The Roots of Equal Protection

The Civil War amendments grew out of the conflict between the ideals of the Declaration and the institution of slavery. The Fourteenth Amendment, in particular, was not born from the war alone. Many of the men who enacted it had been involved in, or sympathetic to, the abolitionist cause. Their arguments and rhetoric were continuous with prewar attacks on the constitutionality of slavery. And as the opponents of slavery gained political strength, proslavery reaction set the issues into sharp relief. The antagonistic positions were defined still more clearly by Supreme Court decisions that came down on the proslavery side and weakened the chances of compromise. Finally, out of thirty years of increasingly polarized opinion, there emerged what became the theoretical foundations of the equal-protection clause.

The Anti-Slavery Movement

The following discussion is not intended as an argument that the Civil War was fought over political philosophy. I am concerned here with the roots not of the war itself but of a particular consequence of that war, an amendment to the Constitution. This particular investigation inevitably leads into political philosophy. There exists strong agreement among constitutional historians that the Fourteenth
Equality under the Constitution

Amendment had its origins in the antislavery movement. And as one of them wrote, “from first to last the campaign against slavery was one predicated on Lockean theories of government.” Theory was a potent weapon in the arguments against slavery and, ultimately, for a constitutional amendment.

Antislavery feeling continued to grow after the Constitution was ratified. By 1804, all states north of Maryland had forbidden slavery. Congress forbade further importation of slaves in 1808, as soon as it constitutionally could. In the South, local antislavery societies managed to persuade some owners to free their slaves, but not enough to make much of a difference. Many people had hoped that slavery would die out after importation was stopped, but the institution thrived in the Deep South’s plantation economy.

Abolition of slavery in their own states did not long satisfy the opponents. Apparently they held a view of themselves in relation to the national government that did not exactly coincide with Oliver Ellsworth’s states’-rights view in 1787. At any rate, most historians date the national movement from the early 1830s. Two significant events were the founding of William Lloyd Garrison’s newspaper, The Liberator, in 1831, and the founding of the American Anti-Slavery Society in 1833. For the next thirty years, the movement’s main arguments depended on the principles of the Declaration.


4The chronological gap here is best filled by Adams, Neglected Period, chaps. 22–23.

The rhetoric of the national movement of the 1830s, 1840s, and 1850s echoes some of the themes of the founding period. Religious arguments continued to play a significant part, and religious leaders were prominent. Indeed, in the early 1830s the antislavery case was made chiefly in terms of religious revivalism. Evangelical Protestant clergy and seminary students from schools in Ohio, and such figures as Theodore Dwight Weld, the great revivalist minister from upstate New York, joined the Quakers in their opposition. Grass-roots evangelists spread through the northern states the word of “the enormity of slavery as a sin against God and man.”

Such appeals were persuasive enough to mobilize latent antislavery sentiment, spurring the development of the “Free Soil” movement. But as the movement matured, arguments focused increasingly on the Declaration. Here again abolitionists echoed the eighteenth-century pamphleteers in emphasizing the “self-evident truths” of natural equality and inalienable rights. Another similarity was reliance on environmentalist theories of human nature, the recurrence of arguments that “the widely assumed Negro inferiority sprang not from real differences in racial or biological or psychological endowments but from sheer lack of social and educational opportunities.”

What was new about nineteenth-century rhetoric was that it came to invoke not only faith and principle, but constitutional law as well. By 1848, three distinct abolitionist positions had emerged with respect to slavery and the federal Constitution. One was typified by Garrison’s famous description of that document as “a covenant with Death and an agreement with Hell”: that the Constitution was, among worse

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1860 (East Lansing: Michigan State College Press, 1949), chap. 6; Lysander Spooner, The Unconstitutionality of Slavery (Boston: Bela Marsh, 1853), chap. 5; John L. Thomas, ed., Slavery Attacked: The Abolitionist Crusade (Englewood Cliffs, N.J.: Prentice-Hall, 1965); Joel Tiffany, A Treatise on the Unconstitutionality of Slavery (1859) (Miami: Mnemosyne, 1969), chap. 2. Any historian will realize that these citations, and others in this chapter, only skim the surface. The literature on the abolitionist movement is vast, rich, and contentious, and I have not attempted to cover all of it. I am concerned with tracing a particular part of that movement in its relation to the Fourteenth Amendment.

