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# Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court.

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# UNDERMINING INALIENABLE RIGHTS: From Dred Scott to the Rehnquist Court

Alexander Tsesis<sup>†</sup>

## I. INTRODUCTION

This 150<sup>th</sup> anniversary of the *Dred Scott*<sup>1</sup> decision presents the opportunity to assess whether the Supreme Court continues to rely on notions of states' rights doctrine to thwart civil rights initiatives. Particularly suspect are recent findings that Congress abused its Fourteenth Amendment, Section 5 authority in passing the Religious Freedom Restoration Act,<sup>2</sup> the Violence Against Women Act,<sup>3</sup> and parts of the Americans with Disabilities Act ("ADA")<sup>4</sup> and the Age Discrimination in Employment Act ("ADEA").<sup>5</sup> While those decisions by no means treat victims as sub-humans, in the way that *Dred Scott* did blacks, they display a knee jerk rejection against federal efforts to protect individual rights for the common good.

Chief Justice Taney's majority opinion in *Dred Scott* denied both the validity of black citizenship and the congressional authority to prohibit state sanctioned forms of racial discrimination.<sup>6</sup> The Reconstruction Amendments overturned Taney's racialized notion of national citizenship.<sup>7</sup> After 1866, with the ratification of the Thirteenth Amendment and the enactment of the Civil Rights Act, the federal government received the unambiguous authority to protect citizens' rights in areas of law that had

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1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).
2. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).
3. *United States v. Morrison*, 529 U.S. 598, 617 (2000).
4. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).
5. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).
6. *Dred Scott*, 60 U.S. (19 How.) at 404, 426.
7. See U.S. CONST. amend. XIII–XV.

been reserved to states, such as contract and real estate transactions.<sup>8</sup> The Fourteenth Amendment further clarified that each citizen had an equal stake in privileges and immunities that no state actor could infringe.<sup>9</sup> The enforcement provisions of the Thirteenth and Fourteenth Amendments provided Congress with the authority to pass civil rights laws for protecting the universally shared interests of American citizens.<sup>10</sup> That new constitutional departure was meant to prevent the Supreme Court from undermining nationally applicable anti-discrimination measures.<sup>11</sup> After the Compromise of 1877, when President Rutherford B. Hayes withdrew federal troops from the South and Reconstruction came to a screeching halt,<sup>12</sup> the Court challenged the Amendments' reduction of its authority in a series of cases, most prominently the *Slaughter-House*<sup>13</sup> and *Civil Rights Cases*.<sup>14</sup> Those decisions and the legislative abandonment of the Reconstruction agenda to protect universal rights wrenched power back to the judiciary for defining what liberties are constitutionally protected. Congress was relegated to a secondary role in the definition of rights.

During the New Deal, the Court became more deferential to federal efforts to administer economic programs with civil rights provisions.<sup>15</sup> It also established a heightened scrutiny standard for assessing the constitutionality of state actions that targeted insular groups.<sup>16</sup> Thereafter, Japanese Internment showed that the Court had not fully comprehended its role as the protector of minority rights.<sup>17</sup> It was, furthermore, unwilling to disturb the post-Reconstruction rulings that had diminished congressional Thirteenth and Fourteenth Amendment authority.<sup>18</sup> Thus, when legislators returned to the task of civil rights protections and enacted the Civil Rights Act of 1964, the statute's legitimacy was upheld on Commerce Clause

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8. 42 U.S.C. § 1981(a) (2000) (“[A]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens.”); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (upholding Congress’s power to prevent private housing discrimination under 42 U.S.C. § 1982).

9. U.S. CONST. amend. XIV, § 1 (Privileges and Immunities Clause).

10. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5.

11. See Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1429–30 (2005).

12. See Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 329 n.102 (2004).

13. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

14. *Civil Rights Cases*, 109 U.S. 3 (1883).

15. See ALEXANDER TSESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* (forthcoming 2008).

16. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

17. See *Korematsu v. United States*, 323 U.S. 214 (1944).

18. ALEXANDER TSESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 82 (2004).

grounds, not the civil rights grounds foreclosed by the Court's post-Reconstruction jurisprudence.<sup>19</sup>

The trend shifted in the direction of Taney's narrow vision of federal authority over national citizenship in a series of decisions limiting congressional ability to regulate state employment discrimination. Finding Congress overstepped the scope of its authority when it passed statutes that held states accountable for disability discrimination (under the ADA)<sup>20</sup> and age discrimination (under the ADEA),<sup>21</sup> the Court elevated state sovereignty ahead of national standards for workplace equality. The Court was not, however, willing to entirely disturb the New Deal's federal orientation on civil rights statutes, as it upheld the applicability to the states of the Family Medical Leave Act<sup>22</sup> and a section of the ADA that dealt with access to courts.<sup>23</sup>

This Article evaluates the extent to which congressional authority under the Thirteenth and Fourteenth Amendments, which were designed to overrule *Dred Scott*, extends to the protection of inalienable rights. The second part reflects on the universal rights Revolutionaries claimed were at the core of nationhood. That part also examines how the pragmatic, constitutional compromises they made for the sake of union sullied their achievements. The third part examines the extent to which *Dred Scott* distanced itself from the protection of universal rights that transcend state sovereignty. Part four discusses the reconstruction of the American conception of citizenship through both constitutional amendment and legislative initiatives. That section further considers how the Supreme Court undermined changes to the Constitution, gravitating back to the antebellum primacy of state authority over universally recognized rights. Part five discusses post-Reconstruction judicial interpretations of the Fourteenth Amendment. Part six then delves into some recent limitations on federal civil rights authority, which the Rehnquist Court predicated on state sovereignty, swinging the pendulum away from the Warren Court deference to legislative efforts on behalf of civil rights back to the Taney Court's narrow construction of federal powers.

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19. See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

20. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

21. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

22. *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 735–36 (2003).

23. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).

## II. REVOLUTIONARY NOTIONS OF INALIENABLE RIGHTS

One of the most commonly recognized errors of Chief Justice Taney's opinion in *Dred Scott* was his claim that blacks were not citizens anywhere in the early republic.<sup>24</sup> Justice Curtis, in his dissent, was the first to point out that Taney's claim was not historically accurate.<sup>25</sup> Not only was he wrong because blacks had been citizens in several states at the time of the Constitution's ratification,<sup>26</sup> but also because a common strand of thought in the Revolutionary Period was the universality of inalienable rights that were not predicated on race.

Thomas Jefferson's Declaration of Independence relied on political rhetoric that had been widely disseminated in the colonies through a variety of pamphlets and treatises. His statement of the "self-evident" truth that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" distilled philosophical and political thought of his day.<sup>27</sup> While the Declaration provides the best known formulation of the Revolution's civil rights foundation, it was by no means a radical statement. Jefferson relied on the contemporary understanding of what rights all people shared. In separate letters, Richard Henry Lee and John Adams drew attention to the Declaration's lack of originality. Jefferson, in turn, responded that he meant for it to reflect the enervating spirit of the times.<sup>28</sup> Lee, a delegate to the first Continental Congress and a signer of the Declaration, claimed that Jefferson "copied from Locke's treatise on government."<sup>29</sup> Adams, who was one of the most powerful figures of the Continental Congress and the second president of the United States, wrote to Timothy Pickering with irritation that there "is not an idea in it but what had been hackneyed in Congress for two years before."<sup>30</sup> John Locke figured prominently in the pantheon of philosophers whose ideas influenced republican ideals. He

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24. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04, 407–08 (1856).

25. *Id.* at 572–73 (Curtis, J., dissenting) ("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."); Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 510 (1997).

26. *Dred Scott*, 60 U.S. (19 How.) at 572–73 (Curtis, J., dissenting).

27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

28. 3 JAMES MORTON SMITH, *THE REPUBLIC OF LETTERS* 1826 (1995) (quoting a letter from Thomas Jefferson to James Madison (Aug. 30, 1823)).

29. *Id.*

30. 2 CHARLES FRANCIS ADAMS, *LIFE AND WORKS OF JOHN ADAMS* 514 (1850) (quoting a letter from John Adams to Timothy Pickering (Aug. 22, 1822)).

insisted that persons “by nature, [are] all free, equal, and independent.”<sup>31</sup> Jefferson did not dispute Lee’s and Adams’s assertions, to the contrary he responded that he had not aimed “to find out new principles, . . . to say things that had never been said before, but to place before mankind the common sense of the subject” that reflected the “sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right.”<sup>32</sup>

Jefferson’s accomplishment lay in rendering the readily recognizable commitment to the protection of individual rights in an elegant style that appealed to his own and future generations. In a somewhat less eloquent manner, Stephen Johnson, Pastor of the First Church of Christ in Lyme, asserted the same commitment as Jefferson:

Important are the rights of mankind, to the safe and unmolested enjoyment of life, liberty and property, and to the best improvement of all their powers, with every reasonable and equitable advantage they have to promote their present and everlasting welfare. These natural rights, civil and religious, are the gifts of God, as such sacred; nor may any but He, as original proprietor, resume them at pleasure.<sup>33</sup>

Many other writers combined religious with secular political views in support of the revolutionary cause. David Griffith, a Virginia Army chaplain, asserted that God did not require any obedience to those “who destroy, by their acts of power, the cause of truth and the happiness of mankind.”<sup>34</sup> Three months before the colonists declared their independence from Britain, Enoch Huntington, a pastor of the First Church of Christ, in

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31. JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT 51 (Edes and Gill, 1773) (1690). On Locke’s influence on the Constitution, see HERBERT FRIEDENWALD, THE DECLARATION OF INDEPENDENCE 201–03 (Da Capo Press 1974) (1904); JEROME HUYLER, LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA 209–11, 246–50 (1995); WILLARD S. RANDALL, THOMAS JEFFERSON 205 (1993); MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 61–78 (1978); Donald L. Doernberg, “We the People”: John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 64–66 (1985); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 307–10 (1990). But see GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 172–75 (1978) (arguing that Locke had little, if any, influence on writing the Declaration of Independence).

32. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 16 THE WRITINGS OF THOMAS JEFFERSON 118 (Andrew A. Lipscomb ed., 1904).

33. Stephen Johnson, Pastor of the First Church of Christ in Lyme, Election Sermon: Integrity and Piety the Best Principles of a Good Administration of Government 5 (May 10, 1770).

34. Rev. David Griffith, Rector of Shelburne Parish, Virginia, Sermon: Passive Obedience Considered 18 (Dec. 31, 1775).

Middletown, relied on religion and reason, drawing attention to the “justness of sentiment, zeal for liberty, and the unalienable rights of mankind” for those who fought for the American cause.<sup>35</sup> The country’s likelihood of success, Huntington went on, was assured by the “fond parents and relatives” who “part with their children and friends, and encourage and spirit them to go forth in the defence and for the protection of our rights and privileges.”<sup>36</sup> Numerous authors of the period sought to flesh out the drive for independence from colonial rule.

A survey of Revolutionary literature about inalienable rights and the general welfare reveals their centrality to eighteenth century political thought. In a 1788 pamphlet, Lee distinguished natural and inalienable rights “of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws: but the people, by express acts, may alter or abolish them.”<sup>37</sup> The people, wrote Elbridge Gerry, a historian of the Revolution, entrusted the government with the power to protect property.<sup>38</sup> The right to own property was one of the most commonly recognized rights intrinsic to the nature of humanity.<sup>39</sup> All persons had an inviolable right to honestly and fairly acquire and to keep possessions.<sup>40</sup> The Pennsylvania Constitution of 1776 likewise recognized that property is among the “natural, inherent and inalienable rights,”<sup>41</sup> which could only be taken away with the owner’s “consent, or that of his legal representatives.”<sup>42</sup> The Declaration of Rights of the Inhabitants of the State of Vermont affirmed that “all men are born equally free and independent, and have certain natural, inherent and unalienable rights” like “possessing and protecting property.”<sup>43</sup> The New Hampshire Bill of Rights similarly asserted that “acquiring, possessing, and protecting, property” were among the “natural, essential, and inherent rights.”<sup>44</sup>

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35. Enoch Huntington, *The Happy Effects of Union, and the Fatal Tendency of Divisions* 23 (Apr. 8, 1776).

36. *Id.* at 17.

37. RICHARD HENRY LEE, *AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* 51 (1788).

38. ELBRIDGE GERRY, *OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS* 4 (1788).

39. See, e.g., MOSES MATHER, *AMERICA’S APPEAL TO THE IMPARTIAL WORLD* 7–9 (1775) (“By nature every man (under God) is his own legislator, judge, and avenger, and absolute lord of his property.”).

40. WILLIAM L. BROWN, *AN ESSAY ON THE NATURAL EQUALITY OF MEN* 81–82 (1802).

41. PA. CONST. of 1776, art. I, § 1.

42. PA. CONST. of 1776, art. I, § 8 (amended 1973).

43. VT. CONST. of 1777, ch. I, § 1.

44. N.H. CONST. pt. First, art. II.

The right to own and sell property was by no means the only inalienable interest of humanity. Even the right to a good reputation, because it is essential to maintaining and improving one's social standing, was thought to be inviolable from "unjust assault."<sup>45</sup> Many of those rights that colonists believed were essential to human equality later made their way into the Bill of Rights. Among these were the rights to free worship, political representation, adequate notice of criminal charges, speedy trials, and attorney representation.<sup>46</sup> The right to travel, which the Pennsylvania Constitution of 1776 and the Vermont Constitution of 1777 listed, was only nationally recognized in the mid-twentieth century.<sup>47</sup>

At the core of the American Revolution was the conviction that the British had no authority to tax the colonists because they were unrepresented in Parliament. The "power of self-government," wrote Richard Price in a widely distributed work that was first published in February 1776, was the precise distinction "between liberty and slavery."<sup>48</sup> At a 1773 anniversary commemoration of the Boston Massacre, Benjamin Church invoked the "sacrifice of that liberty and that natural equality of which we are all conscious."<sup>49</sup> The power of governance came from the people, who share equally in decision-making through their elected representatives. Governance by "[t]he consent of the people" is compatible

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45. BROWN, *supra* note 40, at 78, 82–83.

46. See LEE, *supra* note 37, at 52–53.

47. PA. CONST. of 1776, art. I, § XV; VT. CONST. of 1777, ch. I, § XVII. The lack of a right to travel in the federal constitution enabled states to use statutes to prevent the poor and persons with criminal records from emigrating there. See *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 133, 141 (1837). For contemporary cases recognizing the fundamental right to travel, see *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969); *United States v. Guest*, 383 U.S. 745, 757 (1966); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Edwards v. California*, 314 U.S. 160, 177 (1941).

48. RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA 6 (1776). OBSERVATIONS sold 60,000 copies and went through fourteen London editions in two months. Carl B. Cone, *Richard Price and the Constitution of the United States*, 53 AM. HIST. REV. 726, 730 (1948). As a sign of its popularity in America, the pamphlet was issued in Philadelphia, Boston, New York, and Charleston. *Id.*

49. Dr. Benjamin Church, An Oration; At the Request of the Inhabitants of the Town of Boston; To Commemorate the Bloody Tragedy of the Fifth of March, 1770 (Mar. 5, 1773). Church's speech was delivered to a packed meeting-house. 1 PAGE SMITH, JOHN ADAMS, 1735–1784, at 143 (1962). Church later became the Chief Physician of the Continental Army. But in 1775, he was convicted for "communicating with the enemy." MARK MAYO BOATNER III, ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 228–29 (1966); David James Kiracofe, *Dr. Benjamin Church and the Dilemma of Treason in Revolutionary Massachusetts*, 70 NEW ENG. Q. 443, 457–58 (1997).



with the equal freedom to have proprietary rights.<sup>50</sup> Staying true to this principle of representational democracy, in the midst of Revolution, Pennsylvania confirmed that “the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government.”<sup>51</sup> The people’s grant of power to the government was predicated on “that natural freedom, to which all have an equal claim.”<sup>52</sup> Civil government, wrote Price, was compatible with “the natural equality of mankind.”<sup>53</sup> The statement referred to mature individuals who could act as independent agents for acquiring property.<sup>54</sup>

Thus, an undeniable commitment to inalienable rights permeated early American theory of government. A naturally free person exists before the citizen, and the identical fundamental rights of personhood cannot be abrogated by constitution or statute.

### *A. Practical Failures of Principles*

Particularly disturbing is how many of the men who extolled liberty and even denounced the contradiction between slavery and revolutionary ideals were unreformed slave holders.<sup>55</sup> The universal rights that underlay liberty took a backseat to their material interests. At the age of twenty-five, when he delivered his first speech in the Virginia House of Burgesses, Richard Henry Lee advocated ending slave importation.<sup>56</sup> He drew attention to how importing slaves “has been, and will be attended with effects, dangerous

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50. Samuel Stillman, Pastor of the First Baptist Church in Boston, and The Honorable House of Representatives of the State of Massachusetts-Bay in New England, at Boston, A Sermon Preached before the Honorable Council 8–9 (May 26, 1779).

