

*The Rule of Liberty*  
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### ABSTRACT

*Conservative judges are frequently portrayed as enemies of civil rights. These judges typically respond to criticism by protesting that they are not prejudiced; they are only eschewing harmful “results-based” reasoning. “Law” they say, “is useless . . . if it varies from day to day and from judge to judge.”<sup>1</sup> The law is never fully determinate, so these judges counsel us to look to our traditions to find values, not abstract notions of justice. The appeal of this method is undeniable. It anchors us in our collective will and adopts only those values which have survived the crucible of experience.*

*These values also have a distinct rightward tilt. And so, we are accused of being at least as wishy-washy as liberal thinkers. In this Article, I demonstrate that not all traditional interpretive values are right-leaning. For most of our history, the maxim behind the Rule of Lenity applied in another context: slavery and freedom. Based in the presumption that the natural law favored personal liberty, it required courts to interpret emancipations liberally. The canon—which I call the Rule of Liberty—was unquestioned in the United States until the South began to fear abolition. In the 1850s, the South inverted the canon, presuming instead that the natural law favored slavery. This was a foundational principle of Dred Scott. After abolition, reactionary lawyers induced the U.S. Supreme Court to silently retain this presumption, and its ghost is still with us today.*

*The Rule of Liberty’s pedigree rivals even the most ancient rules of construction, and it was approved by every state of our Union. Its demise was not due to structural flaws; it was destroyed by Klansmen and Confederates intent on preserving slavery. Thus, there is no reason for conservatives to reject it. Indeed, we should return it to its rightful place as part of our constitutional tradition.*

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1. J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663, 1684 (2010).

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## INTRODUCTION

The Rule of Lenity is a staple in Supreme Court jurisprudence.<sup>2</sup> It is an old principle, derived from the Roman maxim *in favorem vitae et libertatis* (in favor of life and liberty).<sup>3</sup> However, the Romans

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2. See generally *Muscarello v. United States*, 524 U.S. 125 (1998); *Skilling v. United States*, 561 U.S. 538 (2010); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* § 47 (2012).

3. See, e.g., *Callanan v. United States*, 364 U.S. 587, 596 (1961); *United States v. Fah Chung*, 132 F. 109, 112 (S.D. Ga. 1904); JEAN ALLAIN, *THE LEGAL UNDERSTANDING OF SLAVERY* 21, 37-39; Intisar A. Rabb, *The Islamic Rule of*

first used the axiom, not in criminal cases, but in the law of slavery. In cases of ambiguity, this Rule—The Rule of Liberty—required Roman judges to restrict slavery and favor human freedom.<sup>4</sup> English and American judges alike adopted this thinking as a bedrock principle of the Common Law.<sup>5</sup> At its most abstract, the Anglo-American rule held that courts must presume in favor of liberty,<sup>6</sup> and that all instruments conferring freedom must be construed liberally, in favor of freedom.<sup>7</sup>

Surprisingly, the courts in most slave states proclaimed that this rule was “unquestioned.”<sup>8</sup> But as the South began to fear abolition, its courts abruptly changed course and decided that the law ought to favor slavery.<sup>9</sup> These decisions were the unseen foundation of *Dred Scott v. Sandford*.<sup>10</sup> Following abolition, reactionary Southern lawyers convinced the U.S. Supreme Court to silently retain the assumptions of these decisions—including *Dred Scott*—to impose a restrictive gloss on the Thirteenth Amendment.<sup>11</sup> Since then, the Rule of Liberty has drifted into obsolescence.

Then again, so has slavery. But the Rule of Liberty has a role in our modern legal system, for at least three reasons. First, it is necessary if *Dred Scott* is, as most people assume, fully overruled. Second, it is necessary to ward against artificial restrictions like those that the South imposed on the Thirteenth Amendment—restrictions that enabled the rise of Jim Crow. The Warren Court

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*Lenity: Judicial Discretion and Legal Canons*, 44 VAND. J. TRANSNATIONAL L. 1299, 1309 n.33 (2011). AARON X. FELLMETH & MAURICE HOROWITZ, A GUIDE TO LATIN IN INTERNATIONAL LAW 128 (2009).

4. ALLAIN, *supra* note 3, at 37-39.

5. THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 80 (Alexander Tsesis, ed., 2010); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1715-16, 1724 (1996).

6. III WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88-89 n.30 (1753).

7. See *Isaac v. West*, 6 Randolph 652, 652-57 (Va. 1828) (citing JUSTINIAN, DIGEST and LORD COKE, THE FIRST PART OF THE INSTITUTES LAWS OF ENGLAND 124b); *Elder v. Elder*, 4 Leigh 252, 260 (Va. 1833).

8. E.g., *Harry v. Decker & Hopkins*, 1 Walk. Miss. 36, 42 (Miss. 1818) (“Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule that courts must lean *in favorem vitae et libertatis*?”).

9. TSESIS, *supra* note 5, at 81-82.

10. JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION 100-01 (2012); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

11. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883).

chafed at the injustices created by this system. But in its haste to end a century of quasi-slavery, the Court upended separation of powers, federalism, and textualism all at once—invoking amorphous concepts of “freedom.” The Rehnquist and Roberts Courts have rightfully pushed back against the judicial abuse these methods permit. But if the Warren Court taught us anything, it showed that overcorrection is dangerous. The Rule of Liberty presents a principled way to protect civil rights without wading into the morass of subjectivity or overcompensating for past mistakes. The rule allows courts, as one Kentucky judge put it in 1820, to decide cases using “the law as it is, and not as it ought to be.”<sup>12</sup>

Finally, it provides an opportunity for conservative thinkers to prove that they are loyal to principles, not politics. The Roberts Court’s substantive canons have a distinct rightward tilt. The stated justification for these interpretive values is that they are based in our history and tradition, and not conjured by the political preferences of the Justices.<sup>13</sup> I do not doubt the truth of this statement. But the only judges in our history who completely rejected the Rule of Liberty were Klansmen and Confederate sympathizers, and they did so out of a conviction that slavery was a natural right, ordained by God for the benefit of the white race.<sup>14</sup> These values have been forcefully repudiated by the blood of our patriots<sup>15</sup> and by our Constitution,<sup>16</sup> leaving only the unbroken presence of the Rule of Liberty in our common law. Thus—if history and tradition are the benchmark—

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12. Rankin v. Lydia, 2 A.K. Marsh. 467, 270-79 (Ky. 1820).

13. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 1-9 (2001); Obergefell v. Hodges, 135 S. Ct. 2584, 2626-2627 (2015) (Scalia, J., dissenting); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* § 47 (2012).

14. Am. Colonization Soc’y v. Gartrell, 23 Ga. 448, 464-65 (1857) (proclaiming that those fighting for abolition were “fighting against the Almighty.”); Neal v. Farmer, 9 Ga. 555, 578-83 (1851) (asserting that the right to hold slaves was a Right, and that “Christ, recognizing the relation of master and servant, ordained [slavery] as an institution of Christianity. It is the crowning glory of this age and of this land.”).

15. Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863) (“Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation, so conceived and so dedicated, can long endure. . . . [W]e here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom . . .”), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>

16. U.S. CONST. amend. XIII.

there is no reason for conservative judges and thinkers to reject the Rule of Liberty. Indeed, there is every reason for us to embrace it.

Part I discusses the origin of the Rule of Liberty. Part II then traces the life and death of the Rule in the United States. Part III argues that the Court ought to resurrect the Rule and apply it in Thirteenth Amendment cases. Finally, Part IV suggests some cases where the it could be useful.

## I. THE BIRTH OF THE RULE OF LIBERTY

It was one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty.

William Blackstone, *Commentaries on the Laws of England*.<sup>17</sup>

The Rule of Liberty was born in Rome. Although the Romans tolerated slavery, they viewed it as an “institution of the law of all nations under which one is subject to the mastership of another, *contrary to nature*.”<sup>18</sup> Slaves were generally taken as captives in war,<sup>19</sup> but many Roman jurists felt that it violated natural law, declaring that “we compare slavery almost with death.”<sup>20</sup> These judges apparently devised the Rule of Liberty to keep slavery in check.<sup>21</sup> In general, the rule was that when the law was ambiguous, it must be interpreted to restrict slavery and favor freedom.<sup>22</sup>

The canon did not fade after the fall of Rome. It was “so well-established in the Middle Ages that an attorney arguing an actual case . . . could plausibly draw upon it in argument.”<sup>23</sup> From there, it was absorbed into Great Britain, where the rule that all presumptions cut in favor of liberty was “for centuries, a glory of English law.”<sup>24</sup> This principle caused the English Common Law to hold a special

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17. III BLACKSTONE, *supra* note 6, at 88-89 n.30.

18. *Servitus*, ENCYCLOPEDIA DICTIONARY OF ROMAN LAW (1953) (emphasis added).

19. ALLAIN 12-13.

20. *Servitus*, ENCYCLOPEDIA DICTIONARY OF ROMAN LAW (1953).

21. ALLAIN 9-16, 21 (quoting Dominicus Tuschus, *Practicarum conclusionum juris*, Lit. S, concl. 227, no. 1 (Rome 1651) (“Just as it is lawful to take any means to evade death, so also it is lawful to avoid slavery.”)); *Servitus*, ENCYCLOPEDIA DICTIONARY OF ROMAN LAW (1953);

22. ALLAIN 9-10, 37-39; JUSTINIAN, DIGEST, Lib. 50, tit. 17, § 179, Ulpian (*in obscura voluntate manumittentis, favendum est libertati* (when will is in doubt, favor freedom)).

23. Wiecek, *supra* note 5, at 1715-16.

24. *Id.*

animus against slavery.<sup>25</sup> For the English judge, property could not lie in a human being, because all men were by nature free.<sup>26</sup> “England,” they said, “was too pure an Air for Slaves to breath[e].”<sup>27</sup>

This distaste for servitude also drove the abolition of feudalism in England.<sup>28</sup> Blackstone pointed out that any time a Lord contracted with or sued his villeins, “the law, which is always ready to catch at anything in favor of liberty, presumed that by [this conduct] he meant to set his villein on the same footage as himself.”<sup>29</sup> As one prominent English judge declared, “Servitude was introduced by men for vicious purposes. But freedom was instilled in human nature by God . . . The laws of England favor liberty in every case.”<sup>30</sup>

The English Rule of Liberty was thus composed of two principles. First, it recognized that, under the natural and common law, all men were born free.<sup>31</sup> Second, since the English positive law did not tolerate property rights in a human being,<sup>32</sup> those property rights would not be enforced in England. In other words, when the positive law was indeterminate on someone’s freedom, the common law refused to assist those seeking to hold a person in slavery.<sup>33</sup>

Lord Mansfield explained this principle in more detail in *Somerset v. Stewart*.<sup>34</sup> Holding someone in slavery was, he said:

So high an act of dominion [that it] must be recognized by the law of the country where it is used. . . . The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only on positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory: it [is] so odious, that nothing can be suffered to support it, but positive law.<sup>35</sup>

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25. COKE, *supra* note 7, at 124b.

26. Wiecek, *supra* note 23, at 1715.

27. *Id.* at 1715, 1724.

28. PAUL FINKELMAN, *THE LAW OF SLAVERY & BONDAGE* 252.

29. IV WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 94-95 (1753); *Keane v. Boycott*, 2 H. Bl. 511, 512 (1795) (Opinion of Heath, J.).

30. SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIÆ* 105 (S.B. Chrimes trans. 1942) (1545).

31. Wiecek, *supra* note 23, at 1715.

32. *Id.* at 1715, 1724.

33. *Somerset v. Stewart*, 1 Lofft 1, 19 (1772).

34. *Id.*

35. *Id.*

Therefore, the moment a slave set foot in England, he was free.<sup>36</sup> After the slave trade was abolished, the courts applied *Somerset* to hold that claims for the “restoration of human beings” should be decided in favor of liberty unless it could be unequivocally shown that the slaves were held under the law of another country.<sup>37</sup> *Somerset* was never overruled, but it was limited by comity to only suspend the slave power while the slave was in England.<sup>38</sup> If the slave was forced back to the slaveholding country, she would be free, but if she returned voluntarily, slavery would reattach.<sup>39</sup>

This framework can also be described in terms of political power. The courts are not political actors, and these courts were not exercising political power. Instead, the courts merely demanded that a litigant show some political authority for exercising dominion over the labor of another. In other words, he must show some express, democratic authorization for his conduct.

*Somerset* illustrates the ameliorative qualities of the Rule of Liberty. Like its cousin in criminal cases, it denied judicial enforcement unless the positive law was clear.<sup>40</sup> But although Lenity only acts as a shield, Liberty was frequently used as a sword: extending the law in favor of freedom when there were glitches in the positive law. The first of these cases are from feudal England, where the judges emancipated people when their Lord took legal action against them.<sup>41</sup> Other cases involved masters who contracted for freedom, but then defended the slave’s suit for specific performance by arguing that a slave could not contract.<sup>42</sup> The courts rebuffed these arguments, reasoning that the nature of a contract for freedom warranted an extension of normal legal rules.<sup>43</sup>

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36. *Id.*; See also FINKELMAN, *supra* note 28, at 32-34. The admiralty courts extended this rule to cases where British warships boarded slave-trade vessels. See *Forbes v. Cochrane*, 2 B. & C. 448, 464-70, 473 (1824).

37. DYER, *supra* note 10, at 56-60. The admiralty courts later imposed the same standard on slavers caught by British warships. The *Amedie*, 1 Acton 240, 250-51 (1810); DYER, *supra* note 10, at 56-59. Admiralty courts uniformly followed *The Amedie*’s holding. The *Anne*, 2 Acton 6, 7 (1810); The *Fortuna*, 1 Dodson 18 (1811); *Le Louis*, 2 Dodson 210 (1817); *Madrado v. Willes*, 3 B. & Ald. 353 (1820).

38. *The Slave Grace*, 2 Hagg. Adm. 94 (1827).

39. *Id.*

40. See *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (stating that Lenity applies when the court “must simply guess at what Congress intended.”).

41. IV BLACKSTONE, *supra* note 29, at 94-95 (1753); see also *Keane v. Boycott*, 2 H. Bl. 511, 512 (1795) (Opinion of Heath, J.).

42. *Williams v. Brown*, 3 Bos. & Pul. 69, 72, 74 (1802).

43. See *id.*



American slaveholders frequently complained that such suppletion was unlawful because it contradicted the Rule of Lenity. Suppletion, they said, was penal, because it deprived them of vested property rights.<sup>44</sup> But Blackstone debunked this false contradiction long before American slaveholders were born. He observed that statutes against frauds were interpreted liberally, even though their consequences were penal.<sup>45</sup> Although this appeared to contradict Lenity, he disagreed: “Where the statute acts upon the *offender*, and inflicts a penalty . . . it is then to be taken strictly; but when the statute acts upon the *offence*, by setting aside the fraudulent transaction, here it is to be construed liberally.”<sup>46</sup>

Criminal statutes act upon the offender. Therefore, Blackstone explained, “whenever an ambiguity arises in a statute introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favor of natural right and liberty”<sup>47</sup> This is desirable because even when the courts err, “no further inconvenience can result than that the law remains as it was . . . And it is more consonant to principles of liberty that the judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity.”<sup>48</sup>

In short, Lenity requires clarity when the positive law intrudes upon the natural right to be free from imprisonment. It is inherently confined to amelioration. The Rule of Liberty also performed this function, because the law of slavery imposed numerous disabilities on the slave.<sup>49</sup> When the law was ambiguous, the courts followed the same formula: Require clarity from the legislature before intruding on the natural right to personal freedom.<sup>50</sup>

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44. See *Harry v. Decker & Hopkins*, 1 Walk. Miss. 36 (Miss. 1818).

45. III BLACKSTONE, *supra* note 6, at 88-89.

46. *Id.*

47. *Id.* at 88-89 n.30.

48. *Id.*

49. See, e.g., *Slave*, BOUVIER’S LAW DICTIONARY (7th ed. 1857) (stating that a slave is “[a] man who is by law deprived of his liberty or life, and becomes the property of another.” A slave “has no political rights, and generally has no civil rights. He can enter into no contract, unless specially authorized by law; what he acquires generally, belongs to his master.”).

50. See, e.g., DYER at 56-60; *Blackbor v. Negro Phill*, 7 Yerger 452, 453-66 (Tenn. 1835) (holding that even if a master intended to evade restrictions on emancipation, “still that will not place them in the condition of slaves. If this State designed to make such acts nullities, then express enactments should be shown.”); *Foster v. Fosters*, 10 Grattan 485, 485-92 (Va. 1853); *Parks v. Hewlett*, 9 Leigh 511, 522-23 (Va. 1838).

But the law of slavery involved more than disabilities. When a master, statute, or Constitution freed a slave, it “acted upon the offence”<sup>51</sup> by striking out the slave status. This act inflicted no penalty, but merely freed a human being from oppression, just as a fraudulent-conveyance statute relieves creditors from the burden of fraud. Such acts “must be construed according to the spirit; for, in giving relief against fraud, or in the furtherance and extension of natural right and justice, the judge may safely go beyond even that which existed in the minds of those who framed the law.”<sup>52</sup>

The English Common Law favored emancipation.<sup>53</sup> Thus, suppletion in favor of freedom was not offensive to the common law. As I demonstrate below, the southern judges who objected to the suppletive Rule of Liberty assumed that *slavery was a natural right*. In their minds, emancipation was not “in the furtherance of natural right and justice,”<sup>54</sup> because it trenched upon the supposed natural right to hold slaves.<sup>55</sup>

Slavery has been abolished in the United States.<sup>56</sup> Therefore, the suppletive Rule of Liberty would dominate contemporary jurisprudence. This may prove disquieting to conservative thinkers. But if originalism is honest, it must adhere equally to every legitimate aspect of our history. The Rule of Liberty was not devised by wild-eyed lefties trying to expand the power of the government. It is as old as our law itself, it was an integral part of the Common Law, and it is enshrined in the text and structure of our Constitution.

## II. THE LIFE AND DEATH OF THE AMERICAN RULE OF LIBERTY

Like most interpretation in early American law, there was no systematic doctrine for applying the Rule of Liberty.<sup>57</sup> It was imported from England like much of early American law,<sup>58</sup> and

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51. III BLACKSTONE, *supra* note 6, at 88-89.

52. *Id.* at 88-89 n.30.

53. *Somerset v. Stewart*, 1 Lofft 1, 19 (1772).

54. III BLACKSTONE, *supra* note 6, at 88-89 n.30.

55. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856); *Cleland v. Waters*, 16 Ga. 496, 508, 513-20 (1854) (expressing “a settled conviction that [slavery] was wisely ordained by a forecast high as heaven above man’s, for the good of both races.”).

56. U.S. CONST. amend. XIII, § 1.

57. WILLIAM ESKRIDGE JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 137-38 (West 2012).

58. TESIS, *supra* note 5, at 80.

judges treated it that way. It appeared as a presumption,<sup>59</sup> a clear-statement rule,<sup>60</sup> a tiebreaker,<sup>61</sup> and a constitutional maxim.<sup>62</sup> But as the sectional crisis deepened and the northern states started agitating for abolition, the southern courts annihilated the canon to justify the continued existence of slavery.<sup>63</sup>

### A. The Nature of the Right to Freedom

The right to sue for freedom was a personal, common-law right, and did not depend on a statute for its existence.<sup>64</sup> It was usually styled as a tort action for “trespass, assault and battery, and false imprisonment.”<sup>65</sup> In every state, a slave could bring an action for freedom, and on a showing of probable cause, the court would enjoin the master from selling the slave pending trial.<sup>66</sup> In contrast,

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59. *See, e.g.,* Nichols v. Bell, 1 Jones N.C. 32, 32-34 (1853) (“We know of no law or decision that authorizes [a presumption that mixed-race children were slaves]. If we had the power, we certainly have not the disposition to extend the principle further . . . [This would be] against the rule that presumptions are always in favor of liberty.”).

60. *See, e.g.,* Findly v. Nancy, 3 T.B. Mon. 400, 400-02 (Ky. 1826) (“It may be a matter of some consideration . . . whether the chancellor ought, in any case, to grant a new trial at law, for the purpose of taking away a right to freedom . . . The case which would warrant such interference ought to be strong and clear.”).

61. *See, e.g.,* Isaac v. West, 6 Randolph 652, 652-57 (Va. 1828) (“If this construction is doubtful, some weight is due to the maxim that every deed is to be taken most strongly against the grantor, and to the spirit of the laws of all civilized nations which favors liberty.”).

62. *See, e.g.,* Harry v. Decker & Hopkins, 1 Walk. Miss. 36, 42 (Miss. 1818) (“[Assuming] it was a doubtful point, whether the constitution was to be considered prospective in its operation or not, the [masters] say, you take from us a vested right arising from municipal law. The [slaves] say you would deprive us of a natural right guaranteed by the ordinance and the constitution. How should the Court decide, if construction were to really determine it? I presume it would be in favour of liberty. . .”).

63. *See, e.g.,* Jameson v. McCoy, 5 Heiskell 108, 118 (Tenn. 1871) (noting that Tennessee’s jurisprudence on slavery “was marked by great liberality until the year 1831, when the public mind began first to be agitated by discussions in the Northern States of abolishing slavery”).

64. Butler v. Duvall, 4 Fed. Cas. 898, 900 (D.C. App. 1829) (Opinion of Cranch, C.J.) (“The remedy by petition for freedom . . . existed long before, and was in daily use at the time of passing the [Maryland act relating to emancipation] . . . There is no statute which expressly gives to a person, held in slavery, a right to sue for his freedom.”).

65. Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 567-68 (2004).

66. *Id.*

habeas corpus could not ordinarily be used to adjudicate freedom; instead, it was used by people who were being *wrongfully* held in slavery.<sup>67</sup> The right to emancipate (or manumit) a slave was also a common-law right.<sup>68</sup>

### 1. *The Right to Give Freedom*

The power of the owner to give, and the capacity of the slave to receive, freedom, exist in nature, and therefore may be used in every case and every way, except those in which it is forbidden by law.

Supreme Court of North Carolina, *Thompson v. Newlin* (1851)<sup>69</sup>

Before states regulated how masters could emancipate their slaves, courts rejected arguments that the form of an emancipation was defective.<sup>70</sup> Almost without exception, the courts reasoned that as manumission was a common-law right, and that it could be used in any way not actually prohibited.<sup>71</sup> The Texas courts, for example, held that “the owner could free his slave, provided no statute prohibiting [emancipation] existed, by simply saying, “*go, you are free.*”<sup>72</sup> Eventually, states enacted statutes burdening both the process of emancipation and the right of manumission itself.<sup>73</sup> However, until the courts abolished the Rule of Liberty, the canon routinely persuaded judges to confine these statutes to their literal terms.

67. See, e.g., *Renney v. Field*, 4 Hayw. Tenn. 165, 165-70 (Tenn. 1817); *Thornton v. Demoss*, 5 S. & M. 609, 611, 618 (Miss. 1846); *Thompson v. Newlin*, 8 Ired. Eq. 32, 46-47 (N.C. 1851); *Field v. Milly Walker*, 17 Ala. 80, 81-83 (1849); *Clark v. Dick ex rel.* 8 Fla. 360, 361, 367 (1859). This is why the southern courts refused to recognize freedom granted on habeas petitions in free states, because such cases could not actually adjudicate freedom. See, e.g., *Lewis v. Fullerton*, 1 Randolph 15, 15-24 (Va. 1821).

68. *Thompson v. Newlin*, 8 Ired. Eq. 32, 46-47 (N.C. 1851).

69. *Id.*

70. MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810–1860*, 205-06 (1981).

71. *Id.*; *Thompson*, 8 Ired. Eq. at 46-47; *Susan v. Ladd*, 6 Dana 30, 30-31 (Ky. 1837).

72. *Jones v. Laney*, 2 Tex. 342, 346-47 (1847); *Guess v. Lubbock*, 5 Tex. 535, 550-51 (1851). See also *M’Cutchin v. Price*, 3 Hayw. Tenn. 195, 212 (Tenn. 1817) (“A testator may direct that the executors shall endeavor to procure the emancipation of his slaves; and if the executor can do so, then all claims founded upon the legal impossibility of doing so, vanish.”); *Jones v. Laney*, 2 Tex. 342, 346-47 (1847) (“In the absence of proof of any law, custom or usage . . . forbidding [emancipation], if the deed . . . be believed by the jury to be authentic, the plaintiffs are entitled to their freedom.”)

