ARTICLE

THE FIRST CIVIL RIGHTS MOVEMENT: BLACK RIGHTS IN THE AGE OF THE REVOLUTION AND CHIEF TANEY'S ORIGINALISM IN *DRED SCOTT*

Paul Finkelman[*]

TABLE OF CONTENTS

---

[*] Chancellor and Distinguished Professor of History, Gratz College. I presented an early version of this article in 2021 at the Aoki Center for Critical Race and Nation Studies, at the University of California, Davis, School of Law, for the symposium "*Dred Scott*—Beyond Black and White"; this event was part of the Center's series on Law and Free People of Color. I also presented some of this at a symposium at Boston University Law School. I thank the historians, law professors, graduate students, and law students who attended the presentation and commented and the students and faculty at Providence College, where I also presented this work. I thank Gabriel Jack Chin, Greg Downs, Andrew Fede, Owen M. Fiss, Mary Louise Frampton, Eric M. Freedman, Allen C. Guelzo, Candace Jackson Gray, Gary Lawson, Kate Masur, Sharon Murphy, James Oakes, David Thomas Orique, O.P., David Richardson, Peter Wallenstein, and Owen Williams for their comments on this article and I thank Katherine E. McKeen at this Journal for her excellent editing.

INTRODUCTION

In *Dred Scott v. Sandford*,[1] Chief Justice Roger B. Taney justified denying free Blacks the right to sue in diversity in federal courts on the ground that no Black, whether slave or free, could ever be a citizen of the United States. He asserted that at the Founding, free Blacks were not citizens of the nation and that they could never be incorporated into the American polity. He infamously asserted that at the Founding, Blacks were "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 for his benefit."[2]

Taney was fundamentally wrong in these claims, and he should have known as much. In the last three decades of the eighteenth century, Americans actually witnessed a dramatic revolution in race relations, leading to the first civil rights laws in U.S. history. While some states retreated from this period of expanded civil rights in the nineteenth century, others did not.[3]

---

1 60 U.S. (19 How.) 393 (1857).

2 *Id.* at 407. There were in fact diversity cases before this involving free Blacks, and no court seems to have objected to Black litigants suing in diversity. In *New Evidence That Dred Scott Was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25 (2004), Stanton D. Krauss examines two 1793 diversity cases in the U.S. District Court in Connecticut, brought by Peter Elkay, a free Black man from Massachusetts, against men who had kidnapped and illegally enslaved his free-born daughters. Elkay won $250 in each case, which was a significant amount of money at the time. *Id.* at 29. Krauss notes that the case gained significant national attention, and "some version" of the case "appeared in almost one-third of the English-language newspapers published in America . . . ." *Id.* Krauss's exhaustive examination of newspapers and the letters and private comments of political figures and leaders of the bar shows that no one—even aggressively proslavery politicians—complained about allowing a Black to sue in diversity. Krauss correctly observes:

> [I]t defies belief that not one supporter of slavery, not one localist opposed to the expansion of federal jurisdiction, not one Unionist concerned about minimizing unrest in pro-slavery or localist states, would have found the time to respond publicly to Elkay if it was as outrageous a decision as Chief Justice Taney's *Dred Scott* opinion would suggest. Or to do so in private writings.

Id. at 48.

3 Kate Masur notes the importance of the distinction between state citizenship and federal citizenship in this period. It is critically important for understanding the rights of Blacks in the North, especially after the Founding period. In *Dred Scott*, Taney acknowledged that states might make free Blacks

To offer a simple example, in the Revolutionary period Massachusetts, New Hampshire, and the fourteenth state, Vermont, enfranchised Blacks on the same basis as Whites and preserved these rights until Reconstruction, when they were nationalized in the Fourteenth and Fifteenth Amendments.[4] Five other states—Pennsylvania, New York, New Jersey, North Carolina, and Tennessee, the sixteenth state—also enfranchised free Blacks on the same basis as Whites in their Revolutionary-era constitutions, although four would later disenfranchise Blacks, and the fifth, New York, would expand the franchise for Whites, but not Blacks. However, it is clear that in 1787–88, when the Constitution was being considered, free Blacks voted on the same basis as Whites for delegates to state ratifying conventions in the first two of these states, as well as in the five other states, and free Blacks also voted for members of the Vermont legislature that ratified the Bill of Rights.[5] Similarly, Blacks voted for local and state officials and members of Congress. As such, they constituted part of the populations of citizens at the Founding. At this time, many citizens could not vote because there were restrictions tied to wealth, gender, and other statuses. But, at the Founding, those who could vote—and the general class of people who could vote—were clearly part of the polity. Put simply, people who could vote for a delegate to a state ratifying convention were obviously members of the political community that created the United States. Thus, if free Blacks voted they were part of the political community—and so too might be other free Blacks who did not meet other requirements for the franchise, such as owning sufficient property. In the 1836 edition of his *Commentaries on American Law*, James Kent conceded that free Blacks, born in the United States, were citizens, even though they might have limited rights under the laws of other states.[6] Thus, Taney's claim that African Americans were not part of the polity that created the American nation between 1775 and 1788 is simply wrong. As I explain

citizens of their polity, but that could not make them citizens of the United States. As Masur shows, well before *Dred Scott* northern politicians believed that their state citizens were also citizens of the United States. Kate Masur, *The Second Missouri Compromise, State Citizenship, and African Americans' Rights in the Antebellum United States*, *in* A FIRE BELL IN THE PAST: THE MISSOURI CRISIS AT 200, VOLUME II: "THE MISSOURI QUESTION" AND ITS ANSWERS 129–162 (Jeffrey L. Pasley & John Craig Hammond eds., 2021).

4 Even before this, in 1839, Massachusetts asserted that Blacks were citizens of the state, and also citizens of the United States. KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021) 149 [hereinafter MASUR, UNTIL JUSTICE BE DONE].

5 As I note later in this article, some free Blacks also voted in Maryland and Connecticut in this period. *See infra* notes 33–34.

6 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258 (3d ed., Boston, Little, Brown & Co. 1836). *See also* MASUR, UNTIL JUSTICE BE DONE, *supra* note 4, at 147–51.

below, other legislation and constitutional provisions in this period constituted the first civil rights movement in American history.[7]

I. TANEY'S RACIST AND HISTORICALLY INACCURATE CHARACTERIZATION OF BLACKS AT THE FOUNDING

Taney's claims about Black rights were not new to him. At least a quarter of a century before *Dred Scott*, Taney had argued that Blacks could never be citizens of the United States. In 1832, as Attorney General under Andrew Jackson, Taney had set out his views in an unpublished opinion to the President.[8] He told Jackson that under federal law, Blacks had no political rights, or even legal rights, except those they might "enjoy" at the "sufferance" and "mercy" of Whites,[9] and even if free, they were a "degraded class" of people whose "privileges" were "accorded to them as a matter of kindness and benevolence rather than right."[10] Taney framed this issue near the beginning of his opinion in *Dred Scott*:

> 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 [sic] by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[11]

The defendant, John F. A. Sanford,[12] had raised this issue in a plea in abatement in the lower court, but Circuit Judge Robert Wells rejected the plea, asserting that *if* the plaintiff, Dred Scott, was free, he had the right to sue in federal court. Because Sanford won the case in the Circuit Court, he did not appeal Judge Wells' ruling on the plea in abatement. Because Scott won on this issue, he did not appeal the ruling. Thus, no one briefed or argued this issue before the U.S. Supreme Court, but Taney began his

---

7 In addition to the historical context, in 1829, as a private attorney Taney had sued a free Black man *in diversity* in federal court on behalf of his white client, and Taney had argued the appeal in the Supreme Court. Taney never doubted he could sue a Black man in diversity. *See* Le Grand v. Darnall, 27 U.S. (2 Pet.) 664 (1829).

8 "Unpublished Opinion of Attorney General Taney," *quoted in* CARL BRENT SWISHER, ROGER B. TANEY 154 (1935). Significantly, three years before this opinion, Taney had been an attorney in a diversity case in which a free Black man was a party. Le Grand v. Darnall, 27 U.S. 664 (1829).

9 Taney *quoted in* PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 184 (2018) [hereinafter FINKELMAN, SUPREME INJUSTICE].

10 *Id.*

11 60 U.S. (19 How.) 393, 403 (1857).

12 The Supreme Court clerk and the reporter misspelled Sanford's name, and so ever after, the caption of the case contains this minor error.

opinion by asserting that a Court always has a right to consider if it has jurisdiction. Having raised the jurisdictional issue, Taney quickly answered it:

> The question before us is, whether the class of persons described in the plea in abatement [free African Americans] 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.[13]

Taney based this position on an aggressive originalism, arguing that at the Founding, people of African ancestry "were 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."[14] As I noted above, Taney asserted that at the Founding, Blacks had "no rights which the white man was bound to respect."[15]

Taney made a distinction between state citizenship and national citizenship, arguing that while the states might make Blacks citizens, "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 . . . ."[16]

---

13 *Dred Scott*, 60 U.S. at 404.

14 *Id.* at 404–05.

15 *Id.* at 407.

16 *Id*. at 405–06. Article III of the Constitution gave the federal courts jurisdiction over "all Cases . . . between Citizens of different states . . . ." U.S. CONST. art. III, § 2. If the states could grant "state citizenship" (as Taney conceded), then linguistically, the clause meant that a person with state citizenship, including a free Black who could vote and/or hold office, in one state, could sue a person with state citizenship in another state. It is worth noting that in Ohio, Blacks could hold public office even though they could not vote. The Black attorney John Mercer Langston was elected to a number of offices in the 1850s. *See* Paul Finkelman, *A Political Show Trial in the Northern District: The Oberlin-Wellington Fugitive Slave Rescue Case*, *in* JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 15–36 (Paul Finkelman & Roberta Sue Alexander eds., 2012). However, in Dred Scott Taney created a new test for diversity jurisdiction, based on being a citizen of the United States, which was inconsistent with the actual text of the Constitution. In the twentieth century, U.S. courts held that a U.S. citizen with no "state citizenship" (such as someone living abroad) could not sue in diversity. See Smith v. Carter, 545 F.2d 909 (5th Cir. 1977), *cert. denied* 431 U.S. 955 (1977) and *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913 (S.D.N.Y. 1965).

Taney conceded that "every-person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised [sic] as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else."[17] If this were in fact the case, and if in fact free Blacks were citizens of some states in 1787–89, then free Blacks would have been citizens of the United States when the Constitution was written and ratified.

Despite the fact that Blacks voted in a number of states before the ratification of the Constitution, Taney argued—at great length—that free Blacks were not citizens when the Constitution was adopted, and thus could never be citizens of the United States. He justified this position by a lengthy discussion of statutes and policies in some of the colonies and early states that denied Blacks the same legal rights as Whites. He asserted that "for more than a century before" the adoption of the Constitution, Blacks had "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 for his benefit."[18] By relying primarily on colonial law under the British Crown—which constituted the period "for more than a century before"—Taney ignored the changes in American law and culture that took place from the 1770s, when the struggle against Britain began, through the end of the 1780s, when the Constitution went into effect.

Taney supported this position with an idiosyncratic mishmash of statutes from the colonial era, Revolutionary era, and early nineteenth century. He used these laws, some of which were passed well after the Constitution had been adopted, to prove that Blacks could not be considered citizens. He offered an originalist argument that was selective and misleading.

For example, he pointed out that in 1705, colonial Massachusetts prohibited interracial marriage, that post-Revolutionary Massachusetts enacted a similar law in 1786,[19] and that Massachusetts reaffirmed this law in its revised code of 1836.[20] Since Taney was trying to prove that at the Founding Blacks could not be citizens, the marriage laws of 1705 and 1786 were perhaps useful to his argument. His use of the 1836 law implies that in

17 *Dred Scott*, 60 U.S. at 406.

18 *Id.* at 407

19 *Id.* at 408–09.

20 *Id.* at 413.

his mind, it was important to show that Blacks remained without rights into the nineteenth century. However, the use of this law also illustrates Taney's disingenuous and dishonest summary of laws. This is because he neglected to note that in 1843, Massachusetts passed a new law specifically allowing interracial marriage.[21] If the 1836 law was relevant to prove his point, so too would have been the 1843 law, which undermined his point. Furthermore, Taney failed to note that other jurisdictions, such as New York, New Hampshire, and Pennsylvania, had never prohibited interracial marriage.

Similarly misleading was his discussion of law and race in Connecticut. Taney asserted that before the passage of a 1788 Connecticut act prohibiting citizens of that state from participating in the African slave trade, the Nutmeg State had never passed a law "indicating any change of opinion as to the relative rights and position of the white and black races in this country."[22] In making this claim, Taney ignored the fact that in 1784, four years before the adoption of the U.S. Constitution (and Connecticut's anti-slave trade law), Connecticut passed a gradual abolition law, which put the state on the road to ending all slavery in the state. Taney later mentioned the 1784 law—not to show that Connecticut had in fact fundamentally altered its laws on race, but rather to show that at the Founding the state still allowed slavery.[23] But in doing this, he did not also note that at the time the Constitution was adopted, Connecticut was actually in the process of ending slavery. Moreover, since the issue before Taney was the rights of *free* Blacks at the Founding, the fact that in Connecticut some people were still enslaved was hardly on point.

This sort of analysis was simply dishonest. It is impossible to comprehend how Taney could claim that the 1784 law, setting the stage for ending slavery in Connecticut, and providing that all children of slave women would be born free, was *not* an act "indicating any change of opinion as to the relative rights and position of the white and black races in this country."[24] This statute flatly rejected the presumption that Black people in Connecticut were slaves unless they could prove otherwise, and that the children of slave

---

21 An Act Relating to Marriages Between Individuals of Certain Races (Act of Feb. 25, 1843), ch. 5, 1843 Mass. Acts 4. *See also* AMBER D. MOULTON, THE FIGHT FOR INTERRACIAL MARRIAGE RIGHTS IN ANTEBELLUM MASSACHUSETTS (2015).

22 *Dred Scott*, 60 U.S. at 413.

23 *Id*. at 414. Taney also failed to note that Blacks who met the property requirements voted at the time of ratification of the U.S. Constitution, but they were later disenfranchised by the Jeffersonian state constitution of 1818. *See* Robert P. Forbes, *Grating the Nutmeg: Slavery and Racism in Connecticut from the Colonial Era to the Civil War*, 20 CONN. HIST. REV. 170, 179, 182 (2013).

24 *Dred Scott*, 60 U.S. at 413.

women would be born as slaves for life. The 1784 law irrevocably altered these presumptions while setting the stage for all Blacks in the state to be free people.