51. The Constitution of the Commonwealth of Pennsylvania, as established by the general convention elected for that purpose, and held at Philadelphia, July 15th, 1776, and continued by adjournments to September 28, 1776. PA. CONST. of 1776, art. I, § V.

52. John Tucker, Pastor of the First Church in Newbury, A sermon preached at Cambridge, before His Excellency Thomas Hutchinson, Esq.; Governor, His Honor Andrew Oliver Esq.; Lieutenant-Governor, The Honorable His Majesty’s Council, and House of Representatives, of the Province of the Massachusetts Bay in New England 13–14 (May 29, 1771).

53. RICHARD PRICE, ADDITIONAL OBSERVATIONS ON THE NATURE AND VALUE OF CIVIL LIBERTY, AND THE WAR WITH AMERICA 11 (1778).

54. *Id.* at 10–11.

55. See Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1779–83 (2006) (evaluating revolutionary writings on political slavery).

56. American Philosophical Society, Richard Henry Lee Papers, Background Note, <http://www.amphilsoc.org/library/mole/l/lee.pdf>.

both to our political and moral interests.”<sup>57</sup> He seemed to condemn the institution of slavery, going so far as to say that persons imported into the colonies should be “considered as created in the image of God as well as ourselves, and equally entitled to liberty and freedom by the great law of nature.”<sup>58</sup> He also supported the Northwest Ordinance, which included a clause against the spread of slavery into the Northwest Territory, which encompassed present-day Ohio, Indiana, Illinois, Michigan, and Wisconsin.<sup>59</sup> In the end, despite his sensibility, Lee did not change his behavior, and at one point in his life even tried to join with others to make money by selling slaves.<sup>60</sup> He died owning thirty-seven slaves, whom he did not free but instead left as property to his heirs.<sup>61</sup>

Some of the Upper South’s opposition to the Importation Clause was driven not by antislavery sentiments but the desire to increase the value of domestic slaves. In opposing ratification of the Constitution, George Mason argued that slave importation was “infamous” and “detestable.”<sup>62</sup> He lectured fellow Virginians that Great Britain’s support for it “was one of the great causes of our separation.”<sup>63</sup> Augmenting “slaves weakens the states; and such a trade is diabolical in itself, and disgraceful to mankind.”<sup>64</sup> Mason’s aversion to treating persons as chattel, regrettably, went no further than importation. He owned about 300 slaves himself and was upset that the Constitution did not secure “the property of the slaves we have already.”<sup>65</sup> Connecticut delegate Oliver Ellsworth and other contemporaries, claimed Mason’s opposition was based on his interest in maintaining high prices for domestically sold slaves, which the importation of Africans was likely to depress.<sup>66</sup>

Patrick Henry came face to face with his own hypocrisy after scrutinizing one of Quaker Anthony Benezet’s abolitionist tracts:

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57. OLIVER P. CHITWOOD, *RICHARD HENRY LEE: STATESMAN OF THE REVOLUTION* 18 (1967) (quoting 1 RICHARD HENRY LEE, *MEMOIR OF THE LIFE OF RICHARD HENRY LEE AND HIS CORRESPONDENCE* 17–19 (1825)).

58. *Id.*

59. *Id.* at 19.

60. *Id.* at 19–20.

61. *Id.* at 19.

62. 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 452 (Jonathan Elliot ed., 2d ed. 1891).

63. *Id.*

64. *Id.*

65. *Id.* at 453; Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution*, 28 WM. & MARY Q. 563, 578 (1971).

66. JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION WEDNESDAY, AUGUST 21, 1787*, at 503 (1987); 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 364, 370 (Max Farrand, ed., rev. ed. 1966); Oliver Ellsworth, ‘*Landholder*,’ VI, *CONN. COURANT*, Dec. 10, 1787.

Is it not amazing, that at a time when the rights of Humanity are defined & understood with precision in a Country above all others fond of Liberty: that . . . we find Men, professing a Religion the most humane, mild, meek, gentle & generous, adopting a Principle as repugnant to humanity . . . . Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it. . . . I believe a time will come when an opportunity [sic] will be offered to abolish this lamentable Evil.<sup>67</sup>

Little could Henry know that the “lamentable Evil” would only be abolished after a bloody civil war. Thomas Jefferson also realized the incongruity of slavery with the Age of Revolution. Jefferson, indeed, had some premonition about the national catastrophe that slavery could catalyze, believing that it was destroying the people’s morals.<sup>68</sup>

With the passage of time, Jefferson grew increasingly indifferent about the plight of slaves. His changed attitude was indicative of the country’s shift from liberal ideals. Writing during the heyday of American expectations, Jefferson had wanted to end the importation of slaves into the colonies and follow up with the “abolition of domestic slavery.”<sup>69</sup> In 1776, the same year his draft Declaration of Independence proposed to condemn King George for the slave trade,<sup>70</sup> Jefferson’s second and third drafts of the Virginia Constitution contained a provision that, “No person hereafter coming into this country shall be held in slavery under any pretext whatever.”<sup>71</sup> Neither passed, but they appear to be indicative of how disdainful of slavery he had been as a young man. But Jefferson, like his fellow slaveholder George Mason, kept slaves during and after the Revolution, even though he admitted that “every master of slaves is born a petty tyrant.”<sup>72</sup>

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67. Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), in GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 443–44 (1937).

68. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162–63 (University of N. C. Chapel Hill Press 1955) (1787). On Jefferson’s paltry condemnation of slavery, see DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 164–84 (1975); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 430–36 (1968); DUNCAN J. MACLEOD, SLAVERY, RACE AND THE AMERICAN REVOLUTION 126–29 (1974).

69. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 16–17 (1774).

70. ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 12–13 (2004).

71. 1 THE PAPERS OF THOMAS JEFFERSON 353, 363 (Julian P. Boyd ed., 1950).

72. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 370 (Max Farrand ed., 1911) (statement of Col. George Mason).

Opponents of the Constitution criticized this lack of integrity to principle. John Mein, a British Loyalist, pointed out the disingenuousness of Bostonians who grounded their struggle in the “immutable laws of nature,” while they lived in a town where two thousand out of its fifteen thousand inhabitants were black slaves.<sup>73</sup> Samuel Johnson, the great English lexicographer and opponent of colonial independence, mocked the “drivers of Negroes” for their pretentious “yelps for liberty.”<sup>74</sup>

With the passage of time, Jefferson became increasingly complacent with the institution of slavery. In an 1814 letter, Jefferson counseled Edward Coles, a soon-to-be antislavery governor of Illinois, against manumitting his slaves.<sup>75</sup> The degeneration from idealism to cold resignation, complicity, and participation typified a political arrangement willing to sacrifice the interests of slaves for creature comfort and domestic tranquility. Later, it would be a comparable pragmatism to the plight of individuals that moved Taney to degrade Dred Scott’s claim to personal liberty below his master’s prerogative to his property.

After the Revolution, not everyone was as complacent as Jefferson, Henry, and Lee. The most famous framer who acted on the ideals of universal rights was former President George Washington who liberated his slaves by will. He directed that elderly freed persons be paid pensions, others be taught to read and write (even though Virginia laws prohibited educating blacks), and any slaves who remained on his estate be paid for their work.<sup>76</sup>

General William Whipple, who served the nation during the Revolution from Portsmouth, New Hampshire and was later a delegate to the

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73. JOHN MEIN, *SAGITTARIUS’S LETTERS & POLITICAL SPECULATIONS* 38–39 (1775).

74. PHILIP S. FONER, *1 HISTORY OF BLACK AMERICANS* 303 (1975); *see also* A LETTER FROM \*\*\*\*\* , IN LONDON TO HIS FRIEND IN AMERICA ON THE SUBJECT OF THE SLAVE-TRADE 15–16 (1784).

75. Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814) in 11 *THE WORKS OF THOMAS JEFFERSON* 419 (Paul L. Ford ed., 1905). Coles, who was one time secretary of President James Madison and cousin of Dolly Madison, eventually set his own slaves free, but only after calling Madison out about his hypocritical conscience on slavery. *See* RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 551–52 (1971); Paul Finkelman, *The Dragon St. George Could not Slay: Tucker’s Plan to End Slavery*, 47 WM. & MARY L. REV. 1213, 1221 (2006) (describing Coles’s manumission of his slaves).

76. ELI GINZBERG & ALFRED S. EICHNER, *THE TROUBLESOME PRESENCE: AMERICAN DEMOCRACY AND BLACK AMERICANS* 45–46 (1964); EUGENE E. PRUSSING, *THE ESTATE OF GEORGE WASHINGTON, DECEASED* 27, 158–59 (1927); BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* 187 (1961); 37 *THE WRITINGS OF GEORGE WASHINGTON* 275–77 (John C. Fitzpatrick ed., 1931). Slavery was so imbedded in Virginia, however, that Washington’s nephew and estate executor, Bushrod Washington, who was then a Supreme Court Justice, only carried out part of his uncle’s will, selling some of the slaves. ELDER WITT, *CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT* 809 (2d ed. 1990).

Continental Congress, likewise acted on the logic of natural rights. His slave, Prince, had been in combat and was even an oarsman on George Washington's boat as it made its way through the icy Delaware River during a Christmas storm in 1776.<sup>77</sup> In 1777, Prince said to Whipple, "you are going to fight for your liberty, but I have none to fight for." These words cut Whipple to the quick, and he immediately freed him.<sup>78</sup> Other great personages of the day who provided slaves freedom by will were Senator John Randolph<sup>79</sup> and Robert Carter III.<sup>80</sup> Randolph deplored the institution of slavery, but even at the time of his death he had about 400 slaves.<sup>81</sup> Carter gradually manumitted about 500 slaves.<sup>82</sup> Some ordinary slave holders were also moved by the enlightened rhetoric of the Revolution. One study of Petersburg, Virginia found that between 1784 and 1806 many deeds of emancipation "speak of freedom as the natural right of all men and declare that no man has a right to enslave another."<sup>83</sup>

Those acts of manumission fit a pattern in the South after the Revolution. Increases in the free black population indicate that many Americans understood that the revolutionary battle cry for inalienable rights was incompatible with the despotism of slavery. The free black population nearly doubled between 1790 and 1800 in the Upper South from 30,158 to 56,855 and in the Lower South from 2,199 to 4,386, respectively.<sup>84</sup> This trend continued in the decade between 1800 and 1810, when the number of free blacks in the Upper South increased to 94,095 and in the Lower South to 14,180.<sup>85</sup> In many cases the slaves who were freed emerged without compensation and at the lowest level on the socioeconomic scale. Even the change in demography can only be viewed as a partial victory, given that the number of slaves did not diminish. In 1790, there were 517,763 slaves

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77. DAVID BRION DAVIS, *INHUMAN BONDAGE* 144 (2006).

78. CHARLES W. BREWSTER, *RAMBLES ABOUT PORTSMOUTH* (2d ed. 1873); DAVIS, *supra* note 77, at 144.

79. Frank F. Mathias, *John Randolph's Freedmen: The Thwarting of a Will*, 39 J. S. HIST. 263, 263 (1973).

80. Deborah A. Lee & Warren R. Hofstra, *Race, Memory, and the Death of Robert Berkeley: "A Murder . . . of . . . Horrible and Savage Barbarity"*, 65 J. S. HIST. 41, 57 (1999); Shomer S. Zwelling, *Robert Carter's Journey: From Colonial Patriarch to New Nation Mystic*, 38 AM. Q. 613, 613 (1986).

81. Mary Haldane Coleman, *Whittier on John Randolph of Roanoke*, 8 NEW ENG. Q. 551, 551-52 (1935).

82. Howard DeLong, *Jeffersonian Teledemocracy*, 4 U. CHI. L. SCH. ROUNDTABLE 47, 63 (1997).

83. Luther P. Jackson, *Manumission in Certain Virginia Cities*, 15 J. NEGRO HIST. 278, 281 (1930); *see also* IRA BERLIN, *SLAVES WITHOUT MASTERS* 30 (1974).

84. BERLIN, *supra* note 83 at 46.

85. *Id.*

in Upper South and 136,358 in the Lower South.<sup>86</sup> Those figures rose in 1800 to 645,682 in the Upper South and 205,850 in the Lower South,<sup>87</sup> and in 1810 slaves there were 802,117 slaves in the Upper South and 301,583 in the Lower South.<sup>88</sup>

The discrepancy between increased manumission on the one hand and increased slave population on the other is partly attributable to the contrary forces of sincerity and self-interest. During this period, roughly from the time just before ratification of the Constitution and the end of slave importation, about 91,000 slaves were imported into North America.<sup>89</sup> The birthrate of slaves also played a role in increasing the total number of slaves despite the manumissions.

By the beginning of the nineteenth century, the early revolutionary possibilities of equally protecting inalienable rights became an unrealized aspiration that was losing its momentum. Yet, the untainted sentiments to create a government by the people and for the people left an undeniable foundation for later federal protections of individual rights. One of *Dred Scott*'s greatest failures was its unwillingness to reflect on the framers' belief in the universality of fundamental rights, giving greater interpretive weight to their compromises with slavery instead.

### B. Rights Based Antislavery

Individual acts of manumission and kindness achieved only small scale civil reform. Free blacks fared little better than slaves; a former general of the Continental Army wrote that in Virginia "it is not only the slave who is beneath his master, it is the negro who is beneath the white man."<sup>90</sup> Northern states, unlike their Southern brethren, adopted policies to outlaw slavery;<sup>91</sup> meanwhile, the Constitution ensnared the entire nation in the net

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86. See University of Virginia Library, Historical Census Browser, <http://fisher.lib.virginia.edu/collections/stats/histcensus/php/start.php?year=V1790> (last visited Nov. 29, 2007) (click "slaves" under "Slave Population" heading, then click "submit query"). My statistics differ from BERLIN, *supra* note 83, partly because he included territories in his calculation of slave population, while I only calculated the number of slaves living in the states.

87. University of Virginia Library, Historical Census Browser, <http://fisher.lib.virginia.edu/collections/stats/histcensus/php/start.php?year=V1800> (last visited Nov. 29, 2007) (follow directions in *supra* note 86).

88. *Id.*

89. PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS* 140 tbl.40 (1969). I am referring here to the 1781–1810 column of Curtin's demographic table. *Id.*

90. 2 FRANCOIS J. CHASTELLUX, *TRAVELS IN NORTH AMERICA IN THE YEARS 1780, 1781, and 1782*, at 440 (Howard C. Rice, Jr. trans., 1963) (1787).

91. ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 107–229 (1967) (detailing the abolition of slavery in Northern states).

of slaveholding. Nevertheless, many antislavery efforts were overtly influenced by Revolutionary ideology.

After the Revolution, a member of the prestigious American Philosophical Society, George Buchanan, pointed out the hypocrisy of citizens who had “thrown off the load of oppression . . . becom[ing] oppressors in their turn.”<sup>92</sup> They had adopted a “fixed principle” of the Declaration of Independence about the equality of all to be free from oppression, but when Americans took the reins of government “they became apostates to their principles, and riveted the fetters of slavery upon the unfortunate Africans.”<sup>93</sup> Benjamin Trumbull, writing in 1773, was irate that slavery continued to flourish despite all the talk of freedom. He berated the institution:

[I]s not this the case, when rulers are made wholly independent of the people, when strangers unconnected with them, and independent of them, are appointed to rule over them? Is not this calculated to deprive a people of liberty and justice;—to render life, property, and every dear enjoyment very precarious; and to reduce them to a state of slavery and misery, instead of making them free and happy? Is it not an infraction of the great and unchangeable laws of Nature, Reason, and Religion?—Incompatible with the essential rights of mankind?<sup>94</sup>

New Jersey Quaker leader David Cooper showed the contradiction between principle and slavery by publishing doctrine in a left hand column and condemning practices on the right. For one, the Declaration made much of self-evident truths which must apply to all of humanity; but “the very people who make these pompous declarations are slave-holders.”<sup>95</sup> Presciently anticipating Taney’s *Dred Scott* opinion, racial differentials in law, Cooper wrote,

tell us, that these blessings were only meant to be the *rights* of *whitemen* [sic], not of *all men*: and would seem to verify the observation of an eminent writer; “When men talk of liberty, they mean their own liberty, and seldom suffer their thoughts on that point to stray to their neighbours.”<sup>96</sup>

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92. GEORGE BUCHANAN, AN ORATION UPON THE MORAL AND POLITICAL EVIL OF SLAVERY 14 (Philip Edwards 1793).

93. *Id.* at 13.

94. BENJAMIN TRUMBULL, A DISCOURSE, DELIVERED AT THE ANNIVERSARY MEETING OF THE FREEMEN OF THE TOWN OF NEW-HAVEN 31–32 (New Haven, Green 1773).

95. DAVID COOPER, A SERIOUS ADDRESS TO THE RULERS OF AMERICA, ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY 14 (London, J. Phillips 1783).

96. *Id.*

He further juxtaposed a 1774 resolve of the Continental Congress of North Americans right to the “immutable laws of nature, are entitled to life, liberty and property” and the treatment of blacks, since they too could justly argue that they had never ceded their equal claim to the immutable rights to life, liberty, and property.<sup>97</sup> The point that blacks retained their human rights, irrespective of constitutional and statutory compromises on slavery, was lost on Taney.

