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THE COURTS AND SLAVERY IN THE UNITED STATES-- PROPERTY RIGHTS AND CREDIBLE COMMITMENTS

by

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ABSTRACT

Recent literature has examined the role of Congress in creating a credible commitment to the institution of slavery in the antebellum United States. This paper explains the contributions of the courts to that commitment. The paper first shows the disparity in the rulings between the state courts in the North and South in cases concerning the freedom of nonresident slaves. Then the paper examines the attempts by the federal courts to strengthen the national commitment to slavery and mitigate the anti-slavery conduct of the North. The paper concludes by showing the futility of the decision in Dred Scott, an opinion that failed in its attempt to reinforce the federal government's commitment to slavery because the courts could not overcome the decades of increasing hostility to slavery. Not only did the Supreme Court in Dred Scott fail to placate the South, the Court exacerbated the tension between the North and South and helped move the country even closer to civil war. The episode described in this paper illustrates how sometimes a government institution can no longer make a formal commitment credible when the public has renounced that commitment.

The famous compromises of the first half of the nineteenth century are well-known examples of Congress's attempt to reinforce the credibility of the commitment to the institution of slavery that was written into the Constitution. The compromises allowed the expansion of slavery into some territories and maintained the power of the slave states in the Senate through the balance rule. (Weingast.) Less known, however, is the role played by the federal courts in reaffirming the constitutional commitment to slavery. Beginning in the 1830's, the state courts of the North, through their interpretation of state statutes and their development of the common law, began to rule with increasing hostility to the rights of slaveowners. The state courts in the South responded by giving less deference to these northern rulings and eventually disregarding them. As the chasm grew between the state courts of the North and South, the federal courts, including those in the northern states, worked at maintaining and sometimes strengthening the federal government's commitment to preserve slavery.

As the sectional conflict grew worse in the mid-nineteenth century, federal courts in the free states faced the difficulty of getting antislavery juries to enforce the pro-slavery law. The charge to the jury in Oliver v. Kauffman illustrates the concern:

> [O]ne of the great objects of this Union, and the Constitution, which we are bound to support, and which is the supreme law of the land, is to make us in many respects one people or nation. And it is well-known that the southern states would not have become parties to this Union, but for the solemn compact of the other states to protect their rights in this species of property. This Constitution, and these laws enforcing it, are binding on the conscience of every good citizen and honest man, so long as he continues to be a citizen of the United States or of Pennsylvania, while Pennsylvania continues to be a member of this Union. Those who are unwilling to acknowledge the obligations which the law of the land imposes upon them should migrate to Canada, or some country whose institutions they prefer, and whose institutions do not infringe upon their tender consciences. But while they claim the benefits of the Union they cannot repudiate its obligations. The people of Pennsylvania are opposed to the institution of slavery and have abolished it within their borders. But they acknowledge the right of other states to make their own institutions, and the obligations imposed upon them and the obligations imposed upon us to regard the solemn compact which we have made with the sister states. (Oliver v. Kauffman. 18 Fed. Cas. at 661.)

The work of the federal courts reached its culmination in Dred Scott v. Sandford, the best known of these cases. Dred Scott. although resting heavily on principles of states' rights, took a new and powerful approach by constitutionalizing property rights in slaves through the due process clause. The approach in Dred Scott, dramatic and inflammatory to the North, laid the seeds for further constitutional (and therefore federal) limitations on the power of the free states. Lincoln, in his campaign for the presidency, expressed the fear of many northerners that Dred Scott could give truth to John C. Calhoun's claim that "slavery is national, freedom sectional." (Finkelman (1), p. 263.) This commitment in Dred Scott to the preservation of slavery was so radical to the North that the decision became one of the events that pushed the country into war three years later. Ironically, the decision did little to placate the South. By 1857, when the Supreme Court decided Dred Scott, decades of ever increasing hostility towards slavery had made it too late

for the courts to make the federal commitment to slavery credible.

The actions of the courts reflect, of course, both the governing law and the participants in the judicial process. The pro-slavery provisions of the Constitution and the federal statutes carrying them out sometimes gave little choice to a judge, so a judge who was staunchly antislave would occasionally end up authoring a pro-slavery opinion.[1] It was also to be expected that federal courts sitting in northern states would render decisions that supported slavery more than their state court counterparts. Many of the presidents who appointed the federal judges were themselves pro-slavery. And the state judges were less apt to hear controversies that were governed by the pro-slavery federal law. Both the abolitionists and the pro-slavery forces used the courts to develop the law in their favor. Some of the most able advocates of the day took part in many of the slavery suits, intentionally litigating far-reaching principles. Similarly, many of the most powerful slavery opinions were written by highly respected judges on prestigious courts, just as some were authored by pro-slavery Democrats who were ridiculed for letting their personal ideology take precedence over the law. Finally, it is important to remember that courts seldom are the source of social change. The work of the courts reflects the changes that are being driven by political, economic, ideological and religious factors. That was truly the case with slavery. The story of the courts in the

conflict between North and South is only a chapter in a much larger story. But it is nonetheless an important chapter. The courts shaped some aspects of the slavery crisis, affected the likelihood of successful compromise and influenced the pace at which the country moved toward war.

This paper will examine the courts' role in the commitment of the federal government to the preservation of slavery. After describing the constitutional framework for slavery, the paper will analyze the tension between the courts of the free and slave states and explain the importance of the federal courts' attempts to counteract the decisions of the northern state courts. The paper will end by examining the impact of these court decisions on the tension between the North and South on the eve of the Civil War.