6 See Barnes, Antislavery Impulse, chaps. 1–8.


10 The following discussion draws mainly from Goodell, Slavery and Antislavery, and Aileen Kraditor, Means and Ends in American Abolitionism (New York: Pantheon, 1967), chap. 7.
things, a proslavery document. Other abolitionists, such as Wendell Phillips, based this conclusion on such provisions as the three-fifths compromise of Article I, Section 2, the migration or importation clause in Section 9 of that article, and the provision for extradition of fugitive slaves in Article IV, Section 2. This group argued for constitutional amendment or, in Garrison’s case, for dissolution.\textsuperscript{11}

A second theory acknowledged the import of these provisions but insisted that the Constitution was antislavery in spirit. These “coalitionists” sought to weaken slavery by securing the passage of federal laws rather than to change the Constitution.

Now, over a hundred years since amendments decided the issue, these two interpretations of the pre–Civil War Constitution seem realistic but obsolescent. They need not detain us long. It is the third abolitionist interpretation that is the most important for understanding the Fourteenth Amendment. This was the argument that the Constitution already forbade slavery.

In the 1830s and 1840s, this doctrine was propounded mainly by Weld himself; by two early associates of his, William Goodell and Gerrit Smith; by Alvan Steward, a lawyer from upstate New York; by James G. Birney, a former slaveholder from Alabama; and by Lysander Spooner. Spooner, in fact, once wrote that the abolitionists would gain overwhelming support in the North if they could prove that slavery was unconstitutional.\textsuperscript{12} If this prediction was overoptimistic, the attention devoted to constitutional arguments indicates that many writers agreed with Spooner.

With skill and imagination, these activists used nearly every possible mode of constitutional interpretation. Several writers showed a flair for constitutional exegesis which would do credit to contemporary interpretivists. Stewart and Birney, for example, both interpreted the due-process clause of the Fifth Amendment to forbid slavery:

Many other essential rights are secured in this same article, to the citizen . . . but the most essential is the one which forbids “ANY PERSON BEING DEPRIVED OF HIS LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW.” . . . And on this subject, it is believed no lawyer in this country or England, who is worthy of the appellation, will deny that the true and only meaning of the phrase, “due process of law”, is an indictment or


\textsuperscript{12}Kraditor, Means and Ends, p. 195.
Stewart was writing in 1837, four years after *Barron v. Baltimore* ruled that the Fifth Amendment was not binding on the states. Since it was the states, not the federal government, that maintained slavery, it would seem difficult to argue that the due-process clause had any bearing on the issue. But these writers did not defer to precedent. They continued to insist that the Bill of Rights, with which slavery is obviously incompatible, imposed positive duties on the states.

These activists were no more bound by clause or text than by precedent. They refused to read the text in isolation from what they saw at its context. They frequently invoked the Preamble, which included justice and liberty among the goals of the new nation. Even more often they derived constitutional arguments from the Declaration. Such writers as Birney, Goodell, Spooner, and Joel Tiffany insisted that the Declaration was part of the Constitution. Some abolitionists even argued that the Declaration itself had legally abolished slavery.

Birney discussed the connection in a footnote to an 1847 pamphlet. The Declaration, he wrote,

is said not to be as obligatory on us as the Constitution, if obligatory at all. That it is not, in the same way, as obligatory as the Constitution, is readily admitted . . . [but] if after achieving our independence under the Declaration, we had voluntarily established a government entirely at variance with the sentiments we had published to the world . . . our national character would have been looked on as partaking of deceit. We are bound, then, as a nation—as much as a nation can be bound to others—by our honor—never to ordain any thing that shall be grossly contrary to the truths which were in our mouths, when we took our seat among the congregation of nations.

