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With Liberty for Some: The Old Constitution and the Rights of Blacks, 1776–1846

Like thousands of other African-Americans, Jupiter Nicholson tasted the fruit of freedom that ripened during the age of the American Revolution. Born into slavery in North Carolina, Nicholson, his wife, and his parents were freed by their owners sometime in the 1780s. Taking advantage of his liberty, Nicholson went to work as a sailor, trying to scrape together enough money to buy a farm and acquire the economic independence that would give substance to his freedom. He soon found, however, that freedom's fruit had a bitter aftertaste. As a growing number of slave-owners—prompted by a combination of religious zeal and revolutionary principle—freed their slaves, many prominent North Carolinians feared that slavery was being undermined from within. In response, the legislature reiterated its restrictions on manumission: slaves could be freed only as a reward for meritorious service and all manumissions must be approved by a county court. Moreover, it authorized citizens to seize blacks who had been freed illegally and to sell them into slavery. Attracted by the prospect of a quick dollar, many white men began to seize illegally freed blacks, quickly turning the dream of freedom into a nightmare for Nicholson and other free blacks. Coming ashore one day about two years after he had been freed, Nicholson was set upon by armed whites who chased him with dogs. Although he eluded the slavecatchers and fled with his wife to Portsmouth, Virginia, his parents and his brother

were not so fortunate, falling into the hands of whites who returned them to bondage.

Nicholson and his wife found refuge in Portsmouth, where they established a home and lived in relative safety as free persons of color, for four years. Yet they could not escape the reign of terror unleashed by the North Carolina legislature; any day slavecatchers from North Carolina might cross the Virginia border, track them down, and carry them back to slavery. Seeking greater security, they left Virginia in the early 1790s and settled in Philadelphia, which had a reputation among blacks as a "city of refuge."¹ A bustling seaport situated in a state that had adopted a program of gradual emancipation during the preceding decade, Philadelphia offered blacks a livelihood and the pure air of freedom. Yet even in Philadelphia, black emigres found security elusive. In 1793—about the time Nicholson and his wife arrived there—the United States Congress bowed to the demands of southerners and passed the Fugitive Slave Act. The law authorized slaveowners to seize runaway slaves who had fled to free soil and take them before federal or state judges, who were to issue warrants authorizing them to return fugitives to bondage. Because it did not afford alleged fugitives an opportunity to prove that they were free, the act made free blacks like Jupiter Nicholson vulnerable, even in a haven of freedom like Philadelphia. Indeed, this vulnerability was underscored in late 1796, when a North Carolina slavecatcher came to Philadelphia and arrested a black man who had been illegally freed by his owner, was subsequently captured and returned to slavery, and then regained his freedom and fled to the North.

Alarmed by the arrest, Nicholson and three other blacks who had sought refuge in Philadelphia immediately turned to Absalom Jones. As a founder of the city's Free Africa Society and its African Church, Jones had helped to forge a sense of identity and community among Philadelphia blacks and was an obvious source of assistance. He undoubtedly alerted members of the society and the church, warning them to be on the lookout for slavecatchers and to be ready to hide neighbors who were in danger. Jones also used the occasion as an opportunity to call Congress's attention to the evils of the Fugitive Slave Act. In the first petition to Congress by African-Americans, Jones described the terror of men and women threatened with reenslavement after having once had their "human right to freedom . . . restored" and called on lawmakers to honor the nation's commitment to liberty and natural rights. "May we not be allowed to consider this stretch of power, morally and politically, a

Governmental defect, . . ." he asked, "and . . . is not some remedy for an evil of such magnitude highly worthy of the deep inquiry and unfeigned zeal of the supreme Legislative body of a free and enlightened people?"²

Jones's eloquent appeal to revolutionary principles failed to move the members of the House of Representatives. Although George Thatcher of Massachusetts moved to instruct the committee on commerce to study the matter and suggest amendments to the Fugitive Slave Act, southerners adamantly resisted any action that might weaken the law. William L. Smith of South Carolina led the offensive against Thatcher's motion, arguing that the petitioners were "not entitled to the attention of this House" and demanding that their petition be dismissed.³ In the face of southern opposition, northern congressmen broke ranks and Thatcher's motion went down to defeat, 50–33.

Congress's action was symptomatic of the retreat from the equalitarian possibilities of the American Revolution which was already well underway. Revolutionary principles had fueled a potent attack on slavery and racial subordination during the 1770s and 1780s. Yet slavery and racism were deeply rooted in the new Republic, proving to be more than a match for revolutionary principles. By the late 1780s the practical exigencies of nation building led to a compromise of revolutionary principle that soon transformed the American constitutional-legal order into a bulwark of slavery and white supremacy. As a result, the chains of bondage were tightened on slaves in the plantation South, and free blacks like Jupiter Nicholson lived, even in the North, under the shadow of slavery in a land of liberty.

Revolutionary Ideals and Political Realities

The dream of freedom, security, and opportunity, which Jupiter Nicholson found so elusive, had its genesis in the momentous changes that transpired during the age of the American Revolution. In the heat of revolution, Americans forged doctrines of liberty and equality that quickly became an integral part of American political culture and sparked widespread criticism of slavery. The intellectual currents of the Enlightenment deeply influenced the attitudes and assumptions of educated Americans as well as Europeans during the second half of the eighteenth century. Enlightenment thinkers asserted that in the mythical state of

nature—before the formation of society and government—all individuals were born free and equal and had enormous capacity for improvement. They believed that human beings were malleable and contended that differences among individuals and cultures were the result of environment and circumstance. This helped them explain the gap between human capacity for improvement and the reality of an imperfect world. The evil and misery experienced by humanity was not a result of defects in human nature but a product of superstition, bigotry, and flawed social and political institutions inherited from the past. Reason and institutional reform, however, could remove these barriers to progress and secure human happiness. For European intellectuals and many of the Americans whom they influenced, slavery was a perfect example of an inherited institution that upset the natural order and stifled progress: it denied the natural equality of all persons, produced incalculable suffering, and denied slaves the opportunity for mental and moral improvement. Once removed from the debasing effects of slavery, they maintained, blacks had the potential to become the equals of whites.

Powerful religious currents also encouraged antislavery sentiment. During the Revolutionary Era the Quakers and the two most rapidly growing denominations in America, the Baptists and Methodists, subjected slavery to withering criticism. These groups emphasized the importance of humility, the equality of all persons in the eyes of God, and the imperative for Christians to treat others in the spirit of Christian love. This led them to criticize slavery as an embodiment of hierarchy and coercion that flew in the face of Christ's great commandment: that Christians should love their neighbors. Because they believed that slavery was a sin, they often attacked it with a sense of urgency, pressing members of their congregations to free their slaves and organizing antislavery societies.

Ideas unleashed by the Revolution interacted with these beliefs to strengthen antislavery sentiment. Between 1763 and 1776, patriot leaders charged that Parliament repeatedly denied the colonists rights guaranteed by the British Constitution. Parliamentary legislation, they argued, limited their right to jury trial and peaceable assembly, eroded constitutional restrictions on a standing army, and, most importantly, deprived them of liberty and property without their consent. These acts were ominous because they suggested that Parliament was under no restraints in dealing with the colonists and could govern them arbitrarily.

Without rights, subject to arbitrary power, merely enjoying such privileges as their parliamentary masters chose to give them, Americans repeatedly asserted, they were reduced to slavery. Parliament's program was clearly "a system formed to enslave America," the Continental Congress declared in 1774. A year later, in the Declaration of the Causes and Necessity of Taking Up Arms, Congress asserted that Americans were "resolved to die freemen rather than to live Slaves."⁴

Patriots did not refer to the chattel slavery that blacks suffered, but, instead, invoked a political concept that was ubiquitous in eighteenth-century polemical writing on both sides of the Atlantic. As the historian John Phillip Reid has noted, "To warn against slavery was the way Britons raised questions about constitutionality."⁵ Nevertheless, many Americans realized that as long as they held half a million blacks in bondage their defense of liberty rang hollow and argued that fidelity to revolutionary principles demanded abolition. Combined with Enlightenment notions of the natural equality of all persons and evangelical warnings that British tyranny was divine punishment for the sin of slavery, the rhetoric of rights and liberty convinced many Americans to join the attack. A Virginia conference of Methodists, acting in the wake of the Revolution to bar slaveholders from communion, suggested this melding of secular and religious ideas when it noted that slavery was "contrary to the Golden Law of God . . . and the inalienable Rights of Mankind, as well as every Principle of the Revolution. . . ."⁶

Revolutionary thought contained an equalitarian emphasis that reinforced antislavery arguments. As Americans rejected monarchy in 1776, they embraced republicanism, a set of ideas with far-reaching implications. Republican government, according to American writers, was more than government purged of monarchy and resting on popular will. Its survival required a virtuous people willing to sacrifice for the common good. Virtue, they claimed, could only exist in a society that did not suffer great extremes of wealth. The lure of opulence would make the very rich self-indulgent and reluctant to sacrifice, while the misery of the poor would provide pliable material for self-serving demagogues. Although republicanism did not lead to leveling programs designed to redistribute wealth, it did suggest that some degree of material equality was necessary for the survival of republican government. Republicanism also demanded that government promote the common good and refuse to serve the special interests of the privileged few, a principle asserted in the

revolutionary state constitutions. Hostility to privilege carried with it the implication that all men—few extended the principle to women—were entitled to equal rights.

During the decades following the Revolution, ideals of liberty and equality came squarely into conflict with the realities of slavery and racial subordination, systems supported by powerful economic interests and entrenched social mores. When the Revolution began, slavery existed in all of the American colonies. Slaves were most numerous in the South, where they were substantial minorities (thirty to forty-two percent) in Virginia, North Carolina, and Maryland and a majority (sixty percent) in South Carolina. Slave agricultural laborers and craftsmen were essential to the plantation economies of these states. Even in the North, where they ranged from less than two percent of the population in Massachusetts to more than ten percent in New York, slaves played an important economic role because of the general shortage of labor. Moreover, white attitudes toward blacks, which had taken root during the previous century, reinforced slavery and the system of racial hierarchy which it created. The vast majority of blacks were slaves who occupied a degraded and subordinate position, and most whites viewed them as ignorant, shiftless, and lazy. Such attitudes legitimized existing social arrangements and provided ready arguments against emancipation: once freed from white control, blacks would become paupers and criminals and threaten social stability.

Although they faced formidable obstacles, antislavery advocates made great strides toward implementing the truths proclaimed self-evident by the Declaration of Independence. They achieved their greatest success in the North where there were few slaveholders and blacks were not numerous. Vermont, with a slave population of fifty, quickly abolished slavery in its 1777 Constitution. In Massachusetts, the Supreme Court of Judicature used the equalitarian language of the state's 1780 constitution ("all men are born free and equal") to undermine the institution in the early 1780s. Northern opposition to abolition was not always so completely or quickly overcome, however. Most northern states passed post-nati abolition laws that stipulated that slaves born prior to enactment of the legislation would remain in slavery while those born thereafter would be freed when they reached adulthood. Pennsylvania (1780), Connecticut (1784), and Rhode Island (1784) quickly passed post-nati bills, but New York (1799) and New Jersey (1804) acted only after twenty years of pressure from well-organized antislavery groups. The hard-earned vic-

tory over slavery in the North was significant because it transformed slavery from a national to a sectional institution.

Southerners also subjected slavery to criticism. Baptists, Methodists, and Quakers, groups which drew members primarily from nonslaveholders, led the way. Although slaveholders refrained from calling for abolition, some acknowledged that slavery violated the ideals of the Revolution, supported legislation permitting individual owners to free their slaves, and manumitted some of all of their own slaves. In Virginia, where private manumission was widespread, the free black population grew from 2,000 in 1782 to 20,000 in 1800. Nevertheless, the private acts of well-intentioned slaveholders did not imperil the institution; 345,000 Virginia blacks remained in bondage in 1800. Indeed, slavery was the social and economic foundation of the planter class, the most influential group in Virginia and the rest of the South, and it was economically important to tens of thousands of farmers who owned one or two slaves. Moreover, because blacks constituted between thirty and sixty percent of the population of the southern states, even non-slaveholders—conditioned by racism to believe that blacks were incapable of freedom—equated abolition with social chaos. As a result, no southern legislature seriously considered even a gradual emancipation law during the late eighteenth century.

Antislavery reformers also encountered formidable obstacles to their effort to guarantee the rights of free blacks. Most whites viewed free blacks as pariahs, generally excluding them from their churches, theaters, and inns and relegating them to unskilled, low-paying jobs. In the South, antiblack feeling prompted lawmakers to consign free blacks to an inferior legal status; throughout the region they were prohibited from testifying against whites or having sexual relations with them. In addition, most southern states barred blacks from voting and serving in the militia, and South Carolina and Georgia explicitly denied them citizenship.

Although they experienced social and economic discrimination, northern free blacks escaped widespread legal discrimination during the late eighteenth century. They were routinely excluded from the militia, and a 1788 Massachusetts law (which was not enforced) barred them from entering the state. Throughout the North, however, free blacks enjoyed the same right to vote and testify as whites, were eligible for citizenship on the same terms as whites, and generally had the same legal rights and obligations as whites. In 1785, when the New York legislature passed a

bill denying free blacks the right to vote and to testify against whites and prohibiting interracial marriages, the state's Council of Revision vetoed it. According to the council, the measure created "an aristocracy of the most dangerous and malignant kind, rendering power permanent and hereditary in the hands of those persons who deduce their origin through white ancestors only."⁷ Thus revolutionary principles did occasionally prevail over racial prejudice and class interest.

The Constitutional Convention, however, was not one of those occasions. The delegates who met in Philadelphia during the summer of 1787 believed that the weakness of the existing national government had created an economic and political crisis that threatened America's republican experiment. Most agreed that the Articles of Confederation was the root of the problem. A new Constitution creating a strong national government was imperative in order to achieve economic recovery, promote prosperity, cope with threats from abroad, reestablish the public credit, and restrain the states from interfering with property rights. Although many delegates expressed reservations about slavery and a few passionately denounced it, there was little likelihood that the convention would take meaningful antislavery action. Constitutional reform and continued union were impossible without the support of southerners, and southern delegates were unwilling to accept constitutional provisions that threatened the economic well-being of the South and the existence of its powerful planter class. Consequently, the price of constitutional reform was northern concessions on the slavery issue.

Southerners won a significant victory in debates on representation in Congress. Although they failed to have slaves counted fully for purposes of determining representation, southern delegates did win acceptance of a provision that apportioned representatives among the states "according to their respective Numbers, which shall be determined by adding the whole Number of free Persons . . . and . . . three fifths of all other Persons."⁸ Because these "other persons" were slaves, northerners objected to the three-fifths clause, charging that it allowed southerners to use property to increase their clout in the national government. Southerners, however, insisted on the extra political security that the three-fifths clause conferred. North Carolina's William Davie, for example, explained that he "was sure that N. Carola. would never confederate on any terms that did not rate them [slaves] at least 3/5. If the Eastern [i.e., northern] States meant . . . to exclude them altogether the business was at an end."⁹ In the end, northern delegates accepted the three-fifths

clause as the price of a strengthened national government that they deemed vital to their interests.

Inclusion of the three-fifths clause rested solely on considerations of sectional power and had nothing to do with whether slaves—who could not vote—would be represented in the national government or whether they were considered persons in the eyes of the law. The South's share of population and therefore seats in the House of Representatives increased from forty-one percent when only free persons were counted to more than forty-six percent under the three-fifths formula. This increased the region's strength in the House and also in presidential politics because a state's presidential electors were equal to the number of its senators and representatives. Consequently, it became an important tool that southerners would use during the next seventy years to bend national policy to their will and make the Constitution a proslavery document.

The convention also bowed to the South on the infamous slave trade. In early August, after the convention had been in session for more than two months, delegates considered a controversial proposal denying Congress authority to enact "prohibitions on ye Importations of such inhabitants or people as the sevl. States think proper to admit" or "duties by way of such prohibition."¹⁰ Representatives from South Carolina and Georgia, eager to protect the flow of slaves from Africa, were the principal supporters of this measure. A number of northern delegates, however, objected because it protected the most brutal aspects of slavery: tearing Africans away from their homeland; crowding them into the hot, foul holds of ships where they suffered unspeakably and many died; and selling them like cattle at auctions in America. Gouverneur Morris, the voluble Pennsylvania delegate, charged that it protected "the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages."¹¹ These northerners were joined by delegates from Maryland and Virginia who not only regarded the slave trade as immoral, but represented states that had a surplus of slaves and stood to benefit from the higher prices that would result from closing the African trade.

