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Slavery in the Canon of Constitutional Law - Symposium on the Law of Slavery: Constitutional Law and Slavery

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SLAVERY IN THE CANON OF CONSTITUTIONAL LAW

SANFORD LEVINSON*

I. INTRODUCTION

One of the central debates in contemporary intellectual, and particularly academic, life concerns the notion of "canonicity." Among other things, this debate addresses the question of how disciplines, especially within the "liberal arts" and at the introductory level, become substantially defined in terms of certain subject matters that in turn are approached through the study of a limited number of what the British call "set texts." These texts then comprise, among other things, the base of knowledge that every educated man or woman, at least within particular disciplines, is expected to know. There are many possible answers to the question of canonicity, at various levels of abstraction or reference to social theory.

In this Essay I confine myself to a relatively low level of abstraction and, concomitantly, relatively uncomplicated empirical assumptions. Whatever else might be involved in the successful construction of a canon, it is hard to imagine the process taking place without the actual presentation of the canonical issues and texts in the syllabi of relevant courses. Everyone knows the difference between "assigned" and "suggested" reading, and a necessary condition of canonicity is the appearance on the first of these two lists. What I want to do in this Essay is to defend a (deceptively) simple proposition: slavery ought to be a major topic of an introductory course in constitutional law, which is also to say that among the "set texts" assigned students, and made the subject of our class discussions, should be cases and materials involving slavery. Let me make this proposition more concrete: no fewer than six of the forty-two classes of my first-year constitutional law course are devoted to various aspects of slavery, and I shall detail below why I think they are so important and why it is worth paying the undoubted costs that are incurred by including them in the canon. The most obvious cost, given the inevitable limitations of time available in a course, is the necessity of

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omitting other valuable material in order to make way for the materials on slavery.

Before turning to the specifics of my syllabus and its rationale, it is crucial to note that teachers construct their syllabi by reference to what is easily available. It is, indeed, paradoxical to refer to an "out-of-print" canonical text, for surely one of the indicia of canonicity is that a work remains in print, year after year, providing profits to its publishers by virtue of its remaining on syllabi and therefore being assigned to new generations of students. Within the legal academy, especially, the role of the "casebook" is crucial, for very few professors include in their syllabi material that is not presented in one or another of the standard casebooks.

It will surely surprise no reader that my own casebook of choice is one that Paul Brest and I coedit, *Processes of Constitutional Decisionmaking*. I think it is safe to say that it is unique among currently available casebooks on general constitutional law (that is, those not devoted exclusively to "the constitutional law of race relations" and the like) in the amount of coverage it gives slavery. The first extended section of the book is organized chronologically, and within the first three chapters can be found fairly extensive excerpts from a variety of cases involving slavery. They include *The Antelope*, *Elkison v. Deliesseline*, *Groves v. Slaughter*, *Prigg v. Pennsylvania*, (perhaps the farthest-reaching legitimation of implied national power in our history), and, of course, *Dred Scott v. Sandford*. Readers will also find, just as importantly, most of the text of Frederick Douglass's speech, "The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?" as well as selections from exchanges between Abraham Lincoln and Stephen A. Douglas about the legitimacy of *Dred Scott*. They will also read an opinion by Attorney General Caleb Cushing explaining why Southern states can legitimately prevent the delivery of abolitionist mail calling into question the legitimacy of slavery. Finally, a section on Abraham Lincoln as a war presi-

5. 8 F. Cas. 493 (1823).
7. 41 U.S. (16 Pet.) 536 (1842).
10. Id. at 211-14 (quoting CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 20-21, 36-37, 56-57, 77-78 (Paul Angle ed., 1958)).
11. Id. at 190-91 (quoting 8 Op. Att'y Gen. 489 (1857)).
dent culminates in a discussion of the Emancipation Proclamation, including a vigorous "dissent" to the Proclamation written by former Justice Benjamin R. Curtis,\textsuperscript{12} who had, of course, just as vigorously dissented from Chief Justice Taney's egregious opinion in \textit{Dred Scott}. In addition to a number of predictable Fourteenth Amendment cases that, in one way or another, make reference to the prior existence of chattel slavery,\textsuperscript{13} we also include \textit{Bailey v. Alabama}, in which the Alabama peonage laws were described by the Supreme Court (over Justice Holmes's vigorous dissent) as the kind of "involuntary servitude" outlawed by the Thirteenth Amendment.\textsuperscript{14}

As the casebook coeditor I can state with confidence that a high degree of self-consciousness went into the selection (and omission) of cases. I strongly hope that these choices work to influence the canon of our discipline in a number of respects, one of which most definitely concerns the treatment of slavery. Ideally, more casebooks would include relevant material on slavery. Should this occur, the Brest & Levinson casebook would lose some of its market advantage, but that would be a price well worth paying.

