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Opinions of the Justices

CHIEF JUSTICE ROGER BROOKE TANEY

Opinion of the Court in Dred Scott, *Plaintiff in Error v. John F. A. Sandford*

March 6, 1857

Roger Brooke Taney (1777–1864) was born to a wealthy slave-owning family in Calvert County, Maryland. Taney served as chief justice longer than any individual except John Marshall.

At age eighteen Taney graduated from Dickinson College in Pennsylvania, read law with Maryland Judge Jeremiah Chase, and began practicing law in 1799. A Federalist state legislator in 1799–1800, he broke with the party when it failed to support the War of 1812. In 1816 he won a five-year term in the Maryland senate and in 1827 became Maryland's attorney general. The following year Taney chaired the Maryland central committee for Andrew Jackson's presidential campaign.

In 1831 Jackson appointed Taney attorney general of the United States, and in July and August of that year he also served as interim secretary of war. Taney was one of Jackson's key advisers, helping shape Jacksonian policies on slavery and the rights of blacks, federal-state relations, and the Bank of the United States. Taney drafted Jackson's famous veto of the recharter of the Bank of the United States, and then as secretary of the treasury he was responsible for removing the deposits of the United States government from the bank. President Jackson nominated him to the Supreme Court on December 28, 1835, and the Senate confirmed him on March 15, 1836.

During the nullification crisis of 1831–1832, when South Carolina asserted its right to nullify a federal law, Taney strongly supported President Jackson in insisting on the supremacy of the national government over the state governments. Here Taney was a proponent of federal power

in the tradition of John Marshall. However, when confronted with questions of slavery and the rights of free blacks, Taney deferred to state authority and declined to assert federal power. He argued that neither under its commerce power nor its treaty power could the national government regulate slavery and race relations in the states.

Taney's support of states' rights on issues of race and the rights of free blacks anticipated the views he later articulated in Dred Scott. *As attorney general, Taney had to comment on the constitutional power of southern states to prohibit free blacks (from other states or the British Empire) from entering their jurisdiction. In his official "Opinion of the Attorney General," Taney asserted:*

> *The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than right. . . . They are not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term* citizens.

In this opinion Taney also concluded that the Declaration of Independence was never meant to apply to blacks, who were, in the attorney general's mind, not entitled to the natural rights of "life, liberty, and the pursuit of happiness."

This official opinion of the attorney general demonstrates that the antiblack, proslavery views Taney expressed in Dred Scott *were not an aberration or a function of the changing politics of the 1850s. Rather, these views were part of his lifelong ideology.*

Mr. Chief Justice Taney delivered the opinion of the court. . . .

The Issues before the Court[1]

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

[1]The headings throughout this opinion have been inserted by the editor, as has all material in brackets.

The Plea in Abatement

The plaintiff [Dred Scott] . . . was, with his wife and children, held as slaves by the defendant [Sanford], in the State of Missouri; and he brought this action in the Circuit Court of the United States for [Missouri], to assert the title of himself and his family to freedom.

The declaration is . . . that he and the defendant are citizens of different States; that . . . he is a citizen of Missouri, and the defendant a citizen of New York.

[Sanford countered with a plea in abatement, asserting that Scott was] not a citizen of the State of Missouri [because he was] a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

[Taney explains that the federal judge ruled against Sanford on the plea in abatement, concluding that if Scott was free, then he was a citizen of Missouri for purposes of suing in federal court. However, after hearing the evidence in the suit, the judge ruled in favor of Sanford on the grounds that under Missouri law Scott was still a slave. Scott then appealed to the Supreme Court, where his lawyers argued that once the trial court had ruled on the plea in abatement, the Supreme Court could not reconsider the issue. Chief Justice Taney disagrees. He first turns to this question.]

If the question raised by [the plea in abatement] is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court [on the plea in abatement] is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us; and that as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it. . . .

We think . . . the plea in abatement is necessarily under consideration; and it becomes, therefore, our duty to decide [it]. . . .

The Constitutional Rights of Free Blacks

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

ment to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . .

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who . . . form the sovereignty, and who hold the power and conduct the Government through their representatives. . . . The question before us is, whether the class of persons described in the plea in abatement [people of African ancestry] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

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 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.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges

by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own . . . introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. . . .

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race . . . made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

Free Blacks Have No Rights under the Constitution

The court think the affirmative of these propositions cannot be maintained. And if it cannot, [Dred Scott] could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

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

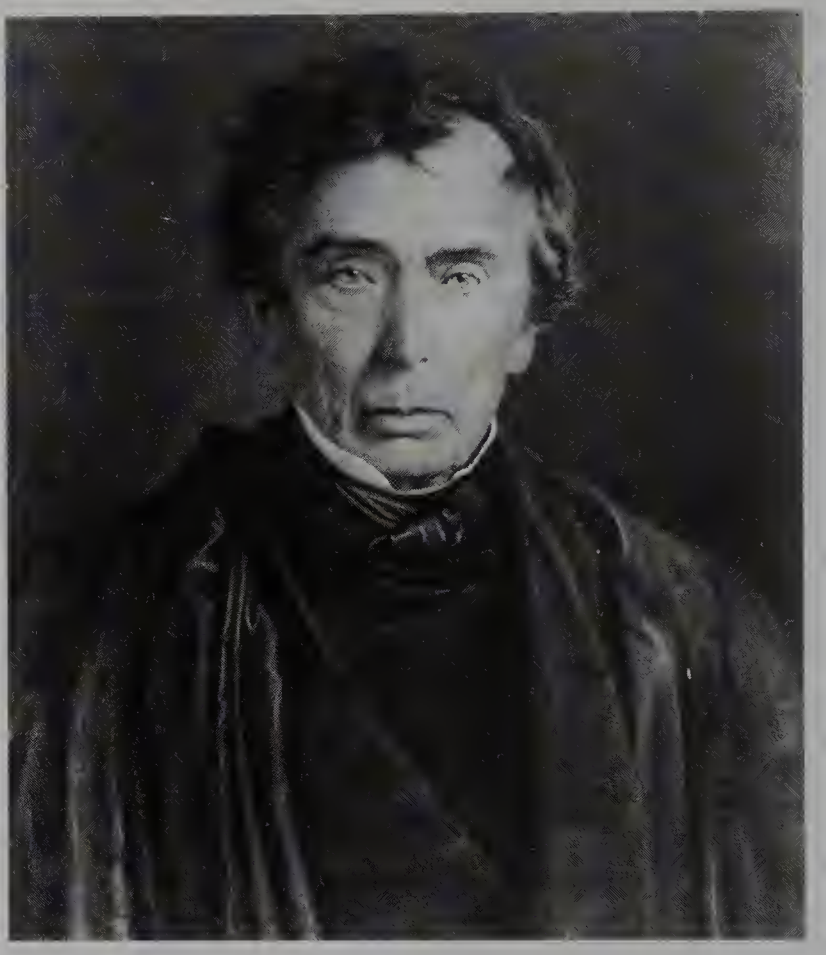

Figure 7. Chief Justice Roger Brooke Taney (1777–1864)
Taney was born to a wealthy and prominent Maryland family and married into the wealthy Key family. His brother-in-law Francis Scott Key wrote "The Star-Spangled Banner." Taney served as United States attorney general and secretary of the treasury under President Andrew Jackson before becoming chief justice in 1836. He served longer than any chief justice except John Marshall. Initially Taney made his mark in cases involving economic development, by reaching decisions that favored emerging industries. Early in his life Taney freed his own slaves, but throughout his career he was almost fanatical in his defense of slavery and southern society. His opinions in *Groves v. Slaughter* (1841), *Prigg v. Pennsylvania* (1842), and *Strader v. Graham* (1850) were decidedly proslavery, offering no protection to free blacks or the free states that opposed slavery. His majority decision in *Dred Scott*, coming late in his life, was consistent with all his other opinions on slavery.

posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. . . .

