the colonial period, increasingly there seemed to be an **(1997) 56 Md. L. Rev. 1330** issue of public safety<sup>63</sup> that made even individual manumissions come to seem unacceptable.<sup>64</sup>

I mention these last cases, which require or permit removal of a slave to free territory, because they begin to approach the category of conflicts cases. The one feature of conflicts cases that sets them apart from other cases is that they are cases in which the facts span two different places. But we can also see that the possibility of a second source of law is not limited to cases in which the facts span two different places. Conflicts cases are not essentially different from other cases in which courts cast about for a device to avoid an otherwise applicable legal rule.

One of the allures of the strategy of choosing another state's law is that this device seems so unintrusive. It seems the least disruptive among the available expedients because it purports to do no structural damage to the law not applied. True, a choice of another state's law cannot carry the broad conclusiveness of a "striking down," but it can at least supply an ethical, if temporary, alternative to bad law. It can give justice, if only in the individual case.

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59. See *Frazier v. Executors of Frazier*, 20 S.C.L. (2 Hill) 304, 315-16 (1835); see also A.E. Keir Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall*, 21 S.C. L. REV. 141, 158, 174 (1969) (discussing *Frazier*).

60. See *Shaw v. Brown*, 35 Miss. 246, 269-70 (1858).

61. See *id.* at 320-21.

62. See, e.g., *Louis v. Cabarrus*, 7 La. 170, 172 (1834) (reversing a verdict for the slave, in an action for freedom, and remanding for a clearer showing that the slave's sojourn in a free state was with the consent of the master).

63. An interesting anticipation of this is seen in Lord Mansfield's remarks holding over *Somerset's Case*: "The setting 14,000 or 15,000 men at once loose by a solemn opinion, is very disagreeable in the effects it threatens." *Somerset v. Stewart*, 98 Eng. Rep. 499, 509 (K.B. 1772) (Mansfield, C.J.). Mansfield urged the parties to settle, but responded to their evident refusal: "If the parties will have judgment, '*fiat justitia, ruat coelum*;' let justice be done whatever be the consequence." *Id.*

64. Compare, e.g., *Vance v. Crawford*, 4 Ga. 445, 458-59 (1848) (declaring foreign manumission in accordance with Georgia policy), with *Sanders v. Ward*, 25 Ga. 109, 117 (1858) (declaring foreign manumission to be "neither within the letter or the spirit of the law"). These examples are offered by Reid, *supra* note 7, at 593.

*Somerset's Case* can be viewed as a conflicts case in the sense that Lord Mansfield departed from the domiciliary law, which ordinarily would have determined the status of persons. James Somerset was set free even though, under the laws of his home state of Virginia,<sup>65</sup> he was a slave. On the other hand—and this is important because it became a feature of many of the American cases—the reasoning in *Somerset's Case* was not conflicts reasoning.

Starting from the explicit moral premise that slavery was “odious,” and the observation that such “high dominion” is insupportable by reason and, therefore, could be supported only by “positive” law,<sup>66</sup> (1997) 56 Md. L. Rev. 1331 Lord Mansfield made the profound but altogether practical observation that England had no laws to support the master’s dominion over Somerset or to prohibit Somerset from exercising the freedoms enjoyed by others in England.<sup>67</sup> A lesser judge might have imported the laws of Virginia to legitimize Somerset’s detention in England at the instance of his master. After all, *Somerset* arose on habeas corpus.<sup>68</sup> James Somerset was confined to a ship at anchor on the Thames, and his custodian therefore was the ship’s commander, one Knowles.<sup>69</sup> It was Knowles, then, who became obliged to make return to the writ of habeas corpus. No English official was involved, and no direct blame need have attached to England for Somerset’s detention.

Even so, in a similar situation, another celebrated judge, Chief Justice Shaw of the Commonwealth of Massachusetts, also was able to reach a liberating decision.<sup>70</sup> Shaw used rather different reasoning. He held that the ship in Boston harbor, the brig *Chickasaw*, was not authorized to imprison a fugitive slave.<sup>71</sup> From that he leaped to the conclusion that, even though the two female slaves in that case were fugitives subject to

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65. James Somerset had been domiciled in Virginia, but was being held for eventual sale in Jamaica. *Somerset*, 98 Eng. Rep. at 499.

66. *Id.* at 510. Lord Mansfield wrote:

So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. . . .

*Id.*

67. *Id.* Chief Justice Shaw held to the same effect in *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836), adding the intriguing remark that the freed slave became “entitled to the *protection of our laws*.” *Id.* at 217 (emphasis added). But Joseph Story read the position more broadly: “It has been solemnly decided, that the law of England abhors, and will not endure the existence of slavery within the nation; and consequently, as soon as a slave lands, in England, he becomes *ipso facto* a freeman. . . .” JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 159 (5th ed. 1857).

68. *Somerset*, 98 Eng. Rep. at 499.

69. *Id.*

70. See *Commonwealth v. Eldridge*, reported in DAILY EVENING TRANSCRIPT, Aug. 1, 1836, described in LEVY, *supra* note 37, at 73-76.

71. See LEVY, *supra* note 37, at 75.

rendition under the fugitive slave law, they must be “discharged from all further detention.”<sup>72</sup>

## V. THE EVOLUTION OF THE CONFLICT OF (SLAVE) LAWS: MORAL AND POLITICAL CHANGES

I turn now to the conflict of slave laws proper. We should not be misled: in slavery cases the antebellum courts did very little reasoning of a kind we would associate today with the law of conflict of laws. What these courts did do, typically, was to consider whether they should exercise their sovereign powers, or, as they put it, should extend (1997) 56 Md. L. Rev. 1332 “comity” to the law of a sister state on some ground that comported with their own policies.

Historians currently see the story of the antebellum conflict of slavery laws as having come in chapters. Writers seem to discern two or three phases in the way courts chose law in slavery cases.<sup>73</sup> I will try to sketch a quick composite of these views, interjecting an occasional comment of my own.

### A. *The First Period: Liberty Law and the Property Exception*

In the first period, until the early 1830s, courts of both slave<sup>74</sup> and free states<sup>75</sup> are thought to have extended comity to *each other’s* laws.<sup>76</sup> But the cases adduced for that view do not support it.

It is true that southern judges show a relatively liberal humanity until the later phase of the antebellum period.<sup>77</sup> Where a slave had been freed through operation of law in a

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72. *Id.*

73. See generally FINKELMAN, *supra* note 7 (two phases); FEHRENBACHER, *supra* note 6 (three phases); Nash, *supra* note 7 (criticizing Finkelman’s generalizations about the phases of conflict of slavery laws); Reid, *supra* note 7 (comparing Finkelman’s and Fehrenbacher’s theories).

74. For the story of the consolidation of the slave system in the south, see generally KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956). Also of interest is MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

75. For the story of the early abolition of slavery in the north, see generally ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967). Also of value is WIECEK, *supra* note 6.

76. Northern case law on this problem is much sparser than southern, probably because slaveowners did not like to sue in the north. *Cf.* *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 207-08 (1836) (Shaw, C.J.) (stating that he cannot find earlier Massachusetts cases in point).

77. See, e.g., *Shaw v. Brown*, 35 Miss. 246, 313 (1858) (concluding that the law of Indiana had freed Mississippi slaves sent there for that purpose by their owner); *Betty v. Horton*, 32 Va. (5 Leigh) 615, 621 (1833) (holding that two female slaves had become domiciled in Massachusetts and therefore could not be

free state, judges in the (1997) 56 Md. L. Rev. 1333 south quite often did not think it right to re-enslave her.<sup>78</sup> In those days the presence of free black people in a southern state was not yet perceived as too demoralizing to slaves, dangerous to whites, or debasing to free white labor.

It may be tempting to view these sorts of cases as evidence of a climate of reciprocal comity. In some cases southern courts said they were extending comity lest northern courts retaliate.<sup>79</sup> But in fact even those northern cases that withheld freedom from slaves sojourning in the north do not seem to support the view that there was a general rule of comity. Rather, those cases seem to have to do with the temporariness of the sojourn. If the master took up a *permanent* residence in a free state, a slave suing for her freedom there could have obtained it in this period, as in later periods.<sup>80</sup> But even in

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reimported as slaves into Virginia); *Lunsford v. Coquillon*, 2 Mart. 401, 408 (La. 1824) (holding a slave freed *ipso facto* by her owner's remove with her from Kentucky to Ohio with an intention of residing there); *Winn v. Whitesides*, 1 Mo. 259, 261 (1824) (holding that removal of a slave to free territory with the consent of the master frees the slave, but distinguishing the situation of slaves in transit); *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 479 (1820) (holding that removal of a slave to a free state with the consent of the master frees the slave); *Griffith v. Fanny*, 21 Va. (Gilmer) 143 (1820) (same); *Harry v. Decker*, 2 Miss. (1 Walker) 36 (1818) (same). *Cf.* *Neal v. Farmer*, 9 Ga. 555, 582-83 (1851) (although holding it not a felony to kill a slave, acknowledging the claims of religion and humanity and the protections of the common law as opposed to the interests of the master); *Graham v. Strader*, 44 Ky. (5 B. Mon.) 173, 182 (1844) (opining that slavery would reattach in Kentucky upon the voluntary return of a former slave, but acknowledging the claims of humanity).

78. *See, e.g., Shaw*, 35 Miss. at 273; *Betty*, 32 Va. (5 Leigh) at 625-26; *Bland v. Dowling*, 9 G. & J. 19, 30 (Md. 1837).

79. *See, e.g., Rankin*, 9 Ky. (2 A.K. Marsh.) at 479 (Mills, J.):

If the comity between this and the state of Indiana is to have any bearing on this subject [we must consider the ex-slave as free]. . . . [Otherwise, if negroes domiciled in Indiana are] removed, and it is once known that their vested rights are denied . . . , it is calculated to produce retaliatory measures, and to cause them to detain . . . our transient slaves. . . .

*Id.*

80. In *Commonwealth ex rel. Hall v. Cook*, 1 Watts 155 (Pa. 1832) (on a writ of habeas corpus), the Cook family represented to the court that, when they moved from the District of Columbia to Pennsylvania, their slave, Hannah Hall, indentured herself orally for seven years in consideration of manumission. *Id.* at 155. The Pennsylvania court rejected this transparently cooked-up lease-back arrangement and held that the slave became free by operation of a Pennsylvania statute when brought into Pennsylvania, the master having the requisite intention of taking up a permanent residence there. *Id.* at 155-56; *see also* *Butler v. Hopper*, 4 F. Cas. 904, 905 (C.C.D. Pa. 1806) (No. 2241) (Bushrod Washington, Circuit Justice) (holding that Pierce Butler's slave, Ben, became free by operation of the laws of Pennsylvania because Butler was domiciled there at the time; Butler was not then serving in Congress as representative from South Carolina, and therefore, was not privileged). A slave born in a free state was often considered free at birth in both northern and southern courts. In southern courts, *see*, for example, the remarkably late case of *Union Bank v. Benham*, 23 Ala. 143 (1853), which held that a black man born in a free state could try by habeas corpus the legality of his detention by a sheriff for execution of a debt, although not permitted to try his freedom against his master by habeas corpus. *Id.* at 151. The court observed that "it would hardly be contended, that a white man not held in servitude . . . , and confined in jail, could not try the legality of his confinement by habeas corpus." *Id.* at 155. In *Gentry v. McMinnis*, 33 Ky. (3 Dana) 382 (1835), the court said:

northern courts, especially in this earlier period, it was regarded as (1997) 56 Md. L. Rev. 1334 deeply unfair to strip the master of his rights of “property” when the slave accompanied the master merely in *temporary* transit in the state on the way to another state.<sup>81</sup> On similar thinking, southern courts that otherwise would have granted freedom to one whose master had been domiciled on free soil *refused* to do so when the sojourn on free soil was intended to be temporary.<sup>82</sup>

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[I]f the defendant’s mother was free at her birth, she herself is necessarily free; and that, if she were born in Pennsylvania since the year 1780, even though her mother was a slave, she was, by virtue of the abolition statute of that year, born free, and was only subjected to a state of pupillage until she attained twenty eight years of age; and that, consequently, the fact that she was brought here, before she was entitled to liberation from custody . . . cannot have affected her legal rights as a free person.

*Id.* at 390-91; *see also* Merry v. Tiffin, 1 Mo. 725, 725-26 (1827) (holding, in an action of assault and battery for freedom, brought by John, a slave, that, having been born in free territory in Illinois, “John is free,” although he had been held in servitude for thirty-six years).

81. Northern sympathies for the property rights of masters gave way only very slowly. *See, e.g.*, Willard v. Illinois, 5 Ill. (4 Scam.) 461, 469, 472 (1843) (permitting a prosecution under Illinois law for assisting a slave to escape while temporarily in Illinois, notwithstanding the state’s abolition of slavery in its constitution; arguing that to do otherwise would “weaken, if not . . . destroy the common bond of union amongst us”). Illinois may be a poor example because its southern sections shared the more southern-leaning sentiments of the border states. *See* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 60 (1968). For a disturbing post-bellum example of this attitude in the Supreme Court of the United States, *see Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654, 661 (1871) (holding the Thirteenth Amendment no bar to recovery in an action for the contract price of a slave).

Sometimes enforcement of the fugitive slave laws in northern courts was thought to be justified on property-rights grounds. *See, e.g.*, Johnson v. Tompkins, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416) (Baldwin, Circuit Justice). A proslavery northerner, Justice Baldwin charged the jury:

If this is unjust and oppressive, the sin is on the heads of the makers of laws which tolerate slavery, or in those who have the power, in not repealing them; to visit it on those who have honestly acquired, and lawfully hold property, under the guarantee and protection of the laws, is the worst of all oppression, and the rankest injustice towards our fellow-men. It is the indulgence of a spirit of persecution against our neighbours. . . .

