

TEACHING SLAVERY IN AMERICAN CONSTITUTIONAL LAW

by

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From 1787 until the Civil War, slavery was probably the single most important economic institution in the United States. On the eve of the Civil War, slave property was worth at least two billion dollars.¹ In the aggregate, the value of all the slaves in the United States exceeded the total value of all the nations railroads or all its factories. Slavery led to two major political compromises of the antebellum period,² as well as to the most politically divisive Supreme Court decision in our history.³ Vast amounts of political and legal energy went into dealing with the institution. It was a central issue at the Constitutional Convention in 1787,⁴ and remained at the center of much of American politics until after the Civil War. Slavery was the root cause of the Civil War itself, and the eradication of slavery led to the adoption of three constitutional Amendments,⁵ which in many ways remade the Constitution. Finally, slavery shaped many of the key decisions of the 19th century and led to the creation of doctrine

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¹This estimate is based on an average value of \$500 for the approximately 4,000,000 slaves in the United States. This estimate is probably on the low side.

²The Missouri Compromise, passed in 1820, and the Compromise of 1850.

³*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁴Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423,424 (1999) [hereinafter Finkelman, *Affirmative Action*]; PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (1996) [hereinafter FINKELMAN, *SLAVERY*].

⁵U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

that continues to affect modern Constitutional law today.

Despite the importance of slavery to the development of the United States, and to the shaping of our Constitution -- both during and after the Convention of 1787 -- slavery is rarely mentioned, or is mentioned only in passing, in most Constitutional Law courses. This approach to Constitutional law leads to a skewed and incomplete understanding of how the American Constitution developed during its first century.

I. WHY TEACH SLAVERY IN CONSTITUTIONAL LAW?

At the onset, let me spell out why we ought to teach slave cases in Constitutional Law. I will elaborate on these points throughout this essay.

1: Slavery was a central issue at the Constitutional Convention.⁶ Many clauses in the Constitution were fully or partially included in the document to accommodate or protect slavery. Some clauses, such as the Three-fifths Clause,⁷ the protection of the African slave trade until at least 1808,⁸ and the Fugitive Slave Clause,⁹ were obviously written with slavery in mind. Other clauses, such as the bans on export taxes,¹⁰ were less obviously tied to slavery, but were in fact written solely to accommodate the demands of slave state delegates. Still other clauses, such as the Insurrections

⁶ See Finkelman, *Affirmative Action*, *supra* note 4, at 424; FINKELMAN, *SLAVERY*, *supra* note 4.

⁷ U.S. CONST., art. I, § 2, cl. 3.

⁸ U.S. CONST. art. I, § 9, cl. 1. This clause is often misunderstood to have required an end to the slave trade. In fact, the clause merely prohibited Congress from ending the trade before 1808. Many delegates in 1787 assumed that, by 1808, the deep South would have had the political clout to protect the slave trade for the future. For more discussion of this, see Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J. L. & HUM. (forthcoming 2001).

⁹ U.S. CONST. art. IV, § 2, cl. 3.

¹⁰ U.S. CONST., art. I, § 9, §10.

Clause,¹¹ the Domestic Violence Clause,¹² and the provisions for the election of the president by the electoral college,¹³ were heavily influenced by the needs of the slave south, but were supported for other reasons as well. The Insurrections Clause, for example, guaranteed that federal troops could be called out to suppress slave rebellions, but it could also be used to suppress other kinds of insurrections not involving slavery. In teaching Constitutional Law, it seems useful to start with a discussion of how the Constitution came to be framed. Part of that framing centers on how slavery affected the final document.

2: Federalism, as it developed in the 19th century and as it has evolved since, was greatly influenced by slavery. Some aspects of Constitutional law, including the notion of state police powers and the preemption doctrine, were deeply rooted in slavery. So too, was much of the fear of a central government that led to the enactment of the Tenth Amendment. Obviously states' rights theory, as it developed in the 19th century and as it has been used ever since, was deeply rooted in debates over slavery. As early as 1790, southern states began to articulate claims of states' rights in controversies

¹¹ U.S. CONST., art. I, § 8, cl. 15.

¹² U.S. CONST. art. IV, § 3.

¹³ U.S. CONST. art. II. During a debate over how to choose the president, James Madison argued that "the people at large" were "the fittest" to choose the president. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56 (Max Farrand ed., rev. ed., 1966). But "one difficulty . . . of a serious nature" made election by the people impossible. *Id.* at 57. Madison noted that the "right of suffrage was much more diffusive in the Northern than the Southern States, and the latter could have no influence in the election on the score of the Negroes." *Id.* In order to guarantee that the non-voting slaves could nevertheless influence the presidential election, Madison favored the creation of the electoral college. *Id.* Hugh Williamson of North Carolina was more open about the reasons for southern opposition. *Id.* at 32. He noted that under a direct election of the president, Virginia would not be able to elect her leaders president because "her slaves will have no suffrage." *Id.*

involving slavery.¹⁴ By the end of the antebellum period, both southern and northern states had made assertions of states' rights in the context of slavery.¹⁵ Modern states' rights arguments, sometimes framed in Tenth Amendment jurisprudence, are often a recycling of these older arguments relating to slavery. Similarly, much of our modern Commerce Clause jurisprudence, including such important concepts as the dormant Commerce Clause and the state police powers exception to federal commerce power, developed, at least in part, because of slavery. Thus, in the antebellum period slavery was often the connecting link between Commerce Clause jurisprudence and the development of states' rights theory. Because we live with the results of this linkage, it is important for students to see and fully understand the linkage.

3: The Civil War Amendments¹⁶ were, of course, the direct result of slavery. It is imperative to teach something about slave law, and even the substance of slavery, to understand them. We cannot understand what was abolished by Section 1 of the Thirteenth Amendment without some knowledge of slavery. The Supreme Court acknowledges that the Thirteenth Amendment prohibits the imposition of badges of slavery.¹⁷ But how can students understand what a "badge of slavery" is unless they

¹⁴ See FINKELMAN, *SLAVERY* *supra* note 4, at 80-104 (discussing at length a controversy between Virginia and Pennsylvania over the extradition of persons accused of kidnapping a free black). This controversy led to the adoption of the first federal extradition law and the first fugitive slave law Act of February 12, 1793, ch. 7, 1 Stat. 302 (amended 1850) (repealed 1864). Virginia based its refusal to return the kidnapers on states' rights arguments.