Although debate became acrimonious, delegates accepted a compromise. New Englanders agreed to support an obliquely worded provision prohibiting congressional interference with the slave trade for twenty years: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the

Congress" prior to 1808.¹² In return, the South Carolinians supported deletion of a provision requiring two-thirds majorities for Congress to pass commercial regulations. The New Englanders thus abandoned their scruples against the slave trade in order to win a concession vital to northern commercial interests. Connecticut's Oliver Ellsworth captured the spirit of pragmatism that paved the way for the compromise: "let every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves—What enriches a part enriches the whole, and the States are the best judges of their particular interest."¹³

On the heels of the slave trade compromise, the convention quickly agreed to another southern demand. Slaveholding delegates in the convention knew that their slaves, far from being docile, frequently ran away, and they sought a constitutional remedy. Pierce Butler and Charles Cotesworth Pinckney of South Carolina moved adoption of a clause requiring "fugitive slaves and servants to be delivered up like criminals."¹⁴ The following day, delegates adopted the Constitution's fugitive slave clause with little debate. As finally approved, it was an indirect and obscurely worded guarantee: "No Person held to Service or Labour in one State, under the Laws thereof, escaping to another, shall, in consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."¹⁵

Delegates conferred perhaps the greatest Constitutional protection on slavery when they granted Congress enumerated powers rather than giving it plenary legislative authority. They did not intend to limit Congress to exercise of those powers expressly listed in the Constitution. Indeed, the framers gave it authority "to make all laws which shall be necessary and proper" for carrying out any of the enumerated powers. This broadened national authority and gave Congress considerable flexibility without threatening slavery. The nature of Congress's enumerated powers precluded it from outlawing slavery or from interfering with its day-to-day operation in any state that chose to make it lawful. The framers, concerned more with union than with liberty, thus made freedom a matter of local option.

When the final gavel fell at Philadelphia, delegates had created a framework of government that tacitly recognized slavery, offered protection to it, and, most important, strengthened the hand of its advocates in the national government. Yet it would be wrong to view the Constitution

of 1787 as uniformly and consistently proslavery; the framers created an open-ended document that, while favorable to slavery in many respects, contained a reservoir of antislavery potential. Because many of the framers believed, with James Madison, that it would be "wrong to admit in the Constitution the idea that there could be property in men,"¹⁶ they refrained from including the words "slave" or "slavery" and thus refused to give explicit recognition to the institution. Moreover, the Constitution did not require the national government to promote slavery or, as southerners would subsequently argue, refrain from any action hostile to it. For example, the slave trade clause prohibited Congress from interfering with the importation of slaves into the original states until 1808. This suggested that after that date Congress could use its power to regulate commerce (a power denied it in the Articles) to end the trade. Indeed, it did so at the earliest possible moment. Moreover, the fugitive slave clause did not require or explicitly authorize Congress to help slaveowners recapture runaways. The wording of the clause and its placement in Article IV, Section 2 (which deals with interstate relations) suggested merely that states ought not prevent slaveowners from reclaiming fugitives.

Several other features of the Constitution mitigated the concessions to slaveholders. Because Americans had begun by the late eighteenth century to migrate to the Trans-Appalachian West, the future of slavery depended on whether it moved with the settlers. The Northwest Ordinance of 1787, passed by the Confederation Congress as the Constitutional Convention met, prohibited slavery in the territories north of the Ohio River. This, coupled with the postrevolutionary emancipation acts of the northern state legislatures, was an important stride toward making slavery a local—a peculiar—institution rather than the national institution it had been in 1776. The Constitution gave Congress authority to carry out the spirit of the Northwest Ordinance and further circumscribe slavery. It empowered Congress "to make all needful Rules and Regulations respecting the Territories," thus conferring authority to exclude slavery from the western territories, thereby containing it in the southeast. Moreover, the Bill of Rights, the ten amendments which became part of the Constitution in 1791, proclaimed a host of fundamental liberties—freedom of speech, the right to jury trial, protection against unreasonable search and seizure, the guarantee of due process of law—which were hostile to the arbitrary power essential to maintain slavery.

This is not to suggest—as abolitionists and Republicans would do

later—that the framers were closet abolitionists who created a thoroughly antislavery Constitution. They made important concessions to slavery that proslavery advocates later effectively exploited. Nevertheless, the antislavery sensibilities of many delegates placed limits on how far they would go to protect slavery. Northern delegates made concessions to slaveholders' demands, but they did not seek to create a document that would promote slavery. Moreover, the framers did not carve the Constitution in stone. They wrote it in general language that was susceptible to a variety of interpretations. And they created a document that was inherently political because it defined governmental authority. Of necessity, such a document would evolve as rival political forces mustered their strength to shape the general language of the Constitution to their ends, whether proslavery or antislavery.

Toward a Proslavery Constitution

Between ratification of the Constitution and the Mexican War (1846–1848), the American political system worked against realization of the Constitution's antislavery potential. As they had at the Philadelphia Convention, southern political leaders doggedly insisted that the national government show solicitude for slavery and challenged measures that threatened the institution. Although northern politicians sometimes resisted these demands, more often they backed down or broke ranks in the face of southern initiatives. Confronted with southern assertiveness, many northern leaders believed that preservation of the Union required them to make concessions to southerners on an issue so vital to their interests. Moreover, the growth of a two-party system served to mute criticism of slavery within the national government. Between 1795 and 1815, as Federalists and Republicans vied for power, and, again, from 1832 until 1854, as Democrats and Whigs dominated the political scene, both major parties sought support in the North and the South. Consequently, party leaders generally avoided action with respect to slavery that would alienate southerners and splinter their party organizations.

The antebellum party system strengthened the South's hand in another way. The Republican party of Jefferson and Madison, which came to power in 1800 and remained dominant into the 1820s, attracted crucial support in the North, but drew most of its strength from the South, guaranteeing southerners a powerful influence over national policy. In

the aftermath of the War of 1812, the demise of the Federalist opposition encouraged factionalism in Republican ranks and quickly led to a breakdown of party unity. This was a blow to southerners, undermining the bisectional political alliance that had served to protect slavery. Indeed, in 1819, when Missouri sought admission to the Union as a slave state, northerners in the House of Representatives closed ranks in an effort to block the spread of slavery. The Missouri crisis precipitated bitter sectional conflict, arrayed northern politicians against slavery, and resulted in legislation (the Missouri Compromise of 1820) excluding slavery from the northern portion of the vast Louisiana Purchase Territory. Nevertheless, southern leaders quickly recovered. In the late 1820s and early 1830s, supporters of Andrew Jackson—most notably New York's Martin Van Buren—forged a powerful new coalition, the Democratic party. Resting on a strong southern base, it also attracted considerable support in the North and the rapidly growing Midwest. Despite competition from a formidable Whig opposition, it became the dominant force in antebellum politics, controlling the White House for all but eight years between 1829 and 1861. Because southerners played a prominent role in party councils, Democratic hegemony guaranteed a national policy favorable to slavery.

Northern politicians were able to make concessions to southerners because of the attitudes of their constituents. A small minority of northerners worked actively against slavery, but the majority was not deeply concerned about the institution. Some were proslavery, others tolerated slavery, and still others opposed slavery in the abstract but placed antislavery low on their list of priorities. A variety of factors were responsible for this state of affairs. Many settlers in Ohio, Indiana, Illinois, and Iowa had been born in the South, and they and their descendents were generally sympathetic with southern mores. Apart from southern immigrants, racism was strong throughout the North and led many to have little sympathy with enslaved blacks. In fact, many northerners feared that emancipation in the South would lead to a northward migration of members of a despised race. Still other northerners believed that acceptance of slavery was the cornerstone of the Union and were willing to make concessions to the South on slavery in order to preserve national unity.

The national government began its support for slavery shortly after George Washington assumed the presidency in 1789. Presidents and Congresses allowed slavery to take root in the Old Southwest (the area

south of the Ohio River stretching from the Appalachian Mountains to the Mississippi River). In 1789, Congress accepted North Carolina's cession of its western lands to the United States, even though the grant stipulated that "no regulation made or to be made shall tend to emancipate slaves."¹⁷ Lawmakers organized territories in the region without reference to slavery, fully aware that immigrants from the older southern states would establish slavery, and subsequently admitted these territories to the Union as slave states. In 1801, shortly after the government moved to Washington, D.C., Congress decreed that the laws of Virginia and Maryland, which recognized slavery, should remain in force in the District of Columbia. The nation's capital thus became a slave city, replete with a slave market where human beings were bought and sold, and city officials, acting under congressional authority, enforced laws supporting the institution.

Federal officials also worked to insulate slavery from attack. During the 1830s radical abolitionists in the North subjected slavery and slaveholders to withering criticism in hundreds of pamphlets and thousands of petitions to Congress. Southerners were offended by this criticism and feared that it would incite slave insurrection. Although Congress refused to enact legislation excluding abolitionist pamphlets from the mail, it did not object when President Andrew Jackson's postmaster general authorized local postmasters to destroy antislavery tracts. Though a violation of the postal laws and the First Amendment's guarantee of freedom of the press, postal officials continued to enforce the policy until the Civil War. Faced with abolitionist petitions, Congress also acted with flagrant disrespect for the Constitution. In 1836, the House of Representatives adopted a resolution, popularly known as the "gag rule," that prohibited members from reading or even discussing petitions concerning slavery. Although the rule abridged the right "to petition the Government for a redress of grievances" which was guaranteed by the First Amendment, the rule remained in force until 1844.

Congress also bolstered slavery by helping slaveowners secure the return of runaway slaves. In 1793, after little debate, Congress passed "An Act respecting fugitives from justice, and persons escaping from the service of their masters." The first part of the law implemented the constitutional provision requiring states to extradite fugitives from justice. Without providing any federal enforcement machinery, it simply admonished state officials to return fugitives from justice when requested to do so by the governor of another state. The fugitive slave clause, like

the extradition clause, was a directive to the states and did not expressly authorize congressional action. At the insistence of southerners, however, the second part of the 1793 act went beyond admonishing state officials to fulfill their obligation to return runaway slaves. It authorized slaveholders (or their agents) to seize runaways and take them before a United States district judge or any state justice of the peace. After presenting evidence of ownership—either an oral statement or a written affidavit made before a justice of the peace in the owner's home state—the claimant was to be given a warrant authorizing him or her to take the fugitive back to slavery. Alleged fugitives were denied due process of law: they had no right to testify, to command witnesses to appear, or to counsel. By establishing this procedure, Congress not only commanded state and federal officials to aid in the return of runaways but stipulated that they employ the assumptions and procedures of slave state law in doing so. Northern state law presumed all persons to be free and required slaveowners to establish their claims beyond a reasonable doubt. Under the Fugitive Slave Act, however, blacks were presumed to be slaves, and claimants had to provide only minimal evidence that they owned the alleged fugitive. Thus to protect slaveowners Congress gave extraterritorial application to southern state law.

Because of the summary procedure it authorized, the act threatened free blacks as well as runaway slaves. Free blacks who were kidnapped or mistaken for fugitive slaves were denied the procedural means necessary to establish their freedom. This undoubtedly violated the Fifth Amendment's guarantee that no person shall "be deprived of life, liberty, or property without due process of law." As commonly understood by contemporaries, due process obligated the government to follow traditional common law procedures when it deprived persons of life, liberty, or property. Because the Fugitive Slave Act allowed blacks to be denied liberty through *ex parte* testimony (the testimony of only one party to the case) and without the right to counsel or to trial by jury, it violated the common understanding of due process.

Despite criticism of the procedure employed by the law, during the five decades following its enactment the northern states generally cooperated with slaveowners who sought the return of runaways. Nevertheless, many northern legislatures took action to protect free blacks. Some merely passed statutes imposing fines and imprisonment on persons convicted of kidnapping free blacks with the intention of selling them into slavery. Several legislatures went further, however, stipulating that state

judicial officers who heard fugitive slave cases must afford blacks greater procedural protection than required under the Fugitive Slave Act. An 1826 Pennsylvania law, for example, insisted that slaveowners could only take runaways out of the state if they obtained a certificate of rendition from a state or federal judge, thus denying them the right to return fugitives without judicial intervention. The law also provided that in hearings before justices of the peace, slaveowners and other interested parties could not testify and that alleged fugitives were to be given sufficient time to obtain evidence that they were free. Thus Pennsylvania attempted to balance its obligation under the fugitive slave clause with its interest in protecting free black citizens from kidnapping or being condemned to slavery in a kangaroo-court proceeding.

A complicated series of events brought questions concerning the meaning of the fugitive slave clause and the constitutionality of the Pennsylvania statute before the United States Supreme Court in 1842. Margaret Morgan was the daughter of Maryland slaves who had been permitted by their owner to live as free persons. Like her parents, she was not claimed by her owner, married a free black man, and in 1832 moved to Pennsylvania, where at least one of her daughters was born. When Morgan's owner died in 1837, his niece and heiress hired Edward Prigg to go to Pennsylvania and claim Morgan and her children as fugitive slaves. Although Pennsylvania law recognized as free persons all children born in the state, Maryland law provided that slave status passed through the mother, thus making Margaret Morgan and all of her children slaves. Prigg obtained a warrant for the arrest of Morgan and her children, but the justice of the peace before whom they were brought refused to hear the case. Prigg then took matters into his own hands, seizing his prey and carrying them across the Maryland line to slavery.

Subsequently, Prigg was convicted of kidnapping by a Pennsylvania court, and the state supreme court upheld his conviction. In the 1842 case, *Prigg v. Pennsylvania*, he appealed to the United States Supreme Court, contending that the Pennsylvania law under which he was convicted violated the Constitution's fugitive slave clause and the Fugitive Slave Act of 1793. Justice Joseph Story, the distinguished Massachusetts jurist, wrote the opinion for the Court. Although Story personally disliked slavery, he feared that northern impediments to the return of fugitives would produce sectional animosity that might ultimately destroy the Union. Therefore, as the historian Paul Finkelman has shown, he offered a strongly proslavery interpretation of the fugitive slave

clause, sacrificing black rights to the interest of sectional harmony and national unity.¹⁸

The decision upheld the constitutionality of the Fugitive Slave Act. Even though the fugitive slave clause did not expressly authorize congressional action, Story argued that it recognized the right of slaveowners to recover runaways and therefore implicitly empowered Congress to adopt legislation to enforce the right. He also struck down the Pennsylvania law under which Prigg had been convicted, asserting that the fugitive slave clause gave Congress exclusive authority to regulate the return of fugitive slaves (even though it did not give Congress express, much less exclusive, authority to legislate). Therefore, he reasoned, any state legislation on the subject was unconstitutional. Three of the nine justices disagreed on this point, arguing that state legislatures could or must pass laws to help slaveholders regain their property; however, even these justices agreed that the procedure mandated by the 1826 Pennsylvania law created barriers to the return of fugitives and was therefore unconstitutional. Despite this disagreement, the Court clearly suggested that the summary procedure authorized by the 1793 Fugitive Slave Act was constitutional and that state legislation which sought to add procedural safeguards to allow blacks to prove their freedom was unacceptable. When blacks were involved, even when it was possible that they could be free, the Court did not consider it necessary to require Congress to honor the procedural guarantees of the Bill of Rights or to permit state legislatures to compensate for Congress's omission.

A final aspect of the opinion, which went unchallenged, bears mention. Story held that the fugitive slave clause recognized a property right that extended throughout the Union. Therefore, he reasoned, slaveowners and their agents had the right to enter free states, seize fugitives, and carry them back to the South without obtaining judicial authorization. The definition of personal status contained in the law of the southern states thus had extraterritorial force in the free states, regardless of the policy of those states. Moreover, Story's interpretation left free blacks at the mercy of those who had the audacity to claim them as slaves and the power to seize them and carry them out of the state. Any legislation enacted by the states that established mandatory procedures which gave alleged fugitives the opportunity to prove their freedom and protect themselves from enslavement was impermissible.

Ironically, *Prigg* offered blacks some hope. Story's opinion asserted that since justices of the peace were state officers, Congress could not

compel them to enforce the Fugitive Slave Act. States might accept Congress's invitation to have their officials execute the law, but they were not required to do so. Many northern states responded by ordering state functionaries—sheriffs and jailers as well as justices of the peace—to refuse to arrest, hold, and return fugitives. Since there were few federal district judges to enforce the act (generally only two in each state) this aspect of the ruling made it difficult for slaveholders to obtain official assistance in securing runaways. Despite this bright spot, the *Prigg* decision gave explicit constitutional sanction to slavery, eroded the rights of free blacks, and made their liberty precarious. Moreover, the benefit that blacks received from *Prigg* was short-lived; in 1850, Congress gave in to southern demands, passed an even harsher fugitive law, and provided a small army of federal officials to enforce it.