73. *Greenlow v. Rawlings*, 3 Humphreys 90, 90-94 (Tenn. 1842) (process); *Frazier v. Frazier*, 2 Hill Eq. 304, 305-17 (S.C. 1835) (right).

Two values sat at the heart of these cases. First was the common-law preference for liberty. Second was the right of the legislature to exercise its policymaking authority. When these values collided, the courts never questioned the legitimacy of either. Instead, they presumed that the legislature was not hostile to human freedom, but permitted clear text or intent to rebut this presumption. Thus, general restrictions on emancipation were simply designed to *order* the natural process of freeing humans from bondage, and the courts would not infer a legislative policy disfavoring emancipation unless clearly stated.<sup>74</sup> Even total prohibitions on emancipation within the state were generally not construed to prohibit a master from sending his slave to another state to be free, since the prohibition was designed to protect citizens from the “danger” of a free African-American population.<sup>75</sup>

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74. *Stewart v. Miller*, 1 Meigs 574, 575-77 (Tenn. 1839) (“[S]ubstantial compliance” with the statute could support a grant of freedom, “although there may not be the most exact regularity in the proceeding.”); *Rueben v. Parrish*, 6 Humphreys 116, 122-26 (Tenn. 1845) (technicalities are not “judicial acts necessary to perfect the emancipation, but are mere police regulations”); *Greenlow*, 3 Humphreys at 90-94 (holding that if the county judge freed a slave, the appellate courts must “presume that the proof required . . . was made”) *State v. Pitney*, 1 Coxe 165, 165 (N.J. 1793) (“The boy is entitled to his freedom, whether the administrators have given the security required by the act or not.”); *Smith v. Adam*, 18 B. Mon. 685, 686-89, 692 (Ky. 1858); *In re Moorman’s Will*, 1 CATTERALL 93-94 (holding that where a testator manumitted slaves “if the law permits it,” the devise of freedom is valid even though the estate had to petition the assembly for a law permitting manumission after his death); *Cox v. Williams*, 6 Ired. Eq. 15, 16-17 (N.C. 1845); *Thompson*, 8 Ired. Eq. at 46-47; *Alvany v. Powell*, 1 Jones Eq. 35, 35-39 (N.C. 1853) (“The reasons upon which [emigration conditions] are based, by no means make it necessary to hold that they have not capacity to take property until they have left the state. . . . With this saying, the humanity of our laws strikes his fetters at once, and says, go ‘enjoy life, liberty and the pursuit of happiness.’”).

75. *Jordan v. Bradley*, 1 Dudl. Ga. 170, 171 (Ga. 1830); *Antoinette ex rel. Roser v. Marlow*, R.M.C. 542, 548 (Ga. 1837) (holding that the intent of the statute was solely to prevent a free black population in Georgia); *Myrick v. Vineburgh*, 30 Ga. 161, 163 (1860) (holding that a will requiring slaves to be taken to a free state and there manumitted does not violate the anti-emancipation laws); *Jones v. Abernathy*, 11 Iredell 280 (N.C. 1850) (“A power . . . to manumit is not so absolutely incompatible with slavery, that they cannot co-exist under the same [federal] government.”); *Shaw v. Brown*, 35 Miss. 246, 311-13, 321 (1858) (“It was [the master’s] intention to locate them permanently where they could be free. [He] unquestionably had that right. The only restraint upon that right is, that he shall not emancipate them with the intent to bring them back as free persons.”); *Atwood’s Heirs v. Beck*, 21 Ala. 590, 614 (1852) (“There is nothing said, either in the Constitution, statutes or decisions of Alabama, about the power of the owner to remove his slaves to a non-slaveholding State” in order to free them); *Ross v. Verner*, 5 How. Miss. 305, 359 (1840); *Leech v. Cooley*, 6 S. & M. 93, 93, 98-99

These rationales are ameliorative. They placed the onus on the legislature to tell the courts if state policy was unfavorable to freedom in a particular context. But there were also suppletive cases. Some slave states justified this broad construction because “devises in favor of charities, and particularly those in favor of liberty, ought to be liberally expounded.”<sup>76</sup> The leading case from this category was *Isaac v. West*.<sup>77</sup> A condition to freedom became unlawful between the time a deed was executed and the time the right accrued.<sup>78</sup> The dispute was over who benefited from the failure of the condition, between the heirs and the slave—and the Court sided with the slave:

The deed may be construed to give immediate freedom, to all intents and purposes . . . If this condition was against Law, as inconsistent with the right granted, it would not frustrate the grant. . . . If this construction is doubtful, some weight is due to the maxim that every deed is to be taken most strongly against the grantor, and to the spirit of the Laws of all civilized nations which favours liberty.<sup>79</sup>

In most states, legislatures responded to these cases with restrictive statutes or constitutional amendments. Some courts saw this as a cue to change course.<sup>80</sup> However, even while giving full force to whatever was clear about the legislature’s intent, the courts construed these statutes narrowly at the margins.<sup>81</sup>

In the late 1850s, most Southern courts abruptly reversed course and decided that the law ought to favor slavery.<sup>82</sup> These cases

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(Miss. 1846) (“The mere collocation of words, if their meaning be the same, cannot vary their construction” if the testator tried to comply with the law in good faith).

76. *Charles v. Hunnicutt*, 5 Call 311, 311-12, 318-30 (Va. 1804).

77. *Isaac v. West*, 6 Randolph 652, 652-57 (Va. 1828).

78. *Id.*

79. *Id.* (citing JUSTINIAN’S DIGEST and COKE’S INSTITUTES).

80. *State v. Emmons*, 1 Pennington 10, 11-14 (N.J. 1806) (abandoning precedent “in favor of liberty . . . supporting manumissions, which were not very precise and determinate”); *Smith v. Adam*, 18 B. Mon. 685, 686-89, 692 (Ky. 1858);

81. *Kitty v. Commonwealth*, 18 B. Mon. 522, 527-28 (Ky. 1857) (allowing a slave, freed before the amendments, to stay in the state notwithstanding that the constitution required her to leave the state); *Walthall v. Robinson*, 2 Leigh 189, 192-95 (Va. 1830).

82. *Myers v. Williams*, 5 Jones Eq. 362, 362-68 (N.C. 1860) (“The true principle of our law, in relation to . . . emancipation . . . is, that it permits, but does not favor it.”); *Mitchell v. Wells*, 37 Miss. 235, 243-45, 252-56, 263-64 (1859) (“Mississippi came into the union . . . with this institution, . . . protected . . . by the express provisions of [the Federal] Constitution . . . Her climate, soil, and productions . . . require slave labor. [O]ur policy is [not] limited to the prevention of the increase of free negroes in this state.”); *Spencer v. Dennis*, 8 Gill 314, 318, 321 (Md. 1849) (holding that the power to free slaves was not an existing right. It was granted by statute, and thus, a master must comply with the statute).

did not alter the relationship between the courts and the legislature—instead, they simply replaced the common law’s preference for liberty with an invented preference for slavery:

[T]he favor shown to liberty by the Common Law does not apply to negroes in Georgia. . . . It is not apparent, that up to this period, the true character of slavery had not been fully understood [by] the South . . . . [Slavery] was wisely ordained by a forecast high as heaven above man’s, for the good of both races, and [requires] a calm and fixed determination to preserve and defend it, at any and all hazards.<sup>83</sup>

These restrictive statutes also sparked fights over what the courts called quasi-freedom. Masters, annoyed by laws that made it difficult to emancipate slaves, circumvented them by using the near-infinite morass of future interests.<sup>84</sup> A few states had no issue with these devices.<sup>85</sup> One Delaware Judge explained the position this way:

It is true that slavery is tolerated by our laws; but it is going too far to say that this kind of property in slaves is precisely like any other species of property. The spirit of the age and the principles of liberty and personal rights as held in this country are equally opposed to a doctrine drawn from the ages . . . of despotism.<sup>86</sup>

Other states voided these contraptions as frauds upon the law.<sup>87</sup> These cases were uniformly based on the idea that a population of free, “entitled” African-Americans within the state was undesirable.<sup>88</sup>

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83. *Cleland v. Waters*, 16 Ga. 496, 508, 513-20 (1854); *Drane v. Bell*, 21 Ga. 21, 39, 43 (1857).

84. TUSHNET, *supra* note 70, at 193-95.

85. *Hope v. Johnson*, 2 Yerger 123, 123-25 (Tenn. 1826); *David v. Bridgman*, 2 Yerger 557, 563 (Tenn. 1831) (permitting emancipation to exist as a contingent remainder following a life estate); *Leiper v. Hoffman*, 26 Miss. 615, 622-23 (1853) (allowing a slave to hold a contingent interest in property placed in trust for her, and holding that if she did obtain freedom, her rights would immediately vest); *Young v. Cavitt*, 7 Heiskell 18, 30 (Tenn. 1871) (“There has always been an intermediate state between slavery and absolute freedom, recognized by our courts, in which the inchoate legal right to freedom, and the vested equitable right to its benefits, have been capable of being enforced.”); *Purvis v. Sherrod*, 12 Tex. 140, 164-65 (1854).

86. *Jones v. Wootten*, 1 Harrington 77, 84-85 (Del. 1833) (Harrington, J., dissenting).

87. *Adams v. Gilliam*, 1 Patt. & H. 161 (Va. 1855) (holding that the law does not recognize devices creating a quasi-free status between slavery and freedom); *Redmond v. Coffin*, 2 Dev. Eq. 437, 437-40 (N.C. 1831) (“Qualified emancipation . . . stands upon the same ground as a bequest directly for that purpose—however praiseworthy the motive for accepting such a trust, or however benevolent the will of the donor may be, it cannot be supported in a court of justice. A stern necessity arising out of the safety of the commonwealth forbids it.”); *Dunlap v. Ingram*, 4 Jones Eq. 178, 179-84 (N.C. 1858) (voiding a trust as an attempt to

These cases reflect two antithetical views on emancipation. One followed *Somerset v. Stewart*. Since slavery could only be sustained by positive law, all restrictions on emancipation must be stated clearly in the positive law and would be construed narrowly. Neither would a master's failure to observe these requirements deprive a human being of freedom. The other view, invented by the slave states leading up to the War, rested on the opposite assumption. Free African-Americans were a curse upon democracy. Thus, restrictions on emancipation must sweep broadly, to protect whites from free African-Americans. A similar dynamic appeared in cases where an heir or a master tried to return a free person to slavery.

## 2. Irrevocability & Deference

Slavery is involuntary, and cannot cease to exist till the right of the master ceases with it. . . . This right, then, during the seven years residence of Lydia in Indiana, was not only suspended, but ceased to exist; and we are not aware of any law of this state which can bring into operation the right of slavery once destroyed. . . . For we cannot for a moment admit that the bare treading of our soil is thus dangerous.

Kentucky Supreme Court, *Rankin v. Lydia* (1820)<sup>89</sup>

Judgments are normally permanent.<sup>90</sup> But cases involving human freedom were unique. One of the most striking of those cases was *Findly v. Nancy*.<sup>91</sup> The master in *Findly* lost a freedom suit at law, but then asked a court of equity to order a new trial. The Chancellor refused:

It may be a matter of some consideration . . . whether the chancellor ought, in any case, to grant a new trial at law, for the purpose of taking away a right of freedom gained at law. For as the chancellor will only interfere to take from a party a legal advantage, which, in conscience, he cannot retain, it may be doubted whether a right to freedom can ever be a claim of

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circumvent the emancipation laws, where the executors must hold the proceeds of the slaves' labor for their own benefit); *Dougherty v. Dougherty* 2 Strob. Eq. 63, 63-64, 67 (S.C. 1848); *Thornton v. Chisholm*, 20 Ga. 338, 339-41 (1856).

88. See, e.g., *Myers v. Williams*, 5 Jones Eq. 362, 362-68 (N.C. 1860); *Morton v. Thompson*, 6 Rich. Eq. 370, 370-75 (S.C. 1854). See generally cases cited in note 87.

89. *Rankin v. Lydia*, 2 A.K. Marsh. 467, 270-79 (Ky. 1820).

90. See Kevin Clermont, *Civil Procedure's Five Big Ideas*, 2016 MICH. ST. L. REV. 55, 94-95; RESTATEMENT (FIRST) OF JUDGMENTS § 1 (AM. LAW INST. 1942).

91. *Findly v. Nancy*, 3 T.B. Mon. 400, 400-02 (Ky. 1826).



that character. . . . The case which would warrant such interference ought to be strong and clear.<sup>92</sup>

This sentiment pervaded judicial review of judgments in favor of freedom in many other states, even when the basis of the freedom claim was questionable.

For example, a court in Tennessee held that a judgment in favor of freedom was immune from collateral attacks that the master was insane and that the lower court made some technical errors.<sup>93</sup> Two judges in Virginia caused an appellate deadlock by “presuming in favor of liberty” that the jury inferred an essential fact of the freedom claim.<sup>94</sup> One Pennsylvania court held that a county judge’s decision to free a slave on a writ of habeas corpus was not appealable at all.<sup>95</sup> The New York courts held that marriage of a free woman of color to a slave husband did not return her to slavery.<sup>96</sup> New York also held that even a bona fide purchaser “could not make a free man a slave, much less authorize the sale of him.”<sup>97</sup> Even the late Missouri courts held that freedom, once vested, could not be stripped away except as punishment for crime.<sup>98</sup>

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92. *Id.*

93. *Hartsell v. George*, 3 Humphreys 255, 255-57 (Tenn. 1842) (holding that these errors “do[] not invalidate the act of emancipation; . . . the act was consummate; . . . the character of the slave ceased . . . [and] the jury had no right to inquire into the sanity of the [master] at the time the order of liberation was made”).

94. *Coleman v. Dick and Pat*, 1 Wash. Va. 233, 236-39 (Va. 1793) (affirming by an equally divided court); *Betty v. Horton*, 5 Leigh, 615, 624-25 (Va. 1833).

95. *Russell v. Commonwealth*, 1 P. & W. 82, 82-83 (Pa. 1829). The trial judge ruled that “to hold [the slave] under the[se] circumstances, would be contrary to the spirit of the laws of Pennsylvania, for the gradual abolition of slavery.” *Id.* The court of appeals refused the appeal on the grounds that that “no writ of error will lie to remove a judgment upon a habeas corpus” petition.” *Id.*

96. *Marbletown v. Kingston*, 20 Johnson 1, 3 (N.Y. 1872) (“I cannot admit that by such a marriage, a free wife subjects herself to the custody and control of the slave husband . . . I am inclined to listen to the suggestions of policy and humanity, which I think dictate the rule, that the children of such marriages shall follow the condition of the free mother. . .”).

97. *Livingston v. Bain*, 10 Wendell 384, 384-86 (N.Y. 1833) (“The ignorance of all parties . . . could not make a free man a slave, much less authorize the sale of him . . . Although the sale in this case may not have been immoral . . . still it is nonetheless illegal.”); *State v. Anderson*, 1 Coxe 36, 36-37 (N.J. 1790) (“The hardship [pled] by the [purchaser] . . . ought not to be recompensed by the slavery of the child.”); *Ponder v. Cox*, 26 Ga. 485, 486-92 (1858).

98. *Charlotte v. Choteau*, 21 Mo. 590, 597 (1855) (“[W]hen any of the race, who were then reduced to slavery, acquired their freedom under the laws of the country in which they lived, we are aware of no law by which they, except for crime, could be again subjected to bondage. The principle that there is no

Freedom also vested by residence in a free state. The courts generally held that this right was inviolable except by an act of the legislature.<sup>99</sup> The Kentucky courts noted that this inviolability came from *Somerset*'s rule that slavery cannot be supported except by positive law.<sup>100</sup> Once a slave resided in a free state by the master's permission, his right to that slave was gone.<sup>101</sup> And as no positive law in Kentucky re-imposed slavery on a free person, the court could not do so.<sup>102</sup> Even Deep South states, which "utterly repudiate[d] the whole current of decisions, from *Somerset* on down," held that when a master takes his slaves to a free state, they became free, and could only be made slaves by a voluntary return to the slave state.<sup>103</sup>

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prescription against liberty, applied to them as well as to those of any other color."); *Blackbor v. Negro Phill*, 7 Yerger 452, 453-66 (Tenn. 1835) (holding that even a design by the master to evade the emancipation laws "will not place them in the condition of slaves. If this State designed to make such acts nullities, then express enactments should be shown.");

99. See *Rankin v. Lydia*, 2 A.K. Marsh. 467, 270-79 (Ky. 1820). *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407, 557 (1856) (McLean, J., dissenting); *Davis v. Tingle*, 8 B. Mon. 539, 545 (Ky. 1848); *Mercer v. Gilman*, 11 B. Mon. 210, 210-12 (Ky. 1851); *Hunter v. Fulcher*, 1 Leigh 172, 182 (Va. 1829); *Vaughan v. Williams*, 28 Fed. Cas. 1115, 1118 (C.C. Ind. 1845).

100. *Rankin*, 2 A.K. Marsh. at 470-79 ("Slavery is sanctioned by the positive law of this state, . . . But we view this as a right existing by positive law . . . without foundation in the law of nature.")

101. *Id.*

102. *Id.* ("This right then, during the seven years residence of Lydia in Indiana, was not only suspended, but ceased to exist; and we are not aware of any law of this state which can bring into operation the right of slavery when once destroyed. . . . For we cannot for a moment admit, that the bare treading of [Kentucky] soil is thus dangerous."). The courts limited this holding in 1844 to operate only as a suspension of the slave power when the slave was out of state, similar to the holding in *The Slave Grace*. See *Graham v. Strader*, 5 B. Mon. 173, 177-82 (Ky. 1844).

103. *Willis v. Jolliffe*, 11 Rich. Eq. 447, 495-516 (S.C. 1860) ("They were free from the moment when, by the consent of their master, they were placed upon the soil of Ohio to be free. I have no idea that the soil of Ohio *per se* confers freedom. It is the act of the master which has that effect. . . . To permit the devise in their favor to operate is, we are told, contrary to the policy of South Carolina . . . But I should feel myself degraded if . . . I trampled on law and constitution, in obedience to popular will. There is no law in South Carolina which . . . declares that the trusts in their favor are void."); *Guillemette v. Harper*, 4 Richardson 186, 187-92 (S.C. 1850) ("[*Somerset*] carries the law further than I would willingly acknowledge. But if the master . . . assents in any way to his freedom, there can be no objection to the validity of freedom thus acquired. . . . If the slave [voluntarily] returns to a country where slavery is recognized, he *ipso facto* is remitted to his original condition."); *Cleland v. Waters*, 19 Ga. 35, 40-42 (1855) ("I utterly repudiate the whole current of

In other cases, the irrevocability principle appeared as a version of equitable estoppel. Once a slave had acted free for several decades, the courts refused to void the right at the insistence of the master or his heirs, premised on some oversight<sup>104</sup> or delay.<sup>105</sup> The courts also permitted the slave to rely on oral promises that she was free,<sup>106</sup> but barred masters from invoking the same rule.<sup>107</sup> These

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decisions, from *Somerset* down. . . . Still, whenever removed to a free country to remain there permanently, they cease to be slaves.”)

104. *Cully v. Jones*, 9 Iredell 168, 168-69 (N.C. 1848) (“[W]e are clearly of the opinion that [the executor], whose duty it was to give the bond [cannot] take advantage of that omission. . . . After so long an acquiescence, almost anything will be presumed, in order to give effect to the act of emancipation.”); *Mayo v. Whitson*, 2 Jones N.C. 231, 239 (N.C. 1855) (holding that after a half-century, the court’s failure to put the emancipation in the record would not permit the next of kin to claim the slave); *Jarman v. Humphrey*, 6 Jones N.C. 28, 28-31 (N.C. 1858) (When the master (1) acted like the slave was free in previous proceedings, and (2) acquiesced in the slave’s conduct as a free person for a long time, then “every presumption ought to be made in favor of his actual emancipation according to all the requirements of law.”); *Oatfield v. Waring*, 14 Johnson 188, 192-93 (N.Y. 1817) (“I have no doubt, that suffering the plaintiff to act as a free man, without any claim or pretence that he was a slave, until this suit was brought, would authorize the inference of a manumission . . . all presumptions in favor of personal liberty and freedom ought to be made.”); *Scott v. Waugh*, 15 S. & R. 17, 20-21 (Pa. 1826). *But see, e.g.*, *Mahan v. Jane*, 2 Bibb. 32, 32-33 (Ky. 1810) (“Though in doubtful cases we may presume in favor of liberty, we cannot indulge it in a cause where the testimony is as clear and decidedly opposed to the verdict as this.”).

105. *Judy ex rel. Monk v. Jenkins*, 2 Hill Eq. 9, 9-14 (S.C. 1834) (“Until the seizure [of a wrongfully freed slave] is actually made, the emancipated slave must stand on the footing of any other free negro . . . the woman was never seized, and being now dead, never can be.”); *Miller v. Regine*, 2 Hill 592, 592-94 (S.C. 1835) (holding that when a slave had lived as a free person for twenty years, heirs could not challenge the emancipation); *Wells v. Lane*, 9 Johnson 144, 144-45 (N.Y. 1812) (“[A]fter such . . . a lapse of time, to authorize the plaintiff to claim her as his slave, would be extremely unjust.”).

106. *Phebe ex rel. Pepon v. Clarke*, 1 Mill. 137, 137-38, 141 (S.C. 1817) (holding that when a master treated a slave as free and told people she was free, his heirs could not re-enslave her); *State v. M’Donald*, 1 Coxe 332, 335 (N.J. 1795) (“In equity, a thing agreed to be done is looked upon as done; and in a case where the liberty of a human being is involved—where the promise is coolly and deliberately made—it ought to receive from this court a similar construction. It is far better to adopt this rule than to suffer promises thus made, in a matter of so great consequence to a human creature, to be violated or retracted at pleasure.”); *Tom v. Daily*, 4 Ohio 368, 368, 371-73 (1831); *Hinklin v. Hamilton*, 3 Humphreys 569, 569-75 (Tenn. 1842); *Geer v. Huntington*, 2 Root 364, 364 (Conn. 1796) (holding that one conversation where a mistress said her slave would be free at twenty-five was sufficient to prove freedom); *United States v. Bruce*, 25 Fed. Cas. 1279, 1280 (D.C. App. 1813) (“As between the master and slave, [an] informal paper, with

cases rested on the same maxim: In Equity, “all presumptions in favor of personal liberty and freedom ought to be made.”<sup>108</sup>

In a similar vein, the courts used this principle to put strict conditions on the master’s ability to revoke a grant of freedom, if they allowed him to do so at all. Some states held that even an informal grant of freedom was irrevocable.<sup>109</sup> But nearly all states and the U.S. Supreme Court held that once a master executed a deed or will, the slave was free against all the world.<sup>110</sup> In the words of one court: “‘Once free and always free,’ is the maxim of Maryland law . . . freedom having been once vested, by no compact between the master and the liberated slave, nor by any condition subsequent . . . can a state of slavery be reproduced.”<sup>111</sup>

The rule also appeared as a form of deference to political actors. Several South Carolina courts refused to disturb jury verdicts granting freedom, reasoning that emancipation was “more of a political than legal character, and, in a great degree [must] be decided by public opinion.”<sup>112</sup> One court in Tennessee refused to

actual manumission, [is] valid”); *Ralph v. Duncan*, 3 Mo. 194, 196 (1833) (holding that giving a legal document to a slave could be sufficient to prove freedom).

107. *Tongue v. Crissy*, 7 Md. 453, 465 (1855); *Isaac v. McGill*, 9 *Humphreys* 616, 616-19 (Tenn. 1848) (“There were only casual conversations in which some expressed their unwillingness to go to Africa. To hold that such conversations . . . should be their solemn decision to remain slaves, rather than be free, would outrage every principle of justice.”).

108. *Oatfield v. Waring*, 14 *Johnson* 188, 192-93 (N.Y. 1817).

109. *Porter v. Blakemore*, 2 *Coldwell* 556, 563-65 (Tenn. 1865) (holding that parol evidence is sufficient to establish a right to freedom when other circumstances suggest that it is reliable); *Jones v. Laney*, 2 *Tex.* 342, 346-47 (1847) (holding that an “owner could free his slave, provided no statute prohibiting [emancipation] existed, by simply saying, “*go, you are free.*”).