Taney argued that the laws regulating African Americans in 1787–89 were the only measure of the rights of free Blacks under Constitution, but he supported this claim with cases and statutes from the 1790s through the 1830s—all passed after the ratification of the Constitution. Thus, he discussed a Connecticut law of 1833 prohibiting free Blacks from coming into the state to attend school.[25] It is not clear how the 1833 law illustrated the status of free Blacks in the United States in 1787–89, but that did not seem to bother Taney. The fact that such a law did not exist during the Revolution or at the time the Constitution was ratified might demonstrate that at the Founding, Connecticut did not discriminate against Black migrants or visiting students. Equally important, Taney did not bother to note that in 1838, Connecticut repealed the 1833 law.[26] Similarly, Taney made a reference to a Connecticut supreme court decision on the law, but not feel the need to explain that in that case, the Connecticut court had overturned the conviction of the only person ever prosecuted under the law.[27] As noted earlier in this article, he also ignored the fact that in 1793, a free Black citizen of Massachusetts had successfully sued two White men in the United States District Court in Connecticut.[28]

Many of Taney's other claims and use of evidence on the status of Blacks at the Founding are equally suspect. But my goal here is not to point out *all* the inaccuracies in Taney's opinion, or his selective use of evidence to support his view that Blacks were not citizens at the Founding. Others have done this, starting with the two dissenting justices in *Dred Scott*, John McLean and Benjamin Robbins Curtis.[29] Rather, the goal here is to understand the remarkable expansion of Black rights in the Revolutionary period.

---

25 *Id.* at 414–15.

26 Act of May 24, 1833, ch. 9, 1833 Conn. Pub. Acts 420, *repealed by* Act of May 31, 1838, ch. 34, 1838 Conn. Pub. Acts 30.

27 *Dred Scott*, 60 U.S. at 415. For a discussion of this law and the prosecution under it, see Paul Finkelman, *Prelude to the Fourteen Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 434 (1985). On the expansion of Black rights after the Founding period, see MASUR, UNTIL JUSTICE BE DONE, *supra* note 4. *See also* the essays in REVOLUTIONS AND RECONSTRUCTIONS: BLACK POLITICS IN THE LONG NINETEENTH CENTURY (Van Gosse & David Waldstreicher eds., 2020).

28 *See supra* note 2.

29 *Dred Scott*, 60 U.S. at 529–564 (McLean, J., dissenting & Curtis, J., dissenting).

II. BLACK RIGHTS IN THE CONTEXT OF THE REVOLUTION

The Revolutionary era must be seen as a dramatic revolution in race relations, leading to the first civil rights laws in United States history. Taney ignored this history—and the many laws I discuss below—because acknowledging them would have undermined his overly broad conclusion that Blacks (and by implication other non-Whites, such as Chinese immigrants who had only recently started to come to the United States when Taney wrote his opinion) could never be citizens of the United States. Indeed, it is reasonable to believe that Taney was hoping to preempt any citizenship claims for immigrants and their children from Asia and the Pacific Islands (the United States was by this time heavily involved in relations with Hawaii), as well as some people from Mexico and Central America.

In his opinion, Taney argued—I think correctly—that the United States Constitution was overwhelmingly proslavery.[30] But the constitutional protection of property in human beings did not directly undermine the status of free Blacks in the nation. Indeed, the "three-fifths clause"[31]—the best-known clause dealing with slavery in the Constitution—only applied to "unfree" people. Under this clause free people, including free Blacks since 1788 (and in the 1850s, all recent immigrants from China), were counted fully for purposes of representation without regard to their race.[32]

In 1787–88, when Americans ratified the Constitution, free Blacks voted in seven[33] or possibly eight[34] states. Free Blacks in a number of states were surely "citizens" of the nation because they voted for delegates to the state ratification conventions, voted for members of their state legislatures, voted

30 *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d ed. 2014) [hereinafter FINKELMAN, SLAVERY AND THE FOUNDERS] *and* FINKELMAN, SUPREME INJUSTICE, *supra* note 9. For a similar analysis, see DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009).

31 U.S. CONST. art. I, § 2, cl. 3.

32 It is important to remember that the census counts all people without regard to their citizenship status, and before 1865 this meant counting all free people of color fully and slaves on a three-fifths ratio.

33 Massachusetts, New Hampshire, Connecticut, New York New Jersey, Pennsylvania, and North Carolina. The issue of Black voting in Connecticut has been in dispute; Robert Forbes has shown that Blacks could vote in Connecticut in the Early National period but were deprived of the vote when Jeffersonians took power in the state and disenfranchised Blacks in the state constitution of 1818. *See* Forbes, *supra* note 23, at 179, 182.

34 There is also evidence that some free Blacks voted in Maryland. David Skillen Bogen, *The Maryland Context of* Dred Scott*: The Decline in the Legal Status of Maryland Free Blacks 1776–1810*, 34 AM. J. LEGAL HIST. 381, 383 (1990). Taney was from Maryland and had practiced law there before going to the Court, and it is quite likely he was aware that Blacks had voted in the state.

for members of Congress, and were eligible to hold public office, as at least one man did.[35] In addition, at this time slavery was under assault in a number of states, and some states had begun to pass laws—the nation's first civil rights laws—to protect the fundamental rights of former slaves. Racial equality was hardly complete, and in some states free Blacks had very few legal protections. Taney certainly pointed that out in *Dred Scott*. But across the North, new state constitutions and new laws (such as the 1780 Massachusetts Constitution and the 1780 gradual abolition act in Pennsylvania) had begun to radically change the status of Americans of African ancestry.

There were also some changes along these lines in the South. Until the late 1830s, free Blacks in North Carolina and the sixteenth state, Tennessee, admitted in 1796, could vote on the same basis as Whites.[36] During the Revolution, Virginia passed a law allowing slaveowners to voluntarily manumit their slaves,[37] and the legislature authorized the state attorney general to intervene on behalf of Blacks who had been manumitted to serve in the army if their former owners tried to re-enslave them.[38]

Developments in southern criminal law also reflect the changes of the Revolutionary era. In the seventeenth and early eighteenth centuries, the southern colonies did not prosecute the murder of slaves in the same way they prosecuted the killing of Whites. For example, a Virginia law of 1669 provided that "if any slave resist his master . . . and by the extremity of the correction should chance to die, that his death shall not be accompted ffelony, but the master . . . be acquit from molestation, since it cannot be

---

35 Wentworth Cheswell was first elected to public office in New Hampshire in 1768 and held local elected office for most of the rest of his life, until he died in 1817. *See Wentworth Cheswell, the Black Man Who Rode with Revere*, NEW ENGLAND HIST. SOC'Y, https://www.newenglandhistoricalsociety.com/wentworth-cheswell-black-man-rode-paul-revere/ [https://perma.cc/3XMP-5VXC] (last visited May 20, 2022). Alexander Twilight, a graduate of Middlebury College, would be elected to the Vermont legislature in 1836—thirty-one years before the decision in *Dred Scott*. It is hard to imagine how he could be a member of his state legislature, and thus vote on the election of U.S. Senators, and not be a United States citizen. *See The Twilight Project*, MIDDLEBURY COLL., https://www.middlebury.edu/office/twilight-project/bio [https://perma.cc/MRR2-HDGL] (last visited May 20, 2022).

36 On Black voting in North Carolina, see JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860 106–07 (1943). *See also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 44 (2000).

37 An Act to Authorize the Manumission of Slaves, 1782 Va. Acts ch. 21, *reprinted in* 11 VA. STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1629 39–40 (William Waller Hening ed., R. & W. & G. Bartow 1823) [hereinafter Hening].

38 An Act Directing the Emancipation of Certain Slaves Who Have Served as Soldiers in This State, 1782 Va. Acts ch. 190, § 2 (11 Hening 308–309).

presumed that prepensed malice . . . should induce any man to destroy his owne estate."[39] In 1741, in the wake of the Stono Rebellion in South Carolina, the North Carolina colonial legislature provided compensation to owners for slaves killed while "dispersing any unlawful Assemblies of rebel Slaves or Conspirators."[40] In these colonies Black lives did not matter, except to the extent that Blacks represented a property interest for the owner.

But the Revolutionary era brought change. By 1774, the colonies were in open resistance to British rule. While almost no one expected war,[41] violence against British officials had taken place.[42] The emerging Revolutionary ideology led North Carolina to give greater protection for slaves. An act of 1774 provided that anyone found "guilty of wilfully and maliciously killing a Slave, so that, if he had in the same Manner killed a Freeman, he would . . . be held and deemed guilty of Murder . . . such Offender shall, upon due and legal Conviction thereof . . . suffer Twelve Months Imprisonment: And upon a second Conviction thereof, shall be adjudged guilty of Murder, and shall suffer Death, without Benefit of Clergy."[43] This was a step forward, in a world where the killing of a slave was usually punished by a fine, if punished at all. In 1791, in the wake of the Revolution, the state passed a more meaningful law. The relevant portion is worth noting with its full language:

> And whereas by another act of Assembly passed in the year 1774, the killing a slave, however wanton, cruel and deliberate, is only punishable in the first instance by imprisonment and paying the value thereof to the owner; which distinction of criminality between the murder of a white person and of one who is equally an human creature, but merely of a different complexion, is disgraceful to humanity and degrading in the highest degree to the laws and

---

39 An Act About the Casuall Killing of Slaves (Act I), 1669 Va. (2 Hening 270) (spelling original).

40 An Act, Concerning Servants and Slaves, 1741 N.C. Sess. Laws ch. 24, §§ 44 & 45. Considered "the largest uprising of enslaved people in the British mainland colonies prior to the American Revolution," the Stono Rebellion of 1739 left "more than twenty white Carolinians and nearly twice as many black Carolinians" dead in its wake. *Today in History—September 9: The Stono Rebellion*, U.S. LIBRARY OF CONG., https://www.loc.gov/item/today-in-history/september-09/ [https://perma.cc/7FKU-U4W9]. For a full history of the Stono Rebellion, see PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION (1974).

41 *See* JOSEPH J. ELLIS, THE CAUSE: THE AMERICAN REVOLUTION AND ITS DISCONTENTS, 1773–1783 3–51 (2021).

42 *See* BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA (2010); Benjamin Woods Labaree, THE BOSTON TEA PARTY (Oxford Univ. Press 1964) (1979); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789 (2007).

43 An Act to Prevent the Willful and Malicious Killing of Slaves, 1774 N.C. Sess. Laws ch. 31 (spelling original).

> principles of a free, Christian and enlightened country: *Be it enacted by the authority aforesaid*, That if any person shall hereafter be guilty of wilfully and maliciously killing a slave, such offender shall upon the first conviction thereof be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man; any law, usage or custom to the contrary notwithstanding. Provided always, That this act shall not extend to any person killing a slave outlawed by virtue of any act of Assembly of this state, or to any slave in the act of resistance to his lawful owner or master, or to any slave dying under moderate correction.[44]

This act reflects the contradictions and complexities of race and slavery in this period. On one hand, the law clearly recognizes the humanity of Black people, and their right to some basic legal protections. But the last sentence of the 1791 law reminds us that violence was permissible where slavery undergirded the economy, the prosperity of the master class, and the wealth and power of the elite. On the other hand, it undermines Taney's claims that Blacks (even slaves) had "no rights" and on the other hand, it underscores that for slaves those rights could be limited or ignored to protect the status, power, and wealth of the slaveholding class.

III. INEQUALITY ON THE EVE OF THE AMERICAN REVOLUTION

Understanding the rights and liberties of free Blacks in the United States, and later of other people of color from China and elsewhere, starts with the dismantling of slavery in the era of the American Revolution. As long as Blacks were slaves,[45] the only meaningful debate over their rights concerned

---

44 An Act to Amend an Act . . . Passed in the Year One Thousand Seven Hundred and Seventy-Four, Entitled, An Act to Prevent the Wilful and Malicious Killing of Slaves, 1791 N.C. Sess. Laws ch. IV, § 3 (spelling original).

45 In the early colonial period, some Native Americans were also enslaved, but this practice disappeared by the end of the seventeenth century in the English colonies that would become the United States. After that, Indians were treated as members of foreign nations, sometimes as military enemies, sometimes discriminated against by Whites, and other times welcomed into the White community. Four striking examples illustrate the difference in treatment between Blacks and Indians. General Andrew Jackson, who spent much of his life warring against various southeastern tribes, nevertheless adopted an Indian child, something that would have been impossible and unheard of if the child had been an African American. Ely S. Parker, born Ha-sa-no-an-da, was a member of the Seneca Nation in western New York. When the Civil War began, Parker, who was a trained engineer and a sachem of the Seneca Nation, tried to organize a volunteer regiment, but Governor Edwin D. Morgan of New York rejected his offer, almost certainly on racial grounds. Parker was later appointed a captain in the regular U.S. Army and ended the war as a brigadier general on the staff of General Ulysses S. Grant. He helped draft, and then wrote out, the surrender agreement that Robert E. Lee signed at Appomattox. *See* Miriam Touba, *"We Are All Americans": Grant, Lee, and Ely Parker at Appomattox Court House*, N.Y. HIST. SOC'Y MUSEUM & LIBR. (Apr. 2, 2015), https://www.nyhistory.org/blogs/we-are-all-americans-grant-lee-and-ely-parker-at-

limitations on certain barbaric punishments, such as mutilation[46] or intentionally murdering slaves.[47] Otherwise, Blacks held in bondage had no legal rights.[48] As Blacks became free, however, the law had to deal with their new status.

Coming to terms with the long struggle for equality requires suspending our own world view, in order to confront two fundamental aspects of the Atlantic world before the era of the American Revolution: the lack of equality and ubiquitous presence of slavery.

Before the late eighteenth century, there was virtually no sense of "equality" in European nations or their American colonies. In a world of hereditary monarchies, noble ranks, and other inherited statuses, "equality" was an impossibility. Second, slavery was a common practice in the Atlantic world (and almost everywhere else), as it had been since antiquity. Every institution of the era—monarchies, legislatures, courts, diplomatic

---

appomattox-court-house-2g [https://perma.cc/8XHM-F5GK]; 2 ALEXANDER S. BIELAKOWSKI, ETHNIC AND RACIAL MINORITIES IN THE U.S. MILITARY: AN ENCYCLOPEDIA 513–514 (2013). Meanwhile, Stand Waite, a member of the Cherokee Nation from present day Oklahoma, rose to the rank of Brigadier General in Confederate Army, where no Blacks could serve. *See Stand Watie*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Stand-Watie [https://perma.cc/ST9W-NLTG] (last visited May 20, 2022). Between 1893 and 1933, Charles Curtis, a member of the Kaw Nation, served in the House of Representatives, the Senate, and as Vice President of the United States without anyone questioning his status or right to participate in the culture of segregated Washington, D.C. He was the first person of color to be elected Vice President and to serve as Senate majority leader (1924–29). His racial background and tribal membership never affected his political career. *See* Livia Gershon, *Who Was Charles Curtis, the First Vice President of Color?*, SMITHSONIAN MAG. (Jan. 13, 2021), https://www.smithsonianmag.com/history/who-was-charles-curtis-first-non-white-vice-president-180976742/ [https://perma.cc/3UTT-VUYQ].

46 As early as 1740, South Carolina provided that Whites could be fined for mutilating slaves. ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 100 (1992). By the end of the Revolutionary period all of the slave states prohibited mutilation, castration, and other forms of torture or cruel and unusual punishment. Harsh whippings, of course, were permissible. There are a few famous cases of masters being punished for brutally murdering slaves. These are examples of the slave states protecting the institution from the behavior of sadistic masters. *See, e.g.*, State v. Hoover, 20 N.C. 500 (4 Dev. & Bat. 365) (1839).

