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American Duality: The Legal History of Racial Slavery in the United States of America

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Introduction

This paper aims to examine how the law and cultural mores worked together to create and sustain racial slavery in America. Notably, there was a duality to both the law and culture of America that was undeniably present at the time of its founding and persists in many ways today. With respect to the law, there was a duality to how it applied, who it applied to, how it was interpreted, and how it was weaponized. Concerning culture, there was a duality to how social rules applied akin to the duality noted in the law, and a multiplicity of prevailing cultural values and beliefs relating to slavery and race. More significantly though, there was a duality to what America represented and what it meant to be an American. There was, on the one hand, the idea of a free America with all the privileges, rights and liberties promised to its citizens by the Constitution. On the other, there was the idea of an oppressive America that provided little opportunity, a constant threat of enslavement, and none of the protections of freedom and liberty guaranteed by the Constitution. The most important thing to note about duality, however, is that it refers to two sides of the same thing, not two distinct things. There was—and still is—unmistakably a duality to American culture and law as this paper will demonstrate, but this is not a paper about two separate stories of America's legal history. To be clear, America's legal history is one story. The story has multiple chapters, so to speak, but they are all in the same book. The book is full of contradictions, hypocrisies, disparate treatment, and double standards. It has many heroes and villains, martyrs and murderers, utterly reproachable moments and moments beyond reproach, but they are all part of the same story. The story of America is inextricable from the experiences of Black Americans. That is, the tribulations and triumphs of Black Americans must be told *as part* of the American story. This paper seeks to capture the chapter of slavery within that story as honestly as possible.

The discussion will begin with an analysis on the origins of racial slavery in colonial America. That analysis will emphasize the insidious function of the law and preconceptions about African culture and race in what Winthrop Jordan dubbed "the process of debasement."[1] After exploring the forces responsible for the creation of racial slavery in colonial America, the focus will turn to the role of Southern law and culture in sustaining the hegemonic structure of Southern society that allowed for slavery's continued survival. With the role of Southern law and culture put properly in their place, the focus will turn to federal law by examining how the nation's highest institutions allowed slavery to survive the birth of a "free" republic." The part that the framers and the Constitution of 1787 played in the story of American slavery will be first considered in the context of Frederick Douglass's arguments related to whether the Constitution was pro-slavery or anti-slavery. Next, it will be argued that the Court rendered the Constitution undeniably pro-slavery through two racially-driven decisions made under the pretense of legal formalism: *Prigg* and *Dred Scott*.[2] Congress's role will be discussed in conjunction with the *Dred Scott* case. Finally, the paper will close with a brief comment on the implications of this sinister part of American history on life in today's America.

Origins of Racial Slavery: The Law and Cultural Bias in Colonial America

Whether owed to bad intent or lack of foresight, the law played an unfortunate role in creating a society in which racial slavery could thrive. Though, the law did not operate in a vacuum: prevailing prejudices about African sexuality and culture, preconceptions surrounding blackness and whiteness, and the fears and anxieties of the English settlers all played integral roles in the ultimate creation of racial slavery in the American South. In the mid to late

[1] WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN 45 (1974).
[2] Dredd Scott v. Sandford, 60 U.S. 393 (1857); Prigg v. Pennsylvania, 41 U.S. 539 (1842).

seventeenth century, the law and cultural biases effectively debased African Americans and created a clear and palpable distinction in the way White and Black people living in America were treated and perceived by the public and the legal system. This section will examine this cultural "process of debasement"[3] and argue that it created a firm foundation for *racial* slavery in America. The efficacy of the clearly repugnant institution was entirely dependent on the public seeing the oppressed class as fundamentally different and inferior. Southern society would have rejected slavery as repulsive if it saw African-Americans as being equal and deserving of personal dignity and autonomy. It is therefore unlikely that racial slavery would have survived without this process of cultural debasement that played on social prejudices to establish laws that distinguished between the races. In this light, the reproachable impact the law had on this process begins to look more like a product of bad intent than lack of foresight.

The economic conditions of the South and the Country's dependence on the Southern economy were also of incredible significance to the story of slavery. The massive amounts of land required large-scale, unskilled, and cheap labor to fuel the Tobacco and Cotton industries among others.[4] This demand for labor undoubtedly had a hand in the ultimate creation and maintenance of slavery in America, but the need for labor does not explain why America's iteration of slavery was racially driven and predicated on anti-Black prejudice. This "proses of debasement" in which the law and culture subjugated and debased African people immediately upon their first arrival in North America better explains the origins of *racial* slavery in America.

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[3] WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN 45 (1974).

[4] *See e.g.*, MARK TUSHNET, THE LAW OF SLAVERY IN THE EARLY REPUBLIC, in SLAVE LAW IN THE AMERICAN SOUTH 11-18 ("The cotton economy of the early republic also supported a hierarchical social system , with plantation owners superior to ordinary farmers and farmers superior to slaves. Reconciling such a social system with democratic presuppositions that pervaded the nation, including the slave South, could be most easily accomplished by reinforcing the racist dimensions of Southern slavery: Farmers could think that they were equal to planters, at least politically, while both were superior to the enslaved blacks.").

The origins of anti-Black prejudice can be traced back well before the days of slavery. The prevailing concepts of blackness and whiteness—apart from race—in English and colonial American society before the Englishmen and Africans first interacted are quite revealing. Blackness was associated with impurity, darkness and evil. It was considered dirty and filthy, foul and wicked, repulsive and reproachable. In contrast, whiteness was associated with purity and virginity, cleanliness and beauty, virtue and righteousness.[5] Consequently, upon meeting Africans, the English were flooded with bewilderment and immediate prejudices based simply on the color of the Africans' skin.[6] Cultural differences would only serve to exacerbate this sense of otherness felt toward Africans by the English, but it was unmistakably the color of the Africans' skin that made them an immediate target for persecution and oppression by the xenophobic colonists.[7] This is arguably evidenced by the difference in the way the colonists treated Native Americans and Africans. Of course, the colonists committed horrific atrocities against the Native tribes, but they also saw them as a people worth assimilating into American culture.[8] Africans, on the other hand, were only seen as having potential for free labor. Part of this was likely due to the social context in which the colonists encountered the two groups of peoples.[9] The Native Americans knowledge of the landscape and its military capacity, for example, made enslaving them a steep battle.[10] Similarly, the cultural differences must have played some role. The colonists had some respect and reverence for the Native American way of life, they saw them as having nations and statehood, a sense of community and national or tribal pride. In contrast, they saw the Africans as being stateless and without religion, laws, hierarchy, or a sense of

[5] WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN 6 (1974).
[6] *Id.* at 4.
[7] *Id.* at 6.
[8] *Id.* at 12.
[9] *Id.*
[10] *Id.*

community and nationalism.[11] Africa was one monolithic stateless land mass in the eyes of the English colonists.[12] Yet, to be clear, both Native Americans and Africans were looked at as inferior and savage heathens by the colonists. The ultimate difference with respect to slavery and assimilation, however, seems to come down to skin color. The colonists could not separate what they considered to be the Africans' "savagery" and heathenism from the Africans' black skin tone.[13] In fact, the Africans' perceived heathenism and "savagery" was often viewed by the English as linked to their blackness.[14] To that end, there were some who viewed blackness in man as the consequence of a biblical curse, God's Curse on Ham.[15] Perhaps this difference in treatment is due to those preconceptions of blackness that date back centuries. Alternatively, maybe it is because the English had encountered peoples somewhat similar in complexion to the Native Americans, such as the Moors, but they had never encountered any group of people with dark skin tones like those of people from Central and West Africa.[16] Either way, it is clear that it was the African's blackness that made the English view him as fundamentally different from both White people and Native Americans. Further, it was the African's blackness that the colonists saw as presenting a practical advantage in that it was a permanent and readily identifiable mark.[17]

That is not to say that religion, notions of "savagery," and preconceptions about African sex and culture were insignificant. To the contrary, those differences only made the English view their disparate treatment of the Africans as justified. For the English, the Africans' presumed godlessness and incivility—taken in combination with the color of their skin—made them a

[11] *Id.* at 13.
[12] *Id.* at 12-14.
[13] *Id.*
[14] *Id.* at 13.
[15] *Id.* at 9.
[16] *Id.*
[17] M

fundamentally different type of person.[18] Everything *presumed* about African culture was reproachable to English colonial eyes merely because of how fundamentally different it was presumed to be: their dress, their appearance, their religion, their language, their sexuality. Most disturbingly, the English would label Africans as animalistic and beastly. "They knew perfectly well that [Africans] were men, yet they frequently described the Africans as 'brutish' or 'beastial' or 'beastly.'"[19] For example, the English frequently compared the Africans to apes and fabricated stories detailing absurd interactions between apes and African people.[20] A particularly disgraceful iteration of these baseless prejudices was the persistent defamatory claim that African women and apes had sexual relations.[21] Similarly, African male sexuality was arbitrarily depicted as aggressively libidinous and rapacious.[22] Though, arguably more important than the actual prejudices may have been the colonists' own insecurities underlying these prejudices. Many of their preconceptions about African culture were ultimately projections of their own insecurities and anxieties. Most importantly, the colonists had a massive fear of becoming uncivilized. They were in the new world which necessitated an inherently rugged and remote lifestyle in its early days. As such, the colonists had a desire to establish their version of civility: law and hierarchical order. What is worse, they overreacted to anything they found contrary to their own conceptions of civility.[23] As academically interested in the concept of savagery as they may have been, they were more so repulsed and terrified by the idea of becoming savage themselves.

