

# SLAVERY & THE LAW

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FIRST EDITION

# Chief Justice Hornblower of New Jersey and the Fugitive Slave Law of 1793

Paul Finkelman

IN 1836, IN *State v. The Sheriff of Burlington*, Chief Justice Joseph C. Hornblower of New Jersey ordered the release of Alexander Helmsley, who was then being held as a fugitive slave in Burlington, New Jersey. In deciding this case Hornblower wrote a strongly abolitionist opinion, implying that the federal Fugitive Slave Law of 1793 was unconstitutional. However, Hornblower did not declare the federal law void, because he did not have to do so. Helmsley had been seized and incarcerated under a state law. Thus, Hornblower was able to order his release when he determined that the New Jersey law under which Helmsley was held violated the state constitution. Because neither the sheriff who held Helmsley nor the slave owner who claimed him raised the federal law of 1793, Hornblower did not have to explicitly address its constitutionality. Hornblower did not read his elaborate opinion from the bench, although he did he summarize his conclusions. Nor did Hornblower have the opinion published, either in the official reports or as a pamphlet.<sup>1</sup>

Some newspapers, especially the antislavery press, communicated Hornblower's decision. As far west as Ohio the antislavery attorney Salmon P. Chase, a future chief justice of the United States Supreme Court, cited it for authority in a fugitive slave case. But Chase's citation was probably an exception. Hornblower's unreported decision and unpublished opinion were initially of little use to antislavery lawyers and activists. Illustrative of the initial obscurity of Hornblower's decision is the fact that in 1838 William Jay, the abolitionist attorney and antislavery constitutional theorist, was unaware of it. Jay lived in Westchester County, New York, close to Hornblower, and Hornblower had been a personal friend of Jay's late father, Chief Justice John Jay. Yet, Jay knew nothing of the opinion.<sup>2</sup>

In 1851 the *New York Evening Post* resurrected the Hornblower opinion from obscurity, publishing it in pamphlet form.<sup>3</sup> The new Fugitive Slave Law of 1850 had revived interest in Hornblower's 1836 opinion because its principles applied to this law as well as to the 1793 act. Anti-slavery editors, activists, and politicians appreciated the applicability of Hornblower's conclusions to the debate over the constitutionality of the Fugitive Slave Law of 1850. In the 1850s some judges cited the previously unpublished opinion as a legal precedent;<sup>4</sup> but more importantly Hornblower's opinion emerged as an intellectual, moral, and political argument against the Fugitive Slave Law. The very fact that Hornblower had not published his opinion in 1836 made his arguments more valuable in the 1850s. Hornblower had not been an abolitionist when he wrote the opinion, and he had written it before fugitive slave rendition was a major political issue. Thus, his opinion was an example of a dispassionate approach to fugitive slaves by a respected state chief justice, untainted by abolitionism.

The Hornblower opinion illustrates the connection between court cases, legal theory, and antislavery politics. An understanding of this case begins with a short discussion of how New Jersey dealt with the problems posed by fugitive slaves entering that state.

### *Fugitive Slaves and Ending Slavery in New Jersey*

The problem of fugitive slaves in New Jersey cannot be divorced from other aspects of slavery in the state. Because New Jersey was the last northern state to abolish slavery, during much of the antebellum period New Jersey was concerned about its own runaway slaves as well as those escaping from Southern bondage. This is just one of the peculiar aspects of New Jersey's relationship to the peculiar institution.<sup>5</sup>

In the colonial period, New Jersey was the home of one of America's most important early antislavery activists, John Woolman. In 1786 Elias Boudinot and Joseph Bloomfield organized New Jersey's first antislavery society. These men were not idealists, isolated from the mainstream. On the contrary, they were leaders in state and national politics. Boudinot was twice president of the Continental Congress, a signatory to the peace treaty with Great Britain in 1783, and a three-term congressman under the new Constitution. Bloomfield was an Admiralty judge, state attorney general, congressman, governor of New Jersey from 1801 to 1812, and a general in the War of 1812.<sup>6</sup>

Despite this early antislavery leadership, New Jersey was, as mentioned above, the last Northern state to take steps to abolish slavery. Not until 1804 did New Jersey enact a gradual emancipation statute. This was nearly a quarter century after Pennsylvania adopted the nation's first gradual emancipation act.<sup>7</sup>

There is a striking contrast on statewide abolition between New Jersey and New York. New York was also slow to join the "first emancipation," passing its Gradual Emancipation Act in 1799. But New York quickly made up for lost time. In 1817 New York adopted a law freeing all its slaves on July 4, 1827. Meanwhile, in New Jersey slavery lingered. As late as 1845, the New Jersey Supreme Court held, in *State v. Post*, that the "free and equal" clause of the state constitution of 1844 did not emancipate the approximately seven hundred slaves remaining in the state. Only the aged Chief Justice Hornblower supported the abolitionists who brought this case.<sup>8</sup>

In 1846 New Jersey took a small step toward finally ending slavery. A new law changed the status of the state's remaining slaves to "servants for life."<sup>9</sup> Although a "free state," New Jersey was home to some blacks still in servitude when the Civil War began. These superannuated blacks remained in a state of semibondage until the adoption of the Thirteenth Amendment ended all involuntary servitude in the nation.

Although a "free state," New Jersey was not always considered a safe haven for escaped slaves. Bondsmen from Delaware and Maryland who came into New Jersey were well advised (if they could find someone to give them such advice) to continue north. In 1846 the state's only anti-slavery newspaper complained that New Jersey "still continues to be the hunting ground of the kidnapper." On the other hand, in the 1830s negrophobes in southern Cumberland County complained that they were about to be overrun by fugitive slaves. One racist politician claimed these "vicious intruders" threatened the stability of the entire county, if not the state.<sup>10</sup> The truth no doubt lay somewhere in between these somewhat self-serving assessments.

Nathan Helmsley, whom Chief Justice Hornblower released from custody, illustrates the complexity of the treatment of fugitive slaves in New Jersey. When he resolved to leave his bondage in Maryland, Helmsley recalled, "I started for New Jersey, where, I had been told, people were free, and nobody would disturb me."<sup>11</sup> Once there Helmsley relocated a few times to avoid capture, and he managed to live in the state for a number of years before he was discovered and seized by a slave catcher. As the Helmsley case suggests, New Jersey was neither entirely hostile to fugitive slaves nor especially welcoming. New Jersey was no Vermont or New Hampshire; but neither was it a Maryland or a Virginia. Ironically, it was in this atmosphere that Chief Justice Hornblower would issue the most radically antislavery state supreme court opinion before the 1850s.

*New Jersey, Slavery, and Early National Politics*

Despite New Jersey's slow movement towards abolition, the state's representatives in the new Congress often opposed slavery and supported the rights of free blacks. In 1793 all four of New Jersey's congressmen—Elias Boudinot, Abraham Clark, Jonathan Dayton, and Aaron Kitchell—voted for the Fugitive Slave Law. None of these men were supporters of slavery; Boudinot and Dayton were known to be strong opponents of slavery. But probably they did not see this vote as proslavery. The history of the first fugitive slave law suggests that its supporters thought the law was a fair compromise between the needs of slaveowners to recover their fugitives and the needs of the Northern states to protect their free inhabitants from kidnapping. Within a few years it became clear that the Fugitive Slave Law of 1793 in fact offered little protection to Northern free Blacks. In 1797 New Jersey's Isaac Smith argued in favor of federal legislation to protect free blacks from kidnapping. Congressman Smith argued that it "was impossible" for the states to protect against kidnapping because when the kidnapper reached a new jurisdiction, he was safe from arrest and prosecution. Smith was particularly worried about those free Blacks who might be kidnapped and taken to the West Indies. He wanted a federal inspection law to help prevent this. Smith could see no reason why such legislation would give "offence or cause of alarm to any gentleman."<sup>12</sup>

Later in this session, Congressman Kitchell spoke in favor of a petition from a group of African Americans in Philadelphia who claimed to be free but who felt threatened by the Fugitive Slave Law of 1793. During this debate Southerners argued that these blacks were in fact fugitive slaves and that their petition was unworthy of consideration by the House. Kitchell believed that the status of the petitioners was irrelevant. He argued that Congress should accept a petition if there was merit to the claim. The only question for him was "whether a committee shall be appointed to inquire on the improper force of law" used against blacks living in the North.<sup>13</sup>

The House of Representatives ultimately refused to modify the fugitive slave law or even to receive the petition of the Philadelphia blacks. The votes were not entirely sectional: a number of congressmen from New England and New York voted with Southerners on both issues. Firm support for the rights of free blacks came from Pennsylvania, Delaware, and New Jersey.<sup>14</sup> This opposition to slavery continued through the 1790s.

This relationship of slavery to national politics changed with the Jeffersonian Revolution of 1800. Aaron Kitchell, for example, was a leader of the Jeffersonians in New Jersey. He shared with Jefferson a negrophobia typical of many Democrats of the era. Kitchell believed "the great evil of slavery was the introducing a race of people of different colour from the mass of the people. If they were the same colour, time might assimilate them together." After 1801 he was likely to side with his proslavery South-

ern allies.<sup>15</sup> Thus, after 1800 New England Federalists led the opposition to slavery, while New Jersey's congressional delegation receded into the background on this issue. Opposition to fugitive slave rendition in New Jersey would not reemerge until the 1830s. The key figure at this time would be Chief Justice Hornblower, who viewed himself as a political and intellectual descendant of the Federalist Party of the previous generation.