47 Most of the colonies punished the willful murder of a slave, although the punishments were often mild. South Carolina, for example, generally fined Whites who murdered slaves, but could sentence a White servant to jail for up to three months. FEDE, *supra* note 46, at 62. Famously in the antebellum period, North Carolina executed someone who murdered his slave. *See Hoover*, 20 N.C. 500. Both North Carolina and Mississippi executed Whites who murdered other people's slaves, see State v. Reed, 9 N.C. (2 Hawks) 454 (1823) and State v. Isaac Jones, 1 Miss. (1 Walker) 83 (1820), and Virginia jailed a White man who murdered his own slave, see Souther v. Commonwealth, 48 Va. (7 Gratt.) 672 (1851).

48 THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860 (1996); *see generally* FEDE, *supra* note 46.

conventions, the accepted rules of warfare, financial institutions (such as banks and insurance companies), centers of learning, and all established churches—supported and condoned slavery. Almost no one challenged the legitimacy of slavery, even when people thought it was a bad policy.[49]

Until the seventeenth century, almost no one in the western world thought about "equality." The European New World colonizers—Spain, Portugal, England, France, the Netherlands, Denmark, and Sweden—were ruled by monarchs or princes who were born into their status or had seized it in battle. They were at the top of their hierarchical worlds. The English monarch ruled with the help of dukes, earls, barons, lords, and various others who mostly held their position through bloodlines and were supported by the lesser nobility, the gentry, and the Lords of the Church, the bishops and archbishops. The English Reformation retained the church hierarchy. The English Church had broken with Rome, but except for substituting the monarch for the Pope, most of the existing religious hierarchy remained in place. The importance of hierarchy was well understood by Britain's most intellectual royal, King James VI of Scotland, the future King James I of England. When Calvinists urged a more thorough reformation of the Scottish Church, including the elimination of an ecclesiastical hierarchy, James famously replied: "No Bishop, No King."[50]

The structure of British society contained numerous statuses, running from the monarch and his or her noble relatives to the serfs. When serfdom died, the urban poor, landless peasants, and common sailors remained at the bottom of society, although without formal legal rules controlling their social status. There had been no slaves in England since the end of the Roman period, but there was certainly room for such a status in the structure of British society. Magna Carta contained charming phrases about justice and fairness, but even in theory there was no legal, political, or social equality.

Thomas More's *Utopia* (1516) imagined a perfect society where most people were equal, but he assumed there would be slaves. In any event, More was not offering a rationale for such a place. His book, written in Latin, was inaccessible to all but the elite, who were unlikely to challenge the status

---

49 On the paucity of opposition to slavery, see DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966). Two rare exceptions to this are BENJAMIN LAY, ALL SLAVE-KEEPERS THAT KEEP THE INNOCENT IN BONDAGE, APOSTATES PRETENDING TO LAY CLAIM TO THE PURE & HOLY CHRISTIAN RELIGION . . . . (Philadelphia, printed by Benjamin Franklin, 1737) and JOHN WOOLMAN, SOME CONSIDERATIONS ON THE KEEPING OF NEGROES 42, 39 (The Gehenna Press, 1970) (Philadelphia, printed and sold by James Chattin, 1754).

50 *James VI and I (r. 1567–1625)*, ROYAL BRIT. HOUSEHOLD, https://www.royal.uk/james-vi-and-i-r-1567-1625 [https://perma.cc/4YAL-YKKF] (last visited May 20, 2022).

quo.[51] Furthermore, it was not a political treatise. It was a fantasy, an allegory, or perhaps a satirical condemnation of the implications of the emerging opposition to the hegemony of the Roman Catholic Church in western Europe.

In the wake of the English Civil War, some late seventeenth century intellectuals, such as John Milton and John Locke, offered theoretical arguments for some forms of equality and democratic government, although neither contemplated a society where there was true legal equality for all people.[52] Neither, for example, would have extended legal or political equality to Roman Catholics, who were seen as a threat to English liberty, or Jews, who had only recently been allowed to return to England after some four centuries of exile. It is important to remember that these two intellectuals had no meaningful impact on the actual structure of English society or its political and legal institutions.

By the eighteenth century, some members of a few dissenting Protestant faiths, including Quakers, Mennonites, other pietists, Methodists, and Baptists, moved toward theological views that supported at least spiritual equality, if not outright racial equality. In contrast to Anglicanism, which espoused what Katharine Gerbner refers to "Protestant Supremacy"—which she defines as "an exclusive ideal of religion based on ethnicity," where Christianity and Whiteness were synonymous—some Quakers in New World colonies sought to convert their slaves and included them in their worship meetings.[53] This belief that Blacks could be spiritually equal to Whites inspired some Quakers to argue that race did not justify barring Blacks from civic rights. As Quaker John Woolman wrote, "The Colour of a Man avails nothing, in Matters of Right and Equity."[54]

But Woolman's treatise had little impact beyond the Society of Friends. These religious dissenters were a tiny minority in the British Empire, and outside of Pennsylvania, mostly politically powerless. The Puritans opposed the Anglican hierarchy, dispensing with bishops and calling their clergy "ministers" rather than "priests." They bridled under a monarch. But the New England colonies still respected class distinctions and titles, maintaining hierarchies, and rules, such as sumptuary laws, which enforced inequality.

---

51 THOMAS MORE, UTOPIA (Edward Arber ed., Ralph Robinson trans., London 1869) (1516).

52 *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 1 (Thomas Hollis ed., London, A. Millar et al. 1794) (1690).

53 KATHARINE GERBNER, CHRISTIAN SLAVERY: CONVERSION AND RACE IN THE PROTESTANT ATLANTIC WORLD 2 (2019).

54 *See* WOOLMAN, *supra* note 49, at 42, 39; *see also* Lay, *supra* note 49.

Puritan internal church governance, known as congregational polity, was democratic, but participation was limited to church members—those in the community who had experienced what the Puritans called a "visible conversion experience" and were considered among the elect (also known as "visible saints").[55] The majority of most Puritan congregations were not among the visible saints, and were thus unequal. The Puritans avoided the problem of inequality for Catholics, Jews, Quakers, and most other non-Puritans by simply excluding them from their colonies.

Catholic nations generally denied equality to Protestants—and in those nations where the Reformation had taken hold, Catholics could expect similar persecution. Jews were tolerated, or not tolerated, at the whim of monarchs and princes. With the exception of some pietists, almost no one imagined that Africans or Indians could be equal, even if they were not held in bondage.

IV. SLAVERY FROM ANTIQUITY TO THE MODERN ERA

Just as it is difficult for people today to imagine a world where equality was unknown and virtually unthinkable, it is equally hard for people in our time to grasp the ubiquitous nature of slavery, which was culturally, legally, and theologically accepted, economically important, and universally common. Before the late eighteenth century, throughout the Atlantic world, there were virtually no opponents of slavery as a system of labor, a form of a property, and a means of social control.[56] As Orlando Patterson taught us many years ago, for most of human history slavery was *not* a "peculiar

55 A useful place to start to understand Puritan conversion is EDMUND MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 68–71, 121–25 (2d ed. 1999).

56 There are three rare examples of opposition to slavery in the Atlantic world before the mid-eighteenth century. In the mid-sixteenth century Father Bartolomé de las Casas, who later became the Bishop of Chiapas, famously condemned the enslavement of American Indians and had some success in persuading the Spanish Crown to limit the practice. However, this ironically led to the increased enslavement of Africans. LEWIS HANKE, ARISTOTLE AND THE AMERICAN INDIANS: A STUDY IN RACE PREJUDICE IN THE MODERN WORLD 18–19, 28–37 (1959). *See also* Armando Lampe, *Las Casas and African Slavery in the Caribbean: A Third Conversion*, *in* BARTOLOMÉ DE LAS CASAS, O.P.: HISTORY, PHILOSOPHY, AND THEOLOGY IN THE AGE OF EUROPEAN EXPANSION 421 (David Thomas Orique, O.P. & Rady Roldán-Figueroa eds., 2019). In 1688, a religious meeting of Quakers and Mennonites in Germantown, in present day Philadelphia, issued a striking attack on the morality of slavery, known as the Germantown Protest Against Slavery. It had virtually no affect at the time but was the precursor of a movement a half century later, which led to increased antislavery sentiment among Quakers and some other pietists. In 1700 a Puritan lawyer in Massachusetts, Samuel Sewall, published an attack on slavery, THE SELLING OF JOSEPH: A MEMORIAL (Boston, printed by Bartholomew Green & John Allen, 1700). *See also* DAVIS, *supra* note 49, at 342–47.

institution."[57] It was, with rare exceptions, found almost everywhere: "It has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized."[58] People of all ethnicities, religions, and races were held as slaves and also held slaves. In antiquity, slaves were most often outsiders—people captured in battle or purchased on trading ventures. The ancient Greeks preferred to enslave non-Greeks, whom they considered to be "barbarians." Biblical law favored the enslavement of non-Hebrews. But Greeks enslaved other Greeks, and Hebrews enslaved fellow Jews. As the great classical historian M. I. Finley observed, there were "Greek slaves in Greece [and] Italian slaves in Rome."[59] Similarly, there were Chinese slaves in China, Russian slaves in Russia,[60] and Muslim slaves in Islamic societies.[61] Slavery, in various forms, was common all over Africa. In West Africa, Igbos more often enslaved Yorubas than their own kinsman (and vice versa)—but as a general matter, West Africans held other West Africans in bondage, just as Greeks and Romans had held their fellow Greeks and Italians as slaves.[62]

From late antiquity to the end of the medieval period, Norsemen brought so many captured Slavic peoples from the Baltic region, Russia, and Ukraine (as well as from Ireland and Scotland) to the Mediterranean basin that the words "Slav" and "slave," which emerged in the twelfth century, became almost interchangeable. But Europeans also had few qualms about enslaving their neighbors and even their relatives. In 655 C.E., the Ninth Council of

---

57 ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY vii (1982). *See Speech on the Reception of Abolition Petition, February, 1837*, *in* SPEECHES OF JOHN C. CALHOUN: DELIVERED IN THE CONGRESS OF THE UNITED STATES FROM 1811 TO THE PRESENT TIME 225 (New York, Harper & Brothers 1843), https://archive.org/details/speechesofjohncc00incalh/page/222/mode/2up?view=theater (last visited May 20, 2022) (describing slavery as a "peculiar institution"). The proslavery politician John C. Calhoun first used this term to argue that southern slavery was both a positive good and "special." *Id.* at 225 (describing slavery as "a good—a positive good"). The term evolved among scholars and the general public to reflect the more modern use of "peculiar" as "different" or "unusual." This framing influenced the first important modern scholarly history of slavery. *See* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

58 PATTERSON, *supra* note 57, at xvii.

59 MOSES I. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY 118 (1980).

60 *See* PETER KOLCHIN, UNFREE LABOR: AMERICAN SLAVERY AND RUSSIAN SERFDOM (1987) *and* RICHARD HELLIE, SLAVERY IN RUSSIA 1450–1725 (1982).

61 *See* Bernard K. Freamon's pathbreaking study, POSSESSED BY THE RIGHT HAND: THE PROBLEM OF SLAVERY IN ISLAMIC LAW AND MUSLIM CULTURES (2019); *see also* WILLIAM GERVASE CLARENCE-SMITH, ISLAM AND THE ABOLITION OF SLAVERY (2006).

62 SLAVERY IN AFRICA: HISTORICAL AND ANTHROPOLOGICAL PERSPECTIVES (Suzanne Miers & Igor Kopytoff eds., 1977); SLAVERY AND OTHER FORMS OF UNFREE LABOUR (Léonie J. Archer ed., 1988) (surveying slavery in varying locations).

Toledo mandated the enslavement of the children of Catholic priests, even though the fathers, and not the children, were the sinners who had violated clerical vows of celibacy.[63] The Council of Pavia reaffirmed this rule in 1012.[64] In 1089, Pope Urban II "enforced clerical celibacy by granting to secular princes the power to reduce the wives of clerics to slavery."[65] These rules on enslaving the children and wives of clerics were later "incorporated into the Western Church's collection of canons."[66] In 1370, Pope Clement authorized the enslavement of captured Roman Catholic Venetian soldiers who were fighting against the Papal state. In the mid-sixteenth century, the Church authorized the Knights of Malta to enslave European Christians who been previously captured by Muslims and forcibly converted to Islam. These captured Europeans soldiers, who had been compelled to serve in Muslim armies, likely envisioned that being captured by the Knights of Malta would lead to redemption from their years of forced conversion. But they quickly discovered that, even as they reembraced Christianity, they were doomed to enslavement.[67]

On the eve of European expansion into Africa and the Americas, the Vatican authorized enslavement of non-believers. In 1452, Pope Nicholas V gave the Portuguese "full and free permission to invade, search out, capture and subjugate the Saracens and pagans and any other unbelievers and enemies of Christ wherever they may be . . . and to reduce their persons into perpetual slavery."[68] Pope Callixtus III, Pope Sixtus IV, and Pope Leo X reiterated these authorizations, applying them to sub-Saharan Africans, Arabs, and natives of the New World.[69]

The English had no slavery at the time of their expansion into the New World, but by the end of the seventeenth century England had emerged as a major player in the slave trade. In the 1680s, John Locke wrote about the fundamental rights to life, liberty, and property in his *First Treatise on Government*, and asserted that "[s]lavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our

63 JOHN FRANCIS MAXWELL, SLAVERY AND THE CATHOLIC CHURCH: THE HISTORY OF CATHOLIC TEACHING CONCERNING THE MORAL LEGITIMACY OF THE INSTITUTION OF SLAVERY 37 (1975).

64 *Id.*

65 *Id.*

66 *Id.*

67 SEYMOUR DRESHER, ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY 13 (2009); HANKE, *supra* note 56, at 133.

68 MAXWELL, *supra* note 63, at 53; DRESHER, *supra* note 67, at 62–63.

69 MAXWELL, *supra* note 63, at 54.

nation; that it is hardly to be conceived, that an *Englishman*, much less a gentleman, should plead for it."[70] But however "vile" slavery was, Locke had provided for it in his draft of the Fundamental Constitutions of Carolina (1669), and though an Englishman who doubtless considered himself a gentleman, he personally invested in the Royal Africa Company, which imported a steady supply of African slaves to the British Caribbean and the mainland colonies. His *Second Treatise on Government* provided the very argument for slavery that he said no English gentleman "should plead for"[71]:

> But there is another sort of servants, which by a peculiar name we call *slaves*, who being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters. These men having, as I say, forfeited their lives, and with it their liberties, and lost their estates; and being in the *state of slavery*, not capable of any property, cannot in that state be considered as any part of *civil society*; the chief end whereof is the preservation of property.[72]

By the eighteenth century, slavery was common throughout the British New World, to the extent that even some emerging opponents of the practice still accepted it in some circumstances. Even when someone voiced opposition to one iteration of slavery, almost no one challenged the legitimacy of the institution itself. For example, in 1754 the antislavery Quaker John Woolman condemned the African trade and hereditary slavery on both religious and prudential grounds—but conceded the legitimacy of lifetime slavery for criminals or captured soldiers.[73]

The expansion into the Americas eventually altered the use of slaves by western Europeans and their American descendants, and by the seventeenth century only Africans (and occasionally Indians) were considered enslavable.[74] This racialization of slavery was a departure from the traditional notion that anyone might be enslaved. But it was not an innovation or a change in the virtual universal acceptance of slavery in the Atlantic world.

