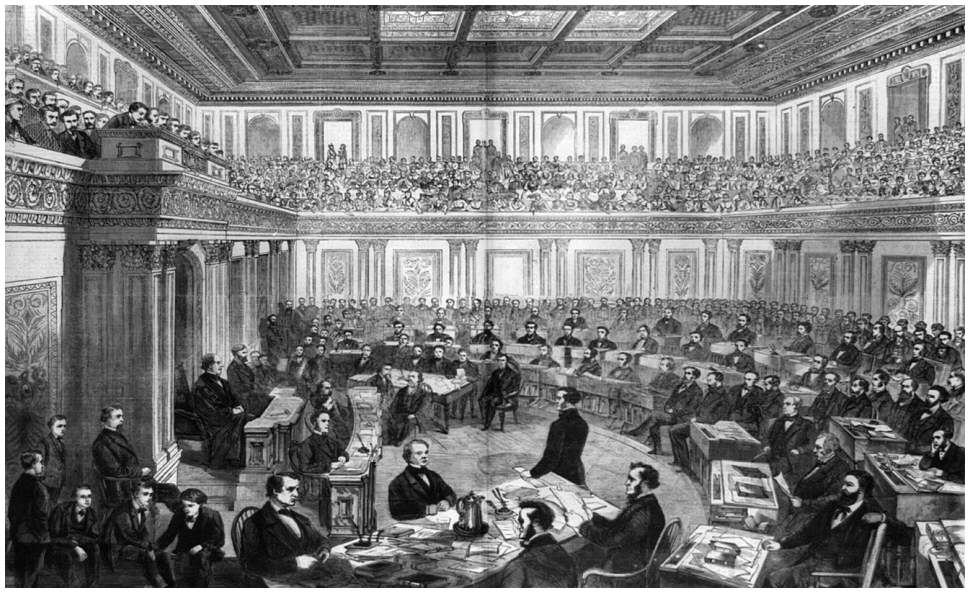
CONSTITUTIONAL RIGHTS



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Aspen Casebook Series

CONSTITUTIONAL RIGHTS

Cases in Context

Fourth Edition

Randy E. Barnett
Patrick Hotung Professor of Constitutional Law
Georgetown University Law Center

Josh Blackman
Professor of Law
South Texas College of Law Houston

Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-3902-9

Library of Congress Cataloging-in-Publication Data

Library of Congress Cataloging-in-Publication Data application is in process.

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To those whose vision of the Constitution
is not limited to that of the Supreme Court

To my wife, Beth — Randy Barnett

To Militza, Miriam, and Clara — Josh Blackman

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CHAPTER 2

Slavery and the Constitution

The United States Constitution, ratified in 1788, does not mention the words "slave" or "slavery." But it does refer to slavery, albeit indirectly, in three provisions. Each of these provisions was the result of compromises between Northerners, who favored ending slavery, and Southerners, who sought to maintain slavery — at least for the foreseeable future.

First, "free persons" were afforded full representation in Congress, but a group referred to as "all other persons" were only afforded "three fifths" representation. Here, the Constitution expressly contrasts "free persons" with "all other persons," that is, slaves.

Second, the Constitution ensured the continued "importation of such Persons as any of the States now existing shall think proper to admit" until 1808. The Constitution does not specify who "such Persons" would be. This provision, however, was widely understood to prevent Congress from using its powers under the Foreign Commerce Clause to abolish the barbaric slave trade for two decades.

Third, any "Person held to Service or Labour in one State" shall not "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." The precise meaning of this provision was not entirely clear, but at a minimum, a slave could not become free by escaping to a free state. Instead, he would be returned back to his owner.

This chapter will trace the history of the Constitution's three slavery clauses from 1619, when the first African slaves arrived in Virginia, until 1842, when the Supreme Court upheld the Fugitive Slave Act in *Prigg v. Pennsylvania*.

A. THE DEVELOPMENT OF SLAVERY IN AMERICA FROM 1619 TO 1787

In 1619, the institution of slavery was imported into North America by European settlers. That year, the first African slaves in North America landed at Jamestown, Virginia. Initially, few slaves were imported, and their status was unofficial. African slaves toiled together with white indentured servants. However, there was one stark difference between the two groups: slavery was indefinite, while indentured servants served for a fixed term of years.

In 1641, Massachusetts enacted the first statute in the colonies that recognized slavery. This law concerned the status of fugitive slaves. Connecticut enacted a similar law in 1650, and Virginia followed in 1661. In the Northern colonies, slaves were primarily used as household servants and in trade. In the Middle Atlantic colonies, slaves were used more in agriculture. In the Southern colonies, slavery became a mainstay on plantations, the principal economic institution of Southern agriculture. In the latter half of the seventeenth century, the growth of the plantation system in the Southern colonies accelerated the importation of African slave laborers. The legal apparatus surrounding slavery grew gradually and fitfully.

By 1776, Africans forcibly brought to America were slaves in the fullest sense of the term. Slavery existed in all thirteen colonies. But 1776 also marked the publication of the Declaration of Independence, which proclaimed that "all men are created equal." With the Declaration came the rise of a powerful political movement against slavery and the beginning of the end of slavery in the North.

From 1776 until 1787, a growing consensus about slavery began to emerge. Influenced by the principles advanced in the Declaration of Independence, many Americans came to view slavery as an evil. In the eleven years between Independence and the Constitutional Convention, five states moved to abolish slavery: Pennsylvania, Massachusetts, New Hampshire, Connecticut, and Rhode Island. In 1777, Vermont was established as a sovereign republic. Its founding constitution prohibited slavery. Vermont was the first independent country in the world to formally abolish slavery. Vermont would become the fourteenth state of the Union in 1791.

By 1787, as Northern states rapidly moved to abolish slavery, opponents of slavery thought history was on their side. There was a growing consensus that abolitionism was a morally just cause. During this time, many slaveholders conceded the injustice of slavery. This antislavery momentum was reflected in the Articles of Confederation Congress.

In 1787, that legislature enacted the Northwest Ordinance by a vote of 17-1. Article 6 of the Ordinance prohibited slavery in the federal Northwest Territory: "There shall be neither slavery nor involuntary servitude in the said territory." The Northwest Territory would eventually become the free states of Ohio (1803), Indiana (1816), Illinois (1818), Michigan (1837), Wisconsin (1848), and Minnesota (1858). "Despite the prohibition on slavery in the territories, the four southernmost states — Virginia, North Carolina, South Carolina, and Georgia — were present and voted for the Ordinance without dissent."*

* Matthew J. Hegreness, An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities, 120 Yale L.J. 1820, 1827 n.17 (2011).

This vote shows how even Southern slave states supported the nonextension of slavery into new territories.

That same year, delegates from every state convened in Philadelphia to draft a new constitution. Most members of that convention believed slavery to be unjust and contrary to the principles of the Declaration of Independence. But Southern slaveholders who opposed slavery in principle feared what would happen to them in practice if their slaves were freed. The wealth of the most prominent Southern slaveholders was bound up in their slave "property." If slavery was abolished immediately, these influential slaveholders would be impoverished overnight. Consequently, while slaveholders at the Convention conceded slavery's injustice as an intellectual matter, they doggedly fought to preserve the institution. In Philadelphia, the Framers would eventually make three primary concessions to slavery in the text of the Constitution.

B. THE CONSTITUTION'S THREE PRIMARY CONCESSIONS TO SLAVERY

During the Constitutional Convention of 1787, delegates from Northern and Southern states debated the Constitution's treatment of slavery. This debate resulted in three clauses that obliquely referred to slaves. Today these provisions are called the Three-Fifths Clause, the Slave Trade Clause, and the Fugitive Slave Clause. The first two provisions represented compromises between proslavery and antislavery delegates. The third provision was a complete victory for the slave states. These concessions to slavery were essential to secure the ratification of the Constitution by Southern states. But on one issue, the Northern delegates held the line: they refused to use the word "slave" or "slavery" in the text of the Constitution. That stance would prove momentous for the antislavery movement in the years leading up to the Civil War.

1. The First Compromise over Slavery: The Three-Fifths Clause

During the Philadelphia Convention, most, if not all, of the delegates held the view that slavery was unjust and inconsistent with the principles of the Declaration. Still, Southern resistance to the abolition of slavery jeopardized the prospect of a new constitution. One of the most significant debates concerned representation in Congress. Delegates from Southern slaveholding states wanted to bolster their legislative power in the new government. To accomplish this goal, they sought to count enslaved people as *full* persons for purposes of calculating representation in the House. The Southerners would have preferred a five-fifths clause. The delegates from the Northern states who thought slavery was unjust wanted to deprive the Southern states of that additional representation. So they opposed the inclusion of *any* slaves in calculating representation. The Northerners would have preferred a zero-fifths clause.

Eventually, the Convention reached a compromise: slaves would be counted as three-fifths of a person for purposes of representation. But slaveholders would have to pay a price for this concession on representation. The Constitution permitted Congress to

apportion so-called direct taxes based on the population of a state. Under the three-fifths compromise, slaves would also be counted as three-fifths of a person for the purpose of calculating "direct" taxes. In theory, at least, Southern states would owe more taxes than they would if their enslaved people were not counted at all.

Ultimately, this price did not prove to be costly. Few direct taxes were ever imposed. We doubt this outcome was a coincidence. The Southern states likely sought to avoid taxes based on their growing slave populations. Instead, the national government relied on excise taxes and duties. On the other hand, the three-fifths compromise would increase the representation of the Southern states in Congress and in the Electoral College. This boost would greatly strengthen the South's political power in the early years of the Republic. And this electoral control over the presidency and Congress led to control over judicial nominations to the federal courts.

2. The Second Concession to Slavery: The Slave Trade Clause

During the Philadelphia Convention, delegates did not seriously consider requiring the abolition of slavery. However, several states did want to prohibit any further importation of slaves from Africa, which was widely regarded as an especially cruel and barbaric practice. Slaves were kidnapped from their native homes, and many perished from the brutal conditions of the transatlantic passage. Some Northerners also believed ending the slave trade would contribute to the gradual end of the practice of slavery itself. But some slaveholding delegates threatened to leave the Convention if the slave trade was banned outright. Article I, Section 8 gave Congress the power to "regulate Commerce with foreign nations," which was thought to include the power to prohibit traffic, including traffic in slaves.

Eventually, the delegates made another concession to slavery: the Constitution would bar Congress from using that power for two decades — that is, until January 1, 1808. The Slave Trade Clause provides:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

This provision was added to Article I, Section 9, which restricts Congress's exercise of its delegated powers. The Constitution does not impose any other restriction on Congress's commerce powers.

The Framers made a second reference in the Constitution to the Slave Trade Clause. Article V of the Constitution provides the framework to amend the Constitution. But the Constitution places two limits on the amendment power. First, "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Here, the larger states could not reduce the representation of the smaller states in the Senate: each state would have only two members. This limitation was deemed essential to preserve the compromise between large and small states. The second restriction concerned the Slave Trade Clause: "no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section

of the first Article." In two places in the Constitution, the Slave Trade was protected until 1808. Article I, Section 9 prevented Congress from using its enumerated powers to bar the slave trade. And Article V prevented the people from using the amendment power to repeal the Slave Trade Clause. These two references stressed how important this concession to the slave trade was.

Shortly after ratification, Congress considered several steps to restrict the slave trade — though these bills would have stopped short of abolishing it. In 1789, Representative James Madison spoke in support for a proposal to impose a $10 tax on imported slaves. (At the time, a "dollar" referred to a Spanish silver dollar, which designated a valuable unit of silver.) Madison explained:

> I conceive the constitution in this particular, was formed in order that the government, whilst it was restrained from laying a total prohibition, might be able to give some testimony of the sense of America, with respect to the African trade. We have liberty to impose a tax or duty upon the importation of such persons as any of the states now existing shall think proper to admit; and this liberty was granted, I presume, . . . [so] that until the time arrived when they might abolish the importation of slaves, they might have an opportunity of evidencing their sentiments, on the policy and humanity of such a trade. . . . It is to be hoped, that by expressing a national disapprobation of this trade, we may destroy it, and save ourselves from reproaches, and our posterity the imbecility ever attendant on a country filled with slaves.[1]

That bill, however, failed in the House of Representatives.

Five years later, Congress enacted the Slave Trade Act of 1794. This law prohibited the use of any American port or shipyard for the building or outfitting of a ship that would be used to import slaves. Congress here relied on its power to regulate foreign commerce. Also, the Slave Trade Act of 1800 increased the fines for persons convicted under the 1794 Act.

By 1803, with the exception of South Carolina, all states had prohibited this gruesome practice. That year, Congress would "enact new fines for bringing newly imported slaves into states that banned the international trade."[2]

In 1806, President Thomas Jefferson urged Congress to abolish the international slave trade in his State of the Union address:

> I congratulate you, fellow-citizens, on the approach of the period at which you may interpose your authority constitutionally, to withdraw the citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of our country, have long been eager to proscribe.[3]

On March 2, 1807, Congress passed a law prohibiting the importation of slaves effective January 1, 1808. President Jefferson signed the bill that same day. This second concession to slavery lasted exactly two decades. The third concession would endure far longer.

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[1] 2 James Madison, Import Duty on Slaves, House of Representatives (May 13, 1789), https://perma.cc/H3UR-8JBP.

[2] Sean Wilentz, No Property in Man: Slavery and Antislavery at the Nation's Founding 163, 315 n.25 (2018).

[3] Thomas Jefferson: Sixth Annual Message to Congress (Dec. 2, 1806), https://perma.cc/WTS5-TASD.

3. The Third Concession to Slavery: The Fugitive Slave Clause

Leading up to the Philadelphia Convention, some states in the Union were free, and others were slave. The disparity created a potential problem for slaveholders: would an enslaved person become free if he traveled to a free state? In 1772, the English Court of King's Bench answered this question *yes* in the famous *Somerset Case*.

At the time, slavery was prohibited in England, but was permitted in English colonies, such as Jamaica. This landmark case held that an enslaved person taken to England by his owner could not be required to be returned to Jamaica to be sold there. Lord Mansfield explained that the "odious" institution could not be "introduced on any reasons, moral or political" — that is, by natural law. Slavery could only be supported by "positive law" — that is, by statute. Because slavery was not sanctioned by positive law in England, as soon as Somerset set foot on English soil, and breathed free English air, he was no longer a slave. Therefore, he could not be forced back to Jamaica.

When the Constitutional Convention began in 1787, the delegates were acutely aware of the *Somerset Case*. For a variety of reasons unrelated to slavery, the Convention rejected calls for a consolidated national government, and preserved the existence of separate states. That "federalism" feature of the Constitution also addressed the *Somerset* principle. Each state retained the powers to decide this question for itself as a matter of its own statutes or "positive law." They could allow slavery. Or they could prohibit slavery — rapidly or gradually. This federalist structure obviated the need to address the slavery issue on a national basis.

But the fact that *some* states had already abolished slavery raised a different problem for slaveholders in a federal union. What would happen to an enslaved person who fled to a state that did not authorize slavery by positive law? The *Somerset* principle suggests that an escaped slave would become free and thus could not be returned to bondage, just as Somerset could not forcibly be returned to Jamaica. This question was not an issue in 1776 when all the states recognized slavery. At the time, the Articles of Confederation did not have to address the status of fugitive slaves. But by 1787, this threat to slavery existed and would only increase as more states abolished slavery in the future.

To address this situation, the Framers reached yet another concession to slavery, which would come to be known as the Fugitive Slave Clause. Article IV, Section 2, Clause 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."