### *Regulating Slaves and Freeman*

The history of New Jersey's statutory and judicial regulation of slavery during and after the Revolution reveals the contradictions within the state on the issue. In 1786 New Jersey virtually abolished the further importation of slaves as merchandise from Africa or other states by establishing fines for bringing slaves into the state. However, illegally imported slaves were not freed. Furthermore, this statute prohibited free blacks from moving to New Jersey.<sup>16</sup> Such a provision was common in the laws of the slave states. These aspects of the law suggest a state more interested in slowing the growth of its black population than in favoring liberty. However, such an analysis may be mistaken, because the statute also encouraged private manumission and the decent treatment of slaves within New Jersey.

The 1786 statute also allowed for private manumission without requiring either that the ex-slave leave the state or that the owner give a bond to guarantee that the ex-slave would not become a public charge. This was an important inducement for those masters who wanted to free their slaves but could not afford to risk having to support them in the future or who did not want to force their slaves to choose between gaining freedom and having to abandon friends and family.

Finally, the law also subjected owners who kept their slaves to penalties if they mistreated their bondsmen.<sup>17</sup> This was both a step towards humanizing slavery and discouraging slaveholding.

In 1788 the legislature strengthened the prohibition on the slave trade and also attempted to prevent the kidnapping of free blacks. The statute prohibited the removal of slaves from the state without their consent. This law also removed some disabilities of free blacks while simultaneously requiring slaveowners to teach their young slaves to read and write. This statute contrasts sharply with the laws of the antebellum South, which generally made it a criminal offence to teach a slave to read. While the literacy provision was certainly "a step in preparing them for freedom," the New Jersey legislature was not ready to take the final step of adopting an emancipation scheme.<sup>18</sup>

These statutes made New Jersey moderately antislavery, but the legislature's actions were consistent with Madison's claim that New Jer-

sey was not a threat to slavery in the South. This assessment of New Jersey was confirmed in 1790, when the legislature refused to adopt a gradual emancipation statute. The legislature concluded that private manumission would soon end slaveholding, and thus there was no need for a law on the subject. Indeed, the legislature perversely argued that a gradual emancipation bill would actually delay the end of slavery in the state and would "do more hurt than good, not only to the citizens of the State in general, but the slaves themselves." There was, however, little evidence to support this conclusion.<sup>19</sup>

In 1798 New Jersey adopted a new, comprehensive slave code as part of a general revision of the state's laws. This new law did not lead to an end to slavery, but it did contain some important modifications in how blacks and slaves would be treated in New Jersey. One significant change was to allow free Blacks from other states to enter New Jersey as long as they could produce proof of their freedom. This made New Jersey virtually unique among slave states in that it allowed the unrestricted immigration of free blacks.<sup>20</sup>

The 1798 law also supplemented the federal Fugitive Slave Law of 1793 by providing mandatory rewards for anyone seizing a runaway slave and by holding liable for the full value of the slave anyone harboring a fugitive slave or helping such a slave escape.<sup>21</sup>

In 1804 the state finally passed a gradual emancipation statute, giving freedom to the children of all slaves born in the state but requiring that they serve as apprentices, the females until age twenty-one, the males until age twenty-five. In the next seven years, the legislature fine-tuned this law, but none of these amendments and changes significantly altered the status of slaves in the state and or affected fugitives there.<sup>22</sup>

In 1821 New Jersey adopted a comprehensive revision of its slave laws. The provision of the 1798 law regarding fugitives remained intact. However, the 1821 law also punished severely anyone unlawfully removing a black from the state. This new provision was at least in part the result of petitions from Middlesex County calling for a law to "prevent kidnapping and carrying from the State blacks and other people of color." Slaves owned by New Jersey residents could not be sold out of the state, and only under certain circumstances could owners permanently leaving the state take their slaves with them. Persons selling a slave for illegal export were to be fined between five hundred and a thousand dollars, or sentenced to one to two years at hard labor, or both. Purchasers and exporters were to be fined one to two thousand dollars and were to spend two to four years at hard labor. Officials were empowered to search ships for blacks who were being forced out of the state, and anyone resisting faced the same penalties as exporters. This law did not apply to bona fide transients from other states nor presumably to masters recovering fugitives.<sup>23</sup> But the law did make fugitive slave rendition more difficult by



requiring the master or his agent to make sure that the proper documentation was available before a removal took place.

The laws of 1788, 1798, 1804, and 1821 reflected the tension between the need to support the constitutional claims of Southerners and the almost universal belief in the North that slave catching was a dirty business, to be avoided by decent people. Indeed, throughout the North individual fugitive slaves often gained the sympathy of people who opposed abolitionists, believed in supporting the Union at all costs, and supported the South in politics. Thus, New Jersey's citizens were usually not inclined to support the return of fugitive slaves. Moreover, as the statute of 1798 indicates, they felt an obligation to protect both the liberty of their free black neighbors and some basic rights of the slaves living within their midst.

At the same time, however, unlike every other free state, as late as the 1830s New Jersey had a substantial slave population. New Jersey's legislators, and no doubt many of their constituents, were inclined to protect the property rights of their slaveholding neighbors. Thus, in New Jersey a tension existed between protecting local slaveowners whose human chattel might escape and protecting free blacks and fugitives from other states who lived in New Jersey. This tension is seen in the early New Jersey cases dealing with fugitive slaves.

In *The State v. Heddon* (1795), the New Jersey Supreme Court released Cork, a black who claimed he had gained his freedom during the Revolution. At the time, Cork was imprisoned in Essex County as a runaway slave, claimed by a man named Snowden. In a habeas corpus proceeding, the court ruled that Snowden's claim to Cork was insufficient and released the alleged slave.<sup>24</sup>

*Heddon* illustrates that before 1804 New Jersey treated blacks the way other slave states did. Officials presumed Cork was a slave, arresting him when he appeared to be wandering about without a master. The New Jersey court did not actually declare Cork to be free, but only determined that Snowden was not his owner, and since no one else claimed him, Cork had to be released from jail.

The Gradual Emancipation Act of 1804 did not end New Jersey's willingness to help in the return of fugitive slaves. In *Nixon v. Story's Administrators* (1813), a trial court awarded judgment against a man who had carried slaves from New Jersey to Pennsylvania. Although the Supreme Court reversed the verdict on technical grounds, the original judgment reveals the state's willingness to aid slave owners seeking their runaways.<sup>25</sup>

In *Gibbons v. Morse* (1821) and again in *Cutter v. Moore* (1825), the New Jersey court decided in favor of masters suing ship owners or captains who had allowed slaves to escape. New Jersey continued to enforce the provisions of the 1798 law that punished those who helped slaves

escape. In both cases the plaintiffs did not allege any intent to help the slaves escape. These were not the actions of abolitionists trying to undermine slavery; rather, they were the acts of common carriers who negligently allowed slaves to escape. In these civil suits motive was not an issue. In both cases the owners recovered for the value of the lost slaves.<sup>26</sup>

For blacks in New Jersey—free people, local slaves, or fugitives—these two cases set ominous precedents. In *Gibbons* the chief justice of New Jersey “charged the jury, that the colour of this man was sufficient evidence that he was a slave.” In upholding the jury’s verdict, the New Jersey Court of Errors and Appeals also affirmed that “the law presumes every man that is black to be a slave.” The headnotes to the official report of the case confirmed that “In New Jersey, all black men are presumed to be slaves until the contrary appears.”

*Cutter* explicitly reaffirmed this analysis. Unlike all other northeastern states, New Jersey accepted the Southern view that all blacks were presumed to be slaves until they could prove otherwise.<sup>27</sup>

### *The New Jersey Personal Liberty Law of 1826*

In 1826 New Jersey fundamentally altered its approach to fugitive slave rendition with the adoption of a new statute regulating fugitive slaves. This law required a claimant to apply to a judge for a warrant ordering a county sheriff to arrest the alleged fugitive slave. The judge would then hold a hearing and, if convinced that the person before him was a fugitive slave, would issue a certificate of removal. This law was designed to provide more protection for blacks living in New Jersey than was afforded by the federal Fugitive Slave Law of 1793. It was, as Chief Justice Hornblower asserted, “more humane and better calculated to prevent frauds and oppression” than the federal statute.<sup>28</sup> But, as Hornblower would also conclude, this law did not adequately protect against fraud and oppression.

Shortly after New Jersey adopted its 1826 act, Pennsylvania and New York passed similar laws. These laws “represent a voluntary effort to find a workable balance between a duty to protect free blacks and the obligation to uphold the legitimate claims of slave owners.” While balancing interests, these laws also represented a direct challenge to federal supremacy on the subject of fugitive slave rendition. These statutes added requirements to the rendition process that had been set out in the federal law of 1793. In 1842, in *Prigg v. Pennsylvania*, the Supreme Court would declare such extra requirements to be unconstitutional. But before *Prigg* these laws gave some protections to free blacks and fugitive slaves in New York, Pennsylvania, and New Jersey. These laws also are early examples of state legislatures finding independent and separate state grounds for protecting the liberty of their citizens. Chief Justice

Hornblower's decision in *State v. The Sheriff of Burlington* similarly reflects the nineteenth-century notion that the states, and not the federal government, were the primary guarantors of individual rights.<sup>29</sup> The case also underscores that in antebellum America the federal government, predicated on a proslavery constitution and perpetually dominated by slaveowners, posed greater dangers to individual rights than the Northern states.