---

70 LOCKE, *supra* note 51, at 1; *The Two Treatises of Government*, STANFORD ENCYC. PHIL., https://plato.stanford.edu/ entries/locke/#TwoTreaGove [https://perma.cc/374R-6BCL] (last visited May 20, 2022).

71 *Id.*; *see also* THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA (Mar. 1, 1669), *available through* THE AVALON PROJECT, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. https://avalon.law.yale.edu/17th_century/nc05.asp [https://perma.cc/8X8D-KJMS].

72 LOCKE, *supra* note 51. *See also* DAVIS, *supra* note 49, at 118.

73 WOOLMAN, *supra* note 49.

74 South Carolina held Indians as slaves into the 1720s, although the trade in Indian slaves ended with the Yamasee War in 1715. EDWARD B. RUGMER, SLAVE LAW AND THE POLITICS OF RESISTANCE IN THE EARLY ATLANTIC WORLD 76–78 (2018).

V. SLAVERY AND FREEDOM ON THE EVE OF THE REVOLUTION: THE BEGINNING OF CIVIL RIGHTS IN AMERICA

In 1774, at the beginning of the Revolution, slavery was legal in all of the colonies. In the northern colonies, the Black population (almost all of whom were slaves) varied from under 2% of the population in New Hampshire to at least 12% of New York.[75] The distribution of slaves also varied within each colony. About one-third of Kings County (present day Brooklyn) was enslaved, mostly owned by small farmers, but slaves were only three-tenths of 1% of remote Cumberland County, which later became part of the state of Vermont. The 6,000 or so slaves in Revolutionary Connecticut constituted about 3% of the population,[76] but they were not distributed evenly in the colony. Six and a half percent of New London County was enslaved, but slaves made up only 3% of New Haven County and 1.5% of Litchfield County.[77]

On April 14, 1775, just days before the battle of Lexington and Concord, two dozen (mostly Quaker) men in Philadelphia organized the Society for the Relief of Free Negroes Unlawfully Held in Bondage.[78] This was the first antislavery society in the British Empire. But after four meetings, the Society disbanded because of the complications caused by the outbreak of the war. At the time, there was no organized political agitation to end slavery in the colonies, although most Quakers and other pietists, Methodists, and some Baptists opposed slavery within their own communities. So did a few social and political radicals, such as Thomas "Tom" Paine and Benjamin Rush.[79]

Nor at this time were there any antislavery societies in Great Britain. The government, the Crown, and most social and political leaders were deeply committed to the African slave trade and colonial slavery.[80] In 1769, Virginia attempted to tax newly imported slaves. This was not an attack on

---

75 ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 4–7 (1967).

76 *See* Forbes, *supra* note 23, at 172.

77 EDGAR J. MCMANUS, BLACK BONDAGE IN THE NORTH, 210, 205 (1973).

78 EDWARD NEEDLES, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY 14–16 (Philadelphia, Merrihew & Thompson 1848).

79 *See* James V. Lynch, "The Limits of Revolutionary Radicalism: Tom Paine and Slavery," 123 PA. MAG. HIST. & BIOGRAPHY, 177–199 (1999).

80 There were many individuals in England who were increasing hostile to the African slave trade, and to slavey itself. Most notable among these was the literary figure, Samuel Johnson. But there were no antislavery or anti-slave trade organizations, and Britain's "investment in the slave trade was reaching then unprecedented levels in 1763–1775" following the acquisition of new colonies where sugar could be grown, after the Seven Years' War. DAVID RICHARDSON, PRINCIPLES AND AGENTS: THE BRITISH SLAVE TRADE AND ITS ABOLITION 178–79 (Yale Univ. Press, 2022).

slavery, but an economic measure to reduce the outflow of capital from Virginia to England, since virtually all of the African slaves coming to the colonies arrived on British ships, owned and operated by English investors and crews. Responding to petitions from English slave traders who opposed the proposal, the Crown vetoed this law. In 1772, the Virginia colonial legislature passed a new law with a prohibitive tax on imported slaves.[81] The debate over this bill included some assertions about the "inhumanity" of the African trade, but not about slavery itself.[82] The Virginians' main motivations were economic—aimed at reducing the outflow of capital to England—and prudential. The prudential argument was based on the fear that newly imported Africans were more dangerous than those people raised as slaves in the Americas. Virginians argued that too many newly imported African slaves "will endanger the very existence of your majesty's American domains."[83] The Royal governor, Lord Dunmore, supported the law on these grounds, but once again the Crown overruled a law that would limit the trade, underscoring the government's commitment to this important economic engine of British prosperity.[84]

The same year that the Crown vetoed Virginia's attempts to restrict the importation of new slaves, the Court of King's Bench, the most important court in England, reaffirmed the legitimacy of the African slave trade and colonial slavery in *Stewart v. Somerset*.[85] At the same time, the Court concluded that slaves could not be held in England. This outcome was based on the complexities of English law and colonial law. In England, "the law" was created by Parliament and judges implementing the common law. Parliament had never established slavery in England, and it was at least theoretically in conflict with the common law. The colonies, on the other hand, had their own local legislatures, and were governed by a complex

81 *See* Christine McBurney, *The First Efforts to Limit the African Slave Trade Arise in the American Revolution: Part 2 of 3, the Middle and Southern Colonies*, J. AM. REVOLUTION (Sept. 14, 2020), https://allthingsliberty.com/2020/09/the-first-efforts-to-limit-the-african-slave-trade-arise-in-the-american-revolution-part-2-of-3-the-middle-and-southern-colonies/ [https://perma.cc/Z2PV-HPEK].

82 The Virginia petition featured in the debate is quoted at length in FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 30, at 136 (citing ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 51–52 (Philadelphia, William Young Birch & Abraham Small, 1803)).

83 FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 30, at 136.

84 *Id.* at 136–37.

85 Somerset v. Stewart (1772) 98 Eng. Rep. 499, 509 (KB). *See also* JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 128–29 (1992).

mixture of local law, Royal decree, admiralty law, and sometimes acts by Parliament.

A handful of opponents to slavery, led by Granville Sharp, sued on behalf of James Somerset, who had been a slave in Virginia; Somerset was owned by Charles Stewart, an official in Britain's colonial bureaucracy. When Stewart returned to England, he brought Somerset with him. When Somerset ran away, Stewart hired a few local ruffians to capture him, tie him up, and deposit him on a ship that would take him to Jamaica to be sold. Sharp, who had studied law on his own but was not admitted to the bar, put together a small team of pro bono counsel to represent Somerset. At the time, Sharp was more or less a one-man antislavery society. There would be no organized antislavery movement in Britain for another decade and a half. In 1787, well after England had lost the American War, Sharp would team up with a few younger opponents of slavery, including Thomas Clarkson and William Wilberforce, to form The Society for Effecting the Abolition of the Slave Trade.[86] But in 1772, Wilberforce was all of thirteen and Clarkson was a year younger. Their energy and skill in fighting slavery would not come to fruition until after the American War. Even then, their goal was to end the African trade, *not* to end slavery in Britain's New World colonies or in the newly independent United States.

In *Somerset*, Lord Chief Justice Mansfield considered whether anyone could be held as a slave *in England,* as opposed to the American colonies. Mansfield conceded the legality of slavery in all of Britain's American colonies (based on local law and Royal prerogative), the legality of the African slave trade, and the legitimacy of people in Britain participating in this commerce. He reaffirmed that English courts would enforce business arrangements connected to the African slave trade to the New World. "Contract for sale of a slave is good here [England]; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement."[87] Mansfield's decision condemns slavery as "odious,"[88] suggesting his personal distaste for it. But his decision did not threaten slavery in Jamaica, Barbados, or any of the mainland colonies that would soon become the United States. Nor was he challenging the legitimacy of the African slave trade. English courts, Mansfield made clear, would support the commerce in human beings between Africa and the New World.

---

86 HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE 493 (1997).

87 *Somerset*, 98 Eng. Rep. at 509.

88 *Id.* at 510.

After reaffirming support for the African trade—and, implicitly, slavery—in all of Britain's New World colonies, Mansfield noted that Somerset's case was not about either the African trade or the status of slaves in the New World:

> But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, Whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England.[89]

In other words, English law would not allow beating someone up on the streets of London, as Stewart's minions had done, or chaining someone in the hold of a ship docked in an English port. But Mansfield understood that such physical coercion was necessary if anyone was to be held as a slave in England. After looking at the case in some detail, Mansfield concluded that Somerset had to go free:

> Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[90]

A few years after *Somerset*, just as the Revolution was beginning, M.P. David Hartley (the Younger) offered a motion that "the slave trade was contrary to the laws of God and the rights of men."[91] This was the first time that anyone in the House of Commons had challenged the legitimacy of slavery. As David Richardson notes, the motion was "doubtless premature, even naïve," but it does illustrate that a few leaders in England were beginning to understand the horrors of British participation in the African trade[92]—although, as in *Somerset*, the opposition was not yet focused on

---

89 *Id.* In many ways, this outcome reflects Eric Freedman's analysis that habeas corpus cases are generally "fact specific," and here the fact that Somerset was actually in England led Mansfield to issue a relatively narrow legal ruling freeing Somerset. ERIC M. FREEDMAN, MAKING HABEAS WORK: A LEGAL HISTORY 23 (2018).

90 *Somerset*, 98 Eng. Rep. at 510.

91 *Introduction* to 2 DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA LV (Elizabeth Donnan ed., 1931).

92 *See* RICHARDSON, *supra* note 80, at 100.

slavery itself. At this time—the beginning of the American Revolution—there was little opposition to slavery in Parliament and "no known pressure group outside Parliament to coordinate or mobilize opinion or action."[93] The motion went nowhere. At the dawn of the Revolution, and for some years after it, there was simply no organized or meaningful opposition in England to the African slave trade or slavery in the colonies.

Less than a decade after *Somerset*, and before the end of the American Revolution, Mansfield reaffirmed the legitimacy of the African slave trade in a case that exemplifies its horrors.[94] The case involved a ship with an almost science-fiction name, the *Zong*, a slaver that was off course, foundering in the ocean, with a cargo of weakened and hungry Africans. While the slaves on board might survive the trip, they would bring a poor price in the Caribbean slave markets. Claiming to be almost out of water, the captain tossed about 200 living Africans into the ocean, and later made an insurance claim for jettisoning some cargo to save the rest. This captain believed that the insurance claim would bring more money to the ship than selling these weakened Africans at auction.[95]

Initially Mansfield supported the ship owner in a dispute with the insurer, noting that under English insurance and maritime law, if the slaves were thrown overboard because of necessity due to a shortage of water, "though it shocks one very much," in terms of law "the case of slaves was the same as if Horses had been thrown overboard."[96] With some understatement, Mansfield nonetheless observed, "It is a very shocking case."[97] But, shocking or not, Mansfield initially upheld the claim of the slave trader, and in doing so again affirmed the legitimacy and legality of the African slave trade.

In a second hearing, Mansfield reversed his position because of new evidence provided by the insurance company. Using the ship's own log, the insurers proved that the ship was not running out of water and that the crisis on the ship was due to poor management and an incompetent captain.[98] While the slave traders ultimately lost their case (and did not collect the insurance money they hoped for), the Court of King's Bench and the highly respected Lord Mansfield had affirmed the legality of the trade, with all of its

93 *See id.* at 179.

94 Gregson v. Gilbert (1783) 99 Eng. Rep. 629 (KB); THOMAS, THE SLAVE TRADE, *supra* note 86, at 489–90.

95 JAMES WALVIN, THE *ZONG*: A MASSACRE, THE LAW AND THE END OF SLAVERY 101 (2011).

96 *Id.* at 153.

97 *Id.* Notably, Mansfield emphasizes that the case of the *Zong* both "shocks" and is "shocking" in the same short opinion.

98 Gregson v. Gilbert (1783) 99 Eng. Rep. 629 (KB).

barbarity, including the possibility that live Africans could be thrown overboard as jettisoned "cargo." Neither the ship captain nor the owner of the ship faced any legal consequences for the unnecessary death of so many Africans. In the English courts during the era of the American Revolution, Black lives did not matter.

The Crown's rejection of the Virginia laws limiting the African trade in the 1760s and 1770s, the quixotic failure of Hartley's motion, and the cases of *Somerset* and the *Zong* demonstrate that on the eve of the American Revolution, England's political and legal institutions were intensely committed to slavery and the African trade. Nothing in English policy threatened American or Caribbean slavery. The African slave trade, along with the sugar, tobacco, indigo, and rice that slaves produced, were keys to English prosperity.[99] The highest components of the British government—Parliament, the Crown, and the Court of King's Bench—opposed any interference with this huge industry, which centered on commodifying human beings and trading them like horses, as Mansfield's decision in the *Zong* made quite clear.

The failure of Virginia's attempts to tax the slave trade, the complexity of *Somerset* in prohibiting slavery in England but supporting it in the colonies, and the case of the *Zong* also underscore that before, during, and after the American Revolution, there was no organized English opposition to the African trade or slavery in the Colonies. There was no antislavery movement in London clamoring for the rights of Africans. At best, a few lawyers and philanthropists could save James Somerset from being sent to the Caribbean, and an insurance company could defeat a fraudulent claim by a slave trader.

In sum, on the eve of the American Revolution slavery was a dominant social, political, and economic force in England and much of America. The legal and political system in Britain and the colonies fully supported it. There was little support for freedom, liberty, or humanitarian sympathy for Africans and their American-born descendants. The small number of free Black people in the American colonies were restricted by a legal and social system designed to preserve bondage.

---

99 It is important to remember that cotton was a very minor crop at this time, grown profitably only on the sea islands off the coast of Georgia and South Carolina. The most important slave produced product was sugar.

VI. SLAVERY IN THE NORTH AND THE REVOLUTION

At the beginning of the Revolution, slavery was legal in all of the thirteen colonies that would form the United States. Concentrations of slaves varied. While more than half of South Carolina's population was enslaved, slaves constituted less than two percent of New Hampshire's population. As this suggests, most slaves lived south of Pennsylvania. But in 1790, after the disruptions of the war, the evacuation of many slaves (or former slaves) with the British army, and considerable manumissions by patriots, the first census still counted about 37,000 slaves in the three middle states (New York, New Jersey, and Pennsylvania), as well as some 14,000 free Blacks, many of whom would have been slaves when the war began.[100]

By 1810, slavery was dead or dying in the North. Four states had abolished it outright in their constitutions or through judicial enforcement of their constitutions,[101] and five had passed gradual abolition laws.[102] No slaves became immediately free under these gradual emancipation laws. However, the children of all slave women were born free, which meant that slavery was

---

100 CAMPBELL GIBSON & KAY JUNG, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES (U.S. Census Bureau, Population Div., Working Paper No. 56, 2002), http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf [https://perma.cc/ C2 EY-CFMD], at tbls. 45, 47 & 53 [hereinafter cited as GIBSON & JUNG].

101 Massachusetts by its 1780 Constitution and judicial enforcement in 1781—see *infra* notes 143–44 and accompanying text for a discussion of *Commonwealth v. Jennison*, known as the Quock Walker Case; New Hampshire by its 1783 Constitution; Vermont by its 1791 Constitution when it became a state; and OH. CONST. 1803 art. VIII, § 2 ("There shall be neither slavery no involuntary servitude in this State. . . .") (replaced with similar language by its Constitution of 1851).

