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Rethinking Ableman v. Booth and States' Rights in Wisconsin

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RETHINKING *ABLEMAN V. BOOTH* AND STATES' RIGHTS IN WISCONSIN

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INTRODUCTION

ABLEMAN v. Booth is widely recognized as one of the most historically significant Supreme Court decisions of the nineteenth century.[1] It is taught in the leading constitutional history textbook for three major contributions.[2] First, it reasserted the Supreme Court's appellate jurisdiction over state courts and, in doing so, presented the antebellum Court's vision of dual federalism. Second, as one of only three major Supreme Court rulings on slavery, it notoriously held constitutional the Fugitive Slave Act of 1850,[3] a highly controversial law whose enforcement was widely believed to control the fate of the Union. By upholding the Fugitive Slave Act, the Court also effectively undermined antislavery theories of constitutional interpretation and invalidated the personal liberty laws of the northern states, which were designed to protect blacks in the North from southern slave catchers. Third, *Ableman* held for the first time that state courts cannot issue habeas corpus on federal prisoners.

The Wisconsin Supreme Court's decision in *In re Booth* that *Ableman* overruled is also worthy of notice. Because the Wisconsin court ruled that the Fugitive Slave Act was unconstitutional, it was widely cited by Southerners as one of the clearest examples of northern infidelity to the Constitution, thus justifying secession.[4] Also, in order to rule against the Fugitive Slave Act, the Wisconsin

[*] J.D., University of Virginia School of Law; B.A., Miami University. I would like to thank Professor Michael Klarman, Professor Charles McCurdy, several referees at the *Law and History Review*, and the participants of a *Virginia Law Review* Notes Workshop for their criticisms and comments on earlier drafts of this Note.

[1] 62 U.S. 506 (1859); see, e.g., Don E. Fehrenbacher, The Slaveholding Republic: An Account of the United States Government's Relations to Slavery 239–40, 291 (Ward M. McAfee ed., 2001); Alfred H. Kelly et al., The American Constitution: Its Origins and Development 238, 278–79 (7th ed. 1991).

[2] See Kelly et al., supra note 1, at 238, 278–79.

[3] Fugitive Slave Act, 9 Stat. 462 (1850) (repealed 1864).

[4] See infra notes 194–96 and accompanying text.

court developed a unique states' rights version of federalism that remains the most extreme declaration of state judicial power north or south of the Mason-Dixon Line. Finally, the decision represents the greatest success of antislavery constitutionalism, as the Wisconsin court was the highest in the nation to rule against slavery on constitutional grounds in the antebellum era.[5]

The traditional story of *Ableman* goes something like this: In 1854 fugitive slave Joshua Glover was captured and held in Milwaukee, Wisconsin. Demonstrating northern resistance to the odious Fugitive Slave Act, a massive crowd stormed the jail and rescued Glover.[6] Several leaders of the crowd were arrested by federal authorities for their role in the rescue, including Sherman M. Booth, a local abolitionist leader and newspaper editor.

In what amounted to a legally unjustifiable political act, the Wisconsin Supreme Court, motivated by opposition to slavery, granted Booth a writ of habeas corpus from federal detention and ruled that the Fugitive Slave Act was unconstitutional.[7] The Wisconsin court then inexplicably attempted to shield its decision from review by refusing to send the case record to the Supreme Court.[8] The Wisconsin court justified its actions in terms of the southern doc-

[5] See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 189 (1975) ("*Ableman v. Booth* . . . was the most extensive and successful of the many attempts to make a new constitutional law that would at least emphasize the elements of the Constitution that were essentially antithetical to slavery . . . .").

[6] See, e.g., Fehrenbacher, supra note 1, at 236.

[7] See, e.g., id. at 237 ("[T]he local unpopularity of an act of Congress had raised the specter of nullification."); A.J. Beitzinger, Federal Law Enforcement and the Booth Cases, 41 Marq. L. Rev. 7, 18 (1957) (calling the decisions "indefensible in law . . . [and] tantamount to judicial nullification"); Joseph A. Ranney, "Suffering the Agonies of Their Righteousness": The Rise and Fall of the States Rights Movement in Wisconsin, 1854–1861, 75 Wis. Mag. Hist. 83, 115 (1992) ("The general verdict of historians has been that the Wisconsin court's Booth decisions sacrificed legal principle for politics. The decisions have been seen as . . . nullification."). For a contemporary account, see Annual Report Presented to the American Anti-Slavery Society: The Milwaukee Rescue and Decisions 49, 57 (1855) (explaining that the Anti-Slavery Society did "not regard this decision . . . as of so much consequence in its legal bearings as in its political").

[8] See, e.g., Beitzinger, supra note 7, at 18 (calling the action "[t]horoughly indefensible in law"); Jenni Parrish, The Booth Cases: Final Step to the Civil War, 29 Willamette L. Rev. 237, 245 (1993) ("This action flew in the face of the Wisconsin court's own assertion two years earlier . . . ."); Louise Weinberg, Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist, 56 Md. L. Rev. 1316, 1357 (1997) ("At this point an almost surreal thing happened.").

trine of states' rights, an idea that became a dominant issue in state elections and was intimately associated with the Republican Party in Wisconsin.[9]

On appeal, the Supreme Court ruled in *Ableman* that it had appellate jurisdiction over the Wisconsin Supreme Court and that the Fugitive Slave Act was constitutional. After being arrested by federal marshals under the authority of *Ableman*, Booth was forcibly rescued because of ongoing hostility to the Fugitive Slave Act and defied federal authorities for months.[10] Support for states' rights then collapsed after the election of 1860, as Wisconsinites attempted to appease a seceding South.[11]

While partially accurate, this traditional narrative fails to explain adequately the legal doctrine of states' rights used in Wisconsin, the motivation of the Wisconsin justices, and the interaction of states' rights with the federal court system and party politics. And although the holding of *Ableman* is well known, the effects of the Supreme Court's decision on the antislavery movement and state and national politics have apparently been ignored.[12] This lack of scholarly attention is especially noticeable given the volumes written on *Dred Scott v. Sandford*, a contemporary decision on slavery-related issues.[13]

[9] See H. Robert Baker, The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War 120–22, 136–61 (2006); Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 134–35 (1995); Michael J. McManus, Political Abolitionism in Wisconsin, 1840–1861, at 140–47, 177–80 (1998).

[10] See Beitzinger, supra note 7, at 28–32; George W. Carter, The Booth War in Ripon, Proceedings of the State Historical Society of Wisconsin 161, 162–63 (1903).

[11] See infra note 173. Joseph Ranney also hints that the election of 1860 may have played a role. Ranney, supra note 7, at 112 & n.61.

[12] A few studies have incidentally touched the subject. Professor Michael J. McManus documents the initial reaction of the Wisconsin legislature and the effect of the decision on the election of a Wisconsin Supreme Court justice. See McManus, supra note 7, at 174–78. Professor Thomas Morris recounts the effect of *Ableman* on the personal liberty laws of the North. See Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780–1861, at 186–201 (1974).

[13] 60 U.S. 393 (1856). See generally Austin Allen, Origins of the *Dred Scott* Case: Jacksonian Jurisprudence and the Supreme Court 1837–1857 (2006); Walter Ehrlich, They Have No Rights: Dred Scott's Struggle for Freedom (1979); Don E. Fehrenbacher, The *Dred Scott* Case: Its Significance in American Law and Politics (1978); Mark A. Graber, *Dred Scott* and the Problem of Constitutional Evil (2006).

This Note will offer several contributions to the historiography of *Ableman*. Glover's rescue and the Wisconsin court's decision were motivated by more than mere opposition to slavery and the Fugitive Slave Act. Wisconsinites felt betrayed by the repeal of the Missouri Compromise in the Kansas-Nebraska Act, which opened the Kansas and Nebraska Territories to slavery for the first time. In response, they were not willing to extend legal comity to the South on the subject of slavery and thus wished to reject the harsh terms of the Fugitive Slave Act. A majority, however, saw no alternative consistent with the rule of law and thus disapproved of Glover's rescue. The Wisconsin Supreme Court, responding to these same social forces, made the people's rejection of the Fugitive Slave Act consistent with the rule of law by declaring the Fugitive Slave Act to be unconstitutional.

It was very likely, though, that the Supreme Court would uphold the Fugitive Slave Act on appeal. The Wisconsin court therefore developed the constitutional theory of John C. Calhoun and other southern theorists into a unique doctrine of states' rights under which state courts had the power to render a final interpretation of the Constitution. Previous explanations of the Wisconsin court's decisions as nullification or as appealing to states' rights, though partially accurate, fail to capture fully the court's position.

The Wisconsin court's doctrine and its repudiation by the Supreme Court in *Ableman* also had drastic social ramifications. While historians have recognized that states' rights became a dominant political issue, it is important to recognize further that the doctrine became influential only as a direct result of continued federal enforcement of the Fugitive Slave Act. Representing the culmination of such enforcement, *Ableman* had a destabilizing influence on Wisconsin and the rest of the nation. The Court's decision further increased support for states' rights in Wisconsin, and federal attempts at enforcement nearly resulted in civil war, ultimately ending in armed resistance to the federal government. In fact, the states' rights movement lost support only when it began to conflict with the more important goal of electing an antislavery president—not because of federal coercion resulting from *Ableman*. Moreover, *Ableman* encouraged antislavery use of states' rights outside of Wisconsin and further aggravated the sectional tensions that would soon result in civil war.

This new understanding of *Ableman* should not alter its place as one of the most historically significant constitutional cases of the nineteenth century. However, it may change exactly why scholars should regard the case as significant.

I. HISTORICAL CONTEXT

A. Legal Context

The Fugitive Slave Act was passed as part of the Compromise of 1850, but it was not a compromise on the issue of fugitive slaves. After the Supreme Court declared that Congress had exclusive power on the subject of fugitive slaves but could not require state officers to enforce an earlier congressional fugitive act in *Prigg v. Pennsylvania*,[14] many northern states passed personal liberty laws that prohibited state officers from aiding in the recapture of fugitive slaves and using state jails to detain them.[15] In response to these northern laws, the Fugitive Slave Act was passed to meet southern demands to aid slave owners in the rendition process.

The Fugitive Slave Act met southern demands so effectively that it denied alleged fugitives the traditional legal protections afforded to other northern citizens and thus essentially created a presumption of slavery in the North.[16] In hearings before a federal commissioner—who was paid a higher fee when ruling in favor of the slave catcher—alleged fugitive slaves were denied basic due process rights, such as the right to testify and a trial by jury.[17] These proceedings were deemed summary and final—no appeal or writ of habeas corpus was permitted.[18] Moreover, stiff penalties were imposed on anyone who interfered in the rendition.[19]

Although strong legal arguments against the constitutionality of the Fugitive Slave Act existed,[20] by 1854, when the litigation in

[14] 41 U.S. 539 (1842).

