Fugitives from Slavery and the Lost History of the Fourth Amendment*

Michael J. Zydney Mannheimer**

ABSTRACT

Conventional historical accounts of the Fourth Amendment generally ignore the entire antebellum period. Fourth Amendment scholars of an originalist bent typically look to the three decades from the American Writs of Assistance controversy and the British Wilkesite cases in the 1760s, to the adoption of the Bill of Rights in 1791. Scholarship then jumps to the post-Civil War period and the first two Supreme Court decisions interpreting the Amendment, In re Jackson in 1878 and United States v. Boyd in 1886. Ignoring the entire antebellum period makes some sense given that the Supreme Court did not decide a single Fourth Amendment case during this lengthy period.

But just because the Court did not make any Fourth Amendment law does not mean that the Amendment lay dormant. The Amendment was, in fact, very much alive in the hands of Northern lawyers and state legislators resisting the seizure of people of color in their States as alleged fugitives from slavery, whether under the auspices of the Fugitive Slave Acts of 1793 and 1850 or under the so-called common-law “right of recaption.” Lawyers representing alleged fugitives from slavery and state legislators trying to protect free persons of color from being kidnapped into slavery mobilized the Fourth Amendment as a preservation of state control of seizures within each respective State. According to this theory, while the Constitution’s Fugitive Slave Clause required that enslaved persons escaping bondage be “delivered up,” the Fourth Amendment demanded that any claim that a person was a fugitive from slavery would have to be adjudicated by the procedures established by the State where the claim was made. Seizing an allegedly enslaved person without heeding those procedures could subject the slave catcher to civil and criminal liability under state law. In the infamous case of Prigg v. Pennsylvania, the Supreme Court, rather than tackle this Fourth Amendment argument, simply ignored it and broadly rejected States’ attempts to regulate the seizure of allegedly enslaved persons within their borders. Ultimately, this view of the Fourth Amendment as a preservation of state control was forever lost.

* © 2022 Michael J. Zydney Mannheimer. It is not without some reluctance that I use the term “fugitive from slavery.” On the one hand, it is more precise than the conventional term “fugitive slave,” which emphasized the enslaved person’s status as a slave rather than their humanity. On the other hand, the word “fugitive” carries a connotation that the person seeking freedom is doing so wrongfully, as one would call a duly convicted escaped prisoner a “fugitive from justice.” I considered “escapee from slavery” but found it too jarring. Rebecca Zietlow has used the term “freedom seeker,” a term I find too broad (and Zietlow also uses “fugitive from slavery”). Rebecca E. Zietlow, Freedom Seekers: The Transgressive Constitutionalism of Fugitives from Slavery, 97 NOTRE DAME L. REV. 1375, 1377-78 n.7 (2002). However, I decided that “fugitive from slavery” most accurately reflects the extraordinary paradox of American slavery: a crime against humanity that was legal for over two centuries in some parts of the country.

** Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.
INTRODUCTION

Fourth Amendment scholarship almost universally ignores the first seventy-five years of the Amendment’s existence. Those with an historical bent typically examine the roots of the Amendment in the 1760s, the adoption of precursors to the Amendment in state constitutions after 1776, the ratification debates and demands by Anti-Federalists for a Bill of Rights in 1787—88, and the ultimate adoption of the Amendment with the rest of the Bill in 1791.

Then, it would seem, the Fourth Amendment fell silent for at least seventy-five years. It came up again only in Congressional debates over the Fourteenth Amendment in 1866, which is important for those examining whether that Amendment is properly understood as incorporating the Bill of Rights. For those looking to how the Fourth Amendment applies, one must look another dozen years down the road for a Supreme Court case, Ex parte Jackson, where the Court wrote in dicta that federal postal inspectors would violate the Amendment if they were to open mail and read its contents. And it would not be until United States v. Boyd in 1886, nearly a century after ratification, that the Court would offer some of the broad language on the Fourth Amendment that set the stage for its development in the twentieth century.

But it would be a mistake to think that the Fourth Amendment simply lay dormant during the entire antebellum period. Such a view betrays both the academy’s juriscentric bias, which places the obligation to interpret the Constitution exclusively in the hands of judges, and its hyper-focus on the federal government to the exclusion of goings on at the state level. The Fourth Amendment was alive and well during this period in the hands of state legislators, litigants in state courts, and the general public of free States in their struggle to protect free persons of color from being kidnapped into slavery. Federal criminal justice machinery was tiny during this period,

1 96 U.S. 727, 733, 735 (1877).
2 116 U.S. 616, 630 (1886) (“It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . . .”).
3 See Rebecca E. Zietlow, Freedom Seekers: The Transgressive Constitutionalism of Fugitives from Slavery, 97 NOTRE DAME L. REV. 1375, 1381–92 (documenting the “transgressive constitutionalism” of fugitives from slavery, not only as litigants but in their political advocacy and their popular and “performative” constitutionalism).
excise taxes were virtually non-existent, and inspection of ships for purposes of collecting customs duties was thought outside the purview of the Fourth Amendment. The area where federal law was most intimately involved in searches and seizures was in supporting the seizures in free States of persons of color alleged to have escaped slavery. It is here that we see Fourth Amendment arguments invoked by northern lawyers in state courts representing alleged fugitives from slavery, deployed by Northern state legislators to justify special state “personal liberty laws,” and made by ordinary people in support of the plight of persons of color dragged into slavery.

Because these seizures were made by private individuals, our modern notion of a “state action” requirement suggests that the Fourth Amendment was irrelevant in these cases. But the federal Fugitive Slave Acts of 1793 and 1850, which spelled out the process by which private persons were authorized to capture alleged fugitives from slavery and bring them back to the slave States, can be thought to have clothed these private individuals with the authority of federal officers. More importantly, the Fourth Amendment argument is susceptible to two different interpretations. Advocates for alleged fugitives from slavery may have been arguing that the federal acts contravened general, nationwide Fourth Amendment standards. Alternatively, or in addition, they may have been arguing that the acts unconstitutionally displaced state procedures for recapture of the alleged escapees from slavery. This latter interpretation makes more sense given that even when a private individual exercised the common-law “right of recaption,” i.e., self-help outside the auspices of the federal acts, constitutional arguments were deployed to suggest that the Fourth Amendment preserved the authority of each State to modify the common-law right of recaption. This strongly suggests that the Fourth Amendment argument was focused more on federalism and less on rights.4

Even when the issue was raised, few courts addressed the potential Fourth Amendment problem with the seizure of fugitives from slavery. The one court that addressed the issue head on, Commonwealth v. Griffith,5 an 1823 Massachusetts case, rejected the claim that the Amendment protected enslaved persons, and the person of color seized in that case conceded having

---

5 19 Mass. (2 Pick.) 11, 11, 13 (1823).
been enslaved. However, a close reading of *Griffith* suggests that the court there actually accepted the Fourth Amendment’s preservation of state regulation of seizures as applied to free persons. By contrast, in the infamous case of *Prigg v. Pennsylvania* in 1842, in which a coalition of Southern slavocrats and Northern ultra-nationalists on the U.S. Supreme Court broadly rejected constitutional challenges to the Fugitive Slave Act of 1793, and struck down state attempts to regulate the rendition of fugitives from slavery, the Court utterly ignored the Fourth Amendment argument.

This Article is the first to excavate the lost history of the Fourth Amendment as an ultimately unsuccessful tool to protect free persons of color from the Southern slave catcher. It argues that the Fourth Amendment arguments made on their behalf posited the Amendment as a reservation of state control over seizures of persons in each respective State, which were to be regulated by the civil and criminal law of each State. Part I briefly discusses the inattention of Fourth Amendment scholars to the first seventy-five years of the Amendment’s history. Part II demonstrates the mobilization of the Amendment during the antebellum period by state legislators, litigants, and the general public in the North on behalf of persons of color alleged to be fugitives from slavery. It disinters a lost understanding of the Fourth Amendment as a reservation of state control over searches and seizures within each respective State through state civil and criminal law. Finally, it demonstrates how the *Prigg* Court dealt an ultimately mortal blow to this view of the Fourth Amendment when the Court simply ignored the argument and broadly rejected the idea of state regulation of seizures of alleged fugitives from slavery.

I. The Conventional View of Fourth Amendment History

From 1791 until 1868, the Fourth Amendment applied only to the federal government. Moreover, the federal government was far smaller than it became in the twentieth century. Thus, there was not much of an opportunity for Fourth Amendment doctrine to develop during this period. The most obvious place where we would see litigation over the Fourth

---

6 See infra notes 129-132.
7 41 U.S. (16 Pet.) 539 (1842).
8 See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).
Amendment would be in the federal collection of customs and excise taxes. However, there is a strong probability that shipboard searches for dutiable goods simply were not considered to be covered by the Fourth Amendment. And while the collection of excise taxes caused much upheaval during the 1790s, this furor was met with a political, not a legal, solution. In the election of 1800, the small-government Democratic-Republicans swept into Congress with a majority in both houses. In the House, they gained (and the opposition Federalists lost) twenty-two seats, over a fifth of the membership. Party leader, Thomas Jefferson, became President. Perhaps unsurprisingly, then, all internal taxes were repealed in 1802.

The Jeffersonians were no flash in the pan. The Democratic-Republicans, later to become just Democrats, dominated national politics during the antebellum period. They held the presidency for forty-eight of the sixty years between 1801 and 1861. They controlled the Senate for all but six years during that period and the House for all but twelve years. Their distaste for a large federal government resulted in their imposing few

10 The so-called “Whiskey Rebellion,” an insurrection against the United States whose leaders were convicted of treason and sentenced to hang, was triggered by opposition to the 1791 Excise Act. See Francis Wharton, State Trials of the United States during the Administrations of Washington and Adams 105, 110–17 (1849).
13 See An Act to Repeal the Internal Taxes, ch. 19, sec. 1, 2 Stat. 148 (1802) (repealing acts imposing internal duties on “stills and domestic distilled spirits, on refined sugars, licenses to retailers, sales at auction, carriages for the conveyance of persons, and stamped vellum, parchment and paper”).
14 See The Editors of Encyclopedia Britannica, List of Presidents of the United States, Britannica, https://www.britannica.com/topic/Presidents-of-the-United-States-1846996 [https://perma.cc/46NT-R36Q] (last visited Nov. 21, 2022). These are Presidents Jefferson (eight years), Madison (eight years), Monroe (eight years), Jackson (eight years), Van Buren (four years), Polk (four years), Pierce (four years), and Buchanan (four years).
internal federal taxes. As a result, there were few if any Fourth Amendment challenges to the collection of customs and internal taxes during the antebellum period.\(^{17}\)

That is why most historical narratives on the Fourth Amendment examine the British Wilkesite cases\(^ {18}\) and the American Writs of Assistance controversy of the 1760s,\(^ {19}\) and the framing and ratification of the Fourth Amendment itself, and then they stop. Some scholars pick up again in 1866, when the Fourteenth Amendment was being debated in Congress, to extract references to the Fourth Amendment in order to determine whether and to what extent it should be thought to apply to the States.\(^ {20}\) Others jump to the first significant Supreme Court case mentioning the Amendment, \textit{Ex Parte Jackson}, decided in 1878;\(^ {21}\) or to \textit{Boyd v. United States}, decided in 1886.\(^ {22}\) For

\(^{17}\) Fabio Arcila, Jr., \textit{In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause}, 10 U. PA. J. CONST. L. 1, 5 (2007) (“[D]uring the Framers’ era . . . Fourth Amendment claims as we know them today did not exist. For nearly a century after the Constitution was adopted there was no constitutional search and seizure jurisprudence.”); David E. Steinberg, \textit{The Uses and Misuses of Fourth Amendment History}, 10 U. PA. J. CONST. L. 381, 388 (2008) (“[I]n the early nineteenth-century cases that reached the United States Supreme Court . . . the attorneys representing the shipowners never even argued that the ship seizures had violated the Fourth Amendment.”) (emphasis omitted).

\(^{18}\) Briefly, the Wilkesite cases were a series of tort actions brought in Britain by Whig Member of Parliament John Wilkes and others associated with him against Crown officers who ransacked their homes and offices, searching for an allegedly seditious tract written by Wilkes, and seizing private papers as evidence. See Laura K. Donohue, \textit{The Original Fourth Amendment}, 83 U. Chi. L. REV. 1181, 1196-1207 (2016).

\(^{19}\) The writs of assistance controversy occurred when Crown officers throughout the colonies attempted to obtain and execute “writs of assistance,” a type of general warrant that allowed them to search multiple places without showing good cause and without requiring return of the seized goods to a magistrate, and which expired only with the death of the monarch. See generally O.M. Dickerson, \textit{Writs of Assistance as a Cause of the Revolution}, in \textit{THE ERA OF THE AMERICAN REVOLUTION} 40 (Richard B. Morris ed., 1939); Josiah Quincy, Jr., \textit{Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772}, 540 (Samuel M. Quincy ed., 1865) (describing and providing examples of writs of assistance); Joseph R. Frese, \textit{Writs of Assistance in the American Colonies: 1660-1776}, at 246 (1951) (Ph.D. dissertation, Harvard University) (on file with author) (unpublished).

\(^{20}\) See MANNHEIMER, supra note 4, ch. 7.; see, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866) (listing as one of the rights protected in a “republican form of government” as “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”).

\(^{21}\) 96 U.S. 727 (1878). The Amendment came up briefly in the treason prosecution against former Vice-President Aaron Burr in 1807, but only as to the rather unusual issue of the seizure of several of the prosecution witnesses in order to have them testify. See Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 136 (1807).