102 Pennsylvania (1780), Rhode Island (1784), Connecticut (1784), New York (1799), and New Jersey (1804). *See* Peter P. Hinks, *Gradual Emancipation Reflected the Struggle of Some to Envision Black Freedom*, CONN. HIST. (Jan. 2, 2020), https://connecticuthistory.org/gradual-emancipation-reflected-the-struggle-of-some-to-envision-black-freedom/#:~:text=In%201780%2C%20Pennsylvania%20passed%20a,initially%20resisted%20acting%20against%20slavery [https://perma.cc/2BTB-4PY4]. The Connecticut law was not passed as a specific statute, but was simply added to a revised code, adopted in early 1784, consolidating previous existing laws on race and slavery. The entire gradual abolition provision read:

> And whereas sound policy requires that the abolition of slavery should be effected as soon as may be, consistent with the rights of individuals and the public safety and welfare, Therefore, Be it enacted, That no negro or mulatto child, that shall, after the first day of March, one thousand seven hundred and eighty-four, be born within this state, shall be held in servitude, longer than until they arrive to the age of twenty-five years, notwithstanding the mother or parent of such child was held in servitude at the time of its birth; but such child, at the age aforesaid, shall be free; any law, usage, or custom to the contrary notwithstanding.

THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT, bk. I, ch. 1, at 79 (Hartford, Hudson & Goodwin, 1808) (published by Authority of the General Assembly).

put "in the course of ultimate extinction," as Abraham Lincoln would later describe the process.[103]

In 1799, New York passed its gradual emancipation law, and in 1817 the state passed a law freeing all slaves in the state on July 4, 1827.[104] When this law went into effect on the fifty-first anniversary of the Declaration of Independence, New York became the first American state to absolutely abolish slavery by legislative action. The changes in New York's Black population during this period illustrate that while gradual abolition laws did not automatically emancipate any existing slaves, the laws undermined the entire system and led to private manumissions. New York had more than 20,000 slaves when the 1799 law went into effect.[105] By 1820, the slave population had been cut in half to 10,088, and it was at zero by 1830.[106] Meanwhile, during this period the free Black population grew dramatically, suggesting that with slavery set on the road to extinction many owners simply ended their participation in human bondage. The census found only 4,600 free Blacks in 1790. By 1800, a year after passage of the gradual abolition act, the free Black population had more doubled to 10,417. By 1810, the free Black population had more than doubled again to 25,333. The growth slowed down in the next decade, reaching just over 29,000 by 1820. All slavery ended in New York on July 4, 1827, and in 1830 there were 44,870 free Blacks in the state.[107]

New Jersey did not pass a gradual abolition act until 1804. In 1800, the state had about 12,422 slaves. By 1830, there were only 2,254 slaves in the state, and by 1840 this had dropped to 674.[108] In 1846, New Jersey ended all slavery in the state, but converted the few remaining slaves to the status of

---

103 Abraham Lincoln, *House Divided Speech* (June 16, 1858) [https://perma.cc/4292-FLR5].

104 An Act for the Gradual Abolition of Slavery, ch. 62, 1799 N.Y. Sess. Laws 388; An Act Relative to Slaves and Servants, ch. 137, 1816 N.Y. Sess. Laws 2. For a significant history of ending slavery in New York, see DAVID GELLMAN, EMANCIPATING NEW YORK: THE POLITICS OF SLAVERY AND FREEDOM, 1777–1827 (2006).

105 The 1800 census found 20,903 slaves in the state. *See* GIBSON & JUNG, *supra* note 100, at tbl. 47.

106 The 1830 census lists seventy-five slaves in New York, but this is clearly a mistake by either the census taker or the tabulator, or it reflects masters from other states who were visiting with their slaves when the census was taken. *See* GIBSON & JUNG, *supra* note 100, at tbl. 47.

107 *Id.* at tbl. 45.

108 *Id. See also* GRAHAM RUSSELL HODGES, SLAVERY AND FREEDOM IN THE RURAL NORTH: AFRICAN AMERICANS IN MONMOUTH COUNTY, NEW JERSEY, 1665–1865 (1997); GRAHAM RUSSELL HODGES, ROOT AND BRANCH, AFRICAN AMERICANS IN NEW YORK AND EAST JERSEY, 1613–1863 (1999).

apprentices.[109] In 1787, Congress, under the Articles of Confederation, had prohibited slavery north of the Ohio River, although a small number of people would be held in bondage in Indiana until the 18230s and in Illinois until the 1840s.[110] By 1850, slavery no longer existed in the North.

VII. THE REVOLUTION AND THE FIRST CIVIL RIGHTS MOVEMENT

The Revolution was the catalyst for the first civil rights movement in American history. Before the Revolution, there were a small number of free Blacks in the New England colonies who had some legal protections and rights.[111] Free Black men served in some colonial militias and were involved in protests against British rule. Between 1756 and 1763, Blacks served in New York and New England militias during the Seven Years' War.[112] And in 1770, British regulars killed the former slave Crispus Attucks at the Boston Massacre.[113] His participation in this street brawl with British troops suggests some equality for Blacks in Boston at this time.

Importantly, militia service was a fundamental aspect of citizenship throughout this period.[114] The fact that free Black men served in militias is a strong indication that they were considered citizens, or had the potential to be considered citizens, before, during, and after the Revolution. This is in part why during the Revolution southern politicians tried to prohibit such service by both free and enslaved Blacks, and why after the ratification of the Constitution southerners in Congress demanded that Blacks not be enrolled in militia duty.[115] But in the northern colonies—soon to be the northern states—militia service was common for free Blacks and some masters manumitted their slaves to serve in the war. On the eve of the Revolution, Peter Salem's owner manumitted him so he could join the local militia. He

---

109 An Act to Abolish Slavery, N.J. REV. STAT., § 6:6 (1846). In 1850, the census found 236 slaves in the state, but they were probably former slaves who were legally apprentices. *See* GIBSON & JUNG, *supra* note 100, at tbl. 45.

110 FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 30, at 46–101.

111 *See, e.g.*, Forbes, *supra* note 23. As noted above, one Black man, Wentworth Cheswell, had been elected to public office in New Hampshire by this time. *See supra* note 35, *Wentworth Cheswell, the Black Man Who Rode with Revere*.

112 BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 8–9 (1962). Earlier historians called this the French and Indian War, after the two main enemies of England and the American colonies.

113 Henry M. Ward, *Attucks, Crispus*, 1 AFRICAN AMERICAN NATIONAL BIOGRAPHY 195–97 (2008).

114 AKHIL AMAR, AMERICA'S UNWRITTEN CONSTITUTION: A BIOGRAPHY 185–88, 322–27, 391–92 (2005).

115 Paul Finkelman, *Race, Slavery, and Federal Law, 1789–1804: The Creation of Proslavery Constitutional Law Before Marbury*, 14 U. ST. THOMAS L.J. 1, 2, 11–13 (2018).

fought at Lexington and Concord along with a number of other Blacks, including Prince Estabrook, who was killed in action. After the battle of Bunker Hill, fourteen White officers singled out Salem Poor as "a brave and gallant soldier" who deserved special commendation.[116] These officers were fully aware that Poor was African American. Black enlistments were controversial among southern officers. In the Continental Congress, Edward Rutledge of South Carolina unsuccessfully tried to ban Black soldiers. Hostility to Black enlistment reduced the number of African American under arms until 1777, when once again the Continental army began accepting new Black soldiers. Many were recently manumitted slaves or runaways. At least 750 African American soldiers suffered with their White comrades in arms at Valley Forge.[117] Among them was Salem Poor, the hero of Bunker Hill.[118]

Policies towards Black troops varied by state and region. Early in the war, Blacks served in New England and New York regiments. Many masters manumitted their slaves so that the newly freed Blacks could serve, since slaves could not. Sometime available signing bonuses facilitated these private acts, with the slaveowners claiming the bonus. In other cases, slaves were manumitted to serve as a substitute for their owners. The slaveowner avoided service; the slave became free. As one pioneer Black scholar noted, "most slave soldiers received their freedom with their flintlocks. Upon enlistment they were given certificates of manumission."[119]

Some manumissions also reflected the Revolutionary ideology of liberty. Black military service was an important step towards ending slavery and establishing some rights for northern Blacks. Congress initially discouraged Black enlistment, but in 1777 this changed. By the end of the war, more than 5,000 Black soldiers had served.[120] In 1781, New York specifically authorized masters to enlist "able bodied male slaves," who would become

---

116 QUARLES *supra* note 112, at 11.

117 Some scholars suggest that Blacks made up as much as ten percent of the troops at Valley Forge, which would raise their numbers to around 1,200. Harry Schenawolf, *Black Soldiers in the American Revolution Did Not Quit or Go Home on Furlough: Daily Presence Was Much Higher Than Total Percentage of Those Who Fought* (Oct. 14, 2018), REVOLUTIONARY WAR J., https://www.revolutionarywarjournal.com/arm-negroes-to-the-principles-of-liberty-never-to-be-lost-in-a-contest-for-liberty-the-black-presence-in-the-american-revolutionary-army-was-much-larger-than-what-weve-tho/ [https://perma.cc/K75B-2SVU].

118 *Id.* at 11; ELLIS, *supra* note 41, at 154.

119 QUARLES, *supra* note 112, at 68.

120 ELLIS, *supra* note 41, at 390.

free after serving three years or being "regularly discharged" before that time.[121]

Most of the southern states opposed or discouraged Black enlistment, but nevertheless it occurred. Virginia rejected calls for enlisting slaves, who would then become free, but did allow free Blacks to serve.[122] Some Virginia slaveowners took advantage of this to avoid military service, by asserting their slaves were free men and having them enter in the army in their place.[123] After the war, some of these masters forcibly re-enslaved these Blacks when they left the army. This behavior, of course, reflects greed and racism, which are the opposite of any commitment to civil rights or human liberty.

But in 1782, with the war dying down and peace on the horizon, Virginia passed legislation to protect the freedom of its Black veterans. Noting that some masters had initially enlisted their slaves—asserting that they were free—and then subsequently tried to re-enslave them, the law declared that any

> slave, who by the appointment and direction of his owner, hath enlisted in any regiment or corps raised within this state, either on continental or state establishment, . . . and hath served faithfully during the term of such enlistment, or hath been [properly] discharged from such service . . . shall . . . be fully and completely emancipated, and shall be held and deemed free in as full and ample a manner as if each and every of them were specially named in this act.[124]

The law further provided that

> the attorney-general for the commonwealth, is hereby required to commence an action, *in forma pauperis*, in behalf of any of the persons above described who shall after the passing of this act be detained in servitude by any person whatsoever; and if upon such prosecution it shall appear that the pauper is entitled to his freedom . . . a jury shall be empannelled to assess the damages for his detention.[125]

Reflecting the ideology of the Revolution, the legislature noted: "[I]t appears just and reasonable that all persons enlisted as aforesaid . . . have thereby of course contributed towards the establishment of American liberty and independence, should enjoy the blessings of freedom as a reward for their toils and labours."[126]

---

121 An Act for Raising Two Regiments for the Defence of This State on Bounties of Unappropriated Lands, ch. 32 § 6, 1781 N.Y. Laws 351.

122 QUARLES, *supra* note 112, at 58.

123 *Id.* at 69.

124 An Act Directing the Emancipation of Certain Slaves Who Have Served As Soldiers in This State, 1782 Va. Acts ch. 190 § 2 (11 Hening 308–309).

125 *Id.* (spelling original).

126 *Id.*

This law is unique in the history of the slave South. Here a southern legislature acknowledged and declared that some slaves had earned their freedom, and the state provided legal counsel to help them secure their liberty. Even more surprising, the law authorized the payment of damages from those who had illegally held them in bondage after their military service. This might be considered the first "civil rights act" ever passed by a southern state.[127] It could also be seen as the first reparations act in American history, since it required that those unscrupulous Whites—who had illegally re-enslaved veterans—compensate the former slaves for their work after they returned from the army. The law was narrow in its scope, only protecting a small class of Black men, but it clearly showed that the Virginia accepted some responsibility to protect the liberty and the economic rights of those slaves who had earned their freedom by serving the new nation.

In 1782, Virginia also passed a law allowing masters to privately manumit their slaves, under certain conditions, and allowing those now-free Blacks to remain in the state.[128] In the colonial period, under British rule, private manumission in Virginia was illegal. Under the 1782 law, manumitted slaves had to be under age forty-five; males had to be over twenty-one and females over eighteen.[129] The act reflected the Revolutionary spirit of some White Virginians, and the religious sentiments of others. The law remained in force until 1805.[130] It is estimated that in 1780 there were only 2,000 free Blacks in Virginia,[131] but by 1810 the state had more than 30,000 free Blacks.[132] Among those masters taking advantage of the law was George Washington.[133] Starting in 1805, Virginia went back and forth on allowing private manumission, but it was not a simple process, and the free Black population grew slowly, going from 30,000 in 1810 to just 56,000 on the eve of the Civil War.[134] This contrasts with the period from 1782 to 1810, when

127 Some might consider it the first "reparations act" in U.S history, but it was more like recognition of compensation owed by wrong doers, since it was individuals, and not the state, who were required to compensate people illegally held in bondage. The compensation was not for work when these veterans had been slaves, but for illegal exploitation of them after they were free.

128 An Act to Authorize the Manumission of Slaves, 1782 Va. Acts ch. 21 (11 Hening 39–40).

129 *Id.* at § 2.

130 *See* An Act to Amend the Several Laws Concerning Slaves, ch. 63, 1806 Va. Acts 251 (amending the 1782 law).

131 FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 30, at 200, 229 n.36.

132 GIBSON & JUNG, *supra* note 100, at tbl. 61.

133 FRITZ HIRSCHFELD, GEORGE WASHINGTON AND SLAVERY: A DOCUMENTARY HISTORY 209–15 (1997).

134 GIBSON & JUNG, *supra* note 100, at tbl. 61.

the free Black population was "the fastest growing element of the Southern population."[135]

VIII. TOWARD FREEDOM AND CIVIL RIGHTS

The use of Black soldiers in the Revolution and the ideology of liberty reflected in the Virginia acts of 1782, which protected the freedom of Black soldiers and allowed private manumission, set the stage for the first wave of civil rights laws in American history. This civil rights legislation was, by the standards of our times, incomplete. With the exception of the two Virginia acts, these laws were almost entirely limited to the states north of the southern boundary of Pennsylvania—the boundary surveyed by Charles Mason and Jeremiah Dixon in 1767. Enforcement mechanisms were often weak. There was only limited equal protection of the law, and the laws did not guarantee equal access to places of public accommodation.

Nevertheless, by the standards of the eighteenth century—and indeed by the standards of world history—the legal changes in this period were stunningly innovative and revolutionary. Between 1780 and 1804, four states abolished slavery outright through a constitutional provision[136] and five others[137] adopted legislation providing freedom for all people born in the state and thus gradually ending slavery.[138] In the following sixteen years, three other states[139] would enter the union with a constitutional ban on slavery within their jurisdictions. In addition, New York would pass new legislation freeing all slaves within its jurisdiction.[140]

A careful examination of two states, Massachusetts and Pennsylvania, illustrates this new world of liberty and civil rights.