[15] See Morris, supra note 12, at 103–04, 109–17.

[16] See Fehrenbacher, supra note 1, at 231–32, 244 ("A pursuing slaveholder took with him the relevant slave law of his own state, including . . . the presumption of slavery attaching to all people of color.").

[17] See Fugitive Slave Act, ch. 60, 9 Stat. 462, 463–64 (1850) (repealed 1864).

[18] Id. at 462.

[19] Id. at 464.

[20] See Stanley W. Campbell, The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860, at 26–45 (1970); Fehrenbacher, supra note 1, at 239–44. But see

Wisconsin arose, there was little hope that the federal judiciary would embrace them. *Prigg* had already cast doubt on many of the arguments that could be made against the law, including a lack of congressional power under the Fugitive Slave Clause, the denial of a trial by jury, and the denial of due process.[21] The constitutionality of the new role of federal commissioners, who acted as judges under the act, was arguably an open question in 1850.[22] By 1854, however, all four northern Supreme Court Justices had upheld the constitutionality of the law while riding circuit.[23] Because it would have been inconceivable that all five southern Justices would rule otherwise, by 1854 it was a forgone conclusion that the federal courts would uphold the Fugitive Slave Act. This fact was no doubt clear to the Wisconsin Supreme Court in the litigation following the law's attempted enforcement.[24]

B. Political Context

In 1849, sectional tensions, which arose largely over the status of slavery in the territories and northern nullification of the 1793 Fugitive Slave Act, demanded a national adjustment. The South was already outnumbered in the House and faced permanent minority

Cover, supra note 5, at 207 (asserting that the constitutionality of the Fugitive Slave Acts was "well-established by the 1850's").

[21] See *Prigg*, 41 U.S at 613, 624; see also Paul Finkelman, Sorting Out *Prigg v. Pennsylvania*, 24 Rutgers L.J. 605, 630 (1993) ("At least seven justices accepted the notion that fugitive slaves were not entitled to due process rights.").

[22] Commissioners did not meet the requirements of Article III, Section 1 of the Constitution for federal judges, such as lifetime tenure and a fixed salary. Also, because commissioners were paid a higher wage for returning an alleged fugitive to slavery, their new role arguably violated the Fifth Amendment's guarantee of due process.

[23] Miller v. McQuerry, 17 F. Cas. 335, 337–41 (C.C.D. Ohio 1853) (McLean, J.); U.S. v. Hanway, 26 F. Cas. 105, 124 (C.C.E.D. Pa. 1851) (Grier, J.); In re Charge to the Jury, 30 F. Cas. 1007, 1010 (C.C.S.D.N.Y. 1851) (Nelson, J.). Justice Benjamin R. Curtis, though not ruling in his official capacity, defended the constitutionality and morality of the law in a written opinion published in the *Boston Courier* and in public speeches in Boston. Stuart Streichler, Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism 42–52 (2005). Moreover, Curtis was frequently attacked by abolitionists for his supposedly proslavery opinions. See id. at 64–65.

[24] But see Ranney, supra note 7, at 115 (contending that "in 1854 the constitutionality of the 1850 Act had never been formally decided" and thus the Wisconsin Supreme Court's decision to rule it unconstitutional was "by no means legally frivolous at the time [it was] made").

status in the Senate upon the admission of any new free states. With many Northerners advocating the Wilmot Proviso, which would ban slavery in the Mexican Cession, southern leaders warned of disunion. In the fall of 1849, a southern convention was called in Nashville "to devise and adopt some mode of resistance to [northern] aggressions."[25]

The Compromise of 1850 emerged as a sweeping bargain that was intended to provide a final resolution to the sectional controversy.[26] It contained eight provisions that covered every prominent issue of sectional tension. Most relevant to this Note, it purported to end the controversy over the status of slavery in the territories and passed a new Fugitive Slave Act to meet southern demands for more effective enforcement.[27] The sectional controversy was intended to have been put to rest, and Stephen A. Douglas, the Democratic champion of the compromise, "resolved never to make another speech on the slavery question in the halls of Congress."[28]

Although the Fugitive Slave Act was unpopular in Wisconsin, the Compromise of 1850 was ultimately accepted without resistance. Whig, Democrat, and Free Soil conventions alike expressly condemned the Fugitive Slave Act,[29] but prominent political leaders in Wisconsin opposed resistance to the law despite their personal feeling against it.[30] Also, while the antislavery Free Soil Party

[25] Avery O. Craven, The Growth of Southern Nationalism 1848–1861, at 64 (1953) (citing Natchez Miss. Free Trader, June 27, 1849; Natchez Wkly. Courier, July 24, 1849).

[26] David M. Potter, The Impending Crisis 1848–1861, at 97, 121 (1976).

[27] The territorial concerns were addressed by admitting California as a state on her own terms, which meant without slavery, and establishing territorial governments in the rest of the Mexican Cession without the Wilmot Proviso.

[28] Cong. Globe, 32d Cong., 1st Sess. app. at 65 (1850).

[29] Vroman Mason, The Fugitive Slave Law in Wisconsin, with Reference to Nullification Sentiment, Proceedings of the State Historical Society of Wisconsin 117, 120 (Madison, Democratic Printing Co. 1896). The Free Soil Party, successor of the Liberty Party, was a small political party organized around opposition to slavery, especially in the territories.

[30] See id. at 121 (quoting Free Soil Congressional Representative Charles Durkee and Democratic Governor Nelson Dewey). But see McManus, supra note 9, at 71 (arguing that the people only accepted the Fugitive Slave Act because they never expected to see it enforced in Wisconsin).

in Wisconsin had its weakest election results in 1851,[31] the Democratic Party in Wisconsin won sweeping victories after stepping back from its unusually strong antislavery platform.[32]

This sectional calm came to an abrupt end in 1854, as Democratic leader Stephen Douglas introduced the Kansas-Nebraska Act. Douglas pushed through a bill to repeal the Missouri Compromise, which excluded slavery from the Louisiana Purchase north of the 36°30' line, and to organize the territories of Kansas and Nebraska, thus opening them to slavery for the first time. The Kansas-Nebraska Act aroused northern antislavery feeling in a way never before seen. The Missouri Compromise had been viewed in the North as a "sacred pledge," and its repeal was seen as a terrible betrayal.[33] Douglas claimed that "he could have traveled to Chicago by the light of his own burning effigies."[34] The public reaction can perhaps best be gauged from behavior at the polls: in a political defeat of staggering proportions, Democrats managed to retain only twenty-five of the ninety-one incumbent northern seats in the following election.[35] Reaction to the Kansas-Nebraska Act was no less dramatic in Wisconsin, as bipartisan mass meetings across the state virulently condemned the law.[36]

Three lessons from these events proved to play an important role in the coming developments in Wisconsin. First, although the Fugitive Slave Act was unpopular, at first it did not generate widespread resistance in Wisconsin and was not a major political asset for the antislavery movement. Second, the Fugitive Slave Act was accepted as part of a compromise that was intended to end all agitation on slavery issues. Third, the Kansas-Nebraska Act, with its repeal of the Missouri Compromise, was perceived in Wisconsin as a betrayal by the South.

[31] See Theodore Clarke Smith, The Free Soil Party In Wisconsin, Proceedings of the State Historical Society of Wisconsin 97, 134–35 (Madison, Democratic Printing Co. 1895).

[32] See id. at 133–34.

[33] Potter, supra note 26, at 164.

[34] Id. at 165 (quoting Douglas).

[35] Id. at 175.

[36] See, e.g., Anti-Nebraska Meeting, Wis. St. J. (Madison), Mar. 13, 1854 (calling the act an "*outrage* upon humanity" and the congressmen who passed it "dishonest and unworthy [of] the true confidence of a free and intelligent people").

As will be demonstrated, resistance to the Fugitive Slave Act emerged in Wisconsin because many people believed that southern repudiation of the Missouri Compromise relieved them of any duty to abide by the Compromise of 1850. Relieved of this political duty, and wishing to extend no comity to the faithless South, many Wisconsinites sought to enforce the Fugitive Slave Clause of the Constitution under northern legal norms, including the presumption that all black residents were free. The result was massive resistance to the first attempt to enforce the Fugitive Slave Act in Wisconsin.

II. THE FACTS OF *ABLEMAN*: ENFORCEMENT OF THE FUGITIVE SLAVE ACT IN WISCONSIN

A. The Rescue of Joshua Glover

On March 10, 1854, a group of three U.S. marshals and Kentucky slave owner Benammi S. Garland arrested Joshua Glover as a fugitive slave.[37] Glover initially resisted arrest but was violently subdued by the marshals. Bruised and bloody, he was transported to Milwaukee under the cover of darkness and placed in jail with orders to keep the arrest a secret.[38]

The news of Glover's arrest, however, quickly spread across Wisconsin. After one of Glover's companions escaped from the scene of the arrest and alerted the people of Racine,[39] Sherman M. Booth, local Free Soil political leader and editor of the *Daily Free Democrat* in Milwaukee, was telegraphed news of the arrest.[40] After interviewing Marshal Charles Cotton, Federal District Judge Andrew Miller, and Glover, Booth and his associates issued a handbill stating:

> Last night a colored man was arrested near Racine, on a warrant of Judge Miller, by Deputy-Sheriff Cotton, and making some resistance, was knocked down and brought to this City, and incarcerated in the County Jail.

[37] See In re Booth, 3 Wis. 157 (1854); Kidnapping Case! Man-Hunters on our Soil!!, Daily Free Democrat (Milwaukee), Mar. 11, 1854.

[38] A Fugitive Slave in Wisconsin, Wis. St. J. (Madison), Mar. 14, 1854; United States Commissioner's Court, Daily Free Democrat (Milwaukee), Mar. 22, 1854.

[39] See History of Glover's Arrest, Daily Free Democrat (Milwaukee), Mar. 13, 1854.

[40] Kidnapping Case! Man-Hunters on our Soil!!, supra note 37.

