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WHEN INTERNATIONAL LAW WAS A DOMESTIC PROBLEM

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This Article will focus on two interrelated aspects of human rights law in the domestic context. First, I briefly examine the use of foreign law by the United States in the eighteenth and nineteenth centuries. This history shows that in America's first century there was a substantial amount of borrowing of law from Europe, and that this foreign law shaped, sometimes dramatically, the development of American law.[1] Not all of this borrowing had to do with what we might identify as "human rights" in the twenty-first century, but, much of it did. Sometimes this foreign law was used to expand human rights; and at other times it might be seen as "anti-human rights" in the sense that it was used to suppress what the modern world would identify as human rights. But, whether supportive of human rights or harmful to it, this history shows that the United States has a long tradition of applying foreign law involving human rights to our domestic law.

My second focus is on the fact that the American states treated each other as "foreign entities" from the founding of the country until the beginning of the Civil War. This practice was a function of the federal republic model, which loosely defined concepts of state sovereignty and state independence. At the same time, states also treated the national government as a foreign power. In its most extreme form, this notion of state sovereignty would lead to secession and civil war.

When American states faced issues of slavery and freedom, the states often refused to recognize and give comity to the laws of other states. Thus, from 1787 to at least 1865, notions of international human rights law in the domestic context usually involved interstate relations, rather than relations between the United States and foreign nations. The most significant aspect of this domestic use of international law concepts involved slavery and race.

One example of this interstate conflict over human rights law, which I will discuss at some length below, involved the status of free black sailors who entered Southern ports. Starting in 1822, South Carolina refused to recognize the free status of black sailors serving on Northern

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1 For a much more elaborate discussion of the use of foreign law by American courts, see Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. ANN. SURV. AM. L. 29 (2007).

and British ships when those ships docked in Charleston.[2] Almost every other Southern coastal state followed South Carolina's lead. In the 1840s, Massachusetts sent commissioners to South Carolina and Louisiana to resolve disputes over this issue, but these efforts failed. Then, in *Dred Scott v. Sandford*[3] the Supreme Court held that blacks could never be citizens of the nation and had no rights under the Constitution, implying that Southern states had an absolute right to prohibit the entrance of free blacks from other states.[4] The issue remained unresolved until the end of the Civil War and was finally settled with the ratification of the Thirteenth and Fourteenth Amendments, which recognized the rights of blacks as citizens of the United States and guaranteed their right to travel freely throughout the nation.[5]

Another example of how the application of human rights law affected American domestic law concerns the status of slaves voluntarily brought by their masters into free states. Before the 1840s almost all the states—North and South—recognized that freedom attached to slaves voluntarily taken into the North, although some northern states passed laws to modify this rule by granting southern masters a right of limited transit. By the 1850s this had changed. Most Southern states no longer accepted the idea that residence in a free state would emancipate a slave while most Northern states aggressively asserted the right to emancipate slaves who, with their masters' permission or acquiescence, set foot on free soil. Similar issues arose over the status of fugitive slaves and of northerners who helped fugitive slaves who had escaped to the North.

I. FEAR OF FOREIGN LAW

This symposium focuses for the most part, on the problem of applying international human rights law to American domestic law. Most of us think of international law or human rights law in the domestic context as involving some other system of law being either borrowed or imposed by outsiders.

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2 "AN ACT for the better regulation and government of Free Negroes and Persons of Color; and for other purposes," 7 Stat. S.C. 461 (1822).

3 60 U.S. (19 How.) 393 (1857).

4 This might still have left open the possibility that the southern states could not interfere with the free black citizens from Britain and other foreign states who came into their ports, but given the Court's strong support of local police powers, in such cases as *Miln v. Mayor of New York City*, 36 U.S. (11 Pet.) 102 (1837) and *Cooley v. Bd. of Port Wardens of Philadelphia*, 53 U.S. (12 How.) 299 (1852), it seems likely that the Court would have upheld the right of the slave states to prohibit foreign blacks from entering their ports.

5 In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) the Supreme Court settled this issue six months before the ratification of the Fourteenth Amendment. The modern court reaffirmed this right under the Fourteenth Amendment in *Saenz v. Roe*, 526 U.S. 489 (1999).

For the paranoid, this idea conjures up notions of blue-helmeted foreigners occupying American territory, arresting our politicians for alleged misdeeds, and dragging them to The Hague, Geneva, or some other foreign place, to be tried and punished without a jury or a bill of rights to protect them. In the mind of Justices Antonin Scalia or Clarence Thomas, this idea conjures up a world in which the Supreme Court overturns state or federal law on the basis of "foreign moods, fads, or fashions."[6]

For the hopeful, this idea might mean that the United States signs-on to various human rights conventions and treaties, and actually implements them.[7] This might be in part an extension of existing federal law, such as the Alien Tort Claims Act,[8] which allows non-Americans to gain substantial private justice in our courts for wrongs committed overseas. Oddly, despite the fear of "foreign law" by some people (especially those such as Justices Thomas and Scalia, who glory in the intent of the framers), the Alien Tort Claims Act has been with us since the adoption of the Judiciary Act of 1789.[9] Thus, in one sense, it seems clear that the members of the First Congress, who also wrote and passed the Bill of Rights, believed in the implementation of international human rights law in the United States courts. Another notion of human rights law might be that U.S. law simply allows claims to be brought in our courts under international concepts of human rights as well as U.S. statutes. Alternatively, acknowledging international human rights might be as simple as the Court accepting, as Justice Anthony M. Kennedy did in *Roper v. Simmons*, that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."[10] *Roper* overturned a death penalty for someone who committed a capital offense when he was a minor. Justice Kennedy's majority opinion cited an amicus brief from the Human Rights Committee of the Bar of England and Wales. Relying on this brief, and

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6 Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J. dissenting) (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring)). *See also* Finkelman, *Foreign Law and American Constitutional Interpretation*, *supra* note 1 (discussing this in larger detail).

7 Although it had a leading role in promulgating the Universal Declaration of Human Rights, in years since that time the United States has signed but not ratified, or signed and ratified with reservations, declarations, or understandings to which other states object, various international treaties concerning human rights. *See* Racism, Human Rights & Worldwide Issues, http://academic.udayton.edu/race/06hrights/unitednations/US Status.htm (summarizing the status of U.S. action with respect to key international treaties); *see generally* Joe Stork, Human Rights and U.S. Policy, http://www.fpif.org/reports/human_rights_and_us_policy.

8 Judiciary Act, ch. 20, 1 Stat. 73 (1789) (codified at 28 U.S.C. § 1350 (2006)).

9 Judiciary Act, ch. 20, 1 Stat. 73 (1789).

10 Roper v. Simmons, 543 U.S. 551, 578 (2005).

other arguments, Kennedy noted "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[11]

II. FOREIGN LAW IN EARLY AMERICAN LAW

Foreign law has been part of our jurisprudence since our first courts met. Nineteenth century jurists cited foreign courts, continental legal theorists, and even Roman law. American courts often followed new legal ideas coming from outside the United States. For example, the "fellow servant rule" in labor law began in Britain,[12] but American courts quickly adopted it. Under this rule, courts held that large employers, such as railroads and factories, were not liable to their employees for work-place accidents caused by other employees' negligence. Rather, the injured worker had to sue his negligent "fellow servant," who in most cases would be judgment proof. This rule had the effect of shifting one cost of industrialization—the care of injured workers—from investors and capitalists to the workers themselves and their families. By the end of the nineteenth century, almost every state adopted this rule, which began in Great Britain in the 1830s.[13]

In the 1820s the Supreme Court turned to foreign law to justify the taking of Indian land. In *Johnson v. M'Intosh*,[14] Chief Justice John Marshall, speaking for a unanimous Court, turned to European notions of conquest, land use, and property ownership when considering the nature of Indian land ownership. The Court used these foreign law concepts to proclaim that Indians, neither as individuals nor as nations, had any permanent title to their land. Counsel in the case cited a plethora of foreign law sources,[15] including the works of Emmerich de

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11 *Id.*

12 Priestly v. Fowler, (1837) 150 Eng. Rep. 1030. South Carolina accepted the doctrine in *Murray v. S.C. R.R. Co.*, 26 S.C.L. (1 McMul.) 385 (1841). More importantly, the great Massachusetts Chief Justice, Lemuel Shaw, adopted the rule in *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49 (1842). For a discussion of the early American application of this case see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 166–82 (1957).

13 Jerrilyn G. Marston, Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579, 579 (1984) ("By 1880 the [fellow servant] rule . . . was . . . firmly entrenched in nearly every American jurisdiction . . . ."). Southern courts did not generally apply this rule to slave workers rented by railroads, steamboats, and other industries. *See* Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEGAL. HIST. 269, 281–304 (1987).

14 21 U.S. (8 Wheat.) 543 (1823). *See generally* LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005).

15 *See* Briefs for Defendants, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 569–70 (1823).

Vattel, Baron Samuel von Puffendorf, Hugo Grotius, John Locke, and Baron Montesquieu.[16] The theories of the foreign scholars helped bolster the result in the case. In his opinion, Marshall embraced the doctrine of discovery,[17] which derived from European law. This doctrine allowed the United States to take land from the Indians at will. Marshall asserted throughout the opinion that all European nations accepted the doctrine of discovery,[18] and that Americans inherited and adopted the doctrine. The Chief Justice endorsed "the theory of the British constitution, [that] all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative."[19] Marshall acknowledged that "this principle was as fully recognized in America as in the Island of Great Britain."[20] This doctrine, being entirely based on foreign law, became fundamental to American land law.[21] Marshall asserted that the United States might take land by treaty or purchase, but would only do so to avoid conflict and accomplish the land grab smoothly. Using foreign law, Marshall justified the United States taking the land in any way it chose.

This case can be seen as the opposite of imposing international human rights law on the United States. It can be seen as an "anti-human rights" result; however, the issue here is not the outcome of the case nor its relationship to human rights *per se*, but rather to underscore that early in our history the courts and the legislatures accepted international law concepts which then could be applied to human rights domestically.

Indeed, in our nation's first century, foreign law was prominent in American cases. Database searches of United States Supreme Court opinions reveal that the Court cited foreign legal sources extensively.[22]

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16 His full name was Charles-Louis de Secondat, baron de La Brède et de Montesquieu.

17 *See M'Intosh*, 21 U.S. at 572.

18 *Id.* at 572–79.

19 *Id.* at 595.

20 *Id.*

21 *Id.* at 592 ("[T]he principle . . . supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

22 The material in this section is based on searches conducted in Lexis and Westlaw databases. These searches probably undercount the use of foreign law because search results will not include spelling variations of proper names or descriptive references to not-named authors. For example, my search by proper name for "Vattel," the great Swiss legal scholar, did not return results to "Vatel," general references to his book, *The Law of Nations*, or a reference describing Vattel not by name but as "a great European expert on the law of nations."

The U.S. Supreme Court cited English law about 750 times before 1865. The Court cited Lord Chief Justice Mansfield about 170 times, the Court of King's Bench about 125 times, Sir Edward Coke about 100 times, the German legal scholar Baron Samuel von Puffendorf more than 12 times, the Dutch scholar Hugo Grotius about 50 times, and the Dutch scholar Ulrich Huber and the French philosopher Montesquieu at least 10 times each. The great Swiss legal scholar Emmerich de Vattel was a central figure for American jurisprudence, because he wrote extensively on federalism in his treatise, *Law of Nations*.[23] This book was "[t]ranslated immediately into English" and "was unrivaled among such treatises in its influence on the American founders."[24] Before 1865, the Court cited him at least thirty times while attorneys cited him in their arguments about seventy times. From 1865 to 1910, the Court cited Vattel thirty-three more times, while lawyers cited him in nearly thirty other cases.[25]

Sometimes the early Court cited many foreign sources in the same case. Consider *Brown v. United States*,[26] a case involving the embargo during the War of 1812 and the seizure of goods aboard a ship. Here, Chief Justice Marshall cited the French theorist Montesquieu, the Dutch legal scholar Cornelius van Bynkershoek, the Swiss legal scholar Emmerich de Vattel, and the English scholar Joseph D. Chitty.[27] In his dissent, Justice Joseph Story cited a long list of English cases, as well as the German legal scholar Puffendorf, Vattel, Grotius, Bynkershoek, Lord Chief Justice Mansfield, and other foreign sources.[28]

During the Civil War, in *The Prize Cases*,[29] the Court considered the legality of Lincoln's blockade of Confederate ports. In this uniquely American case, the Court relied heavily on foreign law. In arguing for the United States, Richard Henry Dana, Jr. cited a number of British cases as well as works by Grotius and other international law theorists.[30] In his opinion upholding President Lincoln's power to impose a

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23 *See* MONSIEUR DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND OF SOVEREIGNS (Joseph Chitty ed. & trans., 1852) (1785).