The Citizenship Question

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. . . .

. . . [T]he legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery. . . . He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact. . . .

The province of Maryland, in 1717, passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years. . . ."

The other colonial law to which we refer was passed by Massachusetts in 1705. It is entitled "An act for the better preventing of a spurious and mixed issue," &c.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped. . . ."

. . . [T]hese laws . . . show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. 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. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted . . . in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The Declaration of Independence and Equal Rights

The language of the Declaration of Independence is equally Conclusive: . . .

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appeared, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language. . . .

The Constitution and Racial Equality

[There] are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808. . . . And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. . . . And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

State Laws of the Founding Era Used to Interpret the Constitution

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had

entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race. . . .

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the Government went into operation.

[The] . . . laws of the present slaveholding States . . . are full of provisions in relation to this class [and] . . . have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As related to these States, it is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure. . . .

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, [a] Massachusetts . . . Law of 1786 . . . forbids the marriage of any white person with any negro, Indian, or mulatto . . . and declares all such marriages absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. . . .

And again, in 1833, Connecticut passed another law, which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or institution, or board or harbor for that purpose, any such person, without the previous consent in writing of the civil authority of the town in which such school or institution might be. . . .

By the laws of New Hampshire . . . no one was permitted to be enrolled in the militia of the State, but free white citizens; and the same provision is found in a subsequent collection of the laws, made in 1855. Nothing could more strongly mark the entire repudiation of the African race. . . . [W]hy are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not,

by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it. . . .

It would be impossible to enumerate . . . the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say, that Chancellor Kent,[2] whose accuracy and research no one will question, states in . . . his Commentaries . . . that in no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, . . . and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . . and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were

[2]James Kent (1763–1847) was a justice on the New York Supreme Court from 1798 to 1823, and he also served as chancellor of the state's court system from 1814 to 1823. He wrote the highly influential four-volume *Commentaries on American Law.* A forceful advocate of a strong judiciary, Kent was a Federalist in his politics and thus an advocate of a strong national government; he was a northerner and at least a nominal opponent of slavery. Here Taney shrewdly uses Kent to support his position that blacks have no rights under the Constitution.

recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them. . . .

Federal Laws Used to Explain the Constitution

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. . . .

The first of these acts is the naturalization law . . . [of] March 26, 1790, [which] confines the right of becoming citizens *"to aliens being free white persons."* . . .

Another of the early laws of which we have spoken, is the first militia law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant. . . . It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word *citizen* to exclude unnaturalized foreigners; the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, (2 Stat., 809) and it provides: "That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States."

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word *citizens,* and they are described as another and different class of persons, and authorized to be employed, if born in the United States. . . .

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States." . . .

"Original Intent" Analysis Used to Assert That the Constitution Protects Slavery

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to

the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty. . . .

Taney's Ruling on Black Citizenship

And upon a full and careful consideration of the subject, the court is of opinion, that, . . . Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. . . .

. . . [I]t appears affirmatively on the record that he is not a citizen, and consequently his suit against Sandford was not a suit between citizens of different States, and the court had no authority to pass any judgment between the parties. The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgment in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any, difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment, would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

[Here Taney recounts the facts of Dred Scott's residence in Illinois and Minnesota, his marriage to Harriet Robinson at Fort Snelling, and the birth of their two daughters.]

The Question of Residence in a Free Jurisdiction

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States . . . ? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress [the Missouri Compromise], upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. [But] . . . [was Congress] authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff [Dred Scott] has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" [article IV, section 3, paragraph 2] but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given . . . was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more. . . .

It will be remembered that, from the commencement of the Revolutionary war, serious difficulties existed between the States, in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the States. . . .

The letters from the statesmen of that day will show how much this controversy occupied their thoughts, and the dangers that were appre-

hended from it. It was the disturbing element of the time, and fears were entertained that it might dissolve the Confederation by which the States were then united.

These fears and dangers were, however, at once removed, when the State of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the river Ohio, and which was within the acknowledged limits of the State. . . .

This was the state of things when the Constitution . . . was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according to the terms of the cession. . . . It was necessary that the lands should be sold to pay the war debt; that a Government and system of jurisprudence should be maintained in it, to protect the citizens of the United States who should migrate to the territory, in their rights of person and of property. . . . And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new Government nor any one else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new Government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which gives Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was intended for a specific purpose, to provide for the things we have mentioned. . . .

The . . . clause . . . does not speak of *any* territory, nor of *Territories,* but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to *the* territory of the United States—that is, to a territory then in existence, and then known or claimed as the territory of the United States. [It] . . . gives the power which was necessarily associated with the disposition and sale of the lands—that is, the power of making needful rules and regulations respecting the territory. . . .

The words "needful rules and regulations" would seem, also, to have been cautiously used for some definite object. They are not the words usually employed by statesmen, when they mean to give the powers of

sovereignty, or to establish a Government, or to authorize its establishment. Thus . . . in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of Government independently of a State, it does not say Congress shall have power "to make all needful rules and regulations respecting the territory;" but it declares that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.["] . . .

Whether, therefore, we take the particular clause in question, by itself, or in connection with the other provisions of the Constitution, we think it clear, that it applies only to the particular territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to territory which the new Government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this Territory . . . can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the General Government exercised over slavery in this Territory, as altogether inapplicable to the case before us. . . .

Interpretation of the Territories Clause of the Constitution

. . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power . . . it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a state upon an equal footing with the other States, must rest upon the same discretion. . . .

Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a Territory belonging to the peo-

ple of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose. The principle upon which our Governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. . . .

Effect of the Bill of Rights on Slavery in the Territories

But until that time [of statehood] arrives, it is undoubtedly necessary that some Government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the Government which represented them . . . it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a Government as would enable . . . to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. . . . But . . . what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside, or for any other lawful purpose . . . until it is fitted to be a State.

But the power of Congress over the person or property of a citizen . . . [is] regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters . . . upon it with its powers over the citizen strictly defined, and limited by the Constitution. . . . It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. . . . [A]nd the Federal Gov-

ernment can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved. . . .

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the 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.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition . . . extend[s] to the whole territory over which the Constitution gives it power to legislate. . . . It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—

if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. . . . It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said . . . the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory . . . is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. . . .

Did Scott's Residence in Illinois Affect His Status?

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. *v.* Graham [1850]. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had no jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status,* as free or slave, depended on the laws of Missouri, and not of Illinois. . . .

