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## Slavery in the United States

### *Persons or Property?*

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The American Constitution does not mention slavery until 1865, with the adoption of the Thirteenth Amendment, which abolished the institution. Yet the Constitution, written in 1787, is riddled with provisions tied to slavery which protected it without naming it. The goal of this chapter is relatively modest: to examine how the US Constitution and the Supreme Court ‘understood’ what slavery was and how the Court defined it. I begin by exploring how seventeenth-century Englishmen in colonial Virginia developed a legal system to accommodate and perpetuate slavery within a common law regime that was essentially hostile to human bondage. The colonial lawmakers had to develop rules to balance the tension between treating Africans and others as persons held to labor and as property owned by other people. This colonial background sets the stage for understanding how the framers at the Constitutional Convention in 1787 protected slavery in law. Next, I examine how the US Supreme Court came to define slavery through its jurisprudence. A constant theme of this discussion is how the legal system balanced the dual status of slaves as ‘people’ and as ‘property’.

### A. Slavery, the Common Law, and Colonial America

The Spanish and the Portuguese, who first settled the New World, had well developed slave cultures at the time of the first voyage of Columbus in 1492. Not surprisingly they brought concepts of slavery with them and quickly established the institution.<sup>1</sup> Ironically, the first trans-Atlantic slave trade went from west to east, when Christopher Columbus sent 500 Carib Indians to Spain in 1495.<sup>2</sup>

<sup>1</sup> They did not of course *introduce* slavery to the New World. Slavery could be found throughout Central and South America, and flourished among the Maya, Inca, and Aztec. In addition, various North American Indians held slaves, and some, like the Tlingit, were vigorous in capturing slaves from other nations. See entries on Maya, Aztec, Inca, and other native peoples in Paul Finkelman and Joseph C. Miller (eds), *The Macmillan Encyclopedia of World Slavery* (Macmillan 1998).

<sup>2</sup> William D. Phillips, Jr., ‘Columbus, Christopher’ in *ibid*, vol 1, 206.

Spaniards already held Turks, Arabs, Africans, and others as slaves, and would initially enslave Indians in the New World. When the Indians died off in large numbers due to disease, overwork, and brutality, the Spanish brought Africans into their new colonies.

In addition to experience with slaveholding, the Spanish and Portuguese legal culture, based on Roman law, allowed for the quick creation of not only slaveholding, but of a system of slavery.<sup>3</sup> Roman law defined slavery as ‘an institution of the law of nations by which . . . a person is subjected to the dominion of another’.<sup>4</sup> According to Justinian, ‘the principal distinction in the law of persons is that all men are either free or slaves—there is no third, intermediate, category in Roman law’.<sup>5</sup>

At the beginning of the sixteenth century, slavery as an institution did not exist in France,<sup>6</sup> and there was a long tradition of emancipating slaves who entered the country.<sup>7</sup> But, at the same time, there had always been some slaves in France and France’s legal culture provided some institutional support for slavery. France did not wholly adopt Roman law, but French lawyers and judges regularly turned to Roman law. France’s code-based system of law also meant that legal change could be quickly accomplished. Concepts of slavery in Roman and Canon law meant that the legal principles on which slavery was based were not entirely foreign to France. Thus it was possible for French settlers to establish slavery in the early seventeenth-century Caribbean, and for the government in Paris to regulate slavery in the colonies with the introduction of the *Code Noir* in 1685. Indeed, the *Code Noir* was created at the behest of the King, which illustrates how easily France accepted slavery as a legal concept.<sup>8</sup> In 1716 French legislation explicitly allowed masters to bring slaves to France, under some limited circumstances, even as it also provided for the freedom of slaves brought to the metropolis contrary to the law.<sup>9</sup> These laws illustrate how smoothly France, a nation which prided itself on not having slaves, adapted to slavery. Its Roman, Civil, and Canon law traditions made these legal developments possible.<sup>10</sup> Other Continental powers—the Dutch, Swedes, and Danes—were likewise able to draw on Roman law traditions to establish slavery in their New World colonies, even though there was no slavery in the metropolis.

Unlike other New World settlers, the English had neither a law of slavery nor a tradition of slavery. The English, who arrived in Jamestown in 1607, came from a place where the legal institution of slavery was a relic of the past.<sup>11</sup> Moreover, when

<sup>3</sup> Alan Watson, *Roman Slave Law* (Johns Hopkins University Press 1987).

<sup>4</sup> *Ibid* 7 (quoting *Justinian*).

<sup>5</sup> *Ibid* 7.

<sup>6</sup> Alan Watson, *Slave Law in the Americas* (University of Georgia Press 1989) 83.

<sup>7</sup> On slavery in France, see Sue Peabody, ‘There are No Slaves in France’: *The Political Culture of Race and Slavery in the Ancien Régime* (Oxford University Press 1996) 11–24.

<sup>8</sup> Vernon Valentine Palmer, ‘The Origins and Authors of the Code Noir’ (1995) 53 *Louisiana Law Review* 363. See also Watson (n 6) 84–87.

<sup>9</sup> Peabody (n 7) 11–24.

<sup>10</sup> Watson (n 3).

<sup>11</sup> There had been serfdom and villeinage, but these had disappeared by the end of the fifteenth century. Also see Ch 2 of this volume.

the English came to Virginia they saw themselves as potential liberators of the Indians and slaves, who were under the domination of the Spanish.<sup>12</sup> Thus slavery, as a system of property ownership or labor exploitation, was truly foreign to England. The English had nothing in their legal structure that recognized slavery or property in human beings. Eventually England would make huge profits from the African trade and its sugar colonies; members of the royal family would be among the first to invest their private money in the Royal Africa Company, thus profiting from the slave trade to the Americas. But in England slavery was never legal. Neither the monarchy nor Parliament would ever attempt to authorize the writing of a slave code for the colonies, as Louis XIV had with the *Code Noir* of 1685. Parliament would never pass a law, as France did in 1716, to specifically allow masters to bring slaves to the metropolis. However, the British courts did recognize the status of slaves in the colonies and use common law and commercial law concepts to enforce sales contracts or marine insurance policies involving the buying, selling, and shipment of African slaves. But at no time would Parliament, the Crown, or the courts ever create laws or precedents to allow slavery in the metropolis or to govern slavery in the colonies. Slavery in the British Empire would be governed by local laws, haphazardly passed by colonial legislatures or developed by colonial courts responding to specific events and cases. This would lead to a complicated legal structure for slavery in the colonies and later in an independent United States of America.

In 1619, in what would later become part of the United States, Dutch traders sold about twenty Africans to Virginia authorities. At the time this was England's only New World colony. Virginia was the first British mainland colony to establish slavery, and the rules developed there eventually spread to the other mainland colonies. Virginia would become the largest British colony and the most important of the thirteen that would eventually come to form the United States. From the seventeenth century until the United States Civil War, Virginia continued to maintain the largest slave population on the North American continent.

The first Africans in Virginia were treated as indentured servants, held for a term of years, and then eligible for freedom. 'Antonio a Negro' came to Virginia in 1621, and was listed as a servant. He later became free, changed his name to Anthony Johnson, and ultimately accumulated land, held whites as indentured servants, and would later own a black slave.<sup>13</sup> The earliest legal records of Virginia illustrate a confusing process. Some Africans were held in lifetime servitude; others were free. In 1640, John Punch was famously sentenced to a lifetime servitude for running away while the same year, less famously, another African received no additional

<sup>12</sup> See generally, Edmund Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (W.W. Norton 1975) 3–43.

<sup>13</sup> T.H. Breen and Stephen Innes, *Myne Owne Ground: Race & Freedom on Virginia's Shore, 1640–1676* (Oxford University Press 1980). Breen and Innes assert that in 1625 he was a 'slave' (pp 9 and 116), but this seems unlikely simply because there is no evidence of slavery being practiced in Virginia at this time and his subsequent freedom suggests this as well.

service for running away.<sup>14</sup> By contrast, no European was ever sentenced to lifetime servitude for running away. Punch's case indicates that by 1640 the leaders of Virginia viewed Africans as 'enslaveable', and were gradually and inconsistently imposing that status upon them. This process was slow, until the legislature began to codify slavery and give masters security in their ownership of slaves. A decision a year after John Punch was sentenced to lifetime servitude illustrates the haphazard nature of slavery at this time. In 1641, the general court allowed John Graweere 'a negro servant unto William Evans to purchase the freedom of his son who was born to a black woman belonging to Lieut. Robert Sheppard', another planter. Whether Graweere was a slave or an indentured servant is unclear, as is the status of the woman who bore his child. But the status of the child was unambiguous. After Graweere 'did for his said child purchase its freedom' the court ordered that 'the child shall be free'.<sup>15</sup>

The uncertain status of Africans in early Virginia continued into the 1670s. Thus, in 1672, the Virginia General Court determined that 'Edward Mazingo, a Negro man, had been and was an apprentice by Indenture' had served out his indenture, and thus the Court ordered 'the said Edw: *Mozingo* be and Remyne free to all Intents and purposes'.<sup>16</sup> A year later, the Court ruled that 'Andrew Moore A Servant Negro' had served out his indenture and would henceforth 'bee free from his said master', and that his master had to give him freedom dues of 'Corne and clothes According to the Custom of the Country and four hundred Pounds' of tobacco.<sup>17</sup> These, and other scattered court records, illustrate that the status of Africans was uncertain in early British Virginia. The rules were unclear and there was no certain definition of who was a slave.

In the 1640s—before slavery had emerged as an institution in Virginia—the colonial legislature, the House of Burgesses, tackled complex questions of servitude and status. The House of Burgesses was elected by the landowners and dominated by the emerging planter class. Their legislation reflected their class interest in controlling the colony's laborers, white and black. From the 1640s through the 1680s, the Burgesses struggled to secure their growing investment in Africans, but at no time was the legislature able to create a certain and clear definition of slaves.