### *The Hornblower Decision*

*State v. The Sheriff of Burlington*, an unreported case heard by the New Jersey Supreme Court in 1836, determined the meaning of the 1826 law. The case involved Alexander Helmsley, a black living near Mount Holley, New Jersey, his wife Nancy Helmsley, and their three children. Sometime around 1820 Helmsley, then a Maryland slave called Nathan Mead, escaped to New Jersey. There he married a woman who had been free in Maryland "by word of mouth" but had no free papers. In New Jersey the Helmsleys found work and raised a family of freeborn children.<sup>30</sup>

In 1835 John Willoughby, a Maryland attorney, purchased Helmsley "running" from the executor of Helmsley's deceased master. Another Maryland attorney, R. D. Cooper, claimed Nancy and the children as his own slaves.<sup>31</sup> On October 24, 1835, Willoughby and Cooper secured the arrest of the Helmsleys on a warrant issued by Burlington county judge George Haywood and had them placed in the county jail. Two days later Judge Haywood issued a writ of habeas corpus, which brought the Helmsleys into his courtroom. Following the habeas corpus hearing, Haywood recommitted Helmsley to the jail but apparently released his wife and children. At this point Helmsley's attorney applied to Chief Justice Hornblower for a writ of habeas corpus to bring the case before the New Jersey Supreme Court. While Hornblower would eventually issue this writ, he did not do so immediately. Thus, Helmsley remained in jail until November 24, when he was brought before Judge Haywood under a second writ of habeas corpus. Once again Judge Haywood returned Helmsley to the jail.

Throughout these proceedings friends of the Helmsleys provided the unfortunate family with attorneys who were abolitionists. The hearings before Judge Haywood raised numerous questions about the identity of the arrested blacks and if indeed they had been previously manumitted. A trial on the status of Helmsley finally began on December 9. After intermittent proceedings over a two week period, Haywood finally declared Helmsley to be the slave of the claimants and ordered him held in jail until he could be remanded to his owners.<sup>32</sup>

In early December, before Judge Haywood reached his decision on

the merits of the case, Helmsley's attorneys filed for a writ of certiorari to bring the case before the New Jersey Supreme Court. This writ was in addition to the request for the writ of habeas corpus filed in November. The extant court papers do not indicate the exact procedural developments in the case. The remaining record does show that in February 1836 Chief Justice Hornblower finally issued the writ of habeas corpus that Helmsley's attorney had applied for in November.<sup>33</sup>

On March 3, 1836, Helmsley was brought to Trenton, where the New Jersey Supreme Court determined his status. At this point Helmsleys' abolitionist attorneys deferred to more prominent counsel, William Halsted and Theodore Frelinghuysen. Halsted had previously been the reporter for the New Jersey Supreme Court. Frelinghuysen, the mayor of Newark, was a former United States senator, a leader of the American Colonization Society, and a politician not disposed to abolition. Nevertheless, he vigorously supported the claims of this black family living in New Jersey. This suggests the potency of claims to freedom by Blacks living in the North.

Hornblower began his analysis of the case by noting that the New Jersey law of 1826 was in conflict with, although not "in direct opposition" to, the federal law of 1793. The two laws prescribed "different modes of proceedings," and so, he concluded, "both cannot be pursued at one and the same time, and one only . . . must be paramount."<sup>34</sup>

Hornblower concluded that the federal law provided a "summary and dangerous proceeding" that afforded "little protection of security to the free colored man, who may be falsely claimed as a fugitive from labor." The New Jersey law was "more humane." The question for the court was which law should be paramount.<sup>35</sup>

Hornblower acknowledged that the United States Constitution made federal laws the "supreme law of the land," but he pointed out this was only true if the law was "made in pursuance" of the Constitution. This meant that if Congress had "a right to legislate on this subject," New Jersey's law was "no better than a dead letter." Hornblower, however, was unwilling to acknowledge that Congress had this power. Instead, he offered a careful analysis of Article IV of the Constitution.<sup>36</sup>

Hornblower compared the Full Faith and Credit clause of section 1 with the Fugitive Slave clause of section 2. The first provision explicitly gave Congress the power to "prescribe the manner in which" acts, records, and proceedings of one state would be proved in another. Similarly, Hornblower noted that section 3 of article IV also explicitly empowered Congress to pass legislation.<sup>37</sup> But no such language existed in section 2 of article IV. This led Hornblower to conclude that "no such power was intended to be given" to Congress for section 2. Indeed, Hornblower argued, Congressional legislation over the Privileges and Immunities clause or over interstate rendition "would cover a broad field, and lead to the most unhappy results." Such legislation would "bring the general

government in conflict with the state authorities, and the prejudices of local communities." Hornblower also noted, in a reference to the emerging proslavery argument in the South, that in "a large portion of the country, the right of Congress to legislate on the subject of slavery at all, even in the district [of Columbia] and territories over which it has exclusive jurisdiction, is denied." Thus, Hornblower found that Congress surely lacked the "right to prescribe the manner in which persons residing in the free states, shall be arrested, imprisoned, delivered up, and transferred from one state to another, simply because they are claimed as slaves." Hornblower warned that the "American people would not long submit" to such an expansive view of Congressional power.<sup>38</sup>

This analysis seemed to lead to only one conclusion: that the federal law of 1793 was unconstitutional. But Hornblower insisted that it was not his "intention to express any definitive opinion on the validity of the act of Congress." He thought he could avoid this grave responsibility because the case before him had been brought "in pursuance of the law of this state." However, Hornblower's position on the constitutionality of the federal law was unambiguous. His opinion explicitly argued that Congress lacked power to pass such a law.<sup>39</sup> The rest of his opinion dealt with the constitutionality of New Jersey's 1826 law. While not returning to the federal law, Hornblower's discussion of the state law implied that the federal law of 1793 was also unconstitutional because it did not guarantee a jury trial to putative slaves and thus violated the basic protections of due process found in the Constitution and the Bill of Rights.

Hornblower began his examination of New Jersey's 1826 law by affirming "the right of state legislation on this subject." He did not debate this question. He merely assumed the state had such a right. But the right to regulate fugitive slave rendition did not automatically make such a law constitutional. Hornblower complained that the 1826 law authorized "the seizure, and transportation out of this state, of persons residing here, under the protection of our laws." Hornblower noted that these blacks might be "free-born native inhabitants, the owners of property, and the fathers of families." Yet "upon a summary hearing before a single judge, without the intervention of a jury, and without appeal," they could be removed from the state. Rhetorically he asked, "Can this be a constitutional law?"<sup>40</sup>

Hornblower pointed out the possibilities for fraud and deception under the 1826 law. Under this law any free black could "be falsely accused of escaping from his master, or he may be claimed by mistake for one who has actually fled." These were issues of fact, which Hornblower believed should be decided by a jury. Indeed, he believed that the New Jersey constitution *required* that such a question come before a jury.<sup>41</sup>

Hornblower agreed that the Fugitive Slave clause of the Constitution had to "be executed fully, fairly, and with judicial firmness and integrity." But that did not require that "the person *claimed* shall be given

up." It only required that a person who actually owed service or labor "be given up" to his or her master. But the question of whether the person before the court actually owed service or labor was a factual one that only a jury could determine.<sup>42</sup>

Here Hornblower made a careful distinction between the Fugitives from Justice and the Fugitive Slave clauses of article IV of the Constitution. Hornblower believed that the former required the surrender of an alleged criminal "on demand of the EXECUTIVE authority of the state" because the person delivered up was "charged with a crime." However, being charged with a crime did not guarantee a conviction. An accused person was "to be delivered up, not to be punished, not to be detained for life, but to be *tried*, and if acquitted to be set at liberty."<sup>43</sup>

The case of fugitive slaves was different. They would not get a trial when returned to the claimant. They would face a lifetime of bondage. With unusually passionate language, Hornblower noted that the issue was "whether he is to be separated forcibly, and for ever, from his wife and children, or be permitted to enjoy with them the liberty he inherited, and the property he has earned. Whether he is to be dragged in chains to a distant land, and doomed to perpetual slavery, or continue to breathe the air and enjoy the blessings of freedom." Hornblower had no difficulty declaring the law of his own state to be "unconstitutional on the ground that it deprives the accused of a trial by jury."<sup>44</sup>

Hornblower still had one more hurdle to overcome before he could free the slaves before him. By 1836 very few cases involving fugitive slaves had come before American courts. Nevertheless, one of the few precedents on this subject complicated Hornblower's decision. In 1819 the prestigious chief justice of Pennsylvania, William Tilghman, had heard a similar case, involving an alleged fugitive slave held in a Pennsylvania jail. The incarcerated black had argued that under both the Pennsylvania and the United States constitutions he was entitled to a jury trial.<sup>45</sup>

In rejecting this plea, Chief Justice Tilghman had asserted that "our southern brethren would not have consented to become parties to a constitution under which the *United States* have enjoyed so much prosperity, unless their property in slaves had been secured." This implication of the "original intent" of the framers of the Constitution, like so much modern intentionalist analysis, had no basis in fact. This was of little matter to Tilghman, who had concluded that "the whole scope and tenor of the constitution and act of Congress" led to the conclusion "that the fugitive was to be delivered up, on a summary proceeding, without the delay of a formal trial in a court of common law." Tilghman had naively believed, or disingenuously claimed to believe, that any slave who "had really a right to freedom" could "prosecute his right in the state to which he belonged."<sup>46</sup> Thus, Tilghman would not release the alleged slave before him or grant him a jury trial.