1. The Constitution

Any analysis of the role of the courts must start with the Constitution. Even though the Framers were too squeamish to use the words slave or slavery, there is no doubt that the Constitution accommodated the existence of slavery at the time the document was written and established legal principles that would be used to preserve it into the future. Nine clauses of the Constitution dealt with slavery in some way. The best known are the clauses that counted slaves as three-fifths for voting and taxation purposes, the sentence that gave Congress the power to ban the importation of slaves after 1807, and the section that

required the return of fugitive slaves. Other clauses empowered Congress to suppress insurrections (which to at least some of the Framers meant slave uprisings), limited amendment of the slave trade and proportionate taxation sections until 1808, and prohibited the taxation of exports (which could have been an indirect tax on slavery through taxation of the products of slave labor).[2]

There has long been great debate on whether the Framers intended to preserve slavery or only accommodated it as a temporary phenomena with the expectation of its withering away. Following the views of William Lloyd Garrison that the Constitution united the states by a "covenant with death" and "agreement with Hell," the radical abolitionists saw no hope for universal freedom under the Constitution. Consequently, many radical abolitionists in the 1830's supported secession of the free from the slave states. (Potter, p. 45; Wieck, p. 35.) But the black abolitionist Frederick Douglass claimed that

> the Federal Government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered. It was purposely so framed as to give no claim, no sanction to the claim, of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed. (Quoted in Jensen, pp. 9-10.)

Even today scholars continue this debate over the Framer's expectations.[3]

Regardless of any hopes in 1787 for the gradual demise of slavery, technology made that impossible. The invention of the

cotton gin and the birth of the cotton economy in the South at the beginning of the nineteenth century induced a gigantic expansion of slavery and made slavery too profitable to end on its own. (Fogel, pp. 29-34.) Likewise, regardless of whatever the original intent of the Framers concerning the Constitution's governance of slavery, the uncertainty over the precise terms of the Constitution's accommodation of slavery and the power left to the states in the original federal structure both provided the courts with ways to reinforce the federal government's commitment to slavery.

2. Comity and State Sovereignty

A. Commitment to Slavery in the South

Perhaps the aspect of the Constitution that supported slavery to the fullest was the Constitution's silence on the issues of who was a slave and how a slave became free. By leaving these issues untouched, the Constitution continued to leave them to the states. It is ironic that the Bill of Rights, through the tenth amendment's admonition that all powers not delegated to the federal government remain with the states or the people, expressed the notion of limited federal authority, which would result in nearly all issues of slavery remaining within state control. Leaving to the states the issue of who was enslaved or free was also consistent with the common law's treatment of status as a local issue.

The federal government has always left issues of status to

the states. Even today, it is state law that determines whether someone is divorced, whether a child is legitimate, whether a particular parent has custody and whether someone qualifies as an heir. Although it may seem inappropriate today to include slavery with these issues, whether someone is a slave or free is legally an issue of the person's status, historically left to the states until the thirteenth amendment abolished slavery.

State control over the existence of slavery also stemmed from the common law view that slavery was against "natural law" and thus could not legally exist without "positive" ri.e.. statutory) law authorizing its existence. This notion was instilled in the American common law by the famous case of Somerset v. Stewart, which greatly curtailed slavery in England in 1772. As Lord Mansfield, the Chief Justice of the Court of the King's Bench, wrote in Somerset;

> "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only by positive law, which preserves its force long after the reason, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.'! (Somerset, p. 510.)

These three factors — the Constitution's implicit recognition of a state's authority to determine whether slavery will be legal within its borders, the historical allocation of issues of status to state control, and the need for positive law to legalize slavery — all gave strong legal support for the slave states to maintain the existence of slavery. Throughout the antebellum slavery crisis, there was no real likelihood that

slavery would become illegal in the South, although the abolitionists hoped otherwise. President Lincoln and the Republican leaders, who rode to victory on their opposition to any expansion of slavery, tried to avert war by supporting a constitutional amendment to preserve slavery in the slave states. (Potter, pp. 550, 565.) This proposed constitutional amendment, so astonishing to us today, would have been essentially an express codification of the then-prevailing view of the legality of slavery in the South.

B. Slaveowners' Rights in the North

The controversy over the expansion of slavery into the territories is well-known from a litany of important historical events: the Missouri Compromise in 1820, the Compromise of 1850, the Kansas-Nebraska Act in 1854, the 1857 Dred Scott decision, Lincoln's election in 1860, and the failed attempts at the Crittenden compromise on the eve of the Civil War. But at the same time, another dispute over slavery was slowly growing — the ability of the free states to free slaves who came within their borders and the extent to which the Constitution compelled them to support the institution of slavery. This was a dispute over the relative importance of state sovereignty, comity and federalism in the states themselves, not in the territories. Congress took the lead in the dispute over the territories, while federal and state courts were the key players in the controversy between the states.

Historically, a state's authority to affect the status of

someone within its borders depended upon the degree of permanence of that person's connection with the state. There was no doubt that a person's physical presence in the state, coupled with the intention to remain permanently, was enough for a state to use its authority to determine status. So if a slaveowner moved with his slaves to a free state and became a resident of that state, the free states viewed themselves as having the legal authority to free the slaves. On the other hand, if a slaveowner journeyed through a free state with his slaves, at least into the 1840's, the free states would not alter the status of a slave in transit. The more difficult issues involving the requisite connection between the slave and the state arose in the context of a slaveowner's less than permanent presence in a free state with a slave, such as a slaveowner's temporary six-month or even six-week visit to a free state with a slave.

The rights given to visiting slaveowners in Pennsylvania is typical of the rights of slaveowners throughout the North until the mid-1830's. Pennsylvania was a leader among the states in the movement to free the slaves even before the enactment of the Constitution. Philadelphia was the home of the country's first active antislave society, whose members zealously worked to free slaves brought into Pennsylvania by their masters and gladly helped fugitive slaves. Bordered by slave states, Pennsylvania was a busy station on the underground railroad and frequently visited by professional slave catchers. On the other hand, Philadelphia was a leading commercial center and, during the

1790's, the nation's capital. As a result, it was the site of visits and temporary residence by many slaveowners and their slaves. (Finkelman (1), pp. 46-47.)

In 1780, Pennsylvania enacted an emancipation statute that attempted to end slavery without hindering economic growth. The statute freed the children of Pennsylvania slaves upon birth but required them to remain apprentices until they turned 18. Members of Congress and diplomats were permitted to retain their domestic slaves. Other people were allowed to remain in the state for up to six months with their slaves. Any slave kept in Pennsylvania longer was freed. An amendment in 1788 freed slaves of new Pennsylvania residents the instant they became residents. (Finkelman (1), p. 48.)