\(^{22}\) 116 U.S. 616 (1886).
example, Jacob Landynski, in his much cited monograph Search and Seizure and the Supreme Court, reviews the founding era history in Chapter One and then, in Chapter Two, jumps straight to the Boyd case.\(^{23}\) It appears that only seven law review articles discuss the 1823 case Commonwealth v. Griffith\(^{24}\) (examined in Part II.D below) as a Fourth Amendment case, and then only in passing (three only in footnotes).\(^{25}\)

As far as Fourth Amendment scholarship is concerned, the Amendment was forged in the crucible of colonial and Whiggish resentment of promiscuous searches and seizures by the Crown in the 1760s, shaped by dire Anti-Federalist predictions two decades later that those Crown policies would be replicated by the new federal government, granted its exalted place in the Bill of Rights in 1791—and then forgotten for seventy-five years. If it seems hard to believe that such a central protection from tyranny was simply irrelevant for about the first third of the Amendment’s existence, it is because it’s not true. One area where the federal government was active during the antebellum period was in aiding in the recapture of fugitives from slavery. It is here that we see the Fourth Amendment at work.


\(^{24}\) 19 Mass. (2 Pick.) 11 (1823).

II. EXCAVATING THE LOST HISTORY OF THE FOURTH AMENDMENT

Almost from the beginning of the Republic, the federal government took an active part in the recapture of fugitives from slavery. As antislavery sentiments outside the South grew, the use of federal power to support slavery became more and more controversial.26 At the same time, while Democrats, whose power base was in the South, maintained their states’ rights orientation, their dominance at the federal level led them to more aggressively put the federal government to work for their own interests.27 One of those interests was in creating nationwide protections for slavery, the wicked institution propping up the Southern economy. Abolitionists would eventually coin a term for the outsized political influence that the South, helped by their Northern Democratic allies, had over the federal government: the Slave Power.28

The Fourth Amendment provides in part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”29 Because the recapture of enslaved persons involved literal “seizures” of “persons,” one would expect at least some recognition that this process had to satisfy the Fourth Amendment. As it turns out, Fourth Amendment and other constitutional objections were raised in cases challenging the legality of the recapture process. These objections were also registered by state legislators in northern States, who enacted “personal liberty” laws in order to govern the process by which putative fugitives from slavery were taken from free States to slave States. And these objections were made by private citizens in the North in railing against the rendition of alleged fugitives from slavery.

Most courts either rejected or simply ignored Fourth Amendment challenges when they were raised. But one court, while rejecting the claim,

---

26 See THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 71-93 (1974) (describing efforts in free States, beginning in the mid-1830s, to strengthen protections for people of color seized as fugitives from slavery).
29 U.S. Const. amend. IV.
was careful to confirm a federalism-based reading of the Fourth Amendment: that, although enslaved persons were not among “the people” protected by the Amendment, it preserved state tort and criminal law for free people who were wrongfully seized. More broadly, the wave of personal liberty laws enacted throughout the North demonstrates the prevalent notion that state procedure was to govern searches and seizures even where Congress had legislated. But the U.S. Supreme Court, in a fit of ultra-nationalism, rejected constitutional challenges to federal fugitive slave laws and broadly struck down state laws regulating the seizure of fugitive slaves. The federalism orientation of the Fourth Amendment was irrevocably lost.

A. Constitutional Objections to the Fugitive Slave Act of 1793

From the beginning, the Constitution accommodated the recapture of fugitives from slavery. Article IV, section 2 of the Constitution, known as the Fugitive Slave Clause, provided:

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. 30

In 1793 and again in 1850, Congress passed statutes pursuant to this provision governing how persons from slave States could recapture those who had been enslaved to them and had escaped into free States.

In response to an incident involving enslaved persons escaping from Virginia, where slavery was permitted, to Pennsylvania, where it was not, the Second Congress enacted the Fugitive Slave Law of 1793, which sought to enforce the Fugitive Slave Clause of the Constitution. 31 It provided that when an enslaved person escaped into another State, the person claiming ownership of the slave, or someone acting on his or her behalf, was “empowered to seize or arrest such fugitive from labour, and to take him or her before any” state or federal judge. 32 “[U]pon proof to the satisfaction” of that judge, in either oral or written testimony, he was obligated “to give a certificate” to the “claimant” or his or her agent, which would act as “sufficient warrant for removing the said fugitive from labour, to the state or

---

30 U.S. CONST. art. IV, § 2.
32 An Act respecting fugitives from justice, and persons escaping from the service of their masters, ch. 7, § 3, 2 Stat. 302, 302-05 (1793).
Accordingly, the statute contemplated a two-step process: the claimant, alleging that his or her slave had escaped, could personally or through an agent recapture the escapee; and any state or federal judge could certify both the identity of the person seized and the fact that he or she was indeed the slave of the claimant, thereby authorizing the escapee’s return.

Opponents of the Act were concerned primarily with the fact that summary proceedings were inappropriate when determining such a grave subject as whether a person should be reduced to slavery. The problem was most pronounced when there was a question as to the identity of the person of color as an actual fugitive from slavery or, instead, a free person being kidnapped into slavery. Of course, many in the North were also perfectly fine with stifling efforts to recapture actual fugitives from slavery as well.

Opponents made a number of constitutional arguments against the 1793 Act. Although we are primarily concerned with the Fourth Amendment, it will be helpful to rehearse the other constitutional objections because they were typically made together and there was a great deal of overlap among them. These objections fall into two categories: lack of power on the part of Congress to enact the law; and particular violations of the Bill of Rights.

33 Id.
34 See, e.g., SOLOMON NORTHUP, TWELVE YEARS A SLAVE (1853) (discussing Northup’s experience of being kidnapped into slavery). Northup’s harrowing memoir of a free person of color kidnapped into slavery only recently entered the public consciousness when it was turned into the Oscar-winning film, 12 YEARS A SLAVE (Regency Entertainment 2013). See generally JONATHAN DANIEL WELLS, THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTANCE ON THE EVE OF THE CIVIL WAR (2020) (providing an account of complicity by some Northern whites in kidnapping free persons of color in the North into slavery).
35 See generally J. M. W. YERRINTON, ARGUMENT OF WENDELL PHILLIPS, ESQ., AGAINST THE REPEAL OF THE PERSONAL LIBERTY LAW, BEFORE THE COMMITTEE OF THE LEGISLATURE 3 (1861) (“I value this Personal Liberty Bill not only for the protection it gives to the free natives of Massachusetts, but for the measure of protection that it gives to fugitive slaves within the Commonwealth.”).
36 See generally Allen Johnson, The Constitutionality of the Fugitive Slave Acts, 31 YALE L.J. 161 (1922). It would be interesting to know whether any of these constitutional objections were raised in the Second Congress which enacted the Fugitive Slave Act of 1793. Unfortunately, records of debates in Congress from this time period are usually scarce, and debates on the Fugitive Slave Act of 1793 are no exception. See Finkelman, infra note 31, at 418 (“Because the records of Congress for this period are scant, it is impossible to reconstruct fully the debates.”). However, we do know that the vote in the House was 48 to 7, and that voting against the bill were five northerners and only two southerners. Id. at 417. See also infra note 65 (discussing the two Southerners who voted against the 1793 Act).
1. **Lack of Federal Power**

The main argument against Congress’s power to enact the fugitive slave law was actually quite strong. The general consensus at the founding was that federal power would be quite limited and that most power would continue to reside with the States.\(^37\) Thus, the argument goes, we ought not infer from ambiguous language that the Constitution has granted the federal government power. The language of the Fugitive Slave Clause is at least ambiguous as to whether Congress has power to enforce it. Indeed, probably the better reading is that there is no such power. Its first sentence, providing that no enslaved person “escaping into another” State shall, because of some “Law or Regulation” of that State, suddenly become free, clearly provides no power. It merely renders void any attempt by a free State to endow an enslaved person with freedom merely by being on its soil. This provision was necessitated by the prevailing common-law view, expressed in the pre-Revolution English case, *Somerset v. Stewart*, that once an enslaved person touches free territory, he or she becomes forever free.\(^38\) And even notwithstanding this common-law rule, one could easily imagine a free State doing the same by statute, which some Northern States eventually did in the case of enslaved persons brought into free States.\(^39\)

It is the second sentence of the Clause that is ambiguous. Because it is written in the passive voice – requiring that the fugitive from slavery “be delivered up on Claim of the Party to whom such Service or Labour may be due” – it raises the questions: “delivered up” by whom and according to what process? One view was that this language was directed squarely at the States themselves. Section two of Article IV, on this view, is in the nature of a compact. The Fugitive Slave Clause is just one clause of three in this section, and all, on this view, impose on the States certain duties when interacting with their sister States: to “deliver[ ] up” fugitives from slavery (clause three)

---

\(^37\) *See The Federalist No. 45*, at 241 (George W. Carey & James McClellan eds. 2001) (Madison) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

\(^38\) *See Somerset v. Stewart*, 98 Eng. Rep. 499 (1772); *see also* RANDY E. BARNETT & EVAN D. BERNICK, *The Original Meaning of the 14th Amendment: Its Letter and Spirit* 73 (2021) (“[T]he so-called Fugitive Slave Clause is best read as negating the default rule established by the 1772 *Somerset* case, which would otherwise apply to enslaved people who made good their escape from a slave state and into a free state.”).

\(^39\) *See* PAUL FINKELMAN, *An Imperfect Union: Slavery, Federalism, and Comity* 144-45 (1981) (describing the laws in many Northern States refusing to recognize any enslavement within their borders).
and fugitives from justice (clause two), and to provide citizens of other States “all Privileges and Immunities of [its own] Citizens” (clause one). These edicts might be enforceable in court, or the States might be on the “honor system” to abide by these clauses. Either way, Congress had no power to enforce them.40

This view is greatly strengthened by the fact that article IV, section 1, the Full Faith and Credit Clause, does include an explicit grant of power to Congress: “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.”41 The lack of a similarly explicit grant of power to Congress to enforce article IV, section 2 strongly suggests that no grant of power was intended.42

2. Violations of the Bill of Rights

Opponents of the fugitive slave law also made several overlapping arguments that the law violated specific provisions of the Bill of Rights. First, and perhaps most obviously, they argued that the law deprived the alleged fugitive of the right to a trial by jury in civil cases, secured by the Seventh Amendment.43 Second, they argued that the summary proceedings

40 See, e.g., S. JOURNAL, 36th Gen. Assemb., at 579 (Ohio 1838) (“The clause in the constitution of the United States in relation to fugitives from labor, vests no power in Congress to legislate on the subject. It is merely prohibitory of the exercise of certain powers by the State, and declaratory of certain reciprocal duties to each other.”); see also REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, H. R. REP NO. 51, at 15-19 (Mass. 1837) (discussing Congress’s lack of power to enforce the Fugitive Slave Act).
41 U.S. CONST. art. IV, § 1 (emphasis added).
43 See U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”); see, e.g., REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, H. R. REP NO. 51, at 4-7, 27 (Mass. 1837) (discussing the application of the right to a trial by jury to enslaved persons); REPORT OF THE MINORITY OF THE COMMITTEE ON THE JUDICIARY, REP NO. 141, 66th Sess., at 41 (N.Y. 1843) (asserting that alleged fugitives possess the right to trial by jury). The Sixth Amendment guarantees the right to a jury trial in criminal cases. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ”). However, most of those opposed to the fugitive slave law recognized that the proceedings authorized by it were civil, not criminal, in nature. Occasionally, opponents of the law made arguments based on the Sixth Amendment rights of a
contemplated by the law violated the Fifth Amendment prohibition on depriving anyone of “life, liberty, or property, without due process of law.”

They also made an argument based on the Tenth Amendment, which reserved to the States all power not delegated to the federal government by the Constitution. This was, more or less, the flip side of their “no federal power” argument discussed above. Finally, they made the Fourth Amendment argument: that the law authorized what amounted to “unreasonable . . . seizures” of “persons.”

These arguments overlap to a very large extent. For example, among the process that is due, according to the Fifth Amendment argument, is a seizure consistent with common-law rules as provided by the Fourth and a jury trial secured by the Seventh. Likewise, the Tenth Amendment cuts across the other provisions because its reservation of power, on this view, means that the States get to dictate the process used to implement the Fugitive Slave Clause. So, while focusing on the Fourth Amendment, we should keep in mind that all of these objections are interrelated.

Some who made the Fourth Amendment argument focused on the fact that the 1793 Act permitted claimants to make the initial seizure of the alleged fugitive without a warrant. For example, abolitionist William Yates observed in 1838:

---

44 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . .”); see also The Right of Trial by Jury, 3 THE ANTI-SLAVERY REC. 1, 9 (1837) (observing that the 1793 Act deprived the alleged fugitive of the “power to compel the attendance of witnesses”) [hereinafter Trial by Jury]; cf. TRIAL OF THOMAS SIMS, ON AN ISSUE OF PERSONAL LIBERTY, ON THE CLAIM OF JAMES POTTER, OF GEORGIA, AGAINST HIM, AS AN ALLEGED FUGITIVE FROM SERVICE, at 17 (1851) (argument of Robert Rantoul, Jr.) (asserting that the “right to cross-examination” is part of “due process of law”). Again, however, these provisions are inapplicable outside of “criminal prosecutions.”

45 U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see, e.g., REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, H.R. REP. NO. 51, at 15 (Mass. 1837).

