What Did the Prigg Decision Really Decide?

The "Taney Court" spoke with many voices; at times with nearly as many voices as it had judges. This penchant of the "Taney justices" for having their say has complicated the task of those who must determine what the Supreme Court decided in a given case. Historians, bent on snatching unity from diversity and precedents from dicta, often speak confidently of the majority opinion of the "Taney Court" when no majority opinion existed. Judges have often proclaimed that it is better for the law to be certain than just, but when writing of the "Taney Court" certainty can often be purchased only at the expense of ignoring or blurring the differences among the judges.

The Prigg decision is a case in point. Though seven of the nine justices filled sixty-five pages of fine print in the Supreme Court Reports with their opinions, most contemporary, and nearly all modern, students of the Court claim that Joseph Story spoke for the majority. A careful reading of these seven opinions refutes this claim.


2 Prigg v. Pennsylvania, 16 Peters 539 (1842).

While the judges unanimously concurred in the judgment, which reversed Prigg's conviction, a majority failed to agree on at least two of the principles announced by Story. As so often happens, the judgment in the Prigg case remained a thing of the moment, important only to the parties in the suit, but the principles asserted by Story lived on to arouse contemporaries and confuse historians.

The Prigg case spelled controversy, for it entangled the Supreme Court in the issues of fugitive slaves and federal-state relations. The lean clause in the Federal Constitution, which guaranteed the owner's right to recover his slave, left in doubt the roles of the federal and state governments in enforcing this right: "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 may be due." Did Congress alone have the power to legislate on this subject, or did the state legislatures retain a concurrent power? Did federal officials have the sole responsibility to execute this provision, or did state officials share this responsibility? The Constitution gave no clear answers to these questions.5

The practice of the federal and state governments before 1842, when the Prigg case arose, indicated that both assumed the right and the duty to pass laws and provide officials to carry out the fugitive slave clause of the Constitution. An act passed by Congress in 1793 permitted an owner or his agent to seize, or have arrested, his runaway slave and to bring him before a federal judge or state judge or magistrate for a hearing. It required the judge or magistrate, after receiving satisfactory proof of ownership, to issue a certificate au-

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5 Article IV, sec. 3, par. 3. The brief comments in the Constitutional Convention also fail to answer these questions, though they do refute the repeated assertions in the Prigg case that the fugitive slave provision was essential to southern acceptance of the Constitution. Max Farrand, ed., Records of the Federal Convention (New Haven, 1937), II, 443, 446, 451, 601, 621, 628.
Authorizing removal of the slave to the state or territory from which he had fled. Not the slightest hint appeared in this act that the states could not legislate on this subject; and, given the scarcity of federal judges, its enforcement depended almost exclusively on the co-operation of state officials, from the sheriff who usually arrested the fugitive to the justice of the peace who often granted the certificate of removal. Most of the states also enacted legislation aiding the return of runaway slaves; but, as one after another of the northern states moved to abolish slavery, they modified their laws to prevent the kidnapping of free Negroes under the color of recovering fugitive slaves. The constitutionality of such a law was challenged in *Prigg v. Pennsylvania*.

The facts of the case are quickly told. Edward Prigg, an agent of a Maryland slaveowner, had Margaret Morgan arrested as a fugitive slave under a warrant from a justice of the peace of York County, Pennsylvania. When this same justice of the peace refused to hold the hearing required by the federal act of 1793, Prigg, without a certificate of removal, carried Margaret, along with her children, one of whom had been born in Pennsylvania, back to Maryland. This act violated a Pennsylvania law of 1826 which forced state officials to demand more proof of ownership than that required by the federal law. It also forbade justices of the peace and aldermen from holding the hearings to determine ownership and made it a crime to carry a Negro from the state for the purpose of holding him or her as a slave without a certificate of removal from a state judge. An agreement with Maryland to test the constitutionality of the law of 1826 first brought the case to the Pennsylvania courts, which convicted Prigg, and finally, by writ of error, to the Supreme Court of the United States.

The traditional interpretation of the *Prigg* case claims that a majority of the judges, speaking through Joseph Story, decided that the states lacked the power to pass any laws on fugitive slaves, including laws to aid their recovery, and that the Constitution did not obligate state officials to assist owners in regaining their runaway

6 *I_Stat._, 302–305.
slaves. This interpretation not only ignores the differences among the judges on these two issues, it also disregards the subtleties of Story's opinion, turning insinuations into legal doctrines and *dicta* into precedents.

