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Paul Finkelman

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I. INTRODUCTION

Professor Levinson argues with some passion for compromise in constitutional law. He notes that the Constitution itself was a product of compromise. That is clearly the case. However, it is worth considering if compromise is always such a wonderful thing. We might even ask if the compromises at the Constitutional Convention were worth the long-term costs. As I have argued elsewhere,[1] throughout the Constitutional Convention the northern delegates made numerous compromises over slavery.[2] The southern delegates made demands and the northern delegates, for the most part, gave the southerners most or all of what they asked for.[3]

As a result, the delegates in 1787 created a slaveholders' republic in which the national government was committed to protecting slavery.

* President William McKinley Distinguished Professor of Law and Public Policy, Albany Law School.

1. *See e.g.*, PAUL FINKLEMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (2d ed. 2001).

2. *Id.* at 6–12.

3. *See id.* at 110 (stating that the Constitution "accommodated the needs and demands of slavery at almost every turn").

Meanwhile, the structure of the Constitution gave slavery enormous protection. Under the Constitution, Congress lacked the power to regulate the day-to-day life of the American people, and thus prevented any meaningful legislation that could have harmed slavery. Nor could the political system deal with slavery through a constitutional amendment. By requiring that three-fourths of the states were necessary to ratify any constitutional amendments,[4] the Framers made sure that slavery could *never* be abolished as long as normal constitutional processes were in place. To understand this, it is useful to remember that in 1860 there were fifteen slave states, and if all of them had remained in the Union, it would be impossible, *to this day*, to pass a constitutional amendment to end slavery. With fifteen slave states it would take forty-five free states—in a sixty state union—to ratify an amendment ending slavery.

Most of the major compromises over slavery were eventually undone by the Civil War Amendments,[5] but as their name reminds us, these Amendments were possible *only* because the normal constitutional order had been disrupted by four years of brutal war. The cost of undoing the compromises of 1787 was paid with the lives of some 620,000 Americans, the disrupted lives of millions more, and billions in treasure.

Some compromises over slavery at the Convention, such as counting slaves for purposes of representation,[6] were clearly necessary to create a stronger national government. There could be no population based representation without some accommodation for slavery. On the other hand, the fugitive slave clause[7] was given to the South without any quid pro quo or even much debate. The Convention adopted the slave trade provision[8] over the angry protests of numerous delegates, including some slave owners, who recognized that there was something especially immoral about protecting the African Slave Trade, when the Constitution did not give any special protection to any other form of commerce or any other social or economic institution. The electoral college, which continues to haunt American politics,[9] was also a function of the compromises over slavery.[10] Counting

4. U.S. CONST. art. V.

5. Not all slavery-related compromises were eliminated by the end of slavery. The electoral college was designed to fold slavery into the election of the president by basing electors on the members of the House of Representatives, which was in turn based on the three-fifths clause, which counted slaves for representation. Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002). The Thirteenth Amendment ended slavery, but the electoral college remained. Similarly, the prohibitions on export taxes in Article I, Section 9 and Section 10 of the Constitution were also adopted to prevent an indirect taxation of slaves by taking the products—tobacco and rice in 1787—they produced. The need to protect slavery in this way is long gone, but the prohibition on export taxes remains.

6. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes").

7. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour").

8. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons").

9. *See* Bush v. Gore, 531 U.S. 98 (2000).

10. *See* Finkelman, *supra* note 5, at 1145–57.

slaves for representation and the electoral college, while specifically preventing Congress from ending the African Slave Trade for *at least* twenty years,[11] led one delegate to complain:

> when fairly explained [it] comes to this: that the inhabitant of Georgia and S[outh]C[arolina] who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and dam[n]s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of [Pennsylvania] or N[ew] Jersey who views with a laudable horror, so nefarious a practice.[12]

Thus the framers created a constitution that protected slavery in a variety of ways. The South gained extra political muscle for its slaves, was guaranteed that fugitives would not be emancipated, and knew that the slave trade would be protected for *at least* twenty years. The national government promised to help suppress slave rebellions and never tax the export products produced by slaves.[13] The requirement that three-quarters of the states were needed to ratify an amendment gave the South what amounted to a perpetual veto over any constitutional amendment. By creating a government of limited powers, the Framers also insured that Congress could never interfere with slavery where it already exists. Thus, as General Charles Cotesworth Pinckney, the leader of the South Carolina delegation at the Convention, proudly told his state legislature when he returned from Philadelphia:

> We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.[14]

The constitutional compromises over slavery may have been necessary to create the "more perfect Union" of 1787, but it was hardly a "perfect Union." Slavery bedeviled American politics and law from 1787 until the

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11. U.S. CONST. art. I, § 9, cl. 1.

12. Gouverneur Morris, Address at the Constitutional Convention, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 222 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (third alternation in original).

13. *See* FINKELMAN, *supra* note 1, at 34.

14. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 286 (Jonathan Elliot ed., 1968) (1866).

Civil War. Slavery became what the great legal historian William M. Wiecek called "[t]he [n]emesis of the Constitution."[15] Most importantly it was the nemesis because there was seemingly nothing to be done about it. This led to one piece of legislation after another and one compromise after another. Most of this legislation strengthened slavery and did little for freedom. In that sense there was little compromise. This makes sense, perhaps, since compromise with unrestrained evil is usually impossible. The Fugitive Slave Law of 1793, for example, offered no protections for free blacks, but left them vulnerable under a rendition statute that required minimal proof.[16] The Missouri Compromise (1820) brought a new slave state into the Union as did the acquisition of Florida (1821) and Texas Annexation (1845). In *Prigg v. Pennsylvania*,[17] the Supreme Court weighed in to prevent the northern states from protecting free blacks from kidnapping.[18] The Mexican War brought the United States vast new territories which slaveholders wanted to settle. This led to the most massive "compromise" ever over slavery—the Compromise of 1850. But that in fact, turned out to be more one-sided than any other compromises over slavery since the adoption of the Constitution.

The Compromise of 1850 has always been seen as a classic moment of American political history. Historians wax eloquently about the brilliance of the debate, the selfless dedication to Union of some of the participants, and particularly the heroic role of Henry Clay in coming out of retirement to craft a compromise in 1850 as he had done in 1820. The traditional works also acknowledge the other "heroic" men of the age who worked with Clay, especially Daniel Webster and John C. Calhoun. Thus, the historian Robert Remini has argued in the most recent book on the Compromise that "[o]nce the great men of the antebellum era passed away—men such as Andrew Jackson, Henry Clay, Daniel Webster, and John C. Calhoun—the nation lacked individuals in position of power who were passionately devoted to the Union . . . ."[19] Remini argues that the crisis of 1850 was averted

> because there were a number of men in Congress who were willing to compromise—and not simply on one issue, like slavery, but on many related issues that divided North and South, such as congressional control over the territories, the admission of California, the New Mexico boundary, and the Texas debt.[20]

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15. *See* HAROLD HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 86 (1982).

16. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793).

17. 41 U.S. (16 Pet.) 539 (1842).

18. *See id.* at 540.

19. ROBERT REMINI, AT THE EDGE OF THE PRECIPICE: HENRY CLAY AND THE COMPROMISE THAT SAVED THE UNION xi (2010).

20. *Id.* at xii.

This heroic analysis of the Compromise is problematic. Remini argues that the Compromise of 1850 prevented the American Union from being "irreparably smashed"[21] and says the Compromise "is a prime example of how close this nation came to a catastrophic smash-up"[22] and that his heroes in Congress "avoided that disaster—just in time."[23] But of course, the "catastrophic smash-up"[24] in fact occurred anyway, with a cost of 620,000 or so lives and hundreds of thousands more wounded and damaged, and property costs in the billions. The Union was not "irreparably smashed" by the Civil War, but the legacy of that conflict still haunts the nation, on the eve of the war's sesquicentennial. Remini implicitly concedes that the Compromise was, in the end a failure, and having praised the Congress and its leaders, he then retreats to saying the real success of the Compromise was that it "gave the North ten years to build its industrial strength and enable it to overpower the South when the war finally broke out."[25] He asserts that it was in this decade that the North expanded its industrial capacity but that when the war began the South "did not have the railroad system by which to move men and material to the areas where they were most needed."[26] He further claims that the Compromise also gave the North "ten years to find a leader who could save the Union."[27]

These arguments are, in the end, not persuasive. Remini's list of men "passionately devoted to the Union" includes John C. Calhoun, who left Jackson's administration over nullification and in 1850 asserted that the Union was expendable. He opposed any compromise and had a long record of defending the constitutionality and the expediency of secession. A true Unionist believed that secession was *always* unconstitutional and unacceptable. In 1850 southern senators like Clay, Thomas Hart Benton of Missouri, and Sam Houston of Texas believed secession could *never* be on the table. They were slave owners who despised abolitionists, but they did not believe in breaking up the Union. Similarly, northern senators like William Henry Seward of New York, Salmon P. Chase of Ohio, John P. Hale of New Hampshire, and Hannibal Hamlin of Maine were passionately opposed to slavery but were also passionately devoted to Union. They opposed the Compromise because it was overwhelmingly proslavery, but after its passage they did not return to the North and campaign for secession.

21. *Id.* at xi.
22. *Id.* at xiii.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 158.
27. *Id.* at xiii.

But southern Senators who had been acolytes of John C. Calhoun, like Henry S. Foote of Mississippi, R. Barnwell Rhett of South Carolina, James M. Mason of Virginia, and David Levy Yulee of Florida were still talking about secession after the Compromise, even though they won almost everything they wanted in the Compromise. Rather than stifle secessionist talk, the Compromise emboldened southern nationalists[28] to push for more concessions from freedom, while also stimulating them to push their disunion agenda.

The legislation that ultimately comprised the Compromise of 1850 was, in the end, overwhelmingly proslavery. It was an appeasement of the most radical proslavery men, and gave virtually nothing to the North or to freedom. But in its wake, no northern political leaders suggested secession. The only politicians considering secession after the Compromise were southern followers of the late John C. Calhoun, who were decidedly not passionately devoted to the Union. In the North, the only secessionist claims came from a small band of radical abolitionists who followed William Lloyd Garrison, and they did not even vote or participate in politics.[29]

By any measure, the Compromise of 1850 failed to achieve its major goal—to defuse sectional conflict over slavery. The Compromise stimulated a decade of confrontations between northerners and the federal government over the fugitive slave law and even led to states' rights arguments by *northern* public officials in opposition to that law.[30] The Compromise also failed to settle the issue of slavery in the Territories. In 1854, Congress revisited the issue, passing the Kansas-Nebraska Act, which led to a mini-civil war in Kansas and the creation of the first nationally viable anti-slavery political organization: the Republican Party. In 1857, the Supreme Court weighed in on the issue in *Dred Scott v. Sandford*.[31] The presidential elections of 1856 and 1860 were mostly about the issues that the Compromise of 1850 supposedly settled.

Despite Remini's claim that in 1850 there were many issues troubling

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28. The term "southern nationalists" does not refer to southerners who favored a strong union—they are traditionally called "southern unionists." A southern nationalist favored, to one degree or another, an independent or semi-independent southern nation. John C. Calhoun of South Carolina and Jefferson Davis of Mississippi (who became the president of the Confederate States of America) are examples of extreme southern nationalists.

29. Elsewhere, I have argued that the Garrisonian disunionist position was sensible because the U.S. Constitution was proslavery and precluded a democratic response to slavery. The Garrisonians, of course, could not anticipate that the end to slavery would come through a war started by the slaveholders themselves. *See* Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413 (2001).

30. The most famous example took place in Wisconsin, where the state supreme court declared the federal law unconstitutional. *See In re* Booth and Rycrafft, 3 Wis. 157 (1854), *rev'd*, Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). For a history of this case, see H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (2006).

31. 60 U.S. (19 How.) 393 (1857).

Congress, there was, with one minor exception, just a single issue: slavery. Southerners objected to California's admission because it was entering the Union as a free state; northerners worried about the regulation of the territories because Henry Clay wanted to allow slavery in *all* of them. The New Mexico boundary was an issue because northerners hoped the territory would eventually enter the Union as a free state, and thus giving substantial parts of it to Texas would only increase the land controlled by the slave power. Only the Texas debt—the easiest and least controversial aspect of the Compromise—was not directly connected to slavery. Remini's summary of the issues, in his heroic analysis of the Compromise, oddly ignores the single most divisive aspect of the Compromise—the Fugitive Slave Act of 1850.[32] Nor does his short list note that by settling the territorial issue as it did Congress actually eviscerated the Missouri Compromise, which Clay had brilliantly crafted three decades earlier.

