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Ableman v. Booth: How State Nullification Can Defy Tyrannical Government

In 1854, Wisconsin rejected the federal Fugitive Slave Act, which mandated Northern states return Southern slaves without due process, demonstrating both the validity and usefulness of nullification.

When Georgia joined the Confederacy and seceded from the union on January 29, 1861, a state convention explained the state's reasons for separation. Georgia singled out Wisconsin's Supreme Court for particular excoriation because this court had the temerity to declare null and void within the state of Wisconsin the Fugitive Slave Act of 1850. This federal law — a part of the Compromise of 1850 between Southern states where slavery was legal and Northern states where it was not — required that runaway slaves, upon capture, be returned to their masters. The subsequent U.S. Supreme Court unanimously upheld the constitutionality of this law, overturning the Wisconsin Supreme Court decision, the Georgia convention noted. Not only that, but Wisconsin's "own local courts with equal unanimity (with the single and temporary exception of the supreme court of Wisconsin), sustained its constitutionality in all of its provisions."

The only factually inaccurate part of Georgia's declaration was the word "temporary." To this day, Wisconsin courts have refused to recognize the U.S. Supreme Court decision *Ableman v. Booth* as legitimate or binding on state courts. That 1859 U.S. Supreme Court decision claimed to overrule the Wisconsin Supreme Court's 1854 decision *In Re: Booth*, which declared the federal Fugitive Slave Act of 1850 unconstitutional. According to the Wisconsin court system today, "The U.S. Supreme Court overturned that decision but the Wisconsin Supreme Court refused to file the U.S. Court's mandate upholding the fugitive slave law. That mandate has never been filed." The Wisconsin decision on the Fugitive Slave Act is the one instance of successful state judicial nullification of federal law that still stands in a state.

The Booth cases brought into focus two of the key issues of the day: Whether the U.S. Constitution was a confederation of states that permanently protected slavery or a freedom document that temporarily recognized slavery as a legacy of colonial times, and whether the U.S. Supreme Court was, or the states

were, the final arbiter of infringements of the U.S. Constitution.

The Booth Controversy

The Booth controversy began when Wisconsin abolitionist Sherman Booth published editorials in his newspaper and made public speeches to help liberate escaped Missouri slave Joshua Glover from a Wisconsin jail in 1854. Booth was later prosecuted under the federal Fugitive Slave Act of 1850 for "aiding and abetting" the escape of Glover, who fled to freedom in Canada after a mob sympathetic to Glover broke down the door of the Milwaukee jail where he was detained.

Booth himself turned out to be a less-than-sympathetic historical figure, later standing trial for seducing the underage babysitter of his children. Though the jury acquitted him, his wife didn't believe him and divorced him. But the case he created, nevertheless, continues to create ripples throughout American history.

Though Booth did not personally participate in the assault on the jail where Glover was being held, he touted it in his newspaper and incited a crowd in a public speech that set the mob upon the jail. Booth's attorney appealed to the state courts with a habeas corpus petition, charging that U.S. Marshall Stephen Ableman had illegally and unconstitutionally imprisoned him within the territorial boundaries of the state of Wisconsin. The Wisconsin Supreme Court granted Booth's habeas petition in 1854, and unanimously declared the Fugitive Slave Act of 1850 null and void because it unconstitutionally federalized slave-catching.

The Wisconsin decision cheered abolitionists across the nation, with Massachusetts Senator Charles Sumner leading the praise of the Wisconsin court. "This very act is an assumption by Congress of power not delegated to it under the Constitution, and an infraction of rights secured to the States," the Republican argued in a Senate speech February 23, 1855.

> Show me, Sir, if you can, the clause, sentence, or word, in the Constitution, which gives to Congress any power to legislate on the subject. I challenge honorable Senators to produce it. I fearlessly assert it cannot be done. The obligations imposed by the "fugitive" clause, whatever they may be, rest upon the States, and not upon Congress.... And now, almost while I speak, comes the solemn judgment of the Supreme Court of Wisconsin — a sovereign State of this Union — made after elaborate argument, on successive occasions, before a single Judge, and then before the whole bench, declaring this act to be a violation of the Constitution.