¹⁵ Paul Finkelman, *States' Rights, Federalism, and Criminal Extradition in Antebellum America: The New York-Virginia Controversy, 1839-1846*, in *GERMAN AND AMERICAN CONSTITUTIONAL THOUGHT: CONTEXTS, INTERACTION, AND HISTORICAL REALITIES* 293-327 (Hermann Wellenreuther, ed., 1990); Paul Finkelman, *States Rights North and South in Antebellum America*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* 125-58 (1989) [hereinafter Finkelman, *Antebellum*]; Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 *CIV. WAR HIST.* 211-34 (1988) [hereinafter Finkelman, *Black Rights*].

¹⁶ U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

¹⁷ See, e.g., *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968).

understand something about the legal badges of slavery imposed by the states and by the U.S. Supreme Court during the antebellum period? Similarly, an understanding of slavery and slave law can shed light on the goals of the Equal Protection Clause of the Fourteenth Amendment. Less obvious is the way the history of slavery and the Constitution can help explain the Privileges and Immunities Clause of the Fourteenth Amendment and the problem of incorporation.¹⁸ The suppression of abolitionist speech in the South and the arbitrary arrests of free blacks entering slave states, which are both part of the legal and constitutional history of slavery, can shed much light on this issue and can help us understand the evolution of First Amendment freedoms in the 19th century.

This history may also be useful for helping us to understand the constitutional right to travel. In *Saenz v. Roe*,¹⁹ the United States Supreme Court struck down a California statute that provided lower welfare payments for people who had recently moved into the state. The Court in part relied on earlier cases protecting a "right to travel,"²⁰ which is embedded in the Privileges and Immunities Clause of Article IV of the Constitution. But, the Court also noted that this right grew and developed under the Fourteenth Amendment, which requires that states give equal rights to recent migrants.

The brief for the lead counsel representing Roe in this case,²¹ as well as the *amicus* briefs, cited

¹⁸ Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. (in this volume); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 26-56 (1986).

¹⁹ *Saenz v. Roe*, 526 U.S. 489 (1999).

²⁰ *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823); *Paul v. Virginia*, 75 U.S. 168 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *United States v. Guest*, 383 U.S. 745 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Zobel v. Williams*, 457 U.S. 55 (1982).

²¹ Brief of Respondents at 42, *Saenz v. Roe*, 526 U.S. 489 (1999) (No. 98-97).

to a number of slavery cases and scholarly articles relating to the jurisprudence of slavery.²² They also discussed the actions taken by antebellum southern states to limit the right of abolitionists and free blacks to travel within their jurisdictions.²³ These attorneys argued that a fundamental purpose of the Fourteenth Amendment was to reverse this history, and to allow free and open travel for all Americans. The Court did not cite to this history or to the scholarly literature on the subject, but Justice John Paul Stevens, speaking for a seven-to-two majority, did cite to arguments by Congressman John Bingham on the meaning of the Fourteenth Amendment. Justice Stevens also noted that, in *Dred Scott v. Sandford*,²⁴ Chief Justice Taney denied that blacks could be citizens of the United States, or that they could claim privileges and immunities under the U.S. Constitution.²⁵ The Fourteenth Amendment, of course, had been adopted in part to reverse *Dred Scott*. Here, then, is an example of how the modern court uses the jurisprudence of slavery to help explain the meaning of the Fourteenth Amendment for our own time.

4. Proslavery constitutional theory affected the development of the Constitution in a variety of ways. In the 1820s and 1830s, opponents of the restriction on slavery in the Missouri Compromise argued that the Compromise unconstitutionally denied southerners access to the territories with their constitutionally protected property. By 1857, a majority of the Supreme Court accepted this theory,

²² Brief of Catholic Charities USA et al., Amici Curiae in support of Respondents at 12, *Saenz v. Roe*, 526 U.S. 489 (1999) (No. 98-97); Brief for William Cohen et al., supporting Respondents at 3-8, 23-24, *Saenz v. Roe*, 526 U.S. 489 (1999) (No. 98-97).

²³ See *infra* note 81 and accompanying text (discussing *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D. S.C. 1823) (No. 4366)).

²⁴ *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857).

²⁵ *Saenz v. Roe*, 526 U.S. 489 (1999).

articulating it in *Dred Scott v. Sandford*. An example of the connection of slavery to the evolution of Constitutional law can be seen in the extreme response to *McCulloch v. Maryland* by some southern nationalists. In 1820, in response to *McCulloch*, the Virginia politician and lawyer, John Taylor of Caroline, published *Construction Construed and Constitutions Vindicated*. Taylor was a cranky, hardline Jeffersonian states' rights southern legal theorist who hated the Bank of the United States, the growing power of the national government, and Chief Justice Marshall's expansive nationalist opinion. He considered Madison and Monroe to be virtual traitors to their states and to the Jeffersonian Party. Taylor ended his attack on *McCulloch* with the argument that, if Congress could create a Bank under the Necessary and Proper Clause, then it could end slavery in the states under the same power.

It is hard to see the logic of that argument, even in the modern era. It must have seemed extreme in the early 19th century as well. But, Taylor's argument illustrates both how fearful slaveowners were about the growth of federal power and the way in which slavery could shape constitutional jurisprudence. Especially after Roger B. Taney became Chief Justice, the Court began to take seriously the theories and ideas of men like Taylor.

Consider, for example, *Mayor of New York v. Miln*,²⁶ which the Court decided in 1837, during Taney's first year as Chief Justice. On the surface, the case involved the regulation of migrants. At issue was a New York law requiring all vessels docking in New York City to provide a list of passengers and to post security against these passengers from becoming public charges. Miln, the master of the ship *Emily*, had not done so and the city sought to collect the statutory penalty for his failure to file the report. Miln argued that the state had no power to pass such a law because it violated

the Commerce Clause, which vested in the Congress all powers over interstate and foreign commerce. Justice Philip J. Barbour, whom Jackson had named to the Court at the same time as Justice Taney, avoided the Commerce Clause argument and instead invoked, for the first time, what later came to be called the state police power doctrine -- the right of a sovereign to take all necessary steps to protect the health, safety, and welfare of its citizens. A state, according to Justice Barbour, is competent "to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported"²⁷ While it is not apparent at first glance, the subtext of the decision in *Miln* was the growing sectional tension over slavery and the rights of free blacks. If New York could not regulate immigrants, then states like South Carolina could not regulate free blacks or slaves who might be brought into the state. Thus, in the 1830s, proslavery constitutional theory affected the development of constitutional law, even in cases that were not about slavery.