The Militia Act of 1639–40, recognized the colony's growing African population, but did not treat them as slaves. This Act required that all white males, including servants, be provided with arms for militia service. However, the law exempted 'negroes' from this mandatory rule.<sup>18</sup> The law did not preclude arming blacks to help defend against Indian attacks, but simply did not require it. This law may have reflected the fear of arming Africans, who were in Virginia against their

<sup>14</sup> H.R. McIlwaine (ed) *Minutes of the Council and General Court of Colonial Virginia, 1622–1632, 1670–1676, Notes and Excerpts from Original Council and General Court Records, into 1683, Now Lost*, 2nd edn (Virginia State Library 1979) 466 (entry for June 4, 1640) and 467 (entry for July 22, 1640).

<sup>15</sup> McIlwaine (ed) *Minutes of the Council*, 477 (entry for March 31, 1641).

<sup>16</sup> *Ibid* 316 (entry of October 5, 1672).

<sup>17</sup> *Moore v Light*, *ibid* 354 (entry of October 27, 1673).

<sup>18</sup> 'Act for Arming of Persons' Act X January, 1639–40, 1 Hening 226.

will, and presumptively hostile to those who controlled their labor. Three years later the Burgesses adopted legislation to treat African females as tithables, just as European and African men were treated. Tithes were taxes levied on people—not property—who contributed to the economy. European women had not been tithables because the law presumed they worked inside the home and were not producing wealth. This law by contrast assumed that African women worked in the fields, alongside men of various races, and thus were tithables. This may have been an example of race discrimination, but more likely it was simply recognition that African females were usually used as agricultural workers, just as men were, and should be taxed accordingly.<sup>19</sup> This analysis is supported by subsequent legislation, twenty years later, taxing white women servants at the same rate as male servants and black female servants, if their ‘common employment is working in the crop’.<sup>20</sup> Significantly, the law taxing African women as well as African men did not see Africans as ‘property’, but rather as members of the community, just like white men of all classes, including both Burgesses and indentured servants.

A 1657 statute regulating runaways also illustrates the lack of any formal recognition of slavery before the 1660s.<sup>21</sup> This law punished runaway servants, who were overwhelmingly European at this time, by extending their service and branding them. However, these statutes did not provide any particular rule for slaves. In the same legislative session the Burgesses regularized the length of service for servants ‘brought into this collonie without indentures or covenants to testifie their agreements’. The law provided that anyone under sixteen years of age would serve until age twenty-one, and anyone sixteen and older would serve for just four years.<sup>22</sup> This would have applied to almost all Africans brought into the colony, as well as many Europeans. The Burgesses clearly did not anticipate that they would soon be treating Africans as lifetime slaves, rather than short-term servants.

In 1659–60, a Virginia law recognized slavery for the first time, although without defining it. The law provided ‘That if the said Dutch or other foreigners shall import any negro slaves, They the said Dutch or others shall, for the tobacco really produced by the sale of the said negro, pay only the impost of two shillings per hogshhead, the like being paid by our owne nation’.<sup>23</sup> By this time slaves were seen as commodities being imported into the colony. This was the first clear statement that Africans in new British colonies were considered ‘things’ or property, rather than persons.

But of course, Africans were persons, many of whom resisted their New World bondage. Most commonly they ran away. This created a new problem. The standard punishment for runaway servants, as set out in the 1657 statute mentioned above, was whipping (and sometimes branding) followed by additional

<sup>19</sup> ‘Act Concerning Church Government’ Act I March, 1642–43, 1 Hening 240, 242.

<sup>20</sup> ‘Women Servants Whose Common Employment is Working the Ground to be Accompted as Tythable’ Act XIII, December 1662, 2 Hening 170.

<sup>21</sup> ‘Against Runaway Servants’ Act XVI, March, 1657–58, 1 Hening 440.

<sup>22</sup> ‘How long Servants without Indentures shall Serve’ Act XVIII, 1 Hening 441–42.

<sup>23</sup> ‘An Act for the Dutch and all other Strangers for Tradeing to this Place’ Act XVI, March, 1659–60, 1 Hening 540.

time of service beyond their indenture. But a slave could never have additional service added to his bondage; thus, in 1661, the Burgesses passed its first police regulation of slaves, dealing with the problems of European indentured servants escaping with slaves. To discourage such interracial challenges to the regime, the law provided that Europeans would have to serve extra time for any slaves who ran away with them. The new law declared:

in case any English servant shall run away in company of any negroes who are incapable of making satisfaction by addition of a time, *it is enacted* that the English soe running away in the company with them shall at the time of service to their owne masters expired, serve the masters of the said negroes for their absence soe long as they should have done by this act if they had not beene slaves, every christian in company serving his proportion; and if the negroes be lost or dye in such time of their being run away, the christian servants in company with them shall by proportion among them, either pay [four] thousand five hundred pounds of tobacco and caske or [four] yeares service for every negroe soe lost or dead.<sup>24</sup>

This law not only provided compensation for masters whose slaves ran away with whites, but also drove a wedge between African slaves and European servants.<sup>25</sup> The colonial legislators hoped this law would discourage interracial cooperation and lead to fewer escapes.<sup>26</sup>

The law helped divide European servants and African slaves, strengthened planter power, and more firmly attached the chains of lifetime bondage to Africans in the emerging system of slavery. The law also unambiguously acknowledged and affirmed that some ‘negroes’ in Virginia were ‘incapable of making satisfaction by addition of time’ because they were slaves. But, despite this explicit acknowledgement of slavery in the colony, the law did not help define who could be a slave. In fact, the language of the statute confused the issue.

The law initially referred to any ‘English servant’ who might escape with ‘any negroes’ who were incapable of having time added to their servitude. This language implied that some Africans had this status, but that others did not have such a status. All Africans in the colony were clearly not slaves. While being a ‘negro’ was clearly a marker of being a slave, all ‘negroes’ were not slaves. The use of the term ‘English’ was also unclear, since at the time there were white indentured servants who were Irish, Scottish, Dutch, and probably other nationalities as well.<sup>27</sup> But the legislation surely applied to them. Further confusion comes from the use of the

<sup>24</sup> ‘Run-aways’, Act CII, March, 1661–62, 2 Hening 116–17.

<sup>25</sup> On black–white relations in this period see Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (W.W. Norton 1975). There is not a great deal of literature on runaways in the seventeenth century, but on the eighteenth century see Gerald W. Mullin, *Flight and Rebellion: Slave Resistance in Eighteenth Century Virginia* (Oxford University Press 1972).

<sup>26</sup> Mullin, *ibid.*, notes that in the eighteenth century, English-speaking, American-born slaves were more likely to successfully escape than native Africans.

<sup>27</sup> For example, the African John Punch escaped with ‘Victor, a dutchman, the other a Scotchman called James Gregory’. See *In re John Punch*, McIlwaine 466 (9 July 1640). Similarly, ‘Emanuel the Negro’ ran away with ‘Christopher Miller a dutchman (a prince agent in the business)’ and ‘John Williams a dutchman and a Chirurgeon’ as well as four men who were not identified by their ethnicity and were presumably English. *In re Emanuel*, McIlwaine 467 (22 July 1640).

term ‘christian’, providing that if a slave ran away with other servants ‘every christian in company’ would serve extra time for the loss of the slave’s time. This may have implied that Christians could not be slaves, and thus conversion might emancipate a slave. Or it may have implied that the non-Christian status of Africans justified their enslavement. It would take a few years for the Burgesses to clarify this.<sup>28</sup>

Before the Burgesses could deal with how religion helped define slavery, the Virginia legislators faced a more pressing problem: how to classify the offspring of white men and African women. Under English common law a child, even one born out of wedlock, followed the status of the father. If this rule applied in the children of slaves, then the mixed-race children of slave women would be born as free people. This would lead to the situation of slave mothers raising their free-born children, while also creating a class of free mixed-race people. The leadership in Virginia was troubled by both of these possibilities. In addition, since these slave women would not have been legally married to the fathers of their children, their mixed-race children would have been legally bastards. Under existing law, the Overseers of the Poor were obligated to help raise and educate all illegitimate children. Furthermore, authorities were obligated to track down the fathers of all bastard children, to make sure they supported them. Applying these rules to the mixed-race children of slave women would lead to huge social problems, as masters—and leaders of the community—might be prosecuted for illicit (and sometimes adulterous) sex with their own slaves.

On the other hand, if the colony abandoned the common law, and instead adopted the Roman law rule of *partus sequitur ventrem*, these problems would disappear. This was the legal rule applied to livestock and other domestic animals: that the offspring of a domestic animal belonged to the owner of the female who gave birth.<sup>29</sup> Treating slave women as property and reducing their status to that of domestic animals resolved some tough legal issues, and at the same time had the added virtue—if the word applies here—of benefiting white men, who could now freely prey on slave women without fear of legal consequences. Any children resulting from such encounters would be slaves, belonging to the owner of the mother. Thus, the local authorities do not need to institute bastardy proceedings against the father because society would not be required to maintain or support the illegitimate child. Maintenance would be the responsibility of the owner of the mother, who would benefit from the birth of a new slave. When subsequent statutes prohibited blacks from testifying against whites, the entire issue was taken out of the legal culture—there could never be bastardy proceedings or any rape

<sup>28</sup> ‘An act declaring that baptisme of slaves doth not exempt them from bondage’, Act II September, 1667, 2 Hening 260.

<sup>29</sup> ‘Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that *partus sequitur ventrem*’ in the brute creation, though for the most part in the human species it disallows that maxim’. William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1766) 2:390. This rule, according to Coke, did not apply to swans because they were royal animals.

prosecutions involving slave women because they could never be a complaining witness. There would only be more slaves, albeit mulatto slaves.