> Marshal Cotton denied knowing anything about it at 9 o'clock this morning. The object evidently is to get a secret trial, without giving him a chance to defend himself by counsel.
>
> Citizens of Milwaukee! Shall we have Star Chamber proceedings here? and shall a Man be dragged back to Slavery from our Free Soil, *without an open trial of his right to Liberty*?[41]

That afternoon, Booth and his associates organized a mass meeting at the Court House Square in Milwaukee, and Booth helped gather the crowd by riding through the streets on horseback, "calling on all Free Citizens, who were not willing to be made slaves or slave-catchers."[42] Because of the deceptive behavior of the U.S. officers in Glover's arrest and detention, there was great concern at the meeting that Glover would be secretly carried off to slavery without a trial.[43] Thus, a vigilance committee was appointed to keep watch over the jail.[44] A committee was also appointed to secure a writ of habeas corpus for Glover, so that the legality of his detention could be determined.[45] The people pledged to "stand by this prisoner, and do [their] utmost to secure for him a fair and impartial Trial by Jury."[46]

Following a series of speeches against the constitutionality of the Fugitive Slave Act, Booth told the people that the law should not be broken but ended by implicitly encouraging resistance, remarking that "if they all felt as he did, he knew what they would do."[47] Just as Booth concluded his speech, Glover's attorney stood atop a fence post and announced to the crowd that, acting under the advice of Federal District Judge Andrew Miller, the U.S. marshals refused to obey any writ of habeas corpus issued from a state court.[48]

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[41] Kidnapping Case!—Man-Hunters on our Soil!!, Daily Free Democrat (Milwaukee), Mar. 13, 1854.

[42] Great Meeting at Racine, Daily Free Democrat (Milwaukee), Mar. 13, 1854.

[43] See A Fugitive Slave in Wisconsin, supra note 38.

[44] See id.

[45] See Great Meeting in the Court-House Square!, Daily Free Democrat (Milwaukee), Mar. 13, 1854.

[46] Id.

[47] Examination of S. M. Booth, For Aiding in the Rescue of John Glover, a Fugitive Slave from Missouri, Milwaukee Daily Sentinel, Mar. 22, 1854 (summarizing the testimony of Thomas Shepard).

[48] Mr. Watkin's Speech before Commissioner Smith, Daily Free Democrat (Milwaukee), Apr. 5, 1854.

Upon hearing this news, members of the crowd, wielding axes and a battering ram, rushed the jail and broke down the door.[49] Glover was then taken from Milwaukee and eventually fled to Canada. Soon after the rescue, a sheriff from Racine arrested Garland, Glover's alleged owner, for assault and battery.[50] Judge Miller, however, released him under a writ of habeas corpus since the alleged assault took place during an arrest authorized by federal law.[51]

B. An Interpretation of the Rescue

The rescue of Joshua Glover highlights the legal issues that Wisconsinites faced in 1854. A number of people desired to reject the Fugitive Slave Act, accept the constitutional duty to return fugitive slaves using the traditional northern presumption of freedom, and preserve the rule of law.[52] The crowd's actions and responses bring these contradictory propositions to light.

The crowd wished to reject the Compromise of 1850, and thus the Fugitive Slave Act, because of Congress's repeal of the Missouri Compromise. As the *Daily Wisconsin* asserted, "There cannot be a doubt that the attempted repeal of the Missouri compromise has so far exasperated many that they consider themselves absolved from the obligation to enforce the Fugitive Slave law . . . ."[53] Booth, speaking through the *Daily Free Democrat*, proclaimed that the "Slave Power may repeal the Compromises in favor of Freedom. We will repeal those in favor of Slavery."[54]

The people of Wisconsin wished to replace the southern-inspired Fugitive Slave Act with the traditional northern presumption of

[49] The Rescue Case, Daily Wis. (Milwaukee), Mar. 13, 1854.

[50] Id.

[51] Judge Miller's Decision, On the Discharge of B. S. Garland from custody of the Racine Co. Sheriff, Milwaukee Daily Sentinel, Mar. 16, 1854.

[52] Howard Baker, however, argues that the rescue was an act of popular constitutionalism, which in this context meant that the people advanced the ultimate interpretation of the Constitution and had the power to enforce it. See Baker, supra note 9, at 23–26; see also Howard Robert Baker II, The Rescue of Joshua Glover: Lawyers, Popular Constitutionalism, and the Fugitive Slave Act in Wisconsin 18–27 (2004) (unpublished Ph.D. dissertation, UCLA) (on file with the Virginia Law Review Association) (providing a more detailed account of his argument).

[53] The Rescue Case, supra note 49.

[54] The Fugitive Slave Law Repealed, Daily Free Democrat (Milwaukee), Mar. 13, 1854.

freedom. This movement parallels a similar response regarding slaves brought to the North by their southern masters. Northern states first extended comity to southern states by allowing Southerners to bring slaves into the North for limited periods of time.[55] As antislavery sentiment became more intense and widespread, however, northern states revoked the comity previously given to the South and eventually freed all slaves voluntarily brought into the North.[56] As Professor Paul Finkelman explains:

> In granting comity to visiting slaveholders the free states were explicitly rejecting (or at least suspending) their common law in favor of national harmony. In many cases the emerging free states were also rejecting—or suspending—parts of their constitutions and natural rights heritage. When the courts in the free states changed their decision making they were simply returning to the law as it had been—and as it theoretically should have remained—all along.[57]

The legal rules governing fugitive slaves, however, were very different from those for slaves voluntarily brought to the North. While no federal law governed the status of slaves voluntarily brought to a free state, the Fugitive Slave Clause prohibited northern states from freeing fugitive slaves. Moreover, the legal process mandated by the Fugitive Slave Act essentially created a presumption of slavery for anyone alleged to be a fugitive. The Fugitive Slave Act therefore forced northern states to extend comity to the South on the issue of fugitive slaves.

Once the people of Wisconsin rejected allegiance to the Fugitive Slave Act, however, they wished to return to the common law presumption of freedom for alleged fugitive slaves. Although the Fugitive Slave Clause of the Constitution clearly did not allow northern states to similarly free fugitive slaves that fled to the North, it did not establish any specific process for returning fugitives. The withdrawal of comity toward the South and restoration of the presumption of freedom meant that fugitive slaves would be returned, but only after they received the same legal process as any white citizen

[55] See Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 11 (1981).

[56] See id. at 340–42.

[57] Id. at 341.

accused of a crime—including a trial by jury, the writ of habeas corpus, the ability to testify, and a trial before an actual judge rather than a federal commissioner who was paid a variable salary.

The actions of the crowd before the rescue demonstrate that they believed Glover was entitled to the same legal protections as a white citizen. First, the crowd met for the purpose of ensuring that Glover was extended the rights of habeas corpus and trial by jury. The crowd issued several resolutions to such effect and even appointed a vigilance committee to ensure that Glover was not spirited away without a fair trial. Second, indignation over the manner of Glover's arrest and the prosecution of Garland for assault shows that the people of Milwaukee refused to extend the rights of slave owners into Wisconsin. The people demanded that alleged fugitive slaves be arrested in the same manner as any other suspect. In sum, the crowd wished to reject the use of southern legal processes to arrest and try fugitives, as expressed in the Fugitive Slave Act, and instead restore the traditional northern presumption of freedom for all black residents.

While the Milwaukee crowd rejected the provisions of the Fugitive Slave Act, a majority was not willing to go so far as to reject the constitutional duty to return fugitive slaves. Even Booth, one of the most radical abolitionists in the state, did not condemn the arrest of Glover simply because he was a fugitive slave. Instead, the crowd condemned the legal process that amounted to a presumption that Glover was in fact a fugitive slave: physical abuse by the marshals, secret detention, lack of a trial by jury, and denial of the writ of habeas corpus. Significantly, the jail was stormed only when it was announced that the state's legal process would be ignored.

And although the people wished to reject the Fugitive Slave Act and return to a presumption of freedom under the Fugitive Slave Clause, a majority was not prepared to openly violate the law.[58] It would be a mistake to assume that the crowd, which met to secure Glover's release by legal means, approved of storming the jail. The Democratic *Daily Wisconsin* called the breaking of the jail "an outrage upon law."[59] The Whig *State Journal* asserted that "every

[58] But see Baker, supra note 52, at 18–27 (arguing that the rescue should be seen as an expression of constitutional interpretation and enforcement by the crowd).

[59] The Rescue Case, supra note 49.

thinking man must dislike to see the laws of the land trampled upon, and the mob triumphant."[60] Perhaps somewhat disingenuously, even Booth's Free Soil *Daily Free Democrat* stated that it "regret[ed] the breaking into the jail to rescue Glover," suggesting that even Free Soil readers would not approve of a paper that endorsed open violation of the Fugitive Slave Act.[61] Moreover, eyewitnesses reported that while the crowd was happy to see Glover released, many disapproved of breaking the law.[62] The actions of the crowd and commentary of newspaper editors thus demonstrate that many Wisconsinites rejected the principles of the Fugitive Slave Act but saw no alternative consistent with maintaining law and order.

III. PROCEDURAL HISTORY PART I: THE CONSTITUTIONAL THEORY OF THE WISCONSIN COURT

A. Booth's Trial before Commissioner Smith and the Meeting at Young's Hall

On March 15, 1854, Sherman Booth was arrested for aiding and abetting the rescue of a fugitive slave and had a preliminary hearing before U.S. Commissioner Winfield Smith.[63] This highly publicized trial became a debate over whether the Fugitive Slave Act was binding in Wisconsin rather than if Booth had violated it.[64] Commissioner Smith summarily ruled that the Fugitive Slave Act was clearly constitutional under existing precedent and determined that there was probable cause for Booth's arrest.[65] Booth was thus released on bail pending indictment by a grand jury in federal court.

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[60] A Fugitive Slave in Wisconsin, supra note 38.

[61] The State of the Case—Judge Miller vs. the People and Constitution, Daily Free Democrat (Milwaukee), Mar. 13, 1854.

[62] See United States Commissioner's Court, supra note 38 (summarizing testimony from eyewitnesses to the events surrounding Glover's rescue).

[63] Booth, though not the only person arrested, was likely singled out because he was instrumental in organizing the crowd and because his speech precipitated the rush to the jail.

[64] See More of the Slave Case—Arrest of Mr. Booth, Milwaukee Sentinel, Mar. 16, 1854; United States Commissioner's Court, Daily Free Democrat (Milwaukee), Mar. 24, 1854; see also Baker, supra note 9, at 80–92 (giving a summary of the trial).

[65] United States Commissioner's Court, Daily Free Democrat (Milwaukee), Mar. 24, 1854.