The fears and insecurities of the early played out in the context of interracial sex and the law as well. As mentioned, there was a presumption by many white Englishmen in the American

[18] *Id.* at 13.
[19] *Id.* at 14.
[20] *Id.* at 15.
[21] *Id. at* 17.
[22] *Id.* at 18-20.
[23] *Id.* at 12-15.

colonies that Africans were particularly libidinous and promiscuous. Many of these preconceptions, which included the idea that Black men lusted White women, could be characterized as the English colonists projecting anxieties about their own primal instincts and desires unto the African population out of insecurity. This included, of course, anxieties about their own sexual inadequacy. Whatever the cause, there was a clear ambivalence—a tension between "desire" and "aversion"—about interracial sex held by the White population that Jordan attributes to a deeper, more fundamental dilemma of the day.[24] That is, White people saw Black people as both similar to and different from themselves, and White people feared both sides of that reality.[25]

Laws prohibiting and punishing interracial sex and marriage served to reinforce these prejudice notions about sexuality and race. The same could be said of laws that deemed the offspring of interracial unions illegitimate,[26] and those that classified biracial people as Black, not White or biracial.[27] These laws effectively enlarged the barrier distinguishing White people from Black people in the eyes of the public which, again, was an integral part of how racial slavery was able to survive and thrive in the South. In a similar, although arguably more damaging, vein, there were also laws that significantly distinguished between the races for the purposes of labor and service.

Specifically, there were two kinds of labor laws enacted before chattel slavery was in full swing that are particularly jarring with respect to how directly they reinforced the institution in the Southern colonies. First, there was a declaration by colonial Maryland in 1664 that Black servants were to serve "Durante Vita," for life, which was followed by similar declarations in

[24] *Id.* at 70.
[25] *Id.*
[26] *Id.* at 71.
[27] *Id.* at 84.

many other Southern colonies soon after.[28] Second, there were various state laws allowing Black women to be used as field laborers.[29] Unsurprisingly, White women could not be used for such strenuous labor. Although slavery had already taken root in some southern colonies, this man-made legal distinction between the races is what allowed racial slavery to thrive in a society that paradoxically prided itself on freedom. Most significantly, the laws made it such that *owning* a Black servant (which quickly became "slave") was more valuable than *having* a White servant.[30] A Black servant was a slave, the chattel of his master, and he would be such for his life. Worse still, his kids would be born slaves. In stark contrast, a White servant was not personal property, he would not be bound for life, and his kids were born free. Moreover, since a Black female servant could be used for much more difficult labor than her White counterpart, her service was inherently more valuable.

As the laws requiring Black servants to serve for life took effect, slavery soon surpassed indentured servitude. Again, indentured servitude was for White people of a certain lower class, but chattel slavery was reserved for Americans of African descent and occasionally Native Americans. Though, the process of debasement did not limit itself to slaves, it was directed at all African Americans. For example, there were laws barring free Black men from testifying against White men; laws allowing slaves to testify against free Black men, but prohibiting slaves from testifying against White men; and references to free Black men in the Southern colonies' slave codes. Such laws were blatant attempts to encourage the public to associate free Black men with enslaved Black men rather than with free White men. This continued an all too familiar theme: make the slaves, and African Americans more generally, appear to the public, and feel to

[28] *Id.* at 42-45.
[29] *Id.* at 43-44; 66.
[30] *Id.*

themselves, inferior and worthy of enslavement to justify the morality of the institution of racial slavery. As Frederick Douglass once put it, "[b]y the laws of the country from whence I came, I was deprived of myself—of my own body, soul, and spirit."[31]

Regardless of whether cultural mores informed the law or the law informed cultural mores, it cannot be denied that the enactment of a law or a decision by a high court is an expression by the state that effectively formalizes a government's position on a given matter. A law that prohibits interracial sex and distinguishes between White and Black people, for example, sends a clear message to the public that there is a fundamental difference between these two groups of people that requires the law to mandate different treatment. Further, a law that distinguishes between the races disproportionately to the detriment of Black people sends a clear message to the public that Black people are considered to have a subordinate and inferior role in that society. Whether the message is effectively 'you were right to be prejudice' and only reaffirms the already widely held cultural mores, or 'you were wrong for not being prejudice' and invites new prejudices is not entirely significant. Either way, the law was being used as a tool to affirm or reaffirm prejudice in a process which created and sustained cultural norms and social hierarchies based on those prejudices. This theme would continue virtually uninhibited throughout slavery's existence and beyond, especially in the South where the slaveholding class's hegemony was strongest.

The Law as a Hegemonic Tool in the American South

[31] Frederick Douglass, *My Experience and My Mission to Great Britain*, 1 THE FREDERICK DOUGLASS PAPERS (eds. John W. Blassingame) (Yale Univ. Press 1979).

Looking at the law in the antebellum South as part of a larger cultural hegemony can tell us a great deal about the nature of Southern society. Most importantly though, it puts the role of law in its proper place as being the principle vehicle used to maintain the White slaveholders' control of the American South.[32] Black's Law Dictionary defines hegemony as "(1) influence, authority, or supremacy over others" and provides the example of "the hegemony of capitalism."[33] The slaveholding class's control and dominance over the South is best described as a hegemony and Southern law during the era of slavery is best understood as a hegemonic device. That is, once slavery was clearly established in the South, the law acted hegemonically to accommodate the institution and sustain the power hierarchy in place. It is at this stage where the law was most actively weaponized to reinforce the rights of slave owners, deter slave insurrection, and reaffirm—in the minds of slave owners and the White community at large—the sinister notion that the continued enslavement of African Americans was not only justified but in the public interest.

One interpretation of the relationship between law and hegemony suggests that laws can be characterized as "attempts by their authors. . . to describe the social relations of their society in ways that reconciles those relations with the moral traditions widely available in that society."[34] As the argument goes, hegemony results when the law succeeds in this endeavor, "allowing the reproduction of existing social relations, because the social relations seem right, or at least defensible, to the audiences. . . ."[35] Thus, there may be an "equally cause and effect" relationship between law and morals with respect to slavery.[36] Many judicial decisions, state

[32] EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 26.
[33] "Hegemony," Black's Law Dictionary (11th ed. 2019).
[34] Mark Tushnet, *Review: Constructing Paternalist Hegemony: Gross, Johnson, and Hadden on Slaves and Masters*, 27 L. & SCIENCE INQUIRY 169, 173 (2002).
[35] *Id.* at 173.
[36] WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN 59 (1974).

statutes, and regulations have served to describe slavery in a way that reconciled it with society's morals. Put differently, the law allowed for the continuation of slavery and the hegemony of White slaveholders by making slavery "seem right, or at least defensible," to the majority of people living in the antebellum South.[37] Significantly, the slaveholding class was ostensibly aware of its hegemony over the South. Thus, most laws coming out of state courts and state legislatures in the South could be characterized as tools intentionally used to maintain that hegemonic power imbalance.