This provision was not novel. The Northwest Ordinance, passed that same year by the Articles of Confederation Congress, barred slavery in the territories and contained a fugitive slave clause. It provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid."

The precise meaning of the Fugitive Slave Clause would become the subject of considerable debate. At a minimum, however, this clause recognized that an enslaved person who escaped to a free state was not automatically freed — that is, "emancipated" — and could be returned to a slave state. Now, the Constitution would formally reject the application of the *Somerset* principle within the United States.

The Three-Fifths Clause and the Slave Trade Clause could be viewed as compromises to slavery. The Fugitive Slave Clause, however, was not itself a "compromise." It did not represent a middle ground between two positions. This provision was an absolute victory to the slaveholders. Free states now had some sort of constitutional duty to return fugitive slaves. Above all, their courts could not rely upon the precedent of *Somerset* to recognize runaway slaves as emancipated people. This agreement could be considered a "compromise" in one limited, but important regard: it helped secure Southern support for the Constitution.

Still, in 1787, it was not exactly clear *how much* of a boon the clause would become. In 1793, five years after ratification, Congress relied on the Fugitive Slave Clause to enact the first Fugitive Slave Act. This law raised the question: Did the clause do more than obligate the free states? Did it also empower Congress to enforce that duty? The Supreme Court would not address that issue until 1842.

4. Antislavery Delegates Held the Line and Rejected the Concept of "Property in Man"

The Northern states made three significant concessions to the slaveholding states. But there was one line that the antislavery delegates would not cross. States in the Deep South repeatedly tried to include the terms "slave" or "slavery" in the text of the Constitution. This language, the delegates contended, would expressly endorse the concept of "property in man." And it was not uncommon for the Articles of Confederation to use the term "slavery." The Northwest Ordinance, for example, expressly referred to "slavery."

The Northern states vehemently opposed these efforts. They were willing to acquiesce to slavery in states where it was authorized by local law. And the Northwest Ordinance reflects their opposition to the further extension of slavery into territories, from which *new* states would be formed. But they were not willing to expressly endorse the *justice* of holding slaves as property in the Constitution. It may seem surprising that delegates from Virginia, many of whom were slaveholders themselves, joined the Northern antislavery delegates. But their stance was a function of the general antislavery sentiment at that historic moment.

This antislavery coalition, due to its combined strength, refused to compromise, and ultimately prevailed.[4] The concept of "property in man" was not expressly included in the Constitution. (In 1856, Chief Justice Taney would falsely claim otherwise in his infamous opinion, *Dred Scott v. Sandford*.) Instead, the Framers used oblique references to slavery. The Three-Fifths Clause referred to "all other *persons*." The Slave Trade Clause referred to "such *Persons*." And the Fugitive Slave Clause referred to "*person*[s] held to service or labour in one state, *under the laws thereof*. . . ." Enslaved people were referred

[4] See Wilentz, at 58-114.

to as "persons" rather than *property*. And the practice of slavery was treated solely as a creature of the local *laws* of the states, reflecting the *Somerset* principle.

This word choice would become highly significant as the legal debate over slavery intensified in the nineteenth century. The so-called *Constitutional Abolitionists* could make a compelling, and accurate claim: the Constitution acknowledged slavery as a product of local positive law, but it also recognized a federal power to restrict slavery wherever it had the power to regulate. In particular, the Constitution gave Congress the power to abolish slavery in the District of Columbia and in the territories from which new states would be formed. The political slogan of these Constitutional Abolitionists became "Freedom National, Slavery Local."

5. Why Compromise with Slaveholders?

There is a simple reason why Northern delegates were willing to compromise with Southern delegates. Historian Sean Wilentz explains that "the slaveholding states, above all the Lower South, would have never ratified such a Constitution."[5] But "why did the North then cut deals that bolstered slaveholders' power? . . . [I]nstead of choosing complicity with evil, why didn't the North simply form a nation of its own, free from the scourge of slavery?"[6] Wilentz responds:

> Like all counterfactual speculations, these raise a host of imponderables about how such changes would have played out, including possibilities that would have been deeply discouraging to the antislavery cause, let alone the enslaved. . . . Creating a separate northern nation . . . might have permitted antislavery northerners to verify their righteousness but would have done nothing to help enslaved southerners, whose fates might well have been crueler in a formal, independent slaveholders' republic. What, meanwhile, would have become of New York and New Jersey under such a plan — two key northern states that had yet to commence emancipation? How would a free northern United States have found a way to include two slave states? . . . Alternatively, how might a northern republic have fared without New York and New Jersey?[7]

Moreover,

> northern toleration of southern slavery hardly signaled indifference to human bondage. Having extirpated slavery in their own states, many antislavery northerners shared the view, still widespread outside the Lower South in the 1780s, that the glutted Atlantic market in tobacco spelled American slavery's doom, no matter the Constitution's immediate concessions to the slaveholders. Although complacent, even deluded in retrospect, that view was reasonable enough in 1787, before the cotton boom changed the course of American economic and political history.
>
> Other northerners, meanwhile, saw no contradiction in supporting both the Constitution and the abolition of slavery. Quite the opposite: many antislavery advocates, including prominent abolitionists, considered the Atlantic slave trade clause the Constitution's truly important provision regarding slavery, and they saw it not as a setback but as a great triumph. By

[5] Wilentz, *supra* at 14.
[6] Id.
[7] Id. at 15.

empowering Congress to abolish the trade even eventually, they thought, the Constitution took the first vital step toward eradicating American slavery completely. At least one group of free blacks in Providence, Rhode Island, mounted a celebration of the Constitution, and its slave trade provisions on July 4, 1788, and toasted the proposition, "May the Natives of Africa enjoy their Natural Privileges unmolested." The idea that the North would repudiate the Constitution over the framers' concessions to the slaveholders would have struck them as preposterous.[8]

6. The Growth of Slavery and Proslavery Ideology *After* Ratification

The Constitution was framed during a unique window in American history. In 1787, an intellectual consensus existed in the North and South that slavery was unjust and in conflict with the principles of the Declaration of Independence. The Constitution, which only indirectly referenced the institution of slavery, reflected that consensus. Most Northerners and Southerners agreed that using slaves to raise tobacco was inefficient. Economics, they believed, would lead to the gradual end of slavery. Southerners could morally rationalize their resistance to the immediate abolition of slavery because they shared the widespread belief that slavery would fade away on its own.

But this perception would soon change, and change rapidly. In 1793, Eli Whitney invented the cotton gin. This simple device quickly and easily separated cotton fibers from sticky seeds. This process had previously been slow and labor-intensive. The older, manual approach severely limited the quantity of cotton that could be grown and sent to market. Now with the cotton gin, much more cotton could be planted, picked, and sold at a much lower cost. In response, plantation owners shifted their crops from tobacco to cotton, and the use of slaves now became enormously profitable. This invention would radically increase the demand for slavery in the South. As the profitability of slavery increased, Southerners soon developed a new proslavery ideology. And they would assert it with increasing boldness.

For the first time since the Declaration of Independence, many people began to publicly contend that slavery was an *inevitable* and *just* institution. Slavery was inevitable because some races were inherently inferior to others. Slavery was just because slaveholders were like parents who cared for their children. Indeed, slaveholders would claim that the institution of slavery was *more* just than the system of "free labor" in the North. With free labor, they said, employers only paid wages to workers who were capable of working. But slaveholders claimed they benevolently cared for their slaves from cradle to grave, whether fit for work or not.[9]

The economic boom from the cotton gin, bolstered by this new proslavery ideology, led to a vast increase in demand for slaves. From 1800 to 1860, the slave population in the South increased from about one million to nearly four million slaves. And this growth occurred domestically, in the absence of the transatlantic slave trade. Indeed, contrary to the expectations of the Framers in 1787, the domestic growth of the slave population

[8] Wilentz, *supra* at 15-16.

[9] The most developed presentation of the claim that slavery was morally preferable to free labor was George Fitzhugh, Cannibals All! or, Slaves Without Masters (1857).

completely substituted for the now-banned international slave trade. And this domestic trade of slaves became yet another source of revenue for slave owners.

This explosion in the slave population also affected the composition of the national government. The Three-Fifths Clause inflated Southern representation in the House. And it also increased the number of votes that Southern states had in the Electoral College that chose the President. As a result, most of the Presidents before the Civil War were either slaveholders themselves, or were unwilling to oppose the institution.

With this disproportional political power, Southerners — together with some Northern sympathizers — were able to enact proslavery legislation and to block efforts in Congress to limit slavery. And slaveholders reversed their previous position about slavery in the territories. They now pushed strongly for the expansion of slavery into the federal territories from which new states would be formed. This shift threatened to overwhelm the free states in Congress. Finally, this new political dynamic also affected the judiciary. Presidents elected with Southern support appointed Justices to the Supreme Court who were either proslavery or disinclined to entertain constitutional challenges to federal laws protecting slavery.

The opponents of slavery fell into several camps. In the early years of the nineteenth century, the so-called *abolitionists* favored immediate abolition. Many opponents of slavery who favored gradual emancipation declined to use that label. Generally, political office holders fell into this latter camp. For simplicity's sake, we will refer to all people who wished to see slavery *abolished* — whether gradually or immediately — as "abolitionists." And, we will distinguish among three categories of abolitionists who favored different *methods* to abolish slavery: the Radical Abolitionists, the Political Abolitionists, and the Constitutional Abolitionists.

a. Radical Abolitionists

First, the "radical abolitionists" rejected any political or constitutional compromises over slavery. Instead, they favored "no union with the slave power." In other words, they argued that Northern states should secede from the Union, which they called "disunionism." The radical abolitionists predicted that without the benefit of the Fugitive Slave Clause, the border states would either be drained of slaves by those fleeing to freedom in the North, or the South would bankrupt itself by trying to keep slaves from escaping. Either way, they contended, the slave system would eventually collapse. The radical abolitionists publicly voiced their views about the immorality of slavery. But many of them viewed the political system as inherently corrupt, and refused to become involved with that process.[10] Their refusal to engage with the political process greatly limited both their effectiveness and their political appeal.

b. Political Abolitionists

Second, the "political abolitionists" sought to use political action to eliminate slavery in the South. Professor Richard H. Sewell explains that the political abolitionists "never

[10] See generally Lewis Perry, Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought (1973).

attached to an antislavery society or [were] insistent on immediate emancipation, [but] nonetheless embraced non-extension in part because they thought it a perfectly constitutional way to hasten slavery's downfall."[11] The political abolitionists, unlike the radical abolitionists, were willing to engage with the political process. Throughout the 1840s and 1850s, this group formed a series of antislavery political parties. In 1840, they formed the Liberty Party. Two of this party's prominent founders were James Birney and Salmon Chase, both attorneys from Cincinnati, Ohio. (We will profile both men in our discussion of the Fugitive Slave Acts.) In 1840 and 1844, Birney was the Liberty Party's candidate for President. The Liberty Party adopted a stridently antislavery platform, which proved to be largely unsuccessful.

In 1848, the Liberty Party was supplanted by the Free Soil Party, which was less radical. Instead of abolition, it stressed the non-extension of slavery into the territories. This position had a far greater political appeal in the North. Salmon Chase coined the party's slogan: "Free soil, free speech, free labor, and free men." The Free Soilers were more successful.

In 1850, Free Soil candidates won several seats in the Massachusetts state legislature. These small victories denied a majority to the two most prominent parties, the Whigs and the Democrats. The Free Soilers aligned with the Democrats in exchange for a valuable concession: the state legislature agreed to send Charles Sumner, a vocal abolitionist, to the U.S. Senate. Two years later, the Free Soilers executed the same strategy in Ohio: by winning a small number of seats in the state legislature, the Free Soilers were able to send Salmon Chase to join Sumner in the Senate. As part of the deal, Ohio Democrats also agreed to repeal the state's racially discriminatory Black Code. This success was not limited to the state legislatures. At this time, the House of Representatives was sharply divided between the Whigs and Democrats. As a result, at one point, about a dozen Free Soil congressmen held the balance of power in the House, which gave them considerable influence.

In 1854, the Free Soilers were absorbed by the newly formed Republican Party. In 1856, the Republican Party nominated John C. Frémont as its nominee for the presidency. The Republicans adapted the Free Soil Party slogan: "Free speech, free press, free soil, free men, Frémont and victory!" Frémont would lose the 1856 election. But the candidate in 1860, Abraham Lincoln, would prove far more successful.

c. Constitutional Abolitionists

Third, the "Constitutional Abolitionists" made constitutional objections to slavery. The people in this group were largely a subset of the political abolitionists. There was one notable exception. Lysander Spooner, a Massachusetts lawyer, offered extensive constitutional objections to slavery, but also opposed political action. However, Spooner was pragmatic — he largely kept his latter views to himself.

Benjamin F. Shaw described the complicated relationship among the abolitionists:

> [T]he fight for liberty in this land was begun by the Radical Abolitionists long before the final battle. . . . They were followed, however, by a class known as Constitutional Abolitionists; equally bold and brave, but more practical. It was the labor of the latter that accomplished

[11] Richard H. Sewell, Ballots for Freedom: Antislavery Politics in the United States, 1837-1860, at ix (1980).

glorious results; fought the good battle to a finish and destroyed the slave power. They were among the organizers of the Republican Party.[12]

The remainder of this chapter will focus on the work of the Constitutional Abolitionists. Specifically, we will study the arguments they raised against the constitutionality of the federal Fugitive Slave Act of 1793.

C. THE FUGITIVE SLAVE ACT OF 1793

Five years after the Constitution was ratified, the federal government enacted the Fugitive Slave Act of 1793. This law authorized slave catchers to travel across state lines and arrest runaway slaves. The slave catcher could return the slave to bondage after obtaining a certificate of removal from a federal judge or state magistrate. But this statute raised a constitutional question: Did Congress have any power to *enforce* Article IV, Section 2, Clause 3?

Quickly, a divide formed over the constitutionality of this law. The slaveholders defended a broad conception of federal power. However, the Constitutional Abolitionists contended that the Fugitive Slave Act was unconstitutional. Salmon P. Chase argued that Congress lacked the enumerated power to authorize slave catchers to kidnap alleged slaves and forcibly transport them back to slave states. The Supreme Court would disagree with Chase in *Prigg v. Pennsylvania* (1842). This case, decided by the Taney Court, upheld the federal law as a valid exercise of Congress's implied powers. In the wake of *Prigg*, the Constitutional Abolitionists began to develop sophisticated constitutional arguments based on the original public meaning of the Constitution.

1. Salmon P. Chase Argued That the Fugitive Slave Act Was Unconstitutional

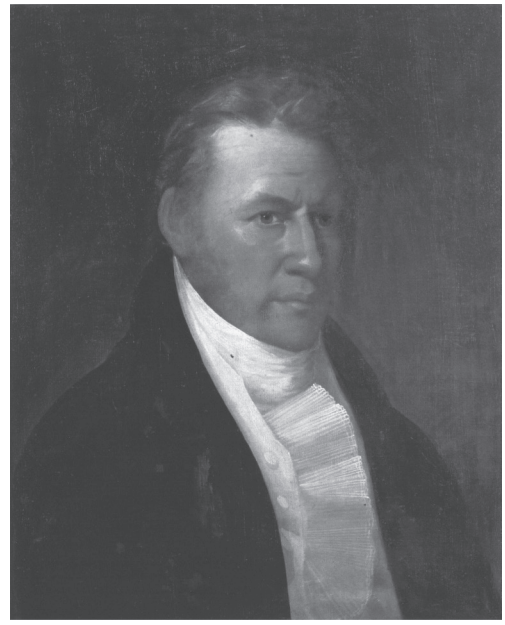
Salmon P. Chase, an Ohio attorney, became a prominent advocate for what some have called "constitutional abolitionism." In 1837, at the age of 29, he helped develop a novel constitutional argument: Congress lacked the enumerated powers to implement the Fugitive Slave Act of 1793. Chase would first present this argument in a case concerning Matilda, a runaway slave.

