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Fidelity through History and to It: An Impossible Dream

Cover Page Footnote

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FIDELITY THROUGH HISTORY AND TO IT: AN IMPOSSIBLE DREAM?

Robert J. Kaczorowski*

INTRODUCTION

“AS a theory of fidelity through history,” Jack Rakove concludes, “originalism ultimately fails because it is false to the history it purports to describe.”¹ Its logic falsely assumes that “the decisions of 1787-88 [were] the conclusive culmination of some prior course of reflection and deliberation,” which “locked into the Constitution at the moment of its adoption” “a set of definitive meanings.”² Fidelity to history, Professor Rakove argues, demonstrates “the avowedly experimental nature of revolutionary constitutionalism.”³ Larry Kramer shares Professor Rakove’s interpretation of the Founding and of the Constitution as experimental in its origins. He uses this insight to build a theory of constitutional interpretation which conceives of “the Constitution as a dynamic framework of evolving institutions and restraints.”⁴ This theory “makes history central to the interpretive enterprise,”⁵ because it “requires us to evaluate a historically unfolding process.”⁶ Professor Kramer goes so far as to assert that “[t]he real ‘Founding’ took place when the Founders attempted to turn [the ratified Constitution] into something real.”⁷ He argues that “[i]t was the Founders’ choices in putting their ideas to work that shaped the course of American government. And it was the choices of their successors, starting where the Founders left off, that made the Constitution what it is today.”⁸

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1. Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 Fordham L. Rev. 1587, 1609 (1997) [hereinafter Rakove, *Fidelity Through History*].

2. *Id.* at 1608.

3. *Id.* Professor Rakove develops this point more fully in his remarkable book, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) [hereinafter Rakove, *Original Meanings*].

4. Larry Kramer, *Fidelity to History—And Through It*, 65 Fordham L. Rev. 1627, 1638 (1997).

5. *Id.*

6. *Id.* at 1651.

7. *Id.* at 1655.

8. *Id.* This view accords with that of David Currie, who goes so far as to characterize the First Congress as “practically a second constitutional convention.” David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 Nw. U. L. Rev. 606, 606 (1996); see also David P. Currie, *The Constitution in Congress: Substan-*

Chris Eisgruber suggests a more ambiguous role for history in constitutional interpretation. He concludes "that fidelity to the Constitution, if defensible at all, means fidelity to justice, and history matters to constitutional interpretation only as the servant of justice."⁹ "Fidelity through history' . . . is a defensible conception of constitutional interpretation," in his opinion, "only if history enlists in the service of justice."¹⁰ He also believes, however, that "[h]istory serves a specific and indispensable rhetorical role [in constitutional interpretation]: It reconciles the American faith in popular sovereignty with the justice-seeking Constitution."¹¹ Although Professor Eisgruber argues that judges should enlist history to persuade their audiences that their decisions are correct and that their decisions serve the ends of justice, he also insists "that constitutional interpreters be faithful *to* history if they make historical arguments at all."¹²

Many of the choices the Founders made when they put the Constitution into practice support Professors Rakove's and Kramer's interpretations of the Founders' conception of the Constitution and the manner in which it should be interpreted and applied. Constitutional interpreters of the early American Republic also used history as Professor Eisgruber recommends. Certainly one finds hotly contested and conflicting *interpretations* of the Constitution and of the scope of the federal government's powers. But many of the Founders' *actions* evince a conception of the Constitution as an evolving framework to be shaped by political experience which would expand and adapt the federal government's powers to meet changing and unanticipated events. Although the Founders conceived of the Constitution as a limitation on governmental powers, many of the choices they made reveal a conception of the Constitution as a power-enhancing document more than a power-limiting set of constraints. I would like to discuss three of these choices and their judicial enforcement: Congress's initial exercise of its contempt power in 1818; Congress's charter of the Bank of the United States in 1793; and Congress's enactment of the Fugitive Slave Acts of 1793 and 1850. Finally, this Response will argue that Reconstruction Congresses transformed the constitutional theories and guarantees of the Fugitive Slave Clause and the Fugitive Slave Acts into constitutional theories and guarantees of the fundamental rights of all Americans.

tive Issues in the First Congress, 1789-1791, 61 U. Chi. L. Rev. 775, 776-78 (1994) [hereinafter Currie, *Substantive Issues*] (discussing the significant contributions of the First Congress).

9. Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 Fordham L. Rev. 1611, 1626 (1997) (footnote omitted).

10. *Id.* at 1612.

11. *Id.* at 1622.

12. *Id.* at 1625.

I. CONGRESS'S EXERCISE OF ITS CONTEMPT POWER

I include the contempt power because it was challenged on the grounds that Congress had usurped judicial powers, in violation of the principle of the separation of powers, and that it violated the contemnor's Fifth Amendment right to due process of law.¹³ In 1818 Congress found a private citizen to be in contempt of Congress for attempting to bribe a Congressman. The contemnor appealed, insisting that the powers to subpoena, to arrest, to detain, to try, and to punish private citizens were judicial in nature.¹⁴ He argued also that, in imposing criminal sanctions, Congress violated his procedural guarantees under the Fifth Amendment of the Bill of Rights.¹⁵ Distinguishing the "unlimited powers" of state legislatures, which included the contempt power, from the enumerated powers of Congress, which it derived "in derogation of the rights of sovereign states," the contemnor insisted that Congress's powers must be strictly limited to those expressly delegated and others that "may be 'necessary' to effectuate the express powers."¹⁶

In an opinion written by Justice William Johnson, who had been appointed by Thomas Jefferson "to put [on the Court] a Justice of

13. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 232-33 (1821).

14. *See id.* at 214; *see also* U.S. Const. art. III, § 2, cl. 3. Article III, Section 2, Clause 3 provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Id.

15. *See Anderson*, 19 U.S. (6 Wheat.) at 218; *see also* U.S. Const. amend. V. The Fifth Amendment states, in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ." *Id.*

16. *Anderson*, 19 U.S. (6 Wheat.) at 213, 215. Nor could this power be implied from the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, the contemnor insisted, for the power to punish attempted bribery was not necessary to enable Congress to perform its legislative duties. Only if such punishment were not otherwise available would it be necessary for Congress to exercise this power. He noted, however, that such offenses were punishable in the courts of the states and the District of Columbia. Moreover, Congress could remedy any perceived inadequacy in judicial redress of an attempted bribe of one of its members. The only constitutional provision which might have authorized Congress's actions, he argued, was Article I, Section 5. But this provision merely authorizes Congress to "determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. The contemnor vehemently insisted that Congress's authority to order the arrest and to compel the appearance of private citizens and punish their wrongdoing "cannot be construed to operate beyond the walls of the house, except on its own members, and its officers." *Anderson*, 19 U.S. (6 Wheat.) at 213-14. By its very terms the Constitution limits this authority "solely to the internal polity and economy of the house." *Id.* at 214. Consequently, he argued, Congress acted without constitutional authority. *Id.* at 213-14.

unquestionable Republican sympathies,"¹⁷ the Supreme Court upheld Congress's contempt powers even though it acknowledged that the Constitution clearly did not expressly give "to either house [the power] to punish for contempts, except when committed by their own members."¹⁸ The Court concluded that, if such a power existed, it "must be derived from implication," notwithstanding that "the genius and spirit of our institutions are hostile to the exercise of implied powers."¹⁹ The reason, quite simply, is that it was impossible to frame "a system of government which would have left nothing to implication."²⁰

Justice Johnson then described the Constitution as an experimental, power-enhancing, and dynamically-evolving framework shaped by political experience. He characterized the "science of government" as "the most abstruse of all sciences," having "but few fixed principles."²¹ Government "practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise."²² Presaging Oliver Wendell Holmes, Johnson declared that government "is the science of experiment."²³ The most important maxim of government, "which necessarily rides over all others, . . . is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them."²⁴

The Court upheld Congress's contempt power on a theory that the Constitution necessarily delegates to Congress those powers that are inherent in the sovereign nature of the national government and implied from the purposes, ends, and objectives for which it was established, broadly conceived. I will refer to these powers as "implied *inherent* powers." Justice Johnson explained that Congress's contempt powers were inherently derived from its paramount duty to secure "the safety of the people [which] is the supreme law,"²⁵ and its implied inherent power of self-defense against "rudeness" and "insult."²⁶ In addition, the Court adopted a theory that Congress also has certain

17. 3-4 G. Edward White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-1835*, at 189 (1988). Professor White observes, however, that Justice Johnson eventually acquiesced in the "consolidationist tendencies" of the Marshall Court. *Id.*

18. *Anderson*, 19 U.S. (6 Wheat.) at 225.

19. *Id.*

20. *Id.*

21. *Id.* at 226.

22. *Id.*

23. *Id.*

24. *Id.* In this theory of government and conception of constitutional powers, Justice Johnson echoed the comments expressed in the First Congress by Theodore Sedgwick: "[T]he whole business of Legislation was a practical construction of the powers of the Legislature . . ." Currie, *Substantive Issues, supra* note 8, at 775 n.1 (quoting Representative Theodore Sedgwick in 2 *Annals of Congress 1960* (Gales & Seaton eds., 1791)).

25. *Anderson*, 19 U.S. (6 Wheat.) at 227.