Consider, for instance, the opinion authored by Judge Ruffin on behalf of the North Carolina Supreme Court in the infamous 1829 case of *State v. Mann*.[38] As Professor Mark Tushnet frames it, "[t]he case's content, its exposition of the logic of slavery, might best be understood as Ruffin's effort to establish, for the entire South, what slavery really required."[39] Tushnet rightly points out that Ruffin was attempting to establish the legal foundation that he felt slavery required. However, Tushnet and other scholars have been far too generous in deeming Ruffin's stance on slavery ambivalent.[40] It is shocking that abolitionists of the day had any positives to say about the 'honesty' of this opinion. Granted, it was honest about the horrors of slavery, but the opinion by Judge Ruffin as a whole is perhaps the most blatant and unsettling example of pretextual judicial conservatism and legal formalism by a high state court, crocodile tears and all. Ruffin presents an illusion of judicial restraint to excuse an unjust and poorly reasoned decision. Of course, Ruffin owned plenty of slaves. What is more, he spent a great deal of time and money as a slave trader, and he also faced claims of cruelty and harsh mistreatment of his own slaves.[41]

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[37] Tushnet, *supra* note 34, at 173.
[38] *State v. Mann*, 13 N.C. 263 (1829)
[39] MARK TUSHNET, STATE V. MANN IN HISTORY AND LITERATURE, in SLAVE LAW IN THE AMERICAN SOUTH 85-96.
[40] *Id.*
[41] *Id.*

It is clear that his personal views on slavery crept into his jurisprudence despite all his appeals to the contrary. The case dealt with the issue of whether "cruel and unreasonable battery on a slave, by the hirer, is indictable."[42] According to Judge Ruffin, it was not an indictable offense because the master had near absolute power over his slave as that is what the institution mandated.[43] Ruffin's rhetoric would lead one to belief that he was genuinely exercising judicial restraint and repudiated slavery in his personal capacity. Though, under closer examination it is clear that his decision was far from restrained. The jury in the lower court found Mann liable for cruelly beating his slave, yet Ruffin reversed and maintained the argument that the public would not approve had he ruled against Mann despite the public—through the jury—expressing just the opposite. Time and again, Ruffin suggested that although slavery ought not to be accepted morally, it was simply the way things were and he, as a judge, could not change that.[44] In reality, however, Ruffin was doing exactly what Tushnet said he was. That is, Ruffin was establishing the absolute superiority of the master and the absolute subordinacy of the slave because, as he openly admits, that is the hierarchical dynamic that the institution of slavery required to run effectively.[45]

[42] State v. Mann, 13 N.C. 263 (1829)

[43] *Id.* at 266 ("Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.").

[44] *Id.*at 268 ("But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute."). *See also Id.* at 266-67 ("I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection.").

[45] *See e.g., Id.* at 266 .("With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits.").

Like Judge Ruffin, many Southern courts and legislatures sought to solidify the relationship between slaves and slaveowners by reducing slaves to the legal status of property. In almost all of the South, slaves were treated as personal property under the law.[46] In Louisiana, the one exception in the South, the slave was treated as real property.[47] However, in states where the slave was treated as personal property generally, they were treated as real property for purposes of inheritance.[48] Similarly, although treated primarily as real property in Louisiana, the slave "retained many characteristics of chattels personal."[49] In either case, the point remains the same: slaves were treated as property rather than as people. Slaves were given free will and the status of a person only when they were being held 'accountable' for 'misconduct':

> The paradox of the slave's being at once person and property often disappeared when he or she committed a crime. In that instance the slave was almost invariably a person in the eyes of the law. By contrast, when a slave was victimized by an owner's cruelty, Louisiana was far more cognizant of the slave as property. Thus, again, the legal system was rendered inadequate to protect slaves' most basic rights. . . .[50]

Although she was addressing specifically the Louisiana legal system, this quote from author Judith Schafer can be extended to most of the South. Take, for example, the trial of Celia, a slave who was hung by the state of Missouri in 1855 for the murder of Robert Newsom.[51] Newsom, a widower in his late seventies, had bought Celia when she was only 14.[52] For five years, Celia was sexually assaulted and raped by Robert Newsom which resulted in two children.[53] At age 19, she was pregnant for a third time and the father was unknown as she had been romantically involved

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[46] Kenneth Stampp, *Chattels Personal*, in The Peculiar Institution 192-236 (1964).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Judith Kelleher Schafer, *"Details are of a Most Revolting Character": Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, in SLAVERY & THE LAW 241-267.
[51] DeNeen L. Brown, *Missouri v. Celia, A Slave: She Killed the White Master Raping Her, then Claimed Self-Defense*, WASH. POST (Oct. 19. 2017).
[52] *Id.*
[53] *Id.*

with one of Newsom's male slaves, George.[54] At this point, Celia and George decided that Newsom's abuse had to stop. Celia warned Newsom that she would hurt him if he came to her cabin again, and she asked his adult daughters to keep him away. Of course, he did not oblige. When Newsom entered Celia's cabin on June 23, 1855 and tried to force himself on her sexually, Celia cracked his head with a stick and killed him.[55] She was subsequently arrested and charged with first degree murder. At trial, her attorney argued that she was acting in self-defense under Missouri law. Despite the obvious veracity of this legal argument, the court denied it and sentenced her to execution. The court attributed her free will for the killing of her master, but somehow held she simultaneously lacked the personal autonomy to protect herself against rape and sexual assault from her master. Celia was "hanged until she died" on December 21, 1855.[56]

To be perfectly clear, "the cold language of statutes and judicial decisions made it evident that, legally, the slave was less a person than a thing."[57] It is quite revealing that slave masters got compensated for destruction of property when their slaves were injured, killed, or arrested for crimes.[58] The unreported case of *Humphreys v. Utz* is illustrative of this point.[59] In that case, Henry Utz, a grotesquely abusive overseer, was held liable for damages due to his vicious, cruel and sadistic beating and murder of a slave called Ginger Pop. Significantly, however, it was a tort action for destruction of property, not a criminal murder trial.[60] Thus, Utz was not held liable for his disgusting murder of Ginger Pop; rather, he was held liable only for damaging the property of the plaintiff, Ginger Pop's master.[61] His only punishment for the brutal murder of another human

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Kenneth Stampp, *Chattels Personal*, in The Peculiar Institution 192-236 (1964).
[58] *Id.*
[59] *The Unreported Case of Humprheys v. Utz*, Louisiana (1856).
[60] *Id.*
[61] *Id.*

being was to pay damages, jail time was never in consideration. Notably, the most silent parties on most slavery related court records in Southern states were the subjects of the suits themselves: the slaves.[62] Of course, witnesses were almost always white and the jury would often be made up of landowning White men.[63] Further, many of the lawyers, witnesses, jurors and judges in the Southern courts were active participants in slavery and owned or traded slaves.[64] The trial of Celia, the Humphreys case, and *State v. Mann* were certainly no exceptions to that.

Although legally considered more property than man, the dual nature of African American slaves was something that Southern law undeniably accounted for—just not in the way one would have hoped. As Jordan put it, "[c]onsidered as men, slaves raised much more difficult problems. The most pressing necessity was maintenance of discipline: hence the famous slave codes."[65] Consequently, a large portion of the slave codes were statutes aimed at the punishment of runaway and malfeasant slaves, which included punishments like "a specific number of stripes 'well laid on,' all the way, occasionally, to burning at the stake."[66] The slave codes and other Southern state law also sought to provide an omnipresent, self-enforcing compliance mechanism, which was also essential to maintaining the slaveholding class's hegemony over the South. The law achieved this by placing an obligation directly on slave owners to punish the misdeeds of their slaves and enforce the various provisions enumerated in a given state's slave code.[67] Though, even if unenforced, harsh laws had an inherent deterrent effect.

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[62] Ariela Gross, *The Law and the Culture of Slavery: Natchez, Mississippi* 92-123.
[63] *Id.*
[64] *Id.*
[65] WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN 59 (1974).
[66] *Id.* at 60.
[67] *Id.* at 61 ("[T]he slaveholding gentry were coerced as individuals by the popularly elected legislatures toward maintenance of a private tyranny which was conceived to be in the community interest. In the community at large, effective maintenance of slavery depended to considerable degree on vigilance and force, and colonial governments had at their direct command precious little force with which to be vigilant.").

Notwithstanding many of the harsh laws calling for cruel punishment of runaway or rebel slaves, hegemony may also explain many of the more "paternalistic" laws of the day. Take, for instance, laws that imposed the obligation on masters to care for their old and ailing slaves. Laws of this nature served two hegemonic functions. Of course, the first was to confirm the nature of the relationship between slave and master: the slave was the master's property and responsibility *forever.* The second function—to present an image of paternalism—stemmed from a recognition by the slaveholding class that establishing a paternalistic relationship with the slave class was essential to the efficacy and public perception of its hegemony over the South. As Eugene Genovese put it, "[the law] must manifest a degree of evenhandedness sufficient to compel social conformity; it must, that is, validate itself ethically in the eyes of the several classes, not just the ruling class."[68] Consequently, if the slaveholding class was perceived as overwhelmingly cruel and vulgar in its treatment of slaves, the slave class as well as the non-slaveholding White and free Black class would have rebelled against the institution.