24 PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776–1814, at 11 (1993).

25 *See supra* note 22. Statistics are based on Westlaw and Lexis databases queries. Regarding U.S. Reports, searches seriously undercount the use of foreign sources in legal arguments and briefs first because most briefs and arguments were not published in U.S. Reports, but also because, as noted *supra*, search results will not include cases where the Court cited a book's title, but not its author, or incorrectly spelled the author's name.

26 12 U.S. (8 Cranch) 110 (1814).

27 *Id*. at 124–25.

28 *Id*. at 129–50 (Story J., dissenting).

29 67 U.S. (2 Black) 635 (1863).

30 Brief for Libellants at 650, 654, The Prize Cases, 67 U.S. (2 Black) 635 (1862).

blockade, and thus enabling the President to prosecute the war effort, Justice Robert Grier quoted Vattel: "it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war."[31] He also cited Lord Stowell of the British High Court of Admiralty,[32] a proclamation by Queen Victoria of England,[33] and the "law of nations" as a general body of law.[34]

After the Civil War, the Court considered the use of military courts to try civilians when the civilian courts were open and functioning. In the aftermath of the War, lawyers and judges turned to foreign law to help determine whether the United States could try civilians by military tribunals or military commissions. In *Ex parte Milligan*,[35] a case that has implications for the United States in the modern War on Terror[36] as well as modern human rights law, lawyers for Milligan relied heavily on foreign law and what would have been a version of "human rights law" at the time. The burden of Milligan's case was to show, in effect, that it violated fundamental notions of justice—which would of course include fundamental human rights—to try a civilian by a military court if there was a civil alternative available. One of Milligan's lawyers, the great David Dudley Field, cited English law, French law, and the writings and opinions of William Blackstone, Lord Hale, Sir James Mackintosh, Montesquieu, and the French scholar and student of American society, Alexis de Tocqueville. All of these citations supported the principle that the military could not try civilians,[37] and that to do so would threaten fundamental human rights. This is a powerful example of the application of foreign notions of fundamental rights—the right to a fair trial by an impartial forum—in American law.

Stressing the importance of foreign law to the United States, one of Milligan's other attorneys, Jeremiah S. Black (a former U.S. Attorney General), declared "England owes more of her freedom, her grandeur, and her prosperity to [the jury trial], than to all other causes put

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31 *The Prize Cases*, 67 U.S. (2 Black) at 667.

32 *Id*. at 668.

33 *Id*. at 669.

34 *Id*. at 670.

35 71 U.S. (4 Wall.) 2 (1866).

36 *See, e.g.,* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc, per curiam), *vacated, remanded, application* [for transfer from military to civilian custody] *granted by* Al-Marri v. Spagone, 129 S. Ct. 1545 (U.S. 2009). The Fourth Circuit opinion discussed at length "*Milligan's* teaching—that our Constitution does not permit the Government to subject civilians within the United States to military jurisdiction." *Id*. at 230.

37 *See* Briefs for Petitioners at 31, 35–39, 47–49, 53–56, 65, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

together."[38] Black noted that French scholars such as "Montesquieu and De Tocqueville speak of [the jury trial] with an admiration as rapturous as Coke and Blackstone."[39] Citing recent European history, he noted that:

> the most enlightened states of continental Europe have transplanted it into their countries . . . . It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the Revolution of the Barricades gave the right of trial by jury to every Frenchman.[40]

Here was a former attorney general arguing that the United States Supreme Court should take note of, and follow, European notions of due process and the fair administration of justice.

In his opinion for the Court, Justice David Davis similarly cited old English law, the theories of Lord Brougham and Sir James Mackintosh, and a famous nineteenth century English case involving the military court trial of a civilian in the colony of Demerara.[41] Justice Davis noted that Brougham and Mackintosh had "participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that 'when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime.'"[42] This was almost exactly the situation in Milligan's case. Thus, the Court found foreign precedent useful and directly on point for civilian trials after America's Civil War.[43] The Demerara case turned on the jurisdiction of courts in the British colonies, but the principle from that case, which Justice Davis accepted, was that a civilian trial was essential to the preservation of fundamental rights.

III. FOREIGN LAW IN OUR EARLY FEDERAL REPUBLIC

The debate over international human rights law in the United States, as the previous section shows, should begin with the understanding that foreign law has always been part of American constitutional law. But it

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38 *Ex parte Milligan*, 71 U.S. (4 Wall.) at 65.

39 *Id.*

40 *Id.*

41 *Id.* at 128. The Demerara case, *The King v. Rev. John Smith*, is discussed in PAUL FINKELMAN, SLAVERY IN THE COURTROOM 272–77 (1985).

42 *Ex parte Milligan*, 71 U.S. (4 Wall.) at 128.

43 Both cases are of course relevant to the United States in a post-9-11 World.

is also useful to understand that there was a time when "international law" was a part of American domestic law in a quite different and more powerful way. Today, with fifty states, the District of Columbia, more than 500 Indian tribes government by tribal law, federal Indian law, or both, and Puerto Rico, the United States is a veritable United Nations of jurisdictions, which can be in conflict with each other in a variety of ways. Many interstate legal issues today are covered by federal law, but there are still instances where the states can, or at least try to, treat each other as foreign nations. [44] While generally treating the laws of other states with respect, the American states have, sometimes, nevertheless interacted as though they were separate countries being asked to enforce the laws of foreign nations.[45]

Under the pre-Civil War Constitution the states were more likely to act as independent republics or nations than they are today. As such, they often related to each other exactly as foreign nations relate to each other today. This context often forced the Supreme Court to use international law concepts to settle purely domestic issues between the states or citizens of the states. These cases did not implicate federal plenary powers, which was the issue in *Johnson v. M'Intosh* and *The Prize Cases*.

Sometimes these issues were relatively benign and had few consequences for the nature of the Union or human rights. In *Alabama v.*

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[44] See for example the facts surrounding *Granholm v. Heald*, 544 U.S. 460 (2005). In *Granholm*, plaintiffs challenged Michigan and New York laws that discriminated against out-of-state wineries in favor of in-state wineries. *Id.* at 465–66. The laws allowed in-state wineries to sell directly to consumers but prohibited out-of-state vendors from making direct sales. *Id.* at 466. The Court held that both state laws violated the Commerce Clause and the Twenty-first Amendment. *Id.* The Court affirmed the "mandate" that "[s]tates may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Id.* at 472. The history of this maxim dates back to the Framers' concern that states would not unify and would essentially "Balkanize" and operate as a group of separate nations. *Id.* The Court reviewed the historical need to prevent friction among the states:

> This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Id. (citing Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)).

[45] Issues surrounding same sex marriage are likely to be the next major example of this. The Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006), even if it is held to be constitutional, is unlikely to eliminate all interstate disputes over the status of spouses, children, property, taxation, rights of survivorship, and inheritance stemming from same-sex unions, same-sex marriages, and domestic partnerships.

Georgia,[46] for example, decided on the eve of the Civil War, the Court determined the location of the boundary between those two states. Nothing, it would seem, could have been a more distinctly American legal question than the border of these two states along the Chattahoochee River. Yet, in order to determine the boundary between these two states, Justice James Wayne (who was from Georgia) turned to Grotius, Vattel, and England's Lord Hale.[47] This was surely not the application of international human rights law to American law, but rather the application of more general aspects of international law. However, the general principle seems clear. In the antebellum period, the Court had no problem using international law to solve what were purely domestic legal problems.

This understanding of the common use of international law helps us better understand the role of international law, and human rights law, when applied to the great problems of slavery and race in antebellum America. This problem arose out of interstate conflicts over the status of slaves, free blacks, and white opponents of slavery. This was where America domestic law intersected with international law and with what today we could call international human rights law. The antebellum system of American federalism deeply tied "domestic international law" to the problematic relationship between human rights and an expansion of liberty, in one state, and the denial of human rights, and protection of slavery, in another state.

IV. INTERSTATE CONFLICTS, THEORY, AND RACE IN ANTEBELLUM AMERICA

Antebellum American jurists generally turned to Joseph Story, and to a lesser extent, James Kent, when confronted with a domestic conflict-of-laws issue. In his *Commentaries on the Conflict of Laws*, Story declared that conflicts issues should be decided by the application of three interrelated axioms that Story extrapolated from the work of the seventeenth-century Dutch legal theorist, Ulrich Huber.[48] The first

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[46] 64 U.S. (23 How.) 505 (1859).

[47] *Id*. at 513.

[48] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 30 (1834) [hereinafter STORY, CONFLICT]. Alan Watson has argued that Story actually misread and/or misunderstood Huber. ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 18–21 (1992). This is likely for two reasons. First, although an accomplished scholar, Story may have very well misunderstood or mistranslated Huber, who wrote in Latin and Dutch. More importantly, much of Story's scholarship, especially his work on conflicts and his *Commentaries on the Constitution of the United States* (1833) was consciously designed to further his lifelong goal of nationalizing all law in the United States. On Story's nationalizing interests, see generally R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985); Paul Finkelman, *Story*

axiom declared the laws of any nation were enforceable "only within the limits of its own government" and had no binding force "beyond those limits."[49] Second, Story asserted that "all persons, who are found within the limits of government, whether their residence is permanent or temporary, are to be deemed subjects thereof."[50] The third axiom was the most difficult to apply. It held that all rules "from comity admit, that the laws of every people in force within its own limits, ought to have the same force every where, so far as they do not prejudice the power or rights of other governments, or of their citizens."[51]

The critical question was how to determine these limits, especially for the separate jurisdictions that made up the United States in the antebellum period. What were the elements of a law or judicial opinion that made it "prejudice" another jurisdiction? There was no set answer for this question. How a court responded to such an argument depended on the philosophical foundations of the political entity, as well as the ideological assumptions of the judges. Not surprisingly, in the antebellum era, attitudes towards race and slavery could put the jurisprudence or laws of one state beyond the pale of acceptability in another. The most crucial tests of these theories involved slavery and race.

Story wrote in the wake of the Missouri Crisis and at the very moment that the abolitionist movement was growing in his home state of Massachusetts. Slavery was fast becoming the central issue of the era. Furthermore, new technologies, particularly the steamboat and the railroad, made the states of the nation seem physically closer because of easier accessibility, just as northern opposition to slavery and southern insistence on the positive good of slavery drove a wedge between them.

How should the free states treat slaves who entered their jurisdictions accompanying their masters on visits or sojourns? How should the slave states treat slaves who lived or worked in the North, and under northern law gained their liberty? How should the slave states treat northern or foreign free blacks who entered their jurisdictions? The place of comity in domestic international law was about to move from an abstract theoretical issue to a concrete problem,

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Telling on the Supreme Court: Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247; Paul Finkelman, Prigg v. Pennsylvania*: Understanding Justice Story's Pro-Slavery Nationalism*, 2 J. SUP. CT. HIST. 51 (1997). Thus, his version of Huber may have been a conscious effort to nationalize American law, with the Supreme Court at the center of all legal controversies.

49 STORY, CONFLICT, *supra* note 48, at 30.

50 *Id.*

51 *Id.* at 29.

made more complicated by the highly charged emotional issues surrounding slavery, freedom, and race.