5. Finally, the heritage and memory of slavery remain potent forces in American society. Slavery is a profoundly painful aspect of American history that resonates deeply with Americans. Understanding the way slavery shaped the writing and development of the Constitution gives students a broader sense of the relationship among law, public policy, and social realities. Try as we might in the last half-century, Americans have been incapable of overcoming race; creating a color-blind Constitution that fosters racial equality and a color-blind society; or eliminating race as a profoundly

²⁶ *Mayor of New York v. Miln*, 36 U.S. 102 (1837).

²⁷ *Id.* at 142-43.

important factor in criminal justice.²⁸ Less obviously, race is a factor in immigration law,²⁹ welfare policies,³⁰ and foreign policy.³¹ In training new lawyers, we create not only courtroom practitioners, but also attorneys who will end up in all types of positions in government, business, and policy-making. We must make sure that these lawyers understand the way race has shaped American law for more than two centuries. The great black scholar, W.E.B. DuBois, proved to be prophetic in predicting that the problem of the 20th century would be the color line.³² Only by understanding how deeply race has been a constitutional issue for us can we hope to remove the "color line" as the fundamental issue for the 21st century.

II. FINDING SLAVERY IN MOST CONSTITUTIONAL LAW COURSES AND CASEBOOKS

Despite the obvious importance of slavery to American constitutional history, and other legal developments,³³ slavery is virtually absent from Constitutional Law classes. The reasons for this are

²⁸ See, e.g., Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

²⁹ See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3 (1998). See also Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great was "The Great Dissenter?"*, 32 AKRON L. REV. 629, 631 (1999). See also *Ozawa v. United States*, 260 U.S. 178, 190 (1922); *United States v. Thind*, 261 U.S. 204, 207 (1923);

³⁰ See *Saenz*, 526 U.S. at 489.

³¹ Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1643 (1997); RACE AND U.S. FOREIGN POLICY FROM THE COLONIAL PERIOD TO THE PRESENT (Michael L. Krenn ed. 1998).

³² W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 13 (1904) ("The problem of the Twentieth Century is the problem of the Color Line.").

³³ Slavery might also be profitably integrated into other law school subjects. Some property casebooks now incorporate slavery to a greater extent than constitutional law books. One text in particular contains a nice section on "Property in Persons," which includes excerpts from *Dred Scott v. Sandford*. See JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1326-41 (2d ed. 1997). However, this section is placed at the very end of the book, along with a section on "Indian Human Remains," and many courses will never get to that part of the book. RICHARD H. CHUSED, CASES AND MATERIALS IN PROPERTY 1075-1103 (2d ed. 1999) also contains a substantial section

complex. Most law professors, like most other Americans, are uncomfortable with our slaveholding past, and for lawyers especially, it may be particularly difficult to deal with something that seems so aberrant to the nature of American law. For example, the late Professor Harry Kalven "could not understand how a system as good as American law could have supported an institution as evil as slavery."³⁴ Kalven struggled with the problem, and along with Owen Fiss and Stanley N. Katz, pioneered the teaching of a course on the law of slavery at the University of Chicago School of Law. Similar courses are now taught at many law schools, and many legal scholars have increasingly come to accept that slavery mattered in the development of American constitutional law.³⁵ These courses, however, are discrete and specialized offerings in legal history, jurisprudence, or race relations. In required courses, such as Constitutional Law, slavery remains virtually unseen and unmentioned.

Some casebook authors seem to be unaware that slavery played a significant role in American constitutional law. The addition of Kathleen Sullivan to Gerald Gunther's *Constitutional Law*³⁶ casebook has not changed the book's stubborn resistance, over 13 editions, to acknowledging that slavery was even a factor – much less a critical factor – in the development of American constitutional law. The book mentions *Dred Scott* three times, but does not have any text from the case. The word "slavery" is in the index, but the references are to post-Civil War cases. The book has no reference to

on slavery. J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 28-30 (1998) has a very tiny discussion of slavery and a brief excerpt from *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836).

³⁴ Stanley N. Katz, *Opening Address*, 17 CARDOZO L. REV. 1689, 1690 (1996).

³⁵ Illustrative of the growing interest in slavery and the law are recent symposium issues of the *Chicago-Kent Law Review*, the *Cardozo Law Review*, and a symposium on race and affirmative action in the *Akron Law Review*. See Symposium, *The Law of Freedom*, 70 CHI-KENT L. REV. 325 (1994); Symposium, *Opening Address*, 17 CARDOZO L. REV. 1689 (1996); Symposium, *Reflections on Law and Race*, 32 AKRON L. REV. 423 (1999).

any other cases involving slavery. Oddly, many professors use this book because it is "encyclopedic." Its reputation as "encyclopedic" leads to a kind of circular logic that tends to underscore the belief that slavery is irrelevant to our constitutional development. After all, if there are no slave cases in an "encyclopedic" casebook, then slavery must be unimportant.

Like Gunther and Sullivan, Jerome Barron and his co-authors have managed to avoid any mention of slavery through five editions of their casebook,³⁷ as have William B. Lockhart and his co-authors in the eight editions of their book.³⁸ The same is true for Ronald Rotunda's casebook, which is now in its sixth edition.³⁹ In some of these books, *Dred Scott* is mentioned in a footnote, or even in an excerpt of a dissenting opinion, but no text of the case appears anywhere and there is not even a note discussing it. Daniel Farber and his colleagues have a nice three-page discussion of slavery and the Constitution in their narrative introduction to constitutional developments, but they provide no cases on slavery. The term "slavery" in the index directs the reader to a seven-page section of the book, but it turns out that this section is an edited version of the *Civil Rights Cases*,⁴⁰ decided eighteen years after the end of slavery.⁴¹ Discussions of this issue on a con-law listserv suggest that a smattering of professors using these books supplement the texts with an excerpt from *Dred Scott* or some other slave

³⁶ GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

³⁷ JEROME BARRON, ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (5th ed. 1996).

³⁸ WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES (8th ed. 1996).