This decision was from a different state and thus was not binding on

Hornblower. Nevertheless, Tilghman was a distinguished judge from an important, neighboring state. Hornblower could not simply ignore the decision. Instead, Hornblower boldly rejected it, reiterating his demand for due process by attacking Tilghman's belief that an alleged fugitive could "be transported" to another state because "he will there have a fair trial." Hornblower declared, "So long as I sit upon this bench, I never can, no I never will, yield to such a doctrine." Indignantly the New Jersey justice asserted:

What, first transport a man out of the state, on a charge of his being a slave, and try the truth of the allegation afterwards—separate him from the place, it may be, of his nativity—the abode of his relatives, his friends, and his witnesses—transport him in chains to Missouri or Arkansas, with the cold comfort that if a freeman he may there assert and establish his freedom! No, if a person comes into this state, and *here* claims the servitude of a human being, whether white or black, *here* he must prove his case, and here prove it according to law.<sup>47</sup>

With this opinion Hornblower established a right to a jury trial for any person claimed as a slave in New Jersey. He also overturned any vestiges of the notion that in New Jersey blacks were presumed to be slaves. Finally, Hornblower established himself and his court as perhaps the most antislavery justice and venue in the nation. Ironically, although New Jersey was the Northern state with the largest number of slaves, its supreme court had staked out the most progressive position on the rights of blacks claimed as fugitive slaves.

### *The Hornblower Opinion and Personal Liberty in the North*

Hornblower's position was a remarkable response to the problem of fugitive slaves. It was the first case where a state supreme court justice demanded due process protections and jury trials for alleged fugitive slaves. Hornblower had rejected the reasoning and analysis of the Chief Justice Tilghman and the Pennsylvania Supreme Court. Similarly, he had ignored a recent New York case, even though it might have bolstered his position that New Jersey need not follow the federal law of 1793.<sup>48</sup> Hornblower's opinion was as radical as anything the new abolitionist movement was demanding. Equally significant, Hornblower was ahead of moderate antislavery politicians on this issue. A comparison with rulings in other states illustrates the radical position of Hornblower.

In 1826 Pennsylvania had adopted a personal liberty law that resembled the New Jersey law of the same year. Although the Pennsylvania Abolition Society thought this law was "a manifest improvement upon

the previously existing laws," the law hardly offered blacks due process. A single magistrate in Pennsylvania, without the aid of a jury, would decide the status of the alleged slave. Although the law has been correctly characterized as "a compromise between what were considered the demands of the fugitive slave clause, and the responsibility to protect the personal liberty of free blacks," the 1826 act did not guarantee a jury trial, or indeed a trial of any kind, on the issue of freedom. Unlike New Jersey, Pennsylvania was unwilling to move from this position in the 1830s. In 1837, a year after the *Hornblower* decision, the Pennsylvania legislature overwhelmingly defeated a bill to provide jury trials in fugitive slave cases. In the Pennsylvania senate only ten of thirty-one senators present voted in favor of the bill; the Pennsylvania house defeated the proposal by a vote of seven for and ninety-three against.<sup>49</sup>

In 1835 Massachusetts had eliminated the common law remedy of the writ of *de homine replegiando*. This writ had allowed alleged fugitives to try their claim to freedom before a jury. With the writ gone, and no jury trial law on the books, alleged fugitives in Massachusetts were at the mercy of a single magistrate and the federal law of 1793.<sup>50</sup>

The situation in New York was more complicated. In 1828 New York had adopted a procedure to allow the return of fugitive slaves after a hearing before a judge. However, alleged fugitives were allowed under another statute to apply for a writ *de homine replegiando*, which would bring their status before a jury. But in *Jack v. Martin* the New York Supreme Court concluded that the statute allowing a writ *de homine replegiando* in fugitive slave cases was unconstitutional. On appeal to the New York Court for the Correction of Errors, Chancellor Reuben Walworth held in 1835 that the writ should apply to alleged slaves. However, Walworth, along with the rest of that court, ruled that Jack was a fugitive slave, and he was remanded to his owner. Thus, after 1835 it was impossible to know exactly what the status of a jury trial was for alleged fugitives seized in New York. In 1838, New York abolitionists questioned candidates for governor on whether they supported a jury trial in fugitive slave cases. The Democratic candidate ignored the questions, while the victorious William H. Seward was evasive. Not until 1840 did Seward sign into law a bill guaranteeing a jury trial for fugitive slaves.<sup>51</sup>

Within a year of *Hornblower's* opinion, New Jersey adopted a new law, the Personal Liberty Law of 1837, regulating the return of fugitives from the state. The law sailed through the legislature, with minimal discussion in the House and almost no debate at all in the Council. This statute allowed for a summary hearing before a state court, but instead of one judge deciding the case, a panel of three judges would be convened. The law also provided that "if either party shall demand a trial by jury, then it shall be the duty of the said judge, before whom such fugitive shall be brought," to impanel a jury to determine the black's status. This was the first statute in the North to guarantee a jury trial for fugitive



slaves. It placed New Jersey in the forefront of the emerging movement to protect free blacks and alleged fugitive slaves.<sup>52</sup>

In 1842, in *Prigg v. Pennsylvania*, the United States Supreme Court ruled that state laws which interfered with the rendition of fugitive slaves were unconstitutional. Justice Joseph Story, who wrote the majority opinion, upheld the constitutionality of the 1793 law; asserted, in what may be one of the earliest uses of the "preemption doctrine" in federal constitutional law, that the law preempted the entire question; and concluded that no state could make additional regulations for the return of fugitives. Story based some of his decision on the same sort of incorrect history that Judge Tilghman had used in *Wright v. Deacon*. This ruling of course undermined Hornblower's opinion and the 1837 statute. Nevertheless, when New Jersey revised its statutes in 1846, the legislature included the 1837 act.<sup>53</sup>

### *The Hornblower Opinion and Antislavery Legal Theory*

Although Hornblower's opinion had some impact on New Jersey law, it had little immediate effect on the rest of the nation. The opinion was never officially reported because, as Hornblower later explained, "it [was] thought best on a conference between my associates and myself not to agitate the public mind on the question of the constitutionality of the Act of Congress of 1793, then in force." As we have seen, Hornblower's opinion did not become a useful legal precedent for abolitionist attorneys. Only after it was published as a pamphlet in 1851 did the opinion become important—and then mostly as a political precedent. Moreover, Hornblower's failure to publish the opinion eventually undermined its value in New Jersey. The opinion probably set the stage for the adoption of New Jersey's Personal Liberty Law of 1837.<sup>54</sup> But, as knowledge of the unpublished opinion dwindled, its utility as a precedent disappeared.

The decision not to officially publish the opinion limited the public's access to newspaper accounts of the case. That had two consequences. First, it undermined the opinion as a precedent. Second, it led to conflicting understandings of exactly what was in the opinion.

The first newspaper account of the case was in *The Friend*, published by antislavery Quakers in Philadelphia. This report did not appear until June, three months after the decision. A month later the nation's leading antislavery newspaper, the *Liberator*, reprinted this article under the headline "Important Decision." *The Liberator* quoted favorably one of Helmsley's original abolitionist attorneys, who declared "this day" was "the brightest that has dawned upon this unfortunate race of beings since the year 1804," the year New Jersey had passed its Gradual Emancipa-

tion statute, "and the proudest which has occurred in our judicial history, since we became a state."<sup>55</sup>

At about the same time another abolitionist periodical, the *Emancipator*, reprinted of the original article in *The Friend*. The *Emancipator* added a summary of the three major points of Hornblower's decision: that the federal fugitive slave law of 1793 was unconstitutional; that all people in New Jersey had a right to a jury trial; and that "the color of a person should be no longer considered as presumptive evidence of slavery" in New Jersey. Meanwhile, the *New York Evening Star* also wrote about the decision. The *Evening Star*, basing its assessment of the case on the story in the *Emancipator*, editorialized that under this decision New Jersey had become "an asylum of fugitive slaves" where owners lacked "any hope of recovering such property."<sup>56</sup>

Both newspaper reports were somewhat incorrect. Hornblower had not actually declared that the federal law of 1793 was unconstitutional, although his opinion certainly implied it was. The assertions in the *Emancipator* that alleged fugitives were entitled to a jury trial and that blacks were presumptively free did accurately reflect Hornblower's opinion, but the *Evening Star* clearly exaggerated when it stated that New Jersey had become an "asylum" for fugitive slaves. However, had the principles of Hornblower's decision been vigorously adopted throughout the state, slave catching would have become quite difficult.