In a society with a huge gender imbalance, with far more men than women, this law was a great benefit to white men. Thus, in 1662 the white men in the House of Burgesses wrote a statute with far reaching implications: ‘WHEREAS *some doubts have arisen whether children got by Englishmen upon a negro woman should be slave or free [sic], Be it therefore enacted . . .* that all children borne in this country shall be held bond or free only according to the condition of the mother . . .’<sup>30</sup> This law left slave women vulnerable to all white men, because the law simply would not take notice of sexual activity that resulted in mixed-race children of slave women. Masters had free sexual access to their slaves without legal sanction. Non-slaveowners could, in theory, face a trespass suit from a master of a slave woman for having sex with her, but no such lawsuits appear to have been filed. This law helped define slaves, by denying a slave woman the right to control her body or have any control over her children. (Slave fathers similarly had no control over their children.) The law also led to a particularly disgraceful aspect of American slavery which would continue until final abolition: masters would be the owners of their own children fathered with slave women and would treat them as property, to be bought, sold, used as collateral, and gifted. This law reduced the children of all slave women to property and, perversely, led generations of white southern men to treat their own children as property.<sup>31</sup>

Five years after dealing with the status of the children of slave mothers, the Burgesses returned to the issue of slavery and religion. From the first arrival of Africans, Virginians had been troubled by the interrelationship of religion, race, ethnicity, and status. Early statutes often made a distinction between Africans or Negroes and ‘christians’. One early justification for enslavement was that Africans were not Christians. But, at the same time, another justification for the African slave trade was that it brought Christianity to Africans. Tied to this was a belief, among some Europeans, that it was wrong to enslave fellow Christians, and that conversion should lead to emancipation. Some slaves apparently gained their freedom through conversion. However, in 1667 the Burgesses devised a solution to this dilemma with the following statute:

WHEREAS some doubts have arisen whether children that are slaves by birth, and by the charity and piety of their owners made partakers of the blessed sacrament of baptism, should by virtue of their baptism be made free; *It is enacted . . .* that the conferring of baptism doth not alter the condition of the person as to his bondage or freedom; that diverse masters, freed from this doubt, may more carefully endeavour the propagation of christianity by permitting . . . slaves . . . to be admitted to that sacrament.<sup>32</sup>

<sup>30</sup> ‘Negro womens children to serve according to the condition of the mother’, Act XII, December 1662, 2 Hening 170. Emphasis in the original.

<sup>31</sup> For a discussion of this problem when masters recognized their paternity, see Bernie D. Jones, *Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South* (University of Georgia Press 2009).

<sup>32</sup> ‘An act declaring that baptism of slaves doth not exempt them from bondage’, Act II September, 1667, 2 Hening 260.



Unlike the legislation on the status of the children of slave women, this law recognized the fundamental humanity of slaves, acknowledging they had souls which required attention. However, in the long term, conversion would help fasten the chains of bondage onto slaves, as generations of ministers taught slaves that obedience to their masters was the equivalent of obedience to God, and that the key to heaven began with proper deference to their earthly status. After the American Revolution (1775–83) southern ministers would also defend slavery on the grounds that it was sanctioned by the Bible.<sup>33</sup>

In two subsequent statutes the Burgesses turned once more to religion, using it to explicitly justify slavery and to help define who might be enslaved. An act of 1670 declared that ‘all servants not being christians imported into this country by shipping shalbe [*sic*] slaves for their lives’. However, those who came by land would serve to age thirty if they came as ‘boyes or girles’ and for twelve years if they came as adults.<sup>34</sup> Presumably, Native Americans came to Virginia by land, while Africans would come by sea. But, the mode of transportation was hardly a key to social status, especially as slavery became rooted in the neighboring colonies of Maryland and then South Carolina, thus opening the possibility that Africans would enter Virginia by land. A 1682 law clarified these issues. Once again relying on religion and nativity to define slavery, the Burgesses declared that ‘all servants . . . whether Negroes, Moors, Mollattoes or Indians, who and whose parentage and native country are not Christian at the time of their first purchase of such servant by some Christian . . . to be slaves’.<sup>35</sup> Henceforth, any non-European who came from a non-Christian land, whether by land or sea, was to be a slave. But, under this law blacks coming from other New World colonies—even if born in those colonies—might be considered slaves because their ‘parentage’ or ancestry would also have been African and thus non-Christian. Subsequent conversion, as set out in the law of 1667, would not change this. The law applied to mixed-race people (‘Mollattoes’ in the statute), even though half their parentage presumably came from white people who were from Christian countries. But this inconsistency did not apparently trouble the Virginia lawmakers.

The 1670 law, combined with the rule that the children of slave mothers were slaves from birth, created a definable attribution to slavery. Any African brought to Virginia was presumptively a slave, even if baptized, because that person would have come from a non-Christian country. That would also apply to blacks born in Christian colonies in the New World because their ‘parentage’ was African. Whether the law treated them as people or property—or a mixture of both—was unsettled, but their status as slaves was now clear.

A final aspect of the definition of slavery and the status of slaves as people or property concerned slave resistance, rebellions, and punishment. An act of 1669

<sup>33</sup> Examples of religious defenses of slavery are found in Paul Finkelman, *Defending Slavery: Proslavery Thought in the Old South* (Bedford Books 2003), 96–128.

<sup>34</sup> ‘What tyme Indians to serve’, Act XII, October 1670, 2 Hening 283.

<sup>35</sup> ‘An act to reapele former law making Indians and others ffree’, Act I, November 1662, 2 Hening 490–92.

provided that a master would not be prosecuted if a slave died from punishment. The statute articulated an economic rationale: ‘it cannot be presumed that pre-pensed malice . . . should induce any man to destroy his own estate’.<sup>36</sup> This rationale was of course faulty, since we know that some slave masters killed slaves for pleasure, out of anger, or when drunk.<sup>37</sup> More importantly, the act ignored the possibility that a master’s callous and reckless disregard for the life of a slave could be punished by a charge other than premeditated murder. This statute treated the slave as property—a commodity—and not a person. British common law protected the life of all persons, but under this law the life of a slave was not protected from the whims or anger of the master.

A law of 1680 further limited common law protections for the person of a slave. ‘An act for preventing Negro Insurrections’ made it legal to kill any slaves who escaped from their masters and ‘lye hid and lurking in obscure places’.<sup>38</sup> A decade later the legislature authorized local justices of the peace to order sheriffs to ‘kill and destroy . . . by gunn or any otherwise whatsoever’ any ‘negroes, mulattoes, and other slaves unlawfully absent[ing] themselves from their masters and mistresses service’ who ‘lie hid and lurk in obscure places’.<sup>39</sup> These laws effectively reduced slaves to the legal status of wild beasts, to be ‘destroy[ed]’ by public authorities without any trial or hearing. Slaves were property, except when they might ‘lie hid and lurk’ and then they were reduced to the legal status of wild creatures. With these two statutes Virginia had adopted one of the central aspects of the Roman law of slavery—that it was not a criminal act to kill a slave.<sup>40</sup>

The statutes of the 1660s were the closest colonial Virginians ever came to actually defining slavery. However, the definition was limited and incomplete. Africans sold by the Dutch were slaves, unless they came into Virginia as indentured servants. The children of slave women would be slaves. Slaves who converted to Christianity remained slaves. Blacks (or their descendants) imported from Africa

<sup>36</sup> ‘An act about the casuall killing of slaves’, Act I, October 1669, 1 Hening 270. This was a variation of the Biblical rule ‘And if a man smite his servant, or his maid, with a rod, and he die under his hand; he shall be surely punished. Notwithstanding, if he continue a day or two, he shall not be punished: for he is his money’. Exodus, 20:21–22 (King James Translation). However, the Biblical rule would have punished a master whose punished slave did not linger and the Virginia law did not. Nor, of course, did Virginia or any other slave jurisdiction follow the Biblical rule on maiming a slave. ‘And if a man smite the eye of his servant, or the eye of his maid, that it perish; he shall let him go free for his eye’s sake. And if he smite out his manservant’s tooth, or his maidservant’s tooth; he shall let him go free for his tooth’s sake’. Exodus, 20:26–27.

<sup>37</sup> Examples from two hundred years later demonstrated this: *State v Hoover*, 4 Dev. and Bat. (NC) 365 (1839) (master executed after torturing his slave to death over a number of months); *Souther v Commonwealth*, 7 Gratt. (Va.) 672 (1851) (master sentenced to the penitentiary for second degree murder after torturing his slave to death); and Boynton Merrill, *Jefferson’s Nephews: A Frontier Tragedy* (University of Nebraska Press 2004) (describing how in 1811 Lilburne and Lewis Isham, the nephews of Thomas Jefferson, murdered a young slave boy by dismembering him with an axe).

<sup>38</sup> Act X, June 1680, 2 Hening 481.

<sup>39</sup> ‘An Act for suppressing outlying Slaves’, Act XVI, April, 1691, 3 Hening 86.

<sup>40</sup> In 1723 the legislature provided that if captured, such slaves could be ‘punished, by dismembering, or in other way, not touching life’, but if they died from such punishment no one could be prosecuted. ‘An Act directing the trial of Slaves . . .’ Chap. IV, May 1723, 4 Hening 126. In the nineteenth century, most slave states would prohibit the intentional murder of a slave.

and other non-Christian places were slaves. These laws set the standard that the other British mainland colonies would follow. South Carolina's founding document simply declared that 'Every freeman of Carolina, shall have absolute power and authority over his negro slaves, of what opinion or religion soever'.<sup>41</sup> This added to the definition, only by assuming that slaves were 'negroes', but of course, with no definition of 'negro' the provision assumed that everyone knew what a 'negro' was. This might have been true in the 1660s when most slaves in the New World had two African parents, but over the next two centuries, the connection between race and slave status would become far less certain.