³⁹ RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (6th ed. 2000).

⁴⁰ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁴¹ DANIEL FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 11-13, 165-72 (2d ed. 1998).

case, or integrate a little of slave law into their courses in some other way.⁴²

A few casebooks do slightly better. Norman Redlich, the late Bernard Schwartz, and John Attanasio have a four-page note on *Dred Scott v. Sandford*, although they make no attempt to provide an edited version of the case.⁴³ Donald Lively and his colleagues offer a ten-page section on slavery as an introduction to the materials on civil rights.⁴⁴ This section includes a short excerpt from Chief Justice Roger B. Taney's angry concurrence in *Prigg v. Pennsylvania*⁴⁵ and a longer excerpt from *Dred Scott*. Most other casebooks are similarly bereft of material on slavery. Similarly, in *American Constitutional Law*, Louis Fisher, who has a political science and public policy background, provides a section on "Racial Discrimination" that contains nine pages on slavery, including four and a half pages on *Dred Scott v. Sandford*.⁴⁶ His narrative mentions two other cases, *Ableman v. Booth*⁴⁷ and *Prigg v. Pennsylvania*,⁴⁸ although only minimally describing what the cases were about.⁴⁹

The influence of Mark Tushnet, an important scholar of slavery,⁵⁰ is obvious in *Constitutional*

⁴² Self-servingly, I should note that some Constitutional Law professors supplement their courses with a small paperback book containing a scholarly introduction to this case and an edited version of the *Dred Scott* decision. See PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (1997) [hereinafter PAUL FINKELMAN, *DRED SCOTT*].

⁴³ NORMAN REDLICH ET AL., *CONSTITUTIONAL LAW* 618-22 (3d ed. 1996).

⁴⁴ See generally DONALD E. LIVELY ET AL., *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* (2d ed. 2000).

⁴⁵ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 626 (1842).

⁴⁶ LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 853-62 (3d ed. 1999).

⁴⁷ *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

⁴⁸ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

⁴⁹ FISHER, *supra* note 46, at 853-62.

⁵⁰ MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860* (1981).

Law edited by Geoffrey Stone and three others, including Tushnet.⁵¹ The book begins its section on race discrimination with ten pages on slavery, including four pages on *Dred Scott* and a bit on *State v. Post*,⁵² a relatively obscure New Jersey case that seems oddly placed in the book. The book also contains some note material on slavery, including two paragraphs on *Prigg*, which raise some significant issues about the case. The book does not, however, explore the way in which important slave cases like *Prigg* and *Dred Scott* had a jurisprudential impact that went beyond slavery.

Sanford Levinson, who has a Ph.D. in political science, has long argued that slavery should be incorporated into the canon of constitutional law.⁵³ His two articles on the subject even suggest how to teach slavery in a Constitutional Law class. This influence is apparent in *Process of Constitutional Decisionmaking*, which he co-authors with Paul Brest and others.⁵⁴ Much of the direction of his course is jurisprudential, and slavery becomes a vehicle for getting at difficult theoretical questions. Thus he argues, as I have in my own work,⁵⁵ that *Dred Scott* is an example of original-intent jurisprudence. The use of originalism in *Dred Scott* might make any scholar or jurist wary of such an approach. Levinson is also concerned with issues of professionalism and professional responsibility, and slavery is helpful for

⁵¹ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (3d ed. 1996).

⁵² *State v. Post*, 20 N.J.L. (1 Spencer) 368 (1845).

⁵³ Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI-KENT L. REV. 1087 (1993); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, in *SLAVERY AND THE LAW* 89-112 (Paul Finkelman, ed., 1997).

⁵⁴ PAUL BREST ET AL., *PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (4th ed. 2000).

⁵⁵ PAUL FINKELMAN, *DRED SCOTT*, *supra* note 42; Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT L. REV. 349 (1989).

raising questions in this area of the law as well.⁵⁶

When I am wearing my "legal history hat," I can make a strong case for slavery as a separate topic -- the Brest and Levinson approach.⁵⁷ This approach, however, is inherently problematic because of the way most professors teach Constitutional Law. Few Constitutional Law classes are taught topically, thus it is hard to figure out how to fit slavery into the course as a separate topic, unless one uses it to make ethical or jurisprudential points. The Brest and Levinson approach, which is the best so far in any casebook, also isolates slavery by making it a separate chapter that is not a specifically "legal" or "constitutional" chapter. I can understand the reasons for having slavery as a separate topic, but I think that this approach has the danger of signaling to the student that slavery was not really part of American constitutional law. Rather, it was something that happened apart from American constitutional law. Equally important, by separating slavery from other parts of the casebook, we mislead students into thinking that the origins of some precedents does not matter. In fact, I think it is important to demonstrate that some precedents, and some jurisprudential lines of thinking, developed out of slavery and may still be used to maintain inequality, even though slavery itself was "purged" from the Constitution when the Thirteenth Amendment was adopted.

At most schools, Constitutional Law is divided into two parts: the first part, Con Law I, is universally required, and covers judicial review; separation of powers; the Commerce Clause; the

⁵⁶ For other considerations of slavery and legal ethics, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 *CARDOZO L. REV.* 1793 (1996); Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 *ROGER WILLIAMS L. REV.* 75 (1999).

⁵⁷ BREST, *supra* note 54, which appeared after I first presented this paper at a conference at the University of Akron School of Law, has also begun to integrate material on slavery into other parts of the book, such as the Commerce Clause, where the editors show how slavery affected interstate commerce and Supreme Court rulings.

powers of Congress and the executive; and perhaps substantive due process. It is taught neither chronologically, nor by subject. The sections of the course are jurisprudential and doctrinal. Thus, "slavery" as a subject, does not easily fit into such a course. The contrast with other cases would be apparent to students. We do not teach a section on banks and the Constitution, but rather we teach *McCulloch v. Maryland*⁵⁸ as part of a discussion of the Supremacy Clause. Similarly, we have no section on steamboats or bridges, but we use *Gibbons v. Ogden*⁵⁹ or *Charles River Bridge Company v. Warren Bridge Company*⁶⁰ to teach about the Commerce Clause or the Contracts Clause. Thus, if we teach slavery as a separate section in Con Law I, it will appear to some students as a non-legal topic, rather than a topic that is part of the mainstream of American law.