The emancipation statute led to considerable litigation over the years, much instigated by the Abolition Society, to resolve questions unanswered by the statute. These questions included, for example, such issues as what constituted residency, making the six-month period inapplicable, and whether a series of visits to Pennsylvania could aggregate to six months. Although the Pennsylvania courts broadly carried out the state's policy toward freedom, the opinions through the mid-1830's show that the courts acted differently toward nonresident slave owners — by assisting with the return of fugitive slaves, by adhering strictly to the six-months rule and by protecting the transit of slaves through the state.' This was also typical for the courts in the other free states into the 1830's. By then, however, public sentiment

against slavery was growing much stronger. This attitude was soon reflected in the state courts.

The northern abolition societies and some of the most able lawyers in the North had been striving to get the courts to adopt the principles of Somerset v. Stewart. In 1836, the Supreme Judicial Court of Massachusetts rendered an opinion in Commonwealth v. Aves that deeply affected the development of slavery law in both the North and South. The case concerned a slaveowner from New Orleans who visited her father in Boston, intending to remain there for a few months. She brought with her a six-year-old slave girl. Shortly after their arrival, the Boston Female Antislavery Society sued in the state court to free the girl. Some of the most prestigious members of the Boston bar took up the cause of each side. (One of the lawyers for the slaveowner, Benjamin Curtis, would ultimately rise to the United States Supreme Court and dissent in Dred Scott, relying on some of the arguments made by his opponent in Aves. (Finkelman (1), p. 103.)) In an opinion written by Chief Justice Lemuel Shaw, one of the country's most influential jurists of his time, the court freed the slave and developed a rationale that could have been used to end nearly all the rights of slaveowners in free states.

Shaw acknowledged that slavery was recognized by the Constitution and many of the states, even though it was contrary to natural law. He understood that comity to the interests of the slave states supported a ruling that Massachusetts could not

free the slave, but he saw the severe restraint this analysis would impose on Massachusetts' attempts to deal with slavery within its borders. As Shaw explained, "the right of personal property follows the person, and ... by the comity of nations the same must be deemed his property everywhere." But this approach would impinge on the free states: "[I]f slavery exists anywhere, and if by the laws of any place a property can be acquired in slaves, the law of slavery must extend to every place where such slaves may be carried." This logic would make slavery legal in Massachusetts. So Shaw reasoned that comity should "apply only to those commodities which are everywhere, and by all nations treated and deemed subject of property." (Aves. p. 216.) This, of course, excluded slaves.

After rejecting the application of comity, Shaw turned to the importance of local law. Noting that slave states considered the relationship between owner and slave to be "a creature of municipal law," Shaw pointed out that everyone entering Massachusetts was subject to all of its laws and "entitled [only] to the privileges which those law confer." He concluded that slaves entering Massachusetts became free "not so much because any alteration is made in their status or condition," but because the laws of the state, applying to everyone except fugitives, "prohibit their forcible detention or forcible removal." (Aves. p. 217.)

Although the opinion made Aves a broad precedent, Shaw did attempt to limit the reach of Aves into certain areas. After

noting that Aves did not involve a fugitive slave, Shaw pointed out that a slaveowner could pass through a free state with a captured fugitive. He also emphasized that Aves did not involve a traveling slaveowner who "necessarily passes through a free State, or where by accident or necessity he is compelled to touch or land therein, remaining no longer than necessary." He gave no opinion about the outcome of that kind of case, but speculated (probably hopefully) that "our geographic position exempts us from the probable necessity of considering such a case." (Aves. p. 225.)

The importance of the Aves decision was obvious to both the South and North. Typical of the concern in the South, the Augusta Sentinel asked southerners if they were "willing to sustain forever a confederation with states into which you dare not travel with your property, lest that property becomes by law actually confiscated." (Finkelman (1), p. 125.) Abolitionists applauded the decision and quickly tried to expand the holding of Aves to other states. The courts of the free states gradually followed Massachusetts, and by 1860, nearly all the free states had embraced some version of Aves. through the common law, statutes or state constitutions.[5] This made it impossible for slaveowners to visit many free states with their slaves. Even if the law of a state had not developed to the full extent of Aves. it was risky for a slaveowner to send or journey with a slave into the state. Whenever a slave entered a state, there was always the risk that abolitionists would free the slave

physically or through a writ of habeas corpus, contending that state law made the slave legally free. This would force the master to sue for return of the slave, with the uncertainty over how the court would rule. Sometimes the slave would have vanished, leaving the owner with only a suit for damages against the abolitionists.

The expansion of the Aves principles culminated in a decision in 1860 by the New York Court of Appeals in Lemmon v. The People. The case involved husband and wife slaveowners from Virginia who were traveling in late 1852 to Texas via New York City with their eight slaves. The fastest route was to travel from Virginia to New York by ship and then from New York to New Orleans by steamboat. There was no steamboat service to New Orleans from the Virginia area; the overland route took much longer. Although the ship's captain warned the slaveowners not to take the slaves ashore in New York, they disregarded the warning and checked into a hotel with their slaves to wait the three days until the steamboat departed. Within the day, the slaveowners were served with a writ of habeas corpus to free the slaves. (Finkelman (1), p. 296.) Early in the nineteenth century, New York State had enacted a statute, similar to Pennsylvania's, that freed all slaves who remained in New York more than nine months. The judge in the habeas corpus proceeding in Lemmon freed the slaves, concluding that an 1841 repeal of the nine-month provision had the effect of freeing all slaves who entered New York State upon their entry into the state.

This ruling answered the question left open in Aves because it dealt with slaveowners in transit with their slaves, not with a slaveowner who entered a state with an intention to remain, however temporarily. And it caused consternation in the South. The Richmond Daily Express saw the decision cutting into the roots of the Union:

> If it be true that the inhabitants of one State had not the right to pass with their property through the territory of another, without forfeiting it, then the Union no longer exists. The objects for which it was instituted, and for which the Constitution of the United States was established, have been rendered, in one respect, impossible of attainment. Fifteen States have been declared out of the pale of legal protection, so far as New York can effect it, and the citizens of these states cannot pass through New York with property of a certain kind, without losing it, though it is recognized by the Constitution of the United States. (Richmond Daily Dispatch. Nov. 17, 1852, quoted in Finkelman (1), pp. 298-99.)