46 See, e.g., HORACE MANN, LETTER TO THE EDITORS OF THE BOSTON ATLAS (June 6, 1850), reprinted in HORACE MANN, SLAVERY: LETTERS AND SPEECHES 282, 310 (B. B. Mussey & Co. 1851) (calling the Fourth, Fifth, and Seventh Amendments “three provisions of the constitution . . . [each strengthening] the other,” and “form[i]g] a triple implication, if not a *trinoda necessitas* [a trio of obligations], which no man, however powerful he may be, can break”).
As to the arrest and seizure, the law provides no checks; it may be made, it
seems, without oath, without affidavit, without a description of the person,
and without warrant or precept by the claimant himself, his agent or
attorney, and without the intervention of the sheriff, or of any known public
officer whatever . . . . And when the arrest is made . . . and the person
arrested has been brought before a magistrate . . . then, and not till then . . .
can the rightfulness or wrongfulness of the proceedings and claim be
questioned or met.\footnote{47}

More often, the Fourth Amendment complaints went to the process as a
whole. As Horace Mann put it: “[W]hat ‘seizure’ can be more
‘unreasonable,’ than one whose object is, not an ultimate trial, but bondage
forever, without trial? Can mortal imagination conceive of any seizure less
entitled than this to be called ‘reasonable?’”\footnote{48}

Of course, the initial seizure by the claimant would be made by a private
person, not a government agent, and we think of the Fourth Amendment as
addressed to government actors.\footnote{49} But by permitting seizures of alleged
fugitive slaves by claimants in order to bring them before a judicial officer,
the federal law essentially clothed claimants with federal authority.\footnote{50}
Moreover, the process as a whole often involved the cooperation of federal
judges.

However, Northerners also made constitutional objections to the purely
private process of capturing an alleged fugitive from slavery and bringing
them back to slave territory, without compliance with the 1793 Act, known
as the “private right of recaption.” This sounds foreign to modern ears: how
could the Constitution be implicated when no government actor is involved?
The answer is that the constitutional arguments they made were not only
about what we today think of as an individual right to a particular process,

\footnote{47} WILLIAM YATES, RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP AND TRIAL BY JURY 81 (1838) (footnote and emphasis omitted). \textit{See also Trial by Jury, supra note 43, at 3 (noting that according to the Act “any person may be seized without warrant,” citing the Due Process Clause of the Fifth Amendment [emphasis omitted]); ADDRESS OF THE COMMITTEE APPOINTED BY A PUBLIC MEETING HELD AT FANEUIL HALL 6 (1846) [hereinafter FANEUIL HALL ADDRESS] (“Amongst other measures, we earnestly and solemnly call upon the FREEMEN of the North to obtain for the people security ‘in their persons against unreasonable seizure’ . . . .”).}

\footnote{48} \textit{See, e.g., MANN, supra note 46, at 309.}

\footnote{49} \textit{See, e.g., Burdeau v. McDowell, 256 U.S. 465, 475 (1921) [observing that the Fourth Amendment’s “protection applies to governmental action” and it “was not intended to be a limitation upon other than governmental agencies”].}

\footnote{50} \textit{See DON E. FEHRENBACKER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY 214-32 (2001) (“Interstate recovery of fugitive slaves was essentially a private enterprise conducted under the authority of federal law . . . .”)}.
but also about federal displacement of state procedures. Their arguments based on the Bill of Rights were as much about federalism as they were about rights.

B. The Federalism-Based Nature of the Constitutional Objections

Drilling down into the constitutional objections raised in the fugitive slave context, we see that they were actually two slightly different arguments. John Codman Hurd, the leading authority in this area, writing on the eve of the Civil War, reviewed the arguments that had been made in his *The Law of Freedom and Bondage in the United States*. Hurd focused most of his attention on the question whether the Fugitive Slave Acts of 1793 and 1850 were “in violation of any guarantee in the . . . Bill of Rights.” But, Hurd noted, there was also a second argument: that, even where a slave catcher engaged in self-help, outside the federal statute, the Bill of Rights required that recapture of an alleged fugitive from slavery be conducted in accordance with state law. As Hurd put it, it was a separate question “whether these guarantees” (the guarantees of the Bill of Rights) “modify whatever power private persons may derive from the Constitution, and so limit the rights given by the fugitive-slave [Clause] to the owner.”

This latter argument sounds strange. What “power” did “private persons . . . derive from the Constitution?” And how could the Bill of Rights “modify” or “limit” that power? The answer to the first question is that the Fugitive Slave Clause itself purported to preserve what was known as the common-law private right of recaption. This right provided people with the ability to reclaim lost or stolen property, without legal process, and return it to their homes. On this view, claimants would not even have to resort to the procedures prescribed by the federal law but could simply rely on the private right of recaption. Even some who were otherwise sympathetic to the plight of those alleged to be fugitives from slavery

51 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 698 (1862).
52  Id. at 700 n.1.
53  See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 4 (9th ed. 1783) (“[W]hen any one hath deprived another of his property, in goods or chattels personal, or wrongfully detains one’s wife, child, or servant . . . 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.”).
acknowledged that the Fugitive Slave Clause probably preserved the common-law private right of recaption.\textsuperscript{54}

But, to answer the second question, they argued that the Bill of Rights modified this common-law right by preserving for the States the ultimate and exclusive authority to regulate seizures within their respective borders. Hurd cited the 1859 argument of Ohio Attorney General C.P. Wolcott in \textit{Ex Parte Bushnell} that the “guarantees [of the Bill of Rights] do apply against seizure and removal by the claimant” in exercising the private right of recaption.\textsuperscript{55} Wolcott had argued that “the asserted right of private recaption [was] explicitly and affirmatively prohibited by three distinct constitutional guaranties,” citing the Fourth, Fifth, and Seventh Amendments.\textsuperscript{56} Because recaption was a purely private affair, Wolcott’s argument makes sense only if he viewed these provisions as preserving for each State the power to regulate all seizures within its own borders.

This view also sheds light on the first argument—that the 1793 act violated the Bill of Rights—and renders that argument at least ambiguous as to what exactly the contention was. It might have been an argument akin to one that might be made today, that the federal Act violated specific nationwide rights established by the Fourth, Fifth, and Seventh Amendments, such as the right to be free from arrest without a warrant. Alternatively, or in addition, the argument about the 1793 Act might be a contention about federalism: if the Bill of Rights preserves each State’s authority to regulate seizures within its own borders, then the Fugitive Slave Act’s purported displacement of otherwise applicable state law regulating rendition is a violation of the Constitution.

The federalism interpretation is supported by a number of statements made by those opposed to the Act, who argued that the Act encroached on

\textsuperscript{54} \textit{See}, e.g., Mass. House Rep. No. 51, “Report on the Trial by Jury in Questions of Personal Freedom,” Mar. 27, 1837, at 19 (observing that the Fugitive Slave Clause “extended th[e] right of recaption, which existed by the common law of most of the States, to all of them, and prohibited any from changing or modifying it by legislation.”). A court as early as 1812 recognized that the Clause preserved the right of recaption. \textit{See} Glen v. Hodges, 9 Johns. 67, 69 (N.Y. 1812) (declaring that the master’s right of recaption was a private right guaranteed by the Constitution, enforceable in the courts). \textit{Accord} Jack v. Martin, 14 Wend. 507, 527 (N.Y. 1835) (opinion of Walworth, Ch.) (opining that the Fugitive Slave Clause does not empower Congress “but merely . . . restrain[s] the exercise of a power, which the state legislatures respectively would otherwise have possessed, to deprive the master of [the] pre-existing right of recaption.”).

\textsuperscript{55} \textit{See} HURD, supra note 51, at 700 n.1 (citing \textit{Ex Parte Bushnell}, 9 Ohio St. 77 (1859)).

\textsuperscript{56} \textit{Ex Parte Bushnell}, 9 Ohio St. 77, 173 (1859) (argument of Attorney General Wolcott).
state sovereignty and was in many instances inconsistent with state law. As Yates put it, the Act was “in derogation of State sovereignty—because, if a citizen of a State may be seized by the hand of a stranger . . . without the possibility of the State interfering to secure him from injustice, then surely its sovereignty is invaded; as to him it is prostrate [and] powerless.”

Likewise, at a meeting at Faneuil Hall in Boston in 1842 to discuss the controversial case of alleged fugitive from slavery George Latimer, one of Latimer’s lawyers exclaimed, although without explicitly invoking the Fourth Amendment: “‘[W]hy should Latimer be informally seized by [the claimant], without a shadow of legal process, and dragged to jail in a manner both contrary to our principles and our feelings!'” And at another meeting in the same venue in 1846 to protest the seizure of a fugitive and his return to slavery by a ship captain, Charles Sumner, then an up-and-coming Boston lawyer, later a U.S. Senator who figured prominently in the framing of the Fourteenth Amendment, declared that the Slave Power had “invaded the soil of Massachusetts” and that the captain “violated the laws of Massachusetts in the cause of Slavery.”

Here we see the very same arguments—and even much of the same rhetoric—that the Anti-Federalists had used decades earlier in opposition to the Constitution, leading directly to the adoption of the Bill of Rights. The Anti-Federalists had seen their state governments as more accountable and democratic than the proposed new federal government and considered the States to be the primary guardians of individual liberty. The Anti-Federalists were thus gravely concerned because the proposed federal government would be able to act directly upon the citizens of the States, bypassing the States themselves and the mechanisms the States created for the preservation of liberty. They thus opposed the Constitution because they feared that the proposed new central government would yield too much power, leading to

---

57 YATES, supra note 47, at 82. Yates had just quoted the Fourth Amendment in full and cited it as one of the constitutional provisions that rendered the Act unconstitutional. See id. at 81 n.*.
59 FANEUIL HALL ADDRESS, supra note 47, at app. 7.
60 See MANNHEIMER, supra note 4, ch. 3.
the “annihilation” of the States and, consequently, the destruction of individual rights.\textsuperscript{61}

Anti-Federalists demanded that the federal government be bound by the same set of common-law constraints with which the States constrained themselves. James Winthrop of Massachusetts (writing as “Agrippa”) proposed that the following provision be added to the Constitution to explicitly bind the federal government and its officials to adhere to state bills of rights in each State:

Nothing in this constitution shall deprive a citizen of any state of the benefit of the bill of rights established by the constitution of the state in which he shall reside, and such bills of rights shall be considered as valid in any court of the United States where they shall be pleaded.\textsuperscript{62}

In a similar vein, Melancton Smith, leader of the Anti-Federalist faction at the New York ratifying convention, proposed an amendment that would have required all federal officers “to be bound, by oath or affirmation, not to infringe the constitutions or rights of the respective states.”\textsuperscript{63}

One of these rights was the right to be free from unreasonable searches and seizures. For example, “A Maryland Farmer” (believed to have been John Francis Mercer) noting the absence from the Constitution of any of the common-law rights of Englishmen, observed that state recognition of those rights in its own laws would do a Marylander no good in federal court:

If a citizen of Maryland can have no benefit of his own bill of rights in the confederal courts, and there is no bill of rights of the United States—how could he take advantage of . . . any of the common law rights, which have

---

\textsuperscript{61} See, e.g., \textit{Pennsylvania and the Federal Constitution} 1787–1788, at 287 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing & Publ’g Co. 1888) (statement of Robert Whitehill (arguing that the Constitution would be “the means of annihilating the constitutions of the several States, and consequently the liberties of the people”)); Letter of Centinel (Oct. 24, 1787), \textit{reprinted in 2 The Complete Anti-Federalist} 143, 152 (Herbert J. Storing ed., 1981) (“[T]he general government would necessarily annihilate the particular [i.e., state] governments, and . . . the security of the personal rights of the people by the state constitutions [would be] superseded and destroyed.”); Patrick Henry, Speech in the Virginia State Ratifying Convention (June 16, 1788), \textit{reprinted in 5 The Complete Anti-Federalist}, at 246, 247 (declaring that the Constitution would “annihilate[]” the state government and leave the Virginia Bill of Rights a barrier only against a “weakened, prostrated, enervated State Government.”).

\textsuperscript{62} Letter from Agrippa to the Massachusetts Convention (Feb. 5, 1788), \textit{reprinted in The Essential Anti-Federalist} 54, 57 (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002).

\textsuperscript{63} 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 409–10 (Jonathan Elliot ed. 1881) [hereinafter \textit{Elliot’s Debates}]; see 1 id. at 331.
heretofore been considered as the birthright of Englishmen and their descendants . . . 64

He followed this up almost immediately with an example regarding federal search-and-seizure authority: “To render this more intelligible—suppose for instance, that an officer of the United States should force the house . . . of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the constitution of the United States?” 65 Comments by Patrick Henry of Virginia (of “Give me liberty or give me death!” fame), John DeWitt of Massachusetts, and “Federal Farmer” (probably Melancton Smith), 66 among others, also expressed anxiety about federal search and seizure power. 67 All this, of course, led to adoption of the Fourth Amendment.

Nineteenth-century opponents of the Fugitive Slave Act of 1793 likewise tied individual rights to state sovereignty and posited that the States were the


65 Id. at 13-14. Interestingly, Mercer was later elected to Congress, still an Anti-Federalist, and he was one of the only two Southerners to vote against adoption of the Fugitive Slave Act of 1793. The other was Josiah Parker of Virginia, who had also opposed the 1791 excise tax engineered by hated high Federalist Alexander Hamilton. Regarding the latter, Parker had warned of “a swarm of harpies, who, under the denomination of revenue officers, will range through the country, prying into every man’s house and affairs, and like a Macedonian phalanx bear down all before them.” 1 ANNALS OF CONG. 1891-92 (1791). While we cannot know for sure if Mercer and Parker objected to the Fugitive Slave Act specifically on Fourth Amendment grounds, we can surmise that “they probably opposed the centralizing tendencies of the bill.” FINKELMAN, supra note 58, at 417.