110. *Manns v. Givens*, 7 *Leigh* 452, 707-08, 710-19 (Va. 1836) (“[S]o far as the master is concerned, from the moment [the deed] is executed . . . it is final and complete. . . What power can the executor have to defeat his wishes by a revocation, or by seizing the slaves? Such a proposition appears to me to extravagant to be maintained.”); *Fulton v. Shaw*, 4 *Randolph* 597, 597-99 (Va. 1827) (a master cannot free a slave but retain an absolute right to enslave her children); *Forward v. Thamer*, 9 *Grattan* 537, 538-39 (Va. 1853) (a master cannot divest his slaves of freedom by a condition subsequent); *Town of Colombia v. Williams*, 3 *Conn.* 467, 470-71 (Conn. 1820) (holding that the words “set at liberty” put a slave “in a permanent condition of freedom, and implies the extinguishment of a right, which the master had over the slave, and not the mere cessation of actual authority.”); *Fenwick v. Chapman*, 9 *Pet.* 461, 482 (1835) (“When an executor permits manumitted slaves to go at large and free . . . he cannot recall such assent by his own act.”).

111. *Spencer v. Dennis*, 8 *Gill* 314, 321 (Md. 1849).

112. *White v. Comm’r*, 3 *Richardson* 136, 136-41 (S.C. 1846) (3-2 decision) (“It would be difficult, if not impolitic, to define by . . . inflexible rules the line of

review a University's interpretation of a land-grant statute that conferred 1,000 acres of land on a former slave.<sup>113</sup> And when a statute gave county judges authority to give the state's assent to freedom, judgments in favor of the slave were not reviewable.<sup>114</sup>

These rules vanished as the South panicked over the prospect of abolition. In the words of one Georgia court: "Our law does not allow conveyances, nor contrivances, nor time, to convert a slave into a free man."<sup>115</sup> A North Carolina court reversed a verdict in favor of freedom even when the evidence was in conflict.<sup>116</sup> Other courts abolished the reliance arguments, rejecting emancipations not made in the precise form required by law.<sup>117</sup> The same courts seemed unconcerned about applying legislation retroactively to void gifts of freedom that were lawful when made.<sup>118</sup> When slaves insisted that this injured their vested right to freedom, the courts responded stiffly: "The law declares them chattels."<sup>119</sup>

Before the demise of the Rule of Liberty, the law in these cases was rooted in the *Somerset* tradition. Slavery could only be supported by positive law, and once a master surrendered that right, the gravitational pull of the common law resisted all but the clearest

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separation . . . the question of the reception of colored persons into the class of citizens, must partake more of a political than legal character, and, in a great degree, be decided by public opinion, expressed in the verdict of a jury."); *Sally v. Beaty*, 1 Bay 260, 260-62 (S.C. 1792) ("If the [slave] chose to appropriate the savings of her extra labour to the purchase of this girl, in order afterwards to set her free, would a jury of the country say no? [The trial judge] trusted not. They were too humane and upright, he hoped, to do such manifest violence to so singular and extraordinary act of benevolence.").

113. *University v. Cambreling*, 6 Yerg. 79, 79, 85-86 (Tenn. 1834) ("This argument is addressed to us in vain. The board of commissioners of North Carolina has . . . adjudged that the negro Frederick . . . was entitled to [the land]. [This is] conclusive.").

114. *Lewis v. Simonton*, 8 Humphreys 185, 185-91 (Tenn. 1847) ("The proceedings of the tribunal entrusted by law to give the assent of the state [to emancipation] cannot be impeached . . . unless upon their face they be absolutely void."); *Greenlow v. Rawlings*, 3 Humphreys 90, 90-94 (Tenn. 1842).

115. *Escheator v. Candler*, 30 Ga. 275, 277 (1860).

116. *Bookfield v. Stanton*, 6 Jones N.C. 156 (N.C. 1858).

117. *Redmond v. Murray*, 30 Mo. 570, 575 (1860) ("Manumission is a mere gratuity under our laws, and a mere intention or promise by the master, not consummated in the manner pointed out by law, however solemn such promise may be made, can confer no power or capacity to have it enforced.")

118. *Gordon v. Blackman*, 1 Rich Eq. 61, 61-66 (S.C. 1844), *on reh'g*, *Blackman v. Gordon*, 2 Rich. Eq. 43, 43-45 (1845); *Finley v. Hunter*, 2 Strob. Eq. 208, 208-09 (S.C. 1848).

119. *See id.*

statements by the legislature. The later cases, inverting this principle, required textual or intentional clarity from the master or the legislature before they would enforce the right to freedom. These decisions are necessarily rooted in the mirror-image of *Somerset*: That the natural order of things favors slavery, and that nothing, short of positive law, can free a slave or give him rights.

### 3. Primacy

It has also been contended in argument, that although the compact vested a right to freedom, as yet it was never acknowledged . . . the right cannot be coerced. As well might it be said that a vested right of inheritance by an heir held by an intruder, could have no remedy . . . If rights of property can thus be coerced by appropriate remedies, much more ought the right to freedom, compared with which, all other rights sink into insignificance.

Kentucky Supreme Court, *Rankin v. Lydia* (1820)<sup>120</sup>

Antebellum litigation often involved multiple claimants asserting a right to slave. Unfortunately, one of those claimants often *was* the slave. Most courts solved this conflict by declaring that the right to freedom prevailed over property rights.<sup>121</sup> The courts also looked with disfavor on complaints that freeing the slave would deprive a master of their vested rights. The Mississippi Courts, confronting one such conflict, noted wryly:

What are these vested rights, are they derived from nature, or from the municipal law? Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule that courts must lean *in favorem vitae et libertatis*? . . . [T]he [masters] say, you take from us a vested right arising from municipal law. The [slaves] say you would deprive us of a natural right guaranteed by the ordinance and the constitution. How should the Court decide, if construction were to really determine it? I presume it would be in favour of liberty. . . .<sup>122</sup>

In cases where creditors pursued slaves to settle debts, the courts routinely found that emancipation had priority over all other financial interests.<sup>123</sup> In most states, creditors could only reach the

120. *Rankin v. Lydia*, 2 A.K. Marsh. 467, 470-79 (Ky. 1820).

121. *See, e.g., id.*; *Harry v. Decker & Hopkins*, 1 Walk. Miss. 36, 42 (Miss. 1818).

122. *Id.*; *Jarrot v. Joseph*, 2 Gilman 1, 6-11, 23-30 (Ill. 1845).

123. *See, e.g., Susan v. Ladd*, 6 Dana 30, 149-51 (Ky. 1837) (“Slaves . . . occupy the double character of property and legatees, or *quasi* legatees. And, as freedom is a legacy above all price, humanity, justice, and the spirit of the laws, inculcate the propriety of placing them in the most favored class of legatees.”);

slave after all other assets were exhausted—and even then, they could only hire them out until the debt was paid.<sup>124</sup> Creditors could not choose to take freed slaves over less liquid forms of property.<sup>125</sup>

In other cases, the grant of freedom superseded property interests and other testamentary maxims. Reasoning that “there is a manifest difference between a gift of freedom and a gift of property,” the Tennessee and Kentucky courts held that the Rule Against Perpetuities did not apply to grants of freedom.<sup>126</sup> Dower rights were also inferior to gifts of freedom.<sup>127</sup> And even donations to charity, which received favorable treatment at common law, failed before grants of freedom, “lest it might deprive some or all of the manumitted slaves of . . . that liberty secured to them by [the testator’s] benevolence and humanity, which is supposed to have been an act no less meritorious” than gifts to charity.<sup>128</sup>

As the sectional crisis deepened, the South retreated from this super-strong rule. The North Carolina courts made emancipation an ordinary property right.<sup>129</sup> Neither did emancipation prevent sale,

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*Parks v. Hewlett*, 9 Leigh 511, 522-23 (Va. 1838) (“Emancipation is not strictly a gift of property. It is the exoneration of a human being from the bonds which our institutions have fastened on him, and which the beneficence of our times has authorized the master to remove.”). The only exception to this rule was in cases of actual fraud. *Woodley v. Abby*, 5 Call. 336, 336-37 (Va. 1805). But even this was not a unanimous rule. *See id.* at 342 (Tucker & Roane, JJ., dissenting). In another case, creditors who could have (but did not) perfect their security interest in a slave *before* the master emancipated him could not recover the slaves even on a showing of actual fraud. *Milly v. Smith*, 2 Mo. 171, 173-75 (1829).

124. *See, e.g., Dunn v. Amey*, 1 Leigh 465, 471-72 (Va. 1829); *Ferguson v. Sarah*, 4 J.J. Marsh. 103, 105 (Ky. 1830); *Harry v. Green*, 9 Humphreys 182, 183-85 (Tenn. 1848); *Armstrong v. Pearre*, 7 Coldwell 171, 176-78 (Tenn. 1869) (“The bequest of freedom is of a higher nature than a pecuniary legacy, and . . . will not abate . . . to satisfy such a legacy, or be compelled to contribute if it is absorbed by the debts.”); *But see Allein v. Sharp*, 7 Gill & John. 96, 106-08 (Md. 1835) (requiring the rest of the estate to be sold before the slaves, but permitting them to be sold at that point).

125. *Wilson v. Barnett*, 9 Gill & John. 158, 163-64 (Md. 1837).

126. *Wood v. Humphreys*, 12 Grattan 333, 333-34, 338-42 (Va. 1855); *Ludwig v. Combs*, 1 Met. Ky. 128, 131-32 (Ky. 1858). *But see Woodland v. Wallis*, 6 Md. 151, 165 (1854) and *Smith v. Dunwoody*, 19 Ga. 237, 256, 260 (1856).

127. *Lee v. Lee*, 1 Dana 48, 48 (Ky. 1833); *Graham v. Sam*, 7 B. Mon. 403, 406 (Ky. 1847).

128. *William & Mary Coll. v. Hodgson*, 6 Munford 163, 163-65 (Va. 1818).

129. *Cox v. Williams*, 6 Ired. Eq. 15, 19 (N.C. 1845) (“[T]he owner of a slave cannot defeat the rights of a creditor by manumitting the slave.”); *Bennehan’s Ex’or v. Norwood*, 5 Ired. Eq. 106, 109 (N.C. 1847);

because creditors need not be obligated to wait indefinitely for payment.<sup>130</sup> Other states privileged creditors over emancipation.<sup>131</sup>

Until the states began repudiating the Rule of Liberty, the Courts almost uniformly treated freedom as superior to property. This superiority prevailed even when the interest was held by an innocent third party. Thus, the rule was founded not on the injustice of holding a human in slavery, but on the sheer power of the natural right to freedom. Had this rule rested on a common-law distaste for slavery alone, the courts would not have permitted emancipation to prejudice the rights of innocent third parties. Instead, it was rooted in the common-law conviction that “freedom is a legacy above all price,”<sup>132</sup> and so property rights were necessarily inferior to it.

#### 4. *Rights Inherent in Freedom*

Freedom in this country is not a mere name . . . and it makes itself manifest by many public acts . . . transfers its possessor, even if he be black, or mulatto, or copper-colored, from the kitchen and the cotton-field, to the court-house, and the election ground. . . . In some states renders him a politician, takes him to the ballot box—and above all, secures to him . . . trial by jury.

Tennessee Supreme Court, *Vaughan v. Phebe* (1827)<sup>133</sup>

Once free African-Americans became more numerous, the courts were confronted with their role in deciding the status of a free person of color. The states vehemently disagreed on this subject, but the majority rule was that freedom itself conferred all *civil* rights on a person without further legislation. They usually left it to the legislature, however, to confer *political* rights, like the right to vote.

The courts of South Carolina, Maryland, Mississippi, Alabama, Tennessee, Pennsylvania, Connecticut, Massachusetts, Indiana, Wisconsin, and Texas held that the very status of freedom gave people of color the right to acquire, hold, transmit, and dispose of property on equal terms with white persons.<sup>134</sup> The Pennsylvania

130. *Shaw v. McBride*, 3 Jones Eq. 173, 173-76 (N.C. 1857); *Lane v. Bennett*, 3 Jones Eq. 390, 392, 394 (N.C. 1857).

131. *Bynum v. Bostick*, 4 Dessausure 266, 267 (S.C. 1812) *George v. Corse*, 2 Har. & Gill. 1, 2, 8 (Md. 1827).

132. *Susan v. Ladd*, 6 Dana 30, 149-51 (Ky. 1837).

133. *Vaughan v. Phebe*, 1 Mart. & Yerg. 5, 5-7 (Tenn. 1827).

134. *In re Real Estate of Hardcastle*, 2 Harper 495, 498-501 (S.C. 1826); *Carmille v. Carmille*, 2 McMullan 454, 454-56, 469-72 (S.C. 1842); *Bowers v. Newman*, 2 McMullan 472, 486-89 (S.C. 1842); *Hughes v. Jackson*, 12 Md. 450, 463 (1858); *Shaw v. Brown*, 35 Miss. 246, 320 (1858) (“[F]ree negroes are only



courts described these rights as “incident to the grant of his freedom.”<sup>135</sup>

Most states also held that unless the positive law imposed disabilities, the free black person had the same inherent *personal* rights as the white person. These included the rights to sue,<sup>136</sup> to demand due process,<sup>137</sup> to petition for habeas corpus,<sup>138</sup> to testify,<sup>139</sup> to pursue a lawful profession,<sup>140</sup> to be free from unreasonable

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debarred, by our laws, of the rights secured to them . . . so far as the exercise of those rights may be positively prohibited, or may be directly dangerous to the conditions of our slaves.”); *Mathews v. Springer*, 16 Fed. Cas. 1096, 1098-99 (2 Abb. U.S. 283) (1871); *Berry v. Alsop*, 45 Miss. 1, 10 (1871); *Tannis v. Doe ex rel. St. Cyre*, 21 Ala. 449, 453-54 (1852) (“[I]ncapacity [to hold property] can only be fixed upon [a free person or color or an emancipated slave] by express legislative enactment, or by necessary implication.”); *Nelson v. Smithpeter*, 2 Coldwell 13, 13-15 (Tenn. 1865) (holding that the ratification of the Thirteenth Amendment inherently gave former slaves the right to hold property); *Foremans v. Tamm*, 1 Grant 23, 23-25 (Pa. 1853) (“The effect of the manumission is to give the colored man the right to acquire and dispose of lands as fully as the white man . . . [as] an incident to the grant of his freedom. There is nothing in the [law] . . . that excludes the colored man.”); *Town of Colchester v. Town of Lynne*, 13 Conn. 274, 275, 278 (1839); *Roberts v. City of Boston*, 5 Cushing 198, 204-09 (Mass. 1849); *Smith v. Moody*, 26 Ind. 299, 300-01, 303-07 (1866); *In re Booth*, 3 Wis. 1, 15-18 (1854); *Webster v. Heard*, 32 Tex. 685, 710 (1870).

135. *Foremans*, 1 Grant at 23-25.

136. *State v. Bender*, 3 Harrington 572, 574 n. (Del. 1793) (“Negroes are allowed the same redress for injuries to their persons as whites. . .”).

137. *Mayor v. Winfield*, 8 Humphreys 707, 707-10 (Tenn. 1848).

138. *See Renney v. Field*, 4 Hayw. Tenn. 165, 165-70 (Tenn. 1817); *Weddington v. Sam*, 15 B. Mon. 147, 154-55 (Ky. 1854); *Coston v. Coston*, 25 Md. 500, 500-01 (1866); *In re Turner*, 24 Fed. Cas. 337, 337-40 (1 Abbot U.S. 84) (Chase, Chief Justice); *State v. Philpot*, 1 Dudl. Ga. 46, 49-52 (Ga. 1831).

139. *State v. Bender*, 3 Harrington 572, 574 n. (Del. 1793); *United States v. Mullany*, 27 Fed. Cas. 20, 22 (D.C. App. 1808) (“[C]olor alone does not disqualify a witness.”); *Handy v. Clark*, 4 Houston 16, 16-18 (Del. 1869); *Gurnee v. Dessies*, 1 Johnson 508, 508 (N.Y. 1806).

140. *Carey v. Washington*, 5 Fed. Cas. 62, 66 (D.C. App. 1836) (“Although free colored persons have not the same political rights which are enjoyed by free white persons, yet they have the same civil rights, except so far as they are abridged by the general law of the land. Among these civil rights, is the right to exercise any lawful and harmless trade, business, or occupation.”); *The William Jarvis*, 29 Fed. Cas. 1309, 1310 (C.C. Mass. 1859) (holding that a Louisiana law was unconstitutional because it prohibited free seamen of color from going ashore with white people. “It is no avail to say that Congress have not, in express terms, said that negroes may be seamen on board of American vessels. It is sufficient that there is no prohibition, and that all persons, of every shade of color, stand upon the same ground of right to constitute part of the crew.”).

punishments and restraints on free choice,<sup>141</sup> and to invoke the protection of the state from violence.<sup>142</sup> Some states even allowed freed slaves to sue their masters for wrongful enslavement.<sup>143</sup>

The real conflict between the states centered around the right to vote. Some states held that the act of giving freedom itself “adopt[ed] into the body politic a new member”<sup>144</sup> and obligated the government to respect their rights on the same level as those of a white man.<sup>145</sup> Michigan, confronting the intervening effect of the Thirteenth Amendment on its election law, declared:

The reasons for drawing distinctions between classes are notorious; the course of events has, with the destruction of slavery, . . . modified public opinions. . . . We cannot truly interpret our Constitution upon voting, without consideration to the fact that it sprang from prejudice. . . . We have never attempted to make color a test of veracity in the witness box. . . . [N]o one has advanced the notion that a preponderance of mixed blood . . . has any bearing upon fitness to possess political privileges.<sup>146</sup>

This perspective on freedom demanded that “[i]f the rights of the black man are to be assailed, let it be done boldly.”<sup>147</sup>

Other states held that free persons of color had no political rights,<sup>148</sup> and some of the more liberal states later overruled decisions

141. *Cooper & Warsham v. City of Savannah*, 4 Ga. 58, 74-75 (1845) (holding that a free person of color could not be imprisoned for the failure to pay a fine or a debt); *Banks v. Banks*, 2 Coldwell 546, 550-55 (Tenn. 1865) (holding that abolition voided a legal requirement that a slave leave the state to claim property).

142. *In re Booth*, 3 Wis. 1, 15-18 (1854) (holding that a free person of color “is entitled to the full protection of our laws; so long as he is unclaimed.”); *Bender*, 3 Harrington at 574 n. (Del. 1793) (“Negroes are allowed the same redress for injuries to their persons as whites. . .”).

143. *Paup v. Mingo*, 4 Leigh 163, 176, 180-87 (Va. 1833); *Scott v. Williams*, 1 Devereux 376, 376 (N.C. 1828); *Matilda v. Crenshaw*, 4 Yerger 299, 300, 304-05 (Tenn. 1833). Other states allowed the claim, but limited it to cases where the right to freedom was clearly established. *Warfield v. Davis*, 14 B. Mon. 40, 43 (Ky. 1853). Other states rejected the tort. *Russell v. Cantwell*, 5 S.C. 477 (S.C. 1874).

144. *Fisher’s Negroes v. Dabbs*, 6 Yerger 119, 120-32 (Tenn. 1834).

145. G.H. MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 7; *Roberts v. City of Boston*, 5 Cushing 198, 204-09 (Mass. 1849).

146. *People v. Dean*, 14 Mich. 406, 414-19, 422-25 (1866); *Coger v. N.W. Union Packet Co.*, 37 Iowa 145, 146-60 (1873) (“In our opinion the plaintiff was entitled to the same rights and privileges . . . The doctrines of natural law and Christianity forbid that rights be denied on the ground of race or color.”); *Town of Colchester v. Town of Lynne*, 13 Conn. 274, 275, 278 (1839) (“The master of [a] slave, by relinquishing all claims to service and obedience, effectually emancipated her; and thus she became *sui juris*, and entitled to all the rights and privileges of other free citizens”).

147. *Brittle v. People*, 2 Neb. 198, 204-09, 222-25 (Neb.)

148. *See, e.g., Bowers v. Newman*, 2 McMullan 472, 486-89 (S.C. 1842).

treating free persons of color equally.<sup>149</sup> Many of these decisions invoked reasoning eerily similar to that which would later appear in *Dred Scott*.<sup>150</sup> Georgia asserted that manumission conferred nothing except the right to movement, and that the free African-American had no rights except by statute.<sup>151</sup> These cases, therefore, wholly repudiated the Rule of Liberty. However, other states held that while free persons of color had less rights than white persons, this was only because the slave clauses in the U.S. Constitution precluded the political freedom of the African-American.<sup>152</sup> All political rights, therefore, must be conferred by statute.<sup>153</sup>

Another set of cases involved segregation. Some free states, while acknowledging the equal rights of persons of color, endorsed segregation.<sup>154</sup> Other courts held that mixed-race children had a right to attend white schools.<sup>155</sup> These states reasoned that segregation was illegal unless authorized by a “sovereign authority.”<sup>156</sup>

There is significant disagreement in these cases. But there are two lessons to be drawn from this brief survey. First, most states—even deep south states—recognized that civil and personal rights vested in the African-American simply by being free. In fact, some courts held that depriving slaves of these rights must be done by

149. *State v. Claiborne*, 1 Meigs 331, 338-41 (Tenn. 1839).

150. *See, e.g., id.* (“Free negroes have always been a degraded race in the United States . . . with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom, the laws have never allowed . . . the immunities of the free white citizen. . . . But free negroes never [citizens] in any of the States. . . . in the sense of *Magna Charta*, or of our Constitution.”).

151. *Bryan v. Walton*, 14 Ga. 185, 198-201 (1853) (“[T]he status of the African in Georgia, whether bond or free, is such that he has no civil, social, or political rights or capacity, whatever, except such as are bestowed upon him by statute. The act of manumission confers no other right but . . . freedom from the dominion of the master, and the limited liberty of locomotion . . . to become a citizen of the body politic, capable of contracting, of marrying, of voting, requires something more than the mere act of enfranchisement.”).

152. *Hobbs v. Fogg*, 6 Watts 553, 553-54, 556-60 (Pa. 1837) (holding that a person “though free as the winds,” “may be no freeman in respect of its government.” The court admitted that the issue was ambiguous, but resolved doubt considering the bargain struck by the Constitutional Convention); *Hudgins v. Wrights*, 1 Hen. & M. 134, 137 (Va. 1806) (holding that the Bill of Rights only protects whites).

153. *E.g., Foremans v. Tamm*, 1 Grant 23, 23-25 (Pa. 1853).

154. *Roberts v. City of Boston*, 5 Cushing 198, 204-09 (Mass. 1849); *Burton v. Schepf*, 83 Mass. 133, 134-36 (1861).

155. *Van Camp v. Logan*, 9 Ohio St. 406, 412-15 (1859).

156. *Clark v. Bd. of Directors*, 24 Iowa 266, 269-77 (1868).

legislation. Second, Chief Justice Taney's view of African-Americans was in a distinct minority. Most states did afford free blacks civil rights; there were common-law rights that the white man was bound to respect. Most states also held that the legal disabilities of African-Americans stemmed from necessity, safety, racial purity, or some policy mandate—and not, as Chief Justice Taney thought, from the supposed inherent inferiority of the black man.

The weight of authority in these cases paints a picture of an antebellum judiciary that firmly believed in the *Somerset* vision of freedom. Moreover, they felt empowered to enforce it. Freedom existed in the law of nature, and could only be restricted by clear, positive law. Once given, freedom from slavery could not be revoked. When the right to freedom and the right to property conflicted, the presumption was in favor of liberty. And when the positive-law disabilities of slavery were removed, the freed man—by default—gained civil and personal rights (at least), or citizenship (at most). This was the core of the Rule of Liberty. But the canon also appeared in a procedural context, beating back a perennial enemy of civil rights: Formalism.

## B. Liberty and Formalism

Formalism—the rigid adherence to an existing legal framework—has frustrated more than one attempt at protecting civil rights.<sup>157</sup> This is not a new phenomenon. In the nineteenth century, formalism provided courts with opportunities to make emancipation practically impossible. Property could not sue; how, then, could slaves enforce a deed giving them freedom? Even if a slave could sue, his master had the right to control his movement. And even if a slave could gather evidence, many freedom claims rested on ancestry from a free mother—things that might only be provable through hearsay. But when a master offered formalism in argument, the Rule of Liberty frequently beat it back and afforded the slave a window to assert his claim, if indeed he had one.