Matilda's owner — who was also her slaveholding father — had taken her north to accompany him on a trip. While they were in Northern states, he held her out as his white daughter. Having stepped on free soil and breathed free air, Matilda pleaded with her father for a certificate of emancipation, but he refused. When they reached Cincinnati on their return journey, Matilda fled to the small neighborhood of free blacks in Cincinnati. While there, she came to be employed as a maid by an attorney named James Birney. Birney had formerly been a slaveholder in Kentucky, but later moved to Cincinnati, Ohio to advocate against slavery. In 1836, he founded the abolitionist newspaper *The*

[12] See Benjamin F. Shaw, *Owen Lovejoy, Constitutional Abolitionism and the Republican Party*, in Transactions of the McLean County Historical Society 60-62 (Ezra Prince ed., 1900).

Philanthropist. In his paper, he not only opposed slavery, he also maintained that African Americans were entitled to equal rights and opportunities with white people.

Matilda's father sent slave catchers to find her and bring her back. Soon, she was located and held in custody. The slave catchers sought her removal from Ohio pursuant to the Fugitive Slave Act of 1793.* Birney recruited his fellow Cincinnatian attorney, Salmon Chase, to assist in Matilda's legal defense. They sought a writ of habeas corpus for Matilda's freedom. Together, Birney and Chase developed an argument that Congress lacked the enumerated powers to enact the Fugitive Slave Act. Therefore, the slave catchers could not rely on this law to remove Matilda. And, because the Act was unconstitutional, state judges were not obligated to assist slave catchers who were attempting to return runaway slaves. Chase presented this argument before the local judge in Cincinnati, Ohio. Ultimately, Chase lost the case, but this incident changed the course of his career.



James Birney

We include an excerpt of Chase's argument on behalf of Matilda, which was published in a widely distributed pamphlet. This pamphlet helped Chase's rise to prominence in the national antislavery movement.

Speech of Salmon P. Chase, in the Case of the Colored Woman, Matilda, Who Was Brought Before the Court of Common Pleas of Hamilton County, Ohio, by Writ of Habeas Corpus (March 11, 1837)

STUDY GUIDE

1. Article IV, Section 2 of the Constitution provides: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." Chase focused on the fact that the Fugitive Slave Clause is located in

* The events surrounding the *Matilda* case and Chase's involvement are discussed in John Niven, Salmon P. Chase 50-54 (1995).

Article IV. What is the significance of the fact that the Fugitive Slave Clause is located in Article IV, rather than in Article I?

2. In light of the Fugitive Slave Clause, what is Chase's argument that the Fugitive Slave Act of 1793 was beyond the scope of Congress's enumerated powers? How does he distinguish the provisions of Article IV from those in the first three articles?
3. How does Chase interpret the Necessary and Proper Clause? How does he use the Tenth Amendment? How does he reconcile his legal and constitutional analysis with natural rights?

Salmon P. Chase in his youth

. . . Slavery is admitted, on all hands, to be contrary to natural right. Wherever it exists at all, it exists only in virtue of positive law. The right to hold a man as a slave is a naked legal right. It is a right which, in its own nature, can have no existence beyond the territorial limits of the state which sanctions it, except in other states whose positive law recognises and protects it. It vanishes when the master and the slave meet together in a state where positive law interdicts slavery. The moment the slave comes within such a state, he acquires a legal right to freedom. The petitioner, Matilda, is now within the limits of Ohio, by whose fundamental law slavery is positively and forever interdicted. Admitting then, that she was once a slave, and is now claimed as such: admitting that if she is a slave, the present detention is lawful, still, it by no means follows that she is now a slave, or now legally restrained. On the contrary, she is now legally free: legally restored to her natural right; unless some exception to the great interdict can be clearly shown. And is there a man of all who hear me, who would rejoice that this poor woman, if legally free, should nevertheless be given up because once a slave? Is there a citizen of Ohio within these walls, who regards this woman as a mere article of property, the title to which is founded in natural right, and is recognised by the law of nations, and is protected by the positive laws of all states, and as bound to her owner by the same permanent ties which connect him with his horse or his ox? — If there be, let me tell that individual, that the constitution of Ohio frowns upon him, and that the soil of Ohio is dishonored by his tread. . . .

I maintain . . . that the [Fugitive Slave] act of congress which authorizes justices of the peace, without a jury, to try and decide the most important questions of personal liberty, which makes the certificate of a justice a sufficient warrant for the transportation out of the state, of any person, whom he may adjudge to be an escaping servant, — is not . . . warranted by the constitution of the United States. The leading object of the framers of

our federal constitution was to create a national government, and confer upon it adequate powers. A secondary object was to adjust and settle certain matters of right and duty, between the states and between the citizens of different states, by permanent stipulations having the force and effect of a treaty. Both objects were happily accomplished.

The constitution establishes a form of government, declares its principles, defines its sphere, and confers its powers. It creates the artificial being, denominated "the government," and breathes into it the breath of life, and imparts to each branch and member, the necessary energies and faculties. It also establishes certain articles of compact or agreement between the states. It prescribes certain duties to be performed by each state and its citizens, towards every other state and its citizens: and it confers certain rights upon each state and its citizens, and binds all the states to the recognition and enforcement of these rights.

These different ends of the constitution — the creation of a government and the establishment of a compact, are entirely distinct in their nature. Either might be attained independently of the other. If all the clauses of compact in the constitution were stricken out, the government created by it would still exist. If the articles and sections, establishing a form of government, were blotted from the constitution, the clauses of compact might still remain in full force, as articles of agreement among the states.

The clauses of compact confer no powers on the government: and the powers of government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact. . . . Now what is the clause in the constitution in regard to fugitives from labor, but an article of agreement between the states? It is expressed in these words, "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due." Does this clause confer any power on government, or on any officer or department of government? — Clearly not. It says nothing about the government, or its officers, or its departments. It declares that the citizens of no state in the Union, legally entitled to the service of any person, shall be deprived of that right to service, by the operation of the laws of any state into which the servant may escape; and it requires such state to deliver him up, on the claim of the lawful master.

The clause, then, restrains the operation of state constitutions and state laws in a particular class of cases; and it obliges, so far as a compact can oblige, each state to the performance of certain duties towards the citizens of other states. The clause has nothing to do with the creation of a form of government. It is, in the strictest sense, a clause of compact. The parties to the agreement are the states. The general government is not a party to it, nor affected by it. If the clause stood alone in the constitution, it would mean precisely what it does now, and would be just as obligatory as it is now. Nothing can be plainer, then, than that this clause cannot be construed as vesting any power in the government, or in any of its departments, or in any of its officers; and this is the only provision in the constitution which at all relates to fugitives from labor.

Now the whole legislative power of congress is derived, either from the general grant of power, "to make all laws, necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof"; or from special provisions in relation to particular subjects. If congress has any power to legislate upon the subject of fugitives from labor, it must

be derived from one of these sources, — from the general grant, or from some special provision.

It cannot be derived from the general grant, because the clause in regard to fugitives from labor, vests no power in the national government, or in any of its departments or officers; and the general grant of legislative power is expressly confined to the enactment of laws, necessary and proper to carry into execution the powers so vested. Nor can it be derived from any special provision: for none is attached to the clause relating to fugitives from service. The conclusion seems inevitable, that the constitution confers on congress no power to legislate in regard to escaping servants.

Where then is this power? Undoubtedly it is reserved to the states; for "all powers not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people." The constitution restrains the operation of the state constitutions and the state laws, which would enfranchise the fugitive. It also binds the states to deliver him up on the claim of the master, and by necessary inference, it obliges them to provide a tribunal before which such claim may be asserted and tried, and by which such claims may be decided upon, and, if valid, enforced: but it confers no jot of legislative power on congress.

This construction of this clause in the constitution, is strengthened by reference to another provision. The first clause of the first section of the same article, in which the provision in regard to escaping servants is found, is in these words: "full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state." This clause, so far, is of the same nature with the clause in regard to fugitives from labor. It is a clause of compact, and it pledges the faith of each state to the faithful observance of it. But it confers no power on government, or any of its departments or officers. Congress, therefore, could not legislate in reference to the subject of it in virtue of the general grant of legislative power.

Aware of this, the framers of the constitution annexed to this first clause, a second, specially providing that congress might "prescribe, by general laws, the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Am I not right in saying that the framers of the constitution were aware, that without this special provision, congress would have no power to legislate upon the subject of the section? If the first clause, *propria vigore*, confers on Congress legislative power, why add the second? Why add it, if legislative power is conferred by the general grant, or by any other provision in the constitution? . . .

The framers of the constitution were men of large experience, comprehensive knowledge, sound judgment, and great ability. Among them were Hamilton, and Madison, and Washington. Such men, in framing such an instrument would avoid all needless repetition. They would not incorporate into the constitution a special provision upon any subject unnecessarily. To them, therefore, the second clause of the section under consideration, must have appeared not only fit, but necessary. But if a special provision was necessary to enable congress to legislate in regard to the authentication and effect of records, why is not a special provision necessary to enable congress to legislate in regard to fugitive servants? Can the counsel explain?

Both clauses of the constitution are of the same nature. Neither has any thing to do with creating, organizing, or energizing a form of the government. Both are articles of compact. If then, the framers of the constitution had intended that congress might

legislate in reference to the subjects of both, would not special provisions, conferring such legislative power, have been annexed to both? Is not the annexation of such a special provision to one clause, and not to the other, decisive evidence that the convention intended to confer legislative power in regard to the subject of one clause, and to withhold legislative power in reference to the subject of the other? This conclusion seems to me inevitable. I see not how the counsel for the claimant, with all their ability and ingenuity, can frame an argument which will conduct to any other.

Nor is it difficult to assign valid and substantial reasons why the convention should not entrust to congress any legislative power upon this subject. Let us suppose that, when this clause about escaping servants was under discussion, a member had proposed to annex another clause in these words, "And congress shall have power to appoint officers in each state to try and determine the validity of such claims; and to provide by law for the apprehension and re-delivery of persons so escaping." Would not the answer have been, "What! Give congress power to appoint officers to try questions of personal liberty, and to provide for the arrest and redelivery of all persons who may be claimed as escaping servants? Who would be safe under such a constitution? What personal right, conferred by God and guarantied by the state constitutions, might not be prostrated under it? Who might not be claimed as a fugitive from labor? Who would be secure against condemnation to servitude? To little purpose has liberty been achieved, if only to be placed in jeopardy like this." And if this answer had failed to satisfy the convention, and the clause had been incorporated into the constitution, can any one believe that it would have received the assent of the states?

Let it be remembered that the states existed before the federal constitution, and that the fundamental law of each asserted and guarantied the absolute, inherent, and unalienable rights of every citizen. Among these were reckoned "life, liberty, and the pursuit of happiness": and can it be supposed that any state, especially any nonslaveholding state, would have assented to a constitution which would withdraw from either of these rights, the ample shield of the fundamental law, and leave it exposed to the almost unlimited discretion of congress, and of officers appointed by congress? I think not. . . .

I have now done with this case. I have presented, feebly perhaps and unsuccessfully, but honestly and fearlessly, the great principles, legal and constitutional, which, in my judgment, ought to govern it. I have not asked — I do not now ask, in behalf of my humble client, deliverance from imprisonment, because that imprisonment is against natural right, but because it is against the constitution and against the law. I claim, however in her behalf, that it be borne in mind that there is such a thing as natural right, derived, not from any civil constitution or civil code, but from the constitution of human nature and the code of heaven.

This court, I am sure, need not to be reminded of the original, paramount truth, written upon the hearts of all men by the finger of God, the same in all ages and in all climes, and destined to no change, proclaimed by our fathers, in the declaration of independence, to be selfevident, and reiterated in our state constitution as its fundamental axiom, that all men are born "equally free." And if the petitioner at the bar cannot expect, here, the full benefit of this fundamental truth; if her right to freedom must, here, be vindicated upon narrower grounds, let her have, at least this advantage from it.

Let her be regarded as free, until it be shown by the fullest and clearest evidence, that her case falls within some exception to the universal law of human liberty. Let the

proceedings by which she is now, without the accusation of crime, and without the suspicion of guilt, deprived of freedom and driven a suppli[c]ant to this bar, be narrowly scrutinized. Let every provision, unfavorable to liberty, whether legal or constitutional, receive a strict and rigorous interpretation. And if, when thus scrutinized, these proceedings shall be found insufficient, and especially if they shall be found to be warranted by no law and repugnant to the most vital principles of our social system; if, when thus interpreted, those provisions, which exclude a certain class of persons from the benefit of these vital principles, shall be found not broad enough to reach the case of this petitioner; I demand her discharge in the name of justice, of liberty, and of our common humanity.

The judge in Cincinnati rejected Chase's arguments. Matilda was taken "down the river" by boat the next day. She was sold in New Orleans, and was never heard from again.

Matilda's case undercuts the commonly held view that federalism and states' rights arguments were used exclusively to defend slavery. Southerners were more than willing to use *federal* power to bolster the slave system whenever they could muster the votes to do so. In contrast, the Constitutional Abolitionists relied on federalism and states' rights to oppose slavery. Free states soon began to enact so-called *personal liberty laws* that protected free African Americans within their borders, and prevented them from being wrongly captured by slave catchers.

The Supreme Court considered the constitutionality of Pennsylvania's personal liberty law, as well as the federal Fugitive Slave Act, in *Prigg v. Pennsylvania* (1842).

2. The Taney Court Upheld the Constitutionality of the Fugitive Slave Act

In the presidential election of 1800, Thomas Jefferson, a Republican, defeated John Adams, a Federalist. Before the inauguration, Adams appointed Chief Justice John Marshall to the Supreme Court. Marshall would serve more than three decades on the Court. During his tenure, the American political system would radically change.

In the wake of the disastrous War of 1812 with England, the pro-British Federalist party fell apart. It was eventually replaced by the Whigs. In 1828, the Jeffersonian Republicans were replaced by a more tightly organized Democratic party. This party sometimes called itself "The Democracy" because it purported to speak for the people.[1] The new Democratic Party was the brainchild of Martin van Buren. It was formed to support the presidential candidacy of Andrew Jackson, who won the election of 1828. Jackson was a hero of the War of 1812. He was the general credited with defeating the British at the Battle of New Orleans at the end of that war. In January 1835, Chief Justice Marshall died. President Jackson would now get the chance to place his stamp on the Supreme Court.

In July 1835, Jackson nominated Roger Brooke Taney (pronounced Taw-nee) to succeed John Marshall as Chief Justice. Taney belonged to a wealthy and influential

[1] See Gerald Leonard, The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois (2002).