So America was obligated, by its statement to the world, to incorporate, or at the very least not to traduce, the ideas of the Declaration
Equality under the Constitution

in any organic document. The words of the Declaration itself had imposed this obligation. Not only was the Declaration, in effect, part of the Constitution, but, a fortiori, so were the principles of natural law which it expressed. Men were equal, and endowed with rights, under the United States Constitution; therefore, slavery violated it.\(^{18}\)

Here is Weld, in 1836, urging Congress to abolish slavery in the District of Columbia:

Congress has unquestionable power to adopt the Common Law, as its legal system, within its exclusive jurisdiction. . . . THE COMMON LAW KNOWS NO SLAVES. . . . By adopting the common law within its exclusive jurisdiction Congress would carry out the principles of our glorious Declaration, and follow the highest precedents in our national history and jurisprudence. . . . Who needs to be told that slavery makes war upon the principles of the Declaration, and the spirit of the Constitution, and that these and the principles of the common law gravitate toward each other with irrepressible affinities, and mingle into one.\(^{19}\)

Antislavery constitutional doctrine did just what most disturbs contemporary jurists: it found ideas of justice and natural law in the Constitution. And it was with this strain of constitutional theory that several framers of the Fourteenth Amendment were most familiar and most comfortable. Some powerful members of the Thirty-ninth Congress had been associated with Weld, Birney, or their followers. Ten of the fifteen members of the Joint Committee on Reconstruction, which wrote the amendment, came from abolitionist states, where they were at least exposed to these arguments. Such influential committee members as Senators Jacob Howard of Michigan, Justin Morrill of Vermont, and William Pitt Fessenden of Maine represented abolitionist strongholds. Representative Thaddeus Stevens of Pennsylvania had been “converted” to the antislavery cause by a group of Weld’s protégées.\(^{20}\) John Bingham of Ohio, another House appointee to the committee and the amendment’s chief author, combined the due-process and natural law arguments in a speech in Congress on February 11, 1859, that well illustrates his influential ideas.

Bingham was opposing the admission of Oregon as a state. His opposition was based on the territorial constitution, which prohibited free Negroes from holding property, making contracts, or bringing suits. These provisions, he insisted, violated the federal Constitution.

\(^{18}\) A good discussion of this argument is contained in Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975), chap. 9.


\(^{20}\) See Graham, Everyman’s Constitution, pp. 236, 301–2, 313.
Therefore, the supremacy clause of Article VI prohibited Congress from voting Oregon into the Union, and thus implicitly sanctioning the limitation. The controversy over Oregon had little to do with slavery, but the range of Bingham’s argument was wide.

Sir, if the persons thus excluded from the right to maintain any suit in the state of Oregon were not citizens of the United States; if they were not natives born of free parents within the limits of the Republic, I should oppose this bill; because I say that a State which, in its fundamental law, denies to any person, or to a large class of persons, a hearing in her courts of justice, ought to be treated as an outlaw, unworthy [of] a place in the sisterhood of the Republic. A suit is the legal demand of one’s right, and the denial of this right by the judgement of the American Congress is to be sanctioned as law! But, sir, I maintain that the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several states, and therefore are citizens of the United States, and as such are entitled to all of the privileges and immunities which are the rights of life and liberty and property; and their due protection in the enjoyment thereof by law; and therefore I hold this section for their exclusion from the State and its courts, to be an infraction of that wise and essential provision of the national Constitution . . . “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

Bingham went on to make some crucial distinctions. Equality was different from capacity. Equality did not entitle Negroes to the right to vote, for example:

Nobody proposes or dreams of political equality any more than of physical or mental equality. It is as impossible for men to establish equality in these respects as it is for “The Ethiopian to change his skin.” Who would say that all men are equal in stature, in weight, and in physical strength; or that all are equal in natural mental force, or in intellectual acquirements? Who, on the other hand, will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation?

No one might have been that bold at the 1787 convention, or in 1791, when the Bill of Rights was ratified. By the time Bingham spoke, many of his listeners were prepared to make just that denial with respect to slaves, and he knew it. But he was not ready to yield the floor. He hammered his points home:

... I cannot, and will not, consent that the majority of any republican state may, in any way, rightfully restrict the humblest citizen of the United
Equality under the Constitution

States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which, not to confer, all good governments are instituted; and the failure to maintain which invidiously furnishes a sufficient cause for the abrogation of such government; and, I may add, imposes a necessity for such abrogation, to the construction of the political fabric on a juster basis, with surer safeguards.