67 See Statement of Mr. Patrick Henry, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 412 (Jonathan Elliot ed. 1836) (“Suppose an exciseman will demand leave to enter your . . . house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress? They will tell you that he is executing the laws . . . .”); John DeWitt, ESSAY TO THE FREE CITIZENS OF THE COMMONWEALTH OF MASSACHUSETTS No. IV (1787), reprinted in 4 THE COMPLETE ANTI-FEDERALIST 29, 33 (Herbert J. Storing ed., 1981) (“They [Congress] are to determine, and you are to make no laws inconsistent with such determination, whether such [tax] Collectors shall carry with them any paper, purporting their commission, or not—whether it shall be a general warrant, or a special one . . . .”); Letter from the Federal Farmer (Jan. 20, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST, at 325, 328 (expressing worry that Congress could exercise its “general powers” to destroy people’s constitutional rights, including the “right to be secure from all unreasonable searches and seizures”).
primary guarantors of civil rights. The federal act impinged on both in one fell swoop, rendering the State “prostrate [and] powerless,” as Yates put it, to protect its own citizens. Some, like the Anti-Federalists, predicted the “annihilation” of the States. Former President John Quincy Adams, speaking at the 1846 Faneuil Hall meeting, also tied together individual liberty and state sovereignty: “It is a question whether this commonwealth is to maintain its independence as a state or not. It is a question whether your and my native commonwealth is capable of protecting the men who are under its laws, or not.” Attendats at that meeting passed, “almost unanimously,” a resolution declaring

\[\text{[t]hat the first duty of all government is to guarantee the personal safety of every individual upon its soil; and that the removal . . . of any person, beyond the jurisdiction of its laws, especially with the purpose of preventing inquiry into the rights of such person . . . is an insult to the dignity of the sovereign power, and a violation, as well of the rights of the government, as of the immediate victim of the outrage.}\]

Likewise, New York legislator E.F. Warren, vainly dissenting from a decision to cut back on the State’s personal liberty law, called the law a “bulwark of security” for the “personal liberty of those who were entitled to the protection of the laws of this State.” “This,” he continued, was the “exclusive and paramount object of State legislation.” In words that could have been written by any Anti-Federalist during the framing period, Warren elaborated:

\[\text{The first, the highest, the most peculiar object of the legislation of any State is, the protection of the rights of her own citizens, and all who are entitled to claim her protection . . . . It is for this protection that sovereignty is conferred; it is in the uncontrolled power and right to make and enforce all laws, proper for the security of the citizen, that sovereignty consists. If it is curtailed or restricted ever so little, that State is no longer sovereign, and that people no longer free.}\]

There is even a direct parallel between the provocative, sometimes sexual, imagery used by those opposed to the Fugitive Slave Act and that

---

68 YATES, supra note 47, at 82.
69 See, e.g., Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 603 (1842) (argument of Attorney General Johnson) (“A more absolute annihilation of the state sovereignties than this would be, is not within the stretch of human power.”).
70 FANEUIL HALL ADDRESS, supra note 47, app. at 2.
71 Id. app. at 6, 25 (emphasis added).
which was conjured up by the Anti-Federalists decades earlier. For example, one Pennsylvania Anti-Federalist had warned that, under the Constitution, a federal “constable, having a warrant to search for stolen goods, [could] pull[] down the clothes of a bed in which there was a woman and search[[]] under her shift,” i.e., her nightclothes, and she could get no redress from “a lordly [federal] court of justice.”73 Compare this to the specter raised by a northern opponent of the Fugitive Slave Act who warned that under it, [t]he Agent of any Slaveholder may this day enter your house, and lay his hands upon your daughter, and carry her off as his slave. If you make resistance . . . he has only to go before a justice of the peace, or a judge of the United States Court, and swear that she is his slave, and the functionary must give her up to him, unless you can prove by testimony, satisfactory to the justice, that she is not a slave!74 Because it was common knowledge that enslaved females were routinely raped, the message was clear. In both of these instances, state law was posited as the only thing that stood between female honor and chastity (the values protected by rape law at the time), and an overreaching, overzealous central government. Thus, nineteenth-century proponents of state protection of alleged fugitives from slavery carried over the eighteenth-century notions espoused by Anti-Federalists that the States were the primary guarantors of liberty and that state sovereignty and personal freedom were intertwined.

C. The Nature of State Protections Against Unlawful Seizures

Whether slave catchers acted under the auspices of the Fugitive Slave Act of 1793 or purely in their private capacity in exercising the right of recaption, advocates for alleged fugitives from slavery argued that they were entitled to adequate processes to determine whether they were, in fact, fugitives from slavery or were instead free persons of color wrongfully seized. As future U.S. Chief Justice Salmon P. Chase put it in an 1847 argument before the U.S. Supreme Court, both the Act and the purported right of recaption “authorize[d] unreasonable seizures, [and] privation of liberty without due process of law,” because under neither scenario could the alleged fugitive even try to prove that he or she was being wrongfully seized.75 On this view, the States had the power to regulate both the common-law right of recaption

73 PENNSYLVANIA AND THE FEDERAL CONSTITUTION, supra note 61, at 154.
74 FANEUIL HALL ADDRESS, supra note 47, at 6 (emphasis omitted).
75 S.P. Chase, Argument for the Defendant in Jones v. Vanzandt [sic] (1847) [hereinafter Chase Argument in Jones], reprinted in FINKELMAN, supra note 58, at 341, 435 36.
and the seizures authorized by the 1793 Act, at least vis-à-vis free people of color erroneously captured as fugitives from slavery.

The forms that such regulation would take were both defensive procedures to test the legal authority for a recapture, and offensive measures to punish and deter wrongful captures. Defensively, a State could require either a pre-seizure warrant or some post-seizure procedure, or both. Even if the right of recaption embedded in the Fugitive Slave Clause survived adoption of the Fourth Amendment, recaption of property could always be answered at common law with a writ of replevin, disputing the right of the recaptor to the property.\textsuperscript{76} The response to the recaption of persons—whether it be a runaway wife, child, or enslaved person—was one of two common law writs that could be sought on behalf of the alleged fugitive: the well-known writ of habeas corpus and the more obscure writ \textit{de homine replegiando}, or “writ of personal replevin.”\textsuperscript{77} The main difference between the two was that a jury trial was provided pursuant to the latter but not the former.\textsuperscript{78}

Offensively, a State could provide either a civil or a criminal remedy, or both, for those forcibly abducting a free person of color as an alleged fugitive from slavery. On the civil side, the State could provide for a damages action for trespass brought by the alleged fugitive. On the criminal side, the State could prosecute the abductor for kidnapping.

Both sets of mechanisms—defensive procedures to determine the validity of seizures of alleged fugitives from slavery and offensive punishments and damage awards imposed on errant slave catchers—found expression in state “personal liberty laws” in the free States.

\textbf{D. The Mobilization of Fourth Amendment Arguments in Support of the Personal Liberty Laws}

The free States took the position that they were empowered and obligated to provide due process of law, jury trials, and protection from unreasonable

\textsuperscript{76} See N.Y. STATE ASSEM., REPORT OF THE MINORITY OF THE COMMITTEE ON THE JUDICIARY, No. 141, 66th Sess., at 11 (1843) (“[W]herever the right of seizure exists, the antagonist right of replevin also exists. The two things are inseparable . . . .”).

\textsuperscript{77} 3 BLACKSTONE, \textit{supra} note 53, at 129 (“The writ \textit{de homine replegiando} lies to replevy a man out of prison, or out of the custody of any private person . . . upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.”) (footnote and emphasis omitted).

\textsuperscript{78} See Daniel Farman, \textit{Resistance Lawyerining}, 107 CALIF. L. REV. 1877, 1925 n.212 (2019) (“Unlike habeas corpus, issues of fact raised by the writ \textit{de homine replegiando} were triable by a jury . . . .”).
searches and seizures for free persons of color by marauding slave-catchers, aided by the federal government. This led to the enactment of what were known as “personal liberty laws.” These statutes demonstrate the belief of denizens of the free States that, notwithstanding the 1793 federal law, the seizure of persons of color was to be regulated, and often strictly circumscribed, by state law. They also show the variety of ways in which different States chose to regulate seizures within their borders. Once again, we see arguments based on the Bill of Rights, some specifically invoking the Fourth Amendment, to provide state procedures governing seizures of alleged fugitive slaves. Again, the argument was susceptible of two interpretations: that the federal fugitive slave laws violated the Fourth Amendment and other provisions of the Bill of Rights because they abrogated generally applicable procedural rights; and that these provisions preserved the State’s authority to regulate the rendition of those alleged to be fugitives from slavery, whether it took place under the auspices of the federal acts or pursuant to the private right of recaption.

By 1857, personal liberty laws had been enacted in one form or another in nearly all of the free States: Connecticut, Indiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and Wisconsin. Some versions of these laws preserved the common-law private right of recaption but established or confirmed the existence of post-seizure remedies to test the validity of the claim to the alleged fugitive. Some States permitting recaption made it extremely hazardous by enacting stringent criminal penalties for kidnapping a free person of color. Some statutes more aggressively barred recaption and required a warrant for the initial seizure of the alleged fugitive.

Even prior to enactment of the Fugitive Slave Act of 1793, States specifically addressed the seizing and carrying out of the State of free persons of color. A 1788 Connecticut law punished such a transgressor as a kidnapper with a one-hundred pound fine. Massachusetts’ 1788 law,

---

79 I do not include Illinois, whose law forbade taking anyone from the State into another “without having established a claim according to the laws of the United States.” Ill. Rev. Laws § 56 (1833). Thus, the statute was consistent with the 1793 Act and merely created a state law crime for not following its dictates. I do include New Hampshire and Rhode Island, although their laws were relatively weak. They merely prohibited state officers and judges from assisting with the implementation of the federal act. See An Act for the Further Protection of Personal Liberty, §§ 1, 2, 1846 N.H. Laws 295; An Act Further to Protect Personal Liberty, 1848 R.I. Pub. Laws 12; An Act Further to Protect Personal Liberty, 1854 R.I. Pub. Laws 22.

though not specifying persons of color, permitted an action for damages for anyone wrongfully “carried off, by force or decoyed away” outside the State, observing that some of its residents had been taken “by evil minded persons . . . with a probable intention of being sold as slaves.”\(^81\) Pennsylvania, in the 1780 act providing for the gradual abolition of slavery in the State, also reaffirmed the common-law right of recaption, preserving the right of a slaveowner “to demand, claim and take away [any] slave or servant” who had absconded from another State.\(^82\) However, eight years later, it prohibited the kidnapping of free persons of color to take them out of state with the intent to keeping, selling, or disposing the person as a slave.\(^83\)

The States also reaffirmed the procedural mechanisms that could be invoked to question the validity of the seizure of an alleged fugitive from slavery, whether by writ of habeas corpus, as Pennsylvania did in 1785,\(^84\) or by writ of personal replevin, as Massachusetts did in 1787.\(^85\) Were a claimant to exercise his or her right of recaption, such a writ could be obtained on the alleged fugitive’s behalf in order to have a court determine whether he or she was in fact a fugitive from slavery.

After passage of the Fugitive Slave Act of 1793, States continued to make special provisions addressing the seizing of persons and taking them out of state to hold or sell them as slaves. Vermont passed an anti-kidnapping law in 1806 that seemed to do away with any right to seize a fugitive slave, regardless of the process undertaken—an interpretation that would render it inconsistent with not only the 1793 Act but the Fugitive Slave Clause of the Constitution itself. Facialy race-neutral, it forbade the taking of persons out of the State in order to “dispose [them] into servitude for a longer term of time, or in a different manner, than he, she or they could have a right, by law

\(^{81}\) An Act to Prevent the Slave-Trade, and for Granting Relief to the Families of Such Unhappy Persons as May be Kidnapped or Decoyed Away from This Commonwealth, 1788 Mass. Acts 672 – 73.


\(^{83}\) See An Act to Explain and Amend an Act, Entitled, “An Act for the Gradual Abolition of Slavery,” § 7, 1788 Pa. Laws 586, 589. Because the statute applied to “any negro or mulatto” in the State, it technically forbade slaveowners even from recapturing their fugitive slaves. However, it is unclear whether the statute was ever enforced in that manner.

\(^{84}\) See An Act for the Better Securing Personal Liberty, and Preventing Wrongful Imprisonments, § 13, 1785 Pa. Laws 241, 245 46 (extending provisions awarding and granting writs of Habeas Corpus to a person “confined or restrained” of his or her liberty).

to do, within” Vermont. Some States preserved the common-law private right of recaption but, again, made exercise of this right hazardous for slaveowners and their agents by exposing them to kidnapping prosecutions. In 1819, Ohio did away with the right of recaption and made failure to follow the procedures of the 1793 Act punishable as kidnapping. The following year, Pennsylvania also eliminated the right of recaption, making any forcible taking of “any negro or mulatto” outside the State with the intent to reduce that person to slavery a kidnapping punishable by seven to twenty-one years in prison. And States continued to provide for writs of habeas corpus and personal replevin to test the validity of a claim for an alleged fugitive.