Story understood what was at stake, as he went on to argue[52] that the obligation of comity is an "imperfect obligation, like that of beneficence, humanity, and charity."[53] Thus, Story found that "[e]very nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded."[54] Among those circumstances where comity would *not* be required, were when foreign "laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or where the moral character is questionable, or their provisions impolitic."[55] Story believed that "a nation ought not to make its own jurisprudence an instrument of injustice for other nations, or their subjects"[56] but the test of injustice would always be in the courts of the forum state. Indeed, in the end "every nation must judge for itself"[57] when to grant comity.

Story's position mirrored that of the nation's other great legal theorist and treatise writer, Chancellor James Kent of New York. In his *Commentaries on American Law*, Kent asserted that the "laws and usages of one state cannot be permitted to prescribe qualifications for citizens, to be claimed and exercised in other states, in contravention to their local policy."[58] A concrete example of this assertion helps explain its meaning. Under Kent's theory, a Virginia slave owner could not claim a right to own a slave in New York by arguing that he had that right under Virginia law, and that New York had an obligation to extend comity to Virginia law, and recognize his ownership in a slave. Virginia slave law, in other words, could not be imposed on New York, "in contravention" of its "local policy." Similarly, a free black from New York who could move about that state without any legal impediments, could not claim such rights in Virginia.[59]

Before the Civil War, the slavery controversy could turn in two directions. A free state might declare that it immediately emancipated

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52 WATSON, *supra* note 48, at 20–22. Here, Watson argues that Story departs significantly from Huber's thesis. *Id.*

53 STORY, CONFLICT, *supra* note 48, at 33.

54 *Id.*

55 *Id.*

56 *Id.* at 34.

57 *Id.*

58 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 62 (1827).

59 Free blacks from Northern states might have claimed that under the Privileges and Immunities Clause of the Constitution (U.S. CONST. art. IV, § 2, cl. 1) they had a right to travel to other states, but the southern states simply refused to acknowledge that free blacks could be citizens of the states, and thus have rights under this clause. Chief Justice Taney upheld that position in *Dred Scott* v. *Sandford*.

slaves voluntarily brought into its jurisdiction; a slave state might claim the right to incarcerate a visiting free black or to re-enslave a black who gained liberty though sojourn or transit in a free state.

V. SLAVERY, RACE, AND DOMESTIC CONFLICTS OF LAW: SLAVES IN FREE STATES

The most complex and important issue of antebellum America was slavery. It was, as some scholars have called it, the "Nemesis of the Constitution."[60] Much of antebellum constitutional decision-making turned on judges' feelings about slavery. Even in cases that did not directly concern slavery, such as *The Passenger Cases*[61] or *Mayor of New York v. Miln*,[62] slavery lurked in the background, affecting the analysis and decisions of the Justices.[63]

The domestic application of human rights principles and international law to the problem of slavery arose whenever a case involved a slave who was in a "foreign" jurisdiction. "Foreign," in this case, meant a state other than the slave's, or the master's, home state. "Foreign" could also apply if a slave returned to his or her home state, after being taken to a free state or country. In such cases, race and concepts of human rights became a significant factor in the development of American law. As slavery ended in most of the western hemisphere, the South's "peculiar institution" became increasingly "peculiar" and increasingly problematic for lawyers. Meanwhile, American law became increasingly disconnected from international notions of human rights. By 1850, slavery had been abolished everywhere in the Western Hemisphere *except* Cuba, Puerto Rico, Brazil, and the United States. Yet, in 1857 Chief Justice Taney held in *Dred Scott v. Sandford* that slavery was a protected form of property and that blacks, even if free, could never be citizens. Clearly, there was a disconnect between the international community and the United States.

A. Fugitive Slave Cases

These issues arose in cases involving fugitive slaves. The Constitution prevented the free states from emancipating fugitive slaves and guaranteed that masters could recover their escaped slaves in other

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60 HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 86 (1982).

61 48 U.S. (7 How.) 283 (1849).

62 36 U.S. (11 Pet.) 102 (1837).

63 *See* Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000).

states.[64] In this context the U.S. Constitution might be seen as "anti-human rights." In fact, some abolitionists saw it that way, with William Lloyd Garrison calling the document "A Covenant with Death and an Agreement in Hell."

Whenever a person claimed a black as a fugitive slave, questions of identification could easily cloud the implementation of this clause. In an age before photographs, fingerprinting, and DNA, the wrong person might easily be seized and enslaved. Thus, throughout the North there were legitimate fears that free blacks might be kidnapped or illegally claimed as fugitive slaves.

But, even if identification had been perfect, questions of the actual legal status of an alleged fugitive slave might arise. In 1797, for example, four blacks living in Pennsylvania petitioned Congress, which was meeting in Philadelphia at the time, to protect their freedom. They claimed their North Carolina masters manumitted them and that the Superior Court of North Carolina confirmed their freedom. However, a state statute threatened their liberty by retroactively[65] voiding all manumissions, except for "meritorious service."[66] Were these blacks slaves who owed service or labor in North Carolina? Or, were they free people in danger of being kidnapped by greedy heirs or creditors of their former masters? The situation of these blacks illustrates the complexity of determining who might be a fugitive slave.

The two most significant fugitive slave cases to reach the U.S. Supreme Court—*Prigg v. Pennsylvania*[67] and *Jones v. Van Zandt*[68]—involved issues of status, identity, and race. These cases illustrated how race and human rights claims became a central issue in determining whether the law of the free states or that of the slave states would set the standard in American jurisprudence. Significantly, in both cases the Supreme Court adopted a jurisprudence which simply assumed that blackness was equivalent to slavery. A brief examination of the cases illustrates this.

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64 U.S. CONST., art. IV, § 2, cl. 3.

65 The U.S. Constitution prohibits the states from passing "ex post facto law." U.S. CONST. art. I, § 10. But the ban on ex post facto laws narrowly applied to criminal matters. A statute declaring manumissions to be void would not be a criminal law, and thus would not be prohibited by the ban on ex post facto laws.

66 DONALD F. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820 288–89 (1971).

67 41 U.S. (16 Pet.) 539 (1842). On the history of this case, see Finkelman, *Story Telling on the Supreme Court*, *supra* note 48; Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605 (1993); Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979).

68 46 U.S. (5 How.) 215 (1847).

Prigg began when Nathan S. Bemis, Edward Prigg, and two other Marylanders seized a black woman, Margaret Morgan, and her children, and took them from York County, Pennsylvania to Harford County, Maryland as fugitive slaves.[69] Bemis's mother-in-law claimed that Morgan was her slave and that she escaped to Pennsylvania. Prigg *et al.* took Morgan and her children to Maryland without first obtaining a certificate of removal from a Pennsylvania judge, as required by Pennsylvania's personal liberty law of 1826.[70]

The Marylanders initially tried to comply with the Pennsylvania law. Before seizing Morgan they went to a local justice of the peace, Thomas Henderson, and obtained a warrant, as required by the Pennsylvania law of 1826. A local constable then accompanied the four Marylanders to the Morgan home, arrested the family, and brought them back to Justice of the Peace Henderson. Henderson, however, refused to grant a certificate of removal to take the Morgans back to Maryland. Jerry Morgan, Margaret's husband, was clearly a freeborn native of Pennsylvania, and Margaret gave birth to one or more of her children in that free state as well, and under Pennsylvania law, the children were also free.[71] Furthermore, Margaret Morgan had never been claimed as a slave in Maryland, nor treated like one. Indeed, the 1830 census, taken while the Morgans were still present in Maryland, listed Margaret and her children as free blacks.[72] Significantly, the county sheriff gathered this census data. Although we cannot be certain, Morgan probably explained the circumstances of her life to Henderson, who then released the Morgans from custody.

Bemis, Prigg, and the other two men then seized Margaret Morgan and her children (but not her free-born husband), and took them to Maryland, where eventually they were sold to a slave trader and removed from the state. York County indicted all four men for kidnapping, and the governor of Pennsylvania sought their extradition. Initially, Maryland's governor stonewalled on returning any of the

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69 *See* Finkelman, *Story Telling on the Supreme Court*, *supra* note 48, at 252.

70 *Prigg*, 41 U.S. (16 Pet.) at 550–56. The personal liberty law was entitled, "An act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping." *Id.* at 550. A number of northern states passed "personal liberty laws" to prevent the kidnapping of free blacks by requiring an inquiry by a state judicial officer before a black could be removed from the state as a fugitive slave. *See generally* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861 (1974).

71 The 1830 census provides information on how many children Morgan had while living in Maryland; we know she had at least two more when taken out of Pennsylvania. One or both were born in Pennsylvania. U.S. CENSUS, MANUSCRIPT CENSUS FOR HARFORD COUNTY, MARYLAND 394 (1830).

72 *Id.*

Bemis party to Pennsylvania for trial. However, after protracted negotiations, Maryland authorities returned Prigg (but no one else) to Pennsylvania for trial. An agreement between the two states set the stage for the extradition and Prigg's trial.[73] This agreement included a promise that Pennsylvania would not incarcerate the alleged kidnapper until after he exhausted all appeals and that there would be an expedited appeal through the Pennsylvania courts.[74] In the Opinion of the Court, Justice Joseph Story praised both states for their cooperation in this matter when the case reached the U.S. Supreme Court.[75]

This agreement illustrates one aspect of human rights law and the domestic international law of race. Pennsylvania was eager to protect its free blacks—like Jerry Morgan and his freeborn children—from being kidnapped. Maryland, on the other hand, wanted to eliminate free state interference with the rendition of fugitive slaves. Maryland also did not want its citizens incarcerated for kidnapping when they were exercising what they believed to be a constitutional right to recover fugitive slaves. In the context of human rights, Pennsylvania wanted to protect the liberty of its residents while Maryland wanted to protect the property claims of its residents. This agreement was much like a treaty between sovereign nations. Emissaries from the governor of Pennsylvania worked out the details of the agreement with men appointed by the Maryland governor. The legislatures of both states ratified the agreement, much as national legislatures might ratify a treaty. The Pennsylvania Supreme Court willingly participated, giving a speedy review of Prigg's conviction. In upholding the conviction, the Court did not write an opinion in the case, perhaps because that would have slowed down the process. The Court may also have felt that such an opinion would have complicated the appeal to the U.S. Supreme Court. With no opinion to respond to, the U.S. Supreme Court crafted its own solution to the problem raised by Pennsylvania's personal liberty law and Prigg's behavior.

In his opinion of the Court, Justice Joseph Story callously ignored the facts of the case. Importantly, he refused to consider whether Morgan was ever actually a slave or whether she ever "escaped" from slavery. He noted that some of her children had been born in Pennsylvania, but did not offer any analysis of how that fact might affect their status. In

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73 We have no evidence of why Prigg was extradited, rather than Bemis, although it is possible that Bemis's higher social status as a lawyer and an important property owner protected him.

74 For case details, see Finkelman, *Story Telling on the Supreme Court*, *supra* note 48.

75 *Prigg*, 41 U.S. (16 Pet.) 539. For a discussion and details of this case, see Finkelman, *Story Telling on the Supreme Court*, *supra* note 48.

effect, Story refused to consider the human rights laws of Pennsylvania, which provided that all people born in that state were born free and could not be enslaved. The choice of law here was to favor the property rights law of Maryland over the human rights law of Pennsylvania.[76]

Instead, Story focused on the importance of the fugitive slave clause, and the 1793 federal fugitive slave law, for promoting sectional harmony. In doing this, Story held that masters had the right to take fugitive slaves back to the South without any legal process or judicial superintendence, as long as this could be accomplished without a "breach of the peace." This in effect was a green light to kidnappers, who could now seize any blacks in the North because no state official could interfere with the return of a fugitive slave. The opinion made race the sole criterion for determining who might be seized and taken to the South without any due process. After *Prigg*, if he could act without an obvious breach of the peace, any southerner could seize *any* black person in the North, and take him or her to the South, without any interference from Northern authorities. This made all blacks living near the South—in the southern parts of Pennsylvania, New Jersey, Ohio, Indiana, and Illinois, as well as those living in port cities such as Boston or New York—vulnerable to seizure and a quick removal to a slave state, before they could make their plight known to any neighbors.