As word of Booth's trial before Commissioner Smith spread, many Republican and Democratic papers alike joined in condemnation of the proceedings, accurately predicting that they would result in public opposition.[66] With the public sufficiently agitated, Booth and his supporters moved to promote their cause by organizing a mass meeting at Young's Hall.[67]

The meeting at Young's Hall first introduced the constitutional doctrine of states' rights as a solution to the legal tensions exhibited in the Glover rescue.[68] In a series of resolutions that quoted the famous Virginia and Kentucky Resolutions, in which Thomas Jefferson and James Madison had first developed the states' rights constitutional theory, the meeting declared:

> [W]e view the powers of the Federal Government as resulting from the compact to which the states are parties . . . this government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself . . . [and] each party has an equal right to judge for itself as well of infractions as of the mode and manner of redress.[69]

The resolutions continued, declaring that the Supreme Court of the United States was the final arbiter of the constitutional allocation of power "in relation to the authorities of the other departments of the [federal] government, [but] not in relation to the rights of the parties to the constitutional compact."[70]

Drawing on southern constitutional theory, the meeting at Young's Hall thus adopted the compact theory of the Union as the theoretical basis behind rejecting the final authority of the Supreme Court. This theory, first developed by Thomas Jefferson, James Madison, and John C. Calhoun, held that the states, as op-

[66] See, e.g., The Kidnapping Case, Daily Free Democrat (Milwaukee), Apr. 4, 1854 (reprinting Detroit Democrat) (explaining that enforcement "will result in discomfiture and shame to the prosecutors"); Sentiment of the Press, Daily Free Democrat (Milwaukee), Apr. 1, 1854 (reprinting Mineral Pt. Trib.) (predicting that enforcement "will only create a ten fold stronger opposition to the enforcement of its penalties").

[67] See Anti-Slave-Catchers' Mass Convention, Daily Free Democrat (Milwaukee), Apr. 11, 1854.

[68] But see Baker, supra note 9, at 94 (arguing that the meeting advanced a theory of citizenship where "it became the duty of citizens to resist" unconstitutional laws).

[69] Afternoon Session, Daily Free Democrat (Milwaukee), Apr. 13, 1854.

[70] Id.

posed to the people, had created the Constitution and thus could decide which powers were ceded to the federal government. The states, as principal actors, could not be subordinate to the agent they had created, the federal government. Using the traditionally southern compact theory of the Union, the people at the convention believed that the states had the power to render a final interpretation of the Constitution, including the Fugitive Slave Clause.

B. The Wisconsin Supreme Court

The Wisconsin Supreme Court largely adopted the constitutional doctrine proposed at Young's Hall. The Wisconsin court's unique strand of compact theory resolved the legal tensions apparent in the Glover rescue by rejecting the Fugitive Slave Act and at the same time preserving respect for the rule of law.

On May 26, 1854, Booth was granted a writ of habeas corpus from Wisconsin Supreme Court Justice Abram D. Smith.[71] Byron Paine, acting as Booth's attorney, attacked the constitutionality of the Fugitive Slave Act in an argument that would form the basis of Wisconsin's states' rights movement. First, Paine asserted that the federal commissioners who ruled on the fugitives' status were not Article III judges and thus could not be given federal judicial power.[72] Second, he argued that Congress had no power to legislate on the subject of fugitive slaves.[73] Third, because the Fugitive Slave Act did not provide alleged fugitives with a trial by jury, Paine claimed that it violated the Fifth, Sixth, and Seventh Amendments.[74]

These arguments, while arguably quite convincing, had already been rejected by the northern Justices of the Supreme Court.[75] Paine himself admitted that "[i]t may be said that [my] position is

[71] In re Booth, 3 Wis. 1, 8 (1854). While a state court cannot issue habeas corpus on a federal prisoner today, this was not settled law in 1854. See Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It: With A View of the Law of Extradition of Fugitives 189–90, 190 n.1 (Albany, W. C. Little & Co. 2d ed. 1876).

[72] Habeas Corpus Trial, Daily Free Democrat (Milwaukee), June 7, 1854.

[73] Habeas Corpus Trial, Daily Free Democrat (Milwaukee), June 9, 1854.

[74] Habeas Corpus Trial, Daily Free Democrat (Milwaukee), June 22, 1854.

[75] While there was no direct Supreme Court ruling, every northern Justice had already upheld the use of commissioners. See supra note 23 and accompanying text.

contrary to precedent."[76] He thus exhaustively attacked Justice Story's reasoning in *Prigg v. Pennsylvania* and advanced an argument for the Wisconsin Supreme Court to decide constitutional issues independently of Supreme Court precedent.[77] He argued that "it follows as a necessary consequence of State sovereignty that . . . the Judiciary, as one of the great departments of the State, is to decide [constitutional issues] independently of all other tribunals upon earth."[78]

Paine supported his argument with the compact theory of the Union proposed earlier at Young's Hall. He asserted that the states, as sovereign and "independent nations," gave only limited powers to the federal government in the Constitution.[79] Suggesting that sovereignty is indivisible, Paine argued that if the Supreme Court could render a final decision on the limits of federal power, then the federal government "is sovereign over everything, and the States are sovereign over nothing."[80] He reasoned that since sovereignty is unitary and the federal government is merely an agent of the states, the states must have complete political power, including the power to render a final interpretation of the powers granted under the Constitution.[81] While he recognized that conflicting judicial decisions could result in a collision of state and federal authorities, he asserted that the states must avert "the terrible ordeal of revolution" that would result if the federal government usurped powers not granted in the Constitution and used them to oppress the people.[82]

Justice Abram D. Smith of the Wisconsin Supreme Court adopted every major position found in Paine's argument. Justice Smith held that the Fugitive Slave Act was unconstitutional, reasoning that it violated the right to a trial by jury, gave judicial du-

[76] Habeas Corpus Trial, supra note 74.
[77] Id.
[78] Habeas Corpus Trial, Daily Free Democrat (Milwaukee), June 6, 1854.
[79] Id.
[80] Id.
[81] Id. ("I do not belong to that school . . . which seems to teach that the States are to look up to the Departments of the Federal Government, with all the submissive deference with which a serf is to listen to the commands of his master. . . . [States] must have the power to judge when their sovereign rights are encroached upon, and to adopt measures for their defense.").
[82] Id.

ties to commissioners in violation of Article III, and was passed without a congressional grant of authority in the Constitution.[83] He thus released Booth from federal custody.

Following Paine's lead, Justice Smith justified his decision with the compact theory of the Union. He asserted that no "one department of the government is constituted the final and exclusive judge of its own delegated powers" and argued that if given such power, the U.S. Supreme Court would allow the federal government to consume state sovereignty.[84] He predicted that if state sovereignty were undermined, such an "[i]ncrease of influence and patronage on the part of the Federal Government [would] naturally lead[] to consolidation, [and] despotism."[85] Thus, he felt justified in stating that "every State officer . . . is bound to provide for, and aid in their enforcement, according to the true intent and meaning of the Constitution."[86]

While not explicitly overruling *Prigg*, Justice Smith used his theory of states' rights to criticize the decision and render a holding clearly inconsistent with Story's opinion. He turned Story's historical analysis on its head, arguing that "no Union could have been formed" if the North had understood the Fugitive Slave Clause to give the federal government the power to arrest northern citizens and send them to slavery without the protection of state courts.[87] After attacking the reasoning in *Prigg*, Justice Smith explicitly called on the Supreme Court to review its decision.[88] Moreover, in holding that "Congress has no constitutional power to legislate on this subject," Justice Smith's decision effectively overruled the holding in *Prigg*.[89]

Justice Smith and Paine's doctrine of states' rights was a unique theory of federalism that was closer to Calhoun's doctrine of nullification than Chief Justice Spencer Roane's coequal sovereign the-

[83] In re Booth, 3 Wis. 1, 1–2 (1854).
[84] Id. at 23–24.
[85] Id. at 25.
[86] Id. at 34. Justice Smith further asserted that "upon the States rests the immense responsibility of preserving not only their own sovereignty, but the just constitutional powers of the general government." Id. at 35.
[87] Id. at 32.
[88] Id. at 47–48.
[89] Id. at 36–37.

ory.[90] Spencer Roane, Chief Justice of the Virginia Court of Appeals from 1795 until his death in 1822, argued that the decisions of state courts are final and cannot be reviewed by the Supreme Court because neither court system is superior to the other, as they derive their power from different sources of sovereignty.[91] Calhoun, on the other hand, argued more broadly that whenever the "General Government and a State come into conflict . . . [t]he States themselves may" define the powers surrendered to the federal government. [92] He reasoned that the states possessed unitary sovereignty and the Supreme Court, a mere agent of the states, could not be trusted to limit the federal government to the powers delegated to it in the Constitution.[93] Unlike Chief Justice Roane, Justice Smith and Paine were not merely arguing that state courts were coequal with, and independent of, the Supreme Court. Rather, like Calhoun, they at least implicitly argued that states, possessing unitary and indivisible sovereignty, had superior power to define the limits of federal power under the Constitution.[94] Justice Smith and Paine differed from Calhoun only in the means of implementation—while Calhoun envisioned an elaborate process involving state conventions,[95] Justice

[90] Many commentators have simply called the decision nullification or have failed to differentiate the decision from other states' rights conceptions of federalism. See Baker, supra note 9, at 113, 117–18; Potter, supra note 26, at 295. Others have focused on the constitutional power of states to protect the liberty of their citizens. See McManus, supra note 9, at 136. This Note's fundamental point of departure is in arguing that the Wisconsin court advocated state judicial supremacy or, in other words, the power of the state to render a final interpretation of the Constitution.

[91] Gerald Gunther, John Marshall's Defense of *McCulloch v. Maryland* 138–54 (1969) (reprinting Chief Justice Roane's critique of the Marshall Court).

[92] 6 The Works of John C. Calhoun 68 (Richard K. Crallé ed., New York, D. Appleton & Co. 1857).

[93] Id. at 68–73.

[94] In addition to the Wisconsin court's language, the facts of the case also support this interpretation. The Wisconsin court intervened in a federal prosecution under a federal law. Under Chief Justice Roane's theory this would have been indefensible since a state court could not interfere with the judicial proceedings of a separate sovereignty—only Calhoun's theory of state sovereignty justified the court's actions. Moreover, this interpretation is supported by Chief Justice Taney's language in *Ableman*. See infra note 145 and accompanying text.

[95] See Kelly et al., supra note 1, at 207–09. Thomas Jefferson and James Madison, who first developed the theory of states' rights in the famous Virginia and Kentucky Resolutions, also envisioned implementation through state conventions. See id. at 135.

Smith and Paine vested the power directly in the Wisconsin Supreme Court.[96]

Justice Smith's decision was later affirmed by the entire Wisconsin Supreme Court. Chief Justice Whiton also held that the Fugitive Slave Act was unconstitutional, though on narrower grounds.[97] Justice Crawford dissented on the constitutional issue, holding that it had been "authoritatively decided by the Supreme Court of the United States, the last and final constitutional exponent."[98] Justice Smith himself offered a concurring opinion, in which he again explicitly rejected the ability of the Supreme Court to render a final interpretation of the Constitution, declaring that this would "prostrat[e] the creators at the feet of the creature."[99] This statement seems to imply that that the states, or the "creators," not only could decide constitutional issues independently of the federal government, the mere "creature" of the states, but also that those interpretations would be more authoritative.