The argument of Remini and other scholars—that the Compromise of 1850 "bought time" for the North to become stronger—is also quite problematic. First, it is important to understand that the Compromise was not designed to "buy" time to prepare for a future war. It was designed to avoid secession and war, and in this sense it failed. But even if we accept the argument that an unintended consequence of the compromise was to "buy" time, it is not clear if this favored the North. Economic data suggests just the opposite: that the rate of industrial growth in the South actually exceeded that in the North during this period.

The North was clearly more industrialized than the South both in 1850 and in 1860, but by 1860 the South was catching up.[33] Southern railroads "underwent remarkable transformations in the 1850s."[34] In that decade, "southerners began committing more money to railroads and an explosion of mileage resulted."[35] For example, between 1850 and 1860 railroad mileage doubled in Pennsylvania and New Jersey, and nearly doubled in New York.[36] There were even greater expansions in the Midwest.[37] On the other hand, in New Hampshire it grew by only 50% and in Massachusetts mileage grew by just 20%.[38] Many southern states more than matched these growth

32. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).

33. *See generally* Fred Bateman et al., *Large-Scale Manufacturing in the South and West, 1850–1860*, 45 BUS. HIST. REV. 1(1971).

34. AARON W. MARRS, RAILROADS IN THE OLD SOUTH: PURSUING PROGRESS IN A SLAVE SOCIETY 5 (2009).

35. *Id.* at 6.

36. *See id.* at 5 (Table 2).

37. *See id.*

38. *See id.*

rates.[39] In Georgia mileage more than doubled; it more than tripled in Alabama, South Carolina, Virginia, and North Carolina; and in Louisiana, it more than quadrupled.[40] But these rates were dwarfed by other slave states. While Ohio's railroad mileage grew by about 500%, neighbor Kentucky's mileage grew by almost 700%.[41] Indiana's tracks increased by about 900%, but Mississippi topped that with about a 1,100% growth as did Florida's growth of about 1,900%.[42] Illinois's mileage grew by 2,513%, and Wisconsin topped the North with a 4,525% growth, but Tennessee easily beat both states with a 13,922% growth rate.[43] Three slave states (Arkansas, Missouri, and Texas) had no railroads in 1850, but more than 1150 miles in 1860, while only two free states (California and Iowa) had no miles in 1850, and they had only 678 miles in 1860.[44] These figures demonstrate that Remini's arguments about the Compromise buying time for the North to increase its railroad capacity are simply wrong. If anything, the Compromise gave the South more time to build up its railroads—which it used effectively in the Civil War.

The percentage growth of southern railroads in the 1850s should not be misunderstood. Because of the low starting base, the percentage growth is exaggerated. Tennessee, for example, had only nine miles of railroads in 1850, so its percentage increase is huge.[45] But its absolute mileage growth of 1,244 miles in the decade was greater than that all but four northern states.[46] So too was Virginia's (including West Virginia) expansion from 481 miles to 1,731 miles from 1850 to 1860.[47] The point here is not that the South was suddenly the industrial equal of the North, but rather that the South's "extraordinary expansion during the 1850s" severely undercuts the notion that the industrial growth between the Compromise and the Civil War favored the North.[48]

Railroad receipts underscore the closing gap between the sections. They illustrate not only the growth of railroads but also the growth of commerce and other industrial development. In New England, receipts nearly doubled from 1849 to 1859, and in the Middle Atlantic, they tripled.[49] But in the South they quadrupled, and in the Southwest they were eighteen times larger in 1859 than in 1849.[50] As with the growth in tracks, the percentage growth

39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.*
47. *Id.*
48. *See id.* at 6.
49. *See id.* at 4 (Table 1).
50. *See id.*

in revenue is skewed by low starting bases. However, the absolute growth is significant. The Central Railroad of Georgia earned over $269,000 in 1850 from its upfreight operations (freight carried into the state or across the state).[51] In 1860 this figure was over $637,000.[52] Downfreight sometimes accounted for even more earnings.[53] Upfreight revenue on the Charlotte and South Carolina Railroad went from over $11,000 in 1851 to over $156,000 in 1858.[54] Other southern railroads recorded similar growth.[55]

Railroad mileage and railroad receipts are crude measures, but they illustrate the growing industrialization of the South in the 1850s. The more dramatic southern growth underscores the general low level of industrialization in the South before 1850. But, this dramatic growth shows that it is simply wrong to claim that the Compromise allowed the North to gain an industrial advantage by 1860. On the contrary, in the 1850s the South was catching up with the North, and thus relative to where it was in 1850, southern industrial capacity was stronger in 1860.

The argument about leadership is, of course, utterly impossible to prove or disprove. We can never know if a leader might have emerged in the early 1850s to oppose southern secession, if it had occurred then. We might imagine a young Stephen A. Douglas leading the North in 1852 in fighting to preserve the Union. The staunchly Unionist Sam Houston might also have been the leader of the moment. Like Jackson in the 1830s, Houston would have been a southern slaveholder and a military hero of national status standing up to southern hotheads. Missouri's Thomas Hart Benton had similar stature as a staunch slaveholding Unionist, although without the military experience of Houston or Jackson.

It is equally important to understand that there is also no way to know if any southern states would have in fact seceded in 1850 if a substantially different set of laws had been passed. There were some secessionist sentiments bandied about in 1850, but two secessionist conventions that year were comical failures. One took place and then collapsed before the Compromise was passed; the other met and failed after the Compromise had passed.[56] The Compromise surely undermined the second secessionist convention, but we cannot know if a more reasonable and less one-sided compromise would not have worked just as well. Moreover, as the historian

51. *Id.* at 117 (Table 6).
52. *Id.*
53. *Id.* at 119.
54. *Id.* at 123 (Table 9).
55. *Id.* at 117, 123; *see also id.* at 115–25 (for a discussion of other railroads).
56. DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 126 (1976); *see also* PAUL FINKELMAN, MILLARD FILLMORE 71, 101, 108-09 (2011).

David Potter points out in his Pulitzer Prize-winning study of the decade, "widespread prosperity" and high cotton prices also undermined the secessionists. Potter notes: "There was too much contentment for a secession movement to take root."[57] Equally significant, in the early 1850s the South had no clear political figure to lead a secessionist movement.

Indeed, we might easily turn Remini's argument on its head. The Compromise of 1850 bought time for the secessionists to gather support, encourage southern industrial growth, and find leadership. The death of Calhoun left the secessionists and extreme southern nationalists groping for a leader. Not until well after the Compromise did Jefferson Davis emerge as a logical successor to Calhoun. Meanwhile, it took a decade under the utterly proslavery Compromise for southern nationalists to gain strength and foster hostility toward the Union. They could do this because the compromise was so one-sided that it emboldened southern nationalists to make new demands for more concessions to slavery, while the outrageous fugitive slave law led to open northern hostility, which in turn played into the hands of the southern nationalists.

It was during this decade that southerners also began to seriously create their own institutions that would support a southern nation. Georgia's Chief Justice Joseph Henry Lumpkin teamed up with his son-in-law, Thomas R.R. Cobb, to create the Lumpkin Law School, to teach men from the slave states how to practice a "southern" version of law. At the end of the decade Cobb published his treatise on the law of slavery—the first ever written by a southerner.[58] Southern defenses of slavery proliferated on the heels of the Compromise, while in the 1850s southern leaders pushed for an expansion of education throughout the region, reflecting James De Bow's assertions that Southerners should "cherish and *give preference to our own institutions of learning and native instructors*."[59] De Bow argued that "life, habits, thoughts, and aims, are so essentially different" in the South "that here a different character of books, tuition, and training is absolutely required, to bring up the boy to manhood with his faculties fully developed."[60] These of course would be "faculties" that reflected southern values and ideology. As an 1856 convention in Savannah noted, sending southern children north for an education was "fraught with peril to our sacred interests."[61]

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57. POTTER, *supra* note 56, at 126; *see also* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 608 (1999).

58. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (Univ. of Ga. Press 1999) (1858); *see also* Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75 (1999).

59. JOHN HOPE FRANKLIN, THE MILITANT SOUTH 1800–1861, at 136–137 (Univ. of Ill. Press 2002) (1956) (quoting 20 DE BOW'S REVIEW AND INDUSTRIAL RESOURCES, STATISTICS, ETC. 67 (James D.B. De Bow ed., New Orleans & Wash. City 1856)) (internal quotation marks omitted).

60. *Id.* (quoting 13 DE BOW'S REVIEW OF THE SOUTHERN AND WESTERN STATES AND INDUSTRIAL RESOURCES, STATISTICS, ETC. 67 (James D.B. De Bow ed., New Orleans 1852)).

61. *Id.* at 137 (quoting 16 DE BOW'S REVIEW AND INDUSTRIAL RESOURCES, STATISTICS, ETC.

After the Compromise was passed, "military education" in the South "took on a more serious aspect" as traditional schools, like La Grange College, were turned into military schools and Virginia put more resources into the Virginia Military Institute.[62] During the 1850s private military companies proliferated in the South, with state governors urging greater attention to military training. By the mid-1850s, "anxieties of some citizens of the upper South regarding their militia bordered on hysteria."[63] But the deep South was equally concerned. For example, in 1858 Alabama incorporated seven new militia companies while others formed without the benefit of any statutory authority. The growth of militia companies all over the South followed the Compromise.[64] Thus, just as the South used the Compromise to buy time to build up its railroad infrastructure, the slave owners also expanded their intellectual infrastructure and increased their military preparedness.

Fresh from their victory in claiming the entire Mexican Cession for slavery, except California, the southern nationalists hungered for more. This led to the Kansas-Nebraska Act in 1854[65] and the *Dred Scott* decision in 1857.[66] These events finally led to the creation and success of the Republican Party, the first political force in the nation's history able and willing to stand up to the endless demands of the slaveocracy. The fear of Republicans galvanized secessionists, as southern demagogues used northern politics to claim that the Republicans were about to make war on the South. Meanwhile, the Fugitive Slave Act of 1850[67] outraged the North because it was so antithetical to American values of justice, fairness, and due process. Northern opposition to the law infuriated southerners and played directly into the hands of the southern hotheads. Nothing, it seemed, would appease the South or stop its seemingly endless demands for more land and ever greater protection for slavery. Each southern victory encouraged secessionists to demand more, fostering northern opposition. After 1850, every act of northern resistance to the compromise measures and the subsequent proslavery laws and decisions also played into the hands of the secessionists, giving them rhetorical ammunition for their cause. Absent the Compromise of 1850, none of this might have happened.

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639 (James D.B. De Bow ed., New Orleans & Wash. City 1854)).

62. ARTHUR C. COLE, THE IRREPRESSIBLE CONFLICT: 1850–1865, at 289 (1934).

63. FRANKLIN, *supra* note 59, at 188.

64. *See id.*

65. Kansas–Nebraska Act, ch. 59, 10 Stat. 277 (1854).

66. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

67. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).

II. THE CRISIS

The crisis the nation faced in 1850 had a number of components, but was not terribly complicated. During the Mexican War, northern members of Congress tried to ban slavery in any territory acquired from the conflict. The first attempt to do this was an amendment to an appropriations bill known as the Wilmot Proviso, after its author, Congressman David Wilmot of Pennsylvania. The proviso passed the House but failed in the Senate, where the South had a majority until late 1848 and afterwards could always find a few northern Democrats to vote against the proviso. After the war the United States acquired a huge land mass, comprising all of present-day California, Utah, and Nevada, most of Arizona and New Mexico, and parts of Colorado, Wyoming, and Texas. In addition—this is ignored by most historians of the War—the peace treaty also settled the border of Texas by ceding huge amounts of what is now west Texas and south Texas to the United States.[68] At the time of Texas's independence (1836), the southern and western boundary of the Mexican state of Tejas was the Nueces River. Thus, because of the war, Texas gained all the land to the Rio Grande as well as large portions of what was then eastern New Mexico.[69] Immediately after the Mexican War, the entire nation recognized that the land south of the Nueces River to the Rio Grande—what is today south Texas—belonged to Texas. But the land west of the Nueces River—some 50,000 square miles—was clearly not part of Texas. As the leading history of Texas notes, "the Nueces was traditionally viewed as the western boundary of Texas."[70] When Texas entered the Union, neither it nor the two parties to the peace treaty had actually defined the western boundary of the state, and the resolution of annexation merely said "all questions of boundary that may arise with other governments" would be "subject to the adjustment by this government."[71] This covered the contingency of diplomacy with Mexico to settle where the western boundary of the United States ended and Mexico began. But this provision did not anticipate the acquisition of *all* of the territory from the Nueces River to the Pacific Ocean.

