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The Roots of *Printz*:: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation

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PROSLAVERY CONSTITUTIONALISM, NATIONAL LAW ENFORCEMENT, FEDERALISM, AND LOCAL COOPERATION*

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I. INTRODUCTION

The USA PATRIOT Act[1] and the creation of a Department of Homeland Security signal a new chapter in the tension between civil liberties and national security. How secure can we be, and at what cost to our personal liberty and personal privacy will that security come? A concomitant issue is the role that the States can, or must, play in implementing the plans of the national government. The leading case on this issue is *Printz v. United States.*[2] Here the Supreme Court struck down the portion of the Brady Act[3] that required the Chief Law Enforcement Officer (CLEO) in each county to administer the law. One of the tasks of the CLEO under the law was to conduct a background check on prospective gun purchasers. The statute also provided a penalty of up to a year

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[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

[2] 521 U.S. 898 (1997).

[3] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.) [hereinafter Brady Act].

in jail for anyone who refused to comply with the law. Presumably this penalty applied to a CLEO who failed or refused to conduct a background check on a prospective gun purchaser. In overturning this provision of the law, Justice Scalia argued that the act breached the wall of separation created by federalism. He characterized the law as "conscripting state officers."[4] While the majority opinion did not use the term "unfunded mandates," this was also part of the debate.[5] Oddly, none of the opinions in this case mentioned the first Supreme Court case to deal with these issues, *Prigg v. Pennsylvania*.[6]

In *Printz* both the Solicitor General of the United States (Walter Dellinger), arguing for the constitutionality of the provision, and Justice Scalia, finding the law unconstitutional, invoked the Fugitive Slave Law of 1793.[7] The use of this statute was unusual. Modern courts rarely discuss our constitutional heritage of slavery,[8] and when they do mention slavery, it is usually to attack a statute, earlier decision, or the opinion of another justice.[9] For example, a frustrated Justice Scalia compared the majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[10] to the *Dred Scott*[11] decision.[12] Similarly, Justice Brennan compared the majority opinion in *McKlesky v. Kemp*[13] to *Dred Scott*.[14] In his heroic opposition to the constitutionalization of segregation in *Plessy v. Ferguson*,[15] Justice John Marshall Harlan chastised the Court for writing an opinion that he correctly predicted would "prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[16] Given the usual propensity of justices to use slavery only to attack modern opinions that they

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[4] *Printz*, 521 U.S. at 925.

[5] *Id.* at 957 (Stevens, J., dissenting).

[6] 41 U.S. (16 Pet.) 539 (1842).

[7] Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793) (law setting out procedures for the return of fugitive slaves).

[8] For a discussion of this, see Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000), and PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (2d ed. 2001).

[9] For a discussion of this, see PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 5-6 (1997).

[10] 505 U.S 833 (1992).

[11] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[12] *Casey*, 505 U.S. at 984 (Scalia, J., concurring in part, dissenting in part).

[13] 481 U.S. 279 (1987).

[14] *Id.* at 343-44.

[15] 163 U.S. 537 (1896).

[16] *Id.* at 559.

dislike, it is startling to see both the attorney for the United States and the Court itself invoke a proslavery statute in support of a legal proposition. It is particularly odd to imagine that the Solicitor General would turn to the Fugitive Slave Law of 1793 as a viable precedent for upholding a modern statute. Perhaps even more peculiar than the resurrection of this law is that fact that neither the Solicitor General nor Justice Scalia seemed to get it right.

In his majority opinion Justice Scalia wrote that some early statutes "apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as . . . hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled . . . ."[17] He noted that the Solicitor General had mentioned this statute as one in which the United States had required state officials to enforce a federal law. In response to this claim, Justice Scalia wrote: "These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[18] After a brief discussion of these laws, Scalia concluded: "For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service."[19]

Both Justice Scalia and Solicitor General Dellinger ignored the history of the 1793 law, including Justice Joseph Story's opinion upholding its constitutionality in *Prigg*.[20] In upholding this law Justice Story nevertheless concluded that the federal government could not force state officials to implement the law. Oddly, Justice Scalia did not use this point in his opinion. He also failed to note that Justice Story developed an argument against "unfunded mandates" that was similar to the argument used in *Printz*. Neither the Justices nor Solicitor General Dellinger considered whether the obligation to perform government functions imposed by the 1793 law was similar to that imposed by the Brady Act.

Even if we think that *Prinz* might have been wrongly decided, a careful examination of the 1793 law and its history

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[17] Printz v. United States, 521 U.S. 898, 906 (1997).
[18] *Id.* at 907.
[19] *Id.*
[20] 41 U.S. (16 Pet.) 539 (1842).

can tell us a great deal about why we must be skeptical of statutes that conscript state officials. The lessons of the 1793 law and opinion of Justice Story in *Prigg* also illustrate why, if Congress wants to or needs to recruit state officials to enforce federal law, it should be required to use carrots rather than sticks to accomplish its goals.