*Id.* at 843-44. Justice Baldwin went on to say that if a master could not recover his slave then the creditor could not recover his loan, and the rule of law would come to an end. *Id.* at 844. In the end, “property” rights in black persons were more fully understood, and the formal abolition of slavery in this country was achieved, although at immeasurable cost, without compensation to the former “owners.” *Cf.* U.S. CONST. amend. XIV, § 4 (“But neither the United States nor any State shall assume or pay any . . . claim for the loss or emancipation of any slave; but all such . . . claims shall be held illegal and void.”).

82. *See, e.g.*, Rankin, 9 Ky. (2 A.K. Marsh.) at 479. The difference between the two kinds of cases is described in *Anderson v. Poindexter*, 6 Ohio St. 622, 628 (1856). The court observed:

Some enlightened jurists in the slave States admit that if the master take his slave into a free state to reside permanently, that he thereby becomes emancipated, but, at the same time they hold that if he go there with him for a temporary purpose, . . . if the servant return voluntarily into the State where he was legally held to service, the rights and powers of the master re-attach. . . . This distinction between the effect of a *temporary* and a *permanent* removal of slaves is maintained upon the ground that the property of an individual does not cease to belong to him on account of his being in a foreign State. . . .

(1997) 56 Md. L. Rev. 1335 The states were *not* applying each other's laws criss-cross. Rather, all states applied the law of liberty, and all states made an exception for brief sojourns of a slave in the north, in transit.<sup>83</sup> These results reflected shared dual policies in all states. The conflicts were not between the laws of different states, as such, but were internal policy conflicts of the forum. One measure of this is that in wholly domestic cases, as we have seen, similar conflicts emerged, with similar results.<sup>84</sup> These results had little to do with comity, although the language of comity reinforces them. Rather, insistence in both sets of courts on keeping the slave in bondage in "transit" cases was a function of an ingrained belief, one that was to erode only very slowly, in the possibility of "*property*" in *human beings*.

Northern accommodation to the law of slavery in these "transit" cases has not been without its defenders. Commentators have valued the concept of comity for its own sake, or have been concerned for the expectations of the slaveowners, or for the sanctity of property, or for the vindication of multistate or national policies. Even today, many might find worthwhile the north's willingness to pay the price of injustice in northern courts in the hopes of avoiding retaliatory injustice in the courts of the south.<sup>85</sup>

It is worth pausing to comment on this idea of retaliatory comity.<sup>86</sup> We are sometimes warned that courts could retaliate for another sovereign's want of comity by withholding comity reciprocally.<sup>87</sup> But it is an oddity of the idea of retaliatory comity that it sometimes seems to lack affirmative content. In slave cases retaliation is possible, but not in the sense that, if New Hampshire freed a Georgia slave, Georgia could retaliate by freeing a New Hampshire slave. It is true that, in theory, if northern courts freed blacks after *short* sojourns, southern courts might retaliate by refusing to recognize their freedom after *long* (1997) 56 Md. L. Rev. 1336 sojourns.<sup>88</sup> Yet even that "retaliation" could achieve only what the extension of "comity" itself contemplated: the continued dominion of a slavemaster over a black. Thus, a rule of "comity" in a slave case in the

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*Id.* at 627.

83. See *supra* notes 74-82 and accompanying text.

84. See *supra* notes 55-57 and accompanying text.

85. This seems to be the implication of the work of such proponents of comity as LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 145-89 (1991); Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245 (1991). But see generally Weinberg, *supra* note 19 (arguing that reciprocal comity poses risks).

86. The classic case is *Hilton v. Guyot*, 159 U.S. 113 (1895), which refused to recognize a French judgment because France would not recognize an American judgment. *Id.* at 228. Arguably disapproving such retaliations against innocent private parties is *Zschernig v. Miller*, 389 U.S. 429 (1968), which struck down, under the Supremacy Clause, an Oregon law barring foreigners from inheriting Oregon property if the foreigner's country would bar an American from inheriting property there. *Id.* at 440-41.

87. See *supra* note 79.

88. Eventually, northern courts did decide to free blacks after short sojourns, and southern courts did decide not to recognize freedom after long sojourns, undoubtedly antagonized by their northern brethren. But by the time this polarization occurred, there were such powerful political pressures on both sides that the courts had little choice. See *infra* notes 115-138 and accompanying text.

north, based on concern over possible retaliation, would trade the freedom of an individual in a real case for the freedom of a speculative future person in a speculative future case, on the irrational speculation that the court in that later case would be willing to penalize a party for the unrelated fault of a court far away, even though the same court sometimes construed its own laws narrowly to free a slave. Even apart from these unpalatable ideas, the notion that the problem of conflicting laws should usually be resolved by applying the other state's laws makes scant sense. As Justice Stone once remarked, to require full faith and credit to laws in addition to judgments would produce an "absurd result." In each case of conflict, he pointed out, the forum would have to apply the other state's laws, but would never be allowed to apply its own.<sup>89</sup>

A far more persuasive argument in favor of accommodation to slave law than this concern about retaliation is that the greater good of the Union might have required "reasonable" accommodation with the needs of the southern traveler. Certainly, disunion and civil war present an awful alternative to judicial accommodation.

But we should begin to consider, I think, the difference judicial insistence on justice might have made. Historians do not like to indulge in counter-factual musings, and little work has been done on the question whether consistent *nonenforcement* of slave law in courts could have succeeded in ridding the country of slavery without war, if insisted on early enough after the slave trade became illegal. Such judicial leadership would have required the cover of earlier and better rulings from the Supreme Court than the country got, but writers also generally have not considered whether war could have been avoided if the Supreme Court had done that job early enough. What we do have is a strong strand of thinking that the antebellum Constitution, as it stood, could have supported even outright abolition.<sup>90</sup>

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89. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

90. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 537-38 (1856) (McLean, J., dissenting) (arguing that the Founders opposed the idea of property in man); *id.* at 572-76 (Curtis, J., dissenting) (arguing that the Founders intended to include freed slaves as citizens of the United States); see generally WIECEK, *supra* note 6, at 202-75; FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 396 (1855); Frederick Douglass, Speech, "Is the United States Constitution For or Against Slavery," July 24, 1851, reprinted in 5 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 191, 198 (Philip S. Foner ed., 1975) (relying on the Preamble, the absence of a constitutional guarantee of slavery, and the principles of good government underlying the Constitution); LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 54-114 (1860) (same); cf. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 216 n.79 (1988) (arguing that even before Douglass took this view, mainstream black opinion also relied on the Constitution); David A.J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 *N.Y.U. J. INT'L L. & POL.* 1, 24 (1993) (pointing out the earlier abolition of slavery by Britain, the relatively weaker power of the slavery interest in the early antebellum period, and James Madison's "original constitutional suggestions of a power in the nation to secure that states could not violate a nationally articulated conception of human rights and the public interest"); Robin West, Commentary: *On Constitutional Positivism-Natural Law Ambiguities*, 25 *CONN. L. REV.* 831, 838-40 (1993) (considering the interpretive issue); Robert Bernasconi, *The Constitution of the People: Frederick Douglass and the Dred Scott Decision*, 13 *CARDOZO L. REV.* 1281, 1288-90 (1991) (describing the antebellum debate on the question whether the Constitution embodied the ideals of the Revolution); Randall Kennedy, *Afro-American Faith in the Civil Religion; Or, Yes, I Would Sign the Constitution*, 29 *WM. & MARY L. REV.* 163, 164-68 (1987) (arguing that black interests are better served by faith in the Constitution); see also Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg, November 19, 1863*,

**(1997) 56 Md. L. Rev. 1337 B. *The Second Phase: The Rule of Liberty and the  
“Fugitive” Exception***

It may be a measure of dissatisfaction with the concept of property in human beings that northern courts began to abandon it.<sup>91</sup> Moving into a second, middle phase of the antebellum period, northern courts tended increasingly to take the view, as we might argue today, that all states shared a reciprocal interest in the liberty of persons **(1997) 56 Md. L. Rev. 1338** within their respective borders.<sup>92</sup> Increasingly, northern courts were willing to grant freedom to sojourners unconditionally.<sup>93</sup>

Southern judges in this period also could be found extending a willing, humane comity to the liberating laws of the north. It was at this time that courts began to rely

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*in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler ed., 1946) (asserting that the nation was at conception “dedicated to the proposition that all men are created equal,” and that the nation was founded “[f]our score and seven years ago,” i.e., in 1776 with the Declaration of Independence, rather than in 1789 with the Constitution). On the other hand, William Lloyd Garrison famously dubbed the supposed constitutional compromise a “covenant with death” in his July 4th speech of 1854 in Framingham, Massachusetts, as he set fire to a copy of the Constitution. *See* PHILLIP PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 2-4 (1975). Wendell Phillips also reportedly made a speech referring to the Constitution (quoting *Isaiah*) as a “covenant with death and an agreement with hell,” some ten years before Garrison used that term. *See* Soifer, *supra* note 50, at 1920 n.14; *see also* JOHN PIERPONT, A DISCOURSE ON THE COVENANT WITH JUDAS (1842), *cited in* *The Latimer Case*, 5 LAW REP. 481, 492 (1843).

91. FINKELMAN, *supra* note 7, at 99, finds that *Willard v. People*, 5 Ill. (4 Scam.) 461 (1843), is the last major northern-state case furnishing protection to the “property” of a slaveowner in transit; but as he points out, *Dred Scott* restored the right of transit. *See* FINKELMAN, *supra* note 7, at 282. *See generally* Reid, *supra* note 7, at 574-81 (“The Northern Reaction Against Comity”).

92. *Cf.* *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.”).

93. Arguably it had become easier for northern courts to take a moral stand. The gradual manumission laws, in place by 1804, would have had the unintended consequence of producing a transfer of the northern slave population to the south, *see* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 397-98 (Henry Reeve trans., 8th ed. 1848), as northerners in slave states like New York, Pennsylvania, and New Jersey perceived that they must liquidate their investments in slave property. Some northern legislatures reacted to these sales, and to the concomitant breaking up of black families in the north, by prohibiting the export of slaves for sale. But the slave population of the north dwindled rapidly. Indeed, the northern black population could not have been anywhere near that of the south even at the time of the Constitutional Convention. In *The Federalist No. 54*, for example, Alexander Hamilton or James Madison treats the problem of slavery as a problem of the southern states. THE FEDERALIST NO. 54, at 367, 369, 371 (Alexander Hamilton or James Madison) (Jacob E. Cooke ed., 1961). Madison’s notes of the Convention throughout show southerners, particularly those of South Carolina and Georgia, as standing for the slaveowning interest. I do not know how the revolutionary army’s recruitment of slaves affected the different sections; there was a scheme in place by which the owner received compensation and the slave liberty.

heavily<sup>94</sup> on Lord Mansfield's position in *Somerset's Case*, that the institution of slavery was so "odious" that it could be maintained only by "positive law."<sup>95</sup>

What would happen, then, under these evolved better understandings, during this middle period, when a slave came into "free" territory? What if she were then returned to her home in a "slave" state?<sup>96</sup> The answers to such questions came more sharply to depend (1997) **56 Md. L. Rev. 1339** on whether the slave was a "fugitive," or had been taken by her master "voluntarily" into a free state.<sup>97</sup> In "voluntary" cases, as I read them, the answer would be affected less and less by the duration of the sojourn in the free state.

The distinction between the "voluntary" and "fugitive" cases was prompted by Article IV of the Constitution,<sup>98</sup> with its provision for the return of fugitive slaves.<sup>99</sup> The distinction was first drawn importantly by Chief Justice Shaw of Massachusetts in 1836 in *Commonwealth v. Aves*.<sup>100</sup> One suspects that Shaw drew the distinction instrumentally, to carve out a class of cases in which "comity" need not be extended to slave law, although later the distinction came to seem inevitable and natural. Indeed, *Aves* is remembered more generally as perhaps the first case rejecting the principle of comity to slave law.<sup>101</sup> In *Aves*, Chief Justice Shaw freed a slave sojourning in

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94. Professor Finkelman says that *Somerset's Case* was not applied in the earlier period. See FINKELMAN, *supra* note 7, at 41. *But see* Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820) (echoing *Somerset's Case* in stating that slavery can be maintained only by positive law, being against natural law).

95. *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (K.B. 1772) (Mansfield, C.J.). Here I differ somewhat from the student author of the *Columbia Law Review* Note, *supra* note 7, at 92, who thought that from 1830 "courts in both the north and the south took increasingly divergent attitudes." The Note's author believed that JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834), was responsible for the decline of comity in the slavery cases, Note, *supra* note 7, at 93, since Story left wholly to the forum the question of slave status. STORY, *supra*, at 165. I also differ somewhat from Professor Finkelman, who finds more intransigence in the south in the 1830s than I do, over a broader range of cases and issues than those considered by me. See FINKELMAN, *supra* note 7, at 181-235. Professor Nash also has trouble locating much intransigence this early in the south. See Nash, *supra* note 7, at 295.

96. Under the case of *The Slave, Grace*, 166 Eng. Rep. 179, 185 (Adm. 1827), the received position was that the original domicile did not violate international law by re-enslaving a freedman.

97. Reports even of federal cases having to do with the fugitive slave problem are quite sparse through the 1830s. These include *Johnson v. Tompkins*, 13 F. Cas. 840, 855 (C.C.E.D. Pa. 1833) (No. 7416) (reversing an award of penalties for obstruction of a recapture); *Hill v. Low*, 12 F. Cas. 172, 173 (C.C.E.D. Pa. 1822) (No. 6494) (reversing because incitement to escape is not obstruction of arrest); *In re Susan*, 23 F. Cas. 444, 445-48 (C.C.D. Ind. 1818) (No. 13,632) (holding for the first time that the Fugitive Slave Act of 1793 was constitutional; also holding that the proceeding provided is summary, and that state laws are immaterial).