In August the *Newark Daily Advertiser* attacked the decision and the various newspaper accounts of it. The *Daily Advertiser* was unhappy with the decision and with public perceptions of it. The *Daily Advertiser* began its comment by quoting briefly from the stories in the *Emancipator* and the *New York Evening Star*.<sup>57</sup> The *Daily Advertiser* believed these newspaper reports had created an erroneous impression that needed to be countered.

But if the reports of the case in the *Emancipator* and the *Evening Star* were incorrect, so too was *Daily Advertiser's* own account of the case. This paper asserted that the "only point decided by the Court was, that upon the facts of the case, . . . the prisoner was entitled to be discharged out of jail." The paper conceded that all blacks in the state were presumed free, while it inaccurately denied that Hornblower had spoken to this point. The *Daily Advertiser* stressed that Hornblower's opinion had not been written and was therefore not a precedent at all. The paper complained that "an obscure partizan press" (like the *Emancipator*) was allowed to publish misleading articles about the law by "catching reports of cases . . . from the lips of lookers-on, and spreading them before the world as decisions." The *Daily Advertiser* feared that other papers would make the same mistake as the *Evening Star* and believe the report in the *Emancipator*. The Newark paper feared that this would lead to a "kindling [of] prejudice and passion" in "the Southern States, against one of the most respectable legal tribunals in the country."<sup>58</sup>

The *Daily Advertiser's* fears were unnecessary. Because it was unre-

ported, few people learned of Hornblower's decision. Moreover, shortly after the decision, abolitionists in New Jersey discovered that their victory was incomplete. In deciding the case Chief Justice Hornblower had said New Jersey's act of 1826 was unconstitutional. Other judges in the state apparently accepted this, but with ironic results.

While declaring the law violated New Jersey's constitution, Hornblower did not rule on the constitutionality of the federal law, in part because he did not have to and in part because he did not want to directly confront the national government. The result left New Jersey's free blacks and fugitives slaves in a worse position than before the Helmsley case. The 1826 New Jersey law had offered fugitive slaves more protection than the federal law, although not as much as Hornblower demanded. But with the 1826 act no longer in force, slave catchers could still use the federal law of 1793.

In August 1836 the arrest of Severn Martin, a black living in Burlington, New Jersey, revealed the irony of Hornblower's opinion. Martin had lived in the area for seventeen years, and there was little evidence that he was a slave. Only the "energy and judgment displayed by the Mayor" prevented a riot, as several hundred people "attempted to rescue" Martin. When calm was restored, a county magistrate, applying the loose evidentiary standards of the federal law of 1793, remanded Martin to the man who claimed to be his owner. The claimant quickly removed Martin. He was only freed when his New Jersey friends raised eight hundred dollars to purchase him.<sup>59</sup>

Because this "atrocious case occurred in New Jersey," the Philadelphia paper *Human Rights* rhetorically asked, "What has become of the decision of Chief Justice Hornblower?" The paper concluded the decision was "inoperative" because it had declared the state law, but not the federal law, unconstitutional, even though the latter also denied a right to trial by jury. The New Jersey legislature remedied this situation at its next session, when it passed the 1837 law giving alleged fugitive slaves greater legal protections than they had previously enjoyed, including the right to demand a jury trial.<sup>60</sup>

### *The Resurrection of the Hornblower Opinion*

Because Hornblower's opinion was never officially reported, it was not generally cited by abolitionist lawyers in other fugitive slave cases. In Boston the nation's most prominent abolitionist, William Lloyd Garrison, urged Ellis Gray Loring, the city's most prominent abolitionist attorney, to

assume the ground maintained by Judge Hornblower of New Jersey—viz.—that the law of Congress regulating the arrest of fugitive slaves, is unconstitutional, because no power is given by the Constitution to

Congress to legislate on the subject—that every person in the State, white or black, free or slave, is entitled to a trial by jury—and that the color of a person should be no longer considered as presumptive evidence of slavery.

However, there is no evidence that Loring in fact ever cited the case. The one lawyer who did use the opinion was Salmon P. Chase, the "attorney general for fugitive slaves," who cited a newspaper account of Hornblower's opinion in attempting to free the slave Matilda, in 1837.<sup>61</sup> At the time, however, Chase had not seen a complete report of the opinion. With the emergence of a new fugitive slave law in 1850, Hornblower and his 1836 opinion gained new fame.

In April 1851 Chase, by this time a U.S. senator, sent Hornblower a copy of his brief to the United States Supreme Court in the fugitive slave case of *Jones v. Van Zandt*. Chase also sent Hornblower a copy of a speech he had given on the new fugitive slave law. Chase did not know Hornblower, but Chase often sent copies of his speeches and legal arguments to strangers who might agree with his position. In this letter Chase mentioned that he had cited the 1836 Helmsley opinion in Matilda's case, and Chase asked Hornblower for a copy of that opinion.<sup>62</sup>

Hornblower immediately responded with a gracious and lengthy letter thanking Chase for the material he had sent. He praised Chase for the "noble stand" the Ohio Senator had "taken in behalf of right; in behalf of law; of justice; humanity, of the Constitution, of patriotism, of philanthropy, of universal emancipation of the human race in body & mind, and of all that is calculated to elevate our fellow men, to the dignity of manhood." Hornblower complained that the "sacred . . . soil of New Jersey, consecrated by the blood of our fathers, in their struggles for human liberty, is now desecrated by the feet of bloodhounds pursuing their victims," and that "Jerseymen" and all "other free Americans" faced fines or imprisonment if they refused to "join in the chase."<sup>63</sup>

Hornblower concluded this four-page letter by explaining to Chase that in the Helmsley case he had prepared a long opinion but did not actually read it from the bench. Instead, he had given an oral summation of his points. Although it now lay in his "mass of miscellaneous unfinished" writings, Hornblower promised to find the opinion and send it to Chase.<sup>64</sup>

Shortly after Chase asked for a copy of the opinion, William Dayton, a former U.S. senator from New Jersey, also asked for a copy. Dayton had been on the Senate Judiciary Committee during the debates over the Fugitive Slave Law of 1850, and he regretted that he had not had access to Hornblower's opinion then.<sup>65</sup>

It is unknown if Hornblower ever sent either Chase or Dayton a full copy of the opinion. However, in 1851 the long-dormant opinion took on a new life. That summer an antislavery convention in Ohio read

Hornblower's opinion and ordered it published.<sup>66</sup> This convention could have obtained the text of the opinion from Chase (who was from Ohio) or some old newspaper account.

Meanwhile, portions of Hornblower's letter to Chase appeared in newspapers and were "extensively disseminated by the press." The excerpts from the letter included references to the Helmsley case. These newspaper accounts prompted William Jay, the abolitionist attorney and son of former Chief Justice John Jay, to write Hornblower praising his antislavery position. Jay was especially pleased to find a "gentleman moving in" Hornblower's "sphere"—that is to say, a fellow bona fide upper-class American brahmin—who also opposed slavery. Hornblower then offered to send a copy of his Helmsley opinion to Jay, and by the end of July he had done so.<sup>67</sup>

Hornblower sent Jay the original manuscript opinion, which Jay excitedly read and then sent to New York City to have it published. On 30 July 1851 the opinion appeared on the front page of the *New York Evening Post*. In addition to publishing Hornblower's opinion in a newspaper, Jay arranged for its publication and distribution in pamphlet form. Jay told Hornblower he could have "as many copies of the pamphlet as you might desire," which made sense, since the pamphlet had been published for "gratuitous distribution."<sup>68</sup>

Printed with the opinion was a short unsigned commentary (actually written by Jay) quoting Massachusetts senator Daniel Webster's "Seventh of March Speech" together with a short attack on Webster for his support of the Fugitive Slave Law of 1850. Following this commentary was an extract from a letter from Hornblower to Jay, also attacking Webster and the Fugitive Slave Law of 1850.

The commentary and the quotations from Webster and Hornblower supported the notion that fugitive slave rendition should be kept in the hands of the states. The pamphlet quoted Webster's "Seventh of March" speech where he declared:

I have always thought that the constitution addressed itself to the legislatures of the states themselves, or to the states themselves. It says that those persons escaping into other states, shall be delivered up, and I confess I have I always been of opinion that it was an injunction upon the states themselves.<sup>69</sup>

Jay quoted Webster on this issue to make two points. First, if the "constitution addressed . . . the states," then the federal laws of 1793 and 1850 were unconstitutional, as Hornblower had intimated in 1836, and the states should accordingly protect black rights and black freedom through appropriate legislation. Hornblower in effect held that "adequate and independent state grounds"—to use a modern concept—existed to protect free blacks from kidnapping and to insure that alleged fugitive slaves

received due process.<sup>70</sup> Second, if this position was correct, then Webster, who had become an anathema to many Northerners—a “monster,” a “fallen angel,” “incredibly base and wicked”—was further exposed as a hypocrite whose only concern was his political ambition.<sup>71</sup>

Jay and his fellow abolitionists were willing to give away this pamphlet because they believed that Hornblower's opinion was an invaluable asset to their antislavery constitutionalism. Unlike most antislavery propaganda, this assault on the fugitive slave laws had not been written by an abolitionist. Rather, the opinion came from the respected chief justice of a very conservative northern state. This increased the credibility of the opinion and its potential impact on Northern society.