The foregoing laws all regulated the process of rendition following the initial seizure of the alleged fugitive from slavery. Some States, beginning

---

87 See, e.g., An Act for the Protection of the Personal Liberty of the Citizens, § 1, 1821 Me. Laws 90. Maine later added “without lawful authority” as an element of the offense presumably to provide a carve-out for those who had followed the procedures dictated by the 1793 federal act. See An Act Against Kidnapping or Selling for a Slave, § 1, 1838 Me. Laws 470.
88 See An Act to Punish Kidnapping, § 1, 1819 Ohio Laws 370, 371; see also MORRIS, supra note 26, at 29 (“Anyone who removed a black (any black) from the state without following the procedures outlined in the federal law of 1793 would be deemed guilty of a high misdemeanor.”); FEHRENBACKER, supra note 50, at 213 (explaining that Ohio’s law made “private recapture and removal of a fugitive slave the legal equivalent of kidnapping”). This provision was essentially re-enacted in 1831 and 1839. See An Act to Prevent Kidnapping, § 2, 1831 Ohio Laws 442; An Act Relating to Fugitives from Labor or Service from Other States, § 11, 1839 Ohio Laws 38, 42. The 1839 law also authorized but does not seem to have required arrest of the fugitive via warrant, id. § 1, and it contemplated trial of any disputed factual issue, but not by jury. Id. § 4 (“[The fugitive] will then and there abide the decision of the judge who shall try the case”). The 1839 Ohio law, although generally favorable to slaveowners, did not reinstate the right of recaption. See MORRIS, supra note 26, at 91.
89 An Act to Prevent Kidnapping, § 1, 1820 Pa. Laws 104, 104-05. The law also forbade some Pennsylvania officials – justices of the peace and aldermen – from enforcing the 1793 federal act. Id. § 3 (“When a person held to labour or service in any of the United States, or in either of the territories thereof, under the laws thereof, shall escape into this commonwealth, the person to whom such labour or service is due . . . is hereby authorized to apply to any judge, justice of the peace, or alderman, who on such application . . . shall issue his warrant . . . .
with Indiana in 1817, also regulated the initial seizure of alleged fugitive slaves by requiring a warrant or other legal process for such a seizure. Pennsylvania followed suit in 1826. Pennsylvania also retained its punishment for taking out of the State “any negro or mulatto” to enslave them, in essence applying the warrant requirement even in cases of actual fugitives from slavery. New York in 1830 and Connecticut in 1838 began requiring that the claimant obtain a writ of habeas corpus, which presumably had a similar effect as a warrant. Likewise, Vermont began in 1840

91 An Act to Prevent Manstealing, § 3, 1817 Ind. Acts 150, 151-52 (requiring a warrant prior to seizure). Indiana appears to have later made this warrant process voluntary rather than mandatory. See An Act Relative to Fugitives from Labour, § 1, 1824 Ind. Acts 221 (establishing that persons “may go before the clerk of any circuit court” in order to obtain a warrant).

92 An Act to Give Effect to the Provisions of the Constitution of the United States, Relative to Fugitives from Labour, for the Protection of Free People of Colour, and to Prevent Kidnapping, §§ 1, 3, 1826 Pa. Laws 95, 95-97. It was this statute that the U.S. Supreme Court would later declare unconstitutional in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). See infra text accompanying notes 133-132.

93 An Act for the Fulfilment of the Obligations of This State, Imposed by the Constitution of the United States, in Regard to Persons Held to Service or Labor in One State Escaping Into Another, and to Secure the Right of Trial by Jury, in the Cases Herein Mentioned, § 1, 1838 Conn. Pub. Acts. 32 (requiring the “person entitled to the labor or services of [the] fugitive” to show proof for a writ of habeas corpus); N.Y. Rev. Stat., chap. IX, Title I, §§ 6, 20 (1836) (same). Connecticut’s law was repealed following Prigg; the new law merely forbade state officers and judges from enforcing the 1793 Act. An Act to Repeal an Act Therein Mentioned and for Other Purposes, § 2, 1844 Conn. Pub. Acts. 33-34 (“No judge, justice of the peace, or other officer appointed under the authority of this state shall be authorized, as such, to make, issue, or serve any warrant or process for the arrest or detention of any person claimed to be a fugitive from labor or service, as a slave, under the laws of any other state or country . . . .”; see also An Act Further to Protect Personal Liberty, §§ 1-2, 1843 Mass. Acts 33 (stating that the 1793 Act shall not be enforced with respect to alleged fugitives from slavery). An 1804 Ohio law seemed to authorize but not require arrest via warrant of fugitives from slavery. See An Act, to Regulate Black and Mulatto Persons, § 6, 1804 Ohio Laws 356, 358. Although this statute did not explicitly apply to claimants from other States, this must have been its import, given that slavery was outlawed in Ohio by virtue of the Northwest Ordinance of 1787. See An Ordinance for the Government of the Territory of the United States North West [sic] of the River Ohio, 32 J. Cont. Cong. 334, 343 (July 13, 1787) (“There shall neither be slavery nor involuntary servitude in the said territory. . . .”). I do not include in this category New Jersey, which in both 1826 and 1846 ostensibly required a warrant in order to seize an alleged fugitive slave on pain of conviction with a sentence of up to two years at hard labor. See A Supplement to an Act entitled “An Act Concerning Slaves[”], § 8, 1826 N.J. Laws 90, 93; An Act Concerning Fugitive Slaves, § 13, 1846 N.J. Laws 567, 571-72 (requiring a warrant before a sheriff could arrest and seize a fugitive slave). But both statutes gave the claimant the option of acting pursuant to either a warrant or “other legal authority . . . under some act . . . of the congress of United States.” See id. And because the 1793 federal act permitted the claimant “to seize or arrest [the] fugitive” without a warrant, no warrant was required so long as the claimant abided by the process laid out in the 1793 act. But see ANDREW TASSITZ, RECONSTRUCTING THE FOURTH
requiring a “writ of arrest” for the capture of a fugitive, which could be obtained only by posting a bond of $1,000, to go towards the cost of the proceedings and damages to the alleged fugitive should he or she ultimately be found not to be an enslaved person. These laws obviously did away with the common-law right of recaption. They were also inconsistent with the 1793 Act, which explicitly “empowered” the claimant “to seize or arrest [the] fugitive from labour.”

Some of these laws also tended to raise, or at least be more explicit about, the amount of proof required to have an alleged fugitive from slavery seized. The 1793 federal Act vaguely required “proof to the satisfaction of [the] judge or magistrate” for an alleged fugitive from slavery to be taken from the State. By contrast, just to have the alleged fugitive from slavery seized via habeas corpus, the 1838 Connecticut law required an affidavit by the claimant “setting forth minutely and particularly, the ground of [the] claim to the service[] of [the] fugitive, the time of his or her escape, and where he

---


95 MORRIS, supra note 26, at 52, 56 (discussing the elimination of the right of recaption); FEHRENBACKER, supra note 50, at 216 (discussing New York’s prohibition of private recaption).

96 An act respecting fugitives from justice, and persons escaping from the service of their masters, 2d Cong., 1 Stat. 302, § 3 (1793).

97 Id. § 3.
or she then is, or is believed by the affiant to be.” 98 The 1830 New York law was similar. 99

Legislators in several States invoked the Fourth Amendment in support of legislation that would require a warrant to seize an alleged fugitive slave and in opposition to the warrantless arrests permitted by the federal fugitive slave laws. In support of the 1826 Pennsylvania law, conservative house leader William M. Meredith said:

“In a government of Laws—in a free government especially,—no man should be arrested, but by the warrant of an officer of the Law . . . . Citizens of this State . . . are at present exposed to seizure without warrant of any kind. Why should they not be placed upon the same footing with our other Citizens?” 100

Several years later, another Pennsylvania legislator, Francis James, pointed out the inconsistency between the 1793 Act and the Fourth Amendment, concluding:

Now, sir, gentlemen must show either that persons who from the color of their skin, may become the object of this uncensernous seizure are not embraced within the meaning of the word ‘people,’ or they must prove that the seizure is not an unreasonable seizure, or they must admit that this part of the law of congress at least is an infringement not only of the spirit but of the letter of the constitution. 101

Likewise, in deploring the Fugitive Slave Act’s authorization for alleged fugitive slaves to “be seized without a warrant,” a select committee of the Ohio Senate, after quoting the Fourth Amendment, asked rhetorically:

Did the framers of the constitution design to invest the Congress of the United States with the despotic power, of subjecting the people of the States, not chargeable with the commission of any crime, to lawless seizure and caption, without notice, without process of law, in a manner unknown in the history of even criminal jurisprudence, and expressly prohibited by the very instrument from which all their authority is derived . . . . 102

Again, these arguments are ambiguous as to whether they are positing a general, nationwide right to certain arrest procedures or instead a right to be

98 An act for the fulfilment of the obligations of this State, imposed by the Constitution of the United States, in regard to persons held to service or labor in one State escaping into another, and to secure the right of Trial by Jury, in the cases herein mentioned, 1838 Conn. Pub. Acts. 32, § 2 (1838).
100 MORRIS, supra note 26, at 50 (quoting Meredith) (emphasis omitted).
101 Trial by Jury, supra note 43, at 5.
arrested only pursuant to state law. But the variety of procedures established in the free States militates toward the latter interpretation.

That so many States enacted so many different versions of personal liberty laws, all having as their object state control over the process of rendition of alleged fugitives from slavery, demonstrates the widespread view among state legislators and, presumably, their constituents, that the process was theirs to control. On this view, the Fugitive Slave Clause governed what was to become of fugitives from slavery, but it was for state law to govern how to determine whether one was actually a fugitive from slavery at all or, instead, a free person of color. As “[t]he Constitution is silent as to the manner of proof,” one legislator argued, the framers and ratifiers “contemplated that the facts would be ascertained, according to that usual common law method by writ of homine replegiando or other common law trial adopted to the nature of the claim”—that is, by state law. As a select committee of the Ohio Senate put it in 1838: “It would have been preposterous to suppose that the manner of determining these questions was to be dictated by any other authority than the sovereign power of the State” and “in accordance with its own laws.”

This view was apparently shared by some lawyers who had held prominent positions in the federal government, such as former U.S. Attorney General Benjamin F. Butler, former War and Treasury Secretary John C. Spencer, and former U.S. Attorney for the Southern District of New York John Duer, each of whom was said to have endorsed New York’s sweeping 1830 law. As a Massachusetts legislative committee put it in 1837 regarding the New York law: “These provisions assume, as a right in the State government, the power to regulate the whole process and proceedings, by which persons claimed as fugitive slaves shall be delivered up and the claim substantiated . . . .” Even proslavery forces accepted the early personal liberty laws as legitimate and temperate exercises of state power to . . .

---

105 See H.R. REP. NO. 51, REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, at 21 (Mass. 1837) (“[T]hese provisions were recommended by John Duer, Benj. F. Butler, (the attorney general of the United States,) and John C. Spencer who were the committee of revision. . . .”).
106 Id. at 20-21; see also MORRIS, supra note 26, at 57 (noting that the “states acted on the assumption that they possessed the constitutional power to provide some standards for those officials who might be called upon to administer the federal law . . . .”).
enforce the Fugitive Slave Clause. It was only when anti-abolitionism grew with a fervor in the 1830s that these laws were attacked as impeding slavery.\textsuperscript{107}

Of course, these laws could regulate the process only in the state courts. Although “\textit{some} had urged the states to regulate entirely the process by which runaways were returned to their masters” even in federal court, the States “settled on prescribing the modes of procedure for their own officials.”\textsuperscript{108} However, for claimants to gain immunity from anti-kidnapping laws, state courts would have to give preclusive effect to a federal judge’s determination that the person in question actually was a fugitive from slavery. (The “conclusive” effect of the certificate was later spelled out explicitly in the 1850 federal act).\textsuperscript{109} Moreover—and this is crucial—during this time period, state writs of habeas corpus and personal replevin could be used to take a purported fugitive slave out of federal custody and bring him or her into state court.\textsuperscript{110} Indeed, this would be the inevitable result in States that both retained these common-law writs but also forbade state officials from enforcing the 1793 Act: the Act could be enforced only in federal court and yet the writs remained available. The U.S. Supreme Court did not disapprove of this practice until 1859.\textsuperscript{111} For nearly the entire antebellum period, then, even a recapture process initiated by a claimant in federal court could ultimately wind up in state court, governed by state law.

Thus, conflict between some state personal liberty laws, on the one hand, and the Fugitive Slave Act of 1793 and the private right of recaption, on the other, was inevitable. As an 1837 Massachusetts legislative committee observed, many of the personal liberty laws were “in direct contradiction of the power of Congress.”\textsuperscript{112} The implications of that contradiction—that is,
whether the federal act or, instead, the state personal liberty laws were void—
obviously would fall to the courts. Here again we see arguments based on
the Bill of Rights, including the Fourth Amendment, made on behalf of
alleged fugitives from slavery.

E. The Fourth Amendment and Fugitives from Slavery in the Courts

The question of whether the Fugitive Slave Act of 1793 was constitutional
was litigated first in a Pennsylvania case in 1819, but the alleged fugitive from
slavery in that case argued only that both the U.S. and the Pennsylvania
Constitutions entitled him to a jury trial.\textsuperscript{113} That claim was rejected in broad
language that affirmed the constitutionality of the 1793 law.\textsuperscript{114} Most
subsequent cases similarly upheld the federal law but the Fourth Amendment
argument, if it was made at all, was typically ignored. For example, in \textit{Jack
v. Martin}, in the New York Court for the Correction of Errors (the highest
state court at the time), the fugitive from slavery made a cursory argument
that the Fugitive Slave Act of 1793 was “at variance not only with . . . the
right of trial by jury . . . but with the sixth article of the amendments, which
declares the right of the people to be secure against unreasonable searches
and seizures.”\textsuperscript{115} The court did not directly address the argument, perhaps
because the arrest there had actually been consistent with New York law: the
claimant first obtained a writ of habeas corpus directing the sheriff to arrest
the fugitive.\textsuperscript{116} Salmon P. Chase argued to no avail on behalf of an alleged
fugitive from slavery in 1837: “[H]ow could the people be more completely
exposed to ‘unreasonable seizures,’ than by this act of congress? Under its
sanction, any man who claims another as his servant, may seize and confine

\textsuperscript{113} Wright v. Deacon, 5 Serg. & Rawle 62, 63 (Pa. 1819) (reporting plaintiff’s argument that “under the
constitutions of Pennsylvania and of the United States the plaintiff was entitled to a trial by jury”).