98. U.S. Const. art. IV, § 2, cl. 3, *superseded* by U.S. CONST. amend. XIII.

99. See *supra* note 36.

100. 35 Mass. (18 Pick.) 193, 219 (1836) (Shaw, C.J.). In fact, Chief Justice Tilghman of Pennsylvania drew this distinction even earlier in *Wright v. Deacon*, 5 Serg. & Rawle 62, 63-64 (Pa. 1819), and *Commonwealth ex rel. Negro Lewis v. Holloway*, 6 Binn. 213, 217-18 (Pa. 1814). See also the opinion of Justice Bushrod Washington to the same effect in *Butler v. Hopper*, 4 F. Cas. 904, 905 (C.D.D. Pa. 1806) (No. 2241), cited in *Aves*, 35 Mass. (18 Pick.) at 221.

101. Earlier cases outside Massachusetts are noted in LEVY, *supra* note 37, at 62-71.

Massachusetts.<sup>102</sup> In doing so, he followed Lord Mansfield's position in *Somerset's Case*, that slavery could not be enforced in the courts of a free state.<sup>103</sup> In making that ruling, Shaw also remarked that slavery was against both "natural right" and "the fundamental laws of this State,"<sup>104</sup> and "wholly repugnant to our laws."<sup>105</sup> Responding to the choice-of-law argument that a traveler's personal property was protected by domiciliary law, and should not be stripped at the place of sojourn, Shaw in effect reached the merits and roundly rejected the view that there could be "property" in human beings.<sup>106</sup>

**(1997) 56 Md. L. Rev. 1340** The distinction between a fugitive slave and a slave brought voluntarily into a free state, in some cases, might have been more technical than real, signifying only that the slave had made her escape while sojourning in the north rather than from her home in the south. Somerset, too, had been brought voluntarily to England and only then had run away. But in some cases there was no "escape" of any kind. There was simply a stay in the free state, and in such cases the sojourning slave was commonly supposed to have become free. It was a rather metaphysical question just why the slave did become free. Take Somerset, for example. Was Somerset freed only because there was no slave law in England, or was he freed, as Joseph Story seems to have thought, because he had set foot on free soil and breathed free air?<sup>107</sup>

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102. *Aves*, 35 Mass. (18 Pick.) at 225.

103. *Somerset v. Stewart*, 98 Eng. Rep. 499, 509 (K.B. 1772) (Mansfield, C.J.).

104. *Aves*, 35 Mass. (18 Pick.) at 217.

105. *Id.* at 218.

106. *Id.* at 216. A slave state until 1846, New Jersey rejected these "higher law" remarks in *State v. Post*, 20 N.J.L. 368, 376-77 (1845). See Act of Apr. 17, 1846, ch. 3, 1846 N.J. Laws 53 (abolishing slavery). Cf. *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 512-13 (1841) (Baldwin, J.) ("As each state has plenary power to legislate on this subject, its laws are the test of what is property. . .").

107. See *supra* note 67 and accompanying text; see also, e.g., *Lemmon v. People ex rel. Napoleon*, 20 N.Y. 562, 605 (1860) ("The idea was . . . fixed in the public mind by a striking metaphor which attributed to the atmosphere of the British Islands a quality which caused the shackles of the slave to fall off."). This may have been a reference to lines of Cowper, quoted in LEVY, *supra* note 37, at 67:

*Slaves cannot breathe in England; if their lungs*

*Receive our air, that moment they are free,*

*They touch our country, and their shackles fall.*

See also *Anderson v. Poindexter*, 6 Ohio St. 622 (1856). The court stated:

[B]ut the [northwest] ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio, prohibits, in express terms, [slavery's] introduction here for any purpose whatever. By its imperative language it is denied any vitality on our soil. Its manacles instantly break asunder and crumble to dust, when he who has worn them . . . is afforded the opportunity . . . of placing his feet upon our shore, and of breathing the air of freedom.

*Id.* at 630.

Interestingly, Pennsylvania, concerned that delegates would stay away from the Constitutional Convention for fear of losing their slave "property," enacted special protective laws. Soifer, *supra* note 50, at 1918-19 n.10.

In this middle period, then, northern courts began to apply their own laws to free a slave even on shorter sojourns in the state, as long as the slave was there with the owner's consent.<sup>108</sup> *Volenti non fit injuria*. But the arresting feature of this second period is that some southern courts continued for a time to extend comity unilaterally, (1997) 56 Md. L. Rev. 1341 applying northern state law to free a slave. The principle was, "Once free always free."<sup>109</sup> This happened, to take the most prominent late example, in the Missouri trial court in the first litigation in Dred Scott's case. Because Scott had been taken voluntarily to a free state and to a free territory, and had resided in each for a considerable time, he argued that he had become free by operation of their respective laws, and the Missouri trial court so held.<sup>110</sup>

Such one-way choices of liberating law suggest the emergence in this middle period of what the late Professor Ehrenzweig would have called "a true rule."<sup>111</sup> Ehrenzweig might have called it, by analogy to his "rule of validation," a "rule of liberation."<sup>112</sup> A rule of liberation could almost be said to have been typical until perhaps the 1850s,<sup>113</sup> when the national agony was becoming too acute for such forbearance.

Now, antebellum judges knew, as the legal realists reminded us, that the forum does not actually escape its law, whatever it purports to be doing.<sup>114</sup> Its evasions, as much as its narrowing constructions, always reflect or become what forum law actually is. Yet it

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108. *Aves's Case* is the classic example. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836); *see also* *Jackson v. Bulloch*, 12 Conn. 38, 49 (1837) (freeing a slave who had sojourned two years temporarily in the state, but distinguishing the case of a slave solely in transit); *Daggs v. Frazer*, 6 F. Cas. 1112-13 (D. Iowa 1849) (No. 3583) (dismissing an action in trover by a citizen of Missouri for the return of nine slaves lost on a visit to Iowa because trover would not lie in Iowa for the return of slaves). For antebellum discussion of the master's right of transit, *see* THOMAS COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 135-40 (1858).

109. *See, e.g.*, *Fenwick v. Chapman*, 34 U.S. (9 Pet.) 461, 465 (1835); *see also* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560 (1856) (McLean, J., dissenting) ("In . . . *Spencer v. Negro Dennis*, [8 Gill 314, 321 (Md. 1849)] the court say: 'Once free, and always free, is the maxim of Maryland law upon the subject. . . .'").

110. The case is unreported. *See* *Scott v. Emerson*, 15 Mo. 387, 395 (1852) (reversing the trial court's ruling in Scott's favor).

111. Albert A. Ehrenzweig, *Choice of Law, Current Doctrine and "True Rules"*, 49 CAL. L. REV. 240, 241 (1961) (identifying "true rules" of choice of law reliably predictive of actual outcomes in a way formal rules might not be).

112. ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW § 65 n.169 (1967); ALBERT A. EHRENZWEIG, A TREATISE OF THE CONFLICT OF LAWS 465 (1962) (identifying a true "rule of validation" for contract cases more reliably predictive of actual outcomes than the rule of the "place of making").

113. Between 1824 and 1852, when the Missouri Supreme Court decided *Scott v. Emerson*, 15 Mo. 387 (1852), Missouri cases had held that taking a slave into a free territory, at least when there had been an intention to establish a permanent residence there, freed the slave. *Winny v. Whitesides*, 1 Mo. 259 (1824), seems to be the first such reported Missouri decision. *See also, e.g.*, *Wilson v. Melvin*, 4 Mo. 347, 351 (1837). Later Missouri cases followed Emerson. *See, e.g.*, *Sylvia v. Kirby*, 17 Mo. 434, 435 (1853).

114. *See, e.g.*, *Anderson v. Poindexter*, 6 Ohio St. 622, 656 (1856) (Swan, J., concurring) (explaining that the forum, in choosing foreign law, makes that law its own municipal law). This was the view of Joseph Story. *See* STORY, *supra* note 67, ch. II, § 23.

would be fatuous for us today to look back upon a southern court applying liberating northern law and to say to it: “You do seem to see that slavery is ‘odious.’ Abhorrence of slavery, then, is your *true policy*. This true policy is probably captured in declarations of liberty in your own case law. Instead of making intellectually dishonest departures from the laws so regrettably maintaining slavery in your state, you should declare (1997) 56 Md. L. Rev. 1342 property in slaves a nullity in your courts, under principles of national policy found in the Declaration and Ordinance, or on state common law principles.” Such reasoning was scarcely to be imagined in southern courts then, if only because a southern state’s economy would have been too profoundly invested in slavery for a judicial *coup de main* to have had any efficacy. However clear might have been the requirements of justice in the individual case, the requirements of the situation as a whole would have seemed altogether different to a southern judge then. The rights of property, the needs of public safety, considerations of the welfare of aged or infirm black dependents, and the want of constitutional principle to the contrary, all seemed to fix the slave system irrevocably upon the state. The best, then, that southern courts could do with slavery in this second antebellum period was to depart from their own “odious” laws whenever it was possible to choose liberating law instead—leaving their own laws ostensibly undisturbed.

### C. The Final Phase: Polarization

Now we come to the third, last chapter in the story. As the south saw the balance of power tilting away, it increasingly resented the rhetoric of the north, implicitly one of both moral reproach and incitement to slave revolt. Southern rhetoric underwent a change. The people of the south had reconsidered the entire position, as one southern judge put it, and now the whole people were of one mind: the white master’s utter dominion over the black slave, even when violent and cruel,<sup>115</sup> was ordained by God.<sup>116</sup>

The Supreme Court of Mississippi waited until 1859 to declare its “settled conviction,” in *Mitchell v. Wells*,<sup>117</sup> “that the interests of both (1997) 56 Md. L. Rev.

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115. This Calhoun-like position can be seen in Joseph H. Lumpkin, *Report on Law Reform*, 1 U.S. MONTHLY L. MAG. 68, 77-78 (1850) (“If duty to ourselves, as well as to our slaves, requires increased severity, by way of security, let it be imposed, regardless of the hypocritical cant and clamor of the fanatics of our own or other countries.”).

116. *See id.* (“The conscience of the whole south, after having been thoroughly aroused to the most earnest and intense investigation of this subject by the merciless and unremitting assaults of our relentless foes, have become thoroughly satisfied that this institution—like government itself—is of God.”). This and other expressions of Georgia’s point of view are discussed in Reid, *supra* note 7, at 624.

117. 37 Miss. 235 (1859). *See* the notorious remarks of Justice Harris:

The State of Ohio, forgetful of her constitutional obligations . . . and afflicted with a *negro-mania*, . . . inclines . . . to her embrace, as citizens, the neglected race. . . . Suppose that Ohio, still further afflicted with her peculiar philanthropy, should . . . claim to confer citizenship on the chimpanzee . . . , are we to be told that “comity” will require of the States not thus demented, . . . to meet the necessities of the mongrel race thus . . . introduced into . . . this confederacy?

1343 races are best promoted by the institution of slavery as it exists amongst us.”<sup>118</sup> So saying, the court abruptly veered away from its former accommodating course of decision<sup>119</sup> and held that a manumission effected in Ohio was ineffective in Mississippi.<sup>120</sup> In *Wells*, the former slave was the daughter of her master. She had been taken to Ohio and freed there by her father. The Mississippi court held her a slave again, denying her rights to inherit any of her father’s property in Mississippi, notwithstanding the “will of the master” to the contrary.<sup>121</sup>

The Georgia Supreme Court abandoned comity and liberty in an 1855 case, denying freedom to a former slave who had been manumitted in Maryland.<sup>122</sup> Georgia’s peppery Chief Justice Lumpkin insisted on this sharp departure from pre-existing law: “This whole question is one of State policy, and should not be put upon these principles of *meum et tuum*. . . . No one pretends that negroes can be carried to New York . . . and held there in perpetual bondage. . . . With what more propriety can slaves be brought here and emancipated?”<sup>123</sup> In another case, while in fact ordering manumission, Lumpkin protested: “For myself, I utterly repudiate the whole current of decisions, English and *Northern*, from *Somerset’s* case down to the present time, which hold that the bare removal of a slave to a free country. . . will give freedom to the slave.”<sup>124</sup>

The Kentucky Court of Appeals, too, took a sudden turn toward forum law in its “in transit” cases. As late as 1848, Kentucky was still following its earlier cases in recognizing the free status of a former slave who had lived in Ohio for two years.<sup>125</sup> Within a year, however, (1997) 56 Md. L. Rev. 1344 the Kentucky court made a sudden about-face and insisted on its sovereign power to support the institutions of slavery within its own territory.<sup>126</sup> Even more strikingly, in another case the Kentucky court re-

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*Id.* at 262-64 (Harris, J.). *But see id.* at 282 (Handy, J., dissenting) (complaining that the court was adopting “barbarian rules which prevailed in the dark ages”).

118. *Mitchell*, 37 Miss. at 238.

119. *See* *Shaw v. Brown*, 35 Miss. 246, 321 (1858) (holding that, although manumitted blacks could not enter or leave Mississippi, in another state they could take a pecuniary legacy of property originating in Mississippi); *see also id.* at 273 (distinguishing *Hinds v. Brazealle*, 2 Miss. (2 Howard) 837, 842-44 (1838)). *Hinds* involved a master’s return to the slave state with his manumitted slave after a brief departure for the sole purpose of manumitting the slave, thus working a “fraud on the law,” which disqualified the black devisee from taking.

120. *Mitchell*, 37 Miss. at 264.

121. *Id.* at 257 (treating a recent statute to the same effect as indicative of state policy, which it declared in strong terms).

122. *See* *Knight v. Hardeman*, 17 Ga. 253 (1855).

123. *Id.* at 262-63.

124. *Cleland v. Waters*, 19 Ga. 35, 41-42 (1854); *see also* *Neal v. Farmer*, 9 Ga. 555, 567-71 (1851) (suggesting that *Somerset’s Case* abolished all slavery in England, but had no application in the United States).

125. *See* *Davis v. Tingle*, 47 Ky. (8 B. Mon.) 539, 545-48 (1848).