This Article offers a brief history of the Fugitive Slave Law of 1793 and the Court's decision in *Prigg* v. *Pennsylvania*, in order to illustrate the pitfalls of relying on state officials to implement and enforce federal policy. The Fugitive Slave Law of 1793 was one of the first attempts by the national government to create a law enforcement policy that could reach into local communities on a regular basis. The Congress assumed that state officials would willingly enforce this law. In fact, however, many northern states were hostile to the law and the policy behind it. As a result, states passed their own laws, known as personal liberty laws, to protect free blacks from wrongful seizure. Many northerners also hoped these laws might shield fugitive slaves from being returned to bondage. Part II of this Article describes the Fugitive Slave Law of 1793. Part III examines the state personal liberty laws that undermined the effectiveness of the federal law. Part IV analyzes *Prigg v. Pennsylvania*, and the development of the doctrine of "unfunded mandates." This case illustrates the problem of "conscripting" state officials to implement federal policy. Part V shows how Justice Story's opinion in *Prigg* set the stage for federal enforcement of the fugitive slave law, and how this might be a model for implementing national policy in our modern age of terrorism. Finally, Part VI offers some policy arguments in support of federal enforcement of federal laws. These arguments are based on the experiences of the nation with the Fugitive Slave Law of 1793 and a similar enactment in 1850, as well as the Court's decisions in both *Prigg* and *Printz*.

II. THE FUGITIVE SLAVE LAW OF 1793 AND STATE ENFORCEMENT

The Fugitive Slave Law of 1793 authorized a master or his agent to seize an alleged fugitive slave and bring that person before "any magistrate of a county, city, or town corporate" where the arrest was made. Upon "proof to the satisfaction of the judge or magistrate" that the person arrested was a fugitive slave, the statute provided that "it shall

be the duty of such judge or magistrate to give a certificate" to allow the claimant to remove the fugitive.[21] This law seemed to *require* that judges enforce and implement the law, although the term "duty" is unclear. However, the law provided no penalty for a judge or magistrate who did not do his "duty." Nor did the law set any standard process for appeal of the decision of a judge who found the claimant's evidence unpersuasive. The law did provide a penalty of five hundred dollars for anyone who "shall knowingly and willingly obstruct or hinder such claimant."[22] However, this provision does not seem to have applied to judges who might refuse to hear such a case. Thus it is hard to know exactly how Congress intended "duty" to apply to a state judge or magistrate.

There appears to have been no immediate remedy if a state judge refused to take jurisdiction in a fugitive slave case. Similarly there was no remedy if a judge arbitrarily ruled against the claimant. For example, antislavery activists wrote in the abolitionist newspaper *The Liberator* about an 1807 Vermont case, in which Justice Theophilus Harrington, speaking for a unanimous Vermont Supreme Court, refused to return a fugitive slave to his New York owner, declaring, "If the master could show a bill of sale, or grant, from the Almighty, then his title to him would be complete: otherwise it would not."[23] Although perhaps apocryphal, this unreported decision was viewed by abolitionists as an example of how judges ought to deal with the Fugitive Slave Law.

The abolitionist argument implied by the opinion attributed to Justice Harrington raised the issue of a judge's "duty" to a new level. If a state judge refused to take a case or took a case and then refused to issue a certificate of removal, what could a claimant do? The claimant might have gone to a federal judge to ask for a certificate of removal. In theory the claimant could have also asked for a writ of mandamus to force the state judge to act. Moreover, if the claimant was able to find a federal judge, he would not need a mandamus to be directed at the local or state judge, since he could get his certificate of removal directly from the federal judge. However, at this time there were relatively few federal judges in the

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[21] Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-05 (1793) (respecting fugitives from justice, and persons escaping from the service of their masters).

[22] *Id.* at 305.

[23] Samuel E. Sewall, *Harrington's Decision*, THE LIBERATOR, Jan. 6, 1843, at 1.

nation – most of the northern states had only one federal district judge before 1850. Alternatively, if one state judge refused to act under the 1793 law, there was nothing to prevent the claimant from finding another state judge or magistrate to help him. This would not even have been an appeal, since the first judge's refusal to act under the law would not have produced an opinion, or anything else, to appeal. But all these alternatives would have been expensive and time consuming and might not have accomplished anything. While the claimant was seeking a second forum under the 1793 law, the slave would have been free to leave the region, since the claimant would have had no legal authority to hold a black person again his or her will, especially after a magistrate had in effect declared that there was not enough evidence to hold the person as a fugitive slave. Alerted to what was happening, the alleged slave would probably have moved away, gone into hiding, or left the country. Thus, whatever the term "duty" meant in the 1793 law, it does not appear to have had a practical effect on northern judges beyond setting out what they *ought* to do. The term clearly did not set out what they *had* to do.