Many of the most famous Revolutionary leaders drew attention to the incongruity between American demands for freedom and their rationales for tyrannizing slaves. Hamilton, for instance, wrote that “[n]o reason can be assigned why one man should exercise any power, or pre eminence [sic] over his fellow creatures more than another; unless they have voluntarily vested him with it.”<sup>98</sup> Thomas Paine, exhibiting a knack for penetrating brevity in his first published article, entreated Americans to consider “with what consistency, or decency they complain so loudly of attempts to enslave them, while they hold so many hundred thousands in slavery; and annually enslave many thousands more, without any pretence of authority, or claim upon them.”<sup>99</sup>

In 1764, at the time that he was arguably the most influential agitator against colonial regulation, James Otis mocked the racism that went hand-in-hand with slavery. So “shocking violation of the law of nature” could never be excused because Africans have “short curled hair . . . instead of Christian hair, as it is called by those whose hearts are as hard as the nether millstone.”<sup>100</sup> Nor could justification for it “be drawn from a flat nose, [and] a long or a short face.”<sup>101</sup> He viewed the institution of slavery as a despoiler of civilization that prefers the interests of petty tyrants to the value of liberty. In another publication, Otis mocked the paradox of opposing the Stamp Act while leaving slavery intact: “I affirm, and that on the best information, the Sun rises and sets every day in the sight of five millions of his majesty’s American subjects, white, brown and black.”<sup>102</sup> Theologian Samuel Hopkins, who after the Revolution proved critical to abolishing slavery in Rhode Island, was likewise indignant at the “shocking . . .

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97. *Id.* at 11.

98. ALEXANDER HAMILTON, A FULL VINDICATION OF THE MEASURES OF THE CONGRESS 5 (New York, Rivington 1774).

99. THOMAS PAINE, AFRICAN SLAVERY IN AMERICA (1775), *reprinted in* 1 THE WRITINGS OF THOMAS PAINE 4, 7 (Moncure Daniel Conway ed., AMS Press 1967) (1894).

100. JAMES OTIS, RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 43–44 (Boston, J. Almon 1764).

101. *Id.*

102. JAMES OTIS, CONSIDERATIONS ON BEHALF OF THE COLONISTS 30 (2d ed. 1765).



intolerable inconsistency” of embracing liberty while “at the same time making slaves of many thousands of our brethren, who have as good a right to liberty as ourselves, and to whom it is as sweet as it is to us, and the contrary as dreadful!”<sup>103</sup> The commerce in humans was against nature, wrote Abraham Booth, because everyone, be they African or European, has an “equal claim to personal liberty with any man upon earth.”<sup>104</sup> This equality was not regarded to be a matter of citizenship but of human nature. Everyone, it was thought, has a common share of essential rights that are immune against indiscriminate government intrusion. To think otherwise would fly in the face of the founding principle that “all men are created equal.”<sup>105</sup>

On April 14, 1775, five days before the battles of Lexington and Concord, the first antislavery society was born.<sup>106</sup> Then, in 1785, with John Jay as its president, the New York Society for Promoting the Manumission of Slaves was organized.<sup>107</sup> In 1792, similar societies operated in Delaware, Rhode Island, Connecticut, New Jersey, Maryland, and Virginia.<sup>108</sup> The 1794 delegates to the Abolition Society decried the illogic of a republic that zealously advocated freedom to tolerate “in its bosom a body of slaves.”<sup>109</sup> Each slave, wrote Richard Wells, “carries about him the strongest proofs in nature of his *original rights*.”<sup>110</sup> Slavery was incompatible with the proposition that “*ALL the inhabitants of America* are entitled to the privileges of the inhabitants of Great-Britain.”<sup>111</sup>

On March 8, 1775, just a month before Paine played an important part in the first antislavery society’s formation, he bluntly asked Americans to reflect on their tyrannical hypocrisy.<sup>112</sup> Quaker Anthony Benezet was as poignant at using religious arguments as Paine was at using secular ones.

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103. SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS 50 (Norwich, Spooner 1776).

104. ABRAHAM BOOTH, COMMERCE IN THE HUMAN SPECIES, AND THE ENSLAVING OF INNOCENT PERSONS, INIMICAL TO THE LAWS OF MOSES AND THE GOSPEL OF CHRIST 18 (London, Wayland 1792).

105. JAMES DANA, DOCTOR DANA’S SERMON ON THE AFRICAN SLAVE TRADE 28 (1790) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

106. Lorenzo Dow Turner, *The Anti-Slavery Movement Prior to the Abolition of the African Slave-Trade (1641–1808)*, 14 J. NEGRO HIST. 373, 396 n.80 (1929).

107. J. FRANKLIN JAMESON, THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT 23–24 (Beacon Press 1956) (1926).

108. *Id.* at 24.

109. ADDRESS OF A CONVENTION OF DELEGATES FROM THE ABOLITION SOCIETY, TO THE CITIZENS OF THE UNITED STATES 5 (New York, Durell 1794).

110. RICHARD J. WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES 81 (Philadelphia, Dunlap 1774).

111. *Id.* at 80.

112. PAINE, *supra* note 99, at 7.

Back in the 1760s, Benezet, who was one of the most influential abolitionist forerunners, related people's natural equality to their identity as a "species."<sup>113</sup> None was naturally superior since the "black-skin'd and the white-skin'd" were "all of the human Race."<sup>114</sup> Given the broad consensus that slavery lacked any legitimacy, it is no surprise, as the historian Winthrop D. Jordan summarized, that in the years preceding the Revolution a general impression prevailed that slavery was a "communal sin."<sup>115</sup>

*Dred Scott*, of course, would prove to be absolutely oblivious to these ideas.<sup>116</sup> Taney's opinion would fixate on the existence of slavery during the Revolution rather than the Constitution-drafting generation's overwhelming consensus that the institution was in conflict with the humanitarian purposes of republican government.

In the North, the clarity of Revolutionary tenets led to various forms of emancipation. Prior to the Revolution, slavery was legal in all thirteen colonies.<sup>117</sup> In 1774, the Continental Congress required that the importation of slaves cease after December 1, 1775, but it lacked the power to enforce the decree.<sup>118</sup> Historian and sociologist W.E.B. Dubois pointed out that the colonists' motives for ending the trade were complex, including a genuine commitment to the philosophy of freedom in the Northern and Middle states, fear of slave insurrections fomented by newly arrived Africans, domestic slave breeders' economic self-interests, and a strategic decision to harm British commerce.<sup>119</sup> The Northwest Ordinance of 1787 prohibited the slave trade, slavery, and involuntary servitude from being introduced into the territory.<sup>120</sup> Yet it was an imperfect provision that contained an article

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113. See ANTHONY BENEZET, *A SHORT ACCOUNT OF THAT PART OF AFRICA, INHABITED BY THE NEGROES* 36–38 (2d ed. Philadelphia, Dunlap 1762).

114. *Id.* at 38.

115. See JORDAN, *supra* note 68 at 298.

116. See *infra* Part III.

117. PHILIP A. KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 20 (1999); PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877*, at 78–79 (1993) (describing emancipation in the North); DUNCAN J. MACLEOD, *SLAVERY, RACE AND THE AMERICAN REVOLUTION* 98–99 (1974) (discussing abolition during the Revolutionary Era); ZILVERSMIT, *supra* note 91, at 116 (indicating that Vermont passed the first law to abolish slavery in 1777).

118. Michael Daly Hawkins, *John Quincy Adams in the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1, 5 (2000); William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteenth States*, 31 U. RICH. L. REV. 111, 172 n.401 (1997).

119. W. E. BURGHARDT DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638–1870*, at 45–57 (Cambridge, Univ. Press 1904) (1896).

120. PETER KOLCHIN, *AMERICAN SLAVERY, 1619–1877*, at 78–79 (1993).

allowing masters to lawfully reclaim fugitive slaves or indentured servants who fled there.<sup>121</sup>

Several states ended slave importation. This development began in 1774, when Rhode Island restricted the slave trade. The preface to the law explained that the state had decided “those who are desirous of enjoying all the advantages of liberty themselves, should be willing to extend personal liberty to others.”<sup>122</sup> Rhode Island did not follow that policy to its ultimate conclusion, continuing to allow slave traders to temporarily bring their cargo into the state from the West Indies.<sup>123</sup> The same year, Connecticut also prohibited slave importation.<sup>124</sup> In the South, the slave trade was prohibited by Delaware (1776), Virginia (1778), and Maryland (1783).<sup>125</sup> In 1786, North Carolina enacted a prohibitory tax on the practice, and South Carolina prohibited importation in 1787 but reneged on that decision in 1803.<sup>126</sup>

The Northern emancipation of slaves manifested an even greater commitment to revolutionary ideals. The Vermont Constitution outlawed slavery in 1777, ten years before the federal Constitution had even been drafted.<sup>127</sup> Likewise the New Hampshire bill of rights of 1784 appears to have been the primary means for ending slavery there. It afforded even greater safeguards to vulnerable classes than would the federal Bill of Rights. New Hampshire provided that the natural rights to life, liberty and property “shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”<sup>128</sup> Toward the same end, Massachusetts Chief Justice William Cushing of the Superior Court declared slavery to be against the constitutional principle of natural rights, according to which everyone was born “free and equal.”<sup>129</sup>

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121. The Northwest Ordinance, art. VI, 1 Stat. 50, 53 (1789).

122. QUARLES, *supra* note 76, at 41.

123. *Id.*

124. *Id.* at 40–41.

125. Patrick S. Brady, *The Slave Trade and Sectionalism in South Carolina, 1787–1808*, 38 J. S. HIST. 601, 602 n.2 (1972) (recounting that Maryland ended slave trade in 1783); William Cohen, *Thomas Jefferson and the Problem of Slavery*, 56 J. AM. HIST. 503, 508 (1969) (stating that Virginia outlawed slave trade in 1778); James Wilford Garner, *Amendment of State Constitutions*, 1 AM. POL. SCI. REV. 213, 217 (1907) (stating that the Delaware Constitution of 1776 forbade the establishment of slavery).

126. Brady, *supra* note 125, at 601, 602 n.2 (providing information on North Carolina and South Carolina); Joyce E. Chaplin, *Creating a Cotton South in Georgia and South Carolina, 1760–1815*, 57 J. S. HIST. 171, 191 (1991).

127. VT. CONST. of 1777, ch. I, §1, available at <http://www.yale.edu/lawweb/avalon/states/vt01.htm>.

128. N.H. CONST. of 1784, art. II, available at <http://www.state.nh.us/constitution/billofrights.html>.

129. PHILIP S. FONER, HISTORY OF BLACK AMERICANS 353 (1975).

Some Northern states, like Pennsylvania in 1780, only gradually transitioned from slavery.<sup>130</sup> Similarly gradual laws were enacted by Rhode Island and Connecticut in 1784, New York in 1799, and New Jersey in 1804.<sup>131</sup> Gradualism recognized the incompatibility of revolutionary ideals with slavery, but nevertheless temporarily validated slave holders' property interest. In contrast with the North, no Southern state outlawed slavery. The closest provisions to abolition there during the 1780s and 1790s were laws recognizing masters' right to manumit slaves, which passed in Virginia, Delaware, and Maryland.<sup>132</sup>

For most of those who were gradually or immediately manumitted, liberty entailed scarcely any of the privileges and immunities of citizenship. They emerged from slavery uncompensated for their years of toil and without the right to participate in the political process. Revolutionaries, who believed in the universality of natural rights, proved themselves unwilling to shed the prejudices of their era. Even the original Constitution, which was to be the model for republican self-government, contained guarantees for perpetuating slavery.

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130. John M. Mecklin, *The Evolution of Slave Status in American Democracy*, 2 J. NEGRO HIST. 229, 230 (1917); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1045 n.45 (1997).

131. See JAMESON, *supra* note 107, at 25; 10 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 132 (John Russel Bartlett ed., New York, AMS Press 1865) ("[E]very negro or mulatto child born after the first day of March, A.D. 1784, be supported and maintained by the owner of the mother of such child, to the age of twenty-one years, provided the owner of the mother shall during that time hold her as a slave; or otherwise, upon the manumission of such mother . . . ."); Lois E. Horton, *From Class to Race in Early America: Northern Post-Emancipation Racial Reconstruction*, 19 J. EARLY REPUBLIC 629, 639 (1999). By 1830, fewer than 3,000 blacks remained enslaved, while 125,000 blacks lived freely in the northern and middle states. Gordon S. Wood, *Revolution and the Political Integration of the Enslaved & Disenfranchised*, Address Before the House of Representatives' Chamber, Kentucky State Capitol (Jan. 9, 1974), in AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH 13 (1974).

132. DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 49 (1978); KOLCHIN, *supra* note 120, at 77; David Skillen Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776–1810*, 34 AM. J. LEGAL HIST. 381, 392 (1990) (regarding manumission in Maryland); Luther P. Jackson, *Religious Development of the Negro in Virginia from 1760 to 1860*, 16 J. NEGRO HIST. 168, 179 (1931) (discussing the history of manumission in Virginia); Marianne Buroff Sheldon, *Black-White Relations in Richmond, Virginia, 1782–1820*, 45 J. S. HIST. 27, 33 (1979) (mentioning the Virginia manumission act of 1782); Delaware Slave Law Summary and Record, [http://www.slaveryinamerica.org/geography/slave\\_laws\\_DE.htm](http://www.slaveryinamerica.org/geography/slave_laws_DE.htm) (last visited Nov. 29, 2007).

*C. Straying from National Aspirations*

For the sake of national unity, the original Constitution compromised the human rights principles of the Declaration of Independence and the Preamble. Several clauses left slave policies at the discretion of the states. *Dred Scott* later relied on those clauses to draw the inference that slavery was a constitutionally protected form of property.<sup>133</sup> Any attempt to keep it out of the federal territories, as by the Missouri Compromise of 1820, was an overreaching on the part of the federal government.

The framers' decision to use "person held to Service or Labour," "such persons," and "other persons" instead of "slaves" and "slavery" indicated that some of them expected the institution to gradually vanish without any constitutional changes.<sup>134</sup> Whatever their wishes, the Constitution facilitated slavery's spread through overt protections of the institution for which the founding generation bears much responsibility. The most glaring protections of slavery came in the form of the Importation, Three-Fifths, and Fugitive Slave Clauses.<sup>135</sup> The Importation Clause prohibited Congress from abolishing the international slave trade for twenty years after state ratification of the Constitution.<sup>136</sup> The Three-Fifths Clause provided that slaves were to be counted as three-fifths of a person for the purpose of determining how many representatives a state was to have in Congress.<sup>137</sup> The Fugitive Slave Clause,<sup>138</sup> which passed without any dissenting votes at the Constitutional Convention,<sup>139</sup> required fugitives to be returned "on

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133. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1856).

134. See generally Tsesis, *supra* note 12, at 320.

135. See *id.* at 319–22; see also WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* 3–7 (Negro University Press 1969) (1844); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 62–83 (1977); Frederick Douglas, *The North Star*, Apr. 5, 1850, *reprinted in* VOICES FROM THE GATHERING STORM: THE COMING OF THE AMERICAN CIVIL WAR 40–41 (Glenn M. Linden ed., 2001); Frederick Douglas, *The North Star*, Feb. 9, 1849, *reprinted in* THE LIFE AND WRITINGS OF FREDERICK DOUGLAS: EARLY YEARS, 1817–1849, at 352–53 (Philip S. Foner ed., 1950); Frederick Douglas, *The Revolution of 1848*, Speech at West India Emancipation Celebration, Rochester, New York (Aug. 1, 1848), *in* THE LIFE AND WRITINGS OF FREDERICK DOUGLAS: EARLY YEARS, 1817–1849, at 321–30 (Philip S. Foner ed., 1950).

136. U.S. CONST. art. I, § 9.

137. *Id.* art. I, § 2, cl. 3.

138. *Id.* art. IV, § 2, cl. 3.

139. See DON E. FEHRENBACHER, *SLAVERY, LAW AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 13 (1981) (disputing the view that the Fugitive Slave Clause was indispensable to the success of the Constitutional Convention); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 121 (1989) (asserting that the Fugitive Slave Clause did not arouse much debate at the Constitutional Convention because it was not a significant issue); Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 613 (1993) (asserting that while the "initial

demand” and prohibited free states from liberating them.<sup>140</sup> Less overt, although no less protective of slavery, were clauses directing the apportionment of taxes among the states pursuant to the Three-Fifths Clause;<sup>141</sup> the Insurrection Clause,<sup>142</sup> giving Congress power to call up the militia to suppress slave revolts; the Domestic Violence Clause;<sup>143</sup> and a separate clause making the Importation Clause unamendable.<sup>144</sup>

These constitutional provisions established the foundation for the private property rights of whites, on which Chief Justice Taney’s *Dred Scott* opinion placed great emphasis,<sup>145</sup> to trump any universal notions of liberty and equality. *Dred Scott*’s denial that the federal government had the authority to prohibit slave property in the territories rested on a racially exclusionary notion of citizenship.