... The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests—its sure foundation and defense. ... The charm of that Constitution lies in the great democratic idea which it embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or state may rightfully take away. ... Before your constitution, sir, as it is, as I trust it ever will be, all men are sacred, whether white or black, rich or poor, wise or simple.21

All this is pure Locke, and, at least to pre-Wills understanding, pure Jefferson. Bingham's language echoes the Declaration at several points. His speech included a long discussion of political rights and of his distinction between equality in political rights and equality in what Jefferson called the endowments of body and mind. Bingham's analogy, referring as it does to black people, is telling, perhaps more telling than he realizes. He makes it clear that equality does not depend on capacity, but on divine endowment. People are equal because they were made that way, though there are extreme inequalities among human beings in almost every attribute.

Bingham still held these views at the end of the Civil War, and he wrote them into a draft of an amendment he conceived of as “declaratory” of what was already in the Constitution.22 This thesis was derived from what had gone before: from the arguments of Weld, Birney, Stewart, and the others, from the notion that the Constitution embodied the Declaration and its principles.

Bingham made that speech just two years before the war began. By then this antislavery argument had been twenty years in the making. During that time, proslavery reaction had produced arguments about humankind and about government which predictably stood in clear contradiction to those I have been examining. If the abolitionists had a theory, the South produced an antitheory, and these two arguments continue to influence and to confound our thinking about equality.

22Graham, Everyman's Constitution, chap. 7; ten Broek, Equal under Law, pp. 209–11.
The Roots of Equal Protection

The Southern Antithory

Ultimately, people did stand up to endorse slavery. And many of them argued intelligently and lucidly. Proslavery thought divides itself into two chronological phases, which may be called the moderate and the extreme. In fact, it might reasonably be suggested that these were the second and third phases, and that the first, in the 1770s and 1780s, was a latent or dormant phase. If so, the three phases correspond roughly to the vigor and effectiveness of the opposition. The harder the attack, the stronger became the defense.

Up to the 1830s, most defenders of slavery stressed moderation and compromise, and focused more on discussion of various means of gradual emancipation than on a positive endorsement of slavery itself. The change in tone and content was not due solely to the new antislavery militancy. An important turning point was the debates in the Virginia legislature in the winter of 1831–32, in which several proposals, including one for expatriation, were defeated. Thomas R. Dew, a professor at the College of William and Mary, published a review of the debates which contains the last of the moderate proslavery arguments. Defending the legislature's failure to act, Dew dwelt on the prohibitive cost of deporting the ex-slaves, of shifting from slave to free labor, and of compensating former masters (all parties assumed that compensation would be necessary, whatever policy was chosen). A minor theme is the danger of inciting slave insurrection by building false hopes. Only after developing these points at some length did Dew make this revealing statement:

It is said slavery is wrong, in the abstract at least, and contrary to the spirit of Christian principles. To this we answer as before, that any question must be determined by its circumstances, and if, as really is the case, we cannot get rid of slavery without producing a greater injury to both the masters and slaves, there is no rule of conscience or revealed law of God which can condemn us. The physician will not order the spreading cancer to be extirpated, although it will eventually cause the death of his patient, because he would thereby hasten the fatal issue.

Except for that passage, Dew and the abolitionists were arguing past one another. If there is something cold-blooded about a defense


of oppression couched primarily in terms of profit and loss, it is not a type of argument with which twentieth-century Americans can claim to be unfamiliar. At any rate, "cancer" was not a metaphor for slavery that appealed to later southern writers. From the 1830s to the Civil War, the defenses became more aggressive. Three writers typical of this period are George Fitzhugh and Edmund Ruffin of Georgia and one of America’s most eminent political thinkers, John C. Calhoun of South Carolina.