Even before the *Evening Post* printed the full text of Hornblower's manuscript, the opinion was apparently circulating within the antislavery movement. The potential of Hornblower's denunciation of the Fugitive Slave Law of 1793 and his support of due process for blacks became clear in the wake of the adoption of the Fugitive Slave Law of 1850. Finally, in early August 1851 Jay's pamphlet printing of the opinion began to circulate. Although they had asked Hornblower for a copy of the opinion before Jay did, neither Chase nor Dayton may have seen the full opinion before Jay had it published.

After reading the full opinion, Chase complimented Hornblower and expressed his regret that the opinion had not been “printed and generally circulated” when first delivered because it would “certainly have done much good.” Chase thought that Hornblower's opinion might have prevented the “promulgation of the consolidation doctrines of constitutional construction” accepted by many “from whom better things might have been expected.”<sup>72</sup>

The flurry of activity surrounding the opinion dissipated in 1851 but reemerged during the crisis over the Kansas-Nebraska Act in 1854. That year the *Trenton State Gazette* reprinted the opinion as a front-page story, noting that “Although delivered before the passage of the fugitive law of 1850, its arguments are such as will apply to that and all other laws passed by Congress for the rendition of fugitives.” This paper endorsed Hornblower's argument that a jury trial was necessary for the return of a fugitive slave.<sup>73</sup>

A few months later Horace Greeley's *New York Tribune* cited Hornblower's opinion in arguing that judges should oppose the Fugitive Slave Law of 1850, which the paper believed violated “reason and the vital principles of the Constitution.” The *Tribune* praised the the Wisconsin Supreme Court, which had declared the law unconstitutional in the case that would eventually come to the United States Supreme Court as *Ableman v. Booth*. “Chief Justice Hornblower of New-Jersey,” the *Tribune* noted, “sometime ago, led the way in an elaborate opinion denying the power of Congress to legislate on the subject of fugitive slaves.”<sup>74</sup>

In the legal conflicts caused by the Fugitive Slave Law of 1850, the

Ohio Supreme Court saw the opinion as a valid precedent, although members of that court disagreed on what it stood for. Both majority and dissenting judges cited Hornblower's opinion in *Ex parte* Bushnell, *Ex parte* Langston, a case growing out of the famous Oberlin-Wellington rescue. Simeon Bushnell and Charles Langston were in jail, under federal process, for their role in rescuing a fugitive slave. In concurring in the decision not to release the abolitionists, Justice Peck noted that in 1836

Ch. J. Hornblower, of New Jersey . . . expressed doubts as to the validity of the act of 1793, on the ground of a want of constitutional power to pass it, and also of the validity of the act of New Jersey, but declined to declare either law invalid, and finally discharged the prisoner, because the proceedings did not conform to the requirements of the act of the State of New Jersey.<sup>75</sup>

In dissent, Justice Jacob Brinkerhoff, an abolitionist ally of Salmon P. Chase, found that Hornblower's opinion, along with Chancellor Walworth's of New York Court in *Jack v. Martin*, "shows that the question" of federal power to pass a fugitive slave law "is not settled." Justice Sutliff, also in dissent, cited both Hornblower and Walworth for the proposition that the Fugitive Slave Clause of the Constitution "vests no power in the federal government" to adopt legislation.<sup>76</sup>

In March 1860 Senator Benjamin F. Wade of Ohio conceded that Congressional jurisdiction over fugitive slave rendition had been accepted, "the courts having adjudicated that point against my opinions;" but he argued that "no lawyer would agree with the courts were it a case of first impression." He disputed that the courts of the nation had been unanimous on this question, as Senator Robert Toombs of Georgia had asserted. Wade pointed out that "Judge Hornblower, of New Jersey, on *habeas corpus*, held the law [of 1793] unconstitutional, and discharged the fugitive for that reason."<sup>77</sup> This was a slight exaggeration of what Hornblower had held. He never reached the constitutionality of the federal law because the case came before him under the state statute.

Less than a month later, New Jersey's Senator John C. Ten Eyck attempted to straighten out the facts of the case. He told the senate that Hornblower had not in fact declared the 1793 law unconstitutional but had freed the slaves before him "on the ground of defective evidence."<sup>78</sup> This was also an incorrect statement of what had occurred.

The speeches by Wade and Ten Eyck led to some correspondence between Hornblower and his senator. In a letter to Ten Eyck, Hornblower reaffirmed his position in the case and his opposition to remanding fugitive slaves without jury trials. Hornblower also noted that the two other judges on the court, "both of them my political opponents," agreed with him. One of these, Judge Ford, was himself a slaveholder, with family ties

to South Carolina. Nevertheless, the New Jersey justices were unanimous in their belief that Helmsley should be discharged from custody. Hornblower believed that Senator Ten Eyck, or Hornblower's "friend," the more radical Benjamin Wade, should bring these facts before the Senate.<sup>79</sup>

By 1860 the Hornblower opinion had become part of the growing crisis of the Union. In 1836 Hornblower had argued that the powers of Congress in article IV were strictly limited. They did not include the right to legislate over fugitive slaves. This, he believed, was reserved for the states. That position, however, had been rejected by the Congress in 1793, by the Supreme Court in 1842, and again by the Congress in 1850.

In 1860 the eighty-three-year-old Hornblower suggested that the defeat of his position might yet help promote antislavery. Writing to Senator Ten Eyck, Hornblower suggested that someone "introduce a bill in Congress to secure to citizens of this or any other state the same 'immunities', they enjoy here, in every other state, or in other words, to carry into effect the provision of that section." Hornblower's logic was clear. If Congress had the power to pass legislation to enforce the fugitive slave clause of article IV of the Constitution, then Congress also had the power to enforce the Privileges and Immunities clause of article IV. Hornblower thought that a bill along these lines would "add fuel to the fire already burning in the South" and "what is now comparatively a small combustion will become a volcano."<sup>80</sup> The retired justice may by this time have regretted not publishing his 1836 decision, for he no longer thought that deference to the South, or federal power, was the answer to the problem of slavery in the nation.

## Notes

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1. *State v. The Sheriff of Burlington*, No. 36286 (N.J. 1836) (unreported decision of New Jersey Court of Errors and Appeals, case records on file at New Jersey State Archives; hereinafter cited as *Helmsley Case file*.) In the *Helmsley Case file* this case is called *Nathan, Alias Alex. Helmsley v. State*.

2. Salmon P. Chase to Hornblower, April 3, 1851, Hornblower Papers, box



2. New Jersey Historical Society, Newark. Chase cited Hornblower's opinion before the Cincinnati Court of Common Pleas in the case of Matilda. Salmon P. Chase, *Speech of Salmon P. Chase in the Case of the Colored Woman, Matilda* (Cincinnati: Pugh and Dodd, 1837), 18; reprinted in *Southern Slaves in Free State Courts: The Pamphlet Literature*, ed. Paul Finkelman (New York: Garland, 1988), 2:1-40. William Jay to Hornblower, July 11, 1851, Jay Family Papers, Rare Book and Manuscript Library, Columbia University. Jay wrote: "In 1838 the question occurred to me, under what constitutional grant of power Congress has passed the fugitive slave law of 1793. I was not aware that the question had been mooted before." On the friendship between the two families, see Jay to Hornblower, August 12, 1851, Jay Family Papers, thanking Hornblower for his support "Your commendation is necessarily valuable to all who are honored by it, but to me it is peculiarly so, as coming from my Father's friend." Letters from Jay Family Papers are cited and quoted with permission of the Rare Book and Manuscript Library, Columbia University.

3. *Opinion of Chief Justice Hornblower on the Fugitive Slave Law* ([New York]: [New York Evening Post], [1851]); reprinted in *Fugitive Slaves and American Courts: The Pamphlet Literature*, ed. Paul Finkelman (New York: Garland, 1988), 1:97-104. (hereinafter cited as Hornblower Opinion). This is an incomplete report of the case but the best that exists. The text of this pamphlet is *exactly* the same as an article appearing in the *New York Evening Post* on August 1, 1851. The type and fonts for both also seem to be identical. It appears that the pamphlet was printed from the fonts of the *Post*, and logically it would have been published by the *Post*.

4. *Ex parte* Bushnell, *Ex parte* Langston, 9 Ohio St. 77, at 205, 227, 321 (1859).

5. There is no good history of slavery in New Jersey. Helpful early studies include: Henry Schofield Cooley, *A Study of Slavery in New Jersey* (Baltimore: Johns Hopkins Press, 1896); Marion Thompson Wright, "New Jersey Laws and the Negro," *Journal of Negro History* 28 (1943): 156-99; Simeon F. Moss, "The Persistence of Slavery and Involuntary Servitude in a Free State (1685-1866)," *Journal of Negro History* 35 (1950): 289-314. The most important modern contribution to this literature is Arthur Zilversmit, "Liberty and Property: New Jersey and the Abolition of Slavery," *New Jersey History* 88 (1970): 215-26; reprinted in *Slavery in the North and the West*, ed. Paul Finkelman (New York: Garland, 1989), 485, 491-96. Also useful is Francis D. Pigeon, "Dissenting Attitudes toward the Negro in New Jersey," *New Jersey History* 89 (1971): 197-220.

6. The society did not formally draft a constitution until 1793, when members of the older Pennsylvania Abolition Society came to Burlington, New Jersey, for the formal signing of the Constitution of the New Jersey Society. Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967), 173.