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157. See *The Civil Rights Cases*, 109 U.S. 3, 23-33; *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev'd* 401 U.S. 424 (1971); *Tyler v. Cain*, 533 U.S. 656, 662-68 (2001); *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2630-31 (2013).

### 1. *Capacity & Standing*

Although the law of this state considers slaves as property, yet it recognizes their personal existence, and, to a qualified extent, their natural rights. [They] must, of course, have a right to seek and enjoy the protection of the law in the establishment of all legal documents of emancipations . . . to this extent, the general reason of policy which disables slaves as persons, and subjects them to the brute condition of property, does not apply; and the reason ceasing, the law ought also to cease.

Kentucky Supreme Court, *In re Bodine* (1836)

A slave generally could not “do anything, have anything, or acquire anything, but what must belong to his master.”<sup>158</sup> Thus, in capacity cases, the courts routinely confronted the first paradox of slavery: Are slaves people or property?<sup>159</sup> Formalism required courts to choose one box or the other. For the overwhelming majority of judges, however, recognizing the right to freedom without a remedy to enforce it violated basic maxims of the legal system.<sup>160</sup> Thus, many courts ameliorated the harsh doctrines of formalism with their powers of equity, at least until the system collapsed into the rule that slavery was a natural-law good.

The southern states generally “suppose[d] that a slave, who is capable of nothing else, is at least capable to take his freedom.”<sup>161</sup> There were at least three different rationales for this relaxation of the slave codes. Georgia rejected the formalist interpretation because it was “too technical” and because it would effectively abolish emancipation as a legal device.<sup>162</sup> Virginia took an equally pragmatic approach: Allowing emancipation but refusing standing would “keep the promise to the ear, and break it to the hope.”<sup>163</sup>

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158. *Slave*, A NEW DICTIONARY & GLOSSARY (1st ed. 1850).

159. See generally ALLAIN, at 105-130; TUSHNET 157-88.

160. See *Ashby v. White*, 1 Eng. Rep. 417 (1703) (Holt, C.J., dissenting) (“If then when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law?”).

161. E.g., *Manns v. Givens*, 7 Leigh 452, 710-19 (Va. 1836); *Peters v. Van Lear*, 4 Gill 249, 262-65 (Md. 1846); *Redding v. Findley*, 4 Jones Eq. 216, 217 (N.C. 1858) (“[T]here is inherent legal capacity to assent to all those incidents which go to make the emancipation itself effectual.”).

162. *Cleland v. Waters*, 19 Ga. 35, 40-42 (1855).

163. *Manns v. Givens*, 7 Leigh 452, 710-19 (Va. 1836) (“In giving them an interest in having the deed proved, the act of assembly gave them a right also to have it done: otherwise it would indeed ‘keep the promise to the ear, and break it to the hope.’”)

Kentucky and Tennessee provided more complete reasoning. Although slaves were property, the law recognized freedom as a natural right.<sup>164</sup> Thus, in these cases, slaves “must be considered as natural persons, entitled to some legal rights . . . and, to this extent, the general reason of policy which disables slaves as persons, and subjects them to the condition of brute property, does not apply; and the reason ceasing, the law ought also to cease.”<sup>165</sup> The recognition of the natural right to freedom was crucial: The common law refused to contemplate the absurdity of a right without a remedy.<sup>166</sup> Thus, if the natural law held that a slave could be freed, that right was forcible even if the positive law did not acknowledge it.<sup>167</sup>

Like they did in other contexts, the courts eventually began to cut back the Rule of Liberty. Most states held that slaves could not contract for their freedom<sup>168</sup> or enforce contract rights to freedom in disputes between third parties.<sup>169</sup> Virginia and Alabama reversed course and held that nothing but the positive law could give the

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164. *In re Bodine*, 4 Dana 476, 476-78 (Ky. 1836); *Ford v. Ford*, 7 Humphreys 92, 92-98 (Tenn. 1846) (“A slave is not in the condition of a horse . . . he is made after the image of the Creator. He has mental capacities, and an immortal principle in his nature, that constitute him equal to his owner, but for the accidental position in which fortune has placed him . . . the laws cannot extinguish his high born nature, nor deprive him of the many rights which are inherent in man . . . he can make a contract for his freedom, which our laws recognize, and he can take a bequest of his freedom, and by the same will he can take personal or real estate.”).

165. *In re Bodine*, 4 Dana at 476-78.

166. *Id.* (“Unless, then, there can be such an absurdity as a legal right without any remedy, the plaintiffs may proceed in their own proper names.”).

167. *Cf. Ashby v. White*, 1 Eng. Rep. 417 (1703) (Holt, C.J., dissenting); *Rankin v. Lydia*, 2 A.K. Marsh. 467, 470-79 (Ky. 1820) (“If rights of property can thus be coerced by appropriate remedies, much more ought the right to freedom, compared with which, all other rights sink into insignificance.”). In some cases, the right to freedom prevailed even where other procedural hiccups could have technically obstructed it. *See Bell v. Jones*, 10 Md. 322, 323-30 (1856) (refusing, on a successive petition for freedom, to apply a fee-shifting statute to force a slave to pay the master’s legal costs for defending the first petition); *Mary v. Talburt*, 16 Fed. Cas. 949, 949 (D.C. App. 1831) (holding that a slave’s act of running away did not bar a subsequent petition for freedom); *Thornton v. Davis*, 23 Fed. Cas. 1147, 1148 (D.C. App. 1835) (refusing to “suffer the merits of [a freedom case] to be smothered in the technicalities of special pleading.”).

168. *Shanklin v. Johnson*, 9 Ala. 271, 274-75 (1846); *Clark v. Pease*, 41 N.H. 414, 416 (1860); *Contee v. Garner*, 6 Fed. Cas. 361, 361 (D.C. App. 1818); *Hall v. United States*, 2 U.S. (Otto) 27, 29-30 (1875) (applying Mississippi law). *But see Logan v. Commonwealth*, 2 Grattan 571, 572-74 (Va. 1845); *Ford*, 7 Humphreys at 92-98.

169. *Thompson v. Wilmot*, 1 Bibb. 422, 422-24 (Ky. 1809); *Major v. Winn*, 13 B. Mon. 250, 251-52 (Ky. 1852).

slaves the power to choose freedom, much less enforce it.<sup>170</sup> This rule necessarily either (1) abandoned the right–remedy mandate in slave cases because the common law did not protect slaves,<sup>171</sup> or (2) concluded that the slave could have no legal right to freedom at all.

Until the Southern states began to see slavery as a natural-law good, courts uniformly held that the slave codes were necessities, not fundamental truths.<sup>172</sup> This assumption was grounded in *Somerset* and the western tradition that slavery must have support in statutory law. The *Somerset* logic also demanded that any civil disabilities of slaves come from positive law. Since these laws were regulatory, they prevailed in other civil matters. But when the natural right to freedom was concerned, the positive-law reason for the law ceased, and therefore, the law ceased with it.

## 2. *Presumptions & Proof*

All presumptions should be indulged in favor of human freedom.

Kentucky Supreme Court, *Davis v. Tingle* (1848).<sup>173</sup>

Ordinarily, a rebuttable presumption of slavery rested upon an African-American.<sup>174</sup> But this presumption applied only in clear

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170. *Bailey v. Poindexter*, 14 Grattan 132, 197 (Va. 1858) (3-2 decision); *Williamson v. Carter*, 14 Grattan 394 (Va. 1858); *Hooper v. Hooper*, 32 Ala. 669, 673 (1858) (“[T]he owner’s executor . . . will . . . not be compelled by the court, at the instance of the slave, to carry him to the state to which the will directs him to be carried for emancipation.”)

171. *See Neal v. Farmer*, 9 Ga. 555, 579 (1851) (“If the common law be applicable to a state of slavery, it would seem to be applicable as much in one as another particular. If it protects the life of the slave, why not his liberty? And if it protects his liberty, then it breaks down, at once, the *status* of the slave. . . it is absurd to talk about the Common Law being applicable to an institution which it would destroy.”)

172. *See* 2 CATTERALL at 267 (quoting a southern judge who spoke of “such limitations and guards as rendered the free negro, not dangerous but as a useful member of the community, however humble he might be.”); *Redmond v. Coffin*, 2 Dev. Eq. 437, 437-40 (N.C. 1831) (citing “a stern necessity arising out of the safety of the commonwealth”); *Hobbs v. Fogg*, 6 Watts 553, 553-54, 556-60 (Pa. 1837) (lamenting “the necessity of [slave] disabilities”); *Tindal v. Hudson*, 2 Harrington 441, 442-43 (Del. 1838) (speaking of the “necessary relations of master and slave”).

173. *Davis v. Tingle*, 8 B. Mon. 539, 544-45 (Ky. 1848).

174. *Davis v. Curry*, 2 Bibb. 238, 238 (Ky. 1810); *Fox v. Lambson*, 3 Halsted 275, 277-78 (N.J. 1826) (“Color . . . affords a presumption of slavery.”); *Johnson v. Tompkins*, 13 Fed. Cas. 840, 843, 855 (C.C. E.D. Pa. 1833) (“It is not permitted to you or us to indulge our feelings of abstract right . . . the law of the land recognizes the right of one man to hold another in bondage.”); *Scott v. Williams*, 1 Devereux 376 (N.C. 1828).

cases. In other cases, the courts almost uniformly refused to indulge in a presumption of slavery. For most courts, there were too many “probabilities . . . in favor of the liberty of these persons, [and] they ought not to be deprived of it on mere presumption.”<sup>175</sup>

Thus, whenever someone was not clearly of pure African descent, the burden of proof lay on the person asserting the right to slavery, regardless of the litigating posture of the parties.<sup>176</sup> Any other rule “would lead us into darkness, doubt, and uncertainty, for they are as various as the admixture of blood between the races, and against the rule that presumptions are always in favor of liberty.”<sup>177</sup> This same rule automatically reversed the presumption in favor of slavery when the person had been permitted to act as a free person.<sup>178</sup>

Other courts went further. Justice Story held in 1822 that, as the slave trade was an offense against both the law of nature and the

175. *Gobu v. Gobu*, 1 Taylor N.C. 164, 101 (N.C. 1802) (“I am not aware that the doctrine of presuming against liberty, has been urged in relation to persons of mixed blood . . . and I do not think it reasonable that such a doctrine should receive the least countenance. Such persons may have descended from Indians in both lines, or at least the maternal; they may have descended from a white parent in the maternal line or from mulatto parents originally free, in all which cases the offspring, following the condition of the mother, is entitled to freedom. Considering how many probabilities there are in favor of the liberty of these persons, they ought not to be deprived of it upon mere presumption.”).

176. *Gregory v. Baugh*, 2 Leigh 665, 683-86 (Va. 1831) (“No possible contrivance, short of reducing the whole race to absolute slavery, could be better calculated to obscure and confound their right to freedom, and to destroy the evidence of it . . . proof that a party is descended in the female line from an indian woman, and especially, a native american, without anything more, is *prima facie* proof of his right to freedom.”); *Daniel v. Guy*, 19 Ark. 121, 134 (1857) (“If it be doubtful [if the plaintiff is white or black], there is no basis for legal presumption, but it is safest to give him the benefit of the doubt.”).

177. *Nichols v. Bell*, 1 Jones N.C. 32, 32-34 (N.C. 1853) (“We know of no law or decision, which authorizes such a presumption [in favor of slavery] . . . If we had the power, we certainly have not the disposition to extend the principle further . . . Let the presumption rest upon the African color; that is a decided mark.”).

178. *Fox*, 3 Halsted at 277-78 (“A long fruition of all the rights and privileges of a freeman raises a violent presumption of freedom.”); *Hunter v. Shaffer*, 1 DuRoi 224, 226 (Ga. 1831) (“The fact that those persons have been considered free, and enjoyed their liberty and property for nearly a half a century in a neighboring State, that they have formed contracts of marriage with free white citizens, will require this Court to presume them free.”); *Minchin v. Docker*, 17 Fed. Cas. 437, 437 (D.C. App. 1806) (“Although color is *prima facie* evidence of slavery, yet the fact that the [person] had, for a long time, publicly acted as free, turned the presumption the other way.”); *Burke v. Joe*, 6 Gill & John. 136, 136-39 (Md. 1834); *State v. Harden*, 2 Spears 152, 152 n. (S.C. 1832) (“Proof that a negro has been suffered to live in a community for years, as a free man, would, *prima facie*, establish the fact of freedom.”).



law of nations, the burden of proof always lay on the claimant to show that he was entitled to hold the slave.<sup>179</sup> Regardless of color, these states held that the presumption of freedom, guaranteed by the common law, applied to everyone. As one Delaware court put it:

At the common law there was always a strong presumption in favor of freedom. In the first settlement of his country, the fact of the existence of the negro race in a state of bondage to the whites, and a large majority of that color being slaves, was considered sufficiently strong to outweigh the common law presumption, and to introduce a legal presumption that a colored person is *prima facie* a slave. Yet the state of things has changed; and *cessante causa, cessat et ipsa lex*. There are in this state about 20,000 persons of color; of whom 17,000 are free, and 3,000 slaves. A large majority of all persons of color in the United States are free. In point of fact, therefore, there is no reason to presume slavery from color; in opposition to the strong common law presumption, that every man having the human form is a freeman.<sup>180</sup>

Other courts refused to presume slavery without affirmative proof of title, even when the facts plausibly suggested slavery.<sup>181</sup> Illinois justified this presumption by invoking natural justice:

With us the presumption is in favor of liberty; and the mere claim of the defendant to hold the plaintiff as a slave, and the fact of his having resided with the defendant during the time when the services were rendered, devolved no legal necessity on the plaintiff to prove his freedom . . . The rule, in some or most of the slaveholding States, from considerations of public policy, is undoubtedly that the *onus probandi* lies with the party asserting his freedom. This rule, however, is conceived and founded in injustice. It is contrary to one of the fundamental principles upon which our Government is founded: and is repugnant to natural right; nor can there be, in my judgment, sufficient grounds of public policy, to justify a

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179. *La Jeune Eugenie*, 26 Fed. Cas. 832, 847-49 (C.C. Mass. 1822) (Story, Circuit Justice) (adopting the holding of *The Amedie*) (“I am bound to consider the [slave] trade an offence against the universal law of society and in all cases where it is not protected by a foreign government. . . . The *onus probandi* rests on the claimants to establish the legitimate existence of the trade.”); see also *Fales v. Mayberry*, 8 Fed. Cas. 970, 971 (C.C. R.I. 1815). This holding was later reversed in the famous Marshall-era decision, *The Antelope*, 10 U.S. (Wheat) 66, 122 (1825) (holding that the slave trade can only be made piracy by positive law). Counsel for the slaves cited the Rule of Liberty in argument, but the Court ignored it. See *id.* at 81, 107-08; DYER 62-65.

180. *State v. Dillahunt*, 3 Harrington 551, 551 (Del. 1840); *State v. Griffin*, 3 Harrington 559, 559 (Del. 1841).

181. *Butler v. Craig*, 2 Har. & McH. 214, 214 (Md. 1791) (“[N]o presumption of such a conviction arises from the petitioner and her ancestors having always been held in slavery.”); *Dighton v. Freetown*, 4 Mass. 539, 540 (Mass. 1808).

departure from the well-settled rules of evidence governing all other cases, and adopting one which inverts a rule drawn from natural justice.<sup>182</sup>

As powerful as these presumptions were, they could not prove freedom.<sup>183</sup> But for quite some time, the courts relaxed the rule against hearsay and the general bar on parol evidence in order to accommodate claims to freedom.<sup>184</sup> While most cases justified these lenient rules based on necessity,<sup>185</sup> one court pointed out that this evidence carried the same reliability guarantees as the traditional hearsay exceptions:<sup>186</sup>

Freedom in this country is not a mere name . . . and it makes itself manifest by many *public* acts . . . transfers its possessor . . . from the kitchen and the cotton-field, to the court-house, and the election ground. . . . It is difficult to suppose a case, where common reputation would concede to a man the right to freedom, if his right were a groundless one.<sup>187</sup>

But slowly, following the U.S. Supreme Court in *Mima Queen v. Hepburn*, courts began to overrule these cases and adopt a formalistic rule that demanded direct proof of the right to freedom.<sup>188</sup>

182. *Kinney v. Cook*, 3 Scammon 232, 232-33 (Ill. 1840); *Bailey v. Cromwell*, 3 Scammon 71, 73 (Ill. 1841) ([T]he presumption of law was, in this State, that every person was free, without regard to color . . . . The girl being free, and asserting her freedom in the only modes she could, by doing as she pleased, making purchases, [and] contracting debts, could not be the subject of a sale."); *Hone v. Ammons*, 14 Ill. 29, 29-30 (1852) ("The moment the defendant proved that the negro was on our soil, he established *prima facie* that he was free . . . the bare claim of title by Hone was no evidence" to rebut this presumption).

183. *State v. Jeans*, 4 Harrington 570, 571 (Del. 1845).

184. *Jenkins v. Tom*, 1 Wash. Va. 69, 123 (Va. 1792); *Mahoney v. Ashton*, 4 Har. & McH. 63, 295-96, 306-09, 321 (Md. 1797); *Shorter v. Boswell*, 2 Har. & John. 359, 362 (Md. 1808); *Davis v. Forrest*, 7 Fed. Cas. 129, 129 (D.C. App. 1811); *Geer v. Huntington*, 2 Root 364, 364 (Conn. 1796); *Dowrey v. Logan*, 12 B. Mon. 236, 236-39 (Ky. 1851); *United States v. West*, 28 Fed. Cas. 529, 529 (D.C. App. 1836). The courts refused to show the same leniency to the master. *Lucy v. Pumfrey*, 1 Addison 380, 380-81 (Pa. 1799) (refusing to permit a master to introduce hearsay evidence that his unregistered slave was known by a different name, which was on the registry, because that would "reduce that certainty of a registry to uncertainty. . . . Fraud and perjury would be let in, to make slaves of negroes really free. The fault lies with the master, and he must bear the consequences."); *Cato v. Howard*, 2 Har. & John. 323, 323-24 (Md. 1808).

185. *Gregory v. Baugh*, 2 Leigh 665, 690-91 (Va. 1831).

186. *Vaughan v. Phebe*, 1 Mart. & Yerg. 5, 5-7 (Tenn. 1827); *Miller v. Denman*, 8 Yerger 233, 234-36 (Tenn. 1835)

187. *Vaughan v. Phebe*, 1 Mart. & Yerg. 5, 5-7 (Tenn. 1827).

188. See, e.g., *Walkup v. Pratt*, 5 Har. & John. 51, 56 (Md. 1820); *Mima Queen v. Hepburn*, 7 Cranch 290, 295-97 (1813); *Glover v. Millings*, 2 Stew. & P. 28, 30-32 (Ala. 1832); *Abercrombie v. Abercrombie*, 27 Ala. 489, 495 (1855).

The Virginia courts opined that “our judges, (from the purest of motives I am sure), did, *in favorem libertatis*, sometimes relax, rather too much, the rules of law, and particularly the rules of evidence.”<sup>189</sup> Justice Duvall dissented in *Mima Queen*, pointing out that hearsay was admissible to prove, for example, the ancient boundaries of land. He argued that hearsay must therefore be competent in freedom cases because “the right to freedom is more important than the right to property.”<sup>190</sup>

The thrust of these cases was that formalism—while perhaps generally appealing—should not play a major role in freedom cases. Human freedom was too important to be smothered by the inequitable spillovers caused by formalism. Thus, the courts structured the rules in these cases to guard against wrongful enslavement, even if those structures permitted some fraud or abuse.<sup>191</sup> Indeed, this structural advantage forms the very basis of both Lenity and Liberty.<sup>192</sup>

### C. Interpretation

The final set of cases where the Rule of Liberty appeared was in the interpretation of legal documents. It appeared in the mundane probate case, the high-profile constitutional law decision, and everything in-between. Like in the previous two Sections, the courts applied the rule liberally until the South eradicated it.

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189. *Gregory*, 2 Leigh at 680 (Opinion of Carr, J.).

190. *Mima Queen*, 7 Cranch at 298 (Duvall, J., dissenting).

191. This is not an unfamiliar tactic. *Cf.* *Phila. Newspapers v. Hepps*, 475 U.S. 767, 778 (1986) (“We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so . . . . [But] “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.””).

192. III BLACKSTONE, *supra* note 6, 88-89 n.30 (“[F]or whenever any ambiguity arises in a statute introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favour of natural right and liberty; or, in other words, the decision shall be according to the strict letter in favour of the subject. . . . And it is more consonant to principles of liberty that the judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity.”) Had England needed to deal with institutional slavery, Blackstone could have easily continued his analogy: “And it is more consonant to principles of liberty that the judge should free him whom the law makes a slave, than that he should enslave him whom the law declares to be free.”

## 1. *Private Law: Wills, Deeds, and Contracts*

If [a] construction is doubtful, some weight is due to the maxim that every deed is to be taken most strongly against the grantor, and to the spirit of the Laws of all civilized nations which favours liberty.

Virginia Supreme Court, *Isaac v. West* (1828)

In private-law cases, the Rule of Liberty operated as a super-strong *contra performem* rule. Courts generally construed ambiguities against the drafter of an instrument. But added to that rule was the fact that the right in question was freedom, and courts generally required clarity or contravening state policy before they would frustrate a grant of freedom.

*Isaac v. West* was followed in most states.<sup>193</sup> The courts routinely interpreted private legal documents to favor freedom by permitting the humane treatment of slaves,<sup>194</sup> by implying grants of freedom,<sup>195</sup> by construing conditions precedent to freedom narrowly,<sup>196</sup> by creating default rules favoring emancipation<sup>197</sup> and by

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193. See, e.g., *Elder v. Elder*, 4 Leigh 252, 260 (Va. 1833); *Cromartie v. Robison*, 55 N.C. (2 Jones Eq.) 218, 221 (N.C. 1855); *Concklin v. Havens*, 12 Johnson 314, 314-15 (N.Y. 1815).

194. *McLeish v. Burch*, 3 Strob. Eq. 255, 255 (S.C. 1849) (holding that a direction to the administratrix that she should only make slaves work as much as necessary to pay taxes would not be set aside at the behest of the next-of-kin); *Ford v. Porter*, 11 Rich. Eq. 238, 239-54 (S.C. 1860) (affirming a testator's instruction to treat slaves as humanely as the law will allow.).

195. *Hall v. Mullin*, 5 Har. & John. 190, 192-95 (Md. 1821) (holding that when someone devises property to a slave, he frees them “by implication, or by the true construction of his will, taking all its parts together. . . . under those parts of the will by which property was given to her . . . her freedom by implication, is indispensably necessary to give efficacy to those clauses of the will.”); *Davis v. Wood*, 17 B. Mon. 86, 92-94, 100 (Ky. 1856) (holding that the use of “negro” in a will, instead of “slave” should be interpreted to give an immediate right to freedom, not a future right to freedom). *But see, e.g., Bell v. McCormick*, 3 Fed. Cas. 107, 108 (D.C. App. 1838) (holding that there is no implied emancipation when the master conveys a legacy to a slave but also directs him to be sold).

196. *Jacob v. Sharp*, 1 Meigs 114, 114-18 (Tenn 1838); *Pleasants v. Pleasants*, 2 Call. 353 (Va.) (construing ambiguity to mean a present right to future freedom, not a mere promise of future freedom); *Erskine v. Henry*, 9 Leigh 188, 189-90 (Va. 1838); *Graham v. Sam*, 7 B. Mon. 403, 405 (Ky. 1847) (following the same principle, not just “in view of the clearly presumed intention of the testator, but in obedience to the dictates of humanity.”); *Snow v. Callum*, 1 Dessausure 542, 543 (S.C. 1797) (holding that the words “and her increase” mandated that the children of a slave were free when born while their mother was awaiting freedom).