III. PERSONAL LIBERTY LAWS

Initially the northern states cooperated with the fugitive slave law. Most northern jurists who heard cases under the law made good faith attempts to enforce it. For example, in 1819, Pennsylvania Chief Justice William Tilghman enforced the federal law while denying that a fugitive slave had the right to a jury trial.[24] Similarly, in 1823 Chief Justice Isaac Parker of Massachusetts also upheld the 1793 law[25] but limited his analysis to "a single point, whether the statute of the United States giving power to seize a slave without a warrant is constitutional."[26] Parker upheld this warrantless seizure because "slaves are not parties to the [C]onstitution, and the [Fourth] [A]mendment has [no] relation to the parties."[27] Parker noted, without any citation or actual reference to the Constitution, that "[t]he [C]onstitution does not prescribe the mode of reclaiming a slave, but leaves it to be

[24] Wright v. Deacon, 5 Serg. & Rawle 62 (Pa. 1819).
[25] Commonwealth v. Griffith, 19 Mass. (2 Pick) 11 (1823).
[26] *Id.* at 18.
[27] *Id.* at 19.

determined by Congress."[28] Thus, despite the story of Justice Harrington in Vermont, there were no mass revolts against the law by northern judges.

The northern states did, however, pass a number of laws to provide procedural protections for people claimed as fugitive slaves. In the 1820s Maine, New Jersey, New York, and Pennsylvania passed laws to protect the personal liberty of their black residents. Known as "personal liberty laws," these acts were designed to protect free blacks from kidnapping while at the same time providing some mechanism for the state to comply with the federal obligation to return fugitive slaves to their owners.[29] In order to prevent fraud, kidnapping, and the wrongful seizure of free blacks, these laws required a stronger evidentiary basis for the removal of a black from a free state to a slave state than did the federal law of 1793. The federal law of 1793 allowed a master to seize a fugitive slave and bring that slave before any state or federal judge, who would then issue a certificate of removal for the black. The federal law had a very lax standard for determining if the person seized was indeed a fugitive slave, requiring only proof "either by oral testimony or affidavit taken before and certified by a magistrate" in the state where the claimant resided that the claimant actually owned a slave as described in the affidavit or testimony.[30] Under the federal law, anyone willing to commit perjury might easily kidnap a free black by giving false oral testimony claiming the person was a fugitive slave.

The personal liberty laws were aimed at preventing such frauds. Typical of these laws was Pennsylvania's act of 1826,[31] which required that anyone removing a black person from the state must first obtain a warrant from a Pennsylvania judge, who would then direct the sheriff to arrest the alleged fugitive. In order to obtain the warrant, the claimant had to prove a prima facie ownership through "oath, or affirmation" while also producing "the affidavit of the claimant of the fugitive, taken before and certified by a justice of the peace or

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[28] *Id.*

[29] For a general history of these laws, see THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861 (1974).

[30] Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 303-05 (1793) (respecting fugitives from justice, and persons escaping from the service of their masters).

[31] Act of Mar. 25, 1826, ch. 50, 1826 Pa. Laws 150 (giving effect to the provisions of the Constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping), *quoted in* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

other magistrate authorized to administer oaths in the state or territory in which such claimant shall reside, and accompanied by the certificate of the authority of such justice or other magistrate to administer oaths, signed by the clerk or prothonotary, and authenticated by the seal of a court of record, in such state or territory, which affidavit shall state the said claimant's title to the service of such fugitive, and also the name, age, and description of the person of such fugitive."[32]

Once this was done, the sheriff could arrest the alleged fugitive and bring him back to the judge for a hearing on whether to issue a certificate of removal. The law allowed for removal of the fugitive "upon proof to the satisfaction of such judge"[33] that the person arrested was a fugitive slave owned by the claimant. However, at this stage the statute provided that "the oath of the owner or owners, or other person interested, shall in no case be received in evidence before the judge on the hearing of the case."[34] Thus, the claimant needed some proof of ownership, such a bill of sale, eyewitness testimony from a disinterested third party, or some sort of certified record from a lower court.

These standards required far more evidence than the federal law. They were also more likely to lead to adverse results for a claimant. The state judges had the power to actually consider evidence before sending an African-American back to the South. The 1826 law also provided that state judges who refused to hear fugitive slave cases could be fined. Thus, unlike the "duty" provision of the federal law, the Pennsylvania law actually backed up the "duty" requirement with an enforcement mechanism. Northerners saw these laws as good faith attempts to balance the needs of the free states to prevent kidnapping with the rights of slave owners under the Constitution.