Whereas Article I of the Constitution explains the powers of Congress, Article IV of the Constitution explains the obligation of states. Article IV, Section 2 of the U.S. Constitution charges states with catching slaves and other fugitives that had escaped from other states, and returning them:

> A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.
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> No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Thus, when the Congress took up the issue in 1793, the Fugitive Slave Act of 1793 simply claimed, "It shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured," and gave slave owners and their slave catchers a cause

in federal court to arrange the return of their slaves to the state where they were originally held in slavery.

The State of the States

By the time the U.S. Constitution had been adopted, nearly all of the Northern states had passed laws guaranteeing an eventual abolition of slavery. Vermont banned slavery in 1777, during the War for Independence and before it was even a state. Connecticut, Rhode Island, and Pennsylvania had already passed laws on gradual abolition before the 1787 constitutional convention. New Hampshire didn't bother with abolishing slavery since nearly all of its slaves were emancipated after serving in the Continental Army during the War for Independence. By 1810, the U.S. Census recorded no slaves in New Hampshire. New York and New Jersey passed gradual abolition laws in 1799 and 1804, respectively. Massachusetts courts proclaimed all slaves free in the 1784 Quock Walker cases, saying that the 1780 state constitution written by John Adams freed slaves, proclaiming that "all men are born free and equal."

In *Commonwealth v. Jennison*, slave Quock Walker applied for his freedom, and the state of Massachusetts charged his former master, Nathaniel Jennison, with criminal battery for beating Walker and trying to return him to slavery. Jennison was convicted of criminal battery, and Walker was freed in the criminal case. A separate jury in a civil suit said Jennison had to grant financial damages to Walker for the beating. Massachusetts Chief Justice William Cushing — later nominated to serve on the first U.S. Supreme Court by George Washington — summed up the attitude of the American Revolution toward slavery in his instructions to the jury in the 1784 *Commonwealth v. Jennison* case:

> As to the doctrine of slavery and the right of Christians to hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle, that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage — a usage which took its origin from the practice of some of the European nations, and the regulations of British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses-features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that "all men are born free and equal" — and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property — and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.

Despite this new attitude toward freedom and against slavery after the American Revolution, Northern states regularly enforced the first fugitive slave law for about 40 years after adoption of the U.S. Constitution. But by the 1830s, Northern states had gradually tired of returning slaves to captivity. A few state governments showed open hostility to the fugitive slave clause, and Southern states demanded a more effective mechanism for the return of their citizens' "property" as the Underground Railroad ramped up.

Countrywide Compromise

The result of that constitutional impasse — where Southern states refused to honor humanity and abolish slavery, while Northern states refused to honor their constitutional obligations to return fugitive slaves — was the Compromise of 1850, which involved multiple compromises: It continued the Missouri Compromise (which decided slavery would be prohibited in most Western territories); banned the slave trade but not slavery itself in Washington, D.C.; settled a dispute over the Texas border; granted statehood to California as a free state; and passed the new fugitive slave law.

The Fugitive Slave Act of 1850 changed the old constitutional arrangement completely. Instead of states enforcing the fugitive slave clause, as constitutionally required, the 1850 law made all federal officials slave catchers, criminalized federal officials if they did not actively collect slaves, and bribed those federal officials with a $5 bounty for every slave they found ($400 in today's money). Those alleged to be escaped slaves were returned without a habeas corpus hearing or trial by jury. Non-judicial federal commissioners were charged with determining the return of alleged slaves, and the accused were prohibited from testifying upon their own behalf.