This notion of a "paternalistic hegemony" might similarly explain why slavery and slave resistance was much different in the United States than in other European colonies in the Caribbean and South America. The Southern slave masters did not face the same threat of insurrection and they had "little need for extralegal measures" against their slaves because the laws already established their roles.[69] Thus, the American slave-owners were able to operate virtually unconcerned with rebellion. However, insurrections that gained traction—often led by charismatic leaders—were even more impactful because of how rare they were. That Nat Turner, for example, led a rebellion of over 60 armed slaves resulting in the deaths of over 50 White

[68] EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 27.
[69] *Id.*

people was incredibly jarring for the slaveholding class and non-slaveholding White class alike in areas with significant numbers of slaves. So jarring in fact that the local militia groups and mobs of Angry White men retaliated by beating and killing many slaves accused of participating in the rebellion. Nat Turner, of course, was executed by the State. Perhaps adding fuel to the fire was that Thomas Gray, the man who transcribed Nat Turner's confession, seemingly took liberties in relaying Nat's story.[70] Presumably, Gray exaggerated Nat's religiosity and the messiah-like vibe of the rebellion, used the word "murder" where Nat likely would not have, and portrayed the rebellion in a dramatically brutal and cold blooded manner.[71] This was arguably done to portray slaves in general as presenting a much larger appetite for violent uprising than they did in actuality. By painting Nat Turner's rebellion in such a manner, Gray created the false impression that slave insurrection was an omnipresent threat to White people in the South. Perhaps Gray did this simply for journalistic effect, but it is more likely that he was merely a cultural cog in the hegemonic machine. If slaves were seen as presenting such a grave threat, their continued enslavement would appear more justified to the public.

On a similar note, that lynching, violence against the Black community and prejudicial court proceedings arguably got worse after slavery also speaks to the reality that it was the slaveholding class's hegemony that allowed for a "paternalistic" iteration of slavery in America. When the war ended and slavery was abolished, that power structure was seriously disrupted and the treatment of African Americans became more violent and aggressive as a consequence. In essence, racist Whites in America were compensating for their loss of control by ramping up their anger and hate. The Colfax massacre in 1873, for example, resulted in murder of 60 to 150

[70] *The Confessions of Nat Turner, Edited with an Introduction by Kenneth S. Greenberg.*
[71] *Id.*

African Americans. In the words of historian Eric Foner, "[it was] the bloodiest single instance of racial carnage in the Reconstruction era, the Colfax massacre taught many lessons, including the lengths to which some opponents of Reconstruction would go to regain their accustomed authority."[72] To be clear, there was indisputably abhorrent and morally repugnant mistreatment of slaves in the American South prior to the war. But, the point is that violence against African Americans ostensibly got more aggressive when the White ruling class's control over Southern society was threatened. It is therefore doubtful that this "paternalistic" iteration of slavery in America would have occurred had the control of the slaveholding class not been so clearly delineated.

Ultimately, the role of the law in a slave society is to allow the institution to thrive without the public developing a guilty conscience: "[the] law acts hegemonically to assure people that their particular consciences can be subordinated—indeed, morally must be subordinated—to the collective judgement of society."[73] If the law compels masters to punish runaway slaves, for example, it is unlikely that the master will feel some sense of immorality for doing what the law commands him to do. Indeed, he may feel immoral for not doing it. By distinguishing the races in their status, rights, privileges and protections under the law, the state judges and legislators of the day sought to suppress doubt about the efficacy and morality of slavery in the minds of the many classes. Simply put, the law aimed to clearly delineate the roles of each class in society in a way that upheld slavery and its attendant power structure. Numerous examples of state explicitly uphold slavery, place the slave master on superior ground, and relegate slaves to the role of property. From laws that allow and even compel the master to discipline his slave to laws

[72] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (2011). Foner goes on to say: "Among blacks in Louisiana, the incident was long remembered as proof that in any large confrontation, they stood at a fatal disadvantage."
[73]EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 27-28.

that hold the master accountable for the actions of his slave, the entire corpus of law from the Southern slave states could be seen as serving the hegemonic end of reinforcing the illusion that White men were superior to Black men. As a consequence, White men in this country felt that they could own Black men as personal property without being immoral. The institution of slavery depended on this illusion, and the illusion was made possible by the law. The next section will consider how the federal law worked to sustain this illusion at a grand scale.

The Original U.S. Constitution

It is impossible to deny the duality implicit in the Constitution of 1787. It was simultaneously pro-freedom and pro-slavery. It contained a grand promise of opportunity, due process, and liberty for some, but a condemnation to undeserved subordinacy and oppression with no process for others. It was weaponized by slaveowners and racists to reinforce and sustain slavery while also weaponized by the brightest abolitionist minds of the day to derail the institution. Clearly, whether the Constitution was pro-slavery or pro-freedom in its effect depended on who was applying it and who it was being applied to. This section will first briefly discuss Edmund Morgan's arguments about the correlation between American freedom and American slavery: the American paradox as he calls it. Then, Frederick Douglass and his arguments for an anti-slavery Constitution will be used as a framework for analyzing the most relevant provisions of the original Constitution to show the founding fathers' ambivalence toward slavery.

The American Paradox

Edmund Morgan's contemplation of the American paradox eloquently captures the duality and contradiction of American values. Although he does not argue explicitly in constitutional terms, the contradiction and duality he notes as being prevalent in colonial America undeniably seeped into the Constitution of 1787. Morgan started with the observation that "the rise of liberty and equality in this country was accompanied by the rise of slavery." He noted further, "[t]hat two such contradictory developments were taking place simultaneously over a long period of our history, from the seventeenth century to the nineteenth, is the central paradox of American history."[74] Morgan went on from here to make the nuanced point that slavery and freedom coevolved in colonial America. Furthermore, prevailing conceptions of freedom and liberty in American culture were, paradoxically, a direct consequence of slavery in that slavery inevitably incited an aggressive form of liberalism that is responsible for the staunch personal rights and liberties granted in documents like the Bill of Rights.[75] It is perhaps no coincidence then that slavery and representative democracy arrived in Jamestown, Virginia in the same year, 1619.[76] Similarly, one could view the strong ideas of freedom, resistance and liberty developed by the African Americans subjected to slavery as another manifestation of this American paradox. "The challenge" for historians and legal scholars according to Morgan "is to explain how a people could have developed the dedication to human liberty and dignity exhibited by the leaders of the American Revolution and at the same time have developed and maintained a system of labor

[74] Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, 59 J. AM. HIST. 5, 6 (1972).
[75] *Id.* at 26 ("It was slavery, I suggest, more than any other single factor, that had made the difference, slavery that enabled Virginia to nourish representative government in a plantation society, slavery that transformed the Virginia of Governor Berkeley to the Virginia of Jefferson, slavery that made the Virginians dare to speak a political language that magnified the rights of freemen, and slavery, therefore, that brought Virginians into the same commonwealth political tradition with New Englanders. The very institution that was to divide North and South after the Revolution may have made possible their union in a republican government. Thus began the American paradox of slavery and freedom, intertwined and interdependent, the rights of Englishmen supported on the wrongs of Africans.").
[76] Class 9/9/20 & 12/2/20

that denied human liberty and dignity every hour of the day."[77] The point of including this brief discussion on Morgan's work here is threefold. First, it is significant to simply to note that the duality of American values and principles and the consequent inconsistent nature of the original Constitution had roots deep in American culture, dating back well before 1787. Second, as the following section will hopefully manifest, the Constitution is perhaps the best example, at least in document form, of this American paradox in action. Moreover, the Constitution is illustrative of the contradictory stances held by the founding fathers that Morgan consistently references in his work. Third, it is a fitting way to preface Douglass's arguments as a framework for analyzing the Constitution in that his argument was itself representative of the American paradox. A free African-American abolitionist was effectively excusing the framers' ambivalence toward slavery evident in the language of original Constitution.

Frederick Douglass on Whether the Constitution was Pro-Slavery or Anti-Slavery

At first blush, one might be struck with confusion or even frustration by some of Douglass's arguments related to the original Constitution. How could such a brilliant man, and an abolitionist at that, not see the Constitution for what it was? Why would he go beyond the text to give the Constitution of 1787 an anti-slavery tinge? How could Douglass ignore the undeniable language that explicitly recognized the idea of "property in man"? After some deliberation, one's

[77] Morgan, *supra* note 74, at 6; *See also* MARK TUSHNET, THE LAW OF SLAVERY IN THE EARLY REPUBLIC, in SLAVE LAW IN THE AMERICAN SOUTH 11-18 ("The drafters of the Constitution, meeting in Philadelphia, discovered that they would be unable to secure the Constitution's ratification if they allowed the Constitution to cast doubt on slavery. They avoided using the words slavery or slaves in the Constitution, but they included several provisions that recognized and even protected the institution where it existed.").

irritation and confusion should fade as the realization dawns on them: Douglass made this argument because he had more foresight than his opponents who shared the same goal of abolition. What he was saying was this: if we allow the constitution to be labeled as pro-slavery then we allow it to be used as a mechanism for perpetuating slavery. Instead, as the argument goes, we need to make it look anti-slavery and pro-freedom so those in opposition to abolition will be forced to admit that slavery does not comport with the Constitution.[78] In other words, we need to utilize the Constitution as a tool for ending slavery: weaponize it in the name of freedom, rather than letting it be weaponized in the name of slavery. Nonetheless, one might wonder if Douglass would stick to his argument today in a world where racial chattel slavery in America has been abolished with no chance of making a comeback as many of the problematic provisions have been rendered dead letter by amendments—mass incarceration notwithstanding. Would he still argue that the Constitution as written in 1787 was anti-slavery? It is hard to believe that he would given his genius and the obvious error in his legal conclusions.