Only after reviewing the status of an alleged fugitive slave under the state law, could a Pennsylvania judge or magistrate comply with the "duty" imposed by the federal law. The juxtaposition of these two laws shows that while Pennsylvania recognized it had a "duty" to enforce the federal law, it would only do so under its own rules. This condition clearly had the potential to wreak havoc on national law enforcement by setting the stage for each state to create its

[32] *Id.* § IV.
[33] *Id.* § VI.
[34] *Id.*

own rules for implementing a federal law. It is hard to imagine a more chaotic scheme for law enforcement. Moreover, southern claimants would have found such a system intolerable. How could they hope to vindicate a right, created by the Constitution and enforced by a federal statute, if they could not be certain that courts would uniformly interpret and apply the law? How could a master know what the rules would be in each state? Against this background the Court decided *Prigg v. Pennsylvania*.

IV. *PRIGG V. PENNSYLVANIA* AND THE DEVELOPMENT OF THE DOCTRINE OF UNFUNDED MANDATES

In 1837, Edward Prigg, Nathan Bemis, and two other Marylanders traveled to York County, Pennsylvania, where they obtained a warrant from a Pennsylvania justice of the peace to arrest Margaret Morgan and her family. Prigg and his associates asserted that Morgan was a fugitive slave owned by Margaret Ashmore, who was Bemis's mother-in-law. Mrs. Ashmore was the widow of a small farmer named John Ashmore who had lived in Harford County, Maryland. John Ashmore had owned Margaret Morgan's parents (whose names are unknown), but shortly after the War of 1812 he allowed them to live as free people. Margaret was raised in this environment and always considered herself to be free. Sometime in the mid-1820s Margaret married a free black man from Pennsylvania named Jerry Morgan. The Morgans lived in Harford County, Maryland, where the 1830 census recorded them and their two children as "free black" persons.[35] Clearly, the county sheriff, who took the census, believed Margaret and her children were free. In 1832 the Morgans moved to Pennsylvania and in 1837 Margaret Ashmore sent Nathan S. Bemis, her son-in-law, to bring Margaret back to Maryland as a fugitive slave. Bemis brought three neighbors with him, including Edward Prigg.

The four Marylanders arrested Margaret and her family under a warrant issued by Justice of the Peace Thomas Henderson. But, when the Morgans were brought before Henderson he refused to give Bemis and Prigg the authority to remove them from the state. Acting under the state law, rather than the federal law, Henderson concluded that the African-

[35] U.S. Census Bureau, 1830 Census: Manuscript Census for Harford County, Maryland, at 394.

Americans before him were not slaves. Jerry Morgan was clearly a free black born in Pennsylvania and one or two of their children had been born in Pennsylvania and were thus born free under Pennsylvania law. Margaret's parents were once slaves but she had never been considered a slave. Justice of the Peace Henderson clearly thought she was free.

Henderson released the Morgans, but Bemis and Prigg then grabbed Margaret and her children – but not Jerry Morgan – and forcibly removed them to Maryland. The four Marylanders were indicted for kidnapping and after two years of negotiations between the governors of the two states, Maryland agreed to allow only one of the indicted men, Edward Prigg, to be extradited to Pennsylvania for prosecution. The agreement between the two governors provided that if Prigg was convicted he would not be incarcerated until the U.S. Supreme Court heard his appeal. As expected, a jury in York County convicted Prigg for violating the 1826 act, and the Pennsylvania Supreme Court quickly upheld the conviction without an opinion. In 1842 the case went to the Supreme Court.[36]

In an elaborate opinion[37] Justice Joseph Story, speaking for an eight-to-one majority, overturned Edward Prigg's conviction for kidnapping Margaret Morgan and her children. In his opinion, Justice Story reached five major conclusions: 1) that the federal Fugitive Slave Law of 1793 was constitutional; 2) that no state could pass any law that added additional requirements to the federal law or impeded the return of fugitive slaves; 3) that claimants (masters or their agents) had a constitutionally protected common law right of recaption, or "self-help," that allowed a claimant to seize any fugitive slave anywhere and to bring that slave back to the South without complying with the provisions of the Fugitive Slave Law of 1793; 4) that a captured fugitive slave was entitled to only a summary proceeding to determine if he was the person described in the papers provided by the claimant; and 5) that state officials should, but could not be required to, enforce the Fugitive Slave Law.[38] In his opinion, Story wrote:

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[36] For a discussion of these facts, see Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1995), and Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605 (1993).

[37] For a larger discussion of Story's opinion, see Finkelman, *Story Telling on the Supreme Court*, *supra* note 36.

[38] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 536-42 (1842).

> We hold the [1793] act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it; none is entertained by this Court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.[39]

Story in fact suggested that it might be unconstitutional to require state officials to enforce the fugitive slave law, noting:

> The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution. The remark of Mr. Madison, in the Federalist (No. 43) would seem in such cases to apply with peculiar force. "A right (says he) implies a remedy; and where else would the remedy be deposited, than where it is deposited by the Constitution?" meaning, as the context shows, in the government of the United States.[40]

Thus, in 1842, in a case dealing with slavery, the Supreme Court for the first time addressed the constitutionality of "conscripting" state officials. Story's opinion is perhaps less clear than one would have liked, and perhaps even less clear than one might find in a modern case. He does not exactly tell us if Congress can *force* a state official to act; rather, consistent with nineteenth century respect for federalism, he allows that the States might prevent officials from acting. Nevertheless, despite its antique ring, the opinion comes down against what today we call unfunded mandates. Oddly, Justice Scalia did not cite *Prigg* to bolster his contention that the law at issue in *Printz* was unconstitutional, even though he could have mustered the intellectual support of Justice Story. Perhaps Justice Scalia did not do so because he would have been citing a case that otherwise supported slavery

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[39] *Id.* at 622.
[40] *Id.* at 615-16.

and was indeed, next to *Dred Scott*, the most important judicial support for slavery in our constitutional jurisprudence.