### III. *DRED SCOTT*

By the early nineteenth century proslavery advocates mocked revolutionary claims of natural equality. Writers like George Fitzhugh popularized the view that slavery was a positive good both for whites and blacks.<sup>146</sup> William Grayson, who served in the U.S. Congress, claimed that slavery subdued blacks’ “savage heart,”<sup>147</sup> making a racial distinction that implied blacks should not be treated as fully human citizens under the law. South Carolina Senator and one-time Governor James H. Hammond supported subjugating blacks, as a class, to white citizens: “In all social systems there must be a class to do the mean duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little

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response” to South Carolina’s proposed fugitive slave provision “was hostile,” the Constitutional Convention “with neither debate nor formal vote, adopted the fugitive slave provision as a separate article of the draft constitution”).

140. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 575 (1842).

141. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 9, cl. 4, *amended by* U.S. CONST. amend. XVI.

142. U.S. CONST. art. I, § 8, cl. 15.

143. U.S. CONST. art. IV, § 4.

144. U.S. CONST. art. V; see Samuel Marcossion, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. 429, 469 (1998) (arguing that Article V can be viewed as “the Framers’ insurance policy against the possibility that then-excluded groups, including women, blacks and free blacks, could one day change the power structure the Founders had erected without regard for the needs, views, and priorities of the members of those groups”).

145. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–07 (1856).

146. See IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 364 (1974).

147. William J. Grayson, *Hireling & the Slave*, in *SLAVERY DEFENDED* 57, 64 (Eric L. McKittrick ed., Prentice-Hall 1963) (1856).

skill. Its requisites are vigor, docility, fidelity.”<sup>148</sup> *Dred Scott*’s rejection of universal rights was related to proslavery statements, justifying the oppressive treatment of blacks.<sup>149</sup>

Chief Justice Taney’s opinion referred to the founding generation several times, holding that African Americans, like Scott, could never be citizens of a state for diversity jurisdiction purposes.<sup>150</sup> This meant that federal courts lacked the authority to entertain his freedom suit. His opinion for the majority not only denied blacks had fundamental citizenship rights but also rejected Congress’s authority to protect such rights against state infringement.<sup>151</sup> Taney’s perspective on citizenship distorted the historical record, and, as I discuss in later portions of this Article, was eventually rejected by Americans through the Reconstruction Amendments, but his narrow perspective of federal civil rights authority continues to periodically rear its head in Supreme Court decisions.

*Dred Scott* was decided at a time of repeated national compromises with slavery. Beginning with slave-protecting constitutional provisions, safeguards for Southern slavery were later embedded into parts of the Missouri Compromise, the Compromise of 1850, and Kansas-Nebraska Act.<sup>152</sup> Even before the *Dred Scott* opinion inflamed hostilities between the North and South, the Kansas-Nebraska Act of 1854 had abrogated Missouri Compromise’s prohibition against the introduction of slavery above the 36°30’ parallel.<sup>153</sup> The Act provided that Kansas and Nebraska be “received into the Union with or without slavery, as their Constitution may prescribe at the time of their admission.”<sup>154</sup> What remained for the Court to decide

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148. CONG. GLOBE, 35th Cong., 1st Sess. 962 (1858).

149. See WILLIAM SUMMER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 168–69 (Peter Smith 1960) (1935).

150. See *Dred Scott*, 60 U.S. (19 How.) at 406–11.

151. *Id.* at 405–06.

152. Beginning with the Missouri Compromise (1820) through the South Carolina Nullification Crises in Jacksonian America (1833), the Compromise of 1850, the Kansas-Nebraska controversy (1852–54), and onto secession (1860) and the Civil War (1861), all internal conflicts centered on slavery. See ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 23–31 (2004).

153. Kansas-Nebraska Act of 1854, ch. 59, § 14, 10 Stat. 277, 282–83. For background on the Kansas-Nebraska Controversy, see ARTHUR C. COLE, THE IRREPRESSIBLE CONFLICT 1850–1865, at 272–75 (1934); AVERY CRAVEN, THE COMING OF THE CIVIL WAR 325–26, 328–31 (1942); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 121, 123 (Ballantine Books 1989) (1988); 2 ALLAN NEVINS, ORDEAL OF THE UNION 86–88, 92, 98, 103–05, 107–08, 121 (1947); ROBERT R. RUSSET, CRITICAL STUDIES IN ANTEBELLUM SECTIONALISM 25–48 (1972); LAWRENCE R. TENZER, THE FORGOTTEN CAUSE OF THE CIVIL WAR: A NEW LOOK AT THE SLAVERY ISSUE 89 (1997); James Ford Rhodes, *Antecedents of the American Civil War*, in THE CAUSES OF THE AMERICAN CIVIL WAR 49, 56 (Edwin C. Rozwenc ed., 2d ed. 1972).

154. Kansas-Nebraska Act of 1854 § 19.

was whether Congress ever had the power to constitutionally prohibit slavery in the United States's territories.

Key events to Mr. Scott's suit for freedom are familiar and are recounted with a fair degree of accuracy in *Dred Scott's* statement of the facts. Scott lived on free land for the first time in 1834, when his holder, an army physician named John Emerson, was sent to Fort Armstrong in Rock Island, Illinois.<sup>155</sup> In 1836, when Fort Armstrong closed, Scott accompanied Emerson to his new assignment in Fort Snelling, located in the northern part of the Louisiana Purchase, then known as the Wisconsin territory and now part of the state of Minnesota.<sup>156</sup> That territory was free by virtue of the Missouri Compromise. While at Fort Snelling, Scott married, something he could not have lawfully done in any Southern state.<sup>157</sup> From there, Emerson was transferred to St. Louis, Missouri and then to Louisiana.<sup>158</sup> When Emerson died, in 1843, Scott was bequeathed to Emerson's wife.<sup>159</sup> Shortly thereafter, in 1846, Scott brought suit in a state court for his freedom against Emerson's widow, whom he claimed beat him.<sup>160</sup> Although he won his freedom at the trial level, he lost it after Ms. Emerson's appeal to the Supreme Court of Missouri.<sup>161</sup>

That would have ended the case, but by a strange twist of events, Ms. Emerson married an abolitionist, Calvin C. Chaffee, who was later elected to Congress, and she moved to live with him in Massachusetts.<sup>162</sup> She left Scott to live in St. Louis, under the ownership of her brother, John Sanford, a citizen of New York and administrator of his deceased brother-in-law's estate.<sup>163</sup> This provided a new defendant against whom Scott filed suit in federal court on the basis of diversity jurisdiction.<sup>164</sup> When the district court found it had jurisdiction and entered a judgment in favor of Sanford, Scott appealed to the Supreme Court of the United States.<sup>165</sup>

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155. *Dred Scott*, 60 U.S. (19 How.) at 397.

156. *Id.* at 493 (Campbell, J., concurring in the judgment).

157. *Id.* at 398.

158. *Id.* at 397–98.

159. *Id.* at 398.

160. *Id.*

161. *Id.* at 399.

162. DAVID M. POTTER, *THE IMPENDING CRISIS 1848–1861*, at 290 (1976); Walter Ehrlich, *Was the Dred Scott Case Valid?*, 55 J. AM. HIST. 256, 259, 264 (1968).

163. Ehrlich, *supra* note 162, at 257, 259–60.

164. *Id.* at 262.

165. *Id.* at 257. For further elaboration of the facts, see WALTER EHRLICH, *THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM* 9–81 (1979); DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS* 239–83 (1978); DAVID M. POTTER, *THE IMPENDING CRISIS, 1848–1861*, at 268–69, 276–77 (Don R. Fehrenbach ed., 1976).



The justices who heard the case seemed to be a sectionally balanced bunch, with five Southerners and four Northerners. Nevertheless, at least seven of them, everyone except Justices John McLean of Ohio and Benjamin R. Curtis of Massachusetts, had markedly pro-Southern leanings on the issue of slavery. Ironically, Chief Justice Taney of Maryland had freed nearly all of his slaves and even provided a monthly pension to those among them who were too old to work.<sup>166</sup> He even helped a free black in purchasing his wife by fronting him the money and binding him until the loan was repaid.<sup>167</sup> Yet, these were not, as they might first appear, signs of opposition to institution of slavery. As an Attorney General under President Andrew Jackson, Taney took the position that blacks were undeniably sub-citizens.<sup>168</sup> "The African race in the United States even when free," he declared, "are every where a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right."<sup>169</sup> As a Supreme Court Justice, Taney was in the concurrence to *Prigg v. Pennsylvania*, which invalidated a Pennsylvania law and upheld the constitutionality of the Fugitive Slave Act of 1793.<sup>170</sup> Unlike the majority in *Prigg*, Taney believed the Act of 1793 required states to assist in the recapture.<sup>171</sup> Taney was later able to garner a majority for his position in *Ableman v. Booth*, which upheld the Fugitive Slave Act of 1850 with its provision requiring state citizens to help to arrest fugitives.<sup>172</sup>

Another member of the *Dred Scott* Court, Justice John A. Campbell of Alabama, had also manumitted his slaves.<sup>173</sup> He was, however, so passionately pro-Southern that at the outbreak of the Civil War, he quit the Supreme Court, and eventually become the Assistant Secretary of War to the Confederacy.<sup>174</sup> The other three Southerners, Justices James M. Wayne of Georgia, Peter V. Daniel of Virginia, and John Catron of Tennessee, were slave owners, and therefore had an indirect interest in the outcome of

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166. CARL B. SWISHER, ROGER B. TANEY 94 (1935); F. H. Hodder, *Some Phases of the Dred Scott Case*, 16 MISS. VALLEY HIST. REV. 3, 17 (1929); Robert M. Spector, *Lincoln and Taney: A Study in Constitutional Polarization*, 15 AM. J. LEGAL HIST. 199, 211-12 (1971).

167. SWISHER, *supra* note 166, at 94.

168. *Id.* at 140, 154.

169. *Id.* at 154.

170. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 626 (1842).

171. *Id.* at 628.

172. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 522-26 (1858).

173. HENRY G. CONNOR, JOHN ARCHIBALD CAMPBELL: ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 1853-1861, at 71 (Leonard W. Levy ed., DaCapo Press 1971) (1920).

174. *Id.* at 149, 158.

*Dred Scott*.<sup>175</sup> The other two Northerners, besides Justices McLean and Curtis, were committed to Democratic appeasement of Southerners. Justice Samuel Nelson of New York winked at slave trading in New York,<sup>176</sup> and he, like Justice Robert C. Grier of Pennsylvania, while acting as designated circuit justices, repeatedly enforced the Fugitive Slave Acts of 1793 and 1850 while counseling the North against the risks to the Union of resistance.<sup>177</sup>

Taney wrote a fractured opinion for the Court. Six other justices agreed with him that Scott had not gained his freedom when he lived in the Wisconsin Territory, but all of them decided to write separate concurrences to explain their distinct rationales.<sup>178</sup> The first part of Taney's opinion denied that Scott was a citizen of any state or the United States.<sup>179</sup> This was fatal to Scott's ability to have a federal court adjudicate his claim. Taney presumed that states never meant for black inhabitants to be citizens. At the time of the nation's founding, Taney noted, no state other than Maine allowed the "African race" to "participate equally with the whites in the exercise of civil and political rights."<sup>180</sup> We need not spend much time on the fallacy of Taney's induction since it was long ago refuted in Justice Curtis's dissent which showed that, at the time of the founding, blacks had been citizens of several states (New Hampshire, Massachusetts, New York, New Jersey, and North Carolina) that granted them voting privileges.<sup>181</sup> The crux of Curtis's argument was that when the Union was formed, blacks obtained national citizenship by virtue of their state citizenship status.<sup>182</sup> The limiting factor of Curtis's dissent was that if a state, like Virginia, did not grant a class of persons citizenship, they could never be citizens of the

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175. JOHN P. FRANK, JUSTICE DANIEL DISSENTING 58 (1964); ALEXANDER A. LAWRENCE, JAMES MOORE WAYNE: SOUTHERN UNIONIST 144–45 (1943); J. Merton England, *The Free Negro in Ante-Bellum Tennessee*, 9 J. S. HIST. 37, 46–47 (1943).

176. Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532, 535 n.17 (1969).

177. Charge to Grand Jury, 30 F. Cas. 1013, 1014 (C.C.N.D.N.Y. 1851) (No. 18,262). Nelson put the Onus of Unity on the North helping in the capture of fugitives: "They must determine it, and the responsibility rests upon them. If they abide by the constitution—the whole and every part of it—all will be well. If they expect the Union to be saved, and to enjoy the blessings flowing from it, short of this, they will find themselves mistaken when it is too late." Charge to Grand Jury, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261); *Ex parte Jenkins*, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7,259); *Van Metre v. Mitchell*, 28 F. Cas. 1036 (C.C.W.D. Pa. 1853) (No. 16,865).

178. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454–529 (1856) (concurring opinions).

179. *Id.* at 400 (majority opinion).

180. *Id.* at 416.

181. *Id.* at 572–73 (Curtis, J. dissenting).

182. *Id.*

United States.<sup>183</sup> Instead of rehashing this argument, this Article concentrates on the inaccuracy of Taney's white-supremacist notion of revolutionary ideology.

Part II demonstrated that statements about the universality of natural rights were widely shared during the Revolutionary Period. One of Taney's opening salvos was his claim that any reference to "the people of the United States" in the Preamble was "not intended to" apply to blacks.<sup>184</sup> This conjecture denied that the federal government's obligations to secure "the blessings of liberty" and to promote the general welfare extended to blacks.<sup>185</sup>

Contrary to Taney's assertion, the founding generation held a much more nuanced and egalitarian point of view. In 1778, an American jurist wrote that those rights people "possess at birth are equal, and of the same kind."<sup>186</sup> John Adams held a similar sentiment. As he saw it, inalienable rights are divinely granted and cannot be "repealed or restrained by human laws" because they are antecedent "to all earthly government."<sup>187</sup> Moreover, no person could dispossess himself of those rights that are intrinsic to human nature and the rights to life and liberty fit into this category.<sup>188</sup> Except for those proslavery thinkers who thought that blacks were members of a human subspecies,<sup>189</sup> Africans like all other persons had to be included in the category of living beings with inalienable rights.

Standard texts written at the time of the nation's founding, which developed the structure of the American government, are conspicuously devoid of racial differentiation about fundamental rights. The Federalist, arguably the most influential political science work of its time, explores government's obligation to secure the "public good" for the "great body of the people" but never mentions any racial disjunctions.<sup>190</sup> Likewise, the Bill of Rights makes no racial distinctions. On the subject of equally inalienable rights, the Declaration differed from the language of several state constitutions only in so far as it was explicitly inspired by theism. The

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183. *Id.*

184. *Id.* at 404 (majority opinion).

185. *Id.* at 414.

186. RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX (1778), reprinted in THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS 359, 365 (Boston, 1861).

187. JOHN ADAMS, A DISSERTATION ON THE CANON & FEUDAL LAW, in 3 THE WORKS OF JOHN ADAMS 477, 480 (Charles F. Adams ed., 1851) (1782).

188. HAMPDEN, THE ALARM (No. III) (Oct. 15, 1773).

189. See 2 EDWARD LONG, THE HISTORY OF JAMAICA 353-73 (2d ed., Frank Cass & Co. Ltd. 1970) (1774) (taxonomizing blacks somewhere between humans and simians); PERSONAL SLAVERY ESTABLISHED 18 (Philadelphia, John Dunlap 1773) (1773).

190. THE FEDERALIST No. 45, at 309 (James Madison) (Jacob E. Cooke ed., 1961).

Virginia Constitution of 1776 asserted that “all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”<sup>191</sup> Virginia’s retention of slavery despite this highbrow language might have been taken to confirm Taney’s view that the early republic meant to only protect whites.<sup>192</sup> But that interpretation is belied by Jefferson’s earlier draft of the Declaration,<sup>193</sup> as well as luminaries like Mason and Henry who indicated their understanding that the universalism of their claims could not be limited by race.<sup>194</sup> The North, with its post-Revolutionary emancipatory acts, proved willing to at least follow the path that the rhetoric on inalienable rights revealed for a government by the people and for the people.<sup>195</sup>

Besides the outright denial that blacks were thought of as “the people of the United States” by those who accepted the nation’s cornerstone documents, Taney maintained that even if some states granted blacks citizenship rights, it did not follow that they also enjoyed the privileges of national citizenship.<sup>196</sup> That postulate ignored that there may be inalienable rights that neither federal or state governments can infringe. Not only did the Bill of Rights assure states that they would keep certain rights that were not delegated to the United States,<sup>197</sup> but the people likewise retained unenumerated rights that went well beyond the explicit provisions of the first ten amendments.<sup>198</sup>

Many of the founding generation, especially the Federalists, worried that by including a bill of rights in the Constitution they would be implying that it provided an exhaustive list of rights. Hamilton explained, in *The Federalist* No. 84, that in the past bills of rights had been grants from kings to their subjects.<sup>199</sup> Such grants were unnecessary in America where the power of government came from the people, who “surrender nothing” of their inalienable rights and therefore need not explicitly reserve any part of

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191. VA. CONST. of 1776, §1.

192. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

193. *See supra* text accompanying note 71.

194. *See supra* text accompanying notes 56–72.

195. *See supra* text accompanying notes 37–44. Although, various discriminatory practices persisted throughout the North even after emancipation. *See generally* LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860* (1961).

196. *Dred Scott*, 60 U.S. (19 How.) at 404–05.

197. U.S. CONST. amend. X.

198. U.S. CONST. amend. IX.

199. *THE FEDERALIST* No. 84 (Alexander Hamilton).

them.<sup>200</sup> James Wilson proudly distinguished British citizens' need for a declaration of rights from the American citizens' implicit retention of rights against governmental interference. According to Wilson, the Magna Charta regarded the declared liberties to be "the gift or grant of the king;" on the other hand, the Constitution was a grant of power to government from the people who would not part with their natural liberties.<sup>201</sup> Thomas Hartley explained further that since the people delegated power to government through the Constitution, "whatever portion of those natural rights we did not transfer to the government was still reserved and retained by the people."<sup>202</sup> During the North Carolina ratification convention, a participant argued that "if there be certain rights which never can, nor ought to be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up."<sup>203</sup>

The implication of this early support for a constitution without a bill of rights was that there are certain interests that people have by nature, simply by virtue of being human, that are not derived from state or federal governments and which they cannot take away. Thus, the many colonists who wanted to degrade blacks to perpetual slavery could not intrude on fundamental rights that lay altogether outside the province of governmental authority. The lack of a bill of rights mistakenly presumed that representative government would protect the people's natural rights, especially their right to property. The principle that "all men are created equal"<sup>204</sup> in respect to inalienable rights implied that even if Taney were right and in practical terms the founding generation meant to protect only whites their exclusionism could neither diminish nor abridge what was ultimately hereditary. From this perspective, Taney's question of whether the Constitution "embraced the negro African race"<sup>205</sup> was misformulated. The better question was whether the underlying national commitment to safeguarding inalienable rights enabled the federal government to prevent the exploitation of minorities in territories under its exclusive control. James

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200. THE FEDERALIST, *supra* note 190, at 578.

201. James Wilson, Pennsylvania Convention Debates (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 382, 383-84 (Merril Jensen ed., 1976).

202. Thomas Hartley, Pennsylvania Convention Debates (Nov. 30, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 430 (Merril Jensen ed., 1976).

203. Mr. Maclaine (N.C.) Address in Committee of the Whole House (July 29, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 161 (Jonathan Elliot ed., 2d ed. 1836).

204. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

205. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1856).

Madison had written to Thomas Jefferson expressing the obligation of representative government to prevent political majorities from exploiting minorities.<sup>206</sup>

The *Dred Scott* Court failed to provide minority protections. To the contrary, it viewed slavery through the lens of majoritarian tyranny, interpreting “all men are created equal” to be inapplicable to blacks.<sup>207</sup> It concerns “neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not.” He drew this conclusion from no historical source. Rather than analyzing the implications of revolutionary rhetoric, he drew his conclusions from the practice of buying and selling blacks and treating them as “an ordinary article of merchandise and traffic.”<sup>208</sup> They were treated and “regarded as beings of an inferior order.”<sup>209</sup> His supremacist stereotype read blacks out of the Constitution’s reference to “the people” and “men,” whose inalienable rights were heralded by the Declaration. If the languages of that document meant to include blacks, Taney emphasized “the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.”<sup>210</sup>

Taney’s opinion did not so much as consider whether the Declaration gave voice to the universal ideals of the Revolution,<sup>211</sup> even though many of its signatories failed to put them into practice. As we saw earlier, Patrick Henry was explicit about this point, writing that while his generation was proclaiming “the rights of Humanity” he continued to be a master of slaves, being “drawn along by ye general Inconvenience of living without them.”<sup>212</sup> Paine, who was involved in antislavery efforts, also wrote of the inconsistency of enslaving others while fighting for one’s liberty.<sup>213</sup> Essentially, Taney was wrong to think that the framers meant only to include whites in the national framework; to the contrary, many of them

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206. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland et al. eds., 1977) (“Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”).

207. *Dred Scott*, 60 U.S. (19 How.) at 407.

208. *Id.*

209. *Id.*

210. *Id.* at 410.

211. See *supra* text accompanying notes 29–44.

212. Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), in GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 443–44 (1937).

213. See PAINE, *supra* note 99, at 7.

recognized their own hypocrisy but for personal and national interests chose to persist in it.

In opposing the Boston Port Act, Baptist preacher John Allen demonstrated his evenhandedness by denouncing slaveholders. He labeled them “trifling patriots” and “pretended votaries for Freedom” who trampled on the natural rights and privileges of Africans even as they made a “vain parade of being advocates of the liberties of mankind.”<sup>214</sup> Many blacks sensed the possibility during this time to change their status. A group of black petitioners from New Hampshire deduced that since “freedom is an inherent right of the human species,” then slavery must be a detestable form of tyranny.<sup>215</sup> Another group writing to Massachusetts Governor Thomas Hutchinson in the 1770s protested that they had “in comon [sic] with other men a naturel [sic] right to be free and without molestation to injoy [sic]” their property.<sup>216</sup>

These sentiments seem to have been shared by a large number of white colonists. Worcester instructed its representative to the Massachusetts General Court, the state’s legislature, to use his “influence to obtain a law to put an end to that unchristian and impolitic practice of making slaves of the human species in this province.”<sup>217</sup> On January 12, 1775, a group from Darien County, Georgia bristled at the notion that the colonial struggle should be thought in pragmatic terms: “To show the world that we are not influenced by any contracted or interested motives, but a general philosophy for all mankind, of whatever climate, language, or complexion, we hereby declare our disapprobation and abhorrence of the unnatural practice of Slavery in America.”<sup>218</sup>

Fourth of July orations throughout the country made reference to such sentiments as a matter of course. A Philadelphia newspaper recounted that two of the 1792 Independence Day celebration toasts were for “The daughters of America” and “The people of Africa.”<sup>219</sup> The next year, the same paper transcribed the Order of Cincinnati’s Independence Day toast to the “human race—may the great family of mankind without distinction of countries or colours, be united . . . and enjoy liberty as a common inheritance.”<sup>220</sup> In a later year, celebrating the holiday in Maryland, a toast

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214. JOHN ALLEN, *THE WATCHMAN’S ALARM TO LORD N---H* 27–28 (Salem, Mass. 1774).

215. WINTHROP D. JORDAN, *WHITE OVER BLACK* 291 (1968).

216. 3 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 432–33 (5th ser. 1877).

217. WILLIAM LINCOLN, *HISTORY OF WORCESTER, MASSACHUSETTS FROM ITS EARLIEST SETTLEMENT TO SEPTEMBER 1836*, at 68 (Worcester, Hersey 1862).

218. PHILIP S. FONER, *HISTORY OF BLACK AMERICANS: FROM AFRICA TO THE EMERGENCE OF THE COTTON KINGDOM* 303–04 (1975).

219. *THE GENERAL ADVERTISER* (Philadelphia), July 6, 1792, at 3.

220. *THE GENERAL ADVERTISER* (Philadelphia), July 6, 1793, at 3.

contained the message that slavery was “[c]ontrary to the declaration that ‘all men are created equal,’ may Congress consider the necessity of an immediate eradication of this evil.”<sup>221</sup>

In addition to Taney’s narrow construction of revolutionary ideology, his opinion relied on slavery-protecting clauses of the U.S. Constitution:

The only two provisions which point to them [Negroes] 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: . . . 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.<sup>222</sup>

Taney not only showed too much “respect due to these States” but also an overly indulgent “respect to the State sovereignties.”<sup>223</sup> His opinion denies federal interest in redressing civil rights issues and leaves them to the sole discretion of the states.<sup>224</sup> The compromises with slaveocracy made at the Philadelphia Constitution Convention glaringly contradict the purposes of the Revolution,<sup>225</sup> but Taney was unwilling to reflect on the underlying purposes of republican government; relying, instead, on the plain language of slave protecting clauses of the constitution.<sup>226</sup> Yet, as has been pointed out by others, even the text of the Constitution purposefully excluded any reference to race. The framers seem to have conscientiously avoided the terms “slave” or “slavery.”<sup>227</sup>

One further explanation for the inexcusable inclusion of the Three-Fifths, Importation, and Fugitive Slave Clauses, beyond the perceived need for compromise, might be the unrealistic belief of the period that slavery would wither away of its own, without any legal intervention. As Benjamin Rush, a former member of the Continental Congress and an intimate friend of two

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221. BALTIMORE PATRIOT & MERCANTILE ADVERTISER, July 9, 1818, at 2.

222. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 425–26 (1856).

223. *Id.* at 416.

224. *See id.* at 416–17.

225. *See* WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 62–84 (1977).

226. *See supra* text accompanying note 222.

227. The Constitution of the Confederate States of America, unlike the United States Constitution, overtly protected “Negro slavery.” EMORY M. THOMAS, *THE CONFEDERATE NATION, 1861–1865*, at 313 (1979). Moreover, the Confederate Constitution excluded persons of African descent from civil protections: “No bill of attainder, ex post facto law, or law denying or impairing the right to property in Negro slaves, shall be passed.” *Id.* The entire Confederate Constitution is reprinted in *id.* at 307–22 (1979). For a further discussion on the Confederate Constitution, see Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 543–44 (2002).



U.S. presidents, explained in a 1774 letter to the British Abolitionist Granville Sharp, “[t]he cause of African freedom in America continues to gain ground.”<sup>228</sup> He expected slavery in America to end within forty years. The same year that Rush wrote his letter, Jefferson unsuccessfully tried to have Virginia adopt the statement that “the abolition of domestick slavery is the greatest object of desire of these colonies.”<sup>229</sup> Madison’s statement at the Constitutional Convention is also indicative of the explicit repudiation of slavery even as it was being entrenched into the nation’s fundamental law. “We have seen,” he said “the mere distinction of colour made in the most enlightened period of time, a ground to the most oppressive dominion ever exercised by man over man.”<sup>230</sup> The constitutional willingness to compromise with the advocates of slavery is attributable not only to racism but also the perception that union should come first and abolition later.

Another controversial part of Taney’s opinion dealt with the merits of Scott’s case.<sup>231</sup> His finding that Dred Scott lacked any recognizable form of citizenship should have led to a dismissal based on the Court’s lack of subject matter jurisdiction. Rather than exercising judicial restraint, however, Taney determined to resolve decades of sectional conflict in one fell swoop. The Missouri Compromise, he asserted, violated the Fifth Amendment substantive due process rights of slaveowners to enjoy property in any and all parts of the United States, including the territories.<sup>232</sup> While Congress’s powers over the territories were extensive, they were delimited by the Fifth Amendment’s prohibition against the deprivation of property without due process.<sup>233</sup> Thus, the Missouri Compromise had been an unconstitutional exercise of congressional authority. Scott could never have become free even though he had lived in federal territory North of the 36° 30’ because, as Taney saw it, it was unconstitutional for Congress to encroach on slaveholders’ property right to own, travel, and enjoy their human chattel.<sup>234</sup>

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228. Letter from Benjamin Rush to Granville Sharp (May 13, 1774), in *The Correspondence of Benjamin Rush and Granville Sharp, 1773–1809*, 1 J. AM. STUD. 1, 5 (John A. Woods ed., 1967).

229. Guion Griffis Johnson, *The Impact of War Upon the Negro*, 10 J. NEGRO EDUC. 596, 599 (1941) (quoting THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICANS (1774), reprinted in 4 AMERICAN ARCHIVES 969 (Peter Force, ed., 1834)).

230. Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 490 n.192 (1989) (quoting M. MEYERS, THE MIND OF THE FOUNDER 72 (1981)).

231. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404–27 (1856).

232. *Id.* at 450, 452.

233. *Id.* at 451–52.

234. See *id.* at 432.

Just as with the citizenship question, the decision that Congress lacked power to limit property in slaves relegated individuals' fundamental rights to the exclusive control of the states. *Dred Scott* considered congressional attempts to affect slavery, to confine it to only some parts of the country, and to prohibit it elsewhere to be both interference with individuals' property rights and with states' rights.<sup>235</sup> In another decision drafted by Taney, *Strader v. Graham*, the Court similarly resorted to state prerogatives in matters of slavery.<sup>236</sup>

Elsewhere, Taney seems to have been even more concerned with maintaining slavery than with bolstering the doctrine of states' rights. When Congress included a provision in the Fugitive Slave Act of 1850 to prevent states from using personal liberty laws to harbor fugitives against slave catchers, Taney, writing on behalf of the majority, upheld the federal law.<sup>237</sup> The decision is an anomaly, in all likelihood because by narrowing the scope of state autonomy Taney increased slave owners' recapture rights.<sup>238</sup> In part, the indication from the contrasting approaches in *Dred Scott* and *Ableman* is that the importance of property ownership in slaves could trump any opposing individual interests. Yet, Taney's insistence in *Dred Scott* that the country give its "respect to the State sovereignties"<sup>239</sup> in their several decisions to stigmatize blacks was central to his denial of nationally recognized black citizenship. Thus, the federal government could not trump states' policies in safeguarding property interests.

Taney's proslavery decisions, especially *Dred Scott*, faced the concerted opposition of the Republican Party.<sup>240</sup> The historian Alfred Brophy has

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235. See Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637, 707 (2000) (discussing *Dred Scott* in the context of the states' rights doctrine).

236. See 51 U.S. (10 How.) 82, 93–94 (1850) (holding that every state has a right to determine the slave status of individuals without federal intervention).

237. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524–26 (1858); accord *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 631 (1842) (Taney, J., concurring) (indicating that the Fugitive Slave Act of 1793 required states' "cordial co-operation" in the recapture of fugitive slaves).

238. Tony A. Freyer, *A Precarious Path: The Bill of Rights After 200 Years*, 47 VAND. L. REV. 757, 773 (1994).

239. *Dred Scott*, 60 U.S. (19 How.) at 416.

240. Abraham Lincoln, for instance, rejected that *Dred Scott* had any binding effect upon the political decision-making of the President or Congress. See Hadley Arkes, *On the Moral Standing of the President as an Interpreter of the Constitution: Some Reflections on Our Current "Crises"*, 20 PS SUMMER 637, 640–41 (1987); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 88 (1998); Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 941–42 (2006). Lincoln walked a political tight rope, neither wanting to be seen as a supporter of the opinion nor as an opponent of judicial interpretive supremacy. He

explained that Lincoln believed *Dred Scott* required free states to accept slavery within their borders: Taney's decision led to the conclusion that "the Constitution 'expressly affirms slavery' according to Taney; [and] because of the supremacy clause, nothing in the Constitution or laws of a state can destroy a right expressly affirmed in the Constitution. Therefore, the right to property in a slave cannot be abridged by any state or by the United States Constitution."<sup>241</sup>

With the outbreak of the Civil War, Republicans gained control of all three branches of government and found the occasion to overturn *Dred Scott* by constitutional amendment.<sup>242</sup> The next section shows that while the Thirteenth and Fourteenth Amendments aimed to supersede states' plenary power in matters of civil rights, subsequent judicial decisions reestablished significant aspects of antebellum federalism.

#### IV. RECONSTRUCTION PROGRESS

The Thirteenth and Fourteenth Amendments emerged from efforts to overturn *Dred Scott* and to add a clear provision to the Constitution providing federal authority to act on matters of liberty and equality.<sup>243</sup> The Thirteenth Amendment was ratified to immediately abolish slavery, something that before the Civil War was unfathomable to all but the most

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ultimately settled on claiming that *Dred Scott* was not binding on any but the immediate controversy involved in that case. See Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861) (transcript available at <http://209.10.134.179/124/pres31.html>). Another Republic leader, William H. Seward, who went on to be Secretary of State, ardently expressed his party's disagreement with the substantive part of *Dred Scott*, calling for a reorganization of the Court to make certain that it would abide by the Constitution. See CONG. GLOBE, 35th Cong., 1st Sess. 941 (1858); J. G. de Roulhac Hamilton, *Lincoln's Election an Immediate Menace to Slavery in the States?*, 37 AM. HIST. REV. 700, 702 (1932).

