AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Equality/Race/Slavery in the Territories

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Dred Scott v. Sandford, 60 U.S. 393 (1857) (expanded)

John Emerson's hypochondria was responsible for the most infamous case in American judicial history. Emerson was an army surgeon who complained of health problems wherever he was posted. He could not stomach Rock Island, Illinois, then a stint in Louisiana, and finally a posting at Fort Snelling in the Minnesota territory. Emerson was accompanied at all times by his slave, Dred Scott. While Emerson served at Fort Snelling, Dred Scott married Harriet Robinson, another slave.[1] *In 1838, Emerson returned to Missouri with both Dred and Harriet Scott as slaves. When Emerson died, Irene and John Sanford (misspelled in the case name) inherited the Scotts.*

During the late 1840s, the Scotts sued Sanford in state court. The Scotts claimed that their previous residence in a free state and a free territory emancipated them. The case initially presented fairly simple state law issues. Both free and slave states during the early nineteenth century made a distinction between residence and sojourning. Slaves who resided in free states with their masters were emancipated. Slaves who traveled through free states with their masters remained slaves. Had Missouri applied these conventional rules, the Scotts would have won their freedom suit. Emerson resided in both a free state and a free territory. State constitutional law, however, was in flux. Several northern state courts abandoned the residence/sojourning distinction. In Commonwealth v. Aves *(1836), Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts ruled that slaves traveling with their masters were free the instant they entered that state. In response, the Missouri Supreme Court in Dred Scott's case ruled that slavery reattached whenever a slaveholder returned with his slaves from a free state or territory, no matter how long the northern stay.*

The Scotts refiled their freedom lawsuit in federal court, hoping that a federal judge might treat their claims under federal common law rather than under state law.[2] *This move changed the legal claims open to both parties. Sanford claimed that Dred Scott could not sue in federal court because Dred Scott was not a citizen for the purposes of Article III. If a slave or a former slave could not be an American citizen, then Scott and Sanford did not meet the diversity of citizenship requirement for federal jurisdiction.*[3] *The federal district court did not rule on this matter, claiming that the issue of citizenship had been waived. The trial court instead supported the state court ruling that slavery reattached when the Scotts returned to Missouri. When Scott appealed that decision, Sanford added as an alternative ground for judgment the claim that Scott did not become free in Minnesota because the Congressional ban on slavery in that territory was unconstitutional.*

The Supreme Court of the United States was inclined to resolve Scott's case on narrow grounds. A previous case, Strader v. Graham *(1851), ruled that states had the power to determine whether bondage reattached when a slave "voluntarily" returned from a free state or territory. On this view,* Dred Scott *raised no important federal constitutional questions. Missouri law determined the status of all persons of color in Missouri.*

At some point during the winter of 1856–57, the southern justices on the Taney Court decided to resolve all the issues raised by Scott's appeal. Their precise reason for doing so remains a mystery. Some commentators believe Taney choose to write a broad opinion only after Justice McLean announced that he was writing a dissenting opinion articulating the anti-slavery position on slavery in the territories. Other commentators note the judicial belief that a broad judicial decision might settle contentious sectional issues. President-elect Buchanan pushed for a

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[1] See Lea VanderVelde, *Mrs. Dred Scott: A Life on Slavery's Frontier* (New York: Oxford University Press, 2009).

[2] This argument relies heavily on *Tyson v. Swift*, 41 U.S. 1 (1842). In *Tyson*, the justices ruled that federal courts when resolving diversity cases need not rely on the law of the state in which the contested action took place.

[3] Questions also arose whether Sanford waived this claim in the litigation. Several justices in *Dred Scott* refused to consider the citizenship issue on that ground.

broad decision. Acting through Justice Catron, Buchanan wrote a series of letters urging Justice Grier to join the southern justices in order to present Dred Scott *as a bisectional ruling.*

Almost every facet of the Dred Scott *decision was and is controversial. Consider Justice Taney's decision to rule on the constitutionality of the Missouri Compromise after he declared that former slaves, because they were not citizens of the United States, could not bring lawsuits in federal court. Was this, as many northerners charged, a judicially inappropriate effort to discuss the merits of a case in which the court declined jurisdiction? Alternatively, was the discussion of the Missouri Compromise an alternate grounds for rejecting jurisdiction, as Taney insisted? What is the actual holding of* Dred Scott*? Conventionally, that decision has stood for the proposition that black persons[4] could not be American citizens (although other persons of color were eligible) and that slavery could not be prohibited in American territories. Do five Justices endorse Taney's argument on black citizenship? Are there five votes for any particular theory about the status of slavery in the territories?*