A. Massachusetts

In 1778, the Massachusetts legislature wrote a constitution and sent it to town meetings for approval. This was the first time any state constitution

135 IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 46–50 (1974).

136 Massachusetts (1780); New Hampshire (1783), Vermont (1791), and Ohio (1803).

137 Pennsylvania (1780), Rhode Island (1784), Connecticut (1784), New York (1799), and New Jersey (1804).

138 Pennsylvania (1780), Rhode Island (1784), Connecticut (1784), New York (1799), and New Jersey (1804).

139 Indiana (1816), Illinois (1818), and Maine (1820).

140 An Act Relative to Slaves and Servants, ch. 137, § 4, 1817 N.Y. Laws 136.

was sent to the people for ratification,[141] and no other states in this period did so. To the shock of the legislators, the people rejected the document. "The town meetings of Massachusetts . . . openly discussed the incompatibility of racial discrimination and the principle of equality. . . . The draft of the state constitution presented to the towns in the spring of 1778 contained no bill of rights and withheld the vote from Indians, mulattoes, and blacks. Many towns thereupon demanded a bill of rights and criticized the discriminatory article" in the proposed constitution.[142] Significantly, the draft constitution also failed to end slavery in the Commonwealth. In 1780, Massachusetts adopted a different constitution, written mostly by John Adams. The first sentence of the document asserted:

> All men are born free and equal, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property, and in fine of seeking and obtaining their safety and happiness.[143]

Most people in Massachusetts believed that this clause ended slavery. After the adoption of the Constitution, many slaves simply declared themselves free and walked away from their bondage. In 1781, a slave named Quock Walker left his master, Nathaniel Jennison, and went to work for a neighbor. Jennison tracked Walker down, beat him, and dragged him back to bondage on his farm. Walker in turn filed a criminal complaint and Jennison was prosecuted for battery and false imprisonment. The jury convicted Jennison based on Chief Justice William Cushing's charge:

> The defense set up in this case afforded much scope for discussion and has been fully considered. It is founded on the assumed proposition that slavery had been by law established in this province: that rights to slaves, as property, acquired by law, ought not to be divested by any construction of the Constitution by implication; and that slavery in that instrument is not expressly abolished. It is true, without investigating the right of christians to hold Africans in perpetual servitude, that they had been considered by some of the Province laws as actually existing among us; but nowhere do we find it expressly established. It was a usage—a usage which took its origins from

---

141 Paul Finkelman, *The Nefarious Intentions of the Framers?*, 84 U. CHI. L. REV. 2155–56 (2017). It is worth noting that a recent major book on this period, MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 618 (2016), incorrectly argues that ratification of state constitutions was common, when in fact Massachusetts was the only state to do it. Had Pennsylvania, New York, or New Jersey adopted the Massachusetts model, it is possible that they too would have ended slavery outright. In this period neither Rhode Island nor Connecticut adopted a new constitution, and thus there was no opportunity to end slavery outright as a constitutional provision.

142 WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 163, 83–84 (1980).

143 MASS. CONST. art. I.

> the practice of some of the European nations and the regulations for the benefit of trade of the British government respecting its then colonies. But whatever usages formerly prevailed or slid in upon us by the example of others on the subject, they can no longer exist. Sentiments more favorable to the natural rights of mankind, and to that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast have prevailed since the glorious struggle for our rights began. And these sentiments led the framers of our constitution of government by which the people of this commonwealth have solemnly bound themselves to each other to declare—*that all men are born free and equal;* and that *every subject is entitled to liberty*, and to have it guarded by the laws as well as his life and property. In short, without resorting to implication in constructing the constitution, slavery is in my judgement as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence. The court are therefore fully of the opinion that perpetual servitude can no longer be tolerated in our government, and that liberty can only be forfeited by some criminal conduct or relinquished by personal consent or contract. . . . The Def[endan]t must be found guilty as the facts charged are not contraverted.[144]

Commonwealth v. Jennison is arguably the first civil rights case in the United States. It is also the first American case in which a court expansively read a constitutional provision to support liberty and the rights of a racial minority. More importantly, the Massachusetts Constitution of 1780 was the first political document in the western world—and probably in the history of the entire world—to unconditionally abolish slavery. Slavery had faded away in post-Roman England, only to be replaced by serfdom. But nowhere had a political body consciously decided to end bondage and immediately free all those enslaved within its jurisdiction.

Significantly, the Massachusetts Court ignored the economic claims of Jennison. This deliberate choice may have surprised some American slaveowners with human "property" in the Revolutionary era. The Revolution was fought over private property as well as liberty. The Revolutionary slogan "taxation without representation is tyranny" combined notions of self-government with a rejection of the idea that the government could arbitrarily take private property from people.[145] The United States Constitution would ultimately support this idea in what became the Fifth

---

144 John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts*, 5 AM. J. LEG. HIST. 132–33 (1961).

145 Nat'l Const. Ctr. Staff, *On This Day: "No Taxation Without Representation!"*, NAT'L CONST. CTR. (Oct. 7, 2021), https://constitutioncenter.org/blog/no-taxation-without-representation#:~:text=James%20Otis%2C%20a%20firebrand%20lawyer,a%20series%20of%20public%20arguments [https://perma.cc/VYJ7-V4WQ] (attributing the quotation to Massachusetts representative and lawyer James Otis).

Amendment.[146] In 1857, Chief Justice Taney would use this Amendment to give slaveowners the right to take their human property with them to any federal territory.[147] In early 1862, the law ending slavery in the District of Columbia would provide compensation for masters on the theory (in part based on Taney's decision in *Dred Scott*) that uncompensated emancipation by statute was an unconstitutional taking.[148] There was also an important practical issue in the structure of the D.C. Emancipation law. With the war raging, it was important not to antagonize slaveholders in the loyal slave states—Kentucky, Missouri, Maryland, Delaware, and the area that would soon become the state of West Virginia. As Lincoln told Senator Orville Browning the previous year, "to lose Kentucky is nearly . . . to lose the whole game."[149] Similarly, early in the war, when a group of ministers urged Lincoln to free all the slaves in nation, saying he would then have God on his side, Lincoln allegedly replied: "I hope to have God on my side, but I must have Kentucky."[150] Thus, in 1862 Congress compensated slaveowners in the District of Columbia because it was politically practical and possibly constitutionally necessary.

But when Congress abolished slavery through the Thirteenth Amendment, it avoided a takings question because the new amendment superseded the Fifth Amendment. By the time Congress passed the Amendment in early 1865, it was clear the traitorous regime in Richmond would lose the war and that no slaveowners in the four loyal slave states would be joining the doomed Confederate war effort. But the Amendment also neatly avoided the takings issue. Congress reaffirmed this in the Fourteenth Amendment, which specifically provided that "neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations

---

146 U.S. CONST. amend. V.

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

148 An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, ch. 54, 12 Stat. 376 (1862). *See also* Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L.J. 63 (2015); KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. (2010).

149 Letter from Abraham Lincoln to Orville H. Browning (Sept. 22, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 531–32 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

150 Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 361 (2009).

and claims shall be held illegal and void."[151] The Supreme Court still hears cases under the takings clause of the Fifth Amendment,[152] but has never had to consider the right of slaveowners to compensation.

Abolition in Massachusetts avoided the takings issue because—as with the Thirteenth Amendment—the "taking" came from a constitutional provision, which would supersede any property claim. In 1790 the first federal census found no slaves in the state. Free Blacks, who could vote on the same basis as Whites, participated in political life. But, ironically, the ending of slavery in Massachusetts may have been almost too speedy to resolve the many practical and legal implications from such a dramatic change in law and social policy. The legislature did not considered how the heritage of slavery would affect race relations, or the status of free Blacks; and after slaves were emancipated under the law, there were no further public debates about the need for new laws to address slavery's legacy on Black lives.[153] As a result, there was no working concept of "equal protection" beyond traditional criminal law, no notion that private businesses could be required to serve Blacks, and no contemplation of how to accommodate a complete end slavery in Massachusetts while it remained legal in all other states within the newly created "Perpetual Union."[154] The incompleteness of Massachusetts' approach in disowning slavery is reflected in Chief Justice Taney's strategic arguments in *Dred Scott*. Taney ignored the major breakthrough of the 1780 Massachusetts Constitution, which legally ended all slavery and enfranchised Blacks and Indians on the same basis as Whites. In trying to prove that Blacks were not citizens in the 1780s, Taney was able to accurately note some of the inconsistencies between the abolition of slavery in the North, citizenship, and full equality.

In the three quarters of a century after the 1780 emancipation, Massachusetts would gradually create a society without formal discrimination, but it would take legislation, as well as some judicial acts, to do so. Three examples illustrate this.

In *Commonwealth v. Aves* (1836), the Massachusetts Supreme Judicial Court heard a novel case involving the status of Med, a six-year-old slave child who

---

151 U.S. CONST. amend. XIV, § 4.

152 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1982).

153 JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780–1860 (1998).

154 The Articles of Confederation, written in 1778 and finally ratified in 1781, created a "perpetual union between the states," as described in the document's full title.

had been brought to the state from Louisiana by a former resident of Boston who was visiting her family.[155] Women from the Boston Female Anti-Slavery Society, posing as representatives of the local Sunday school, investigated Med's status, determined she was a slave, gathered evidence, and hired counsel to bring a private habeas corpus action to liberate her.[156] In this case of first impression, Chief Justice Lemuel Shaw concluded that no one could be held as a slave in Massachusetts, except for fugitives from other states, whose status was regulated by the U.S. Constitution.[157]

In freeing Med, Chief Justice Shaw easily applied the state constitution, noting:

> It is now to be considered as an established rule, that by the constitution and laws of this Commonwealth, before the adoption of the constitution of the United States, in 1789, slavery was abolished, as being contrary to the principles of justice, and of nature, and repugnant to the provisions of the declaration of rights, which is a component part of the constitution of the State.[158]

After reviewing the history of slavery in Massachusetts, Shaw explained:

> [I]t is sufficient for the purposes of the case before us, that by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit. "All men are born free and equal, and have certain natural, essential, and unalienable rights, which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." It would be difficult to select words more precisely adapted to the abolition of negro slavery. According to the laws prevailing in all the States, where slavery is upheld, the child of a slave is not deemed to be born free, a slave has no right to enjoy and defend his own liberty, or to acquire, possess, or protect property. That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the constitution to the present time. The whole tenor of our

---

155 Commonwealth v. Aves, 25 Mass. 193, 18 Pick. 193 (1836).

156 The Boston Female Anti-Slavery Society hired one of the most distinguished lawyers in Boston, Rufus Choate, to argue the case. *See* PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 25, 28 (1985). Choate's arguments are found in CASE OF THE SLAVE CHILD MED., REPORT OF ARGUMENTS OF COUNSEL AND THE OPINION OF THE COURT IN THE CASE OF COMMONWEALTH VS. AVES; TRIED AND DETERMINED BY THE SUPREME JUDICIAL COURT OF MASSACHUSETTS (Boston, Isaac Knapp, 1836).

157 35 Mass. 193, 18 Pick. 193 (1836). For a full discussion of this case, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 103–08 (The Lawbook Exchange Ltd. 2000) (1981) [hereinafter FINKELMAN, AN IMPERFECT UNION]. On Shaw and Med's case, see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

158 Id. at 208.

> policy, of our legislation and jurisprudence, from that time to the present, has been consistent with this construction, and with no other.[159]

While the Massachusetts constitution had ended slavery, it had not provided for any regulation of race or status based on race. A 1788 Massachusetts statute concerned vagabonds and the support of indigents[160] required Blacks to prove their freedom when entering the state. Of course, no Whites were required to prove their status to enter the state, because all Whites were by definition free. At the time, slavery was still legal in three of the states bordering Massachusetts—New York, Connecticut, and Rhode Island. Thus, this law was more about interstate comity in the new nation, before the adoption of the Constitution, than an assault on free Blacks. While the law reflected racist notions that fugitive slaves would become burdens on society, it did not prohibit free Blacks from moving to the state. There is no evidence that this law was ever enforced before it was repealed *sub silentio* in 1835.[161]

The history of antebellum Black education in Massachusetts illustrates both the limitations of the constitution in protecting Black rights and the importance of political activism by Blacks and Whites, in a state where there were no racial restrictions on voting. In 1800, the city of Boston refused to appropriate funds for a public school for Blacks. In 1820, Boston established a segregated public school for Blacks. By the late 1840s, most schools in Massachusetts were integrated, but Boston still maintained separate schools for Blacks. In 1846, the Boston Black community, led by a Black printer and historian, William C. Nell, petitioned the Boston School Committee to integrate the city's schools. This agitation led to the nation's first school desegregation case, *Roberts v. City of Boston*.[162] Benjamin F. Roberts sued to have his daughter, Sarah, admitted to the closest school to where they lived. Representing Roberts were Charles Sumner, a White antislavery lawyer, future United States Senator, and eventually the author the Civil Rights Act of 1875, and Robert Morris, Jr., the second African American admitted to

---

159 *Id.* at 210.

160 An Act for Suppressing and Punishing of Rogues, Vagabonds, Common Beggars, and Other Idle, Disorderly and Lewd Persons (Mar. 26, 1788), 1788 MASS. GEN. LAWS ch. 21, *repealed* sub silentio *by* An Act for the Regulation of Gaols and Houses of Correction (Mar. 29, 1834), 1834 MASS. GEN. LAWS ch. 151. No trace of the 1788 Act is found in the 1835 Massachusetts Revised Statutes.

161 An Act for Suppressing and Punishing of Rogues, Vagabonds, Common Beggars, and Other Idle, Disorderly and Lewd Persons (Mar. 26, 1788), 1788 MASS. GEN. LAWS ch. 21, *repealed* sub silentio *by* An Act for the Regulation of Gaols and Houses of Correction (Mar. 29, 1834), 1834 MASS. GEN. LAWS ch. 151. No trace of the 1788 Act is found in the 1835 Massachusetts Revised Statutes. A discussion of this can be found in MASUR, UNTIL JUSTICE BE DONE, *supra* note 4, at 58.

162 Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).

practice law in the United States.[163] Sumner argued for the inherent equality of all people, making constitutional, policy, and psychological arguments similar to those used in *Brown v. Board of Education*.[164] However, in the first use of the "separate but equal doctrine" in American law, Chief Justice Shaw upheld Boston's system of segregating Black children.[165]

Unlike the U.S. Constitution at the time of *Brown*, the Massachusetts Constitution did not have an "equal protection clause" or a "due process clause." Chief Justice Shaw ruled that under Massachusetts law, school districts had vast discretion in assigning students without state interference or any constitutional limitations. Shaw asserted that "[i]n the absence of special legislation on this subject, the law has vested the power in the [school] committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences [sic], the decision of the committee must be deemed conclusive."[166] Today, of course, we would consider race as an *unreasonable* classification of students, but in 1850 racial classifications existed in almost all states and in federal law, and Shaw saw nothing unreasonable about it in public education.

While not winning in the Supreme Judicial Court on constitutional grounds, the state's Black community and its antislavery White allies won in the legislature. Supporters of equal schooling, including Blacks voters, petitioned the state legislature to prohibit segregated schools throughout the state.[167] These petitions were successful in 1855, when the state prohibited segregated schools.[168] This outcome was a legacy of Revolutionary Massachusetts.