Equally important, most Constitutional Law teachers feel pressed to get through so much material in such a short time. How can we possibly add more cases and more subjects when we can barely cover the standard canon, and keep up with the latest twists and turns of the Supreme Court? Ironically, while law is a field that is inherently historical -- based on precedent with jurists looking at legislative histories and original intent -- most law teachers feel a compulsion to focus on what is new, what happened today, or at least what happened yesterday. Slavery, as a "dead" field of law, seems to have no place in the curriculum, except as an appendage. The danger of this approach is that we teach modern cases in an area such as federalism without showing how these cases are rooted in slavery, states' rights arguments to protect slavery, and post-bellum racism. It is worth pointing out that the

⁵⁸ *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁵⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

modern Supreme Court seems to have resurrected notions of federalism and limitations on federal commerce power that grew out of slavery. In some cases, these jurisprudential theories have been used to trump the Fourteenth Amendment, including section five of that Amendment, which seemed to empower Congress to overcome the pernicious effects of racism. Thus, the equality principles of the Civil War Amendments (especially the Fourteenth) are limited by the antebellum interpretations of federalism that were developed to prevent equality.

Slave cases are also unlikely to be considered in Con Law I because, when they are found in casebooks, as they are in Fisher, Brest and Levinson, or Stone, et al., they are segregated from the main development of the law and are usually found in the section on race discrimination and equal protection. To integrate a slave case into the main flow of Con Law I would require skipping from one section to another, or assigning some cases out of order and out of the organizational structure of the casebook.

Con Law II, often called civil liberties or civil rights, is taught in most law schools, sometimes as a required course, but often (and unfortunately) as an elective. Thus, it is possible to get a law degree without ever reading a case on freedom of expression or racial discrimination. Astoundingly, students can get through some law schools without encountering such central cases as *Brown v. Board of Education*,⁶¹ *Abrams v. United States*,⁶² *New York Times Company v. Sullivan*,⁶³ or *Roe v.*

⁶⁰ Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. (11 Pet.) 420 (1837).

⁶¹ Brown v. Board of Educ., 347 U.S. 483 (1954).

⁶² Abrams v. United States, 250 U.S. 616 (1919).

⁶³ New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Wade.⁶⁴

Most casebooks that do deal with slavery place it in this section of the book. Certainly it is important to consider slavery here. Slavery serves as a critical background for understanding equal protection jurisprudence. When I teach Con Law II, I usually begin the section on civil rights with *Prigg* and *Dred Scott*, as well as some background on the Constitutional Convention and slavery.⁶⁵ It is impossible for me to think of how one would teach about the Fourteenth Amendment, either in the 19th century or in the 20th, without discussions of slavery, especially *Dred Scott*. The absence of any discussion of slavery in the Gunther and Sullivan book and in other books seems to be fundamentally wrong-headed.

Without seeing the antebellum jurisprudence in all its horror, we cannot possibly understand the purpose of the Civil War Amendments or the Civil Rights Act of 1866, which led to the Fourteenth Amendment. In order for us to come to grips with the development of our constitutional history -- and indeed with constitutional jurisprudence -- and to "understand how a system as good as American law could have supported an institution as evil as slavery,"⁶⁶ we must expose students to the nature of constitutional law under slavery. Similarly, as I already noted, cases involving slavery are vital in teaching the meaning of civil rights under the Fourteenth Amendment.

⁶⁴ *Roe v. Wade*, 410 U.S. 113 (1973). During his confirmation hearings Justice Clarence Thomas claimed he did not read or think about *Roe* in law school. Some of his detractors questioned the credibility of this statement, but given the nature of legal education in the United States, this is entirely possible.

⁶⁵ Self-servingly I assign my own book, which provides a very good introduction to the problem of slavery and race. See FINKELMAN *DRED SCOTT*, *supra* note 42. For a course on race and the law, I begin with FINKELMAN, *SLAVERY*, *supra* note 4.

⁶⁶ Katz, *supra* note 34, at 1690.

An analogy here to other aspects of constitutional law might be helpful. Some Constitutional Law professors and many students wonder why we should spend much time, or any time, on the "dead law" of slavery. But, of course, we spend a great deal of time on "dead law" in other parts of Constitutional Law. *Dred Scott* and *Prigg* are no more "dead" than are *Plessy v. Ferguson*,⁶⁷ *United States v. E. C. Knight*,⁶⁸ *Lochner v. New York*,⁶⁹ *Hammer v. Dagenhart*,⁷⁰ *Whitney v. California*,⁷¹ or *Dennis v. United States*,⁷² all of which have been reversed. We teach these cases to show how and why they were reversed. But, too often, law professors start their discussion of the Fourteenth Amendment without a serious investigation of what *it* reversed. Similarly, I assign -- as I think many law professors do -- the dissent in *Abrams v. United States*⁷³ and the concurrence in *Whitney* for the elegance of the language and the importance of the jurisprudential theories propounded by Justices Holmes and Brandeis. Surely it is also useful to use *Prigg v. Pennsylvania* and *Dred Scott v. Sandford* to show students the perversity of slavery and its pernicious effect on the way United States Supreme Court justices thought.

III. INTEGRATING SLAVERY INTO THE CONSTITUTIONAL LAW COURSE

While it is critical to teach slavery as a prelude to understanding the Equal Protection, Privileges

⁶⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶⁸ *United States v. E.C. Knight*, 156 U.S. 1 (1895).

⁶⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁷⁰ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁷¹ *Whitney v. California*, 274 U.S. 357 (1927).

⁷² *Dennis v. United States*, 341 U.S. 494 (1951).

⁷³ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

and Immunities, and Due Process Clauses of the Fourteenth Amendment, in teaching slavery we need to go a step further and begin to integrate slave cases into the general sweep of Constitutional Law.

Right now, slavery sits either as an introduction to race discrimination, or as a separate topic, disconnected from the rest of Constitutional Law. This disconnectedness is misleading. Students fail to see how much of the Constitution's structure and development was influenced by slavery. Components of the Constitution, such as the electoral college, the ban on export taxes, and even the Tenth Amendment, were shaped by slavery.⁷⁴ Similarly, 19th century jurisprudence on commerce and state police powers was shaped by slavery. The constitutional jurisprudence of slavery clearly affected judicial review, separation of powers, the Commerce Clause, state police powers, the Tenth Amendment, and the powers of Congress and the President. Thus, many cases and other materials involving slavery might be profitably integrated into American legal education, and not segregated into a special section of the course or casebook. Unfortunately, however sensible it would be to teach slavery as part of the development of the Commerce Clause or state police powers, the existing casebooks make this difficult. However, it would be possible to demonstrate the importance of slavery and racism in the development of jurisprudence in this area by strategically placing a few headnotes and integrating a few lines in cases that are often edited out of the casebooks.