## B. Slaves as Persons and Property in the Revolution

The American Revolution forced many Americans to rethink the status of slaves. The Declaration of Independence proclaimed that all men were 'created equal' and entitled to the 'rights' of 'Life, Liberty, and the pursuit of Happiness'. During and immediately after the Revolution Massachusetts and New Hampshire abolished slavery, while Pennsylvania, Rhode Island, and Connecticut passed gradual abolition laws that would lead to an end to slavery in a generation. Thus the new nation was already beginning to divide over the issue of human bondage. A significant number of Americans—mostly in the North but some in the South—had also reached the conclusion that slavery was morally wrong, and politically and culturally corrosive. Most Southern whites, however, were increasingly dependent on slavery and deeply convinced of its morality and its necessity. At the Constitutional Convention of 1787, Charles Pinckney of South Carolina aggressively defended slavery: 'If slavery be wrong, it is justified by the example of all the world. He cited the case of Greece Rome & other antient [*sic*] States; the sanction given by France England, Holland & other modern States. In all ages one half of mankind have been slaves'.<sup>42</sup>

Throughout the Revolution, southern politicians argued that slaves were property, not persons. At the end of July 1776, just weeks after the Continental Congress agreed to the Declaration of Independence, the delegates debated how to allocate taxes to support the new government. The plan was for each state to send taxes to the national government based on its population. A central issue in this debate was whether to count slaves as well as free people when allocating these taxes. Northerners insisted that slaves contributed to the economy just like free people, and thus should be counted when assessing taxes. Southerners rejected this idea. Samuel Chase from the southern state of Maryland complained that slaves were 'wealth', not people, and should no more be taxed than 'Massachusetts

<sup>41</sup> Drawn up by John Locke (1 March 1669). [Historical research suggests that this constitution was drawn up jointly by Locke and his patron, the Earl of Shaftesbury.] From the 1 *Statutes at Large of South Carolina* 43 (Columbia SC 1836).

<sup>42</sup> The quotation is from the private notes James Madison took at the convention. See Max Farrand (ed), *The Records of the Federal Convention of 1787* (rev edn, Yale University Press 1966), 2:371.

fisheries'. He argued that old and young slaves were 'a burthen to their owners'. James Wilson from Pennsylvania, the largest northern state, sharply responded that in the South slaves were taxed just as free people. This led Thomas Lynch of South Carolina to utter the first threat of secession from that State, blustering that if Congress 'debated whether their slaves are their property' then there would be 'an end to the Confederation'. He argued, 'Our slaves being our property why should they be taxed more than the land, sheep, cattle, horses, &c.?' Pennsylvania's Benjamin Franklin, not easily intimidated, pungently replied that there was 'some difference between' slaves and sheep as 'sheep will never make a revolution'.<sup>43</sup>

The Southerners won this debate, and slaves were never counted for the allocation of taxes under the Articles of Confederation. Slaves were thus seen as 'property' under the Articles. This had significant implications for the new nation. Just weeks before South Carolina's Lynch squared off with Franklin, the Congress had adopted the Declaration of Independence, with its rhetoric about equality and liberty. The Declaration had no legal effect, but it did have a strong moral force. In the North it would help lead to the abolition of slavery.<sup>44</sup> But, slaveowners like Lynch, as well as masters like Thomas Jefferson, the primary author of the Declaration, surely did not intend these statements about equality and liberty to interfere with their right to hold slaves. Thus, Lynch's position was more than merely a narrow point about taxation. It was a statement about how slaves would be defined—had to be defined in his view—in the new nation: 'property', not people.

The claim that slaves were property continued after the Revolution. When the British evacuated America, about 15,000 former slaves left with them. Most ended up as free people in England or various British colonies.<sup>45</sup> In the peace negotiations the Americans demanded the return of these slaves. If these evacuees were actually property, and not people, then the Americans could legitimately demand that they be returned. The British, looking at these former slaves as people, many of whom were also former comrades in arms, refused to comply.<sup>46</sup> Human liberty, it seems, was more important to the Crown than it was to the American Republic.

### C. Slavery and the Constitutional Convention

When the status of slaves—as people or property—reemerged during the Constitutional Convention in 1787, the positions of the North and the South were

<sup>43</sup> *Journals of the Continental Congress*, 6: 1079–80 (debate of July 30, 1776).

<sup>44</sup> The Massachusetts Constitution of 1780 used the language of the Declaration to end slavery in that state, 'All men are born Free and equal . . .' Massachusetts Constitution, 1780, Part I, Art. I.

<sup>45</sup> Graham R. Hodges, *Root & Branch: African Americans in New York & East Jersey, 1613–1863* (University of North Carolina Press 1999) and Graham R. Hodges, *Black Loyalists Directory: African Americans in Exile in the Age of the Revolution* (Garland 1997).

<sup>46</sup> In 1794, in the negotiations leading to what Americans called the Jay Treaty, the British offered monetary compensation for lost slaves, implying that the Americans might have a property interest in the slaves but refused to return the former slaves themselves, seeing them fundamentally as people. 'Treaty of Amity Commerce and Navigation, between His Britannic Majesty; and The United States of America', 1 Stat. 116 (19 November 1794).

reversed. In the Continental Congress and in the Congress under the Articles of Confederation each state had a single vote. Population was irrelevant to representation in the national Congress. In this context, Southerners had argued that slaves were property. But, from day one of the Convention, it was clear that representation in the new Congress would be based on population. Suddenly Southerners believed slaves should be considered ‘persons’ under the new Constitution. Thus, the delegates from the South, especially the South Carolinians, argued slaves should be counted as people, and factored into determining how many congressional seats the Southern states received. The Constitutional Convention ultimately settled on the Three-Fifths Clause, which counted slaves for representation but on a three-fifths basis. This was a political compromise, between those Southerners who wanted slaves counted fully for representation and northerners who did not want to count them at all. The debates over that document, and its final wording, illustrate the complexity of defining slaves as persons or property.

Throughout the Constitutional Convention, slavery bedeviled the delegates.<sup>47</sup> The call for population-based representation led to vitriolic debates over whether slaves were part of the population or merely property. The Three-Fifths Clause was formal recognition that they were persons, although as slaves, persons of a diminished capacity or value. Some Northern delegates could not stomach giving the South extra seats and thus power in Congress by counting slaves for representation. William Paterson of New Jersey complained that everyone knew that slaves were to be seen ‘in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and like other property entirely at the will of the Master’. Pointing to the apparent absurdity of allocating representation by counting slaves, he sarcastically asked, ‘Has a man in Virga. a number of votes in proportion to the number of his slaves?’<sup>48</sup> Paterson’s complaints, however valid, could not prevent the Convention from giving political power to the South for its slave property. Part of this compromise was to try to hide what was really happening, by referring to the slaves as ‘other persons’.<sup>49</sup>

The debate over what became the Commerce Clause of the Constitution,<sup>50</sup> which allowed Congress to regulate all international and interstate commerce, led Southerners, particular the South Carolina delegates, to demand that Congress be specifically prohibited from banning the African Slave Trade. After a nasty debate on this subject,<sup>51</sup> the Convention agreed to suspend the application of the

<sup>47</sup> See Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (2nd edn, M.E. Sharpe 2001).

<sup>48</sup> Farrand (n 42) 1:560–61.

<sup>49</sup> US Constitution, Art. I, Sec. 2, Cl. 3 (‘Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons’.)

<sup>50</sup> US Constitution, Art. I, Sec. 8, Cl. 3. ‘The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several Stats, and with the Indian Tribes’.

<sup>51</sup> See Finkelman (n 47) Ch 1.

Commerce Clause to ending the African trade for at least twenty years. The commerce power related to property and trade, and the entire debate was about commerce, trade, and property. But, rather than honestly state this, the framers used language that implied they were treating slaves as people, providing 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, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person’.<sup>52</sup>

Connecting the right to import slaves with the Three-Fifths Clause, Gouverneur Morris, who represented Pennsylvania at the Convention, exploded at this betrayal of the ideals of the Revolution:

[W]hen fairly explained [the compromise on the slave trade and the Three-Fifths Clause] comes to this: that the inhabitant of Georgia and South Carolina who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice.<sup>53</sup>

Morris understood that in the end, the Convention was giving representation to property, not people.

Less passionate debates also led to other victories for slavery and the South. The Convention provided for the return of fugitive slaves, but in a masterful stroke of linguistic subterfuge referred to a runaway slave as a ‘Person held to Service or Labour in one State, under the Laws thereof, escaping into another’.<sup>54</sup> Debates over taxation led to a ban on export taxes, because Southerners feared that taxes on the tobacco, rice, and indigo that slaves produced would indirectly harm slavery. The very idea of centralized power particularly frightened Southerners, who were worried that the new government would end slavery. More than any other group, they demanded a government of limited and enumerated powers. Here they were enormously successful. Thus, General Charles Cotesworth Pinckney of South Carolina, boasted to his state’s House of Representatives:

We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>55</sup>

In the end, the Constitution almost always referred to slaves as ‘persons’ rather than property, even though they were clearly seen as property throughout the

<sup>52</sup> US Constitution, Art. I, Sec. 9, Par. 1.

<sup>53</sup> Farrand (n 42) 2:222.

<sup>54</sup> US Constitution, Article IV, Sec. 2, Cl. 3. (‘No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.’)

<sup>55</sup> Pinckney quoted in Jonathan Elliot (ed), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols (Burt Franklin 1987, repr. of 1888 edn), 4:286.

slaveholding states. The Three-Fifths Clause referred to them as ‘other persons’.<sup>56</sup> This language was repeated throughout the Constitution. The slave trade clause<sup>57</sup> referred to ‘such persons’ as the states chose to admit into their jurisdiction. The fugitive slave clause,<sup>58</sup> likewise referred to a ‘person held to service or labour’ under the laws of a state. Thus, the Constitution defined slaves as ‘persons’.