The slaveowners in Lemmon. who had been compensated by the New York business community after the freed slaves fled to Canada, had no interest in appealing the habeas corpus decision. With such an important principle at stake, the Virginia legislature directed the state attorney general to proceed with an appeal in the New York state courts and appropriated funds for the appeal. The governor of Virginia took up the cause against the Lemmon decision in his 1853 annual message:

> If it be true that the citizens of the slaveholding States, who, by force of circumstances, or for convenience, seek a passage through the territory of a non-slaveholding State with their slaves, are thereby deprived of their property in them, and the slaves ipso facto become emancipated, it is time that we know the law as it is. No court in America has ever announced this to be law. It would be exceedingly strange if it should be. By the comity of nations the personal status of every man is determined by the law of his domicile.... This is but the courtesy of nation to nation

> founded not upon the statute, but is absolutely necessary for the peace and harmony of States and for the enforcement of private justice. A denial of this comity is unheard of among civilized nations, and if deliberately and wantonly persisted in, would be just cause of war.

(Quoted in Finkelman (1), p. 300.)

After the case had worked its way through the New York appellate system, the Court of Appeals, New York's highest court, finally announced its decision in April 1860. In a five-to-three decision to free the slaves, the court affirmed the trial judge's conclusion that the 1841 statute freed all slaves upon their entry into New York. The majority saw itself bound to follow the direction of the New York legislature rather than common law principles of comity. It also viewed the case as raising an issue of status, controlled by state law, implicitly rejecting the notion that something more than transitory presence was necessary before a state could regulate status. In rejecting the claim that people in transit were protected by the commerce or privileges and immunities clauses of the Constitution, the majority pointed out that if the Constitution were interpreted as allowing the federal government to "rightly interfere in the regulation of the social and civil condition of any description of persons within the territorial limits of the respective States of the Union, it is not difficult to foresee the ultimate result" — federal interference with slavery in the South. (Lemmon. p. 625.) The majority expressly distinguished the problem of transit with fugitive slaves, because the fugitive slave clause of the Constitution established limits on state power.

The dissent relied on the Constitution's creation of a union between slave and free states. Emphasizing the greater importance of comity between the states in the United States when compared to comity between nations, the dissent claimed that the Constitution prohibited a state from ignoring "the right to property in the labor and service of persons in transitu from [slave] States," although a state was free "to abolish or retain slavery in reference to its own inhabitants." (Lemmon. p. 643.) The dissent also expressed the fear that the majority's rejection of comity to the slave states was playing into the hands of the supporters of secession and could lead to civil war. Lemmon was not appealed to the Supreme Court, although opponents of the decision apparently rattled their sabers about getting the Supreme Court that decided Dred Scott to also rule on Lemmon. (Finkelman (1), p. 313.) Other events on the eve of the Civil War dwarfed Lemmon in importance, however.

These cases in the courts of the free states, from the mid-1830's to 1860, exacerbated the growing tension between the North and South over slavery. The lawsuits enraged slaveowners, both because the rulings limited their movement out of the South and because the judges' rhetoric insulted their way of life. The slaveowners also feared that these decisions created incentives for slaves to escape and, even worse, to revolt. The fear of violent slave insurrection was a powerful influence on the breadth of the legal and social control of the slaves in the South.' This fear was a reason for many of the detailed arcane

laws of slavery in the South that treated slaves as property, that tried to rid the South of free blacks and that did everything possible to limit the education, gathering, power and other aspects of slaves that could lead to revolt. The court opinions from Aves to Lemmon reflected the growing antislavery sentiment in the North from the 1830*s on and heightened the fear of slave rebellion.

C. The Response of the Southern Courts

Through the early nineteenth century, the courts in the South were quite lenient in recognizing the freedom of slaves who had gained their freedom under the law of a free state or territory. This was true for border states, such as Kentucky and Missouri, as well as Mississippi and Louisiana in the deep South. In fact, until the Missouri Supreme Court declared that Dred Scott had remained a slave, the Missouri courts had consistently recognized the freedom of a slave who had resided in a free state or territory. (Broply, p. 196 n.24.) This issue arose in various ways. Sometimes a slave who had spent time in a free state would sue for freedom in his home state in the South and claim his freedom under the law of the free state. Sometimes the effect of the law of a free state would be tested when a freed slave was involved in litigation in a southern court over an inheritance. In reaching these decisions, the southern courts sometimes expressly relied on comity, respecting the law of the state that freed the slave. Sometimes the courts, relying on the positive law theory of Somerset, reasoned that a slave who had

become free could not be reenslaved without a statute expressly doing that. A few southern courts also found a common law preference for freedom.

Rankin v. Lydia, an 1820 decision by the Kentucky Court of Appeals, was one of the leading southern court opinions supporting freedom. Lydia, who was born a slave in Kentucky, sued for her freedom following her return to Kentucky after a seven-year stay in the free Indiana territory. In ruling for Lydia, the court relied on natural law and comity. Emphasizing the distinction between residence and transit in a free jurisdiction, the court reasoned that Lydia was free under Indiana law. Then it concluded that it was "not aware of any law of [Kentucky] which can or does bring into operation the right of slavery when once destroyed." (Rankin, p. 471.) The court even declared that "freedom is the natural right of man, although it may not be his birthright." (Id-1 p. 476.) In its reliance on comity, the court emphasized the tit for tat problem inherent in a rejection of comity. If Kentucky ignored the laws of Indiana, Indiana could very well do the same and free transient slaves from Kentucky. This, of course, implied that the court would reexamine its conclusions if the free states acted more harshly toward slave owners.