26. *Id.* at 229.

powers that flow from those specifically enumerated in Article I and in other constitutional provisions that expressly delegate legislative power to Congress. I will refer to these powers as "implied *enumerated* powers." The Court interpreted the Constitution's express delegation of the power to punish counterfeiting and treason as encompassing an implicit delegation of power to punish other kinds of offenses.²⁷ The contemnor had argued that the explicit delegation of congressional power to punish and expel its own members barred Congress from punishing private citizens.²⁸ Justice Johnson responded: "This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress."²⁹ He further explained:

To enforce its laws upon any subject, without the sanction of punishment, is obviously impossible. Yet there is an express grant of power to punish in one class of cases, and one only, and all the punishing power exercised by congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.³⁰

The Court thus affirmed Congress's contempt power on a theory of constitutional interpretation predicated on the assumption that the Constitution was a power-enhancing document and that Congress was a sovereign legislative body with the powers inherent in such assemblies, "derived from implication," such as the power to punish violations of its laws, limited only by the ends and purposes for which it was established. In addition, the Court rejected the contemnor's narrow textual interpretation that would have limited Congress's penal powers to those expressly delegated and instead implied general penal powers from those specifically delegated by the Constitution.

II. THE BANK OF THE UNITED STATES

The Bank of the United States presents a fuller example of constitution making through political practice, because its creation involved the political and constitutional decisions of all three branches of the government. Moreover, the executive and congressional participants in the initial decision to charter the Bank included many of the draft-

27. *Id.* at 233.

28. *Id.* at 213-14. Justice Johnson noted:

But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the house of representatives; that the express grant of power to punish their members, respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members.

Id. at 232-33.

29. *Id.* at 233.

30. *Id.*

ers of the Constitution and those who played leading roles in its ratification. The question of Congress's power to charter corporations was thoroughly discussed in President George Washington's first administration by Secretary of the Treasury Alexander Hamilton,³¹ Secretary of State Thomas Jefferson,³² and Attorney General Edmund Randolph. President Washington even solicited the views of Congressman James Madison before he signed the bill into law.³³ The constitutionality of the Bank was discussed in Congress as well, with Madison leading the opposition, insisting that in 1787 the Framers rejected a proposal that would have delegated to Congress the power to charter corporations. The Framers' intent was not a significant factor in Congress's decision to enact the Bank bill or in the President's decision to sign it into law in 1793.³⁴

The United States Supreme Court upheld the constitutionality of Congress's power to charter the Bank against a challenge brought by the state of Maryland in 1819.³⁵ The lawyers who argued the case included the most eminent constitutional lawyers of the day,³⁶ and they argued the case on conflicting conceptions of the Constitution and of the ways in which the Constitution and Congress's powers under it should be understood and interpreted. Their arguments elaborated many of those made in President Washington's administration and in Congress. In one of Chief Justice John Marshall's most famous opinions, the Court adopted a conception of the Constitution as a dy-

31. Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, in 8 *The Papers of Alexander Hamilton* 63, 97 (Harold C. Syrett et al. eds., 1965).

32. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, in 19 *The Papers of Thomas Jefferson* 275, 279-80 (Julian P. Boyd & Ruth W. Lester eds., 1974).

33. Stanley Elkins & Eric McKittrick, *The Age of Federalism* 232 (1993). Madison's proposed veto message is in James Madison, *The Bank Bill*, in 13 *The Papers of James Madison* 383 (Charles F. Hobson & Robert A. Rutland eds., 1981).

34. Rakove, *Original Meanings*, *supra* note 3, at 350-55; Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 *J. Early Republic* 19, 20, 39-41 (1990).

35. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

36. The case was so important that the Court permitted each side to be represented by three lawyers. The Bank's lawyers (McCulloch was cashier of the Bank's Baltimore branch) included the incomparable Daniel Webster; William Pinckney, who was characterized by the most eminent contemporary scholar of the Marshall Court as "the most eminent of the Marshall Court advocates" in 1819; and the United States Attorney General, William Wirt. Maryland was represented by its attorney general, Luther Martin, one of the few surviving members of the Constitutional Convention of 1787; Joseph Hopkinson, a frequent advocate before the Supreme Court who argued *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), with Daniel Webster and was later appointed to the United States Circuit Court; and Walter Jones, who argued more than 169 cases before the Marshall Court and was destined to become United States Attorney for the District of Columbia. White, *supra* note 17, at 230, 235, 238, 243, 289.

namically-evolving, power-enhancing document³⁷ whose scope and meaning were defined through political practice.³⁸ Chief Justice Marshall attributed this conception to the Founders, to President Washington and his cabinet, and to the early Congresses.³⁹ Justice Felix Frankfurter cited Marshall's opinion in 1952 as authority for his "gloss on the Constitution" theory of interpreting implied executive powers.⁴⁰ The Chief Justice asserted that the Constitution could not "con-

37. Chief Justice Marshall had earlier asserted that the provisions of the Constitution are

intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

Id. at 415-16.

38. Referring to the question of whether Congress possessed the power to incorporate a bank, Marshall began:

It has been truly said, that [the Bank's constitutionality] can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

Id. at 401. He conceded that "a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this." *Id.*

But it is conceived that a doubtful question, . . . in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; *if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.* An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

Id. (emphasis added).

39. Marshall attributed particular importance to the fact that this power "was exercised by the first Congress elected under the present constitution," that "[i]ts principle was completely understood, and was opposed with equal zeal and ability," both in Congress "and afterwards in the executive cabinet," and, having "convinced minds as pure and as intelligent as this country can boast, it became a law." *Id.* at 401-02. He noted that after the original law was allowed to expire, "a short experience of the embarrassments to which the refusal to revive it exposed the government . . . induced the passage of the present law." *Id.* at 402. Marshall concluded that "[i]t would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance." *Id.*

40. This theory of constitutional interpretation through political practice became a recurring theme in constitutional litigation and practice. *See, e.g., infra* text accompanying notes 76-78 (discussing this theory's application in fugitive slave cases). Justice Felix Frankfurter's "gloss on the Constitution" theory of constitutional interpretation is an extension of Marshall's approach to interpreting the constitution as expressed in

tain an accurate detail of all the subdivisions of which its great powers will admit," for this "would partake of the prolixity of a legal code."⁴¹ Rather, the Constitution required "only [that] its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."⁴² The Court thus conceived of the Constitution as a power-enhancing framework of government whose substance would evolve over time through the workings of the political system.

In addition to the powers enumerated in the Constitution, Chief Justice Marshall declared that the national government possessed the implied or inherent powers of sovereign governments, limited in their scope to the purposes, ends, and objects for which the government was established and from which these implied or inherent powers were derived. Consequently, Congress possessed the sovereign power to charter corporations to perform the duties and accomplish the

McCulloch. Like Marshall, Justice Frankfurter argued that history and political practice were essential factors in interpreting the Constitution. Justice Frankfurter, citing *McCulloch* as authority for "a spacious view" of the Constitution, opined:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Justice Robert Jackson derived his tripartite approach to examining the constitutionality of executive powers based on the history of political practice from the same theory of constitutional interpretation:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

Id. at 635 (Jackson, J., concurring). Justice Jackson offered this approach to constitutional interpretation as a more realistic alternative to originalism and textualism, which he regarded as futile methods of defining the scope of governmental powers. Although he was addressing the issue of presidential powers, his comments are applicable generally to constitutional interpretation:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Id. at 634-35 (Jackson, J., concurring) (footnote omitted).

41. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

42. *Id.*

objectives the Constitution conferred upon it.⁴³ But, the Constitution did not leave Congress's implied powers "to general reasoning," Marshall declared.⁴⁴ He quoted the Necessary and Proper Clause and interpreted it as an express delegation of implied powers to execute the powers enumerated in Article I, in addition to "all other powers vested by this constitution, in the government of the United States, or in any department thereof."⁴⁵

43. *Id.* at 410-11. Marshall noted that Maryland's argument against the Bank's constitutionality was based "[o]n this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress." *Id.* at 409. Conceding that this was true, Marshall dismissed the argument with the observation that "all legislative powers appertain to sovereignty." *Id.* He then affirmed the Bank's theory of dual sovereignty and theory of implied powers derived from the objects entrusted by the Constitution to the government of the United States: "[T]he powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *Id.* at 410. Thus, Congress possessed the sovereign power of incorporation as a power inherent in its sovereignty which it could use to carry into effect the great objects and vast powers the Constitution conferred on it. Justice Story made a similar argument in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), with respect to Congress's power to enforce the property rights of slaveholders. See *infra* notes 76-83 and accompanying text.

44. *McCulloch*, 17 U.S. (4 Wheat.) at 411.

45. *Id.* at 412 (quoting U.S. Const. art. I, § 8, cl. 18). Chief Justice Marshall asserted that the terms of the Necessary and Proper Clause "purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." *McCulloch*, 17 U.S. (4 Wheat.) at 420. Marshall's explanation of the Necessary and Proper Clause appears to have been taken from James Madison, who explained in *The Federalist* No. 44 why the powers conferred on the United States government were not limited to those expressly delegated in the Constitution, as Article II provided in the Articles of Confederation. *Id.* at 415. Madison explained:

Had the [constitutional] convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.