126. *See* *Collins v. America*, 48 Ky. (9 B. Mon.) 565, 571 (1849).

enslaved a black who had been declared free in a judicial proceeding in habeas corpus in Pennsylvania.<sup>127</sup>

In this third, final chapter in the antebellum story, southern courts become more intransigent.<sup>128</sup> The best-known example of this hardening of southern judicial attitudes is seen in the dramatic about-face of the Missouri Supreme Court in the original state court litigation in *Dred Scott v. Sandford*.<sup>129</sup> Under its existing precedents, as we have seen, Missouri would have recognized Scott's freedom, based on his master's long voluntary sojourn with him on free soil. Now, however, the state court took a very different view:

Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.<sup>130</sup>

So Missouri changed the ground rules in the middle of Scott's case, suddenly jettisoning its former conflicts rule of comity and the principle of "Once free, always free." Scott complained of this in the United States Supreme Court<sup>131</sup>—quite fruitlessly, because under *Strader v. Graham*,<sup>132</sup> state laws on the status of slaves did not raise a federal (1997) **56 Md. L. Rev. 1345** question.<sup>133</sup> *Strader*, indeed, was one of the linchpins of the Supreme Court's policy in this dark time.

What were the northern courts doing in this third phase? As the antebellum era was drawing to its disastrous end, the northern state courts are supposed to have taken an increasingly strident, abolitionist turn, thus joining the south in the flight from comity. But it needs to be remembered that forum law was already the choice rule on liberty in

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127. See *Maria v. Kirby*, 51 Ky. (12 B. Mon.) 542, 545 (1851) (holding that, the parties being different, on the slave's return to Kentucky in a state of slavery rather than freedom it was "as if he had not been absent"); see also *id.* at 551 (distinguishing a hypothetical case in which the slave had been adjudicated free in a proceeding between the same parties in the free state).

128. Nash, *supra* note 7, argues that Texas, Tennessee, North Carolina, Florida, and Arkansas, among seceding states, and Maryland, Kentucky, and Delaware, among other slave states, could not legitimately be included in this generalization. See *id.* at 301-08. Professor Finkelman takes the view that, by the outbreak of war, only Kentucky afforded comity, and in the north, only the border state of Illinois afforded comity. See FINKELMAN, *supra* note 7, at 11.

129. See *Scott v. Emerson*, 15 Mo. 387, 395 (1852) (reversing the trial court, which had followed earlier Missouri cases).

130. *Id.* at 394-95.

131. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 466 (1856) (Nelson, J., concurring) ("But what court has not changed its opinions? What judge has not changed his?").

132. 51 U.S. (10 How.) 81 (1850).

133. *Id.* at 93 (holding that the status of a slave was up to each state in its own courts).

the north. The transit cases were an exception. What happened in this third chapter of the story is that some northern courts did become willing to free slaves even in brief transit. Eventually, abolitionist judges in some northern states would free slaves who were merely passing through the state on the way to another. *Lemmon v. People ex rel. Napoleon*<sup>134</sup> is the example usually given. In that 1860 case, a slave was held liberated, although the master was not visiting the state in any real sense, but merely waiting between ships. An alarmed group of New York businessmen raised a compensatory fund of \$5000 for the southerner so unexpectedly deprived of his “property.”<sup>135</sup>

Similarly, in *Anderson v. Poindexter*,<sup>136</sup> the Ohio court ruled that Poindexter had become a free man simply by having been sent on an errand in Ohio by his Kentucky master.<sup>137</sup>

One should not underestimate the importance of the northern shift from comity in the “transit” cases. It meant that a southern slaveowner in effect was losing what today we would call the right to travel, at least the right to travel accompanied by slaves.<sup>138</sup>

## VI. CONFLICT OVER THE KIDNAP AND RESCUE OF FUGITIVES

There is an even more dramatic story of sectional conflict in those northern state courts that, at last, hauling out the big constitutional guns, resisted the return even of fugitive slaves, and refused to punish slave rescuers. The first key to the fugitive cases is that the internal domestic policy conflict in northern courts was fracturing. The polar, proliberty position was to be seen, for the most part, in *state* (1997) **56 Md. L. Rev. 1346** courts in the north, while fidelity to an imagined “greater good,” and comity to the south’s proslavery concerns, found expression largely in northern *federal* courts.<sup>139</sup> It was the state courts in the north that were more likely to try to free alleged fugitives. But even in federal courts, the judges could not always control the sympathies of northern juries.

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134. 20 N.Y. 562 (1860).

135. After the initial hearing in *Lemmon*, New York businessmen reportedly contributed to a fund raised by the New York Journal of Commerce to compensate the master in that case. See FINKELMAN, *supra* note 7, at 297.

136. 6 Ohio St. 475 (1856).

137. *Id.* at 482.

138. This was argued in *Lemmon*. 20 N.Y. at 580. For this reason, it is not unlikely that had the Supreme Court reviewed *Lemmon* it would have built upon *Dred Scott* to force legitimization of slavery upon the free states. For this argument, see JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 179-81* (1988).

139. There were some successful enforcement efforts also in some northern state courts. See, e.g., *Ex parte Bushnell*, 9 Ohio St. 77, 199, 200 (1859) (sustaining the conviction of a slave rescuer under the Fugitive Slave Act). On the whole, presidential appointments to the federal courts tended to be sympathetic to southern views throughout the antebellum period.

In these fugitive cases, then, the nation ultimately weighed in, much more strongly than in the past, on the side of the slave interest. To be sure, courts had always tended to see the enforcement of federal fugitive slave law as a constitutional duty, not so much because of the Supremacy Clause as because of the Fugitive Slave Clause. But federal judges, especially, were becoming increasingly frightened. They came increasingly to believe that if they did not enforce the fugitive slave law the Union would fall apart. It is certainly true that any such dissolution would be disastrous. The Union would lose lands for which it had paid millions; the midwest would lose its outlets to the sea; and the north would become vulnerable to hostile penetration from the foreign friends of the south, unless—and this was the most awful alternative—the north launched a fratricidal war to suppress rebellion.

I have said that, with the nation more clearly taking one side in the sectional dispute, the internal policy conflict in each northern state fractured, with federal courts in the north aligned in favor of comity to southern interests, and state courts in the north increasingly determined to resist slavery, in favor of human rights. Here, too, the story differs in one respect from other current tellings. Once one moves beyond the transit cases and brings the fugitive cases into the picture, it appears that a few northern judges—the federal judges—became more *appeasing* rather than more intransigent. For them, comity remained important.

The best point of entry into this thicket is probably the Supreme Court's 1842 decision in *Prigg v. Pennsylvania*.<sup>140</sup> In *Prigg*, Justice Story read the Fugitive Slave Clause, as Chief Justice Shaw of Massachusetts (1997) 56 Md. L. Rev. 1347 had read it in *Aves*,<sup>141</sup> as a crucial compromise without which the south would never have ratified the Constitution.<sup>142</sup> It is sometimes said today that the Fugitive Slave Clause was more of a technical afterthought than the crucial compromise Justice Story supposed—some say invented<sup>143</sup>—in *Prigg*.<sup>144</sup> The Clause was reported out by the Committee of Detail after the rest of Article IV was drafted, and was voted unanimously with little debate.<sup>145</sup>

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140. 41 U.S. (16 Pet.) 345 (1842). For current discussion, see generally 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 Telling*]; Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605 (1993); Holden-Smith, *supra* note 18.

141. See *supra* note 36 and accompanying text.

142. *Prigg*, 41 U.S. (16 Pet.) at 395.

143. See, e.g., FEHRENBACHER, *supra* note 6, at 21; Finkelman, *Story Telling*, *supra* note 140, at 256; Wiecek, *supra* note 43, at 136. There is no discussion of the Clause in *The Federalist Papers*.

144. *Prigg*, 41 U.S. (16 Pet.) at 711. *Prigg* relied on an earlier emphatic expression of this “crucial compromise” thesis by Chief Justice Shaw of Massachusetts in *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 220-21 (1836). There are even earlier judicial expressions of the position. See, e.g., *Wright v. Deacon*, 5 Serg. & Rawle, 62, 63 (Pa. 1819) (Tilghman, C.J.) (“[I]t is well known that our southern brethren would not have consented to become parties to a Constitution under which the *United States* have enjoyed so much prosperity, unless their property in slaves had been secured.”).

145. Although there was profound concern at the Convention that the south be protected from the abolitionist tendencies it feared from a strong central government, it is unlikely that there was a constitutional compromise over fugitive slaves, if only because it would not have been necessary. See

Although the “crucial” compromise (1997) 56 Md. L. Rev. 1348 theory of the Fugitive Slave Clause is widely accepted now, it might well be argued that the *northern* states

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*Prigg*, 41 U.S. (16 Pet.) at 428 (McLean, J., dissenting) (arguing that from a very early period fugitives from labor were delivered up by the colonies in a spirit of comity); *see also Ex parte Bushnell*, 9 Ohio St. 77, 268 (1859) (Sutliff, J., dissenting):

For more than a hundred years immediately preceding the adoption of the constitution, the colonies and states had respectively exercised and received offices of kindness by comity in relation to the recapture and restoration of fugitive servants and apprentices, in a manner perfectly satisfactory to each other, and to the citizens of each. At least there is no evidence of any complaint having been made to the contrary, either at the formation of the articles of confederation, or in the constitutional convention.

*Id.*

On August 28, the Committee of Detail reported out a clause providing for the surrender of fugitives from justice. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 545 (Adrienne Koch ed., 1966). Pierce Butler and Charles Pinckney of South Carolina then moved that the states also be required to surrender fugitive slaves. Roger Sherman of Connecticut remarked drily that it was no more proper to seize a slave in public than a horse. *Id.* at 546. Butler withdrew his motion, but renewed it the next day, and it was agreed without discussion or vote. *Id.* at 552. Neither at the Philadelphia Convention nor in the state ratification conventions does there seem to have been any mention of the Clause as an element of a constitutional compromise. COVER, *supra* note 7, at 88, found support for the “crucial compromise” thesis in remarks made in the period of ratification. *See* Report of the North Carolina Delegates to Governor Caswell, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83-84 (Max Farrand ed., 1966) (“The southern States have also a much better Security for the return of Slaves who might endeavor to Escape than they had under the original Confederation.”); Speech of Charles Pinckney in the South Carolina House of Representatives (1788), *reprinted in id.* at 255, 256 (to same effect); remarks of James Madison in the Debate in the Virginia Convention (1788), *reprinted in id.* at 325 (same); *see also* JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 453 (1836). But a fair reading of these remarks shows only that the advantage of the Fugitive Slave Clause to the south became a point in the Constitution’s favor, not that it embodied a crucial compromise. *But see* Miller v. McQuerry, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9583). Justice McLean, sitting on circuit, stated:

I am aware it has been stated, that the subject of slavery was not discussed in the convention, and that the reclamation of fugitives from labor was not, at that time, a subject of much interest. This is a mistake. It was a subject of deep and exciting interest, and without a provision on the subject no constitution could have been adopted. I speak from information received from the late Chief Justice Marshall. . . .

*Id.* at 338.

Article IV contains no explicit mention of power in Congress over fugitive slaves. *Cf. Bushnell*, 9 Ohio St. at 228 (Brinkerhoff, J., dissenting):

[A]s early as 1828, in *American Insurance Company v. Canter*, the Supreme Court of the United States, Chief Justice Marshall delivering its opinion, unanimously decided that in the territories Congress rightfully exercises the “combined powers of a general and of a state government.” Yet, in the recent case of *Dred Scott v. Sandford*, all this is overturned and disregarded, and the whole past theory and practice of the government in this respect attempted to be revolutionized by force of a judicial *ipse dixit*. We are thus invited by that court back to the consideration of first principles; and neither it nor those who rely on its authority have a right to complain if we accept the invitation [*i.e.*, to strike down the Fugitive Slave Act].

*Id.* (citing *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 388 (1828); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).

would never have joined the Union if it had entailed giving Congress power to authorize what was in fact done in the fugitive slave laws.<sup>146</sup>

*Prigg* is generally remembered as holding both that the states could not impose protective procedures upon the enforcement of the Fugitive Slave Act of 1793, and that federal officials could not require—we would say, “commandeer”<sup>147</sup>—state officials to assist in enforcing it.<sup>148</sup> There was, however, a third prong. In the course of his murky opinion for the *Prigg* Court, Justice Story also declared that the Fugitive Slave Clause of Article IV was self-executing. It directly authorized (1997) 56 Md. L. Rev. 1349 private, as well as federal governmental, action. The Clause, Story insisted, gave slaveowners a right of self-help—“recaption.”<sup>149</sup> And neither the state nor the nation could interfere with it.

In other words, after *Prigg*, a slaveowner had a constitutional right to enter a free state and capture and remove an alleged slave. If any mistakes were made, of course, the state was free to impose civil and criminal liabilities on a kidnapper. But *Prigg* reversed the north’s presumption of freedom and projected into the north the south’s racial presumption of bondage. *Prigg* put terribly at risk all blacks living in the north, legitimating raids into the north by parties of “slave-catchers.”<sup>150</sup>

In northern streets, and in northern state courts as well,<sup>151</sup> there had long been resistance to recaptures of alleged escaped slaves, whether attempted by warrant under

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146. See *In re Booth*, 3 Wis. 13, 127-28 (1854) (Smith, J., concurring), *rev’d sub nom.* *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1858); *infra* text accompanying note 199.

147. Cf. *New York v. United States*, 505 U.S. 144, 175 (1992) (O’Connor, J.) (“Either type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.” (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981), to the effect that Congress may not “commandee [r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”).

148. *Prigg*, 41 U.S. (16 Pet.) at 625-26 (holding that Pennsylvania could not regulate claims for fugitive slaves); *id.* at 622 (indicating that state magistrates may assist in slave recapture and rendition “unless prohibited” by state law). The *Prigg* Court also held the Fugitive Slave Act of 1793 to be well within the power of Congress, *id.* at 618-19, but the Court did not otherwise pass on the constitutionality of the Act.