7. Act of Feb. 15, 1804, 1811 N.J. Laws 103-09 ("An Act for the Gradual Abolition of Slavery"), published as *Laws of the State of New Jersey, Compiled and Published under the Authority of the Legislature* 103-09, (Joseph Bloomfield, ed., Trenton: James J. Wilson, 1811). Act of March 1, 1780, 1810 Pa. Laws 1, 492-93 (Philadelphia: Bioren, 1810).

8. Act of Mar. 29, 1799, ch. 62, 1799 N.Y. Laws 388 ("An Act for the Gradual Abolition of Slavery"). Act of Mar. 31, 1817, ch. 137, 1817 N.Y. Laws 136 ("An Act relative to slaves and servants"). See *State v. Post* and *State v. Van Beuren*, 20

N.J.L. (1 Spenc.) 368 (1845); *aff'd. o.b.*, 21 N.J.L. 699 (1848). See also Dan Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 4 *Law and History Review* 337.

9. *Statutes of the State of New Jersey. Revised and Published under the Authority of the Legislature* 567-72 (Trenton, Phillips and Boswell, 1847), later reprinted in *Digest of the Law of New Jersey* 801-10 (Lucius Q. C. Elmer ed., 3d ed., Bridgeton, Elmer and Nixon, and Trenton; C. Scott, 1861).

10. Clement A. Price, *Freedom Not Far Distant: A Documentary History of Afro-Americans in New Jersey* (Newark: New Jersey Historical Society, 1980), 92; Pingeon, "Dissenting Attitudes toward the Negro in New Jersey," 198-99.

11. Benjamin Drew, *A North-Side View of Slavery. The Refugee; or, The Narratives of Fugitive Slaves in Canada* (Boston: John P. Jewett, 1856), 33-34.

12. 2 *Annals of Cong.* 861 (debate of Feb. 5, 1793). 4 *Annals of Congress*, 1767 (debate of Jan. 2, 1797); *Journal of the House*, 4th Cong., 2d Sess. 67. Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, N.Y.: M. E. Sharpe, 1996), 80-104.

13. 4 *Annals of Cong.* 2024.

14. These states, along with Virginia, had been the only ones to consistently oppose the slave trade compromise at the Constitutional Convention. Finkelman, *Slavery and the Founders*, Chapter 1, "Making a Covenant With Death: Slavery and the Constitutional Convention," 1-33.

15. Zilversmit, "Liberty and Property," 225. On Jefferson's Negrophobia, see Winthrop Jordan, *White over Black: American Attitudes towards the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968); Finkelman, *Slavery and the Founders*, 105-168. While beyond the scope of this essay, it may be noted that the change in direction for New Jersey after 1801 suggests that the slaveholding majority in Jefferson's party led to the creation of northern doughface Democrats long before the antebellum period.

16. Act of Mar. 2, 1786, 1786 N.J. Acts, published as *Acts of the Tenth General Assembly of New Jersey . . . Second Sitting* (Trenton, 1786). The fines were fifty pounds for slaves imported from Africa since 1776 and twenty pounds for other blacks. Visitors and transients were exempt from the duty as long as they removed the slave from the state. This act is discussed in Cooley, *A Study of Slavery in New Jersey*, 18-19. In *State v. Quick*, 2 N.J.L. (1 Pennington) 393, 413e (1807), the New Jersey court refused to free a slave who was illegally exported from New York into New Jersey.

17. Act of Mar. 2, 1786 *supra* note 17.

18. Act of Nov. 25, 1788, 1788 N.J. Acts 13, 486-88. For one example of a Southerner prosecuted for teaching free blacks to read, see *The Personal Narrative of Mrs. Margaret Douglass, A Southern Woman, Who Was Imprisoned for One Month in the Common Jail of Norfolk, under the Laws of Virginia, for the Crime of Teaching Free Colored Children to Read* (Boston: John P. Jewett, 1854); reprinted in *Slaves, Rebels, Abolitionists, and Southern Courts: The Pamphlet Literature*, ed. Paul Finkelman (New York: Garland, 1988), 2:373-439. Zilversmit, *First Emancipation*, 159, and generally, Zilversmit, "Liberty and Property."

19. An Act to Authorize the Manumission of Slaves," ch. 61, 1782 Va Laws. See Robert McColey, *Slavery in Jeffersonian Virginia* (Urbana: University of Illinois Press, 1972). Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution*, 2d ed. (Washington: Printed for the

Author, 1836), 3:422-23. The Assembly Journal is quoted in Cooley, *A Study of Slavery in New Jersey*, 25. Zilversmit, *First Emancipation*, 161-62.

20. Act of March 14, 1798, § 27, 1798 N.J. Laws. ("An Act Respecting Slaves"). Leon F. Litwack, *North of Slavery* (Chicago: University of Chicago Press, 1961), 70, cites this law as an example of northern negrophobia. However, Litwack has failed to realize or acknowledge that at the time New Jersey adopted the law it was a *slave* state, and that for a *slave* state this was an unusually progressive law. For a discussion of the problem of understanding Northern law and race relations, see Paul Finkelman, "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North," 17 *Rutgers Law Journal* 415, at 432-34 (1986).

21. Act of Mar. 14, 1798, §27, 1798 N.J. Laws, §§4-7 ("An Act Respecting Slaves").

22. Act of Feb. 15, 1804 ("An Act for the Gradual Abolition of Slavery"); Act of Mar. 8, 1806 ("An Act to repeal the third section of an act entitled 'An act for the gradual abolition of slavery,' passed the fifteenth day of February, eighteen hundred and four"); Act of Nov. 28, 1808 ("An additional supplement to the act entitled 'An act for the gradual abolition of slavery.'") Act of Feb. 22, 1811 ("An Act concerning the Abolition of Slavery"); Act of Dec. 3, 1804 ("An Act supplementary to the act respecting slaves") All published in 1811 N.J. Laws (*supra* note 7) 103-9, 141-43.

23. Wright, "New Jersey Laws and the Negro," 179. Act of Feb. 24, 1820, §§ 11-21, 1820 N.J. Laws 74-80 ("An Act for the gradual abolition of slavery, and for other purposes respecting slaves"). Masters moving out of the state could take slaves with them only if they had lived in the state for the previous five years, had owned the slave during that time, and had obtained the slave's consent to the move. On slave transit in New Jersey, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), 71, 76-77, 83.

24. *State v. Heddon*, 1 N.J.L. (1 Coke) 328 (1795). Heddon was the jailer who held Cork.

25. *Nixon v. Story's Administrators*, 3 N.J.L. (2 Pennington) 722 (1813).

26. *Gibbons v. Morse*, 7 N.J.L. (2 Halsted) 253 (1821); *Cutler v. Moore*, 8 N.J.L. (3 Halsted) 219 (1825).

27. *Gibbons v. Morse*, *supra* note 26, at 270. *Cutler v. Moore*, *supra* note 26, at 225. In *Boice v. Gibbons*, 8 N.J.L. (3 Halsted) 324 (1826), the New Jersey court retreated slightly from this position, implying that being black might not lead to a *prima facie* assumption of slavery. See also *Fox v. Lambson*, 8 N.J.L. (3 Halsted) 366 (1826).

28. Act of Dec. 26, 1826, N.J. Laws 51 ("A Supplement to an Act entitled 'An Act concerning slaves'"). *Hornblower Opinion* at 4.

29. Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore: Johns Hopkins University Press, 1974), 57. Unfortunately, Morris does not discuss or analyze the New Jersey law. *Prigg v. Pennsylvania*, 41 U.S. (16 Peters) 536, 539 (1842). In the Constitutional Convention James Wilson of Pennsylvania asserted that one purpose of the states was "to preserve the rights of individuals." Similarly, Oliver Ellsworth of Connecticut explained that he looked to the state governments "for the preservation of his rights." Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven:

Yale University Press, 1966), 1:354, 492. Significantly, perhaps, both Wilson and Ellsworth subsequently served on the United States Supreme Court.

30. Drew, *North-Side View*, 33-34. Like many other fugitive slave cases, this one was complicated by the length of time Helmsley had lived in New Jersey, the roots he had put down, and the fact that his children had been born in a free state and thus were free persons.

31. "Upholding Slavery," 20 *The Friend* 281-82 (June 11, 1836).

32. Application for writ of habeas corpus, in Helmsley Case file. "Upholding Slavery," 281-82. Portions of this article are reprinted as "Important Decision," *The Liberator*, July 30, 1836, 124. Helmsley did not admit he was a fugitive slave until after Chief Justice Hornblower had released him and he had moved to Canada.

33. "Upholding Slavery," 281-82. Application for writ of habeas corpus in Helmsley Case file.

34. *Hornblower Opinion* at 1.

35. *Ibid.*, at 4.

36. *Ibid.*

37. U.S. Const. art. IV, § 3, ¶ 2, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

38. *Hornblower Opinion* at 4-5.

39. *Ibid.*, at 5.

40. *Ibid.*

41. *Ibid.*, at 6.

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*, at 6, 7.

45. *Wright otherwise called Hall v. Deacon, Keeper of the Prison*, 5 Serg. & Rawle 62 (Pa. 1819). The United States Supreme Court would not decide a fugitive slave case until *Prigg v. Pennsylvania*, *supra* note 32.