In sum, the Revolutionary constitution of 1780 enfranchised Blacks and led to an immediate end to slavery in Massachusetts. The Constitution ultimately led to a political climate where substantial equality could be achieved over the next eighty years. By the eve of the Civil War, Blacks in Massachusetts would have equal access to schools, railroad cars, jury boxes,

---

163 Paul Finkelman, *Not Only the Judges' Robes Were Black: African American Lawyers As Social Engineers*, 47 STAN. L. REV. 161, 172 (1994).

164 347 U.S. 483 (1954).

165 *Roberts*, 59 Mass. 198.

166 *Id.* at 209.

167 JAMES HORTON & LOIS HORTON, BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH 74–5 (1979).

168 An Act in Amendment of "An Act Concerning Public Schools" (Apr. 28, 1855), 1855 MASS. GEN. LAWS ch. 256. For a full documentary history of this issue, see JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE (Leonard W. Levy & Douglas Jones eds., 1974).

and ballot boxes. Despite racial prejudice against social equality, the legislature repealed prohibitions on interracial marriage.[169] Black lawyers would appear in court, and a few Blacks would be elected or appointed to public office. Except for unlucky fugitive slaves who were captured in the Bay State, no one had been held as a slave since the early 1780s.

Thus, when Massachusetts ratified the U.S. Constitution, there were no slaves in the state and all Black men were able to vote on the same basis as Whites. In *Dred Scott*, Chief Justice Taney ignored this history because it would have completely undermined his claims that Blacks were not citizens of the United States. On the contrary, they were voting citizens of Massachusetts during the Revolution in 1780 and when the state elected delegates to its ratifying convention in 1788.

B. Pennsylvania

On April 14, 1775, the first antislavery organization in the nation—the Society for the Relief of Free Negroes Unlawfully Held in Bondage—held its first meeting in Philadelphia. Five days later the Revolution began, and within a few months the society collapsed, having met only four times.[170] But the lack of an organization did not stop agitation to end bondage. Indeed, the Revolution stimulated antislavery activity.

Pennsylvania had far more slaves than Massachusetts, and many owners were politically connected.[171] Slaveholding was common among middle-class and upper-class Philadelphians. The ideology of the Revolution cut in conflicting directions in Pennsylvania. Support for liberty was strong, but so too was support for private property. There was significant opposition to taking slaves from owners, depriving some people of their valuable property in order to give liberty to others.

As noted above, Massachusetts avoided the "takings" question by a constitutional provision, which overrode any statutory or common law claims. The United States would eventually do this with the Thirteenth

---

169 An Act Relating to Marriages Between Individuals of Certain Races (Feb. 25, 1843), 1843 MASS. GEN. LAWS ch. 5. *See also* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY (2002); AMBER D. MOULTON, THE FIGHT FOR INTERRACIAL MARRIAGE RIGHTS IN ANTEBELLUM MASSACHUSETTS (2015).

170 NEEDLES, *supra* note 78, at 14–16.

171 GARY B. NASH, FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720–1840 38 (1988).

Amendment, and then explicitly override any claims for compensation for the loss of slaves in the Fourteenth Amendment.[172]

But the "takings" question was clearly an issue in 1780 when Pennsylvania began to end slavery through legislation. Throughout the colonial period and the first five years of the Revolution, Pennsylvanians acquired slaves, investing in a legally recognized and relatively expensive form of property. In 1765, there were about 1,400 slaves in Philadelphia.[173] There were a significant number of slaveholders in the southwestern part of the state, where boundaries were fluid and slaveowners from Maryland and Virginia sometimes settled. There were also large numbers of slaveowners in York and Lancaster Counties, along the Maryland border.[174] The political weight of these slaveowners was not insignificant.

Some local political issues also affected opposition to slavery. The strongest support for abolition was among Quakers and other pietists. Quakers constituted a significant proportion—but not a majority—of the state. Most were also pacifists, unwilling to take up arms for either side of the conflict. However, some Quakers were openly sympathetic to the British, who did not pressure them to become combatants or even to actively support the Crown. Others were simply neutral, unwilling to participate in a military conflict. But neutrality is suspect during a revolution. Many patriots considered Quakers to be Tories, even when they were not; this view was exacerbated by the fact that some leading Quakers *were* Tories.[175] Thus, during the Revolution, the largest and most economically powerful community opposed to slavery in Pennsylvania was also the most politically weak and vulnerable.

Geopolitical issues further complicated ending slavery in Pennsylvania. The state bordered Virginia, the largest state with the most slaves, as well as Maryland and Delaware, which would remain slave states until the Civil War. Its other neighbors, New York and New Jersey, had the largest percentage of slaves in the North, and would be the last two northern states to take steps to end slavery. Most importantly, Philadelphia was the nation's largest city and the national capital. Delegates to the Continental Congress

---

172 U.S. CONST. amend. XIV, § 4 ("But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.").

173 NASH, *supra* note 171, at 38.

174 EDGAR MCMANUS, BLACK BONDAGE IN THE NORTH 207 (1973).

175 Shannon E. Duffy, *Loyalists*, ENCYC. OF GREATER PHILA., https://philadelphiaencyclopedia.org/archive/loyalists/ [https://perma.cc/GR3K-9PXZ] (last visited May 20, 2022).

from the southern states resided there, often with some slaves in tow. A precipitous abolition of slavery would complicate interstate harmony, undermine the war against Britain, undermine Philadelphia's status as the country's leading city, and jeopardize its role as the national capital.

These considerations made an immediate emancipation in Pennsylvania impossible. But there was strong opposition to the institution, which seemed like a blot on a nation that had proclaimed that "all men are created equal" and were entitled to "Life, Liberty and pursuit of happiness."[176] Thus, in 1778, the state legislature began to consider how to end slavery.[177] On March 1, 1780 the legislature passed An Act for the Gradual Abolition of Slavery.[178] It would serve as a model for similar laws passed in Connecticut, Rhode Island, New York, and New Jersey, and the Canadian province of Upper Canada (Ontario).[179] It was the first time *in the history of the world* that a legislature had passed a statute to end slavery. Simultaneously the legislature sought to prepare the children of slaves—who would be born free—for their freedom.[180] Racial attitudes—what today we would identify as racism—further complicated these dramatic changes.

The Pennsylvania act was truly remarkable. Unlike the simple sentence in the Massachusetts Constitution, this complex statute balanced the desire to end slavery with the need to avoid a property-owners revolt against taking private assets (slaves). Because the law gradually ended slavery, the legislators understood that there would a long period of time when most Blacks would be free, but some would still be in bondage. In addition, the legislature had to balance the political concerns of being a free state surrounded by slave states and the home of the nation's capital, where many slave owning political leaders, military officers, diplomats, businessmen, and war refugees might congregate. Another complication concerned the exiting legal structure. Unlike Massachusetts, slavery—and racial control—was embedded in Pennsylvania law. The legislature had to simultaneously protect the liberty

176 THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

177 A history of this legislation is found in ZILVERSMIT, *supra* note 75, at 124–37.

178 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282.

179 An Act to Prevent the Further Introduction of Slaves and to Limit the Terms of Contracts for Servitude Within This Province 1793, 33 Geo. 3 c. 7 (Eng.).

180 The act did this indirectly, in Section 6, by making the owner of a slave women liable for the maintenance of Black children who might need public assistance after they served out their indenture. The members of the Pennsylvania legislature apparently expected that masters would educate the children of their slaves to prepare them for freedom to avoid later financial costs. It is easy to criticize this provision as lacking a strong enforcement provision. It illustrates the difficulty of a legislature creating a new and unique social policy quickly and without any precedents to follow.

of free Blacks, protect the society from revolts of those still in bondage, protect the property interests of masters who still owned slaves, and prevent slaveowners from evading the law by perpetuating bondage and furthering their own economic interests. It was a tall order.

The law contains two preambles. The first acknowledged the American struggle against British "tyranny" and "how miraculously" they had been delivered from "the variety of dangers to which we have been exposed." Reverently, but non-theistically, the legislature thanked "that being, from whom every good and perfect gift cometh" for American military success. The legislature rejoiced that it could "extend a portion of that freedom to others, which hath been extended to us." Confronting race directly—which was unusual at the time—the legislature asserted that "[i]t is not for us to enquire why, in the creation of mankind, the inhabitants of the several parts of the earth were distinguished by a difference in feature or complexion." Attempting to blame Britain for slavery, the legislature celebrated that the people of Pennsylvania have

> a peculiar blessing granted to us, that we are enabled this day to add one more step to universal civilization, by removing, as much as possible, the sorrows of those who have lived in undeserved bondage, and from which, by the assumed authority of the kings of Great-Britain, no effectual, legal relief could be obtained.[181]

In other words, success in the Revolution allowed for the abolition of slavery.

This preamble underscores how American opponents of slavery fully understood that emancipation was impossible within the British Empire. They welcomed the Revolution because it allowed them to end human bondage within their community. This quasi-religious statement is followed a second preamble that condemns both slavery and British tyranny. Significantly, it recognizes one of the great horrors of slavery—the destruction of Black families.

> And whereas the condition of those persons, who have heretofore been denominated Negro and Mulatto slaves, has been attended with circumstances, which not only deprived them of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other and from their children, an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case. In justice, therefore, to persons so unhappily circumstanced, and who, having no prospect before them whereon they may rest their sorrows and their hopes, have no reasonable inducement to render their service to society, which they otherwise might, and also in grateful commemoration of our own happy

181 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282, § 1.

> deliverance from that state of unconditional submission, to which we were doomed by the tyranny of Britain.[182]

This remarkable paragraph is one of the few instances in United States history where the White majority articulated the notion that to understand the pain and oppression of slavery and race discrimination, Whites should imagine themselves being treated the way that Blacks were treated.[183]

After articulating the moral and Revolutionary basis of the law, the legislature turned to the difficult problem of actually ending slavery. Under this law all children born in Pennsylvania as of March 1, 1780, would be born free. The clause recognized—and rejected—the longstanding American rule that the children of slave mothers are born as slaves for life:[184]

> That all persons, as well Negroes and Mulattoes as others, who shall be born within this state from and after the passing of this act, shall not be deemed and considered as servants for life, or slaves; and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within this state, from and after the passing of this act as aforesaid, shall be, and hereby is utterly taken away, extinguished and for ever abolished.[185]

This provision avoided "taking" any existing property. The 1780 law cleverly took nothing from slaveowners that they currently owned, although it denied them any future interest in the replication of their human property through births. However, this led to a new problem: Who would pay for the cost of raising the children of slave women? The law required the owner of the mother to do so, and in return the children would serve the mother's owner as indentured servants until they turned twenty-eight.[186] This was an

---

182 *Id.* at § 2.

183 In 1688, a Mennonite/Quaker meeting in Germantown, Pennsylvania articulated a similar notion. Germantown Protest Against Slavery (1688), *reprinted in* KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., AMERICAN LEGAL HISTORY: CASES AND MATERIALS (5th ed., 2017). In 1963, President John F. Kennedy would make a similar argument, when introducing what became the Civil Rights Act of 1964. Kennedy said:

> If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who will represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place? Who among us would be content with the counsels of patience and delay?

President John F. Kennedy, Televised Address to the Nation on Civil Rights (June 11, 1963), https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights [https://perma.cc/G7PR-WAUV].

184 This rule was first promulgated by the Virginia House of Burgesses, the colonial legislature, in 1662. *See* Negro Womens Children to Serve According to the Condition of the Mother (Act 12), 1662 Va. Acts (2 Hening 170).

185 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282, § 3.

186 *Id.* at § 4.

excessively long indenture and gave the owners of slave women an enormous payback for the cost of raising these children. This was deeply unfair to these free-born Blacks, who were forced to serve the owners of their mothers for many of their most productive years.[187] Some other states followed the Pennsylvania model, but would reduce the indenture time.[188] Why such long indentures? The legislature possibly did not carefully consider the length of the indenture, or the lawmakers believed that without this enormous compensation for the owners of slave women, the law would not pass.

The law made masters financially liable to the overseers of the poor if the children of slave women could not support themselves after their indenture.[189] This incentivized slaveowners to prepare the children of their slaves for freedom. The law also required an elaborate registration system to prevent illegal importation of new slaves.[190] Courts would strictly enforce this law, leading to some Blacks becoming free because they were not properly registered.[191]

The law also dramatically provided significant equal protections rights for both indentured Blacks and slaves: "That the offences and crimes of Negroes and Mulattoes, as well slaves and servants as freemen, shall be enquired of, adjudged, corrected and punished, in like manner as the offences and crimes of the other inhabitants of this state are and shall be enquired of, adjudged, corrected and punished, and not otherwise, except that a slave shall not be admitted to bear witness against a freeman." This was the first time an American legislature treated slave defendants the same way that free people were treated. Every colony—and, after 1776, every other state where slavery was legal—had special punishments, rules, laws, and trials for slaves. Pennsylvania no longer did. Granting the right of free Blacks to testify against Whites—and that would include the indentured children of slave mothers, testifying against those who owned their mothers and fathers—also broke new ground. In no other slave jurisdiction in the

187 *See* Robert William Fogel & Stanley L. Engerman, *Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation*, J. LEGAL STUDS. 377 (1974).

188 Rhode Island provided that the children of slave women would serve their mother's master until they reached adulthood—eighteen for women and twenty-one for men. *See* An Act Authorizing the Manumission of Negroes, Mulattoes and Others, and for the Gradual Abolition of Slavery, 1784 R.I. Sess. Laws 6–8. On the other hand, New York initially kept the female children of slave women in servitude until age twenty-five and the male children until age twenty-eight. *See* An Act for the Gradual Abolition of Slavery, ch. 62, 1799 N.Y. Sess. Laws 388.

189 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282, § 6.

190 *Id.* at § 5.

191 *See, e.g.*, Respublica v. Negro Betsey, 1 U.S. (1 Dall.) 469 (1789); Wilson v. Belinda, 3 Serg. & Rawle 396 (Pa. 1817).

nation could Blacks, slave or free, testify against Whites. These provisions, granting equal protection for all free Blacks and substantial protections for slaves could not be found in any other slave state,[192] and should be seen as the first civil rights law in the United States. Under this law, the twenty-one-year-old daughter of a slave woman would still be indentured to her mother's owner, *but* the child would have been able to testify against the owner for abusing her mother. Furthermore, the law allowed slaves and indentured Blacks to sue their masters, or lodge a complaint with authorities, and "be entitled to like relief, in case he or she be evilly treated by his or her master or mistress."[193] When freed from their indenture, the children of slave mothers were to be given the same "freedom dues and other privileges" as White apprentices and indentured servants.[194] This contrasts with laws further south, which allowed for the re-enslavement of manumitted slaves, or even the enslavement of free born Blacks.[195]

The law did not allow slaves to testify against free people, Black or White. This made sense—however unfair it was—in a society where slaves were present. But even here the law was innovative because it applied to all free people, not just Whites. Thus status (as a slave), not race, became the critical factor on limiting testimony. As noted above, the law allowed free Blacks to testify against Whites, something no other slave state allowed, and allowed Blacks to complain about being "evilly treated."