241. Alfred L. Brophy, Note, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 221 (1990).

242. See Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 Hous. L. REV. 221, 227 (1987).

243. See JACOBUS TENBROEK, EQUAL UNDER LAW 157 (2d ed. 1969) (explaining abolitionist thought relative to Thirteenth Amendment); Alexander Tsesis, *Reconstruction Abolitionism*, in PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY (Alexander Tsesis ed., Columbia University Press, forthcoming 2008) (discussing Thirteenth Amendment abolitionism); Lucinda M. Finley, *Putting "Protection" Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists' Understandings of Equality*, 13 TEMP. POL. & CIV. RTS. L. REV. 429, 436 (2004) (elaborating on how abolitionist thought on the Declaration of Independence became part of the Fourteenth Amendment). For a more detailed discussion, see generally HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875 (1982); WIECEK, *supra* note 225.

radical of abolitionists. The Amendment's second section granted Congress the power to end any practices that legislators found to be rationally related to any remaining vestiges of involuntary servitude.<sup>244</sup> The Fourteenth Amendment secured the privileges and immunities of citizenship with the interlinking prohibition against any state actions that infringed on due process and the equal protection of law.<sup>245</sup> The Fourteenth Amendment's fifth section also provided Congress with a new authority to protect the rights of its citizens,<sup>246</sup> thereby changing the very federalist foundation of the American Constitution and rendering *Dred Scott* obsolete. It granted the federal government the authority to enact protections for fundamental rights, to allocate funds for their protection, and to grant federal courts powers to adjudicate alleged infringements on substantive rights.<sup>247</sup> These two Amendments altered the dynamic between state and federal governments.<sup>248</sup> During congressional debates Representatives and Senators spoke of them as providing the federal government with the authority

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244. U.S. CONST. amend. XIII, § 2; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

245. U.S. CONST. amend. XIV.

246. *See id.* § 5.

247. *See* Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 857 (2005) (discussing how the primacy of national citizenship of the Fourteenth Amendment overruled *Dred Scott*); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005) ("[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866."); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 353 (2006) (arguing that under the Fourteenth Amendment "fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State"); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 363 (1993) (relating how the Fourteenth Amendment "united [the Declaration of Independence] with the Constitution in the enactment of the Fourteenth Amendment. . . . Section 1 of the Fourteenth Amendment is the Declaration of Independence") (emphasis added); Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. 1465, 1478 n.40 (2006) (asserting that "the U.S. Congress has an obligation under Section Five of the Fourteenth Amendment" to ensure states uphold the "duty to protect all citizens' natural rights"). For a perspective indicating that the Fourteenth Amendment was not a radical break from traditional federalism, see EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 30 (1990); Maltz, *supra* note 242, at 278–79 (siding with a narrow interpretation of Reconstruction statutes and the Thirteenth and Fourteenth Amendment).

248. *TSESIS*, *supra* note 15.

needed to safeguard the founding principles of the Declaration of Independence and Preamble to the Constitution.<sup>249</sup>

The constitutional fruits of Reconstruction's civil rights revolution aimed to alter the federalism of *Dred Scott* and to empower Congress to provide protections against private and state infringements. As in the days of Chief Justice Taney, who challenged the notion of congressional power to prevent slavery in the territories, the post-Reconstruction Supreme Court denied the constitutionality of some of the most important legislative efforts to assert national primacy in the realm of fundamental human rights.<sup>250</sup>

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249. Space does not allow for an exhaustive treatment of this point, but there are many representative statements indicating the Revolutionary foundations of both Amendments. For example, Schuyler Colfax, the Speaker of the House for the Thirty-Ninth Congress, opened the session, in 1865 soon after the Amendment was ratified, with a statement on Congress's power:

[I]t is yours to mature and enact legislation which . . . shall establish [state governments] anew on such a basis of enduring justice as will guaranty all necessary safeguards to the people, and afford, what our Magna Carta, the Declaration of Independence, proclaims is the chief object of government—protection to all men in their inalienable rights.

CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865). The same year Representative Godlove S. Orth expected the Thirteenth Amendment to be “a practical application of that self-evident truth, ‘that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.’” CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865); *see also* CONG. GLOBE, 38th Cong., 2d Sess. 260 (1865) (statement of Sen. James S. Rollins).

After the ratification of the Thirteenth Amendment, Senator Lyman Trumbull explained that “the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the amendment which has recently been adopted.” CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Iowa Representative James F. Wilson avowed that “citizens of the United States, as such, are entitled to certain rights; and . . . being entitled to those rights it is the duty of the Government to protect citizens in the perfect enjoyment of them. The citizen is entitled to life, liberty, and the right to property.” *Id.* at 1294. Wilson stood for national rights while continuing to maintain that states must retain their police power. *Id.* Colfax made the most revealing statement of all about Section 1 of the Fourteenth Amendment:

[I]t is the Declaration of Independence placed immutably and forever in our Constitution. What does the Declaration of Independence say? . . . It says that all men are created equal [quoting]. That's the paramount object of government, to secure the right of all men to their equality before the law. So said our fathers at the beginning of the Revolution. So say their sons to-day, in this Constitutional Amendment . . . It declares that every person—every man, every woman, every child, born under our flag, or naturalized under our laws, shall have a birthright in this land of ours.

Charles Fairman, *The Original Understanding: Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 73 (1949).

250. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 884–99 (1986). *But see* MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION 5 (2006) (“[M]ost Republicans did not want to displace state and local governments as primary protectors of the ordinary rights of their

But following the ratification of the Thirteenth Amendment the prospects looked good for the advocates of nationally recognized civil rights. With the passage of the Civil Rights Act of 1866,<sup>251</sup> Congress showed its willingness to pass laws for protecting rights at the core of American citizenship. The Act secured the right to “make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>252</sup> The statute further provided citizens with the “full and equal benefit of all laws and proceedings for the security of person and property . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”<sup>253</sup> It prohibited public and private acts of discrimination.<sup>254</sup> Federal courts were authorized to exercise original jurisdiction over cases, but state courts could also hear causes of action arising under the Act.<sup>255</sup> Litigants could remove cases from state to federal courts if state laws infringed on their federal rights.<sup>256</sup> Even state officials who violated the Act could be criminally prosecuted.<sup>257</sup> All violators could be imprisoned for up to a year and fined no more than \$1,000.<sup>258</sup> States retained concurrent authority to pass civil rights laws.<sup>259</sup> The sweeping nature of these provisions showed the intent of those who enacted the Reconstruction Amendments to federalize civil rights protections, which had previously been solely at the states’ discretion.

The Act’s criminal provisions similarly were predicated on a radical revision of civil rights federalism. States retained exclusive jurisdiction over private conduct, involving civil, criminal, and transactional matter, but the federal government now asserted its jurisdiction to regulate matters affecting nationally recognized fundamental rights.<sup>260</sup> That meant states could enact varying tort, penal, and contract laws, but they could not exclude an entire class of persons from their protections. By itself, even before the ratification of the Fourteenth Amendment, that was a clear break from the *Dred Scott* construct of federalism.

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citizens. . . . Republicans framed the most limited Reconstruction they could and still secure meaningful freedom in the South.”).

251. Ch. 31, 14 Stat. 27 (1866).

252. *Id.* § 1.

253. *Id.*

254. *See id.*

255. *Id.* § 3.

256. *Id.*

257. *See id.* § 2.

258. *Id.*

259. *Id.* § 3.

260. *Id.*

During debates on the Civil Rights Act of 1866, Chairman of the Senate Judiciary Committee, Lyman Trumbull, explained that the statute was meant to secure the Declaration of Independence's promises of life, liberty, and property.<sup>261</sup> This was especially critical for African Americans who had been "ground down and degraded" by slavery.<sup>262</sup> Congress passed the law less than a year after Chief Justice Taney's death, demonstrating a decisive unwillingness to accept his racialized notions of rights. Just as consequential was the signal that Congress could now interpret the Constitution and determine what rights are essential to citizenship. As Trumbull put it, the Thirteenth Amendment "vests Congress with the discretion of selecting that 'appropriate legislation' which it is believed will best accomplish the end and prevent slavery."<sup>263</sup>

Senator George H. Williams noted that there was no need to include a citizenship clause in the statute because its protections would implicitly confer civil rights protections on everyone residing in the states and territories.<sup>264</sup> Trumbull looked to Justice Bushrod Washington's circuit court dicta in *Corfield v. Coryell*<sup>265</sup> to deduce the extent of congressional authority under the Thirteenth Amendment.<sup>266</sup> Washington's nonexhaustive list of privileges of citizenship included "the enjoyment of life and liberty, with the right to acquire and possess property of every kind; and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may justly prescribe for the general good of the whole . . . , [t]he right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise."<sup>267</sup> The Reconstruction Congress surmised that under the Thirteenth Amendment's Section Two it had the authority to provide for these and other essentials of citizenship, even if they were not enumerated in the Bill of Rights.<sup>268</sup>

The key players who supported the Civil Rights Act expected to use *Corfield* as a starting point for establishing what civil rights Congress was

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261. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

262. *Id.* at 475.

263. *Id.*

264. *Id.* at 572.

265. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

266. CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866).

267. *Id.* at 475.

268. See MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE 80–83 (1986) (discussing the constitutional authority Congress relied on to pass the Civil Rights Act of 1866); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner*, 38 B.C. L. REV. 1, 32 n.122 (1996) (citing primary sources on congressional authority to pass the Civil Rights Act of 1866).

empowered to protect now that it was no longer burdened by *Dred Scott*'s states oriented federalism. As Trumbull put it, the proposed law made it clear "that all persons in the United States shall be entitled to the same civil rights."<sup>269</sup> Its only object "is to secure equal rights to all the citizens of the country," by protecting "a white man just as much as a black man."<sup>270</sup> Representative James Wilson, chairman of the House Judiciary Committee and the bill's floor manager, defined civil rights as "the natural rights of man; and those are the rights which this bill proposes to protect every citizen to enjoy."<sup>271</sup> These statements indicated a newfound sense of authority of Congress to affirmatively act on interests, such as property ownership, which Taney had found to be at the sole discretion of the states. The Thirteenth Amendment, the wellspring of congressional power to pass the Civil Rights Act of 1866, had changed the dynamic between state and federal authority. To Trumbull this power shift was clear: "Congress is bound to see that freedom is in fact secured to every person throughout the land,"<sup>272</sup> pursuant to its Thirteenth Amendment authority. Everyone "must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured."<sup>273</sup> The Act's supporters did not, by any means, expect that changes to the Constitution would remove ordinary criminal and civil cases, which did not involve infringements of civil rights, from the exclusive realm of state sovereignty.<sup>274</sup>

The Act of 1866 was to be only the beginning of Reconstruction. Its terms were so limited because Republicans needed a supermajority to pass the measure over President Andrew Johnson's April veto.<sup>275</sup> Republicans

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269. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

270. *Id.*

271. *Id.* at 1117.

272. *Id.* at 77.

273. *Id.*

274. See Kaczorowski, *supra* note 247, at 187, 210–12.

275. The congressional vote overriding Johnson's veto is found at CONG. GLOBE, 39th Cong., 1st Sess. 1809 (Senate), 1861 (House) (1866). The urging of Secretary of State Seward and Ohio Governor Jacob D. Cox, both Republicans who supported Johnson against attacks from those in their own party, made no difference in Johnson's decision to break with congressional reconstruction. In his lengthy message explaining the veto, Johnson said that the rights enumerated in the Act were the province of each state and that it was unconstitutional to grant such extensive jurisdiction to the federal courts. Letter from Jacob D. Cox to Andrew Johnson (Mar. 22, 1866), in 10 THE PAPERS OF ANDREW JOHNSON 287 (Paul H. Bergeron et al. eds., 1992). The note from Seward is filed under date of March 27, 1866 in ANDREW JOHNSON



shortly decided that the ambiguities inherent in the enormous power to end all incidents and badges of involuntary servitude made further constitutional clarification necessary. The year Congress enacted the Civil Rights Act, it began debating the merits of an additional amendment.

In May 1866, Congress started its debate on the language of the Fourteenth Amendment, which was meant, in significant part, to constitutionalize the federal authority over citizenship rights codified in the Civil Rights Act of 1866.<sup>276</sup> Members of the Joint Committee of Fifteen on Reconstruction, like Thaddeus Stevens, John A. Bingham, William P. Fessenden, and Jacob M. Howard, wanted to extend national power over civil rights beyond the protections that were enumerated by the Act.<sup>277</sup> Their aim was to clarify the grant of congressional enforcement authority in the Thirteenth Amendment by adding nationally applicable equal protection, due process, and privileges and immunities clauses to the Constitution.

The Committee incorporated phrases into their drafts that reflected unmistakably abolitionist sounding rhetoric. Like the Declaration of Independence, the Fourteenth Amendment forced the nation to examine its practices against an ideal government that protected individual rights to increase overall welfare. Inclusion of the Citizenship Clause seemed to foreclose any future judicial decision that tied citizenship rights to any particular race. The terms of the Amendment's first section were broad enough to provide for the federal protection of natural rights of all American citizens. Through the process of appellate reevaluation, later judges in the twentieth and twentieth-first centuries would interpret the "due process" and "equal protection" clauses to cover the rights of women,<sup>278</sup> racial minorities,<sup>279</sup> disabled persons,<sup>280</sup> and gays.<sup>281</sup>

An opponent of the Fourteenth Amendment, Representative Samuel J. Randall, warned that "[t]he first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the

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PAPERS Reel 21 and at the Library of Congress; 6 ANDREW JOHNSON, COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 405 (James D. Richardson ed., 1897).

276. See Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1584–85 (1995). For a couple of examples of statements connecting the Fourteenth Amendment with the Civil Rights Act of 1866, see CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Representative Eliot) and *id.* at 2462 (statement of Representative Garfield).

277. See Bybee, *supra* note 276.

278. *United States v. Virginia*, 518 U.S. 515 (1996).

279. *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

280. *Tennessee v. Lane*, 541 U.S. 509 (2004).

281. *Lawrence v. Texas*, 539 U.S. 558 (2003).

States.”<sup>282</sup> Randall was in fact correct in the extent to which the Fourteenth Amendment would alter the constitutional vision of *Dred Scott*. There was no discussion during the debates of disempowering states of the day-to-day workings of its citizens’ rights; rather, the framers wanted to prevent any unjust infringements against nationally recognized civil rights. As Representative Frederick E. Woodbridge of Vermont put it, Congress would henceforth have the power to “enact those laws which [would] give to a citizen of the United States the natural rights which necessarily pertain to citizenship.”<sup>283</sup>

## V. POST-RECONSTRUCTION JUDICIARY

The first judicial interpretations of Reconstruction laws recognized that the Thirteenth and Fourteenth Amendments had eliminated the state-oriented civil rights federalism of *Dred Scott*. Designated circuit court justice Noah Swayne upheld the constitutionality of the Civil Rights Act of 1866 in *United States v. Rhodes*.<sup>284</sup> Swayne found that the Thirteenth Amendment enabled Congress to pass civil rights legislation and to grant federal courts jurisdiction to adjudicate cases arising under it.<sup>285</sup> That amendment, he found, “trenches directly upon the power of the states and of the people of the states.”<sup>286</sup> Even though the final version of the Act did not include the term “citizen,” Swayne thought Congress had meant to confer that status to all “free inhabitants born within the United States or naturalized under the laws of Congress.”<sup>287</sup> Until the passage of the Thirteenth Amendment, rights varied “in different localities and according to circumstances.”<sup>288</sup>

Other decisions, such as *In re Turner*,<sup>289</sup> which struck down the Maryland apprenticeship statute, also drew away from *Dred Scott*’s state oriented federalism, adopting a more national notion of civil rights policy.<sup>290</sup> Chief Justice Chase, writing as a designated circuit court justice, found that following the ratification of the Thirteenth Amendment “[c]olored persons equally with white persons are citizens of the United States.”<sup>291</sup> The

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282. CONG. GLOBE, 39th Cong., 1st Sess. 2530 (1866).

283. *Id.* at 1088.

284. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No 16,151).

285. *Id.* at 787.

286. *Id.* at 788.

287. *Id.* at 789 (quoting 1 Kent, Comm. 292).

288. *Id.* at 790.

289. 24 F. Cas. 337 (C.C. Md. 1867) (No. 15,210).

290. *Id.* at 339.

291. *Id.* at 340.

Amendment made legislators primarily responsible for carrying out its principles: "Congress is itself the judge of its power to pass such a law, and is alone the judge of the existing necessity for it."<sup>292</sup> Six years later, in *United States v. Given*,<sup>293</sup> with Justice Strong also sitting as a circuit justice, a Delaware district court held that the Reconstruction Amendments "enlarged the powers of congress" by securing "to persons certain rights which they had not previously possessed."<sup>294</sup> He noted that "prior to the recent amendments" congressional legislation could not be used to protect all personal rights in the Constitution; "[b]ut the recent amendments have introduced great changes."<sup>295</sup> Reconstruction had not only extended the notion of rights to a universal principle often discussed during the revolutionary period,<sup>296</sup> it also increased federal legislative power to protect them.

