

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

Supplementary Material

Chapter 6: The Civil War and Reconstruction—Individual Rights/Personal Freedom and Public Morality

---

**Burns v. State, 48 Ala. 195 (1872)**

---

*Burns was a justice of the peace in Mobile, Alabama. During Reconstruction, he performed a marriage ceremony for Thomas Woods, an African-American man, and Echie Bunch, a white woman. This marriage violated an Alabama statute that forbade persons from performing marriages between white persons and persons of color. Burns was convicted and fined by a local trial court. He appealed that decision to the Supreme Court of Alabama.*

*The Alabama law banning interracial marriages was somewhat of an outlier in the early Reconstruction South. Southern legislatures controlled by Republicans and persons of color in the late 1860s either repealed previous restraints on marriage or passed new laws granting consenting adults the right to marry the person of their choice. Northern states in 1872 were more likely than southern states to ban interracial marriages.*

*The Supreme Court of Alabama ruled that the Alabama ban on interracial marriage violated the Fourteenth Amendment and federal law. Judge Benjamin Saffold insisted that marriage was a contract and that persons had the same right to make contracts for interracial marriages as they did to make interracial contracts to build a house or sell a horse. Why did Saffold reach this conclusion? Why was his claim that “Marriage is a civil contract” crucial to his decision? Did Burns hold that the Constitution of Alabama protects a fundamental right to marry?*

JUDGE SAFFOLD

...

Marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible. The very excess to which such a construction would lead is conclusive against it.

It is self-evident that an inhabitant of a country, proscribed by its laws, approaches equality with the more favored population in proportion as the proscription is removed. . . . Dred Scott was not allowed to sue a citizen because he was not himself a citizen. One of the rights conferred by citizenship, therefore, is that of suing any other citizen. The civil rights bill now confers this right upon the negro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.

. . . The first section of that article proclaims that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.” The spirit and express declaration of this section are, that no person shall be disfranchised, in any respect whatever, without fault on his part, except for his own good, reasonably apparent, and that the persons who acquire citizenship under it shall not be distinguished from the former citizens for any of the causes, or on any of the grounds, which previously characterized their want of citizenship. . . .