Briefly, the following are some of the ways this sort of integration might take place. This discussion is meant to be suggestive, rather than comprehensive. My goal is to suggest ways of integrating cases involving slavery into the mainstream of Constitutional Law. In doing so, we can see -- and teach our students -- that slavery was not an aberration in American constitutional development;

that slavery should not be seen as a separate topic that is outside of traditional constitutional categories.

Rather, I would argue, slavery was a driving engine of American constitutional law -- just as it was a key factor in the writing of the Constitution itself -- and that much of our modern constitutional law directly evolved out of these slave cases.

We teach *Marbury* to introduce judicial review. Perhaps we should pair it with *Dred Scott*, the only other antebellum case in which the United States Supreme Court struck down a federal statute. The case is instructive, because in *Dred Scott* the Court struck down a major statute, which had been in force for 37 years, or more than half of the time the nation had operated under the Constitution. The case and its aftermath allow us to teach some important aspects of constitutional development, including the way in which a Supreme Court decision can have disastrous political and constitutional ramifications and that one answer to a Supreme Court opinion can be a constitutional amendment. *Dred Scott* provides a "counter story" to *Marbury*. In *Marbury*, students learn how a smart (clever? brilliant?) Chief Justice outsmarted a president, solved a dilemma, and created a great and useful precedent. The message of *Marbury* is that judicial review is painless, and that striking down a federal statute is easy and has no cost. *Dred Scott* tells a different story.

Dred Scott is also important for teaching the development of substantive due process. With the exception of one New York case,⁷⁵ Justice Taney's opinion in *Dred Scott* is the first use of substantive due process. Taney argued that the ban on slavery in the Missouri Compromise amounted to a "taking" under the Fifth Amendment. Indeed, this case can perhaps be seen as the earliest example of the

⁷⁴ See Finkelman, *Affirmative Action*, *supra* note 4 at 428; FINKELMAN, *SLAVERY*, *supra* note 4.

⁷⁵ *Wynehamer v. The People*, 13 N.Y. 378 (1856).

takings jurisprudence that is so popular with the current Supreme Court.⁷⁶ When we teach *Dred Scott*, we might compare it to some of the modern takings cases, and ask if banning slavery from an area might not be similar to an environmental regulation that is designed to save an endangered beach.

Of course, it is possible to argue that *Dred Scott* is not a problematic use of the takings doctrine. One might argue that it is even a correct use of the doctrine -- because the Constitution did protect slavery and therefore a statute (the Missouri Compromise) which arbitrarily takes property away from someone is unconstitutional. However, we might also argue that the ban on slavery in the territories was not arbitrary because it did not lead to a traditional "taking" of private property. Instead, it prohibited bringing a particular product into the territories that was banned for a good reason. Slaveowners had ample notice that they could not bring slaves into the region. In that sense, the ban on slavery might look like a modern environmental regulation that prohibits boats, automobiles, guns, or even pets in certain areas. Nor was the ban on slavery a "taking" for "public use" in any normal sense of the term. Under such an argument, the substantive due process analysis was not legitimately applied.

Slavery had a strong impact on the development of the constitutional recognition of the police powers of states, which emerged in *Mayor of New York v. Miln*,⁷⁷ *Cooley v. Board of Port Wardens of Philadelphia*,⁷⁸ and *The Passenger Cases*.⁷⁹ In *Miln*, counsel argued that the regulation of

⁷⁶ See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 376 (1994).

⁷⁷ *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 107 (1837).

⁷⁸ *Cooley v. Board of Port Wardens of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

⁷⁹ See *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849).

immigrants was similar to state laws banning the African slave trade before the federal ban in 1808.⁸⁰ Implicit in these cases was the Supreme Court's recognition that the South had a special interest in protecting its slaves from the "corruption" of free blacks from other places. Some of the opinions in these cases refer directly to the problem. However, casebooks gloss over this matter or edit it out altogether. Moreover, with the exception the newest edition of Brest and Levinson,⁸¹ no casebook mentions the origins of this problem.

This issue first emerged in South Carolina, in the Circuit Court case of *Elkison v. Deliesseline*.⁸² The case involved an 1822 South Carolina statute -- known as a "black seamen's act" - which required the incarceration in the local jail of free black sailors who came into the state while serving on merchant ships. Elkison, a British subject, turned to the federal courts when the local sheriff, Deliesseline, incarcerated him under this statute. Justice William Johnson, while riding circuit, declared, in dicta, that the South Carolina law violated the Commerce Clause. But, for procedural reasons, Johnson did not order Elkison's freedom. Counsel for South Carolina argued that the state had as much right to "quarantine" free blacks as New York had to quarantine immigrants with diseases. Tied to this issue were arguments about states' rights, federal powers, federalism, and the Tenth Amendment. All of this is tied up in the evolution of the Commerce Clause. Without slavery, it is entirely possible that Commerce Clause jurisprudence on local control and police powers might never have developed, or

⁸⁰ *Miln*, 36 U.S. at 111.

⁸¹ BREST, *supra* note 54, at 157-60.

⁸² *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D. S.C. 1823) (No. 4366). BREST, *supra* note 54, at 157-59, is the only casebook I know of that mentions this case.

might have developed in an entirely different way. Even the *License Cases*,⁸³ which allowed for state bans on liquor, were affected by slavery to the extent that northerners and southerners alike recognized that banning certain commercial products from interstate commerce might be necessary for both the protection of the slave states and for the protection of the free states.