197. *Caffey v. Davis*, 1 Jones Eq. 1, 5 (N.C. 1853) (holding that a testator need not expressly state that the children of slaves, born before freedom accrued, follow the parents into freedom: “Had [slave parents] at the termination of the life

applying cy pres when the grant (as written) would be illegal.<sup>198</sup> Even after slavery was abolished, some courts continued to interpret these documents liberally, in order to give full effect to freedom—some on the grounds that strict construction would be “contrary to the policy of the United States.”<sup>199</sup>

One Massachusetts court explained the rationale for enforcing the Rule of Liberty after abolition. A testator devised a substantial fortune with the goal of persuading the public to abolish slavery.<sup>200</sup> After the Amendment intervened, the Court sustained the trust:

The law of Massachusetts has always been peculiarly favorable to freedom . . . The Constitution of the United States uniformly speaks of those held in slavery, not as property, but as persons; and never contained anything inconsistent with their peaceable and voluntary emancipation . . . The bequest itself manifests its immediate purpose to be to educate the whole people upon the sin of a man’s holding his fellow-man in bondage . . . The charitable bequests . . . cannot, in the opinion of the court, be regarded as so restricted in their objects, or so limited in point of time, as to have terminated and been destroyed by the abolition in the United States . . . Neither the immediate purpose of the testator—nor his ultimate object—has been fully accomplished by the abolition of slavery.<sup>201</sup>

Following the historical pattern, however, some states repudiated this thinking. They overruled the cases holding that a devise of property implied a grant of emancipation.<sup>202</sup> They required surgical precision from masters before they would enforce any right to freedom,<sup>203</sup> subordinated freedom to other property rights,<sup>204</sup> and

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estate, been unable to comply with the condition [entitling them to freedom], their issue . . . would have gone with them into servitude to the remainderman . . . Why any more necessity that the testator should mention [the] issue [in the will] . . . to give liberty to such increase, than to doom it to slavery?”)

198. *Boon v. Lancaster*, 1 Sneed 577, 580, 585-86 (Tenn. 1854).

199. *Cowan v. Stamps*, 46 Miss. 435, 440-42, 447-49 (1872) (“To require these people to remove . . . would seem an unnecessary hardship, and . . . it would be against a wise public policy to impose a condition of emigration in order to accept a bequest, not imposed by a testator, but by a prior law since abrogated . . . removal . . . was not a condition precedent in the mind of the donor, but a mode of giving freedom, a pre-requisite, imposed by law.”). This hearkens back to the pre-crisis theory of emancipation laws as police regulations, not as broad statements of policy. *See also, e.g., Haley v. Haley*, 1 Phil. Eq. 180, 181-86 (N.C. 1867) (ignoring the condition because it would be contrary to the policy of the United States).

200. *Jackson v. Phillips*, 14 Allen 539, 541, 545 (Mass. 1867).

201. *Id.* at 539-45, 550-70, 594-95.

202. *Atkins v. Kron*, 2 Ired. Eq. 8, 60, 66 (N.C. 1841); *Kirkpatrick v. Rogers*, 6 Ired. Eq. 130, 130-36 (N.C. 1848).

203. *See, e.g., Taylor v. Am. Bible Soc’y*, 7 Ired. Eq. 201, 201, 206 (N.C. 1851) (voiding a grant of freedom when a mistress said “if I could in any way effect

declared that applying *cy pres* to grants of freedom would be “monstrous.”<sup>205</sup> The theme of these cases was the primacy of state laws favoring slavery and the newfound inherent inferiority of the African-American.<sup>206</sup>

Cases interpreting deeds and contracts are more sparse. But the general rule seemed to mirror *Isaac v. West*, at least in Virginia: “[U]nless the opinion pronouncing the construction . . . be clear and disembarassed of all reasonable doubt, the law entitles the [slave] to the benefit of the doubt, and the most favorable construction upon the deed.”<sup>207</sup> Kentucky also refused to require exacting clarity.<sup>208</sup> During the brief period where North Carolina favored freedom, the courts enforced a grant of freedom to a child even though it failed to mention meritorious services—a legal requirement—and even though the child was too young to have met the requirement.<sup>209</sup> Other courts refused to allow a subsequent sale to void a grant of freedom, even when the purchaser was ignorant of the grant.<sup>210</sup> For these

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it, I would emancipate [my slaves]. I do not wish to entail slavery upon them,” because she “nowhere leaves them their freedom.”); *Curry v. Curry*, 30 Ga. 253, 257-62 (1860) (holding that a slave could not choose between freedom and slavery, and then holding that the emancipation clause was not severable because the court was not sure what the master would have done if he knew the slave had no power of choice); *Maria v. Surbaugh*, 2 Randolph 228, 238-41 (Va. 1824) (without an express statement that children born during the life estate are free, they must be enslaved); *Johnson v. Johnson*, 8 B. Mon. 470, 471-74 (Ky. 1848); *Ellis v. Jenny*, 2 Rob. Va. 597, 597-99 (Va. 1844).

204. *Drury v. Grace*, 2 Har. & John. 356, 356-59 (Md. 1808).

205. *Am. Colonization Soc’y v. Bass*, 18 Ga. 127, 127-29, 136-38 (1855) (“The monstrous doctrine of *cy pres* is not to have given it one inch of ground . . . The bequests of the will as to the negroes cannot be executed under the ‘*cy pres*’ doctrine without manifesting . . . any general intent to manumit . . .”).

206. *E.g.*, *Cromartie v. Robison*, 55 N.C. (2 Jones Eq.) 218, 221 (N.C. 1855) (“We think proper also to say, in putting a construction upon the will now before us, we have a single eye to the intention of the testator, without reference to the notion that Courts should favor charities, and lean *in favorem libertatis*; for, however humane we may suppose the feeling that prompts, it is not established that public policy favors the emancipation of our slaves; and although the principles of the common law look with favor upon the transition of a bondsman, or villain, to the state and condition of a *free white man*, yet very different conclusions may be involved, when the question is between the condition of a slave and that of a *free negro*.”).

207. *Logan v. Commonwealth*, 2 Grattan 571, 572-74 (Va. 1845).

208. *See, e.g.*, *Fanny v. Bryant*, 4 J.J. Marsh. 368, 369 (Ky. 1830) (holding that a deed freeing a woman “and her increase” on a certain date in the future granted a present right to future freedom).

209. *Sampson v. Burgwin*, 3 Dev. & Bat. 28, 28-32 (N.C. 1838).

210. *See, e.g.*, *Isaac v. Farnsworth*, 3 Head 275, 276-79 (Tenn. 1859).

judges, “The manumission does not [merely] rest upon the principles of a contract, . . . but it is an act of benevolence, sanctioned by the statute, and made obligatory, if in writing.”<sup>211</sup> The contrary cases followed the same pattern—masters must confer freedom and rights clearly, and the fundamental law of the land favored slavery.<sup>212</sup>

## 2. *Public Law: Legislation*

[G]overnors might be presumed to be disposed to do much to conciliate the rich and powerful at the expense of the weak and defenseless . . . All men are by the law of nature free: And without some positive declaration of the sovereign power of the State to the contrary, all judicial opinions, in my opinion should set at liberty every individual who sues for his freedom.

Missouri Supreme Court, *Marguerite v. Choteau* (1828)<sup>213</sup>

The issue of slavery was often subject to legislation. The most common kinds were statutes abolishing slavery, statutes banning the importation of slaves, and the federal Fugitive Slave Act. But the Rule of Liberty also appeared in cases interpreting criminal statutes, in questions involving retroactivity and implied repeals, to resolve ambiguity, and (most importantly) to interpret the Northwest Ordinance.

As a general rule, courts interpreted statutes abolishing slavery in favor of the slave. Pennsylvania’s gradual-abolition statute—which imposed meticulous registration requirements—provides the most useful example.<sup>214</sup> When the construction of this statute was in

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211. *Ketletas v. Fleet*, 7 Johnson 324, 325-26, 330-31 (N.Y. 1811).

212. *Allen v. Peden*, 2 Car. L.R. 638, 638 (N.C. 1816) (striking down a legislative act freeing slaves because such an act was “plainly in violation of the fundamental law of the land.”); *Mayho v. Sears*, 3 Iredell 224, 224-25, 232 (N.C. 1842) (interpreting neutral language in a deed to enslave children even though their mother would be free); *Franklin v. Waters*, 8 Gill 322, 323-24, 327-28 (Md. 1849) (holding that an obligation for a master to pay wages to a freed slave must be stated clearly); *Jason v. Henderson*, 7 Md. 430, 441 (1855) (holding that a free person of color could not sue a person unlawfully holding him in servitude).

213. *Marguerite v. Choteau*, 2 Mo. 71, 90 (1828) (Opinion of Tompkins, J.); Errata, 2 Mo. 241. One judge was absent, and, the other judge dissenting, the court affirmed the decision below in favor of the master. *Marguerite*, 2 Mo. at 93. This decision was later overruled and decided in conformity with Judge Tompkins’ view of the law. *Marguerite v. Choteau*, 3 Mo. 540, 571 (1834). The U.S. Supreme Court denied review for want of a substantial federal question. *Choteau v. Marguerite*, 12 U.S. (Pet.) 507, 509 (1838).

214. See 4 HELEN T. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 243-54 (1936); FINKELMAN, *supra* note 28, at 52-59

doubt, the Pennsylvania courts generally construed it against the master.<sup>215</sup> The courts justified this on considerations of humanity, the purpose of the statute,<sup>216</sup> and laches by the owner, who had the ability to be careful.<sup>217</sup> Even the most trivial of oversights sometimes caused the master to lose his slave.<sup>218</sup>

Connecticut's treatment of its importation statutes was similar. These statutes, among other things, freed all slaves "left" in the state, with an exception for travelers. Citing *Somerset*, the court interpreted the word "left" as imposing forfeiture even without proof of intent to leave slaves in the state: "Is it true, that if a person does not intend to do an act, and yet does it, that the act is done? . . . This slave has been brought and left in this state, contrary to [law]; and therefore, . . . she cannot be claimed or treated as a slave, under our laws."<sup>219</sup>

The courts also used their equitable powers to expand the scope of statutes to assist slaves. Early cases in Virginia invoked "principles of humanity" to expand the scope of a law prohibiting the mistreatment of indentured servants.<sup>220</sup> New York refused to eject a slave from land he received for serving in the revolutionary war, reasoning that by giving him the land, the legislature impliedly removed the relevant slave-code disabilities.<sup>221</sup>

In other cases, early courts interpreted ambiguous words in a statute to favor freedom.<sup>222</sup> When later-enacted statutes were

215. *Id.*; see, e.g., *Republica v. Betsey*, 1 Dallas 469, 472, 474-78 (Pa. 1789) (Opinions of Atlee, J., and Rush, J.); *Commonwealth v. Barker*, 11 S. & R. 360, 361 (Pa. 1824).

216. *Betsey*, 1 Dallas at 472, 474-78 (Opinions of Atlee, J., and Rush, J.).

217. *Id.* at 472, 478-79 (Opinion of Bryan, J.).

218. *Barker*, 11 S. & R. at 361 (holding that the failure of a master to indicate his occupation on the slave register, as required by statute, was grounds for forfeiture). *But see* *Wilson v. Belinda*, 3 S. & R. 396, 398 (Pa. 1817) ("[W]here there appears to have been an intent to comply honestly . . . the construction should be liberal in favor of the master."); *Marchand v. Peggy*, 2 S. & R. 18, 18-19 (Pa. 1815) (holding that the rule did not apply to the threshold issue of territorial jurisdiction).

219. *Jackson v. Bulloch*, 12 Conn. 38, 39-40, 45-52 (1837). The dissenting judge, engaging in some excellent textual analysis, pointed out that this stretched the text farther than was reasonable. *Id.* at 55-66 (Bissell, J., dissenting).

220. *Gwinn v. Bugg*, 1 Jefferson 87, 87-89 (Va. 1769).

221. *New York ex rel. Jackson v. Lurvey*, 5 Cowen 397, 397, 400-404 (N.Y. 1826) ("[T]he disabilities of the patentee and the heir, arising from a state of slavery, are removed by the acts authorizing the grant. . . . the legislature intended to remove the disabilities incident to slavery.")

222. *Butt v. Rachel*, 4 Munford 209, 209-13 (Va. 1814); *Reno v. Davis*, 4 Hen & M. 283, 285 (Va. 1809) ("[I]n a case of doubt, the law of humanity ought to turn the scale."); *Ex parte Ferrett*, 1 Mill 194, 195 (S.C. 1817) (holding that the word



inconsistent with earlier laws favoring slavery, the courts freely held that the slave laws were impliedly repealed.<sup>223</sup> But until the courts began deconstructing the Rule of Liberty, they rigorously enforced the presumptions in the opposite situation—when a newer law or sentiment favored slavery.<sup>224</sup>

Lenity and Liberty called for courts to exercise their discretion “whenever possible in *favorem libertatis*, and for the amelioration or avoidance of human suffering.”<sup>225</sup> But in criminal law, these principles pointed to opposite results. In prosecutions involving slavery and freedom, the Rule of Lenity required affirmative proof of both *mens rea*<sup>226</sup> and most necessary attendant circumstances.<sup>227</sup>

But this was not a universal rule. Lenity did not apply when the defendant attempted to escape an involuntary-servitude indictment by arguing that the statute was being extended to new circumstances not specifically intended by Congress.<sup>228</sup> Congress passed peonage statutes specifically to address debt bondage in New Mexico, but the U.S. Attorney in Georgia used it to charge two defendants who were holding African-Americans in servitude.<sup>229</sup> The defendants argued (à la *Holy Trinity*) that although their conduct might be within the letter of the statute, “[I]t is not within the statute, because not within the

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“Indian” would not be expanded to enslave *Asian Indians*); *State v. Belmont*, 4 Strobbart 445, 454-57 (S.C. 1850) (“I am for adhering to the decision . . . that spares the race of Shem.”)

223. *Robin v. Hardaway*, 1 Jefferson 109, 116, 122 (Va. 1772); *Hannah v. Davis*, 2 Tucker 47, 139 (Va. App. 1787); *Hudgins v. Wrights*, 1 Hen & M. 134, 137-38 (Va. 1806); *Jenkins v. Tom*, 1 Wash Va. 69, 123 (Va. 1792).

224. *State v. Taylor*, 2 McCord 483, 483-85, 492 (S.C. 1823); *Campbell v. Campbell*, 13 Ark. 513, 521-22 (1853) (“The act [limiting the number of free blacks in the state] was . . . but a measure of self-defence . . . we will tolerate the evils resulting from the emancipation of our own slaves, until the sense of the people may require an avowed change in policy.”); *Redd v. Hargrove*, 40 Ga. 18, 24 (1869). *But see* *Mordecai v. Boylan*, 6 Jones Eq. 365, 365-68 (N.C. 1863) (applying a law retroactively to defeat an emancipation).

225. *United States v. Fah Chung*, 132 F. 109, 112-13 (S.D. Ga. 1904)

226. *Birney v. State*, 8 Ohio 230, 238 (1837) (“We know of no case where . . . action is held criminal, unless the intention accompanies the act. . . . It cannot be assumed that an act which . . . involves no moral wrong . . . should be made criminal, when performed in total unconsciousness of the facts that infect it with crime.”).

227. *United States v. Darnaud*, 25 Fed. Cas. 754, 760-61 (C.C. E.D. Pa. 1855) (“The slave trade, however horrible it may be, is not [Piracy] . . . [T]he element, therefore, of citizenship [of the United States], is an essential condition of the crime.”).

228. *United States v. McClellan*, 127 F. 971, 972-79 (S.D. Ga. 1904)

229. *Id.*

spirit of the law.”<sup>230</sup> They also cited Lord Coke on the Rule of Lenity, where he says: “Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endangered.”<sup>231</sup>

The court impaled the defendants on this last argument. The judge admitted that it was probably true that Congress was targeting New Mexican peonage. But invoking Lenity in this case was barred by the Thirteenth Amendment:

[How] can it be contended that the conduct of the prisoners, as described in this indictment, as innocent or free from injury or wrong? Is it not inimical to the amendment of the Constitution which defines involuntary servitude? Is it not involuntary servitude to seize by force, to hurry the victim from wife and children, to incarcerate him in a stockade, and work him in range of the deadly muzzle of the shotgun, or under the terror of the lash, and continue this servitude as long as resentment may prompt, or greed demand? It is true that a literal construction will not be favored, if the object be to punish those who are innocent, or free from injury or wrong. This was the decision of the Supreme Court in [*Holy Trinity*] . . . There the statute was construed in favor of liberty. . . But what parallel is there between the holy ministrations of the man of God, though serviceable and laborious, and the conduct of lawless and violent men who would seize helpless and pathetic negroes, and for their own selfish purposes consign them to a life of involuntary servitude, compared to which the slavery of the antebellum days was a paradise. And it otherwise appears that the construction of this act which seems to us proper is in salutary accord not only with the spirit of Congress in adopting it but with other statutes for the same general purpose, which portray unmistakably the consistent purpose to stamp out on American soil any and every form of involuntary servitude. . . . This is another instance of the exercise by Congress of the power granted by the thirteenth amendment to prevent involuntary servitude.”<sup>232</sup>

Essentially, such a barefaced attempt to recreate slavery—a crime *malum in se*, if there ever was one—was constitutionally ineligible for Lenity.

Finally, the Rule of Liberty also appeared in interpretations of the Northwest Ordinance, which said that “there shall be neither slavery nor involuntary servitude in the said territory.”<sup>233</sup> Until 1856, courts uniformly agreed that the Ordinance was constitutional.<sup>234</sup>

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230. *Id.*

231. *Id.*

232. *United States v. McClellan*, 127 F. 971, 976-77 (S.D. Ga. 1904).

233. The Northwest Ordinance, Act of July 13, 1787, art. 6, 1 Stat. 50.

234. *Winn v. Whitesides*, 1 Mo. 472, 474-76 (1824) (“We did not suppose that any person could mistake the policy of Congress, in making this provision. . . . Sound national policy required, that the evil should be restricted, as much as

These courts, particularly the courts in Missouri, imposed near-strict liability on masters who brought their slaves into the Territory.

According to these courts, the ordinance was a “fundamental law, for those who choose to live under it.”<sup>235</sup> Thus, if the master stayed in Missouri for any longer than necessary, his slaves became free.<sup>236</sup> And when it was doubtful whether the Ordinance operated to free a slave, the courts erred in favor of liberty:

I remark, however, that if the plaintiff’s freedom was at all doubtful under the Ordinance . . . the court would, in favor of liberty, infer that he was born since the adoption of the Constitution, in a case where the evidence leaves the fact doubtful . . . But I should never feel warranted in resorting to such a construction, to deprive a human being of his liberty, or deny him the rights of humanity. The presumption is in favor of liberty . . . if I entertained a doubt I should be compelled to decide in favor of liberty.<sup>237</sup>

The U.S. Supreme Court declined to review any of these cases until *Dred Scott*, citing either the lack of a substantial federal question<sup>238</sup> or holding that the Ordinance was properly construed.<sup>239</sup>

### 3. *Constitutional Law*

Admitting it was a doubtful point, whether the constitution was to be considered prospective in its operation or not, the [masters] say, you take from us a vested right arising from municipal law. The [slaves] say you would deprive us of a natural right guaranteed by the ordinance and the constitution. How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty.

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possible. What they could, they did. [The People] said, by their representatives, it shall not vest within these limits, and by their acts for nearly half a century, they have approved and sanctioned this declaration.”); *Merry v. Tiffin*, 1 Mo. 725, 725 (Mo. 1827) (“The ordinance is positive, that slavery cannot exist; and . . . we, or any other court, [cannot] say otherwise.”). *But see Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432-53 (1856).

235. *La Grange v. Chouteau*, 2 Mo. 20, 22 (Mo. 1828), *writ denied*, *Lagrange v. Choteau*, 4 U.S. 287, 290 (1830).

236. *Julia v. McKinney*, 3 Mo. 270, 272-75 (1833) (holding that convenience is not an excuse for delay); *Rachel v. Walker*, 4 Mo. 350, 352-54 (1836); *La Grange*, 2 Mo. at 22. (“[A]ny sort of residence contrived or permitted by the legal owner, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance . . . would doubtless entitle a slave to freedom.”); *Ralph v. Duncan*, 3 Mo. 194, 195-96 (1833) (temporarily hiring out a slave to someone in Missouri resulted in the slave being free).

237. *Jarrot v. Joseph*, 2 Gilman 1, 6-11, 23-30 (Ill. 1845).

238. *Menard v. Aspasia*, 5 U.S. (Pet.) 505, 517 (1831) (Opinion of McLean, J.) (“The title of [the master] does not arise under an act of congress.”).

239. *Lagrange*, 4 U.S. at 290 (Opinion of Marshall, C.J.).

Mississippi Supreme Court, *Harry v. Decker & Hopkins* (1818)<sup>240</sup>

The most significant applications of the Rule of Liberty were in constitutional law. It is common knowledge that the Constitution would not exist had the North and South not compromised about slavery.<sup>241</sup> This compromise resulted in the Fugitive Slave Clause, which forced courts to arbitrate disputes between northern and southern citizens.

These disputes gave birth to American conflicts-of-law rules. In *Prigg v. Pennsylvania*, the first major conflicts case before the U.S. Supreme Court, the question was Congress's power to enact the fugitive slave laws and northern states' ability to free slaves within their borders.<sup>242</sup> Justice Story began with *Somerset*:

By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized . . . This was fully recognized in [*Somerset*].<sup>243</sup>

Although the entire Court agreed that slavery must be supported by positive law, Justice Story found one: The Fugitive Slave Clause.<sup>244</sup> The Clause "manifestly contemplate[d] the existence of a positive, unqualified right on the part of the owner of the slave, which no state law . . . can in any way qualify, regulate, control, or restrain."<sup>245</sup>

But this was the extent of the Clause's reach, as far as Northern courts were concerned. With the exception of a few cases urging comity for the sake of preserving the Union,<sup>246</sup> northern courts refused to recognize slavery except as declared by express federal law.<sup>247</sup> Their position was, essentially, that while the Constitution

240. *Harry v. Decker & Hopkins*, 1 Walk. Miss. 36, 42 (Miss. 1818). This case is representative of the opinions of the courts in (at least) Missouri, Tennessee, Maryland, and Virginia at the start of the nineteenth century. FINKELMAN 169-70.

241. *Commonwealth v. Holloway*, 2 S. & R. 305, 307-08 (Pa. 1816) (The [Founders] had the whole subject of slavery before them, . . . it was no easy task to reconcile the discordant prepossessions . . . but the business was accomplished by acts of concession and mutual condescension.").

242. *Prigg v. Pennsylvania*, 16 U.S. (Pet.) 539, 611-12 (1842).

243. *Id.*

244. *Id.*

245. *Id.*

246. *E.g.*, *Willard v. People*, 4 Scammon 461, 470-72 (Ill. 1843).

247. *White v. White*, 3 Head 404, 406-11 (Tenn. 1859) (enforcing an emancipation in a will even though the testator died in Mississippi and the Mississippi courts voided the emancipation); *Lemmon v. People*, 20 N.Y. 562, 601-02, 610, 615 (N.Y. 1860) ("Every sovereign State has a right to determine by its

acted as a sort of “treaty”<sup>248</sup> mandating the recognition of the right to recapture fugitive slaves, it could not be extended by equity to any other case.<sup>249</sup> Therefore, the common-law Rule of Liberty—including the irrevocability principle—was binding.<sup>250</sup>

laws the condition of all persons who may at any time be within its jurisdiction . . . [the master] has no more right to the protection of this property than one of the citizens of this state would have upon bringing them here under the same circumstances, and . . . the [fugitive slave] clause of the Constitution . . . has no application to this case.”); *Jackson v. Bulloch*, 12 Conn. 38, 39-43, 45, 52-54 (1837) (declaring that slavery was “a system of such a character, that it can claim nothing by the law of comity, which prevails among friendly states upon subjects of a different class . . . it [is] local, and must be governed entirely by the laws of the state, in which it is attempted to be enforced.”); *Commonwealth v. Aves*, 18 Pickering 193, 211, 217-18 (Mass. 1836) (holding that slavery, being “contrary to natural right, and effected by the local law, is dependent upon such local law for its existence and efficacy, and being contrary to the fundamental laws of this State, such general right of property cannot be exercised or recognized here.”); *Selectmen v. Jacob*, 2 Tyler 192, 199 (Vt. 1802) (“No inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here.”); *Jack v. Martin*, 14 Wendell 507, 528 (N.Y. 1835).

248. *In re Sims*, 7 Cushing 285, 297-98 (Mass. 1851) (“But the right, thus secured by the constitution to the slave owner, is limited by it, and cannot be extended, by implication or construction, a line beyond the precise *casus foederis*. The fugitive must not only owe service or labor in another state, but he must have escaped from it.”). In other words, it cannot be extended beyond the object in the mind of the people who framed the law. Cf. III BLACKSTONE 88-89.