149. *Id.* at 612-14; see also *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11, 18 (1823) (to similar effect).

150. *Prigg* can hardly be called the “triumph of liberty” Justice Story always insisted it had been. Presumably Story referred to the fact that *Prigg* denied the resources of unwilling states to enforcement of the Fugitive Slave Act. Yet it is reported that after *Prigg* was decided, Story wrote a member of Congress proposing, for better enforcement of the Fugitive Slave Act, that federal officials be commissioned in each county, and enclosing a draft bill; this suggestion was adopted by Congress in the harsh new Fugitive Slave Act of 1850. The story is told in KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC* 126 (1985); Finkelman, *Story Telling*, *supra* note 140.

151. After Chief Justice Shaw’s decision, for example, in *Morris v. Eldridge*, reported in the *Daily Evening Transcript*, Aug. 1, 1836, freeing the slaves there claimed, the claimant’s agent inquired about obtaining a fresh warrant, as if to re-seize the freedwomen in open court. See LEVY, *supra* note 37, at 73-76. The freedwomen were advised to “clear out before the agent got them again.” *Id.* at 75. Then the mob

the fugitive slave laws or not. Indeed, such resistance, coupled with the sparseness of federal detention facilities and courts, had rendered the Fugitive Slave Act of 1793<sup>152</sup> substantially ineffective. The enactment of the harsh new Fugitive Slave Act of 1850,<sup>153</sup> however, plunged northern courts into turmoil. It is terrible to contemplate that, as the Union threatened to fall apart, the rendition of fugitive slaves came to be seen as vital national policy.<sup>154</sup> It is true that state courts in the north did resist this alleged national policy. There was intransigence there. In contrast, in northern (1997) 56 Md. L. Rev. 1350 federal courts we find almost hysterical efforts to placate southern opinion and overcome local passion.

Part of the Compromise of 1850,<sup>155</sup> the second Fugitive Slave Act<sup>156</sup> was a drastic attempt to make fugitive slave law effective. The Act authorized massive federal assistance to slave-catchers in the north and made a federal commissioner available in every county for the first time, as a justice of the peace,<sup>157</sup> with powers to arrest, imprison,<sup>158</sup> issue process, appoint persons to execute process, and order rendition of fugitive slaves—a jurisdiction concurrent with that of the federal district courts and circuit courts of appeals.<sup>159</sup> The commissioners earned a fee of \$10 for every rendition,<sup>160</sup> but only \$5 for an unsuccessful rendition proceeding. They could command the obedience of the U.S. marshals and deputies,<sup>161</sup> under penalties of \$1000 for refusal to obey and the full value of the slaves' services for permitting any to escape while in federal custody.<sup>162</sup> In addition, the commissioners were empowered "to summon . . . to their aid the bystanders, or *posse comitatus*."<sup>163</sup> The Act commanded "all good citizens .

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of spectators, white and black, chanting, "Go, go!" surged out of the courtroom hustling out the freedwomen. *Id.* Shaw called out, "Stop, stop," but the freedwomen were muscled into a carriage outside and driven away, chased by a hastily appointed but ineffectual posse. *Id.* at 75-76.

152. Act of Feb. 12, 1793, ch. 7, §§ 3,4, 1 Stat. 302, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

153. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

154. The numbers suggest that the problem of fugitive slaves was not very great, and enforcement of the fugitive slave laws not very effective. There were some 4 million slaves in the south on the eve of the Civil War. FINKELMAN, *supra* note 7, at 27 n.24, says that the 1850 census reported 1011 runaway slaves; CAMPBELL, *supra* note 81, at 207, says that 298 fugitives were returned in eleven years.

155. California came into the Union as a free state; certain territories were opened to slavery, and the public sale of slaves was prohibited in the District of Columbia. *See* CAMPBELL, *supra* note 81, at 3.

156. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, 463-65, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

157. *Id.* § 1.

158. *Id.*

159. *Id.* § 5.

160. *Id.* § 8.

161. *Id.* § 5.

162. *Id.*

163. *Id.*

. . . to aid and assist in the prompt and efficient execution of this law.”<sup>164</sup> The expenses of the slave hunt were to be borne by the federal treasury.<sup>165</sup> The Act authorized a pursuer to reclaim a fugitive either by warrant and arrest, or by seizure and prompt presentment.<sup>166</sup> The presiding judge or commissioner was authorized to hear a rendition “in a summary manner.”<sup>167</sup> All that would be required was an affidavit or certificate under seal stating that the claimant was entitled to the labor of the stated fugitive, together with similar “proof” of the identity of the alleged fugitive.<sup>168</sup> These proofs (1997) 56 Md. L. Rev. 1351 conclusively authorized the claimant to seize and remove the fugitive from the state.<sup>169</sup> As for an alleged fugitive’s right to be heard, the Act is explicit: “In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence. . . .”<sup>170</sup> Yet even with this blanket denial of hearing or appeal, court cases emerged in the wreckage anyway. Habeas corpus cases turned up in state and federal courts;<sup>171</sup> state courts convicted U.S. marshals for trespass or assault or kidnapping; federal courts issued writs of habeas corpus against rescuers, or prosecuted or tried them for statutory penalties.<sup>172</sup>

The Act required courts and commissioners to set aside the basic procedural protections of liberty guaranteed by the common law, protections we would locate today in the Bill of Rights. Yet such had been the leadership of the Supreme Court on the fugitive slave laws that it seems to have been obscure to the eyes of some of the lawyers occasionally involved in fugitive slave cases that those laws were unconstitutional. Surely at least the Fifth Amendment might have had some bearing. The young lawyer, Richard Henry Dana, Jr., for example, already famous for his *Two Years Before the Mast*,<sup>173</sup> and a passionate abolitionist, intruded himself into an ongoing rendition proceeding in Boston, and argued to the federal commissioner as an amicus that rendition

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164. *Id.* The commissioner could appoint all personnel necessary to such pursuit. *Id.*

165. *Id.* § 9.

166. *Id.* § 6.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. For an interesting discussion of federal habeas corpus in fugitive slave cases, see Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995).

172. Under section 7 of the Act, criminal and civil penalties and damages were imposed for knowingly obstructing capture of the fugitive, attempting rescue, or aiding or abetting. See, e.g., *Norris v. Newton*, 18 F. Cas. 322, 327 (C.C.D. Ind. 1850) (No. 10,307) (awarding \$2850 in statutory damages for harboring fugitive slaves from Kentucky in violation of the Fugitive Slave Act).

173. RICHARD H. DANA, JR., *TWO YEARS BEFORE THE MAST: A PERSONAL NARRATIVE OF LIFE AT SEA* (1840).

without a hearing was not in accordance with law.<sup>174</sup> But he did not mention the Due Process Clause of the Fifth Amendment.<sup>175</sup> In one case, Massachusetts's Chief Justice Shaw impatiently brushed (1997) 56 Md. L. Rev. 1352 aside the suggestion that it was not due process to deny a recaptured fugitive a hearing with the conclusory remark that Congress had provided an administrative, not a judicial, process.<sup>176</sup>

Enforcement of the Act required subordination of humane feelings. As Ohio's Supreme Court Judge Brinkerhoff complained, the Fugitive Slave Act of 1850

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174. This was the rendition of Anthony Burns, discussed in Finkelman, *supra* note 5. See also *infra* note 187 and accompanying text.

175. See Finkelman, *supra* note 5, at 1810 (providing an account of Dana's arguments). In *In re Booth*, 3 Wis. 13 (1854), *rev'd sub nom. Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), the Wisconsin court did declare the 1850 Act unconstitutional, striking it down, among other things, under the Fifth Amendment, for want of provisions for notice and a hearing. *Id.* at 67-69. For the various arguments in the colloquy among the Wisconsin judges in *In re Booth*, see *id.* at 36, 40-43, 64-70 (Smith, J.), and *id.* at 82-84 (Crawford, J., dissenting). For a good current presentation of the *In re Booth* saga, see Jenni Parrish, *The Booth Cases: Final Step to the Civil War*, 29 WILLAMETTE L. REV. 237 (1993).

Ohio's Judge Brinkerhoff, dissenting in *Ex parte Bushnell*, 9 Ohio St. 62, 177 (1859) (Brinkerhoff, J., dissenting), pointed out that slaves seized under the 1850 Act were deprived of liberty without due process of law. *Id.* at 221-23; see also *id.* at 246 (Sutliff, J., dissenting); *In re Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261). Responding to the due process argument of counsel in *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9583), the federal court, in an opinion by "the Court," took the optimistic view that process might be afforded in the southern state after rendition:

That right [liberty] when presented to a court in a slave state, has, generally, been acted upon with fairness and impartiality. . . . The claim to freedom, if made, in the slave state, would be unaffected by the preliminary inquiry and decision. . . . It is true, . . . that the power of the master may . . . defeat a trial for the freedom of the fugitive. This must be admitted, but the hardship and injustice supposed arises out of the institution of slavery, over which we have no control. . . . [We] can not be held answerable.

*Id.* at 340.

176. See LEVY, *supra* note 37, at 100; *Sims's Case*, 61 Mass. (7 Cush.) 285, 303 (1851). Chief Justice Shaw was probably the most prestigious state judge of the nineteenth century; but in *Sims's Case*, Shaw became the first judge to write a full-dress opinion upholding the hated Fugitive Slave Act of 1850. *Sims's Case*, 61 Mass. (7 Cush.) at 308-09 (upholding the Act on the authority of *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 345, 402 (1842), which had sustained the constitutionality of the 1793 Act). Shaw also disregarded Massachusetts's 1837 "personal liberty law" because it conflicted with the Act. See the account of *The Latimer Case*, 5 LAW REP. 481, 483-84 (1843) (Shaw, C.J.) (sitting as single justice of the Supreme Judicial Court of Massachusetts). Shaw also refused, no doubt correctly, to issue a writ of habeas corpus against the U.S. marshal in Shadrach Wilkins's case. See *infra* notes 184-186 and accompanying text. Richard Henry Dana writes of this, "The Ch. Justice read the petition, & said, in a most ungracious manner—'This won't do. I can't do anything on this,' & laid it upon the table & turned away, to engage in something else. . . . I asked him to be so good as to tell me what the defects were. . . . He . . . attempted to bluff me off. . . ." Entry for Feb. 15, 1851, in 2 THE JOURNAL OF RICHARD HENRY DANA, JR. 411-412, 424 (R. Lucid ed., 1968). Nevertheless, no fugitive slave had been returned from Boston as late as 1852. See Leonard W. Levy, *Sims's Case: The Fugitive Slave Law in Boston in 1851*, in JUDGMENTS, ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 292 (1972). Rufus Choate is reported to have remarked of Shaw, "I always approach Judge Shaw as a savage approaches his fetish, knowing that he is ugly, but feeling that he is great." VAN WYCK BROOKS, THE FLOWERING OF NEW ENGLAND, 1815-1865, at 325 (rev. ed. 1937).

disregarded “the instinctive virtues of humanity.”<sup>177</sup> Supreme Court Justice Baldwin, sitting on circuit, warned a federal jury in Pennsylvania not to allow their humane feelings to blind them to their duty:

The only permanent danger is in the indulgence of the humane and benevolent feelings of our nature, at what we feel to be acts of oppression towards human beings endowed (1997) **56 Md. L. Rev. 1353** with the same qualities and attributes as ourselves, and brought into being by the same power which created us all; without reflecting that in suffering these feelings to come into action against rights secured by the laws, we forget the first duty of citizens of a government of laws: obedience to its ordinances.<sup>178</sup>

The conflict of policies, then, became acute. In northern courts there was enormous pressure to deliver up fugitive slaves under the Act. At the same time, it was almost impossible for them to do so. There had long been public resistance in the north to the “slave-catching” authorized by *Prigg v. Pennsylvania*;<sup>179</sup> now, after the 1850 Act, with the force and treasury of the nation placed behind the slave-catcher, there was rioting across the north. Abolitionists formed mobs to effect rescue.<sup>180</sup> Federal prosecutors charged some would-be rescuers with treason (the penalty for treason being death), but that only made it harder to obtain a conviction.<sup>181</sup> Northern federal judges struggled to persuade grand juries to indict. Justice Nelson, sitting on circuit, charged a federal grand jury:

If any one supposes that this Union can be preserved, after a material provision of the fundamental law upon which it rests is broken and thrown to the wind by one section of it—a provision in which nearly one-half of the states composing it are deeply and seriously interested—he is laboring under a delusion which the sooner he gets rid of the better.<sup>182</sup>

As if to emphasize the conflict of northern policies, northern federal courts became scenes of riot. In Massachusetts the new fugitive slave law was received with particular

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177. *Bushnell*, 9 Ohio St. at 182 (Brinkerhoff, J., dissenting).

178. *Johnson v. Tompkins*, 13 F. Cas. 840, 844 (C.C.E.D. Pa. 1833) (No. 7416). The jury eventually awarded \$4000 in damages for obstructing the arrest of the plaintiff’s slave. *Id.* at 855.

179. 41 U.S. (16 Pet.) 345 (1842).

180. Attempts of alleged owners to kidnap blacks in the north were not uncommonly blocked by angry crowds. *See Johnson*, 13 F. Cas. at 852-53; *see also Levy, supra* note 176, at 290-97 (describing events in Boston after the Fugitive Slave Act of 1850, including mass meetings, rescue plots, a “treasonably violent” address by Wendell Phillips, and calls by other antislavery leaders for “nullification” of the Act).

181. In one treason case, the Pennsylvania jurors would not convict the alleged conspirators, black or white, in the murder of a Maryland slaveowner seeking rendition. The case is described in *Oliver v. Kauffman*, 18 F. Cas. 657, 658-59 (C.C.E.D. Pa. 1850) (No. 10,497). *See infra* note 190.