Conclusion: Scott Remains a Slave

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its

judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

JUSTICE JAMES M. WAYNE

Concurring Opinion

March 6, 1857

James Moore Wayne (c. 1790–1867) was born in Savannah, Georgia, the son of a rice planter. He received a degree from the College of New Jersey (now Princeton University) in 1808 and began law practice in Savannah in 1810. Wayne held various political positions and was in his fourth term in Congress when President Andrew Jackson nominated him to the Supreme Court. A slave owner, Wayne generally took a moderately proslavery position. He concurred with Justice Joseph Story's majority opinion in Prigg v. Pennsylvania *(1842), the first fugitive slave case to come before the Supreme Court. While fully supporting the right of masters to regain their slaves, Wayne did not endorse Chief Justice Taney's more extreme concurring opinion in* Prigg. *Similarly, in 1858, the year after the* Dred Scott *decision, Wayne unsuccessfully urged a South Carolina jury to convict alleged slave traders of violating the federal ban on the African slave trade. At the beginning of the Civil War Wayne chose loyalty to the nation of his birth and thus remained on the Court until his death in 1867.*

In Dred Scott *Wayne specifically concurred with Chief Justice Taney's opinion, asserting that Taney had the power and duty to decide every point in the case. Why did Wayne feel the need to write an opinion at all, if he completely agreed with Taney's opinion? Is Wayne's short opinion politically, rather than legally, motivated? Wayne also specifically endorsed Justice Nelson's position, while indicating that he believed Nelson should have joined him in finding the Missouri Compromise unconstitutional. After you have read Nelson's opinion, consider whether it is illogical, or inconsistent, to specifically endorse both the Taney opinion and the Nelson opinion. Does Wayne's opinion offer a way of mediating between the proslavery southern majority on the Court and their two northern allies?*

Mr. Justice Wayne.

[I concur] entirely in the opinion of the court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusions. . . .

. . . [T]he court neither sought nor made the case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from the Circuit Courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

It would certainly be a subject of regret, that the conclusions of the court have not been assented to by all of its members, if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment. . . .

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion, upon a single point in the case, with which I concur, assuming the Circuit Court had jurisdiction; but he abstains altogether from expressing any opinion on the eighth section of the act of 1820, known commonly as the Missouri Compromise law, and six of us declare that it was unconstitutional.

JUSTICE SAMUEL NELSON

Concurring Opinion

March 6, 1857

Born in upstate New York, Samuel Nelson (1792–1873) attended Middlebury College in Vermont, read law in Salem, New York, and was admitted to the bar in 1817. He served as a postmaster in Cortland, New York, from 1820 to 1823 and then served on various state courts from 1823 until 1845, when President James K. Polk appointed him to the United States Supreme Court. Nelson was a classic "doughface" Democrat—a northern man with southern principles. Initially Nelson was going to write the opinion of the Court in Dred Scott. *He planned to decide the case quickly, and with little controversy. As his concurring opinion shows, he would have avoided most of the difficult issues surrounding slavery in the territories and the rights of free blacks by simply holding that Missouri had a right to decide for itself the status of blacks within its jurisdiction. The southern majority on the Court, however, wanted a more forcefully proslavery opinion, which Nelson would not write. Thus the four southern associate justices asked Taney to write a majority opinion that would strike down the Missouri Compromise.*

Would Nelson's opinion have been the wiser for the Court and the nation? Would Dred Scott *have become a major political issue if Nelson's had been the main opinion in the case? At the end of his opinion Nelson wrote the following:*

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

What are the implications of this statement? Does Nelson's statement support Lincoln's fears in his "House Divided" speech (p. 185) that the Court might nationalize slavery?

Mr. Justice Nelson.

[Nelson explains why he thinks the plea in abatement is not before the Court. He then turns to the issue of Dred Scott's residence in free jurisdictions.]

. . . Our opinion is, that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice; and hence, in respect to the case before us . . . [it is] a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the Federal Government . . . but sovereign as respects each other. Whether, therefore, the State of Missouri will recognise or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. . . .

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties. . . .

Judge Story[1] observes, in his Conflict of Laws, . . . "that a State may prohibit the operation of all foreign laws, and the rights growing out of

[1]Joseph Story (1779–1845) was the most distinguished scholar to serve on the United States Supreme Court. During his years on the Court (1811–1845) he wrote

them, within its territories." "And that when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognise and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself; and is never bound . . . to recognize them, if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes . . . "that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known interests." . . .

These principles fully establish, that it belongs to . . . Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy . . . can have no operation within her territory, or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extra-territorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate. . . .

[Dred Scott's attorneys] . . . insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extra-

numerous treatises on American law, including his *Commentaries on the Constitution,* 3 vols. (Boston: Hilliard and Gray, 1833) and the work cited by Nelson, *Commentaries on the Conflict of Laws* (Boston: Hilliard and Gray, 1834). His work was generally considered to be authoritative and thus courts throughout the nation regularly cited him. On Story, see generally R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985).

territorially; and the State of Illinois refused to recognize its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognize and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extra-territorially, except what may be voluntarily conceded to them. . . .

[In] Strader et al. v. Graham [1850] . . . [t]he question . . . was, whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily [in] . . . Ohio, with their master's consent, and had returned to Kentucky into his service, had thereby become entitled to their freedom. The Court of Appeals held that they had not. . . . This court held that it had no jurisdiction, for . . . the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that "every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes, that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine, for herself, whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff, that the [Missouri Compromise] . . . possessed some superior virtue and effect, extra-territorially, and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of Strader et al. v. Graham. . . .

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that, if this act had attempted any such legislation, it would have been a nullity. And yet the argument here . . . leads to the result, that effect may be given to such legislation; for it

is only by giving the act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject. . . .

. . . [M]any of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for, not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign State—an effect, as insisted, that displaces the laws of the State, and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Congress possesses the power, under the Constitution, to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject; and then, upon the process of reasoning which seeks to extend its influence beyond the Territory, and within the limits of a State, if Congress should establish, instead of abolish, slavery, we do not see but that, if a slave should be removed from the Territory into a free State, his status would accompany him, and continue, notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided, if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is, that even conceding, for the purposes of the argument, that this provision of the act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a State. It can neither displace its laws, nor change the status or condition of its inhabitants.

Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it.

The remaining question for consideration is, What is the law of the State of Missouri on this subject? . . . [As *Scott v. Emerson* (1852)] this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff [Scott]. The [Missouri Supreme

Court] reversed the judgment . . . upon the principles of international law, that foreign laws have no extra-territorial force, except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations. . . .

Lord Stowell, in communicating his opinion in the case of the slave Grace[2] to Judge Story, states . . . : "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of Somersett;[3] but the practice, he observed, "has regularly been, that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes: "I have read with great attention your judgment in the slave case, &c. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State, (Massachusetts), the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be reintegrated." . . .

[Nelson discusses similar cases from Maryland and Louisiana.]

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his Government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. . . . In such a case, the officer goes to his post for a temporary

[2]*The Slave, Grace,* 2 Hagg. Admin. (G.B.) 94 (1827). See page 21 of this book.
[3]*Somerset v. Stewart,* 1 Lofft (G.B.) 1 (1772). See page 20 of this book.

purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. . . .

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

Our conclusion is, that the judgment of the court below should be affirmed.

JUSTICE ROBERT COOPER GRIER

Concurring Opinion

March 6, 1857

Born in Cumberland County, Pennsylvania, Robert C. Grier (1794–1870) received a degree from Dickinson College in 1812 and read law until 1817, when he was admitted to the Pennsylvania bar. A loyal Jacksonian Democrat, he served as a state judge from 1833 until President James K. Polk appointed him to the United States Supreme Court in 1846. Grier generally supported states' rights. Until the Civil War he also always voted to support the interests of the South and slavery. After the election of President James Buchanan, but before his inauguration, Justice Grier wrote to his fellow Pennsylvanian and told him how the Court was going to decide Dred Scott. *Thus, when Buchanan read his inaugural address and urged the nation to respect the forthcoming opinion, he already knew that the Court was about to declare the Missouri Compromise unconstitutional and allow slavery in all the federal territories. Grier's three-sentence opinion is the shortest of the nine delivered by the justices.*

Grier specifically concurs in Justice Nelson's opinion but also agrees with Justice Taney. Having read both opinions, do you think Grier was

intellectually consistent? Why do you think Grier felt compelled to write this opinion, trying to side with both Nelson and Taney at the same time? Does his opinion add anything to the decision?