Virtually all commentators agree that Dred Scott *is wrong as a matter of constitutional law.[5] Do you agree with this assessment? To what extent is what is wrong with* Dred Scott *what is wrong with slavery and racism? Could a person who believed in slavery and racism find Chief Justice Taney's arguments constitutionally plausible? If Taney is wrong, was he wrong because he used the wrong method of constitutional interpretation or misapplied the right method of constitutional interpretation? What method did Taney use? Was he an originalist or did he implicitly reject originalism? What methods did the dissents use? Is the argument between the dissenting and majority opinions an argument about method or application of method?*

Justice Benjamin Curtis's dissent is considered a masterpiece of legal writing. Curtis concluded that Congress could decide whether to ban slavery in the territories. He asserted that free blacks were American citizens only if the state in which they were born treated free blacks as citizens. Very few states did so in 1856. Justice John McLean's dissent maintained that Congress was constitutionally obligated to ban slavery in the territories and that all free persons of color born in the United States were American citizens. What explains the different positions taken in the dissenting opinions? Which position is constitutionally correct? If you were on the Taney Court, would you write a narrower or a broader dissent?

Most legal commentators believe that Dred Scott *helped cause the Civil War. Robert McCloskey declares that the Taney Court tragically "imagined that a flaming political issue could be quenched by calling it a 'legal' issue and deciding it judicially."[6] Both northern and southern Democrats, however, rallied around the* Dred Scott *decision in the spring and summer of 1857. Democrats gained votes at the expense of Republicans in every northern election held between March and September of that year. Democrats fractured in the late fall of 1857 over the issue of Kansas statehood. Did* Dred Scott *nevertheless aggravate sectional tensions by increasing Republican militancy or by providing another barrier between northern and southern Democrats when the controversy over Kansas statehood emerged? Is the real lesson of the 1850s that no American institution was able to fashion a successful compromise over slavery?*

CHIEF JUSTICE TANEY delivered the opinion of the court.

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The situation of this [negro] population was altogether unlike that of the Indian race. . . . [A]lthough they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. . . . [T]hey may . . . be naturalized by the authority of Congress. . . .

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[4] Or, more accurately, slaves and descendants of slaves.

[5] The seminal expression of the scholarly consensus is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). One of the authors of this casebook strongly disputes this scholarly consensus. See Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006).

[6] Robert McCloskey, *The American Supreme Court* (4th ed.) (revised by Sanford Levinson) (Chicago: University of Chicago Press, 2004), 62.

The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who . . . form the sovereignty, and who hold the power and conduct the Government through their representatives. . . . The question before us is, whether [former slaves and their descendants] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

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In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. . . . For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. . . . Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. . . . The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive. . . . Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government. . . .

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It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. . . .

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In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

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They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . .

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The language of the Declaration of Independence is equally conclusive:

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It . . . say[s]: 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.'

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them,

the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

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[W]hen we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them. . . .

By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State, but free white citizens; and the same provision is found in a subsequent collection of the laws, made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded, because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it.

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More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

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Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

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No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands

of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

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The act of Congress, upon which the plaintiff relies [as the basis of his freedom claim], declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France . . . which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;' but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. . . .

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. . . [T]he clause was inserted in the Constitution which gives Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States' . . . was intended for a specific purpose. . . . It was to transfer to the new Government the property [i.e., western lands] then held in common by the States, and to give to that Government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

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The words 'needful rules and regulations' would seem, also, to have been cautiously used for some definite object. They are not the words usually employed by statesmen, when they mean to give the powers of sovereignty, or to establish a Government, or to authorize its establishment. . . . And in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of Government independently of a State, it does not say Congress shall have power 'to make all needful rules and regulations respecting the territory;' but it declares that 'Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.

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[I]t may be safely assumed that citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose. The principle upon which our Governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee

acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

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[T]he power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. . . .

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For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

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. . . [T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

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It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. . . .

