AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 4: The Early National Era—Equality/Race/Slavery and Free Blacks

Hudgins v. Wright, 11 Va. 134 (VA 1806)

Holden Hudgins for many years treated Jackey Wright and her children as slaves. When Hudgins attempted to sell some members of the Wright family, Jackey Wright sought a court order prohibiting the sale. Wright insisted her family were Native Americans not descended from slaves. Under Virginia Law, this meant they were free persons. The chancellor of the Richmond Chancery District of Virginia, George Wythe, granted the petition. Wythe first insisted that Wright and her children physically resembled Native Americans. This placed the burden of proof on Hudgins to demonstrate that the Wrights were black and lawfully enslaved. More dramatically, Wythe insisted that in a freedom suit, the slaveholders always bore the burden of proof. Although the actual opinion Wythe wrote is lost, according to the summary given by the Supreme Court of Appeals of Virginia, Wythe ruled

> *that freedom is an inherent blessing, of which according to the [Virginia Constitution's] bill of rights, they could not be deprived; and therefore [since defendants had introduced no evidence of African descent] that they were free.*

Hudgins appealed this decision to the highest court in Virginia.

The Supreme Court of Appeals of Virginia granted the Wrights their freedom, but on a narrower ground than relied on by Chancellor Wythe. The justices agreed that both judge and jury could make an initial determination from physical appearances whether a person was white, Native American or black. The justices agreed that the Wrights resembled Native Americans. This placed the burden on Hudgins to prove that they were black. Hudgins did not have sufficient evidence, so the Wrights were freed. The Supreme Court rejected claims that slaveholders always bore the burden of proof in freedom suits. The presumption in Virginia Courts was that Native Americans were free, but that blacks were slaves. How did Judge Tucker justify these differing presumptions? Did he have any legal basis for his presumptions or does prejudice alone explain how Tucker interpreted the "free and equal" clause of the state constitution?

JUDGE TUCKER

. . .

From the first settlement of the colony of *Virginia* to the year 1778, . . . all *negroes, Moors,* and *mulattoes,* except *Turks* and *Moors* in amity with *Great Britain,* brought into this country by sea, or by land, were SLAVES. And by the uniform declarations of our laws, the descendants of the *females* remain slaves, to this day, unless they can *prove a right* to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.

By the adjudication of the General Court, in the case of *Hannah and others* against *Davis,* April term, 1777, all American Indians brought into this country since the year 1705, and their descendants in the maternal line, are *free.* . . . Consequently I draw this conclusion, that all *American Indians* are *prima facie* FREE: and that where the fact of their nativity and descent, in a *maternal* line, is satisfactorily established, the burthen of proof thereafter lies upon the party claiming to hold them as slaves. . . . .

All *white persons* are and ever have been FREE in this country. If one *evidently white,* be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.

. . .

Nature has stamped upon the *African* and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair. . . . Upon these distinctions as connected with our laws, the burthen of proof depends. . . .

Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper-coloured person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent *Roman* nose, were brought together before a Judge upon a writ of *Habeas Corpus,* on the ground of false imprisonment and detention in slavery: that the only evidence which the person detaining them in his custody could produce was an authenticated bill of sale from another person, and that the parties themselves were unable to produce any evidence concerning themselves, whence they came, &c. &c. How must a Judge act in such a case? I answer he must judge from his own view. He must discharge the white person and the *Indian* out of custody . . . and he must redeliver the black or mulatto person, with the flat nose and woolly hair to the person claiming to hold him or her as a slave, unless the black person or mulatto could procure some person to be bound for him, to produce proof of his descent, in the maternal line, from a *free female ancestor.* . . This case shows my interpretation how far the *onus probandi* may be shifted from one party to the other: and is, I trust, a sufficient comment upon the case to show that I do not concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern, agency* or *interest.* But notwithstanding this difference of opinion from the Chancellor, I heartily concur with him in pronouncing the appellees *absolutely free;* and am therefore of opinion that the decree be affirmed.

JUDGE ROANE

The distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only. . . .

In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an *Indian,* the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.

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JUDGES FLEMING, CARRINGTON, and LYONS, President, concurring. . . .

[opinion omitted]