The *Federalist* No. 44, at 284-85 (James Madison) (Clinton Rossiter ed., 1961). This is not to suggest that Madison favored the broad interpretation the Court affirmed in *McCulloch*. His theory of republican government coupled with his fear of legislative tyranny led him to oppose a broad construction of the Necessary and Proper Clause after the Constitution was ratified. See Rakove, *Original Meanings*, *supra* note 3, at 355. Nevertheless, Marshall certainly intended a broad interpretation:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but

Marshall's interpretation of the Necessary and Proper Clause is generally understood as an explanation of implied enumerated powers.⁴⁶ This is only part of Marshall's analysis, however. He also interprets the Necessary and Proper Clause as a delegation of implied inherent powers. The example he used to explain the scope of the Necessary and Proper Clause was not an enumerated power, but a power implied from the sovereign nature of the national government: Congress's penal powers.⁴⁷ Indeed, Marshall asserted that a general penal power attributed to Congress "might be denied with the more plausibility, because it is expressly given in some cases,"⁴⁸ whereas the power to charter a bank might be more easily justified because it is a power about which the Constitution is silent.⁴⁹ He asserted that "the whole penal code of the United States" is implied from its sovereign powers, except where it is expressly given.⁵⁰ Thus, like Congress's

those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

McCulloch, 17 U.S. (4 Wheat.) at 415-16. It is here that Marshall admonished: "[W]e must never forget, that it is a constitution we are expounding." *Id.* at 407.

46. Professor Levinson, in his "nit" with me, insists that *McCulloch* is an Article I case. See Remarks, *Fidelity Through History: Colloquy*, 65 Fordham L. Rev. 1693, 1697 (1997); see also Paul Brest & Sanford Levinson, *Processes of Constitutional Decisionmaking: Cases and Materials* 34-35 (3d ed. 1992) ("Marshall does not place principal reliance on the [Necessary and Proper] clause as a ground of decision; . . . before he reaches it he has already decided, on the basis of far more general implications, that Congress possesses the power, not expressly named, of establishing a bank and chartering corporations . . ."); Geoffrey R. Stone et al., *Constitutional Law* 66-67 (2d ed. 1991) (musing that, while the *McCulloch* decision does not necessarily recognize implied inherent powers, perhaps it does reflect Marshall's view "that [an enumerated] power naturally includes the appropriate means for achieving the intended end"); see also *supra* pp. 1666-67 (defining "implied enumerated powers" and "implied inherent powers").

47. Marshall opined, "[W]ith respect to the whole penal code of the United States: whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress." *McCulloch*, 17 U.S. (4 Wheat.) at 416.

48. *Id.* Marshall referred to the express delegation of the powers "'to provide for the punishment of counterfeiting the securities and current coin of the United States,' and 'to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.'" *Id.* at 416-17 (quoting U.S. Const. art. I, § 8, cls. 6, 10).

49. *Id.* at 416. Recall that the contemnor in *Anderson v. Dunn* made this precise argument two years later in challenging Congress's inherent power to find private individuals guilty of criminal contempt. See *supra* text accompanying notes 16, 28-30. Marshall's comment likely inspired the contemnor's attorney to make this argument.

50. *McCulloch*, 17 U.S. (4 Wheat.) at 416. Marshall continued:

The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

Id. at 418; accord *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 233 (1821).

contempt powers, the Court recognized Congress's power to charter corporations as an implied inherent power, to accomplish the "objects," "purposes," and "ends" for which the national government was established, as well as an implied enumerated power.

III. THE FUGITIVE SLAVE CLAUSE AND THE FUGITIVE SLAVE ACTS OF 1793 AND 1850

My third example relates to the Fugitive Slave Clause of Article IV, Section 2⁵¹ and the Fugitive Slave Acts of 1793⁵² and 1850.⁵³ The legislative history of the 1793 statute, like that establishing the Bank of the United States, involved many of the Framers and Ratifiers of the Constitution, including the governors of Pennsylvania and Virginia. It was discussed in President Washington's cabinet as well as in Congress, and it was enacted at the request of Washington's administration. Congress enacted the Fugitive Slave Act in 1793, and President Washington immediately signed it into law without any question of Congress's legislative power.⁵⁴ It is noteworthy that the Fugitive Slave Clause is in Article IV, Section 2 and, like the Privileges and Immunities Clause which precedes it, does not delegate enforcement power to Congress. In contrast, Sections 1 and 3 of Article IV expressly delegate enforcement power to Congress.⁵⁵ Nevertheless, no one challenged Congress's power to enforce these clauses.

51. The Fugitive Slave Clause states:

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.

52. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

53. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

54. William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 *Am. Hist. Rev.* 63, 72-73 (1952); Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 *J.S. Hist.* 397, 411 (1990); Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 *Rutgers L.J.* 605, 621 (1993). Professor Finkelman argues, however, that the Framers did not intend to delegate enforcement power to Congress. See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 *Sup. Ct. Rev.* 247, 259-63 [hereinafter Finkelman, *Story Telling*].

55. Article IV, Section 1 states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1 (emphasis added). Article IV, Section 3 states:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the

The Fugitive Slave Act of 1793 is extraordinary, for it is an act of Congress in which Congress exercised plenary power to enforce a constitutional right, however reprehensible this right might be to us today. In adopting the Fugitive Slave Clause, therefore, the Founders expanded an ancient common law right of property to include property in slaves⁵⁶ and elevated it into a new constitutional right that au-

United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Id. at art. IV, § 3, cls. 1, 2 (emphasis added). Moreover, Article IV, Section 4 stipulates affirmative duties directing the government of the United States to guarantee to each state a republican form of government and to protect them from invasion and from foreign violence: "*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*" *Id.* at art. IV, § 4 (emphasis added).

56. The common law recognized the right of the owner of chattels that strayed or were taken away to recapture them through self-help, provided it could be done without a breach of the peace. 3 William Blackstone, *Commentaries on the Laws of England* *4 [hereinafter Blackstone, *Commentaries*]. In the eighteenth century, this proprietary right also authorized masters to recapture fugitive servants, fathers to recapture runaway children, and husbands to recapture absconding wives. *Id.* This right encompassed an extrajudicial remedy, as Sir William Blackstone explained in his *Commentaries*:

This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. . . . If therefore he can so contrive it as to gain possession of his property again without force or terror, the law favors and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; . . . it is provided that *this natural right of recaption* shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society.

Id. at *4-5 (emphasis added).

The common law, however, did not recognize a slave owner's right to recapture a fugitive slave. The apparent reason is that the property right to slaves was unlike the right to other kinds of property. It did not exist by natural law, by customary law, or by common law. This was Lord Mansfield's holding in *Somerset v. Stewart*, 98 Eng. Rep. (1 Lofft) 499, 510 (K.B. 1772). Jurisdictions in the United States affirmed this principle as authoritative precedent. *See, e.g., Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 196-201 (1836) (citing *Somerset* as "high authority"). Slavery existed only by positive law. The slave owners' property right in their slaves, including the right of recapture, was thus created by and existed only under state statutory law. Under the Articles of Confederation, then, the recapture of fugitive slaves who escaped from the state in which they owed labor or service to another state was a matter of comity among the states. William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848*, at 78 (1977). The state to which a slave fled was free to emancipate her or to return her, as it saw fit. *Jones v. Vanzandt*, 13 F. Cas. 1040, 1042 (C.C.D. Ohio 1843) (No. 7,501); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229 (1847); *see also* Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861*, at 15-16 (1974) (discussing states' sovereignty in handling the recovery of runaway slaves).

As Northern states abolished slavery while Southern states retained it, two conflicting legal systems emerged in the United States. This troubled slaveholders. The legal effect of any state's law did not go beyond its territorial jurisdiction. A state that did

thorized slaveholders to pursue and recover their slave property even when their slaves escaped to a state that did not recognize slavery.⁵⁷ The significance of the Fugitive Slave Clause is that it conferred on slave owners a new constitutional property right enforceable under the authority of the national government, independent of the states, and it prohibited the states from interfering with this right.⁵⁸

In 1793, Congress exercised plenary power in enacting the Fugitive Slave Act to enforce this constitutional right. In addition to prescrib-

not recognize slavery was under no obligation to give effect to the master's right in his slave, should either or both come within the state's jurisdiction. Nor were non-slaveholding states under any legal obligation to return runaway slaves to their owners in another state.

57. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 613-15 (1842) (recognizing a constitutional right to recovery of slave property); *Glen v. Hodges*, 9 Johns. 67, 69-70 (N.Y. Sup. Ct. 1812) (granting plaintiff a new trial in action for trespass, stating that when his slave escaped to Vermont, the Constitution "entitled [plaintiff] to reclaim him in the state to which he fled," without interference by the defendant); *Wright v. Deacon*, 5 Serg. & Rawle 62, 63 (Pa. 1819) (quashing a writ *de homine replegiando* which would release a fugitive slave from prison, stating that issuance of such a writ would violate the U.S. Constitution); *Kauffman v. Oliver*, 10 Pa. (10 Barr) 514, 517 (1849) (holding that actions under the Fugitive Slave Act of 1793 may be brought only in federal court, where it is not met with "local legislation, or municipal peculiarities"); *Sims's Case*, 61 Mass. (7 Cush.) 285, 296-310 (1851) (denying writ of *habeas corpus* to fugitive slave who had escaped to Boston, concluding that "the question [of the 1793 Act's constitutionality] . . . is settled by a course of legal decisions which we are bound to respect, and which we regard as binding and conclusive upon this court"); *Driskill v. Parrish*, 7 F. Cas. 1100, 1101 (C.C.D. Ohio 1845) (No. 4,089) ("Neither the laws of nations nor the common law authorise the master to recapture his slave beyond the jurisdiction in which slavery is sanctioned. The constitution and the act of congress give the remedy in this case."); *Giltner v. Gorham*, 10 F. Cas. 424, 425 (C.C.D. Mich. 1848) (No. 5,453) (stating that "the owner of a slave has a right to reclaim him in a state where slavery does not exist" and recognizing that right as constitutional); *Ray v. Donnell*, 20 F. Cas. 325, 326 (C.C.D. Ind. 1849) (No. 11,590) (recognizing that "[a]n action against one or more persons, for harboring or secreting fugitives from labor" is based on the Constitution of the United States); *Oliver v. Kauffman*, 18 F. Cas. 657, 659, 661 (C.C.E.D. Pa. 1850) (No. 10,497) (charging jury and stating that "the people of these United States," who have "united under a common government, have bound themselves, by the great charter of their Union, to deliver up slaves escaping from one state into another," even where such slaves have escaped to a state whose citizens are "opposed to the institutions of slavery, and have abolished it within their borders"); *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1015, 1016 (D.C.D. Mass. 1851) (No. 18,263) (finding a conspiracy to prevent the execution of the fugitive slave law to be a treasonable conspiracy); *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9,583) ("The citizen of a slave state has a right, under the constitution and laws of the Union, to have the fugitive slave 'delivered up on claim being made,' and no state can defeat or obstruct this constitutional right.").

58. During the ratification of the Constitution, James Madison acknowledged this when he explained that the Fugitive Slave Clause "secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws." 3 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 453 (2d ed. 1836-45), quoted in *Morris, supra* note 56, at 19. The Fugitive Slave Clause, he concluded, "was expressly inserted, to enable owners of slaves to reclaim them." *Id.*, quoted in *Morris, supra* note 56, at 19.

ing a summary process for the rendition of fugitive slaves,⁵⁹ this statute is extraordinary for the two civil remedies it conferred on slaveholders against anyone who knowingly interfered with the owners' recapture of a fugitive slave or assisted in her escape. The first was a civil "penalty" of five hundred dollars recoverable by the owner in an action of debt.⁶⁰ Even more remarkable was the second remedy: a tort action for damages.⁶¹ Thus, this federal statute, enacted by many of the United States Constitution's Framers and Ratifiers, in consultation with President Washington and Attorney General Randolph, just four years after the ratification of the Constitution, provided civil process to enable private parties to enforce their constitutionally secured property right through private causes of action! This presents important evidence not only of the Founders' conception of constitutional rights, but of their understanding of the scope of congressional powers to enforce them. Moreover, the 1793 statute is a significant example of constitution making by the executive and legislative branches of the government, for it constituted the exercise of a federal police power that overrode the police powers of the states.

Slave owners and their agents brought many lawsuits under the Fugitive Slave Act in federal and state courts, and they succeeded in recovering the civil fine and tort damages more often than they failed.⁶²

59. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-05.

60. *Id.* § 4, 1 Stat. at 305; *see also* Stearns v. United States, 22 F. Cas. 1188, 1192 (C.C.n.p. n.d.) (No. 13,341) (holding that private actions for penalties are civil actions).

61. Act of Feb. 12, 1793, ch. 7, § 4, 1 Stat. at 305.

62. *Compare* Glen v. Hodges, 9 Johns. 67, 70 (N.Y. Sup. Ct. 1812) (affirming action for trespass *vi et armis* by slave owner under Fugitive Slave Act of 1793 and ordering new trial); Jones v. Vanzandt, 13 F. Cas. 1040, 1046 (C.C.D. Ohio 1843) (No. 7,501) (returning verdict for plaintiff of \$1,200), *aff'd*, 13 F. Cas. 1054 (C.C.D. Ohio 1849) (No. 7,503); Giltner v. Gorham, 10 F. Cas. 424, 427, 433 (C.C.D. Mich. 1848) (No. 5,453) (returning verdict for plaintiff and awarding judgment for \$2,752); Ray v. Donnell, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590) (returning verdict for plaintiff and awarding judgment for \$1,500); Driskill v. Parrish, 7 F. Cas. 1100, 1104 (C.C.D. Ohio 1845) (No. 4,089) (jury could not agree), *retried*, 7 F. Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4,088) (returning verdict for plaintiff and awarding judgment for \$500, the proved value of the slaves in question); Dreskill v. Parish, 7 F. Cas. 1068, 1068-69 (C.C.D. Ohio 1851) (No. 4,075) (awarding plaintiff per diem costs and travel expenses for witnesses who were summoned); Dreskill v. Parish, 7 F. Cas. 1069, 1069 (C.C.D. Ohio 1851) (No. 4,076) (same); Oliver v. Kauffman, 18 F. Cas. 657, 664 (C.C.E.D. Pa. 1850) (No. 10,497) (considering action on the case for harboring and concealing fugitive slaves; jury disagreed), *retried*, Oliver v. Weakley, 18 F. Cas. 678, 679 (3d Cir. 1853) (No. 10,502) (returning verdict for plaintiff and awarding judgment for \$2,800); *and* Dags v. Frazer, 6 F. Cas. 1112, 1113-14 (D.C.D. Iowa 1849) (No. 3,538) (holding that action in trover will not lie in Iowa to recover the value of slaves, but permitting plaintiff to amend his declaration and continue the cause at his own expense) *with* Worthington v. Preston, 30 F. Cas. 645, 646-47 (C.C.E.D. Pa. 1824) (No. 18,055) (charging jury that jailor could not be held liable for fugitive slave's escape if he was not negligent) *and* Kauffman v. Oliver, 10 Pa. (10 Barr) 514, 518-19 (1849) (holding that an action at common law does not lie for harboring runaway slaves or

Moreover, antebellum judges enforced the Fugitive Slave Clause and the Fugitive Slave Act of 1793, notwithstanding their personal abhorrence of slavery.⁶³ Federal and state appellate judges generally asserted that the constitutional recognition of the slaveholder's right of recapture inherently delegated legislative power to Congress to enforce the right. When they did not assert it, they simply assumed that the Fugitive Slave Clause secured the slaveholder's property right, and that this recognition inherently delegated to Congress the power to enforce the right. Through the first half of the nineteenth century, every court that decided the question of the 1793 Fugitive Slave Act's constitutionality upheld it.⁶⁴ State and federal judges were consist-

for aiding in their escape, and that state courts do not have jurisdiction under the 1793 Act to try such cases).

63. See, e.g., *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11, 19 (1823) (considering the constitutionality of the Fugitive Slave Act of 1793, stating that "[i]t is difficult . . . for persons who are not inhabitants of slaveholding States, to prevent prejudice from having too strong an effect on their minds," but nevertheless concluding, "We do not perceive that the statute is unconstitutional"); *Wright v. Deacon*, 5 Serg. & Rawle 62, 63 (Pa. 1819) (holding that the Constitution supports the right of a master to control his slave); *Johnson v. Tompkins*, 13 F. Cas. 840, 843 (C.C.E.D. Pa. 1833) (No. 7,416) (charging jury, stating that "[i]t is not permitted to you or to us to indulge our feelings of abstract right on these subjects; the law of the land recognises the right of one man to hold another in bondage, and that right must be protected"); *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1015, 1016 (D.C.D. Mass. 1851) (No. 18,263) (stating that the conclusion that fugitive slave laws are to be disobeyed does not follow from the prevailing moral conviction against the institution of slavery).

64. Justice McLean asserted in 1853:

The act of 1793 has been in operation about sixty years. During that whole time it has been executed as occasion required, and it is not known that any court, judge, or other officer has held the act, in [a summary process to determine the right to remove an alleged fugitive slave], or in any other respect, unconstitutional.

Miller v. McQuerry, 17 F. Cas. 335, 340 (C.C.D. Ohio 1853) (No. 9,583). For a contrary view, see Finkelman, *Story Telling*, *supra* note 54, at 269-73. Finkelman asserts that two courts, one in New York and one in New Jersey, held that the Fugitive Slave Act was unconstitutional on the ground that the Fugitive Slave Clause is not among the enumerated powers of Congress and therefore did not delegate legislative power to Congress to enforce it. *Id.* at 271-72. It appears that Finkelman misread the cases on which he relies. In neither case did the legal issue involve the constitutionality of the Fugitive Slave Act of 1793, nor did the courts decide the constitutionality of this statute. The opinions on which Finkelman relies were the personal views of two judges expressed in dicta. Both judges acknowledged that they were not deciding the question of the 1793 Act's constitutionality. One judge is Chancellor Reuben H. Walworth. He expressed his personal view that the Fugitive Slave Act of 1793 was unconstitutional while acknowledging that the issue was not before his court. See *Jack v. Martin*, 14 Wend. 507, 524-30 (N.Y. 1835). Indeed, he joined the decision of the New York Court for the Correction of Errors, the predecessor of the New York Court of Appeals, in affirming the New York Supreme Court's decision in *Jack v. Martin*, 12 Wend. 311 (N.Y. Sup. Ct. 1834), which upheld the constitutionality of the Fugitive Slave Act of 1793 and a master's right to remove an alleged fugitive slave from New York City to New Orleans. *Id.* at 325-27. The Court of Errors upheld the Supreme Court's decision, but made the following qualification:

The judgment of the Supreme Court was affirmed, but it was affirmed solely on the ground that the plaintiff having by his pleas admitted that he was the

ently deferential to Congress, not only in recognizing its power to enforce the Fugitive Slave Clause, but in refusing to pass upon the justice, fairness, and policy considerations of the legislation as well.⁶⁵

slave of the defendant and had escaped from her service; that, therefore, the defendant was entitled to judgment; *the court expressly declining to pass upon the constitutionality of the law of Congress and of the Statute of this State.*

Jack v. Martin, 14 Wend. at 507 n.(a) (emphasis added).