The debate over slavery ranged over every issue that had any relation to it. No legal, political, moral, biblical, social, psychological, economic, or practical argument that could advance either side was ignored, and no argument was left unanswered, although apparently neither side deigned to read the other. The proslavery response to abolitionist constitutional theory belongs to the last, militant phase of the debate. A response it is, indeed; it attacks the core of that theory, its reliance on the Declaration of Independence. Thus, as the abolitionists give us a theory of equal protection, the southerners give us an antitheory.

Fitzhugh and Calhoun, in particular, squarely confronted the theory. They did not try to reconcile slavery with the Declaration—no one ever had any success with that enterprise—nor did they make a literalist argument that the Declaration was not part of the Constitution. Instead, they denied the Declaration’s “self-evident” truths. Calhoun put it this way:

> It is a great and dangerous error to suppose that all people are equally entitled to liberty. It is a reward to be earned, not a blessing to be gratuitously lavished on all alike—a reward reserved for the intelligent, the patriotic, the virtuous and deserving;—and not a boon to be bestowed on a people too ignorant, degraded and vicious, to be capable either of appreciating or of enjoying it. Nor is it any disparagement to liberty, that such is, or ought to be the case. On the contrary, its greatest praise,—its proudest distinction is, that an all-wise providence has reserved it, as the noblest and highest reward for the development of our faculties, moral and intellectual. . . .

> These great and dangerous errors have had their origin in the prevalent opinion that all men are born free and equal;—than which nothing can be more unfounded and false. It rests upon the assumption of a fact, which is contrary to universal observation, in whatever light it may be regarded. It is, indeed, difficult to explain how an opinion so destitute of all sound reason, ever could have been so extensively entertained.  

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21 Dumond, Antislavery Origins; Clement Eaton, Freedom of Thought in the Old South (New York: Peter Smith, 1951).

The Roots of Equal Protection

Thus men are neither created equal nor endowed with natural rights. Any human rights have to be earned, by wisdom, virtue, loyalty, industry, or some combination of these qualities. Apparently these rights are earned not by individuals, but by racial groups; it seems to follow that all whites in America enjoy rights, and no blacks do—at least, no slaves. And apparently the degree of merit needed to earn them is that already displayed by whites, or at least by adult male whites. But the important point to be gleaned from Calhoun is that there was a clear split between those like him, who viewed equality as an earned attribute, and those like Bingham, who regarded it as a given entitlement. That strain of American political thought which emphasizes similarities and abilities appears to belong not to the framers of the Fourteenth Amendment, but to their enemies, and thus to be an antitheory to the theory.

Slavery and Rights in the Supreme Court

William Lloyd Garrison was often accused of being extreme and unrealistic in his views on the Constitution. But ultimately he was proved right, on two counts. First, the pre–Civil War Constitution did support slavery. Second, abolition could not be achieved under this Constitution through accommodation and compromise. It is customary to assign much of the blame for those two developments to the Supreme Court, specifically to its decision in Dred Scott v. Sandford. That ruling, as we shall see, did indeed go to unnecessary extremes. But two earlier decisions had greater impact. The first, Barron v. Baltimore, had nothing whatever to do with slavery. But at least for the precedent-bound, it destroyed the one solid textual argument the antislavery movement had. The second case was Prigg v. Pennsylvania, decided in 1842. These decisions indicate that experienced judges, applying their education, expertise, and lawyerly outlook to the question, were likely to reach only one result, no matter how they personally felt about slavery.

The one constitutional provision that appeared, on its face, absolutely to forbid slavery was the due-process clause of the Fifth Amendment. It is hard to improve on Stewart here. American slavery was a deprivation of liberty without due process of law. Barron v. Baltimore

27 See Kraditor, Means and Ends, chap. 7.
28 60 U.S. 393 (1857); 32 U.S. 243 (1833); 41 U.S. 539. See Cover, Justice Accused, pp. 238–56.
Equality under the Constitution