While mostly defining slaves as ‘people’, one clause of the Constitution also defined them as property. The slave trade provision<sup>59</sup> is internally contradictory on this point. The clause talks about ‘migration’ which involves people but also the ‘importation’ of persons which implies they are property. This is further supported by the last part of the clause allowing for ‘a Tax or duty . . . on such Importation’. This was clearly the language of ‘property’, but then to confuse the matter further, the Constitution allowed for a tax not to exceed ‘ten dollars for each Person’. In essence, this clause encapsulated the dual concepts of slaves as persons and as property. It similarly incorporated the idea that states, not the national government, defined who or what was a slave, even for purposes of federal taxation and federally regulated immigration.

The Constitution was quickly ratified, although over significant opposition, with many complaining about the compromises over slavery.<sup>60</sup> However, more common were complaints that the Constitution lacked a Bill of Rights. In 1789 Congress proposed a series of amendments, which, when ratified in 1791, became known as the Bill of Rights. The Fifth Amendment provided that no person could ‘be deprived of life, liberty or property, without due process of law’, nor could ‘private property be taken for public use without just compensation’. This provision, like the rest of the Bill of Rights, only limited the actions of the national government, and thus only applied to those places—like the national capital and the federal territories—that were under the jurisdiction of Congress. However, where the Fifth Amendment applied, the provision had implications for slavery.

If slaves were ‘persons’ then they could not be deprived of their ‘liberty’ without due process of law. Since there were no laws creating slavery, and slaves had not committed any offence that would justify depriving them of their liberty, as

<sup>56</sup> US Constitution, Art. I, Sec. 2, Cl. 3. (‘Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons’.)

<sup>57</sup> US Constitution, Art. I, Sec. 9, Cl. 1. (‘The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person’.)

<sup>58</sup> US Constitution, Art. IV, Sec. 2, Cl. 3. (‘No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due’.)

<sup>59</sup> US Constitution, Art. I, Sec. 9, Cl. 1. (‘The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person’.)

<sup>60</sup> See Finkelman (n 47) Ch 1.

‘persons’ they could not be held as slaves in any place where the federal government had jurisdiction. Surely, the author of the Fifth Amendment, James Madison of Virginia, who himself owned many slaves, did not intend to deprive Southerners of their slaves through this clause. Thus, it would be dangerous to slavery to think of slaves, in the constitutional context, as being ‘persons’. However, if slaves were ‘property’ then masters could not be ‘deprived’ of their ‘property’ without due process.<sup>61</sup> If the government decided to end slavery on policy grounds—that is to take slaves ‘for public use’—then the masters would have to be justly compensated.<sup>62</sup> From the perspective of 1789, the only plausible interpretation of the Fifth Amendment was to assume that slaves were property, not persons. It is simply impossible to imagine that most members of Congress thought otherwise, or that any of the slave state legislators who voted to ratify the amendments believed they were threatening slavery.

#### D. Implementing the Constitution: The African Slave Trade

The Constitution prohibited the American Congress from banning the African Slave Trade before the year 1808. However, Congress retained the power to regulate the trade and starting in 1794 Congress did just that<sup>63</sup> by prohibiting the use of any US shipyard for fitting out or building any ship to be used in the trade or using any American port as an embarkation point for the trade. Ships leaving US ports for Africa, even if foreign registered, were required ‘to give bond with sufficient sureties, to the treasurer of the United States, that none of the natives of Africa, or any other foreign country or place, shall be taken on board . . . to be transported, or sold as slaves in any other foreign place, within nine months thereafter’.<sup>64</sup> In 1800, Congress dramatically increased fines for illegal American participation in the trade and gave informants a right to the entire value of any ship condemned under the law.<sup>65</sup> The 1800 amendment explicitly subjected any American citizen or resident alien voluntarily serving ‘on board any foreign ship or vessel . . . employed in the slave trade’ to a \$2,000 fine.<sup>66</sup> In 1803, Congress passed further regulation of the trade.<sup>67</sup> This act created new fines for people who brought slaves or any ‘negro, mulatto, or other person of color’ imported from Africa or the Caribbean into states that banned the importation of slaves.<sup>68</sup> The language was apparently used to prevent people from claiming that illegally imported Africans found on their ships were not slaves but servants or indentured servants.

<sup>61</sup> The US Supreme Court would hold this in *Dred Scott v Sandford*, 60 US (19. How.) 393 (1857).

<sup>62</sup> Thus, when Congress ended slavery in the District of Columbia during the Civil War, the law provided compensation for the slave owners. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, 12 Stat 376 (16 April 1862).

<sup>63</sup> Act of March 22, 1794, Ch11, 1 Stat. 347 (1794).

<sup>64</sup> *Ibid.*

<sup>65</sup> Act of May 10, 1800, Ch 51, 2 Stat. 70 (1800).

<sup>66</sup> *Ibid.*

<sup>67</sup> Act of February 28, 1803, Ch 10, 2 Stat. 205 (1803).

<sup>68</sup> *Ibid.*



The acts of 1794, 1800, and 1803 had been designed to limit American participation in the trade, but could not be used to stop the trade itself, because of Article I, Section 9 of the Constitution. Significantly, all of the laws passed before 1807 focused on ships, sailors, and investors.<sup>69</sup> None of the laws had contained any provision regarding what should happen to slaves illegally imported into the United States. Indeed, while the 1794 law provided for the sale of a ship and its ‘tackle, furniture, apparel and other appurtenances’ of a slaver, it did not mention what should happen to any slaves or other cargo on the ship.<sup>70</sup> Presumably, they too would be sold for the benefit of the United States, the informant, or any other claimant.

In March 1807, Congress passed legislation prohibiting the trade, as of 1 January 1808.<sup>71</sup> By passing the law in March, Congress gave all slave traders nine months to close down their operations to the United States. After 1 January 1808, it would ‘not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such [person] . . . as a slave, or to be held to service or labour’.<sup>72</sup> Anyone building a ship for the trade or fitting out an existing ship to be used in the trade could be fined up to \$20,000. Americans participating in the trade were subject to fines of up to \$10,000 and five- to ten-year jail terms. Foreign slavers using American ports, or even hovering off the American coast with slaves on board, could be seized and forfeited, with the captain facing a \$10,000 fine and up to four years in prison.<sup>73</sup> Americans purchasing illegally imported slaves would forfeit them, and could be fined \$800 for every slave purchased. The law authorized the United States Navy to interdict American ships involved in the illegal trade on the high seas. The law’s penalties were certainly impressive. Fines were enormous, and the potential jail time was enough to discourage most slave smugglers.

Curiously, however, the law provided little solace to the subjects of the act—the Africans themselves. Logically, the illegally imported Africans should have been either freed in the United States or repatriated to Africa. This would have made sense if the Africans were treated as people, illegally kidnapped and enslaved. But the law did not do that. President Jefferson was deeply hostile to the presence of free blacks in the United States, considering them ‘pests’ on society.<sup>74</sup> Thus, Jefferson had no interest in freeing illegally imported Africans. Nor was the deeply

<sup>69</sup> Act of March 22, 1794, Ch 11, 1 Stat. 347 (1794); Act of May 10, 1800, Ch 51, 2 Stat. 70 (1800); Act of February 28, 1803, Ch 10, 2 Stat. 205 (1803).

<sup>70</sup> Act of March 22, 1794, Ch 11, 1 Stat. 347 (1794).

<sup>71</sup> An Act to Prohibit the Importation of Slaves, Ch 22, 2 Stat. 426 (1807). This law was not required by the US Constitution, which simply prohibited such a law *before* 1808. However, by 1807 most Americans wanted to see the trade end, although there was strong opposition to ending the trade in the deep South, especially South Carolina and Georgia.

<sup>72</sup> *Ibid* 426.

<sup>73</sup> *Ibid* 426–28.

<sup>74</sup> Finkelman (n 47) Chs 6 and 7; Letter from Thomas Jefferson to Edward Coles (August 25, 1814), available at <<http://www.teachingamericanhistory.org/library/index.asp?document=307>> (accessed 22 May 2012).

parsimonious Jefferson likely to support spending money to return the hapless Africans to their homeland. They may have been sold into an immoral form of commerce and illegally brought to America as slaves, but at least from Jefferson's perspective, they were still treated as commodities. So, what would the nation do with slaves illegally brought to its shores? Reflecting Jefferson's states' rights ideology, his hatred of free blacks, and his refusal to spend money unless absolutely necessary, the law treated illegally imported Africans as property, to be turned over to authorities in the state where they were found, to be sold.

Thus, the 1807 ban on the African slave trade did not treat illegally imported Africans as people, whose rights had been violated. Instead, they were merely commodities, to be confiscated from smugglers and then sold to the highest bidder. Such confiscations had the triple advantage of discouraging slave smugglers (who would lose all their cargo), enriching the Southern states which would profit from the sale of the illegally imported slaves, and also giving individual Southerners the opportunity to acquire new slaves. Under the law, the United States would gain money from the sale of confiscated ships and the large fines imposed on anyone involved in the trade and the states would gain money from the sale of illegally imported slaves. Anticipating the logic of Chief Justice Taney's decision in *Dred Scott v Sandford* (1857), the Africans themselves would 'have no rights'<sup>75</sup> and remain slaves.

In 1819 a new law provided that illegally imported slaves be removed to Africa.<sup>76</sup> The Act authorized the President to appoint agents to return rescued Africans to the continent of their birth. Shortly after the adoption of this law, the United States would help create Liberia as a destination for Africans taken from intercepted ships.<sup>77</sup> An 1822 law further demonstrated the 'personhood' of Africans by making slave trading piracy, punishable by death. Surely it would not be a capital offense to transport 'property' in violation of law. The theory behind these changes in the law was based on the idea that Africans brought to the United States in violation of the law were never legally slaves, and thus could only be considered persons.