Thus, with the exception of the Rio Grande valley in south Texas, the question for Congress—and the nation—was how to organize these territories. About half of the land was north of the Missouri Compromise line, which was set as the 36° 30' parallel north (the southern boundry of Missouri). One option was to simply extend the Missouri Compromise line across the rest of the nation, opening up present-day New Mexico, Arizona,

68. *See* Treaty of Guadalupe Hidalgo, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922.

69. *See id.* Most maps of the "Mexican Cession" exclude eastern New Mexico, west Texas, and south Texas, but all of this land was also ceded to the United States as a result of the treaty.

70. RUPERT N. RICHARDSON, ADRIAN ANDERSON, CARY D. WINTZ & ERNEST WALLACE, TEXAS: THE LONE STAR STATE 128 (10th ed. 2009).

71. *Id.* at 129.

and southern California to slavery and leaving northern California, Utah, Nevada, and Colorado free. Most northerners rejected this because they did not want any new slave states; most southerners opposed this solution because they wanted to spread slavery to all the new federal territories. While this issue festered, the California gold rush brought about 100,000 settlers there, making California eligible for immediate statehood. With fewer than a thousand blacks in California—most of whom were not slaves—the settlers there demanded immediate admission to the Union as a free state. Further complicating the organization of the new territories were the increasing demands from Texas that most of New Mexico be ceded to that state. There was no historical or legal basis for this, nor had Texans actually settled the area.

The territorial issue virtually paralyzed Congress in the last three years of the 1840s. As settlers poured into California, Congress was incapable of passing legislation to provide a working government for the territory. Iowa (1846) and Wisconsin (1848) entered the Union, but Congress could not pass laws to organize the new territories, even though by 1849 both California and New Mexico had enough settlers to justify statehood. Meanwhile, as the territorial question festered, other issues, mostly connected to slavery, further bedeviled Congress.

Beyond the territorial question were three other issues, one of which would become a central focus of political debate in the 1850s. The easiest of the three involved the debt of Texas. From 1836 to 1845 Texas had been an independent republic. When it entered the Union in 1845, Texas was deeply in debt. Texans argued, with some justice, that the national government should bail out the state. One piece of the Compromise of 1850 would settle this matter in favor of Texas.[72] Less easy to settle were two issues related to slavery. Northerners wanted to end the public sale of slaves in the District of Columbia.[73] This would not harm slave owners or the system of slavery, but merely end the embarrassment of having slaves marched through the national capital in chains or publicly auctioned off in the shadow of the White House and Congress. Northerners were deeply offended by this (as were some diplomats) but everyone understood that the ban was merely symbolic, since slave owners in the District could easily take their slaves to Virginia for sale, or sell them privately. Southerners almost universally opposed ending the trade, not because it would affect the system of

72. *See* Act of Sept. 9, 1850, ch. 49, 9 Stat. 446 (1850) (providing ten million dollars to Texas).

73. Some northerners were pushing for the abolition of slavery in the national capital. This was constitutionally permissible, since Congress had plenary authority over the district, but it would have been impossible to achieve and most northern members of Congress knew this.

slavery—because it clearly would not—but as a matter of proslavery principles. Ending the D.C. slave trade would be an admission that buying and selling slaves was morally wrong—which southerners would not admit, and most did not believe.

While northerners wanted to end the slave trade in the District, southerners had a more practical demand, although one that was deeply symbolic as well. They wanted a new fugitive slave law that would require the federal government to become involved in the process of capturing runaway slaves and returning them to the South. The practical value of this was obvious, since there were perhaps ten thousand or more fugitive slaves in the North (and more escaping every year) worth millions of dollars. Southerners wanted this property returned to them. Since northern states refused to cooperate in hunting runaway slaves, southerners wanted the national government to do the job. In the face of growing northern non-cooperation on the return of fugitive slaves, southerners also wanted Congress to emphatically reaffirm their right to recover their runaways. Equally important, they insisted that the federal government enforce this right.

With these issues festering, General Zachary Taylor, who had spent almost his entire adult life in the military, was elected president. In March 1849 he took office. The following December the new Congress met, hoping to finally settle the issues of the moment. One of the newest members of Congress, and thus one with no seniority, was in fact the most senior politician in the nation, Senator Henry Clay of Kentucky. Clay was first elected to the Senate in 1806, when he was a few months shy of the constitutionally required age of 30 to sit in that body. Since then Clay had been in the House or Senate for most of his life. He was in the Senate in 1806–1807, 1810–1811, and continuously from 1831 to 1842. He also served in the House of Representatives from 1811 to 1821 and 1823–1825. Six times he was elected Speaker of the House of Representatives. While Speaker in 1819–1820, he guided the Missouri Compromise through Congress. This was his greatest accomplishment. The Missouri Compromise had allowed for sectional peace over slavery in the territories for three decades. Had there been no war with Mexico, the Missouri Compromise might have continued to hold up, and the whole conflict over slavery in the territories could have been avoided. After his successful negotiation of the Missouri Compromise, Clay ran for president in 1824 but lost. He then served as Secretary of State under John Quincy Adams. He ran unsuccessfully for president in 1832 and again in 1844. In 1848, he expected to run one more time, but lost the Whig nomination to the hero of the Mexican War, Zachary Taylor, who then won the election. With this career of fame, success, and ultimate disappointment, Clay returned to the Senate in 1849.

III. CLAY'S RETURN TO THE SENATE

The seventy-two-year-old junior senator from Kentucky returned to the Senate after an absence of seven years. Clay was still deeply bitter about the presidency. He had come so close in 1844. He lost New York by about 5,000 votes. Had Clay carried New York, he would have been president. Clay and other Whigs (including the new Vice President, Millard Fillmore, who lost the New York Governorship that year) blamed the loss on the abolitionists, 15,000 of whom voted for the Liberty Party. It was of course unrealistic and even foolish to believe that committed opponents of bondage would have voted for Clay. Moderate opponents of slavery may have seen him as the lesser of two evils when compared to Polk, but, for abolitionists there was no meaningful difference between the slaveholding Clay, who waffled on Texas annexation, and the slaveholding Polk who more directly supported Texas annexation. In 1848, Clay felt he deserved the Whig nomination, after his years of service to the party and his incredibly narrow loss in the previous election. The year seemed to belong to the Whigs, and Clay wanted to lead the Party to victory and finally get to live in the White House. Instead, the Party shunted him aside for a general who had never held elective office and in fact had never even voted in an election. Taylor's victory only increased Clay's disappointment, since in his mind it should have been *his* victory.

In 1849 Clay claimed to be uninterested in going back to the Senate, but also agreed to serve if elected by the Kentucky legislature.[74] This was a common pose of nineteenth-century politicians, coyly denying interest in the offices they hungered for. In this pose Clay was ready to make the great "sacrifice" of serving the people, if they chose him for office. Given the politics of Kentucky at the time, Clay's response effectively guaranteed his election. If Clay had really not wanted to serve again, he certainly was a skillful enough politician to avoid getting elected to a position he did not want.

Clay also claimed he would only return to the Senate "[i]f I could be persuaded that I could materially contribute to the proper adjustment of the momentous question which has grown out of the acquisition of New Mexico and California."[75] In other words, he was ready to ride back to Washington on a white horse to save America, as he had done in 1820. Bruised by three presidential losses and a final failure even to be nominated, Clay's ego was

74. REMINI, *supra* note 19, at 37–38. At this time Senators were elected by state legislatures. This changed with the adoption of the Seventeenth Amendment in 1913.

75. *Id.* at 38.

still strong. He was ready to be America's savior. He was also ready to save the Whig Party from the impending catastrophe, as he saw it, of the Taylor presidency. Taylor was no politician and while a lifelong Whig (and a lifelong supporter and admirer of Clay), Taylor talked about being a president above party. Clay was *never* above party, and wanted to redeem the Party and the nation by returning to the Senate. While he was old, and not in great health, he doubtless still dreamed of one more run for the White House. Thus, he happily accepted his election to the Senate, even as he modestly claimed he was uninterested in the job.

Once in the Senate, Clay decided that he, and not President Taylor, should be the leader of the Whig Party. To accomplish this, he would propose a new compromise, replaying his heroic role of 1820. Clay would create the compromise, guide it through Congress, and save the nation. It would make him a hero once again, and maybe, finally, president. To do this, he had to oppose a president of his own party.

Taylor did not want a dramatic sweeping bill to solve all the problems of the nation with a stroke of the pen. The methodical, careful general, wanted to fight one political battle at a time. He insisted that California, with nearly 100,000 residents, enter the Union immediately. Then he would turn to the other issues. He did not believe slavery could be profitable in New Mexico, and thus he was not willing to expend a great deal of energy, or political capital, on the issue. Indeed, he wanted to bring New Mexico into the Union as a free state after California was admitted. There were no slaves in New Mexico because under Mexican law slavery had been illegal. The residents of New Mexico did not want slavery, but were demanding statehood. New Mexico's population was greater than the free population of Florida, the most recent slave state to enter the Union. Thus, Taylor hoped to bring New Mexico in right after California. This would settle the Texas boundary issue and also avoid a debate over the Wilmot Proviso. With California and New Mexico admitted it would be easier to organize the rest of the Mexican Cession without any reference to slavery because Taylor believed there would be no support for slavery in the Utah Territory. Then he could turn to the Texas debt, fugitive slaves, and if necessary the slave trade in the District of Columbia. His non-dramatic, piecemeal approach might have worked. But that left no role for Clay—no chance for the Kentucky senator to become the hero of the nation and maybe, finally, the president. Thus, Clay plotted his own solution.

IV. CLAY'S COMPROMISE

On what was literally a dark and stormy night in late January 1850, Henry Clay surreptitiously visited Daniel Webster to discuss the compromise. In 1830, Webster had famously debated Senator Robert Hayne of South Carolina, powerfully asserting that no state could nullify or defy

federal law. His closing statement—"Liberty and Union, Now and Forever, One and Inseparable"[76]—made him a patriotic icon, but also a hero in the North for his willingness to tie liberty to union. The two giants of the Whig Party secretly agreed to cooperate on a plan to save the Union. The plan was designed to outflank southern nationalists, like John C. Calhoun, who were trying to create a "southern" party that would compel slave state Whigs to align with them, and force a fundamental restructuring of American politics. The plan would also outflank and marginalize President Taylor, forcing the Whig President to accept the leadership of Clay and Webster, rather than having them follow Taylor's lead.

On January 29, 1850, Clay presented his eight resolutions to the Senate.[77] His goal was to have a single bill that would attract votes from both sections. He did not present the details of the laws, but only sketched out their direction. In his book on the coming of the War, David Potter argued that "Clay's proposals gave most of the material concessions to the North . . . ."[78] This statement utterly ignored the fugitive law that Clay proposed and ultimately passed. But, Potter's analysis is both wrong and misleading on the way the territorial solution would affect both North and South. Potter argued that California would enter the Union as a free state—thus giving something to the North—but that the South gained nothing from the rest of the Mexican Cession because it was "unsuited to slavery."[79] This traditional analysis is simply wrong. Clay's compromise, as well as the final legislation that passed that fall, was overwhelmingly favorable to the South, while giving the North almost nothing of value, except the admission of California as a free state, which was a foregone conclusion given the existing demographics of the state.

At the outset, it is important to understand that the land acquired from Mexico was in fact quite suitable to slavery. In 1850, southern slaves were used in the mining and metal industries[80] and could easily have been adapted to mining in what later became the states of Colorado, Nevada, Utah,

76. FINKELMAN, *supra* note 56, at 74 (quoting Daniel Webster's second "Reply to Hayne" delivered January 26-27, 1830); *see also* DARTMOUTH COLLEGE, *Daniel Webster Exhibit*, http://www.dartmouth.edu/~dwebster/speeches/hayne-speech.html (last visited March 30, 2011) (providing a full text of the speech).