The other judge Professor Finkelman referred to is Chief Justice Joseph G. Hornblower of the New Jersey Supreme Court. The case in which the New Jersey Chief Justice expressed his views involved a petition for habeas corpus on behalf of an alleged fugitive slave who had been seized under a New Jersey fugitive slave statute. The habeas claim alleged that the seizure and detention of the petitioner were not done in compliance with the New Jersey statute and that he should therefore be released. The legal process provided in the state statute was virtually identical to the summary process provided for in the Fugitive Slave Act of 1793. Chief Justice Hornblower asserted that both statutes were probably unconstitutional. He nonetheless acknowledged:

[I]t is not my intention to express any definitive opinion on the validity of the act of Congress, nor is it necessary to do so in this case, as the proceeding in question has not been in conformity with the provisions of that act, but in pursuance of the law of this state.

State v. Sheriff of Burlington 5 (N.J. Super. Ct. 1836), *reprinted in* 1 Fugitive Slaves and American Courts: The Pamphlet Literature 97, 101 (Paul Finkelman ed., Series No. 2, 1988). Apparently Chief Justice Hornblower's opinion was not officially reported. It was printed in a newspaper and appears to have been reprinted in a pamphlet in 1851.

Robert Cover curiously, and in my opinion erroneously, asserted that, during the first half-century following the enactment of the Fugitive Slave Act of 1793, "[s]ome case law had developed, largely unfavorable [to the fugitive slaves and the antislavery cause], though not conclusive." Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 163 (1975). He referred to three cases that upheld the statute, *In re Susan*, 23 F. Cas. 444 (C.C.D. Ind. 1818) (No. 13,632); *Wright v. Deacon*, 5 Serg. & Rawle 62 (Pa. 1819); and *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11 (1823). Cover then made the following observation: "In 1834 and 1835 New York judges split as to the proper scope of congressional power to implement rendition." Cover, *supra*, at 163. This comment is puzzling because, as explained above, Chancellor Walworth's views in *Jack v. Martin* were pure dicta. See *supra*. Professor Cover presented no other evidence to show that the case law relating to fugitive slaves and the Fugitive Slave Act of 1793 was inconclusive.

65. See, e.g., *Glen v. Hodges*, 9 Johns. 67, 69-70 (N.Y. Sup. Ct. 1812) (granting plaintiff's motion for a new trial in action for trespass and stating that the Fugitive Slave Act of 1793 "prescribes the mode of reclaiming . . . [a fugitive] slave"); *Wright v. Deacon*, 5 Serg. & Rawle 62, 63-64 (Pa. 1819) (holding that the Constitution and the 1793 Act specifically permit a master to recover his fugitive slave, "whatever our private opinions on the subject of slavery"); *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11, 19 (1823) (stating that the Constitution reflects a compromise between the slaveholding and nonslaveholding states, and concluding that, despite those "whose feelings [are] abhorrent to slavery," the 1793 Act, promulgated in accordance with the constitution, is not unconstitutional); *Jack v. Martin*, 12 Wend. 311, 321 (N.Y. Sup. Ct. 1834) ("I am . . . satisfied . . . that a fair interpretation of the terms [of the Fugitive Slave Clause] . . . not only prohibits the states from legislation upon the question involving the owner's right to this species of labor, but that it is intended to give to congress the power to provide the delivering up of the slave."), *aff'd on other grounds*, 14 Wend. 507 (N.Y. 1835); *In re Susan*, 23 F. Cas. 444, 444-45 (C.C.D. Ind. 1818) (No. 13,632) (denying motion to dismiss a warrant for the arrest and removal of a fugitive

Affirming the decisions and theories of the lower federal and state appellate courts, the United States Supreme Court upheld the statute's constitutionality in an 1843 decision that again conceived of the Constitution as a dynamically-evolving, power-enhancing framework of government whose meaning would largely be defined by political practice.⁶⁶ Justice Joseph Story wrote the opinion for the Court.⁶⁷ He began his analysis with a theory of judicial review that defined the judicial function as enforcing the legislative exercise of constitutional power: The judge should look to the nature and object of particular constitutional provisions and interpret them to "secure and attain the ends proposed."⁶⁸ Judges should therefore interpret the Constitution "in such a manner as, consistently with the words, shall fully and completely effectuate the whole objects of it."⁶⁹ As a general rule of interpretation, Story opined, "No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."⁷⁰ The Court's deference to the lawmaking decisions of the people's representatives was the judicial norm, whether the decisions were made by a constituent assembly or a legislative assembly.

Applying this approach to constitutional interpretation, Story analyzed the Fugitive Slave Clause as containing two constitutional guar-

slave, stating that "it is a privilege secured to the people of the states . . . to seek redress before the tribunals, in the mode designated by Congress"; *Johnson v. Tompkins*, 13 F. Cas. 840, 851 (C.C.E.D. Pa. 1833) (No. 7,416) (recognizing that the Fugitive Slave Act of 1793 bestows "an unqualified right [on] the master to seize, secure and remove his fugitive slave"); *In re Martin*, 16 F. Cas. 881, 883-84 (C.C.S.D.N.Y. n.d.) (No. 9,154) ("[W]hatever our private opinions on the subject of slavery may be, we are bound in good faith to carry into execution the constitutional provisions in relation to it; . . . We are, accordingly, of opinion that the act of congress . . . is a valid and constitutional law . . ."). The United States Supreme Court upheld Congress's legislative authority to enforce the Fugitive Slave Clause in the first constitutional challenge to the 1793 Act it decided. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625-26 (1842). Justice Story acknowledged that state courts had universally upheld the Fugitive Slave Act of 1793. *Id.* at 621.

66. *Prigg*, 41 U.S. (16 Pet.) at 618-19, 625-26.

67. As this discussion will demonstrate, I disagree with Professor Levinson's assertions that the Court in *Prigg* affirmed the slaveholder's Article IV right with "notorious embarrassments," and that "the Court . . . just punt[ed] on this and [said], 'We are not going to explain exactly why it is constitutional but it just has to be the case.'" Remarks, *Fidelity Through History: Colloquy*, *supra* note 46, at 1697. The Court exhaustively examined the Fugitive Slave Clause, the rights it guaranteed, and the powers it conferred on the national government and on individuals to enforce it, as well as the limitations it imposed on the states' police powers. Moreover, Justice Story's opinion had been preceded by many lower federal court and state appellate court opinions with similar analyses of slaveholders' Article IV right.

68. *Prigg*, 41 U.S. (16 Pet.) at 610-11.

69. *Id.* at 612.

70. *Id.*

antees. The first prohibited the states from freeing fugitive slaves.⁷¹ Significantly, Story interpreted this prohibition against state action as an affirmative recognition of "a positive and unqualified" right.⁷² Thus, the Court unanimously held that the Fugitive Slave Clause nationalized the slave owner's right to his slave, for it "puts the right to the service or labour upon the same ground and to the same extent in every other state as in the state from which the slave escaped, and in which he was held to the service or labour. If this be so," Story reasoned, "then all the incidents to that right attach also."⁷³ Story concluded that this common law property right had been elevated to a federally enforceable constitutional right.⁷⁴

The Fugitive Slave Clause contains a second provision which required that the fugitive slave "shall be delivered up on Claim of the Party to whom such Service or Labour may be due."⁷⁵ Story interpreted these two provisions as a constitutional guarantee of the slave owners' property right which delegated to Congress plenary power to enforce it. Story declared: "If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted,) the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."⁷⁶ Story reaffirmed *McCulloch's* principle of constitutional delegation of power inherent in the sovereign nature of the national government and implied from the purposes, ends, and

71. The first part of the Fugitive Slave Clause states: "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." U.S. Const. art. IV, § 2, cl. 3. Story explained the obvious and literal meaning of this language: "The slave is not to be discharged from service or labor, in consequence of any state law or regulation." *Prigg*, 41 U.S. (16 Pet.) at 612.

72. *Prigg*, 41 U.S. (16 Pet.) at 613. "The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain," Story declared. *Id.* at 612. Story identified the common law origin of this constitutionally secured right of slave recapture with the following observation:

[T]his is no more than a mere affirmance of the principles of the common law applicable to this very subject. Mr. Justice Blackstone (3 Bl. Comm. 4) lays it down as unquestionable doctrine. 'Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.'

Id. at 613 (quoting 3 Blackstone, Commentaries, *supra* note 56, at *4).