\textsuperscript{114} Wright v. Deacon, 5 Serg. & Rawle 62, 63-64 (Pa. 1819) (“It plainly appears from the whole scope
and tenor of the constitution and act of Congress, that the fugitive was to be delivered up, on a
summary proceeding, without the delay of a formal trial in a court of common law.”).

\textsuperscript{115} Jack v. Martin, 14 Wend. 507, 512-13 (N.Y. 1835). The reference to “the sixth article of the
amendments” was common during this era because what we know as the Fourth Amendment was
the sixth amendment proposed to the States by Congress in 1789; the first two were not adopted at
that time.

\textsuperscript{116} \textit{Id.} at 507-08; \textit{see also} Jack v. Martin, 12 Wend. 311, 312-13 (N.Y. Sup. Ct. 1834) (lower court
opinion), aff’d 14 Wend. 507 (N.Y. 1835) (describing the process by which the alleged fugitive was
arrested).
him.” A Fourth Amendment argument was also made by counsel—one of whom was again Chase—in an 1845 Ohio case, *State v. Hoppess*:

[N]o seizure could be more unreasonable or dangerous, or more directly prohibited by article IV of the amendment to the constitution, than that in this case; for it was a seizure by the intended party upon his bare claim, unsupported by evidence other than his own naked statement, without a warrant, and, if lawful, every person of every complexion might be in like manner seized and held . . . .

The court ignored the argument and ordered the alleged fugitive from slavery to be kept in custody. In these cases, we again see a failure to specify whether the Fourth Amendment was thought to impose general, nationwide standards for seizures or whether the argument was instead that the Amendment preserved state law processes.

The latter interpretation is suggested by the only case in which the Fourth Amendment argument was addressed, an 1823 Massachusetts case, *Commonwealth v. Griffith*. Although the court there rejected the challenge, a careful reading of the opinion shows that the court actually accepted that the Fourth Amendment reserves to the States the authority to regulate seizures of free persons. In *Griffith*, a man named Randolph had been enslaved by one M’Carty in Virginia, when Randolph fled to New Bedford, Massachusetts. He bought a house and had lived there for four or five years when Mason, the administrator of M’Carty’s estate, authorized the defendant Griffith “to seize and arrest Randolph” pursuant to the Fugitive Slave Act of 1793. Griffith and a deputy sheriff seized Randolph without a warrant and confined him with the intent of bringing him before a magistrate in order to obtain a certificate to bring Randolph back to Virginia. Griffith was ultimately indicted for “assault and battery and false imprisonment.” There being no dispute about the facts, Griffith’s guilt or innocence hinged on whether the seizure of Randolph was proper under the 1793 Act.

117 Speech of Salmon P. Chase, in the Case of the Colored Woman, Matilda 26 (Mar. 11, 1837) [hereinafter CHASE MATILDA SPEECH].
119 *Id.* at 117.
120 *Commonwealth v. Griffith*, 19 Mass. 11, 12-13 (1823).
121 *Id.* at 12.
122 *Id.*
123 *Id.*
124 *Id.*
The Attorney General of Massachusetts, Perez Morton, argued that the Act violated the Fourth Amendment because it authorized a seizure without a warrant. Morton argued that the Fugitive Slave Clause “does not authorize a seizure without some legal process; which would manifestly be contrary to the fourth article of the amendments of the constitution.”

Although the jury ultimately determined that Randolph had indeed been enslaved in Virginia, Morton argued that at the time of the seizure Randolph “was prima facie a freeman, and entitled to all the rights of a freeman, until it should have been proved in a legal manner that he was a slave.”

The court disposed of the argument by holding that enslaved persons were not part of “the people” who are protected by the Fourth Amendment: “[S]laves are not parties to the constitution, and the amendment has relation to the parties.”

Had the court stopped there, it would of course have been guilty of question-begging: even if enslaved persons were not “parties to the constitution,” the whole point of the personal liberty laws and the purported constitutional constraints on the rendition process was that some process was required in order to determine whether the alleged fugitive from slavery really was a fugitive. As John Codman Hurd put it: “When the question is, how shall a man be proved to owe service and labor, to have escaped, &c., it is absurd to say it is proved by assuming him to be a slave.”

But the court did not stop there. It acknowledged that a free person of color might be taken erroneously as an enslaved person: “But it is objected, that a person may in this summary manner seize a freeman.”

The court’s answer is telling: “It may be so, but this would be attended with mischievous consequences to the person making the seizure, and a habeas corpus would lie to obtain the release of the person seized.”

That is to say, if a free person were seized, he or she would be entitled to release via a writ of habeas corpus.

---

125 Id. at 15.
126 Id. at 15-16.
127 Id. at 19.
128 2 HURD, supra note 51, at 727; see also FEHRENBACHER, supra note 50, at 217 (observing that the Griffin court’s “pronouncement begged the central question commonly at issue in fugitive slave cases, namely whether the alleged fugitive was in fact a slave.”); MASS. H.R. REP. NO. 51, REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, at 23, 24, 28 (1837) (taking the Griffith court to task for “begging the very question in dispute”); CHASE MATILDA SPEECH, supra note 117, at 24 (observing that “[i]t is idle to say that none but escaping servants can be seized,” because the seizure takes place before “the validity of the claim [can] be tried”).
129 Griffith, 19 Mass. at 19.
130 Id.
And there would be “mischievous consequences” to the claimant: civil liability to the person wrongfully seized as well as exposure to a criminal prosecution for kidnapping.

Thus, although the Griffith court rejected the Fourth Amendment challenge, it did so in a way that made clear that the Fourth Amendment preserved state control of seizures, at least insofar as free persons were concerned. It rejected the challenge only because it was undisputed that Randolph was actually a fugitive from slavery and therefore, the court held, unprotected by the Fourth Amendment. As to free persons of color, the Amendment preserved the State’s method of regulating seizures: procedurally by making the habeas corpus writ available, and substantively by subjecting the person making a wrongful seizure to the “mischievous consequences” of civil and criminal liability.

This is precisely how the Massachusetts House Judiciary Committee later read Griffith. Emphasizing the “mischievous consequences” language, the Committee wrote that the case stood for the proposition that the Fugitive Slave Act of 1793 was “constitutional as to slaves, and unconstitutional as to freemen, and gives the person seized the right to try the question [of their status] either before or after certificate.” This aspect of Griffith, the Committee wrote, preserves the right of the person seized to test his confinement “by habeas corpus, or the writ de homine,” and to sue the claimant for damages if wrongfully seized. “It makes, then, the claimant act at his peril throughout, and gives the person seized an opportunity to try . . . the applicability of the process to him . . . .” The Committee saw no other way the 1793 federal act could be valid under the Fourth, Fifth, and Seventh Amendments except to construe it in this way.

131 MASS. H.R. REP. NO. 51, REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, at 29-30 (1837).

132 See id., at 30-31 (1837) (“The Committee cannot see any other ground on which the validity of the act of Congress, under the [Fourth and Fifth Amendments], can be maintained for a moment, but upon the construction of its effect given by our supreme court.”). Accord Baker, supra note 107, at 1148 (observing that the Griffith court “took care to distinguish the case from that of a free black kidnapped under cover of federal law”); Trial by Jury, supra note 43, at 11 (interpreting Griffith to mean “that the state has a right to grant a jury trial [even] after the certificate given by the magistrate”); While not specifically addressing the Fourth Amendment, the Supreme Court of Judicature of New York wrote similarly in Jack v. Martin, 12 Wend. 311, 325-26 (N.Y. Sup. Ct. 1834): “Such seizure would be at the peril of the party; and if a freeman was taken, he would be answerable like any other trespasser or kidnapper.” See also N.Y. ASSEMBL., REPORT OF THE MINORITY OF THE COMMITTEE ON THE JUDICIARY, NO. 141, at 27 (1843) (arguing that the 1840
Unfortunately, when the issue reached the U.S. Supreme Court in 1842, the Court would not be as careful. *Prigg v. Pennsylvania* had an odd procedural history. An enslaved woman named Margaret Morgan escaped from Maryland into Pennsylvania in 1832. Edward Prigg, the agent of Margaret Ashmore, the woman claiming ownership of Morgan, obtained a warrant for Morgan’s arrest in Pennsylvania, by which Morgan was arrested by a constable and taken before a state magistrate. However, the magistrate refused to hear the case, after which Prigg exercised Ashmore’s right of recaption and took Morgan and her children into Maryland. Prigg was then indicted for violating Pennsylvania’s 1826 anti-kidnapping law. At trial, the jury found that Morgan had indeed been enslaved by Ashmore under the laws of Maryland. Nonetheless, Prigg was convicted. Ultimately, he took his appeal to the U.S. Supreme Court, arguing that the Pennsylvania law under which he was convicted was unconstitutional.

In the Supreme Court, Pennsylvania argued, in part, that the Fourth Amendment supported the constitutionality of the Pennsylvania law. This argument was not counsel’s main point, and it was largely coupled with an argument based on the Due Process Clause of the Fifth Amendment.

New York statute “does not interfere with the right of the owner, with his own hand, and at his own peril, peaceably to seize and remove his slave”). Here we see a repetition by judges and legislators of the term “at his peril,” used by the common law authorities to signify when the person conducting a search or seizure would be liable in tort if he was incorrect about his authority to do so. See, e.g. THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 27 (1792) (observing that if a person executes an arrest warrant for a felon by breaking the doors of the home of a third party, “he must at his peril see that the felon is there; for if the felon be not there, he is a trespasser to the stranger whose house it is”).

However, when counsel focused on the Fourth Amendment, the argument makes perfect sense on a federalism-based interpretation. Counsel argued:

I cannot be convinced that the right of recaption of persons ever existed here, or if it did exist, it is taken away by the amendments to the Constitution. I take the open avowed ground that in a free State every man is *prima facie* a free man who is at large. If so, he comes under that class called ‘people,’ and the right of ‘the people’ to be secure in their persons against unreasonable seizure is guarantied by the Constitution.\(^{142}\)

Thus, counsel countered the Griffith court’s explanation that the enslaved are not part of “the people” protected by the Fourth Amendment by contending that an alleged fugitive in a free State must be presumed to be a free person. Counsel also expressed skepticism that there ever was a common-law right of recaption in the United States. He then argued that, even if it did exist, it was “taken away by” the Fourth Amendment, which provides “secur[ity]” from “unreasonable seizures.”

But what security? A general, nationwide rule on seizing alleged fugitive slaves? Or differentiated, state-based rules, here Pennsylvania’s warrant requirement coupled with its anti-kidnapping provision? Unfortunately, counsel never got more specific. However, contextual clues lead to the latter interpretation. At this point in his argument, counsel was addressing whether the Pennsylvania law violated the Fugitive Slave Clause, not whether it conflicted with the 1793 federal law or whether the latter violated the Constitution. Moments earlier, he observed that “*[t]he allegations of unconstitutionality made against the [Pennsylvania] act of 1826*” were based on the “assert[ion] that no legislation is needed, that the constitutional provision is ample . . . and that under this clause a power is contained, in virtue of which, any one [sic] may step into a crowd and seize and carry off an alleged [sic] slave . . . .”\(^{143}\) Indeed, counsel here actually sounded like he was defending the power of Congress to legislate under the Clause concurrently with the States.\(^{144}\) Only later in his argument, after discussing the Fourth Amendment, did counsel argue that the 1793 federal Act was

---

\(^{142}\) *Id.* at 21 (first and third emphases added).

\(^{143}\) *Id.* at 12.

\(^{144}\) *Id.* at 13-15 (rejecting “the construction [of the Clause] that neither the Union nor the States can legislate upon this subject”); see also *Prigg* v. Pennsylvania, 41 U.S. (16 Pet.) 539, 600 (1842) (argument of Attorney General Johnson) (“The acts of congress and of Pennsylvania form together a harmonious system.”).
unconstitutional, not because it violated the Fourth, Fifth, or Seventh Amendments, but because Congress lacked the power to enact it. \footnote{The argument was that if the Clause preserved the right of recaption at all, it did so subject to the later-ratified Fourth Amendment. And the Fourth Amendment applied notwithstanding that Prigg was a private actor.}

More importantly, Prigg had not even adhered to the procedures set forth by the Fugitive Slave Act of 1793. He tried to, but the state magistrate proved uncooperative. Prigg had exercised the private right of recaption of his principal. The federal act was beside the point and the question was the constitutionality of the Pennsylvania statute under which Prigg had been convicted. Thus, when counsel for Pennsylvania made the Fourth Amendment argument, he was not asserting that the federal act violated the Amendment; he was arguing that the Pennsylvania law was constitutional because the Fourth Amendment preserved the right of the States to regulate seizures of persons. That is, he was making the second argument identified by Hurd (that the Bill of Rights modified the private right of recaption guaranteed by the Fugitive Slave Clause) not the first argument (that the federal law violated the Bill of Rights). \footnote{In 1840, New York had limited the requirement of legal process for an arrest to state officials. See supra text accompanying note 93.}

Moreover, as discussed above, \footnote{See supra Part I.D.} by 1842 when the case was argued, there were a multitude of procedures in the free States for guarding against the unlawful seizure of purported fugitives from slavery. Some States preserved the right of recaption in toto but exposed to stringent anti-kidnapping laws those who took free persons of color; others preserved the right of recaption only to the extent of permitting a claimant to seize the fugitive to bring him or her before a state official for determination of identity and status; and some, like Pennsylvania, did away with the right of recaption altogether, requiring that the initial seizure of a putative fugitive be made via warrant or other legal process. But only two other States besides Pennsylvania—Connecticut and Vermont—fell into this last category. \footnote{See supra note 141.} It is possible, but extremely unlikely, that counsel for Pennsylvania was arguing that this minority position was compelled by the Fourth Amendment. As co-counsel for Pennsylvania later observed during his argument:

\footnote{In 1840, New York had limited the requirement of legal process for an arrest to state officials. See supra text accompanying note 93.}
Different rules on this subject would naturally be established in different states. . . . The states are the best judges of that mode of delivering up fugitive slaves, which will be most acceptable to their citizens. It is evident that no general law can suit the spirit of the people in all; and the only rational mode of providing for the evil, is that provided by the framers of the Constitution — by committing it to the wisdom and patriotism of the states themselves.\textsuperscript{149}

The Fourth Amendment argument boiled down to this: even if the common-law right of recaption had been preserved by the Fugitive Slave Clause, the Fourth Amendment clarified that the right could be abridged or even eliminated by a State in its sovereign capacity to determine the best way of regulating the seizure of alleged fugitives from slavery.