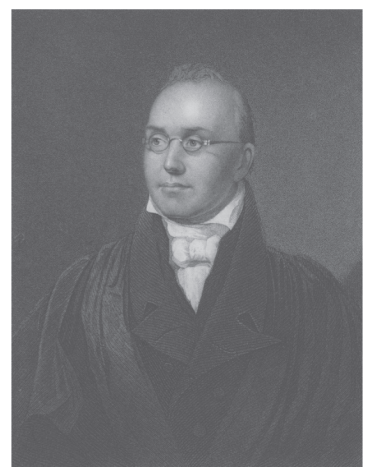
tobacco-growing family in Maryland. Originally a Federalist, he became a staunch Democrat. Taney had served in several positions in Jackson's cabinet: Attorney General, Secretary of War, and Secretary of the Treasury. In that last position, he assisted Jackson in dismantling the national bank. Recall that President Jackson had vetoed the reauthorization of the national bank. Like Jackson, Taney shared the Democrats' commitment to states' rights, as well as to slavery.

Taney proved to be a very controversial and unpopular nominee. The Senate giants — Henry Clay, John Calhoun, and Daniel Webster — all lined up against Taney and Jackson. One New York newspaper called Taney "unworthy of public confidence, a supple, cringing tool of power." Another newspaper attacked him as a "political hack." Indeed, one year earlier, the Senate had blocked Taney's nomination as an Associate Justice of the Supreme Court. The Senate even voted to eliminate that seat on the Court, but the House failed to support the bill. In response to the Senate's resistance to Taney, Jackson declined to send any other nominations to the Senate.[2]

Taney married Anne Key, the sister of Francis Scott Key. Key wrote "The Star Spangled Banner" during the British bombardment of Baltimore during the War of 1812.

Eventually, the opposition fizzled out. Taney was finally confirmed in March 1836 by a vote of 29-15. He would serve on the Court until 1864. During this time, he presided over several significant cases concerning slavery. His most infamous decision was *Dred Scott v. Sandford* (1857). In that case, the Court held that (1) people of African descent could never be citizens, and (2) the federal government could not bar slavery in the territories from which future states would be formed.

The Taney Court decided another highly significant case concerning slavery that is not nearly as well known. *Prigg v. Pennsylvania* (1842) upheld the constitutionality of the Fugitive Slave Act of 1793. This federal law authorized slave catchers to travel across state lines, arrest runaway slaves, and return them to their masters. Justice Joseph Story wrote the majority opinion in *Prigg*. The Madison appointee was an arch-Federalist, and was a close confidant of Chief Justice Marshall. Justice Story found that Congress had the power to enact the Fugitive Slave Act. Chief Justice Taney joined the majority opinion, and wrote a concurring opinion.



Justice Joseph Story wrote the majority opinion in Prigg v. Pennsylvania.

Under the Court's practices, Chief Justice Taney would have tasked Story with writing the majority opinion. Seven years earlier, President Jackson declined to promote Associate Justice Story to Chief Justice. Jackson thought that Story, who favored a strong federal power, too closely resembled John Marshall. In *Prigg*, however, Story's strident nationalism overlapped with Taney's proslavery sentiments.

[2] See Ilya Shapiro, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court 21-23 (2020).

STUDY GUIDE

1. Salmon Chase contended that Article IV, Section 2, does not empower Congress to enact the Fugitive Slave Act. How does Justice Story address this argument? (*Hint:* How exactly does Story rely on the Necessary and Proper Clause?)
2. Story claims that the Fugitive Slave Clause was essential to the ratification of the Constitution. How do you respond to this argument? (*Hint:* Did a similar provision exist in the Articles of Confederation?)
3. We have come to associate the Southern side of the Civil War with that of "states' rights." Does Congress's enactment of the Fugitive Slave Act, and the outcome of *Prigg*, challenge that narrative?

Prigg v. Pennsylvania

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

Video on CasebookConnect.com

[Margaret Morgan, a slave, left Maryland to marry a free black man in Pennsylvania. She did so with the apparent acquiescence of her owner, John Ashmore. Morgan gave birth to at least one of her children in Pennsylvania. After John Ashmore died, his widow sent Edward Prigg and others to recapture Morgan. They captured Morgan, her husband, and their children in York County, Pennsylvania. Pennsylvania's "personal liberty law" required that certificates of removal be obtained from a state judge, justice of the peace, or alderman. Prigg took Morgan and her children (but not her husband) to Maryland without obtaining a certificate. The York County prosecutor obtained indictments against Prigg and his helpers for violating the liberty law and for kidnapping. After a public outcry and extensive negotiations between state officials, Maryland extradited Prigg to Pennsylvania, where he was convicted of kidnapping. Morgan and her children were "sold down the river" and shipped south, where they remained in bondage. The Pennsylvania Supreme Court affirmed Prigg's conviction. He appealed to the U.S. Supreme Court, and challenged the constitutionality of the Pennsylvania "personal liberty law." — Eds.]

Mr. Justice Story delivered the opinion of the court. . . .

Few questions which have ever come before this Court involve more delicate and important considerations; and few upon which the public at large may be presumed to feel a more profound and pervading interest. . . .

Before, however, we proceed to the points more immediately before us, it may be well — in order to clear the case of difficulty — to say, that in the exposition of this part of the Constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the

duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions; that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

There are two clauses in the Constitution upon the subject of fugitives, which stand in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the second section of the fourth article, and are in the following words:

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

The . . . true interpretation [of the last clause] is directly in judgment before us. 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, was 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. Its true design was, to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favour of the subjects of other nations where slavery is recognised. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in *Somerset's Case*. . . . It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different states. The clause was, therefore, of the last importance to the safety and security of the southern states; and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the

Constitution, by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.

How, then, are we to interpret the language of the clause? The true answer is, in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it. If by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end; and by another mode it will attain its just end and secure its manifest purpose; it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No Court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labor, in consequence of any state law or regulation. Now, certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labour, operates, pro tanto, a discharge of the slave therefrom. . . .

[T]he clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any which is not expressed, and cannot be fairly implied. . . . If this be so, then . . . the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding states. . . . Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace, or any illegal violence. In this sense, and to this extent this clause of the Constitution may properly be said to execute itself; and to require no aid from legislation, state or national.

But the clause of the Constitution does not stop here; nor indeed, consistently with its professed objects, could it do so. Many cases must arise in which, if the remedy of the owner were confined to the mere right of seizure and recaption, he would be utterly without any adequate redress. He may not be able to lay his hands upon the slave. He may not be able to enforce his rights against persons who either secrete or conceal, or withhold the slave. He may be restricted by local legislation, as to the mode of proofs of his ownership; as to the Courts in which he shall sue, and as to the actions which he may bring; or the process he may use to compel the delivery of the slave. Nay, the local legislation may be utterly inadequate to furnish the appropriate redress . . . ; and this may be innocently as well as designedly done, since every state is perfectly competent, and has the exclusive right, to prescribe the remedies in its own judicial tribunals, to limit the time as well as the mode of redress, and to deny jurisdiction over cases, which its own policy and its own institutions either prohibit or discountenance.

If, therefore, the clause of the Constitution had stopped at the mere recognition of the right, without providing or contemplating any means by which it might be established

and enforced, in cases where it did not execute itself, it is plain, that it would have been, in a great variety of cases, a delusive and empty annunciation. . . .

And this leads us to the consideration of the other part of the clause, which implies at once a guarantee and duty. It says, "But he (the slave) shall be delivered up, on claim of the party to whom such service or labor may be due." Now, we think it exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. . . . If, indeed, the Constitution guaranties the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.

The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted. The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect.

The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution. . . .

Congress has taken this very view of the power and duty of the national government. . . . The result of their deliberations was the passage of the act of the 12th of February 1793. . . . [This] legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. . . . [W]here Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed.

But it has been argued, that the act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore it is void. Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon the national government, yet, unless the power to enforce these rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore* ["by its own force" — Eds.], however defective may be their operation; nay, even although, in a practical sense, they may become a nullity from the want of a proper remedy to enforce them, or to provide against their violation.

If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects as a security of rights, and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted

as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers, or enact laws beyond the powers delegated to it by the Constitution; but it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the ends. . . .

The provisions of the act of 12th February, 1793, relative to fugitive slaves is clearly constitutional in all its leading provisions. . . . Upon these grounds, we are of the opinion that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave, by his master, which the Constitution of the United States was designed to justify and uphold. . . .

Taney, Ch. J.

I concur in the opinion pronounced by the court, that the law of Pennsylvania, under which the plaintiff in error was indicted, is unconstitutional and void; and that the judgment against him must be reversed. . . . But, as I understand the opinion of the court, it goes further, and decides, that the power to provide a remedy for this right is vested exclusively in congress. . . . I think, the states are not prohibited; and that, on the contrary, . . . the words of the article which direct that the fugitive "shall be delivered up," seem evidently designed to impose it as a duty upon the people of the several states, to pass laws to carry into execution, in good faith, the compact into which they thus solemnly entered with each other. . . .

The delivery of the property itself — its prompt and immediate delivery — is plainly required, and was intended to be secured. Indeed, if the state authorities are absolved from all obligation to protect this right, and may stand by and see it violated, without an effort to defend it, the act of congress of 1793 scarcely deserves the name of a remedy. The state officers mentioned in the law are not bound to execute the duties imposed upon them by congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it. . . . And it will be remembered, that when this law was passed, the government of the United States was administered by the men who had but recently taken a leading part in the formation of the constitution. And the reliance obviously placed upon state authority, for the purpose of executing this law, proves that the construction now given to the constitution by the court, had not entered into their minds. Certainly, it is not the construction which it received in the states most interested in its faithful execution. . . .

It is true, that Maryland as well as every other slave-holding state, has a deep interest in the faithful execution of the clause in question. But the obligation of the compact is not confined to them; it is equally binding upon the faith of every state in the Union; and has heretofore, in my judgment, been justly regarded as obligatory upon all.

I dissent, therefore, upon these grounds, from that part of the opinion of the court which denies the obligation and the right of the state authorities to protect the master, when he is endeavoring to seize a fugitive from his service, in pursuance of the right given to him by the constitution of the United States; provided the state law is not in conflict with the remedy provided by congress. . . .

I do not speak of slaves whom their masters voluntarily take into a non-slave-holding state. That case is not before us. I speak of the case provided for in the constitution; that is to say, the case of a fugitive who has escaped from the service of his owner, and who has taken refuge and is found in another state.

3. Constitutional Abolitionism: Rejecting the Framers' Intent

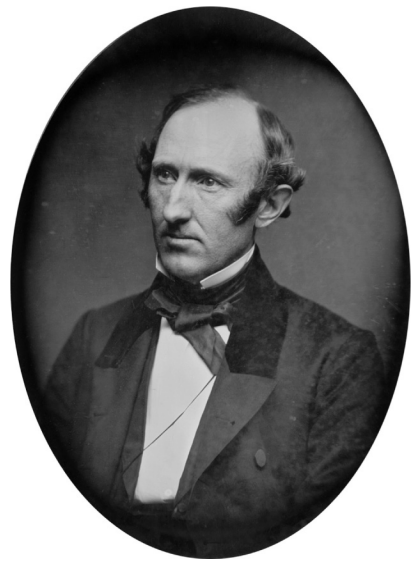
In *Prigg*, Justice Story relied on the Framers' unstated intentions. He wrote that the Constitution would never have been ratified if "every non-slaveholding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits." The Court found these arguments based on purpose more persuasive than Salmon Chase's arguments based on text.

Story did not speculate about the Framers' intent in a vacuum. In 1840 — two years before *Prigg* was decided — James Madison's notes from the Constitutional Convention were finally published. These debates show that the Framers of the Constitution deliberately made specific concessions to protect slavery.

The Radical Abolitionists, perhaps ironically, agreed with Story's view about the Framers' intent. At the time, the leading Radical Abolitionist was William Lloyd Garrison. His close associate, attorney Wendell Phillips, had been a student of Joseph Story's at Harvard Law School. Garrison and his associates famously characterized the Constitution as "a covenant with death and an agreement with hell." Even more ironically, the Radical Abolitionists would agree with Chief Justice Taney's understanding of original intent in *Dred Scott*.

After *Prigg* was decided, the Garrisonians put James Madison's recently published notes to use. In 1844, Phillips published *The Constitution a Pro-slavery Compact: Or, Extracts from the Madison Papers, Etc.* In his book, Phillips used quotes from the Philadelphia convention to show that the Framers of the Constitution had intended to protect slavery all along.

William Lloyd Garrison



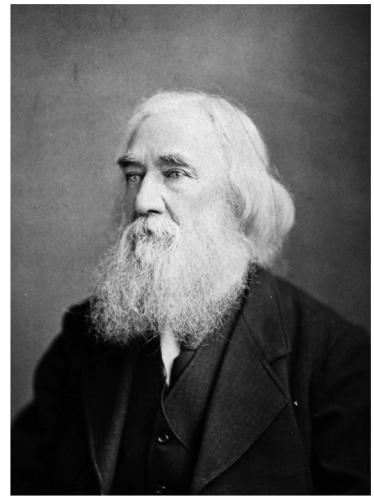
Wendell Phillips

That same year, two of the leading Constitutional Abolitionists would forcefully respond to the Garrisonians. Instead of relying on the Framers' unstated intentions, William Goodell and Lysander Spooner based their arguments on the actual text of the Constitution.

In 1844, Goodell published *Views of American Constitutional Law*. In this seminal book, Goodell rejected a reading of the Constitution based on the Framers' intentions. Instead, he advocated interpreting the Fugitive Slave Clause in particular, and the Constitution more broadly, according to its original plain or public meaning. Goodell rejected the claim that the Constitution represented "compromises" and "guaranties" in support of slavery. This contention, he wrote, "is seldom made out, from the provisions of that instrument itself without lugging in, what is claimed to be the 'implied understanding' of the supposed parties to the 'compact' — an understanding, without which it is assumed, the assent of the slave States to the Constitution, could not have been gained." Goodell observed that, "in the absence of the appropriate words and phrases" to express any such compromise or guaranties, "resort is instantly had to supposed intentions and 'understandings' to eke out the construction!" He then lambasted proponents of original intent for selectively abandoning "any recognized principle of interpretation by which all other questions, the meaning of this national document, in particular, or of any other similar instrument, is supposed to be obtained."[1]

In 1845, Spooner published *The Unconstitutionality of Slavery*, which built upon Goodell's book in a critical regard. In his foundational book, Spooner presented an elaborate discussion of interpretive methodology. The first edition of Spooner's book was 145 pages. Spooner's book greatly appealed to Constitutional Abolitionists. The Radical Abolitionists would soon respond.

William Goodell



Lysander Spooner

[1] William Goodell, Views of American Constitutional Law in Its Bearing upon American Slavery 19-20 (1844).

Wendell Phillips, the Garrisonian, was "[g]oaded by charges that he was afraid to tackle the most famous antislavery analysis of the Constitution" in Spooner's book.[2] In 1847, Phillips published a ninety-page reply at his own expense. Phillips argued that focusing *solely* on the text of the Constitution, and not the Framers' intent, leads to a *reductio ad absurdum* — that is, an argument that reduces to absurdity:

> [I]f we construe the Constitution according to Mr. Spooner's rules, women are constitutionally eligible to the Presidency and to Congress; nothing but "extraneous and historical evidence" shields us from this result. As Mr. Spooner does not allow of this when it will fix upon a clause any meaning contrary to "natural right," he is bound to hold that women may now legally fill these offices, or to give up his rules. . . .[3]

Is the Original Meaning of the Constitution Gendered?