Story's replacement on the Court, Levi Woodbury, took this racialization of American law one step further in *Jones v. Van Zandt*.[77] In the process, Woodbury added to what might be called the "anti-human rights" law of the United States, by in effect holding that all blacks, even those in a free state, should be presumed to be slaves.

The case began when a group of slaves escaped into Ohio from a Kentucky slaveowner named Wharton Jones. In Ohio, just outside of Cincinnati, a farmer named John Van Zandt offered a ride in his wagon to this group of blacks walking along the road. Van Zandt later claimed that in Ohio all people were presumed free, and thus he committed no crime or civil wrong when he offered a ride to these strangers. In fact, all of these people were slaves, owned by Jones. Jones did not take any immediate action to recover the slaves, but a party of freelance slavecatchers heard that Jones's slaves had escaped, and crossed into Ohio to find them. The slavecatchers tried to stop Van Zandt's wagon, but he refused to halt when these unknown and unidentified

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[76] Story might have compromised here, and declared that the children of Morgan, born in Pennsylvania, were free and thus Prigg was legitimately convicted for their kidnapping but this would have muddied the waters and prevent Story from writing the emphatically proslavery opinion he seemed bent on writing.

[77] 46 U.S. (5 How.) 215 (1847).

southerners, with no legal process in hand, accosted him. Eventually they stopped the wagon and in the ensuing chaos one of the slaves evaded capture and was never returned to Jones. Van Zandt had no legal notice that the people in his wagon were fugitive slaves and essentially argued that in the free state of Ohio all people were presumptively free. Then he claimed he had no legal obligation to respond to this group of armed ruffians who chased him.

Speaking for the Court, Woodbury held that Van Zandt was liable for the value of the lost slave because he did not need written notice nor specific notice from the owner that the people in his wagon were slaves. The fact that a group of armed, unknown men from another state—freelance slave catchers—tried to stop his wagon made no difference. Just as Story ignored the free state birth of some of Margaret Morgan's children, Woodbury ignored the illegal violence of self-deputized armed ruffians stopping a wagon peacefully traveling down an Ohio road. The law of the United States was now clear: all people—North and South—should assume that any black they encountered was a runaway slave. In *Dred Scott v. Sandford*[78] Chief Justice Taney would hold that free blacks had no rights under the Constitution. While stated clearly and starkly, Taney's anti-human rights analysis in that case was in many ways just an expansion of the doctrine created in *Jones* by Justice Woodbury.

Woodbury asserted that any information that would "satisfy a fair-minded man that he is concealing the property of another" was sufficient to sustain a civil action for harboring a fugitive slave.[79] While not directly stating it, Woodbury's assumptions were clear: Van Zandt should have assumed that a group of blacks walking along a road in southern Ohio were, or might be, fugitive slaves. He should further have assumed that any white man with a southern accent had a legitimate reason to stop his wagon to search it for fugitive slaves. Race was sufficient to justify the suspicion that even in a free state all blacks were likely to be runaway slaves. Race was similarly sufficient to allow a search by people who were not even officers of the law. This case may be the first example of the Supreme Court upholding a profile search based on race.

Taken together, *Prigg* and *Van Zandt* in effect held that in any choice-of-law situation involving race, the court should ignore the free state law in favor of the law of the slave states. If this were true, then the common presumption of the South, that race determined status, would become the law of the nation. The domestic international law, under these cases,

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78 60 U.S. (19 How.) 393 (1857).

79 *Id.* at 225.

rejected the human rights claims of blacks, but firmly supported the property rights claims of southerners.

B. Slaves in Transit in Free Jurisdictions

Somerset v. Stewart[80] was the first major Anglo-American case involving international law concepts and slavery.[81] James Somerset was the slave of Charles Stewart, a minor colonial official who lived in Virginia. Stewart took Somerset to England in 1769 and held him as a slave until he escaped in 1771. Stewart hired men who captured Somerset and placed him on board a ship destined for Jamaica, where he was to be sold as a slave. British opponents of slavery, led by Granville Sharp, obtained a writ of habeas corpus to bring Somerset before Chief Justice Lord Mansfield of the Court of King's Bench.

At stake in this case was the status of some 15,000 slaves then living in England. Lord Mansfield tried to avoid the issue and urged the parties to settle the case so he would not have to reach a decision. He suggested Mr. Stewart "end the question, by discharging or giving freedom to the negro."[82] But, in fact, there was little room for settlement. Somerset would take nothing less than his liberty; for Stewart, emancipating Somerset was hardly a settlement—it was a total loss.[83] Mansfield was uncomfortable with the potential consequences of the case, admitting that "setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable."[84] But, Mansfield enforced the law, no matter what the cost: "fiat justitia, ruat coelum" he told the lawyers for both sides[85]—let justice be done, though the heavens may fall!

In deciding the case, Mansfield noted that "Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of

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80 Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).

81 *See generally* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823, at 469–522 (1975); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981, reprint 2001); William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

82 He similarly suggested that the "merchants" who thought the case was "of great commercial concern" should take the issue to Parliament. *Somerset*, 98 Eng. Rep. at 509.

83 It is not impossible to imagine some compromise, in which Somerset agreed to work for Stewart as an indentured servant for a set term, in exchange for his absolute freedom, but neither side seemed interested in such a result.

84 *Somerset*, 98 Eng. Rep. at 509.

85 *Id.*

enquiry; which makes a very material difference."[86] This is important, because in effect Mansfield acknowledged that international law recognized slavery and accepted the system, and that for purposes of international commerce, Britain did too. Thus, in 1772, rather than there being an international human rights law, there was an international anti-human rights law that acknowledged and recognized trafficking in human beings. Mansfield did not reject this rule of law for international transactions, but for domestic litigation—when "the person of the slave himself" was in Great Britain—he chose to develop a domestic (British) human rights law that prohibited slavery.

In the end, Mansfield issued a narrow opinion. He would not consider the status of all slaves in England; he was not prepared to issue an emancipation proclamation for all of Britain. He simply held that Stewart had no grounds to hold Somerset against his will. Stewart's "return" of the writ of habeas corpus stated "that the slave departed and refused to serve; whereupon he was kept, to be sold abroad."[87] This was beyond what English law could tolerate, and went directly to the issue of international law: "So high an act of dominion must be recognized by the law of the country where it is used."[88] Was there such a "law" in England? Clearly there was not, for:

> [t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reason, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[89]

Thus, the court released Somerset. Implicitly, any slave taken to any common law jurisdiction that did not have slavery would be equally entitled to liberty.

This was what Chief Justice Lemuel Shaw of Massachusetts concluded in *Commonwealth v. Aves*[90] six decades later. Like *Somerset*, this was a case brought by opponents of slavery—this time the Boston Female Anti-Slavery Society—to secure the freedom of a slave visiting in a free jurisdiction. The case involved Med, a six-year-old slave girl

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86 *Id.* at 510.
87 *Id.* at 510.
88 *Id.*
89 *Id.*
90 35 Mass. (18 Pick.) 193 (1836).

brought to Boston by Mary Aves Slater, when she returned from New Orleans, Louisiana to visit her father, Thomas Aves.

The case was relatively easy for Chief Justice Shaw to decide.[91] Shaw was surprised that it was a case of first impression for a Massachusetts judge. But he was firm in concluding that slavery was illegal in Massachusetts, and no one could be held a slave in that state, except a fugitive who escaped *into* Massachusetts and whose slave status was preserved by the U.S. Constitution. Clearly, Med was not such a person.

The only difficult question for Shaw was whether some theory of international law, modified and strengthened by the national union and the U.S. Constitution, required Massachusetts to recognize the status of "slave" conferred on Med by Louisiana law. Shaw noted that slavery was clearly "contrary to natural right, to the principles of justice, humanity and sound policy," but Shaw admitted that slavery was certainly not "contrary to the law of nations."[92] He could have hardly done otherwise in a nation whose Constitution seemed proslavery to many Americans,[93] clearly protected the rights of masters to recover fugitive slaves in the free states,[94] and counted slaves for purposes of allocating representation in the national Congress.[95] He even admitted that under the theory of "*lex loci contractus*" he would uphold a claim under a contract for the sale of slaves if the contract had been made in New Orleans. The legal theory of this was obvious. Any court should enforce a contract if "the contract was a legal one by the law of the place where it was made."[96] Like Lord Mansfield in *Somerset*, he did not find slavery contrary to international law. If there was an international human rights law, it did not affect the status of a slave. Shaw also acknowledged that under general notions of international law, personal property acquired in one place "by the comity of nations the same must be deemed his property everywhere."[97] But, he would not accept such a law for the person of a slave. The theory of personal property adhering to the owner could apply "only to those commodities which are everywhere, and by all nations, treated and deemed subjects of

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91 *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 101–25; LEVY, *supra* note 12, at 101–125.

92 *Aves*, 35 Mass. (18 Pick.) at 215.

93 See PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3 (2d ed. 2001), for the proslavery nature of the U.S. Constitution.

94 U.S. CONST. art. IV, § 2, cl. 3.

95 U.S. CONST. art. I, § 2, cl. 3.

96 *Aves*, 35 Mass. (18 Pick.) at 215. Lord Mansfield reached the same conclusions in Somerset, noting that a contract for sale of a slave in the American colonies would be upheld in England. *See* Jonathan A. Bush, *The British Constitution and the Creation of American Slavery*, *in* SLAVERY & THE LAW 379 (Paul Finkelman ed., 1997).

97 *Aves*, 35 Mass. (18 Pick.) at 216.

property."[98] Otherwise, "the law of slavery must extend to every place where such slaves may be carried."[99]

Thus, Shaw found that comity did not require Massachusetts to recognize the status of a slave that a foreign law created. Med was free, not because the law of Massachusetts made her free, but because the law of Louisiana ceased to have any force over her once her master voluntarily removed her from that state. The status of slave could only be maintained under positive law, and no such law was available to Med's owner in Massachusetts. As in *Somerset*, this was a decision in which local human rights law trumped international law principles that denied the liberty to slaves and generally allowed people to move their property (including slaves) from one jurisdiction to another.

Most other northern states followed Shaw's lead in this area.[100] More importantly, the states accepted the notion that any black traveling with a white might be treated as a slave and thus in need of help from the legal system. From the mid-1830s until the beginning of the Civil War, white and black abolitionists often intervened to secure the freedom of slaves brought into the North. Just as southern whites frequently stopped blacks traveling alone on the suspicion that they were fugitive slaves, northerners stopped southern whites traveling with blacks on the suspicion they might be bringing slaves into the free states.

In 1839 whites in Holden, Massachusetts intervened on behalf of Anne, a thirteen-year-old black girl they suspected of being a slave. Mrs. Olivia Eames, a native of Massachusetts, who lived in New Orleans, brought Anne to the Bay State when she returned home. Eames's failure to send Anne to school, and of her generally harsh treatment of Anne troubled concerned neighbors. These neighbors feared Eames would eventually take Anne back to New Orleans and sell her. A county court ruled that Anne was free and forced Eames to pay nominal damages to Anne for illegally holding her in servitude.[101]

Similar cases occurred in Connecticut, Pennsylvania, and Ohio, as northerners asserted the presumption that visiting blacks might be illegally treated as slaves, and thus should be freed.[102] These cases might be seen as profile stops in reverse. If a white was traveling in the North with a black, this alone was cause to stop the white on suspicion of

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98 *Id.*

99 *Id.*

100 See FINKELMAN, AN IMPERFECT UNION, *supra* note 81, for a general discussion and analysis of the many slave transit cases that reached northern courts.

101 HOLDEN ANTI-SLAVERY SOCIETY, REPORT OF THE HOLDEN SLAVE CASE TRIED AT THE COURT OF COMMON PLEAS FOR THE COUNTY OF WORCESTER (1839), *reprinted in* 2 SOUTHERN SLAVES IN FREE STATE COURTS: THE PAMPHLET LITERATURE 41 (Paul Finkelman ed., 1988).

