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AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Federalism

Commonwealth v. Aves, 35 Mass. 193 (1836)

Commonwealth v. Aves *was a celebrated case in the antebellum period. Mary Slater had returned to Boston from Louisiana to visit her sick father, Thomas Aves, bringing her attending slave, the six-year-old Med, with her. When the Boston Female Anti-Slavery Society learned of Med's presence in Boston, they hired some of the most prominent lawyers in town to seek a writ of habeas corpus in the state courts to demonstrate how she could be legally held in the state of Massachusetts. Aves had a great deal of difficulty finding a lawyer in Boston willing to represent him in the notorious case, but eventually the young Benjamin Curtis took it on. Curtis is better known for his later service on the U.S. Supreme Court, where he authored the primary dissenting opinion in* Dred Scott v. Sandford *(1857), but as a moderate Whig and protégé of Daniel Webster in 1836 Curtis was particularly concerned that antislavery agitation in New England threatened the stability of the federal union. In an opinion written by the famed chief justice of the Massachusetts Judicial Supreme Court, Lemuel Shaw, however, federal union took a backseat to personal liberty.*

The U.S. Constitution did not specifically require non-slaveholding states to recognize and enforce the right of slaveholders except in the fugitive slave clause, which required that fugitive slaves who escaped across state lines be returned to their lawful owners. Any additional rights that slaveholders had in non-slaveholding states were the result of "comity," the voluntary recognition by one state or nation of the laws and legal decisions of others states or nations. It was comity that allowed slaveholders to bring slaves with them when they attended college or traveled to do business in the northern states, or when they simply crossed the territory of a free state when moving from one slave territory to another. Comity was the natural expectation within a friendly union of states, and some thought it was not just voluntary but implicitly required by the existence of the U.S. Constitution and its goal of creating a "more perfect union." By the 1830s, however, comity was breaking down with the rise of abolitionist sentiment in the North and pro-slavery sentiment in the South. For Shaw, the fugitive slave clause should be read narrowly, a carefully negotiated exception to the "independence" and "sovereignty" of the states rather than a sign of their close, familial relationship.

Benjamin R. CURTIS, for the respondent.

In this case I shall endeavor to maintain the following proposition; that a citizen of a slaveholding State who comes to Massachusetts for a temporary purpose of business or pleasure, and brings his slave as a personal attendant on his journey, may restrain the slave for the purpose of carrying him out of Massachusetts and returning him to the domicil of his owner.

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. . . [I]t cannot be denied that the general principles of international law are broad enough to cover this case. Slaves are looked upon in all codes in two lights, as persons, and as property. The general rule of international law applicable to them as persons, is, that personal capacity or incapacity, attached to a party by the law of his domicil, is deemed to exist everywhere, so long as his domicil remains unchanged. Story's *Conflict of Laws*, 64. . . .

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. . . . It is also important to keep in view the relations which we sustain to Louisiana. She is not a foreign nation. We are bound up with her and the other slave-holding states, by the constitution, into a union, upon the preservation of which no one doubts that our own peace and welfare depend. . . . [T]he constitution provides for that class of cases which was most important [fugitive slaves]; a class which

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requires the active interposition of the law. The slave-holding States might be willing to leave other cases to the comity of the non-slaveholding States; and non-slaveholding States might be willing to accord as a favor and as a matter of comity, more than they were willing to surrender as a matter of right. Accordingly, soon after the adoption of the federal constitution, the legislature of New York, Rhode Island, Pennsylvania and New Jersey, passed laws securing to citizens of slave States, who came within their territories as travelers and brought slaves with them, a right to take those slaves back to their domicil. . . .

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Ellis G. LORING, for the Commonwealth.

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Comity is practically founded on the consent of nations, and the need which is felt of reciprocal good offices. Now nothing is more certain than that no such consent of nations prevails on this subject, in any part of Europe. . . . Nor is there room here for reciprocity. We have no slaves in Massachusetts, in regard to whom we can ask the same comity which is claimed of us. Nay, the comity which is due to freemen, is not extended to us by the slave-holding States. In all those States, color furnishes a presumption of slavery, and a free colored citizen may be called on to prove affirmatively his freedom, or be sold into slavery. In direct violation of the constitutional provision guarantying to the citizens of each State "all privileges and immunities of citizens in the several States," colored citizens of the North, seamen or others, are forbidden by law from entering many of the southern ports of this Union, on peril of being confined in jail till the departure of the vessel in which they arrived, the captain to pay the jail expenses, under the penalty of 1000 dollars fine and not less than six months imprisonment. Laws of South Carolina, 1823. . . .