Although fugitive slave legislation posed a special threat, other congressional measures eroded the rights of free blacks. In 1790, when Congress established regulations for immigrants to become naturalized citizens, it excluded blacks. Two years later it limited service in the militia (one of the responsibilities of citizenship in a republic) to whites, and in 1810 denied blacks the right to carry the mail. In 1820 lawmakers authorized white citizens of the District of Columbia to establish a municipal government and to create a legal code for slaves and free blacks. In 1848, when Congress created the Oregon Territory, and again in 1850, when it established the New Mexico Territory, it denied blacks the right to claim federal land there.

Because the national government exercised limited functions during the nineteenth century, state and local governments were far more significant in determining the rights that blacks enjoyed. Moreover, in defining these rights, states operated virtually without restraint by the national government. The Constitution contained no guarantee of equal rights (except to states, which were guaranteed equal representation in the Senate) and few provisions protecting individual rights from infringement by state and local governments. It forbade states to enact ex post facto laws, bills of attainder, and laws impairing the obligation of contracts, but these restrictions offered slender protection to blacks. The Bill of Rights contained a long list of fundamental rights such as freedom of speech, press, and religion; the right to counsel and jury trial; and protection from self-incrimination and unreasonable search and seizure. In *Barron v. Baltimore* (1833), however, the United States Supreme Court ruled that the Bill of Rights had been added to the Constitution to

assuage fears of a powerful national government and served as a restriction on the national government but not on the states.¹⁹ Although state constitutions generally contained provisions similar to those in the national Bill of Rights, state legislatures and courts determined the scope and applicability of such guarantees.

The privileges and immunities clause of Article IV, section 2 ("the Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the Several States") held out the possibility of national protection of individual rights. During the early nineteenth century, however, politicians, judges, and constitutional commentators disagreed over what the clause meant, and the United States Supreme Court did not resolve the dispute. Some, including James Kent of New York, one of the nation's most influential judges and legal writers, believed that it did not create a body of fundamental rights that were protected against violation by the states. Rather, Kent contended, it merely guaranteed that a citizen of one state who entered a second state was entitled to whatever rights that state accorded its own citizens. In Kent's words, the clause "means only that citizens of other states shall have equal rights with our own citizens."²⁰ This reading of the clause neither shielded free blacks from denial of basic rights by the state in which they resided, nor protected them if they ventured into states that imposed discriminatory laws on their own black citizens.

Other judges and legal commentators argued that the clause was designed to protect the fundamental rights of United States citizens. United States Supreme Court Justice Bushrod Washington gave the most thorough statement of this position in his opinion in *Corfield v. Coryell* (1823), a case he decided while sitting as a United States circuit court judge. Equating the rights guaranteed by the privileges and immunities clause with natural rights, he argued that they included those rights which "are, in their nature, fundamental; which belong, of right, to the citizens of all free governments. . . ." Noting that these were "more tedious than difficult to enumerate," Washington explained that they included "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Because these rights were fundamental and existed throughout the nation, presumably citizens were entitled to enjoy them at home as well as in other states.²¹

Even when judges and legislators accepted this approach, it did not offer blacks unassailable protection. Washington himself noted that the fundamental rights he sketched were "subject . . . to such restraints as the government may justly prescribe for the general good of the whole." This had important implications in light of the expansion of state police power during the 1830s and 1840s. Most judges and legal experts agreed that the Constitution divided power into federal and state spheres, and that the police power—the authority to promote the public health, safety, and welfare—lay within the state sphere. Thus states might justify special restrictions on free blacks on the grounds that they were necessary to prevent slave insurrection or to control individuals who were incapable of exercising responsibly rights enjoyed by whites.

A more fundamental problem stood in the way of using the privileges and immunities clause to protect blacks from discriminatory state action: there was no consensus that free blacks were citizens entitled to constitutional rights. The Constitution did not define national citizenship. Some legal writers pointed out that under traditional legal norms birth conferred citizenship and contended that all free persons born in this country were United States citizens. Others argued that state citizenship was controlling and that all state citizens were citizens of the United States. The fact that the Constitution conferred important rights on state citizens seemed to support this view. For example, Article III provided that federal judicial authority extended to cases "between Citizens of different States," suggesting a federal right (to bring suit in federal court) that rested on one's status as a state citizen. Similarly, the privileges and immunities clause, read literally, conferred rights on persons who were state citizens. Because most free blacks were born in the United States and many were state citizens, either of these definitions entitled a significant number of free blacks to United States citizenship.

Most white southerners, however, denied that free blacks were United States citizens. They feared that as citizens, free blacks would be entitled by the privileges and immunities clause to travel freely throughout the South, something that they believed posed a clear threat to slavery. As Philip Barbour, who later served on the United States Supreme Court remarked in 1820, free blacks were "the most dangerous [class] to the community that can possibly be conceived. They are just enough elevated to have some sense of liberty, and yet not the capacity to estimate or enjoy all its rights . . . and being between two societies, above one and below the other, they are in a most dissatisfied state . . . firebrands to

the other class of their own color."²² To protect themselves, southerners argued that the framers had not considered blacks eligible for citizenship and that, consequently, they were not entitled to any rights created by the federal Constitution (including the rights conferred by the privileges and immunities clause). In 1820, for example, Charles Pinckney, who had been a delegate to the Constitutional Convention, asserted, "There did not then [1787] exist such a thing in the Union as a black or colored citizen, nor could I have conceived it possible such a thing could ever have existed in it. . . ."²³

During most of the antebellum period, there was no authoritative resolution of the debate over black citizenship. In the winter of 1820–1821, Congress discussed the issue when Missouri sought approval of a state constitution that barred immigration by free blacks. Northern congressmen argued that this provision was unconstitutional because it denied free blacks rights (to enter any state in the Union and to enjoy the rights of citizenship there) protected by the privileges and immunities clause. Southerners responded that blacks were not U.S. citizens and therefore were not entitled to rights created by the Constitution. Congress failed to resolve the issue, ending the debate by adopting an ambiguous compromise. Shortly after the Missouri debate, Attorney General William Wirt, a southerner, issued an opinion that lent support to the southern position.²⁴ Nevertheless, it had no legal authority and left the question unresolved.

During the 1820s and again in the 1840s passage of state laws requiring incarceration of black sailors who entered southern ports renewed the debate. Because blacks who were citizens of northern states and who claimed to be United States citizens were affected, the laws raised the question of whether blacks were citizens who were protected by the privileges and immunities clause. As in the Missouri debates, however, there was no resolution of the question. In 1823, Justice William Johnson of the United States Supreme Court, while sitting as circuit judge for South Carolina, struck down the South Carolina law, and Attorney General William Wirt issued an official opinion declaring the law unconstitutional. However, both did so on the grounds that it interfered with Congress's power to regulate interstate and foreign commerce and violated the treaty rights of foreign shippers. Neither held that the law violated rights enjoyed by black American sailors as state or United States citizens under the Constitution's privileges and immunities clause.

In the early 1840s, when a congressional committee examined the

constitutionality of the Negro seamen's laws, a majority of its members supported a resolution declaring that the laws violated the rights of free blacks; however, a minority report asserted that blacks were not United States citizens and therefore were not entitled to protection by the privileges and immunities clause. The full House of Representatives rejected the majority's resolution, implicitly endorsing the minority report. Dissatisfied by the House's action, the Massachusetts legislature dispatched lawyers to Charleston and New Orleans to file suits challenging the constitutionality of the laws. This tactic also failed to produce a ruling because angry mobs in both cities ran the Massachusetts emissaries out of town before they could begin litigation.

Slaves, Free Blacks, and the Law

Although the issue of black citizenship remained unresolved, one thing was clear. There were few Constitutional limitations on the manner in which states might treat persons residing within their borders and even fewer if they were black. States, in the North as well as in the South, used this discretion to enact laws denying blacks equal rights.

The slave codes of the southern states were, of course, the most egregious examples of this. They included statutes enacted by state legislatures and rules established by state courts as they interpreted and applied existing law to individual cases. Although this body of law varied among states and changed over time, there are enough similarities between states and sufficient continuity during the antebellum years to permit generalization. Southern law stipulated that a person born of a slave mother was the property of his or her mother's owner, who had an absolute legal right (in the words of the Louisiana code) to "sell him, dispose of his person, his industry, and his labor."²⁵ Regarded as things rather than persons, slaves did not enjoy a legal right to own property. In practice, some slaves were allowed to work for others during their spare time or to sell produce raised in their gardens, and many used the proceeds to acquire property; however, they had no legal title to this property and held it at the sufferance of their masters, not as a matter of legal right.

Slaves could not enter legally binding contracts and, because marriage was a civil contract, could not legally marry. Certainly, most slaves established long-term monogamous relationships, expected fidelity from

their spouses, and established families and complex kinship networks. Because slave marriages were not recognized by the law, however, masters could separate husbands from wives and parents from children. "The relationship between slaves is essentially different from that of man and wife joined in lawful wedlock," noted the North Carolina Supreme Court, for "with slaves it may be dissolved . . . by the sale of one or both, depending upon the caprice or necessity of the owners."²⁶ Indeed, the sale of slaves—whether to obtain needed capital, to be rid of a recalcitrant slave, to complete the settlement of an estate, or to satisfy the judgment of a court against a slaveowner—was common. And sales frequently ended marriages and separated family members.

Southern law also stripped slaves of other personal rights. Concerned about the problem of runaways, legislatures required slaves to carry passes when they left their owners' plantations and established slave patrols whose members had authority to beat slaves found traveling without passes. In order to prevent slaves from reading abolitionist tracts and forging passes, statutes barred anyone from teaching a slave to read or write. Southern legislatures attempted to prevent slave insurrections by prohibiting slaves from possessing firearms or other weapons and by making it illegal for slaves to gather in groups of five or more outside the presence of a white person. To encourage deference from slaves, southern law made it a crime for a slave to strike a white person and authorized whites to chastise insolent slaves. According to a North Carolina judge, this could be "a look, the pointing of a finger, a refusal or neglect to step out of the way when a white person is seen to approach. . . . such acts violate the rules of propriety, and, if tolerated, would destroy that subordination, upon which our social system rests."²⁷

In order to protect slaveowners' property and to bring the law into line with southerners' claim that theirs was a mild, paternalistic form of slavery, the slave codes afforded slaves protection against abuse by their owners and other whites. Statutes defined as murder the willful and malicious killing of a slave by an owner or other white person and provided that whites might be fined for undue cruelty to slaves even if it did not result in death. Thus the Louisiana code provided that an owner or overseer might be fined for punishing a slave with "unusual rigor . . . so as to maim or mutilate him."²⁸ As might be expected, such laws afforded slaves little protection. Masters and overseers had the right to whip or use other forms of "moderate correction" on slaves who disobeyed, worked poorly, stole, or ran away. And if a slave resisted, a

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With Liberty for Some: The Old Constitution and the Rights of Blacks, 1776–1846

Like thousands of other African-Americans, Jupiter Nicholson tasted the fruit of freedom that ripened during the age of the American Revolution. Born into slavery in North Carolina, Nicholson, his wife, and his parents were freed by their owners sometime in the 1780s. Taking advantage of his liberty, Nicholson went to work as a sailor, trying to scrape together enough money to buy a farm and acquire the economic independence that would give substance to his freedom. He soon found, however, that freedom's fruit had a bitter aftertaste. As a growing number of slave-owners—prompted by a combination of religious zeal and revolutionary principle—freed their slaves, many prominent North Carolinians feared that slavery was being undermined from within. In response, the legislature reiterated its restrictions on manumission: slaves could be freed only as a reward for meritorious service and all manumissions must be approved by a county court. Moreover, it authorized citizens to seize blacks who had been freed illegally and to sell them into slavery. Attracted by the prospect of a quick dollar, many white men began to seize illegally freed blacks, quickly turning the dream of freedom into a nightmare for Nicholson and other free blacks. Coming ashore one day about two years after he had been freed, Nicholson was set upon by armed whites who chased him with dogs. Although he eluded the slavecatchers and fled with his wife to Portsmouth, Virginia, his parents and his brother

were not so fortunate, falling into the hands of whites who returned them to bondage.

Nicholson and his wife found refuge in Portsmouth, where they established a home and lived in relative safety as free persons of color, for four years. Yet they could not escape the reign of terror unleashed by the North Carolina legislature; any day slavecatchers from North Carolina might cross the Virginia border, track them down, and carry them back to slavery. Seeking greater security, they left Virginia in the early 1790s and settled in Philadelphia, which had a reputation among blacks as a "city of refuge."¹ A bustling seaport situated in a state that had adopted a program of gradual emancipation during the preceding decade, Philadelphia offered blacks a livelihood and the pure air of freedom. Yet even in Philadelphia, black emigres found security elusive. In 1793—about the time Nicholson and his wife arrived there—the United States Congress bowed to the demands of southerners and passed the Fugitive Slave Act. The law authorized slaveowners to seize runaway slaves who had fled to free soil and take them before federal or state judges, who were to issue warrants authorizing them to return fugitives to bondage. Because it did not afford alleged fugitives an opportunity to prove that they were free, the act made free blacks like Jupiter Nicholson vulnerable, even in a haven of freedom like Philadelphia. Indeed, this vulnerability was underscored in late 1796, when a North Carolina slavecatcher came to Philadelphia and arrested a black man who had been illegally freed by his owner, was subsequently captured and returned to slavery, and then regained his freedom and fled to the North.

Alarmed by the arrest, Nicholson and three other blacks who had sought refuge in Philadelphia immediately turned to Absalom Jones. As a founder of the city's Free Africa Society and its African Church, Jones had helped to forge a sense of identity and community among Philadelphia blacks and was an obvious source of assistance. He undoubtedly alerted members of the society and the church, warning them to be on the lookout for slavecatchers and to be ready to hide neighbors who were in danger. Jones also used the occasion as an opportunity to call Congress's attention to the evils of the Fugitive Slave Act. In the first petition to Congress by African-Americans, Jones described the terror of men and women threatened with reenslavement after having once had their "human right to freedom . . . restored" and called on lawmakers to honor the nation's commitment to liberty and natural rights. "May we not be allowed to consider this stretch of power, morally and politically, a

Governmental defect, . . . " he asked, "and . . . is not some remedy for an evil of such magnitude highly worthy of the deep inquiry and unfeigned zeal of the supreme Legislative body of a free and enlightened people?"²

Jones's eloquent appeal to revolutionary principles failed to move the members of the House of Representatives. Although George Thatcher of Massachusetts moved to instruct the committee on commerce to study the matter and suggest amendments to the Fugitive Slave Act, southerners adamantly resisted any action that might weaken the law. William L. Smith of South Carolina led the offensive against Thatcher's motion, arguing that the petitioners were "not entitled to the attention of this House" and demanding that their petition be dismissed.³ In the face of southern opposition, northern congressmen broke ranks and Thatcher's motion went down to defeat, 50–33.

Congress's action was symptomatic of the retreat from the equalitarian possibilities of the American Revolution which was already well underway. Revolutionary principles had fueled a potent attack on slavery and racial subordination during the 1770s and 1780s. Yet slavery and racism were deeply rooted in the new Republic, proving to be more than a match for revolutionary principles. By the late 1780s the practical exigencies of nation building led to a compromise of revolutionary principle that soon transformed the American constitutional-legal order into a bulwark of slavery and white supremacy. As a result, the chains of bondage were tightened on slaves in the plantation South, and free blacks like Jupiter Nicholson lived, even in the North, under the shadow of slavery in a land of liberty.

Revolutionary Ideals and Political Realities

The dream of freedom, security, and opportunity, which Jupiter Nicholson found so elusive, had its genesis in the momentous changes that transpired during the age of the American Revolution. In the heat of revolution, Americans forged doctrines of liberty and equality that quickly became an integral part of American political culture and sparked widespread criticism of slavery. The intellectual currents of the Enlightenment deeply influenced the attitudes and assumptions of educated Americans as well as Europeans during the second half of the eighteenth century. Enlightenment thinkers asserted that in the mythical state of

nature—before the formation of society and government—all individuals were born free and equal and had enormous capacity for improvement. They believed that human beings were malleable and contended that differences among individuals and cultures were the result of environment and circumstance. This helped them explain the gap between human capacity for improvement and the reality of an imperfect world. The evil and misery experienced by humanity was not a result of defects in human nature but a product of superstition, bigotry, and flawed social and political institutions inherited from the past. Reason and institutional reform, however, could remove these barriers to progress and secure human happiness. For European intellectuals and many of the Americans whom they influenced, slavery was a perfect example of an inherited institution that upset the natural order and stifled progress: it denied the natural equality of all persons, produced incalculable suffering, and denied slaves the opportunity for mental and moral improvement. Once removed from the debasing effects of slavery, they maintained, blacks had the potential to become the equals of whites.