Justice Smith's concurrence also lends insight into his motivations. Expanding on his criticism of *Prigg*, Justice Smith explained that the decision's recognition of slave owner's rights in the North would cause "[t]he slave code of every state in the union [to be] engrafted upon the laws of every free state."[100] He further asserted that "[t]he rights, interests, feelings, dignity, sovereignty, of the free States are as nothing, while the mere pecuniary interests of the

[96] Since compact theory vested unitary sovereignty in the states, Justice Smith and Paine took compact theory to its logical extreme by arguing that each department of the state government could conclusively interpret the Constitution. Calhoun took a more moderate approach by arguing that only the people of the states acting through a convention could conclusively interpret the Constitution. It is not entirely clear why Paine and Justice Smith departed from Calhoun on this point, but it is possible that they feared that Wisconsinites would associate a convention with South Carolina's nullification crisis. Vesting the power in the Wisconsin court offered them two additional advantages: first, implementation would be much easier as Justice Smith would need to convince only one colleague on the court rather than a majority of Wisconsin's electorate; second, acting through the court perhaps lent the theory the perception of legal credibility.

[97] In re Booth, 3 Wis. 1, 64–66 (1854).

[98] Id. at 75–76 (Crawford, J., dissenting). However, Judge Crawford concurred in the judgment. He held that the process served on Booth was inadequate to state a claim under the Fugitive Slave Act. Id. at 86–87.

[99] Id. at 101 (Smith, J., concurring).

[100] Id. at 122.

slaveholder are everything."[101] From these passages, it appears that Justice Smith was driven by the same motives as the crowd in Milwaukee—a desire to reject the southern legal processes of the Fugitive Slave Act and return to the traditional northern presumption of freedom.

Although it was not the first northern invocation of states' rights, the Wisconsin Supreme Court was the only court to rule against the Fugitive Slave Act. The decision was thus legally innovative, but it was also very much the product of underlying social forces. As the Glover rescue demonstrates, many Wisconsinites had rejected the Fugitive Slave Act long before the case was heard but felt compelled to respect the rule of law. The demonstration at Young's Hall suggested a solution: if the U.S. Supreme Court was not the final arbiter of constitutional questions, the state could reject the Fugitive Slave Act and at the same time preserve the rule of law. When the Wisconsin court adopted this solution, its decision was probably a product of the same underlying social forces that had caused the rescue. However, the legal doctrine used in the decision would also exert a powerful influence on the social landscape.

C. The Wisconsin Court's Connection to Antislavery Constitutionalism

Antislavery constitutional theory was split between two very different groups during the antebellum era. First, the more radical Garrisonians conceded that the Constitution was a proslavery document and that judges could not interpret the law to meet their own views of morality. They thus advocated that the North should dissolve the Union rather than be ruled by an unjust Constitution, which they called a "covenant with death" and "agreement with hell."[102] Second, more moderate and mainstream antislavery thinkers, sometimes referred to as "constitutional utopians," argued that antislavery judges should read the Constitution according to natu-

[101] Id. at 131.

[102] See, e.g., William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760–1848, at 228 (1977).

ral law, which meant straining to reach an antislavery interpretation.[103]

Before *In re Booth*, fugitive slave cases had been argued under the utopian framework, and antislavery lawyers had accordingly read the Fugitive Slave Clause as consistently with natural law as possible.[104] For example, Salmon P. Chase, the leading antislavery lawyer in the West, argued in *Jones v. Van Zandt*, a civil case involving an action for damages for harboring a fugitive, that the section of the Fugitive Act of 1793 that outlawed harboring a fugitive slave was unconstitutional since the Fugitive Slave Clause should be interpreted consistently with natural law, which permitted freemen to lend aid to runaways.[105]

While historians have generally placed the Wisconsin court in the same camp as the utopians, the arguments presented in this Note suggest that this approach is misguided. Professor Robert Cover, for example, argues that the Wisconsin ruling was "the most extensive and successful of the many attempts to make a new constitutional law that would at least emphasize the elements of the Constitution that were essentially antithetical to slavery."[106] In contrast, this Note has argued that the Wisconsin court, like the crowd in Milwaukee, did not adopt a forced antislavery reading of the Constitution that was consistent with natural law; rather, the court returned to *traditional* northern legal norms to enforce the Fugitive Slave Clause, such as a trial by jury and due process of law, because it no longer wished to extend comity to the South after it had repealed the Missouri Compromise.

In doing so, the Wisconsin court did depart from traditional northern constitutional law in its doctrine of states' rights. This doctrine was not a natural rights reading of federalism, however, as there is nothing inherently moral about the states having the authority to definitively interpret the Constitution.[107] Instead, the

[103] See, e.g., Cover, supra note 5, at 154–58.

[104] Id. at 153–54, 183; Wiecek, supra note 102, at 212–13.

[105] Jones v. Van Zandt, 46 U.S. 215, 231 (1847), aff'g 13 F. Cas. 1040, 1042 (C.C.D. Ohio 1843); see also Cover, supra note 5, at 173.

[106] Id. at 189.

[107] Professor Cover uses this argument to claim that the Wisconsin court's decision reveals the inherent limits of utopian constitutional theory, as states' rights undermines other antislavery positions, such as slavery in the territories. Id. at 190. But the Wisconsin court embraced states' rights—and thus was limited—only because it knew

states' rights argument was created to preempt the court's certain reversal in the Supreme Court and to justify the court's departure from precedent.

One leading utopian theorist, Representative Gerrit Smith of Ohio, condemned the Wisconsin court's decision for remaining at odds with natural rights, demonstrating the Wisconsin court's departure from earlier antislavery constitutional theory. Smith condemned the Wisconsin decisions because "they . . . imply that there might be a *constitutional* Fugitive Slave Act, and that slavery is capable of being invested with the sacredness of law."[108] Smith, hoping to interpret the Constitution according to natural law, could not sympathize with the limited goals of the Wisconsin Supreme Court, which desired only to return to a northern version of the Fugitive Slave Clause.

Although the Wisconsin court's decision broke from past paradigms of antislavery constitutionalism, traditional antislavery theorists immediately recognized its utility in the fight against slavery. Wendell Phillips, the intellectual force behind the Garrisonian school of thought, argued that since the courts are "nearest to popular control[,] . . . . [r]evolution can come only through the Courts defying each other."[109] He thus urged his supporters to follow the Wisconsin decision and thus "insinuate [their] Disunion doctrine into the practice of the country through the courts."[110] Charles Sumner, a leading antislavery figure in the Senate who followed the utopian tradition, argued that state resistance to the Fugitive Slave Act followed legitimate northern legal traditions and declared that "Wisconsin has nobly set the example which older states must follow."[111] Members of both schools of abolitionist constitutional theory were thus prepared to use Wisconsin's theory of states' rights to meet their own agendas.

it faced certain reversal in the Supreme Court. A utopian approach, however, need not have used states' rights if reversal were not an issue.

[108] Gerrit Smith to Wendell Phillips, The Liberator (Boston), Mar. 16, 1855, at 1.

[109] Speech of Wendell Phillips, The Liberator (Boston), Feb. 1, 1856, at 20.

[110] Id.

[111] Letters on the Glover Incident, Milwaukee Sentinel, Dec. 13, 1896; see also The Demands of Freedom: Speech of Hon. Charles Sumner, New-York Daily Times, Mar. 10, 1855, at 2.

IV. PROCEDURAL HISTORY PART II: JUDICIAL CONFLICT AND THE DEVELOPMENT OF STATES' RIGHTS

In subsequent litigation in the Booth cases, the Wisconsin Supreme Court used its newfound constitutional power to challenge federal authority. Reacting to these decisions, the states' rights movement came to dominate Wisconsin politics, eventually securing the passage of a personal liberty bill and contributing to the ascendancy of the Republican Party. As the federal judiciary attempted to assert its authority, the states' rights movement constantly gained in both influence and extremism.

The states' rights movement in Wisconsin quickly emerged in the wake of Justice Smith's decision in *In re Booth*. The *Sheboygan Secretary* asserted that "Judge Smith is right, and his decision will be sustained before the highest tribunal of the country, viz: the tribunal of the people, from which there is no appeal."[112] Due to the intense antislavery feeling aroused by the Kansas-Nebraska Act and the Glover rescue,[113] the Free Soil and Whig Parties combined to form the Republican Party in Wisconsin, which officially tied itself to the states' rights movement by including the "abrogation of the Fugitive Slave Act" in its platform.[114]

Although most Republican papers endorsed the Wisconsin court's decision and some form of states' rights, it is unclear to what extent they initially accepted the doctrine that Paine and Justice Smith proposed. Referring to the U.S. Supreme Court, an editorial in the Republican *Milwaukee Sentinel* claimed that "[b]y its decision we must abide—there is no such thing as resisting that."[115] Booth, in a reply to the editorial, did not challenge this proposition; rather, he merely argued that the Wisconsin Supreme Court was "bound by what the U.S. Supreme Court *has* decided" instead of "what it possibly *may* decide."[116] It would take further litigation for the public to fully endorse states' rights.

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[112] Judge Smith's Decision, Sentiment of the Press, Daily Free Democrat (Milwaukee), June 19, 1854 (reprinting Sheboygan Secretary).

[113] McManus, supra note 9, at 88–92.

[114] People's Mass State Convention!, Daily Free Democrat (Milwaukee), July 14, 1854. Some antislavery Democrats joined the Republican Party as well.

[115] The Habeas Corpus Case, Daily Free Democrat (Milwaukee), Aug. 17, 1854 (reprinting Milwaukee Sentinel).

[116] Id.

The Wisconsin court's decision released Booth from federal custody, but his trial was still pending before Judge Miller in the federal district court of Wisconsin. Like Commissioner Smith, Judge Miller refused to hear arguments on the constitutionality of the Fugitive Slave Act, declaring that the issue had already been decided by the Supreme Court.[117] Refusing to bend to popular rejection of the Fugitive Slave Act in Wisconsin, Miller emphasized in his jury instruction that "[p]ublic opinion, public feeling, or public sympathy, for or against a procceeding [sic] in a court of justice, can not influence the minds or control the judgments of judges and jurors."[118] After hearing Judge Miller's instructions, the jury found Booth guilty of aiding in the escape of a fugitive slave.[119]

As the trial was coming to a close, a resolution was proposed in the Wisconsin Assembly "calling for a Report of the Judiciary Committee upon the expediency of prohibiting the use of the jails and prisons of this state, and aid by state officers, in confining fugitive slaves, and persons convicted under the Fugitive Slave Law."[120] Republicans were able to push the bill though the Assembly, but it was eventually voted down in the Senate.[121] Although the initial success of the bill displayed a strong reaction by the legislature to Miller's trial, the bill's supporters defended it by attacking slavery and the Fugitive Slave Act rather than by invoking the doctrine of states' rights.[122]

For the people of Wisconsin, most of whom were far removed from any interaction with slaves or slaveholders, the federal prosecution made the danger and injustice of the Fugitive Slave Act take on a new meaning. In the words of the *State Journal*, "We are sometimes told that the institution of slavery should be let alone . . . that its 'agitation' can do no good. But here it is rampant,

[117] The Charge of Judge Miller, Daily Free Democrat (Milwaukee), Jan. 1, 1855.