249. *In re Sims*, 7 Cushing at 297-98; *Rodney v. Illinois Central Ry. Co.*, 19 Ill. 42, 44-45 (1857); *Anderson v. Poindexter*, 6 Ohio St. 622, 626-31 (1856) (Opinion of Bowen, J.) (“Slavery is entirely local . . . and is repugnant to reason and natural law. . . . In this state not only are our institutions opposed to slavery but the Ordinance . . . prohibits its introduction here for any purpose. . . . Strengthened by the clearest principles of natural law, and by the decisions of courts of high character . . . [the slave] coming into this state by the consent of the master, obtained the freedom of which he had been deprived by local municipal legislation. His servitude ceased, and there is no law which can bring into operation the right of slavery once destroyed.”); *see id.* at 634-38 (Opinion of Brinkerhoff, J.) (“The absolute freedom of all persons at birth is a fundamental principle . . . This principle was, by the ordinance of 1787, impressed on the soil of Ohio . . . the moment any person comes within . . . Ohio, his personal rights are determined by the laws of Ohio [except in cases of fugitive slaves]. . . . The enslavement of a man once free, presents the monstrosity of a legalized wrong; The policy of Ohio is to maintain the rights of men.”); *id.* at 639-48, 671 (Opinion of Swan & Scott, JJ.) (“Whatever construction may be given by the Supreme Court of the United States to the constitutional provision relating to fugitives, whereby the laws of a free state are rendered inoperative, it is limited to cases coming within that provision.”); *Commonwealth v. Holloway*, 2 S. & R. 305, 307-08 (Pa. 1816) (holding that a child in utero at the time his mother escaped was not a fugitive within the Clause).

250. *See supra* notes 247-249; *supra* Subsection II.A.2.

Southern cases displayed the same state-centric ideas. Except for a few cases respecting freedom given by northern law,<sup>251</sup> southern courts rejected northern judgments freeing a slave.<sup>252</sup> The default rule in the South was that even a small showing that slavery was tolerated in another State was sufficient to require the courts to protect the rights of the master.<sup>253</sup> Eventually, the southern courts expanded the Fugitive Slave Clause by equity, interpreting it as a promise that their slaves would be protected under all circumstances:

Mississippi came into the union . . . with this institution, . . . protected . . . by the express provisions of [the Federal] Constitution. . . . Ohio . . . chooses to take to her embrace, as citizens, the neglected race, . . . regarded, at the formation of our government as an inferior caste. . . . Ohio can never confer freedom on a Mississippi slave, nor the right to acquire, hold, sue for, nor enjoy property in Mississippi.<sup>254</sup>

This sentiment also translated into broad constructions of the Clause and its enforcing statutes, on the federalist reasoning that the Clause placed the slave power under federal protection.<sup>255</sup>

Tangential to the conflicts question was how states, as independent sovereigns, would interpret their own Constitutions. The Supreme Judicial Court of Massachusetts, citing the Rule of Liberty, held that a constitutional provision saying that all men were born “free and equal” impliedly abolished slavery.<sup>256</sup> Although slavery had

251. *E.g.*, *Harry v. Decker & Hopkins*, 1 Walk. Miss. 36, 42 (Miss. 1818).

252. *Scott v. Emerson*, 15 Mo. 576, 583-86 (1852); *Lewis v. Fullerton*, 1 Randolph 15, 15-24 (Va. 1821); *Maria v. Kirby*, 12 B. Mon. 542, 546, 551 (Ky. 1852); *Mahorner v. Hooe*, 9 S. & M. 247, 272, 278 (Miss. 1848).

253. *See, e.g.*, *Charlotte v. Choteau*, 11 Mo. 193, 199-200 (1847).

254. *Mitchell v. Wells*, 37 Miss. 235, 243-45, 252-56, 263-64.

255. *See Ex parte Hill*, 38 Ala. 429, 436-37, 450, 456 (1863) (Opinion of Walker, C.J.) (“The fugitive-slave law was passed to protect . . . a clear constitutional right of a class of citizens in the United States. . . . In many of the states, the execution of the law was prevented; The powers of the Confederate government are given to it for the benefit . . . of all the people in all the states; and the historic lesson teaches us that the execution of the laws, passed by virtue of those powers, can not be safely left to the control of local tribunals.”); *Fugitive Slave Law Cases*, 30 Fed. Cas. 1007, 1009 (C.C. N.Y. 1851) (stating that the fugitive slave act is “designed, first, to substitute officers of the federal government in the place of the[] state magistrates; and second, to arm the officers with sufficient power and authority to enable them to execute the law against any resistance actual or threatened, and in whatever form it may be presented.”).

256. *Commonwealth v. Jennison*, 1 Proc. Mass. Hist. Soc. 1873-75, 293, 294 (Mass. 1783) (Opinion of Cushing, C.J.). *But see State v. Post*, 1 Spencer 368, 369-72, 377-78 (N.J. 1845) (holding the opposite on the same language). The Rule of Liberty also appeared in the arguments of some advocates, even if it was ultimately rejected. *See, e.g., Ex parte Bushnell*, 9 Ohio St. 77, 116-18 (1859) (argument of

previously been permitted, “nowhere is it expressly enacted,” and “a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty . . . without regard to color [or] complexion.”<sup>257</sup> This idea, and the declaration that all men were born free, were:

[T]otally repugnant to the idea of being born slaves . . . the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.<sup>258</sup>

This view of the law was explicitly based on the logic of *Somerset*.<sup>259</sup>

Once Constitutions began to abolish slavery and grant new protections to civil rights, the courts were confronted with new interpretive issues. In Ohio, the Constitution guaranteed all “free white citizens” the right to vote. But there was no bright line between black and white persons—and so the Ohio courts held that anyone nearer white than black was protected.<sup>260</sup> The Ohio courts reaffirmed this principle in the wake of *Dred Scott*, snidely repudiating the Court’s holding that African-Americans could not be citizens:

We do not think [authority] can be found which will countenance the idea that any the least admixture of African blood will preclude a person from being considered a citizen of the United States . . . it seems too clear an argument that, had the phrase “citizen of the United States” [meant purely white], the word white would have been applied.<sup>261</sup>

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counsel) (“[S]lavery is so odious a nature, that the power to recognize its existence can be derived only from an affirmative grant . . . that honored maxim . . . requires every doubtful phrase to be construed in favor of liberty . . . In all the constitution, the word slave . . . is not there . . . vainly do you read the whole instrument in search of any express grant.”); *The Antelope*, 10 U.S. (Wheat) 66, 81, 107-08 (1825) (argument of counsel); *DYER* 62-65.

257. *Id.*

258. *Jennison*, 1 Proc. Mass. Hist. Soc. at 294 (Opinion of Cushing, C.J.).

259. *Id.*; *Winchendon v. Hatfield*, 4 Mass. 123, 125, 127-28 (1808); *Commonwealth v. Robinson*, 1 Thach. Cr. Cas. 488, 496-97 (Mass. 1827) (holding that a person, “[H]aving been brought into this state by her master, cease[s] to be a slave . . . it being established law, that the moment that the master carries his slave into a country where domestic slavery is not permitted, he becomes free.”); *Commonwealth v. Aves*, 18 Pickering 193, 208-09 (Mass. 1836).

260. *Jeffries v. Ankeny*, 11 Ohio 372, 374-75 (1842); *Thacker v. Hawk*, 11 Ohio 376, 376-79 (1842) (rejecting the one-drop rule). This rule was later applied to void statutes prohibiting schools from accepting “colored” students. *Lane v. Baker*, 12 Ohio 237, 238-39, 252 (1843).

261. *Anderson v. Miliken*, 9 Ohio St. 568, 576-80 (1859).

These interpretations laid the groundwork for the court to invalidate a law permitting elections inspectors to refuse a ballot based on their “visual inspection” and belief that a person was 51% black.<sup>262</sup> “What the legislature cannot do directly it cannot do by indirection . . . the law is partial by imposing unreasonable burdens of proof . . . [it] is calculated to impair and defeat the colored man’s right to vote, but such seems to be its leading, nay its only object.”<sup>263</sup>

Then came the Thirteenth Amendment. The U.S. Supreme Court did not see a Thirteenth Amendment case until 1872, and only spoke in dicta until 1883.<sup>264</sup> But some state courts commented on the Amendment in the meantime. Both the California and Indiana courts held that the initial Civil Rights Act was constitutional under the Thirteenth and Fourteenth Amendments.<sup>265</sup> California, removed from the fervor of the war, provided some striking reasoning:

The Thirteenth Amendment was intended to make all men born in the United States . . . equal before the law with respect to personal liberty . . . . It would be a remarkable anomaly, if the National Government, without the Thirteenth Amendment, could confer citizenship on aliens . . . irrespective of race or color, and cannot with . . . that amendment confer on those of the African race . . . all that the Civil Rights Act seeks to give them.”<sup>266</sup>

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262. *Monroe v. Collins*, 17 Ohio St. 665, 666-67, 684-92 (1867). The statute permitted inspectors to deny someone the right to vote if he had a visible admixture of African blood and could not prove his whiteness by affirmative evidence. It also allowed black blood to be proven by reputation, but required white blood to be shown by direct testimony. *Id.*

263. *Monroe*, 17 Ohio St. at 666-67, 684-92 (“If the legislature have power to abridge suffrage of black men of visible admixture, then they can exercise the same power in regard of white men of visible admixture, then they can exercise the same power in regard of white men of black hair, of low stature, of small fortune . . . . Between the legislative power and the legal elector, . . . the constitutional protection stands as a bulwark for the protection of his right to vote.”).

264. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Civil Rights Cases*, 109 U.S. 3 (1883).

265. *People v. Washington*, 36 Cal. 658, 664-72 (Cal. 1869); *Smith v. Moody*, 26 Ind. 299, 300-01, 303-07 (Ind. 1866).

266. *Washington*, 36 Cal. at 664-72.



The Rule of Liberty had substantial power in constitutional law cases. That power was largely split along ideological lines—It was potent in many northern courts and despised by most southern judges. But these cases were decided largely after the South began deconstructing the Rule of Liberty and replacing it with a rule that whites had a natural right to hold African-Americans in slavery.

#### D. The Demise of the Rule of Liberty

With the exception of [a few cases], founded mainly on the unmeaning twaddle, in which some human judges and law writers have indulged, as to the influence of the “natural law,” “civilization and Christian enlightenment,” in amending, *proprio vigore*, the rigor of the common law . . . the cases and text-writers are uniform in declaring that slavery, as it exists in this country, was unknown to the common law . . . and hence its provisions are inapplicable. . . . Masters and slaves cannot be governed by the same common system of laws: so different are their positions, rights, and duties.

Supreme Court of Mississippi, *George v. State* (1859).<sup>267</sup>

Many southern courts reacted to the sectional crisis and the Missouri Compromise by annihilating the Rule of Liberty and asserting that the law ought to favor the cherished institution of slavery.<sup>268</sup> Some Southern judges lamented this turn of events, noting, “Until fanaticism and folly drove us from that position, the law of our State has uniformly favored emancipation . . . with such limitations and guards as rendered the free negro, not dangerous but as a useful member of the community, however humble he might be.”<sup>269</sup> This “fanaticism and folly” extended not only to laws governing emancipation, but was the origin of the rule that a slave, once freed, received only the right to freedom of movement.<sup>270</sup>

This shift demanded a new theory. England was no help—*Somerset* had been limited, but its core principles were never

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267. *George v. State*, 37 Miss. 316, 320 (1859).

268. TESIS 80-81; *Andrews v. Page*, 3 Heiskell 653, 660 (Tenn. 1871) (“Before the unconstitutional, and impertinent interference, of intermeddlers in other States . . . the uniform course of decision in this State was shaped with a view to ameliorate the condition of the slave.”).

269. 2 CATTERALL at 267.

270. TESIS 79, 78-95; *Bryan v. Walton*, 14 Ga. 185, 198-201 (1853) (“[T]he status of the African in Georgia, whether bond or free, is such that he has no civil, social, or political rights or capacity, whatever, except such as are bestowed upon him by statute. The act of manumission confers no other right but . . . [T]o become a citizen of the body politic, capable of contracting, of marrying, of voting, requires something more than the mere act of enfranchisement.”).

overruled. So the Southern Courts inverted the Rule of Liberty. The freedom of African-Americans was not a natural law good.<sup>271</sup> Neither was slavery a necessary evil: It was “the cornerstone of American democracy rather than the rock on which it must break.”<sup>272</sup>

The Georgia courts were particularly venomous. One judge proclaimed that abolitionists were “fighting against the Almighty.”<sup>273</sup> Another asserted that “Christ, recognizing the relation of master and servant, ordained [slavery] as an institution of Christianity. It is the crowning glory of this age and of this land.”<sup>274</sup> Other cases are scattered throughout the previous sections of this Article, repudiating nearly every other facet of the Rule of Liberty.

Then came *Dred Scott*. Chief Justice Taney held that black people, slave or free, could never be citizens of the United States:

[T]he legislation and history 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. . . . 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 man might justly and lawfully be reduced to slavery for his benefit.<sup>275</sup>

Although the Thirteenth and Fourteenth Amendments are widely understood as overruling *Dred Scott*,<sup>276</sup> Southern states continued to treat the theory underlying the decision as binding, namely, that slavery was a natural-law good.<sup>277</sup>

The Maryland courts therefore held that even after abolition, the incidents of slavery remained lawful, because slavery was part of

271. See, e.g., *George v. State*, 37 Miss. 316, 320 (1859).

272. DYER 99-101; TUSHNET 230-32; *Harrell v. Watson*, 63 N.C. 454, 458-60 (N.C. 1869) (complaining that slavery should not be looked at as something wicked, but as something established and made lawful by the laws of the state, recognized by the Constitution, and handed down from father to son as a tradition).

273. *Am. Colonization Soc’y v. Gartrell*, 23 Ga. 448, 464-65 (1857).

274. *Neal v. Farmer*, 9 Ga. 555, 578-83 (1851).

275. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856)

276. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 300-01 (1964); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1495 (D. Colo. 1985); *State v. Dearmas*, 841 A.2d 659, 663 (R.I. 2004).

277. *Calhoun v. Calhoun*, 2 S.C. 283, 284-307 (S.C. 1870) (“For upwards of two centuries, slavery existed in South Carolina, owing its origin to now statutory provisions . . . it existed as a common law institution . . . although not recognized by the common law of England, it lawfully prevailed in her American colonies.”).

the natural law.<sup>278</sup> Therefore, as “[s]lavery [was] established by the municipal law of the State, rights vested under the municipal law . . . are not affected by a change or abrogation of th[at] law.”<sup>279</sup> Several courts continued to enforce limitations on emancipation from the pre-war era,<sup>280</sup> and voided transfers of property to slaves by citing the slave codes.<sup>281</sup> South Carolina even said that the 1868 Reconstruction Constitution of the state—which voided all contracts based on slave property—was unconstitutional under the Contracts Clause of the U.S. Constitution.<sup>282</sup> These contracts, the court said, must be valid because they were “consistent with the public opinion which prevailed in South Carolina when [they] w[ere] entered into.”<sup>283</sup>

The intellectual gymnastics in these cases are astounding. But they are part of our history, and the results they wrought remained in our law until the Warren Court era.<sup>284</sup> Even then, the Court did not revive the Rule of Liberty, but instead granted near-unlimited deference to the federal government to protect civil rights.<sup>285</sup> This theory, as applied to the Fourteenth and Fifteenth Amendments, has been peeled back in recent years—and the Roberts Court can be trusted to overrule the Thirteenth Amendment version as well.<sup>286</sup> But the Roberts Court has also leaned heavily on “traditional” canons of interpretation,<sup>287</sup> and so it should replace Warren-Court deference with a principle based on the ancient history of the Rule of Liberty.

### III. RESURRECTING THE RULE OF LIBERTY

Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist in the United States, or anywhere subject to their jurisdiction.

-U.S. Constitution, Amendment Thirteen<sup>288</sup>

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278. *Williams v. Johnson*, 30 Md. 500, 505-06 (1869).

279. *Id.*

280. *Rosborough v. Rutland*, 2 S.C. 378, 380, 386 (S.C. 1870).

281. *Cobb v. Battle*, 34 Ga. 458, 477, 483 (1866); *Rosborough*, 2 S.C. at 380, 386; *McMath v. Johnson*, 41 Miss. 439, 459-60 (1867).

282. *Calhoun*, 2 S.C. at 284-307; *Blease v. Pratt*, 3 S.C. 513, 513 (1872).

283. *Calhoun*, 2 S.C. at 284-307.

284. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968)

285. *Id.* at 440-41.

286. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2628-29 (2013).

287. *See* ESKRIDGE, FRICKEY & GARRETT 214, 224-32, 254-59; SCALIA & GARNER 8-9.

288. U.S. CONST. amend. XIII.

The Southern states, having lost on the battlefield, waged a second war in the courtroom, attempting to limit the scope of new laws favoring freedom and civil rights.<sup>289</sup> This strategy worked, yielding decisions like the inaptly named *Civil Rights Cases*.<sup>290</sup> Couched in the language of “states’ rights” and federalism, the Supreme Court slowly adopted 1850-60s *southern* jurisprudence on liberty and slavery.<sup>291</sup>

#### A. The Ghost of *Dred Scott*

The U.S. Supreme Court first confronted the Thirteenth Amendment in *The Slaughter-House Cases*.<sup>292</sup> Although the case involved no question of slavery, the Court discussed basic principles of the Amendment.<sup>293</sup> First, the Amendment preserved abolition as “the main and most valuable result” of the war in the Constitution “as one of its fundamental articles.”<sup>294</sup> Second, the Amendment referred to human servitudes only.<sup>295</sup> Third, the prohibition on “involuntary servitude” was meant to “forbid all shades and conditions” of servitude, since “the purpose of the article might have

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289. See Michael A. Ross, *The Supreme Court, Reconstruction, and the Meaning of the Civil War*, 42 J. SUP. CT. HIST. 275, 283-89 (2016) (“In the Crescent City, John Archibald Campbell, a former United States Supreme Court Justice who had resigned from the Court to join the Confederacy, launched an all-out legal campaign designed to thwart Louisiana’s Reconstruction government. While some white Southerners turned to violence to fight the new order, a cohort of reactionary lawyers turned to briefs rather than bullets in the effort to destroy the biracial governments in the South.”).

290. See, e.g., *Civil Rights Cases*, 109 U.S. 3, 32 (1883).

291. See TESIS 78-95; Ross, *supra* note 289, at 291 (“[A]t the turn of the twentieth century . . . most white Americans, including historians, came to agree that . . . it was also good that Reconstruction (the ‘Tragic Era’) failed and that white supremacy was restored. By the end of the 1890s, it was clear that . . . the struggle to define the meaning of the civil war had been won . . . by the ideological descendants of Andrew Johnson.”).

292. 83 U.S. 36 (1872).

293. The case involved a challenge to a state-sanctioned monopoly because it placed an involuntary servitude on property. *Slaughter-House Cases*, 83 U.S. at 50-51. The court dispensed of this issue in a few sentences. See *id.* at 69 (“To withdraw the mind from the contemplation of this grand yet simple declaration of personal freedom of all the human race . . . and with a microscopic search endeavor to find in it a reference to servitudes, requires an effort, to say the least of it.”).

294. *Id.* at 68.

295. *Id.* at 69.

been evaded, if only the word slavery had been used.”<sup>296</sup> Fourth, the Court proclaimed that the Amendment was not limited to those of African descent, as its text “forbids any other kind of slavery, now or hereafter.” Finally, the court seemed to adopt the “mischief rule” as a means of interpreting the amendment.<sup>297</sup>

Congress responded to these grand dicta by passing the Civil Rights Act of 1875, the first attempt to raise African-Americans to equal footing with whites.<sup>298</sup> The act, among other things, prohibited private racial discrimination.<sup>299</sup> The Court, however, threw out several convictions under the act, holding that the law was beyond Congress’s authority.<sup>300</sup> Although the Thirteenth Amendment abolished slavery, “decree[d] universal civil and political freedom throughout the United States,” and gave Congress authority to punish private individuals for imposing the badges and incidents of slavery, it held that private discrimination was not an incident of slavery.<sup>301</sup>

What, the Court asked, had racial discrimination to do with slavery?<sup>302</sup> Nothing. “The long history of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents,” and discrimination was not among them.<sup>303</sup> Legally enforced service? Yes. Physical restraint of movement? Yes. Incapacity to contract, sue, testify, and hold property? Yes. Imposing harsher sentences on slaves than on free persons? Yes.<sup>304</sup> But Congress had used the Thirteenth Amendment to legislate these barriers out of existence,<sup>305</sup> and not purported to adjust “the social rights of men and races in the community.”<sup>306</sup>

The Thirteenth Amendment “has respect, not to distinctions of race, or class, or color, but to slavery,” and it “would be running the slavery argument into the ground to make it apply to every act of

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296. *Id.* at 69.

297. *Id.* at 72 (“But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.”).

298. *The Civil Rights Cases*, 109 U.S. 3, 19 (1883).

299. *Id.* at 19-20.

300. *Id.* at 32.

301. *Id.* at 28-29.

302. *Id.* at 29.

303. *Id.* at 29.

304. *Id.* at 29.

305. *Id.* at 29-30 (citing Act of April 9, 1866, § 1, 14 Stat. 27).

306. *Id.* at 30.

discrimination” based on race.<sup>307</sup> In Justice Bradley’s mind, the black man’s rights “[we]re to be protected in the ordinary modes in which other men’s rights are protected.”<sup>308</sup>

By “ordinary modes,” the Court meant state law, which ostensibly required all businessmen to open their venues to all “unobjectionable” persons.<sup>309</sup> Free persons of color prior to abolition, the Court insisted, had never demanded that racial discrimination was unlawful.<sup>310</sup> The Thirteenth Amendment did not change this, as it “merely abolished slavery.”<sup>311</sup> And that disposed of the case.<sup>312</sup>

Under this tangled mess of formalism is the sinister ghost of *Dred Scott*. Although the Court paid lip service to the “universal civil and political freedom” guaranteed by the Amendment and said that Congress had power to punish privately imposed badges of slavery, it instead read both principles out of the Amendment entirely. Certainly, Congress could attack the legal disabilities of slavery. It could compel the law to treat people of color the same as white persons. The only truly private action Congress could reach was the physical restraint of one’s liberty under the involuntary-servitude clause of the Amendment.

Indeed, until 1968, the only way the Amendment applied to private actors was through forced-labor statutes.<sup>313</sup> It did not allow Congress to protect other “individual rights” of African-Americans by prohibiting whites from forcing them to leave their chosen professions<sup>314</sup> or voiding restrictive covenants.<sup>315</sup> Allowing Congress to do more would federalize too much authority that belonged to the States before the Thirteenth Amendment was passed.<sup>316</sup>

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307. *Id.* at 30-31.

308. *Id.* at 31.

309. *Id.* at 31.

310. *Id.* at 31-32.

311. *Id.* at 32.

312. *Id.* at 32; *see also* *United States v. Harris*, 106 U.S. 629, 641-43; *Baldwin v. Franks*, 120 U.S. 678 (1887).

313. *Clyatt v. United States*, 197 U.S. 207 (1905); *Pollock v. Williams*, 322 U.S. 4 (1944); *Taylor v. Georgia*, 315 U.S. 25 (1942); *United States v. Gaskin*, 320 U.S. 527 (1944); *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911).

314. *Hodges v. United States*, 203 U.S. 1, 9 (1906).

315. *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (holding that the Amendment does not protect the individual rights of African-American).

316. *Hodges*, 103 U.S. at 9 (“[I]f, as we have seen, [the Amendment] denounces a condition possible for all races and all individuals, then a like wrong perpetrated by . . . any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights, which,

In short, Congress's *actual* power under the Thirteenth Amendment looked something like this:

	Slavery	Involuntary Servitude
§ 1	Nullified laws upholding slavery ( <i>Civil Rights Cases</i> )	Prohibited the control by which personal service is coerced for another's benefit ( <i>Bailey v. Alabama</i> )
§ 2 (state action)	Overturn laws disabling African-Americans from holding property, suing, contracting, etc. ( <i>Civil Rights Cases</i> )	Void state laws criminalizing default, leaving employment, etc. ( <i>Bailey v. Alabama</i> )
§ 2 (private action)	?	Punish peonage; forced labor; restraints on personal liberty ( <i>Clyatt v. United States</i> )

Thus, even though the Court held both (1) that *slavery* and *involuntary servitude* were distinct prohibitions;<sup>317</sup> and (2) that Congress could punish privately imposed badges of slavery,<sup>318</sup> it never permitted Congress to exercise that power.