. . . [N]o laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

. . . [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. [N]o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

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JUSTICE WAYNE

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The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

[Justice Wayne then endorsed all the conclusions reached by the Taney opinion.]

JUSTICE NELSON

[Justice Nelson did not consider whether former slaves could be citizens of the United States or whether Congress could ban slavery in American territories. His opinion concluded that Missouri could decide that status of all persons of color in that state who had traveled or resided in a free state or territory.]

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Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.

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[E]ven conceding, for the purposes of the argument, that this provision of the act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a State. It can neither displace its laws, nor change the status or condition of its inhabitants.

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JUSTICE GRIER

I . . . concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of 6th March, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But, that the record shows a prima facie case of jurisdiction, requiring the court to decide all the questions properly arising in it; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance; for, whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

JUSTICE DANIEL

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. . . [T]he following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.

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. . . [A] slave, the . . . property of a master, ... cannot be a CITIZEN. For who, it may be asked, is a citizen? What do the character and *status* of citizen import? Without fear of contradiction, it does not import the condition of being private property, the subject of individual power and ownership. . . . But beyond this, there is not, it is believed, to be found, in the theories of writers on Government, ... an exposition of the term *citizen*, which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.

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It is difficult to conceive by what magic the . . . renunciation of an interest in a subject of *property*, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation. Can it be pretended that an individual in any State, by his single act, . . . can create a citizen of that State? . . .

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That in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as *property* merely, and as such was not and could not be a party or an actor, much less a *peer* in any compact or form of government established by the States or the United States. . . . That so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized either by the language or purposes of the former; and it has been expressly excluded by every act of Congress providing for the creation of citizens by *naturalization*, these laws, as has already been remarked, being restricted to *free white aliens* exclusively.

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. . . Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust [the territories] to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals; but every citizen would, if any *one* could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

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JUSTICE CAMPBELL

[Justice Campbell did not believe Dred Scott's citizenship was properly before the Court.]

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. . . The clause which enables Congress to dispose of and make regulations respecting the public domain, was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands. . . . I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. . . .

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Is it probable . . . that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? . . .

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[T]he power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservations for schools, internal improvements, military sites, and public buildings; the preemption claims of settlers; the establishment of land offices, and boards of inquiry, to determine the validity of land titles; the modes of entry, and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of Territorial Governments and States; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal Government-these important rules and regulations will sufficiently illustrate the scope and operation of the 3d section of the 4th article of the Constitution. But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all

the powers of Government which belong to them as the Legislature of the United States, of which these Territories make a part. . . . Thus the laws of taxation, for the regulation of foreign, Federal, and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice, and for the punishment of crimes, are as operative there as within the States. I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure, is beyond the cognizance of the judiciary department of that Government. How much municipal power may be exercised by the people of the Territory, before their admission to the Union, the courts of justice cannot decide. This must depend, for the most part, on political considerations, which cannot enter into the determination of a case of law or equity. . . .

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[T]he great powers of war and negotiation, finance, postal communication, and commerce, in general, when employed in respect to the property of a citizen, refer to, and depend upon, the municipal laws of the States, to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognize to be property.

And this principle follows from the structure of the respective Governments, State and Federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose acts, within the scope of their respective jurisdictions, are mutually obligatory. They are respectively the depositories of such powers of legislation as the people were willing to surrender, and their duty is to co-operate within their several jurisdictions to maintain the rights of the same citizens under both Governments unimpaired. A proscription, therefore, of the Constitution and laws of one or more States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that Government was designed to accomplish.

. . . This court have determined that the intermigration of slaves was not committed to the jurisdiction or control of Congress. Wherever a master is entitled to go within the United States, his slave may accompany him, without any impediment from, or fear of, Congressional legislation or interference. The question then arises, whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognize and respect the rights and relations that validly exist under the Constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations, within the Territories.

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JUSTICE CATRON

[Justice Catron did not believe Dred Scott's citizenship was properly before the Court.]

. . . My opinion is, that Congress is vested with power to govern the Territories of the United States by force of the third section of the fourth article of the Constitution. . . .

. . .

More than sixty years have passed away since Congress has exercised power to govern the Territories, by its legislation directly, or by Territorial charters, subject to repeal at all times, and it is now too late to call that power into question. . . .

. . . And how does the power of Congress stand west of the Mississippi river? The country there was acquired from France, by treaty, in 1803. . . . And, by article third, that 'the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.'

Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property.

. . .

That the United States Government stipulated in favor of the inhabitants to the extent here contended for, has not been seriously denied, as far as I know; but the argument is, that Congress had authority to *repeal* the third article of the treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress could repeal the third article entirely, at its pleasure. This I deny.

. . .

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousand of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

. . .

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. . . . Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him; and the precise question here is, whether Congress had the power to annul that title. It is idle to say, that if Congress could not defeat the title *directly*, that it might be done indirectly, by drawing a narrow circle around the slave population of Upper Louisiana, and declaring that if the slave went beyond it he should be free. . . . If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

. . .

JUSTICE McLEAN dissenting.

. . .

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. . . . He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is 'a freeman.' Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.

. . .

Slavery is emphatically a State institution.

. . .

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in

fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

. . .

The power to make all needful rules and regulations is a power to legislate. This no one will controvert, as Congress cannot make 'rules and regulations,' except by legislation. But it is argued that the word territory is used as synonymous with the word land; and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section appears from the fact that in the first line of the section 'the power to dispose of the public lands' is given expressly, and, in addition, to make all needful rules and regulations. The power to dispose of is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. As a composition, the Constitution is remarkably free from such a charge.

. . .

But, if it be admitted that the word territory as used means land, and nothing but land, the power of Congress to organize a temporary Government is clear. It has power to make all needful regulations respecting the public lands, and the extent of those 'needful regulations' depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution. . . .

. . . [T]here is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. . . .

But Congress has no power to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the Government of a Territory, to some extent, the combined powers of the Federal and State Governments are necessarily exercised.

If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results, that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States; and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But, not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

. . .

By virtue of what law is it, that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are made property by the law of the State, and no such power has been given to Congress.

. . .

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true, this was said by the court, as also many other things, which are of no authority. . . . A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.

. . .

JUSTICE CURTIS dissenting

. . .

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

. . .

. . . I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. . . .

. . .

Th[e] Constitution was ordained and established by the people of the United States, through the action, in each State, or those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of 'the people of the United States,' by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

. . .[M]y opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

. . .

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, what free persons, born within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. . . .

. . .

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so,

it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

. . . It has been further objected, that if free colored persons, born within a particular State, and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be eligible to not only Federal offices, but offices even in those States whose Constitution and laws disqualify colored persons from voting or being elected to office.

. . . The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

. . .

[Justice Curtis then maintained that, assuming the Missouri Compromise was constitutional, the Missouri Court incorrectly ruled that Dred Scott became a slave when he returned to Missouri. He then discussed whether the Missouri Compromise was constitutional.]

It has been urged that the words 'rules and regulations' are not appropriate terms in which to convey authority to make laws for the government of the territory.

But it must be remembered that this is a grant of power to the Congress—that it is therefore necessarily a grant of power to legislate—and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. . . .

. . .

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power.

. . .

But it is insisted, that whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make '*all* needful rules and regulations' respecting the territory belonging to the United States.

The assertion is, though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument, to exhibit some solid and satisfactory reason, drawn from the subject-matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification.

. . .

There is nothing in the context which qualifies the grant of power. The regulations must be 'respecting the territory.' An enactment that slavery may or may not exist there, is a regulation respecting the territory. Regulations must be needful; but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

. . .

This provision [in the Northwest Ordinance banning slavery] shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory; and accordingly, . . . a few days later, Congress passed the act of May 20th, 1790 [which permitted slavery in the southwest territories]

. . .

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to.

. . .

[With respect to policy arguments for permitting slavery in the territory], this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

. . .

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. . . .

Slavery, being contrary to natural right, is created only by municipal law.

. . .

. . . [T]hey who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently

within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing.

[I agree] that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as 'the people of the United States' under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress; to whose power, as the Legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognized in this court, without arrogating to the judicial branch of the Government powers not committed to it; and which, with all the unaffected respect I feel for it, when acting in its proper sphere. I do not think it fitted to wield.

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

. . .

And if a prohibition of slavery in a Territory in 1820 violated this principle, . . . the ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, of the Legislature of any or all the States of the Confederacy, to consent to such a violation? . . . It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can similar regulation respecting a Territory violate the fifth amendment of the Constitution?

. . .