[118] Judge Miller's Charge, Daily Wis. (Milwaukee), Jan. 16, 1855.

[119] The Verdict, Daily Free Democrat (Milwaukee), Jan. 15, 1855. Howard Baker presents a detailed account of the trial and argues that the central issue was the duties and rights of citizenship. See Baker, supra note 9, at 80–111.

[120] From Madison, Milwaukee Sentinel, Jan 19, 1855. Prohibiting the use of state jails was a common measure taken by northern states to make enforcement of the Fugitive Slave Act impractical.

[121] Morris, supra note 12, at 176.

[122] From Madison, supra note 120.

aggressive, [and] at our very thresholds."[123] The people were incited not only against the law, but also against its federal implementation.[124] Booth himself reported that "[t]here never was half the sympathy felt for us that there has been since this trial."[125]

It is thus not surprising that the Wisconsin Supreme Court granted Booth a writ of habeas corpus following his conviction in federal court.[126] When the people first learned that Booth was to be taken before the Wisconsin court, cannons were fired, church bells were rung, and a massive crowd formed to cheer as Booth passed by in a horse-drawn sleigh like a conquering hero.[127] With much of the public clearly behind them, the court released Booth from federal custody, again declaring the Fugitive Slave Act to be unconstitutional.[128]

For the states' rights movement in Wisconsin, this decision was seen as an affirmation of state sovereignty and state judicial supremacy. The *Potosi Republican* asserted that "we can regard [the Wisconsin Supreme Court's] late exercise as our only proper means of defense against the aggression of national laws."[129] Furthermore, the *Janesville Gazette* explained that "[p]robably no act of any Court has been received with more universal favor[,] . . . . and a disposition to sustain our own State Court in the exercise of its legal powers is every where manifest."[130]

The people demonstrated their support for the Wisconsin court's position soon after their decision when Justice Crawford, the sole dissenting justice in *In re Booth*, came up for re-election. As one paper explained, "[t]he question before the people at the forth-

[123] Booth and Ryecraft Sentenced, Milwaukee Sentinel, Jan. 27, 1855 (reprinting Madison J.).

[124] See, e.g., Booth and Rycraft Aid Meeting, Wisconsin Newspaper (Milwaukee), Jan. 1, 1855 (reporting resolutions from a mass meeting that condemned the federal trial and the Fugitive Slave Act); Feeling of the Country, Daily Free Democrat (Milwaukee), Jan. 26, 1855 (warning that "it would be absolutely *unsafe* for Judge Miller to travel thro' the South-Western part of the State").

[125] Shameful Misrepresentations, Daily Free Democrat (Milwaukee), Jan. 19, 1855.

[126] In re Booth, 3 Wis. 157 (1854).

[127] See The Prisoner off for Madison!, Milwaukee Sentinel, Jan. 30, 1855.

[128] *In re Booth*, 3 Wis. at 212.

[129] The Decision of our Supreme Court, Daily State J. (Madison), Feb. 8, 1855 (reprinting Potosi Republican).

[130] The Action of Our Supreme Court, Milwaukee Sentinel, Feb. 7, 1855 (reprinting Janesville Gazette).

coming election is *shall the decision of* Smith *and* Whiton, *regarding the constitutionality of the Fugitive Slave Act stand?*"[131] The people decided in favor of the court's position, and Orsamus Cole was elected as an associate justice to the Wisconsin Supreme Court,[132] ensuring that the court would not back down from its states' rights position in the near future.

The next stage of judicial conflict garnered little public attention, but it highlights the extent to which the Wisconsin Supreme Court had embraced its theory of states' rights. *In re Booth* was appealed to the Supreme Court, and a writ of error was served on the Wisconsin Supreme Court, ordering it to send up the case record for review. The Wisconsin court, denying the right of the Supreme Court to review its decisions, ordered its clerk not to certify the record.[133] While other commentators have found this action inexplicable,[134] it makes perfect sense in the context of Wisconsin's states' rights movement. Under the Wisconsin court's theory, the states retained complete sovereignty, and thus an arm of the federal government could not review state decisions.

Soon after the Wisconsin court refused to send up the record, the Republican Party, which in Wisconsin was the party of states' rights, routed their Democratic opponents in the election of 1856. The Wisconsin Republicans won a substantial majority in both the Assembly and the Senate and thus were in a position to choose the next U.S. Senator.[135] When Timothy Howe, the frontrunner for the nomination, refused to support the Wisconsin court's stance, former Democrat James R. Doolittle secured the nomination by pledging his support for states' rights.[136] The Republican Party thus had made adherence to states' rights a litmus test for public office,

[131] Right of the Voters to Canvass Opinions of Judicial Candidates on Public or National Questions, Daily State J. (Madison), Mar. 15, 1855 (reprinting Grant Co. Herald).

[132] The Election of Orsamus Cole, Daily State J. (Madison), Apr. 11, 1855.

[133] Ableman v. Booth, 62 U.S. 506, 512 (1859).

[134] See supra note 8.

[135] McManus, supra note 9, at 139.

[136] Id. at 139–42. Interestingly, Senator Doolittle would side with President Andrew Johnson in opposing congressional reconstruction on the grounds that it was an unconstitutional use of federal power in violation of the rights of the southern states. See Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 178–79, 222, 266 (1988).

ensuring that Republican politicians would back the Wisconsin court.

On February 19, 1857, the Wisconsin court and its states' rights ideology finally received the support of the Wisconsin government as the governor signed a personal liberty bill into law, nullifying the Fugitive Slave Act in Wisconsin.[137] The law required district attorneys to represent anyone charged as a fugitive slave, authorized the use of habeas corpus, extended the right of a trial by jury, and imposed a fine of $1,000 and jail time of not less than one year for anyone who falsely and maliciously attempted to reclaim an alleged fugitive slave.[138] In passing the law, members of the Assembly explicitly invoked states' rights and the decisions of the Wisconsin Supreme Court.[139] Because of the continued litigation, by 1857 the states' rights movement, after its failed attempt to pass a similar law in 1855, had become sufficiently influential to receive the support of the governor and legislature of Wisconsin.

The people once again showed their support for the states' rights movement when Chief Justice Whiton was up for re-election in April of 1857. With the election turning on the court's position in the Booth cases, Whiton won re-election with a commanding majority.[140]

V. ABLEMAN V. BOOTH: THE DECISION AND ITS IMPACT

A. Chief Justice Taney's Decision

In re Booth was finally taken up by the U.S. Supreme Court in 1859, with Chief Justice Roger B. Taney delivering a unanimous opinion in *Ableman v. Booth*.[141] Chief Justice Taney spent almost the entirety of his opinion refuting Wisconsin's doctrine of states' rights. He started by correctly recognizing that the Wisconsin court had "determined that their decision is final and conclusive upon all

[137] See Morris, supra note 12, at 177.

[138] 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, Milwaukee Sentinel, Feb. 21, 1857.

[139] The Personal Liberty Bill, Milwaukee Wkly. Sentinel, Feb. 25, 1857.

[140] McManus, supra note 9, at 143–45; John Bradley Winslow, The Story of a Great Court 115 (1912).

[141] 62 U.S. 506 (1859). The Supreme Court considered Booth's release from federal custody following Commissioner Smith and Judge Miller's trials together.

the courts of the United States."[142] Chief Justice Taney rejected this theory on a practical level, arguing that such a doctrine would destroy the uniformity and supremacy of national laws, as well as result in "revolutions by force of arms" without a neutral arbiter to resolve state conflicts.[143] On a theoretical level, he argued that the Constitution was formed by "the people of the several States," instead of by a compact between the states.[144] Moreover, unlike the unitary theory of sovereignty envisioned by the Wisconsin court, Chief Justice Taney put forth a theory of dual sovereignty. In Chief Justice Taney's view, sovereignty was divided between the two levels of government, and the people had given the U.S. Supreme Court the unique role of ensuring that each level did not encroach upon the sovereign powers of the other.[145]

Chief Justice Taney not only rejected the theoretical basis of the Wisconsin decisions, but he also rejected their specific holdings. First, Chief Justice Taney held that when a state court issues a writ of habeas corpus, upon finding that the prisoner is detained under federal authority it must "proceed no further."[146] If a state court ordered a federal marshal to present a federal prisoner for a habeas corpus hearing, "it would be his duty to resist."[147] Chief Justice Taney devoted merely one sentence of his opinion to the issue of the Fugitive Slave Act, declaring 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."[148]

Chief Justice Taney thus rejected every position taken by the Wisconsin court. Historians have concluded that *Ableman* was intended to reinforce federal judicial supremacy, undermine antislavery constitutionalism, and calm the rising sectional tensions

[142] Id. at 514.
[143] Id. at 521.
[144] Id. at 524.
[145] Id. at 520. Recall that Paine and Justice Smith had believed dual sovereignty would collapse into unitary sovereignty vested in the federal government because the Supreme Court, as part of the federal government, could not be trusted to reign in federal power. See supra notes 84–86 and accompanying text.
[146] Id. at 523.
[147] Id. at 524.
[148] Id. at 526.

over slavery.[149] It is unlikely, however, that the decision met any of these goals.

B. Ableman's Impact in Wisconsin

In Wisconsin, the Court's decision had precisely the same effect as earlier federal litigation: it angered Wisconsinites and further strengthened the states' rights movement. The *Milwaukee Sentinel* asserted that "[n]obody any longer entertains respect for the Supreme Court, because in its legal decisions it has clearly violated every principle of right and justice."[150] With uncharacteristically strong rhetoric, the following series of resolutions passed by the Wisconsin legislature demonstrate its intense anger at Chief Justice Taney's decision and complete acceptance of states' rights ideology:

> *Resolved*, . . . we regard the actions of the Supreme Court of the United States, in assuming jurisdiction in the case [of *Ableman v. Booth*] as an arbitrary act of power . . . . and therefore without authority, void and of no force.
>
> *Resolved*, That the Government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well as infractions, as of the mode and measure of redress.[151]

Because of the continued federal prosecution culminating in *Ableman*, the legislature that could not even pass a personal liberty law in 1855 quoted at length from Thomas Jefferson's Kentucky Resolution of 1798 to issue a formal declaration in favor of states' rights.