77. CONG. GLOBE, 31ST CONG., 1ST SESS. 244–52 (1850) [hereinafter CONG. GLOBE].

78. POTTER, *supra* note 56, at 99–100.

79. *Id.* at 100–101.

80. *See generally* CHARLES B. DEW, BOND OF IRON: MASTER AND SLAVE AT BUFFALO FORGE (1994); RONALD L. LEWIS, COAL, IRON, AND SLAVES: INDUSTRIAL SLAVERY IN MARYLAND AND VIRGINIA, 1715-1865 (1979); ROBERT S. STAROBIN, INDUSTRIAL SLAVERY IN THE OLD SOUTH (1970).

Arizona, and New Mexico.[81] This was consistent with traditional uses of slave labor in antiquity and in Spanish America. In the colonial period, slaves were used as herdsmen and could have been used in the same way in the Southwest. Ultimately, of course, irrigation would open the Southwest to mass crop production, including cotton. Southerners fought to open the Mexican Cession to slavery because, contrary to the claims of numerous historians in the mid-twentieth century,[82] they emphatically did not believe that the area was "unsuited to slavery." They knew there were no "natural limits" to slavery, only limits on the production of particular agricultural produce. With this understanding, a careful examination of Clay's proposals is in order.

Five of Clay's eight provisions directly benefitted the South. He offered the South a new fugitive slave law. This would be the most divisive aspect of the Compromise, and one which made the entire series of laws seem to be a complete capitulation to the demands of slavery. The proposals also called for the organization of all the new territories "without the adoption of any restriction or condition on the subject of slavery," federal assumption of the debt that the Republic of Texas had when it entered the Union, an ironclad proclamation that Congress could never end slavery in the District of Columbia without the support of the people of the District and state of Maryland, and finally, another resolution affirming that Congress would never interfere with the interstate slave trade.[83] Clay believed that two of the resolutions favored the North: California statehood and the prohibition of the public sale of slaves in the District of Columbia.[84] The eighth resolution would settle the Texas boundary dispute somewhat, but not wholly, in favor of New Mexico.[85] Clay believed this was also a resolution that favored the North. But, in fact, it was of no value to the North, or to freedom, when coupled with the provision that organized the new territories without any restriction on slavery. Under the Clay proposals, the boundary settlement merely shifted land from one slave state (Texas) to a slave territory (New Mexico).

The obvious gain for the North was the admission of California as a free state. However, with nearly 100,000 people in the territory, almost no slaves, and a population expanding at a record pace, it was impossible to imagine any other outcome. Southerners eyed California, where slaves

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81. The use of Chinese "coolie" labor to build western railroads illustrates yet another example of how slaves could have been profitably used in the Rocky Mountain West.

82. *See* POTTER, *supra* note 56, at 100; *see also* Charles W. Ramsell, *The Natural Limits of Slavery Expansion*, 16 MISS. VALLEY HIS. REV. 151, 160 (1929) ("It was well understood by sensible men, North and South, in 1850 that soil, climate, and native labor would form a perpetual bar to slavery in the vast territory then called New Mexico.").

83. CONG. GLOBE, *supra* note 77, at 244–52.

84. *See id.* at 245–46.

85. *See id.*

could be used in mines and in the region's fertile valleys. In its first decade of statehood there would be a number of attempts to bring some form of slavery into California.[86] But, in 1850 only about one percent of the population was black and many were free. Whatever southerners might have wanted, California clearly would not be a slave state. Thus, the compromise "gave" to the North what it already had: the free state of California.

Historians traditionally see California statehood as a huge victory for the North because it gave the free states a permanent majority in the Senate. But this is the wisdom of hindsight. With all of present-day Arizona, New Mexico, Utah, and Nevada open to slavery, there was still room for many new slave states. The Kansas-Nebraska Act of 1854[87] would of course create even more territory that could become slave states.

The fallacy of California statehood and a permanent free-state majority in the Senate is also based on a misunderstanding of the process of creating new states as it had been practiced since 1791. At a number of times before 1850, both the North and the South had had a majority in the Senate. Most historians write about the "pairing" of free and slave territories in admitting new states. This in fact rarely happened. After the ratification of the Constitution by the first thirteen states, there were five "free" states where slavery was either already abolished (Massachusetts and New Hampshire) or in the process of being gradually abolished (Pennsylvania, Rhode Island, and Connecticut), two northern slave states (New York and New Jersey), and six southern slave states (Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia).

This created a Union of seven northern states and six southern states. But it also created a Union of five free states and nine slave states. In 1791, Vermont entered the Union as a free state, but by 1796, Kentucky and Tennessee had joined the Union, creating eight northern and eight southern states, but ten slave states and six free states. In 1799, New York passed a gradual abolition statute, which meant that now there were seven free states and nine slave states. Ohio statehood, in 1803, gave the north a majority of the states—nine to eight—but there was still a majority of slave states until 1804 when New Jersey finally joined the rest of the North with its own gradual emancipation statutes.[88] New Jersey was the last state to end slavery

86. For a discussion of attempts to bring slaves into California, see Paul Finkelman, *The Law of Slavery and Freedom in California 1848–1860*, 17 CAL. W. L. REV. 437 (1981).

87. Act of May 30, 1854, ch. 59, 10 Stat. 277 (1854) (organizing the territories of Nebraska and Kansas).

88. For a history of the abolition of slavery in the North, see ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967) and PAUL FINKELMAN, AN

before the Civil War. From 1804 until 1812 (when Louisiana entered the Union), there was a free state majority. After that, slave and free states entered the Union at different times with apparent pairing, but in each instance there was a short period when the free states had a majority: Indiana (1816) and Mississippi (1817), Illinois (1818) and Alabama (1819), Maine (1820) and Missouri (1821). In 1836, Arkansas entered the Union, giving the South a majority, but then parity was regained with Michigan statehood in 1837.

In the 1840s, this apparent pairing stopped. Florida and Texas both entered in 1845, giving the South a two-state majority, which fell to one state in December 1846 with the admission of Iowa. Parity was not regained until May 1848 when Wisconsin entered the Union. Thus, when the Mexican War began, the South had a two-state majority, and during the crucial debates over the Wilmot Proviso, the South had a one-state majority. It is also important to understand that until 1850, no territory allowing slavery had ever entered the Union as a free state. The lesson of the previous sixty-three years—since the adoption of the Northwest Ordinance in 1787—was that once slavery was legalized in a territory, only slave states would grow there.

Thus, when California entered the Union in 1850, there was no reason to believe that this would create a permanent free-state majority. This was especially true since Clay's resolutions allowed slavery in the New Mexico and Utah territories with nearly 400,000 square miles to be divided into slave states.

Clay also proposed to ban "the slave trade, in slaves brought into" the nation's capital, "from [s]tates or places beyond the limits of the District, either to be sold therein as merchandise or to be transported to other markets without the District of Columbia."[89] This law only removed a visible irritant that tended to fan antislavery sentiment, but it would have absolutely no effect on slavery itself. Masters could still buy and sell slaves privately "by one neighbor to another,"[90] and they could still ship them out of the District for sale further south. Alexandria, Virginia, which was just across the river from the District, had a slave market that remained open to residents of the District.[91] Thus, this piece of the compromise did not harm slavery or undermine its viability in the District. Indeed, a shrewd defender of slavery might have concluded that the proposal would actually reduce the growth of antislavery sentiment by removing an aggravating practice that was always

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IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 1-45 (1981).

89. CONG. GLOBE, *supra* note 77, at 245–46

90. WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854, at 495 (1990) (quoting Henry Clay).

91. A. Glenn Crothers, *The 1846 Retrocession of Alexandria: Protecting Slavery and the Slave Trade in the District of Columbia, in* IN THE SHADOW OF FREEDOM: THE POLITICS OF SLAVERY IN THE NATIONAL CAPITAL 141–68 (Paul Finkelman & Donald R. Kennon, eds., 2011).

in the face of antislavery members of Congress without actually harming slavery in the District or anywhere else. This analysis was especially powerful when coupled with Clay's resolution that Congress would *never* end slavery in the District without the consent of its residents and of Maryland.

Clay believed that his proposal for the settlement of the New Mexico boundary was also a boon to the North because it defeated the most aggressive aspects of Texas's seemingly insatiable appetite for land. But in fact his proposal (and the final settlement passed by Congress) was of no value to the North. The proposal offered Texas less land than it wanted, which would prevent the further growth of slavery in Texas sometime in the future. But the land that did not go to Texas would simply remain part of the New Mexico territory, where, under Clay's proposal, slavery would be allowed. If the Wilmot Proviso had been adopted, then slavery would have been banned in the new territories, which would have made the debate over the New Mexico boundary deeply important. Under the Wilmot Proviso every acre not given to Texas would remain free soil. Yet under Clay's proposals—and the final compromise—all land not given to Texas went to the slave territory of New Mexico.

Thus, for opponents of slavery, Clay's proposal on the Texas-New Mexico boundary was simply a sleight of hand because it did not include any ban on slavery in the new territories. He offered to only add a little land to Texas, which would presumably please the North. He then opened all of New Mexico to slavery. Implicitly, this meant that slavery would be allowed in the new territories, and southerners surely expected that these places would become slave states. This of course contrasted dramatically with President Taylor's goal of immediately admitting New Mexico as a free state.

Had the Civil War and the actual compromise not intervened, Clay's proposed settlement of the Texas-New Mexico land issue might actually have helped slavery. Texas wanted about half of present-day New Mexico. If this had occurred, then the remaining territory would probably have come into the Union as one single slave state. However, by guaranteeing that the New Mexico Territory would be very large—consisting of most of present-day Arizona and New Mexico and possibly some of present-day west Texas—Clay's proposed settlement of the border dispute was actually more beneficial to the slave states than if Texas had gained all the land it wanted. With approximately 200,000 square miles, this territory was about four times the size of the most recent state (Wisconsin) to enter the Union and thus might have provided three or more slave states. The remaining compromise measures wholly benefitted the South.

The historian David Potter has argued that the territorial settlement "contributed nothing to the strength of the 'slave power'" because the land was "already covered by the Missouri Compromise."[92] This analysis is simply wrong—both as a matter of history and more significantly, as a matter of geography. Clay's compromise did more than just take the Wilmot Proviso off the table, which in itself was a major victory for the South. It also substantially undercut the Missouri Compromise. Much of the Mexican Cession—the present day states of Nevada, Utah, as well as most of Colorado and a bit of Wyoming—lay north of the Missouri Compromise line. Thus, contrary to Potter's utterly incorrect assertions, Clay's compromise actually rejected the Missouri Compromise line by opening to slavery over 180,000 square miles of new territory north of the Missouri Compromise line. This vast space, which became the Utah territory, was more than four times the size of North Carolina and six times the size of South Carolina—large enough to accommodate many new slave states and reaching well north of the Missouri Compromise line. A true "compromise" might have followed the 1820 line, giving some of the new territory to the North and some to the South. Instead, with the exception of California—which was out of his control—Clay, and ultimately Congress, gave all the new territories to the South. Moreover, by opening all the new territories to slavery and thus refusing to apply the Missouri Compromise line to the new territory, Clay completely undermined any value to the free states provided by settling the Texas-New Mexico boundary in favor of New Mexico.

Just as they have misread the territorial settlement, many historians have misunderstood the importance of Clay's two resolutions on slavery in the District of Columbia and on the interstate slave trade. Again, Potter claimed that these were not "tangible advantages" for the South.[93] In reality, however, their passage would have been major victories for supporters of slavery, especially when seen in light of all of Clay's resolutions. Except for a few outlier abolitionists, most opponents of slavery agreed that Congress had no power to regulate slavery in the states where it existed. Political opponents of slavery, from moderates like Abraham Lincoln to radicals like Salmon P. Chase, agreed that there were essentially five areas where Congress could regulate slavery: the African Slave Trade, the territories, interstate commerce, the District of Columbia, and the return of fugitive slaves. Congress had banned the African slave trade in 1808,[94] and it was not an issue in 1850.[95] Congress had always regulated slavery in the

92. POTTER, *supra* note 56, at 100.

93. *Id.*

94. See Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 433–70 (2009).

95. *See id.* at 432. Opponents of slavery complained that Congress never adequately funded the Africa Squadron, which was charged with suppressing the illegal trade. Meanwhile, in the aftermath

territories, and since the adoption of the Northwest Ordinance in 1787, Congress had banned slavery in some territories. One measure of the lack of real compromise in the Compromise was the refusal of Congress to ban slavery in any of the new territories. The Constitution gave Congress specific and plenary power to "exercise exclusive Legislation in all Cases"[96] involving the District of Columbia. It was under this power that Congress would ban the public sale of slaves in the District, which was one of Clay's resolutions. However, under Clay's other resolution on the District, Congress would have voluntarily ceded its powers over the District to the people who lived there and to the state of Maryland. Never before (or since) had Congress promised not to exercise one of its constitutionally enumerated powers without first getting the approval of a single state. The Constitution also gave Congress complete power to regulate commerce "among the several States,"[97] which of course included the interstate slave trade. Congress had never exercised its power to regulate the interstate sale or movement of slaves. The failure to exercise this power did not abrogate the power. Yet, under Clay's resolution, Congress would promise never to exercise the power that it had. This would have been an unprecedented abdication of Congressional power. Congress always has the option to refuse to exercise a constitutional power. In fact, the failure to regulate the domestic slave trade was an example of this. It was one thing for Congress to choose not to exercise a power because Congress felt legislation was unwise or unnecessary. It was quite another to do what Clay proposed, which was for Congress to promise *never* to exercise its power.