considered another part of this amendment, but its principles applied to the Bill of Rights in general. Barron, a wharf owner whose property had been rendered worthless when the city had diverted streams, claimed that his property had been taken without just compensation. But Chief Justice John Marshall, speaking as usual for a unanimous Court, declared that the Bill of Rights was binding on Congress alone, not on states or localities. The First Amendment did seem to demand that conclusion ("Congress shall make no law . . ."), but the rest of the Bill of Rights, including the Fifth Amendment, was worded in the passive voice, so that it was not clear whose powers they restricted. Marshall, however, insisted that when the Constitution meant to restrict the states, it said so clearly, as in Article I, Section 10: "No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." Otherwise, prohibitions referred only to the federal government, however they were phrased, as in Article I, Section 9: "No Bill of Attainder or ex post facto Law shall be passed." 29 Whatever the merits of this mode of construction (which would, incidentally, leave the states free to deny writs of habeas corpus), it also applied to the due-process clause. If the states were not bound by that clause, no challenge to slavery could be made on those grounds.

Nine years later, in Prigg, the Court ruled unanimously in favor of a slave owner. Seven of the nine justices wrote opinions. Some did go to extremes—and the extremes boded ill for future years—but extremists and moderates all voted the same way. Margaret Morgan, owned by Margaret Ashmore of Maryland, had escaped to Pennsylvania. Edward Prigg, Ashmore's lawyer, got a warrant from a Pennsylvania magistrate, captured Morgan, and took her before the same magistrate, who refused to order her extradition. (As will become clear, this apparently irrational judicial behavior was justifiable.) Prigg then returned the slave, by force, to her owner. He was tried and convicted under a Pennsylvania law forbidding the kidnapping of Negroes for the purpose of forcing them into slavery in another state. Prigg challenged the law on two grounds: first, that it violated the service-or-labor clause; and second, that Congress had preempted the field by a 1793 law that established procedures for the extradition of fugitive slaves, and under which the hapless magistrate had issued his original warrant.

The attorney general of Pennsylvania made a statement that startles the twentieth-century reader. He declared that the case "was one of amity, of concord, on the part of Pennsylvania and Maryland, which

32 U.S. 243, 247.
were the real and substantial parties. They came into that Court to try a great question of constitutional law." So Prigg, like Dred Scott, was a test case, and the lawyer had no qualms about telling the Court so. That in itself would be a red flag to modern justices, but the Court's opinion referred to it quite calmly.30

The lawyers for Pennsylvania did not make arguments like those of Weld, Birney, and Bingham. Instead, they concentrated on interpretations of the service-or-labor clause and questions of state and federal power. Justice Joseph Story, as spokesman for the Court, rejected both sets of arguments, even though he himself was opposed to slavery.31 He was unimpressed by Pennsylvania's notion that the constitutional provision was only a statement that masters had the right to seize their fugitive slaves. The words "shall be delivered up on Claim of the Party to whom such Service or Labor may be due" implied duties for third parties: "Now, we think it exceedingly difficult, if not impracticable, to read the language and not to find, that it contemplated some further remedial redress than that which might be made by the owner himself."32

It is hard to reject this piece of textual interpretation. No justice did object to it. Story's contention that the 1793 act had deprived the states of any power to regulate the disposition of fugitive slaves, however, did bother Chief Justice Roger B. Taney and Justice Peter Daniel, but only because it would have precluded the states from assisting in the capture of fugitives.33 (It is not clear how this conclusion follows, as the magistrate's first order appears to have been rendering just such assistance.)

This ruling "in historical importance far outweighed the Dred Scott decision of 1857, because it invalidated all efforts of the Northern states to protect the civil rights and the liberties of an important class of persons under their jurisdiction."34 All the Court needed for its ruling was the service-or-labor clause, and its interpretation was fairly straightforward. What was more interesting—and even more troubling—was the way three justices—Story, Taney, and Smith Thompson—wrote about slaveholders' rights. Story insisted that the clause "contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever." That, he said, was its historic purpose. Given the trepidation

30 41 U.S. 539, 589, 608.
31 Cover, Justice Accused, pp. 238–43.
33 Ibid., pp. 626–30 and 650–53.
34 Dumond, Antislavery Origins, p. 64.
with which the framers had approached this issue, this conclusion seemed dubious, but the justices liked it. Only John McLean seemed wary: “That the Constitution was adopted in a spirit of compromise, is a matter of history . . . the Constitution, as it is, cannot be said to have embodied in all its parts, the particular views of any great section of the Union.” Taney insisted that the clause imposed on the states the positive duty—not, as in the 1793 law, the option—to enforce this right. For Thompson, the clause “affirms, in the most unequivocal manner, the right of the master to the service of his slave, . . . [and] prohibits the states from discharging the slave from such service by any law or regulation therein.”