### E. The Supreme Court and Africans as People and Property: *The Antelope Case*

The US Supreme Court heard a number of cases involving ships, ship owners, crewmen, and captains who violated the ban on the African Slave Trade. Most of these were about technical issues of when a voyage began or what proof was necessary to convict a trader. The most important case involving the status of slaves

<sup>75</sup> *Dred Scott v Sandford*, 60 US 393 (1857), at 404–05.

<sup>76</sup> Act of March 3, 1819, Ch 101, 3 Stat. 532 (1819).

<sup>77</sup> Renee C. Redman, 'The League of Nations and the Right to be Free From Enslavement: The First Human Right to be Recognized as Customary International Law' (1994) 70. *Chicago-Kent Law Review* 759–800; see generally Tom W. Shick, *Behold The Promised Land: A History of Afro-American Settler Society in Nineteenth Century Liberia* (Johns Hopkins University Press 1980).

as people or property came about in 1825, in the complex litigation involving a ship known as *The Antelope*.

In 1820 a US Coast Guard cutter seized *The Antelope*; originally a Spanish vessel involved in the slave trade, *The Antelope* had been captured by pirates and used to raid other ships. When intercepted by the US coast guard, the ship had an American captain and was flying the revolutionary flag of José Artigas.<sup>78</sup> On board were 258 Africans, who had been captured on the high seas from a variety of ships. While Britain and the United States had banned the trade at this time, other nations, including Spain and Portugal, still allowed it. Spain claimed that the Africans were legally enslaved and owned by Spanish citizens, although strong evidence indicated that some of the Africans had been taken by American, Portuguese, or other slavers. The case first reached the US Supreme Court in 1825. The Court might have ruled that all the Africans on the ship were free under the various laws banning the trade to the United States, which included the right of US ships to stop slavers ‘lurking’ off the American coast. But, speaking for a unanimous Court, the slaveholding Chief Justice John Marshall held that while ‘contrary to the law of nature’, the African slave trade was ‘consistent with the law of nations’ and ‘cannot in itself be piracy’.<sup>79</sup> Thus, Chief Justice Marshall treated all Africans on the ship as property—commodities—to be divvied up according to accepted rules of commercial law. He then sent the case back to the Circuit Court to determine the fate of the Africans.

When the case came back to the Supreme Court for the third time, Justice Robert Trimble of Kentucky, speaking for a unanimous bench, ruled that at the time of its capture *The Antelope* had once held 93 slaves legally owned by a Spanish citizen, but on a prorated basis, this claimant was entitled to just 39 Africans. The other Africans on *The Antelope* had been taken from Africa by Americans, Portuguese, and others who never came forward to make any claims. Thus, the Court ruled that 39 Africans should be turned over to Spanish authorities and the remaining Africans should be returned to Africa.<sup>80</sup> The Court did not know, and could never determine, *which* of the Africans on *The Antelope* had belonged to the Spanish claimant. Lawyers for the Africans claimed that since it was impossible to know which individuals might legally be slaves of the Spanish claimant, it would be wrong to condemn any of them to a lifetime of servitude. But, Trimble disagreed, affirming the Circuit Court, which chose 39 Africans by lot, to be turned over to the Spanish. The rest were repatriated to Africa.

The case of *The Antelope* illustrates the willingness of the Marshall court to see Africans—whether slave or free—as commodities or property. Coming from a culture that venerated individual liberty and due process, the justices nevertheless

<sup>78</sup> While his attempted revolution failed, José Artigas is considered the national hero of Uruguay. At this time his revolution was on the verge of total defeat; his flag was not connected to any recognized nation and was, by international standards, a flag that represented a rejection of the existing international order.

<sup>79</sup> *The Antelope*, 23 US (10 Wheat.) 66 (1825). See generally John Noonan, *The Antelope: The Ordeal of the Recaptured Africans and the Administrations of James Monroe and John Quincy Adams* (University of California Press 1977).

<sup>80</sup> *The Antelope* (III), 25 US (12 Wheat.) 546 (1827).

upheld a determination of freedom or bondage by the luck of the draw, without any regard for the individual claims of particular Africans. In subsequent cases the US Supreme Court would similarly accept, without any qualms, the idea that slaves were commodities, property, to be bought and sold. Thus, in 1841, in *Groves v Slaughter*,<sup>81</sup> the court upheld contracts for the sale of slaves, recognizing that slaves were part of interstate commerce.

In *United States v The Amistad*<sup>82</sup> the Court treated all of the Africans as persons—indeed persons entitled to use lethal force to gain their liberty—because they had not been legally imported into Cuba. However, in the same decision the Court held that the cabin boy on the ship, who had been born a slave in Cuba, was not entitled to his liberty, and he was returned to bondage. In essence, the Court held that free people were entitled to fight for their liberty and resist illegal enslavement, but slaves were property and not entitled to liberty and not entitled to fight for their liberty. *The Amistad* is anomalous for many reasons and does not fit well into any particular American constitutional categories, because it is almost entirely about a treaty and specific set of facts. It had virtually no precedential value in the law, but was of course enormously important in the propaganda war over slavery. But it does reveal how the Court reaffirmed the status of slaves as property. Lauded as a great human rights case and an antislavery victory by some modern Americans,<sup>83</sup> the decision did not threaten the institution of slavery or even challenge the legitimacy of slavery. It merely reaffirmed the validity of international agreements that banned the African trade from some places. Had the Africans on *The Amistad* been legitimately held as slaves under Spanish law, the Court would have sent them back to Cuba, as it had in ordering that the slave cabin boy be sent back.

## F. Fugitive Slaves as Property

A year after deciding *The Amistad*, the Court heard its first case under the Fugitive Slave Clause of Article IV of the Constitution. This Clause was framed with language implying that slaves were people. The clause did not specifically give Congress the power to regulate the return of fugitive slaves, and a textual analysis of the Constitution supports the argument that the clause assumed that the task of returning slaves would be entirely handled by the states. However, in 1793 Congress passed a law regulating the return of runaways.<sup>84</sup> The legislation generally spoke of fugitive slaves as ‘persons’. The act was phrased in language similar to that used for criminal extradition. But, unlike a normal criminal proceeding, the law provided minimal procedural and evidentiary requirements for the return of

<sup>81</sup> *Groves v Slaughter*, 40 US (15 Pet.) 449 (1841).

<sup>82</sup> *United States v The Amistad*, 40 US (15 Pet.) 518 (1841).

<sup>83</sup> See for example the movie *The Amistad*.

<sup>84</sup> ‘An Act respecting fugitives from justice, and persons escaping from the service of their masters’, Act of 12 February 1793, 1 Stat. 302.

fugitive slaves. An alleged fugitive could be remanded to a claimant ‘upon proof to the satisfaction’ of any federal, state, or local judge or magistrate, ‘either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested’ was a fugitive slave.<sup>85</sup> This lax evidentiary standard led most of the northern states to pass protective legislation, generally known as ‘personal liberty laws’, to prevent the kidnapping of free blacks.<sup>86</sup> The personal liberty laws recognized the personhood of alleged slaves, and thus gave procedural rights to those claimed as slaves. In a sense the personal liberty laws could be read as merely accepting the presumption that all people in the North were free, and thus persons with rights; and that if that presumption proved to be incorrect, they could then be removed from the state as slaves.

In 1842, in *Prigg v Pennsylvania*,<sup>87</sup> the Supreme Court interpreted the 1793 law for the first time. Edward Prigg had been convicted of kidnapping for taking an alleged fugitive slave to Maryland in violation of Pennsylvania’s personal liberty law of 1826. The Supreme Court reversed his conviction, holding on a variety of grounds that all state personal liberty laws were unconstitutional. Much of the case dealt with issues of federalism and Congressional power and did not affect the nature of slavery per se.<sup>88</sup> But a key aspect of Justice Joseph Story’s majority opinion dramatically affected the definition of slaves. Story held that masters could seize their slaves wherever they found them, without the use of any law or legal process, as long as it was done without breach of the peace. This was so, according to Story, because the Fugitive Slave Clause of the Constitution gave masters a common law right of reception. Story wrote:

We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no qualification or restriction of it to be found therein, and we have no right to insert any which is not expressed and cannot be fairly implied. Especially are we estopped from so doing when the clause puts the right to the service or labor upon the same ground, and to the same extent, in every other State as in the State from which the slave escaped and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him, as property, and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmation of the principles of the common law applicable to this very subject.<sup>89</sup>

<sup>85</sup> Ibid at sec. 3.

<sup>86</sup> See generally, Thomas D. Morris, *Free Man All: The Personal Liberty Laws of the North, 1780–1861* (Johns Hopkins University Press 1974).

<sup>87</sup> 41 US (16 Pet.) 539 (1842).

<sup>88</sup> See Paul Finkelman, ‘Story Telling on the Supreme Court: *Prigg v Pennsylvania* and Justice Joseph Story’s Judicial Nationalism’ (1995) 1994 *Supreme Court Review* 247–94; and Paul Finkelman, ‘*Prigg v Pennsylvania*: Understanding Justice Story’s Pro-Slavery Nationalism’ (1997) 2 *Journal of Supreme Court History* 51–64.

<sup>89</sup> *Prigg* at 613.

Story then quoted *Blackstone's Commentaries* on the meaning of reception:

Recaption or reprisal [says he] is another species of remedy by the mere act of the party injured. This happens when anyone hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child or servant, in which case the owner of the goods, and the husband, parent or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner or attended with a breach of the peace.<sup>90</sup>

Story added:

[U]nder and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence. In this sense and to this extent, this clause of the Constitution may properly be said to execute itself, and to require no aid from legislation, state or national.<sup>91</sup>

Later in his opinion Story suggested that recovering fugitive slaves might be done in an *in rem* proceeding, that is: a suit against 'a thing'.<sup>92</sup>

Decided in 1842, *Prigg* was the most proslavery moment in Supreme Court history until the *Dred Scott* decision in 1857. In *Prigg* the Court eliminated any claims to 'personhood' for alleged fugitive slaves. Rather, the entire United States had to accept and recognize a master's 'right to seize and repossess the slave, which the local laws of his own State confer upon him, as property'. The law of the South was now the law throughout the United States. Slaves were to be treated as 'goods or chattels personal', and could be seized just as one might seize a runaway horse or dog. Or they might be treated as 'things' that were wrongly in the possession of someone who did not own them, and thus subject to an *in rem* process.