The Supreme Court, speaking through Justice Story, declared the 1826 Pennsylvania statute unconstitutional. The Court held not only that the Fugitive Slave Clause preserved the common-law right of recaption, but also that the right of recaption was impervious to any common-law writ, such as the writ of personal replevin, that might be sought in response.\textsuperscript{150} The Court also added immunity from prosecution to the right of recaption, so that the State could not punish Prigg for having exercised that right: ““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.”\textsuperscript{151} However, rather than outright reject the Fourth Amendment argument, the Court simply ignored it.\textsuperscript{152} Indeed, of the seven opinions written in the case—in addition to the majority opinion there were separate opinions by Chief Justice Taney and Justices Thompson, Baldwin, Wayne, Daniel, and McLean—not a single one mentioned the Fourth Amendment.

\textsuperscript{149} Prigg, 41 U.S. at 595 (argument of Attorney General Johnson).

\textsuperscript{150} MORRIS, supra note 26, at 113-14 (observing that Prigg “destroyed the common-law right to challenge a seizure by the writ de homine replegiando”).

\textsuperscript{151} Prigg, 41 U.S. at 612, 613 (“[U]nder 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 . . . .”).

\textsuperscript{152} FEHRENBACHER, supra note 50, at 244 (“Justice Story silently disposed of the [Fourth Amendment] issue in his Prigg decision when he interpreted the fugitive slave clause as a self-enacting, unconditional confirmation of the right of recaption.”); TASLITZ, supra note 93, at 164-65 (observing that the majority opinion and Chief Justice Taney’s concurrence ignored the Fourth Amendment argument).
It is difficult to overstate the awfulness of Prigg. Some consider it possibly the worst Supreme Court decision of all time, which is saying something given the competition provided by cases such as Scott v. Sandford, which held that a person of color could not be a U.S. citizen, and Korematsu v. United States, upholding the forced internment of U.S. citizens of Japanese descent during World War II. It is only one dimension of Prigg’s terribleness that it needlessly obliterated the Fourth Amendment without even realizing what it was doing. As Professor Fehrenbacher has observed, even if the Fugitive Slave Clause enshrined the right of recaption in the Constitution, by ignoring the Fourth Amendment, the Court was able to sidestep the argument that the Amendment modified the meaning of that Clause.

To state the incredibly obvious, the Fourth Amendment amended the Constitution; it amended the whole thing, including the Fugitive Slave Clause. As Charles Francis Adams described Prigg on behalf of a committee of the Massachusetts House in February 1843: “[T]he confined view of [the Fugitive Slave Clause] is made not simply to conflict with the construction of all the other clauses in [the Constitution] which secure to the people the blessings it ought to confer, but, in its practical effect, to ride over them all.” Even if the Fugitive Slave Clause wrote the common law of recaption into the Constitution in 1788, the Fourth Amendment, ratified three years later, made clear that that right was subject to the traditional common-law constraints that a State might wish to apply: the writ of personal replevin to question the recapture, potential prosecution for recapturing the wrong person, a tort action for damages by the person wrongfully seized, or any


155 323 U.S. 214 (1944).

156 FEHRENBACHER, supra note 50, at 244 (“As for the Fourth Amendment’s protection against unreasonable searches and seizures, Justice Story silently disposed of that issue in his Prigg decision when he interpreted the fugitive slave clause as a self-enacting, unconditional confirmation of the right of recaption. . . . Neither Story nor any other federal judge ever came to grips, however, with the fact that the clause antedated the amendments to the Constitution and was presumably limited by each of them.”).

157 MASS. HOUSE REP. NO. 41, at 10 (1843) reprinted in 1 FINKELMAN, supra note 58, at 177, 186. See also Ex Parte Bushnell, 9 Ohio St. 77, 247-48 (1859) (Sutliff, J., dissenting) (“[T]he [fifth] amendment . . . being an amendment of the instrument containing the fugitive clause relied upon, must have full effect, although it be by qualifying, or even, by necessary implication, entirely abrogating that provision requiring a surrender.”).
other method by which the States sought to regulate the “seizures” of “persons” within their respective borders. Prigg wiped these all away without so much as a cite to the Fourth Amendment.

Moreover, the Court’s complete annihilation of the core of the Fourth Amendment—the preservation of state control of seizures within the State—was entirely gratuitous. As noted, the jury had found that Morgan was indeed enslaved by Ashmore under the laws of Maryland.158 As such, the narrow issue in Prigg was whether one could be convicted of kidnapping by exercising the right of recaption as to an actual fugitive from slavery. The real problem with the Pennsylvania kidnapping statute, if there was one, was that it protected all people of color, not just those who were free.159 Rather than depriving the free States of their ability to protect their free citizens of color, the Court might simply have held the law unconstitutional as applied to an enslaved person. After all, again to state the obvious, the subjects of the Fugitive Slave Clause were fugitive slaves. Indeed, Justice Baldwin concurred in the result on these narrow grounds.160 The Court need not even have opined on the constitutionality of the 1793 Act, leaving that question for another day, had it merely held that the Pennsylvania law violated the Fugitive Slave Clause itself as to actual fugitives from slavery.161 Instead, the Court ruled broadly that (1) the federal Fugitive Slave Act was constitutional and (2) States were utterly preempted from regulating in this field.

---

159 See supra text accompanying note 92.
160 Prigg, 41 U.S. (16 Pet.) at 636 (opinion of Baldwin, J.) (“[I]nasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping.”). This possibility was also alluded to by Justice Wayne:

[T]he claim for the states to legislate is mainly advocated upon the ground that they are bound to protect free blacks and persons of colour residing in them from being carried into slavery by any summary process. The answer to this is, that legislation may be confined to that end, and be made effectual, without making such a remedy applicable to fugitive slaves.

See id. at 650 (opinion of Wayne, J.).
161 See Ex Parte Bushnell, 9 Ohio St. 77, 142 (1859) (argument of Attorney General Walcott) (“When it was once held that Prigg had, under the constitution, without any legislation, state or federal . . . the right to seize Margaret, that case was ended . . . and everything that is said about the power of Congress is the purest obiter [dicta], which . . . carries with it no weight as authority whatever.”); CHASE ARGUMENT IN JONES, supra note 75, at 73 (“No question . . . as to the constitutionality of the[e] act was necessarily before the court in the Prigg case.”).
A Fourth Amendment argument would be raised once more in the Supreme Court, this time by Salmon P. Chase in *Jones v. Van Zandt*, 162 representing a man convicted in federal court for harboring a fugitive slave in violation of the 1793 Act. Chase’s argument, again, suggests a view of the Fourth Amendment as a federalism provision, at least in part. Chase argued that the Act violated both the Fourth Amendment and the Due Process Clause of the Fifth Amendment because it “authorize[d] seizure by private force, upon mere claim,” and “without process,” in violation of “that security from unreasonable seizure, which the constitution guaranties to the people.”163 Chase invoked “the sovereignty and independence of the states,” and drew the provocative image of “the slave hunter, ranging at will, through the free states, and clothed with a power, above the control of state laws, and state constitutions, and state authorities, to seize and drag [persons] beyond state limits, without legal process.”164 Again, the Court ignored the Fourth Amendment objection; indeed, it did not address the constitutional issues at all except to say that *Prigg* had already held that the 1793 Act “was not repugnant to the constitution.”165

F. Fallout from *Prigg* and the Fugitive Slave Act of 1850: The Fourth Amendment’s Last Stand

Even after *Prigg*, free States continued to claim that they had both the authority and the obligation to protect their free citizens of color from kidnapping on the pretense that they were fugitive slaves. Despite *Prigg’s* broad language, the decision “did not logically preclude the states from exercising their power to protect free men” because the case dealt only with a person who actually had been enslaved.166 Thus, Pennsylvania enacted another anti-kidnapping law five years after *Prigg* that added language

163 CHASE ARGUMENT IN JONES, supra note 75, at 91.
164 CHASE ARGUMENT IN JONES, supra note 75, at 74 (emphasis added).
165 Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847); see Taslitz, supra note 93, at 168-69 (observing that the *Jones* Court did not attempt to reconcile the Fugitive Slave Act with the Fourth Amendment).
166 MORRIS, supra note 26, at 104; see, e.g., SUPPLEMENT TO THE NEW YORK LEGAL OBSERVER, CONTAINING THE REPORT OF THE CASE IN THE MATTER OF GEORGE KIRK, A FUGITIVE SLAVE, at 459 (1847) (suggesting that parts of Prigg were “obiter dicta”), reprinted in 1 FINKELMAN, supra note 58, at 313, 317; N.Y. ASSEMBLY, REPORT OF THE MINORITY OF THE COMMITTEE ON THE JUDICIARY, No. 141, at 42 (1843) (“[T]he record in [Prigg] admitted that the party seized was a slave, and . . . the decision . . . turned exclusively on that fact” (emphasis omitted)).
making clear that it applied only to the kidnapping of a “free negro or mulatto.” It provided for imprisonment at hard labor for five to twelve years (twenty-one years in solitary confinement for a second offense). By making it clear that the new law applied only to “free” persons of color, the State purported to abide by *Prigg* while continuing to make it perilous for slave catchers to recapture alleged fugitives from slavery.\(^{167}\) Indeed, one notorious slave catcher was sentenced under this statute to ten years in prison for kidnapping a free child of a supposed escaped slave.\(^{168}\) More generally, *Prigg* spurred a new wave of resistance and attempted nullification by non-slave States.\(^{169}\)

In response to these continued claims by free States, slave States pressed the federal government for an even more stringent enactment. The result was the Fugitive Slave Act of 1850 which strengthened the law in several respects. First, it permitted U.S. commissioners (akin to modern-day magistrate judges) to exercise the same authority the 1793 Act invested in state and federal judges.\(^{170}\) Second, it gave the claimant the option of procuring a judicial warrant for seizure of the fugitive slave in addition to allowing the claimant to seize the slave him- or herself, if it could “be done without process.”\(^{171}\) Third, the 1850 Act clarified that any proceeding to determine the material facts of identity and servitude must be “in a summary manner,” precluding the option of a jury trial.\(^{172}\) Fourth, it expressly barred the alleged fugitive from testifying in that summary hearing.\(^{173}\) Finally, it made the certificate issued from the judge or magistrate “conclusive of the [claimant’s] right to take the fugitive, and forbade interference “by any court, judge, magistrate, or other person whatsoever.”\(^{174}\) In essence, this last

---


\(^{168}\) See Matthew Pinsker, *After 1850: Reassessing the Impact of the Fugitive Slave Law*, in *FUGITIVE SLAVES AND SPACES OF FREEDOM IN NORTH AMERICA* 93, 103 (Damian Alan Pargas ed. 2018).

\(^{169}\) See id. at 99 (“That complex decision only made things worse, however. The rest of that decade was punctuated with dramatic and often bitterly contested fugitive cases and an escalating sense of a national ‘border war’”).

\(^{170}\) See An Act to amend, and supplementary to, the Act entitled “An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters,” 31st Cong., 9 Stat. 462, §§ 1-4, at 462 (1850).

\(^{171}\) Id. §6 at 463.

\(^{172}\) Id.

\(^{173}\) Id.

\(^{174}\) Id. §6 at 463-64.
provision sought to preclude a collateral attack on the proceedings in state court.\footnote{See Pinsker, supra note 168, at 100 (noting that the Act was “clearly designed to frustrate the personal liberty regime that had been spreading across the North”).}

A fresh wave of outrage swept the North in response to the 1850 Act. \textit{Prigg} notwithstanding, some state legislators, lawyers, and private citizens continued to assert that Congress lacked power to regulate the re-capture of fugitive slaves.\footnote{Wisconsin Select Committee Report at 719 (1853) (“There is no grant of power in the constitution delegating to congress any control over the subject of slavery.”); \textsc{Trial of Thomas Sims, on an Issue of Personal Liberty, on the Claim of James Potter, of Georgia, Against Him as an Alleged Fugitive From Service at 17 (1851) (argument of Robert Rantoul, Jr.) (asserting that the 1850 statute “is not within the powers granted to Congress by the Constitution”), reprinted in \textsc{Finkelman}, supra note 58, at 617, 633.} Public meetings across the North condemned the Fugitive Slave Act [of 1850] as immoral, un-Christian, and unconstitutional.”\footnote{Baker, supra note 107, at 1165.} And some continued to make Fourth Amendment objections to the federal law.