102 *See generally* FINKELMAN, AN IMPERFECT UNION, *supra* note 81.

bringing a slave into a free state. This jurisprudence applied a domestic law of human rights in the face of international concepts of comity and property that might have supported slavery.

Two cases in New York illustrate the importance of using race as a criterion for intervention in the late antebellum period and the application of state human rights law to domestic international law. In 1846, a Georgia sea captain discovered a slave named George Kirk hidden on his ship as he headed for New York. Unwilling to return to Savannah, the captain put Kirk in irons and planned to take him back to Georgia after he docked in New York and unloaded his cargo. A black stevedore, named Lewis Napoleon, noticed the man in chains, and immediately secured a writ of habeas corpus. The ship captain claimed that Kirk was a fugitive slave and that he therefore had a right to take him back to Georgia. But, the fugitive slave law only applied to slaves escaping *into* a state. Kirk did not do this; rather the captain brought him into New York. This meant Kirk was free.[103]

Six years later the same Lewis Napoleon (or as he now spelled it, Louis Napoleon), gained the release of eight slaves that a Virginia family brought into the state as they changed ships in New York City while traveling from Virginia to Texas. While geographically out of the way, the fastest route from Virginia to Texas was in fact to take a ship to New York and then a direct steamer to New Orleans.[104]

This case began in 1852, but did not reach New York's highest court until 1860. The court in *Lemmon v. The People*[105] ruled that New York had an absolute right to immediately free any slave brought into the state. This case was a minor cause célèbre at the time.[106] Had the Civil War not intervened, this case might very well have reached the Supreme Court, which would have probably upheld the right of slave transit, and thus given a final decision on the requirement of comity for slave owners.[107]

In liberating visiting slaves, Britain and the northern states in effect applied their own human rights laws to the status of visitors, despite the fact that there was legitimate international law precedent and theory for concluding that a state should accept the personal status of visitors from other places. Free jurisdictions usually accepted foreign law involving marriage, divorce, child custody, apprenticeship, and other aspects of personal status as well as foreign laws creating property and contract relations. This was all consistent with recognized concepts of

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103 *In re* Kirk, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846).
104 Lemmon v. The People, 20 N.Y. 562 (1860).
105 *Id.*
106 *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 296–312.
107 *Id.* at 313–38.

international law. It would certainly have been reasonable, within generally understood notions of international laws on property and personal status, to have recognized the status of visiting slaves. Instead, these free jurisdictions applied their own human rights law to trump international law, which did not recognize human rights but did recognize property rights in slaves.

VI. SLAVERY, RACE, AND DOMESTIC CONFLICTS OF LAW: FREE BLACKS IN SLAVE STATES

A corollary to the problem of slaves entering the North arose when free blacks traveled to slave states or when slaves, who had lived in free states, returned to slave jurisdictions, either on their own initiative or because a master forced such a return.

There is only one major case on free blacks entering the South.[108] However, the issue led to tense relations between northern and southern states, and is a good example of how issues of international law and constitutional law are not always resolved in the courts. This issue is also the "purest" antebellum example of race and human rights concerns intersecting with domestic international law. Prohibitions on free blacks entering the southern states were entirely based on race. These prohibitions also flew in the face of the privileges and immunities clause of the Constitution as well as all notions of international comity. The same laws also applied to black citizens of the British Empire. Thus race undermined American foreign policy and prevented the U.S. from fully applying accepted concepts of international law to its foreign policy. These laws also rejected international law by refusing to acknowledge the status of visiting blacks, who were free in places where they lived. In this sense, the southern states substituted their own anti-human rights law for international law that would have protected the human rights of free blacks.

In contrast to the single southern federal case involving a free black entering the South, many southern states heard cases involving the status of slaves who had been taken to a free jurisdiction and then returned to a slave state. In all of those cases, race and color were at issue, and in some, race became the central issue. Two of these cases, *Strader v. Graham*[109] and *Dred Scott v. Sandford*,[110] reached the United States Supreme Court. By the late 1850s, cases on this issue had also

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108 Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366). For a discussion of *Elkison*, see *infra* notes 134–43 and accompanying text.

109 51 U.S. (10 How.) 82 (1850).

110 60 U.S. (19 How.) 393 (1857). *See* PAUL FINKELMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS (1997).

become racialized. At issue was not simply someone's status as a slave or free person, but rather the status of an entire race.

A. State Regulation of the Ingress of Slaves

Nations usually have great discretion as to whom they let into their jurisdictions.[111] While international travel is common today, it still often requires passports, visas, proof of identity, proof of financial status, and even background checks. Even in a federal republic, it would be possible for one state to bar the admission of people from other states. The United States Constitution, at least in theory, eliminated this problem in two ways. First, it gave Congress plenary power over all matters relating to commerce among the states. Thus, only Congress can regulate the interstate movement of people. Second, the Privileges and Immunities Clause of the Constitution[112] presumably meant that every state had to treat the citizens of every other state with dignity and respect.

Complicating these provisions, however, was the slave trade provision of Article I, which declared that: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."[113]

A plain reading of this clause suggests that before 1808 the states could permit or exclude the "migration or importation" of "Such Persons" at their discretion, and that after 1808, Congress could also exclude such people. The slave trade inspired the drafting of the clause

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111 Although beyond the scope of this article, it is worth noting that the United States has historically used race as a component of its naturalization and immigration laws. Before the Civil War, naturalization was available only to "whites." After the Civil War, naturalization expanded to people of African ancestry. In *Ozawa v. United States*, 260 U.S. 178 (1922) and *United States v. Thind*, 261 U.S. 204 (1923), the United States Supreme Court held that under this law people from East and South Asia could not be naturalized. The first restriction on immigration was the Chinese Exclusion Act of 1882, which was directed at a specific racial/ethnic group. Subsequent immigration laws severely limited, or absolutely banned, non-whites from immigrating to the United States. The precedents upholding and interpreting these laws are still valid, and according to Gabriel J. Chin, are the last vestiges of legalization of race discrimination in federal law. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6, 12–15 (1998) (noting that the right to naturalized citizenship was restricted by race from 1790 to 1952, the right to immigrate was restricted by race from 1882 to 1965, and federal decisions still permit racial discrimination by Congress). For a discussion of the informal and then formal restriction on Japanese immigration, which were also based on race, see Paul Finkelman, *Race, Federalism, and Diplomacy: The Gentlemen's Agreement a Century Later*, 56 OSAKA [JAPAN] UNIV. L. REV. 1–30 (2009).

112 U.S. CONST. art. IV, § 2, cl. 1.

113 U.S. CONST. art. I, § 9, c1. 1.

and allowed the states to continue the trade until at least 1808. Implicit in the clause, however, is that after 1808, if Congress chose not to end the African slave trade, the states were still free to "admit or exclude" slaves on their own.

Could the same be said for other "Persons" as well? Surely it applied to slaves other than those from Africa. Surely a state had a right to declare that no one could be a slave within its jurisdiction. Likewise, a state could prevent someone from bringing new slaves into its jurisdiction. This, in any event, was what the states must have thought when they ratified the Constitution. At the time, Pennsylvania, Connecticut, and Rhode Island banned the importation of any new slaves and freed the slaves of visiting masters. Pennsylvania's gradual Abolition Act of 1780 allowed visiting masters to keep their slaves in the state for up to six months. The law also exempted members of Congress and diplomats from the six months rule as long as they held their office.[114] However, the implication of this law was that the state had the power to free the slaves of visitors the moment they were brought into the state. No one at the Constitutional Convention, in any of the state ratifying conventions, or in any of the public debates over ratification ever expressed a fear that the new frame of government would bar such regulation.

In *Groves v. Slaughter*,[115] the Supreme Court affirmed the right of the states to exclude slaves as merchandise. The case involved a civil suit based on the refusal of Groves to pay on a note he had given Slaughter for the purchase of slaves that Slaughter brought to Mississippi. Groves argued the sale was void because Mississippi's 1832 Constitution banned the importation of slaves as merchandise. The Court held in favor of Slaughter on the grounds that the 1832 Constitution was not self-executing, and that Mississippi needed to pass legislation to ban the importation of slaves as merchandise. But the Court clearly believed the states had the right and the power to prohibit the introduction of slaves as merchandise.

However, the Justices could not agree on *why* Mississippi could ban the sale of slaves. Justice McLean asserted that congressional commerce power precluded the states from banning any form of merchandise. However, McLean argued slaves were not merchandise, but people, and thus could be banned. McLean, the only real opponent of slavery on the Court,[116] wanted to make sure that slavery was a local institution. Thus,

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114 An Act for the Gradual Abolition of Slavery, PA. STAT. AT LARGE, §881 (1780).

115 40 U.S. (15 Pet.) 449 (1841).

116 On McLean and antislavery, see Paul Finkleman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519–65 (2009).

he argued that "[t]he power over slavery belongs to the states respectively. It is local in its character, and in its effects; and the transfer or sale of slaves cannot be separated from this power. It is, indeed, an essential part of it."[117] He further argued that the right to exclude slaves was "higher and deeper than the Constitution" because the inherent evil of slavery "involves the prosperity, and may endanger the existence of a state."[118] The power rested on "the law of self-preservation; a law vital to every community, and especially to a sovereign state."[119]

The problem with this analysis, of course, is that it could also cut in the opposite direction. If the outcome rested on the power of a state to exclude "persons," then a slave state could argue that free blacks were a threat and should be excluded. A slave state might even argue that abolitionist whites should also be excluded.

Chief Justice Roger B. Taney concurred in the result of this case by arguing for a classic states rights position that any power of the states to regulate slavery could not "be controlled by congress, either by virtue of its power to regulate commerce, or by virtue of any power conferred by the constitution of the United States."[120] Taney was emphatic that the regulation of slavery lay "exclusively with the several states; and each of them has a right to decide for itself, whether it will, or will not, allow persons of this description to be brought within its limits, from another state, either for sale, or for any other purpose."[121]

Neither McLean nor Taney offered an analysis that was completely coherent or wholly useful for either of their agendas. Under McLean's theory, a slave state might refuse to allow a free black, or even a white abolitionist, to enter its domain. This was not something that McLean would have wanted. Under Taney's theory, on the other hand, a free state could prevent any master from traveling with a slave in or through its jurisdiction. Although Taney never actually faced such a case while on the Court, had he done so he would have likely upheld the right of a master to travel through a free state with his slaves. This would have been consistent with his proslavery jurisprudence[122] and foreshadowed

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117 *Id.* at 508.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *See* Paul Finkelman, "*Hooted Down the Page of History": Reconsidering the Greatness of Chief Justice Taney*, 19 J. SUP. CT. HIST. 83 (1994).

the concurring opinion in *Dred Scott v. Sandford* by Justice Samuel Nelson.[123]

Taney's position also comports with his concurring opinion in *Prigg v. Pennsylvania*[124] the following year. There Taney argued that the federal government had plenary power over the regulation of the return of fugitive slaves, and even argued that the national government had the power to require the states to help in the return of fugitive slaves. Thus, in fact Taney believed the regulation of slavery lay "exclusively with the several states"[125] only to the extent that the states protected slavery. When necessary, Taney appeared to be willing to allow the federal government to regulate slavery in order to protect a master's interest in his slave property.

Yet, despite Chief Justice Taney's mixed messages on the power of the states to regulate slavery, the Constitution clearly seemed to require that people be able to move from place to place without state interference. Passports, visas, and even identification papers would seem to be an unconstitutional burden on interstate movement. Indeed, the right to move from state to state seemed to be a fundamental purpose of the Constitution and a basic aspect of domestic human rights at this time. If there was to be any regulation of this movement, Congress, through its commerce power, would be the body to make such regulations. But, slavery and race undermined the chances of this smoothly happening.

B. Free Blacks Entering the Slave South

Why would any African American even want to enter the slave South? The concept seems chilling. But, for business or pleasure, free blacks did have an occasion to do so. Some free blacks in the North had enslaved relatives and went south to visit them. Other blacks came as part of their work. In New England a large population of black men were merchant seamen whose ships often called on southern ports.

