AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era—Equality/Race/Free Blacks/Citizenship

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Hobbs v. Fogg, 6 Watts 553 (PA 1837)

William Fogg, a free person of color, was prevented from voting by Hiram Hobbs, the inspector of elections in Greenfield, Pennsylvania. Fogg sued Hobbs under a Pennsylvania law that forbade governing officials from maliciously or fraudulently denying the right to vote. Hobbs defended his actions by claiming that Fogg was not a freeman, entitled to vote under the Constitution of Pennsylvania. The trial judge directed the jury to give their verdict for Fogg. "We know of no expression in the constitution or laws of the United States, nor in the constitution or laws of the state of Pennsylvania," that judge declared,

> *which can legally be construed to prohibit free negroes and mulattoes, who are otherwise qualified, from exercising the rights of an elector. The preamble to the act for the gradual abolition of slavery, passed on the 1st of March 1780, breathes a spirit of piety and patriotism, and fully indicates an intention in the legislature to make the man of color a freeman.*

Hobbs appealed this ruling to the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania reversed the trial court on the ground that free persons of color were not citizens of Pennsylvania. Chief Justice Gibson bluntly declared, "No colored race was party to our social compact." John Bannister Gibson was one of the most prominent state court judges in Jacksonian America. On several occasions, he was seriously considered for an appointment to the Supreme Court of the United States. How did he defend his decision in Fogg v. Hobbs*? What principles of constitutional interpretation did Gibson use? Do you see* Hobbs *as a product of simple racism or did Chief Justice Gibson base his ruling partly on principles central to Jacksonian Democracy?*

The opinion of the court was delivered by CHIEF JUSTICE GIBSON

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. . . [N]o colored race was party to our social compact. . . . [O]ur ancestors settled the province as a community of white men, and the blacks were introduced into it as a race of slaves; whence an unconquerable prejudice of caste, which has come down to our day, insomuch that a suspicion of taint still has the unjust effect of sinking the subject of it below the common level. Consistently with this prejudice, is it to be credited that parity of rank would be allowed to such a race? Let the question be answered by the Statute of 1726, which denomination it an idle and a slothful people; which directed the magistrates to bind out free negroes for laziness or vagrancy; which forbade them to harbor Indian or mulatto slaves, on pain of punishment by fine, or to deal with negro slaves, on pain of stripes; which annexed to the interdict of marriage with a white, the penalty of reduction to slavery; which punished them for tippling with stripes, and even a white person with servitude for intermarriage with a negro. If freemen, in a political sense, were subjects of these cruel and degrading oppressions, what must have been the lot of their brethren in bondage? It is also true, that degrading conditions were sometimes assigned to white men, but never as members of a caste. Insolvent debtors, to indicate the worst of them, were compelled to make satisfaction by servitude; but that was borrowed from a kindred and still less rational principle of the common law. This Act of 1726, however, remained in force till it was repealed by

the Emancipating Act of 1780; and it is irrational to believe that the progress of liberal sentiments was so rapid, in the next ten years, as to produce a determination in the convention of 1790, to raise this depressed race to the level of the white one. If such were its purpose, it is strange that the word chosen to effect it, should have been the very one chosen by the convention of 1776, to designate a white elector. "Every *freeman,*" it is said, chap. 11, sect. 6, "of the full age of twenty-one years, having resided in this state for a space of one whole year before the day of election, and paid taxes during that time, shall enjoy the rights of an elector."

Now if the word freeman were not potent enough to admit a free negro to suffrage, under the first constitution, it is difficult to discern a degree of magic in the intervening plan of emancipation, sufficient to give it adequate potency, in the apprehension of the convention under the second.

The only thing in the history of the convention, which casts a doubt upon the intent, is the fact, that the word white was prefixed to the word freeman, in the report of the committee, and subsequently struck out; probably, because it was thought superfluous, or still more probably, because it was feared that respectable men of dark complexion would often be insulted at the polls, by objections to their color. . . . Whatever the motive, the disseverance is insufficient to warp the interpretation of a word on such settled and determinate meaning as the one which remained. A legislative body speaks to the judiciary only through its final act, and expresses its will in the words of it; and though their meaning may be influenced by the sense in which they have usually been applied to intrinsic matters, we cannot receive an explanation of them from what has been moved or said in debate. Were he even disposed to pry into the motives of the members, it would be impossible for him to ascertain them; and in attempting to discover the ground on which the conclusion was attained, it is not probable that a member of the majority could indicate anything that was common to all. Previous propositions are merged in the act of consummation; and the interpreter of it must look to that alone.

. . . [T]he second section of the fourth article of the federal constitution, presents an obstacle to the political freedom of the negro, which seems to be insuperable. It is to be remembered that citizenship, as well as freedom, is a constitutional qualification; and how it could be conferred so as to overbear the laws imposing countless disabilities on him in other states, is a problem of difficult solution. In this aspect the question becomes one, not of intention, but of power; and of power so doubtful as to forbid the exercise of it. Every man must lament the necessity of these disabilities; but slavery is to be dealt with by those whose existence depends on the skill with which it is treated. Considerations of mere humanity, however, belong to a class with which, as judges, we have nothing to do; and interpreting the constitution in the spirit of our institutions, we are bound to pronounce that men of color are destitute of title to the elective franchise. . . .

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