Powerful religious currents also encouraged antislavery sentiment. During the Revolutionary Era the Quakers and the two most rapidly growing denominations in America, the Baptists and Methodists, subjected slavery to withering criticism. These groups emphasized the importance of humility, the equality of all persons in the eyes of God, and the imperative for Christians to treat others in the spirit of Christian love. This led them to criticize slavery as an embodiment of hierarchy and coercion that flew in the face of Christ's great commandment: that Christians should love their neighbors. Because they believed that slavery was a sin, they often attacked it with a sense of urgency, pressing members of their congregations to free their slaves and organizing antislavery societies.

Ideas unleashed by the Revolution interacted with these beliefs to strengthen antislavery sentiment. Between 1763 and 1776, patriot leaders charged that Parliament repeatedly denied the colonists rights guaranteed by the British Constitution. Parliamentary legislation, they argued, limited their right to jury trial and peaceable assembly, eroded constitutional restrictions on a standing army, and, most importantly, deprived them of liberty and property without their consent. These acts were ominous because they suggested that Parliament was under no restraints in dealing with the colonists and could govern them arbitrarily.

Without rights, subject to arbitrary power, merely enjoying such privileges as their parliamentary masters chose to give them, Americans repeatedly asserted, they were reduced to slavery. Parliament's program was clearly "a system formed to enslave America," the Continental Congress declared in 1774. A year later, in the Declaration of the Causes and Necessity of Taking Up Arms, Congress asserted that Americans were "resolved to die freemen rather than to live Slaves."⁴

Patriots did not refer to the chattel slavery that blacks suffered, but, instead, invoked a political concept that was ubiquitous in eighteenth-century polemical writing on both sides of the Atlantic. As the historian John Phillip Reid has noted, "To warn against slavery was the way Britons raised questions about constitutionality."⁵ Nevertheless, many Americans realized that as long as they held half a million blacks in bondage their defense of liberty rang hollow and argued that fidelity to revolutionary principles demanded abolition. Combined with Enlightenment notions of the natural equality of all persons and evangelical warnings that British tyranny was divine punishment for the sin of slavery, the rhetoric of rights and liberty convinced many Americans to join the attack. A Virginia conference of Methodists, acting in the wake of the Revolution to bar slaveholders from communion, suggested this melding of secular and religious ideas when it noted that slavery was "contrary to the Golden Law of God . . . and the inalienable Rights of Mankind, as well as every Principle of the Revolution. . . ."⁶

Revolutionary thought contained an equalitarian emphasis that reinforced antislavery arguments. As Americans rejected monarchy in 1776, they embraced republicanism, a set of ideas with far-reaching implications. Republican government, according to American writers, was more than government purged of monarchy and resting on popular will. Its survival required a virtuous people willing to sacrifice for the common good. Virtue, they claimed, could only exist in a society that did not suffer great extremes of wealth. The lure of opulence would make the very rich self-indulgent and reluctant to sacrifice, while the misery of the poor would provide pliable material for self-serving demagogues. Although republicanism did not lead to leveling programs designed to redistribute wealth, it did suggest that some degree of material equality was necessary for the survival of republican government. Republicanism also demanded that government promote the common good and refuse to serve the special interests of the privileged few, a principle asserted in the

revolutionary state constitutions. Hostility to privilege carried with it the implication that all men—few extended the principle to women—were entitled to equal rights.

During the decades following the Revolution, ideals of liberty and equality came squarely into conflict with the realities of slavery and racial subordination, systems supported by powerful economic interests and entrenched social mores. When the Revolution began, slavery existed in all of the American colonies. Slaves were most numerous in the South, where they were substantial minorities (thirty to forty-two percent) in Virginia, North Carolina, and Maryland and a majority (sixty percent) in South Carolina. Slave agricultural laborers and craftsmen were essential to the plantation economies of these states. Even in the North, where they ranged from less than two percent of the population in Massachusetts to more than ten percent in New York, slaves played an important economic role because of the general shortage of labor. Moreover, white attitudes toward blacks, which had taken root during the previous century, reinforced slavery and the system of racial hierarchy which it created. The vast majority of blacks were slaves who occupied a degraded and subordinate position, and most whites viewed them as ignorant, shiftless, and lazy. Such attitudes legitimized existing social arrangements and provided ready arguments against emancipation: once freed from white control, blacks would become paupers and criminals and threaten social stability.

Although they faced formidable obstacles, antislavery advocates made great strides toward implementing the truths proclaimed self-evident by the Declaration of Independence. They achieved their greatest success in the North where there were few slaveholders and blacks were not numerous. Vermont, with a slave population of fifty, quickly abolished slavery in its 1777 Constitution. In Massachusetts, the Supreme Court of Judicature used the equalitarian language of the state's 1780 constitution ("all men are born free and equal") to undermine the institution in the early 1780s. Northern opposition to abolition was not always so completely or quickly overcome, however. Most northern states passed post-nati abolition laws that stipulated that slaves born prior to enactment of the legislation would remain in slavery while those born thereafter would be freed when they reached adulthood. Pennsylvania (1780), Connecticut (1784), and Rhode Island (1784) quickly passed post-nati bills, but New York (1799) and New Jersey (1804) acted only after twenty years of pressure from well-organized antislavery groups. The hard-earned vic-

tory over slavery in the North was significant because it transformed slavery from a national to a sectional institution.

Southerners also subjected slavery to criticism. Baptists, Methodists, and Quakers, groups which drew members primarily from nonslaveholders, led the way. Although slaveholders refrained from calling for abolition, some acknowledged that slavery violated the ideals of the Revolution, supported legislation permitting individual owners to free their slaves, and manumitted some of all of their own slaves. In Virginia, where private manumission was widespread, the free black population grew from 2,000 in 1782 to 20,000 in 1800. Nevertheless, the private acts of well-intentioned slaveholders did not imperil the institution; 345,000 Virginia blacks remained in bondage in 1800. Indeed, slavery was the social and economic foundation of the planter class, the most influential group in Virginia and the rest of the South, and it was economically important to tens of thousands of farmers who owned one or two slaves. Moreover, because blacks constituted between thirty and sixty percent of the population of the southern states, even non-slaveholders—conditioned by racism to believe that blacks were incapable of freedom—equated abolition with social chaos. As a result, no southern legislature seriously considered even a gradual emancipation law during the late eighteenth century.

Antislavery reformers also encountered formidable obstacles to their effort to guarantee the rights of free blacks. Most whites viewed free blacks as pariahs, generally excluding them from their churches, theaters, and inns and relegating them to unskilled, low-paying jobs. In the South, antiblack feeling prompted lawmakers to consign free blacks to an inferior legal status; throughout the region they were prohibited from testifying against whites or having sexual relations with them. In addition, most southern states barred blacks from voting and serving in the militia, and South Carolina and Georgia explicitly denied them citizenship.

Although they experienced social and economic discrimination, northern free blacks escaped widespread legal discrimination during the late eighteenth century. They were routinely excluded from the militia, and a 1788 Massachusetts law (which was not enforced) barred them from entering the state. Throughout the North, however, free blacks enjoyed the same right to vote and testify as whites, were eligible for citizenship on the same terms as whites, and generally had the same legal rights and obligations as whites. In 1785, when the New York legislature passed a

bill denying free blacks the right to vote and to testify against whites and prohibiting interracial marriages, the state's Council of Revision vetoed it. According to the council, the measure created "an aristocracy of the most dangerous and malignant kind, rendering power permanent and hereditary in the hands of those persons who deduce their origin through white ancestors only."⁷ Thus revolutionary principles did occasionally prevail over racial prejudice and class interest.

The Constitutional Convention, however, was not one of those occasions. The delegates who met in Philadelphia during the summer of 1787 believed that the weakness of the existing national government had created an economic and political crisis that threatened America's republican experiment. Most agreed that the Articles of Confederation was the root of the problem. A new Constitution creating a strong national government was imperative in order to achieve economic recovery, promote prosperity, cope with threats from abroad, reestablish the public credit, and restrain the states from interfering with property rights. Although many delegates expressed reservations about slavery and a few passionately denounced it, there was little likelihood that the convention would take meaningful antislavery action. Constitutional reform and continued union were impossible without the support of southerners, and southern delegates were unwilling to accept constitutional provisions that threatened the economic well-being of the South and the existence of its powerful planter class. Consequently, the price of constitutional reform was northern concessions on the slavery issue.

Southerners won a significant victory in debates on representation in Congress. Although they failed to have slaves counted fully for purposes of determining representation, southern delegates did win acceptance of a provision that apportioned representatives among the states "according to their respective Numbers, which shall be determined by adding the whole Number of free Persons . . . and . . . three fifths of all other Persons."⁸ Because these "other persons" were slaves, northerners objected to the three-fifths clause, charging that it allowed southerners to use property to increase their clout in the national government. Southerners, however, insisted on the extra political security that the three-fifths clause conferred. North Carolina's William Davie, for example, explained that he "was sure that N. Carola. would never confederate on any terms that did not rate them [slaves] at least 3/5. If the Eastern [i.e., northern] States meant . . . to exclude them altogether the business was at an end."⁹ In the end, northern delegates accepted the three-fifths

clause as the price of a strengthened national government that they deemed vital to their interests.

Inclusion of the three-fifths clause rested solely on considerations of sectional power and had nothing to do with whether slaves—who could not vote—would be represented in the national government or whether they were considered persons in the eyes of the law. The South's share of population and therefore seats in the House of Representatives increased from forty-one percent when only free persons were counted to more than forty-six percent under the three-fifths formula. This increased the region's strength in the House and also in presidential politics because a state's presidential electors were equal to the number of its senators and representatives. Consequently, it became an important tool that southerners would use during the next seventy years to bend national policy to their will and make the Constitution a proslavery document.

The convention also bowed to the South on the infamous slave trade. In early August, after the convention had been in session for more than two months, delegates considered a controversial proposal denying Congress authority to enact "prohibitions on ye Importations of such inhabitants or people as the sevl. States think proper to admit" or "duties by way of such prohibition."¹⁰ Representatives from South Carolina and Georgia, eager to protect the flow of slaves from Africa, were the principal supporters of this measure. A number of northern delegates, however, objected because it protected the most brutal aspects of slavery: tearing Africans away from their homeland; crowding them into the hot, foul holds of ships where they suffered unspeakably and many died; and selling them like cattle at auctions in America. Gouverneur Morris, the voluble Pennsylvania delegate, charged that it protected "the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages."¹¹ These northerners were joined by delegates from Maryland and Virginia who not only regarded the slave trade as immoral, but represented states that had a surplus of slaves and stood to benefit from the higher prices that would result from closing the African trade.

Although debate became acrimonious, delegates accepted a compromise. New Englanders agreed to support an obliquely worded provision prohibiting congressional interference with the slave trade for twenty years: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the

Congress" prior to 1808.¹² In return, the South Carolinians supported deletion of a provision requiring two-thirds majorities for Congress to pass commercial regulations. The New Englanders thus abandoned their scruples against the slave trade in order to win a concession vital to northern commercial interests. Connecticut's Oliver Ellsworth captured the spirit of pragmatism that paved the way for the compromise: "let every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves—What enriches a part enriches the whole, and the States are the best judges of their particular interest."¹³

On the heels of the slave trade compromise, the convention quickly agreed to another southern demand. Slaveholding delegates in the convention knew that their slaves, far from being docile, frequently ran away, and they sought a constitutional remedy. Pierce Butler and Charles Cotesworth Pinckney of South Carolina moved adoption of a clause requiring "fugitive slaves and servants to be delivered up like criminals."¹⁴ The following day, delegates adopted the Constitution's fugitive slave clause with little debate. As finally approved, it was an indirect and obscurely worded guarantee: "No Person held to Service or Labour in one State, under the Laws thereof, escaping to another, shall, in consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."¹⁵

Delegates conferred perhaps the greatest Constitutional protection on slavery when they granted Congress enumerated powers rather than giving it plenary legislative authority. They did not intend to limit Congress to exercise of those powers expressly listed in the Constitution. Indeed, the framers gave it authority "to make all laws which shall be necessary and proper" for carrying out any of the enumerated powers. This broadened national authority and gave Congress considerable flexibility without threatening slavery. The nature of Congress's enumerated powers precluded it from outlawing slavery or from interfering with its day-to-day operation in any state that chose to make it lawful. The framers, concerned more with union than with liberty, thus made freedom a matter of local option.

When the final gavel fell at Philadelphia, delegates had created a framework of government that tacitly recognized slavery, offered protection to it, and, most important, strengthened the hand of its advocates in the national government. Yet it would be wrong to view the Constitution

of 1787 as uniformly and consistently proslavery; the framers created an open-ended document that, while favorable to slavery in many respects, contained a reservoir of antislavery potential. Because many of the framers believed, with James Madison, that it would be "wrong to admit in the Constitution the idea that there could be property in men,"¹⁶ they refrained from including the words "slave" or "slavery" and thus refused to give explicit recognition to the institution. Moreover, the Constitution did not require the national government to promote slavery or, as southerners would subsequently argue, refrain from any action hostile to it. For example, the slave trade clause prohibited Congress from interfering with the importation of slaves into the original states until 1808. This suggested that after that date Congress could use its power to regulate commerce (a power denied it in the Articles) to end the trade. Indeed, it did so at the earliest possible moment. Moreover, the fugitive slave clause did not require or explicitly authorize Congress to help slaveowners recapture runaways. The wording of the clause and its placement in Article IV, Section 2 (which deals with interstate relations) suggested merely that states ought not prevent slaveowners from reclaiming fugitives.

Several other features of the Constitution mitigated the concessions to slaveholders. Because Americans had begun by the late eighteenth century to migrate to the Trans-Appalachian West, the future of slavery depended on whether it moved with the settlers. The Northwest Ordinance of 1787, passed by the Confederation Congress as the Constitutional Convention met, prohibited slavery in the territories north of the Ohio River. This, coupled with the postrevolutionary emancipation acts of the northern state legislatures, was an important stride toward making slavery a local—a peculiar—institution rather than the national institution it had been in 1776. The Constitution gave Congress authority to carry out the spirit of the Northwest Ordinance and further circumscribe slavery. It empowered Congress "to make all needful Rules and Regulations respecting the Territories," thus conferring authority to exclude slavery from the western territories, thereby containing it in the southeast. Moreover, the Bill of Rights, the ten amendments which became part of the Constitution in 1791, proclaimed a host of fundamental liberties—freedom of speech, the right to jury trial, protection against unreasonable search and seizure, the guarantee of due process of law—which were hostile to the arbitrary power essential to maintain slavery.

This is not to suggest—as abolitionists and Republicans would do

later—that the framers were closet abolitionists who created a thoroughly antislavery Constitution. They made important concessions to slavery that proslavery advocates later effectively exploited. Nevertheless, the antislavery sensibilities of many delegates placed limits on how far they would go to protect slavery. Northern delegates made concessions to slaveholders' demands, but they did not seek to create a document that would promote slavery. Moreover, the framers did not carve the Constitution in stone. They wrote it in general language that was susceptible to a variety of interpretations. And they created a document that was inherently political because it defined governmental authority. Of necessity, such a document would evolve as rival political forces mustered their strength to shape the general language of the Constitution to their ends, whether proslavery or antislavery.

Toward a Proslavery Constitution

Between ratification of the Constitution and the Mexican War (1846–1848), the American political system worked against realization of the Constitution's antislavery potential. As they had at the Philadelphia Convention, southern political leaders doggedly insisted that the national government show solicitude for slavery and challenged measures that threatened the institution. Although northern politicians sometimes resisted these demands, more often they backed down or broke ranks in the face of southern initiatives. Confronted with southern assertiveness, many northern leaders believed that preservation of the Union required them to make concessions to southerners on an issue so vital to their interests. Moreover, the growth of a two-party system served to mute criticism of slavery within the national government. Between 1795 and 1815, as Federalists and Republicans vied for power, and, again, from 1832 until 1854, as Democrats and Whigs dominated the political scene, both major parties sought support in the North and the South. Consequently, party leaders generally avoided action with respect to slavery that would alienate southerners and splinter their party organizations.

The antebellum party system strengthened the South's hand in another way. The Republican party of Jefferson and Madison, which came to power in 1800 and remained dominant into the 1820s, attracted crucial support in the North, but drew most of its strength from the South, guaranteeing southerners a powerful influence over national policy. In

the aftermath of the War of 1812, the demise of the Federalist opposition encouraged factionalism in Republican ranks and quickly led to a breakdown of party unity. This was a blow to southerners, undermining the bisectional political alliance that had served to protect slavery. Indeed, in 1819, when Missouri sought admission to the Union as a slave state, northerners in the House of Representatives closed ranks in an effort to block the spread of slavery. The Missouri crisis precipitated bitter sectional conflict, arrayed northern politicians against slavery, and resulted in legislation (the Missouri Compromise of 1820) excluding slavery from the northern portion of the vast Louisiana Purchase Territory. Nevertheless, southern leaders quickly recovered. In the late 1820s and early 1830s, supporters of Andrew Jackson—most notably New York's Martin Van Buren—forged a powerful new coalition, the Democratic party. Resting on a strong southern base, it also attracted considerable support in the North and the rapidly growing Midwest. Despite competition from a formidable Whig opposition, it became the dominant force in antebellum politics, controlling the White House for all but eight years between 1829 and 1861. Because southerners played a prominent role in party councils, Democratic hegemony guaranteed a national policy favorable to slavery.