Clay's proposals were also a direct assault on political antislavery and antislavery constitutionalism. Clay's "compromise" was essentially an invitation to political opponents of slavery to give up and disband. If Congress had adopted Clay's resolutions on the interstate slave trade and slavery in the District of Columbia, the legislature would have been on record as saying that any political opposition to slavery was illegitimate. Moreover, the resolutions would have signaled to the nation that the Garrisonian abolitionists were right: the government was in the hands of the slave power.

Congressional regulation of the return of fugitive slaves was more

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of the Compromise of 1850, southern nationalists began to argue for a reopening of the African trade. *Id.* at 464, 466.

96. U.S. CONST, art. I, § 8, cl. 17. The whole passage reads, "Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the government of the United States." *Id.*

97. U.S. CONST., art. I, § 8, cl. 3.

contested than the other areas where Congress had power to legislate on slavery. The Fugitive Slave Clause[98] provides no specific grant of power to Congress. Significantly, the clause is located in Article IV of the Constitution, which regulates interstate relations. Equally important, from a structural perspective, Sections 1, 3, and 4 of that Article specifically mention a role for Congress, but Section 2, dealing with privileges and immunities, fugitives from justice, and fugitive slaves, makes no mention of Congress.[99] In the nineteenth century, many constitutional scholars and jurists had argued that Congress did not in fact have a role to play here, because the language and structure of Article IV, Section 2.[100]

Nevertheless, in 1793 Congress passed a barebones statute regulating the return of both fugitives from justice and fugitive slaves.[101] The law generated little opposition at the time of its passage, but opponents of slavery later argued Congress lacked the power to pass it and that it unconstitutionally denied alleged slaves the right to a jury trial. However, in an overwhelmingly proslavery decision, the Supreme Court settled this issue in favor of Congressional power and the South in *Prigg v. Pennsylvania*.[102] Justice Joseph Story's opinion declared that Congress had full authority, and full responsibility, to ensure the return of fugitive slaves. If Congress had plenary power to regulate the return of fugitive slaves, then it could do so in a variety of ways. Clay's resolution did not spell out any details, but the eventual law—the Fugitive Slave Law of 1850—would be an enormous legislative victory for the slave power. It would create the first national system of law enforcement and deny alleged fugitives—including free blacks wrongly claimed as fugitive slaves—fundamental due process rights.

V. DEBATING CLAY'S BILL

From February 4 to July 4, 1850, the Senate debated Clay's measures. The debates were some of the most eloquent and memorable in American history. On February 4, Clay with charm and wit set out his plan to resolve the crisis. He was later supported by Sam Houston of Texas and predictably opposed by Jefferson Davis of Mississippi. Speaking for President Taylor,

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98. Article IV, Section 3 of the Constitution provides:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST art. IV, § 3, cl. 3.

99. *See* U.S. CONST. art IV, § 1–4.

100. *See supra* note 59 and accompanying text.

101. For a history of the passage of that law, see FINKELMAN, *supra* note 1, at 81–104.

102. 41 U.S.(16 Pet.) 539 (1842). *See generally* Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 247 (1994).

Senator Jacob Miller of New Jersey insisted that California be admitted to the Union immediately and then the other issues could be settled. The only other pressing issue was the absurd demand emanating from Austin that half of New Mexico—all the way to Santa Fe—belonged to Texas. Taylor lost little sleep over the saber rattling of the government in Austin. The former general was prepared to personally lead the army in New Mexico to stop an invasion of federal territory, just as President Andrew Jackson had been prepared to march to South Carolina to suppress nullification. Thus, Taylor wanted California statehood, followed by New Mexico statehood. This would have settled most of the territorial issues. Then, in a more relaxed atmosphere, Congress could craft a new fugitive slave law, organize the Utah Territory, settle the Texas debt question, and, if necessary, consider the slave trade in the national capital. Taylor's program might have worked, but Clay was not about to defer to a president of his own party and therefore lose his chance at glory and perhaps the White House.

On March 4, John C. Calhoun came to the Senate to oppose Clay's compromise, Taylor's solution, and just about any other legislative solution that could have ended the crisis. By this time Calhoun was fading fast—he would be dead by the end of the month—and Senator James Mason of Virginia read Calhoun's speech for him. Calhoun's speech is memorable, but often misunderstood. Historians looking for glory and heroism, who talk about the "great triumvirate" of Webster, Clay, and Calhoun, fail to see that in the end, Calhoun did not want a solution to the crisis. He wanted an excuse to dissolve the Union, and his whole speech was a threat to do just that if he could not have *everything* that he wanted—including things Congress lacked the constitutional power to grant. His speech in effect acknowledged that slavery and freedom were incompatible within the same Union. His solution was to demand that the supporters of human liberty be silenced and democratic notions of majority rule be undone. Calhoun's speech reflected a lifetime of pent-up anger and frustration, for like Webster and Clay, Calhoun too had dreamed of being president. He also dreamed of shaping the country entirely his way.

Much of his speech was based on a history of America that simply did not reflect reality. He complained that the "northern section" had "a predominance in every part of the Government."[103] This claim ignored the fact that nine of the nation's twelve presidents had been southern-born slaveholders, including the current incumbent, Zachary Taylor.[104] All of the

103. CONG. GLOBE, *supra* note 77, at 451.

104. William Henry Harrison, while elected from Ohio, was from a distinguished Virginia planter family, and he owned slaves most of his life. As territorial governor of Ohio, he had attempted to

northerners were one-term presidents,[105] while five of the southerners served two terms. Slaveholders had held the presidency for fifty years while non-slaveholders had held it for a mere twelve years. Since Jefferson took office in 1801, *every* president except John Quincy Adams had been a slaveholder except the doughface northern Democrat Martin Van Buren who was totally subservient to the South.[106] Similarly, since the Jeffersonian "revolution" of 1801, there had been twenty-five Congresses, and southerners had been Speaker of the House of Representative in all but five of them. None of the four northerners who had been Speaker of the House had shown any hostility to the South or slavery. Similarly, except for a brief period in the 1820s and early 1830s, the Supreme Court always had a southern majority. Equally important, the Democratic Party had dominated American politics since 1800, and southerners had always dominated that party. Thus, many northern Democrats—such as Supreme Court Justices Samuel Nelson and Robert Grier as well as President Martin Van Buren—had consistently supported southern interests. The military had similarly been dominated by slaveholding generals such as Andrew Jackson, Winfield Scott, and Zachary Taylor. Extreme proslavery men, like Calhoun and Abel Upshur of Virginia, had served in presidential cabinets, though no strong antislavery man had ever served in a cabinet.

Calhoun argued that the "cords which bind these States together in one common Union" could not be broken "by a single blow," but he claimed that "the slavery question has snapped some of the most important" cords and "greatly weakened all the others."[107] He noted that the churches had divided over slavery, and this signaled an end to the Union.[108] Even so, surely Calhoun did not think Congress could bring the Methodists, Baptists, or Presbyterians back together. This was not evidence of the failure of the political system. Ultimately, Calhoun was not interested in making distinctions between politics and non-political opposition to slavery. Thus, Calhoun argued the "abolition party" in the North was destroying the Union—even though, except for the miniscule Liberty Party, there was in fact no such "party." But for Calhoun, the "abolition party" consisted of everyone in the North, because Calhoun asserted that "[e]very portion of the North entertains views and feelings more or less hostile to" slavery.[109]

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persuade Congress to modify the Northwest Ordinance to allow slavery there. FINKELMAN, *supra* note 1, at 58–70.

105. The three northern-born presidents were John Adams (1797–1801), John Quincy Adams (1825–1829), and Martin Van Buren (1837–1841).

106. After his presidency Van Buren changed, and openly opposed the extension of slavery. In 1848 he ran for president as the candidate of the Free Soil Party, the first significant party opposed to slavery in any meaningful way. While Van Buren did not win, other Free Soil candidates did win seats in state legislatures and in Congress.

107. CONG. GLOBE, *supra* note 77, at 453.

108. *Id.*

109. *Id.* at 452.

For Calhoun, the key to restoring harmony in the Union was entirely in the hands of the North. He wanted Congress to adopt "such measures as will satisfy the States belonging to the southern section that can remain in the Union consistently with their honor and their safety."[110] Yet neither Clay's nor President Taylor's proposals would satisfy this, even though both men were southern slaveholders and planters. Calhoun demanded southern access to all the territories and a guarantee that fugitive slaves would be returned—which was exactly what Clay was offering. But Calhoun wanted more. He insisted that northerners "cease the agitation of the slave question" and that there be a constitutional amendment guaranteeing the South "the power . . . of protecting herself."[111] Here then, was the key to Calhoun's solution to the problem: northerners had to recognize the legitimacy and justice of slavery and cease to oppose or denounce it. This was not something Congress could *ever* accomplish, short of a constitutional amendment prohibiting antislavery speech. Thus, while Calhoun pretended to want to preserve the Union, he articulated utterly impossible conditions for that result.

David Potter's description of Calhoun as the "the most majestic champion of error since Milton's Satan in *Paradise Lost*"[112] is far more accurate than Remini's claim that he was "passionately devoted to the Union."[113] Both, however, exaggerate the power and logic of Calhoun's speech. Calhoun declared that the Union could only be saved if freedom of speech and press were abolished in the North and that the notion of majority rule in Congress or in the election of the president were abandoned.[114] This was not, contrary to the claims of Professor Remini, the speech of a lover of the Union. It was a carefully crafted justification for secession and disunion.

Four days later, on March 7, Calhoun returned to the Senate for the last time in his life to hear Daniel Webster speak. Doubtless, he expected Webster to support the Wilmot Proviso and to denounce slavery. He probably even wanted such a speech, because at this point Calhoun was not arguing for a plausible compromise, but instead was setting the stage for disunion. Webster surprised Calhoun and the nation—and lost almost all credibility in his home state—by supporting the compromise. He poignantly told his colleagues: "I wish to speak to-day, not as a Massachusetts man, nor as a Northern man, but as an American. . . . I speak to-day for the

110. *Id.* at 453.
111. *Id.* at 455.
112. POTTER, *supra* note 56, at 98.
113. REMINI, *supra* note 19, at xi.
114. *See, e.g.*, CONG. GLOBE, *supra* note 77, at 453.

preservation of the Union. 'Hear me for my cause.'"[115] His rhetoric was supremely nationalist, but it was also a betrayal of his state, his section, and the assumption of his supporters that he opposed slavery. Webster tried to redefine nationalism by implying that a patriotic American had to accept the spread of slavery into the new territories and support a fugitive slave law that violated fundamental notions of due process. Indeed, the fugitive slave law that Congress ultimately passed gratuitously declared that "all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law."[116] For Webster, a "good citizen" was someone willing to participate in shipping blacks to bondage without a trial or any due process hearing.