Although "the Kentucky court remained, with respect to comity, one of the most consistent and fair-minded of any of the slave-state courts" in its dealings with slaves who had been freed in other states (Finkelman (1), p. 205), one Kentucky

decision stands out as an example of the slave states' retreat from comity with the North. In 1847, the Pennsylvania legislature repealed its six-month clause, attempting to free slaves the instant they touched Pennsylvania soil. The next year a Kentucky slaveowner took her slave to Pennsylvania, where a free black promptly sought a writ of habeas corpus to free the slave. A Pennsylvania state judge freed the slave in the habeas corpus proceeding, but the slave returned with her master to Kentucky. Two years later the slave sued for her freedom in Kentucky state court, relying on the 1847 Pennsylvania statute and the Pennsylvania judgment. In Maria v. Kirby. the Court of Appeals rejected her claim. Reasoning from the premise that some permanent connection is required before a state can affect status, the court in Kirby concluded that Pennsylvania lacked the authority to stamp "a new and permanent condition or status" on a nonresident who was in Pennsylvania "on a transient entry or momentary sojourn" so that the new status would "adhere to them and determine their condition on their return to their own domicile." (Maria v. Kirby. p. 545.) The decision was particularly important because the court not only rejected the effect of the Pennsylvania statute, it also rejected the effect of the judgment of the Pennsylvania court. The court refused to apply comity to Pennsylvania judgments that denied "rights of property established by [Kentucky] law," rights that should have been respected in Pennsylvania under those same principles of comity. (Id., p. 547.)

Louisiana had been more tolerant of free blacks than most southern states and relatively liberal in recognizing the freedom of slaves freed elsewhere, probably as a consequence of its French heritage and legal system. (Finkelman (1), p. 206.) As slavery became the divisive issue in the country, the Louisiana courts became much more pro-slavery. In two different cases in the early 1850's, the Louisiana Supreme Court was forced to decide if someone currently in the state remained a slave under the law of Mississippi (where they had been enslaved) or had been freed under the law of Ohio (where the slaves had been manumitted). In each case the court chose slavery because manumission was considered a "fraud" against the laws of Mississippi. (Mary v. Brown; Haynes v. Forno) In 1846, the Louisiana legislature enacted a statute declaring that "no slave shall be entitled to his or her freedom under the pretense that he or she has been, with or without the consent of his or her owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited." (Act of May 30, 1846.) In Barclay v. Sewell, a case in which the Louisiana Supreme Court held that an 1839 Ohio emancipation was legal because it occurred before the Louisiana statute went into effect, the court explained that the 1846 statute was enacted "probably in consequence of injudicious and impertinent assaults from without upon an institution thoroughly interwoven with our interior lives." (Barclay v. Sewell. p. 263.)

As the sectional conflict worsened, even the rhetoric of the

southern opinions hardened. In 1859, the Mississippi Supreme Court, in a vitriolic opinion scornful of comity to the North, refused to recognize the manumission in Ohio of a Mississippi slave. As the court put it, "the rights of Mississippi are outraged, when Ohio ministers to emancipation and the abolition of our institution of slavery, by such unkind, disrespectful, lawless interference with our local rights." (Mitchell v. Wells. p. 263.) This change in attitude of the southern courts toward the freedom of slaves was a response to the growing antislave sentiment and activity outside the South. In departing from a long line of precedent recognizing the freedom of slaves freed in free states and territories, the Missouri Supreme Court in the Dred Scott case explained:

> Times are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. (Scott v. Emerson, p. 586.)

3. The Pro-Slavery Federal Courts

As the courts in the free states worked to limit slavery, the federal courts became decidedly pro-slavery and rendered a series of decisions that reaffirmed the federal government's commitment to slavery. Until the mid-1840's, the federal decisions were mixed, some supporting the free states in their attempts to free slaves who entered their territory. In 1845,

Supreme Court Justice John McLean, sitting as a circuit judge in Indiana, rendered the last major federal decision supporting the freedom of slaves obtained through transit or residence in a free state. (Vaughn v. Williams; Finkelman (1), p. 250.) After that, the Supreme Court and lower federal courts generally protected slaveowners. The federal courts could not stem the tide of freedom, but, with their decisions and their opinions, they sure tried.

A. Fugitive Slave Cases

The early pro-slavery federal decisions carried out the 1793 Fugitive Slave Law, enacted to enforce the fugitive slave clause of the Constitution. In 1842, Justice Joseph Story, who believed that the federal scheme created by the Constitution gave states the authority to free slaves who entered into their territory (Finkelman (1), p. 297 n.30), interpreted the Fugitive Slave Law in Prigg v. Pennsylvania to be a constraint on state power. Prigg had been convicted under a Pennsylvania personal liberty law for removing a fugitive slave from the state without an order from a magistrate. In Prigg. the supreme Court held the Pennsylvania law to be an unconstitutional violation of the fugitive slave clause. Justice Story explained that the 1793 federal law did not compel the states to assist in any way with the federal right to recapture slaves; their rights as sovereigns under the Constitution freed them from any obligation to assist. On the other hand, the states could not interfere with the right to recapture, nor could they interfere with people traveling

through their territory with captured fugitive slaves. Thus, there was a constitutional limitation excepting fugitive slaves from the states' attempts to free slaves who entered into their territories.[7]

The harsh Fugitive Slave Law of 1850, an important part of the Compromise of 1850, stirred up widespread protest and resistance to the law in the North, as well as more federal litigation. The Supreme Court dealt with this problem in Ableman v. Booth, an appeal from a decision of the Wisconsin Supreme Court freeing an abolitionist who had been convicted of violating the 1850 act. In Ableman. Chief Justice Taney, writing for a unanimous court, overruled the state court, reaffirmed the supremacy of federal law and emphasized each state's obligation to support all the provisions of the federal Constitution, even a clause as repugnant to a state as the fugitive slave clause.