Northern politicians were able to make concessions to southerners because of the attitudes of their constituents. A small minority of northerners worked actively against slavery, but the majority was not deeply concerned about the institution. Some were proslavery, others tolerated slavery, and still others opposed slavery in the abstract but placed antislavery low on their list of priorities. A variety of factors were responsible for this state of affairs. Many settlers in Ohio, Indiana, Illinois, and Iowa had been born in the South, and they and their descendents were generally sympathetic with southern mores. Apart from southern immigrants, racism was strong throughout the North and led many to have little sympathy with enslaved blacks. In fact, many northerners feared that emancipation in the South would lead to a northward migration of members of a despised race. Still other northerners believed that acceptance of slavery was the cornerstone of the Union and were willing to make concessions to the South on slavery in order to preserve national unity.

The national government began its support for slavery shortly after George Washington assumed the presidency in 1789. Presidents and Congresses allowed slavery to take root in the Old Southwest (the area

south of the Ohio River stretching from the Appalachian Mountains to the Mississippi River). In 1789, Congress accepted North Carolina's cession of its western lands to the United States, even though the grant stipulated that "no regulation made or to be made shall tend to emancipate slaves."¹⁷ Lawmakers organized territories in the region without reference to slavery, fully aware that immigrants from the older southern states would establish slavery, and subsequently admitted these territories to the Union as slave states. In 1801, shortly after the government moved to Washington, D.C., Congress decreed that the laws of Virginia and Maryland, which recognized slavery, should remain in force in the District of Columbia. The nation's capital thus became a slave city, replete with a slave market where human beings were bought and sold, and city officials, acting under congressional authority, enforced laws supporting the institution.

Federal officials also worked to insulate slavery from attack. During the 1830s radical abolitionists in the North subjected slavery and slaveholders to withering criticism in hundreds of pamphlets and thousands of petitions to Congress. Southerners were offended by this criticism and feared that it would incite slave insurrection. Although Congress refused to enact legislation excluding abolitionist pamphlets from the mail, it did not object when President Andrew Jackson's postmaster general authorized local postmasters to destroy antislavery tracts. Though a violation of the postal laws and the First Amendment's guarantee of freedom of the press, postal officials continued to enforce the policy until the Civil War. Faced with abolitionist petitions, Congress also acted with flagrant disrespect for the Constitution. In 1836, the House of Representatives adopted a resolution, popularly known as the "gag rule," that prohibited members from reading or even discussing petitions concerning slavery. Although the rule abridged the right "to petition the Government for a redress of grievances" which was guaranteed by the First Amendment, the rule remained in force until 1844.

Congress also bolstered slavery by helping slaveowners secure the return of runaway slaves. In 1793, after little debate, Congress passed "An Act respecting fugitives from justice, and persons escaping from the service of their masters." The first part of the law implemented the constitutional provision requiring states to extradite fugitives from justice. Without providing any federal enforcement machinery, it simply admonished state officials to return fugitives from justice when requested to do so by the governor of another state. The fugitive slave clause, like

the extradition clause, was a directive to the states and did not expressly authorize congressional action. At the insistence of southerners, however, the second part of the 1793 act went beyond admonishing state officials to fulfill their obligation to return runaway slaves. It authorized slaveholders (or their agents) to seize runaways and take them before a United States district judge or any state justice of the peace. After presenting evidence of ownership—either an oral statement or a written affidavit made before a justice of the peace in the owner's home state—the claimant was to be given a warrant authorizing him or her to take the fugitive back to slavery. Alleged fugitives were denied due process of law: they had no right to testify, to command witnesses to appear, or to counsel. By establishing this procedure, Congress not only commanded state and federal officials to aid in the return of runaways but stipulated that they employ the assumptions and procedures of slave state law in doing so. Northern state law presumed all persons to be free and required slaveowners to establish their claims beyond a reasonable doubt. Under the Fugitive Slave Act, however, blacks were presumed to be slaves, and claimants had to provide only minimal evidence that they owned the alleged fugitive. Thus to protect slaveowners Congress gave extraterritorial application to southern state law.

Because of the summary procedure it authorized, the act threatened free blacks as well as runaway slaves. Free blacks who were kidnapped or mistaken for fugitive slaves were denied the procedural means necessary to establish their freedom. This undoubtedly violated the Fifth Amendment's guarantee that no person shall "be deprived of life, liberty, or property without due process of law." As commonly understood by contemporaries, due process obligated the government to follow traditional common law procedures when it deprived persons of life, liberty, or property. Because the Fugitive Slave Act allowed blacks to be denied liberty through *ex parte* testimony (the testimony of only one party to the case) and without the right to counsel or to trial by jury, it violated the common understanding of due process.

Despite criticism of the procedure employed by the law, during the five decades following its enactment the northern states generally cooperated with slaveowners who sought the return of runaways. Nevertheless, many northern legislatures took action to protect free blacks. Some merely passed statutes imposing fines and imprisonment on persons convicted of kidnapping free blacks with the intention of selling them into slavery. Several legislatures went further, however, stipulating that state

judicial officers who heard fugitive slave cases must afford blacks greater procedural protection than required under the Fugitive Slave Act. An 1826 Pennsylvania law, for example, insisted that slaveowners could only take runaways out of the state if they obtained a certificate of rendition from a state or federal judge, thus denying them the right to return fugitives without judicial intervention. The law also provided that in hearings before justices of the peace, slaveowners and other interested parties could not testify and that alleged fugitives were to be given sufficient time to obtain evidence that they were free. Thus Pennsylvania attempted to balance its obligation under the fugitive slave clause with its interest in protecting free black citizens from kidnapping or being condemned to slavery in a kangaroo-court proceeding.

A complicated series of events brought questions concerning the meaning of the fugitive slave clause and the constitutionality of the Pennsylvania statute before the United States Supreme Court in 1842. Margaret Morgan was the daughter of Maryland slaves who had been permitted by their owner to live as free persons. Like her parents, she was not claimed by her owner, married a free black man, and in 1832 moved to Pennsylvania, where at least one of her daughters was born. When Morgan's owner died in 1837, his niece and heiress hired Edward Prigg to go to Pennsylvania and claim Morgan and her children as fugitive slaves. Although Pennsylvania law recognized as free persons all children born in the state, Maryland law provided that slave status passed through the mother, thus making Margaret Morgan and all of her children slaves. Prigg obtained a warrant for the arrest of Morgan and her children, but the justice of the peace before whom they were brought refused to hear the case. Prigg then took matters into his own hands, seizing his prey and carrying them across the Maryland line to slavery.

Subsequently, Prigg was convicted of kidnapping by a Pennsylvania court, and the state supreme court upheld his conviction. In the 1842 case, *Prigg v. Pennsylvania*, he appealed to the United States Supreme Court, contending that the Pennsylvania law under which he was convicted violated the Constitution's fugitive slave clause and the Fugitive Slave Act of 1793. Justice Joseph Story, the distinguished Massachusetts jurist, wrote the opinion for the Court. Although Story personally disliked slavery, he feared that northern impediments to the return of fugitives would produce sectional animosity that might ultimately destroy the Union. Therefore, as the historian Paul Finkelman has shown, he offered a strongly proslavery interpretation of the fugitive slave

clause, sacrificing black rights to the interest of sectional harmony and national unity.¹⁸

The decision upheld the constitutionality of the Fugitive Slave Act. Even though the fugitive slave clause did not expressly authorize congressional action, Story argued that it recognized the right of slaveowners to recover runaways and therefore implicitly empowered Congress to adopt legislation to enforce the right. He also struck down the Pennsylvania law under which Prigg had been convicted, asserting that the fugitive slave clause gave Congress exclusive authority to regulate the return of fugitive slaves (even though it did not give Congress express, much less exclusive, authority to legislate). Therefore, he reasoned, any state legislation on the subject was unconstitutional. Three of the nine justices disagreed on this point, arguing that state legislatures could or must pass laws to help slaveholders regain their property; however, even these justices agreed that the procedure mandated by the 1826 Pennsylvania law created barriers to the return of fugitives and was therefore unconstitutional. Despite this disagreement, the Court clearly suggested that the summary procedure authorized by the 1793 Fugitive Slave Act was constitutional and that state legislation which sought to add procedural safeguards to allow blacks to prove their freedom was unacceptable. When blacks were involved, even when it was possible that they could be free, the Court did not consider it necessary to require Congress to honor the procedural guarantees of the Bill of Rights or to permit state legislatures to compensate for Congress's omission.

A final aspect of the opinion, which went unchallenged, bears mention. Story held that the fugitive slave clause recognized a property right that extended throughout the Union. Therefore, he reasoned, slaveowners and their agents had the right to enter free states, seize fugitives, and carry them back to the South without obtaining judicial authorization. The definition of personal status contained in the law of the southern states thus had extraterritorial force in the free states, regardless of the policy of those states. Moreover, Story's interpretation left free blacks at the mercy of those who had the audacity to claim them as slaves and the power to seize them and carry them out of the state. Any legislation enacted by the states that established mandatory procedures which gave alleged fugitives the opportunity to prove their freedom and protect themselves from enslavement was impermissible.

Ironically, *Prigg* offered blacks some hope. Story's opinion asserted that since justices of the peace were state officers, Congress could not

compel them to enforce the Fugitive Slave Act. States might accept Congress's invitation to have their officials execute the law, but they were not required to do so. Many northern states responded by ordering state functionaries—sheriffs and jailers as well as justices of the peace—to refuse to arrest, hold, and return fugitives. Since there were few federal district judges to enforce the act (generally only two in each state) this aspect of the ruling made it difficult for slaveholders to obtain official assistance in securing runaways. Despite this bright spot, the *Prigg* decision gave explicit constitutional sanction to slavery, eroded the rights of free blacks, and made their liberty precarious. Moreover, the benefit that blacks received from *Prigg* was short-lived; in 1850, Congress gave in to southern demands, passed an even harsher fugitive law, and provided a small army of federal officials to enforce it.

Although fugitive slave legislation posed a special threat, other congressional measures eroded the rights of free blacks. In 1790, when Congress established regulations for immigrants to become naturalized citizens, it excluded blacks. Two years later it limited service in the militia (one of the responsibilities of citizenship in a republic) to whites, and in 1810 denied blacks the right to carry the mail. In 1820 lawmakers authorized white citizens of the District of Columbia to establish a municipal government and to create a legal code for slaves and free blacks. In 1848, when Congress created the Oregon Territory, and again in 1850, when it established the New Mexico Territory, it denied blacks the right to claim federal land there.

Because the national government exercised limited functions during the nineteenth century, state and local governments were far more significant in determining the rights that blacks enjoyed. Moreover, in defining these rights, states operated virtually without restraint by the national government. The Constitution contained no guarantee of equal rights (except to states, which were guaranteed equal representation in the Senate) and few provisions protecting individual rights from infringement by state and local governments. It forbade states to enact ex post facto laws, bills of attainder, and laws impairing the obligation of contracts, but these restrictions offered slender protection to blacks. The Bill of Rights contained a long list of fundamental rights such as freedom of speech, press, and religion; the right to counsel and jury trial; and protection from self-incrimination and unreasonable search and seizure. In *Barron v. Baltimore* (1833), however, the United States Supreme Court ruled that the Bill of Rights had been added to the Constitution to

assuage fears of a powerful national government and served as a restriction on the national government but not on the states.¹⁹ Although state constitutions generally contained provisions similar to those in the national Bill of Rights, state legislatures and courts determined the scope and applicability of such guarantees.

The privileges and immunities clause of Article IV, section 2 ("the Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the Several States") held out the possibility of national protection of individual rights. During the early nineteenth century, however, politicians, judges, and constitutional commentators disagreed over what the clause meant, and the United States Supreme Court did not resolve the dispute. Some, including James Kent of New York, one of the nation's most influential judges and legal writers, believed that it did not create a body of fundamental rights that were protected against violation by the states. Rather, Kent contended, it merely guaranteed that a citizen of one state who entered a second state was entitled to whatever rights that state accorded its own citizens. In Kent's words, the clause "means only that citizens of other states shall have equal rights with our own citizens."²⁰ This reading of the clause neither shielded free blacks from denial of basic rights by the state in which they resided, nor protected them if they ventured into states that imposed discriminatory laws on their own black citizens.

Other judges and legal commentators argued that the clause was designed to protect the fundamental rights of United States citizens. United States Supreme Court Justice Bushrod Washington gave the most thorough statement of this position in his opinion in *Corfield v. Coryell* (1823), a case he decided while sitting as a United States circuit court judge. Equating the rights guaranteed by the privileges and immunities clause with natural rights, he argued that they included those rights which "are, in their nature, fundamental; which belong, of right, to the citizens of all free governments. . . ." Noting that these were "more tedious than difficult to enumerate," Washington explained that they included "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Because these rights were fundamental and existed throughout the nation, presumably citizens were entitled to enjoy them at home as well as in other states.²¹

Even when judges and legislators accepted this approach, it did not offer blacks unassailable protection. Washington himself noted that the fundamental rights he sketched were "subject . . . to such restraints as the government may justly prescribe for the general good of the whole." This had important implications in light of the expansion of state police power during the 1830s and 1840s. Most judges and legal experts agreed that the Constitution divided power into federal and state spheres, and that the police power—the authority to promote the public health, safety, and welfare—lay within the state sphere. Thus states might justify special restrictions on free blacks on the grounds that they were necessary to prevent slave insurrection or to control individuals who were incapable of exercising responsibly rights enjoyed by whites.

A more fundamental problem stood in the way of using the privileges and immunities clause to protect blacks from discriminatory state action: there was no consensus that free blacks were citizens entitled to constitutional rights. The Constitution did not define national citizenship. Some legal writers pointed out that under traditional legal norms birth conferred citizenship and contended that all free persons born in this country were United States citizens. Others argued that state citizenship was controlling and that all state citizens were citizens of the United States. The fact that the Constitution conferred important rights on state citizens seemed to support this view. For example, Article III provided that federal judicial authority extended to cases "between Citizens of different States," suggesting a federal right (to bring suit in federal court) that rested on one's status as a state citizen. Similarly, the privileges and immunities clause, read literally, conferred rights on persons who were state citizens. Because most free blacks were born in the United States and many were state citizens, either of these definitions entitled a significant number of free blacks to United States citizenship.

Most white southerners, however, denied that free blacks were United States citizens. They feared that as citizens, free blacks would be entitled by the privileges and immunities clause to travel freely throughout the South, something that they believed posed a clear threat to slavery. As Philip Barbour, who later served on the United States Supreme Court remarked in 1820, free blacks were "the most dangerous [class] to the community that can possibly be conceived. They are just enough elevated to have some sense of liberty, and yet not the capacity to estimate or enjoy all its rights . . . and being between two societies, above one and below the other, they are in a most dissatisfied state . . . firebrands to

the other class of their own color."²² To protect themselves, southerners argued that the framers had not considered blacks eligible for citizenship and that, consequently, they were not entitled to any rights created by the federal Constitution (including the rights conferred by the privileges and immunities clause). In 1820, for example, Charles Pinckney, who had been a delegate to the Constitutional Convention, asserted, "There did not then [1787] exist such a thing in the Union as a black or colored citizen, nor could I have conceived it possible such a thing could ever have existed in it. . . ."²³

During most of the antebellum period, there was no authoritative resolution of the debate over black citizenship. In the winter of 1820–1821, Congress discussed the issue when Missouri sought approval of a state constitution that barred immigration by free blacks. Northern congressmen argued that this provision was unconstitutional because it denied free blacks rights (to enter any state in the Union and to enjoy the rights of citizenship there) protected by the privileges and immunities clause. Southerners responded that blacks were not U.S. citizens and therefore were not entitled to rights created by the Constitution. Congress failed to resolve the issue, ending the debate by adopting an ambiguous compromise. Shortly after the Missouri debate, Attorney General William Wirt, a southerner, issued an opinion that lent support to the southern position.²⁴ Nevertheless, it had no legal authority and left the question unresolved.