Today, prominent critics of originalism advance the view that, under an originalist interpretation of the Constitution, a woman could not be elected as President. Dean Erwin Chemerinsky, for example, contends that "under originalism it would be unconstitutional to elect a woman as president or vice president because the Constitution refers to these officeholders as 'he,' and the framers clearly intended that they be male."[4] Professor Robert Natelson counters that "during the Founding Era, as in all modern history before the 1970s, the pronoun ['he'] served as standard pronouns of indefinite gender." Further, Natelson notes, the Framers omitted "gender restrictions" that appeared in nearly all state constitutions of that era. For example, the New York Constitution referred to the state legislature as consisting of "two separate and distinct bodies of men." By contrast, in New Jersey, where women could vote, the state constitution granted the right to hold office to "all inhabitants."[5]

Wendell Phillips realized that under Spooner's methodology a woman would constitutionally be eligible for the presidency and for Congress. Phillips viewed this outcome as absurd, and therefore rejected Spooner's methodology. We think Phillips correctly described this implication of Spooner's methodology, but consider this to be a good rather than bad outcome. And with respect to the original meaning of the text, we think Phillips is right and Chemerinsky is wrong.

[2] Perry, *supra* at 165.
[3] See Wendell Phillips, Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery 53-54 (1847).
[4] Erwin Chemerinsky, Constitutional Law: Principles and Policies (3d ed. 2006).
[5] Robert Natelson, A Woman as President? The Gender-Neutral Constitution, The Volokh Conspiracy (Oct. 28, 2015), https://wapo.st/2VDeeuJ.

Gerrit Smith was a wealthy antislavery activist, and provided financial support to Lysander Spooner. In 1853, Smith was elected to the House as a Free Soiler from New York. He served one term before resigning his seat.

That same year, Spooner responded to Phillips with a "part second" of *The Unconstitutionality of Slavery*. In his reply, Spooner maintained that the "original meaning of the constitution itself" should control. And that meaning cannot be trumped by the unexpressed intentions of those who wrote the text, or by subsequent judicial decisions. The combined edition spanned nearly 300 pages in length, and was reprinted several times. Soon, the Constitutional Abolitionists would gain an important convert: Frederick Douglass, the famous runaway slave, abandoned the Garrisonians. Douglass publicly credited his conversion to a "careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell."[6] We will discuss Douglass's distinctive articulation of this originalist methodology in Chapter 3.

In this remarkable debate, Constitutional Abolitionists like Goodell and Spooner developed a different approach to constitutional interpretation than that of the Radical Abolitionists like Phillips and Garrison. Phillips relied on evidence of the *original intentions of the Framers* of the Constitution. Goodell and Spooner denied that this evidence was relevant. Instead, they based their claims on the *original meaning* of the text. This debate provides the earliest and clearest account of these two distinct forms of originalism. Scholars and jurists still argue about these issues today.

4. The Constitutional Abolitionists Respond to *Prigg*

In the following essay, Lysander Spooner criticized Justice Story's opinion in *Prigg* by expanding on the arguments he developed in *The Unconstitutionality of Slavery*. In

[6] Frederick Douglass, Change of Opinion Announced, The North Star (May 15, 1851), reprinted in The Liberator (May 23, 1851).

particular, Spooner contested Story's interpretation of Article IV, Section 2, Clause 3. Spooner contended that this clause did not refer to slavery. If Spooner is correct, then Story's holding would collapse: Congress would lack the power to enact the Fugitive Slave Act. Spooner also chastised Story for relying on the intentions of the Framers. Indeed, Spooner charged that Story had rejected this method of constitutional interpretation in his own treatise.

We do not offer this excerpt to endorse Spooner's reading of the Fugitive Slave Clause. After this excerpt, we identify the problem with it. Rather, we offer it to show how constitutional interpretation took a turn toward "textualism" and away from the Framers' intent. That turn had significant consequences leading up to the Civil War.

Lysander Spooner, A Defence for Fugitive Slaves Against the Acts of Congress of February 12, 1793 (September 18, 1850)

STUDY GUIDE

1. Chief Justice Marshall wrote the majority opinion in *United States v. Fisher* (1805). He articulated the following principle of statutory interpretation: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects." Spooner, and later Frederick Douglass, stressed this principle.
2. This rule of construction allows a function for natural rights without calling for their direct protection by the courts. Is there anything wrong with adopting such a rule of construction? Does this rule qualify the "originalist" nature of Spooner's interpretive method?
3. In *The Unconstitutionality of Slavery*, Spooner identified an "innocent" meaning for each clause of the Constitution that obliquely referred to slavery with euphemisms. For example, he claimed that the phrase "persons held to service" referred to apprentices and indentured servants. But you need not be persuaded by his interpretation of Article IV, Section 2, Clause 3 — we aren't — to accept the contention that the original meaning of the text rejected the concept of "property in man."
4. How did the Framers' refusal to include an expressed endorsement of "property in man" affect later constitutional arguments about slavery?

Neither the constitutional provision, nor either of said acts of Congress, uses the word slave, nor slavery, nor any language that can *legally* be made to apply to slaves. The only "person" required by the constitution to be delivered up, is described in the constitution as a "person held to service or labor in one state, under the laws thereof." This language is no legal description of a slave, and can be made to apply to a slave only by a violation of all the most imperative rules of interpretation, by which the meaning of all legal instruments is to be ascertained. . . .

The word "*held*" being, in law, synonymous with the word "*bound*," the description, "person held to service or labor," is synonymous with the description in another Section, (Art. 1, Sec. 2), to wit, "those *bound* to service for a term of years." . . . In fact, every body, courts and people, admit that "persons *bound* to service for a term of years," as apprentices and other indent[ur]ed servants, are to be delivered up under the provision relative to "persons *held* to service or labor." The word "*held*," then, is regarded as synonymous with "*bound*," whenever it is wished to deliver up "persons *bound* to service." If, then, it be synonymous with the word "*bound*," it applies only to persons who are "*bound*," in a *legal* sense, — that is, by some legal contract, obligation, or duty, which the law will enforce. . . .

The Supreme Court of the United States, in the *Prigg* case, . . . made no pretence that the *language itself* of the constitution afforded any justification for a claim to a fugitive slave. On the contrary, they made the audacious and atrocious avowal, that for the sole purpose of making the clause apply to slaves, they would disregard, — as they acknowledged themselves obliged to disregard, — all the primary, established, and imperative rules of legal interpretation, *and be governed solely by the history of men's intentions, outside of the constitution*. . . .

Thus it will be seen, that on the strength of *history alone*, they assume that "many of the provisions of the constitution were matters of compromise," (that is, in regard to slavery); but they admit that the words of those provisions cannot be made to express any such compromise, if they are interpreted according to any "uniform rule of interpretation," or "any rules of interpretation of a more general nature," than the mere history of those particular clauses. Hence, "in order to clear the case of [that] difficulty," they conclude that "perhaps the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." . . .

Stripped, then, of the covering, which that falsehood was intended to throw over their conduct, the plain English of the language of the Court is this, — that history tells us that certain clauses of the constitution were intended to recognize and support slavery; but inasmuch as such is not the legal meaning of the words of those clauses, if interpreted by the established rules of interpretation, we will, "in order to clear the case of [that] difficulty," just discard those rules, and pervert the words so as to *make* them accomplish whatever ends *history* tells us were intended to be accomplished by them.

It was only by such a naked and daring fraud as this, that the court could make the constitution authorize the recovery of fugitive slaves.

And what were the rules of interpretation, which they thus discarded, "in order to clear the case of difficulty," and make the constitution subserve the purposes of slavery?

One of them is this, laid down by the Supreme Court of the United States: "The intention of the instrument must prevail; *this intention must be collected from its words*." 12 Wheaton, 332. Without an adherence to this rule, it is plain we could never know what is, and what was not, the constitution.

Another rule is that universal one, acknowledged by all courts to be imperative, that language used must be construed strictly in favor of liberty and justice. The Supreme Court of the United States have laid down this rule in these strong terms.

> Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects. United States vs. Fisher, 2 Cranch, 390.

Story delivered this opinion of the court (in the *Prigg* case), discarding all other rules of interpretation, and resorting to history to make the clause apply to slaves. And yet no judge has ever scouted more contemptuously than Story, the idea of going out of the words of the law, or the constitution, and being governed by what history may say were the intentions of the authors. He says [in his treatise, *Commentaries on the Constitution of the United States*, that],

> . . . Nothing but the text itself was adopted by the people. . . . Is the sense of the constitution to be ascertained, not by its own text, but by the "probable meaning," to be gathered by conjectures from scattered documents, from private papers, from the table-talk of some statesman, or the jealous exaggerations of others? Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text? What would be said of interpreting a statute of a state legislature, by endeavoring to find out, from private sources, the objects and opinions of every member; how every one thought; what he wished; how he interpreted it? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed as to the "probable meaning" of the framers, or of the people, what interpretation is to be followed?
>
> These, and many questions of the same sort, might be asked. It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text, but the words are to be bent and broken by the "probable meaning" of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own. The people adopted the constitution, according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men. 1 Story's Comm. on Const., 387 to 392.

And Story has said much more of the same sort as to the absurdity of relying upon "history" for the meaning of the constitution. It is manifest that if the meaning of the constitution is to be warped in the least, it may be warped to any extent, on the authority of history; and thus it would follow that the constitution would in reality be made by the historians, and not by the people. It would be impossible for the people to make a constitution, which the historians might not change at pleasure, by simply asserting that the people intended thus or so. . . .

Proponents of slavery and the Radical Abolitionists were unlikely allies: they agreed that the Constitution positively sanctioned slavery. All Constitutional Abolitionists

disagreed with this premise. Some Constitutional Abolitionists, like Spooner and Goodell, maintained that slavery was actually unconstitutional even in those states that recognized it.

Other Constitutional Abolitionists relied on Spooner's interpretive method, but reached a more moderate conclusion about the meaning of the Fugitive Slave Clause. Salmon P. Chase, for example, conceded that slavery *was* constitutional within the original thirteen states that retained the institution through positive law. His position is consistent with modern originalist theory. If the public would have understood the phrase "persons held to service" to be a reference to enslaved persons, then *that* was its original meaning, even if the word "slave" was not used. Such a conclusion does not rest on the intentions of the clause's framers, but rather on the *context* that would inform the public's understanding of this language.

Nevertheless, the fact that the Fugitive Slave Clause referred to "person[s] held to service or labour in one state, *under the laws thereof*" was also significant. The Constitution seemed to countenance that state law, and only state law, allowed the institution of slavery. This language reflected the theory of the *Somerset Case*: slavery was fundamentally unjust and it could only be based on positive law — in this case, "under the laws" of the Southern slave states. Therefore, under Chase's view, a state could maintain slavery so long as its statutes permitted the institution. These conclusions did not rest on the intentions of the clause's framers, but rather on the *context* that would inform the public's understanding of this language.

Spooner had initially been hopeful of Chase. In an 1846 letter, Spooner wrote, "I have been in the habit of considering [Chase] the most important anti-slavery man in the west, and therefore I am anxious he should be on the right ground."* But Chase's failure to embrace some of Spooner's substantive conclusions evoked his displeasure. In that same letter, the irascible Spooner wrote, "As to Chase, if I had him within arm's length, I would break every bone in his body, if I could not otherwise make him understand, and either yield to, or answer the arguments in my book."

Ultimately, Chase's view would become dominant among Constitutional Abolitionists.

* Lysander Spooner, Letter to George Bradburn (December 7, 1846).

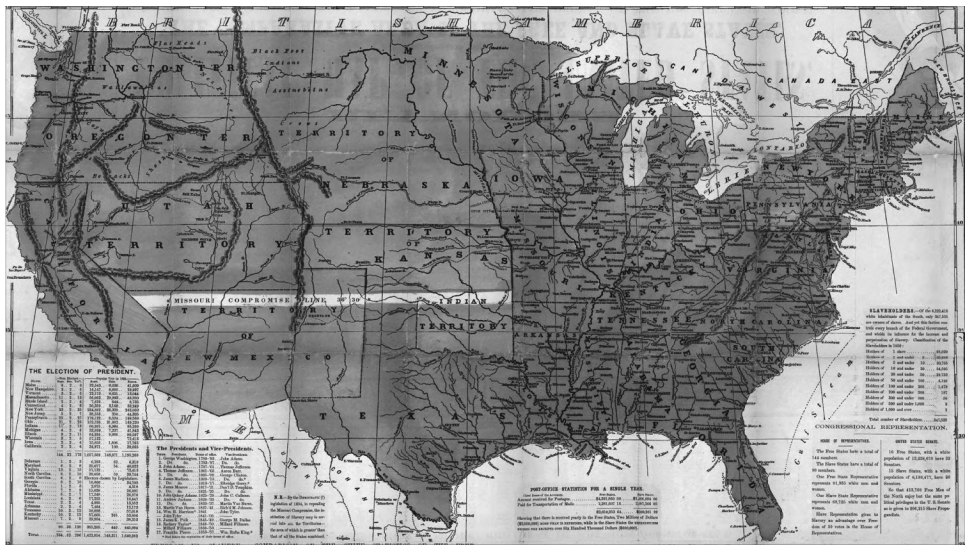
CHAPTER 3

Slavery, Citizenship, and the Due Process of Law

ASSIGNMENT 1

A. SLAVERY AND THE DUE PROCESS OF LAW

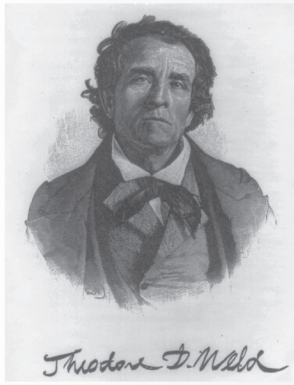
Did the Constitution protect a right to own slaves? Following the Constitution's ratification, the debate over slavery became increasingly bitter. Most antislavery activists agreed that the federal government lacked the power to abolish slavery in the states where it continued to exist. As a result, the political fight over slavery in Congress primarily concerned the federal territories. As new states were formed from these territories, each side feared that the other would gain the upper hand in Congress. This fear resulted in the Missouri Compromise of 1820. The new state of Missouri would be admitted as a slave state, but slavery would be prohibited in all new states north of the 36° 30′ line. The compromise was designed to preserve the political equipoise in Congress: for every new slave state that was admitted into the Union, a free state would also be admitted.



The Missouri Compromise of 1820. Slavery was prohibited in all new states north of the 36° 30′ line, with the exception of Missouri.

The debate over slavery was not limited to the territories. In 1800, the federal capital had moved from Philadelphia to Washington, District of Columbia. This new federal district, sandwiched between Maryland to the north and Virginia to the south, permitted slavery. For decades, abolitionists petitioned Congress to abolish slavery in the nation's capital. Their petitions were largely ignored. Eventually, in 1836, the House of Representatives tasked a select committee to consider the subject of slavery in the District of Columbia. The committee was chaired by Representative Henry L. Pinckney of South Carolina. His father was Charles Pinckney, one of the most active participants at the Constitutional Convention.

The committee concluded that abolishing slavery in the District of Columbia would deprive slaveholders of their property without due process of law, in violation of the Fifth Amendment. This clause limits the scope of federal power and provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." Their report contended that the Constitution "could confer no power contrary to the fundamental principles of the Constitution itself, and the essential and inalienable rights of American citizens." Congress's power to legislate within the District, though exclusive, was "evidently qualified" by the Due Process Clause. "No republican could approve of any system of legislation by which the property of an individual, lawfully acquired, should be *arbitrarily* wrested from him by the high hand of power." According to the committee, a law that "arbitrarily" deprives a person of his property is not consistent with the "due process of law."