By constructing this framework, the Court revived the logic of *Dred Scott*: That under the U.S. Constitution, “whether they had become free or not,” African-Americans were “so far inferior, that they had no rights which the white man was bound to respect.”<sup>319</sup> Such inferiority had nothing to do with slavery; in fact, this personal inferiority was why enslaving the African-American was “just” to begin with.<sup>320</sup> Therefore, the text of the Thirteenth Amendment, operating only on slavery, did not reach so far as to change this status.<sup>321</sup> And “[i]t would be running the slavery argument into the ground” to hold that Congress could change it.<sup>322</sup>

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prior to the 13th Amendment, was unquestionably within the jurisdiction solely of the states, would be transferred to the nation.”)

317. The Slaughter-House Cases, 83 U.S. 36, 69 (1872); *Bailey*, 219 U.S. at 241.

318. The Civil Rights Cases, 109 U.S. 3, 28 (1883).

319. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

320. *Id.*

321. *Civil Rights Cases*, 109 U.S. at 30-31.

322. *Id.* at 30-31 (1883).

This is a clear-statement rule in favor of slavery. It assumes that in the absence of clear, positive guarantees in the Constitution, African-Americans had no federal rights that the courts could protect from private infringement—except the right to freedom of movement.<sup>323</sup> But this is precisely the rule advocated by the late southern courts,<sup>324</sup> which held that without intervention from the positive law, all the incidents and disabilities of slavery must remain undisturbed, even if the institution is abolished.<sup>325</sup> Although Congress could eliminate the *legal* incidents of slavery, it refused to say whether this stemmed from abolition or equal protection.<sup>326</sup>

This is backwards. The abolitionists won both the literal and the constitutional war over slavery, and so their perspective on the law of slavery and freedom has been constitutionalized.<sup>327</sup> It would be bizarre if the rationale and assumptions of Chief Justice Taney survived the Thirteenth Amendment, even if the holding did not.

## B. The First Constitutional Moment

The Rule of Liberty demonstrates that the Court was not writing on a blank slate when it first interpreted the Thirteenth Amendment. Neither was Chief Justice Taney. But *Dred Scott* was not unanimous. Justice John McLean dissented: excoriating the majority, not for racism, but for ignoring the Rule of Liberty.

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323. The court made this in its discussion of the Fourteenth Amendment. Ross, *supra* note 289, at 286 (“The Court, [Justice] Miller wrote, was not willing to undo federalism, and radically change the whole theory of the relations of the State and federal governments to each other and both these governments to the people . . . ‘in the absence of language which expresses such a purpose too clearly to admit of doubt.’” (quoting *The Slaughter-House Cases*, 83 U.S. 36, 79-80 (1872)).

324. *Bryan v. Walton*, 14 Ga. 185, 198-201 (1853).

325. *Cf. Williams v. Johnson*, 30 Md. 500, 505-06 (1869) (“[N]egro slavery and the slave trade were not only recognized as lawful, but sanctioned and protected by all of the enlightened and commercial nations of Europe. . . . The cases, therefore, in which it has been held that actions based upon statute law, fall with the repeal of the law, do not apply. Slavery being established by the municipal law of the State, rights vested under the municipal law . . . are not affected by a change or abrogation of the law.”)

326. *Civil Rights Cases*, 109 U.S. at 29-30.

327. Ross, *supra* note 289, at 280-83 (discussing how the Reconstruction Amendments were “the North’s terms of capitulation to the defeated South.”). *See generally* BRUCE ACKERMAN, *WE THE PEOPLE* (1998); Professor Ackerman’s primary concern is constitutional change outside the Article V process. However, the idea of a “constitutional moment” carries even more weight when “higher lawmaking” in national politics is accompanied by a formal amendment. *See id.* at 6-8.



Justice McLean first recounted the history of the Rule of Liberty. Judges in Rome, Europe, and England held that “slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territories, his master cannot reclaim him, unless by virtue of some express stipulation.”<sup>328</sup> The Court adopted this principle in *Prigg v. Pennsylvania* with no dissent.<sup>329</sup> It had also been adopted by the courts in the slave states—not through amorphous concepts of liberty,<sup>330</sup> but on “the law as it is, and not as it ought to be.”<sup>331</sup> The law, according to these courts, was that slavery “exist[ed] by the positive law . . . without foundation in the law of nature, or the unwritten and common law.”<sup>332</sup>

This history compelled the conclusion that slavery was a state institution.<sup>333</sup> The Founders were careful “to guard the [Constitution] so as not to convey the idea that there could be property in a man,” and therefore only created a federal right to recover *fugitive* slaves.<sup>334</sup> In construing the Constitution, McLean cautioned against relying on

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328. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 534 (McLean, J., dissenting) (citing GROTIUS, lib. 2, ch. 15, 5, 1; GROTIUS, lib. 10, ch. 10, 2, 1; WICQUEPOSTS AMBASSADOR, lib. 1, p. 418; 4 Martin 385; Case of the Creole in the House of Lords, 1842; 1 PHILLIMORE ON INTERNATIONAL LAW 316, 335; 2 Barn & Cres. 440 (K.B.); *Somerset v. Stewart*, 1 Lofft 1, 19 (1772)).

329. *Dred Scott*, 60 U.S. at 534 (McLean, J., dissenting) (“The state of slavery is deemed to be a mere municipal regulation, founded upon and limited by the range of the territorial laws.”).

330. Daniella Lapidous, *The SCOTUS Marriage Decision, in Haiku MCSWEENEY’S* (June 26, 2015), <https://www.mcsweeneys.net/articles/the-scotus-marriage-decision-in-haiku> (“Hark! Love is love and / love is love is love is love. / It is so ordered.”).

331. *Id.* at 534 (quoting *Rankin v. Lydia*, 2 A.K. Marsh. 467, 270-79 (Ky. 1820) (“In deciding the question (of slavery), we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipal regulations is unquestionable. But we view this as a right existing by the positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law.”)).

332. *Id.* at 536.

333. *Id.*

334. *Id.* at 537 (“Our independence was a great epoch in the history of freedom; and while I admit the government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted . . . . Many states, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions . . . and it was a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct.”).

“a traffic which is now declared to be piracy.”<sup>335</sup> If the Court did so, “[W]hy confine our view to colored slavery? On the same principles, white men were made slaves. *All slavery has its origin in power, and is against right.*”<sup>336</sup>

Justice McLean then turned to the heart of the case: Whether Scott became free by residing in Illinois. He started again with *Prigg*: The Fugitive Slave Clause was inserted in the Constitution *because* of the Rule of Liberty. Otherwise, every free state could slowly destroy slavery by providing an incentive for slaves to run away.<sup>337</sup> But the deal reached by the Framers only conferred federal power on cases where the slave, “held to service or labor in one state, *under the laws thereof* . . . escap[ed]” into another state.<sup>338</sup> Thus, if a master began living in a free state, he lost the ability to hold a person in slavery, because the Fugitive Slave Clause did not apply:

[I]f slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or Territory, not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? . . . Where no slavery exists, the presumption, without regard to color, is in favor of freedom. . . . Where the law does not confer this power, it cannot be exercised.<sup>339</sup>

Since no federal law could support the slave right—and since no state law did support the slave right—Scott became free residing in Illinois.<sup>340</sup> Under *Prigg*, this was “not mere argument, but it is the end of the law, in regard to the extent of slavery.”<sup>341</sup>

Sandford’s only way to win the case, then, was to show that Scott became re-enslaved by returning to Missouri. But Justice McLean pointed out that the Rule of Liberty forbade this.<sup>342</sup> Moreover, the irrevocability principle was part of state common law

335. *Id.*

336. *Id.* at 538 (emphasis added).

337. *Id.* at 547-48.

338. *Id.* at 548-49.

339. *Id.* at 548.

340. *Id.* at 548-49.

341. *Id.* at 549. (emphasis added).

342. *Id.* at 550-58, 560-63 (citing *Commonwealth v. Pleasants*, 10 Leigh 697 (S.C.); *Betty v. Horton*, 5 Leigh 615 (S.C.); *Spencer v. Dennis*, 8 Gill. 321 (Md.); *Hunter v. Belcher*, 1 Leigh 172 (Va.); *Harry v. Decker & Hopkins*, 1 Walk. Miss. 36 (Miss); *Rankin v. Lydia*, 2 A.K. Marsh. 467 (Ky. 1820); *Griffith v. Fanny*, 1 Va. Rep. 143 (Va.); *Rhodes v. Bell*, 2 How. 307).

in Illinois and Missouri—something the Court could not change.<sup>343</sup> Neither had Missouri passed legislation re-enslaving Scott.<sup>344</sup> And “it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done, not only in the absence of special legislation, but in a state where the common law is in force.”<sup>345</sup>

Even if the Rule of Liberty was a mere suspension of the slave power while the slave was in a free jurisdiction, *The Slave Grace* required voluntary return to a slave state.<sup>346</sup> Scott had been kidnapped.<sup>347</sup> Thus, under Rule-of-Liberty conflicts principles, Scott was free.<sup>348</sup> Additionally, it was a fundamental rule of constitutional law that states could not strip away rights granted by another state.<sup>349</sup> “If a state may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is . . . within [federal diversity jurisdiction].”<sup>350</sup>

Justice McLean and Chief Justice Taney had fundamentally different assumptions about slavery. Taney began with the inferiority of the African-American; McLean began with the Rule of Liberty. Judges speak of the democratic process as the means to decide on

343. *Dred Scott*, 60 U.S. at 555-57 (McLean, J., dissenting).

344. *Id.*

345. *Id.*

346. *Id.* at 559-60; *see also* *Guillemette v. Harper*, 4 Richardson 186, 187-92 (S.C. 1850) (holding that a freed slave involuntarily returned from Ireland would remain free in South Carolina).

347. *Dred Scott*, 60 U.S. at 559-60 (McLean, J., dissenting) (“It would be a mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.”).

348. *Id.* at 562-63 (quoting *Rankin v. Lydia*, 2 A.K. Marsh. 467, 270-79 (Ky. 1820). (“If, by the positive provision of our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in another, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right on the master on one side, based upon the force of the written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom.”).

349. *Id.* (quoting *Rankin*, 2 A.K. Marsh. at 270-79. (“Free people of color in all the States are, it is believed, quasi citizens . . . Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them; at least, such rights were evidently secured to them by the ordinance in question . . . If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated government to deny their existence in any other part? Is there less comity existing between State and State; or State and Territory, than exists between the despotic Governments of Europe?”)).

350. *Id.*

public values.<sup>351</sup> But the process spoke: It said Taney was wrong. The war and the Thirteenth Amendment cemented one side of this debate in the Constitution in a way no other Amendment has. It makes far more sense to say that Justice McLean's dissent—and therefore, the Rule of Liberty—ought now to control cases based on the Amendment that overruled the majority opinion.

### C. Liberty After Abolition

Perhaps the most significant objection to the Rule of Liberty is that slavery no longer exists. The Rule of Liberty was, after all, invented to limit the evils of slavery and to hedge against wrongful enslavement.<sup>352</sup> Since neither justification has any force in the modern world, a reasonable objection could be made that there is no place for the Rule in the modern legal system.

This argument makes two fatal errors. First, it ignores the fact that historically, American courts used the Rule of Liberty for suppletion, not just amelioration. This principle goes all the way back to Blackstone, who acknowledged that “in the extension of natural right and justice, the Judge may safely go beyond even that which was in the minds of those who framed the law.”<sup>353</sup>

Second, it is founded on an interpretation of the Amendment that the Court has always rejected. It assumes that the Amendment only abolished slavery, nothing more. But even while imposing a restrictive gloss on the Amendment, the Court has always asserted that the Amendment reached beyond slavery itself to the badges and incidents of slavery.<sup>354</sup> Indeed, to read the Amendment any other way would bow to the segregationists who thought that the Amendment merely nullified state laws establishing or upholding slavery.<sup>355</sup> While the precise scope of this power is properly debatable, the court has never asserted that it did not exist.<sup>356</sup>

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351. See e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611-12 (Roberts, C.J., dissenting); Daniella Lapidous, *The SCOTUS Marriage Decision*, in *Haiku MCSWEENEY'S*, (June 26, 2015), <https://www.mcsweeneys.net/articles/the-scotus-marriage-decision-in-haiku> (“I support you all / No, really, I do, but this / Isn't our problem”).

352. See *supra* notes 18-22, 176-178 and accompanying text.

353. III BLACKSTONE, *supra* note 6, at 88-89, n.30.

354. *The Civil Rights Cases*, 109 U.S. 3, 28 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-39 (1968).

355. See *Civil Rights Cases*, 109 U.S. at 28; *Bryan v. Walton*, 14 Ga. 185, 198-201 (1853).

356. U.S. CONST. amend. XIII, § 2.

Congress added § 2 for a reason.<sup>357</sup> It is naïve to think that upon ratification, all the various disabilities, disadvantages, and racial animi associated with slavery vanished. Indeed, history illustrates that the opposite is true: Jim Crow, segregation, peonage, discrimination, and lynching are only a few examples of the traditional “badges and incidents” of slavery.<sup>358</sup>

Declaring what these incidents are need not be left to Congress’s imagination, and the courts need not abdicate all judicial review. The incidents are well-documented, and a court can examine them through historical inquiry.<sup>359</sup> To fully “enforce” the abolition of slavery, Congress must have power to describe and punish these historical incidents. Otherwise, the ghost of *Dred Scott* can legally haunt those who are supposed to be completely free.

#### IV. THE MODERN RULE OF LIBERTY

We value the Rule of Lenity because it is as old as our law itself.<sup>360</sup> But for most of Western history, the Rule of Liberty enjoyed the same status. In many states where slavery was vital to the economy, courts allowed the principle to control—or at least inform—their decisions. Since the Rule of Liberty was so well-established in emancipation cases, a constitutional abolition of slavery should be girded with an equally powerful maxim.

Finding a substantive canon in the Thirteenth Amendment is not outlandish. Most major substantive canons have no textual basis at all. Lenity comes from history and perhaps the due process

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357. South Carolina attempted to hamstring the amendment by only ratifying § 1. TESIS 170 (2010).

358. See generally ALLAIN 105-96 (collecting historical essays on the legal understanding of slavery in the United States); George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in TESIS, at 163; Laura F. Edwards, *The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Governance*, 42 J. SUP. CT. HIST. 310, 322 (2016) (describing the pervasiveness of private violence in the South to reinforce antebellum notions of African-American inferiority).

359. See, e.g., *supra* note 358.

360. See SCALIA & GARNER § 49, at 296-302; Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. L. REV. 581, 583 (1990) (endorsing the Rule of Lenity because it has, through long usage, “acquire[d] a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 436 (2005).

clause.<sup>361</sup> The avoidance canon was invented to protect the court's institutional capital or to enforce constitutional norms without saying so.<sup>362</sup> And the federalism canons are rooted more in common-law sovereign immunity than in the Tenth or Eleventh Amendments.<sup>363</sup> In fact, the Court has forcefully asserted that there are principles of interpretation that—because of our common-law history—are rooted in the text and structure of the Constitution.<sup>364</sup>

This tradition provides a framework for understanding the modern Rule of Liberty. It is a default rule,<sup>365</sup> enshrined in the text and structure of the Thirteenth Amendment. Like sovereign immunity, there is a tsunami of state jurisprudence recognizing it as integral to the common law.<sup>366</sup> And although contrary authority does exist, it would mock history to say we ought to interpret the words of the abolitionist with the default rules of the slaveholder.

But what would this default rule look like? In the modern world, the Rule of Liberty manifests itself through three principles. Those principles are (1) The Broad-Construction Principle; (2) The Non-interference Principle; and (3) The Implied-Repeal Principle.

#### A. The Broad-Construction Principle

The most straightforward application of the Rule of Liberty was that every instrument conferring liberty should be construed liberally, in favor of freedom.<sup>367</sup> The courts sometimes departed from this rule because of the private-law version of the whole-act rule or

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361. See, e.g., 3 SUTHERLAND ON STATUTORY INTERPRETATION § 59:3, at 175 (7th ed., West 2008).

362. E.g., ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 402-03; see also Alexander Bickel, *Passive Virtues*, in THE LEAST DANGEROUS BRANCH 111-183 (1986).

363. See ESKRIDGE, FRICKEY & GARRETT, at 406, 418-22; *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 242-246 (1985); *Alden v. Maine*, 527 U.S. 706, 712-27 (1999);

364. Cf. *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55-57 (1996); *Alden*, 527 U.S. at 712-14.

365. See generally EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008).

366. *Alden*, 527 U.S. at 712-27 (reviewing the history of the Sovereign Immunity doctrine). See generally *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 429 (1793) (Iredell, J., dissenting).

367. See, e.g., *Elder v. Elder*, 4 Leigh 252, 260 (Va. 1833) (“I approve of the principle declared by this court, in the case of *Isaac v. West*, that every instrument conferring freedom should be construed liberally, in favor of liberty”); III BLACKSTONE 88-89 n.30.

because of countervailing state policy.<sup>368</sup> But the Thirteenth Amendment is an unequivocal declaration of freedom, and there is no subsequent constitutional text that dilutes its effect.

Therefore, when interpreting both sections of the Thirteenth Amendment, the courts should operate under a clear-statement rule in favor of liberty. In other words, to render the Amendment inapplicable to a case, the opposing party must show by clear and convincing historical evidence that the Amendment should not apply. The proper application of this principle will bring more coherence to interpretations of both § 1 and § 2 of the Amendment.

### 1. *Resetting § 1*

The common law presumed that freedom from domination was the natural order of things.<sup>369</sup> At various times in Western history, the positive law restricted freedom. These restrictions included the slave disabilities, such as the lack of any rights to make contracts, to sue, to hold property, to vote, and many others.<sup>370</sup> However, the courts, constrained by the Rule of Liberty, were loath to apply these laws to things not envisioned by the legislature.<sup>371</sup>

This history illuminates the Court's initial misunderstanding of the Amendment. The Court treated § 1 as if it simply forbade a certain form of human domination. In reality, it did much more than that. The Amendment certainly overturned the legal regime that allowed people to be held as property. But by barring any positive slavery-related restrictions on human freedom, it—by itself—restored to the African-American the fundamental rights of the common law, withheld from the slave *only because of slavery*. In other words, the civil rights of slaves were suppressed only by the democratic power of the legislature. But once that power was

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368. *Suprier v. Parker*, 16 B. Mon. 274, 283-84 (Ky. 1855); *Cleland v. Waters*, 16 Ga. 496, 508, 513-20 (1854).

369. *See, e.g., Somerset v. Stewart*, 1 Lofft 1, 19 (1772); *Marguerite v. Choteau*, 2 Mo. 71, 90 (1828) (Opinion of Tompkins, J.); Errata, 2 Mo. 241. *See generally* PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (Oxford U. Press 1999).

370. *See Slave*, *BOUVIER LAW DICTIONARY* (7th ed. 1857); Opinion of Daniel Dulany, 1 Har. & McH. 559, 563 (Md. 1767); *United States v. Mullany*, 27 Fed. Cas. 20, 22 (D.C. App. 1808); *Hudgins v. Wrights*, 1 Hen. & M. 134, 137 (Va. 1806); *Ex parte Boylston*, 2 Strobbart 41, 41-44 (S.C. 1847).

371. *See, e.g., Findly v. Nancy*, 3 T.B. Mon. 400, 400-02 (Ky. 1826); *Logan v. Commonwealth*, 2 Grattan 571, 572-74 (Va. 1845)

shattered by the Constitution, no valid legislation remained to suppress a former slave's civil rights.<sup>372</sup>

Thus, Congress did not need to pass legislation in 1866 securing African-Americans the civil rights to sue, testify, hold property, make contracts, and to be treated equally before the law. Those rights automatically vested in the African-American when the Amendment was ratified, and are cognizable in a § 1983 action even without legislation. These are the "reflex" rights of the Amendment that the Court alluded to in its early dicta.<sup>373</sup>

Modern courts have lost sight of these rights in recent years, holding that Thirteenth-Amendment rights may only be asserted by statute.<sup>374</sup> This is only partially true. *Some* Thirteenth-Amendment wrongs are only redressable if Congress says so. But in addition to the pure right to be free from chattel slavery or involuntary servitude, reflex rights are protected by § 1 regardless of legislation enforcing them or not. By historical accident, the Thirteenth and Fourteenth Amendments overlap on this point.<sup>375</sup> But it is important to recognize these reflex rights, because Congress cannot create new rights with its enforcement powers; rather, it can only enforce existing rights.<sup>376</sup>

The Broad-Construction Principle therefore adds two things to § 1 cases. First, it acts as a hedge against political hostility towards civil rights.<sup>377</sup> But the inherent rights conferred by § 1 are not

372. The structure of the Amendment itself is sufficient to make this point. But there is also substantial evidence that this was the intent the Reconstruction Congresses. *See* Ross, *supra* note 289, at 279-82, 285-86; Michael A. Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1; MICHAEL A. LAWRENCE, *RADICALS IN THEIR OWN TIME* (2010).

373. *See* *The Civil Rights Cases*, 109 U.S. 3, 28 (1883).

374. *See, e.g.,* *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225, 1236-38 (2d Cir. 1979); *Sumpter v. Harper*, 683 F.2d 106, 108 (4th Cir. 1982); *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990); *But see Foster v. MCI Tcomm'ns Corp.*, 773 F.2d 1116 (10th Cir. 1985) (holding that the right to be free from racial discrimination in employment is a substantive right guaranteed by the Thirteenth Amendment); *Vann v. Kempthorne*, 534 F.3d 741, 747 (D.C. Cir. 2008) (noting that a Tribe's act of denying a group of Native Americans the right to vote would violate the Thirteenth Amendment).

375. *See Civil Rights Cases*, 109 U.S. at 29.

376. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

377. *E.g.,* Manny Fernandez & Eric Lichtblau, *Justice Dept. Drops a Key Objection to a Texas Voter ID Law*, N.Y. TIMES (Feb. 27, 2017), [https://www.nytimes.com/2017/02/27/us/justice-dept-will-drop-a-key-objection-to-a-texas-voter-id-law.html?\\_r=0](https://www.nytimes.com/2017/02/27/us/justice-dept-will-drop-a-key-objection-to-a-texas-voter-id-law.html?_r=0)



remedial<sup>378</sup> in the sense that they require congressional action—they are self-executing,<sup>379</sup> and the courts do not injure separation of powers by enforcing them. Neither are they subject to majoritarian will: they are personal, constitutional rights guaranteed by § 1.

The rights protected by this framework are *any rights withheld from a group of people because of slavery*. This is mostly a historical question. But since history can be fuzzy, the Rule of Liberty's default principles require courts to be cautious when holding that rights are not guaranteed by § 1. To avoid liability for an injury to a group of people in a § 1 case, the government must show by clear and convincing evidence that the disability was historically imposed without regard for the slave status.

This standard avoids the polarizing rational-basis/strict-scrutiny paradox. Plaintiffs cannot invoke the judicial sledgehammer of strict scrutiny by conjuring hypotheticals where a harm *could* be related to slavery.<sup>380</sup> But neither can defendants prevail by identifying a reason—any reason—that a harm has no relationship to slavery.<sup>381</sup> A plaintiff should prevail if any historical authority exists showing that the harm was connected to the slave status. In cases of historical doubt, the court should resolve the issue in favor of liberty.<sup>382</sup>

Second, the Rule widens the group of rights which Congress can enforce if it chooses to do so. The Court has indicated that Congress can only enforce existing rights.<sup>383</sup> But the Broad-Construction Rule requires that this foundation be robust, not narrow. Any rights cognizable under the § 1 test described above are a legitimate basis for Congressional enforcement legislation. The § 2 question is *how far* Congress may go to enforce these rights.

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378. See *Civil Rights Cases*, 109 U.S. at 30 (noting that Fourteenth Amendment legislation must be “corrective in its character,” but Thirteenth Amendment legislation “may be direct and primary”).

379. The self-executing nature of § 1 is something that has also never been seriously disputed in the Supreme Court. See *id.* at 28 (1883).

380. See generally Susan H. Bitensky, *An Analytical Ode to Personhood: The Unconstitutionality of Corporal Punishment Under the Thirteenth Amendment*, 53 SANTA CLARA L. REV. 1 (2013); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

381. See, e.g., Ryan D. Walters, *The Thirteenth Amendment “Exception” to the State Action Requirement: An Originalist Reappraisal*, 23 GEO. MASON U. C.R.L.J. 283 (2013); See *Civil Rights Cases*, 109 U.S. at 28-30.