Staunch opponents of slavery, such as William H. Seward, Salmon P. Chase, and Hannibal Hamlin, weighed in against Clay's compromise, but not the Union. They were thoroughly opposed to secession and disunion, but they did not believe that the Union had to be built—or even could be built—on a foundation of human bondage. They argued that Clay's proposals were wrong and, especially the proposed fugitive slave law, immoral. Speaking as a man who had defended black rights for his whole career, Seward declared the compromise was "radically wrong and essentially vicious, . . . involve[ing] the surrender of the exercise of judgment and conscience."[117] President Taylor was unhappy with the self-righteousness of Seward's speech, but he did not entirely disagree with Seward's complaints that the compromise gave too much to slavery and rejected American values of liberty and fundamental justice.[118] Taylor wanted immediate admission of California and New Mexico as well. He did not really believe Texas would force a confrontation over the sands of eastern New Mexico, but "Old Rough and Ready," as his soldiers had affectionately called him, ordered troops to New Mexico to be ready, and if necessary, rough, in maintaining national sovereignty. Taylor opposed opening the Southwest to slavery or tying California statehood to a new fugitive slave law. Clay nevertheless moved forward in opposition to the president of his party.

Webster may have spoken "not as a Massachusetts man, nor as a Northern man, but as an American,"[119] but he also spoke as a Whig who was both bitter that he had never been his party's presidential candidate and hostile to the most successful candidate his party ever fielded. Clay and Webster hoped to save the Union, but they also wanted to directly

115. CONG. GLOBE, *supra* note 77, at 476.

116. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).

117. William Henry Seward, "Freedom in the New Territories," Speech in the U.S. Senate, March 11, 1850, ANDREW W. YOUNG, THE AMERICAN STATESMAN 916 (1855).

118. ELBERT B. SMITH, THE PRESIDENCIES OF ZACHARY TAYLOR AND MILLARD FILLMORE 119–20 (1988).

119. CONG. GLOBE, *supra* note 77, at 476 (1850).

challenged Taylor's leadership. On May 21, Clay openly attacked Taylor, saying his plan would not solve the crisis, but would lead the country to "bleed more profusely than ever."[120] In opposing the Whig president, Clay, the longtime leader of the party, was in league with the Democrat and arch-sectionalist, Calhoun. Meanwhile, Taylor's vice president, Millard Fillmore, supported Clay and the compromise. He told Taylor that if he had to break a tie in the Senate, he would do so in favor of Clay's bill. Assuming Clay's bill also passed the House, this would force Taylor to veto the compromise, which would have undermined his administration.[121] Thus, a Whig vice president and two leading Whig senators worked to destroy the presidency of the first Whig president to hold office long enough to accomplish anything.[122]

That was where the debate stood when Congress recessed for the July 4th holiday. A week later, Zachary Taylor was dead. Millard Fillmore, the most obscure vice president ever, was now President of the United States.

VI. PRESIDENT FILLMORE AND THE COMPROMISE

On July 10, 1850, Fillmore went to the House of Representatives to take the oath as President of the United States. Later that day he fired his entire cabinet, something no other accidental president has ever done. Ten days later, he sent the Senate nominations for some cabinet positions. His most important nominee was Daniel Webster, who became Fillmore's Secretary of State. Fillmore was unable to immediately find anyone to serve as Secretary of War and Secretary of the Interior. Thus, as Congress continued to debate the fate of the Mexican Cession and Texas made noises about invading New Mexico, Fillmore had no one in place to run the departments most necessary for both issues.

As the Senate continued to debate Clay's omnibus bill, Fillmore faced his first crisis—without the benefit of having his cabinet in place. Just a few days after he was sworn in, Fillmore received a letter from Governor Peter H. Bell of Texas—addressed to the deceased President Taylor—demanding that the United States recognize Texas's extravagant claims to much of New Mexico, including Santa Fe, and to disavow the U.S. Army's actions to preserve the integrity of the New Mexico Territory.

Bell's absurdly arrogant communication would probably have amused

120. THE SPEECHES OF HENRY CLAY 470 (Calvin Colton ed., New York, A. S. Barnes & Co. 1857).

121. SMITH, *supra* note 118, at 141, 167; *see also* FINKELMAN, *supra* note 56, at 57.

122. In 1840, William Henry Harrison had been elected as a Whig, but he died a month after taking office.

Taylor, a Commander-in-Chief with vast military experience and a President with a full cabinet in place, including a Secretary of War to deal with military issues and a Secretary of the Interior to deal with territorial questions. Indeed, Taylor was prepared to lead the Army personally in New Mexico to stop an invasion of federal territory, just as Jackson has been prepared to march to South Carolina to suppress nullification. Fillmore had no military experience, no Secretary of War, no Secretary of the Interior, and no sense of the impossibility of Texas enforcing its will against a determined American president. More than 750 miles of mostly trackless scrublands separated Austin from Santa Fé. Experienced soldiers were stationed in New Mexico, and it is hard to imagine Texas successfully invading the territory. In August, Fillmore ordered another 750 soldiers to New Mexico. Despite his understanding that he needed to defend U.S. territory against an invasion from any source, Fillmore was ultimately unwilling to actually confront the absurd demands of the Texans that, having once been admitted to the Union, the state could now unilaterally demand that its boundaries be expanded.

Fillmore might have sent a stern response to Bell, reminding him who was Commander-in-Chief, who had an army, and who did not. Or, he might have sent him a lawyerly explanation of how the U.S. Constitution worked. Fillmore did neither. Nor did he move to bring New Mexico into the Union along with California as Taylor had wanted. This would have preempted the Texas debate and mooted the Wilmot Proviso debate. By this time, residents of New Mexico had already held a convention and written a state constitution that was on its way to Washington. New Mexico's statehood could have been quickly accomplished.

In their proposed constitution, the New Mexicans made extravagant claims for their new state, based on the old Mexican Department of New Mexico, which would have moved the New Mexico boundary deep into what everyone agreed was clearly the state of Texas. Under the U.S. Constitution, no state could be forced to give up its own territory against its will. Admission to the Union preserved the existing borders of Texas. Furthermore, a territory could never define its own boundaries. Only Congress could do that. Thus, the territorial claims of the New Mexico convention had no basis in law, just as Texas's claims to territory acquired by the United States from Mexico were legally baseless.

These constitutional and legal realities created the potential for presidential leadership and meaningful compromise. A strong president could have firmly, but tactfully, told both sides they were wrong. Texas was in the Union with the boundaries Congress had already set; New Mexico could enter the Union with boundaries that Congress would create. Since New Mexico had a free population greater than Florida, it was certainly entitled to admission into the Union. There were many variations on this strategy. Fillmore might have supported a compromise that would have

admitted New Mexico as a free state under the theory of popular sovereignty that the Democrat Lewis Cass had proposed in the 1848 election. Such a move might have undermined the extreme southern hotheads, who were all Democrats, because Fillmore was adopting the Democratic Party's solution to the issue of slavery in the territories. Fillmore then might have simultaneously urged that Congress pay off the bonds of the Texas Republic, as Clay had proposed. He might even have offered a compromise on its territorial claims with New Mexico, as Clay also proposed.[123] Or, he might have forcefully sent Congress a concrete proposal for settling the boundary one way or the other.

Instead, Fillmore was so paralyzed by the Texans' saber rattling that he seemed to forget that he was both President and Commander-in-Chief. Rather than lead on this issue, he moved to appease the Texas legislature by refusing to submit the proposed New Mexico constitution to Congress. He offered no guidance to Congress at this time beyond supporting Clay's omnibus bill, which was set to open up all of the Mexican Cession to slavery despite the clear objections of the residents of New Mexico, and the proposed repudiation of the Missouri Compromise for Nevada, Utah, and parts of what became Colorado and Wyoming.

With no leadership from the Whig in the White House, on July 24, the Democrats proposed that Congress not actually set the Texas-New Mexico boundary but instead create a commission to do so. On the heels of this, a Georgia Whig, William Dawson, put together a coalition of southerners and northern Democrats to stipulate that, until the commission met, the New Mexico territorial government would have no authority in the disputed area. This was patently unfair to the claims of New Mexico, and it led to a total unraveling of Clay's Compromise. A week later on July 31, James Pearce, another Whig and close ally of Fillmore, proposed that the whole New Mexico issue be removed from the pending bill. A series of other amendments followed, and by the end of the day Clay's Compromise bill was dead.

The compromise had begun with Clay attempting to wrest control of the Whig party from its own president. Clay envisioned he would once again be the party leader and hero of the nation, as he had been when he guided the Missouri Compromise through Congress in 1820. It might finally make him president. Unfortunately for Clay, his plan had backfired. In the Senate, the party had become utterly leaderless, with two Whigs—both of whom

123. Fillmore might have argued that the Texas debt was similar to the Revolutionary War state bonds that the United States paid off under the programs of Secretary of State Alexander Hamilton. Such an argument would have strengthened a sense of federalism and national power in the South.

supported the compromise—amending the compromise to death while Clay looked on helplessly. The old president was dead, and thus there was no need for Clay to de-throne him. The new president, a thoroughly orthodox Whig, offered no leadership on the nation's pressing issues, and had been prepared to work with Clay. Even so, Clay failed to get other Whigs to go along. The aging Kentucky senator, devastated by the collapse of all of his work, left Washington even though Congress remained in session.

At this point, the Illinois Democrat, Senator Stephen A. Douglas, put the compromise back together. This was the ultimate irony of Clay and Fillmore's machinations against Taylor. Designed to promote Clay and regular Whigs, and to undermine Taylor, the compromise ended up catapulting the Democrat Douglas to greater prominence while devastating Fillmore's presidency and the Whig Party.

Douglas broke the compromise into its component parts and pushed them through Congress one at a time. A small group of southern and northern senators and representatives voted for all, or almost all, the measures, and he picked up the rest of the southerners or northerners for particular issues. This new configuration of the legislation as a series of separate and disconnected laws undermined any pretense of an actual compromise between competing parties. The final outcome overwhelmingly favored the South because, at most, only two parts of the compromise—California statehood and closing the public slave trade in Washington, D.C.—reflected northern interests.

Thus, the final Compromise of 1850 favored the South over the North and slavery over freedom. David Potter called it the "Armistice of 1850,"[124] yet it might best be seen as the Appeasement of 1850. Southerners blustered and threatened to destroy the Union, and Texans threatened to invade New Mexico. A frightened and inexperienced accidental president—only the fourth northerner in the nation's history to hold the office—was easily cowed into giving southerners everything they wanted. Leaderless northerners in Congress caved as well. The South gained everything it wanted, and the North received almost nothing in return. The appeasement was orchestrated with the active support of a northern Whig president working closely with a northern Democrat to defeat the interests of most northerners. Thus the "Compromise" as passed lacked the coherence of a single bill because it was not a single bill. Rather it was series of acts that were mostly disconnected and were not based on any compromises.

The final settlement over the southwest took territory away from New Mexico and gave Texas about 70,000 square miles more than Clay's bill had. It also opened up the entire New Mexico territory to slavery *and* gave Texas a ten million dollar bailout. The politics of this included a fear—perpetuated by Fillmore and Webster—that if the issues were not settled

124. *See* POTTER, *supra* note 56, at 90.

there would be civil war between Texas and the United States of America regarding who owned the New Mexico desert. Taylor, the general who had served in the region and knew the geography of Texas and New Mexico, would have thought this was preposterous. But Fillmore, without a working cabinet or a Secretary of War, and never having seen the vast deserts of the Southwest, was bizarrely cowed by the idea that Texas could somehow raise an army that would be a match for that of the entire United States.

Webster, now seemingly in control of White House patronage, pressured New England's Whig senators to accept the Texas bill. The Senate, led by Douglas, made sure that there would be no vote on California statehood until after the Texas boundary was resolved. Four days after the Texas vote, the Senate voted thirty-four to eighteen in favor of California statehood. Significantly, two southern Democrats voted for the bill: Sam Houston of Texas and Thomas Hart Benton of Missouri. With the exception of two senators from Delaware, no southern Whigs supported California statehood. Webster and Fillmore had pressured New England Whigs to support the Texas bill, but they were unwilling or unable to get any southern Whigs (except those from Delaware) to support California statehood. This underscores the lack of "compromise" in the Compromise of 1850.

On August 15, the Senate voted to organize the New Mexico territory without a ban on slavery, even though by this time, everyone was well aware that a convention in New Mexico had written a constitution that would have made it a free state. This was a blunt attempt to force slavery into the territory and, in effect, give federal support to turning a free New Mexico into a slave state.

Finally, after passing the laws allowing slavery in the new territories and admitting California as a free state, the Senate turned to the District of Columbia slave trade bill and the fugitive slave law. As already noted, the slave trade bill was largely symbolic. It removed an irritation that northerners abhorred, but it had absolutely no effect on the system of slavery or even the sale of slaves. Secretary of State Daniel Webster, Senator Stephen A. Douglas, and President Fillmore sold this law to northerners as a fair trade off for the new Fugitive Slave Law. Yet that was a mirage.