For example, Douglass argued that Article 1, section 2, clause 3[79]—the notorious three-fifths clause—was actually anti-slavery and an intentional "disability" to slave states "by giving

[78] Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? Speech Delivered in Glasgow, Scotland on March 26, 1860*, in THE LIFE & WRITINGS OF FREDERICK DOUGLASS 477 ("But how dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the constitution? Why should such friends invent new arguments to increase the hopelessness of his bondage? This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common sense reading of the constitution itself; by discrediting and casting away as worthless the most beneficent of rules of legal interpretation; by ruling the Negro outside of these beneficent rules; by claiming everything for slavery; by denying everything for freedom; by assuming that the constitution does not mean what it says, and that it says what it does not mean; by disregarding the written constitution and interpreting it in light of a secret understanding. It is in this mean, contemptible, and underhand method that the American Constitution is pressed into the service of slavery.)."

[79] The clause reads: "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."

an increase of 'two-fifths' of political power to the free over slave states."[80] But, Douglass's argument rests on a big assumption: the happening of an actual political movement in which this extra political power would be used to end slavery and promote freedom. Without the political will to end slavery, that extra political power does nothing more than give free states an advantage on issues totally unrelated to slavery. Thus, it might have the potential to be used as an anti-slavery tool, but it does not read as an intrinsically anti-slavery provision. To get there, one needs to read beyond the actual plain letter of the law. It must be conceded, however, that this particular provision similarly cannot be said to be intrinsically pro-slavery: the plain language of this clause neither facilitates slavery nor freedom. Rather, it is an example of an instance where the Constitution—taken in its best light—is passively against slavery. Though, as historian Paul Finkelman has pointed out, this provision actually ended up protecting slavery in practice. Due to the massive amount of slaves in the South, counting them—even if only as three-fifths a person—actually meant more political power (more representatives) for slave states.[81]

Douglass also discussed Article I, Section 9, clause, which is perhaps the most glaring example of the original Constitution being pro-slavery.[82] Frankly, Douglass's argument did not address this provision in a meaningful way. Instead, he chose to focus on the portion about Congress's right, or lack thereof, to prohibit the slave trade. The language of this provision unambiguously allows human trafficking and the slave trade to persist with clear language treating people as property. "Migration or Importation of such Persons," for example, clearly

[80] Douglass, *supra* note 78, at 477. From here, Douglass goes on to say the following: "So much for the three-fifths clause; taking it at its worst, it still leans to freedom, not slavery; for, be it remembered that the constitution nowhere forbids a colored man to vote."
[81] Paul Finkelman, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 19 (2018).
[82] The clause reads: "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."

reflects an idea of property in man. Goods are imported, people are not—people emigrate and immigrate. Further, if that was not clear enough, it actually says that a tax can be imposed "on such importations." Again, the language blatantly treats persons as imported goods, duty and all. As for the portion of the clause about Congress being prohibited from ending slavery until 1808, Douglass said that this language actually provides for the abolition of the slave trade and a means to end slavery.[83] In fact, however, it says that the slave trade cannot be abolished before 1808, but it does not say—anywhere—that it must or will be abolished after that date. Although he may be right about that being the framers' intention, the language lends itself to no such conclusion. Curiously, he also said that "it showed the intentions of the framers were good, not bad."[84] The framers' intentions may well have been good, but this language certainly does not prove that. They gave the slave states a grace period where those states knew—with a virtual guarantee by the supreme law of the land—that the slave trade would persist uninterrupted until 1808. It is also worth mentioning that even if construed as Douglass suggests, the slave trade could end without enslaved men being freed. Prohibiting the slave trade—which is not a guarantee after the twenty years by the clause's own language—would be a way to let slavery slowly die, which appears to be more passive on slavery than anti-slavery.

Significantly, Douglass also addressed Article IV, section 2, clause 3, which is commonly referred to as the fugitive slave clause.[85] Douglass argued that this provision did not apply to slaves at all and instead applied to indentured servants. His argument was essentially that, being

[83] Douglass, *supra* note 78 ("for it says to the slave states, the price you will have to pay for coming into the American Union is, that the slave trade, which you would carry on indefinitely out of the union, shall be put an end to in twenty years if you come into the union").
[84] *Id.*
[85]The clause reads: "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."

"a simple article of property" and not a person with personal rights, a slave cannot owe service.[86] There are many problems apparent with his analysis here. To start, the three-fifths clause refers explicitly to slaves as being persons, and although it only counts them as three-fifths a person, they are nonetheless a *person* for the purposes of the Constitution. Further, it does not read "no person held in service or labor for a term of years," which would reasonably be read as applying to indentured servants only. Instead it reads "no person held in service or labor in one State," which could easily be read as applying to both slaves and indentured servants. Also, the framers had already shown in the three-fifths clause that they knew how to be much more explicit when referring specifically to indentured servants: "Including those bound to service for a *term of years*." And, as we know, this is the principal distinction between what makes someone a slave versus an indentured servant. Why then would the framers, as brilliant and knowledgeable as they were, not be specific about indentured servants in this article? It is simple: they were not talking about indentured servants (or not solely about indentured servants), they were referring principally to slaves.

To reiterate, Douglass made the arguments that he did because he recognized that the times demanded that the Constitution be given an anti-slavery and pro-freedom read so that it could be used as a tool to end slavery. After all, what could be more powerful a tool than the supreme law of the land. Douglass likely also recognized that the best way to change the system was to change it from within. It would surely be a much taller task to abolish the whole Constitution than to abolish slavery as being inconsistent with the Constitution. However, even if Douglass and others were able to make some clever arguments that allowed abolitionists to weaponize it

[86] Douglass, *supra* note 78, at 475. Note the language used here. It is interesting that he would use this language when his whole argument is built on the notion that the Constitution does not recognize the idea of property in man.

against slavery, it seems clear in retrospect that the original language of Constitution was, regrettably, not anti-slavery. This also may have been required of the framers in that they would have been hard pressed to unify the country through the establishment of the Constitution had they been aggressively anti-slavery as the Southern states never would have ratified. Therefore, it may be that the framers made every effort to be anti-slavery and pro-freedom where they could, but the Constitution as a whole was, construed in its worst light, pro-slavery. Even in its best light—assuming that the framers did plan for some language to be used as a mechanism for ending slavery at some later date—these troubling provisions demonstrate that the Constitution was not, at its inception and in in its immediate effect, anti-slavery. To be an anti-slavery document, it would need a generous, perhaps even intellectually dishonest, interpretation. Nonetheless, Douglass's point on the responsibility of judges and lawyers to use their interpretive capacities to fight against slavery is well-taken. As Douglass saw it, the law is what those tasked with interpreting it say it is.

The Supreme Court's Role in Maintaining Slavery

Fittingly, the topic of judicial interpretation brings our discussion to the significance of the Supreme Court's jurisprudence on slavery. Although none of the freedom suit cases heard by the Marshall Court that will be addressed here spoke directly to the Constitution, Marshall's pro-slavery opinions are worth examining as they set the stage for an unsettling trend of pretextual judicial restraint. Then, the focus will turn to Justice Story's perturbing constitutional rationalization of slavery in *Prigg v. Pennsylvania*. Lastly, Chief Justice Taney's racist rhetoric and

feigning of judicial restraint and the troubling implications of *Dred Scott v. Sandford* will be examined.