The Wisconsin Supreme Court declared the federal Fugitive Slave Act of 1850 unconstitutional in the case of *In Re: Booth*, according to the court, "because it does not provide for a trial by jury of the fact that the alleged fugitive owes service to the claimant by the laws of another State, and of his escape therefrom," because it unconstitutionally conferred on federal commissioners judicial powers, because it denied fugitive slaves due process ("any person alleged to be a fugitive may be arrested and deprived of his liberty 'without due process of law'"), and because "Congress has no constitutional power to legislate on that subject." The Wisconsin court noted: "We are aware that it has been said that slaves are not persons in the sense in which that term is used in the amendment to the Constitution above referenced to [the rights to due process and trial by jury guaranteed by the Fifth and Sixth Amendments]. But this, admitting it to be true, does not affect the question under consideration, as persons who are free are liable to be arrested and deprived of their liberty by virtue of this act, without having had a trial by a jury of their peers."

The kidnapping of free black men and women was no straw-man argument by the Wisconsin justices. Kidnapping free blacks had been a fairly common practice, and one that had received treatment in the U.S. Supreme Court a decade earlier in the 1841 *Amistad* decision.

In the Amistad case, a group of Africans had been illegally kidnapped in Africa by Portuguese pirates and sold to Spanish slave-masters in Havana. Since Spain, Portugal, and the United States had all abolished the international slave trade a generation before the 1839 kidnapping, the act was clearly illegal. The black slaves rebelled on a transport trip to Santo Domingo, and eventually ran their ship — the *Amistad* — aground on Long Island, New York. The Spanish embassy demanded the return of the slaves to their politically connected Spanish citizens. But U.S. Supreme Court Associate Justice Joseph Story (ironically, a Massachusetts man who served as Cushing's replacement on the latter's retirement from the U.S. Supreme Court) proclaimed that "these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board the *Amistad*." Interestingly, Chief Justice Roger Taney — who later ruled in the Dred Scott case that a black man, even a free black man, can never have access to federal courts — signed on to Story's opinion in the *Amistad* case granting the Africans their day in court, a court that included full jury trial.

The Wisconsin Supreme Court had simply ruled in its Booth case, *In Re: Booth*, that free black men should have their day in court, as required by the Fifth and Sixth Amendments of the U.S. Constitution.

Moreover, Justice Abram D. Smith observed for the Wisconsin court that under the Fugitive Slave Act "the rights, interests, feelings, dignity, sovereignty, of the free States are as nothing, while the mere pecuniary interests of the slaveholder are everything."

Southern states explicitly referred to Northern nullification efforts against the Fugitive Slave Act as their primary reason for secession in 1860-61. In its "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union," South Carolina complained:

> The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them.... They have encouraged and assisted thousands of our slaves to leave their homes; and those who remain, have been incited by emissaries, books and pictures to servile insurrection.... This sectional combination for the submersion of the Constitution, has been aided in some of the States by elevating to citizenship, persons who, by the supreme law of the land, are incapable of becoming citizens.

Every other state that published an official declaration of the reasons for secession — Georgia, Mississippi, and Texas — also focused upon nullification of the Fugitive Slave Act as their main reason for seceding. And while Georgia and Texas mentioned other grievances against the North in addition to the fugitive slave issue, such as the tariff and lack of aid in fighting Indian tribes, South Carolina and Mississippi limited their complaint to nullification of fugitive slave laws alone.

The Southern complaints about nullification of the Fugitive Slave Act of 1850 were accurate. Each Northern state found its own way to make the federal law ineffectual. The Vermont legislature nullified the Fugitive Slave Act of 1850 within weeks of its enactment, passing its own "Habeas Corpus Law" in November 1850, which required extensive habeas corpus hearings for fugitive slaves and a jury trial before extradition, and essentially banned state officials from cooperating with the anti-habeas Fugitive Slave Act.

In Massachusetts, members of the radical Boston Vigilance Committee liberated fugitive slave Shadrach Minkins from a federal jail, and U.S. Secretary of State Daniel Webster — a former U.S. senator from Massachusetts — was unable to obtain a single conviction under the Fugitive Slave Act of 1850 after the perpetrators were caught. Webster personally led one of the prosecutions, but public sentiment in New England against slavery was so strong that jury nullification became commonplace on slavery issues. Most other Northern states passed "Personal Liberty Laws" that exempted state and local officials — as well as ordinary citizens — from liability when helping escaped slaves.