Story began with the premise that the fugitive slave clause of the Constitution guaranteed to the master the unqualified right to recover his slave. Any state law which qualified that right by delaying or hindering recovery violated the Constitution. Story thought the clause self-executing, requiring neither state nor federal legislation, in the sense that it authorized the master to recapture his slave wherever he found him, provided it could be done peacefully. Still, he insisted that laws were necessary to give full effect to this right, since owners could seldom retake their slaves without the assistance of public officials. Congress recognized this need by enacting the Fugitive Slave Law of 1793. Story, speaking for the Court, then pronounced this act clearly constitutional, with the possible exception of those provisions which conferred authority on state magistrates.

Up to this point Story clearly carried nearly all of his colleagues with him. He lost a majority of them only when he declared that Congress had exclusive authority on this subject. While conceding that the states retained the power to pass "police regulations" to protect their citizens from the depredations of runaway slaves by arresting and expelling them from their borders, he carefully distinguished the authority to pass such regulations from the authority to enact legislation for the recovery of fugitive slaves.

Story need not have mentioned the exclusive powers of Congress. He had sufficient grounds to decide the case without this doctrine. Since the Pennsylvania law of 1826 clearly delayed and hindered the

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10 16 Peters 612-622. For his entire opinion see ibid., 628-626. In his opinion, Story calls the recovery of a fugitive slave a judicial case arising under the judicial power conferred in the Constitution, yet in his *Commentaries* published less than ten years before the *Prigg* case he called such recoveries "summary ministeral proceedings, and not the ordinary course of judicial investigations." *Commentaries on the Constitution of the United States* (Boston, 1833), III, 677-678.

11 Only Henry Baldwin and John McLean differed with Story up to this point.

12 16 Peters 622-625
constitutional right of the master to retake his slave and since it just as clearly conflicted with the federal act of 1793, Story hardly needed additional reasons for declaring it void. His own words convict him of discussing an abstract question which was not pertinent to the case. After establishing the constitutionality of the act of 1793, he added: “The remaining question, is whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the states, until it is exercised by Congress.” No such question remained, since, as he had just noticed, Congress had already exercised this “power of legislation” in 1793.

What Story said and what he decided have been misinterpreted by historians. He merely hinted that state officials need not enforce the fugitive slave clause of the Constitution and the act of 1793. And surely the hint of a judge is something less than the decision of a Court. He did claim to speak for the Court when he declared that Congress alone could legislate on fugitive slaves, but he decided the case on much narrower grounds. He pronounced the Pennsylvania law unconstitutional, because “It purports to punish as a public offense against the State, the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold.” In other words, he ruled the act unconstitutional, not because Pennsylvania could not legislate at all on this subject, but because it punished an owner for exercising his constitutional right of recapturing his slave.

Judges are supposed to decide a case only on the facts presented in the record. Story could not have decided that the states lacked the power to pass laws that aided the recovery of fugitive slaves, for the record in this case shows that the Pennsylvania law of 1826 hindered rather than aided Prigg in recapturing Margaret Morgan. Story’s statements on the exclusive authority of Congress and the duty of state officials are classic examples of what lawyers call *obiter dicta*—statements which could not bind the Court as precedents in future cases, because they dealt with issues that were not necessary to the decision of the *Prigg* case. The *Prigg* decision decided only that all state laws were void which interfered with the right of a master to

recapture his runaway slave. This conclusion would stand even if a majority had agreed with Story’s claims. And such was not the case.

Though several of the judges referred to Story’s opinion as that of the Court, a majority of them felt that the states could legislate on fugitive slaves. Clearly, Roger Taney, Smith Thompson, and Peter Daniel were on that side of the question. They denied Story’s claim that Congress alone could legislate on the subject. All three believed that the states had concurrent authority to pass laws which enforced the fugitive slave clause of the Constitution and which did not conflict with existing federal legislation.\(^\text{16}\) Taney, Daniel, and perhaps Thompson, also felt that the Constitution imposed a positive duty on the states to enact such legislation. While admitting that Congress could not impose duties on state officials nor compel state legislatures to enact laws for the recovery of fugitive slaves, they argued that these considerations did not absolve the state legislatures and state officers from fulfilling their constitutional obligations.\(^\text{17}\) Taney and Daniel accused Story of wandering far beyond the needs of the case. Noting that the Pennsylvania law of 1826 obviously violated the constitutional right of the slave owner and conflicted with the federal act of 1793, they charged that he should not have discussed the broader questions of the authority of the states and their officers on the subject of fugitive slaves.\(^\text{18}\) The traditional interpretation of the *Prigg* case concedes the opposition of Taney, Daniel, and Thompson to Story’s *dicta*.