Mr. Justice Grier.

I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of 6th March, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But, that the record shows a prima facie case of jurisdiction, requiring the court to decide all the questions properly arising in it; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States. . . .

JUSTICE PETER V. DANIEL

Concurring Opinion

March 6, 1857

Born in Stafford County, Virginia, Peter Vivian Daniel (1784–1860) was the most proslavery member of the Court. He was also the Court's most adamant defender of states' rights. Daniel was educated by private tutors and briefly attended the College of New Jersey (later Princeton University). From 1805 to 1808 he studied law with Edmund Randolph, the former attorney general of the United States. Daniel then entered politics, becoming lieutenant governor of Virginia in 1818, at age thirty-four. In the 1830s he was Virginia's leading supporter of Presidents Andrew Jackson and Martin Van Buren. Jackson appointed him to the United States district court in 1836; in 1841, just nine days before he left the presidency, Van Buren elevated him to the Supreme Court. On the Court Daniel was best known for his dissents—fifty between 1842 and 1859—in which he generally opposed banks, corporations, and a strong national government and generally supported states' rights and slavery.

His Dred Scott *opinion is the most extreme of the nine opinions in its denial of federal power to regulate slavery. Unlike the other judges, Daniel argues that even the Northwest Ordinance of 1787, which prohibited slavery in the territories north and west of the Ohio River, was unconstitutional. What are the implications of Daniel's position on the Northwest Ordinance? If Taney was right about the unconstitutionality of the Missouri Compromise, why didn't Taney take such a position on the Northwest Ordinance?*

Mr. Justice Daniel.

It may with truth be affirmed, that since the establishment of the several communities now constituting the States of this Confederacy, there never has been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court. Indeed it is difficult to imagine, in connection with the systems of polity peculiar to the United States, a conjuncture of graver import than that must be, within which it is aimed to comprise, and to control, not only the faculties and practical operation appropriate to the American Confederacy as such, but also the rights and powers of its separate and independent members, with reference alike to their internal and domestic authority and interests, and the relations they sustain to their confederates. . . .

Now, the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.

. . . And it now becomes the province of this court to determine whether the plaintiff . . . a *negro* of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves—such being his *status,* and such the circumstances surrounding his position—whether he can, by correct legal induction from that *status* and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri?

It may be assumed as a postulate, that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the Government. He is himself strictly *property,* to be used in subserviency to the interests, the convenience, or the will, of his owner; . . . Hence it follows, necessarily, that a slave . . . possessing within himself no civil or political rights or capacities, cannot be a CITIZEN. . . .

But it has been insisted, in argument, that the emancipation of a slave, effected either by the direct act and assent of the master, or by causes operating in contravention of his will, produces a change in the *status* or capacities of the slave, such as will transform him from a mere subject of property, into a being possessing a social, civil, and political equality with a citizen. In other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to conceive by what magic the [slave can become a citizen merely by private manumission]. Can it be pretended that an individual in any State, by his single act [of freeing a slave] . . . yet without the co-operation or warrant of the Government, perhaps in opposition to its policy or its guaranties, can create a citizen of that State? Much more emphatically may it be asked, how such a result could be accomplished by means wholly extraneous, and entirely foreign to the Government of the State? . . .

The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution, either under the republic or the empire of Rome, bears, both in its tenure and in the simplicity incident to the mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of *villanage,*[1] as it formerly existed in England. . . .

[In Rome] . . . citizenship was not conferred by the simple fact of emancipation. . . . The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart. There is not perhaps a community in which slavery is recognized, in which the power of eman-

[1]Villenage (as it is spelled today) refers to the status of unfree peasants in medieval England. Villeins were legally tied to the land and owed service and other obligations to their feudal lords. However, they were not slaves. They had many legal rights, including the right to marry, make contracts, and own property, and they could not be bought or sold by their lords.

cipation and the modes of its exercise are not regulated by law—that is, by the sovereign authority; and none can fail to comprehend the necessity for such regulation, for the preservation of order, and even of political and social existence.

[Daniel argues that it would be despotism for one state to have the power to make slaves into citizens without the consent of all other states.]

By the argument for the plaintiff in error, a power equally despotic is vested in every member of the association, and the most obscure or unworthy individual it comprises may arbitrarily invade and derange its most deliberate and solemn ordinances. At assumptions anomalous as these, so fraught with mischief and ruin, the mind at once is revolted, and goes directly to the conclusions, that to change or to abolish a fundamental principle of the society, must be the act of the society itself—of the *sovereignty;* and that none other can admit to a participation of that high attribute. It may further expose the character of the argument urged for the plaintiff, to point out some of the revolting consequences which it would authorize. If that argument possesses any integrity, it asserts the power in any citizen, or *quasi* citizen, or a resident foreigner of any one of the States, from a motive either of corruption or caprice, not only to infract the inherent and necessary authority of such State, but also materially to interfere with the organization of the Federal Government, and with the authority of the separate and independent States. He may emancipate his negro slave, by which process he first transforms that slave into a citizen of his own State; he may next, under color of article fourth, section second, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety. Nay, more: [T]his manumitted slave may, by a proceeding springing from the will or act of his master alone, be mixed up with the institutions of the Federal Government, to which he is not a party, and in opposition to the laws of that Government which, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the Federal compact, have restricted that boon to *free white aliens alone.* If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive—that it has *in effect* no existence, but is repealed or abrogated. . . .

The States, in the exercise of their political power, might, with reference to their peculiar Government and jurisdiction, guaranty the rights of person and property, and the enjoyment of civil and political privileges, to those whom they should be disposed to make the objects of their bounty; but they could not reclaim or exert the powers which they had vested exclusively in the Government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained at the time of the adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect proceeding. . . .

[Daniel argues that Congress had no power to limit slavery when it passed the Northwest Ordinance and the Missouri Compromise.]

The second or last-mentioned position assumed for the plaintiff under the pleas in bar, as it rests mainly if not solely upon . . . the *Missouri Compromise,* that assumption renews the question, formerly so zealously debated, as to the validity of the provision in the act of Congress, and upon the constitutional competency of Congress to establish it. . . .

There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the Territories. . . .

. . . Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary . . . than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals; but every citizen would, if any *one* could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument, which imparts to Congress its very existence and its every function, guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation; and, farther, that the only private property which the Constitution has *specifically recognised,* and has imposed it as a direct obligation both on the States and the Federal Government

to protect and *enforce,* is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow-citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given . . . to another, to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this, cannot be nationally imputed to the patriotic or the honest, or to those who were merely sane. . . .

. . . But apart from the superior control of the Constitution, and anterior to the adoption of that instrument, it is obvious that the inhibition in question never had and never could have any legitimate and binding force. We may seek in vain for any power in the convention, either to require or to accept a condition or restriction upon the cession like that insisted on; a condition inconsistent with, and destructive of, the object of the grant. [The prohibition of slavery in the Northwest Ordinance] being contradictory to the terms and destructive of the purposes of the cession, and after the cession was consummated, and the powers of the ceding party terminated, and the rights of the grantees, *the people of the United States,* vested, must necessarily, so far, have been *ab initio* [from the beginning] void . . . .