However, as already suggested, in the current market this emphasis on slavery is unusual. Consider, for example, five widely used casebooks in American law schools, all edited by distinguished scholars. These are the casebooks edited by Gerald Gunther;\textsuperscript{15} by William B. Lockhart, Yale Kamisar, Jesse H. Choper, and Steven H. Shiffrin;\textsuperscript{16} by William Cohen and Jonathan Varat;\textsuperscript{17} by Ronald Rotunda;\textsuperscript{18} and by Geoffrey R. Stone, Michael L. Seidman, Cass R. Sunstein, and Mark V. Tushnet.\textsuperscript{19} I think it is only slightly hyperbolic to say that any students whose knowledge of American constitutional history will be derived from their immersion in any of the first four of these texts will have only the dimmest realization that the United States ever included a system of chattel slavery or, just as

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 224-26 (quoting 2 \textsc{A Memoir of Benjamin Robbins Curtis} 306-35 (Benjamin R. Curtis ed., 1879)).
\item \textsuperscript{13} \textit{See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); The Civil Rights Cases, 109 U.S. 3 (1883).}
\item \textsuperscript{14} 219 U.S. 219 (1911). Given my belief that \textit{Bailey} should become part of the standard canon of constitutional law cases, it grieves me to confess that I do not include \textit{Bailey} in my syllabus because of the pressures of time.
\item \textsuperscript{15} \textsc{Gerald Gunther, Constitutional Law} (12th ed. 1991).
\item \textsuperscript{16} \textsc{William B. Lockhart et al., Constitutional Law: Cases, Comments, Questions} (7th ed. 1991).
\item \textsuperscript{17} \textsc{William Cohen \& Johnathan Varat, Constitutional Law: Cases and Materials} (9th ed. 1993).
\item \textsuperscript{18} \textsc{Ronald D. Rotunda, Modern Constitutional Law: Cases and Notes} (3d ed. 1989).
\item \textsuperscript{19} \textsc{Geoffrey R. Stone et al., Constitutional Law} (2d ed. 1991).
\end{itemize}
importantly, that its implications pervaded every single aspect of constitutional law (and constitutional interpretation). All of these four basically limit their recognition of slavery to very brief mention of *Dred Scott* and nothing more.

Consider, for example, the fact that, although there is an index entry for "slavery" in his book, Professor Gunther offers only three fleeting mentions, two of them in footnotes, of *Dred Scott*. An attentive student will learn, for example, that the case "held unconstitutional (in part on Fifth Amendment due process grounds) the Missouri Compromise of 1820, a congressional law that excluded slavery from specified portions of American territory." True enough, but this is scarcely the only significant aspect of *Dred Scott*, especially given the repeal of the Missouri Compromise in the Kansas-Nebraska Act in 1854. Students should realize that Taney in effect held unconstitutional the platform of the new Republican Party entering the American political scene insofar as it was committed to blocking the further expansion of slavery into the territories, not to mention the declaration by the Chief Justice that, in the absence of a constitutional amendment, blacks were simply, and permanently, excluded from the American political community. Indeed, they were "so far inferior" in the eyes of ruling whites "that they had no rights which the white man was bound to respect." Gunther is certainly no worse than Lockhart et al., Cohen and Varat, or Rotunda, which also confine themselves to brief mention of *Dred Scott* and nothing else from or about any other materials involving slavery.

Stone, et al., in comparison, offer far more, perhaps reflecting the fact that Professor Tushnet has written an important book on slavery. Their text offers three pages on "Slavery and the Constitution," followed by a two page Note on "Constitutional Attacks on Slavery." This in

20. **Gunther**, *supra* note 15, at 12 n.6, 23, 403 n.2.

21. *Id.* at 403 n.2.

22. The importance of the territorial expansion of slavery is well laid out in Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 60 AM. HIST. REV. 327 (1964), portions of which are reprinted in BREST & LEVINSON, *supra* note 2, at 214-16.