During the 1820s and again in the 1840s passage of state laws requiring incarceration of black sailors who entered southern ports renewed the debate. Because blacks who were citizens of northern states and who claimed to be United States citizens were affected, the laws raised the question of whether blacks were citizens who were protected by the privileges and immunities clause. As in the Missouri debates, however, there was no resolution of the question. In 1823, Justice William Johnson of the United States Supreme Court, while sitting as circuit judge for South Carolina, struck down the South Carolina law, and Attorney General William Wirt issued an official opinion declaring the law unconstitutional. However, both did so on the grounds that it interfered with Congress's power to regulate interstate and foreign commerce and violated the treaty rights of foreign shippers. Neither held that the law violated rights enjoyed by black American sailors as state or United States citizens under the Constitution's privileges and immunities clause.

In the early 1840s, when a congressional committee examined the

constitutionality of the Negro seamen's laws, a majority of its members supported a resolution declaring that the laws violated the rights of free blacks; however, a minority report asserted that blacks were not United States citizens and therefore were not entitled to protection by the privileges and immunities clause. The full House of Representatives rejected the majority's resolution, implicitly endorsing the minority report. Dissatisfied by the House's action, the Massachusetts legislature dispatched lawyers to Charleston and New Orleans to file suits challenging the constitutionality of the laws. This tactic also failed to produce a ruling because angry mobs in both cities ran the Massachusetts emissaries out of town before they could begin litigation.

Slaves, Free Blacks, and the Law

Although the issue of black citizenship remained unresolved, one thing was clear. There were few Constitutional limitations on the manner in which states might treat persons residing within their borders and even fewer if they were black. States, in the North as well as in the South, used this discretion to enact laws denying blacks equal rights.

The slave codes of the southern states were, of course, the most egregious examples of this. They included statutes enacted by state legislatures and rules established by state courts as they interpreted and applied existing law to individual cases. Although this body of law varied among states and changed over time, there are enough similarities between states and sufficient continuity during the antebellum years to permit generalization. Southern law stipulated that a person born of a slave mother was the property of his or her mother's owner, who had an absolute legal right (in the words of the Louisiana code) to "sell him, dispose of his person, his industry, and his labor."²⁵ Regarded as things rather than persons, slaves did not enjoy a legal right to own property. In practice, some slaves were allowed to work for others during their spare time or to sell produce raised in their gardens, and many used the proceeds to acquire property; however, they had no legal title to this property and held it at the sufferance of their masters, not as a matter of legal right.

Slaves could not enter legally binding contracts and, because marriage was a civil contract, could not legally marry. Certainly, most slaves established long-term monogamous relationships, expected fidelity from

their spouses, and established families and complex kinship networks. Because slave marriages were not recognized by the law, however, masters could separate husbands from wives and parents from children. "The relationship between slaves is essentially different from that of man and wife joined in lawful wedlock," noted the North Carolina Supreme Court, for "with slaves it may be dissolved . . . by the sale of one or both, depending upon the caprice or necessity of the owners."²⁶ Indeed, the sale of slaves—whether to obtain needed capital, to be rid of a recalcitrant slave, to complete the settlement of an estate, or to satisfy the judgment of a court against a slaveowner—was common. And sales frequently ended marriages and separated family members.

Southern law also stripped slaves of other personal rights. Concerned about the problem of runaways, legislatures required slaves to carry passes when they left their owners' plantations and established slave patrols whose members had authority to beat slaves found traveling without passes. In order to prevent slaves from reading abolitionist tracts and forging passes, statutes barred anyone from teaching a slave to read or write. Southern legislatures attempted to prevent slave insurrections by prohibiting slaves from possessing firearms or other weapons and by making it illegal for slaves to gather in groups of five or more outside the presence of a white person. To encourage deference from slaves, southern law made it a crime for a slave to strike a white person and authorized whites to chastise insolent slaves. According to a North Carolina judge, this could be "a look, the pointing of a finger, a refusal or neglect to step out of the way when a white person is seen to approach. . . . such acts violate the rules of propriety, and, if tolerated, would destroy that subordination, upon which our social system rests."²⁷

In order to protect slaveowners' property and to bring the law into line with southerners' claim that theirs was a mild, paternalistic form of slavery, the slave codes afforded slaves protection against abuse by their owners and other whites. Statutes defined as murder the willful and malicious killing of a slave by an owner or other white person and provided that whites might be fined for undue cruelty to slaves even if it did not result in death. Thus the Louisiana code provided that an owner or overseer might be fined for punishing a slave with "unusual rigor . . . so as to maim or mutilate him."²⁸ As might be expected, such laws afforded slaves little protection. Masters and overseers had the right to whip or use other forms of "moderate correction" on slaves who disobeyed, worked poorly, stole, or ran away. And if a slave resisted, a

master, overseer, or patrol member might employ sufficient force to quell the resistance, even if it led to the slave's death. Because whites had such broad authority to use force and juries were lily-white, whites rarely were indicted or convicted of murdering or abusing a slave.

Policy as well as prejudice led southern whites to subordinate free blacks as well as slaves. "If all blacks see all of their color slaves, it will seem to them a disposition of Providence, and they will be content," observed one Virginia legislator in 1806. "But if they see others like themselves free, and enjoying rights they are deprived of, they will repine."²⁹ Lawmakers throughout the South did their best to guarantee that free blacks enjoyed few rights. In the early years of the nineteenth century most southern states regarded free blacks as citizens, albeit citizens who did not enjoy all the rights of white persons, and several permitted free blacks to vote if they met existing property-holding requirements. By the 1820s and 1830s, however, the rapid growth of the free Negro population in the Upper South, combined with growing fear of slave insurrection and the insistence of proslavery writers that all blacks were naturally suited to slavery, led to a steady erosion of the rights of free blacks. As the century progressed, the few states that had permitted free blacks to vote disfranchised them, judges handed down decisions declaring that they were not citizens, and legislators enacted a remarkable array of restrictions on their freedom. Joseph Lumpkin of the Georgia Supreme Court perhaps best summarized the position of the South's 250,000 free blacks on the eve of the Civil War:

"The *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed upon him by statute; . . . the act of manumission confers no other right but . . . freedom from the dominion of the master, and the limited liberty of locomotion. . . ."³⁰

As Lumpkin's statement suggests, the law frequently equated free blacks with slaves, in the process diminishing their status as free persons. In most states free blacks accused of noncapital crimes were tried by the informal panels of justices of the peace and citizens that meted out summary justice to slaves. When convicted, they were not only liable to imprisonment but, like slaves, might receive thirty-nine lashes at the public whipping post. The law also demanded that free blacks as well as slaves be submissive to whites. Mississippi and Florida provided that any black who "shall at any time use abusive and provoking language to, or

raise his hand" against a white person might be whipped. Other states authorized whites to chastise "insolent" free blacks. "Free negroes . . . ought by law to be compelled to demean themselves as inferiors," noted John B. O'Neill of the South Carolina Supreme Court. "I have always thought [this] and while on the circuit ruled that words of impertinence and insolence addressed by a free negro to a white man, would justify an assault and battery."³¹ In addition, every slave state except Delaware and Louisiana denied free blacks as well as slaves the right to testify in cases involving whites, making it difficult to prosecute whites who committed crimes against them.

Free blacks also suffered significant restrictions of their personal liberty. Because southern state law assumed that blacks were slaves, free blacks were required to carry papers proving their freedom and could be seized as fugitives if they were unable to produce them. They also had to register periodically with local authorities, thus subjecting themselves to questioning and scrutiny by whites. Southern state and local officials used laws prohibiting free blacks from meeting without white supervision to deter them from establishing independent churches, and several states went so far as to make it illegal for free blacks to learn to read and write. Highly subjective vagrancy laws provided that free blacks who lived in idleness or who lacked industrious habits could be bound to labor for whites. State laws and municipal ordinances prohibited free blacks from practicing numerous occupations.

Worst of all, the legal system left free blacks at the mercy of whites. Those who were suspected of criminal activity or impropriety, offended the sensibilities of whites, or aroused the jealousy or enmity of whites were likely to be victims of mob violence. "Who does not know that when a free Negro . . . has rendered himself obnoxious to a neighborhood," noted a Virginian in 1832, "how easy it is for a party to visit him one night, take him from his bed and his family, and apply to him the gentle admonition of a severe flagellation, to induce him to go away."³² Indeed, blacks could be induced to go away because there was little chance that white sheriffs and lily-white juries would afford them redress against their assailants. Moreover, given the complex web of laws that entwined them and the fact that many of these regulations gave considerable discretion to local officials, whites could snatch away the limited liberty that free blacks enjoyed. If they failed to register with local authorities at the prescribed time, lacked adequate documentation to prove their freedom, practiced a forbidden occupation, or appeared to

local whites to be indolent, they could be dragged to the whipping post, hired out to white farmers, or (in some states) sold into slavery.

Between 1800 and the mid 1840s, blacks who lived north of slavery also witnessed a steady erosion of their rights. Most northern states banned racial intermarriage, and many either permitted or required school boards to establish segregated schools. Six northern states denied blacks an essential tool of self-protection by prohibiting them from testifying in cases in which a white person was a party. Ohio (1804), Indiana (1831), Illinois (1813), Iowa (1839), and Michigan (1827) attempted to prohibit blacks from entering their borders by enacting measures requiring black immigrants to post bonds guaranteeing their good behavior or by imposing fines or imprisonment on black immigrants.

Northern states also restricted blacks' political rights. In 1800 most permitted black men to vote, provided they met the property requirements that applied to white men; however, as states expanded whites' access to the ballot box by abolishing property requirements, they generally excluded blacks from the polls. With the exception of Maine, none of the states that entered the Union after 1800 permitted blacks to vote in general elections. Among the older states, New Jersey (1807), Connecticut (1818), and Pennsylvania (1838) stripped blacks of political rights as they established universal white manhood suffrage. By 1860, only Massachusetts, Maine, New Hampshire, Vermont, and Rhode Island allowed blacks to vote on the same terms as whites, and New York permitted black men to vote if they owned \$250 worth of property, a requirement that did not apply to white men.

Still there were significant differences between the plight of northern and southern free blacks. Southern laws governing free blacks were much more restrictive and repressive than those on northern statute books, making southern free blacks little better than slaves without masters. Moreover, because it was absolutely unthinkable for them to demand equal rights and because they had no allies in the white community, the plight of southern free blacks could only worsen. In the North proponents of racial equality were not popular and were sometimes mobbed or even murdered. There was sufficient tolerance, however, that blacks could organize and protest against discrimination and find white allies to help them press their demands. Therefore, while the position of southern free blacks steadily deteriorated, northern free blacks would make important gains during the late 1840s and the 1850s.

That was in the future, however. In the mid-1840s, as the nation annexed Texas in 1845 and prepared for war with Mexico in 1846, it had moved far away from the antislavery and equalitarian promise of the Revolution. Delegates to the constitutional convention had made important concessions to slavery, and during the succeeding decades politicians and judges had used these to create a constitutional order that promoted slavery and permitted racial subordination. As a result, free blacks in the North as well as the South had seen their rights steadily erode. Slavery, which had appeared to be receding in the Revolution's aftermath, had marched triumphantly westward, establishing beachheads across the Mississippi River in Louisiana, Arkansas, Missouri, and Texas. And as the United States went to war with Mexico in 1846, many predicted that it would move to the Pacific. Yet not everyone was willing to concede that the Constitution was a proslavery document; northern blacks and white abolitionists were already busy creating an antislavery constitutionalism. The war with Mexico would prove to be a watershed, polarizing American politics along sectional lines, reviving a broad-based northern antislavery sentiment, and reestablishing the allure of the Revolution's commitment to the "rights of man" among northerners.

2

Law and Liberty, 1830–1860

On January 15, 1851, thirty-seven black delegates assembled in the Second Baptist Church of Columbus, Ohio, to open the annual Convention of the Colored Citizens of Ohio. Representing 26,000 black Ohioans, the delegation included artisans, barbers, teachers, and ministers. Although delegates discussed strategies for winning repeal of discriminatory state laws and for building a united, self-conscious black community, they were especially concerned about the Fugitive Slave Act of 1850, which Congress had passed the previous fall to replace the venerable 1793 law. Like the old law, the 1850 statute allowed masters to reclaim runaway slaves merely on the basis of sworn testimony and denied alleged fugitives basic procedural rights that were essential to protect their freedom. The new law went further, however, creating a formidable enforcement apparatus; it authorized appointment of hundreds of U.S. commissioners to conduct hearings and to authorize the return of runaways, making it much easier for slaveowners to recover their human chattels. It also provided that commissioners would receive a ten-dollar fee if they ruled in favor of masters and only half that amount if they found in favor of an alleged fugitive, giving them an incentive to be especially solicitous of slaveowners' interests. Thus the law not only posed a serious threat to fugitive slaves but placed northern free blacks in danger of legally sanctioned kidnapping. Indeed, thousands of northern blacks—including some of the delegates' friends and neighbors—had fled to Canada in the wake of its passage, and as the convention met, delegates learned that a black man had been seized as a fugitive slave in southwest Ohio.

Emotions were therefore high as the delegates denounced the new law

and demanded its repeal. In leading the attack, John Mercer Langston—who would later join the bar, establish the Law Department at Howard University, and become president of that institution—invoked the Constitution. Citing its guarantee of trial by jury, due process of law, and habeas corpus, he contended that the fugitive law was not only unjust but flagrantly unconstitutional. "This enactment," Langston charged, "possesses neither the form nor the essence of true law . . . [and] is a hideous deformity in the *garb* of law. It kills alike, the true spirit of the Declaration of Independence, the Constitution, and the palladium of our liberties."¹

That Langston's speech invoked constitutional principles to attack slavery and discrimination was hardly surprising. The Constitution was a vital part of antebellum popular consciousness, and nineteenth-century Americans—not just lawyers—commonly spoke in constitutional terms when debating political and social issues. Indeed, Langston's constitutional analysis was quickly challenged by H. Ford Douglas, a nineteen-year-old barber from Cleveland. Although he had escaped from a Virginia plantation only four years earlier, Douglas was a formidable opponent who was rapidly becoming one of the most forceful abolitionist orators in the state. He argued that the Constitution protected slavery and was an obstacle to black liberation:

I hold, sir, that the Constitution of the United States is pro-slavery, considered so by those who framed it. . . . It is well known that . . . in the Convention that framed the Constitution, there was considerable discussion on the subject of slavery. South Carolina and Georgia refused to come into the Union [unless] the Convention would allow the continuation of the Slave Trade for twenty years . . . the Convention submitted to that guilty contract. . . . Here we see them engrafting on the Constitution a clause legalizing and protecting one of the vilest systems of wrong ever invented by the cupidity and avarice of man. . . . That instrument also provides for the return of fugitive slaves. And, sir, . . . the "Fugitive Law" is in accordance with that stipulation;—a law unequalled in the worst days of Roman despotism, and unparalleled in the annals of heathen jurisprudence. . . .

Douglas concluded that blacks must reject such a document and refuse to participate in a constitutional order that held millions of African-Americans in chains. Consequently, he urged delegates to adopt a resolution declaring that "no colored man can consistently vote under the United States Constitution."²

Douglas's characterization of the Constitution did not meet a sympathetic response. William Howard Day charged that Douglas failed to distinguish between the Constitution and the interpretation given it by proslavery judges and politicians. The Constitution was a malleable document, he contended, and, correctly understood, it was a force for black liberty and equality. Day explained,

"Sir, coming up as I do, in the midst of three millions of men in chains, and five hundred thousand only half-free, I consider every instrument precious which guarantees to me liberty. I consider the Constitution the foundation of American liberties, and wrapping myself in the flag of the nation, I would plant myself upon that Constitution, and using the weapons they have given me, I would appeal to the American people for the rights thus guaranteed."³

In the end, Langston and Day easily prevailed, and Douglas's motion went down to defeat, 28-2.

The debate at Columbus suggested that northern blacks had kept the dream of freedom, citizenship, and equality alive. In the face of six decades of steady defeats, they continued to cling to the equalitarian principles of the Revolution. Indeed, between 1830 and 1860, northern free blacks and their white abolitionist allies skillfully used these principles to develop a powerful constitutional attack on slavery and racial subordination. Initially rejected as the work of a lunatic fringe, by the late 1840s and the 1850s important elements of their analysis gained wider currency as they were taken up by mainstream northern politicians, subjecting proslavery constitutionalism to its severest challenge and the Union to its supreme test.

Blacks, Abolitionists, and the Emergence of Antislavery Constitutionalism

Northern blacks took the lead in challenging proslavery constitutionalism. Beginning in 1830, northern black leaders organized a series of national conventions that met sporadically throughout the antebellum years. Given the state-centered nature of the pre-Civil War constitutional system, however, many of the problems confronting free blacks were local rather than national. Therefore, black leaders increasingly turned their efforts to state conventions; the first state convention met in New

York in 1837 and was followed by a proliferation of such local meetings during the 1840s and 1850s. These national and state conclaves—like the 1851 Columbus meeting—not only helped beleaguered free black communities develop the institutions and solidarity necessary to survive in an increasingly hostile world, they also served as the whetstone on which blacks honed their attack on slavery and racial discrimination to razor sharpness.