The law allowed anyone visiting Pennsylvania to keep a slave in the state for up to six months.[196] This was an explicit modification of the *Somerset* precedent, which required the immediate emancipation of any slave brought into a non-slave jurisdiction. Because *Somerset* was decided before the Revolution, the principle was imbedded in American law. However, *Somerset* was based on the understanding, as Lord Mansfield clearly stated, that

192 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282, § 7.

193 *Id.* at § 4

194 *Id.*

195 For example, a Virginia act of 1705 authorized the manumission of slaves for "meritorious services," but allowed for their re-enslavement and public sale if they remained in the colony for more than a month after being manumitted. An Act Directing the Trial of Slaves, Committing Capital Crimes; and for the More Effectual Punishing Conspiracies and Insurrections of Them; and for the Better Government of Negros, Mulattos, and Indians, Bond or Free, 1723 Va. Acts ch. 4 (4 Hening 126). Similarly, in 1837 Virginia provided that manumitted Blacks who were not given permission to live in the county where they had been manumitted had to leave the states within one year and any former slaves "so remaining, shall forfeit their right to freedom, and may be apprehended and sold . . . ." An Act Amending the Laws Concerning Emancipated Slaves, Free Negroes and Mulattoes, ch. 70, § 2, 1837 Va. Acts 48.

196 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282, § 10.

slavery could only be exist if it had been created, or at least supported, by positive law. Thus, Mansfield wrote:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[197]

Unlike England, Pennsylvania had been supporting slavery with positive law in the colonial period, and the 1780 law recognized the existence of some slaves in the state, even as the law set the state on the road to total abolition. The law balanced the *Somerset* principle with the reality that slavery had, and still did, exist in Pennsylvania. Without any special provision for visitors, any slaves coming into the state would be immediately free. But as part of a "perpetual union" with slave states, the legislature had to specifically modify the *Somerset* principle. The six months rule made sense in a state where slavery was dying, but not yet dead. This modified version of *Somerset* also made sense in a nation where all other states (including Massachusetts at this time) allowed slavery. Thus, slaveowners from Virginia, Maryland, Delaware, New York, or New Jersey could flee to Pennsylvania if the British occupied their neighborhood. Allowing fellow patriots from other states to bring their slaves into the state for a short period of time seemed reasonable in the emerging nation. But if they stayed longer than six months, the slaves would become free. A 1788 law immediately emancipated the slaves of anyone who moved to the state "intending to inhabit or reside therein."[198] Intention to reside could be construed by such actions as starting a business, renting property for more than six months, buying real property, voting in the state, or a declaration of the intention to remain in Pennsylvania.[199]

The six months limitation did not apply to the "domestic slaves attending upon Delegates in Congress from the other American states, foreign Ministers and Consuls."[200] This made perfect sense. If Philadelphia was to remain the nation's capital, the state had to allow political leaders to bring slaves with them. However, the law would be strictly construed. When a U.S. Senator from South Carolina left office for two years, but remained in

---

197 Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (KB).

198 An Act to Explain and Amend an Act, Entitled, "An Act for the Gradual Abolition of Slavery," ch. 394, § 1, 1788 Pa. Laws 586.

199 For a full discussion of this issue and the cases implementing the law, see FINKELMAN, AN IMPERFECT UNION, *supra* note 157 at 46–69, 137–44.

200 An Act for the Gradual Abolition of Slavery, ch. 146, 1780 Pa. Laws 282, § 10.

Philadelphia, his slave won his freedom, even though the politician had subsequently been reelected to the Senate.[201]

In 1788, Pennsylvania bolstered the 1780 law.[202] Beyond strengthening registration procedures for the children of slave mothers, the law prohibited Pennsylvanians from engaging in the African slave trade, selling indentured Blacks out of the state, kidnapping free Blacks, removing a pregnant slave to a slave state so that her child would be born a slave for life, or selling slaves away from their spouses.[203] This last provision was unique in American slave law, as it formally recognized the legitimacy of slave marriages.

CONCLUSION

In 1775, as the Revolution began, slavery was legal in every American colony, Blacks were universally considered "enslavable," and there was no organized political opposition to slavery in England or the American colonies. Members of some faiths opposed slavery, free Blacks and slaves naturally did, and some proto-revolutionaries, like Benjamin Rush and Thomas Paine, were openly hostile to slavery. In Britain, political actions against slavery were mostly limited to attempts to slow down or stop the African slave trade,[204] but these projects were singularly unsuccessful. The slave trade was simply too profitable to consider ending it. While the Court of Kings Bench in England had made it clear that slaves brought to the mother country were entitled to freedom, Lord Chief Justice Mansfield also supported the African slave trade and the enslavement of Blacks in the thirteen mainland colonies and Britain's other New World colonies, including Canada and the Caribbean. Indeed, the enslavement of Africans and their American-born descendants was legal, vibrant, and profitable throughout the Americas, from Spanish Argentina to British Canada.

In 1765, on the eve of the Revolutionary period, free Blacks in most of the northern mainland colonies had some rights, but most were at best residents or "denizens" and could not really even be considered second class citizens. Some were veterans of the Seven Years' War, which the colonists called the French and Indian War. As such, they were possibly considered part of the political community, but there is no evidence they voted. The

---

201 Butler v. Hopper, 4 Fed. Cas. 904 (1806).

202 An Act to Explain and Amend an Act, Entitled, "An Act for the Gradual Abolition of Slavery," 1788 Pa. Laws 586, 589.

203 *Id.* at §§ 4, 2, 3, 6, 7, & 8.

204 In addition to acts in Virginia, there were petitions against the trade circulating in Pennsylvania. *See* NASH, *supra* note 171, at 39–43.

status of free Blacks in the South was worse. While private manumission was possible in the northern colonies, it was illegal in Virginia[205]—the colony with the most slaves—and North Carolina. Limited manumission was possible in South Carolina and Maryland. Almost all Blacks throughout the colonies were enslaved. For example, in 1765, Philadelphia—the most cosmopolitan city in the colonies—had 1,400 slaves and only 100 free Blacks.[206]

The Revolution altered the status of Blacks. By 1783, there were only 400 slaves in Philadelphia and about 1,000 free Blacks. By 1804, every northern state had either abolished slavery outright or passed laws to set it on the course of extinction. Gradual emancipation meant that some masters would keep their slaves to the bitter end, but in most places the new laws stimulated manumissions. In New York the slave population declined rapidly after the passage of that state's gradual abolition act, while the free Black population grew dramatically.[207] The laws also affected social norms and legal rights, with Blacks participating in public life, serving in the militias, and voting—and, as noted above, at least one African American was elected to public office.

The Revolutionary-era thus changed the culture and rights of people of color in the United States. The history of race relations in the United States is rooted in slavery. The legal history of Black rights—and the rights of other minorities—begins with emancipation in the Revolutionary era. If there were no free Blacks, if virtually all Blacks were slaves, then there would have not been any debate over Black rights, because generally slaves had no rights. They were people without rights.

As noted earlier, in *Dred Scott* Chief Justice Roger B. Taney infamously declared that at the founding all African Americans "were considered as a subordinate and inferior class of beings" who "had no rights or privileges but such as those who held the power and the Government might choose to grant

---

205 In 1782, Virginia allowed masters to voluntarily manumit their slaves for the first time in more than a century. An Act to Authorize the Manumission of Slaves, ch. 21, 1782 Va. Acts 39. The law limited manumissions to able-bodied adult slaves under the age of forty-five and allowed these free people to be sold for limited terms if they could not pay their taxes. Masters manumitting slaves had to pay registration fees and could be charged to maintain their former slaves if they could not support themselves. This was not a civil rights law, but more of a grudging admission that some Virginia slaveowners no longer wanted to own slaves. The passage of this law led to a massive growth in the free Black population in Virginia, as the number of free Blacks grew from an estimated 2,000 to over 30,000 by 1810. However, in 1805 Virginia changed its laws and the growth of the free Black population slowed to a trickle. An Act to Amend the Several Laws Concerning Slaves, ch. 63, 1805 Va. Acts 251–253.

206 NASH, *supra* note 171, at 38.

207 *See* GIBSON & JUNG, *supra* note 100, at tbl. 47.

them."[208] Taney asserted Blacks were "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 for his benefit."[209]

If he had been writing about the American colonies before the Revolutionary era, Taney would have been mostly (but not completely) correct. But the history of the Revolutionary era shows that Blacks had been acting as citizens and participated in public life for more than a decade before the Constitutional Convention opened. Blacks had served in the state militias and in the Continental Army and Navy during the Revolution. Military service was an obligation of citizens. The Black veterans of the Revolution were clearly citizens in many states. Had Taney been a better scholar and interested in the reality of Black rights in the United States, he would have known this. In 1855, just two years before Taney wrote his opinion in *Dred Scott*, the Black abolitionist William C. Nell published one of the first serious books on the history of Blacks in the United States: *The Colored Patriots of the American Revolution*.[210] Nell had spearheaded the successful campaign in Massachusetts to ban segregation in the public schools. The most famous novelist in the nation, Harriet Beecher Stowe, wrote an introduction to Nell's book, while the great abolitionist orator (and Harvard trained lawyer) Wendell Phillips wrote a second introduction to a paperbound "pamphlet" edition of the book.

Similarly, as the story in Pennsylvania, Massachusetts, New York, and other new states shows, by 1787–88 when the Constitution was written and ratified, free Blacks voted in six northern states, and also in North Carolina and probably Maryland—the Chief Justice's home state.[211] In Pennsylvania, even slaves had some legal protections and rights in the Revolutionary era. The Revolution led to the first Civil Rights revolution in the United States.

Chief Justice Taney of course ignored or misrepresented this history because he was determined to "prove" that Blacks could never be citizens of the United States, and he was equally determined to give slavery even more protections than the Constitution afforded the institution. For Chief Justice Taney, Black history did not matter.

---

208 60 U.S. 393, 404–05 (1857).

209 *Id.* at 407.

210 WILLIAM C. NELL, THE COLORED PATRIOTS OF THE AMERICAN REVOLUTION, WITH SKETCHES OF SEVERAL DISTINGUISHED COLORED PERSONS: TO WHICH IS ADDED A BRIEF SURVEY OF THE CONDITION AND PROSPECTS OF COLORED AMERICANS (Boston, Robert F. Walcutt, 1855). Available at *Documenting the American South* (1999), UNIV. N.C. CHAPEL HILL, https://docsouth.unc.edu/neh/nell/nell.html [https://perma.cc/7ENX-9BMN].

211 *See* JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860 (1943)

Taney's overreach in *Dred Scott* backfired. The decision invigorated northern opposition to the spread of slavery and offended an enormous number of northerners. The vast number of northerners were not ready to accept social equality for Blacks, or even their participation in electoral politics. But many were also unwilling to deny them basic legal rights.

Abraham Lincoln became the voice of these attitudes. Antebellum Illinois, where Lincoln lived, was one of the most racist states in the North. When seeking public office, Lincoln was not in a position to argue for an end to southern slavery or for northern Black political and social equality. In his 1858 Senate campaign, running *against* Taney's opinion in *Dred Scott*, Lincoln travelled a careful line—opposing social equality, interracial marriage, and Black suffrage, but supporting the promise of the Declaration of Independence for all Americans, and arguing that Blacks should have basic economic and legal rights. In a debate with Stephen A. Douglas, after denying that he favored Black suffrage or racial equality, Lincoln asserted:

> but I hold that, notwithstanding all this, there is no reason in the world why the negro is not entitled to all the rights enumerated in the Declaration of Independence—the right of life, liberty and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas that he is not my equal in many respects, certainly not in color—perhaps not in intellectual and moral endowments; but in the right to eat the bread without leave of anybody else which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every other man.[212]

Lincoln lost in 1858 because senators were elected by the state legislature, and the Illinois legislature was gerrymandered to overrepresent the conservative Democratic counties in the southern part of the state. But Lincoln's articulate evisceration of Taney's opinion catapulted him to the Republican presidential nomination and the White House.

Lincoln was the first president to openly articulate his personal and political hatred for slavery, declaring, "if slavery is not wrong than nothing is wrong."[213] The election of a man who had said that slavery should be put "in the course of ultimate extinction"[214] led to secession, civil war, and ultimately the Fourteenth Amendment, which reversed *Dred Scott*, by declaring that "All persons born or naturalized in the United States, and

---

212 3 COLLECTED WORKS, *supra* note 149, at 249. Lincoln's comment on Blacks not being equal to him "in color" illustrates his deft political skills. Campaigning in Illinois, where Blacks had few rights and there were few opponents of slavery, he was able to parry Senator Douglas's race-baiting without actually saying anything meaningful.

213 Lincoln to Albert G. Hodges (Apr. 4, 1864), 7 COLLECTED WORKS, *supra* note 149, at 282.

214 Abraham Lincoln, *A House Divided, Speech at Springfield, Illinois* (June 16, 1858), 2 COLLECTED WORKS, *supra* note 149, at 461.

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[215]

During the debates over this Amendment, some senators and representatives wanted to limit the citizenship clause to White people and people of African ancestry. While these tepid supporters of equality recognized the need to make Blacks citizens—especially after more than 200,000 of them served in the Army and Navy during the Civil War—they wanted to exclude the Chinese, who California Congressman William Higby called "a pagan race."[216] But in 1866, when this debate took place, the Republican majority in Congress was in no mood to prevaricate about race and racism—the ideology that had led the South to secede and to start a war that slaughtered more than 630,000 Americans.

Taney's racist overreach in *Dred Scott* and the creation of Confederacy on the basis of White supremacy[217] led to the expansive language of Section 1 of the Fourteenth Amendment and set the stage for "a new birth of freedom," to use Lincoln's language,[218] and ultimately civil rights laws. The majority in Congress favored a broad notion of citizenship, as Pennsylvania Senator Simon Cameron made clear in 1869, after he returned to the Senate following his service as Secretary of War and U.S. Ambassador to Russia during the Civil War. Cameron argued that citizenship and equal voting rights "invites into our country everybody; the negro, the Irishman, the German, the Frenchman, the Scotchman, the Englishman, and the Chinaman."[219]

Cameron's understanding of the amended Constitution reversed Taney's lifelong commitment to denying rights to Blacks, and, by implication, to Asians and other non-Whites who might come to the United States. His understanding would set the stage for the Supreme Court affirming in *United States v. Wong Kim Ark*[220] that "all" persons born in the

---

215 U.S. CONST. amend. XIV, § 1.

216 Cong. Globe, 39th Cong., 1st Sess. 2756 (1866) *quoted in* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Law*, 3 ASIAN L.J. 55, 80 (1996). For a greater discussion of this debate, see Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.–KENT L. REV. 1019, 1024–29 (2014).

217 I have detailed this ideology in Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449–478 (2012).

218 Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863), http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm [https://perma.cc/AQ4R-P4ZR].

219 WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 87 (1988).

220 169 U.S. 648 (1898).

United States, except the children of diplomats, are citizens at birth.[221] Cameron's understanding also reflected the partial fulfillment of the civil rights movement that began during the American Revolution. Unfortunately, it would be an incomplete revolution for almost two centuries, and while the legal structure has changed, social, political, and economic forces continue to undermine equality. We have come a long way since 1775, when slavery was legal in all the thirteen new states and equality was unknown. But we are not there yet.

221 *See* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021) (examining the implications of *Wong Kim Ark* and other case law in defining citizenship status for various groups).