V. THE EFFECT OF *PRIGG* ON THE FEDERAL-STATE BALANCE

Prigg, and the issue of fugitive slaves in general, illustrates one of the major problems of "conscripting" state officials: A state official is elected or appointed to enforce state laws and state policy. State policy may be at odds with federal policy. Thus, the conscripted state official might be forced to choose between his oath to the state and the mandates of the federal government. Furthermore, state officials are the servants of a local or state-wide electorate. State and local sentiments may be at odds with national policy. Thus, compelling state officials to enforce national policy can be counterproductive. The political reality of enforcement could lead to a destruction of the very policy that the national government is seeking to implement. If state officials are forced to implement a policy that they oppose, then they will do a poor job; they may undermine the federal policy by their lack of serious enforcement. The image of Justice Harrington is real. In the years after *Prigg* a number of northern judges simply refused to enforce the Fugitive Slave Law of 1793, even though under *Prigg* they were legally free to do so, and in Story's eyes had a constitutional or even moral obligation to do so.[41] Southern masters complained, even before *Prigg*, that northern officials were unhelpful in returning fugitive slaves. This problem was finally solved by the Fugitive Slave Law of 1850,[42] which federalized enforcement of the Fugitive Slave Clause of the U.S. Constitution. In passing this statute, Congress understood that conscripting state officials to do the work of the federal government was a bad idea because, as experience had shown, it may not work. Thus, Congress thought it better to simply have the federal government enforce its own laws, or to pay (rather than conscript) state officials to be part of the enforcement process.

In his opinion, Story suggested that states could, if they chose, refuse to allow their officials to enforce the federal law.

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[41] For a discussion of judges who refused to enforce the law, see Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979).

[42] Act Respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters, ch. 60, 9 Stat. 462 (1850) [hereinafter Fugitive Slave Act].

A number of states followed Story's "hint" – if that is what it can be called – and prohibited their judges from hearing cases under the federal Fugitive Slaw Law of 1793.[43] In 1851 Story's son, William Wetmore Story, claimed[44] that his father intended his decision in *Prigg* to undermine the enforcement of the Fugitive Slave Law of 1793. According to William Wetmore Story, Justice Story "repeatedly and earnestly spoke" of his *Prigg* opinion as a "triumph of freedom."[45] The evidence for this is weak. Except for his son's published statements *after* Story's death, there is no evidence at all that the justice ever took this position. He did not make this claim in any of his private letters and no other friend, ally, or colleague of the Justice ever supported it. The very fact that William Wetmore Story's statement was made after his father's death seems suspicious. Unlike his father, the younger Story was a committed opponent of slavery, and he seems to have wanted to paint his father in the best light. Indeed, it would have been entirely out of character, and completely inconsistent with his entire life's work, for Justice Story to have secretly attempted to undermine the authority of the national government or the U.S. Constitution.[46] In reality, Justice Story's goal in *Prigg* was not to weaken slavery, but to strengthen federal power. By removing state judges from the process, Story in effect forced Congress to assume a more aggressive role in the return of fugitive slaves. Story's own actions illustrate this.

In 1842, shortly before the decision in *Prigg* was announced, Story sent a private letter to Senator John Macpherson Berrien of North Carolina, urging a recodification of all federal criminal law and the extension of the common law to all federal admiralty jurisdiction.[47] This was consistent with his life-long attempts to expand federal powers and federal

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[43] Act of March 24, 1843, to Further Protect Personal Liberty, 1843 Mass. Acts 33; Act for the Protection of Personal Liberty, 1844 Conn. Pub. Acts; Act for the Protection of Personal Liberty, 1843 Vt. Acts & Resolves; Act for the Further Protection of Personal Liberty, 1846 N.H. Laws; Act to Prevent Kidnapping, Preserve the Public Peace, Prohibit the Exercise of Certain Powers Heretofore Exercised by Judges, Justice of the Peace, Aldermen and Jailors in This Commonwealth, and to Repeal Certain Slave Laws, 1847 Pa. Laws 206-08. *See generally* MORRIS, *supra* note 29.

[44] 2 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 392 (William Wetmore Story ed., 1851) [hereinafter LIFE AND LETTERS].