182. *In re Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1007, 1012 (C.C.S.D.N.Y. 1851) (No. 18,261) (Nelson, Circuit Justice).

resentment.<sup>183</sup> Shortly after enactment (1997) 56 Md. L. Rev. 1354 of the new Act, Shadrach Wilkins was arrested in Boston as a fugitive slave and carried off to the federal courtrooms for examination before a commissioner. A mob broke into the courtroom, took Wilkins by force from the U.S. marshal, and effected a rescue.<sup>184</sup> The assistant U.S. attorney charged one of the rescuers not only with resistance to enforcement, but also with the capital crime of treason.<sup>185</sup> The district judge in that case alternately begged and bullied the grand jury:

A wise man will reflect that evils, great evils, must exist under every human government. . . . [I]f there be any, who, . . . looking at our own government, its history and its hopes, . . . can then desire its destruction, in the vain and desperate hope of establishing a better in its stead, they must be inaccessible to reason or remonstrance, and of that unfortunate class in whose minds judgment is dethroned, and monomania holds usurped dominion.<sup>186</sup>

However strenuous the appeasing efforts of the federal judiciary, the cases were few and often failed. In Boston, after the spectacle of Anthony Burns<sup>187</sup> in chains, paraded down State Street past outraged crowds, buildings draped in black, and flags at half-mast, to the ship that waited to take him back to Virginia,<sup>188</sup> it became too difficult for local authorities to lend courts and jails to rendition proceedings. No further enforcements of the Fugitive Slave Act occurred there. Indeed, it became impossible to prosecute rescuers there under the Act.<sup>189</sup>

(1997) 56 Md. L. Rev. 1355 While federal judges begged for convictions, in state courts an active abolitionist spirit appeared in “fugitive” cases. Even before the 1850

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183. See, e.g., *In re Charge To Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1015, 1015, (D. Mass. 1851) (No. 18,263) (“The fugitive slave law . . . was received, in Massachusetts, with almost universal regret and disapprobation. With not a few, it produced great excitement and exasperation. Some openly avowed a determination to resist it by violence, declaring that it was a matter of conscience not to permit it to be executed.”).

184. See Levy, *supra* note 176, at 291.

185. See *In re Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. at 1015.

186. See *id.* at 1017. The outcome of the case is not reported.

187. See Finkelman, *supra* note 5, at 1793 (describing the Burns case as “the most famous return of a fugitive slave in American history”). Professor Finkelman draws attention to an ethical dilemma. See *id.* at 1818. It might have been better had the self-appointed Richard Henry Dana not insisted on a hearing for Burns; Burns did not want one, convinced that resistance to rendition on his part would bring down the wrath of his owner. See *id.* at 1812. The hearing was a failure, and Boston at last succeeded in achieving a formal rendition of a fugitive, to the gratification of much of the southern press. See *id.* at 1825. Four months later, a group of Boston businessmen were able to buy Burns’s freedom back for \$1300. See *id.* at 1820 n.150, 1829. Burns became a minister, see *id.* at 1814, and an author. But Burns’s health was broken; he had been kept shackled on the bare ground for the four months, the punishment he had foreseen. See *id.* at 1829-30.

188. See Levy, *supra* note 37, at 106; Finkelman, *supra* note 5, at 1825.

189. See generally J. Morgan Kousser, “*The Supremacy of Equal Rights*”: *The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941 (1988).

Act, some state judges altogether abandoned the idea of appeasement, giving the national enforcement effort only the most transparent lip service.<sup>190</sup>

The most famous example of the struggle in the north between federal judicial appeasement and state judicial resistance occurred in the wake of a riot over the seizing of the alleged fugitive Joshua Glover from his home in Racine, Wisconsin.<sup>191</sup> The disorderly public reaction alarmed authorities, who locked up Glover in a Milwaukee jail over the weekend to keep his case *in statu quo*.<sup>192</sup> An enraged crowd of his fellow Wisconsin citizens, black and white, freed Glover using a battering ram, “the writ of ‘open sesame.’”<sup>193</sup> Glover was spirited away to Canada by workers in the underground slave “railway,” never to reappear in the pages of history.<sup>194</sup> But now the real story of this case begins. An organizer of the Racine riot and the Milwaukee rescue, journalist Sherman Booth, was now arrested by a U.S. marshal for prosecution under the 1850 Act.<sup>195</sup> Booth sought a writ of habeas corpus from Justice Smith of the state supreme court, who struck **(1997) 56 Md. L. Rev. 1356** down the Fugitive Slave Act of 1850 as

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190. For a heavy dose of northern judicial insincerity, *see*, for example, *Oliver v. Kauffman*, 18 F. Cas. 657 (C.C.E.D. Pa. 1850) (No. 10,497):

A worthy citizen of Maryland, in attempting to recapture a fugitive, was basely murdered by a mob of negroes on the southern borders of our state . . . . That this outrage was the . . . result of the [seditions] . . . taught by a few . . . insane fanatics, may be admitted. But by the great body of the people of Pennsylvania, . . . an anxious desire was entertained that the perpetrators of this murder should be brought to condign punishment. Measures were taken, even at the expense of sending a large constabulary and military force into the neighborhood, to arrest every person, black and white, on whom rested the least suspicion of participation in the offence. A large number of bills of indictment were found against the persons arrested for high treason, and one of them was tried in this court. The trial was conducted by the attorney general of the state of Maryland; and although it was abundantly evident that a riot and murder had been committed, by some persons, the prosecution wholly failed in proving the defendant, on trial, guilty of the crime of treason with which he was charged. But, however much it was to be regretted that the perpetrators of this gross offence could not be brought to punishment, the court and jury could not condemn, without proof, any individual, to appease the justly offended feelings of the people of Maryland. Unfortunately, a different opinion with regard to our duty in this matter, seems to have been entertained by persons holding high official stations in that state. . . .

*Id.* at 658-59.

191. *See* Parrish, *supra* note 175, at 239-42.

192. *See id.* at 240.

193. *Id.* at 241-42 (citing a contemporary news story, *High-Handed Outrage! Attempt to Kidnap a Citizen of Racine by Slave-Catchers*, RACINE ADVOC., Mar. 20, 1854, at 1).

194. *See id.* at 242.

195. *See id.*

unconstitutional<sup>196</sup> and ordered the marshal to release Booth.<sup>197</sup> The full state supreme court approved this order and ruling, one of the judges dissenting.<sup>198</sup>

In striking down the Fugitive Slave Act, the Wisconsin court made a frontal assault on the “crucial compromise” theory:

Had the northern states imagined, that by assenting to this clause of the constitution, they were thereby conferring upon the federal government the power to enter their territory in pursuit of a runaway negro, and to employ the whole military and naval force of the Union for that purpose, to subject their houses to search, and to override their own laws and municipal regulations, and that they were parting with all power to regulate the mode of procedure by which that clause was to be carried into effect; does any sane man believe that they would ever have assented to it? or, if the southern states had imagined such a construction would be put upon it, that they would ever have proposed it?<sup>199</sup>

The U.S. marshal complied with the writ and released Booth, but the local assistant U.S. attorney obtained an indictment, and the marshal re-arrested him.<sup>200</sup> Booth sought habeas corpus again, but this time, the Wisconsin Supreme Court refused to intervene because the federal prosecution was pending.<sup>201</sup> Booth was convicted of violating the 1850 Act and was imprisoned.<sup>202</sup>

Now the Wisconsin Supreme Court ordered Booth released from custody, and this time did so unanimously.<sup>203</sup> Thereupon the Attorney General of the United States, Caleb Cushing, responding to the starkness of this confrontation between the state and federal courts, sought Supreme Court review<sup>204</sup> of this case, and also of Wisconsin’s (1997) 56 Md. L. Rev. 1357 first judgment sustaining Justice Smith’s initial order of release.<sup>205</sup> The Supreme Court granted review, consolidating the two cases.<sup>206</sup>

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196. *In re Booth*, 3 Wis. 13, 48-49 (1854), *rev’d sub nom.* *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

197. *Id.* at 54. For a similar case in Ohio, following the Supreme Court’s decision in *Ableman* shortly after it was handed down, see *Ex parte Bushnell*, 9 Ohio St. 62 (1859).

198. *In re Booth*, 3 Wis. at 72 (Crawford, J., dissenting).

199. *Id.* at 127-28 (1854) (Smith, J., concurring).

200. *Ableman*, 62 U.S. (21 How.) at 510.

201. See *Ex parte Booth*, 3 Wis. 134, 136 (1854), *rev’d sub nom.* *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858) (denying writ of habeas corpus upon Booth’s post-indictment re-arrest).

202. *Ableman*, 62 U.S. (21 How.) at 510.

203. *In re Booth and Rycraft*, 3 Wis. 144, 161, 172, 195 (1854) (seriatim) (granting writ after convictions of Booth and another; ruling the Fugitive Slave Act of 1850 unconstitutional), *rev’d sub nom.* *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858).

204. *Ableman*, 62 U.S. (21 How.) at 511-12.

205. See Parrish, *supra* note 175, at 244.

206. *Ableman*, 62 U.S. (21 How.) at 513.

At this point an almost surreal thing happened. The Wisconsin Supreme Court instructed its clerk *not to respond* to the Supreme Court's writ of certiorari, not to comply with the Court's request for a certified copy of the record, and not to record the High Court's demand.<sup>207</sup> For some reason, the local assistant U.S. attorney in Milwaukee, J.R. Sharpstein, obtained a certified copy of the record before the Wisconsin clerk was instructed to withhold it.<sup>208</sup> After months of futile jockeying and a delay of years, the United States Supreme Court went ahead and reviewed the case on the basis of Sharpstein's copy.<sup>209</sup>

The case, of course, was the famous case of *Ableman v. Booth*.<sup>210</sup> In *Ableman*, the Supreme Court, through Chief Justice Taney, ringingly denied any power in the state courts to release those in federal custody<sup>211</sup> or to block review in the United States Supreme Court.<sup>212</sup> This is the position today.<sup>213</sup> Taney, the erstwhile champion of

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207. *Id.* at 512.

208. *See* Parrish, *supra* note 175, at 245.

209. *See id.* at 245-46.

210. 62 U.S. (21 How.) 506 (1858).

211. *Id.* at 523; *see also* Tarble's Case, 80 U.S. (13 Wall.) 397, 411-12 (1871) (holding that Wisconsin was without authority to issue a writ of habeas corpus for the discharge of an enlisted soldier "mustered into the military service of the National government" and detained by an officer of the United States for desertion).

212. *Ableman*, 62 U.S. (21 How.) at 517-25; *cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding that the Supreme Court must have final say on the duties the Constitution imposes). The Court also conclusorily sustained the constitutionality of the Fugitive Slave Act. *Ableman*, 62 U.S. (21 How.) at 526.

213. *Tarble's Case*, 80 U.S. (13 Wall.) at 412. It is sometimes argued that state courts had long assumed and exercised these powers. *See generally* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 154-198, 556-57 (2d ed. 1876). Hurd notes:

It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States.

And the weight of authority clearly is that they may decide as to the legality of the imprisonment; and discharge the prisoner if his detention be illegal though the determination may involve questions of the constitutionality of acts of Congress, or of the jurisdiction of a court of the United States.

*Id.* at 156; *see also* Michael Vitiello, *The Power of State Legislatures to Subpoena Federal Officials*, 58 TUL. L. REV. 548, 557 (1983) (arguing that the holding in *Tarble's Case* "flies in the face of the rule . . . that state courts are empowered to enforce federal law concurrently with federal courts so long as Congress did not vest exclusive jurisdiction in the federal courts"). The Suspension Clause is thought to protect state habeas corpus against suspension. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 155 (1980) (arguing that "the habeas clause was meant to restrict Congress from suspending state habeas for federal prisoners except in certain cases where essential for public safety"); Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 275 (1965) (noting that even after *Ableman*, "southern courts persistently sustained state court jurisdiction" in habeas corpus cases involving enlistees in the military). But once the return to the writ established that the prisoner was held in federal custody, a state court's jurisdiction would be at an end, and any further state proceedings would become *coram non jure*. *See, e.g.*, Norris v. Newton, 18 F. Cas. 322, 325 (C.C.D. Ind. 1850) (No. 10,307). *See generally* Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

states' (1997) 56 Md. L. Rev. 1358 rights, delivered a sweeping opinion, almost rivaling in the spaciousness and force of its conception of national power the early opinions of Chief Justice Marshall. But Taney's new-found nationalism has usually been read as disingenuous.<sup>214</sup> *Ableman* is only the least indefensible in a series of pro-south, proslavery decisions that included *Dred Scott v. Sandford*<sup>215</sup> and *Prigg v. Pennsylvania*.<sup>216</sup> That is where the Supreme Court was all this time,<sup>217</sup> if you were looking for it, as the country lurched toward its greatest disaster.

Some writers recently have argued that it was within the Court's power even before the Civil War to reinterpret the Constitution and free the slaves.<sup>218</sup> In default of political leadership, early judicial leadership might have made a difference. After all, slavery in the south as well as the north had been much destabilized in the confusion of the Revolution. During the war, slaves fought in exchange for freedom, ran away, or went over to the British.<sup>219</sup> It is true that after the war the (1997) 56 Md. L. Rev. 1359 numbers of slaves steadily increased.<sup>220</sup> Nevertheless, if the Court had had the courage to take on this one great issue; if it had struck down the obviously unconstitutional fugitive slave laws early and let the state "liberty law" procedures protect freedmen from private terrorism; if the Court had founded its interpretations of the Constitution on the sentiments of the American people before the slave system had become so politicized, at a time when all courts agreed that slavery was "odious"; if the Court had early conceived of the Declaration of Independence as a founding document and imported its principle of equality into the Constitution, taking the studied silence of the Constitution as warrant rather than as gag; if presidents had not so often tried to appease the south by judicial

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214. Perhaps because *Ableman* is perceived as tarnished today for its appeasement of proslavery interests, the later *Tarble's Case*, also arising in Wisconsin, *In re Tarble*, 25 Wis. 390 (1870), *rev'd*, 80 U.S. (13 Wall.) 397 (1871), is commonly cited for the proposition that ought to have been established by *Ableman*. See COVER, *supra* note 7, at 187 n.\* ("It is as if the unambiguous language of Booth could not be trusted because of its intimate connection with slavery and with the court that had rendered *Dred Scott*.").