Not only were the rights given—the right of liberty, the right of citizenship, and the right to participate with others in voting, on equal terms, without any discrimination on account of race, color, or previous condition of servitude—but power was expressly conferred upon [C]ongress to enforce the articles conferring the right.<sup>297</sup>

The potential of a socially conscious use of federal powers was significantly diminished by the Supreme Court's narrow interpretation of the Reconstruction Amendments. In the *Slaughter-House Cases*<sup>298</sup> of 1872, butchers challenged a Louisiana law giving a company an exclusive license to operate a slaughterhouse in the New Orleans area.<sup>299</sup> Other than persons who made up the corporation, all other butchers had to pay a fee to use the facility.<sup>300</sup> Those butchers who were not part of the company filed a cause of action in a Louisiana state court.<sup>301</sup> Eventually the matter reached the Louisiana Supreme Court, which held that the exclusive license was a legitimate public health regulation, not an unlawful restraint on the butchers' trade.<sup>302</sup> The Association eventually challenged the statute in the

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292. *Id.* at 339.

293. 25 F. Cas. 1324 (C.C.D. Del. 1873) (No. 15,210).

294. *Id.* at 1325.

295. *Id.* at 1326.

296. *See supra* Part II.

297. *Given*, 25 F. Cas. at 1326.

298. 83 U.S. (16 Wall.) 36 (1873).

299. *Id.* at 59–60.

300. *Id.* at 60.

301. *Id.* at 57.

302. *State ex rel. Belden v. Fagan*, 22 La. Ann. 545, 554 (1870).

United States District Court for Louisiana, where the case was heard by Supreme Court Justice Joseph P. Bradley and District Judge William B. Woods.<sup>303</sup> The opinion, issued under Bradley's name, found that Louisiana had misused its police power to "confer on the defendant corporation a monopoly of a very odious character."<sup>304</sup> The post-Reconstruction Constitution demanded "that the privileges and immunities of all citizens . . . be absolutely unabridged [and] unimpaired" by local sensibilities.<sup>305</sup> States were prohibited from using unreasonable regulations to infringe on the benefits of national citizenship. And "one of the privileges of every American citizen" was "to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit."<sup>306</sup> That privilege was "nothing more nor less than the sacred right of labor."<sup>307</sup>

When the case reached the U.S. Supreme Court, John A. Campbell represented the dealers and butchers.<sup>308</sup> During the Civil War, Campbell had resigned from the Supreme Court and served as the Confederate Assistant Secretary of War.<sup>309</sup> Curiously, Republican Senator Matthew H. Carpenter represented the monopoly.<sup>310</sup> That same Supreme Court term Carpenter argued for a broad reading of the Fourteenth Amendment challenging Illinois's ban against licensing women to be lawyers.<sup>311</sup> Justice Samuel F. Miller wrote the majority opinion in that case, joined by four other Justices, holding that women could not demand to enter occupations of their choice on the basis of a national privilege.<sup>312</sup>

Justice Miller's *Slaughter-House* decision is best known for its distinction between the privileges and immunities of state citizenship and

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303. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.* 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8,408).

304. *Id.* at 653.

305. *Id.* at 652.

306. *Id.*

307. *Id.*

308. ROBERT SAUNDERS, JR., JOHN ARCHIBALD CAMPBELL, *SOUTHERN MODERATE*, 1811–1889, at 214 (1997).

309. *See id.* at 136, 154; *see also* Richard L. Aynes, *Constricting the Law of Freedom*, 70 CHI.-KENT L. REV. 627, 633 (1994); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call To Expand the Constitutional Canon: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 87 MINN. L. REV. 153, 178 (2002).

310. Aynes, *supra* note 309, at 633.

311. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 133–37 (1873). For a fascinating discussion on Chief Justice Chase's decision to dissent without opinion in that case, *see* Richard L. Aynes, *Bradwell v. Illinois: Chief Justice Chase's Dissent and the "Sphere of Women's Work"*, 59 LA. L. REV. 521, 527–30, 537 (1999).

312. *Bradwell*, 83 U.S. (16 Wall.) at 137–39.

United States citizenship.<sup>313</sup> The only national privileges Miller acknowledged were those already enumerated in the Constitution and identified by a Supreme Court precedent, such as the right to travel to Washington, D.C., the right of protection on the high seas, and habeas corpus protections.<sup>314</sup> Miller implied that unenumerated rights could not be redressed in federal courts.<sup>315</sup> Contrary to Trumbull's assertions, Miller understood Justice Washington's interpretation of the privileges and immunities of Article IV, in *Corfield*, to correspond to "rights belonging to the individual as a citizen of a [s]tate."<sup>316</sup> The Amendment, Miller wrote, never meant "to transfer the security and protection of all the civil rights" from state to federal governments.<sup>317</sup> The Court evidently conceived of itself, and the Reconstruction Amendments, as having a very limited role in redressing state violations of individual rights.

Miller also rejected the butchers' Thirteenth Amendment argument, finding its focus on the incidents of involuntary servitude inapplicable to a matter that was primarily about the exploitation of property rather than persons.<sup>318</sup> The Court, therefore, upheld the Louisiana monopoly; of more grave consequence, it engrafted a weak interpretation of citizenship rights onto the Thirteenth and Fourteenth Amendments.

While Justice Miller acknowledged that the first Section of the Fourteenth Amendment overruled *Dred Scott*'s holding on African American citizenship,<sup>319</sup> his interpretation made state sovereignty a trump against federal review of even those state laws that detrimentally affected any inalienable rights. The notion that there is a distinction "between citizenship of the United States and citizenship of a State"<sup>320</sup> incorporated a

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313. During debates on the Fourteenth Amendment, Miller supported a conservative alternative to it, which was supported by President Andrew Johnson, that might have fueled his weak interpretation of the Privileges and Immunities Clause in *Slaughter-House*. See Aynes, *supra* note 309, at 660 & n.228 ("The fact that this alternative Fourteenth Amendment was seen as a conservative proposal orchestrated by President Johnson and that it was specifically rejected in favor of Bingham's more potent formulation, demonstrates that Miller's interpretation of the Fourteenth Amendment was wrong."). Two of the other four justices joining Miller's majority, repeatedly demonstrated opposition to emancipation from slavery. See *id.* at 665–68.

314. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

315. See *id.*

316. *Id.* at 76. Miller actually misquoted *Corfield*; rather than "citizens of the several states" the original case has "citizens in the several states." The original is more open to a national perspective of privileges and immunities. See Kevin C. Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 653–54 (2000).

317. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77.

318. *Id.* at 66–74.

319. *Id.* at 73.

320. *Id.* at 73.

pivotal presumption of *Dred Scott* into post-Reconstruction jurisprudence.<sup>321</sup> The Court showed an unwillingness to budge from the established order of federal sovereignty that had left states free to violate civil rights without being subject to any federal intervention.

The continuing use of racial violence, segregation, and employment and property discrimination in the South made blacks the greatest losers in *Slaughter-House* even though the case had nothing directly to do with them. The power to secure civil rights returned, in great part, to Southern governments which were increasingly being “redeemed” from Republican control. The prospect of equal citizenship was dealt a staggering blow, even though at first glance the opinion seemed to be of minor consequence to any issue other than government created monopolies.

Four out of nine Justices dissented from Miller’s opinion.<sup>322</sup> Two separate dissents are relevant here. Justice Swayne argued against rolling back jurisprudence to antebellum state federalism, viewing the Reconstruction Amendments as “a new departure” because they reduced state power.<sup>323</sup> Justice Bradley, in his dissent, focused on the Reconstruction Amendments’ effect on individuals’ relationship to their communities. The Fourteenth Amendment, Bradley argued, had made United States citizenship “primary,” enabling the federal government to step in if a state or local power “denied full equality before the law” to any classes of persons.<sup>324</sup> Both of these dissents implied that the Fourteenth Amendment not only overruled *Dred Scott* on national citizenship but also enabled the federal government to act against civil rights violations.

The judicial retreat from Reconstruction became increasingly ossified in 1876. *United States v. Cruikshank*<sup>325</sup> relegated the prevention of criminal violence, even when motivated by racial hatred, to state authorities.<sup>326</sup> Just as in the civil realm, which the *Slaughter-House Cases* involved, the court allowed state sensibilities to trump federal concerns for the welfare of American citizens.

*Cruikshank* began chugging its way to the Supreme Court at a time when the Grant Administration’s Justice Department began scaling back civil

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321. See J. OWENS SMITH ET AL., *BLACKS AND AMERICAN GOVERNMENT* 65 (1987).

322. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 111 (Field, J., dissenting).

323. *Id.* at 125 (Swayne, J., dissenting).

324. *Id.* at 112, 113–16 (Bradley, J., dissenting).

325. 92 U.S. 542 (1875).

326. *Id.* at 554–55; see also Timothy Sandefur, *Can You Get There from Here?: How the Law Still Threatens King’s Dream*, 22 *LAW & INEQ.* 1, 12–13 (2004); Bezalel Stern, Comment, *Huck Finn and the Civil Rights Cases: A Case Study in Supreme Court Influence*, 30 *COLUM. J.L. & ARTS* 79, 109 (2006).

rights enforcement.<sup>327</sup> The case concerned 1873 terrorism perpetrated against blacks who were holding a political rally.<sup>328</sup> The event came to be known as the Colfax Massacre.<sup>329</sup> A white mob converged on a courthouse that blacks had taken over.<sup>330</sup> The mob then set the building ablaze and shot at anyone emerging from it. Over 100 black men and two white men lost their lives during the mayhem.<sup>331</sup>

Federal prosecutors secured 100 indictments under the First Enforcement Act, but they could only get three convictions for the massacre, and the Supreme Court, in *Cruikshank*, overturned even those.<sup>332</sup> Chief Justice Waite, writing for the majority, avoided any substantive decision on the case by dismissing all charges because of facial deficiencies in the complaints.<sup>333</sup> While the Court recognized the existence of a national right to peaceful assembly,<sup>334</sup> it refused to extend the reach of the Fourteenth Amendment to privately perpetrated racist violence.<sup>335</sup> According to Waite, then, states had retained a large degree of the latitude that they had at the time of *Dred Scott* to decide whether redress was appropriate for racially instigated crimes.

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327. On Grant administration prosecutions of the Ku Klux Klan, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 457 (1988); LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872* (1996); Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890*, 53 J. S. HIST. 421, 425 (1987); Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1170 n.56 (1984); Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 45-46 (1964); Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. HIST. 202, 217-18 (1962).

328. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 175 (1985).

329. FONER, *supra* note 327, at 530-31.

330. KACZOROWSKI, *supra* note 328, at 175.

331. FONER, *supra* note 327, at 530-31; KACZOROWSKI, *supra* note 328, at 176; David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 LAW & SOC. INQUIRY 1, 15 n. 51 (1996).

332. *United States v. Cruikshank*, 92 U.S. 542, 559-61 (1875) (Clifford, J., concurring and dissenting).

333. Waite found the indictments incomplete because they merely said that the defendants violated victims' civil rights rather than enumerating those rights. *Cruikshank*, 92 U.S. at 551-54 (majority opinion).

334. *Id.* at 552-53.

335. *Id.* at 554 ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.").

An even bigger reversal of Reconstruction took place in the *Civil Rights Cases*.<sup>336</sup> They arose from the enforcement of the Civil Rights Act of 1875.<sup>337</sup> The Act was the ultimate statute passed by the Reconstruction Congress.<sup>338</sup> Its full name was “An act to protect all citizens in their civil and legal rights.”<sup>339</sup> The first section entitled “all persons within the jurisdiction of the United States” to “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.”<sup>340</sup> Its second section provided criminal and civil penalties.<sup>341</sup> Violators were subject both to private causes of action and to criminal prosecutions.<sup>342</sup> The third section gave federal courts exclusive jurisdiction over cases arising under the Act,<sup>343</sup> and the fourth section prohibited state and federal jury selection to be predicated on race.<sup>344</sup> Seemingly, the Act was making certain that there was an equality of rights irrespective of state prejudices. It clearly broke away from *Dred Scott*, prohibiting public places from excluding persons based on race from the equal enjoyment of their facilities.<sup>345</sup>

The Court heard challenges to the first two sections of the Act.<sup>346</sup> By 1883, when the claims made their way into the Supreme Court,

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336. 109 U.S. 3 (1883).

337. Civil Rights Act of 1875, ch. 114, §§ 1–4, 18 Stat. 335, *invalidated by* Civil Rights Cases, 109 U.S. 3 (1883).

338. See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.–C.L. L. REV. 1, 22 (1998) (discussing the debate about Reconstruction that arose in passing the Civil Rights Act of 1875). Concerning Charles Sumner’s heroic effort to secure passage of the Act, see JAMES M. MCPHERSON, *THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP* 16, 19–21 (2d ed. 1995). Even on his death bed, in March 1874, Sumner did not forget that abolition, *via* the Thirteenth Amendment, meant more than merely setting free millions of people who had been denied an education by Southern slave codes and were still excluded from numerous public places. As he lay on his death bed, Sumner was not remiss to remind a visitor, “You must take care of the civil-rights bill, . . . don’t let it fail.” ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION 1863–1877*, at 226 (1990). Sumner died in March of 1874 and did not live to see the enactment of the Civil Rights Act of 1875. *Id.* Benjamin Butler, who managed the bill in the House, committed himself to defending “the rights of these men who have given their blood for me and my country.” *Id.* On the role of President Ulysses Grant in the controversy, see WILLIAM B. HESSELTINE, *ULYSSES S. GRANT: POLITICIAN* 368–71 (Frederick Ungar Publishing Co. 1957) (1935).

339. Civil Rights Act of 1875 §§ 1–4.

340. *Id.* § 1.

341. *Id.* § 2.

342. *Id.*

343. *Id.* § 3.

344. *Id.* § 4.

345. *Id.* § 1.

346. Civil Rights Cases, 109 U.S. 3 (1883).



Reconstruction had come to a standstill even though blacks were still deprived of the equal emoluments of national citizenship. Sharecropping, segregation, peonage, and the convict lease system disproportionately harmed blacks, relegating them to second class citizenship in many states.<sup>347</sup>

The *Civil Rights Cases* decided five consolidated causes of action that dealt with various public accommodations discriminations in California, Kansas, Missouri, New York, and Tennessee.<sup>348</sup> Four cases arose from criminal prosecutions: two defendants allegedly denied black patrons access to an inn or hotel, the third refused to grant a black person entry into the theater dress circle of the popular Maguire's Opera House in San Francisco, and the fourth denied "another person, whose color is not stated, the full enjoyment of the accommodations" to the newly opened "Grand Opera House in New York."<sup>349</sup> A married couple brought the fifth case against a railroad company for denying the wife access to the ladies' car because "she was a person of African descent."<sup>350</sup>

As Part VI discusses, the Court's decision on the Fourteenth Amendment continues to undercut legislative effectiveness in the area of civil rights. The *Civil Rights Cases* held that the Fourteenth Amendment protects citizens only against state interference with their rights, but "[i]ndividual invasion of individual rights is not the subject-matter of the amendment."<sup>351</sup> The federal legislature was not given the authority to pass "general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or

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347. One author recently found that in Alabama, Mississippi, and Georgia, perhaps as many as one-third of all sharecropping farmers "were being held against their will in 1900." JACQUELINE JONES, *THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM CIVIL WAR TO THE PRESENT* 107 (1992). On the convict lease system, see DAVID OSHINSKY, *WORSE THAN SLAVERY* (1996); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996), and KARIN A. SHAPIRO, *A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COAL FIELDS, 1871-1896* (1998).

348. *Civil Rights Cases*, 109 U.S. at 4.

349. *Id.*; see also James Madison, San Francisco Theatrical Memories, <http://www.sfmuseum.org/hist/theatres.html> (last visited Nov. 29, 2007) (concerning Maguire's Opera House); Grand Opera House, Grand History: In the Beginning, <http://www.grandoperahouse.org/aboutus/history/history.html> (last visited Nov. 29, 2007) (history of Grand Opera House).

350. *Civil Rights Cases*, 109 U.S. at 4-5.

351. *Id.* at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope."); see also *id.* at 19 ("This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force.").

enforce.”<sup>352</sup> That went a long way to setting the clock back to *Dred Scott*, placing private discriminations at the behest of states. The Court decided that the Fourteenth Amendment did not give Congress authority to recognize, target, and prevent social discriminations, such as exclusion from public places of amusement and segregation on public carriers.<sup>353</sup> It found the Civil Rights Act of 1875 to be unconstitutional because it provided penalties for behavior that was unconnected to adverse state action.<sup>354</sup> The Court refused to defer to Congress’s finding that the enjoyment of equal public accommodations was an essential right of citizens.<sup>355</sup> Bradley similarly refused to concede that Congress was competent in finding that such discrimination was a badge or incident of involuntary servitude.<sup>356</sup>

Eight other justices joined Bradley’s opinion. The sole dissenter was Justice John Marshall Harlan.<sup>357</sup> From his perspective, the Fourteenth Amendment’s fifth section enabled Congress to enact “appropriate legislation . . . and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state.”<sup>358</sup> Just as *Dred Scott* had “overruled the action of two generations,” so too the majority’s undercutting of Congress “made a new departure in the workings of the federal government.”<sup>359</sup> The Court’s notion that the Reconstruction Amendments did not grant Congress the authority to act at “its own discretion, and independently of the action or non-action of the states” went against their very purpose.<sup>360</sup> They authorized “legislation of a primary and direct character, for the security of rights created by the national constitution.”<sup>361</sup> Returning to issues of the *Slaughter-House Cases*, Harlan referred to “the obligation to protect the fundamental privileges and immunities granted by the [F]ourteenth [A]mendment to citizens residing in the several states.”<sup>362</sup> To hold otherwise undermined “the foundations upon which the national supremacy has always securely rested.”<sup>363</sup> Even if the

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352. *Id.* at 13–14.