Until *Prigg*, the United States had never actually tried to define what a slave was, under federal law. The slave trade bans did not define what a slave was, but simply prohibited the importation of Africans and Afro-Caribbeans, unless ship captains could prove they were free. Cases like *Groves v Slaughter* (1841) did not involve slaves, but only commercial paper associated with the sale of slaves. But in *Prigg*, Justice Story actually defined what a slave was. His answer was simple: slaves were property and that status was conferred by the laws of the Southern states. The slave states would now define who was a slave and the national government would respect that. *Prigg* was an enormous victory for the South, because it nationalized the southern law of slavery and confirmed that under the Constitution slaves were property. But it also led to a backlash of non-cooperation throughout the North.<sup>93</sup> Northern states refused to help enforce the federal law, in part because they did not want to participate in a process that precluded them from protecting their free black neighbors from being kidnapped. Thus, to fully achieve the fruits of their victory,

<sup>90</sup> *Prigg*, quoting *Blackstone's Commentaries*, 1765, 3:4.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Prigg* at 624.

<sup>93</sup> Paul Finkelman, '*Prigg v Pennsylvania* and Northern State Courts: Antislavery Use of a Proslavery Decision' (1979) 25 *Civil War History* 5–35.

Southerners demanded a new fugitive slave law that would provide effective enforcement of their federal right to recapture fugitive slaves.

In 1850 a new fugitive slave law created a federal law enforcement bureaucracy—the first of its kind in American society—to help masters regain their runaway slaves.<sup>94</sup> Federal judges and newly created federal commissioners would hear these cases. Their rulings were final and could not be appealed to a state judge or another federal judge. Rather, the certificate issued by a judge or commissioner would ‘be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever’.<sup>95</sup> Unlike all other people brought before Federal Courts, fugitive slaves had no right of appeal, no right to a writ of habeas corpus, no right to test their liberty before a jury or an appellate judge. Even more important, the law provided that ‘[i]n no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence’.<sup>96</sup> This provision, more than any other, reduced the slave to a ‘thing’. The ability to speak or communicate is an essential aspect of humanity. The law took this quintessential human attribute away from the alleged fugitive slave. Standing mute in a courtroom, the slave had become legally ‘a thing’.

### G. *Dred Scott* and Race: The Final Definition of the Slave

*Dred Scott v Sandford*<sup>97</sup> is certainly the most infamous decision ever rendered by the US Supreme Court. Scott had been the slave of a US Army officer, Captain John Emerson, of Missouri, who took Scott to army forts in Illinois, which was a free state, and to the Wisconsin Territory<sup>98</sup> where slavery was prohibited by the Compromise of 1820, also known as the Missouri Compromise. On the basis of his residence in two jurisdictions where slavery was prohibited—Illinois and the Wisconsin Territory—Scott sued for freedom in 1846. After a number of trials, appeals, and hearings the Supreme Court finally decided the case in 1857.

Two of the Court’s narrow holdings are legally defensible in the context of the 1850s: that Dred Scott did not become free by being taken to the Wisconsin Territory and that Congress lacked the power to emancipate slaves brought to the federal territories. It is even plausible to argue that the Court’s larger holding—that it was unconstitutional to ban slavery from the territories—was at least legally

<sup>94</sup> An Act to amend, and supplementary to, the Act entitled ‘An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters, approved February twelfth, one thousand seven hundred and ninety three’. Act of September 18, 1850, 9 Stat. 462.

<sup>95</sup> *Ibid.*, Sec. 6.

<sup>96</sup> *Ibid.*

<sup>97</sup> 60 US (19 How.) 393 (1857).

<sup>98</sup> A territory was an area of land that was mostly unsettled. When a sufficient number of free, non-Indian migrants had settled a territory, it could apply for statehood. Until then, the territory was initially governed directly by Congress and later by a territorial legislature. Since the adoption of the Constitution, Congress had prohibited slavery in some territories, and allowed it in others.

defensible.<sup>99</sup> However, *Dred Scott* is most remembered for Chief Justice Roger B. Taney's racist language and his constitutionally problematic conclusion that blacks, even if free, could never be citizens of the United States. Free blacks voted in at least six states at the time of the ratification of the United States Constitution in 1787. Similarly, when Chief Justice Taney announced the decision, free African-Americans still could vote and hold office in a number of states. Thus, it is hard to imagine how they could not have been citizens at the founding of the United States, and therefore their descendants not be citizens.

My point here is not, however, to belabor the injustice of Chief Justice Taney's decision. Rather it is to show how the decision helped refine the definition of slavery under federal law. Two parts of Chief Justice Taney's 'Opinion of the Court' are particularly relevant for this analysis.<sup>100</sup> First, Taney found that slaves were a form of private property explicitly recognized and protected by the Constitution and federal law. His analysis precluded seeing slaves as persons. Having established this, Taney concluded that no federal law could emancipate slaves by merely banning them from federal territories. This would constitute taking property without due process of law or just compensation. Thus, *Dred Scott* was not free because the law that made the territories free soil was unconstitutional. This meant that slaves were not only property, but as Taney argued, specially protected property. Taney's second point concerned race. Taney asserted that blacks could never be citizens of the United States, even if free. Taney starkly framed the issue thus:

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, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.<sup>101</sup>

In answering this question, Taney used some of the most racist language in American jurisprudence, arguing that at the Founding of the nation blacks were either all slaves or, if free, without any political or legal rights. He declared 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 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.<sup>102</sup>

<sup>99</sup> Paul Finkelman, 'Was *Dred Scott* Correctly Decided? An "Expert Report" For the Defendant' (2008) 12 *Lewis & Clark Law Review* 1219–1252.

<sup>100</sup> Taney's opinion is labeled the 'Opinion of the Court', although each one of the other eight Justices wrote an opinion in the 7–2 decision.

<sup>101</sup> *Dred Scott v Sandford*, 60 US (19 How.) 393, 403 (1857).

<sup>102</sup> *Ibid* 402–05.



According to Taney, blacks were ‘so far inferior, that they had no rights which the white man was bound to respect’.<sup>103</sup> Thus, he concluded that blacks could never be citizens of the United States, even if they were born free and considered to be citizens of the states in which they lived. Taney in effect determined that the Constitution created a kind of dual citizenship—state and federal—and that while the states might be able to make anyone a citizen, federal citizenship was limited only to whites because it was impossible for Taney to imagine that the southern founders of the nation would have agreed to the Constitution if blacks were to be citizens.

Thus, Taney returned to the original determining factor of the status of slave: race and inheritance. At the founding it was assumed, in Taney’s mind, that all blacks were slaves. This was the proper status of all blacks. Those who had somehow managed to be free were still inherently, genetically, and constitutionally inferior. They might no longer be property, but they could never be fully free members of society. They might instead be seen as unclaimed ‘things’, subject to whatever limitations whites collectively chose to impose on them.

*Dred Scott* was the final antebellum (pre-Civil War) definition of a slave. By 1860 Congress and the Court had shaped the constituent parts of what a slave was. Slaves were Africans or the descendants of black African women. No jurisdiction in the United States had adopted the ‘one drop rule’ of determining race; that would come along in the early twentieth century. But, since the 1660s the rule had been that the children of slave women were slaves. This meant a few slaves looked white, but that was a minor issue. More importantly, African-Americans who were free were still presumptively slaves and could never be citizens. In *Jones v Van Zandt* (1847) the US Supreme Court had held that whites should presume that any black might be a slave.<sup>104</sup> John Van Zandt had given a ride to a group of blacks who were walking on a road in Ohio, which was a free state. Van Zandt had no legal notice that these African-Americans were actually runaway slaves.<sup>105</sup> The Court rejected Van Zandt’s claim that in Ohio there was a legal presumption that all people were free. Instead, the Court held Van Zandt liable for the value of one slave who was not recovered and for the costs of recovering the others.

*Van Zandt*, in conjunction with *Dred Scott*, established the legal rule that all African-Americans were presumptively slaves and had no rights under the Constitution. Furthermore, under the Fugitive Slave Law of 1850 blacks, even if free, had no right to testify on their own behalf in hearings to determine their status. Free people could be dragged into bondage without ever being allowed to assert their free status in their own words. Even free blacks were ‘things’, standing mute in a federal courtroom. Slaves were also property. *Prigg*, *Van Zandt*, *Dred Scott*, and the 1850 Fugitive Slave Law all reaffirmed this. Slaves under federal law were never people. They were property without a voice in a courtroom and without rights. And, as noted above, *all* blacks were presumptively slaves.

<sup>103</sup> *Ibid* 407.

<sup>104</sup> *Jones v Van Zandt*, 46 US (5 How) 215 (1847).

<sup>105</sup> *Ibid*.

The slave states would ultimately determine who was free and who was a slave. The Federal Government and the courts would follow the lead of the slave states. According to the Court's interpretations in *Prigg*, *Jones v Van Zandt*, and other cases, the Constitution commanded this in the Fugitive Slave Clause. The free states were required to accept the rules of the slave states. On the eve of the Civil War, politicians and judges in the slave states were in fact arguing that the free states had to recognize the status of a slave even if a master voluntarily took that slave to a free state. In *Dred Scott*, Justice Samuel Nelson, in a concurring opinion, hinted that this was the next issue the Court would decide:

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.<sup>106</sup>

Two years later, in *Mitchell v Wells*,<sup>107</sup> Mississippi's highest court declared that a slave from that state would always be a slave, even if, as in this case, her master took her to Ohio and legally manumitted her there.