Each bill needed to pass the House as well, where the politics were more complex. Northerners possessed a huge majority in the House and could have blocked some of the proslavery measures, or at least forced amendments to them. In the end, however, this did not happen. On really tough votes, like the fugitive slave bill, many northern congressmen simply failed to show up to vote. The final vote on the New Mexico-Texas boundary was only possible because Fillmore pressured northern Whigs in the House to support the bill even though most had been elected on pledges

that they would never vote to allow slavery in the new territories. For example, Representative Abraham Schermerhorn of Rochester, "buckled under pressure"[125] because Fillmore was prepared to do everything in his power to block Schermerhorn's renomination. Schermerhorn came from the heart of New York's antislavery "Burned Over District" and the home of the nation's most famous black abolitionist, Frederick Douglass, but on this proslavery bill he abandoned his constituents. Using threats and promises of patronage, Fillmore managed to get just enough votes in the House to get each component of the package through Congress.

In September, everything came together. On September 9, Fillmore signed bills on the Texas-New Mexico boundary, California statehood, and the Utah Territory. Slavery was now legal everywhere in all the new territories, including land well north of the Missouri Compromise line. This was a huge victory for the South, especially when paired with the settlement over Texas that gave that slave state more land and ten million dollars. Since 1787, every territory where slavery was allowed had become a slave state. While some politicians like Clay, Webster, and Douglas argued that slavery was unsuited for these territories, most southerners disagreed. They knew better. As already discussed, slaves had historically been used in mining and in ranching. Indeed, the first "cowboys" in America were black slaves in South Carolina. If what had just become west Texas was viable slave country—as the Texans insisted—then so too would be the land just over the border in New Mexico and in the mining country that would become Utah, Nevada, and most of Colorado.

On September 18, Fillmore signed the Fugitive Slave Bill. Two days later, a last crumb was offered to the North as Fillmore signed the bill prohibiting bringing slaves into the District of Columbia for the purpose of sale. It did not prevent the private sale of slaves already in the District, nor did it prevent people from moving into the District with slaves. It was a symbolic victory for freedom but nothing more.

The abandonment of both the Wilmot Proviso and the Missouri Compromise would lead to a decade of controversy over the status of slavery in the territories. Emboldened by his success in 1850 with the cooperation of a Whig president, in 1854 Stephen A. Douglas would contrive, with a northern doughface Democrat in the White House, to eviscerate almost all that remained of the Missouri Compromise line, setting the stage for Bleeding Kansas and the final crisis leading to the Civil War. These long-term consequences of the New Mexico and Utah bills were not yet readily apparent in the 1850s. What was apparent, from the moment it was conceived, was the potential disaster that the new Fugitive Slave Law would cause. Fillmore's enthusiastic support for this law, and his aggressive enforcement of it, would become the hallmark of his administration, and in

125. HOLT, RISE AND FALL OF THE AMERICAN WHIG PARTY, *supra* note 57, at 542.

the end, it would also destroy his administration, the Whig Party, and any chance the "compromise" might have worked.

VII. THE FUGITIVE SLAVE LAW OF 1850

The Fugitive Slave Law of 1850 was one of the most repressive and unfair statutes ever adopted by the United States. It created, for the first time, a national system of law enforcement. In 1793, Congress had passed a fugitive slave law, which provided that any judge—state or federal—could hear a fugitive slave case and remand a fugitive to the custody of a master or a master's agent. The law provided very lax evidentiary standards and no guarantees that free blacks would not be taken south as fugitives. To protect free blacks, almost every Northern state had passed a personal liberty law to guarantee due process for alleged fugitive slaves.[126] In *Prigg v. Pennsylvania*, the U.S. Supreme Court held these laws were unconstitutional because they interfered with the implementation of a federal law.[127] However, the Court also held that Congress did not have the power to require the states to enforce this federal law.[128] Almost immediately, state officials throughout the North refused to enforce the law, and a number of states passed legislation prohibiting their judges from hearing fugitive slave cases and prohibiting federal officials or private slave catchers from using state jails to secure alleged fugitive slaves. Southerners complained, with some legitimacy, that these new personal liberty laws made it impossible for them to vindicate their constitutional right to recover fugitive slaves. With only a few federal courts operating in the country and a similarly small number of federal marshals, masters had to pursue their slaves on their own or with professional slave catchers. The 1850 law remedied this situation by providing for the appointment of federal commissioners in every county who were empowered to hear fugitive slave cases and summon sufficient force to secure the return of runaways.

Under the law, federal marshals could be fined $1,000 if they failed to "use all proper means to diligently" execute the law.[129] Marshals and commissioners were empowered to call on the militia, the army, or create a

126. The standard work on the personal liberty laws in THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1860 (1974).

127. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 622 (1842).

128. *Id.* This was the first use of the concept of "unfunded mandates," because Story asserted in this part of his opinion that Congress could not require state officials to act because it did not pay them. *See* Finkelman, *Story Telling*, *supra* note 102; *see also* Paul Finkelman, *The Roots of* Printz: *Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399 (2004).

129. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, § 5 (1850).

posse to enforce the law. The statute gratuitously declared that "all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law" although there was no clear remedy if citizens refused to help enforce the law.[130] If these measures failed, however, and marshals were unable to prevent a rescue by a mob, they could be held personally liable for the value of any slave who escaped their custody. No other federal law had ever provided such penalties for officers who were unable to implement a law.

Any persons who aided or harbored a fugitive slave or interfered with the rendition process, for whatever reason, were subject to a $1,000 fine and six months in jail. In addition, they were subject to civil damages of $1,000 to be paid to the owner of a slave for each slave who was not recovered. Many northerners found these provisions particularly obnoxious because, if literally enforced, a farmer could be fined, sued, or jailed for giving a cup of water to a black person walking down the road. The harsh penalties, and the minimal standards of proof, could force northern whites to assume that all blacks they saw were fugitives even though in 1850 there were more than 150,000 free blacks living in the North.[131] The new law not only imperiled the liberty of free blacks, but also undermined their relationships with their white neighbors. Whites, and even free blacks in the North, might be reluctant to hire blacks for fear the person was a fugitive, and the very act of hiring could be a violation of the law. From the perspective of blacks and many white northerners, the Act of 1850 had brought the law of slavery into the free states and required northerners to do the bidding of southerners.

These provisions punished free people—white and black—if they helped fugitives. Even more obnoxious were the procedures for returning a slave. Under the law, the alleged slave would get a summary hearing before a federal judge or commissioner. The court was precluded from even considering a writ of habeas corpus. This was the first time the United States Congress suspended the privilege of the writ of habeas corpus, and it was done in violation of the constitutional provision, which provided that habeas could only be suspended in response to an invasion or rebellion.

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130. *See* Fugitive Slave Act of 1850 § 5. Some southerners in fact were contemptuous of the willingness of northerners to participate in the return of fugitive slaves. While the law was being debated, one Kentuckian told Senator Salmon P. Chase that in the South "no man will voluntarily become a negro catcher" and that it would be "gross insult" to ask a southern gentleman to do such a thing. Professional slave catchers were "held in public estimation only secondary to the professional Negro trader, and that is the lowest possible." Edgar Needham to Salmon P. Chase, Feb. 9, 1850, Salmon P. Chase Papers, Library of Congress.

131. The Court had essentially held this in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847). Van Zandt, an Ohio farmer, gave a ride in his wagon to nine blacks walking along the road. They were all fugitives belonging to Jones, a Kentucky slave owner. Jones successfully sued Van Zandt for the value of one of the slaves who permanently escaped and the cost of recapturing the rest. Van Zandt argued that he had no notice they were slaves and that in Ohio all people were presumptively free. The Supreme Court upheld the judgment against Van Zandt, and thus put northerners on notice that they should not assume blacks in their states were free. *Id.*

The law required any judge or commissioner to "hear and determine the case" in "a summary manner" without a jury.[132] The slave owner or his agent had only to present "satisfactory proof" that the person claimed was a fugitive slave.[133] This could be done by "deposition or affidavit, in writing . . . . certified" before any judge or magistrate in the home state of the slave owner.[134] The potential for fraud, or even mistaken identity, was huge. The claimant might bring any black who fit the description in the "deposition or affidavit" before a judge and demand the right to remove the person as a fugitive slave.[135]

In what was clearly its most unfair aspect, the law provided, "In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence."[136] Someone could be dragged south as a slave and never be allowed to offer his or her own voice as evidence that he or she was free. As one northern minister complained,

> It requires but the collusion of two men to seize a freeman in the streets of New York or Boston, to drag him before a commissioner, to make affidavit of his escape from service and of his personal identity, and in one hour the freeman shall be in the custody of an armed force on his way to the slave coffles . . . to be sold to the rice plantations of the South."[137]

The outrageousness of the testimony provision was matched by the provision for paying the commissioners and judges who heard these cases. If a judge ruled in favor of the alleged slave, thus setting him or her free, the judge was entitled to a five-dollar fee. If the judge ruled for the master, he got a ten-dollar fee. Most northerners viewed this as a blatant attempt to bribe the courts.[138]

The law needlessly threatened free blacks and unnecessarily trampled on traditional American notions of due process and the fair administration of

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132. Fugitive Slave Act of 1850 § 6.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Paul Finkelman, *The Treason Trial of Castner Hanway, in* MICHAL BELKNAP, AMERICAN POLITICAL TRIALS 80 (2d ed. 1994) (quoting JOSEPH P. THOMPSON, THE FUGITIVE SLAVE LAW: TRIED BY THE OLD AND NEW TESTAMENTS 8 (1850)).

138. The differential payment was based on the fact that commissioners were paid by collecting fees (rather than a salary) and it took much more time to fill out the paperwork necessary to return a fugitive slave than to set a black free. While the different fees made economic sense, they created the appearance that justice was for sale in the North. The payment scale was a public relations disaster for the national government and the Fillmore administration.

justice. It was not a bill that could be considered part of a "compromise" because it was so utterly one-sided. In addition to its denials of due process and apparent attempt to buy justice, the law made no provisions to protect free people who might be illegally seized under it. There was no anti-kidnapping provision that would have ameliorated northern sensibilities, and under the Supreme Court's decision in *Prigg v. Pennsylvania*, the free states were prohibited from providing any protections for their black residents. Under this law, a northern white could be fined, jailed, and sued for helping a black person who he thought was free, but a southerner would face no sanction for seizing a free black and fraudulently or mistakenly claiming him or her as a slave.

VIII. THE GREAT FAILURE AND ITS AFTERMATH: THE SPREAD OF SLAVERY

The compromise measures accomplished little, but they deeply damaged the Union and the credibility of the national government. The territorial accommodation did not satisfy the South, but only whetted slaveholders' appetite for more land. In 1850, the southerners, with the aid of Senator Stephen A. Douglas of Illinois, had undermined the Missouri Compromise line. In 1854, Douglas introduced the Kansas-Nebraska Act, which repealed the Compromise line for most of the existing western territories. This was the logical extension of the 1850 Compromise. The doughface President Franklin Pierce dutifully signed the law, making slavery legal in all the federal territories except Minnesota and Oregon (which included present-day Washington and parts of Idaho). Slavery was now legal everywhere else in the west. What followed was Bleeding Kansas and the failure of the Pierce and Buchanan Administrations to oversee peaceful settlement or fair and democratic elections in Kansas.

In 1857, the Supreme Court finished this task in the *Dred Scott* case, by striking down the ban on slavery in the Missouri Compromise and further holding that Congress could *never* ban slavery in the territories.[139] It is impossible to know if the legislation of 1850 and 1854 emboldened Chief Justice Taney to reach such an extreme result, but this seems likely. This was only the second time the Court had ever found an act of Congress unconstitutional. Striking down an act of Congress seemed counter to Taney's Jacksonian jurisprudence, but in light of the legislation of 1850 and 1854, the result was consistent with Taney's general deference to Congress.