[45] *Id.*

[46] *See* Finkelman, *Story Telling on the Supreme Court*, *supra* note 36, at 282-94.

[47] LIFE AND LETTERS, *supra* note 44, at 402-03 (Letter from Joseph Story to Senator John Macpherson Berrien (Feb. 8, 1842)).

jurisdiction in criminal and civil matters.[48] It also comports with his opinion in *Swift v. Tyson*,[49] delivered the same month as *Prigg*.

Shortly after the Court decided *Prigg*, Story again wrote to Senator Berrien about various legislative matters. The letter began with a discussion of their collaboration on legislation involving federal criminal law and bankruptcy. This evidence suggests the close relationship Story had with the slaveholding North Carolina senator, and thus makes his next suggestion even more important. Story began to discuss the draft bill on federal jurisdiction that he had sent to Berrien. He reminded Berrien that in that draft legislation he had suggested

> that *in all cases*, where by the Laws of the [United States], powers were conferred on State Magistrates, the same powers might be exercised by Commissioners appointed by the Circuit Courts. I was induced to make the provision thus general, because State Magistrates now generally refuse to act, & cannot be compelled to act; and the Act of 1793 respecting fugitive slaves confers the power on State Magistrates to act in delivering up Slaves. You saw in the case of Prigg . . . how the duty was evaded, or declined. In conversing with several of my Brethren on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers.[50]

Essentially, Story presented Senator Berrien with the solution to the debate over federal exclusivity and the role of the States in enforcing the Fugitive Slave Law of 1793. Through the appointment of commissioners, the federal government would supply the enforcement mechanism so that enforcement would be uniform throughout the nation. The fundamental problem with this idea was how to enact it in a Congress where northerners, who were at least somewhat opposed to slavery, controlled the House of Representatives. Story, the Justice, had the solution for Berrien, the politician:

> This might be done without creating the slightest sensation in Congress, if the provision were made general . . . . It would then pass without observation. The Courts would appoint commissioners in every county, & thus meet the practical difficulty now presented by

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[48] *See* Finkelman, *Story Telling on the Supreme Court*, *supra* note 36, at 282-94.

[49] 41 U.S. (16 Pet.) 1 (1842).

[50] JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 262 n.94 (1971) (Letter from Joseph Story to Senator John Macpherson Berrien (April 29, 1842)) (citing John Macpherson Berrien Papers, Southern Historical Collection, University of North Carolina).

> the refusal of State Magistrates. It might be unwise to provoke debate to insert a Special clause in this first section, referring to the fugitive Slave Act of 1793. Suppose you add at the end of the first section: "& shall & may exercise all the powers, that any State judge, Magistrate, or Justice of the Peace may exercise under any other Law or Laws of the United States."[51]

This was not the letter of a man hoping for a "triumph of freedom." This was the letter of a Justice committed to the return of fugitive slaves and to the aggrandizement of federal power. Here he could have both. In effect, Story was arguing that the national government, not the States, should be in the business of enforcing federal law.

In 1850 Congress followed the outlines of this strategy when it passed the Fugitive Slave Law of 1850. That law created United States commissioners in every county, whose powers included hearing and deciding fugitive slave cases. Many of these commissioners were local lawyers, and some were even state officeholders or state judicial officials. For example, in Boston one of the commissioners was a probate judge.[52]

In the 1850 law Congress did what it should have done in the Brady Act and the USA PATRIOT Act: It provided its own enforcement mechanisms for its own laws. The 1850 law is correctly seen as a draconian, punitive, and unfair statute that denied alleged slaves the most basic procedural protections. Ironically, its enforcement mechanism was remarkably rational and respectful of federalism. Through the creation of local commissioners, Congress provided for federal enforcement of a federal law. This made for more efficient and predictable enforcement than what had existed under the 1793 law, when claimants had, for the most part, to rely on local law judges and magistrates who were often opposed to the law. By allowing for the appointment of local officials as commissioners, Congress provided a mechanism for taking advantage of local expertise and manpower, but yet at the same time did not dragoon local officials into acting against their own interests and own political and law enforcement needs. One need not endorse the substance of the 1850 law – which was truly an affront to justice and fairness – to appreciate the value of its enforcement apparatus.

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[51] *Id.* at 262-63 n.94.

[52] Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1810 (1996).

VI. CONCLUSIONS

As we face the USA PATRIOT Act and the demands that the states enforce federal laws, there are lessons from *Prigg*, *Printz*, and the Fugitive Slave Law of 1850 that we can learn.

First, it is clear that local officials may not always support federal law or wish to enforce it. Sheriffs Jay Printz and Richard Mack did not want to enforce the Brady Bill. It ran counter to their own political views and presumably to the desires of the constituency they served. Many of the people who elected them, and who paid them with their taxes, opposed the law. Printz and Mack did not want to be the servants of the national government in regulating firearm ownership. Had they been required to enforce it, they would have done so grudgingly, and perhaps not done a very good job. Similarly, many northern judges were loath to become complicit in returning fugitive slaves to their owners. Many states adamantly resisted a federal law that seemed to facilitate kidnapping. Ultimately, however, it mattered little whether the claimant seized a bona fide fugitive slave, or was attempting to legally kidnap a free person, or had seized someone, like Margaret Morgan, whose status was truly in doubt. Whatever the substantive issue, northerners in general were unlikely to want to aid in the return of fugitive slaves.