46. *Wright v. Deacon* at 63-64. The fugitive slave clause was added to the Constitution late in the Convention, with little debate and with no demands made by southerners for it. Rather, it seems to have been something that a few southerners wanted and that no northerners opposed. See Finkelman, *Slavery and the Founders*, Chapter 1. For a discussion of the failure of intentionalists as historians, see Paul Finkelman, "The Constitution and the Intentions of the Framers: The Limit of Historical Analysis," 50 *University of Pittsburgh Law Review* 349-398 (1989).

47. *Hornblower Opinion* at 6.

48. In *Jack v. Martin*, 12 Wend. 311 (N.Y. Sup. Ct. 1834) and 14 Wend. 507 (N.Y. 1835), the New York court had denied federal power over fugitive slave rendition while acknowledging the state's obligation to return fugitives under the Constitutional clause in article IV. Despite the different outcomes of the two cases, Hornblower's position was relatively close to New York's. In finding the New Jersey law in violation of the state constitution, Hornblower implied that he might uphold a valid rendition law adopted by his state.

49. Act of Mar. 26, 1826, 1826 Pa. Laws 150-55 ("An Act to Give effect to the provisions of the Constitution of the United States Relative to Fugitives From Labor, For the protection of Free People of Color, and to Prevent Kidnapping").

Morris, *Free Men All*, 52, 53 *The Liberator*, March 24, 1837, 52, reprinting a story from the *Harrisburg Keystone*.

50. Morris, *Free Men All*, 64-65.

51. *Ibid.*, 55-57. *Jack v. Martin*, *supra* note 48, 1834 at 327, 1835 at 512. Paul Finkelman, "The Protection of Black Rights in Seward's New York," *Civil War History* 34 (1988): 211-34.

52. Act of Feb. 15, 1837, 1837 N.J. Acts 134-36 ("A Further Supplement to an act entitled 'An Act Concerning Slaves'"). *New Jersey Assembly Minutes*, 1836-37 331-32; *New Jersey Council Minutes*, 1836-37 192, 210-11.

53. Story wrote:

Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.

*Prigg v. Pennsylvania*, *supra* note 29, at 611. *Wright v. Deacon*, *supra* note 45, at 62. For a full discussion of Story's opinion, and its implications, see Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* 25 (1979): 5-35, Paul Finkelman, "Sorting out Prigg v. Pennsylvania," 24 *Rutgers Law Journal* 605 (1993), and Paul Finkelman, "Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism," 1994 *Supreme Court Review* 247-94 (1995). 1847 N.J. Laws 567-72, published as *Statutes of the State of New Jersey. Revised and Published under the Authority of the Legislature* 567-72 (Trenton, Phillips and Boswell, 1847).

54. Hornblower to J. C. Ten Eyck, April 1860, Hornblower Papers, box 1, New Jersey Historical Society, Trenton. Act of Feb. 15, 1837, *supra* note 52.

55. "Upholding Slavery," 281-82. *The Liberator*, July 20, 1836, 124.

56. "Important Decision," *Newark Daily Advertiser*, August 18, 1836, p. 2, col. 1, quoting *The Emancipator* and the *New York Evening Star*.

57. *Newark Daily Advertiser*, August 18, 1836. The *Advertiser* was apparently unaware that the story in *The Emancipator* had originally appeared in *The Friend*.

58. *Ibid.*

59. *New Jersey Eagle*, August 19, 1836. "The Slave Case," *Burlington Gazette*, August 20, 1836, partially reprinted as "The Slave Case," *New Jersey State Gazette*, August 26, 1836. Aristides [pseud.], "Severn Martin," *Burlington Gazette*, September 10, 1836, p. 1, col. 2, and "Case of Severn Martin," *The Liberator*, September 17, 1836, 151. The *New Jersey Eagle*, a Democratic paper in Newark, praised the outcome of this case and suggested that purchasing the slave, as was done by the people of Burlington, "should be imitated in all similar cases; instead of attempting to defraud the rightful owner of his property." "As It Should Be," *New Jersey Eagle*, August 26, 1836.

60. *Human Rights*, quoted in *The Liberator*, September 17, 1836, 151; Act of Feb. 15, 1837, *supra* note 52.

61. William Lloyd Garrison to Isaac Knapp, August 23, 1836, in *The Letters of William Lloyd Garrison*, ed. Louis Ruchames (Cambridge: Harvard University Press, 1971), 2:53. Chase, *Speech in the Case of Matilda*, 18. Here Chase quoted from the story about this case in *The Liberator*, July 30, 1836, 124, but did not in cite to this story. For a discussion of the Matilda case, see Finkelman, *An Imperfect Union*, 160-62.

62. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847). Chase's brief was published in pamphlet form as Salmon P. Chase, *Reclamation of Fugitives from Service* (Cincinnati: R. P. Donough, 1847), reprinted in *Fugitive Slaves and American Courts* 1:341-448. Chase to Hornblower, April 3, 1851. Paul Finkelman, *Slavery in the Courtroom* (Washington: U.S. Government Printing Office, 1985), 74. See also, Chase Letterbook, Salmon P. Chase Papers, Manuscript Division, Library of Congress, for examples of Chase sending out his own briefs and other writings.

63. Hornblower to Salmon P. Chase, April 9, 1851, Salmon P. Chase Papers, Manuscript Division, Library of Congress.

64. *Ibid.*

65. William L. Dayton to Hornblower, September 9, 1851, Hornblower Papers, box 2, New Jersey State Historical Society, Trenton.

66. *New York Evening Post*, August 1, 1851.

67. William Jay to Hornblower, 17 July 1851, typescript copy in Jay Family Papers, Rare Book and Manuscript Library, Columbia University. The letter is misdated on the typescript as 1850. See also Jay to Hornblower, 11 July 1851, 21 July 1851, and 29 July 1851, typescript copies in Jay Family Papers. In the 21 July letter Jay thanks Hornblower for a copy of the manuscript opinion, and on 29 July he indicates that the opinion has been "forwarded to. . . New York, & it will I trust be soon in print."

68. William Jay to Hornblower, September 3, 1851, typescript copy in the Jay Family Papers, Rare Book and Manuscript Library, Columbia University.

69. *Hornblower Opinion* at 7.

70. This term is used in modern constitutional doctrine to support the idea that state supreme courts may give greater protections to civil liberties and civil rights than the United States Supreme Court demands, as long as those protections are based on "adequate and independent state grounds," found within the constitution of the state. The concept first arose in *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874). See also Martha Field, "Sources of Law: The Scope of Federal Common Law," 99 *Harvard Law Review* 881, 919-921 (1986). Under this theory the state courts can expand liberties above the minimum floor set by the United States Supreme Court's interpretation of the federal Constitution. See also the essays in Paul Finkelman and Stephen Gottlieb, eds., *In Search of a Usable Past: Liberty under State Constitutions* (Athens, Ga.: University of Georgia Press, 1991).

71. Potter, *Impending Crisis*, 132. In the poem "Ichabod" the poet John Greenleaf Whittier wrote of Webster:

Of all we loved and honored, naught  
 Save power remains;  
 A fallen angel's pride of thought  
 Still strong in chains.

All else is gone; from those great eyes  
The soul has fled;  
When faith is lost, when honor dies,  
The man is dead!

Robert Gordon, "The Devil and Daniel Webster," 94 *Yale Law Journal* 445, at 455 (1984), has written:

His more enduring reputation is probably the one originated by the antislavery "Conscience Whigs" of Webster's party. They pictured him as the fallen Lucifer, who, in his support of the Fugitive Slave Law in the compromise package of 1850, had sold out all his principles for the Presidency and his commercial clients.

72. Chase to Hornblower, October 21, 1851, box 2, Hornblower Papers, New Jersey Historical Society, Trenton.

73. *Trenton State Gazette*, June 15, 1854, reprinting the Hornblower Opinion from the *New York Evening Post*, August 1, 1851. As related in n. 3 above, the article in the *New York Evening Post* is identical to the seven-page pamphlet cited herein as *Hornblower Opinion*.

74. "The Fugitive Law Beginning to Tumble," *New York Tribune*, July 12, 1854. The Wisconsin case was *In re Booth and Rycraft*, 3 Wis. 157 (1854), decided in June 1854 and holding that Congress lacked the authority to pass the Fugitive Slave Law of 1850. This was appealed and reversed in *Ableman v. Booth*, 21 Howard (U.S.) 506 (1859)."

75. *Ex parte Bushnell*, *Ex parte Langston*, *supra* note 5, at 205 (Peck, J., concurring), at 227.

76. *Ibid.*, (Brinkerhoff, J., dissenting), at 321 (Sutliff, J., dissenting). See generally, Jacob R. Shipherd, *History of the Oberlin-Wellington Rescue* (Boston: John E. Jewett, 1859).

77. *Cong. Globe*, 36th Cong., 1st Sess., app. 152. Debate of March 7, 1860.

78. *Cong. Globe*, 36th Cong., 1st Sess., pt. 2, 1486. Debate of April 2, 1860.

79. Hornblower to J. C. Ten Eyck, April 1860, and Hornblower to Ten Eyck, April 16, 1860, Hornblower Papers, box 1, New Jersey Historical Society, Trenton.

80. Hornblower to Ten Eyck, April 16, 1860.