26. **Stone** ET AL., *supra* note 19, at 472-77. Included here, with great effect, is State v. Post, 20
turn is followed by two and one-half pages from *Dred Scott*, before the book moves on to consideration of the Fourteenth Amendment and the interpretations of racial classifications based on that Amendment. Even conceding that this constitutes a marked improvement over the other four casebooks, I would still describe it as a relatively scanty introduction to the subject of slavery and the Constitution.

I certainly realize that these distinguished editors could do to *Processes of Constitutional Decisionmaking* what I have just done to them, for we have also omitted a number of issues that might well be thought central to a basic education in constitutional law. We do not, for example, cover many of the contemporary cases dealing with freedom of speech or press, including such fundamental modern cases as *New York Times v. Sullivan*\(^\text{27}\) or *Buckley v. Valeo*.\(^\text{28}\) Also, students looking for illumination on the issue of pornography will find nothing very helpful in our book.

As already suggested, anyone who has ever constructed a syllabus or gathered materials for a casebook is well aware that there is neither time nor paper enough to include everything that one might legitimately want to cover. Choices, almost none of them easy, must inevitably be made. What I want to do in this Essay, then, is to present my reasons for allocating so much time and casebook space to slavery, even though I know that such a choice deprives my students (or the users of our casebook) of material or information in regard to other topics that would surely be desirable. Indeed, one purpose of this Essay is to encourage a broad public discussion by casebook editors (and the professorial constructors of syllabi based on these casebooks) of the rationales for their choices, whether about slavery, freedom of speech, assertions of presidential power, or any other topic of constitutional law.

Before turning to the specifics of slavery, I should make one more obvious point: A successful defense of the inclusion of materials on slavery is not the equivalent of a justification of any given omission. One might well believe, for example, that materials on the modern interpretation of the “dormant commerce clause,” somewhat copiously present in the Brest & Levinson casebook (though not, in fact, included in my

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\(^{27}\) 376 U.S. 254 (1964).

\(^{28}\) 424 U.S. 1 (1976).
course syllabus), should have been omitted instead of the materials on libel\textsuperscript{29} or on regulation of election finance, the latter of which is, I believe, the most important contemporary First Amendment issue. That may well be true, but that is not my concern in this Essay, which attempts only to make the case for including in our teaching more materials on slavery. I am more than happy to leave the decision as to what is best excluded—to make time available for these new materials—to the individual readers of this Essay.

It may also be relevant to confront directly the possibility that many teachers might be reluctant to present materials on slavery because of the emotional valence surrounding the subject. There can be no doubt that the material is emotionally loaded, especially if one asks students, as I do, to assess the cases in terms of “thinking like a lawyer.” That is, I spend relatively little time denouncing the practice of chattel slavery; much more is spent trying to determine whether one's objections to the arguments found in the legal materials are “internal,” based on inappropriate uses of standard legal modes of analysis, or “external,” based simply on the justifiability of the results in terms of morality, political theory, political desirability, or any other basis of objection.\textsuperscript{30} I think it is important to take seriously the possibility that Taney might have been “right” in \textit{Dred Scott}, especially if one has earlier accepted the legitimacy of \textit{Prigg} and several other cases that will have been read earlier.\textsuperscript{31} Ought that to be an “unthinkable” thought for our students? By what criteria is it unthinkable?

This cuts to the heart of the entire enterprise of legal education. Do we teach, in effect, that law is comic—that “thinking like a lawyer” is guaranteed in advance to bring one to morally admirable (or at least tolerable) results? As I have written elsewhere, too “[l]ittle recognition is given to the possibility that life under even the American Constitution may be a tragedy, presenting irresolvable conflicts between the realms of law and morality.”\textsuperscript{32} To refuse to acknowledge the possibility is irresponsible. If one wants to rebut it, what better way than an explicit confrontation with just such cases as are considered in this Essay?

\textsuperscript{29} This might especially be the case insofar as \textit{New York Times v. Sullivan} is best understood within the context of attempts by Southern white segregationists to defeat the “Second Reconstruction” by making it next to impossible for the national press to cover what was occurring in the Deep South. See \textsc{Paul Brest \& Sanford Levinson}, \textit{Processes of Constitutional Decisionmaking} 1176 (2d ed. 1983) (noting that as of March, 1964, libel suits claiming a total of $300 million in damages were pending in the South).

\textsuperscript{30} I also spend a great deal of time in effect questioning the legitimacy of the distinction between internal and external criteria.