Theodore Dwight Weld (1803-1895) was born in Hampton, Connecticut, and was raised near Utica, New York. He studied at the Oneida Institute in New York with Professor Charles Finney, who was also a lawyer and preacher. Soon, Weld converted to abolitionism. Weld later trained for the ministry at Lane Seminary in Cincinnati, a strongly anti-slavery institution. Weld would organize a series of anti-slavery debates between leading ministers and intellectuals. These debates created an important platform for voicing his own abolitionist sentiment. However, in 1834, the Board of Trustees at the seminary banned such student projects. In response, the charismatic Weld led a walkout of the majority of students. Shortly thereafter, his group of activists enrolled in Oberlin College in northern Ohio. Oberlin was the first college in the United States where instruction was regularly open to women and to African Americans. Weld declined a professorship at Oberlin. Instead, he became a full-time antislavery activist, operating mainly in New York. In 1838, he married the noted abolitionist and women's rights advocate, Angelina Grimké.

Soon, the Pinckney report would receive a forceful response. The next year, abolitionist Theodore Dwight Weld published an article in the *New York Evening Post* contending that it was slavery that violated the Fifth Amendment. Weld made a clever argument. He turned the constitutional arguments advanced in Pinckney's report against the committee. The House report had concluded that a law *abolishing* slavery would violate "the due process of law" because it "arbitrarily" deprived slave owners of their property. Weld made the same argument in reverse: the law *establishing* slavery violated the "due process of law" because it arbitrarily deprived slaves of their own liberty.

Weld observed that "[a]ll the slaves in the District have been 'deprived of liberty' by legislative acts." The same laws that deprived the slaves of liberty also granted "the master 'of the identical liberty' previously taken from the slave." That is, the same statute that authorized the master to hold a slave, deprived the slave of his freedom. Weld reasoned that these laws "were either [consistent with] 'due process of law' or they were *not*." Weld then considered both possibilities. First, if the laws depriving slaves of their liberty were consistent with the "due process of law," then a law depriving "the master 'of the identical liberty' previously taken from the slave" would also be consistent with the "due process of law." In other words, if a law depriving the slaves of their property in themselves was constitutional, then a law depriving the master of the very same property right would also be constitutional.

Next, Weld considered the second possibility: what "if the legislative acts 'depriving' [the slaves] of 'liberty' were not 'due process of law' "? In that case, "then the slaves were deprived of liberty unconstitutionally, and these acts are void." Weld concluded, "In that case the constitution emancipates" the slaves. Weld did not contest the basic premise of the *Pinckney* report: that the due process of law protects the fundamental right to hold property free of arbitrary interference. Instead, Weld extended Pinckney's argument to *both* sides of the debate over slavery: the property right applies to the master and to the slave.

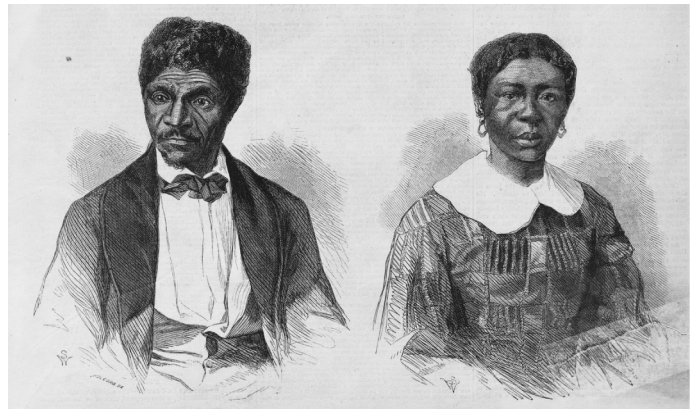
Both the committee and Weld shared a basic conception of "the due process of law." A statute that deprives a person of liberty or property could still violate the Due Process Clause, even if it was enacted according to the legislative process; that is, the statute received a majority vote in the legislature, and was signed by the President. To comply with "the due process of law," there is a greater requirement: the substance of the law cannot be *arbitrary*. A statute that arbitrarily deprives people of their liberty or property is not a binding "law" at all. The legislature does not have the proper power to enact a statute that denies a person the "due process *of law*." This conception of the "due process of law" informed the original meaning of the Due Process Clause of the Fourteenth Amendment.

Weld made another argument. Slaveholders insisted that slaves must follow the laws. But that requirement is a two-way street. If the government demands that slaves must be obedient to the laws, then the government also has a duty to *protect* slaves in accordance with those laws; that is, the government owes the slaves a *duty of protection*. Weld questioned why "the government of the United States [is] unable to grant protection [to the slaves] where it exacts allegiance [from the slaves]?" He then answered his own question: "[i]t is an axiom of the civilized world . . . that allegiance and protection are reciprocal and correlative." Therefore, "[p]rotection is the CONSTITUTIONAL RIGHT of every human being under the exclusive legislation of Congress who has not forfeited it by crime." This concept was eventually incorporated into the text of the Equal Protection Clause of the Fourteenth Amendment. It provides that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

For the next twenty years, Weld's arguments became a staple of Constitutional Abolitionism. "In these remarkable due process and protection arguments," writes historian William Wiecek, "Weld anticipated the following thirty years of antislavery constitutionalism, and hit upon the precise mode that antislavery Republicans would choose to destroy the vestiges of slavery." Moreover, "Weld's tract was a signpost for his contemporaries pointing to doctrines that would lead some of his fellow abolitionists to conclude in a few years that slavery was everywhere illegitimate."

B. *DRED SCOTT v. SANDFORD*

The holding of *Dred Scott v. Sandford* (1857) is well known. First, People of African descent — whether free or enslaved — could *never* be citizens of the United States. And, second, the Court held that the Due Process Clause of the Fifth Amendment protected a slaveholder's "property" interest in his slaves. For this reason, the Missouri Compromise,



Dred and Harriet Scott

which abolished slavery in the federal territories, was declared unconstitutional. This federal law was enacted according to all of the required legislative *procedures*: the bill passed both Houses of Congress, and was signed into law by the President. Taney, however, found the ban on slavery violated the due process of law because its *substance* was arbitrary. This arbitrariness, Taney found, violated the Due Process Clause of the Fifth Amendment. (In Chapter 5, we will study the difference between *substantive* and *procedural* "due process of law.") Here, Taney advanced the same argument proposed in the Pinckney Report. (Taney did not address Theodore Weld's counterargument.)

The vote in *Dred Scott* was 7-2. The two dissenters did not challenge the majority's claim that the Fifth Amendment protected a person's liberty or property from arbitrary statutes.

The dissenters also did not dispute Taney's understanding of "the due process of law." Instead, they denied that slaves were "property" for purposes of the Due Process Clause, regardless of how state law described them.

This infamous decision is part of the *anti-canon*. However, the facts that gave rise to *Dred Scott* are not well understood.* Dred Scott was a slave who belonged to Dr. Emerson, a surgeon in the U.S. Army. In 1834, Emerson took Scott from Missouri to Fort Armstrong in Rock Island, Illinois. This military post was located in a free state. Emerson continued to hold him as a slave. Two years later, Emerson was relocated to Fort Snelling in the Wisconsin Territory. (You can visit the historic Fort Snelling museum, which is located near Minneapolis, Minnesota.) Under the Missouri Compromise and the Wisconsin Enabling Act, Fort Snelling was located in a free territory. Slavery was forbidden in a "free soil" territory.

While at Fort Snelling, Scott met Harriet Robinson, an enslaved person who belonged to another army officer. With Emerson's consent, Scott and Robinson were married. In 1837, Emerson was transferred to Fort Jesup, Louisiana. The following year, Emerson married Irene Sanford and sent for Dred and Harriet from Fort Snelling. The Scotts followed Emerson and his family around the country, first to St. Louis, then to Fort Jesup, and then back to Fort Snelling. The Scott's first child, Eliza, was born during a steamboat trip on the Mississippi River, north of the Missouri state line.

In 1840, Emerson was sent to fight in the Seminole War in Florida. He left his wife and slaves behind in St. Louis. After Emerson's return, he moved to the free territory of Iowa but left Scott and his wife behind in St. Louis where they were hired out for wages.

* Lea VanderVelde reconstructed a remarkably vivid and moving portrait of the lives of Dred and Harriet Scott. See Mrs. Dred Scott: A Life on Slavery's Frontier (2010).

In 1843, Emerson died unexpectedly. His wife, Irene Sanford, inherited the Scott family as property.

In 1846, after laboring and saving for years, the Scotts sought to buy their freedom from Irene, but she refused. Dred and Harriet Scott, likely at the initiative of Harriet, then sued Irene in Missouri state court. Dred argued that he was legally free because he and his family had lived in a free territory where slavery was banned.

In 1850, the trial court declared Scott free. At the time, Missouri case law held that a slave was emancipated by virtue of traveling to a free territory or state. However, Scott's wages had been withheld pending the resolution of his case. During that time Irene remarried and asked her brother, John Sanford of New York, to deal with her affairs. Mr. Sanford refused to pay Scott's back wages, and appealed the trial court's decision to the Missouri Supreme Court. On appeal, the state supreme court reversed prior precedent that had supported the Scotts' claim to liberty, and ruled in favor of Sanford.

Scott did not appeal that judgment to the United States Supreme Court. Instead, he filed another lawsuit against Sanford in a federal circuit court. Scott claimed damages for Sanford's alleged physical abuse against him. Due to a clerical error at the time, Sanford's name was misspelled as "Sandford" in court records.

Federal courts have jurisdiction to hear diversity suits that involve "citizens" of different states. If Scott was in fact a citizen of Missouri, he could sue Sanford, a citizen of New York, in federal court. If Scott was not a citizen, however, the case must be dismissed because the federal court lacked jurisdiction.

The Supreme Court ruled against Scott. Chief Justice Taney's majority opinion concluded that the Court lacked diversity jurisdiction because Scott, whether or not he was a citizen of Missouri, was not a citizen of the United States. Taney contended that descendants of African slaves could never become citizens of the United States — even if they were emancipated under state law and were considered "citizens" by their state.

If the Court lacked jurisdiction to hear the case, the lawsuit should have been dismissed without reaching any other issue. Yet Taney took the opportunity to address another question that would prove politically explosive: the Missouri Compromise violated the Due Process Clause of the Fifth Amendment. As a result, Dred Scott was not emancipated when Emerson brought him into a federal free territory. This part of the *Dred Scott* decision proved to be politically momentous.

Now, slaveholders could assert a constitutional right to take their "property" into any territory. This holding virtually ensured that any new states formed from the territories would be slave states. If Congress could not ban slavery in some of the territories, some Northerners concluded that all of the territories might well permit slavery as soon as slaveholders settled there. If these pro-slavery territories were admitted as pro-slavery states, the delicate balance that the Missouri Compromise had attempted to preserve would be upset. Slave states would then have the upper hand in Congress, and in the Electoral College.

During this period, Southerners also argued that they had a constitutional right to travel with their slaves through Northern free states. They argued that this right to travel was one of the "privileges and immunities" protected by Article IV of the Constitution. If Chief Justice Taney was correct that slavery was a property right, regardless of local regulations, however, then a slaveholder may be able to hold that property *indefinitely* in a free state. During this period, Southerners were quite willing to assert a broad federal power to promote slavery, and trump what we today call "states' rights."

These legal developments posed a serious threat to the free states. In the North, abolitionists were vocal, but in the minority. Most Northerners were indifferent to slavery in the South, which they considered to be none of their business. But these indifferent Northerners were deeply concerned about Southern control of the national government. That control would render the free, Northern states a permanent minority. The high-profile case of *Dred Scott v. Sandford* galvanized these fears.

That infamous decision fueled the growth of the new antislavery Republican Party, which was founded in 1854. Two years later, the Republican Party fielded its first presidential candidate, John C. Fremont, a 43-year-old retired Army officer. The party's campaign slogan was "Free Speech. Free Press. Free Soil. Free Men. Fremont and Victory!" In 1860, Abraham Lincoln, the party's presidential candidate, prevailed on a platform opposing any further extension of slavery. In response to Lincoln's victory, Southern states seceded. In this way, *Dred Scott* can be seen as having led to the Civil War.

STUDY GUIDE

1. How does Chief Justice Taney treat the existence of discriminatory statutes in free states? Do these laws really demonstrate that African Americans, who were free under state law, could not be deemed full citizens? After all, these same laws also discriminated against Native Americans, whom Taney conceded could become U.S. citizens. Is there another possible rationale for these restrictions that is consistent with the citizenship of free blacks?
2. Are you persuaded by Taney's interpretation of the Declaration of Independence? How does he limit the meaning of its "general words" in 1776? How do the dissenters respond to his claim?
3. Taney identifies specific "privileges and immunities" of citizens of the United States. What are they? We will revisit this list when we study *Slaughter-House Cases* (1873) in Chapter 4.
4. Taney writes that "the right of property in a slave is distinctly and expressly affirmed in the Constitution." Is he right? Does the Constitution distinctly and expressly recognize the principle of "property in men"? Justice McLean also cites *Prigg v. Pennsylvania* (1842), which upheld the constitutionality of the Fugitive Slave Act. Does *Prigg* support Taney's claim?
5. In dissent, Justices McLean and Curtis seem to accept Chief Justice Taney's view of the Due Process Clause of the Fifth Amendment: that provision allows the Court to evaluate the substance of a federal law. How do the dissenters disagree with the majority's Due Process Clause analysis?
6. In 1787, the Articles of Confederation Congress approved the Northwest Ordinance, which banned slavery in the so-called Northwest Territories. The Missouri Compromise copied the language banning slavery from the Northwest Ordinance. If *Dred Scott* was correct, then the Northwest Ordinance would also be unconstitutional. Should we lightly presume that a law, enacted the same year the Constitution was framed, was flagrantly unconstitutional? Does this history

undermine Taney's contention that the founding generation accepted the concept of "property in man"?

7. Today, *Dred Scott* remains a potent weapon in debates about the proper method of constitutional interpretation. Opponents of "originalism" use *Dred Scott* as ammunition against that method of interpretation; others use the case to undermine the legitimacy of a reading of the Due Process Clause in which courts can evaluate the substance of a law. Can you see how? What response could each side make to these challenges?
8. Was *Dred Scott* correctly decided in 1857? If *Dred Scott* was wrong, did the Constitution not sanction slavery, as Lysander Spooner had maintained? If Spooner was wrong, why are Taney and the Court so widely condemned? Should we not blame the Constitution, rather than its faithful interpreter, for approving of slavery? But if the blame falls on Taney, perhaps the Constitution was not as pro-slavery as he claimed?