Slavery is also important for the development of the dormant Commerce Clause and of the preemption doctrine. *Groves v. Slaughter*,⁸⁴ decided in 1841, contains important discussions about the nature of the dormant Commerce Clause. The case involved the validity of a provision of the Mississippi Constitution which prohibited the importation of slaves as articles of commerce. After purchasing and receiving slaves from Slaughter, Groves and others refused to honor their notes, claiming the sale was void under the Mississippi Constitution. The Court concluded that this provision of the state constitution required legislative implementation, and without it, the provision could not bar the sale of slaves in Mississippi. Thus, Groves was required to pay Slaughter. In reaching this result, Justice Smith Thompson avoided the larger constitutional question of "whether this article of the constitution of Mississippi is repugnant to the Constitution of the United States."⁸⁵

Other members of the Supreme Court, however, could not restrain themselves from discussing this issue. Justice John McLean offered a powerful articulation of the dormant Commerce Clause, which he was prepared to apply to other constitutional provisions as well: "If a commercial power may be exercised by a state because it has not been exercised by Congress, the same rule must apply to

⁸³ See *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847).

⁸⁴ *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 452 (1841).

⁸⁵ *Id.* at 503.

other powers expressly delegated to the federal government.⁸⁶ Fully articulating the modern language and theory of this rule, Justice McLean went on to declare: "A power may remain dormant, though the expediency of its exercise has been fully considered. It is often wiser and more politic to forbear, than to exercise a power."⁸⁷ Justice McLean then made the distinction between federal powers and state "inspection and police laws."⁸⁸ Justice McLean, a Supreme Court justice from Ohio who was opposed to slavery, articulated why the sale of slaves is not included in the dormant commerce power, and why the states, not Congress, must be free to prohibit traffic in slaves if they so choose. Chief Justice Taney, a proslavery southerner, chimed in that the "power to regulate the traffic in slaves between the different states"⁸⁹ is "exclusively with the several states."⁹⁰ Justice Taney asserted that the states retain the power to determine if they want slaves brought within their jurisdictions, and on this point he and Justice McLean were in agreement. It is not clear, however, if Justice Taney also believed Congress retains the power to absolutely ban the interstate sale of slaves. Justice Taney refused to comment on the existence of a dormant commerce power, but then offered a discussion of why the issue was unlikely to arise.⁹¹

The idea of a dormant Commerce Clause had appeared in a few other cases. In *Willson v.*

⁸⁶ *Id.* at 504.

⁸⁷ *Id.* at 505.

⁸⁸ *Id.*

⁸⁹ *Id.* at 508.

⁹⁰ *Groves*, 40 U.S. at 508.

⁹¹ *Id.* at 509-10.

Black Bird Creek Marsh Company,⁹² Chief Justice John Marshall held that Congress could have regulated the Black Bird Creek under its commerce power, but in the absence of such a statute, the state had the power to erect a dam over the creek. Justice Marshall declared that this power was not "repugnant to the power to regulate commerce in its dormant state."⁹³ In effect, Justice Marshall either denied the existence of the dormant commerce power, or refused to apply it. In *Holmes v. Jennison*,⁹⁴ the Supreme Court cited *Black Bird Creek* for the proposition that there was no dormant Commerce Clause issue. Similarly, in *Mayor of New York v. Miln*⁹⁵ Justice Thompson's dissent mentions the dormant Commerce Clause, but does not seem to be based on that theory of law. Thus, Justice McLean's assertion of the dormant commerce power in *Groves* may be the first time in which a justice asserted that such a power existed.

The New York state decision in *Lemmon v. The People*⁹⁶ also allows for an exploration of the meaning of interstate commerce, as well as that of interstate comity. The case involved a slaveowner who brought eight slaves into New York City while on a trip from Virginia to Texas in 1852. The most direct route for him was to go by steamboat from Virginia to New York and then take a direct steamboat to New Orleans. The New York Court of Appeals declared that his slaves were free the moment he voluntarily brought them into the state. The case never reached the U.S. Supreme Court,

⁹² *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).

⁹³ *Id.* at 252.

⁹⁴ *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 592 (1840).

⁹⁵ *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

⁹⁶ *Lemmon v. The People*, 20 N.Y. 562 (1860). For a full analysis of *Lemmon*, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

but as the dissenters on the New York Court of Appeals noted, this decision surely threatened the concept of national commerce. In his concurrence in *Dred Scott*, Justice Samuel Nelson implied that the Court would not allow such jurisprudence.⁹⁷ *Lemmon*, which was never resolved by the Supreme Court, allows students and teachers to contemplate the tension between local jurisdiction, police powers needs, and the more national goals articulated in the Commerce Clause and the Privileges and Immunities Clause of Article IV.⁹⁸

Even when the advocates of slavery lost, they helped shape constitutional law, especially Commerce Clause regulations. In the *Passenger Cases*⁹⁹ the Court, by a vote of five to four, struck down New York and Massachusetts statutes taxing ships that brought foreign immigrants into those states. In eight opinions covering 180 pages, the Court ruled that the laws violated the Commerce Clause. Justice Taney dissented, along with Peter V. Daniel of Virginia, Samuel Nelson of New York, and Levi Woodbury of New Hampshire. All four justices were proslavery Democrats. The dissenters undoubtedly felt that, in order to preserve the right of the Southern states to forbid free Negroes from entering their jurisdiction, the Court had to allow the Northern states to exclude undesirable aliens. Justice James Wayne, a slaveowner from Georgia, one of the majority justices, argued that the two had nothing to do with each other, but Levi Woodbury warned that one could not separate the categories: nationalism in commerce and states' rights in controlling blacks just were not compatible. Southern newspapers for the most part agreed; whatever fine lines of legal reasoning may have existed in the

⁹⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 468 (1857) (Nelson, J., concurring).

⁹⁸ The issues raised in *Lemmon* may arise in the future in cases involving interstate comity and same-sex marriage.

various opinions, Southern newspapers argued that the Black Seamen's Acts, which effectively prevented free northern blacks from entering southern ports, could hardly stand in the light of these cases. According to the *Charleston [S.C.] Mercury*, the decision would "strip the South of all power of self-protection, and make submission to its rule equivalent to ruin and degradation."¹⁰⁰ Thus, even in cases distant from slavery, there was constant pressure from proslavery constitutional theorists to minimize the commerce power while maximizing state police powers.

From a modern perspective, the *Passenger Cases* seem open and shut; the states imposed taxes on immigrants, which clearly violated the Constitution's ban on state import taxes. The state laws were clearly violation of federal Commerce Clause power. But, southerners were ever vigilant in protecting the interests of slavery. Even when they lost, as they did here, the extreme defenders of slavery scored important points by forcing the majority to write a narrow opinion and also to respect southern interests in subsequent cases.