Southern fears of free blacks were not totally unfounded. Some blacks returned to the South with more than mere visits in mind. Harriet Tubman[126] made numerous forays into the South to help relatives and other slaves escape from bondage. Dangerfield Newby, one of John Brown's raiders, hoped to rescue his wife from bondage. After Newby

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123 Dred Scott v. Sandford, 60 U.S. 393, 454 (1857) (Wayne, J.; Nelson, J.; Grier, J.; Daniel, J.; Campbell, J., Catron, J., concurring). For further development of this argument, see FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 313–38.

124 41 U.S. (16 Pet.) 539 (1842).

125 *Groves*, 40 U.S. (15 Pet.) at 508.

126 Tubman was technically a fugitive slave, but she acted as a free person.

died in the raid, a Louisiana slave trader bought his wife.[127] The case of *Kentucky v. Dennison* emerged out of the attempts of Kentucky to obtain custody of Willis Lago, a free black from Ohio who had gone into Kentucky and helped a slave woman escape to Cincinnati.[128] Even casual black visitors to the South could undermine slavery. Frederick Douglass escaped from bondage carrying identification papers lent to him by a free black sailor from the North.[129]

Ever fearful of free blacks, especially from the outside, most southern states prohibited them from entering their domains. Between 1820 and 1860 every southern coastal state, except Mississippi,[130] passed a law regulating black sailors who entered their ports. The non-coastal states also prohibited free blacks from other states from entering their jurisdictions. Kentucky's 1850 Constitution, for example, directed the general assembly to pass legislation making it a felony for free blacks to move into the state.[131] A brief look at the South Carolina experience illustrates the problem.

In 1800, South Carolina prohibited free blacks from entering the state.[132] This was the first of many such laws on this subject. In 1820 South Carolina prohibited all manumissions within the state and reiterated its prohibition on any free blacks entering the state.[133] South Carolina's laws provided for free blacks entering the state to be incarcerated or sold for a short period of time. If these free blacks persisted in living in the state, they could eventually be sold into lifetime slavery.

In the 1820s South Carolina passed laws, known as the "Negro Seamen's Acts," restricting free black sailors from entering the state.[134]

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127 STEPHEN B. OATES, TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN 316 (1970).

128 65 U.S. (24 How.) 66 (1860).

129 FREDERICK DOUGLAS, LIFE AND TIMES OF FREDERICK DOUGLAS (1892).

130 By the late antebellum period, North Carolina, Georgia, Florida, Alabama, Louisiana, and Texas required the immediate imprisonment of black sailors entering those states. Virginia restricted their movement and allowed for their enslavement if they remained in the state. Lacking a major port, Mississippi did not pass any specific law dealing with black seamen, but restricted the movement of all free blacks in the state and prohibited free blacks from entering the state.

131 KY. CONST. of 1850, art. X, § 2.

132 "AN ACT for the better regulation and government of Free Negroes and Persons of Color; and for other purposes," 7 Stat. S.C. 461 (1822).

133 "AN ACT to restrain the emancipation of Slaves, and to prevent Free persons of Color from entering into this State; and for other purposes," 7 Stat. S.C. 459 (1820).

134 *See* "AN ACT for the better regulation and government of Free Negroes and Persons of Color; and for other purposes," 7 Stat. S.C. 461 (1822). See also subsequent acts of a similar nature: "AN ACT more effectually to prevent Free Negroes and other Persons of Color from entering into this State; and for other purposes," 7 Stat. S.C. 470 (1835); "AN

Under these laws, any black sailor who entered the port of Charleston would be immediately seized and incarcerated for the time that the sailor's ship was in port. When the ship left port, the sailor would be placed on board, provided that the ship captain paid the jail fees for the free black.

The Negro Seamen's Acts presumptively violated the Privileges and Immunities Clause of the Constitution when applied to free blacks from other states and violated various treaties when applied to free blacks from other countries.[135] South Carolina, however, saw these as simple police regulations—health and safety regulations—designed to protect the state from an inherently dangerous class: free blacks. Here the construction of race—the notion that blacks are inherently dangerous people[136]—undermined interstate comity, and severely impacted America's domestic international law. These laws also affected our foreign relations and put the nation in opposition to basic human rights—that free people from one country could visit another country.

South Carolina's Negro Seamen's Acts came before a federal court in *Elkison v. Deliesseline*.[137] In 1822, Charleston authorities imprisoned Henry Elkison, a black British subject. Elkison applied for a writ of habeas corpus from United States Supreme Court Justice William Johnson, a native of South Carolina, who was riding circuit at the time. A South Carolina states' rights organization hired two leading proslavery activists, Benjamin F. Hunt and Isaac E. Holmes, to oppose the writ.

In oral argument, before Justice Johnson, Hunt asserted that under its police powers South Carolina could incarcerate free blacks entering the state, because to do otherwise would make the state "guilty of an act, tending to self-destruction."[138] Hunt admitted that Congress had "an exclusive right," under the Constitution to regulate commerce, but he denied that South Carolina's act infringed on congressional power.[139] He compared South Carolina's law to a New York law allowing the

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ACT the more effectually to prohibit Free Negroes and Persons of Colour from entering into this State; and for other purposes," 7 Stat. S.C. 463 (1823).

135 Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989).

136 See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993), for more on this theory.

137 Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366).

138 BENJAMIN F. HUNT, THE ARGUMENT OF BENJAMIN FANEUIL HUNT, IN THE CASE OF THE ARREST OF THE PERSON CLAIMING TO BE A BRITISH SEAMAN . . . BEFORE THE HON. JUDGE JOHNSON, CIRCUIT JUDGE OF THE UNITED STATES, FOR 6TH CIRCUIT 12–14 (1823), *reprinted in* 2 FREE BLACKS, SLAVES, AND SLAVEOWNERS IN CIVIL AND CRIMINAL COURTS 1 (Paul Finkelman ed., 1988).

139 *Id.* at 12.

quarantine of vessels and individuals. For South Carolina, the "contagion" feared was not disease, but free blacks.[140]

Hunt boldly asserted that the slave states were exempt from certain constitutional provisions because the federal government could not interfere with any law which might affect the domestic institutions of the state. South Carolina's right to regulate free blacks from other states "was one, which from its nature, under the peculiar circumstances of her slave population, she could not and has not surrendered to the Federal Government."[141]

Hunt's argument went directly to the issue of domestic international law. South Carolina's white population believed free blacks were a thoroughly dangerous class of people, who could undermine their society. Thus, South Carolina was prepared to deny basic rights to citizens of other countries or states, solely on the basis of race. Anticipating Story's theories of comity, Hunt argued that South Carolina was only willing to extend comity to aliens whose presence in the state did not, to use Story's language, "prejudice the powers or rights" of South Carolina.[142]

In his circuit court opinion, Supreme Court Justice William Johnson asserted that South Carolina's law was flatly "unconstitutional and void."[143] Johnson declared the law was altogether irreconcilable with the powers of the general government; that it necessarily compromises the public peace, and, "tends to embroil us with, if not separate us from, our sister states; in short, that it leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States."[144] In effect, Johnson argued that the Constitution suspended the power of South Carolina to act as an independent legal entity, and thus to unilaterally decide who could enter the state and who could not. Justice Johnson believed "every arrest made under it subjects the parties making it to an action of trespass."[145] Unfortunately for Elkison, Johnson asserted that he lacked the power to issue a writ of habeas corpus or in any other way interfere with the law. The law was unconstitutional, but the parties could find no justice in the federal courts. Johnson, in effect, refused to enforce his ruling.

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140 *Id.* at 14.

141 *Id.* at 4.

142 STORY, CONFLICT, *supra* note 48, at 30. *See also* HUNT, *supra* note 138, at 4 (discussing a South Carolina law that directed Sheriffs to hold in custody all Africans arriving at South Carolina ports until the ship they arrived on is ready to set sail).

143 Elkison v. Deliesseline, 8 F. Cas. 493, 494 (C.C.D.S.C. 1823) (No. 4,366).

144 *Id.*

145 *Id.* at 496.

South Carolina was not the only state to adopt restrictions on migrants based on color. By 1860 every southern state prohibited the migration of free blacks.[146] Southern states believed free blacks threatened slavery and would have a pernicious influence on the behavior of slaves. Thus, the notion of race, and belief that race was tied to criminality and danger, affected the domestic international law of the United States and led to one state refusing to respect the rights of people who were citizens of another state. Through these statutes, the American South rejected the basic human rights of citizens of other nations and states.

Initially, the free states acquiesced in this result. Perhaps they acted in this way because Elkison was a British subject and because few politicians in the North cared much about the fate of free blacks. But, the rise of the antislavery movement and the growing sectional tensions over slavery and race led to a change of attitude in Massachusetts. The Bay State was particularly affected by these laws because of its large number of free black seamen.

In 1839, the Massachusetts legislature demanded a repeal of the Black Seamen's Acts. The legislature declared it was the "paramount duty of the state to protect its citizens in the enjoyment and exercise of all their rights."[147] In 1842, over 150 Bostonians asked Congress to intervene to prevent the imprisonment of northern black seamen.[148] The petitioners, including many conservative businessmen, asked Congress to "render effectual in their behalf . . . the privileges of citizenship, secured by the Constitution of the United States."[149] A House committee vainly recommended favorable action on the petition.[150]

With Congress unable or unwilling to act on the issue, Massachusetts tried direct negotiations with the two most important southern states implementing these laws: South Carolina and Louisiana. Acting as if it were dealing with foreign nations, Massachusetts, in 1844, sent Samuel Hoar to Charleston and Henry Hubbard to New Orleans as official state commissioners to negotiate a compromise on this issue. The missions were fiascoes. Hoar spent a single night in Charleston before officials told him they could not guarantee his safety. After Hoar had

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146 Paul Finkelman, *States Rights North and South in Antebellum America*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125, 132–33 (Kermit Hall & James W. Ely, Jr. eds., 1989).

147 *Report of the Joint Committee on the Deliverance of Citizens, Liable to be sold as Slaves*, H.R. REP. NO. 38 (Mass. 1839).

148 FREE COLORED SEAMEN—MAJORITY AND MINORITY REPORTS, H.R. Doc. No. 80-2, at 1 (1843) [hereinafter HOUSE REPORT].

149 *Id.*

150 *Id.* at 6–7.

returned to Massachusetts, the South Carolina legislature gratuitously asked the governor to expel him from the state, declaring that Hoar was an "emissary sent . . . with avowed purpose of interfering with" South Carolina's "institutions, and disturbing her peace."[151] In Louisiana, Hubbard faced the very real prospect of being lynched. He left New Orleans on the same day he arrived. Subsequent communications from Massachusetts to these states were fruitless.[152]

After the abortive missions by Hoar and Hubbard, the Georgia legislature jumped to the defense of South Carolina and Louisiana. In an analysis, which anticipated Chief Justice Roger B. Taney's *Dred Scott* opinion, the Georgia legislature asserted that each state, "in the exercise of their sovereign rights," could determine for itself who was a citizen and who was not. The southern states "did not regard" free blacks as citizens, a fact "of which the authorities of Massachusetts could not have been ignorant at the time of her aggressions." The legislature declared that "the people of South Carolina, Louisiana, Georgia, as well as all the States, claim the right of thinking for themselves."[153] In doing so, they chose to reject any claims of citizenship and obligations of comity towards free blacks from other states. In the language of human rights, the states of the Deep South were ready to assert the right to decide who was entitled to such rights and who was not.

These incidents were not quickly forgotten in the North. When introducing what eventually became the Fourteenth Amendment to the Constitution, Congressman John Bingham gave the example of Hoar's expulsion from South Carolina as one reason why the amendment was needed.[154] The Fourteenth Amendment would in fact overrule the right of the states to ban the movement of citizens from other states, and thus apply a fundamental human right to the domestic international law of the United States. Even the post-Civil War court, which was consistently reluctant to interpret the Fourteenth Amendment to further civil rights—what can be called domestic human rights—accepted the idea that the New Amendment protected a right to travel. Thus, even while virtually destroying the Privileges and Immunities Clause of the Fourteenth Amendment in *The Slaughterhouse Cases*,[155] Justice Miller did admit that

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[151] *South Carolina on the Mission of Samuel Hoar: December 5, 1844*, *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 238 (Herman V. Ames ed., 1970).