Thus, the "compromise" passed in 1850 led to a total collapse of the idea of free soil in America. At the beginning of 1850, slavery was banned in almost all the federal territories. Congress had not yet acted on the status of slavery in the newly acquired lands of the Southwest, so presumably

139. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

Mexican law still applied, which made slavery illegal there.[140] In the rest of the West, the Missouri Compromise prohibited slavery. Yet by the end of 1850, Congress had reversed the Mexican law and opened all of the new land except California to slavery. By 1854, Congress extended this reversal of decades of American policy by allowing slavery in what would later be the states of Kansas, Nebraska, South Dakota, North Dakota, Montana, and parts of Colorado, Wyoming, and Idaho. By 1857, slavery was legal in all the remaining territories. In seven years, a gigantic revolution in American public policy had taken place, all under the guise of a "compromise" between the North and the South. The "compromise" was that slavery would be allowed everywhere.

Like slavery in the territories, the Compromise strengthened slavery in the nation's capital. After 1850 there were no longer any public slave markets in Washington, D.C., but this did not limit private sales. Nor did closing the District of Columbia markets harm slavery in the capital. Before 1850 some Congressmen, including Abraham Lincoln, had proposed legislation to gradually end slavery there. But after 1850 such proposals disappeared. The ban on the slave trade seems to have shut off debate on the larger issue of slavery in the District. Thus, the law designed to give something to the North had the effect of actually protecting slavery in the District.

IX. THE GREAT FAILURE AND ITS AFTERMATH: THE FUGITIVE SLAVE LAW

The most important part of the 1850 Compromise was the Fugitive Slave Law. Few laws have been so disastrous. The blatant unfairness of the law shocked many northerners, who were otherwise law-abiding citizens. The enforcement of the law stimulated lawless and even violent responses in many northern communities. Early opposition to the law led President Fillmore to enforce the law even more vigorously, as he sought to vindicate his reputation for supporting the law. He also aggressively enforced the law in order to gain southern support for the 1852 Whig presidential nomination. Meanwhile, Secretary of State Webster, who was equally anxious for the presidential nomination, joined Fillmore in vigorously prosecuting opponents of the law.

The law undermined Fillmore's presidency, the Whig party, and the Compromise. Northern opposition to the law stemmed from its absurdly unfair provisions and its failure to protect free blacks from kidnapping or mistakenly being sent to the South as slaves. Also troublesome was the fact

140. FREEHLING, *supra* note 90, at 488–90.

that many blacks seized under the law had not recently escaped from bondage, but were people who had been away from slavery long enough to establish themselves in northern communities. The first fugitive returned under the law, James Hamlet, had been living in New York City long enough to find steady employment, marry, and have two children. His master saw him as a fugitive slave, but New Yorkers saw him as a neighbor, husband, father, and employee. After he was returned to slavery, New Yorkers raised $800 to buy his freedom and he was met on his return by an integrated demonstration of four to five thousand people.[141]

President Fillmore's actions illustrate the poisonous nature of the law. Fillmore's biographers claim the law "plague[ed] Fillmore's conscience," and that he found it "repugnant."[142] Thus, "he had delayed signing the bill as long as he could."[143] But the evidence does not support either argument. During the summer of 1850 Fillmore communicated with Congress about the Compromise, including a detailed but inconclusive message about the boundary dispute between Texas and New Mexico. Similarly, throughout his administration, Fillmore asked Congress to pass legislation on all sorts of things, from building lighthouses on the Great Lakes to establishing a new mint in San Francisco.[144] But in the summer of 1850, Fillmore never once suggested that the Fugitive Slave Law needed to be altered to guarantee due process. After Clay's omnibus bill failed, Fillmore "intensified his intervention in Congress's proceedings" to secure the compromise and he was "adamant about passing . . . [the] fugitive slave measure[]."[145] If Fillmore truly had doubts about the law's constitutionality—if he knew his "conscience" would be bothered by signing a law so arbitrary and such an affront to due process—it is surprising that he did not mention these concerns in some communication to Congress. If he was bothered by the Fugitive Slave Law, or any particular provisions, we have no evidence of it.

Nor is there evidence that he "hesitated" or "delayed signing the bill as long as he could."[146] The Fugitive Slave Law passed on the Senate on August 26, without any input from Fillmore. On September 12, the House passed the bill, still without any input or communication from Fillmore, and sent it back to the Senate. On September 16, the presiding officer of the Senate reported that the bill had been delivered to the president, who signed

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141. For an account of James Hamlet's story, see AMERICAN AND FOREIGN ANTI-SLAVERY SOCIETY, THE FUGITIVE SLAVE BILL: ITS HISTORY AND UNCONSTITUTIONALITY (1850) and PAUL FINKELMAN, SLAVERY IN THE COURTROOM 85–86 (1998).

142. SMTIH, *supra* note 118, at 200; *see also, e.g.*, ROBERT J. RAYBACK, MILLARD FILLMORE: BIOGRAPHY OF A PRESIDENT 22 (1959).

143. SMITH, *supra* note 118, at 200.

144. FINKELMAN, *supra* note at 56, at 93–94.

145. HOLT, *supra* note 57, at 533.

146. *See supra* note 143 and accompanying text.

it on the eighteenth.[147]

Did this bill plague Fillmore's conscience? The evidence suggests otherwise. More than a month after its passage, Fillmore told Secretary of State Webster "that the law, hav[in]g been passed, must be executed."[148] He emphatically asserted that "so far as it provides for the surrender of fugitives from labor it is according to the requirements of the Constitution and should be sustained against all attempts at repeal."[149] This was hardly the voice of a man who had any pangs of conscience. He saw nothing unconstitutional, or even arbitrary, about a law that did not allow a man to speak in his own defense as to whether he should be dragged away from his home to some other state to be claimed as a slave. He did not even see how this might undermine the liberty of the tens of thousands of free blacks in the North, including the nearly 50,000 living in his home state of New York. He saw nothing wrong, or even politically unwise, in paying commissioners twice as much money for sending a man to slavery as sending him to freedom. While Fillmore's biographers claim he was troubled by the law, he enforced it more vigorously than any other federal law on the books. It became the central piece of the Compromise.

In the next two years Fillmore would expend enormous energy overseeing the enforcement of the Fugitive Slave Law. At no time would he express any doubts about the constitutionality of the law. Privately, Fillmore told Webster, "God knows that I detest Slavery."[150] Perhaps the Almighty did know that Fillmore secretly detested slavery, but no human being would have seen this in his policies, his speeches, or the acts of his administration. He told Webster it was "an existing evil, for which we are not responsible, and we must endure it,"[151] but in fact he was more than willing to endure and protect it. His notion of compromise was to give everything to slavery and not even blink at the act's fundamental denials of due process in the law, its harshness, or the way it threatened all northerners.

Throughout 1851 and 1852, Fillmore and Webster teamed up to aggressively enforce the Fugitive Slave Law. Both men hoped for the Whig presidential nomination in 1852, and both believed aggressive enforcement of the 1850 law would secure this for them. Fillmore and Webster both

147. CONG. GLOBE, *supra* note 77, at 1660, 1806–07, 1810; S. JOURNAL, 31st Cong., 1st Sess. 638 (1850); 5 DIGEST OF THE OFFICIAL OPINIONS OF THE ATTORNEYS-GENERAL OF THE UNITED STATES 254.

148. Fillmore to Daniel Webster, Oct. 23, 1850, *reprinted in* CLAUDE H. VAN TYNE, THE LETTERS OF DANIEL WEBSTER 436–37 (1902).

149. *Id.* at 437.

150. *Id.*

151. *Id.*

personally intervened with local U.S. attorneys to help secure convictions of opponents of the law.[152] After fugitives successfully resisted capture in Christiana, Pennsylvania, Fillmore ordered the U.S. Attorney to charge more than forty men, all of whom had been bystanders in the event, with treason for failing to help a U.S. marshal seize a runaway slave. This led to the largest treason indictment in American history, but no convictions. Supreme Court Justice Robert Grier, who was a doughface Democrat and no friend of abolitionists, nevertheless ruled that refusing to help enforce the fugitive slave law, or even resisting its enforcement, was not treason. Rescues and attempted rescues in Syracuse and Boston also led to endless trials but only one conviction, and that defendant died of natural causes while his case was on appeal.

Overall, the success of the Fugitive Slave Law was, at best, mixed. Between 1850 and 1861, approximately one thousand blacks would be returned to bondage under the law. [153] Because southerners estimated that more than ten thousand escaped in that time—and many more were already in the North—the law hardly gave the South what it needed. The decade was punctuated by rescues and other kinds of resistance. Fillmore, Webster, Clay, and the others who supported the law never expected white northerners to break the law to protect black freedom, though that happened sporadically throughout the decade. In trials, northern juries would almost always refuse to convict men charged with interfering with the law.

Southerners, and their northern allies in Congress, probably assumed that blacks were irrelevant to the political equation. Doubtless their own racist assumptions made them believe that blacks were not "manly" enough to fight for their own liberty. They were wrong. In Boston, blacks rushed the courthouse to rescue Shadrach Minkins from a U.S. marshal. In rural Pennsylvania, fugitive slaves fought for their freedom, killing a master at Christiana. In Syracuse, blacks and whites teamed up to rescue the fugitive slave Jerry from federal custody. Throughout the North, blacks and sometimes their white allies organized self-defense groups. These events, along with resistance organized by blacks and their white friends throughout the North, horrified Fillmore, who saw them as a violation of the fundamental principles of the Constitution. He told Webster, "I mean at every sacrifice and at every hazard to perform my duty."[154] He grandly declared that "Nullification can not and will not be tolerated."[155] But from the perspective of American blacks and many whites, it was absurd to believe that a person who escaped from bondage should peacefully return to

152. *See In re* Charge to the Grand Jury on the Law of Treason, 30 F. Cas. 1047 (C.C.E.D. Pa. 1851); U.S. v. Hanway, 26 F. Cas. 105 (C.C.E.D. Pa. 1851); *see also* Finkelman, *supra* note 137.

153. STANLEY CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW OF 1850 199-205 (1968).

154. *Id.* at 436.

155. *Id.* at 437.

slavery. If this was a "nullification" of the Constitution, it was nevertheless an implementation of the Declaration of Independence.

While President Fillmore insisted he would enforce the law at all costs, Frederick Douglass suggested that the best way to deal with the new law was "to make a dozen or more dead kidnappers."[156] In fact, there were only a few dead slave catchers—one at Christiana in 1851 and another in Boston during a failed attempt to rescue Anthony Burns in 1854. They were still enough to terrify Fillmore and two subsequent administrations and ultimately help derail the Compromise.

Most arrests under the law did not lead to confrontations of violence, but enough did to embarrass every administration for the rest of the decade and lead southerners to conclude that nowhere in the North could they expect to vindicate their claims to fugitive slaves. Northerners who were otherwise law-abiding and peaceful suddenly found themselves helping to rescue slaves from federal marshals or voting to acquit those who did.

Meanwhile the law stimulated Harriet Beecher Stowe to write *Uncle Tom's Cabin* in 1852, and it became the most politically powerful text since Thomas Paine's *Common Sense* and the greatest bestseller of the century. Stowe's book was a powerful indictment of slavery and the fugitive slave law, and it provided a cultural defense of those who protected fugitives and sent them on their way to Canada.

The Fugitive Slave Law did not lead to a wholesale breakdown of law and order. Yet this law, which turned out to be the central component of the Compromise was so unfair, so one-sided, and so outrageous, that it could not possibly work. It left southerners arrogantly believing they could demand and win *anything* from the supine North; it then left them furious when average northern citizens proved to be less pliant.

In the end, the Compromise failed because it was never a compromise at all. It gave almost everything to slavery and almost nothing to freedom. The only tangible gain for the North was the free state of California, and that gain was surely a foregone conclusion. The Compromise caused southerners to be arrogant and then subsequently angry when their legislative victory turned out to be a mirage. They demanded more and more, and still it was never enough. In the end, secession was their only solution. That was fruit of the "compromise" that Henry Clay, Daniel Webster, Stephen A. Douglas, and Millard Fillmore planted in 1850.

The lesson here may be that compromise is not always possible or

156. Frederick Douglass, Let All Soil Be Free Soil (Aug. 11, 1852) *in* THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS 390 (John Blassingame, et al., eds., 1979).

worthwhile. In 1850, the cost of compromise for the North was excessive. However, this was just the logical fruit of the more expensive compromises made in 1787. The appeasement of 1850 flowed naturally from the creation—through compromise—of the "Covenant with Death and the Agreement in Hell" that the framers crafted in 1787.[157]

157. *See* Paul Finkelman, *Garrison's Constitution: The Covenant with Death and How It Was Made*, 32 PROLOGUE MAG., no. 4, 2000.