The genesis of the convention movement paralleled the emergence of a small but imaginative cadre of radical abolitionists. Rising to prominence in the North during the early 1830s, this diverse group, which included blacks and whites, women and men, denounced slavery in harsh, uncompromising terms. While they charged that slavery made a mockery of the republican principle of equality, the abolitionists rested their attack primarily on religious principles and passions. Slavery was a sin, they contended, because it "debased the physical, and defiled the moral workmanship of the great God" and ignored the Gospel's admonition to "love your neighbor as yourself." Claiming that "there is no such thing as holding on to sin with safety," abolitionists eschewed gradualism and called for immediate emancipation.⁴ Abolitionists also recognized that racism violated Christian principles and, by asserting that blacks were different than and inferior to whites, provided the most powerful weapon in the proslavery arsenal. Consequently, they created a powerful argument for black equality.

Not content to wage a campaign of conversion, abolitionists were inexorably drawn to political action. Shortly after its inception in 1833, the immediatist American Anti-Slavery Society sponsored a massive petition campaign designed to prod Congress to abolish slavery in the nation's capital. Throughout the 1830s abolitionists also attempted to influence the political process by questioning candidates about their views on slavery and throwing their support to those who came closest to the antislavery standard. By the late 1830s, however, many were disenchanted with the effectiveness of this strategy and moved toward formation of a third party. Although some prominent leaders (most notably William Lloyd Garrison) opposed them, such antislavery radicals as Henry Stanton, Alvan Stewart, James Birney, Joshua Leavitt, William Goodell, and Gerrit Smith eagerly embraced independent political action, forming the Liberty Party in 1839.

The debate over political action led abolitionists into the realm of constitutional theory, as they, like other Americans, looked to the

Constitution for justification of their political agenda. Garrison and his supporters, eager to prevent northerners from smugly assuming that they had nothing to do with slavery, argued that the Constitution was a proslavery document. Exploiting James Madison's notes on the Constitutional Convention, which first appeared in 1840, Garrisonians gleefully debunked the framers' reputation as opponents of slavery. They charged that southern delegates had demanded protection for slavery and that northerners had cravenly abandoned their principles and acquiesced in provisions that protected, even promoted, slavery. According to Garrison, who dramatized his position by publicly burning a copy of the Constitution, the document was "a covenant with death, and an agreement with Hell."⁵ Northerners should annul it and withdraw from the Union because it protected slavery and slaveholders.

Other abolitionists categorically rejected Garrison's analysis. Their position was most persuasively and eloquently articulated by the black abolitionist Frederick Douglass, a one-time ally of Garrison who rejected Garrisonian constitutional ideas in the late 1840s. Douglass argued that a close reading of the Constitution demonstrated that it did not expressly mention slavery, much less guarantee its existence. On the contrary, it contained colorblind libertarian provisions that were incompatible with slavery. He also brushed aside the contention that Madison's notes proved that the framers had acceded to southerners' demands for provisions that would protect and promote slavery. Douglass suggested that such an argument was preposterous: it "disregarded the plain and common sense reading of the instrument itself" and assumed that "the Constitution does not mean what it says and says what it does not mean." He also chided his opponents for confusing the Constitution with the way in which it had been interpreted by proslavery politicians and judges. "The Constitution is one thing, its administration is another," he noted, "and, in this instance, a very different and opposite thing." Finally, Douglass recognized that the Constitution, because it was written in general language, was an open-ended document capable of serving the cause of freedom and equality. "The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic," he explained, "give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country, without regard to color, class, or clime."⁶

Rejection of the Garrisonian position led to an outpouring of abolition-

ist books and pamphlets that found in the Constitution a powerful weapon against slavery and discrimination. Although abolitionist constitutional theory did not win acceptance by the courts, Congress, or the president in the decades preceding the Civil War, it was not without effect. It gave birth to constitutional principles that would become influential during the 1860s, helping to transform the Constitution into a document that promoted equality, was a source of individual rights, and empowered the national government to protect those rights.

The dominant group in the Liberty party developed a moderate antislavery constitutionalism. Led by Salmon P. Chase, a future United States senator and chief justice of the United States, they attempted to deflect charges that they were irresponsible radicals whose policies would drive southerners to secession. Moderates conceded that in order to bring the South into the Union, the framers had agreed to deny the national government authority to interfere with slavery in states where it already existed. And they pledged to honor this limitation. Nevertheless, moderates argued that the framers had been hostile to slavery and had attempted to put it on the road to extinction. They insisted that the Declaration of Independence stated the fundamental values that the framers of the Constitution attempted to implement and argued that its powerful assertion of equality and natural rights clearly established the framers' antipathy to slavery. They reinforced this argument by reference to the Northwest Ordinance of 1787. In attempting to keep slavery from spreading into new territory, moderates claimed, the Confederation Congress, which included a number of delegates to the Philadelphia Convention, reasserted its hostility to slavery and its commitment to the Declaration of Independence.

Moderates also found specific provisions in the Constitution that were hostile to slavery. The clause recognizing congressional power to end the importation of slaves after 1808, they argued, was designed to restrict the growth of the hated institution. They contended that the commerce clause, by giving Congress plenary authority over interstate commerce, empowered it to prohibit the interstate slave trade. This would prevent slaveowners in Virginia and Maryland, where the soil was depleted and plantation agriculture was unprofitable, from shipping their slaves to the West and, instead, would encourage manumission. Moderates even read the fugitive slave clause to restrict federal support for the return of runaways, arguing that it did not permit federal action but was merely an admonition to the states. Constitutional provisions giving Congress full

authority over the District of Columbia and the territories, antislavery moderates asserted, also enabled it to strike at slavery by abolishing it in the District and, following the example of the Northwest Ordinance, forbidding it to enter the territories.

The most innovative aspect of the moderate position was its use of the Fifth Amendment's due process clause. Traditionally, lawyers understood due process to guarantee persons accused of crimes certain procedural rights such as the right to be informed of the charges against them, the right to counsel, the right to trial by jury, and protection against self-incrimination. Abolitionists, however, gave the clause a substantive interpretation, suggesting that there were certain fundamental rights—such as liberty of movement, freedom to pursue the occupation of one's choosing, and the absolute right of self-ownership—that government could not abridge. Consequently, they argued that slavery was an obvious violation of the due process clause and that the federal government could not tolerate it anywhere within its jurisdiction, whether in the District of Columbia or the territories.

Moderates asserted that the framers had intended to make slavery a local institution, confined to the southeastern states, where it would gradually wither and die. This farsighted policy, they contended, had been subverted by proslavery domination of the national government which had resulted in federal action to protect slavery and, worst of all, to promote its expansion. Moderates thus called for a return to the original principles of the founders: the federal government must divorce itself from slavery, abolishing it in the District of Columbia and the territories, repealing the Fugitive Slave Act, and prohibiting the transit of slaves in interstate commerce. Because moderate abolitionists, like most other Americans, believed that slavery had to expand to remain economically viable, they assumed that this would put slavery on the road to extinction, as the founders had intended.

A number of radical abolitionist legal theorists, most notably Alvan Stewart, William Goodell, Lysander Spooner, and Joel Tiffany, took this argument further. Radicals argued that all persons possessed certain natural rights, including freedom, personal security, and a right to the fruits of their labor, and that government existed to guarantee these rights. Although this led them to the radical conclusion that Congress had an obligation to extirpate slavery, they drew on a tradition of natural rights that had deep roots not only in popular political culture but in Constitutional theory. Indeed, United States Supreme Court Justices

Samuel Chase, John Marshall, and Joseph Story had suggested that statutes that violated principles of natural law lacked legitimacy. In using the Declaration of Independence as the authority to attack slavery, radicals also appealed to deeply rooted values that had broad popular appeal. They argued that the Declaration contained the principles on which the nation had been founded and asserted that the framers had intended to implement these principles when they drafted the Constitution. To accept the Constitution as a substitute for the Declaration, they insisted, "would be to accept the shell, and throw the kernel away."⁷ They contended, therefore, that principles of natural rights and equality suffused the Constitution, empowering—indeed, requiring—Congress to abolish slavery throughout the nation.

Radicals also found warrant for emancipation in the text of the Constitution. They argued that the Fifth Amendment's due process clause applied not only to the federal government but to the states and prohibited them from enforcing the laws that maintained slavery. Although the Supreme Court had held that the Bill of Rights restricted only the federal government, the radical position was not chimerical. As agitators for constitutional change, they could hope to convince the Court to reverse itself, as it had done on more than one occasion. Indeed, unlike the First Amendment which explicitly restricts Congress, the wording of the Fifth Amendment ("No person shall be . . . deprived. . .") could be easily construed to apply to state governments, giving the Court an opening to reverse itself. Radicals also exploited the guarantee clause (Article IV, section 4) which provided that "the United States shall guarantee to each State in this Union a Republican form of Government." Because slavery created a privileged caste and stripped blacks of the most fundamental rights, they argued, no state that tolerated slavery could be truly republican. Radicals therefore concluded that Congress could only fulfill its obligation under the guarantee clause by abolishing slavery in any state that maintained it.

Abolitionists also devoted considerable attention to the plight of free blacks. Black abolitionists were especially sensitive to this issue because they understood the social consequences of discrimination. They realized that discriminatory law was not merely an effect of racism, but that it marked blacks as inferiors and thus deepened the racism that constrained black economic opportunity. "The colored people of this State are, from the non-possession of the right of suffrage, the proscribed class," representatives of New York's black community explained. "This pro-

scription is the fountain Marah, from whence proceed those bitter waters that run through all the various ramifications of society, connecting themselves with all our relations. . . .” Black leaders also understood that only by asserting their right to equal treatment could blacks achieve self-respect. As Michigan blacks noted in demanding political rights, “the enjoyment of those rights in a free country, is a stimulant to enterprise, a means of influence, and a source of respect; they send life, vigor and energy through the entire heart of a people. . . .”⁸

Black abolitionists, together with their white allies, built their case for equal rights on the foundation of black citizenship. They argued that native-born free blacks were citizens of the state where they resided and of the United States. They pointed out that European, English, and American authorities agreed that “the strongest claim to citizenship is birthplace” and that “in whatever country or place you may be born, you are in the first and highest sense a citizen.” “The claims are . . . founded in the fact that they [blacks] are citizens by birth and blood,” noted Hosea Easton, a black minister, in 1837. “Complexion has never been made the legal test of citizenship in any age in the world. It has been established generally by birth and blood. . . .”⁹ Because the framers did not explicitly define citizenship, abolitionists contended, they must be presumed to have accepted this common understanding. The most potent argument on behalf of black citizenship, however, grew out of the historical memory of the black community. Black abolitionists reminded Americans that in 1787 free blacks had been citizens with access to the ballot box in many states and that they had shouldered the responsibilities of citizens, serving with distinction in the Revolution and the War of 1812. “We are Americans. We were born in no foreign clime,” explained the report of the 1840 New York State Convention of Colored People. “We have not been brought up under the influence of other strange, aristocratic, and uncongenial political relations. In this respect, we profess to be American and republican.”¹⁰

Abolitionists argued that if they were to be true to the principles of republicanism and the ideas expressed in the Declaration of Independence, states must grant all citizens equal rights, regardless of race. “That Declaration, and that Constitution . . . may be considered as more fully developing the ideas of American republicanism, than any other documents,” delegates to the 1840 New York Convention of Colored Men asserted in a petition calling for an end to discriminatory voting requirements. “In these, individuals are regarded distinctly and

respectively—each and every one as men, fully capacitated by the Creator for government and progressive advancement. . . .” Members of the Liberty party agreed. The party’s 1844 platform urged “the friends of Liberty in all those free States where any inequality of rights and privileges exists on account of color, to employ their utmost energies to remove all such remnants and effects of the slave system.”¹¹

Many abolitionists went beyond this, urging that the national government had authority to protect individual rights against infringement by the states. Radical constitutional theorists, most notably Joel Tiffany and Lysander Spooner, argued that the national government, by its very nature, had the authority, indeed, the obligation to protect the fundamental rights of its citizens. Such rights included “full and ample protection. . . of . . . personal security, personal liberty, and private property, . . . protection against the oppression of individuals, communities and nations, foreign nations and domestic states: against lawless violence exercised under the forms of governmental authority.”¹² Moreover, Tiffany and Spooner insisted that the Constitution and Bill of Rights were designed to protect these fundamental rights from encroachment by national and state governments and private individuals.

In the antebellum federal system, as we have seen, states were free to define the rights of individuals with only minimal interference or supervision by the national government. Consequently, Tiffany’s and Spooner’s argument was truly radical. While it would enter political discourse and become influential in the 1860s, it had limited utility in the antebellum years. Not only did it go against the assumptions of most Americans, who saw local autonomy as essential to democracy and necessary to the continued existence of a nation as large and diverse as the United States. But with the federal courts, Congress, and the presidency in the hands of those sympathetic to slavery, it made little sense to press for federal action against state discrimination. Nevertheless, other aspects of the abolitionist argument, especially the notion that black citizenship, the Declaration of Independence, and the principles of republicanism made it impermissible to make distinctions in state law based on race, proved more serviceable. Consequently, black leaders and their white allies employed these ideas to challenge discrimination by state and local governments.

Consider two examples. During the early nineteenth century the Boston School Committee established a separate elementary school for black children and excluded blacks from the city’s other elementary

schools. During the 1840s, after a campaign of sit-ins and political action that compelled the state's railroads to end segregation, Boston blacks trained their sights on segregated schools. When in 1849 the committee rejected petitions calling for admission of blacks to the white schools, Benjamin Roberts, a black activist whose six-year-old daughter Sarah had been denied admission to the school closest to her home, challenged school segregation in the Massachusetts courts.

Robert Morris, a black lawyer, and Charles Sumner, a white abolitionist who would go on to a distinguished career in the United States Senate, represented Roberts. Building their case on the Declaration of Independence and the Massachusetts Constitution's assertion that "All men are created free and equal," they rejected the Boston School Committee's contention that it provided blacks with an equal, but separate, education. Morris and Sumner argued that segregation recognized distinctions among citizens on the basis of birth and therefore violated the principle of equality. "The equality declared by our fathers . . . was *Equality before the Law*," they explained. "Its object was to efface all political or civil distinctions, and to abolish all institutions founded upon *birth*." Morris and Sumner also charged that segregation hurt blacks by marking them as a proscribed class and teaching white children to despise them. "Nursed in this sentiment of Caste . . . they [whites] are unable to eradicate it from their natures . . . and . . . continue to embody and perpetuate it in their institutions."¹³ The Massachusetts Supreme Judicial Court rejected these arguments, holding that as long as blacks enjoyed access to schools that provided an education equivalent to that provided to whites, the Constitution's guarantee of equality was met. Undaunted by their failure in court, blacks turned their attention to the legislature, which recognized their claim to substantive equality by outlawing segregation in the state's schools in 1855.

Blacks in New York City also challenged segregation. Manhattan's numerous street railroads, operated by private companies under charters from the city, offered thoroughly segregated service. Black customers might ride outside on the platforms of the cars reserved for whites or wait for one of the few cars set aside for the exclusive use of blacks. Shortly after the street railroads began their operations in the early 1850s, blacks engaged in direct action to challenge segregation, entering whites-only cars, refusing to leave, and, usually, being assaulted and thrown into the streets by drivers and conductors. In 1854, Elizabeth Jennings sued the Third Avenue Railroad after being forcibly expelled from a whites-only

car, and a jury awarded her \$225 in damages. Black leaders used Jennings's victory to encourage black assertiveness. "Don't let them [railroad officials] frighten you with words," one urged, "the law is right, and so is public sentiment."¹⁴

Most of the companies, however, continued to practice segregation. In 1855, Reverend James Pennington, a black Presbyterian minister, was thrown out of a whites-only car on the Sixth Avenue Railroad. Seeking another legal victory that would seal the fate of segregation, Pennington sued the company. He argued that, as a citizen, he was entitled to service without distinction or discrimination from a company that was chartered to serve the public. As the suit dragged on, Pennington and other black leaders encouraged continued resistance to segregation by forming the Legal Rights Association, an organization designed "to raise means to protect persons who are assaulted while standing up for their rights." The association did not win a ruling against segregation, however. When Pennington's case went to trial, the judge informed the jury that the companies might make reasonable rules and regulations to govern passengers. In deciding whether rules prescribing segregated service were reasonable, he added, jurors must consider "the probable effect upon the capital, business and interests of companies admitting blacks into their cars indiscriminately with whites." Not surprisingly, the jury decided against Pennington. Despite this setback, the city's blacks continued to enter whites-only cars, convincing some, but not all, of the companies to abandon segregation.¹⁵ Thus in New York, as in Boston, equalitarian ideas served as a rallying point for blacks, encouraging them to assert their rights and challenge the caste system.