The 1859 election for a justice of the Wisconsin Supreme Court demonstrates that a majority of voters shared the views of their

[149] Kelly et al., supra note 1, at 238, 278–79; see also Campbell, supra note 20, at 47; Stanley I. Kutler, The Supreme Court and the Constitution: Readings in American Constitutional History 110 (3d ed. 1984); Carl Brent Swisher, Roger B. Taney 529–31 (1935); Samuel Tyler, Memoir of Roger Brooke Taney 392 (Baltimore, John Murphy & Co. 1872).

[150] The Supreme Court of the U.S., Milwaukee Sentinel, Apr. 2, 1859.

[151] State Sovereignty Maintained, Racine Wkly. J., Mar. 21, 1859.

legislature. Byron Paine, Booth's former attorney and one of the founders of the states' rights movement, secured the Republican nomination, while the Democrats nominated William Pitt Lynde. The *Free Democrat* aptly explained the issue in the election: "If Mr. Lynde is chosen, the Court at Washington will be endorsed. If Judge Paine is elected, the Supreme Court of this State will be sustained."[152] In what the *Milwaukee Sentinel* called "the *protest* of the freemen of Wisconsin *against* the Fugitive Slave Act . . . [and] the unauthorized and unconstitutional decress [sic] of a partizan [sic] bench," Paine won the election by over 10,000 votes.[153]

After the election was over, Booth was arrested by federal authorities and placed in custody at the Customs House in Milwaukee.[154] Hoping to again use the Wisconsin Supreme Court to rally the states' rights movement around Booth's cause, James Paine, acting as Booth's attorney, brought a petition for habeas corpus.[155] Marking a turning point, the Wisconsin Supreme Court refused to issue the writ.[156] Justice Dixon, who had recently been appointed to replace the deceased Justice Whiton, voted to deny the writ, Justice Sloan voted to grant it, and Justice Paine disqualified himself because of his role in the previous litigation.[157] Lacking formal support from the Wisconsin Supreme Court, alternative means were sought to vindicate states' rights.

The Supreme Court's opinion in *Ableman* not only helped rally support behind states' rights, but it also nearly precipitated a civil war. In his inaugural address, Governor Alexander W. Randall had vowed to use the power of the state to enforce the Wisconsin court's decisions.[158] Before the Wisconsin court had ruled on Booth's petition for habeas corpus in 1860, it was rumored that the U.S. marshals had called on the Milwaukee military companies for assistance if the court ordered Booth's release.[159] The governor re-

[152] Milwaukee News, Mar. 13, 1859 (reprinting Daily Free Democrat).
[153] The Moral of the Late Election, Milwaukee Sentinel, Apr. 12, 1859.
[154] Ableman v. Booth, 11 Wis. 498, 532 (1859).
[155] The Booth Case Before the Supreme Court, Wis. St. J. (Madison), Mar. 6, 1860.
[156] *Ableman*, 11 Wis. at 500.
[157] Id. at 532. Justice Dixon was appointed only because he was thought to be a supporter of states' rights, and his vote thus outraged many Republicans. See McManus, supra note 8, at 182–83.
[158] Carter, supra note 10, at 165.
[159] Editorial Correspondence, Daily J. (Racine), Mar. 7, 1860.

sponded by immediately telegraphing the state military companies with orders not to obey the U.S. Marshal and to await his personal orders.[160] Governor Randall also sought authorization from the state legislature to use the state militia to protect the "sovereignty of the State" from "usurpation or aggression" by the federal government.[161] When the Wisconsin Supreme Court denied Booth's petition for a writ of habeas corpus and the Wisconsin legislature failed to authorize the use of force, however, Governor Randall stepped back from his militaristic stance.

Although a crisis was averted, it is important to note how close Wisconsin came to a direct military confrontation with the federal government. If Paine had taken part in the decision or Dixon had not replaced the recently deceased Whiton, it is likely that the court would have ordered Booth's release. Under Chief Justice Taney's orders in *Ableman*, the United States Marshal would have refused to deliver Booth to the state court. If such a confrontation had occurred, Governor Randall may have called out the militia to enforce the order without the approval of the legislature. Alternatively, if the legislature had given the governor authorization, it is entirely possible that he would have sought to release Booth under the authority of the Wisconsin court's earlier decisions.[162]

Once it became apparent that the state government would take no action to free Booth, some Wisconsinites took it upon themselves to vindicate states' rights. On August 1, 1860, a group of about ten armed men entered the Customs House and rescued Booth, holding his jailer at gunpoint.[163] Booth was first taken to Waupun, where Prison Commissioner Hans C. Hegg acknowledged that he was harboring Booth but refused to deliver him to the U.S. marshals, telling them that "my force is at present employed in a more profitable and honorable way."[164] After a crowd

[160] Id. When the captain of one such company refused to obey the order, calling it a "clearly illegal" act of treason, Governor Randall responded by disbanding his company. Proclamation of the Governor—The Milwaukee Union Guard Disbanded, Wis. St. J. (Madison), Mar. 7, 1860; see also Wis. St. J. (Madison), Mar. 8, 1860.

[161] Wisconsin Legislature, Wis. St. J. (Madison), Mar. 8, 1860.

[162] See Wis. St. J. (Madison), Mar. 5, 1860 (urging the Governor to release Booth under the authority of the Wisconsin court's decision in *In re Booth*).

[163] How Booth was taken out of the Custom House, Wis. St. J. (Madison), Aug. 2, 1860 (reprinting Daily Wis.).

[164] Booth at the State Prison, Ripon Wkly. Times, Aug. 10, 1860.

thwarted a U.S. marshal's attempt to re-arrest Booth while speaking at a public rally,[165] a mass meeting was called in Ripon, which issued a resolution declaring that "we will maintain the doctrine of our Supreme Court and uphold the sovereignty and laws of the State, by enforcing the judgment of that Court."[166] This resolution shows that Booth's rescuers justified their decision with something more than moral opposition to the Fugitive Slave Act—they also employed the rhetoric of states' rights. Federal marshals again attempted to arrest Booth near Ripon but were surrounded by armed men and forced to leave or risk bloodshed.[167]

Like Governor Randall, the U.S. marshals were thus not willing to force an armed conflict over Booth's arrest. One is left to wonder, however, if U.S. marshals exchanging fire with a significant number of Wisconsin citizens in the name of states' rights would have swayed Justice Paine or Governor Randall to involve the state government. This question is lost to history, however, as the U.S. marshals avoided the escalating situation in Ripon and left Booth at large for well over a month. Booth was eventually caught without his usual armed escort and returned to federal custody in the Customs House in Milwaukee, thus quietly ending the risk of armed conflict in Wisconsin.[168]

C. Did Ableman Contribute to the Downfall of States' Rights in Wisconsin?

Although *Ableman* risked military conflict and strengthened the states' rights movement in the short term, the decision may have been at least a partial success if it had ultimately ended the movement. Federal enforcement may have forced Wisconsinites to back down rather than confront the federal government. This Section argues, however, that the threat of federal enforcement had little to do with the fall of states' rights.

[165] See S. M. Booth at Ripon!, Ripon Wkly. Times, Aug. 10, 1860.

[166] Peoples' Mass Meeting, Ripon Wkly. Times, Aug. 10, 1860. The meeting also appointed a committee to ask the U.S. marshals to leave the city. Id.

[167] Another Attempt to Arrest S. M. Booth, Ripon Wkly. Times, Aug. 31, 1860.

[168] Re-Arrest of Booth, Wis. St. J. (Madison), Oct. 10, 1860. Booth's sentence was remitted by President Buchanan in March of 1861. S. M. Booth Released, Ripon Wkly. Times, Mar. 15, 1861.

In addition to the Wisconsin court's failure to grant habeas corpus, the decline of states' rights in Wisconsin is demonstrated by the March 1860 election of Justice Dixon, who had earlier shown his opposition to states' rights by voting against Booth's petition for a writ of habeas corpus when temporarily appointed to replace the deceased Justice Whiton. Before the election began, the Republican Party, which had once made states' rights a test for public office,[169] dodged the issue and nominated A. Scott Sloan, whose views on the states' rights debate were unknown.[170] Although the Republican Party was too badly divided to give a clear position on states' rights, the issue was unambiguously presented to the people. Sloan, after receiving criticism for his lack of a position on the states' rights issue, published a letter asserting "[y]ou of course know that I agree with Judge Smith, and *not* with Judge Dixon."[171] States' rights once again became the primary issue of the campaign, and the people showed their dissatisfaction with the doctrine by electing Dixon as Chief Justice.[172]

It is likely that the key to understanding this sudden lack of support lies in the campaign for the presidential election of 1860.[173] While this analysis is largely speculative, it seems likely that many Republicans in Wisconsin either became convinced that states' rights was bad policy or thought the theory had become a political liability.

States' rights theory was successful during the 1850s because, at a time when the people of Wisconsin felt that the "slave power"

[169] The selection of United States Senator Doolittle is an apt example. See supra note 136 and accompanying text.

[170] To Nominate, or Not to Nominate!, The Debate in the Republican State Convention, Wis. St. J. (Madison), Mar. 2, 1860.

[171] Letter from Judge A. Scott Sloan, Wis. St. J. (Madison), Mar. 15, 1860.

[172] See Voters, to the Polls!, Daily J. (Racine), Apr. 3, 1860; see also McManus, supra note 9, at 185; Winslow, supra note 140, at 141–42.

[173] But see Baker, supra note 9, at 165, 171–72 (arguing that Wisconsinites were forced to abandon states' rights in the context of southern secession following the election); McManus, supra note 9, at 190 (arguing that, beginning in 1861 and continuing after the war, Republicans abandoned states' rights and expanded national power in order to better serve the "goal of protecting and expanding individual liberty"); Ranney, supra note 7, at 112 (arguing that Wisconsinites abandoned the doctrine to appease a seceding South).

was controlling the national government,[174] states' rights could be used to check national power. Because Republicans expected to gain control of the national government in the 1860 election, however, a political theory that vested supreme political power in the states was no longer in their interests.[175] It thus seems likely that Republicans, hoping to soon gain control of the federal government, did not want to provide the South with a precedent for using states' rights to block national legislation.[176]

The states' rights movement in Wisconsin was probably also a political liability for the Republicans in the 1860 elections. The major issue in the northern presidential contest between Republican Abraham Lincoln and Democrat Stephen Douglas was the southern threat of disunion if Lincoln was elected.[177] If Republicans had continued to back states' rights, and thus Wisconsin had proved willing to fight a civil war over states' rights and slavery, then similar threats from the South would have appeared more credible, encouraging moderates to vote for Douglas.[178] Moreover, the Republican Party desired to appear moderate on the issue of slavery in order to win support in key battleground states in the lower North.[179] States' rights, with its potential to nullify federal law and

[174] See, e.g., The Judicial Election, The Milwaukee Daily Sentinel, Mar. 28, 1859 ("Step by step, and year after year, has the Slave Power made its advances and aggressions. Originally weak, it now controls every Department of the General Government.").