Given the opposition of these three judges, a majority of the justices, who wrote opinions, can be won for Story’s views only if Henry Baldwin, James Wayne, and John McLean agreed. Yet each of them differed with Story on at least one point.

Baldwin’s opinion of less than ten lines hardly puts him in Story’s camp. Baldwin concurred in the judgment reversing Prigg’s conviction only on the grounds that the Pennsylvania law denied to the owner his right to recapture his slave. He disavowed the principles used by Story to reach this conclusion.\(^\text{19}\) Only a statement by Wayne justifies the traditional interpretation of placing Baldwin with the


\(^{19}\) *Ibid.*, 636.
so-called "majority." Though Wayne admitted that Baldwin believed the fugitive slave clause was self-executing, he claimed that Baldwin felt that if legislation were necessary Congress alone could pass such laws. Those who place Baldwin on the side of exclusivity do so by the unusual expedient of disregarding what he said in his official opinion in favor of what another judge said Baldwin would have thought had his first opinion been wrong. If the usual practice is followed of taking a judge's official statement at its face value, only three justices, or one less than a majority, could have accepted Story's doctrine that the states could not legislate at all on fugitive slaves. And even the allegiance of these three judges is suspect.

Several statements by Wayne suggest that he felt that even Story's opinion did not exclude all state legislation of fugitive slaves. The Court, speaking through Story, decided, said Wayne, that "the power of legislation by Congress upon the provision is exclusive; and that no State can pass any law as a remedy upon the subject." The operative words in Wayne's comment are no "laws as a remedy." He conceded that the states could pass "ministerial acts" on fugitive slaves.

I deny all rights in the States [said Wayne] to legislate upon this subject; unless it be to aid, by mere ministerial acts, the protection of an owner's right to a fugitive slave—the prevention of all interference with it by the officers of a State, or its citizens, or an authority to its magistrates to execute the law of Congress. . . .

Wayne would have permitted the state legislatures to pass laws authorizing state officers to execute the provisions of the fugitive slave clause and the federal act of 1793. He merely denied their authority to enact remedies, an authority which he believed implied the discretion to hinder as well as to aid the recovery of runaway slaves. As a Georgian, Wayne hoped to prohibit the states from interfering with the master's right to retake his slave, while allowing state laws which merely enforced the right of recovery. Given this belief by Wayne, the judges who felt that the states could pass no laws on the subject has now been reduced to a minority of two, Story and McLean.

20 Ibid., 637.
21 Italics by author. Ibid., 637, 644.
22 Ibid., 644.
23 Ibid.
McLean wrote a lengthy and confusing opinion.\textsuperscript{24} He agreed with Story on one point, yet disagreed with Story and the rest of the justices on several points. He did concur with Story that the power of legislation on fugitive slaves belonged exclusively to Congress, though his remarks indicate a confused notion of the nature of exclusive and concurrent powers.\textsuperscript{25} But he differed from all of the judges by declaring that in the case of fugitive slaves Congress could impose duties on state officials—though it could not compel them to perform these duties.\textsuperscript{26} He also departed from his colleagues when he denied that a master or his agent could disregard state law and recapture his slave as long as he could do it peacefully.\textsuperscript{27} Finally, he was the only justice who suggested that the Pennsylvania act of 1826 might be constitutional.\textsuperscript{28}

So much for the seven judges who wrote opinions. As if the *Prigg* decision was not complicated enough, it is further confused by the silence of two justices, John Catron of Tennessee and John McKinley of Alabama. First of all, it should be noted that the traditional interpretation of the *Trigg* case does not argue that the silence of these two judges meant that they agreed with Story's opinion. Most historians simply ignore Catron and McKinley and base their conclusions on the statements of the seven judges who wrote opinions.\textsuperscript{29} Thus the reasons for their silence is left unexplained. The manuscript records of the Supreme Court lists them as present on the day of the decision and on at least two of the three days of argument. On the remaining day the record does not include the customary list of the judges present.\textsuperscript{30} Though it is impossible to prove how these two justices felt about Story's opinion, it is difficult to believe that both would have concurred in the statement that the states could not legislate even to aid the recovery of fugitive slaves. Both were southerners, and

\begin{itemize}
\item \textsuperscript{24} Ibid., 658–674.
\item \textsuperscript{25} Ibid., 661–663.
\item \textsuperscript{26} Ibid., 664–666.
\item \textsuperscript{27} Ibid., 666–669.
\item \textsuperscript{28} Ibid., 669–673.
\item \textsuperscript{30} Records of the United States Supreme Court, Appellate Case No. 2181, R.G., 267, Mss., National Archives.
\end{itemize}
both supported states rights, though Catron was more of a moderate on this question than McKinley. To interpret their silence as assent to Story’s doctrines is to ignore their backgrounds and beliefs.