JUSTICE JOHN ARCHIBALD CAMPBELL

Concurring Opinion

March 6, 1857

John Archibald Campbell (1811–1889) was born in Washington, Georgia, the son of a lawyer-planter. Campbell studied at both West Point and the University of Georgia before beginning his legal career at the unusually young age of eighteen. In 1830, at age nineteen, he moved to Alabama, where he practiced law and held some local political offices. When President Franklin Pierce appointed him to the Supreme Court in

1853, the New York Tribune *commented that he was "a gentleman of shining and profound talents, vast legal attainments and withal is irreproachable in character, but he is a fire-eater of the blazing school" in defending southern nationalism.*[1] *A slaveholder for most of his life, Campbell's lifelong sympathies were with slavery and the South. In 1861 he resigned from the Court and became assistant secretary of war for the Confederacy.*

Campbell's twenty-five-page concurring opinion in Dred Scott *places him clearly in the camp of the strongest advocates of slavery. Campbell uses various historical arguments, as well as the Ninth and Tenth Amendments to the Constitution, to justify his conclusion that the Missouri Compromise was unconstitutional and that slavery was a constitutionally protected form of property. In this opinion Campbell argues that slavery "is recognized by the law of nations" and could be found everywhere in the world and throughout human history. He also tries to demonstrate that involuntary servitude and bondage were found in England at the time of the Revolution.*

Campbell seems to be arguing that slavery was part of American law at the time of the founding. Does such a historical argument strengthen his position that Congress cannot ban slavery in the territories? Throughout his opinion Campbell also favorably quotes such famous anti-Federalists as Patrick Henry, George Clinton, and Luther Martin. These men, who opposed the ratification of the Constitution in 1787–1788, were, like Campbell, unswerving supporters of states' rights and opponents of a strong central government. However, is it persuasive for Campbell to quote them to support his view of how the Constitution should be interpreted?

Mr. Justice Campbell. . . .

The relation of domestic slavery is recognised in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause, is a violation of that law. . . .

The public law of Europe formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him, and one of the capitularies of Charlemagne . . . directs, "that whereso-

[1]New York *Tribune,* quoted in Gordon Hylton Jr., "John Archibald Campbell," in *The Supreme Court Justices: A Biographical Dictionary,* ed. Melvin I. Urofsky (New York: Garland, 1994), 89.

ever, within the bounds of Italy, either the runaway slave of the king, or of the church, or of any other man, shall be found by his master, he shall be restored. . . ." . . . [T]he clause in the Federal Constitution providing for the restoration of fugitive slaves is a recognition of this ancient right, and of the principle that a change of place does not effect a change of condition. . . .

. . . Historical research ascertains that at the date of the Conquest [1066] the rural population of England were generally in a servile condition, and under various names, denoting slight variances in condition, they were sold with the land like cattle, and were a part of its living money. Traces of the existence of African slaves are to be found in the early chronicles. Parliament in the time of Richard II, and also of Henry VIII, refused to adopt a general law of emancipation. Acts of emancipation by the last-named monarch and by Elizabeth are preserved.

The African slave trade had been carried on, under the unbounded protection of the Crown, for near two centuries, when the case of Somersett[1] [1772] was heard, and no motion for its suppression had ever been submitted to Parliament; while it was forced upon and maintained in unwilling colonies by the Parliament and Crown of England at that moment. Fifteen thousand negro slaves were then living in that island, where they had been introduced under the counsel of the most illustrious jurists of the realm, and such slaves had been publicly sold for near a century in the markets of London. . . . No statute, from the Conquest till [1775] had been passed upon the subject of personal slavery. . . .

The clause [article IV, section 3 of the U.S. Constitution] which enables Congress to dispose of and make regulations respecting the public domain, was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands; and the last clause, that nothing in the Constitution should prejudice the claims of the United States or a particular State, was to quiet the jealousy and irritation of those who claimed for the United States all the unappropriated lands. I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire,

[1]*Somerset v. Stewart,* 1 Lofft (G.B.) 1 (1772). See page 20 of this book.

and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive previsions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry;[2] and, in respect to dangers from power vested in a central Government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them, to warn their countrymen, that here was a power to threaten the landmarks of this federative Union, and with them the safeguards of popular and constitutional liberty; or that under this article there might be introduced, on our soil, a single Government over a vast extent of country — a Government foreign to the persons over whom it might be exercised, and capable of binding those not represented, by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents — expressions which have since been developed as prophecies. . . .

The most dangerous of the efforts to employ a geographical political power, to perpetuate a geographical preponderance in the Union, is to be found in the deliberations upon the [Missouri Compromise]. The attempt consisted of a proposal to exclude Missouri from a place in the Union, unless her people would adopt a Constitution containing a prohibition upon the subject of slavery, according to a prescription of Congress. The sentiment is now general, if not universal, that Congress had no constitutional power to impose the restriction. This was frankly admitted at the bar, in the course of this argument. The principles which this court have pronounced condemn the pretension then made on behalf of the legislative department. . . .

[Campbell implies that the Missouri Compromise was like the oppressions of the British in the years before the American Revolution.]

Could it have been the purpose of Washington and his illustrious associates, by the use of ambiguous, equivocal, and expansive words, such as "rules," "regulation," "territory," to re-establish in the Constitution of their country [arbitrary government]? Are these words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons,

[2]These four men were active in fighting against ratification of the Constitution in 1787–1788. Adams of Massachusetts eventually supported the Constitution, and Clinton of New York acquiesced when New York ratified it. Martin of Maryland and Henry of Virginia were two of the most vocal opponents of the Constitution in their states.

and Dunmores[3]—in a word, as George III would have understood them—or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson; to the sage Franklin, or to Hamilton, who from his early manhood was engaged in combating British constructions of such words? . . . In forming the Constitution . . . [t]he people were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and "that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? . . .

. . . My opinion is, that the claim for Congress of supreme power in the Territories, under the grant to "dispose of and make all needful rules and regulations respecting *territory,*" is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratification of the Federal Constitution. The ordinance of 1787 depended upon the action of the Congress of the Confederation, the assent of the State of Virginia, and the acqui-

[3]Lords North, Grenville, and Hillsborough all headed the British government in the years leading up to the American Revolution. Americans held them responsible for the various laws, such as the Stamp Act, the tea tax, and the Intolerable Acts, that led to the Revolution. Thomas Hutchinson was the American-born lieutenant governor of Massachusetts who supported the closing of Boston harbor after the Boston Tea Party. Hutchinson sided with the British during the Revolution and afterward went to England. Lord Dunmore was the royal governor of Virginia when the Revolution began. Southerners especially hated him because he offered to free any slave who would fight in the British army.

escence of the people who recognized the validity of that plea of necessity which supported so many of the acts of the Governments of that time; and the Federal Government accepted the ordinance as a recognized and valid engagement of the Confederation. . . .

JUSTICE JOHN CATRON

Concurring Opinion

March 6, 1857

Born in Pennsylvania, John Catron (c. 1786–1865) grew up in poverty, served under Andrew Jackson in the War of 1812, and emerged as a lawyer in 1815. Between 1824 and 1834 Catron was a justice of the Tennessee Supreme Court. He was also an active supporter of President Jackson, who, on his last day in office, appointed Catron to the United States Supreme Court. Catron was generally a moderate on slavery, as his concurring opinion shows. Unlike Taney, he did not believe that Congress lacked all power to regulate the territories, although he denied that Congress could ban slavery in the territory acquired from France in the Louisiana Purchase. Also indicative of his moderate position, Catron did not discuss whether free blacks could be citizens of the United States.

Why does Catron refuse to deny Congress power to legislate for the territories? Does Taney's opinion on the unconstitutionality of all congressional regulation of the territories put Justice Catron in a morally ambiguous position?