[152] HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 576–86 (1872).

[153] *Report of the Committee on the State of the Republic, assented to Dec. 19, 1845*, ACTS OF GEORGIA 209–11 (1845).

[154] CONG. GLOBE, 39th Cong., 1st Sess. 157–58 (1866).

[155] 83 U.S. 36, 39–40 (1873).

one of the concrete privileges and immunities of federal citizenship was the right to travel from place to place. Before the Civil War the South denied this right to free blacks and, in the case of Hoar and Hubbard, also to whites who supported the rights for free blacks. However, despite the apparent constitutionalization of this right, the former slave states resisted a full application of the principle until the late 1960s.[156]

C. *Former Slaves Returning to the South After Sojourn or Emancipation in the North*

Initially most southern states accepted the concept articulated by *Somerset v. Stewart* that a slave voluntarily brought to a free jurisdiction became free. In his opinion in *Aves*, Chief Justice Shaw quoted a Louisiana case and a Kentucky case supporting this position.[157] Indicative of this early position was *Harry v. Decker & Hopkins*, where the Mississippi Supreme Court declared that courts should decide "in favour of liberty" when facing such questions.[158]

By and large the early southern cases dealing with slave transit were surprisingly non-racialized and also surprisingly respectful of the fundamental rights of free blacks. Southern jurists in Missouri,[159] Virginia,[160] Kentucky,[161] Louisiana,[162] and Mississippi,[163] applied the *Somerset* doctrine without much concern for race. These states accepted that slavery was protected by international law and certainly by the constitutions and laws of their own states. But they also accepted the idea that freedom was a fundamental human right, and that slavery,

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156 *See e.g.*, the Virginia laws and decisions at issue in *Loving v. Virginia*, 388 U.S. 1 (1967). Here the U.S. Supreme Court struck down Virginia's laws, and all other state laws which made it a crime for people of different races to marry. *Id*. Under these laws, people lawfully married in one state could not travel to other states where their interracial marriages were illegal. *See also* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY (2002) (giving a history of state laws, which make interracial marriage a crime).

157 *See also* Rankin v. Lydia, 9 Ky. (2 A.K. Marsh) 467 (1820) (being cited by Shaw); Lunsford v. Coquillon, 2 Mart (n.s.) 401 (La. 1824) (being cited by Shaw).

158 Harry v. Decker & Hopkins, 1 Miss. (1 Walker) 36 (1818).

159 Winny v. Whitesides, 1 Mo. 472 (1824). *See also* FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 217–28 (discussing the Missouri cases).

160 Betty v. Horton, 32 Va. (5 Leigh) 615 (1833); Hunter v. Fulcher, 28 Va. (1 Leigh) 172 (1829); Spotts v. Gillaspie, 27 Va. (6 Rand.) 566 (1828); Griffith v. Fanny, 21 Va. (Gilmer) 143 (1820).

161 *Rankin*, 9 Ky. (2 A.K. Marsh) 467; FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 190–205 (discussing the cases following and supporting *Rankin*).

162 *See Lunsford*, 2 Mart. (n.s.) 401; FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 206–16 (discussing *Lunsford* and other Louisiana cases).

163 *See* Harry, 1 Miss. (1 Walker) 36; FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 228–35 (discussing Mississippi cases).

while legitimate under international and domestic law, had to be supported by local positive law or treaty. Ironically, some of these early cases used race as a marker, not to protect slavery, but to protect freedom. Thus, while blackness created a presumption of slavery, a mixed blood heritage created a presumption of freedom.[164] In *Adelle v. Beauregard* the Louisiana Court upheld the freedom of a mulatto woman who had lived in New York. It is not clear if the court based its decision on her mixed-race heritage, her residence in New York, or a combination of the two, which together shifted to Beauregard the burden of proving that Adelle was a slave, rather than requiring Adelle to prove she was free.

D. Dred Scott v. Sandford

Throughout the 1830s and 1840s most southern states still followed the *Somerset* rule, although with increasing reluctance in Mississippi, Virginia, and a few other places.[165] Courts in Louisiana, Kentucky, and Missouri, however, continued to accept the idea that foreign law could free a slave, and once free, the slave was always free.[166] As late as 1850 an obscure slave named Dred Scott won his freedom from a St. Louis Circuit Court based on his previous residence in Illinois and at Fort Snelling, in present day Minnesota, which at the time was part of the Wisconsin Territory. This area had been made free by the Missouri Compromise of 1820.

Dred Scott's owner, Mrs. Irene Emerson, refused to accept the result in this case. She appealed to the Missouri Supreme Court, which set the stage for a reversal of southern jurisprudence on slave transit, and for federal intervention leading to a full racialization of domestic international law in the United States and a rejection of the human rights implications of *Somerset*.

In *Scott v. Emerson*[167] the Missouri Supreme Court reversed nearly thirty years of precedents, dating from the very beginning of the state, to hold that Dred Scott did not gain his freedom by living in free jurisdictions. The opinion of the court was fundamentally political, with Justice William Scott arguing that "[t]imes are not now as they were when the former decisions on this subject were made."[168] Justice Scott complained of a "dark and fell spirit" that had taken over the free states

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164 Adelle v. Beauregard, 1 Mart. (o.s.) 183 (La. 1810); Gobu v. Gobu, 1 N.C. (Tay.) 188 (1802); Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806).

165 FINKELMAN, AN IMPERFECT UNION, *supra* note 81, at 189.

166 *Id.* at 181–235.

167 Scott v. Emerson, 15 Mo. 576 (1852).

168 *Id.*

and led them to attack the institutions of the South.[169] Quoting Story's treatise on conflicts, he noted that "the comity of nations is derived altogether from the voluntary consent of the State by which it is shown, and is inadmissible when it is contrary to its known policy or prejudicial to its interests."[170] Emancipating slaves was "contrary" to the interests of Missouri, and the state supreme court would have no part of it.

While mostly an attack on the free states, the majority opinion also wandered into the realm of racial theory. Justice Scott denied that slavery harmed blacks, and in fact argued that slaves in America were better off than:

> the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered . . . we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, who makes the evil passions of men subservient to His own glory, a means of placing that unhappy race within the pale of civilized nations.[171]

If this was so, then it made no sense for Missouri to give force to either the laws of Illinois or of the United States that emancipated a slave. Blacks were better off as slaves, free blacks were a dangerous class of people, and slaves were a valuable form of property. Thus, Missouri rejected the notion that it should give any respect to law of the free states or of the national government that could make slaves free people.

The position of the Missouri Supreme Court raises, for the modern reader, a new and perverse sense of what "human rights law" can look like. The Missouri Court had accepted and adopted the proslavery theories of race and religion that had been growing since Thomas Jefferson published his *Notes on the State of Virginia in 1784*, arguing that blacks were mentally and morally inferior to whites.[172] In effect, the Court held that because blacks were naturally inferior to whites, and Africa was deeply uncivilized, there should be a different standard of human rights for blacks. It was not a violation of human rights to enslave blacks, but on the contrary human rights for blacks, according to the Missouri Court, *required* enslavement.

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169 *Id.*

170 *Id.*

171 *Id.*

172 For a brief introduction to this literature, and an easy access to Jefferson's racial views, see PAUL FINKELMAN, DEFENDING SLAVERY: PROSLAVERY IN THE OLD SOUTH (2003).

Two years after losing before the state supreme court, Dred Scott managed to bring his case into federal court. He lost at trial and took his case to the United States Supreme Court. After two sets of oral arguments, the Court finally decided the case in March 1857. Undoubtedly the most controversial case of the century,[173] the case did not fully settle the conflicts-of-law question raised by slave transit in free states. Relying on *Strader v. Graham*,[174] which the Court decided in 1850, the majority Justices easily reaffirmed that a slave state had the right to decide, for itself, if it would honor any slave's claim to freedom based on free state residence.

This resolved Scott's claim to freedom based on his earlier residence in Illinois. It did not, however, solve the problem of his residence at Fort Snelling in the federal territory made free by the Missouri Compromise. Missouri might choose to ignore Illinois law and declare that his residence in the state did not make him free. But the Missouri Compromise was a federal law, and under the Supremacy Clause of the Constitution[175] the Missouri judges were bound to enforce it. In his controversial opinion, Chief Justice Taney solved the problem by declaring the Missouri Compromise unconstitutional.

In addition to these two prongs of his holding, Taney held that blacks could never be citizens of the United States and that historically they "had no rights which the white man was bound to respect."[176] Taney long held this position. As attorney general in the 1830s, he argued that "[blacks] are not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term *citizens*."[177] Speaking for the Court, Taney stated the issue:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by

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173 *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); FINKELMAN, *DRED SCOTT V. SANDFORD*, *supra* note 110.

174 Strader v. Graham, 51 U.S. (10 How.) 82 (1850).

175 U.S. CONST., art. VI, § 2. The Supremacy Clause states: "This Constitution, and the Laws of the United which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." *Id*.

176 Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

177 Unpublished Opinion of Attorney General Taney, quoted in CARL BRENT SWISHER, ROGER B. TANEY 154 (1935).

> that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[178]

Taney knew that blacks voted in nearly half the states at the time of the adoption of the Constitution. And even though blacks lost political rights in a number of states, in some states they still were citizens with the same rights as white citizens. In some states blacks were attorneys and held public offices.[179] They could vote equally with whites in five states[180] and had limited voting rights in three others.[181] Still, Taney found a way around this evidence. He claimed that:

> [i]n discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State.[182]

Taney based this novel argument entirely on race using his slanted and one-sided history of the founding period. Ignoring the history of black voting, the Chief Justice nevertheless argued that at the founding of the nation, blacks were either all slaves or, if free, without any political or legal rights. He declared that blacks:

> are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time [1787] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet

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178 *Sandford*, 60 U.S. (10 How.) at 403.

179 Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161 (1994).

180 Maine, Vermont, New Hampshire, Rhode Island, and Massachusetts.

181 They had to meet a property requirement in New York; they could vote in school board elections in Michigan; in Ohio people of mixed ancestry who were more than half white could vote.

182 *Sandford*, 60 U.S. (10 How.) at 405.

> remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[183]

According to Taney, at the founding of the United States blacks were "so far inferior, that they had no rights which the white man was bound to respect."[184] Thus, he concluded that blacks could never be citizens of the United States, even if they were born in the country and considered to be citizens of the states in which they lived.

This racially based conclusion did not fully decide the conflicts-of-law issue since it did not prevent northern states from freeing visiting slaves. The decision did, however, guarantee freedom to the slave states to treat free blacks in whatever way they might wish. It constitutionalized the Missouri Court's view that human rights for blacks meant enslavement.

While Taney did not address the issue of slaves being brought to free states, Justice Samuel Nelson offered an ominous hint in his concurrence. Perhaps with the *Lemmon* case in mind, he wrote:

> A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.[185]

It takes little imagination to guess how the Court would decide such a case if it had come before it.

E. Mitchell v. Wells *and the Final Racialization of Antebellum Domestic International Law*

In 1846, Edward Wells, a Mississippi planter, took his slave Nancy to Ohio, where he formally manumitted her. This was more an act of love than charity. In addition to being his slave, Nancy was Wells' daughter.

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183 *Id.* at 404–05.
184 *Id.* at 407.
185 *Id.* at 468 (Nelson, J. concurring).

Wells also took Nancy's mother to Indiana, where he manumitted her and bought her land. In 1848 Wells died and bequeathed to his daughter three thousand dollars and two very personal items: his bed and his watch.