Likewise, we can certainly imagine under present circumstances that at least some state and local law enforcement officers will be reluctant to implement a federal law against people in their community who may be remotely connected to terrorists – or, for that matter, even utterly unconnected to terrorists. In the Detroit area for example, local law enforcement officials were unwilling to interrogate large numbers of their constituents, merely because those constituents were Moslems or of Arab or Middle Eastern backgrounds.[53] Efficient law enforcement may not be possible if the national government has to rely on state officials. Because of differentials in training, sophistication, and experience, it is also possible that local law enforcement will do an inadequate

[53] *See, e.g.*, Fox Butterfield, *A Nation Challenged: The Interviews; A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7; Jodi Wilgoren, *University of Michigan Won't Cooperate in Federal Canvass*, N.Y. TIMES, Dec. 1, 2001, at B6.

job of enforcing federal law, even when the local leadership supports the law.

Second, it also seems obvious that if the national government cannot rely on the states, it must expand its own enforcement machinery. In his dissent in *Printz*, Justice John Paul Stevens noted:

> Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the States.[54]

In a footnote to the paragraph, Stevens notes:

> The Court raises the specter that the National Government seeks the authority "to impress into its service . . . the police officers of the 50 States." But it is difficult to see how state sovereignty and individual liberty are more seriously threatened by federal reliance on state police officers to fulfill this minimal request than by the aggrandizement of a national police force. The Court's alarmist hypothetical is no more persuasive than the likelihood that Congress would actually enact any such program.[55]

This is exactly what happened with the Fugitive Slave Law of 1850. Federal enforcement made the law more efficient, although it never worked well.[56] We can imagine that this will also happen with laws like the one at issue in *Printz*, assuming Congress ever passes such a law, or with the USA PATRIOT Act.

But it is not at all clear that Justice Stevens is correct in his speculation that federal enforcement will be a greater threat to civil liberties than state enforcement. Police corruption scandals in Los Angeles, Chicago, New York City, Philadelphia, and many other places suggest one danger of

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[54] Printz v. United States, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting).

[55] *Id.* at 959 n.21 (citation omitted).

[56] In the eleven years that it was in force, fewer than 375 fugitive slaves were returned to the South. STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, 199-207 tbls. (1968). Based on fugitives reported in the 1850 census, at least 10,000 slaves escaped in that period, and probably another ten to twenty thousand fugitives were already living in the North. Thus, the law did little to actually facilitate the return of runaway slaves.

local law enforcement. The failure of law enforcement to implement state and federal civil rights laws in the deep South was notorious until very recently. The violations of civil rights by police in New York City, Los Angeles, and elsewhere further underscores the misplaced faith Justice Stevens may have in local enforcement.

The historical example of the situation during World War I also illustrates this point. During that war, local authorities were often far more repressive than the national government.[57] The willingness of states to oppress religious and ethnic minorities[58] is well known. Furthermore, the training of local law enforcement is often less rigorous and less successful than the training of federal officers. Anyone who has traveled through airports has realized that the federally-trained and monitored security staffs at most airports are far more polite, efficient, and competent than the security personnel were before the system was federalized.

The federalization of airport security is perhaps similar to the model Congress created in the Fugitive Slave Law of 1850. The Fugitive Slave Law of 1850 of course did not protect the civil liberties of alleged fugitive slaves or their allies. On the contrary, it was one of the most draconian laws ever passed by Congress. It was passed to implement a proslavery Constitution,[59] and the law reflected the pre-Civil War Constitution. At least two states tried to limit the reach of the law, although with little success.[60]

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[57] *See* PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979).

[58] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (vindicating the rights of Americans to teach foreign languages to their children in the face of xenophobic laws in Nebraska and elsewhere that were designed to prohibit immigrants, especially German-speaking immigrants, from teaching their native languages to their children). For more on this case, see Paul Finkelman, *German Victims and American Oppressors: The Cultural Backgroud and Legacy of* Meyer v. Nebraska, *in* LAW AND THE GREAT PLAINS: ESSAYS ON THE LEGAL HISTORY OF THE HEARTLAND 33 (John R. Wunder ed., 1996). For a full history of this persecution throughout the nation, see also WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994). A similar sort of persecution was directed at Jehovah's Witnesses. For Supreme Court cases dealing with this problem, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville*). For a good summary of this persecution of Jehovah's Witnesses, see Renee C. Redman, *Jehovah's Witnesses*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 245-53 (Paul Finkelman ed., 2000), and Paul Finkelman, *The Flag Salute Cases*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 186-190 (Paul Finkelman ed., 2000).