382. This also avoids the obnoxiously subjective intermediate-scrutiny standard. See *Craig v. Boren*, 429 U.S. 190 (1976) (Rehnquist, J., dissenting).

383. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

## 2. *Enforcing Civil Rights*

The Amendment invests Congress with authority to “enforce this Article by appropriate legislation.”<sup>384</sup> The Court’s most recent interpretation of § 2 is half a century old, from the Warren-Court era.<sup>385</sup> The case involved a question nearly identical to that in *The Civil Rights Cases*, except the Court reached the opposite result.<sup>386</sup> Congress, the Court said, must be able to “rationally . . . determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>387</sup> Prohibiting racial discrimination in housing cases was not an irrational response to race-based slavery; therefore, the statute was constitutional.<sup>388</sup>

The reign of rational-basis as the yardstick of Congress’s Reconstruction authority is over.<sup>389</sup> Although *Jones* is still good law, it is the last relic of its era. The Court has taken a narrow view of some cases obliquely touching the Amendment’s substance; and while those cases have not reached the core of the Amendment, they can be easily extended to reach a formalist result.<sup>390</sup>

The Rule of Liberty provides a more solid basis for preserving the scope, if not the reasoning, of *Jones*. The Broad-Construction Principle, antebellum federalism principles, and federal courts’ treatment of fugitive-slave rights all point in this direction. The same sort of default clear-statement rule applies here to Congress’s authority: The person challenging a statute must show by clear and convincing evidence that the legislation targets conduct that has no relationship to slavery as it existed in the United States.

Blackstone provides a helpful place to start. Civil-rights statutes are often coercive, forcing individuals to do things they would rather not. This might seem sufficient to warrant strict construction under the Rule of Lenity. But Blackstone acknowledged that statutes against frauds, although usually categorized as remedial, had consequences that were penal—they voided a contract in which the loser may not be at fault.<sup>391</sup> However, Blackstone still insisted

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384. U.S. CONST. amend. XIII, § 2.

385. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968).

386. *See id.*

387. *Id.*

388. *Id.*

389. *See City of Boerne v. Flores*, 521 U.S. 507, 518-20 (1997).

390. *See, e.g., United States v. Kozminski*, 487 U.S. 931, 934, 942-48 (1988); *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971).

391. III BLACKSTONE at 88-89 n.30.

that these statutes be construed broadly: they act upon the *offense*, not the offender, to void certain things as contrary to law. Thus, in seeking to root out offenses—as opposed to the offenders—“the judge may safely go beyond the things in the mind of those who framed the law.”<sup>392</sup>

This aligns nicely with Congress’s reasons for including § 2 in the Amendment. The drafters predicted, correctly, that some state judges and southern citizens would refuse to recognize the reflex rights granted by Section 1.<sup>393</sup> Section 2 therefore gave Congress power to overturn the disabilities of slavery, and it clothed Congress with authority to punish white citizens who maintained that African-Americans were inferior to them. This kind of power is the minimum necessary if the Amendment abrogated *Dred Scott* entirely.

The Court has raised two objections to this result. First, that the Amendment has nothing to do with race;<sup>394</sup> and second, that such broad authority impinges on the police powers of the States to protect “individual rights.”<sup>395</sup> It is true that the Amendment does not mention slavery.<sup>396</sup> But even a modicum of context shows that American slavery was emphatically racial, at least in the years just before the war—and certainly in the mind of Chief Justice Taney.<sup>397</sup>

The Federalism rationale is equally unavailing. The Thirteenth Amendment shifted a massive amount of power from the states to the federal government.<sup>398</sup> Slavery was a state institution, protected by

392. *Id.*

393. *See, e.g.*, *Penick v. Columbus Bd. of Ed.*, 583 F.2d 787, 790 (6th Cir. 1978) (“The Civil War, in which 550,000 men died, was fought in large measure over the slavery question. At its end Congress and the required number of states adopted the Thirteenth Amendment to abolish slavery. Two years later Congress [became] intensely aware that many Southern states were passing laws to continue the subjugation of former slaves by statutes aimed directly at them.”).

394. *The Civil Rights Cases*, 109 U.S. 3, 30-31 (1883)

395. *Id.* at 31 (1883); *Hodges v. United States*, 203 U.S. 1, 18-20 (1905).

396. *Civil Rights Cases*, 109 U.S. at 30-31.

397. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

398. *United States v. Rhodes*, 27 F. Cas. 785, 788 (C.C.D. Ky. 1866) (Swayne, Circuit Justice) (“[The Thirteenth Amendment] trenches directly on the power of the states and the people of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it.”).

federal agreements—guarantees that had been construed broadly against the North.<sup>399</sup> The Southern states believed that the Fugitive Slave Clause was designed to safeguard their right to hold slaves, because history taught them that the right could not “be safely left to the control of local tribunals.”<sup>400</sup> The Fugitive Slave Acts received the same broad construction from the federal courts.<sup>401</sup> The framers of the Thirteenth Amendment acted against this looming context and the Rule of Liberty. The constitutional replacement of the federal power to protect the slave right should therefore be construed broadly against the states and their citizens.<sup>402</sup>

The Broad-Construction Principle therefore adds two things to § 2 jurisprudence. First, when Congress acts to *protect* the inherent rights guaranteed by the Amendment, it stands on both § 1 and § 2. Section 1 provides a floor of judicial protection that Congress cannot reduce. Section 2 allows Congress to enforce this protection by tailoring remedies to specific social problems.<sup>403</sup> In these cases, the § 1 clear-statement rule should apply.

Second, Congress can exercise its § 2 power to go beyond protection, and into enforcement. These cases largely consist of acts to punish private racial animi, for example, in housing,<sup>404</sup> businesses and public forums,<sup>405</sup> employment,<sup>406</sup> and physical violence.<sup>407</sup> These

399. *Prigg v. Pennsylvania*, 16 U.S. (Pet.) 539, 611-12 (1842).

400. *See Ex parte Hill*, 38 Ala. 429, 436-37, 450, 456 (1863) (Opinion of Walker, C.J.)

401. *Fugitive Slave Law Cases*, 30 Fed. Cas. 1007, 1009 (C.C. N.Y. 1851); *Prigg*, 16 U.S. at 611-12.

402. *See* Robert J. Kaczorowski, *Epilogue: The Enduring Legacy of the Thirteenth Amendment*, in *TESIS* at 304–11. *See also generally* Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005).

403. *Cf. Prigg*, 41 U.S. at 616, 620 (“Congress, then, may call [its enforcement power] into activity, for the very purpose of giving effect to that right.”)

404. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968); 42 U.S.C. §§ 3604-06

405. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971); 42 U.S.C. § 1985(3).

406. 42 U.S.C. § 2000-e2(a). Although this section of the Civil Rights Act of 1964 was based squarely on the Interstate Commerce Clause, the logic of *Jones* would have also justified it under the Thirteenth Amendment. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253 (July 2, 1964). Private racial discrimination in housing and in employment are on similar legal planes; Congress’s authority should apply to each equally. *See Jones*, 392 U.S. 409, 440-44.

407. *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014); *United States v. Hatch*, 722 F.3d 492 (10th Cir. 2013); *United States v. Maybee*, 687 F.3d 1026 (8th Cir. 2012); 18 U.S.C. § 249.

are “badges and incidents” of slavery in the sense that the slave codes permitted whites and masters to use these tools to reinforce their status as better than the “degraded” African-American.<sup>408</sup> This private animus was the keystone of slavery in the United States.<sup>409</sup> Though state law no longer supports this conduct, states are not obligated to prohibit it.

Congress, therefore, must have power to deal with these problems through legislation. States may justifiably provide varying levels of civil-rights protection to their citizens as part of their function as “laboratories of democracy.” But underneath those protections is the federal right not to have blackness be a negative factor in a person’s private life. This right cannot vary from state to state. Congress, therefore, can use § 2 to punish private conduct that a master or a white person could legally commit under the slave codes.<sup>410</sup> These statutes ought to be constitutional unless the person challenging the law shows that *no state* permitted a white person to commit the conduct proscribed by the statute.

Properly construed, then, Congress’s power under the Thirteenth Amendment should look something like this:

	Slavery	Involuntary Servitude
§ 1	Nullified laws upholding slavery; conferred civil and personal rights on African-Americans	Prohibited the control by which personal service is coerced for another’s benefit
§ 2 (state action)	Provide remedies and procedures for violations of § 1 rights	Void laws criminalizing default, provide remedies;

408. See William M. Carter, Jr., *The Abolition of Slavery in the United States: Historical Context and Its Contemporary Application*, in TESIS at 177-97; Edwards, *supra* note 358, at 322-23); Ross, *supra* note 289, at 277-79.

409. See *id.*

410. This Article only considers the Amendment’s application to African-Americans because of the United States’ unique history with African slavery. This logic might be applicable to private prejudice against people of other races; however, that is an issue for another time. *Cf.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (“If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”).

<p style="text-align: center;"><b>§ 2</b> <b>(private action)</b></p>	<p>Prohibit private race-based discrimination; punish hate crimes</p>	<p>Punish peonage; forced labor; restraints on personal liberty</p>
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These § 2 rights are “dependent, as to their mode of execution, solely on the act of Congress.”<sup>411</sup> Thus, in these cases, a court cannot establish a remedy itself as it might under § 1, even if Congress could legally do so. However, in cases involving the *scope* of these laws, the Broad-Construction Principle requires courts to presume that Congress meant for the statutes to sweep broadly. In deciding these cases, the traditional tools of statutory interpretation become helpful, with one notable exception. The Thirteenth Amendment shifted power over an entire area of the law from the states to the national government, and it limited the Ninth and Tenth Amendments in the process. Thus, arguments based on the various federalism canons cannot be used to blunt the scope of these statutes or mandate textual clarity. Congress is justified in assuming that when it exercises its § 2 authority, it need not speak with surgical precision on a federalism question that was settled by the Civil War.

### 3. *Construing Free-Labor Statutes*

I have written elsewhere about the constitutionality of free-labor statutes—laws enacted to protect the right to be free from involuntary servitude, such as prohibitions on peonage and forced labor.<sup>412</sup> These statutes are almost exclusively penal, and so the question arises whether the Rule of Liberty has any application in these cases. Applying the canon in Lenity–Liberty disputes seems slightly quixotic: If the canons are opposites, then applying them both in the same case should yield a net zero result.<sup>413</sup> But the canons are not opposites—they are inverse applications of the same

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411. *Prigg v. Pennsylvania*, 16 U.S. (Pet.) 539, 620 (1842) (analyzing the fugitive slave clause).

412. See Chris Kozak, *Originalism, Human Trafficking, and The Thirteenth Amendment*, XI S.J. POL’Y & JUST. (forthcoming 2017); see also *United States v. McClellan*, 127 F. 971, 976 (S.D. Ga. 1904) (“It does not seem to me that [peonage] is a question upon which the courts of the country should be astute to discover reasons to nullify an act of congress made in favorem libertatis.”).

413. See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

principle, and thus may align or diverge depending on the interpretive problem.

Lenity has more relevance in *malum prohibitum* crimes (things unlawful just because we say they are) than over *malum in se* crimes (things inherently wrong).<sup>414</sup> This is one way where the courts can—and have—set cases apart. In *United States v. McClellan*, an early peonage prosecution, the defendants argued that the means-of-coercion element of the statute was ambiguous, and therefore could not apply to them.<sup>415</sup> The Southern District of Georgia, in a striking move, held that the Rule of Lenity only applied when the defendant was morally “free from injury or wrong.”<sup>416</sup> It would not, by construction, permit defendants to avoid punishment when they were so obviously trying to recreate slavery.<sup>417</sup>

This makes intuitive sense. If slavery is, as the Romans thought, one of the most grievous violations of the natural law,<sup>418</sup> crying foul because you were not quite evil enough is disingenuous. Lenity, therefore, is inappropriate, and the courts should reject these arguments when raised by defendants who quibble about the means-of-coercion element of the offense. Unless the facts charged are so clearly outside the statute that no reasonable person could think he was committing a moral wrong, the courts should uphold the indictment. The fair-notice justifications for Lenity in these cases are nonexistent—every person in the United States should be aware that forced labor and slavery are *unconstitutional* in the same way that censorship, self-incrimination, and state religion are unconstitutional.

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414. ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 367-68; OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 50 (1881).

415. *United States v. McClellan*, 127 F. 971, 976-77 (S.D. Ga. 1904).

416. *Id.*

417. *Id.* (“But how can it be contended that the conduct of the prisoners, as described in this indictment, as innocent or free from injury or wrong? Is it not inimical to the amendment of the Constitution which defines involuntary servitude? Is it not involuntary servitude to seize by force, to hurry the victim from wife and children, to incarcerate him in a stockade, and work him in range of the deadly muzzle of the shotgun, or under the terror of the lash, and continue this servitude as long as resentment may prompt, or greed demand . . . and for their own selfish purposes consign them to a life of involuntary servitude, compared to which the slavery of the antebellum days was a paradise.”)

418. ALLAIN 9-16, 21 (quoting Dominicus Tuschus, *Practicarum conclusionum juris*, Lit. S, concl. 227, no. 1 (Rome 1651) (“Just as it is lawful to take any means to evade death, so also it is lawful to avoid slavery.”)); *Servitus*, *ENCYCLOPEDIA OF ROMAN LAW* (1953).

This is the answer, as well, to the argument that the Rule of Lenity is based on nondelegation, not fair notice.<sup>419</sup> The constitutional prohibitions on slavery and involuntary servitude are self-executing against the individual, and in this way, they are unlike any other part of the Constitution.<sup>420</sup> Thus, free-labor statutes do not just flow from Congress's democratic decision to punish—the condemnation also flows from the Constitution *itself*. Nondelegation is therefore less salient here, since the courts have inherent power to interpret the Constitution.

However, the traditional, non-slavery aspects of Lenity should remain intact, even in these cases. Intent is one example: Courts were (and are) unwilling to dispense with a traditional *mens rea* in criminal cases, in the absence of clear legislative intent.<sup>421</sup> There is no reason to abandon this common-law rule in free-labor cases unless Congress clearly imposes a lower standard.

## B. The Noninterference Principle

The Rule of Liberty also precluded judicial interference when political actors granted freedom. The Noninterference Principle required near-absolute deference in these situations, because the court's equity powers could not extend to void the right to freedom, except in the clearest of cases.<sup>422</sup> Democratic power can legitimately be used to grant freedom or to restrict it. However, under the Rule of Liberty, *judicial* power cannot not be used against raw political power that favors liberty.

The Thirteenth Amendment did not repeal Article I's delegation of legislative powers to Congress, nor did it divest the courts of their Article III authority to say what the law means. However, in a world where the executive has discretion to enforce the law, the Rule of Liberty has special force when the executive interprets the law to favor liberty. The Rule of Lenity—in its due-

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419. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 369; Dan Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

420. See Ahkil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 403 (1997).

421. *Birney v. Ohio*, 8 Ohio 230, 238 (1837); *Torres v. Lynch*, 136 S. Ct. 1619, 1630-31 (2016).

422. See, e.g., *Findly v. Nancy*, 3 T.B. Mon. 400, 400-02 (Ky. 1826) (“It may be a matter of some consideration . . . whether the chancellor ought, in any case, to grant a new trial at law, for the purpose of taking away a right to freedom . . . The case which would warrant such interference ought to be strong and clear.”).



process and separation-of-powers form—appears here in the exercise of prosecutorial discretion.<sup>423</sup> Liberty has its own role.

One of these cases recently ended in a tie before the Supreme Court. *United States v. Texas* involved the President’s authority to interpret the Immigration and Nationality Act to allow certain undocumented immigrants to work.<sup>424</sup> Texas’s primary argument was that the statute conferred no such authority on the Executive.<sup>425</sup> In an ordinary statutory-interpretation case, Texas might be right. However, the free use of labor has long been recognized as a component of liberty protected by the Thirteenth Amendment.<sup>426</sup> Allowing the President to give someone the right to remain here (which the President may do) but not the right to work here creates a caste of residents who are economically paralyzed in a condition similar to slavery or the Jim Crow South.<sup>427</sup>

The Rule of Liberty has something to say about this deadlock. Executive interpretations ordinarily receive deference so long as the statute is ambiguous and the result is reasonable.<sup>428</sup> The Rule of Liberty suggests that if the executive interprets an ambiguous law to favor liberty, the courts should defer to it—reasonable or not—unless and until the political branches act. This is what courts do when prosecutors decline to file charges.<sup>429</sup> These decisions are afforded near-absolute deference because the courts will not compel the executive to prosecute someone at the behest of a third party.<sup>430</sup>

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423. See *Nader v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974). See generally Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, B.U. L. REV. (forthcoming 2017).

424. *Texas v. United States*, 809 F.3d 134, 146-48 (5th Cir. 2015), *affirmed by an equally divided court*, 136 S. Ct. 2271 (2016).

425. *Id.* at 149-50.

426. See, e.g., *Pollock v. Williams*, 322 U.S. 4, 16-20 (1944); *Clyatt v. United States*, 197 U.S. 207, 218 (1905).

427. Oral Argument, *United States v. Texas*, No. 15-674, at 28:8-10, 20-22, 24-25 (Question of Alito, J.) (“I’m just talking about the English language. I just don’t understand it. How can . . . it be lawful to work here but not lawful to be here?”).

428. *Chevron, U.S.A., Inc. v. Nat’l Res. Defense Council*, 467 U.S. 837, 842-43 (1984).

429. *Nader v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974) (cataloguing the long history of this rule). As a practical matter, this deference is absolute. See *id.*

430. See *id.* (citing, e.g., *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *Milliken v. Stone*, 7 F.2d 397 (S.D.N.Y. 1925), *aff’d*, 16 F.2d 981 (2d Cir. 1927).

Similarly, when the executive attempts to “alleviate human suffering” and does not violate vested rights in the process, the courts should not interfere. Unreasonableness, arbitrariness, or caprice in executive action is inappropriate when the result violates vested rights.<sup>431</sup> But when the executive bends ambiguous rules to alleviate burdens on human liberty, that unreasonableness inflicts no harm aside from offending the political convictions of the party not in the White House. Take *Texas* as an example: Congress may restrict the employment liberty of illegal immigrants, but it should do so clearly—not by implication, inference, or judicial interpretation.<sup>432</sup> If the executive violates the political opinions of the country, Congress or an election can remedy it. The courts do not exist to weigh in on political disputes about immigration policy; they exist to protect individual rights.<sup>433</sup> And permitting someone to work violates no one’s vested rights.<sup>434</sup>

### C. The Implied Repeal Principle

It is commonly accepted that the Thirteenth Amendment repealed the Three-Fifths Clause and the Fugitive-Slave Clause of the original Constitution.<sup>435</sup> But the Rule of Liberty often persuaded courts to hold that slave-law statutes were impliedly repealed by laws only slightly inconsistent with slavery.<sup>436</sup> It is possible, then, that the Thirteenth Amendment limited other portions of the original

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431. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

432. See *Texas v. United States*, 809 F.3d 134, 146-48, 180-86 (5th Cir. 2015), *affirmed by an equally divided court*, 136 S. Ct. 2271 (2016); *Id.* at 188, 215-18 (King, J., dissenting). The intense division between the Judges and Justices in this case—not to mention the sometimes-impenetrable labyrinth of the INA—strongly suggests ambiguity.

433. See *Marbury*, 5 U.S. at 166.

434. Another way to frame this argument is as a nonjusticiable political question. The judicial power can act upon a controversy where the executive “sport[s] away the vested rights of others.” *Id.* But when the executive “professes a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.” *Id.*

435. See, e.g., *Evenwell v. Abbot*, 136 S. Ct. 1120, 1146-47 (2016) (Alito, J., concurring in the judgment) (Three-Fifths Clause); *Penick v. Columbus Bd. of Ed.*, 583 F.2d 787, 790 (6th Cir. 1978) (Fugitive-Slave Clause).

436. *Robin v. Hardaway*, 1 Jefferson 109, 116, 122 (Va. 1772); *Hudgins v. Wrights*, 1 Hen & M. 134, 137-38 (Va. 1806); *Campbell v. Campbell*, 13 Ark. 513, 521-22 (1853); *Commonwealth v. Jennison*, 1 Proc. Mass. Hist. Soc. 1873-75, 293, 294 (Mass. 1783) (Opinion of Cushing, C.J.).

Constitution insofar as they supported slavery. Hate Speech is a good candidate for this thought experiment.

The Supreme Court has generally been intolerant towards hate-speech laws.<sup>437</sup> There are good reasons for this, sounding in democratic legitimacy and fear of censorship.<sup>438</sup> But there are also good reasons to believe that the Thirteenth Amendment diluted protection toward some race-based hate speech, and that Congress has power to punish it as an incident of slavery.

The First Amendment has never shielded all expression. Threats, defamation, and obscenity are beyond the pale of protection.<sup>439</sup> They are not protected, generally, because they harm while adding nothing meaningful to public dialogue.<sup>440</sup> But in antebellum South Carolina, calling a free person a “negro” or a “mulatto” was actionable defamation. The courts refused to protect this speech because if true, it would subject the person to the disabilities in the slave codes. In other words, they removed it from the ambit of protected speech because it was *harmful* to its victims.<sup>441</sup>

The parallel between these cases and modern hate-speech laws is not perfect. Calling someone a *n\_\_\_\_\_r* has no effect on their legal status. But these cases still have some force. Race-based hate speech has no purpose other than to harm, to intimidate, to invoke the dual-caste system of slavery, and to reinforce the perceived inferiority of the black person.

Thus, there is room in First Amendment jurisprudence for another historical exception: Speech that has no serious literary, scientific, or historical value but that is solely intended to degrade the African-American is not protected.<sup>442</sup> But this is the extent of Liberty’s reach. When deciding cases on the margin of the “serious

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437. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

438. Compare generally James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, CONST. COMMENT. (forthcoming 2017) with Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010).

439. *Virginia v. Black*, 538 U.S. 343 (2003) (threats); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

440. *Roth*, 354 U.S. at 484-85 (“All ideas having the slightest redeeming social importance . . . have the full protection of [First Amendment] guarantees. But . . . obscenity [i]s utterly without redeeming social importance . . .”).

441. *Eden v. Legare*, 1 Bay 171, 171 (S.C. 1791); *Smith v. Hamilton*, 10 Richardson 44, 44 (S.C. 1856).

442. See generally KEVIN W. SAUNDERS, *DEGRADATION: WHAT THE HISTORY OF OBSCENITY TELLS US ABOUT HATE SPEECH* (2011).

literary, scientific, or historical value” test, the courts should err in favor of Lenity. If the criminal avenue is too severe, this theory could still be used to sustain a federal tort statute on the same topic.

This exception could be seen as an impermissible authorization for Congress to regulate all hate speech—or even all race-based hate speech. This assumes too much. It is true that the bright history of the West is riddled with discrimination and prejudice against women and minority groups.<sup>443</sup> It is true that the Amendment protects all people from slavery. But African-American slavery is the original sin of the United States; it is the most vile thing we have done to other humans.<sup>444</sup> No other group of people in American history have been subjected to the vicious and evil degradation that African-Americans have experienced. “Difficult and intractable problems often require powerful remedies,”<sup>445</sup> and if any problem in our history can be considered intractable, it is slavery and the racial hatred of blacks that slavery nurtured in the heart of the white American. A prohibition on hate speech against the African-American rests squarely on this footing; other bars on hate speech do not. The First Amendment cannot protect speech that is inextricably intertwined with an institution that the Constitution destroyed.

#### CONCLUSION

*“All slavery has its origin in power, and is against right.”*<sup>446</sup>

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443. See generally Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL’Y 89 (1994).

444. See, e.g., 2 THE FREDRICK DOUGLASS PAPERS, SERIES ONE, 253–55 (John W. Blassingame ed. 1982) (“The first work of slavery is to mar and deface those characteristics of its victims which distinguish *men* from *things*, and *persons* from *property*. Its first aim is to destroy all sense of high moral and religious responsibility. It reduces man to a mere machine. It cuts him off from his maker, it hides from him the laws of God, and leaves him to grope his way from time to eternity in the dark, under the arbitrary and despotic control of a frail, depraved and sinful fellow-man.”)

445. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000).

446. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 538 (1856) (McLean, J., dissenting).