Nancy Wells spent the next decade attempting to recover her legacy. In the end she failed. In *Mitchell v. Wells*[186] Justice William Harris ruled that whatever her status was in Ohio, Wells would always be considered a slave in Mississippi. This was not a slave transit case in the normal sense. Nancy had not gained her freedom in Ohio through the application of the *Somerset* principle while her master traveled to that state. On the contrary, Edward Wells took Nancy to Ohio with the express plan of freeing her, and he did so according to all the rules and regulations of that state. Thus, the master's deliberate acts, not the intervention of a free state, led to Nancy's freedom. Nor did Nancy seek to assert her freedom in Mississippi. She had no interest in living in the state, and there is no indication that she ever physically returned to Mississippi after her father's death.

While not a transit case, this case was very much an example of American domestic international law. The issue was whether Mississippi would recognize Nancy's status in Ohio, solely for the purpose of inheriting her legacy. Since Mississippi had no rule that barred residents of other states from inheriting in Mississippi, there was no reason, it would seem, to deny Nancy her inheritance.

But, Justice Harris developed a reason. Nancy was born a slave, and was of African (and also of course white) ancestry. Race and the circumstances of her birth were the key to Nancy's status. She was born a slave in Mississippi and, under Harris's view, would always be one. Harris would not recognize Nancy's new status because "comity is subordinate to sovereignty, and cannot, therefore, contravene our public policy, or the rights, interests, or safety of our State or people."[187] In other words, Mississippi would flatly deny that another state could convey any rights on a Mississippi born slave. "[T]he status of a [Mississippi] slave," he asserted, "is fixed by our laws, and cannot be changed elsewhere, so as to give him a *new status in this State*, without our consent."[188]

This decision was surely the highpoint of proslavery legal theory. But, Harris's argument was fundamentally also about race and the emerging southern notion that human rights for blacks required slavery. Turning notions of comity inside out, Harris argued that Ohio violated

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186 Mitchell v. Wells, 37 Miss. 235 (1859).

187 *Id.* at 249.

188 *Id.* (emphasis added).

the unwritten rules of domestic interstate comity in the United States by "seek[ing] to introduce into the family of States, as equals or associates, a caste of [a] different color, and of acknowledged inferiority, who, though existing among us at the time of our compact of Union, were excluded from the sisterhood of common consent."[189] Harris argued that Ohio forced a breakdown in interstate comity by violating the rules of the United States as Harris understood them. Comity with Ohio was impossible because Ohio:

> forgetful of her constitutional obligations to the whole race, and afflicted with a *negro-mania*, which inclines her to descend, rather than elevate herself in the scale of humanity, chooses to take to her embrace, as citizens, the neglected race . . . incapable of the blessings of free government, and occupying, in the order of nature, an intermediate state between the irrational animal and the white man.[190]

In reality, blacks had virtually no political rights in Ohio[191] and were certainly not equal in the state. But, this reality, or any other, was no longer relevant to Harris. His goal was to use this case to reaffirm that Mississippi would never grant comity to any free state rule or decision that gave blacks any rights at all. He furthermore saw an opportunity to chastise the North for its opposition to slavery and its growing support of some rights for blacks. He considered it "disrespectful" to Mississippi and a "lawless interference" with Mississippi's rights[192] for Ohio to even allow a Mississippi master to free his slave. The mere suggestion that Mississippi should recognize the new status of Nancy Wells truly repulsed Harris:

> But when I am told that Ohio has not only the right thus to degrade and disgrace herself, and wrong us, but also, that she has the right to force her new associates

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189 *Id.* at 261.

190 *Id.* at 262–63 (emphasis added).

191 *See* Finkelman, *Not Only the Judges' Robes Were Black, supra* note 179, at 161–209 (discussing that where completely segregated schools existed, blacks were allowed to vote for members of their school boards and that Blacks in Ohio were not, at this time, prevented from holding office as evidenced by one black, John Langston, who had been elected to office in the hotbed of radical abolition, Oberlin, Ohio). At this time blacks could not serve on juries or in the militia, two key components of nineteenth century citizenship. On the history of black rights in Ohio, see Paul Finkelman, *Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE WESTERN RESERVE UNIV. L. REV. 373–408 (2004).

192 *Mitchell*, 37 Miss. at 263.

> into the Mississippi branch of the American family, to claim and exercise rights *here,* which our laws have always denied to this inferior race, and that Mississippi is bound to yield obedience to such demand, I am at loss to understand upon what *principles* of law or reason, of courtesy or justice, such a claim can be founded.[193]

Harris concluded his attack on Ohio with an analogy that showed why race, more than slavery or economics, was at the center of the breakdown on American domestic international law:

> Suppose that Ohio, still further afflicted with her peculiar philanthropy, should determine to descend another grade in the scale of her peculiar humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that "comity" will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions in the scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy?[194]

Justice Alexander Handy dissented from this opinion, and argued that as long as Nancy Wells never returned to Mississippi, she could inherit her legacy as a free person in Ohio. Handy was not, however, "soft" on black rights. He declared that "negro emancipation" anywhere was "an evil,"[195] but he was willing to recognize that Ohio had the right to subject itself to this "evil," and thus confer the status of a free person on anyone. He would grant comity to Ohio, not because he liked what Ohio did, but rather out of "respect to the nation of which the person, whose individual right is involved, is a member."[196] To do otherwise, would degrade the jurisprudence of Mississippi. If Ohio persisted in opposing the enforcement of the fugitive slave laws and in other antislavery policies, Handy had an alternative to the denial of comity:

> Whilst the confederacy continues, we cannot justify ourselves as a State in violating its spirit and principles, because other States have, in some respects, been false to

193 *Id.* at 263–64 (emphasis added).
194 *Id.* at 264.
195 *Id.* at 279.
196 *Id.* at 282.

> their duties and obligations. It may justify us in dissolving the compact, but not in violating our obligations under it whilst it continues.[197]

In Handy's view, secession, not a denial of comity, was the proper answer to Ohio's "negro-mania." Within two years Mississippi would take that route. When foreign nations cannot get along, within the context of international law, the resort is often to war. The war that followed Mississippi's secession indicates how profoundly antebellum American domestic international law was very much like the international law that existed between separate nations.

VII. CONCLUSION

The Civil War and the Constitutional Amendments that followed it fundamentally reordered American federalism. The process served to finally settle certain issues in favor of racial fairness. Settlement, however, did not take root quickly. More than a century after the Civil War ended, notions of race and denials of comity still affected interstate movement of citizens.

From the end of Reconstruction until the middle third of the twentieth century, the problem of interracial marriage affected American domestic international law and the application of fundamental notions of human rights to American society. It was a problem deeply connected to the social construction of race and the politics of racial intolerance. For the South, interracial marriage raised a problem similar to that of slavery in the North. Northerners found slavery immoral, beyond the pale of legal protection, and a direct threat to their free society. Similarly, many southern whites in the period between 1870 to 1960 found interracial marriage equally repugnant and dangerous to the well-being of their segregated society.[198] Before *Loving v. Virginia*[199] in 1967, the interstate recognition of interracial marriages was an issue of domestic conflicts-of-law.[200] The state prosecuted Richard and Mildred Loving because the

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197 *Id.* at 286.

198 *See* WALLENSTEIN, TELL THE COURT I LOVE MY WIFE, *supra* note 156.

199 388 U.S. 1 (1967).

200 On *Loving* and similar cases, see WALLENSTEIN, TELL THE COURT I LOVE MY WIFE, *supra* note 156; Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After Civil War*, 70 CHI.-KENT L. REV. 873 (1995); Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s–1960s*, 32 AKRON L. REV. 557 (1999) [hereinafter *Boundaries*]; Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371 (1994).

state of Virginia refused to recognize their marriage, which had legally been performed in another jurisdiction, Washington, D.C. Virginia based its refusal on race. The Lovings were not the first to be prosecuted in Virginia for this race-based crime. In 1878, in *Kinney v. Commonwealth*,[201] the Virginia Court of Appeals upheld the conviction of Andrew Kinney, an African-American, for "lewdly associating and cohabitating"[202] with Mahala Miller, a white woman he had married in Washington, D.C. Virginia did not limit its obsession with race, and racial "purity" to African-Americans. Similarly, in 1955 in *Naim v. Naim*,[203] Virginia's highest court ruled that a marriage between a man of Chinese ancestry who married a white woman in North Carolina was illegal in Virginia.[204] In 1962, the same court denied a divorce to a white woman who married a Filipino in New Jersey.[205] The Virginia court held the marriage was invalid in the first place and, thus, no divorce was possible.

All of these cases illustrate the problem of domestic international law and the U.S. Constitution's requirement that the states give "Full Faith and Credit" to the "public Acts, Records, and judicial Proceedings of every other State."[206] Because all of these marriages were valid in the jurisdictions in which they were performed, Virginia's laws appear to have violated both the letter and spirit of the Constitution.[207] These issues are of course also tied to human rights. In *Loving*, the Court accepted the idea that marriage is a fundamental right. It is also a fundamental human right. Even without knowing it, the *Loving* Court was applying concepts of basic human rights through the equal protection clause of the Fourteenth Amendment. In *Lawrence v. Texas*[208] the Court held the government may not "demean" the "existence or control" the "destiny" of gay couples by "making their private sexual conduct a crime."[209] This certainly speaks to issues of "human rights" in our domestic law. In the aftermath of *Loving* and the Civil Rights Revolution of the 1960s, the relationship between race and American domestic international law has been less important, but it has hardly disappeared. On the other hand, issues of gender, sexuality, and

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201 71 Va. (30 Gratt.) 858 (1878).

202 *Id.* at 858–59.

203 87 S.E.2d 749 (Va. 1955).

204 Wallenstein, *Boundaries*, *supra* note 200, at 573.

205 Calma v. Calma, 128 S.E.2d 440 (Va. 1962).

206 U.S. CONST. art. IV, § 1.

207 Under this theory the "Defense of Marriage Act," is also unconstitutional. See *supra* note 45 discussing the "Defense of Marriage Act."

208 539 U.S. 558 (2003).

209 *Id.* at 578.

marriage are remaking our international domestic law. Nevertheless, new connections between race and human rights emerge. The most recent Supreme Court case involving interstate movement focused on the rights of new migrants to receive public assistance.[210] The Supreme Court struck down a California welfare regulation, requiring differential payments for people who recently moved into the state. Part of the rationale for this decision was the concept, now deeply ingrained in American law, that, at a minimum, the Privileges and Immunities Clause of the United States Constitution guarantees the right of people to travel and move from state to state. This makes good sense, since the framers of the 14th Amendment had seen the pernicious influence of the black seamen's laws on interstate relations and the rights of both black and white Americans. Perhaps this is a signal that American constitutional law, domestic international law, and human rights law will move away from using race as a criterion for determining status. However, as long as police departments continue to use a combination of race and out-of-state license plates in the profile stops,[211] we can only wonder if America's third full century will be able to shed the legacy of the first two. Similarly, race is clearly a factor in sentencing and convictions for capital cases, even if the Supreme Court refuses to take notice of it.[212] Similarly immigrant status has become an issue as aliens face special hurdles in capital cases.[213] Recent legislation in Arizona authorizing the police to stop people who "look like" illegal aliens will only raise the potential for harassment and denial of basic rights, due to racial stereotyping.[214] Thus, it seems likely that issues of international human rights, race, American domestic law, and America's domestic international law will continue for the foreseeable future.

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210 Saenz v. Roe, 526 U.S. 489 (1999).

211 Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993).

212 *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (citing David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661–753 (1983)).

213 In *Guerra v. Collins* the court granted a habeas corpus petition and set aside a conviction because of prosecutorial misconduct that included instructing jurors they could consider the defendant's status as an illegal immigrant during sentencing. 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd*, 90 F.3d 1075 (5th Cir. 1996). In *Saldano v. Cockrell* the court granted habeas corpus because of constitutional error where testimony and argument at trial invited the jury to determine whether the inmate would receive the death penalty based in part on his race and ethnicity. 267 F. Supp. 2d 635 (E.D. Tex. 2003), *aff'd in part and appeal dismissed in part*, Saldano v. Roach, 363 F.3d 545 (5th Cir. 2004).

214 S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010).