Mr. Justice Catron. . . .

It is . . . insisted for the plaintiff, that his freedom . . . was obtained by . . . the Missouri compromise. . . .

The first question . . . is, whether Congress had power to make such compromise. For, if power was wanting, then no freedom could be acquired by the defendant under the act.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution, is not open to controversy. But it is insisted that, by the Constitution, Congress has

power to legislate for and govern the Territories of the United States, and that by force of the power to govern, laws could be enacted, prohibiting slavery in any portion of the Louisiana Territory; and, of course, to abolish slavery *in all* parts of it, whilst it was, or is, governed as a Territory.

My opinion is, that Congress is vested with power to govern the Territories of the United States by force of the third section of the fourth article of the Constitution. . . .

It was hardly possible to separate the power "to make all needful rules and regulations" respecting the government of the territory and the disposition of the public lands. . . .

It is due to myself to say, that it is asking much of a judge, who had for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories, by its legislation directly, or by Territorial charters, subject to repeal at all times, and it is now too late to call that power into question. . . . The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there; and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the ordinance of 1787, for the government of the Northwest Territory. She did this also by an act of her Legislature, passed afterwards, which was a treaty in fact. . . .

My opinion is, that Congress had no power, in face of the compact between Virginia and the twelve other States, to *force* slavery into the Northwest Territory, because there, it was bound to that "engagement," and could not break it. . . .

And how does the [territorial] power of Congress stand west of the Mississippi river? The country there was acquired from France, by treaty, in 1803. It declares, . . . by article third, that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Con-

stitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the colony, of a proper size for a State of the Union[,] had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfill the treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become States of the Union. And for this contemplated future population, the treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. . . .

At the date of the treaty, each inhabitant had the right to the *free* enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country, he might go everywhere in it, and carry his liberty, property, and religion, with him, and in which he was to be maintained and protected, until he became a citizen of a State of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the treaty. . . .

The Missouri compromise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi river to the Pacific ocean. . . .

That the United States Government stipulated in favor of the inhabitants to the extent here contended for, has not been seriously denied . . . ; but the argument is, that Congress had authority to *repeal* the third article of the treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory. . . . In other words, that Congress could repeal the third article entirely, at its pleasure. This I deny. . . .

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men own-

ing lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousand[s] of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked; nor can you introduce your tools of trade, or machines, as the policy of Congress is to encourage the culture of sugar and cotton south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slaves labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property. . . .

My opinion is, that the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly, that the act of 1820, known as the Missouri compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire EQUALITY of rights, privileges, and immunities.

On these grounds, I hold the compromise act to have been void; and, consequently, that the plaintiff, Scott, can claim no benefit under it. . . .

JUSTICE JOHN McLEAN

Dissenting Opinion

March 6, 1857

The son of Scotch-Irish immigrants, John McLean (1785–1861) was born in Morris County, New Jersey. Shortly after his birth the McLean family moved to the Ohio frontier. With little formal education, McLean studied law under Arthur St. Clair, the former governor of the Northwest Territory. He practiced law from 1807 to 1813, served in Congress from 1813 to 1816, and was a justice of the Ohio Supreme Court from 1816 to 1822. In 1823 President James Monroe appointed McLean to be postmaster general of the United States. He held this position until March 1829, when Andrew Jackson nominated him to the United States Supreme Court. A day later the Senate confirmed him. McLean remained on the Court until he died in April 1861; but throughout his career he dabbled in politics and was considered a possible presidential candidate by the Anti-Masonic Party, the Free-Soil Democrats, the Whigs, and the Republicans. By 1857 McLean was the only strong opponent of slavery on the Court. McLean's thirty-five-page dissent in Dred Scott *was the third longest of the opinions. He argues that the question of Dred Scott's right to sue is not even legitimately before the Court. McLean takes a traditional antislavery view of the law—that slavery can be established only through positive law and cannot exist without it—and emphatically argues that slavery is strictly a state institution, not national, and not protected by the Constitution per se. McLean stresses the fact that under Missouri law Dred Scott became free when his master took him to Illinois and Minnesota. Like Justice Curtis in his dissent, McLean argues that once Dred Scott became free he was free forever, and thus the Missouri Supreme Court cannot change that status simply by changing its jurisprudence. Justice McLean's opinion did not become as famous as Curtis's (p. 108). Why might this be so? Is McLean's opinion more "political" than Curtis's? Or is it possible that because McLean was an active Republican (who still hoped for a presidential nomination in 1860) people perceived his opinion as being more political?*

Mr. Justice McLean dissenting. . . .

In the first place, the plea to the jurisdiction is not before us. . . .

The decision on the [plea in abatement] was in favor of the plaintiff . . . [and] he does not complain of the decision on [it]. The defendant might have complained of this decision, as against him, and have prosecuted a writ of error, to reverse it. But as the case, under the instruction of the court to the jury, was decided in his favor, of course he had no ground of complaint.

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for the dismissal of the case. This may be characterized as rather a sharp practice, and one which seldom, if ever, occurs. No case was cited in the argument as authority, and not a single case precisely in point is recollected in our reports. . . . Now, the plea which raises the question of jurisdiction, in my judgment, is radically defective. [Sanford's] plea is this: "That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country, and sold as negro slaves."

. . . [B]ut this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him. . . .

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of

these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress. . . .

In the great and leading case of Prigg *v.* The State of Pennsylvania [1842], this court say that, by the general law of nations, no nation is bound to recognise the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in Somersett's case, [Great Britain, 1772] which was decided before the American Revolution. . . .

In giving the opinion of the court [in *Somerset*], Lord Mansfield said:

"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 reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law." . . .

Slavery is emphatically a State institution. . . .

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay,[1] as a means of construing the Constitution. . . .

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. . . .

The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

. . . [The Northwest Ordinance] was passed . . . while the Federal Convention was in session, about two months before the Constitution was adopted by the Convention. The members of the Convention must therefore have been well acquainted with the provisions of the Ordinance. It provided for a temporary Government, as initiatory to the formation of State Governments. Slavery was prohibited in the territory.

Can any one suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country, in the organization of temporary Governments for the vast territory northwest of the river Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary Government of the territory. Without a temporary Government, new States could not have been formed, nor could the public lands have been sold.

If the third section were before us now for consideration for the first time, under the facts stated, I could not hesitate to say there was adequate legislative power given in it. The power to make all needful rules and regulations is a power to legislate. . . . But it is argued that the word territory is used as synonymous with the word land; and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section appears from the fact that in the first line of the section "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regula-

[1]James Madison, Alexander Hamilton, and John Jay were the three authors of the *Federalist Papers,* a series of essays written to support the ratification of the Constitution and to explain its meaning. This is McLean's response to Justice Campbell, who relied on opponents of the Constitution, like Patrick Henry, to support his views.

tions. The power to dispose of is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. . . .

In the discussion of the power of Congress to govern a Territory, in the case of the Atlantic Insurance Company *v.* Canter [1828], Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida, "they do not, however, participate in political power; they do not share in the Government till Florida shall become a State; in the mean time, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States."

And . . . in the close of the opinion, the court say, "in legislating for them [the Territories,][2] Congress exercises the combined powers of the General and State Governments." . . .

If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results, that it would seem no considerate individuals can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States; and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But, not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

This remark is made in answer to the argument urged, that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a Territorial Government is established in a

[2]McLean's addition.

slave Territory, it has uniformly remained in that condition until the people form a State Constitution; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.