B. Federal Transit Cases

With fugitives having no protection in the free states, the question of whether a slave was a fugitive or lawfully within a state often became crucial. Oliver v. Kauffman. an 1850 decision by a federal circuit court in Pennsylvania, is a good example of the pro-slavery approach of the federal courts on this issue. Two months after Pennsylvania repealed its six-months statute, thereby making slaves free upon their entry into Pennsylvania, a slaveowner crossed Pennsylvania with her slaves while returning home to Maryland. A few months later, the slaves ran back to Pennsylvania, where they were aided by Kauffman. After the

slaveowner failed to recover the slaves, she sued Kauffman for their value under the fugitive slave act. Kauffman defended by claiming that the people he helped were not slaves, having become free by Pennsylvania law upon their passage through the state.

The judge told the jury that the law required him, not the jury, to decide which state law applied to determine whether the blacks Kauffman helped were slaves or free. Since the blacks had resided in Maryland, he concluded that the issue depended upon "the law of Maryland, and not of Pennsylvania. This Court cannot go behind the status of these people where they escaped." (Oliver v. Kauffman. p. 660.) With this preference for the law of the slave state over that of the free, the judge instructed the jury that the blacks were slaves when they left Maryland and entered Pennsylvania. Consequently, the jury had little choice but to find Kauffman liable.

While the circuit court was deciding Oliver, the Supreme Court established a related legal principle in Strader v. Graham. The case concerned a slaveowner's suit against an owner of a steamboat on which three slaves escaped from Kentucky to Ohio and then on to Canada. The suit, brought in Kentucky state court under a Kentucky statute, turned on whether the slaves were free blacks when they boarded the steamboat, as a result of their earlier journeys into free states to perform as musicians. The Kentucky court ruled that the slaves had not become free under Kentucky law even though their owner had allowed them to work in Ohio and Indiana. On appeal to the Supreme Court, the steamboat

owner claimed that the Kentucky court had erred when it refused to apply the law of the free states. Chief Justice Taney, again writing for a unanimous court, ruled that the Supreme Court lacked the jurisdiction to review this issue of state law. Relying on the "undoubted right" of every state to determine the status of its residents, Taney concluded that "[i]t was exclusively in the power of Kentucky to determine for itself whether [the slaves'] employment in another State should or should not make them free on their return." (Strader. p. 94.) The Court would not force Kentucky to apply the laws of Ohio and Indiana.

Five years later, another federal court in Pennsylvania considered the effect of the repeal of the six-months statute and concluded that it affected only people who resided or sojourned in Pennsylvania with their slaves. (U.S. v. Williamson.) The Constitution, the court concluded, protected the right of passage of both person and property through states. Thus, a free state could not affect the "property" of slaveowners passing through. (Id., pp. 686, 692-93.) This case, relying on the constitutional protection of slaves as property, presaged the analysis used by the Supreme Court in Dred Scott.

The reasoning of Dred Scott also has roots in a concurrence in Groves v. Slaughter, an 1841 case involving the effect of a provision in the Mississippi constitution that prohibited the importation of slaves purchased outside the state. By ruling that the constitutional provision had no legal effect until the

Mississippi legislature implemented it through a statute, the Supreme Court avoided the more difficult issue of whether the provision violated the commerce clause. Nonetheless, three justices wrote concurrences to express their views on the issue.

Justice McLean wrote that the commerce clause could not be applicable because slaves were people, not property, under the Constitution. He acknowledged that the laws of some states treated slaves as property, but those laws had no bearing on the reach of the commerce clause. (Groves v. Slaughter, pp. 506-07.) In response, Justice Baldwin asserted that slaves were property under the Constitution: "whenever slavery exists by the laws of a state, slaves are property in every constitutional sense, and for every purpose____" (Id., p. 517.) As a Democrat from Pennsylvania, Baldwin would have been sensitive to the issue of slave transit. (Finkelman (1), p. 270.) So it is not surprising that he developed the slaves as property theme in the context of slave transit. Baldwin wrote:

> If, however, the owner of slaves in Maryland, in transporting them to Kentucky, or Missouri, should pass through Pennsylvania, or Ohio, no law of either state could take away or affect his right of property; nor, if passing from one slave state to another, accident or distress should compel him to touch at any place within a state, where slavery did not exist. Such transit of property, whether of slaves or bales of goods, is lawful commerce among the several states, which none can prohibit or regulate, which the constitution protects, and Congress may, and ought to preserve from violation. (Id., p. 516.)

These decisions, in the Supreme Court and in the lower federal courts, were part of the federal government's commitment to slavery. The federal courts generally took the side of

slavery as the sectional crisis grew, but they came nowhere near approaching Congress in terms of stirring up resentment and controversy in the free states and territories — not until the Supreme Court decided Dred Scott, that is.

C. Dred Scott v. Sandford

Dred Scott was a slave to an army doctor who lived in the Jefferson Barracks in St. Louis. In 1834, the doctor took Scott to Illinois, a free state, and then to the upper Louisiana Territory (now Minnesota), which was also free. In Illinois, Scott married and fathered a baby girl. After Scott and his family returned to Missouri in 1838 with the doctor, Scott sued in state court, claiming he was free by virtue of his four years' residency in a free state and a free territory. He lost in the Missouri state courts, when the Missouri Supreme Court departed from a long line of precedent freeing slaves who had lived in free states. Scott then sued in federal court.

The lawsuit was widely known and controversial when it was pending before the Supreme Court. The case was argued twice before the Court rendered its opinion in 1857. It appears that the Court originally planned to dispose of the case with a brief opinion, relying on Strader v. Graham. The justices changed their minds, in part from pressure from some of the pro-slavery justices to write a broader and stronger pro-slavery opinion. The result was a long, rambling and, even for its day, racist "Opinion of the Court" written by Chief Justice Taney. (Fehrenbacher, pp. 428-31.) Six other justices concurred with

Taney; two dissented. All the justices wrote separate opinions to explain their positions.