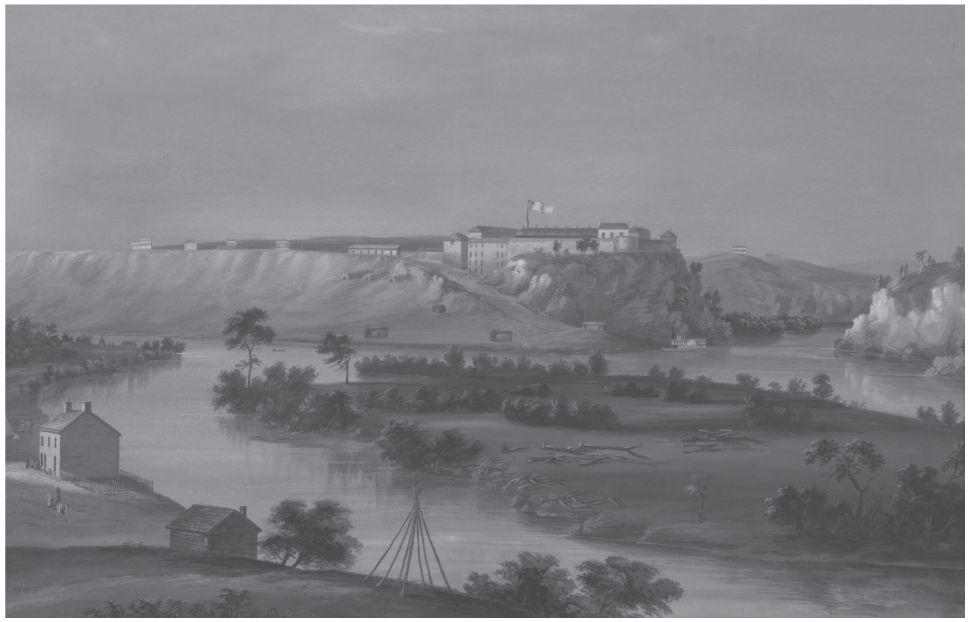
Dred Scott v. Sandford

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

Video on CasebookConnect.com

Mr. Chief Justice Taney delivered the opinion of the court.

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed



Fort Snelling, where Dred and Harriet Scott met and were married.

by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. . . .

[I. Why a Descendant of African Slaves Can Never Be a Citizen of the United States]

[T]he question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. . . . This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves . . . .

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it

has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States.

Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them.

The Constitution has conferred on Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this

court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue [endow or provide with a quality or ability — Eds.] him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white

woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid."

The other colonial law to which we refer was passed by Massachusetts in 1705, It is entitled "An act for the better preventing of a spurious and mixed issue," &c.; and it provides . . . "that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds. . . ."

We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

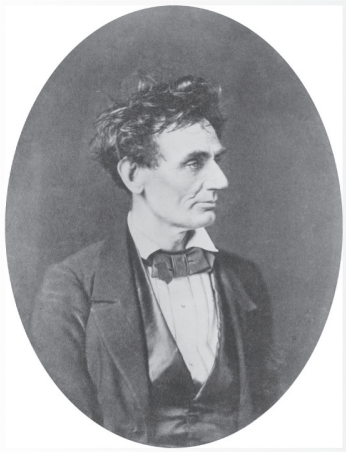
We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation." It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

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

Yet the men who framed this declaration were great men — high in literary acquirements — high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection. This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.



In 1857, Abraham Lincoln ran for an Illinois Senate seat against the incumbent, Democrat Stephen A. Douglas. During that campaign, Lincoln criticized Chief Justice Taney's interpretation of the Declaration of Independence:

> Chief Justice Taney, in his opinion in the *Dred Scott* case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, or ever afterwards, actually place all white people on an equality with one or another. And this is the staple argument of both the Chief Justice and the Senator, for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal — equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories.

By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States: for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave

trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions.

And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form — that is, in the seizure and transportation — the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the Government went into operation.

We need not refer, on this point, particularly to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class, in the same spirit with the Maryland law which we have before quoted. . . . And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of which we have spoken. The law of 1786, like the law of 1705, forbids the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon any one who shall join them in marriage; and declares all such marriage absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their revised code published in 1836.

This code forbids any person from joining in marriage any white person with any Indian, negro, or mulatto, and subjects the party who shall offend in this respect, to imprisonment, not exceeding six months, in the common jail, or to hard labor, and to a fine of not less than fifty nor more than two hundred dollars; and, like the law of 1786, it declares the marriage to be absolutely null and void. It will be seen that the punishment is increased by the code upon the person who shall marry them, by adding imprisonment to a pecuniary penalty.

So, too, in Connecticut. We refer more particularly to the legislation of this State, because it was not only among the first to put an end to slavery within its own territory, but was the first to fix a mark of reprobation upon the African slave trade. . . . [W]e find that in the same statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian, or mulatto servant, who was found wandering out of the town or place to which he belonged, without a written pass such as is therein described, was made liable to be seized by any one, and taken before the next authority to be examined and delivered up to his master — who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides, that if any free negro shall travel without such pass, and shall be stopped, seized, or taken up, he shall pay all charges arising thereby. And this law was in full operation when the Constitution of the United States was adopted, and was not repealed till 1797. So that up to that time free negroes and mulattoes were associated with servants and slaves in the police regulations established by the laws of the State. . . .

And again, in 1833, Connecticut passed another law, which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or institution, or board or harbor for that purpose, any such person, without the previous consent in writing of the civil authority of the town in which such school or institution might be. . . .

We have made this particular examination into the legislative . . . action of Connecticut, because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union; and if we find that at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else. . . . [Discussion of the laws of New Hampshire and Rhode Island omitted. — Eds.] [I]n no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion.

More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories.

The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.

And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much more important power — that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union, than the few foreigners one of the States might improperly naturalize.

The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory. . . .

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the Government went into operation, will be abundantly sufficient to show this. The two first are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words "people of the United States" and "citizen" in that well-considered instrument.

The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "*to aliens being free white persons*." Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of any one, of any color, who was born under allegiance to another Government. But the language of the law above quoted, shows that citizenship at that

time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Congress might . . . have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them. It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure.

Another of the early laws of which we have spoken, is the first militia law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners; the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, (2 Stat., 809,) and it provides: "That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States." Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States. . . .

But it is said that a person may be a citizen, and entitled to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognised there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship. This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or

hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them. . . .

The only two provisions which point to them and include them, treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts. . . .

[II. Why the "Due Process of Law" Protects Property in Slaves in the Territories]

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . . Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? . . .

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri.* And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States. . . .

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, . . . the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law.

And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. . . . And if Congress itself cannot do this — if it is beyond the powers conferred on the Federal Government — it will be

* [In 1787—prior to the ratification of the Constitution—the Articles of Confederation Congress enacted the Northwest Ordinance. Article 6 of this law provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted. . . ."—Eds.]

admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved.

And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words — too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. . . .

Mr. Justice McLean, dissenting. . . .

No injustice can result to the master, from an exercise of jurisdiction in this cause. Such a decision does not in any degree affect the merits of the case; it only enables the plaintiff to assert his claims to freedom before this tribunal. If the jurisdiction be ruled against him, on the ground that he is a slave, it is decisive of his fate. . . .

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognised them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress. . . .

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right. . . .

I will now consider . . . "The effect of taking slaves into a State or Territory, and so holding them, where slavery is prohibited." If the principle laid down in the case of *Prigg v. The State of Pennsylvania* is to be maintained, and it is certainly to be maintained until overruled, as the law of this court, there can be no difficulty on this point. In that case, the court says: "The state of slavery is deemed to be a mere municipal regulation,

founded upon and limited to the range of the territorial laws." If this be so, slavery can exist nowhere except under the authority of law, founded on usage having the force of law, or by statutory recognition. . . .

It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted. But the court says a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man. Suppose a master of a slave in a British island owned a million of property in England; would that authorize him to take his slaves with him to England?

The Constitution, in express terms, recognises the *status* of slavery as founded on the municipal law: "No person held to service or labor in one State, *under the laws thereof*, escaping into another, shall," &c. Now, unless the fugitive escape from a place where, by the municipal law, he is held to labor, this provision affords no remedy to the master. What can be more conclusive than this? Suppose a slave escape from a Territory where slavery is not authorized by law, can he be reclaimed?

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true, this was said by the court, as also many other things, which are of no authority. Nothing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they decided, can be considered as authority. I shall certainly not regard it as such. The question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence. . . .

I think the judgment of the court below should be reversed.

Mr. Justice Curtis, dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. . . . To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. . . .

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed; and colored in common with white persons, were not only citizens of those States, but entitled to the elective franchise

on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts.

I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. . . .

Did the Constitution of the United States deprive [free colored persons of African descent] or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proprio vigore*[, by its own force or vigor — Eds.] deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States. . . .

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law, and in the minds of those who concurred in framing and adopting the Constitution. . . . Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. . . .

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In

selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guarantied by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States. . . .

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established. . . .

It has been further objected, that if free colored persons, born within a particular State, and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be eligible to not only Federal offices, but offices even in those States whose Constitution and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. That this is not true, under the Constitution of the United States, seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications.

The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. . . .

It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution. . . .

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen, cannot depend on laws which refer only to aliens, and do not affect the *status* of persons born in the United States. The utmost effect which can be attributed to them is, to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States. . . .

I do not deem it necessary to review at length the legislation of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the Government, that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus the act of May 17, 1792, for the organization of the militia, directs the enrolment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citizens, would be as inconsistent with the just import of this language, as that all citizens are able-bodied, or males. . . .

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion. . . .

Looking at the power of Congress over the Territories . . . , what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question, whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more

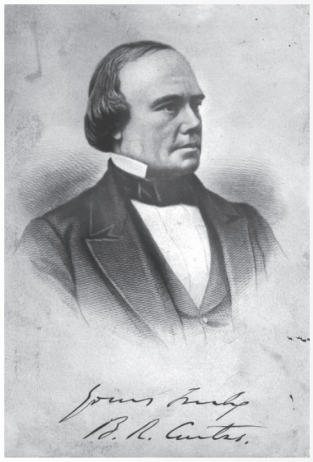
clearly describe a *status* created by municipal law. In *Prigg v. Pennsylvania*, this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." . . .

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? . . .

It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can similar regulation respecting a Territory violate the fifth amendment of the Constitution? . . .

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.



Justice Benjamin Robbins Curtis resigned from the Supreme Court several months after he dissented in Dred Scott. Curtis is said to have stepped down out of disgust with Taney's decision. During the Civil War, Curtis argued that Lincoln's Emancipation Proclamation was unconstitutional. And in 1868, Curtis served as chief counsel during President Andrew Johnson's impeachment trial.

Shortly after the Supreme Court decided *Dred Scott*, Dred and his wife Harriet Scott received their freedom. Historian Melvin Urofsky recounts this remarkable story:

> Irene Emerson's second husband, the abolitionist doctor Calvin Chaffee, now a Massachusetts representative, learned that his wife owned the most famous slave in America just before the court handed down its momentous decision in Scott's case on March 6, 1857. Defenders of slavery ridiculed the hypocrisy of a man who owned slaves and yet spoke out against slavery. Since at that time a husband controlled his wife's property, Chaffee immediately transferred ownership of Scott and his family to Taylor Blow in St. Louis; Missouri law allowed only citizens of the state to emancipate slaves there. Irene Emerson Chaffee insisted, however, that she receive the wages the Scotts had earned during the preceding seven years, a sum of $750 that had been tied up because of the court proceedings.
>
> On May 26, 1857, Dred and Harriet Scott appeared in the St. Louis Circuit Court and were formally freed. Scott then took a job as a porter at Barnum's Hotel in the city and became a celebrity of sorts. Unfortunately, he did not live to enjoy his free status very long. On September 17, 1858, he died of tuberculosis and was buried in St. Louis. Harriet Scott lived until June 1876, long enough to see the Civil War and the Thirteenth Amendment finally abolish slavery in the United States.*

ASSIGNMENT 2

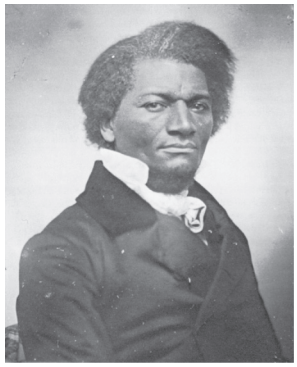
C. CONSTITUTIONAL ABOLITIONISM AND THE *DRED SCOTT* DECISION

In 1818, Frederick Douglass was born in Maryland as a slave. In 1838, he escaped from Maryland to New York City. After his escape, he joined the Massachusetts Anti-Slavery Society, which was led by William Lloyd Garrison, a prominent newspaper editor. The Garrisonians selected Douglass as a featured speaker at their rallies. Douglass's eloquence refuted any suggestion that African Americans were inherently inferior to white people. As Douglass attained fame, however, he faced a growing risk of being recaptured. To avoid his return to bondage, in 1845, he travelled to Britain where he lectured for 19 months. In 1847, British abolitionists purchased Douglass's legal freedom so he could safely return to the United States.

Garrison and the Massachusetts Anti-Slavery Society believed that the Constitution sanctioned slavery. (Chief Justice Taney would take that same position in *Dred Scott*.) On July 4, 1854, Garrison delivered a famous speech at a rally in Framingham, Massachusetts. He held up a copy of the U.S. Constitution, and called it "the source and parent of all the other atrocities — 'a covenant with death, and an agreement with hell.'" He then burned it, crying "So perish all compromises with tyranny!"

Initially, when Douglass joined the Garrisonians, he agreed with their stance on the Constitution. But, in 1851, Douglass wrote that his mind had been changed by "[a] careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell."

* Melvin Urofsky, *Dred Scott*, Britannica, https://www.britannica.com/biography/Dred-Scott.



Frederick Douglass

In Chapter 2, we studied the writings of Goodell and Spooner from 1844 and 1845, respectively. They argued that the original public meaning of the Constitution foreclosed a right to own slaves. Spooner based his argument, in part, on a principle of construction from *United States v. Fisher* (1805). In that case, Chief Justice Marshall wrote, "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

After *Dred Scott* was decided, Frederick Douglass relied on the principle from *Fisher* to criticize the reasoning of Chief Justice Taney's majority opinion. We have included excerpts from two of his most prominent speeches. In the first speech, Douglass equated the views of Chief Justice Taney with those of abolitionist William Lloyd Garrison. Indeed, Taney's reliance on the intentions of the Framers in *Dred Scott* was indistinguishable from that of the Garrisonians. Garrison, a proud abolitionist, no doubt had to swallow a bitter pill after Taney adopted his arguments. In the second speech, Douglass argued that the Constitution is an anti-slavery document.

STUDY GUIDE

1. Douglass was sincerely optimistic about the long-term effects of *Dred Scott*. Is it fair to say his optimism was vindicated by subsequent events? Does this ultimate outcome suggest that a notorious defeat in the courts can sometimes set the stage for a big political victory?
2. Douglass adopted Chief Justice Marshall's rule of construction from *United States v. Fisher*. Does this move undermine the "originalist" nature of the abolitionists' interpretive method?
3. Douglass contended that "the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted as the Constitution of the United States." In other words, only the words chosen, and not unexpressed intentions, became part of the Constitution. Douglass favored a "plain reading" of the Constitution. How could this approach to constitutional interpretation be used today?

1. FREDERICK DOUGLASS, SPEECH DELIVERED, IN PART, AT THE ANNIVERSARY OF THE AMERICAN ABOLITION SOCIETY, HELD IN NEW YORK (MAY 14, 1857)

This infamous decision of the Slaveholding wing of the Supreme Court maintains that slaves are within the contemplation of the Constitution of the United States, property; that slaves are property in the same sense that horses, sheep, and swine are property; that the old doctrine that slavery is a creature of local law is false; that the right of the slaveholder to his slave does not depend upon the local law, but is secured wherever the

Constitution of the United States extends; that Congress has no right to prohibit slavery anywhere; that slavery may go in safety anywhere under the star-spangled banner; that colored persons of African descent have no rights that white men are bound to respect; that colored men of African descent are not and cannot be citizens of the United States.

You will readily ask me how I am affected by this devilish decision — this judicial incarnation of wolfishness? My answer is, and no thanks to the slaveholding wing of the Supreme Court, my hopes were never brighter than now. I have no fear that the National Conscience will be put to sleep by such an open, glaring, and scandalous tissue of lies as that decision is, and has been, over and over, shown to be.