This was precisely the kind of generous construction the Marshall Court had refused to give Fifth Amendment rights, also worded in the passive voice and also vulnerable to frustration by the states. Marshall might also have pointed out that if the clause had been intended as a guarantee of right, it not only was phrased in a peculiar way but was in an odd place. Surely it belonged in Article I, Section 10. If it was an affirmation of rights, it was hardly unequivocal. And it was all beside the point anyway, since the language of the service-or-labor clause effectively killed the Pennsylvania law. There was no need to refer to rights. All that was necessary was a narrowly worded opinion, but, just as Marshall had often done, Story chose to write a broad, sweeping one. Slave owners’ property rights thus got the kind of ringing affirmation that the First Amendment needed eighty more years to get. In its decision in Prigg, the Court made clear where its constitutional sympathies lay.

The Dred Scott decision does not require lengthy analysis here. Like Barron and Prigg, it is dead now, and much has been written about it. I quote from it because, in the light of the foregoing discussion, Chief Justice Taney’s views emerge not only as prejudiced but, as a matter of interpretation, simply wrong.

Dred Scott represented a victory for the extremists in Prigg. In voiding the Missouri Compromise and declaring that a Negro was not a citizen within the meaning of the Constitution, the Court echoed the antitheory as propounded by Calhoun.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence,

35 41 U.S. 539, 613, 639–60, 626–30, 634.
36 Prigg did, however, rule that states need not enforce the Fugitive Slave Act (ibid., pp. 618–25).
The Roots of Equal Protection

and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

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. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. 37

This passage is offered not as an expression of Taney's own opinion, but as a statement of the framers' views. Indeed, it hints that opinion had become rather more enlightened. As a history of ideas, it is particularly vulnerable. "Fixed and universal" gives it away. For the opinions that Taney so labeled had not been held by Jay or Hamilton or Gouverneur Morris, or even by Jefferson. Many people had thought of disputing them; indeed, no one was eager to express them. Taney may have given an accurate statement of the views of one section of the country in 1857, but to attribute those views to the entire "civilized world" in 1776 and 1787 is to read history backward. 38 It is instructive to compare this passage with Dew's defense of slavery—or, for that matter, Aristotle's. By 1857 opinion on both sides of the issue had crystallized, and the Court—first inevitably, then enthusiastically—had come down on the side of slavery.

The main intellectual difference between the opponents and the supporters of slavery was a difference in political philosophy. The anti-slavery theory of equality, derived from the Declaration and its belief that all were equally entitled to rights, was countered by a southern antitheory, which rejected the principles of the Declaration and insisted that equal status had to be earned. The main difference between the opponents of slavery and the pre-Civil War Court, however, pertained not to philosophy but to modes of constitutional interpretation. Even justices who opposed slavery went about their task of ad-

37 60 U.S. 393, 407.
Equality under the Constitution

judication in ways that dictated proslavery results. Single-clause interpretation and *stare decisis* had become the dominant modes. Perhaps that is unfortunate; perhaps, had the justices approached the Constitution as Stewart, Birney, Weld, and Bingham did, slavery might have ended without war. But the justices' methods led to conclusions that favored masters over slaves. Antislavery jurists paid no great deference to precedent, nor did they confine themselves to clause-bound exegesis. These men favored structural and transcendent modes of interpretation, which allowed the conclusion that the Constitution forbade slavery.

If compromise under the Constitution had ever been possible, after *Dred Scott* it was so no longer. But this eventuality was due not only to *Dred Scott*, but to what had gone before. The Constitution, as written and as interpreted, endorsed slavery. Thus it came down on the side of antitheory. Both civil war and constitutional amendment proved necessary for change. When the constitutional change came, the Congress that enacted it recurred to the arguments of antislavery, and made an unambiguous choice for theory in preference to antitheory.