73. *Id.*

74. "Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence." *Id.*

75. U.S. Const. art. IV, § 2, cl. 3.

76. *Prigg*, 41 U.S. (16 Pet.) at 615.

objectives for which it was established. In this case, Congress's plenary power to enforce the slaveholders' property rights of recapture was implied from the constitutional recognition of this right in the Fugitive Slave Clause. Story stated: "The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."⁷⁷

Story supported his interpretation of the Constitution by attributing it to the Founders. But even "independent of [the Founders and] the vast influence [that] . . . a contemporaneous exposition of the provisions [of the Constitution] by those, who were its immediate framers, or intimately connected with its adoption" should have in constitutional interpretation,⁷⁸ Story, like Chief Justice Marshall, Justice Johnson, and other federal and state appellate judges, assumed political practice defined the Constitution. Indeed, Story cited Supreme Court precedents in support of this method of constitutional interpretation.⁷⁹ He noted that Congress had acted on a "rule of interpretation" which assumed the Constitution delegated "the right as well as the duty" on Congress to legislate on the subject of fugitive slaves.⁸⁰ He thus relied on the political practice of the Framers of the 1793 statute, of state and federal judges, and of other governmental officers who universally accepted and acted upon the statute and considered it "a binding and valid law."⁸¹ Finally, Story asserted a structural theory that attributed to Congress plenary power to enforce constitutional rights and duties: The Constitution required the national government "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."⁸² Story quoted Madison's *Federalist* No. 43 as

77. *Id.*

78. *Id.* at 621.

79. *Id.* (citing *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)). Story declared: "Especially did this Court, in [these cases] rely upon contemporaneous expositions of the Constitution, and long acquiescence in it, with great confidence, in the discussion of questions of a highly interesting and important nature." *Id.*

80. *Id.* at 620.

81. *Id.* at 621.

82. *Id.* at 616. The full statement is as follows:

The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. 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 de-

authority for the proposition that a right recognized in the Constitution implies a delegation of power to the national government to secure and enforce it.⁸³ The power of the states to ignore the slave owner's constitutional right of recapture was an additional reason for the necessity, as well as the constitutionality, of congressional legislation to enforce the right.⁸⁴ A majority of the Court held that Congress could enforce such rights and duties only through federal agencies.⁸⁵

This ruling, and growing Northern resistance to the enforcement of the 1793 Act, led to Southern demands for a more effective federal statute. Congress complied by enacting the Fugitive Slave Act of 1850.⁸⁶ The 1850 statute represented an even more remarkable exercise of national authority to enforce constitutional rights than its earlier counterpart. Congress established an enforcement mechanism analogous to an administrative agency by authorizing the appointment of United States commissioners to enforce its provisions.⁸⁷

Moreover, the 1850 statute imposed upon federal legal officers the duty to enforce its provisions under penalty of heavy fines of \$1,000 payable to the slave owner.⁸⁸ Should the fugitive slave escape while in the custody of federal officials, such officials were held liable for the full value of the slave.⁸⁹ The statute also imposed on private citizens the duty to enforce the slaveholder's constitutional and statutory

partments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution.

Id. at 615-16.

83. "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." *Id.* at 616.

84. *See id.* at 620-21.

85. *Id.* at 625-26. Three of Story's judicial brethren, while concurring in the judgment, disagreed with the majority's statements that the jurisdiction Congress conferred on state judges to enforce the 1793 statute was unconstitutional and that Congress's power to enforce the Fugitive Slave Clause was exclusive and could be exercised only through federal agencies. *Id.* at 627 (Taney, C.J., concurring); *id.* at 635 (Thompson, J., concurring); *id.* at 650 (Daniel, J., concurring).

86. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

87. It authorized federal judges to appoint commissioners with "the powers that any justice of the peace, or other magistrate of any of the United States" had to arrest, imprison, or bail offenders of any crime against the United States. *Id.* § 1, 9 Stat. at 462. Moreover, it granted concurrent jurisdiction among federal circuit, district, and territorial court judges to grant certificates of removal to claimants of fugitive slaves "upon satisfactory proof being made." *Id.* § 4, 9 Stat. at 462. A scholar early in this century correctly analogized this federal enforcement structure to federal administrative commissions, such as the Interstate Commerce Commission and boards of immigrant inspectors. Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 *Yale L.J.* 161, 181-82 (1921); *see also* Morris, *supra* note 56, at 132 ("The primary purpose of the bill was to increase the number of officials involved in adjudicating claims under the federal law by spreading the responsibility to nonjudicial officers, such as postmasters and collectors of customs.").

88. Act of Sept. 18, 1850, ch. 60, §§ 1, 5, 9 Stat. at 462.

89. *Id.* § 5, 9 Stat. at 462.

rights. It authorized commissioners to call a *posse comitatus* and "commanded" "all good citizens" to assist in the execution of the statute whenever their aid was required.⁹⁰

The 1850 statute combined the right of self-help recapture with compulsory federal summary legal process.⁹¹ By its terms, the statute prohibited the alleged fugitive slave from entering evidence on her behalf and provided that the certificate of removal was conclusive of the right of the claimant or his agent to remove the fugitive to the state from which she escaped. The 1850 statute expressly invoked the Supremacy Clause⁹² and made the certificate an absolute bar to "any process issued by any court, judge, magistrate, or other person whomsoever."⁹³

The Fugitive Slave Act of 1850 supplemented the civil penalty provided for in the Fugitive Slave Act of 1793 by imposing criminal penalties for knowingly and willingly violating the statute. On conviction, the defendant was subject to a fine of up to \$1,000 and imprisonment for up to six months.⁹⁴ This provision doubled the amount of the civil penalty recoverable under the 1793 Fugitive Slave Act. Violators were also subject to "civil damages" in the amount of \$1,000 for each fugitive slave lost, payable to the owner in an action of debt.⁹⁵ The statutory "civil damages" of \$1,000 in the 1850 Fugitive Slave Act benefitted slaveholders because it was greater than the damages awarded in tort actions under the 1793 Fugitive Slave Act.⁹⁶ The

90. *Id.* § 5, 9 Stat. at 463.

91. *Id.* § 6, 9 Stat. at 463. The statute authorized slave owners and their agents to reclaim runaway slaves either by warrant issued by a federal judge or commissioner or by seizing the fugitive without legal process and bringing her before a federal judge or commissioner "whose duty it shall be to hear and determine the case of such claimant in a summary manner; and on satisfactory proof being made," to issue a certificate authorizing the claimant or his agent to remove the slave back to the state in which she owed service with "such reasonable force and restraint as may be necessary." *Id.*

92. U.S. Const. art. VI, cl. 2.

93. Act of Sept. 18, 1850, ch. 60, § 6, 9 Stat. at 464. The only concessions to state powers that Congress included in the 1850 statute was a provision permitting "satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped," accompanied by a certificate of the authority of the officer and the seal of the proper state court or officer, to serve as conclusive evidence of the identity and service owed by the alleged fugitive. *Id.* § 6, 9 Stat. at 463. The last section of the statute described the state process permitted as conclusive evidence of escape and the service owed to the claimant as "satisfactory proof" recorded in a court transcript authenticated by the clerk and court seal. The claimant or his agent could present this record to a federal officer in any state or territory in which the slave had escaped, and, being conclusive evidence, the federal officer was obliged to issue the certificate of removal. *Id.* § 10, 9 Stat. at 465.

94. *Id.* § 7, 9 Stat. at 464.

95. *Id.*

96. *See, e.g.,* Jones v. Vanzandt, 13 F. Cas. 1040, 1045 (C.C.D. Ohio 1843) (No. 7,501) (fixing value of escaped slave at \$600); Driskell v. Parish, 7 F. Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4,088) (fixing value of two escaped slaves at \$500); Giltner v.

courts interpreted these civil damages as a tort remedy that claimants might seek as an alternative to the tort action provided in the 1793 Fugitive Slave Act.⁹⁷

The fee structure provided in the 1850 Act also appeared to favor slave owners. The fees of federal marshals, deputy marshals, and court clerks in fugitive slave cases were set at \$10 if a certificate of removal was issued and only \$5 if the certificate was denied.⁹⁸ The federal officer who executed process, however, was entitled to a fee of \$5 and reimbursement for any other necessary costs incurred, such as food and lodging, during the fugitive slave's detention, which were to be paid by the claimant.⁹⁹ Should the return of fugitive slaves be met with local resistance in a free state, Congress provided for the removal of the fugitive by federal force at federal expense.¹⁰⁰

By the 1850s, Northern resistance to federal enforcement of slaveholders' rights reached crisis proportions. Northern states exercised their police powers to protect the civil liberties of Black Americans accused of being runaway slaves. Wisconsin presented the most notorious example of state interposition, for the state's executive, legislative, and judicial branches joined its citizens in strenuous efforts to nullify federal law.¹⁰¹ Indeed, the Wisconsin Supreme Court rejected precedents of the United States Supreme Court and lower federal

Gorham, 10 F. Cas. 424, 427 (C.C.D. Mich. 1848) (No. 5,453) (fixing value of six escaped slaves at \$2,752); Ray v. Donnell, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590) (awarding damages of \$1,500 for one adult woman slave and her four children); Oliver v. Weakley, 18 F. Cas. 678, 679 (3d Cir. 1853) (No. 10,502) (awarding damages of \$2,800 for twelve escaped slaves—two husbands, two wives and eight children—on retrial after jury split 10 to 2 for plaintiff in Oliver v. Kauffman, 18 F. Cas. 657, 664 (C.C.E.D. Pa. 1850) (No. 10,497)).