As far as I can determine, the first preemption case was probably *Prigg v. Pennsylvania*. That case involved the constitutionality of Pennsylvania's personal liberty law of 1826. Under that law, claimants seeking to remove a fugitive slave from the state had to first apply for a certificate of removal from a state magistrate. The purpose of the law was to prevent the kidnapping of free blacks in a state with a substantial free black population. Implemented in good faith, the law would not have harmed the interests of most claimants of fugitive slaves, but would have cut down on the removal of free blacks

⁹⁹ See *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849).

¹⁰⁰ CHARLESTON MERCURY, Feb. 14, 1849, *quoted in* Carl B. Swisher, *The Taney Period, 1836-1864 in* 5 OLIVER WENDELL HOLMES DEVISE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 393 (1974).

wrongly or fraudulently claimed to be runaway slaves.

The case began when Prigg and three other men sought to remove a black woman, Margaret Morgan, her husband Jerry Morgan, and their children, claiming them as runaway slaves from Maryland. A York County magistrate refused to issue the proper certificate, in part because Morgan's status as a slave was suspect, and at least one of her children had been born in Pennsylvania and was clearly free under the law of that state. In addition, Jerry Morgan himself had been born a free man in Pennsylvania. Prigg and his cohorts then forcibly took Margaret and her children, but not Jerry, to Maryland. Prigg was subsequently convicted of kidnapping by a Pennsylvania court.

In striking down Pennsylvania's law, Justice Joseph Story argued that federal law preempted state action. No state could add to what Congress had set out in the Fugitive Slave Law of 1793. In dicta, Justice Story also implied that the Fugitive Slave Clause of the United States Constitution¹⁰¹ could function like the dormant Commerce Clause by asserting that, in the absence of any federal law, the Fugitive Slave Clause could still be used to strike down state laws that interfere with the return of fugitive slaves. Thus, *Prigg* contains one of the earliest and most complete discussions of a "dormant" Congressional power. It is the first time this issue is discussed in a majority opinion. Justice Story argued that, in the absence of any federal law, the states could not legislate on this subject to the detriment of people claiming fugitive slaves. Thus a "dormant fugitive slave power" existed, which prevented the states from creating barriers to the return of runaways.

Prigg, an enormously rich case for constitutional doctrine and theory, also contains the first example of the modern notion of "unfunded mandates." The Fugitive Slave Law of 1793 authorized

state magistrates to implement the law. In his opinion, Justice Story concluded that state officials were free to enforce the law if they wished to do so, and that, in fact, they had a moral obligation to do so under the Constitution. He further argued that the states were equally under a moral obligation to enforce the law. But, because the federal government did not employ the state judges, Justice Story also agreed that the states could refuse to enforce the law. That is, the federal government could not impose an unfunded mandate to enforce a federal law. Thus, Justice Story suggested, "it might well be deemed an unconstitutional exercise in the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the Constitution."¹⁰² Thus, *Prigg* can be seen as the precursor of -- and most significant precedent for -- cases like *New York v. United States*¹⁰³ and *Printz v. United States*.¹⁰⁴

The last of the antebellum slavery cases was *Kentucky v. Dennison*,¹⁰⁵ decided in February of 1861, just before Lincoln took office, and after a number of states had already left the Union. The case involved an attempt by Kentucky to extradite a free black from Ohio who had been accused of helping a fugitive slave escape into Ohio. Two Ohio governors, Salmon P. Chase and William Dennison, refused to comply with Kentucky's extradition requisition. Both claimed that helping a slave escape was not a crime that Ohio recognized and therefore the alleged criminal could not be extradited. On the eve

¹⁰¹ U.S.CONST. art. IV, §2, cl. 3.

¹⁰² *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16 (1842).

¹⁰³ *New York v. United States*, 505 U.S. 144,178 (1992) (O'Connor, J.) ("The Constitution simply does not give Congress the authority to require the States to regulate. . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.").

¹⁰⁴ *Printz v. United States*, 521 U.S. 898 (1997) (striking down the portion of the Brady Handgun Violence Protection Act that required state officials to implement the law).

of the Civil War, Chief Justice Taney agreed with Ohio. He was obviously unsympathetic to the antislavery views of the Ohio governors, but he was anxious to avoid a precedent that would give the national government the power to force state governors to act. The meaning of interstate extradition was contested throughout the antebellum period.¹⁰⁶ Governors in New York, Maine, Illinois, and Ohio refused to authorize the extradition of people who were wanted in the South for offenses relating to slavery. Governors in Georgia, Virginia, Missouri, and Kentucky bitterly complained about this. But the ruling in *Dennison* confirmed that the Extradition Clause of Article IV gave the governors the power to protect fugitives from what might be deemed "injustice." In the years after the Civil War, governors occasionally used their powers to protect fugitives, especially blacks escaping the injustice of the segregated South.

In *Puerto Rico v. Bransted*,¹⁰⁷ the Court reversed *Dennison* and removed one last opportunity for the states to work for greater social justice, and to protect people from prejudice in the legal system. *Bransted* seems to be a sad misreading of the jurisprudence of slavery and a potentially catastrophic misunderstanding of the way antebellum federalism was occasionally used to protect minorities. Teaching these two cases might allow us to reclaim the positive heritage of the abolitionists, and remind our students that federalism was sometimes used to protect, rather than oppress, minorities, as was the case with most slavery jurisprudence. *Bransted* also illustrates how impoverished our jurisprudence can become when the courts fail to seriously consider constitutional history.

¹⁰⁵ *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

¹⁰⁶ See Finkelman, *Antebellum*, *supra* note 15, at 125-58; Finkelman, *Black Rights*, *supra* note 15, at 211-34.

¹⁰⁷ *Puerto Rico v. Bransted*, 483 U.S. 219, 220 (1987).

IV. SLAVERY AND THE FUTURE OF LEGAL EDUCATION

Integrating slavery into traditional Constitutional Law courses will be difficult. It requires cramming more into a course that is already crammed with cases, theories, and arguments. But the benefits of doing so will surely outweigh the costs. Students will better understand the way the Constitution developed over time, and they will have a deeper sense of the way race has affected both constitutional law and American culture. In that way, students will be better prepared for living and practicing law in an increasingly multicultural and multiracial American society.