Chief Justice Marshall & His Pro-Slavery Jurisprudence

Despite his heroics for the Court, like establishing judicial review and Constitutional supremacy, Marshall's relatively small line of cases relating to slavery have caused many to question the legal community's widespread reverence for the Chief Justice that shaped the Court and American constitutional law. As was the case with Judge Ruffin, Marshall was a slaveholder in his personal capacity, and not a meager one at that.[87] Marshall was also outspokenly against the idea of free Black people in American society, and he even petitioned the Virginia legislature to fund the removal of free Black people from the state.[88] To what extent his personal views on slavery and race crept into his jurisprudence on the Court is not entirely clear, but it appears safe to say that they did to some degree. For example, every majority opinion issued by Marshall in a case involving a slave resulted in the slave losing.[89] As Finkelman points out, what is more concerning is that Marshall, a famously courageous and creative Justice, often hid behind legal formalism and judicial conservativism in the slavery cases he heard by taking an

[87] Paul Finkelman, *Master John Marshall and the Problem of Slavery*, U. CHICAGO L. REV. ONLINE (Aug. 31, 2020), https://lawreviewblog.uchicago.edu/2020/08/31/marshall-slavery-pt1/ ("Marshall owned hundreds of slaves during his lifetime. He owned plantations and clearly profited from them. In 1830, five years before his death, he owned about 150 slaves. Had he not given a substantial number of slaves to his sons, Marshall would have owned more than 250 slaves. Unlike his distant cousin Thomas Jefferson, Marshall did not inherit these slaves; rather, he bought them throughout his life. Furthermore, throughout his public career Marshall publicly and privately opposed the presence of free blacks in America. He petitioned the Virginia legislature to fund removing them from the state.").

[88] *Id.*

[89] *Id.(*"The Marshall Court heard fourteen cases involving black freedom. The Chief Justice wrote the majority opinion in seven, and in every case the slaves lost. Justice William Johnson, of South Carolina, wrote the opinion rejecting freedom in one case in 1827. In six other cases, decided from 1829 to 1835—when Marshall no longer totally dominated the Court—other justices, including two southern slaveowners, wrote opinions upholding black freedom. That others wrote these opinions suggests Marshall did not agree with the results. But, in an era when dissents were rare—Marshall only wrote six dissents in his lifetime—the chief justice's silence is deafening. Given the nineteenth-century Court's limited jurisdiction and the cost and difficulty of appealing to the Court, especially for a slave, we might conclude that fourteen was actually a large number of cases. But whether "relatively few" or 'relatively many,' the outcome of these cases is striking: Chief Justice Marshall *never* wrote an opinion supporting black freedom.").

uncharacteristically strict and narrow approach to judicial interpretation.[90] Yet, when "statutes and precedent were on the side of freedom," Marshall would still issue decisions supporting the institution of slavery.[91] Thus, his jurisprudence in slavery related cases can be characterized as altogether legally inconsistent: conveniently adhering to the operative text and precedent when it supported slavery, but ignoring or straining the operative text and precedent when it hindered slavery. The constitutional significance of Marshall's decisions may not be immediately clear with the absence of direct constitutional challenges to slavery, but in retrospect one could arguably view the Marshall Court's pro-slavery opinions—particularly those actually authored by Marshall—as laying the groundwork for the Court's inevitable constitutional jurisprudence on the matter in later cases like *Prigg* and *Dred Scott*. Of course the holdings in many of the Marshall Court's slavery cases are troubling, but the ad-hoc application of legal formalism and the feigning of judicial restraint to either defend slavery or avoid questions about its legitimacy is equally, if not more, disconcerting.

Take, for example, the case in which Marshall denied a woman claiming her freedom based on ancestry from presenting affidavits proving her great-grandmother's freedom.[92] Despite being made aware of state practices suggesting that such evidence was generally admissible in similar contexts,[93] Chief Justice Marshall took an unreasonably strict view of the hearsay rule and denied the plaintiff her freedom.[94] In contrast, he hypocritically upheld the trial court's decision to admit the hearsay evidence offered by the White man claiming to own the

[90] *Id.*
[91] *Id.*
[92] Mima Queen and Child v. Hepburn, 11 U.S. 290 (1813).
[93] *Id.* at 299 (Duvall, J., dissenting). To his credit, Justice Duvall would stand in opposition to slavery on a consistent basis while on the Marshall Court. *See e.g.*, Wood v. Davis, 11 U.S. 271 (1812); Le Grand v. Darnall, 27 U.S. 664 (1829).
[94] *Mima Queen*, 11 U.S. at 295.

plaintiff that suggested that the plaintiff's mother was a slave. [95] In that same case, Marshall hid behind a strict application of the law in denying the removal of a juror that the plaintiffs objected to on the grounds that their objection was not made prior to the juror being sworn in.[96] To make matters worse, Marshall upheld the trial court's removal of an anti-slavery juror noting that "it was desirable to submit the case to those who felt no bias either way; and therefore the Court exercised a sound discretion in not permitting him to be sworn."[97] Yet, pro-slavery jurors were allowed to serve. Moreover, this decision had a pernicious effect in practice well beyond its damning impact on the plaintiff in that case. As Justice Gabriel Duvall noted in dissent: "a decision that hearsay evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur."[98] The most bewildering part may be that Chief Justice Marshall ignored the settled law from Southern slave states while purporting to adhere strictly to the law.[99] He would have been far from the first judge to admit such evidence in a case of this kind.[100] Marshall could have easily settled this case in favor of the plaintiff without disturbing the law of Southern states and principles of federalism or threatening the state of the union. That case is but one example in a series of anti-Black freedom decisions by Marshall. Although his rhetoric may not have been as racially charged as Taney's in *Dred Scott*, his opinions demonstrate a firm commitment to upholding slavery and oppressing Black Americans. Consistent with the example set by the Chief Justice, the Court would proceed to hide behind

[95] Finkelman, *supra* note 87.
[96] *Mima Queen*, 11 U.S. at 297.
[97] *Id.* at 298.
[98] *Id.* at 299 (Duvall, J., dissenting).
[99] Paul Finkelman, *John Marshall's Proslavery Jurisprudence: Racism, Property, and the "Great"* Chief Justice, U. CHICAGO L. REV. ONLINE (Aug. 31, 2020) https://lawreviewblog.uchicago.edu/2020/08/31/marshall-slavery-pt2/.
[100] *Id.*

legal formalism and judicial restraint while issuing legally inconsistent opinions riddled with sinister racist undertones for over a century. Taney's opinion in *Dred Scott*, for example, was in effect the antithesis of legal formalism and judicial conservatism, but his rhetoric appealed to those principles—as well as racist ones.[101] Similarly, although Justice Story's rhetoric was less disturbing, his formalistic constitutional justification for slavery and deference to the status quo in *Prigg* was equally concerning.

Prigg v. Pennsylvania

Prigg could be viewed as a paradigm shifting case that set the stage for the legal battle over abolition in the courts that was inextricably connected to the happening of the Civil War. It was paradigm shifting in that it unintentionally provided abolitionist lawyers with a new kind of legal challenge to slavery. But, that positive consequence came in a formalistic opinion by Justice Story that detailed a disconcerting constitutional justification for the efficacy of slavery. The holding in *Prigg* made it unequivocally clear that the Constitution as originally written was pro-slavery. Admittedly, some might argue that, while it did render the Constitution pro-slavery, this case instead bolsters the argument that it was the racist judges and lawyers of the day that gave the Constitution it's pro-slavery tinge, rather than the text itself. Although, the analysis of the Constitution and Frederick Douglass above arguably reveals otherwise. But, even if that point is conceded, it is a distinction without a difference. As Douglass taught us, the meaning of a law is largely (if not solely) determined by what those tasked with interpreting it perceive it to mean. In this case, the body with ultimate authority on interpreting the Constitution posed a textual argument stating that a provision of the Constitution was unambiguously a fugitive slave clause

[101] Dred Scott v. Sandford, 60 U.S. 393, 405 (1857).

that prevents runaway slaves from escaping into non-slaveholding states.[102] Regardless of whether it is the inherent meaning of the text or simply the Court's interpretation of it that renders it so, this cases makes it clear that the Constitution was a pro-slavery document in practice. Thus, the Constitution was effectively a tool in the anti-abolitionists toolbox.