The Supreme Court of the United States is not the only power in this world. It is very great, but the Supreme Court of the Almighty is greater. Judge Taney can do many things, but he cannot perform impossibilities. He cannot bale out the ocean, annihilate this firm old earth, or pluck the silvery star of liberty from our Northern sky. He may decide, and decide again; but he cannot reverse the decision of the Most High. He cannot change the essential nature of things making evil good, and good, evil. . . .

If it were at all likely that the people of these free States would tamely submit to this demonical judgment, I might feel gloomy and sad over it, and possibly it might be necessary for my people to look for a home in some other country. But as the case stands, we have nothing to fear. In one point of view, we, the abolitionists and colored people, should meet this decision, unlooked for and monstrous as it appears, in a cheerful spirit. This very attempt to blot out forever the hopes of an enslaved people may be one necessary link in the chain of events preparatory to the downfall, and complete overthrow of the whole slave system.

The whole history of the anti-slavery movement is studded with proof that all measures devised and executed with a view to allay and diminish the anti-slavery agitation, have only served to increase, intensify, and embolden that agitation. This wisdom of the crafty has been confounded, and the counsels of the ungodly brought to nought. It was so with the Fugitive Slave Bill. It was so with the Kansas Nebraska Bill; and it will be so with this last and most shocking of all pro-slavery devices, this Taney decision. . . .

The recent slaveholding decision, as well as the teachings of anti-slavery men, make this a fit time to discuss the constitutional pretensions of slavery. . . . When I admit that slavery is constitutional, I must see slavery recognized in the Constitution. I must see that it is there plainly stated that one man of a certain description has a right of property in the body and soul of another man of a certain description. There must be no room for a doubt. In a matter so important as the loss of liberty, everything must be proved beyond all reasonable doubt.

The well known rules of legal interpretation bear me out in this stubborn refusal to see slavery where slavery is not, and only to see slavery where it is.

The Supreme Court has, in its day, done something better than make slaveholding decisions. It has laid down rules of interpretation which are in harmony with the true idea and object of law and liberty. It has told us that the intention of legal instruments must prevail; and that this must be collected from its words. It has told us that language must be construed strictly in favor of liberty and justice. It has told us where rights are infringed, where fundamental principles are overthrown, where the general system of the law is departed from, the Legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.* . . .

* [United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805).—Eds.]

I ask, then, [any man] to read the Constitution, and tell me where if he can, in what particular that instrument affords the slightest sanction of slavery? Where will he find a guarantee for slavery? Will he find it in the declaration that no person shall be deprived of life, liberty, or property, without due process of law? Will he find it in the declaration that the Constitution was established to secure the blessing of liberty? Will he find it in the right of the people to be secure in their persons and papers, and houses, and effects? Will he find it in the clause prohibiting the enactment by any State of a bill of attainder?

These all strike at the root of slavery, and any one of them, but faithfully carried out, would put an end to slavery in every State in the American Union. Take, for example, the prohibition of a bill of attainder. That is a law entailing on the child the misfortunes of the parent. This principle would destroy slavery in every State of the Union. The law of slavery is a law of attainder. The child is property because its parent was property, and suffers as a slave because its parent suffered as a slave. Thus the very essence of the whole slave code is in open violation of a fundamental provision of the Constitution, and is in open and flagrant violation of all the objects set forth in the Constitution.

While this and much more can be said, and has been said, and much better said, by Lysander Spooner, William Goodell, Beriah Green, and Gerrit Smith, in favor of the entire unconstitutionality of slavery, what have we on the other side? How is the constitutionality of slavery made out, or attempted to be made out?

First, by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by disregarding the plain and common sense reading of the instrument itself; by showing that the Constitution does not mean what it says, and says what it does not mean, by assuming that the WRITTEN Constitution is to be interpreted in the light of a SECRET and UNWRITTEN understanding of its framers, which understanding is declared to be in favor of slavery. It is in this mean, contemptible, under-hand method that the Constitution is pressed into the service of slavery.

They do not point us to the Constitution itself, for the reason that there is nothing sufficiently explicit for their purpose; but they delight in supposed intentions—intentions no where expressed in the Constitution, and everywhere contradicted in the Constitution. . . . The argument [in Judge Taney's opinion] is, that the Constitution comes down to us from a slaveholding period and a slaveholding people; and that, therefore, we are bound to suppose that the Constitution recognizes colored persons of African descent, the victims of slavery at that time, as debarred forever from all participation in the benefit of the Constitution and the Declaration of Independence, although the plain reading of both includes them in their benificent [sic] range.

As a man, an American, a citizen, a Colored man of both Anglo-Saxon and African descent, I denounce this representation as a most scandalous and devilish perversion of the Constitution, and a brazen mistatement [sic] of the facts of history. But I will not content myself with mere denunciation; I invite attention to the facts.

It is a fact, a great historic fact, that at the time of the adoption of the Constitution, the leading religious denominations in this land were anti-slavery, and were laboring for the emancipation of the colored people of African descent. The church of a country is often a better index of the state of opinion and feeling than is even the government itself. The Methodists, Baptists, Presbyterians, and the denomination of Friends, were actively opposing slavery, denouncing the system of bondage, with language as burning and sweeping as we employ at this day. . . . The testimony of the church, and the testimony of

the founders of this Republic, from the declaration downward, prove Judge Taney false; as false to history as he is to law.

Washington and Jefferson, and Adams, and Jay, and Franklin, and Rush, and Hamilton, and a host of others, held no such degrading views on the subject of slavery as are imputed by Judge Taney to the Fathers of the Republic. All, at that time, looked for the gradual but certain abolition of slavery, and shaped the constitution with a view to this grand result.

George Washington can never be claimed as a fanatic, or as the representative of fanatics. The slaveholders impudently use his name for the base purpose of giving respectability to slavery. Yet, in a letter to Robert Morris, Washington uses this language — language which, at this day, would make him a terror of the slaveholders, and the natural representative of the Republican party.

> There is not a man living, who wishes more sincerely than I do, to see some plan adopted for the abolition of slavery; but there is only one proper and effectual mode by which it can be accomplished, and that is by Legislative authority; and this, as far as my suffrage will go, shall not be wanting.

Washington only spoke the sentiment of his times. There were, at that time, Abolition societies in the slave States — Abolition societies in Virginia, in North Carolina, in Maryland, in Pennsylvania, and in Georgia — all slaveholding States. Slavery was so weak, and liberty so strong, that free speech could attack the monster to its teeth. Men were not mobbed and driven out of the presence of slavery, merely because they condemned the slave system. The system was then on its knees imploring to be spared, until it could get itself decently out of the world. In the light of these facts, the Constitution was framed, and framed in conformity to it.

It may, however, be asked, if the Constitution were so framed that the rights of all the people were naturally protected by it, how happens it that a large part of the people have been held in slavery ever since its adoption? Have the people mistaken the requirements of their own Constitution? The answer is ready. The Constitution is one thing, its administration is another, and, in this instance, a very different and opposite thing. I am here to vindicate the law, not the administration of the law. It is the written Constitution, not the unwritten Constitution, that is now before us. If, in the whole range of the Constitution, you can find no warrant for slavery, then we may properly claim it for liberty.

Good and wholesome laws are often found dead on the statute book. We may condemn the practice under them against them, but never the law itself. To condemn the good law with the wicked practice, is to weaken, not to strengthen our testimony. It is no evidence that the Bible is a bad book, because those who profess to believe the Bible are bad. The slaveholders of the South and many of their wicked allies at the North, claim the Bible for slavery; shall we, therefore, fling the Bible away as a pro-slavery book? It would be as reasonable to do so as it would be to fling away the Constitution. We are not the only people who have illustrated the truth, that a people may have excellent law, and detestable practices. . . .

It may be said that it is quite true that the Constitution was designed to secure the blessings of liberty and justice to the people who made it, and to the posterity of the people who made it, but was never designed to do any such thing for the colored people of African descent. This is Judge Taney's argument, and it is Mr. Garrison's argument, but it is not the argument of the Constitution. The Constitution imposes no such mean and satanic limitations upon its own benificent [sic] operation. And, if the Constitution makes none, I beg to

know what right has any body, outside of the Constitution, for the special accommodation of slaveholding villainy, to impose such a construction upon the Constitution?

The Constitution knows all the human inhabitants of this country as "the people." It makes, as I have said before, no discrimination in favor of or against, any class of the people, but is fitted to protect and preserve the rights of all, without reference to color, size, or any physical peculiarities. Besides, it has been shown by William Goodell and others, that in eleven out of the old thirteen States, colored men were legal voters at the time of the adoption of the Constitution.

In conclusion, let me say, all I ask of the American people is, that they live up to the Constitution, adopt its principles, imbibe its spirit: and enforce its provisions. When this is done, the wounds of my bleeding people will be healed, the chain will no longer rust on their ankles, their backs will no longer be torn by the bloody lash, and liberty, the glorious birthright of our common humanity, will become the inheritance of all the inhabitants of this highly favored country.

The last house owned by Frederick Douglass, Anacostia neighborhood, Washington, D.C.

2. FREDERICK DOUGLASS, THE CONSTITUTION OF THE UNITED STATES: IS IT PRO-SLAVERY OR ANTI-SLAVERY?, SPEECH DELIVERED IN GLASGOW, SCOTLAND (MARCH 26, 1860)

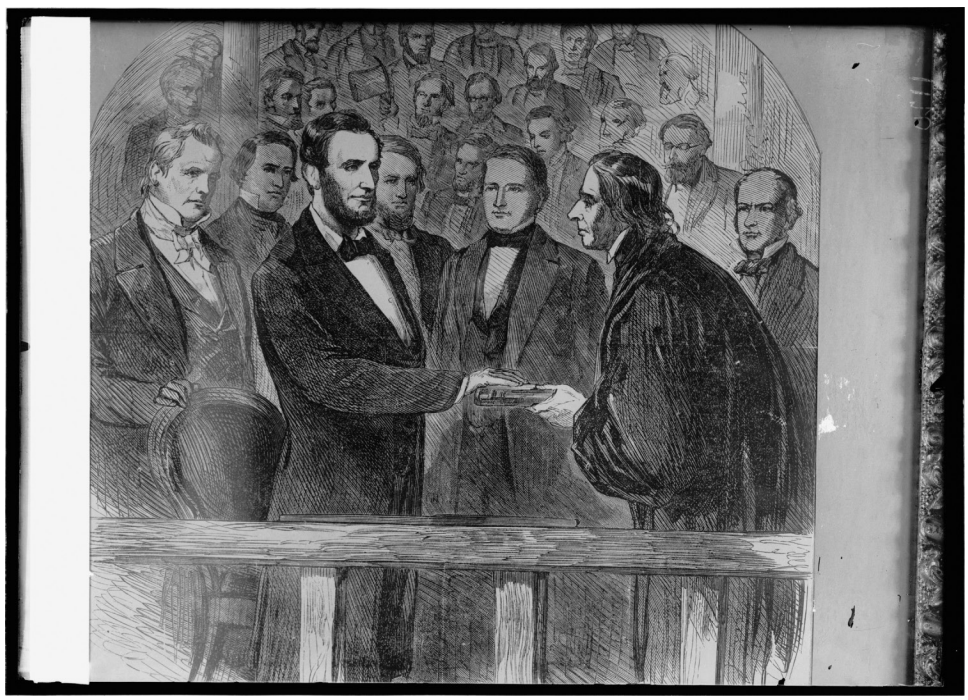
. . . The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word therefrom. . . . [I]t should be borne in mind that the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted as the Constitution of the United States.

It should also be borne in mind that the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are to be respected so far, and so far only, as will find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say.

Bear in mind, also, and the fact is an important one, that the framers of the Constitution sat with closed doors, and that this was done purposely, that nothing but the result of their labours should be seen, and that result should be judged of by the people free from any of the bias shown in the debates. It should also be borne in mind, and the fact is still more important, that the debates in the convention that framed the Constitution, and by means of which a pro-slavery interpretation is now attempted to be forced upon that instrument, were not published till more than a quarter of a century after the presentation and the adoption of the Constitution.

These debates were purposely kept out of view, in order that the people should adopt, not the secret motives or unexpressed intentions of any body, but the simple text of the paper itself. Those debates form no part of the original agreement. I repeat, the paper itself, and only the paper itself, with its own plainly written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects. Again, where would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper. What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the Constitution is for ages. . . .

D. THE AFTERMATH OF *DRED SCOTT v. SANDFORD*



President Abraham Lincoln's inauguration on March 4, 1861. Chief Justice Taney issued the oath of office.

Douglass's optimism about the eventual repudiation of "[t]his infamous decision of the Slaveholding wing of the Supreme Court" was well founded — to a point. Because the Supreme Court never formally reversed *Dred Scott*, that task fell to the Republicans in Congress, who proposed and secured the ratification of two constitutional amendments.

The Thirteenth Amendment, ratified in 1865, provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This provision ended the legal institution of slavery, and immediately emancipated every slave in the United States. (Recall that the Emancipation Proclamation only freed slaves in certain rebel territories, and those that joined the Army.) Above all, it meant that, when Southern states were eventually restored to the Union, they could not reimpose legal slavery, which was entirely possible under the interpretation of the pre–Thirteenth Amendment Constitution held by most Republicans and all Democrats alike. Moreover, since the Emancipation Proclamation was justified as a war measure, it was not even clear that, without the Thirteenth Amendment, the courts would uphold the re-enslavement of emancipated slaves. So the Thirteenth Amendment represented a sea change in the meaning of the Constitution.

Three years later, the Fourteenth Amendment further repudiated *Dred Scott*. Section 1 of the Fourteenth Amendment provided: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." Chief Justice Taney stated that people of African descent could *never* be citizens of the United States, even if they were emancipated and considered citizens by their own state. Now, all people born in the United States, including the freedmen, would be citizens regardless of their race. Moreover, Section 1 eliminated the distinction that Chief Justice Taney drew between state citizenship and national citizenship. Now citizenship in a state entailed citizenship of the United States.

Douglass and other antislavery activists were far too optimistic about what would transpire after the abolition of legal slavery. Many Southerners would simply not accept their defeat. Instead, they ingeniously used every legal means at their disposal to legally subordinate the freedmen in every way they could short of formal slavery. The former Confederate soldiers also organized into terrorist cells to bring the freedmen under their control. The former Confederate soldiers would also subjugate any Southern white who might be tempted to side with the freedmen. President Ulysses S. Grant and the Republicans in Congress vigorously responded to this backlash. They passed numerous civil rights laws, and attempted to "reconstruct" Southern state governments to ensure racial political equality. The Republicans also were able to secure the ratification of the Fifteenth Amendment, which guaranteed the right to vote to the freedmen.

And yet, even all these changes proved inadequate.


HARPER'S WEEKLY
A JOURNAL OF CIVILIZATION
VOL. IX.—No. 425.] NEW YORK, SATURDAY, FEBRUARY 18, 1865. [SINGLE COPIES TEN CENTS. $4.00 PER YEAR IN ADVANCE.
Entered according to Act of Congress, in the Year 1865, by Harper & Brothers, in the Clerk's Office of the District Court for the Southern District of New York.
SCENE IN THE HOUSE ON THE PASSAGE OF THE PROPOSITION TO AMEND THE CONSTITUTION, JANUARY 31, 1865.

Harper's Weekly *cover depicting passage of the Thirteenth Amendment in Congress*