Taney wrote that Congress lacked the power under the Constitution to declare slavery illegal in the territories. Thus, he held that the Missouri Compromise of 1820 was unconstitutional, only the second time in the history of the Supreme Court that it declared an act of Congress unconstitutional.[8] Taney rested this conclusion on two grounds. First, with some contorted legal logic and reliance on a Southern constitutional theory advanced by John C. Calhoun, Taney was able to shrink the meaning of the words of the Constitution that give Congress the power to make rules and regulations for the territories. Calhoun had claimed that the Constitution required the federal government to recognize the fundamental rights of all states, including the right of slavery. (Brophy, pp. 197-200.) In order to treat the slave states on equal terms with those that had abolished slavery, Congress had to permit slavery in the territories.[9]

As a second basis for the holding of unconstitutionality, Taney relied on the protection of property in the due process clause of the fifth amendment.[10] This was the first use of economic substantive due process by the Supreme Court, a precursor of the Lochner doctrine. The key section of the opinion is brief:

> "[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." (Dred Scott, p. 450.)

Taney's opinion left no doubt that a slave was property for constitutional purposes and protected by the Constitution as a species of property. (Id., p. 451.)

Some historians believe that Taney and the majority of the justices had hoped that they could strike a workable national compromise on the slavery issue through the Dred Scott opinion, succeeding where Congress had failed for decades. It is virtually impossible that the Supreme Court could have done that in the late 1850's, even with a more palatable outcome and a better crafted opinion. What the Court gave the country in Dred Scott was a source of outrage and fear to the North, a powerful political tool to the growing Republican party and a wedge that drove the country even further apart. The Court gave the South important pro-slavery legal principles in Dred Scott, but that commitment to slavery could not counteract all the antislavery sentiment and action in Congress and in the free states and territories. With Dred Scott, the Supreme Court threw oil on the kindling fires of sectional conflict. (Potter, p. 118.)

Before the Supreme Court decided Dred Scott, the law provided strong support for the states that chose to abolish slavery. This stemmed from the law of status, historically within state, not federal, authority, and the great power given to states in the federal scheme created by the Constitution. At

the margin, the battle was over the power of a state to free a nonresident transient slave, as in Lemmon. or a slave within the state on a short visit. With those limited exceptions, most people, in both the North and South, accepted the authority of free states to eliminate slavery within their borders. Dred Scott changed that, since slaves were now considered to be property protected by the Constitution, it was possible that the protection of property rights would ultimately outweigh both the historical power of states to control status and the authority to control in-state slavery as an aspect of state sovereignty. Many people feared that the Supreme Court, especially the pro-slavery Court that decided Dred Scott, could just as well expand the notion of a constitutional protection of slaves as property to restrict the free states' prohibition of slavery. Even though the fifth amendment resticted only the federal government, not the states, it was possible that the constitutional protection of slavery in the free states could have been buttressed on either the commerce clause or the privileges and immunities clause. (Finkelman (1), pp. 326-36.) This constitutional theory would reinforce the trend in the federal courts to protect the owners of transient slaves. It could make it impossible for free states to prevent short or perhaps even long visits within their borders by slaves. It is inconceivable that the property rights theory could have been expanded to prevent states from freeing the slaves of their own residents.'' But up to that limit, states could have lost much control over slavery within their own

borders. To the opponents of slavery, the in-state presence of potentially a large number of transient or sojourning slaves would have changed drastically the atmosphere within the state and made the state essentially no longer free.

The decision in Dred Scott became a lightening rod for antislavery sentiment. Northerners protested, editorials expressed outrage and politicians used worst-case extensions of the principles of Dred Scott. The legislatures of a number of free states passed resolutions condemning the decision. (Fehrenbacker, pp. 431-35.) Lincoln built much of his campaigns around the prospects of the South attempting to make slavery national. Dred Scott was an important part of this argument, at least as early as his "House Divided" speech during his Senate campaign of 1858. (Fehrenbacher, p. 438; Finkelman (1), p. 316.) Many Republicans believed that the next step for the Supreme Court was to reverse Lemmon or a similar case.

Besides its stimulus to the antislavery fervor and its political impact, the opinion in Dred Scott had other important consequences that limited the potential approaches to the slavery crisis. Dred Scott established significant limits on the federal power over slavery. By reinforcing the view that slavery was primarily an issue for the states, and by raising the fifth amendment's protection of property, the Court left Congress with little power over slavery. This limited the ways that Congress could have attempted to broker a compromise to prevent war.

Dred Scott also affected the methods that could have been

used to abolish slavery in the South. Three approaches could have been taken. First, adhering to the fifth amendment theme of Dred Scott. Congress could have used the eminent domain power, recognized in the fifth amendment, to condemn the slaves as property. It has been calculated that the required "just compensation" would have been one year's GNP for the entire nation in the 1860's, something surely too costly to northern politicians and taxpayers. (Lee & Passell, ch. 10.) In addition, many northerns would have felt that compensation for the slaves was actually ransom, which should not be paid as a matter of principle. A possible way to avoid compensation would have been to use gradual emancipation, as the northern slave states and some Caribbean countries had. There were two drawbacks to that approach — one legal, one practical. Gradual emancipation would have been analogous legally to the modern approach to eliminating existing uses of property that fail to conform to a changed zoning ordinance. Generally there is no requirement for compensation as long as the property owner is allowed to continue the nonconforming use long enough to realize substantial income from the property and to plan a move to another, conforming location. But this analogy breaks down because slaves could not be moved to produce income later; they would be freed. Further, it is likely that a Supreme Court composed of justices like the ones who decided Dred Scott would have found gradual emancipation to be an unconstitutional violation of the fifth amendment. The practical problem stems

from the extreme difficulty, perhaps impossibility, of maintaining a large slave system throughout the South in which children became free at an early age and adults remained slaves or became indentured for many, many years. With the different treatment of some slaves and with the prospects of true freedom in the future for the rest, the system would have been too unstable to last in this form.

A second approach to the abolition of slavery in the South could have been a constitutional amendment either expressly abolishing slavery or giving Congress the power to gradually eliminate it. The 15 slave states could have blocked any amendment, however, because amendment requires ratification by three-fourths of the states. Plus, the constitutional theory of Calhoun, espoused in Dred Scott, would prohibit amendment of the Constitution to eliminate such a "fundamental" right, inherent in the original Union, without unanimous consent by all the states.