97. See *Norris v. Crocker*, 54 U.S. (13 How.) 429, 439-40 (1851). In *Oliver v. Kauffman*, Justice Grier held that the 1850 Fugitive Slave Act did not repeal the tort action of compensatory damages provided for under the 1793 Fugitive Slave Act. Indeed, he declared:

In case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort.

18 F. Cas. 657, 660 (C.C.E.D. Pa. 1850) (No. 10,497).

98. Act of Sept. 18, 1850, ch. 60, § 8, 9 Stat. at 464.

99. *Id.*

100. *Id.* § 9, 9 Stat. at 465. On mere affidavit by the claimant or his agent that he had reason to believe that a rescue would be attempted by force before he could return the fugitive to the state from which she had fled, the federal officer who made the initial arrest was required to retain as many persons as necessary to overcome such force and to return the fugitive to the claimant in the state from which the fugitive slave escaped. The fees and costs of this process were to be paid out of the United States Treasury. *Id.*

101. See 5 Carl B. Swisher, *History of the Supreme Court of the United States: The Taney Period 1836-64*, at 654-56 (1974); Vroman Mason, *The Fugitive Slave Law in Wisconsin, with Reference to Nullification Sentiment*, 43 Proc. St. Hist. Soc'y Wis. 117-19 (1896).

courts¹⁰² and declared the Fugitive Slave Act of 1850 unconstitutional, issued a writ of habeas corpus directing the federal marshal to release defendants arrested under the statute for leading a mob that stormed the jail and freed the alleged fugitive slave, and refused to recognize the Supreme Court's appellate jurisdiction over its decisions.¹⁰³ The United States Supreme Court vehemently asserted its appellate jurisdiction¹⁰⁴ and affirmed the constitutionality of the Fugitive Slave Act of 1850 in an opinion written by Chief Justice Roger B. Taney in 1858.¹⁰⁵ Chief Justice Taney grounded the Court's appellate jurisdiction on section 25 of the Judiciary Act of 1789,¹⁰⁶ the sovereign nature of Congress's legislative powers, and the theory of constitutional interpretation derived from political practice.¹⁰⁷ He cryptically affirmed the constitutionality of the Fugitive Slave Act of 1850, "in all of its provisions,"¹⁰⁸ in an unequivocal rejection of Wisconsin's attempted interposition and nullification of federal law. The Wisconsin Supreme Court subsequently failed to decide whether to concede to the Supreme Court's appellate jurisdiction.¹⁰⁹

IV. THE RECONSTRUCTION AMENDMENTS AND FEDERAL STATUTORY CIVIL RIGHTS GUARANTEES

The Civil War interrupted the states' efforts to protect the personal liberties of alleged runaway slaves in the face of federal efforts to enforce the constitutional and statutory rights of slave owners. The constitutional crisis relating to individual liberty reemerged after the Civil

102. The United States Supreme Court analyzed the Fugitive Slave Act of 1850 in *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851). It did not formally decide its constitutionality, however, because that question was not before it. Its discussion assumed its constitutionality. *See id.* at 437. For decisions of lower federal courts analyzing the Fugitive Slave Act of 1850, see, for example, *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9,583); *United States v. Scott*, 27 F. Cas. 990 (D.C.D. Mass. 1851) (No. 16,240b); and *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261). U.S. District Court Judge Andrew G. Miller upheld the slave owner's right under the 1850 statute to seize his fugitive slave, with or without a warrant, and issued a writ of habeas corpus directed to the sheriff who held the slave owner on charges of kidnapping and assault and battery for exercising his federal right of recapture. *United States ex rel. Garland v. Morris*, 26 F. Cas. 1318, 1318-19 (D.C.D. Wis. 1854) (No. 15,811).

103. *In re Booth*, 3 Wis. 13, 20, 28-29, 52-53 (1854) (granting habeas), *aff'd*, 3 Wis. 54, 71 (1854); *Ex parte Booth*, 3 Wis. 134, 143 (1854) (denying habeas while case was within jurisdiction of another court); *In re Booth & Rycraft*, 3 Wis. 144, 161 (1855) (granting habeas).

104. *United States v. Booth*, 59 U.S. (18 How.) 477, 478 (1855).

105. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 525-26 (1858).

106. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86.

107. *Ableman*, 62 U.S. (21 How.) at 521-22.

108. *Id.* at 526.

109. The state's Chief Justice decided in favor of the Court's appellate jurisdiction, a second justice decided against it, and the third justice, having been of counsel for Sherman Booth, recused himself. *Ableman v. Booth*, 11 Wis. 517, 518 (1859).

War. The Thirteenth Amendment¹¹⁰ abolished slavery when the Thirty-Ninth Congress announced its ratification of the Amendment in December 1865. Republicans in this Congress announced their intention of making the Amendment's promise of freedom a practical reality.¹¹¹ They asserted the constitutional theories of broad delegation adopted in *McCulloch* and in *Prigg* and the other fugitive slave cases, and interpreted the Thirteenth Amendment's abolition of slavery as an affirmative guarantee of freedom and the fundamental rights of free men of which freedom consists. They also interpreted this constitutional guarantee of freedom as a delegation of plenary power to Congress to secure the status and enforce the rights of free men as the status and rights of all United States citizens.¹¹² Senator John Sherman, for example, declared that the Thirteenth Amendment's prohibition of slavery "secures to every man within the United States liberty in its broadest terms."¹¹³ The House floor manager of the Civil Rights Bill, Congressman James Wilson, expressly cited *McCulloch* and *Prigg* as authority for the framers' broad theory of constitutional delegation under the Thirteenth Amendment and declared that "[t]he possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy."¹¹⁴ Because of Section 2, however, the Thirteenth Amendment was a more explicit delegation of legislative power than the Fugitive Slave Clause. Thus, Senator Sherman quoted Section 2 of the Thirteenth Amendment and declared: "Here is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation."¹¹⁵

110. The Thirteenth Amendment declares:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII, §§ 1, 2.

111. Cong. Globe, 39th Cong., 1st Sess. 5 (1866) (statement of Rep. Colfax).

112. Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 Am. Hist. Rev. 45, 47-49 (1987) [hereinafter Kaczorowski, *To Begin the Nation Anew*]; Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 Yale L.J. 565, 567-73, 581 (1989) [hereinafter Kaczorowski, *Enforcement Provisions*]; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 895-99 (1986) [hereinafter Kaczorowski, *Revolutionary Constitutionalism*].

113. Cong. Globe, 39th Cong., 1st Sess. 41 (1866) (statement of Sen. Sherman).

114. *Id.* at 1294 (statement of Rep. Wilson); *see also id.* at 1118 (statement of Rep. Wilson) (declaring that it is the "true office" of Government to protect civil rights); *id.* at 1836 (statement of Rep. Williams) (declaring that "[t]he national Government is the depository of the power to enforce the enjoyment of . . . fundamental rights when denied or destroyed").

115. *Id.* at 41 (statement of Sen. Sherman).

As Congress had exercised plenary power under the Fugitive Slave Clause to enforce the constitutional property right of slaveholders in 1793 and 1850, so Congress exercised plenary power under the Thirteenth Amendment to enforce the fundamental rights of free men by enacting the Civil Rights Act of 1866.¹¹⁶ Senator Lyman Trumbull, the principal author of the Civil Rights Act of 1866, made this point when he introduced the Civil Rights Bill to the Senate: "Surely we have the authority to enact a law as efficient in the interests of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country."¹¹⁷ Senator Trumbull echoed Justice Story's interpretation of the Fugitive Slave Clause's prohibition against state interference with the right of recaption as an affirmative guarantee of the right which delegated to Congress plenary power to enforce it.¹¹⁸ Trumbull asserted that the Thirteenth Amendment's prohibition of slavery was a declaration "that all persons in the United States should be free."¹¹⁹ He declared that the framers of the Civil Rights Bill "intended to give effect to that declaration and secure to all persons within the United States practical freedom," that is, to secure the rights and privileges "which are essential to freemen."¹²⁰ The purpose of this bill, Trumbull elaborated, was to secure

the liberty which a person enjoys in society, . . . the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the Amendment which has recently been adopted.¹²¹

The framers equated the status and rights of free men secured by the Thirteenth Amendment with the status and rights of citizenship. In section 1 of the Civil Rights Act, the framers conferred citizenship and certain civil rights they deemed essential to political and economic freedom and individual autonomy.¹²² Senator Trumbull insisted:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights

116. Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

117. Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull).

118. *Id.*; cf. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842) ("If, indeed, the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.").

119. Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

120. *Id.*

121. *Id.*

122. Kaczorowski, *Enforcement Provisions*, *supra* note 112, at 570.

enumerated in this bill, and they belong to them in all the States of the Union.¹²³

As the Fugitive Slave Clause and the Fugitive Slave Acts of 1793 and 1850 secured the property rights of slave owners independent of state law and state institutions, so did the Civil Rights Act of 1866 secure the civil rights of *all* American citizens.¹²⁴

Ironically, the Fugitive Slave Act of 1850 also served as a model for the remedial provision of the Civil Rights Act of 1866.¹²⁵ The Civil Rights Act of 1866 criminalized certain violations of the civil rights¹²⁶ the statute secured to citizens,¹²⁷ and it conferred primary civil and criminal jurisdiction on the federal courts to enforce these rights whenever the citizen was unable to enforce them through state law enforcement institutions.¹²⁸ The 1866 Act, like the 1850 statute, provided federal legal process and conferred on citizens causes of action to vindicate their rights through federal institutions. In addition, it provided for the judicial appointment of commissioners and imposed on them and on United States Attorneys, Marshals, and Deputy Marshals the duty, "at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act."¹²⁹ Federal attorneys and marshals who failed "to obey and execute all warrants and precepts issued under the provisions of this act" were subject to a fine of up to \$1,000 payable to "the person upon whom the accused is alleged to have committed the offence."¹³⁰ This section also authorized commissioners "to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary," to enforce this act and to ensure the "faithful observance" of the Thirteenth Amendment.¹³¹ The Act also imposed a fine of up to \$1,000 *and* imprisonment of up to six months on anyone

who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act . . . from arresting

123. Cong. Globe, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull). Section 1 of the Civil Rights Act of 1866 enumerated the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property," as rights that all United States citizens would enjoy under the statute. Civil Rights Act, ch. 31, § 1, 14 Stat. 27, 27 (1866).

124. Kaczorowski, *Enforcement Provisions*, *supra* note 112, at 570.

125. *Id.* at 588-90; Kaczorowski, *To Begin the Nation Anew*, *supra* note 112, at 59.

126. Civil Rights Act, ch. 31, § 2, 14 Stat. at 27.

127. *Id.* § 1, 14 Stat. at 27.

128. *Id.* § 3, 14 Stat. at 27.

129. *Id.* § 4, 14 Stat. at 28.

130. *Id.* § 5, 14 Stat. at 28.

131. *Id.*

any person . . . or [who] shall rescue or attempt to rescue such person from the custody of the officer, other person or persons . . . or [who] shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person . . . or [who] shall harbor or conceal any person for whose arrest a warrant or process shall have been issued¹³²

It also provided that all fees and other expenses incurred in the execution of this statute, such as food and lodging for those detained for violating the statute's provisions, were to be paid out of the United States treasury, but were made "recoverable from the defendant as part of the judgment in case of conviction."¹³³ Unlike the fugitive slave statutes, however, the framers of the Civil Rights Act of 1866 intended the states to retain concurrent jurisdiction over citizens' fundamental rights.¹³⁴

The framers of the Civil Rights Act of 1866 also drafted the Fourteenth Amendment¹³⁵ with the understanding that it incorporated into the Constitution their interpretation of the Thirteenth Amendment and the plenary power to enforce citizens' rights that they had just exercised in enacting the Civil Rights Act under the Thirteenth Amendment.¹³⁶ Indeed, many of its supporters expressly stated their intention to incorporate the 1866 Act into the Fourteenth Amendment to ensure the statute's constitutionality.¹³⁷ Like the statute, the Fourteenth Amendment confers citizenship on all Americans, but it prohibits the states from infringing the rights of United States citizens and from denying all persons due process and equal protection of the law. The Amendment prohibits the states from infringing its guarantees for several reasons. The framers wanted the Amendment to be self-enforcing to avoid the possibility that a future Congress might repeal the Civil Rights Act or refuse to enact additional legislation that might be required to secure citizens' rights more effectively.¹³⁸ Despite the Amendment's wording as prohibitions against the states, the framers understood these clauses as affirmative constitutional guaran-

132. *Id.* § 6, 14 Stat. at 28-29.

133. *Id.* § 7, 14 Stat. at 29.

134. Kaczorowski, *To Begin the Nation Anew*, *supra* note 112, at 56-57; Kaczorowski, *Enforcement Provisions*, *supra* note 112, at 572-73.

135. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

136. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 112, at 910-13.

137. *See id.* at 910-12.

138. *See* Kaczorowski, *Enforcement Provisions*, *supra* note 112, at 572-73; Kaczorowski, *To Begin the Nation Anew*, *supra* note 112, at 56-58.

tees of citizenship and the fundamental rights of citizenship which delegated plenary power to Congress to enforce them.¹³⁹ In other words, they understood the Fourteenth Amendment in the same way that the congressional drafters of the Fugitive Slave Acts of 1793 and 1850 and the state and federal judges who upheld their constitutionality interpreted the Fugitive Slave Clause. Indeed, many of the framers of the Fourteenth Amendment exercised plenary power under it and enacted more far-reaching civil rights enforcement statutes in 1870¹⁴⁰ and 1871.¹⁴¹

The lower federal courts expressed this understanding of the Thirteenth and Fourteenth Amendments in enforcing these statutes and affirming Congress's plenary power to secure citizens' rights.¹⁴² Justice Noah Swayne upheld the Civil Rights Act of 1866 shortly after its enactment.¹⁴³ Citing *Prigg v. Pennsylvania* and *McCulloch v. Maryland* among other authorities, he interpreted the Thirteenth Amendment as an affirmative guarantee of freedom which conferred the status and fundamental rights of citizenship on all Americans, rendering the Civil Rights Act merely declaratory in this regard.¹⁴⁴ United States Circuit Court Judge William B. Woods, a few years before his appointment to the United States Supreme Court, interpreted the Fourteenth Amendment as a guarantee of all the fundamental rights of citizenship, including "the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States," which delegated to Congress "the power to protect them by appropriate legislation."¹⁴⁵ With the election of Ulysses S. Grant to the Presidency in 1868, all three branches of the national government shared the same understanding of the national government's plenary power to enforce citizens' rights and united in protecting citizens' personal liberties from terrorists' violence.¹⁴⁶ The Department of Justice and the lower federal courts enforced the Reconstruction civil rights statutes so vigorously they almost destroyed the first Ku Klux Klan.¹⁴⁷

139. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 112, at 922-25; Kaczorowski, *To Begin the Nation Anew*, *supra* note 112, at 47-48.

140. Act of May 31, 1870, ch. 114, 16 Stat. 140. This statute also reenacted the first two sections of the Civil Rights Act of 1866 to secure its constitutionality under the Fourteenth Amendment, which was ratified in 1868.

141. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

142. Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*, at 1-25 (1985) [hereinafter Kaczorowski, *The Politics of Judicial Interpretation*]; Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 112, at 900-03, 935-38.

143. *United States v. Rhodes*, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151).

144. *Id.* at 791-94.

145. *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282).

146. Kaczorowski, *The Politics of Judicial Interpretation*, *supra* note 142, at 49-134.

147. *Id.* at 93-94.

In a stunning rejection of national civil rights enforcement policy, the United States Supreme Court reversed the lower federal courts, rejected Congress's plenary power to enforce citizens' fundamental rights under the Thirteenth and Fourteenth Amendments, and eliminated much of the legal authority exercised by the Department of Justice to protect citizens' fundamental rights.¹⁴⁸ Instead of fully and completely effectuating the objects of the Constitution, as Justice Story defined the judicial function and antebellum judges enforced the Fugitive Slave Clause, the Court in the 1870s and 1880s applied a textual literalism in interpreting the Thirteenth and Fourteenth Amendments. In doing so, the Court diminished their plenary guarantees of fundamental rights to the abolition of slavery and its badges and prohibitions against racially discriminatory state action.¹⁴⁹

CONCLUSION

These choices the Founders made, and their subsequent implementation, evince a conception of the Constitution as a dynamically-evolving, power-enhancing governmental structure that was to be shaped by political experience. One could argue that fidelity to the Constitution *through history* is possible with *fidelity to history* if we emulate these choices and adopt the conception of the Constitution and the theory of constitutional interpretation they reflect. This constitutional conception and interpretive theory, however, will not necessarily determine the choices that should be made in specific constitutional questions today, for the Founders' choices are ambiguous in terms of the justice they served. The Supreme Court upheld Congress's contempt powers over the contemnors' claims of separation of powers and procedural rights violations. It upheld Congress's power to charter the National Bank, an institution that served the interests of financial elites over those of the general public. It upheld Congress's plenary power to enforce a fundamental constitutional right, but it was the property right of slaveholders in human beings. It struck down Congress's plenary power to enforce fundamental human rights even though federal judges universally affirmed its power, federal attorneys uniformly acted on the belief that Congress constitutionally had conferred such power on them, and Congress in fact conferred such plenary power on federal legal officers and judges in 1866, 1870, and 1871.

148. See *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883); see also Kaczorowski, *Enforcement Provisions*, *supra* note 112, at 590-94 (arguing that the Supreme Court has misinterpreted the Civil Rights Act of 1866).

149. Contrast Justice Story's analysis of the Fugitive Slave Clause. See *supra* text accompanying notes 66-85.

This ambiguity raises questions of whether fidelity through history as a method of constitutional interpretation can always serve the ends of justice in specific cases, for justice, as well as history, is malleable. If this is true, then what principle or principles should guide us in determining when we should use history in constitutional interpretation and when we should not? What view of history should be used if the "best" history clashes with a particular view of justice? Or, should history be used only if it supports a particular view of justice? If so, on what principles does one distinguish one view of justice from another? One interpretation of history from another?