Finally, American constitutional theory, from the Founding until the Civil War, held that generally *only* the states could change the status of slaves. Except in the District of Columbia, and perhaps the Territories (although Taney denied this in *Dred Scott*) virtually all lawyers, jurists, scholars, and politicians agreed that the national government had no power to end slavery or free slaves. Thus, slaves were constitutionally sanctioned property, and the national government had an obligation to protect that property. No other form of property had specific sanction in the Constitution or specific federal statutes aimed at protecting it, like the Fugitive Slave Laws. Yet, while obligated to preserve and protect slavery, the national government had no power to regulate it or end it. In addition, under *Dred Scott*, even when slaves became free, they and their descendants would never be citizens and would always bear the stigma of servitude. While Congress had the power to pass naturalization laws and set standards for citizenship, according to Chief Justice Taney it could never set standards that would include free African-Americans. Constitutionally, at least, slavery was indeed a peculiar institution.

## H. Conclusion: Emancipation and the Definition of Slaves

When he took office in 1861, President Abraham Lincoln faced an unprecedented crisis. Seven states had seceded between his election in November 1860 and his

<sup>106</sup> *Dred Scott* at 468.

<sup>107</sup> *Mitchell v Wells*, 37 Miss. 235 (1859). For an extensive discussion of this case, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (University of North Carolina Press 1981).

inauguration in March 1861. These states claimed to be part of the Confederate States of America. This was a new nation, conceived in slavery and dedicated to the proposition that all men were clearly not created equal. Shortly after Lincoln's inauguration, but before the Civil War began, the Confederate Vice President, Alexander Stephens, condemned the North for accepting the idea of racial equality. But Stevens noted:

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.<sup>108</sup>

The Southern states left the Union in 1860–61 because they believed that Lincoln threatened slavery. In his First Inaugural Address, on March 4, 1861, Lincoln took pains to deny this, urging the seven seceding states to return to the Union. In making this case Lincoln argued that slavery in the southern states was safe under the Constitution and under his administration. He reiterated a point made during the campaign: 'I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so'. He underscored this position by quoting the Republican Party Platform, that 'the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend'. He promised that during his administration 'all the protection which, consistently with the Constitution and the laws, can be given, will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section as to another'.<sup>109</sup>

Lincoln's position was an orthodox and almost universally accepted interpretation of the Constitution. Since 1787, virtually all Constitutional theorists had understood that the national government had no power to interfere with the 'domestic institutions' of the states.<sup>110</sup> Thus the states, and not the national government, had sole power to regulate personal status, such as marriage, divorce, child custody, inheritance, voting, and freedom—whether one was a slave or a free person. After the Constitutional Convention of 1787, General Charles Cotesworth Pinckney told the South Carolina House of Representatives:

<sup>108</sup> Alexander H. Stephens, 'The Cornerstone Speech', March 21, 1861, found at <<http://teachingamericanhistory.org/library/index.asp?documentprint=76>> (accessed 25 November 2011).

<sup>109</sup> Abraham Lincoln, 'First Inaugural Address—Final Text' in Roy P. Basler, *The Collected Works of Abraham Lincoln* (Rutgers University Press 1953) 4:262–63.

<sup>110</sup> A few abolitionist outliers, like Lysander Spooner, argued otherwise. But no judges, politicians, or very many lawyers took their arguments seriously. Even strongly antislavery Republicans, like Salmon P. Chase of Ohio, understood that Congress had no power to end slavery in the states. See for example, Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (Oxford University Press 1970) and Finkelman (n 107).

We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>111</sup>

In 1861 no responsible political leaders, jurists, or legal theorists would have disagreed with this position.

Thus, when Lincoln entered office he fully understood that he had ‘no lawful right’ to ‘interfere with the institution of slavery in the States where it exists’. Because he had no ‘lawful right’ to free slaves in the South, he could honestly tell the seceding states: ‘I have no inclination to do so’. This statement did not mean that Lincoln had no personal desire to see slavery abolished. Lincoln’s personal views on slavery were clear: he hated slavery and had always believed that ‘[i]f slavery is not wrong, nothing is wrong’.<sup>112</sup> But, his personal desires could not overcome the constitutional realities of his age. Consistent with his long-standing Whig ideology, Lincoln rejected the idea of acting outside the Constitution. Reflecting his sense of the politically possible, Lincoln willingly reassured the seceding states that he had no ‘inclination’ to do what he could not constitutionally, legally, or politically accomplish. When circumstances changed, so would Lincoln’s ‘inclination’. But, in March 1861, Lincoln had no reason to think that circumstances would change so dramatically and so quickly.

In April 1861 Confederate forces attacked the United States, and almost immediately emancipation emerged as a war issue. By August 1861, slaves who ran from their Confederate masters to US Army lines became free on the theory that as property they could be confiscated and emancipated as contrabands of war. This affected thousands of slaves, but only thousands out of the nearly four million slaves in the nation. Lincoln rejected other early emancipation schemes—such as John C. Frémont’s vainglorious attempt to free all the slaves in Missouri. Since Missouri was not in the Confederacy, the slaves there could not be construed as contrabands and freed by the Army. As long as Missouri remained in the Union, the Constitution precluded emancipation there.<sup>113</sup> Lincoln understood that slaves within the United States were legally property. So too did Congress. In April 1862, Congress abolished slavery in the District of Columbia by providing compensation for the masters. This law was consistent with the notion that slaves were property but also consistent with the idea that Congress had the power to regulate and govern the District of Columbia.<sup>114</sup>

Five months later, on 22 September 1862, Lincoln issued the preliminary emancipation proclamation. This document, and the final Emancipation

<sup>111</sup> Pinckney quoted in Elliot (n 55) 4:286. For greater discussion of this issue at the Convention see Finkelman (n 47).

<sup>112</sup> Lincoln to Albert G. Hodges, April 4, 1864, Basler (n 109) 7:281.

<sup>113</sup> See Paul Finkelman, ‘Lincoln and the Preconditions for Emancipation: The Moral Grandeur of a Bill of Lading’ in William A. Blair and Karen Fisher Younger (eds) *Lincoln’s Proclamation: Race, Place, and the Paradoxes of Emancipation* (University of North Carolina Press 2009) 13–44.

<sup>114</sup> ‘An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia’, April 16, 1862, 12 *Stat* 376.

Proclamation of 1 January 1863,<sup>115</sup> recognized the property status of slaves. The Proclamation only applied to those states, or parts of states, that were in rebellion against the government. It was a war measure which Lincoln issued ‘as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion’. As a war measure designed to cripple the ability of those in rebellion to resist the lawful authority of the United States, the Proclamation applied only to those states and parts of states that were still in rebellion. This was constitutionally essential. Lincoln only had power to touch slavery where he could not actually enforce the Constitution. Where the Constitution was in force, federalism and the Fifth Amendment prevented emancipation. The Emancipation Proclamation was narrowly written, carefully designed to withstand the scrutiny of the Supreme Court, still presided over by Chief Justice Taney.<sup>116</sup>

However, on another front, Lincoln ignored Taney and *Dred Scott*. When he issued the preliminary Emancipation Proclamation, the United States President also authorized the enlistment of black troops. He had never accepted Taney’s notion that slaves were wholly without rights, or incapable of ever being citizens, even though he also did not believe in full political or social equality for African-Americans. Allowing black men to serve in uniform was a major step in the direction of equality and a fundamental attack on slavery. For the first time since the Constitution was written, the national government was willing to move blacks out of a subordinate status. By the end of the Civil War there would be a few African-American officers and many non-commissioned officers. Some of these soldiers would be awarded the nation’s highest military tribute, the Congressional Medal of Honor, and shortly before he was assassinated, President Lincoln advocated for suffrage for black veterans and other African-Americans.

Even before the War ended, Congress would pass the Thirteenth Amendment to the United States Constitution which put an end to *de jure* slavery in the United States, and, in December 1865, that is eight months after the end of the War, the Amendment was ratified. The Thirteenth Amendment simply stated: ‘Neither slavery nor involuntary servitude, except as punishment of crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction’. Slavery was now over in the United States.

But even after Emancipation, courts and legislatures struggled to determine what the end of slavery meant. Clearly African-Americans could no longer be treated as property, to be bought and sold. But, in 1865, it was not clear what rights ex-slaves would have. Ultimately, both Congress and the Supreme Court would conclude, correctly, that slavery was not simply a system of exploitive labor. Rather, it was a system of treating people like property—without the power to control their own lives, without the right to own land or personal property, without the power to speak out about their own liberty, without the power to even control their families. These were the ‘badges of slavery’ that began in the seventeenth century and grew

<sup>115</sup> Proclamation No. 17, 12 Stat 1268 (January 1, 1863).

<sup>116</sup> See Finkelman, n 113.

until the end of slavery itself. The adoption of the Fourteenth<sup>117</sup> and Fifteenth Amendments<sup>118</sup> recognized that these badges of slavery were tied to race, citizenship, and equality. Thus, the Fourteenth Amendment made all persons born in the United States—including all former slaves—citizens of the United States. The Fifteenth prevented discrimination in voting on the basis of race, color, or previous status as slave. These three amendments provided a promise of freedom, equality, and political rights for former slaves and their descendants. Sadly, within half a century of the end of the Civil War most blacks in the United States, ninety per cent of whom still lived in the former slave states, had been segregated, reduced to dire poverty, and denied access to the nation's political institutions. It would take a civil rights revolution in the two decades after the Second World War to fulfill some of these promises laid out in the Thirteenth Amendment of the United States Constitution.

<sup>117</sup> 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. US Constitution, Amendment XIV, Sec. 1.

<sup>118</sup> 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude'. US Constitution, Amendment XV, Sec. 1.