215. 60 U.S. (19 How.) 393, 449-52 (1856) (holding that Congress could not abolish slavery in the territories because to do so would be to take property from slaveowners without due process of law; thus, the Missouri Compromise of 1820 was unconstitutional wherever it abolished slavery). *Dred Scott* also held that blacks were not citizens of the United States, and therefore could not be citizens of a state within the meaning of the federal diversity jurisdictional grant. *Id.* at 406; *see also id.* at 407 (declaring that negroes were "unfit to associate with the white race, either in social or political relations; and so far inferior, . . . that they had no rights which the white man was bound to respect").

216. 41 U.S. (16 Pet.) 345 (1842); *see supra* note 140 and accompanying text.

217. *But see, e.g.,* *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 109-10 (1860) (holding that the Supreme Court lacks jurisdiction to issue a mandamus to compel a state governor to make rendition of a fugitive from justice). In *Dennison*, the alleged crime was helping a slave escape from Kentucky to Ohio. *Id.* at 67. Rendition of the fugitive slave was not sought. The alleged conduct was not against the laws of Ohio. *Id.* at 68.

218. *See, for the debate over whether these alternatives were within the Court's power, supra* note 90.

219. *See* WIECEK, *supra* note 6, at 54-56; *see also* *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 209-10 (1836) (suggesting that in the immediate post-Revolutionary period, a master litigated "faintly" for a slave, "for such was the temper of the times, that a restless, discontented slave was worth little").

220. *See* WIECEK, *supra* note 6, at 56.

appointments congenial to southern views, is it possible that the tragedy might have been averted? I am tempted to think so, but as we say, “That is a lot of ‘ifs.’”

## VII. HOW A “GREATER GOOD” TENDS TO BE MERELY SPECULATIVE

The slave cases, and in particular the fugitive slave renditions, exhibit the moral and political consequences of subordinating justice in the individual case to some conceived “greater good.” The greater good is not a question of hard facts; it is mere speculation. Sometimes a legislature is moved to act to accommodate considerations of the greater good. That is what happened when Congress enacted the fugitive slave laws. But if abstractions about the greater good produce seriously wrong positive law, enforcement in a country of just ideals becomes problematic. As we have seen, enforcement of the fugitive slave laws was ineffective in the north.

In fact, nothing in *Ableman* could mollify the south. In southern eyes, northerners had turned into abolitionist extremists, and the increasingly strident moralism of northerners had become simply insulting to southern honor. John Brown, who tried to stir up a slave revolt, was a hero to northern enthusiasts, but a terrorist to the south.<sup>221</sup> John Brown’s raid seemed to confirm in southern eyes the logical ends of northern hysteria: black violence and white ruin.

More to the point, the reality was that northern appeasement had nothing to do with, and could not reverse the erosion of, southern power in the national government. To the southern mind the sympathy of the Supreme Court was not enough; the efforts of Congress, the (1997) **56 Md. L. Rev. 1360** repeal of the old political compromise<sup>222</sup>—none of it was enough. Lincoln’s election would have precipitated secession however accommodating northern courts were to the slave interest. Lincoln’s election was important not because he was perceived as favorable to abolition simply, but because it showed that a presidential election could be carried without a single southern state. In the electoral college, in the Congress, in the cabinet, the south could conclude that it had lost the game.

Although some commentators have commended northern efforts at appeasement,<sup>223</sup> and although one can grant that the judges who so desperately struggled to appease the south meant well, that policy was never sound. As Abraham Lincoln pointed out in his *A House Divided* speech, the Union would have had to become all slave or all free, “*all one*

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221. A good account is in ALLAN NEVINS, 2 *ORDEAL OF THE UNION* 70-97 (1950). For northern condemnations of John Brown, see FINKELMAN, *supra* note 7, at 303.

222. The Kansas-Nebraska Act of 1854 repealed the Missouri Compromise of 1820. Act of May 30, 1854, ch. 59, 10 Stat. 277. The Compromise had made all territory north of Missouri’s southern border free, except for Missouri. The Kansas-Nebraska Act repealed these understandings with respect to Kansas and Nebraska, and opened those territories to “popular sovereignty.” *Id.* at 283, 289. The predictable consequence was that curtain-raiser to the Civil War, “bleeding Kansas.”

223. See, e.g., Horowitz, *supra* note 7, at 600-01 (commending the northern courts that reached “accommodation” with the laws of slave states).

thing, or *all* the other,” or it could not stand.<sup>224</sup> The house could not stand, among other things, because conflicts would be inevitable. From this point of view, it would not matter whether the slave states seceded or not. The conflicts would persist.

It was a delusion, then, that an occasional rendition of some slave, fugitive or in transit, could appease the south and save the Union. A northern court’s occasional recognition of slave status, remitting a black to a life of bondage, or the occasional conviction of a would-be rescuer by a northern jury, though watched with great interest in southern papers and courts, could not avert “the impending crisis.”<sup>225</sup> No matter how many successful renditions of fugitive slaves the north achieved, the south would rebel when the balance of national political power shifted decisively to the north.

In any event, northern courts could not have succeeded in ordering the return of more fugitives to bondage. The angry crowds that increasingly attended such attempts at rendition as were made suggest that northern courts were accomplishing all that was politically possible for them to accomplish. But for political reasons even vigorous (1997) 56 Md. L. Rev. 1361 enforcement of the Fugitive Slave Act could not have placated the south. At most it might have bought time. It is hard to justify, for any provisional gain of that kind, the costs of such a policy to human liberty and life.

#### VIII. MESSAGES OF THE SLAVERY CASES

The slavery cases are a wonderful display of how conflicting laws really emerge at the forum, not as clashes of sovereign power, but rather as internalized policy conflicts of the forum state. If this is as generalizable an observation as I think, it identifies the theoretical basis for the realist insight that the forum always applies its own law.

The slavery cases beautifully show that the canonical “conflicts” cases, the two-state cases, even where political viewpoints are deeply divided and entrenched, are not fundamentally distinguishable from wholly domestic cases. In each case there is the same internal policy clash. In the slavery cases you see conflicts between some supposed greater good that it is thought would be served by applying disfavored rules of law on the one hand, and law that is fundamentally right and just on the other. My point is that it does not matter whether these internal conflicts occur in two-state cases or in wholly domestic cases. The only difference between a two-state case and a domestic case is the additional flexibility a judge might have in deciding the two-state case by virtue of the access it affords to choice-of-law justifications.

The slavery cases in northern courts luridly display the sort of injustice that can result when courts allow some speculative *greater good* to defeat the ideal of justice in

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224. Abraham Lincoln, Speech, “A House Divided” (June 16, 1858), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372 (Roy P. Basler ed., 1946). This speech was delivered to the Illinois Republican Convention. *Id.*

225. Cf. HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH AND HOW TO MEET IT (Collier Books 1963) (1857).

the individual case. These cases cast a dark shadow indeed on the orthodox advice to courts in two-state cases to consider “multistate policies,” or “the needs of the interstate (or international) systems.”<sup>226</sup> The northern cases remind us, rather, that the very purpose of the judicial function is to secure justice for the individual—sometimes, if need be, in the teeth of the system and its “needs.”<sup>227</sup>

**(1997) 56 Md. L. Rev. 1362** Indeed, it seems likely that considerations of the greater good are inherently suspect. It may well be time for courts that have adopted the *Restatement (Second)* to make a common law modification. “[T]he needs of the interstate and international systems” should be deleted or at the very least demoted from the top of the list,<sup>228</sup> and the “requirements of justice in the individual case” should finally be brought explicitly to bear—and be given pride of place.

At the same time, the slavery cases in the southern courts stand as a warning to those who would deprive courts altogether of the option of purporting to choose foreign law. One can be too much of a realist about such things or perhaps too little of one. Judges need leeway to depart from bad law when they cannot strike it down, whether they do so by a narrowing construction or by holding that another state’s law unavoidably “governs.”

The slavery cases also help us to see that, in a society of just ideals, unjust results cannot be imposed upon a class of cases for long, as a practical matter, even when the political and executive branches exercise little leadership or perverse leadership. Like the prosecution of unjust wars in open societies, the enforcement of unjust laws in individual cases in societies of just ideals can become very difficult. Independent courts sit to declare individual rights and to furnish remedies for wrongs, and their authority can be compromised when they persist in trying to enforce seriously wrong law.

At the extreme limits of morality, the slavery cases, especially those in the south, strikingly show what is, in fact, a common, if perennially perplexing, feature of judicial behavior. *Judges do rather well*. Correction: They do well in countries that, like ours, are, if not just societies, at least societies of just ideals. Courts with common law powers make terribly wrong decisions, and we all remember the worst of them; nonetheless, in

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226. For one Founder’s insight on this point, see Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 90, 90-91 (Michael Kammen ed., 1986) (complaining that the Constitution as submitted for ratification omitted “a bill of rights providing clearly . . . for . . . trials . . . triable by the laws of the land and not by the law of Nations” (emphasis added)).

227. Consider, on this problem of “the greater good,” Symposium, *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 *BROOK. L. REV.* 1121 (1995); David Luban, *A Report on the Legality of Evil: The Case of the Nazi Judges*, 61 *BROOK. L. REV.* 1139, 1145 (1995) (arguing that the Nazi judges were trained to apply law with the greater good of the state in mind rather than woodenly or positivistically, as had been supposed). Article 2 of the German Criminal Code of 1935 stated: “Punishment is to be inflicted on persons who commit an act which has been declared punishable by the Criminal Code, or which deserves to be punished according to the spirit of a rule of criminal law and healthy folk-feeling.” *Id.*

228. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6(2)(a) (1971).

the end it seems true that, “freedom slowly broadens down/ From precedent to precedent.”<sup>229</sup> Perhaps we show our belief in the generally good performance of judges when we take cases and doctrine seriously. The judicial system, because it is costly, must be based in some part on the assumption that, on average, judges will do better than a flip of the coin. We have little warrant even for this unconscious confidence, and in fact, there are always (1997) **56 Md. L. Rev. 1363** thoughtful observers distrustful of courts. Yet judges do see more of moral dilemmas and have to make harder choices in their daily work than most people. In this country they write under a duty of taking account of, and giving some voice to, emerging as well as settled points of view. They are asked to read reports of the way their domestic laws are viewed abroad. They are asked to consult written declarations of right. They are schooled in and sworn to uphold an interpreted written Constitution and Bill of Rights, although these sources of law will be unavailable to them in most private law cases. They must write opinions and thus think through a position. Through such means and against such a background they become aware of dissonances in the laws. Their job, when that happens, is to make choices. Whether for these or other reasons, judges, conservative and liberal, seem sometimes to anticipate the course of public moral evolution or to give effect to an ideal of justice that in the particular case may not have the impress of positive law, or even the immediate approval of those among whom they live.

So, almost inevitably there will be cases in which judges will cast about for, and should be able to find, ways of escaping from law that seems to strike a wrong note or from results with which they are not comfortable. Among the battery of weapons in the judicial armamentarium, they may look to some choice-of-law device or other formalism; it would be imprudent, even if it were possible, to deny them access to that option. Recall that spectacular case in which the southern court created that option for itself out of a wholly domestic case, requiring the executor of an illegal manumitting will to carry the slave into a free state and execute the will there;<sup>230</sup> and the case in which another southern court did something very similar, allowing a freedman, forbidden by law from entering the state or inheriting there, to receive his legacy in another state.<sup>231</sup>

In other slavery cases courts in the deep south managed, again and again, to evade positive law supporting the slave system. Courts should be able to call on all sorts of means, even formalistic ones, to afford justice. In argument before a court, and in the crafting of persuasive judicial opinions—“the artificial reason . . . of law”<sup>232</sup>—the (1997)

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229. Alfred, Lord Tennyson, *You ask me, why, tho' ill at ease*, reprinted in *THE POETICAL WORKS OF TENNYSON* 60 (Cambridge ed. 1974) (1842).

230. *See supra* note 59 and accompanying text.

231. *See supra* note 60 and accompanying text.

232. *Prohibitions del Roy*, 12 Coke's Rep. 63, 65 (K.B. 1608). Coke there tells us that King James “thought that the law was founded upon reason, and that he . . . had reason, as well as the Judges.” *Id.* at 64-65. To which Coke says he replied:

True it was, that God had endowed His Majesty with . . . great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes . . . are not to be decided

**56 Md. L. Rev. 1364** uses of formalisms, including methodological formalisms, cannot be discounted. As a practical matter, even if we were willing to give up the benefits of formalism, I doubt that we could draw a meaningful line between *reasons on the merits* and *formal reasons*. I doubt that we could draw a meaningful line, for that matter, between *methodological formalisms* and *substantive formalisms*—those evolving sets of test questions under which cases are considered by courts.

The slavery cases strongly suggest, however, that it has been a mistake for courts in our time to have laid it down authoritatively that such-and-such a particular methodological analysis is the automatic requirement in every two-state case. Those cases show with too painful clarity that courts must not let the outcome of cases depend upon abstractions. Why should it matter that the slave state is “interested”? Is “the seat of the relationship”? Is, as domicile, the status-determining state? Is the forum? It hurts to point this out, but even the best of such desiderata is revealed by these extreme cases to be of little or no utility and almost certainly harmful. The dangers of imposing even the best of methods on the living case can be imagined, if you perform the thought experiment of resolving a conflict of slavery laws under the *Restatement (Second)*. In the slavery cases, after all, the *Restatement (Second)*’s “place of most significant contact”<sup>233</sup> with the master-slave relationship all too often would have been a slave state. As flexible as the *Restatement (Second)* is, it emphasizes accommodations to the greater good,<sup>234</sup> when, as the slavery cases so tellingly remind us, the greatest good in courts is justice in the individual case.