Antislavery Constitutionalism Enters the Political Mainstream

The political crisis of the late 1840s and 1850s broadened the appeal of abolitionist constitutional ideas, giving them currency outside the ranks of northern blacks and white abolitionists. The annexation of Texas in 1845 and the Mexican War of 1846–1848 added the vast territories of the Southwest to the Republic. They also ignited a bitter debate over slavery and whether it should be permitted in the newly acquired territories. While Congress patched over the territorial question in the Compromise of 1850, a part of the compromise, the draconian Fugitive Slave Act of

1850, brought the grim reality of slavery to northern attention as slaveowners stepped up efforts to capture runaways, and blacks and abolitionists resisted. While this perceptibly increased northern antislavery sentiment, it was the Kansas-Nebraska Act of 1854 that irreversibly damaged sectional harmony. By accepting southern demands for repeal of the Missouri Compromise's exclusion of slavery from the two territories, Congress appeared to many northerners to be in the grip of proslavery forces intent on expanding slavery and, concomitantly, southern political power. Northerners flocked to the Republican party, which emerged in the uproar over the Kansas-Nebraska Act, calling for an end to southern domination of the national government, denouncing the social system of the slave South, and demanding containment of slavery.

The new party made the Kansas-Nebraska Act and the issue of slavery extension matters of vital importance to northerners. Republicans denounced the Kansas-Nebraska bill as yet another example of slaveholders' domination of the national government. Embracing the abolitionist interpretation of the Constitution as an antislavery document, they contended that the Kansas-Nebraska Act subverted the design of the framers and further eroded the principles of equality and natural rights on which the nation had been founded. They also argued that the expansion of slavery had serious social consequences for whites; slavery destroyed the work ethic by associating labor with a despised caste, discouraged whites from diligent toil, and thereby deprived individuals of the means of advancement. If slavery took root in the West, Republicans warned, it would diminish opportunities there for aspiring northerners and increase the strength of a decadent social system. Even though the party won virtually no support in the South, it spread triumphantly across the North and enjoyed substantial strength in Congress by 1855 and came remarkably close to winning the presidency in 1856.

Despite Republican denunciation of the South and slavery, it was not an abolitionist party and in fact sought to distance itself from the abolitionists. Republicans did promise to stop the spread of slavery, which they asserted would lead to the gradual death of slavery where it already existed; however, they were eager to dispel the charge that they were irresponsible fanatics who threatened the Union and repeatedly said that the national government had no authority to interfere with slavery in those states that sanctioned it. Moreover, Republicans, themselves by no means free of prejudice, realized the depth of northern racism and trimmed their position accordingly. In the face of taunts by Democrats

denouncing them as proponents of Negro equality who condoned interracial marriage, most Republicans repeatedly proclaimed that they did not support black suffrage or social contacts between the races. In addition, many Republicans asserted that colonization was the best solution to the nation's racial problem and enthusiastically supported schemes to encourage free blacks to emigrate and establish colonies in the Caribbean, Central America, and Africa.

The party, nonetheless, took a position on black rights that reflected the influence of abolitionist constitutional ideas and was in advance of northern public opinion. Republicans agreed with non-Garrisonian abolitionists that the framers of the Constitution had attempted to prevent the spread of slavery and had hoped to set it on the path to extinction. Like moderate abolitionists, they asserted that the Fifth Amendment's due process clause guaranteed all persons freedom and natural rights and of its own force abolished slavery in all areas—such as the territories—under the exclusive control of the national government. Many Republicans also contended that native-born free blacks were state citizens and thus entitled to rights guaranteed by the United States Constitution. During the late 1850s Republican conventions in several states affirmed that free blacks were citizens, as did Republican-controlled legislatures in New Hampshire, New York, Vermont, and Ohio, and the Republican justices on the Maine Supreme Court.

Perhaps even more remarkable, given widespread northern racism, Republicans argued that the principles of the Declaration of Independence were the foundation of republican government and applied to all persons, regardless of race. Granted, they hedged their position, explaining that this did not entitle blacks to political rights or to social equality. What it did guarantee, they asserted, was equality of civil and natural rights. Thus while most Republicans did not believe that free blacks were entitled to the right to vote or to service in hotels and restaurants frequented by whites, they did insist that all free men should enjoy the same rights to freedom of movement, to own and control property, to testify in courts, and to the protection of the laws. Abraham Lincoln best articulated this position in his 1858 debates with Stephen Douglas. He admitted that he had "no purpose to introduce political and social equality between the white and the black races," but asserted that "there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence. . . . I hold that he is as much entitled to these as the white man."¹⁶ Indeed, Republicans

worked to guarantee blacks' civil rights: in Ohio they blocked efforts by Democrats to pass legislation barring black immigration (the state's old antiimmigration laws had been repealed in 1849); in Indiana and Illinois they unsuccessfully supported repeal of laws excluding black immigration; in New Hampshire they repealed the law excluding blacks from the militia; and in Iowa they repealed the statute prohibiting blacks from testifying against whites.

Not only did mainstream Republicans offer cautious support for freedom and black rights, a powerful minority of genuine radicals pressed the party to claim higher ground. Salmon Chase, Joshua Giddings, and Charles Sumner were influential Republican radicals, and all three had played a role in developing abolitionist constitutional ideas. Their presence in party councils guaranteed a hearing for these ideas. Most radicals, for example, urged the party to support political as well as civil equality for blacks, and in several states—Iowa (1857), Wisconsin (1857), and New York (1860)—they had sufficient influence to persuade state legislatures to authorize referenda on black suffrage. Although black suffrage was rejected in all three states with many (and in Iowa most) Republicans voting against it, radicals' success in forcing the party to bring the issue before the electorate suggested that they were capable of moving the party.

The Climax of Proslavery Constitutionalism

Although Republicans offered a genuine challenge to proslavery constitutionalism, opponents of slavery were not optimistic as the 1850s drew to a close. A solidly proslavery administration controlled the presidency, and southerners in Congress pressed their demand for a federal code establishing and protecting slavery in the territories. Even more distressing, the Supreme Court, in its 1857 ruling in *Dred Scott v. Sandford*, offered a stinging rejection of antislavery constitutionalism and a resounding affirmation of the South's views on slavery in the territories and black citizenship.

Dred Scott began his long, tortuous road to the Supreme Court when he accompanied his owner, an Army surgeon named John Emerson, on a long tour of duty in Illinois and the Wisconsin Territory during the 1830s. In 1846, after he had returned to St. Louis and Dr. Emerson had died, Scott obtained the services of several local lawyers and sued Irene

Emerson, the doctor's wife, for his freedom. He argued that during his travels with Dr. Emerson, he had lived for two years in the free state of Illinois and for three years in Wisconsin Territory, where the Missouri Compromise of 1820 prohibited slavery. Since slavery was illegal in both places, Scott claimed, he had become a free man and was illegally held in bondage. The proceedings in state circuit court ended with a verdict for Scott, but Mrs. Emerson appealed. In 1852 the Missouri Supreme Court overturned the decision of the lower court, holding that under principles of comity¹⁷ Missouri courts were not bound to enforce the law of another state or territory that was against its policies. In a departure from its earlier decisions, the court ruled that Missouri did not accept and would not give effect to the laws of states which freed slaves who were temporarily taken there by their owners. Whatever Scott's status had been in Illinois or Wisconsin, he was still a slave in Missouri.

Scott, however, refused to give up. In 1850, Irene Emerson had remarried and left Missouri, and her brother, John Sanford (the Supreme Court's reporter spelled his name incorrectly, making him *Sandford* in the title of the case), had gained control of Scott. Because Sanford was a citizen of New York (he frequently traveled to St. Louis on business), Scott was able to begin his freedom suit anew in federal court. Under Article III of the Constitution and the Judiciary Act of 1789, United States circuit courts had jurisdiction over cases between citizens of different states, and Scott claimed that this allowed him, as a citizen of Missouri suing a New Yorker, to have a hearing in the United States circuit court in St. Louis. Yet Scott fared no better in the new forum; the trial in federal court ended in 1854 with a jury verdict against him.

Scott appealed to the United States Supreme Court, but he had little reason to expect victory. Chief Justice Roger B. Taney and four of his colleagues were southerners, and two northern justices were Democrats sympathetic to the South and slavery. Moreover, Taney's opinion for the Court in *Strader v. Graham* (1851) boded ill for Scott. The chief justice had asserted that when slaves returned to a slave state after having traveled or resided in a free state, the courts of the slave state could decide whether they had become free or remained in bondage. Because Missouri's highest court had already ruled against Scott on this very point, the *Strader* precedent seemed to doom his chance for victory in the United States Supreme Court. There was little surprise, therefore, in early 1857 when the Court ruled against Scott by a 7-2 majority. Nonetheless, few observers could have predicted that the Court would

issue such a sweeping proslavery polemic. But the chief justice and his southern brethren, embittered and threatened by the rising tide of northern antislavery sentiment, were determined to slay the twin dragons of abolitionist equalitarianism and Republican antiextensionism.

Each justice wrote an opinion, and historians have endlessly debated what (beyond the fact that Scott was still a slave) the Court actually decided. The chief justice's opinion, however, was authoritative. Not only did a majority authorize Taney to write "the opinion of the Court," but as Don Fehrenbacher notes in his Pulitzer Prize-winning study of the case, "Taney's opinion was accepted as the opinion of the Court by its critics as well as its defenders."¹⁸ Taney held that the circuit court should have dismissed the case for want of jurisdiction. Because Scott was a Negro, he explained, he could not be a citizen, even if free, and therefore he had no right to sue in federal court on the basis of diversity of citizenship. He reinforced this position by arguing that Scott could not be a citizen because he was a slave. The Missouri Compromise, which Scott claimed had made him free, was unconstitutional because Congress lacked authority to exclude slavery from the territories.

Taney's holding that free blacks were not United States citizens was a shot at antislavery constitutionalism. The chief justice asserted that at the time of the Revolution and the Constitutional Convention, Americans regarded blacks as inferior beings who had "no rights which the white man was bound to respect."¹⁹ Consequently, the framers of the Constitution had not regarded blacks as citizens of the United States. Because United States citizenship gave persons certain rights that were enforceable throughout the United States, Taney argued that no state could confer United States citizenship on blacks merely by making them state citizens. To do so would enable a single state to confer national citizenship on a group that the states had collectively excluded when the Constitution was adopted. Thus even if Scott was a citizen under Missouri law, he could not be a United States citizen entitled to rights (such as bringing suit in federal court on the basis of diversity of citizenship) created by the United States Constitution.

Taney's analysis not only rested on bad history, but on a careless reading of the Constitution. The Constitution did not define national citizenship and crucial provisions guaranteed rights, not to United States citizens, but to state citizens. The chief justice's poorly reasoned argument was, nevertheless, purposeful. By denying that free blacks were entitled to rights under the Constitution (including those conferred by the

privileges and immunities clause) he enabled southern states to prevent the entry of free blacks from other states and thus to protect themselves from outside agitators bent on fomenting slave insurrections. Moreover, by excluding free blacks from citizenship, he reinforced the principles of white supremacy which undergirded the South's slave system.

The second part of Taney's ruling—that Scott's residence on free soil had not made him free—was equally polemical and unpersuasive. Here the question of Scott's freedom involved residence in a free state and in a territory where Congress had prohibited slavery. Taney realized that his agenda would be ill-served by first addressing himself to the effect of Scott's residence in Illinois. If he ruled (as he subsequently did) that it did not affect Scott's status once he returned to Missouri because Missouri law denied that temporary residence on free soil freed slaves, he would also dispose of the effect of Scott's residence in Wisconsin Territory. Consequently, Taney turned first to Scott's sojourn in Wisconsin Territory, arguing that residence there did not free Scott because Congress did not have the authority to exclude slavery from the territories. Therefore the prohibition on slavery contained in the Missouri Compromise, which Scott claimed made him free, was unconstitutional and of no effect. Only after he had disposed of Scott's claim to freedom on the basis of living in Wisconsin Territory did Taney turn to Scott's Illinois sojourn, ruling that it did not affect Scott's status once he returned to Missouri.

The chief justice's attack on the Missouri Compromise was as poorly argued as his polemic on citizenship. Despite the clear language of Article IV, section 3, authorizing Congress to "make all needful Rules and Regulations respecting the Territory and other property belonging to the United States," Taney flirted with the implausible argument that Congress did not have authority to govern the territories; however, he ultimately retreated from this position. While it would have denied Congress the power to prohibit slavery in the territories, it would also have taken away Congress's authority to enact a slave code for the territories, which was rapidly becoming a crucial southern demand.

This led Taney to focus on the rights of the residents of the territories. Turning abolitionist constitutionalism on its head, he suggested that the Fifth Amendment's due process clause prohibited Congress from excluding slavery from the territories because to do so would interfere with the property rights of slaveowners who migrated there, depriving them of their slave property. This remained a suggestion; however, as Professor Fehrenbacher notes, Taney did not explicitly declare the Missouri

Compromise unconstitutional on due process grounds. He also flirted with the notion, popularized by the great proslavery theorist John C. Calhoun, that the territories were the common property of the states, held in trust for them by the national government. Congress, Taney hinted, could not prejudice the rights of the southern states by preventing their citizens from migrating to the territories with their property. Yet he failed to develop this argument fully or use it to strike down the Compromise's ban on slavery. He also asserted that the Constitution "distinctly and expressly affirmed" the right to slave property and, in the fugitive slave clause, pledged the national government to protect it. While this assertion accurately stated the proslavery reading of the Constitution, it was (as we have seen) a distorted reading of the Constitution itself. Nevertheless, Taney contended that Congress did not have "greater power over slave property . . . than property of any other description" and that "the only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights."²⁰ Yet he did not explicitly conclude from these assertions that Congress lacked authority to exclude slavery from the territories. Indeed, while Taney clearly declared the antislavery provision of the Missouri Compromise unconstitutional, he did not explain precisely his grounds for doing so.

Despite the manifest weaknesses of Taney's argument, it dealt a devastating, if temporary, blow to antislavery constitutionalism and the Republican party. In declaring that blacks, whether free or slave, were not citizens and were not entitled to constitutional rights, he undermined one of the strongest arguments for black rights. In asserting that Congress did not have the power to exclude slavery from the territories and hinting that it had an obligation to protect it there, he also repudiated important abolitionist constitutional ideas. According to Taney, the Constitution, far from being intended to promote freedom in all areas save the states in which it had already been established, demanded that slavery be allowed and perhaps promoted except in those states that explicitly excluded it. Turning the abolitionist argument on its head, Taney asserted that slavery was national and freedom local. The chief justice also repudiated the Republican program, saying, in effect, that the key element in the party's platform was unconstitutional.

Abolitionists and Republicans subjected Taney's opinion to withering criticism. Lincoln, for example, refused to accept the *Dred Scott* case as the final word on the subject, noting that the Supreme Court did not have exclusive authority to interpret the Constitution and that courts some-

times reversed themselves. Nevertheless, the Court's ruling, when coupled with memories of the annexation of Texas, the Fugitive Slave Act of 1850, and the Kansas-Nebraska Act, did little to encourage faith in the triumph of antislavery constitutionalism. Indeed, Lincoln and many Republicans predicted that the Court would soon hand down an opinion prohibiting the northern states from excluding slavery, thus completing the process of nationalizing the institution. Among northern blacks, the decision was the latest blow to the dream that one day they would enjoy true freedom and equality in their native land. Consequently, it gave impetus to the black emigration movement that already had the support of such prominent leaders as Henry Highland Garnet, Martin Delany, Robert Campbell, and H. Ford Douglas.

Despair was not uniform, however. Frederick Douglass argued that antislavery forces had "nothing to fear" from the *Dred Scott* decision. "The whole history of the antislavery movement," he explained, "is studded with proof that all measures devised and executed . . . to . . . diminish the antislavery agitation, have only served to increase, intensify, and embolden that agitation." Douglass argued that the true principles embodied in the Constitution would ultimately triumph and allay the possibility that "it might be necessary for my people to look for a home in some other country."²¹ Of course, the events of the 1860s would at least partially vindicate Douglass's faith. Taney's proslavery Constitution would be swept away and a new Constitution, informed by the antislavery ideas that emerged in the dark days of the 1840s and 1850s would emerge. This new Constitution, the more perfect Union, however, would be forged, not solely through normal political and constitutional processes, but on the bloody fields of Antietam, Gettysburg, Cold Harbor, and Petersburg.