A select committee of the Wisconsin Assembly observed that the “fugitive act bids the claimant seize its victim wherever he can, even without process” in violation of the Fourth Amendment.\footnote{Wisconsin Select Committee Report at 725, 726 (1853) (“It is of no avail, under the operation of this fugitive slave act, that the federal constitution declares, that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”).} Another meeting at Faneuil Hall in Boston of those opposed to the new act adopted a resolution denouncing it as “in direct violation of . . . the right of the people to be secure from unreasonable seizure.”\footnote{Report of the Proceedings at the Examination of Charles G. Davis, Esq. on a Charge of Aiding and Abetting in the Rescue of a Fugitive Slave 37–38 (1851) (quoting article from \textit{Boston Post}, Oct. 15, 1850), reprinted in \textsc{Finkelman}, supra note 58, at 573, 609–10.} Soon-to-be U.S. Senator from Massachusetts Charles Sumner declared the law “three times unconstitutional,” in that it deprived persons of liberty without due process, the right to a jury trial, and “[t]he right of the people to be secure in their persons against \textit{unreasonable seizures}.”\footnote{Charles Sumner, “Speech on Our Present Anti-Slavery Duties, at the Free Soil State Convention in Boston,” Oct. 3, 1850, reprinted in \textsc{2 Charles Sumner, Orations and Speeches} 396, 401 (1850).}

Between 1854 and 1858, all six New England States, plus Michigan and Wisconsin passed personal liberty laws “designed to obstruct rendition of any person claimed as a fugitive slave.”\footnote{\textsc{Fehrenbacher}, supra note 50, at 238.} Some States kept their old laws on the
books and also prohibited state agents and judges from enforcing the 1850 Act.\footnote{See, e.g., An Act Further to Protect Personal Liberty, ch. 182, § 1, 1853-1856 Me. Pub. Laws 207, 207-08 (1855) (stating that no judge or court in the State of Maine can enforce the 1850 fugitive slave act). Ohio continued to permit the seizure of fugitives so long as claimants followed federal law. See An Act to Prevent Slaveholding and Kidnapping in Ohio, 1857 Ohio Laws 121, 121-22. But, Ohio barred the use of state jail or prison facilities to house alleged fugitive slaves. See An Act to Prohibit the Confinement of Fugitives from Slavery in the Jails of Ohio, § 1, 1857 Ohio Laws 170.}

Vermont’s 1850 law, passed less than two months after the federal law was enacted, reaffirmed the availability of habeas corpus and reinstated jury trials in fugitive slave cases seven years after Vermont’s previous law providing for jury trials had been repealed.\footnote{An Act Relating to the Writ of Habeas Corpus to Persons Claimed as Fugitive Slaves, and the Right of Trial by Jury, §§ 3, 6 1850 Vt. Acts & Resolves 9, 9-10 (allowing a trial by jury “on application of either party”); see also An Act for the Defence of Liberty and for the Punishment of Kidnapping, No. 52, § 1, 1854 Vt. Acts & Resolves 51, 52 (providing a minimum of five years imprisonment for “falsely and maliciously declar[ing] . . . that any free person within the State is a slave” with intent to remove the person from the State as a slave).}

Connecticut enacted a law in 1854 subjecting to a $500 fine and five years in prison anyone “who shall wrongfully and maliciously seize or procure to be seized any free person entitled to freedom, with intent to have [him or her] held in slavery.”\footnote{An Act for the Defense of Liberty in this State, § 3, 1854 Conn. Stat. 798, 799.}

Massachusetts, which does not appear to have previously made it a separate crime to kidnap a free person of color out of the State to reduce him or her to slavery, finally did so in 1855, making the crime punishable by a fine of up to $5000 and up to five years in prison.\footnote{An Act to Protect the Rights and Liberties of the People of the Commonwealth of Massachusetts, ch. 489, § 7, 1855 Mass. Sess. Laws 924, 926; $5000 in 1855 is equivalent to almost $171,271.66 today. CPI Inflation Calculator, https://www.officialdata.org/us/inflation/1855?amount=5000 [https://perma.cc/HC2Q-7H3R] (last visited Dec. 11, 2022).}

The 1855 Massachusetts statute is virtually dripping with outrage. It not only reaffirmed the right to habeas corpus and to a jury trial for the alleged fugitive, but also: permitted the alleged fugitive to enter “a general denial” and a “plea [of] not guilty,” thus allowing even actual fugitives from slavery to put claimants to their proof; expressly placed the burden of proving “every question of fact” on the claimant “by the testimony of at least two credible witnesses, or other legal evidence equivalent thereto”; and invited jury nullification by permitting juries “the right to return a general verdict” and
to have “the same discretion as juries have in the trial of criminal cases,” i.e., the discretion to acquit against the evidence.186

In what can be called a last stand for state supremacy over the regulation of the seizures of alleged fugitives from slavery, the Wisconsin Supreme Court issued an opinion in 1854 declaring the 1850 Act unconstitutional.187 Judge Abram Smith wrote a concurring opinion excoriating the view that the Fugitive Slave Clause deprived the States of the power to regulate the searches for and seizures of alleged fugitives from slavery. He asked rhetorically:

[D]id [the States] delegate to the federal government the right to enter their territory and seize [fugitives]? Did they authorize that government to organize a police establishment, either permanently or temporarily, armed or unarmed, to invade their territory at will, in search of fugitives from labor, ranging throughout their whole extent, subject to no state law, but enjoying a defiant immunity from all state authority or process, while executing their mission? Did the states relinquish the right or power to prescribe the mode by which they would execute their own solemn compact, in delivering up the fugitive?3188

He continued:

 Had the northern states imagined, that by assenting to this clause of the constitution, they were thereby conferring upon the federal government the power to enter their territory in pursuit of a runaway negro, and . . . to subject their houses to search, and to override their own laws and municipal regulations, and that they were parting with all power to regulate the mode of procedure by which that clause

186 An Act to Protect the Rights and Liberties of the People of the Commonwealth of Massachusetts, ch. 489, §§ 4, 6, 1855 Mass. Sess. Laws 924, 925–26; see also PHILLIP S. PALUDAN, COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 2 (1975) (noting that this statute was “the most extreme personal liberty law of the age.”); An Act to Protect the Rights and Liberties of the Inhabitants of this State, ch. 241, §§ 2, 4, 8, 1855 Mich. Compiled Laws 2065, 2065-66 (providing for jury trial at which “the truth of any declaration, representation or pretense” that the alleged fugitive had been enslaved “shall not be deemed proved except by the testimony of at least two credible witnesses, testifying to facts directly tending to establish the truth of such declaration, pretense or representation, or by legal evidence equivalent thereto”); An Act for the Defence of Liberty and for the Punishment of Kidnaping, No 52, § 2, 1854 Vi. Acts & Resolves 51, 52 (similar); An Act Relating to the Writ of Habeas Corpus to Persons Claimed as Fugitive Slaves, the Right of Trial by Jury, and to Prevent Kidnapping in this State, ch. 8, §§ 6, 8, 1857 Wis. Gen. Laws 12, 13-14 (similar). Interestingly, Massachusetts passed a much more conciliatory statute on Mar. 25, 1861, presumably in a futile attempt to stave off the Civil War. See, e.g., An Act Concerning Habeas Corpus and Personal Liberty, ch. 91, § 4, 1861 Mass. Sess. Laws 398, 398-99 (clarifying that Massachusetts law should not “be construed to authorize the punishment of any person, who, without any false pretence or unlawful intent, claims another person as a fugitive from service or labor.”).


188 Id. at 100 (emphasis added).
was to be carried into effect; does any sane man believe that they would ever have assented to it?\textsuperscript{189} Although he cited the Tenth Amendment,\textsuperscript{190} Smith obviously had the Fourth in mind when he wrote that the States would “never consent” to “the houses of their citizens [being] searched [and] the sanctuary of their homes invaded,” with “state sovereignty . . . paralyzed and aghast,” by federal agents. His view of the Fourth Amendment apparently was that state law was to govern searches and seizures even by federal officials, based on “the ‘policy, local convenience and local feelings’ of [each] state.”\textsuperscript{191}

The U.S. Supreme Court reversed in\textit{Ableman v. Booth},\textsuperscript{192} holding for the third time that federal law on fugitives from slavery was constitutional. As it did in\textit{Jones}, the Court failed to address any particular constitutional argument, stating simply that “the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States.”\textsuperscript{193} In a remarkable display of resistance, the Wisconsin legislature issued a joint resolution declaring each state equally competent as the Supreme Court to interpret the Constitution, and pronouncing the decision in\textit{Ableman} to be “without authority, void, and of no force.”\textsuperscript{194} In only two short years, open defiance of the federal government would take a far different and bloodier form, this time by the Southern slavocracy.

\textbf{CONCLUSION}

Our obsession with judicial supremacy in constitutional interpretation would lead us to assume that the Fourth Amendment was essentially irrelevant in the antebellum period. After all, in neither\textit{Prigg} nor\textit{Jones} nor\textit{Ableman} did the U.S. Supreme Court so much as cite the Amendment. But broader views of constitutionalism that posit the Constitution as belonging to

\textsuperscript{189} Id. at 137 (emphasis added)
\textsuperscript{190} Id. at 123, 131.
\textsuperscript{191} Id. at 132, 136, 144.
\textsuperscript{192} 62 U.S. (21 How.) 506 (1859).
\textsuperscript{193} Id. at 526; For a fascinating history of this case, see generally Earl M.altz, \textit{Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle Over Fugitive Slaves}, 56 CLEV. ST. L. REV. 83, 92 (2008).
\textsuperscript{194} S.J. Res. 4, 1859 Leg., at 248 [Wis. 1859]; see Baker, supra note 107, at 1171.
the People, not the judges, show this assumption to be faulty. 195 State legislators, lawyers, and private citizens in the antebellum North carried on the notion from the founding-era that the States were the primary guarantors of civil rights. They operationalized this view against the Slave Power in arguing that the Constitution preserved the authority of the States to regulate seizures that occurred within their borders, not only rendering the federal fugitive slave laws unconstitutional, but also providing constitutional support for the state personal liberty laws. On their view, the Fugitive Slave Clause impinged only narrowly on state sovereignty, forbidding the States only from making enslaved people free. To the extent it purported to go further and preempt state regulation of seizures, it was almost immediately amended by the Bill of Rights. Proponents of this view cited the Fourth Amendment, along with the Fifth, Seventh, and Tenth, in support of both of these intertwined arguments: that the federal laws were unconstitutional and the state laws constitutional.

William H. Seward, former New York Governor and future U.S. Secretary of State, in summing up his argument for the defendant in the Supreme Court in Jones v. Van Zandt, hearkened back to the New York Anti-Federalists, whose reluctant acquiescence to ratification of the Constitution in 1788 in exchange for the promise of a bill of rights gave us the Nation we know today:

When the “Amendments,” which have been cited, were so sternly insisted upon by the State of New-York, as a condition of accepting the Constitution, the alarms and fears, out of which they arose, were thought by many, groundless and absurd. It is a melancholy reflection that [the Amendments] have proved inoperative. Still further and stronger guaranties of personal rights will be necessary, if the decision here be adverse to the Defendant. 196

Of course, the decisions in Prigg, Jones, and Ableman were all adverse to the alleged fugitives in those cases. They were adverse to the cause of freedom. And they were adverse to our federal structure. Faced with the continual

---

195 Baker, supra note 107, at 1134-35 (observing that “[r]ecent work on the antebellum political order has called the[re] assumption [of judicial supremacy] into question by identifying a much broader field of play for the making of constitutional law . . . by ‘the People themselves’”). The definitive works on popular constitutionalism are LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004), and MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

196 ARGUMENT OF WILLIAM H. SEWARD IN JONES V. VAN ZANDT AT 39-40, reprinted in 1 FINKELMAN, supra note 58, at 485-86.
threat of the breakup of the Union over slavery, the Supreme Court, in a
nationalistic fervor, set forth a vision of constitutional centralization on behalf
of the Slave Power in hopes of saving the Union. That vision brushed aside
objections based on the Fourth Amendment and other provisions of the Bill
of Rights.\footnote{See e.g., Fehrenbacher, supra note 50, at 242 (observing that “[i]n the late antebellum years... increasingly dangerous sectional conflict[s]” led to the rejection by the Supreme Court of all constitutional challenges to the fugitive slave laws grounded in the Bill of Rights).} Lost in the skirmish was a state-centered, federalism-oriented
approach to the Bill, whereby the Fourth Amendment stood for the
preservation of state control over searches and seizures.

As we all know, the Supreme Court’s appeasement of the Slave Power in
the 1840s and 1850s only delayed the inevitable. The 1860s would bring not
only a Civil War that destroyed nearly three-quarters of a million American
lives, but also perhaps the most dramatic changes in our legal and political
system in any decade in American history. In 1860, people of color were still
legally enslaved in over a dozen States. By 1870, they were not only
emancipated but—at least in theory—guaranteed full civil and political
rights by the Constitution, including the right to vote.\footnote{See U.S. CONST. amend. XV.}

As Seward predicted in the Jones case, “further and stronger guaranties
of personal rights [were] necessary,”\footnote{William Henry Seward, Argument of William H. Seward on the Law of Congress Concerning the Recapture of Fugitive Slaves in the Supreme Court of the United States.} but not in the way Seward foresaw. He was speaking of personal rights as against a federal government in league
with the Slave Power. The new rights that would be enshrined in the
Constitution in the bloody wake of the Civil War would protect Americans
from their own States. Even then, those who had legislated, litigated, and
otherwise fought for the rights of alleged fugitives from slavery did not forget
that federalism was their ally, not their foe, in that crusade. It may come as
a shock to those raised in the shadow of Jim Crow to hear radical abolitionist
Wendell Phillips proclaim, barely a month after Lincoln’s assassination no
less: “I love States Rights; that doctrine is the corner-stone of individual
liberty.”\footnote{Speech of Wendell Phillips, Esq., Nat’l Anti-Slavery Standard, May 13, 1865, at 1 (as reported by J.M.W. Yerrington).}

But in translating the protections of the Fourth Amendment from a right
against the federal government into a right against the States, its original
federalism orientation—as a preservation of the States’ authority to regulate searches and seizures within their respective borders—has been lost. By unearthing and dusting off the lost history of the Fourth Amendment, perhaps we can once again think about the Amendment as being, at least in part, about federalism.