The holding—that a Pennsylvania law allowing fugitive slaves refuge from slavery contravened Article IV and was thus unconstitutional—was significant in its own right as it made any state law contravening the fugitive slave clause or the subsequent fugitive slave act unconstitutional. Thus, runaway slaves were left with no recourse or right to due process if caught and forced back into slavery. What is worse, the state law at issue in this case was actually meant to protect *free* African Americans from being sold into slavery. Thus, as discussed in an article by Professor Newmyer and Professor Lahav, Story's opinion goes further than just damaging runaway slaves. The holding, like many other decisions and laws that upheld slavery, threatened the rights of *all* African Americans living in the country, free or slave.[103] However, the way Story framed the issue contextually—that the success of the union was ultimately dependent on this clause's existence and continued efficacy—makes that holding even more troubling in that it painted slavery in the image of this immovable object in the American South.[104] That is, immovable to the extent that one wants to keep the union intact. Story makes it clear to the nation as a whole that the slave owners' right to own slaves would—as per the Constitution—take precedent over the peoples' moral objections to the institution of slavery. It

[102] Prigg v. Pennsylvania, 41 U.S. 539, 611 (1842).
[103] Alexandra D. Lahav and R. Kent Newmyer, *The Law Wars of Massachusetts, 1830-1860: How a Band of Upstart Radical Lawyers Defeated the Forces of Law and Order, and Struck a Blow For Freedom and Equality Under Law*, 58 AM. J. LEGAL HIST. 324, 335 (2018).
[104] As Justice Story framed it, "the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude." *Id.*

effectively says that, even when a slave has found refuge in a free state that has affirmatively condemned slavery in its own laws, the master's right to the slave's labor will always prevail and that fugitive slave will be forced back into slavery without due process of law. Notably, Story took a page out of Chief Justice Marshall's playbook and used language alluding to judicial restraint and legal formalism to justify his narrow reading of the Constitution:

> [I]t may be well, in order to clear the case of difficulty, to say, that in the exposition of this part of the constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature.[105]

Story also consistently referred to textualist principles—tools of legal formalism and judicial restraint—as he upheld slavery and defended its efficacy.[106] As alluded to earlier in this subsection, however, this case had some unintended positive consequences. In essence, the infringement on federalism implicit in this decision caused a paradigm shift to the way in which abolitionist lawyers approached their cases: radical lawyers in free states were now inclined to use principles of due process under state law to challenge pro-slavery federal laws.[107] The radical bar in Massachusetts, for example, wasted no time in exploiting Story's reasoning and using it against slavery. *Prigg* effectively motivated anti-slavery, pro-freedom lawyers and set the legal battle for abolition on an unstoppable track by unknowingly providing a strong legal framework for those lawyers to build their cases upon. Inevitably, this unstoppable force (the radical bar's

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[105] *Id.* at 610.

[106] *See e.g.*, *Id.* at 612 ("How, then, are we to interpret the language of the clause? The true answer is, in such a manner as, consistently with the words, shall fully and completely effectuate the whole objects of it. If, by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.").

[107] Alexandra D. Lahav and R. Kent Newmyer, *supra* note 103, at 338 ("In short, *Prigg* and Latimer gave the radical lawyers a legal vocabulary beyond the injustice of rendition and the immorality of slavery with which to argue their position: now the issue was the right to due process of law and trial by jury, as those rights were embodied in Massachusetts law. Radicalism had begun to don the mantle of law and order.").

commitment to eroding and ending slavery) would collide with the immovable object (the institution of slavery in the American South).

Dred Scott v. Sandford

To reiterate, the impact that judges and elected officials had on slavery at the federal level leading up to the *Dred Scott* case was overwhelmingly one of reinforcement and accommodation. As illustrated, this was frequently done through patently racist and poorly reasoned decisions and misguided legislation. But, it was at times a more subtle product of a squandered opportunity or a passing of the buck. The context surrounding the *Dred* case, the Court's decision, and the subsequent Lincoln-Douglas debates stand as examples of both the subtle and the blatant failures of Congress and the Court in defending freedom during the era of slavery. Congress kicked the can down the road to the Court with respect to the issue of slavery,[108] and the Court squandered the opportunity to uphold freedom. Instead, Chief Justice Taney's majority opinion continued the Court's disturbing trend of appealing to legal formalism to uphold slavery and hide behind the law. Although, to be sure, Taney's façade was by far the most transparent. Unsurprisingly, Taney—like others on the *Dred Scott* Court—owned slaves in his personal capacity.[109] Even more unsurprising, Taney was a staunch racist and believer in White supremacy, as evidenced by his grotesque rhetoric in this case.[110] He constantly referred to Black people as

[108] Paul Finkelman, *Abraham Lincoln, A House Divided Speech at Springfield, Illinois, June 16, 1858*, in DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 184 (2d. Ed. 2017).
[109] *Id.* at 24.
[110] Dred Scott v. Sandford, 60 U.S. 393, 409 (1857) ("We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. . . . They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.").

an "inferior," "unfortunate," "unhappy," or "subordinate" race, and he referred to White people as the "dominant" race.[111]

The racist rhetoric was despicable without doubt, but, again, it was also troubling that Taney feigned judicial restraint while simultaneously creating new law and limiting congressional power.[112] For example, Taney used language like, "[i]t is not the province of the Court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power. . . ."[113] Yet, his opinion was doing exactly that. That is, deciding upon the policy or impolicy of Congress's past decisions and Missouri State law; namely, the Missouri Compromise and the Missouri citizenship requirements. In familiar fashion, Taney purported to take a textual approach in suggesting that Congress's right to regulate the territories of the United States under Article IV, section 3, clause 4 of the Constitution only applied to the territories in the Union at the time of the Constitution's enactment.[114] It should be obvious that such an argument is logically and legally inconsistent with most understandings of Congress's power under the Constitution—textual and contextual based interpretations alike. It is simply an incoherent argument to suggest that this power of Congress to regulate, which is in a section addressing Congress's power to make new states, is limited to old states and territories. It would effectively render an explicit power of Congress toothless in the new territories that likely most needed congressional assistance.

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[111] *Id.* at 405; 407; 409; 412; 417; 426.
[112] *Id.* at 405. ("It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.")
[113] *Id.*
[114] *Id.* at 432.

Worse still, he did not need to offer such a broad constitutional holding on Congress's power to regulate slavery in the new territories to uphold the decision against Scott. Dred Scott lost the case in the lower courts pursuant to Missouri Law, and the Kansas-Nebraska Act—an act that made slavery a state by state question dependent on popular sovereignty which was chiefly sponsored by Senator Stephen Douglas—effectively repealed the Missouri Compromise three years earlier. Taney simply could have upheld the lower court's ruling under Missouri Law and deemed the Missouri Compromise void by the Kansas-Nebraska act. It would not be a stretch to suggest that most judges and jurists would consider a broad constitutional holding to be the antithesis of judicial conservativism, especially when not needed to reach the desired conclusion. So much, then, for Taney's self-proclaimed judicial restraint. To be clear, it still would have been a troubling pro-slavery decision had he decided the case against Dredd by other means, but at least it would have been consistent with a theory of judicial conservativism. The same charges of pretextual judicial conservativism and extreme legal formalism could be cast at Taney for the more well-known holding in that case regarding African American citizenship. Taney ruled that African Americans—whether currently slaves or the descendants of slaves—were not considered citizens of the United States and thus not entitled to the rights and protections of the Constitution.[115] Taney acted as though he was simply applying the law, but his convoluted reasoning on this issue blatantly exposes his façade. He was not being conservative or restrained by any definition as the citizenship question was not even an issue in front of the Court. The lower courts decided that Scott was a citizen under Missouri law while also holding that he was a slave. Dred Scott certainly did not appeal the lower court's decision on his citizenship; rather, he appealed the court's decision as to his status a slave.

[115] *Id.* at 407.

Taney consistently grounded his pro-slavery arguments in in unreasonably originalist arguments about the framers' ideologies and personal lives. For example, he made the convoluted argument that, because the framer's owned slaves and were ambivalent about slavery, it is unlikely that they would have included African American's in their definition of citizenship—even when freed. Taney was indeed hiding behind the law under false pretenses, but he was doing it quite conspicuously. As Finkelman put it quite succinctly:

> Taney's opinion illustrates the folly of using an intentionalist analysis when the intentions of the framers were clearly mixed, uncertain, and contradictory. Taney offered an unsophisticated historical claim that was a thinly disguised political argument designed to destroy the republican party and any opposition to the spread of slavery into the territories.[116]

Taney's disturbing portrayal of American values taken together with the holdings of the case also serve as a stark demonstration of the truly exclusive nature of American law and culture at that time:

> It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; *but none other; it was formed by them, and for them and their posterity, but for no one else*. . . .It was the union of those who were at that time members of distinct and separate political communities into one political family. . . .[117]

It is language such as this that takes this case into its own class of repugnancy. A pro-slavery decision that denied Dred Scott his freedom was bad enough, but to go as far as Taney went was a needless atrocity unmatched in its moral reprehensibility as far as this writer is concerned. Consider, in sharp contrast, the alternatives that the Court had. Of course, reversing the lower court's decision regarding slavery and affirmatively holding that Congress had the right to ban

[116] PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT (2018).
[117] *Dred Scott*, 60 U.S. at 406.