A third approach could have been for the Supreme Court to change the constitutional law of slavery. The Dred Scott Court would not have undone its own handiwork. And it would have taken until the late 1860's or early 1870's for two successive Republican presidents to change the composition of the Court to anti-slavery, if there had not been a war. (Finkelman (1), p. 323.) There was an even more fundamental problem, however. Although much of the analysis of Dred Scott lacked support in the precedents, other parts of the opinion were consistent with earlier federal cases. Even if a new Supreme Court could have

rejected the holding of Dred Scott and ruled that slaves became free when they touched free soil, the Court would have faced a virtually impossible task if it had tried to make inroads against slavery in the South. The Constitution, with its accommodation of slavery and its recognition of the power of the states, would have been a formidable barrier to judicial emancipation. Finally, if a new Supreme Court had later overruled Dred Scott and attempted to limit slavery, the South would have resisted just as violently as it actually did — unless the South had changed enough by then to begin to support emancipation on its own.

None of these options for emancipation was feasible. Even if the Supreme Court had stayed out of the national controversy over slavery by avoiding Dred Scott and similar cases, it is inconceivable to me that the country would have avoided civil war. If there might have been some chance for peaceful settlement, Dred Scott diminished it and made war even more likely as the only way to emancipation. As many historians believe, "the Dred Scott decision bears directly upon the coming of the Civil War."[12]

4. Conclusion

The thirteen colonies would not have become the United States of America but for the Constitution's commitment to slavery. And a constitutional commitment is one of the strongest, most secure promises a government can give. As antislavery sentiment grew in the North beginning in the 1830's,

the northern state courts began to rule with increasing hostility to slavery. These rulings never threatened the existence of slavery in the South, although they made it risky for slaveowners to travel into free states and they led slaveowners to believe that the rulings encouraged slaves to escape and revolt. The anti-slavery actions and rhetoric throughout the North, including the state court decisions, undercut the commitment to slavery. To help hold the line, the federal courts became increasingly pro-slavery, reinforcing the Constitution's and the federal government's commitments to slavery. As public sentiment in the North began to swell against slavery, it became harder and harder for the federal government to maintain its obligations to slavery. The Constitution made the task easier by protecting the existence of slavery in the South. But all other aspects of slavery became more difficult to preserve.

Sometimes commitments can no longer be made credible. By 1857, when the Supreme Court decided Dred Scott, the country's attitude toward slavery had changed so much since the ratification of the Constitution that the Supreme Court could do little to make the slavery commitment credible. Words in the Constitution and in court opinions meant little when compared with the thirty years of ever increasing antislave activity. The commitment to slavery could never again be credible.

Notes

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1. For example, Justice Joseph Story, well-known for his anti-slavery views, wrote the opinion in Prigg v. Pennsylvania, a case that upheld the constitutionality of the 1793 Fugitive Slave Law and expanded federal authority at the expense of the states. (Storing, p. 49.)

2. U.S. Const., art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3; art. I, § 9, cl. 4; art. I, §8, cl. 15; art. IV, § 4, cl. 4; art. V; art. I, § 9, cl. 5; and art. I, § 10, cl. 2. See Wieck, p. 32.

3. For example, see the views of Justice Thurgood Marshall, in "Reflections on the Bicentennial," and the response in Jensen, "Commentary." See generally Goldwin & Kaufman.

4. For example, the Abolition Society argued in Respublica v. Richards that the Pennsylvania statutes gave every black — whether free, slave or fugitive slave — the right to a judicial hearing before being removed from the state. The Pennsylvania Supreme Court rejected that interpretation, reasoning that it would unduly burden masters who were legally in the state with their slaves. The court concluded that a master not only had a right to remove a slave, but if the slave resisted, "it was the duty of every magistrate to employ all the legitimate means of coercion in his power, for securing and restoring the negro to the services of his owner." Respublica. p. 224. See Finkelman (1), pp. 63-64, 68-69.

5. All of the free states had embraced some version of Aves except California, Illinois, Indiana, New Jersey and Oregon. Finkelman (1), p. 127 & n. 4.

6. For example, Jefferson was referring to slave insurrection when he wrote that "we have a wolf by the ears and we can neither hold him, nor safely let him go. Justice is in one scale, and self preservation in the other." (Quoted in Storing, p. 56.) See also Buchanan's annual message to Congress in December 1860, quoted in Potter, p. 519.

7. Ten years later, in 1852, the Supreme Court upheld the constitutionality of an Illinois statute making criminal the harboring of a fugitive slave. The Court ruled that states had the authority to assist the purpose of the fugitive slave clause. Moore v. The People. 55 U.S. (14 How.) 13 (1852).

8. When the Supreme Court decided Dred Scott in 1857, Congress had already repealed the Missouri Compromise by the Kansas-Nebraska Act, which allowed the settlers in the previously free territory to decide for themselves whether they wanted to be free or slave.

9. Dred Scott, pp. 441-52. Since the Missouri Compromise was unconstitutional, Scott no longer had any basis to claim he had become free. Taney also rested the decision on a third conclusion: as a black, whether slave or free, Scott had no rights under the Constitution and hence no standing to sue in federal court. The decision about this issue, the most racist and also the longest part of Tandy's opinion, had virtually no support in either legal precedent or history. (See Fehrenbacher, pp. 340-66.) And the conclusion was devastating for free blacks, since it deprived them of all federal rights, including access to federal court.

10. For an interpretation of the opinion as limited in its reliance on due process, see Fehrenbacher, pp. 382-84.

11. Dred Scott was inconceivable to many in its day. "[I]f the Dred Scott decision itself had not been rendered, it might have seemed incredible that the Court could deny the power of Congress to regulate slavery in the territories despite the fact that it had been doing so since 1789 under Article IV, Section 3, of the Constitution, which specified that 'the Congress shall have power to . . . make all needful rules and regulations respecting the Territory or other property belonging to the United States."' Potter, p. 351.

12. Kutler, p. xviii. See Bestor, p. 283; Fehrenbacher, p. 3; Finkelman (1), p. 274; Potter, pp. 291-93.

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