Thus the log on the *Prigg* decision would have to read as follows: Story spoke for all of the judges when he ruled that the Constitution prohibited all state legislation which interfered with the master’s right to recover his fugitive slave. He spoke for all of the judges, except McLean, when he upheld the master’s right to recapture peacefully his runaway slave without regard to federal or state laws and when he pronounced the Pennsylvania act of 1826 unconstitutional. On these points alone did he speak for a majority. Only Wayne and McLean supported him in declaring that the power to legislate on fugitive slaves belonged exclusively to Congress. Taney, Thompson, and Daniel thought the states possessed at least a concurrent power; and Baldwin did not answer this question. Catron and McKinley, of course, were silent. Thus on the question of the exclusive authority of Congress the Court divided three to three, with three judges giving no opinion. And Wayne conceded that the states could pass “ministerial acts.” This meant that on the question of whether the states could legislate at all for the recovery of fugitive slaves the Court divided four to two; Wayne, Taney, Thompson, and Daniel answering yes; Story and McLean replying no. Again Baldwin, Catron, and McKinley did not answer this question.

The Court was no less divided on the question of whether state officials were obligated to aid the retaking of runaway slaves. Taney and Daniel, and perhaps Thompson, felt that the Constitution obligated the states to provide for such assistance by legislation, though they could not be forced to do so. McLean insisted that the fugitive slave clause imposed this duty directly on state officers. Once again Baldwin, Catron, and McKinley did not answer this question. At least three, and perhaps four of the six justices, who dealt with this question, believed that state officers had an obligation to assist the recovery of fugitive slaves.

The only possible way to reverse these conclusions is to assume that the silence of two southern judges, who favored states rights,

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meant that both agreed with the extreme positions taken by Story. While it is impossible to disprove their concurrence, it is difficult to believe. The log must read that a majority of the judges did not agree that the states could not legislate at all on the subject and that state officials were under no obligation to enforce the fugitive slave clause. Finally, the Court could not have decided these points even if all the judges had agreed, for these issues were incidental to the decision of the *Prigg* case. All the case really decided was that a state law which interfered in any way with the master's right to retake his runaway slave was unconstitutional. The rest of Story's opinion was mere *dictum*, not binding on the Court in future cases.

Later decisions by the Court support this conclusion. Historians have long noticed these later decisions, but have ignored their implications for the *Prigg* case. In his opinion in the *Licence* and the *Passenger* cases in 1847 and 1848, Justice Levi Woodbury, who replaced Story, called Story's doctrine of the exclusive powers of Congress over fugitive slaves *obiter dictum*. In 1847, speaking for the Court in *Jones v. Van Zandt*, Woodbury claimed that the *Prigg* decision had upheld all the provisions of the Federal Fugitive Slave Act of 1793. He ignored Story's hint that those provisions were unconstitutional which conferred authority on state officials. And in *U.S. v. Scott*, decided in the Federal District Court of Massachusetts in 1851, Judge Peleg Sprague specifically rejected the argument that the *Prigg* decision decided that those portions of the act of 1793 imposing duties on state officers were unconstitutional. He contended that all of the judges had sustained the constitutionality of this act, including those parts conferring authority on state magistrates.

The Supreme Court again returned to these questions in 1852 when it decided *Moore v. Illinois*. Five of the judges who had participated in the *Prigg* decision still sat on the bench, including McLean and Wayne, who had declared the power of Congress exclusive, and Catron, who had remained silent. Counsel in the *Moore*

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32 See Haines and Sherwood, *Supreme Court*, 130-134; Warren, *Supreme Court*, II, 429-430. Frank does see the relation of the *Moore* decision to the *Prigg* decision and explains it by saying the Court changed its position. Frank, *Daniel*, 249-250.
33 5 Howard 625; 7 Howard 554.
34 5 Howard 229-230.
35 27 *Federal Cases* 996.
case based their argument on the claim that the *Prigg* case had decided that the power of legislation was exclusive—that the states could not legislate even to assist the recovery of fugitive slaves.\(^{36}\)

Justice Robert Grier, who had replaced Baldwin, delivered the opinion for the Court. After upholding the Illinois law as a police rather than a fugitive slave regulation, he insisted that the *Prigg* decision had left open the question of whether the states could enact laws to aid the recovery of slaves.