Not one of the two-state slavery cases could have been decided rightly under the law of a slave state, blindly applied. Yet proliberty rulings obviously could not have been consistently achieved by resort to any choice-of-law method more abstract than “the slaveowner loses.” Even the vague concept of comity in northern courts, if required as a first consideration, could not have avoided inhumane results. In every slavery case, forcing some abstract adjudicatory method (**1997**) **56 Md. L. Rev. 1365** preemptively upon an essentially political and moral problem, at the outset, however superior the method, would channel the mind into irrelevancies, and in the worst case, could result in a hideous injustice—a decision to remit someone to racial bondage.

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by natural reason but by the artificial reason and judgment of law, which . . . requires long study and experience, before . . . a man can attain to the cognizance of it. . . .

*Id.* at 65. For an eloquent typology of some of the forms of legal argument, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991); see generally PHILIP BOBBITT, CONSTITUTIONAL FATE (1982). Cf., e.g., Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 46 (1985); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 285 (1973); M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 40 (1963).

233. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

234. *Id.* § 6(2)(a) (stating the court should consider “the needs of the interstate and international systems”).

Consider a key question before Chief Justice Shaw in the breakthrough case of *Commonwealth v. Aves*.<sup>235</sup> The question whether the slave, Med, rightfully belonged to *Aves* could be dealt with on the merits, or it could be dealt with as a question of whether the law of a free state or a slave state “governed.” Chief Justice Shaw dithered with the choice-of-law question whether the forum was bound to respect the property rights of an individual under the laws of the domicile, but then resolved the case by ruling in a moment of greatness that there could be no property in slaves.<sup>236</sup> How could it have advanced Shaw’s thinking to have insisted on some methodological analysis unrelated to that crucial ruling on the merits?

## IX. ON METHODOLOGICAL INTERVENTIONS

If it would have made no sense to decide the slavery cases by some methodological argument unrelated to *them*, I am not clear why it would make sense to decide other sorts of cases by some methodological argument unrelated to them. I am not clear why we should be persuaded by justifications that would support a decision whether the decision were wrong or right. Of course, there are many sorts of legal issues about which there can be no right answer *a priori*, and there are cases in which any decision would be a good one. But the usual case does not present such a blank face.

In operation, the nature of a methodological system—a fixed method of *deciding how to decide*—is to provide reasoning internal to itself, at a remove from the underlying problem it is intended to attack. The reasoning that persuades us why a defense should be adopted in a particular case, notwithstanding the plaintiff’s proved allegations, is very different from the reasoning that shows why a particular state should be allowed to “govern” that issue, whatever its law turns out to be. It is the merits that matter.

It has long been understood that there are risks to the sound functioning of the judicial process when courts resort to abstract systems of judicial choice, canons of interpretation, bars to adjudication (1997) 56 Md. L. Rev. 1366 of a subject, prudential principles, and the like.<sup>237</sup> Such methods, like abstract methods of choice of law, risk decision on the merits without consideration of the merits, leaving bench and bar without the tools needed in future cases. They risk dismissal of meritorious claims or the striking of meritorious defenses. They require courts to ignore the question for decision and to focus argument upon a methodological question at too remote a level of abstraction to

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235. 35 Mass. (18 Pick.) 193 (1836).

236. *Id.* at 216.

237. For examples of the enormous critical literature on Frankfurterian “neutral principles” of judicial review, see Thomas C. Grey, *Thayer’s Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993); Gary Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REFORM 561 (1988); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

ensure a just result. The more persuasive the methodology the more fortuitous may be the result.

Some formalisms or methodological systems fail us because of their very evenhandedness and neutrality. They have been approved precisely because they enable a case to be stated at a level of abstraction at which they can be stated as “neutral principles.”<sup>238</sup> But is neutrality truly an appropriate criterion for ways of deciding how to decide? Very little law, and very few policies underlying law, can be said to be “neutral.” There can be few outcomes to which the law-giver would be indifferent. It makes no scorekeeper in heaven happy if the scoreboard of the law says, “Property in Slaves: 10; Liberty of Persons: 10.” If we must have ways of *deciding how to decide*, we might want to consider whether it is sufficient that our methods *invoke* rather than yield a jurisprudence that is beneficent.

Walter Wheeler Cook’s legal-realist critique of mechanical choice-of-law rules is sometimes spoken of disparagingly, as having destroyed the old methodological system without having constructed anything to put in its place.<sup>239</sup> That objection misses the point. Understanding the legal-realist critique, one would not want to construct a methodological system.

**(1997) 56 Md. L. Rev. 1367** On the other hand, with the experience of the slavery cases behind us, we can see the limits of the realist critique. Nothing in that critique requires that judges be deprived of the serviceable expedient of avoiding forum law in a particular case without having to shoulder the burden of overtly changing it. Nothing in that critique requires depriving the parties of a serviceable pleading option.

## X. CHOOSING LAW AND ADOPTING LAW

How, then, should law be chosen? How should cases be decided? It would be a significant advance, if a conscious choice among the conflicting laws of concerned states is to be made, that that process be converted into a process of thinking about the actual problem a case presents.

Although it is the received positivistic wisdom that we cannot think about law until we know which law we are thinking about, the deeper truth is that we cannot make choices of law until we understand the respective laws in relation to the requirements of the particular case. It would be an advance if we could find a way of making the

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238. For a cornerstone of “neutral principles” theory in the Warren Court period, *see* the now largely discredited critique of *Brown v. Board of Education*, 347 U.S. 483 (1954), in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that *Brown* was wrong because no abstract “neutral principle” justified it). For other exemplars of this now much less influential prong of the legal process school’s thinking *see generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960); LEARNED HAND, *THE BILL OF RIGHTS* (1958).

239. *See, e.g.*, David F. Cavers, *The Logical and Legal Bases of the Conflict of Laws*, 56 HARV. L. REV. 1170, 1172-73 (1943) (book review).

assistance of our better methodologies, like the *Restatement (Second)*, available to courts without requiring them to transmute a living case at the outset into a problem in parsing methodological language. It is inferior legal process to muffle a living case in such a way.

We should begin to try argument and decision based on construing and interpreting the respective laws on their merits, as applied in the particular case. Functional reasoning of this kind is supposed to support conventional “interest analysis,” but the emphasis has been put on identifying interested “states,” rather than on understanding the laws contended for. It was the hope of the interest analysts that a narrowing construction of the foreign law or of forum law could obviate the necessity of a formal “choice” between them. It was the hope of the realists that courts would come to be more frank about the extent to which they were free to fashion law for a case.

It often happens that, in a wholly domestic case, a court will consider what rule for such a case is most suitable for adoption. In such cases one often sees courts surveying the prevailing legal approaches to a given problem, in order to adopt one of these as its own. Similarly, it is not implausible that even in a two-state case, a court could insulate the case from methodological thinking by surveying a number of prevailing legal approaches to the problem the case presents, including that of the other state, and ultimately adopting some third approach as its own, transforming the postponed “choice-**(1997) 56 Md. L. Rev. 1368**-of-law” question into a more jurisprudential exercise, and in the end dissolving the alleged conflict.

Professor Juenger has on occasion proposed that the forum should “choose the best law available.”<sup>240</sup> This formulation seems to have frightened almost everyone, including its author.<sup>241</sup> It is as if he had let slip away, down the black hole of choice of law, the comforting verities of the common law method. Yet of course we expect judges to try to fashion the best law they can, by their lights, for every litigated issue. When an issue of law is litigated, a court even in a wholly domestic case must decide, after all, between two well-argued positions.

Legal developments in other states are continually argued in ordinary domestic cases, and the forum is continually urged to adopt one of those approaches as its own. The operative word here is *adopt*. There need be no knitting of brows: it has been a misapprehension that the forum is “*applying*” the rule of some “*irrelevant*” state when it

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240. JUENGER, *supra* note 4, at 195-97, 213.

241. *Cf. id.* at 165-67 (suggesting a need to overrule *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and restore *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), to permit federal courts to develop a separate body of substantive law for two-state cases); Borchers, *supra* note 4, at 129-31 (arguing that federal courts should have the ability to “apply the most modern and just of the available laws”); Cox, *supra* note 4, at 533 n.46 (“This does not mean, however, that the forum should seek law outside of its own sphere of influence or should try to apply law to situations outside of its proper sphere of influence.”). I think Larry Kramer, *Appendix D: Letter from Larry Kramer to Harry C. Sigman, Esq., August 29, 1994*, 28 VAND. J. TRANSNAT’L L. 475 (1995), should not be read as expressing such concerns.

“adopts” a new rule.<sup>242</sup> Nothing in either the Due Process Clause or *Erie Railroad Co. v. Tompkins*<sup>243</sup> forbids a relevant (“interested”) forum from resolving under its own laws and policies a legal dispute over which it has jurisdiction;<sup>244</sup> nothing requires this “interested” forum, in attempting to resolve a dispute, to disregard its own views of what is best, simply because the best solution was first tried elsewhere.

It does not matter whether the *adopted* rule is that of a state “interested” in the particular case or not, as long as the forum is. When in a conflicts case the forum “adopts” law as its own, it is using powers it (1997) 56 Md. L. Rev. 1369 already *has*, powers it has in wholly domestic cases as well. It has never mattered in the domestic case whether any of the alternative solutions argued to the forum have a provenance in a state that is “interested” in, or that has “significant contacts” with, the case at bar. That is not what such argumentation is about.

The chief difference between these two conceptions, *applying* or *adopting* law, is that in *adopting* law a court does something momentous: it changes its own law, not just for the particular case, but for all cases. It acknowledges that its position needed revision and it makes the revision. In choosing to *apply* another state’s laws, on the other hand, the court postpones any overt confrontation with its policy difficulties. One can see how useful true choice-of-law methodology can be, if what is wanted is political cover for a given result. But if what is wanted is *good law*, for this case and all future cases, of course the forum is free to say what good law is.

There is nothing about judicial *adoption* of preferred law that should raise a special difficulty about relative values. It is not a question of “letting” judges say what is “best.” It is a question of *hoping*, when they do decide issues of law, as they must, that the result will be good. One of the ways we can make it harder for them to decide well is to confine their discretion by requiring them to subordinate justice in the individual case to some totem of methodological theory.

## XI. CONCLUSION: TRUE CONFLICTS RESOLVED ON THEIR MERITS

I have said, in favor of conflicts methodology, that I do not see why a party should be *denied* the opportunity of pleading a particular claim or defense “under” the law of another “interested” sovereign, which (due process being satisfied) a court presumptively

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242. I hope this simple positivistic explanation of a familiar form of argument will be useful for those who have seen due process (or *Erie*) as standing in the way of a court’s adopting a better rule found in an “irrelevant” state. *See supra* note 241. On the link between *Erie* and due process *see* LOUISE WEINBERG, FEDERAL COURTS, CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 13-14 (1994); Weinberg, *supra* note 24, at 809-14.

243. 304 U.S. 64 (1938).

244. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (holding that the interested state has legislative jurisdiction). The uninterested state, of course, is disempowered; the solution at a neutral forum is a choice of the best of the interested states’ laws. *See* Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the ALI’s Proposed Choice Rule*, 56 ALB. L. REV. 807, 851 (1993).

will respect. I have also said that I do not see why a court should be *denied* the opportunity of resorting to a “choice of law” to solve an otherwise intractable problem.

But our consideration of the slavery cases, I am afraid, demolishes the argument that some abstract methodological intervention should be superimposed preemptively at the outset upon two-state cases. Taking more seriously the realists’ insistence that all cases are fundamentally the same, formally “choosing” law becomes only one among a number of options. Construction on the merits, for example, and if available, “adoption” of any state’s perceived better approach, should be among the natural ways of resolving a conflict of policies in the two-state case as in the domestic case. This suggests that, if a way can be found to do so, the adroit court will postpone formal “conflicts” reasoning or any other methodological intervention in the adjudication (1997) 56 Md. L. Rev. 1370 of a case on its merits, to be used as a last resort. Of course this becomes harder to do when the parties come storming into court demanding an immediate choice-of-law ruling. But surely it was better judging and better statecraft when Massachusetts’s Chief Justice Shaw ruled in *Aves* that there can be no property in slaves,<sup>245</sup> than it would have been had he ruled, unconvincingly, that the place of temporary sojourn “governs” slave status. It is a measure of how wrong our methodological wrong turns may have been that courts today do not seem to have the easy access to the merits of a two-state case that their brethren enjoyed even in the gloom of the nineteenth century.

Nevertheless, a court does need to keep its choice-of-law guns in reserve. It may need them. Although I have argued here that methodological systems, divorced from the merits, are dangerous and unreliable in the decision of cases, we have seen that any such view must make room for the covert and paradoxical utility of such formalisms. Methodological argument can provide a grateful exit from a tight corner. It can lend a justifying color to a decision taken. It can give essential political cover, as some southern slavery cases show, to just decisions in unjust societies; in such societies judicial subterfuge becomes noble resistance.

The best methodological systems, like the great private codification celebrated in this Symposium, can show what the better judges would have done in any event without them, and even, sometimes, turn the inquiring mind to the actual problem on the merits that a case presents. And they can develop, over time, needed barriers to a too-ready judicial acquiescence in some supposed “greater good,” and a proper emphasis upon the overriding judicial duty of providing justice in the individual case.

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245. See *supra* note 236 and accompanying text.

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["The New Judicial Federalism,"](#) 29 STANFORD LAW REVIEW 1191 (1977). [Indexed in CONCEPTS OF FEDERALISM (William Stewart ed.; Lanham, MD: University Press of America, 1984).]