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CHIEF JUSTICE SHAW delivered the opinion of the Court.

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The case presents an extremely interesting question, not so much on account of any doubt or difficulty attending it, as on account of its important consequences to those who may be affected by it, either as masters or slaves.

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Until this discussion, I had supposed that there had been adjudged cases on this subject in this Commonwealth; and it is believed to have been a prevalent opinion among lawyers, that if a slave is brought voluntarily and unnecessarily within the limits of this State, he becomes free, if he chooses to avail himself of the provisions of our laws; not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his *status*, or condition, as settled by the law of his domicil, as because by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into custody in order to his removal. There seems, however, to be no decided case on the subject reported.

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Without pursuing this inquiry farther, it is sufficient for the purposes of the case before us, that by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit. "All men are born free and equal, and have certain natural, essential, and unalienable rights, which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." It would be difficult to select words more precisely adapted to the abolition of negro slavery. . . .

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That the law arising from the comity of nations cannot apply; because if it did, it would follow as a necessary consequence, that all those persons, who, by force of local laws, and within all foreign places where slavery is permitted, have acquired slaves as property, might bring their slaves here, and exercise over them the rights and power which an owner of property might exercise, and for any length of time short of acquiring a domicil; that such an application of the law would be wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles, and is therefore inadmissible.

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Whether, if a slave, voluntarily brought here and with his own consent returning with his master, would resume his condition as a slave, is a question which was incidentally raised in the argument, but is one on which we are not called on to give an opinion in this case, and we give none. From the principle above stated, on which a slave brought here becomes free, to wit, that he becomes entitled to the protection of our laws, and there is no law to warrant his forcible arrest and removal, it would seem to follow as a necessary conclusion, that if the slave, waives the protection of those laws, and returns to the state where he is held as a slave, his condition is not changed.

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The question has thus far been considered as a general one, and applicable to cases of slaves brought from any foreign state or country; and it now becomes necessary to consider how far this result differs, where the person is claimed as a slave by a citizen of another State of this Union. As the several States, in all matters of local and domestic jurisdiction are sovereign, and independent of each other, and regulate their own policy by their own laws, the same rule of comity applies to them on these subjects as to foreign states, except so far as the respective rights and duties of the several States, and their respective citizens, are affected and modified by the constitution and laws of the United States.

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. . . . This language [of the Fugitive Slave Clause] can, by no reasonable construction, be applied to the case of a slave who has not fled from the State, but who has been brought into the State by his master.

The same conclusion will result from a consideration of the well known circumstances under which this constitution was formed. Before the adoption of the constitution, the States were to a certain extent, sovereign and independent, and were in a condition to settle the terms upon which they would form a more perfect union. It has been contended by some overzealous philanthropists, that such an article in the constitution could be of no binding force or validity, because it was a stipulation contrary to natural right. But it is difficult to perceive the force of this objection. . . . Suppose instead of forming the present constitution, or any other confederation, the several States had become in all respects sovereign and independent, would it not have been competent for them to stipulate by treaty that fugitive slaves should be mutually restored, and to frame suitable regulations, under which such a stipulation should be carried into effect? Such a stipulation would be highly important and necessary to secure peace and harmony between adjoining nations, and to prevent perpetual collisions and border wars. It would be no encroachment on the rights of the fugitive; for no stranger has a just claim to the protection of a foreign state against its will, especially where a claim to such protection would be likely to involve the state in war; and each independent state has a right to determine by its own laws and treaties, who may come to reside or seek shelter within its limits, and to prescribe the terms. . . . [T]he clause in question was agreed on and introduced into the constitution; and as it was well considered, as it was intended to secure future peace and harmony, and to fix as precisely as language could do it, the limit to which the rights of one party should be exercised within the territory of the other, it is to be presumed that they selected terms intended to express their exact and their whole meaning; and it would be a departure from the purpose and spirit of the compact to put any other construction upon it, than that to be derived from the plain and natural import of the language used. Besides, this construction of the provision in the constitution, gives to it a latitude sufficient to afford effectual security to the owners of slaves. . . .

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