[175] Democrats had long made this point. See, e.g., The Opinion of Judge Smith, Daily Wis. (Milwaukee), June 8, 1854 ("[W]henever a thorough anti-slavery man is placed in the presidential chair, the same power which is now used for the enlargement of Slavery, can then be used for the strengthening of Liberty.").

[176] See To Nominate, or Not to Nominate!, supra note 170 ("I am unwilling that the Republican Party of Wisconsin should furnish any authority for such disloyalty, or should lend any respectability to it.").

[177] See David M. Potter, Lincoln and His Party in the Secession Crisis 2 (1942). Because the Democrats could not agree on a candidate, the presidential election of 1860 was essentially split into two different races. In the South, Democrat John Breckinridge ran against John Bell of the Constitutional Union Party, which was a successor of the Whig Party.

[178] In reference to Booth's arrest, the *Chicago Press and Tribune* alleged that "the Democratic [P]arty, already in agony of death, want nothing so much as civil war, to give color and substance to their threats of disunion." How it Looks to Outsiders, Wis. St. J. (Madison), Mar. 12, 1860 (reprinting Chi. Press & Trib.).

[179] Lincoln was chosen partially because of his moderate antislavery stance. Potter, supra note 177, at 32–35.

evade constitutional obligations, was probably just the type of radical policy from which Republicans wanted to distance themselves.

After Lincoln was elected, support for states rights' continued to decline as Republicans attempted to appease the South.[180] States' rights had been used to justify Wisconsin's personal liberty law and judicial nullification in the *Booth* cases, both of which were cited as reasons for southern secession.[181] Wisconsinites thus wished to moderate their stance to prevent civil war.[182]

These factors, and not the threat of federal enforcement of *Ableman*, probably caused the fall of states' rights in Wisconsin. The influence of states rights' reached its zenith after Chief Justice Taney's decision in *Ableman*. It is unlikely that the people who had opposed the Supreme Court's decision and supported resistance through states' rights would suddenly back down one year later when the decision was about to be enforced. If fear of a conflict was the primary cause of the fall of states' rights, support would probably have faded, rather than increased, when Chief Justice Taney's opinion in *Ableman* made conflict inevitable.

D. The National Effects of Ableman

The clearest result of *Ableman* was its unintentional contribution to the spread of states' rights as an antislavery constitutional strategy. Following the conviction of two men for rescuing a fugitive slave in Ohio, Representative Benjamin Wade declared that "[i]f the Supreme Court of Ohio does not grant the [writ of] habeas corpus, the people of the Western Reserve must [g]rant it—sword in hand if need be."[183] In defiance of *Ableman*, the Ohio Supreme Court issued a writ of habeas corpus on the federal prisoners and inquired into the constitutionality of the Fugitive Slave Act.[184] It was widely believed that Governor Salmon P. Chase would use the

[180] See Ranney, supra note 7, at 112.

[181] See, e.g., Cong. Globe, 36th Cong., 1st Sess. app. at 89 (1860) (statement of Sen. Robert Toombs) [hereinafter Toombs]; Benjamin H. Hill, Unionist Speech (Nov. 15, 1860), *in* Secession Debated: Georgia's Showdown in 1860, at 83 (William W. Freehling & Craig M. Simpson eds., 1992).

[182] See Ranney, supra note 7, at 112.

[183] Morris, supra note 12, at 187.

[184] Ex parte Bushnell, 9 Ohio St. 77, 184–85 (1859).

state military to enforce the Ohio court's decision if needed.[185] A majority of the Ohio court, however, rejected states' rights and upheld the Fugitive Slave Act.[186] But states' rights nearly carried the court, as two of the five justices dissented from the opinion and fully embraced the Wisconsin court's doctrine.[187]

It would probably be a mistake to attribute the dissenters' failure to *Ableman*. Ohio, a border state, was generally less radical than Wisconsin on slavery issues and thus would have been more accepting of the Fugitive Slave Act. Also, the Ohio court's decision took place in 1859, at about the same time that Wisconsin was backing away from its commitment to states' rights. It is thus likely that the election of 1860, rather than a fear of conflict with federal authorities, was responsible for Ohio's failure to fully embrace states' rights. Moreover, before *Ableman*, the state of Ohio used a moderate personal liberty law to protect its black citizens.[188] After *Ableman* implicitly declared Ohio's personal liberty law unconstitutional, however, many Ohioans were forced to turn to states' rights to justify their actions.[189] *Ableman* thus actually spread, rather than discouraged, antislavery use of states' rights.

While the effects of *Ableman* on national politics are much harder to determine given the outbreak of secession and civil war only a year after the decision, like *Dred Scott*,[190] the case probably contributed to the rising sectional animosity. Northern Democrats used the Wisconsin decisions to portray Republicans as radicals engaged in "a species of South Carolina nullification" and supported *Ableman* as necessary for the supremacy and uniformity of federal laws.[191] Republicans, however, praised the Wisconsin decisions and condemned Chief Justice Taney's opinion as "an alarm-

[185] Morris, supra note 12, at 187–88.
[186] *Bushnell*, 9 Ohio St. at 194–97.
[187] Id. at 221–29, 256.
[188] Morris, supra note 12, at 182, 186–88.
[189] Cf. id. at 186–88.
[190] See Fehrenbacher, supra note 13, at 417–595.
[191] The Presidential Question, N.Y. Times, Apr. 3, 1860, at 5 (reporting a Democratic political speech); see also An Important Decision by the Supreme Court of the United States, Daily News (Milwaukee), Mar. 15, 1859 (reprinting Detroit Free Press).

ing assumption of power" that threatened liberty and would do nothing to increase enforcement of the Fugitive Slave Act.[192]

And although Southerners praised Chief Justice Taney's decision as "able, learned, and eloquent," they were still enraged over what they perceived to be nullification of the Fugitive Slave Clause by the Wisconsin court.[193] *The Richmond Enquirer* initially called Justice Smith a traitor for his "contemptibly frivolous and insufficient" opinion in *In re Booth* and warned that if the North did not fulfill its duty to return fugitive slaves, it would be the duty of "the South to enforce its rights."[194] This anger only intensified over time, as secessionists cited Wisconsin's violation of the Fugitive Slave Clause as a primary example of northern constitutional violations[195] and warned that Republicans would appoint men like the Wisconsin justices to the Supreme Court to further undermine southern rights during the debates over disunion.[196] Thus, while *Ableman* antagonized the sectional Republican Party in the North, it did little to calm southern anger over the Wisconsin court's perceived nullification.

[192] The Last Stride of the Supreme Court, Milwaukee Sentinel, Mar. 24, 1859 (quoting the N.Y. Evening Post); see also, e.g., The Wisconsin Legislature on the Recent Decision of the U.S. Supreme Court, Milwaukee Sentinel, Mar. 24, 1859 (reprinting Detroit Trib.) (praising Wisconsin for refusing to "surrender her State Sovereignty" and calling the Supreme Court a "bench of slave holders"). The *New York Tribune* asserted that "[t]his decision is equivalent to a denial of the writ [of habeas corpus], as an instrument of protection against federal persecution or tyranny. . . . Any State of this Union that will yield to such an interpretation of its political rights as this is only fit to be enslaved. The spirit of freedom spurns it with contempt." Nullification Proclaimed, Milwaukee News, Mar. 23, 1859 (reprinting Detroit Free Press quoting the N.Y. Trib.).

[193] Toombs, supra note 181, at 89.

[194] The Decision Against the Fugitive Slave Law, The Richmond Enquirer, June 15, 1854.

[195] See, e.g., Toombs, supra note 181, at 89; Hill, supra note 181, at 83.

[196] See Toombs, supra note 181, at 88–90 (condemning the Wisconsin court for violating the Constitution and warning that he had "no doubt [that Republicans] will treat the Constitution in the same way if they get power here"); Hill, supra note 181, at 86 (warning that the Republicans, including Republican judges, had a history of violating the Constitution and were "seeking to secure the other two departments—the legislative and judicial").

CONCLUSION

The cases and constitutional theory surrounding *Ableman v. Booth* all produced social change, but they did so in drastically different ways. The Wisconsin court used legal theory to effectively advance an ongoing social movement. The Glover rescue demonstrates that, enraged over southern betrayal in the Kansas-Nebraska Act, many people in Wisconsin wished to reject the Fugitive Slave Act while still obeying the Constitution. The Wisconsin Supreme Court, responding to these social pressures, endorsed the constitutional doctrine of states' rights in order to diverge from a well-established line of federal precedent and rule against the unpopular Fugitive Slave Act. A majority of Wisconsinites initially supported the court's attempt to legitimize rejection of the Fugitive Slave Act even though they did not understand or agree on the underlying constitutional rationale. The Wisconsin court's role in the developments in Wisconsin can only be understood after rejecting the conventional view that Wisconsinites acted solely out of hostility to slavery and wholeheartedly supported the rescue of Glover.

Unpopular federal decisions like *Ableman*, however, produced social change through a backlash effect that strengthened the very constitutional movement they were attempting to suppress. Though primarily antislavery in view, the people of Wisconsin were ordinarily far removed from the world of southern slaveholders. Continued federal attempts to enforce the Fugitive Slave Act, however, made the issues surrounding slavery suddenly visible and relevant to the people of Wisconsin. Each step in the Booth litigation was a vivid reminder of the inconsistency of freedom and the Union, increasing the people's commitment to states' rights as a rejection of federal authority.

Political use of the doctrine of states' rights produced unanticipated effects and exacerbated the backlash against unpopular federal rulings. The Republican Party opportunistically used federal support of the Fugitive Slave Act as a powerful political tool against the more moderate Democrats, who advocated adherence to federal authority. The states' rights issue thus consistently elected Republicans to office and also held sway in intraparty votes, encouraging moderate politicians to embrace more extreme views of state sovereignty. This influence on elected officials served to entrench the states' rights views of the Wisconsin Supreme

Court, secure the passage of a personal liberty law, and nearly prompt the governor to start a civil war. It would take the hope of an antislavery victory in the election of 1860, and not the threat federal coercion, to finally break the cycle of political benefit resulting from federal enforcement.

Ableman occupies a significant place in constitutional history for its contribution to our understanding of antebellum federalism and slavery jurisprudence. But, viewed in its historical context, *Ableman* should also be recognized for weakening the bonds of American federalism, promoting antislavery politics and constitutionalism, adding to sectional tensions, and nearly starting a civil war.