We would not wish it to be inferred, by any implication from what we have said, that any legislation of a state to aid and assist the claimant, and which does not directly nor indirectly delay, impede or frustrate the reclamation of his other remedies, is necessarily void. This question has not been before the court, and cannot be decided in anticipation of future cases.\(^{37}\)

Grier denied that this statement clashed with the *Prigg* case by pointing out that this decision merely voided state laws that hindered the right of owners to regain their slaves.\(^{38}\)

Since Grier upheld the Illinois law as a police measure, his remarks on the *Prigg* case were merely incidental to *Moore v. Illinois*, and therefore *obiter dicta*.\(^{39}\) Still, he spoke for a Court which included five of the judges who sat in *Prigg v. Pennsylvania*. Two of these five justices had called the power exclusive and another had remained silent. None of the three disputed Grier's statement, including McLean who had an excellent opportunity since he dissented from the *Moore* decision.\(^{40}\) It seems unlikely that Wayne, McLean, and Catron would remain silent in the face of a flagrant misconstruction of what they, as part of the majority, had decided in the *Prigg* case. The only conclusion that can be drawn is that by 1852 the Supreme Court believed that the *Prigg* decision had left open the questions of whether the states could legislate and whether their officials could assist in the recovery of fugitive slaves.

But events seldom await the pleasure of judges. The press and the public usually jump to conclusions before the Court has a chance to

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\(^{36}\) 14 Howard 14-15.  
\(^{37}\) Ibid., 19.  
\(^{38}\) Ibid., 20.  
\(^{39}\) Ibid., 18.  
\(^{40}\) Ibid., 21-22.
explain the meaning of its decisions. Laymen and legislators seldom read judicial opinions—and those who do usually scan them for solutions to momentous questions without due regard for those legal darlings, details and distinctions. The \textit{Prigg} decision was no exception. Laymen from the North and the South concluded that the Supreme Court had decided that the states could not legislate even to aid the recovery of runaway slaves and that their officials were not obligated to enforce the fugitive slave clause and the federal act of 1793. After the anger subsided in the North over Story’s insistence on the unqualified right of the owner to recapture his slave, northern legislatures passed laws prohibiting their officials from assisting in any way the recovery of fugitive slaves. These laws forced southerners to turn to Congress for a new fugitive slave law which would supply sufficient federal officers to guarantee the return of runaway slaves.\footnote{Warren, \textit{Supreme Court}, II, 358–361; Hockett, \textit{Constitutional History}, II, 193–195; Swisher, \textit{Taney}, 424–425.}

The debates in Congress on the Fugitive Slave Act of 1850 suggests that most members believed that the \textit{Prigg} decision prohibited state legislation and absolved state officials of any obligation for recovering fugitive slaves.\footnote{\textit{Congressional Globe}, 31 Cong. 1 Sess., 1584, 1586–1588, 1591–1592, 1594, 1595, 1598–1599, 1602–1603, 1606, 1607, 1623, 1624.} Still, several congressmen noted that the case did not reach these questions—that it only rejected state laws which impeded recovery.\footnote{\textit{Ibid.}, 233–235, 438, 1594, 1598, 1602, 1603–1605, 1616, 1623, 1659.} Senator Andrew Butler of South Carolina even claimed he had the “authority of [Chief Justice Taney] and [Daniel Webster], and of many of the judges of the Supreme Court” that the case had only ruled those state laws void which conflicted with the constitutional right of the owner to recover his slave and with the federal law of 1793. He also correctly predicted that if these questions were again raised before the Supreme Court the “decision would be restricted to the point really \textit{sic} adjudicated.”\footnote{\textit{Ibid.}, 1598.} Despite Butler’s statement Congress passed the Fugitive Slave Law of 1850 to fill the void supposedly left by the \textit{Prigg} decision. And this law contributed to the growing animosity which eventually led to the Civil War.

Events seldom await the judgment of historians. Historians can not reverse the misunderstanding of the \textit{Prigg} decision in the 1840’s,
any more than they can reverse the tide of events which rushed North and South to the bloody fields of battle. The historical profession has long realized that what was actually true in the past is often less important than what the people of the past thought was true. Yet, a new look at the *Prigg* decision is more than a venture in antiquarianism. It should remind historians that what people in the past thought was true is not always true. It should remind us to pay at least as much attention to what a court does as to what it says. Finally, it should suggest that when a court speaks with many voices, we listen to one voice only at our peril.

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