[59] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 8, at 3-36.

[60] Wisconsin challenged the law by approving a writ of habeas corpus to release the abolitionist Sherman Booth, who had helped a slave escape the custody of

The purpose of looking at this law is emphatically *not* to use its substantive procedures as a model for modern legislation. Rather, it is to illustrate two points about federal law enforcement and federalism.

First, if Congress chooses to implement a law enforcement policy, the only sure way to make that policy work is for the national government to fund and direct that implementation. Northerners resisted complying with the Fugitive Slave Law of 1793 because they hated it and thought it was immoral and wrong. Furthermore, they hated the policies behind it. In 1864, responding to a changed political atmosphere – and the secession of eleven slave states – Congress would repeal both the 1793 and 1850 Fugitive Slave Laws. A year later a constitutional amendment would radically change the policies behind the Fugitive Slave Laws.[61] But, in the meantime, if Congress wanted to enforce the Fugitive Slave Clause of the Constitution, it had to do it with a federal enforcement apparatus. The same thing is true with the Brady handgun bill. The response to local resistance cannot be to *force* local sheriffs to implement the law; rather it is to use federal money and statutes to create a mechanism for implementation. My point here is not to praise the fugitive slave laws as models of civil liberties. Rather, the point is to show that the history of this law illustrates the problem of expecting the states to implement federal law.

The second point is that local law enforcement in the end cannot achieve the policy goals set out by Congress. The Fugitive Slave Law of 1793 did not work because free state officials simply would not implement it. Thus, under the proslavery Constitution of the period, a government dominated by slaveholders and their northern "doughface"[62] allies passed

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U.S. Marshal Stephen Ableman. The Supreme Court rejected this attempt by Wisconsin to interfere with the law in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859). Ohio flirted with going down this road after the Oberlin-Wellington Rescue, but the Ohio Supreme Court, by a one vote majority, refused to issue a writ of habeas corpus directed against the federal marshal. *Ex parte* Bushnell, *Ex parte* Langston, 9 Ohio St. 77 (1859).

[61] U.S. CONST. amend XIII, § 1 ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[62] "Doughface" was a term of derision for proslavery northerners or northerners who worked closely with southerners. The term evolved because it was said that these northern politicians had faces of "dough" which the southerners could shape any way they wanted. Classic doughfaces included the last three antebellum presidents, Millard Fillmore, Franklin Pierce, and James Buchanan. Fillmore signed the 1850 fugitive slave bill into law while Pierce and Buchanan vigorously enforced it.

the law to implement the Constitution's Fugitive Slave Clause.[63] Similarly, the nation cannot rely on local sheriffs to implement the Brady Handgun bill or expect that local law enforcement officials would necessarily be in sympathy with the government's dragnet approach to investigations after the September 11 attack on the nation.

The lesson of the Fugitive Slave Law of 1793 and Story's decision in *Prigg* is that instead of conscripting state officials like Printz, Congress might simply create some modern equivalent of the commissioners or other law enforcement officials who would be able to implement federal policy. This would have the advantage of involving local people in federal investigations and enforcement, but only because they were hired or volunteered, rather than conscripted. At the same time, these local people would be subject to federal rules and federal standards.

Finally, federal enforcement is by its nature limited. The nation is too big, the enforcement field too vast, for the government to simply sweep across the nation. The kind of petty bullying that local law enforcement can easily do is less likely under a federalized regime. There are of course problems with federal law enforcement. The FBI, DEA, ATF, INS, IRS and a host of other agencies have sometimes been incredibly heavy-handed in their approach to law enforcement. Although the FBI is unlikely to be run by another J. Edgar Hoover, there is no reason to believe that law enforcement abuses will never be a problem in the future. However, it is somewhat easier to monitor the actions of the federal government than it is to monitor the actions of the states. The national media can more easily focus on abuses by federal officials than those committed by state and local officials.

Moreover, as the example of the Fugitive Slave Law suggests, if the States are not part of the federal law enforcement process, they can sometimes protect their own citizens from arbitrary federal power. Similarly, if States violate the civil rights of individuals, then the federal government can become the watchdog. In the age of "homeland security" it is not unthinkable that a state will step over the line of constitutional propriety, and that the federal courts might intervene to protect basic liberty, or the FBI and Justice Department might also investigate violations of constitutional

[63] U.S. Constitution, Art. IV, Sec. 2, Par. 3.

rights. But, again, as the fugitive slave experience shows, if the states become *part* of the federal law enforcement, then the States cannot monitor the federal government. Conversely, the federal government could not monitor the States. Indeed, the genius – if we can call it that – of American federalism is that in times of crisis the States can be a check on the national government and the national government can also be a check on the States. But if the States become a mere adjunct of the federal government, then there will be no checking possibilities, and the potential for the violation of rights is much greater.