353. *Id.* at 19.

354. *Id.* at 18–19.

355. *Id.* at 19.

356. *Id.* at 24.

357. *Id.* at 26 (Harlan, J., dissenting).

358. *Id.* at 36.

359. *Id.* at 57.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

state action doctrine were correct, segregation by “railroad corporations, keepers of inns, and managers of places of public amusement,” all of whom were implicated by the Act of 1875, rendered them answerable to the public since they were subject to state regulation.<sup>364</sup> To rule otherwise left the victims of discrimination at the mercy of corporations and individuals wielding state-regulated authority.<sup>365</sup>

After the decision was rendered, a newspaper columnist wrote that “it is safe to say that no other decision of the court since the famous *Dred Scott* decision . . . has created so much excitement and discussion.”<sup>366</sup> In November 1883, journalist John E. Bruce asserted that the *Civil Rights Cases* had affirmed *Dred Scott*.<sup>367</sup> Both cases struck federal laws—first the Missouri Compromise and later the Civil Rights Act of 1875—that had established national anti-discrimination principles. Methodologically, both cases relied on a literalist textual interpretation, and a narrow approach of original intent, that forbade federal legislators from securing fundamental moral standards against unjustifiable infringement. State sovereignty over private acts of discrimination wound up a more important constitutional principle than the protection of elementary human interests. The Court made clear its readiness to thwart statutory initiatives against state and private discrimination, thereby contributing to the continued complacency with a racially binary America, somewhat like the one that existed in 1857 when *Dred Scott* was decided. The federal government then left the growth of Jim Crow laws unimpeded, until 1954, when the Court began to undo segregation in *Brown v. Board of Education*<sup>368</sup> and Congress followed suit in the Civil Rights Act of 1964.<sup>369</sup> Less than half a month after the *Civil Rights Cases* decision was announced, the Governor of Texas asked rail companies to separate black and white passengers.<sup>370</sup>

Despite the vociferous criticism that has been leveled at the *Civil Rights Cases* for undoing a human rights statute that might have ended segregation in 1875, the Court still follows its state action doctrine.<sup>371</sup> The precedent has

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364. *Id.* at 59.

365. *Id.*

366. THE STEVENS POINT JOURNAL (Stevens Point, WI), Oct. 27, 1883, at 2.

367. See Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1165–66 (1995).

368. 347 U.S. 483 (1954).

369. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

370. Norman J. Colman, COLMAN’S RURAL WORLD, Nov. 1, 1883, at 4.

371. See Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1333–34 (2003) (stating that the current Court continues to follow the *Civil Rights Cases* holding on the restraints of Congress’s Fourteenth Amendment enforcement power).

so crippled the legislative branch's ability to pass principled laws against arbitrary discrimination that the vast majority of civil rights initiatives during the twentieth-century, like the Civil Rights Act of 1964, have been predicated on the Commerce Clause's grant of regulatory authority over the national economy.<sup>372</sup> From the beginning this has presented an odd mismatch between the anti-discrimination moral imperatives and economic regulatory authority. My claim is that the Court's notion that Congress may only act responsively under the Fourteenth Amendment confuses the legislative and judicial functions: there does not have to be a controversy to address before Congress can respond to it with a statute.<sup>373</sup> The Court's responsive reading of congressional powers has much in common with the doctrines of standing and ripeness, but not the typical policymaking of a legislature which is meant to identify, balance, and specify governmental policy for the protection of individual rights for the general welfare.

## VI. CONTEMPORARY IMPLICATIONS

The *Civil Rights Cases* undercut federal efforts to end civil rights violations until passage of the Civil Rights Act of 1964. So harmful an effect might have been expected to fade with a greater sensitivity to minority rights. To the contrary, the state action requirement continues to obstruct federal civil rights initiatives. Recently, the Court has continued to

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372. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Katzenbach v. McClung, 379 U.S. 294, 297-98 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964). My point is in the same vein as Justice Goldberg's concurrence in *Heart of Atlanta*. He agreed with the majority that Congress had legitimately relied on Commerce Clause authority, but he wrote separately to emphasize that the "primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics." *Id.* at 291 (Goldberg, J., concurring). In his opinion, Congress's authority to pass the Civil Rights Act of 1964 derives both from Section Five of the Fourteenth Amendment and the Commerce Clause. *Id.* at 292. Justice Douglas, in a separate concurrence, was likewise reluctant to rest the opinion entirely on commerce authority since the "right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Id.* at 279 (Douglas, J., concurring) (quoting *Edwards v. California*, 314 U.S. 160, 177) (citations and internal quotation marks omitted).

373. The initial recognition of this judicial scrutiny derives from footnote four of *Carolene Products*. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). At the core of Stone's footnote lay the American tradition, often breached by self-interest though it was, of protecting minorities against the whims of powerful majorities. "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* That statement was the fulcrum for future elevated scrutiny cases that probed into whether individuals were unfairly treated for being members of an identifiable group.

rely on post-Reconstruction precedents to strike statutes seemingly dealing with core national rights. *Dred Scott* has long been in disrepute, but the *Civil Rights Cases* have taken its place as the precedent for denying Congress's power to act affirmatively to secure the citizenry's civil rights.

*City of Boerne v. Flores*<sup>374</sup> signaled the Court's unwillingness to effectuate the framers' intent, and the necessity, for the Fourteenth Amendment to alter the dynamic between federal and state power as to civil rights. The holding of the case was that Congress had "exceeded" its Section 5 authority in passing the Religious Freedom Restoration Act ("RFRA").<sup>375</sup> The Act was a major piece of civil rights legislation meant to protect the free exercise of religion from state infringement.<sup>376</sup> Congress passed it by an overwhelming bipartisan majority in response to a Supreme Court holding that neutral laws of general applicability do not violate the Free Exercise Clause, even if they limit an individual's ability to participate in an established religious ritual.<sup>377</sup> The RFRA imposed a strict scrutiny standard on any substantial burden of religious practices.<sup>378</sup> *Boerne* departed from, or at least narrowly construed, *Katzenbach v. Morgan*'s statement that "[Section] 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>379</sup> Instead of relying on that Civil Rights Era case, *Boerne* gave its stamp of approval to the 1883 *Civil Rights Cases*, which had prevented Congress from ending segregation.<sup>380</sup> Likewise, *Boerne* drew on *United States v. Harris*,<sup>381</sup> which had found that Congress exceeded its Fourteenth Amendment Section 5 power when it passed a section of the Ku Klux Klan Act.<sup>382</sup> That law had punished private violence "without reference to the laws of the states, or their administration by the officers of the state."<sup>383</sup> The premise that the *Boerne* Court extracted from these cases was that congressional enforcement through its Fourteenth Amendment Section 5 power can only be remedial but not interpretive.<sup>384</sup>

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374. 521 U.S. 507 (1997).

375. *Id.* at 536.

376. 42 U.S.C. §§ 2000bb–2000bb-4 (2000).

377. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990).

378. 42 U.S.C. § 2000bb-1(b).

379. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

380. *Boerne*, 521 U.S. at 524–25.

381. 106 U.S. 629 (1883).

382. *Id.* at 640.

383. *Id.*

384. *Boerne*, 521 U.S. at 520 ("The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.").

Under this standard, only laws that are congruent and proportional for remedying unconstitutional state behavior can survive judicial scrutiny.<sup>385</sup>

The erosion of legislative authority to identify a fundamental right, such as freedom of religion under the RFRA, and to pass a law to protect it, was also evident in *United States v. Morrison*.<sup>386</sup> In that case, the Court held that Congress had overstepped its Section 5 authority by providing a civil remedy under the Violence Against Women Act.<sup>387</sup> That case, like *Boerne*, also predicated its responsive interpretation of the Fourteenth Amendment on *Harris* and the *Civil Rights Cases* for the principle that the Fourteenth Amendment only applies to state conduct, but not to private action.<sup>388</sup> The Court even found one of the greatest travesties of justice, *Cruikshank*,<sup>389</sup> to be relevant.<sup>390</sup> Cases that had squeezed the federal government out of any serious role in protecting the fundamental rights for which the government of the United States was formed in the first place also became key to the Rehnquist Court's federalism legacy. Jurisprudence that had derailed congressional Reconstruction now unhinged legislative efforts to end gender-based violence.

The Court then applied this same constraint on civil rights authority to strike a provision of the Age Discrimination in Employment Act ("ADEA") that required state compliance.<sup>391</sup> This time, in *Kimel v. Florida Board of Regents*, it found that the Eleventh Amendment renders states immune from complying with national standards of decency in the workplace.<sup>392</sup> Concerns about federal overreaching actually elevated states' prerogatives above the interests of ordinary citizens who might have relied on the law to get redress for employment age discrimination. The majority rejected the predicate that the federal government's plenary role in preventing workplace discrimination trumps state violations of the ADEA.<sup>393</sup> Although *Kimel* was by no means as egregious as *Dred Scott*, both cases were excessively deferential to states' sovereign prerogatives.<sup>394</sup> That the ratification of the Fourteenth Amendment had changed the dynamic between states and the federal governments was seemingly inconsequential to the Court's regressive federalism. In his dissent, Justice Stevens argued that the federal

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385. *Id.* at 520, 530, 532.

386. 529 U.S. 598 (2000).

387. *Id.* at 627.

388. *Id.* at 621–23.

389. See *supra* text accompanying notes 325–35.

390. *Morrison*, 529 U.S. at 622.

391. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

392. See *id.* at 72–73.

393. *Id.* at 82–83.

394. *Id.* at 78; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1856).

government can prohibit private and public acts of discrimination in the labor market.<sup>395</sup> *Kimel* denied that Congress may identify a national standard against age discrimination on which all state employees can rely.<sup>396</sup>

In a similar vein, *Board of Trustees of the University of Alabama v. Garrett*<sup>397</sup> invalidated the applicability of Title I of the Americans with Disabilities Act<sup>398</sup> to state officials.<sup>399</sup> Like *Kimel*, *Garrett* denied that Section 5 of the Fourteenth Amendment enabled Congress to create a cause of action for redressing allegations of state employment discrimination.<sup>400</sup> Congress was thereby judicially restricted from ending discrimination despite the extensive evidence, cited to by the dissent, of state discriminatory conduct against disabled employees.<sup>401</sup> In both cases, the majority applied nothing more than a rational basis of scrutiny to examine whether states had been engaged in unconstitutional discrimination meriting a congressional remedy.<sup>402</sup> Drawing from *Boerne*, the Court decided that “[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”<sup>403</sup> The taint of state rights trumping core values against discrimination harked back to a similarly skewed priority of federalism in *Dred Scott*. The Court showed itself to be unwilling to let Congress decide priorities for protecting vulnerable persons, even when there was no hint of majoritarian abuse.

Unexpectedly to many who thought that civil rights precedents were generally threatened by this old-time version of federalism, the Court qualified its earlier holdings. Hence in *Nevada Department of Human Resources v. Hibbs*,<sup>404</sup> the Court upheld the Family Medical Leave Act’s private cause of action against the states.<sup>405</sup> The Court made clear that it was deferring to Congress because the statute aimed to redress violations of the Equal Protection guarantee against gender discrimination.<sup>406</sup> Then came *Tennessee v. Lane*,<sup>407</sup> which upheld Title II of the ADA’s provision for

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395. *Kimel*, 528 U.S. at 92–93 (Stevens, J., dissenting in part and concurring in part).

396. *Id.* at 64 (majority opinion).

397. 531 U.S. 356 (2001).

398. Americans with Disabilities Act, 42 U.S.C. § 12112 (2000).

399. *Garrett*, 531 U.S. at 374–76.

400. *Id.* at 360.

401. *Id.* at 389–424 (Breyer, J. dissenting).

402. *Id.* at 366 (majority opinion); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83–84 (2000).

403. *Garrett*, 531 U.S. at 368.

404. 538 U.S. 721 (2003).

405. *Id.* at 740.

406. *Id.* at 736.

407. 541 U.S. 509 (2004).

private damages arising from discrimination in access to county courthouses.<sup>408</sup> The Court invoked a standard of review approaching strict scrutiny because the fundamental right to access to the courts was involved.<sup>409</sup>

The Fourteenth Amendment's scrutiny differentiations based on the plaintiff's group status, served to draw the Court away from the legal abyss that could have led it to nullify much civil rights legislation on the basis of state sovereign immunity. The difficulty with *Hibbs* and *Lane* is that their decisional fulcrum was the responsive reading of the Fourteenth Amendment from the *Civil Rights Cases*,<sup>410</sup> which continues to hamper Congress from independently identifying core American rights and passing laws to protect them. That is, even though *Hibbs* and *Lane* came to favorable conclusions on behalf of two pieces of civil rights legislation they did not shed the notion that, at least in circumstances where rational basis of review is relevant as it was in *Kimel* and *Garrett*, state concerns can continue to trump nationally recognized rights. *Hibbs* and *Lane* provided some guidance for Congress, indicating that to pass constitutional muster it can protect only rights the court has recognized to be important or fundamental. Those cases, however, remain only weakly supportive of the Fourteenth Amendment Section 5 grant of congressional authority, which should be on an equal footing with the Court in deciding which rights are fundamental to American citizenship.

## VII. CONCLUSION

*Dred Scott*'s protection of slave property is a moribund relic of the past, but to some extent its state-oriented federalism persists to the present day. Cases like *Boerne*, *Garrett*, and *Kimel* continue to show too much deference to states in matters as fundamental to the people as the freedom of religion and the freedom from discrimination in the workplace. The Court's regressive federalism only countenances responsive congressional action. That constitutional perspective disregards how, by overturning *Dred Scott*, the Thirteenth and Fourteenth Amendments granted Congress the power to

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408. *Id.* at 533–34.

409. *Id.* at 529 (“Title II [of the ADA] is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications.”); *id.* at 522–23 (stating that the federal statute enforced “a variety of . . . basic constitutional guarantees, infringements of which are subject to more searching judicial review”).

410. *Hibbs*, 538 U.S. at 736; *Lane*, 541 U.S. at 529.



secure fundamental interests, making it a coequal branch in determining how to protect life, liberty, and happiness.

Section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment provide Congress with the authority necessary for evaluating, determining, and furthering the common weal by laws narrowly tailored for safeguarding the inalienable rights of its citizens. Those Amendments significantly altered the relationship between the legislative and judicial branches. The implication of my claim is that federalism in its post-Reconstruction formulation provides the Court with the capacity to find unconstitutional a civil rights statute that infringes on other constitutional rights. For instance, if a federal statute that facilitates the right to travel<sup>411</sup> unjustifiably abridges the freedom of speech,<sup>412</sup> then the Court can readily find it unconstitutional. What the change in governmental structure, resulting from the Reconstruction Amendments, prohibits is for the Court to second-guess Congress in its assessment and determination of what legal means to use to provide for the equal protection of fundamental rights. Legislators need not wait for justices to give them guidance on what is essential to the nation's citizens. Contrary to the Court's recent assertion that Congress's power under the Fourteenth Amendment is only remedial and not substantive,<sup>413</sup> the historical record indicates that the Reconstruction Amendments enable Congress along with the Court to define rights essential to citizenship. The change to the interplay between the judicial and legislative branches was meant to prevent another *Dred Scott* and made the *Civil Rights Cases* an example of judicial overreaching, both of which second-guessed legislative decisions to protect civil rights.

Congressional ability to provide meaningful safeguards for civil rights extends beyond the explicit provisions of the Bill of Rights. It includes those interests that are central to the nation's normative purpose, as it is set out in the Preamble to the Constitution and the Declaration of Independence. Recent decisions have drawn from the post-Reconstruction

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411. The Supreme Court has located the right to travel in a variety of constitutional clauses. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965), found the right to travel in the Fifth Amendment; *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), located the right in the Fourteenth Amendment; *United States v. Guest*, 383 U.S. 745, 758–59 (1966), found it in the Commerce Clause's protection of free movement; and both *Saenz v. Roe*, 526 U.S. 489, 501 (1999), and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), found that it derived from the Privileges and Immunities Clause of Article IV, § 2.

412. Free speech is protected by the First Amendment to the United States Constitution.

413. See *City of Boerne v. Flores*, 521 U.S. 507, 517, 518–19 (1997) (determining that the phrase “appropriate legislation” in section 5 means that Congress can only pass remedial legislation which “deters or remedies constitutional violations,” but does not allow Congress to create constitutional rights).

cases, like *Harris* and the *Civil Rights Cases*, to erode congressional civil rights authority. At the heart of the problem is a persistent judicial tendency, which dates back to *Dred Scott* and should have ended with the Reconstruction Amendments, to limit Congress's role in protecting interests that are at the core of national citizenship.

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