Justice Judgments

U.S. Supreme Court Chief Justice Roger Taney ruled in his written opinion for the court in the 1859 *Ableman v. Booth* case that the Fugitive Slave Act of 1850 was constitutional because of the "necessary and proper" clause of Article I, Section 8 of the U.S. Constitution, but — tellingly — he neglected to cite the underlying federal power it was "necessary and proper" to legislate upon.

Of course, Taney had explained why he believed that African-Americans needed no protection of habeas corpus or trial by jury three years earlier in the *Dred Scott* decision. In that 1856 case, he ruled that even free black men can have no access to courts or trials in the United States. Taney revealed an entirely different idea of the language about all men being "created equal" in the Declaration of Independence in the *Dred Scott* decision:

> The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Taney held in Dred Scott of all black men, "He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.… And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States."

Taney's assertion in *Dred Scott* that no state allowed black people the vote and full citizenship was demonstrably false. Massachusetts' *Quock Walker* cases, which abolished slavery four years before the Constitution took effect, proved his statement untrue. Quock Walker had access to the courts, and had gained full citizenship rights — including the right to vote. And — as mentioned above — most of the other Northern states had already set upon the path toward abolishing slavery at the time of adoption of the U.S. Constitution. Some other New England states had also allowed African-Americans the right to vote at the time of adoption of the U.S. Constitution, a fact emphasized by Associate Justice Benjamin Curtis in his dissent.

Taney's words in *Dred Scott* were nevertheless echoed by the seceding Southern states seven years later, when Texas claimed in its declaration of the causes of secession that the Constitution was "established exclusively by the white race, for themselves and their posterity; that the African race had no agency in their establishment" and "that the servitude of the African race, as existing in these States, is mutually beneficial to both bond and free."

Taney claimed in *Ableman v. Booth* that states had no right to oppose even unconstitutional laws, claiming instead that the Supreme Court alone had the power to declare a statute enacted by Congress unconstitutional:

> The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and with out appeal. The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this Constitution" and the laws of the United States — leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the

> Constitution.

Of course, even though the Supreme Court is granted jurisdiction to declare laws unconstitutional, nowhere in the Constitution is this jurisdiction explicitly declared to be exclusive. This explains why the Constitution's primary author, James Madison, along with Thomas Jefferson, authored the Virginia and Kentucky resolutions in 1798. Those resolutions asserted that states were the ultimate authority in determining the constitutionality of a law passed by Congress, the latter document noting of the U.S. Constitution that "the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy."

Moreover, nowhere does the Constitution require states or individuals to follow unconstitutional laws until such time as they are declared unconstitutional by federal courts. Thus, Wisconsin Justice Abram Smith responded for the State of Wisconsin in *Ableman* that he would never accept as a reality that

> an officer of the United States, armed with process to arrest a fugitive from service, is clothed with entire immunity from state authority; to commit whatever crime or outrage against the laws of the state; that their own high prerogative writ of habeas corpus shall be annulled, their authority defied, their officers resisted, the process of their own courts contemned, their territory invaded by federal force, the houses of their citizens searched, the sanctuary or their homes invaded, their streets and public places made the scenes of tumultuous and armed violence, and state sovereignty succumb — paralyzed and aghast — before the process of an officer unknown to the constitution and irresponsible to its sanctions. At least, such shall not become the degradation of Wisconsin, without meeting as stern remonstrance and resistance as I may be able to interpose, so long as her people impose upon me the duty of guarding their rights and liberties, and maintaining the dignity and sovereignty of their state.

At issue in the *Ableman v. Booth* case was the very nature of the U.S. Constitution. Was the U.S. Constitution a confederation created by the states, who ratified the document and were the ultimate judges of infractions of its provisions? Or was the United States a nation where states were mere provinces in a consolidated government and where courts alone could provide a check against a runaway Congress?

While many Americans will assert that the states' right to judge infractions of the U.S. Constitution was decided by the American Civil War, Wisconsin and its Supreme Court remain the one Northern state that asserts that radically different vision of America. And the Wisconsin court's vision was clearly enunciated 55 years earlier by Thomas Jefferson and James Madison.