The sovereignty of the Federal Government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of Congress to punish our citizens for crimes committed in districts of [the] country where there is no organized Government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limit of any organized Territory or State; and no one doubts that such a jurisdiction was rightfully exercised. If there be a right to acquire territory, there necessarily must be an implied power to govern it. When the military force of the Union shall conquer a country, may not Congress provide for the government of such country? This would be an implied power essential to the acquisition of new territory. This power has been exercised, without doubt of its constitutionality, over territory acquired by conquest and purchase. . . .

[I now] consider whether the status of slavery attached to the plaintiff and wife, on their return to Missouri. . . .

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery, the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible, not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say, that I have never found a jury in the four States which constitute my circuit, which have not sustained this law, where the evidence required them to sustain it. And it is proper that I should also say, that more cases have arisen in my circuit, by reason of its extent and locality, than in all other parts of the

Union. This has been done to vindicate the sovereign rights of the Southern States, and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it, with a view of becoming a resident, shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri compromise act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and in the action before us they are not only claimed as slaves, but a majority of my brethren have held that on their being returned to Missouri the status of slavery attached to them.

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a Constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience; and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable . . . : "In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided." This is the agreed case; and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was removed; which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. . . . It would be a mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide, whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence, is not authorized from the facts admitted. . . .

In every decision of a slave case prior to that of Dred Scott *v.* Emerson, the Supreme Court of Missouri considered it as turning upon the Constitution of Illinois, the ordinance of 1787, or the Missouri compromise act of 1820. The court treated these acts as in force, and held itself bound to execute them, by declaring the slave to be free who had acquired a domicil under them with the consent of his master.

The late decision reversed this whole line of adjudication, and held that neither the Constitution and laws of the States, nor acts of Congress in relation to Territories, could be judicially noticed by the Supreme Court of Missouri. This is believed to be in conflict with the decisions of all the courts in the Southern States, with some exceptions of recent cases.

[McLean discusses cases from Louisiana, Mississippi, Virginia, the District of Columbia, and Kentucky, in which slaves gained their liberty because of residence or transit in a free state.]

In the case of Rankin *v.* Lydia [1820] Judge Mills, speaking for the Court of Appeals of Kentucky, says:

"If, by the positive provision in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom."

And he further said:

"Free people of color in all the States are, it is believed, quasi citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them; at least, such rights were evidently secured to them by the ordinance in question for the government of Indiana. If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated Government to deny their existence in any other part? Is there less comity existing between State and State, or State and Territory, than exists between the despotic Governments of Europe?"

These are the words of a learned and great judge, born and educated in a slave State. . . .

But there is another ground which I deem conclusive, and which I will re-state.

The Supreme Court of Missouri refused to notice the act of Congress or the Constitution of Illinois, under which Dred Scott, his wife and children, claimed that they are entitled to freedom.

This being rejected by the Missouri court, there was no case before it, or least it was a case with only one side. And this is the case which, in the opinion of this court, we are bound to follow. The Missouri court disregards the express provisions of an act of Congress and the Constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the twenty-fifth section of the judiciary act, where a right to freedom being set up under the act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

I think the judgment of the court below should be reversed.

JUSTICE BENJAMIN ROBBINS CURTIS

Dissenting Opinion

March 6, 1857

Born in Watertown, Massachusetts, Benjamin Robbins Curtis (1809–1874) graduated from Harvard College in 1829 and Harvard Law School in 1832. Supreme Court Justice Joseph Story, who taught at Harvard Law School, considered Curtis to be one of his best students. Curtis was politically conservative and never sympathetic to the opponents of slavery. As a young man he had represented a slave holder in Commonwealth v. Aves *(1836), involving a slave owner who had brought a slave to Massachusetts. In* Aves *Curtis argued that Massachusetts should not free a slave accompanying a visiting master. Unlike most Bostonians, Curtis supported the Fugitive Slave Law of 1850. He was not proslavery, but merely a staunch nationalist willing to placate the South. Indeed, his endorsement of the Fugitive Slave Law led President Millard Fillmore to appoint him to the U.S. Supreme Court in 1851. In*

1854 Curtis supported the indictment of Massachusetts abolitionists who had tried to rescue the fugitive slave Anthony Burns. Not surprisingly, many of his fellow Bostonians called him the "slave-catcher judge." Thus Curtis's vigorous dissent in Dred Scott *was somewhat surprising.*

His seventy-page dissent—sixteen pages longer than Taney's majority opinion—is most remembered because he so overwhelmingly refutes Chief Justice Taney's assertions that free blacks had no political rights when the United States adopted the Constitution. Curtis shows that blacks were in fact citizens of a number of states in 1787. Curtis also argues that in Anglo-American law, birth has always been tied to citizenship and that allowing slavery into the territories requires allowing all of the laws of a slave society into the territories. He writes:

> *the rights, powers, and obligations, which grow out of that status [of a slave], must be defined, protected, and enforced, by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.*

Curtis's dissent, widely read in the North, was used by some northern legislatures as the basis for resolutions opposing Taney's opinion. Curtis's opinion became a political document during the elections of 1858 and 1860, with Republicans reprinting it in whole or part. But Curtis was no radical and no fan of the Republicans. His dissent does not endorse racial equality and furthermore argues that the states are free to deny citizenship to blacks. During the Civil War Curtis reverted to his conservative views. He supported the war but opposed Lincoln's policy throughout the war and in 1868 defended Andrew Johnson during his impeachment trial.

How does Curtis's opinion compare with Taney's? Who has the better argument on citizenship of blacks and the meaning of the Constitution? Why would a northern conservative, who often supported the interests of the South, write this opinion?

Mr. Justice Curtis dissenting. . . .

[The] . . . question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of

the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court . . . ; for no cause is shown . . . why he is not so, except his descent and the slavery of his ancestors.

The first section of the second article of the Constitution uses the language, "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is, to inquire who were citizens of the United States at the time of the adoption of the Constitution. . . .

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States . . . at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. . . .

[In Massachusetts] . . . persons of color, descended from African slaves, were by [the 1780 state] Constitution made citizens of the State; and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present. . . .

The [1784] Constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the State having the necessary qualifications," of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant . . ." making no discrimination between free colored persons and others. . . .

That of New Jersey, to "all inhabitants of this colony, of full age, who are worth £50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed; and colored in

common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. . . . And . . . no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The fourth of the fundamental articles of the Confederation was as follows: "The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States."

The fact that free persons of color were citizens of some of the several States, and the consequence, that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778 . . . the delegates from South Carolina moved to amend this fourth article, by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged, and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear, that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were entitled to the privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the Constitution

was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proprio vigore* [by its own force], deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States. . . .

Undoubtedly . . . it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. . . .

But, further: though . . . I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitution; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a Constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that Constitution; and as being decisive, to this extent, that all such persons as are allowed by the Constitution to exercise the elective franchise, and thus, to participate in the Government of the United States, must be deemed citizens of the United States. . . .

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity.

And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established. . . .

It has been further objected, that if free colored persons, born within a particular State, and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then . . . such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be eligible to not only Federal offices, but offices even in those States whose Constitutions and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. . . . That this is not true, under the Constitution of the United States, seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or . . . of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-

born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. . . .

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen, cannot depend on laws which refer only to aliens, and do not affect the *status* of persons born in the United States. The utmost effect which can be attributed to them is, to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. . . .

I do not deem it necessary to review at length the legislation of Congress having more or less bearing on the citizenship of colored persons. . . . Undoubtedly they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus the [1792] act . . . for the organization of the militia, directs the enrolment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citizens, would be as inconsistent with the just import of this language, as that all citizens are able-bodied, or males. . . .