slavery in the Union would have been the most preferrable. Unfortunately, that decision was unlikely to happen given the Court's makeup. More realistically, Justice McLean suggested that the Court take an approach more consistent with federalism that would have also freed Dred Scott.[118] While respecting state rights and preserving Congress's right to regulate new territories, he argued that Congress had the authority to establish and regulate the internal affairs of a *territory* such as Wisconsin.[119]

Justice Curtis's dissent, however, offered the more powerful repudiation of Taney's decision. It also painted a more compelling picture of an alternative path for the Court to take. Of course, he dissented vehemently on the citizenship question and stressed that all people born and naturalized in any of the individual states are citizens of this country.[120] On the question of Congress's authority, Curtis personally thought that Congress had the power to ban slavery in the states, but—taking a genuinely textual and conservative approach—he recognized that it was a political question of *principle* requiring immense resources.[121] Thus, according to Curtis, it was not for the Court to decide. Although either of these courses of action outlined by the dissenting justices would have been much preferred to Taney's decision, neither would have done enough to settle the issue of slavery in America. The significance of Curtis's dissent, however, was that it manifested that the "road not taken" was the road that Taney purported he was on; that is, the road of judicial restraint.[122]

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[118] *Id.* at 529 (McLean, J., dissenting).
[119] *Id.*
[120] *Id.* at 565 (Curtis, J., dissenting).
[121] *Id.* at 612.
[122] Keith E. Whittington, *The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions*, 63 *Journal of Politics* 365, 381 (2001) ("The virtue of Curtis's opinion lies not only in his careful refutation of Taney's citizenship argument, but also in his surprisingly Jeffersonian suggestion that political actors bore responsibility for working through the principles at stake for themselves and that the judiciary could not spare them that responsibility.").

The debates over the legitimacy of the Court and the issue of Slavery between Abraham Lincoln and Stephen Douglas that ensued after this case reflect the widespread dissatisfaction regarding the Court's decision and the status of slavery in the union. According to Douglas, slavery had to be a question decided by the states under principles of popular sovereignty. Though, whether he was actually indifferent to Slavery as he presumes to be was seriously questionable to Lincoln.[123] To that end, perhaps Douglas argued for a theory of popular sovereignty because it was clear that slavery would be supported by such a theory if applied in the South. Either way, popular sovereignty was exactly what Congress contrived in 1854 with the Kansas-Nebraska Act authored by Senator Douglas himself.[124] As Lincoln frames it, however, this was an inherently unsustainable plan for a unified country.

> "A house divided against itself cannot stand." I believe this government cannot endure, permanently half slave and half free. I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing, or all the other.[125]

This sentiment of untenable turbulence and tension expressed by Lincoln was well-founded. Obviously, the country went to war over slavery within a few years of the famous debates, but a mini-civil war had already been happening in Kansas. In response to the Kansas-Nebraska Act, from 1854-1849, there was a series of violent confrontations in the Kansas territory as a consequence of the rising political tensions surrounding the slavery debate in the territory. It was essentially a one-state civil war over slavery, commonly referred to as 'bleeding Kansas,' that foreshadowed what was to come for the rest of this country.

[123] Paul Finkelman, *Abraham Lincoln, A House Divided Speech at Springfield, Illinois, June 16, 1858*, in DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 185 (2d. Ed. 2017).
[124] *Id.*
[125] *Id.* at 182.

It seems fitting to juxtapose the brief discussion on Lincoln with the brief point that the Supreme Court cases focused on here—*Dred Scott* and *Prigg*—also set the stage for what the end to slavery, beyond a civil war of course, would have to look like: a constitutional amendment. The Constitution was pro-slavery according to the Supreme Court. Thus, amending the Constitution after the war to make it anti-slavery would be the only way to officially end the institution without throwing out the baby (the Constitution as a whole) with the bathwater (the parts of it that were pro-slavery or anti-freedom).

These cases and laws demonstrate the duality of American law and culture in a jarring way. This is the cruel and exclusive nature of the American legal system that Frederick Douglass was alluding to when he said "their laws, their judges, their representatives and legislators."[126] Worse still, this trend would not end with slavery.

Closing Remarks: The Long-Lasting Implications of the Law's Approach to Race in America

Despite all the nuanced duality noted in the laws, there is one example of duality that stands out above all else. To reiterate, that is the duality of what it meant, and now means, to be an American. For many Black people in the country during the time of slavery, it meant a life of forced labor, gross mistreatment, unsolicited racism, and an utter lack of rights, liberty and opportunity. Consequently, what it means to be an American today in 2020 is, for many, a long ancestral history of being oppressed and abused by one's own government and neighbors. For many, it also means facing pervasive prejudice on a daily basis in a variety of ugly forms—each one more backhanded than the last. Including, to be clear, being subjected to the conscious and

[126] Frederick Douglass, *An Account of American Slavery*, 1 THE FREDERICK DOUGLASS PAPERS (eds. John W. Blassingame) (Yale Univ. Press 1979).

subconscious biases of those responsible for the drafting, interpretation, and enforcement of the law.

It is fair to say that American law has failed the Black community consistently from 1619 through 2020. When slavery ended and African Americans had seemingly gained legitimate rights and liberties, the Court destroyed the civil rights amendments and continued its long-standing tradition of hiding behind the law when faced with issues concerning racism in America. In the *Slaughter House Cases*, the Court held that the Thirteenth Amendment only prohibits chattel slavery as experienced by African Americans before the war.[127] In that same decision, the Court also held that the privileges and immunities clause of Fourteenth Amendment only protects rights guaranteed by the United States and not rights guaranteed by the states.[128] About a decade later, the Court again offered a narrow reading of the Constitution and held that the Fourteenth Amendment's protections against discrimination only allowed Congress to prohibit discrimination by state actors under the Civil Rights Act of 1875.[129] Perhaps worst of all, however, was the infamous *Plessy v. Ferguson* case in which the Court held that racially segregated public accommodations do not violate the Equal Protection Clause provided that they are "separate but equal."[130] Although, it is worth noting that Justice Harlan's dissent in that case—despite expressing his personal racist, White supremacy sentiments—is the genesis of the color-blind Constitution theory.[131] At the state level, Jim Crow laws and segregation took root immediately

[127] Slaughter House Cases: Butchers Benevolent Assn. of New Orleans v. Crescent City Livestock Landing & Slaughter-house Co., 83 U.S. 36 (1872).
[128] *Id.*
[129] The Civil Rights Cases: United States v. Stanley, 109 U.S. 3 (1883).
[130] Plessy v. Ferguson, 163 U.S. 537 (1896).
[131] *Id.* at 559. (Harlan, J., dissenting) ("But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.")

after the war and continued the abhorrent treatment and calculated oppression of Black people in this country for nearly a century. Worse still, racially charged violence against Black Americans from the public at large seemingly increased after the war ended and slavery was abolished because the power structure was rattled.

Today, there remains disparate impact, enforcement and application of the law—including police brutality, racial profiling, significant differences in sentencing, and disproportionate enforcement of non-violent drug laws tied to mass incarceration. Of course, this also translates into prejudices in social and professional settings. Most appalling, however, is the largely unaddressed issue of generational poverty caused as a consequence of Slavery and all its vestiges—such as, mass incarceration and discrimination in housing, voting, education and the work place—that has plagued so many Black communities. Suffice it to say, racism is America's original sin and anti-Black racism is its worst iteration, slavery is just the most patently reprehensible manifestation of that sin.

As these practices and historical facts continue to go unaddressed or underappreciated, the dual nature of what it means to be an America will persist. Racism and slavery are often thought of and taught as being dark parts of history that do not represent who we are as Americans, which may be true in some ways. It is indeed a dark and regrettable part of history, but it is *our* history and it's still plaguing us in 2020—we ought to reckon with that reality. It ought to be mentioned that the founding fathers were, at best, ambivalent about slavery when framing the Constitution every time the founding of this country is discussed. That the Supreme Court of the United States has a reproachable history of pro-slavey and other racially-driven jurisprudence should be common knowledge. Frederick Douglass should not only be discussed as a great African American thinker and historical figure, but rather should be recognized as a great *American*

thinker and figure. His unparalleled foresight and brilliance ought to be discussed *concurrently* with the most revered *American* legal thinkers and writers of his day—the anti-slavery ones and pro-slavery ones alike—with each in their proper place. Of course, examining our past as a historian or legal scholar requires an honest recognition of the duality of our culture and law. But, that being said, one cannot separate slavery, racism and the struggles and achievements of Black Americans from the rest of American history. Again, American history is one story. A story with duality, abhorrent racial distinctions, and bewildering contradictions no doubt, but a single story nonetheless. John Marshall, Frederick Douglass, Joseph Story, Dred Scott, Abraham Lincoln, Celia, and Nat Turner are all part of that same American story. It is time we start telling it that way.