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act. . . .

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisidiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case . . . and so have reached the question of the power of Congress to pass the act of 1820. . . . [I]n my opinion, such an exertion of judicial power transcends the limits of the authority of the court. . . .

I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. . . . The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri. . . . Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed. . . .

The general question may be stated to be, whether the plaintiff's *status,* as a slave, was so changed by his residence within that territory, that he was not a slave in the State of Missouri, at the time this action was brought. . . .

[If] the acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife, and their marriage and the birth of one or both of their children, took place, . . . is a law operating directly on the *status* of the slave. [The

Missouri Compromise] enacted that, within this Territory, "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited. . . ."

[Curtis explains why under international law and American domestic law the state of Missouri was obligated to enforce any change Dred Scott's status caused by his residence in the Wisconsin Territory.]

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the *status* of the plaintiff was or was not such an operation as these principles of international law require other States to recognise and allow effect to. . . .

The material facts agreed, bearing on this part of the case, are, that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling. . . .

On what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners, coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the Territory; and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. . . . Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But, assuming that they were, . . . I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law, could refuse to recognise the effects of such legislation upon the *status* of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that, in the year 1836, the plaintiff, while residing in the Territory, was married, with the consent of Dr. Emerson, to Harriet. . . . And the inquiry is, whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or Country can, consistently with the settled rules of international law, refuse to recognise and treat him as a free man, when suing for the liberty of himself, his wife, and the children of that marriage. . . .

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere. . . .

What, then, shall we say of the consent of the master, that the slave may contract a lawful marriage, attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume—a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave, than by the consent of the master that the slave should enter into a contract of marriage, in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson . . . the effect of which is to deny the validity of this marriage, and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opinion, a law of . . . Missouri, which should thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri . . . would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. . . .

To avoid misapprehension on this important and difficult subject, I will state, distinctly, the conclusions at which I have arrived. They are:

First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the *status* of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the *status* of a slave coming into the Territory of Wisconsin with his master, who went thither to

reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the *status* of the slave, and it is in conformity with the rules of international law that this change of *status* should be recognised everywhere.

Third. The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the *status* of the plaintiff, and change his *status* to that of a free man.

Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State, or of some right derived from them; which cannot be shown in this case, because the master consented to it.

Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery. . . .

I have thus far assumed, merely for the purpose of the argument, that the laws of the United States, respecting slavery in this Territory, were constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws. . . .

. . . [W]hen the Federal Constitution was framed, and presented to the people of the several States for their consideration, the unsettled [Northwest] territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value; and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing with the original States. . . . The ordinance of 1787 had made provision for the temporary government of so much of the territory actually ceded as lay northwest of the river Ohio. . . .

The Congress of the [Articles of] Confederation [in passing the Northwest Ordinance] had assumed the power not only to dispose of the lands ceded, but to institute Governments and make laws for their inhabitants. . . . The Convention for framing the Constitution was then in session at

Philadelphia. The proof is direct and decisive, that it was known to the Convention. . . .

The importance of conferring on the new Government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived, is clearly shown by the Federalist,[1] (No. 38,) where this very argument is made use of in commendation of the Constitution. . . .

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly agitated, was nevertheless overlooked; or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern, which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper. . . .

[Curtis discusses the debates in the constitutional convention over the territories and the admission of new states. This led to two clauses in the final Constitution:]

"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State" [article IV, section 3]. . . .

It is said this provision has no application to any territory save that then belonging to the United States. . . . [But] when the Constitution was

[1]The *Federalist Papers* were a series of essays written by James Madison, Alexander Hamilton, and John Jay in 1787–1788 to gain support for the Constitution. Curtis, like McLean, is trying to tie his position to that of the framers of the Constitution and the founders of the nation.

framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt, by the framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions; a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States, and by the United States . . . ; so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States; and, consequently, to know whether it was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject-matter of this article, which restricts its operation to territory owned by the United States when the Constitution was adopted. . . .

I construe [the territories] clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it. . . .

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power. . . .

But it is insisted, that whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "*all* needful rules and regulations" respecting the territory belonging to the United States.

The assertion is, though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument, to exhibit some solid and satisfactory reason, drawn from the subject-matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification. . . .

There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the territory." An enactment that slavery may or may not exist there, is a regulation respecting the territory. Regulations must be needful; but it is necessarily left to the legislative dis-

cretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar . . . which imposes any restrictions or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution. . . .

It has already been stated, that after the Government of the United States was organized under the Constitution, the temporary Government of the Territory northwest of the river Ohio could no longer exist, save under the powers conferred on Congress by the Constitution. . . . And, accordingly, an act was passed on the 7th day of August, 1789 [reenacting the substance of the Northwest Ordinance, including the prohibition of slavery]. . . .

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison,[2] had been members of the Convention which framed the Constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect." Gen. Washington, who signed this bill, as President, was the President of that Convention. . . .

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the territory of the United States; for it clearly shows that slavery was thereafter to be prohibited there, and it could be prohibited only by an exertion of the power of the United States, under the Constitution; no other power being capable of operating within that territory after the Constitution took effect. . . .

[Curtis discusses eight separate federal laws regulating slavery in the territories that became the free states of Indiana, Illinois, Michigan, Wisconsin, Iowa, and Oregon and the slave states of Tennessee, Louisiana, Mississippi, Alabama, Florida, and Arkansas.]

Here are eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded slavery from the territory of the United States; and six distinct

[2]As he does elsewhere in his opinion, Curtis ties his interpretation to the most famous of the constitutional framers, the "father of the Constitution," James Madison.

instances in which Congress organized Governments of Territories by which slavery was recognised and continued, beginning also with the first Congress, and coming down to the year 1822. These acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to.

It appears, however, from what has taken place at the bar, that notwithstanding the language of the Constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

One is, that though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is, that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is, that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general, concerning the right of self-government, and the nature of the political institutions which have been established by the people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens; and, inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to

make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of judicial interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown, by anything in the Constitution itself, that when it confers on Congress the power to make *all* needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all. . . .

[But the opinion of the Court suggests that the slavery prohibition in the Missouri Compromise violates] that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. . . .

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a *status* created by municipal law. In Prigg *v.* Pennsylvania, [1842] this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In Rankin *v.* Lydia [1820], the Supreme Court of Appeals of Kentucky said: "Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law." I am not acquainted with any case or writer questioning the correctness of this doctrine. . . .

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from *Magna Charta;*[3] was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

[3]In 1215 the leading barons and lords of England forced King John to sign the Magna Carta (Latin for "great charter"; sometimes spelled "Magna Charta," as above). In the Magna Carta the king promised to respect the rights and liberties of "all free men of our kingdom." The document declares that "no freed man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers and by the LAW OF THE LAND." Four other clauses of the Magna Carta were designed to prevent the king from taking private property without permission of the owner or without payment. While initially seen as protecting the barons and lords of England from abuses by the king, over the centuries the Magna Carta came to stand for the fundamental rights of all Englishmen and, by extension, all Americans.

And if a prohibition of slavery in a Territory in 1820 violated this principle of *Magna Charta,* the ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation? . . . I think I may at least say, if the Congress did then violate *Magna Charta* by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons . . . to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it; as may be seen in Wilson *v.* Isabel, (Va., 1805) . . . I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of *Magna Charta.* . . . It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the fifth amendment of the Constitution? . . .

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.