\textsuperscript{31} \textit{See infra} text accompanying notes 47-130 for more extended discussions of these cases.

\textsuperscript{32} \textit{See Sanford Levinson, Constitutional Faith} 59 (1988).
Whether one defines the play of law as comic or tragic, the key actors in the enactment of the play include not only the judges whose opinions are the focus of our attention, but also lawyers, who must decide whether they will indeed provide representation to all those who seek the vindication of their legal rights. What ought we to be teaching our students about such duties of representation? In two notable articles, Charles Fried and Stephen Pepper both offer vigorous defenses of the lawyer's willingness to assert any and all legal rights that the system makes available to its citizenry. According to Fried, "[t]he lawyer acts morally because he helps to preserve and express the autonomy of his client vis-a-vis the legal system." Fried is fully aware that persons can be devoted to immoral ends. Still, he says:

whatever else may stop the pornographer's enterprise, he should not be stopped because he mistakenly believes there is a legal impediment . . . . [R]ights are violated if, through ignorance or misinformation about the law, an individual refrains from pursuing a wholly lawful purpose. Therefore, to assist others in understanding and realizing their legal rights is always morally worthy. Similarly, according to Pepper, "[t]he client's autonomy should be limited by the law, not by the lawyer's morality."

To be sure, Fried emphasizes that he is writing only about a lawyer "within the context of just institutions." An obvious question, and not only for Fried, is whether the United States prior to 1865 provided such a context so as to license an attorney in giving professional succor to slave owners seeking the enforcement of their ostensible legal rights in regard to their property. Would Fried, for example, accept the substitution of "slaveholder" for "pornographer" in the excerpt above?

Equally obvious is that resolution of such a question raises issues that go far beyond the specifics of slavery—ranging from classic questions of political philosophy regarding the criteria of justice and injustice, to the extent to which we wish to profess confidence even today that our basic institutions are sufficiently just to support the claims of Fried or Pepper as to the lawyer's role. To be sure, such discussions present issues not only of great intellectual difficulty, but also of high emotional

34. Fried, supra note 33, at 1074.
35. Id. at 1075.
36. Pepper, supra note 33, at 626.
valence. There is nothing easy about being challenged as to the way one is choosing to live one's life, but that is what serious education ultimately is about.

II. SLAVERY AND AMERICAN CULTURAL LITERACY

It is tempting to defend teaching about slavery simply by reference to certain notions of cultural (or historical) literacy or to the political importance of every American’s awareness of the presence of chattel slavery in our background. I believe that both of these rationales are perfectly correct. However, one more assumption may be necessary to justify the necessity of teaching these materials in law school as part of a standard (that is, required) course on constitutional law. That assumption is that our students will not otherwise become even minimally knowledgeable about slavery if we do not take care to bring the relevant materials to their attention. I confess I think that this assumption is all too often likely to be accurate; fewer and fewer students seem to have felt any need (or institutional pressure) to take as part of their undergraduate education serious courses in American history that include any detailed coverage of chattel slavery. Nor, I suspect, would more than a very few of these students voluntarily select as part of their legal education a course that billed itself as including substantial materials on slavery.

I doubt, of course, that many students are unfamiliar with the abstract fact that slavery once existed in the United States. That is not really the issue. Rather, how many of our students have any genuine idea of how the practice of “thinking like an American constitutional lawyer” was centrally shaped by having to integrate, within the fabric of our law, the adoption of chattel slavery as a system of labor and social relations within much of the United States? To the degree that I think the answer is “all too few,” I think it is crucial that we, as self-conscious educators of lawyer-citizens, should try to alleviate this deficiency. I am motivated in part by a belief that this information about the American past is crucial, in a variety of ways, to understanding a number of contemporary features, including legal dimensions, of American society.

Whatever the cogency of these rationales, they do not at all exhaust the reasons that I emphasize slavery so greatly in my course and casebook. Indeed, I confess that I would have far more mixed feelings than I have about my decisions if these were the only reasons supporting them. The rationales sketched out may seem too overtly “political,” having almost nothing to do with preparing my students for their professional roles as lawyers. Thus, I also insist that the cases and materials are excellent tools of pedagogy for raising central problems of constitu-
tional law and theory that should be at the heart of any first-year course; though, of course, I insist as well that slavery has "surplus value," as it were, that justifies their substitution for the contemporary cases that many students might in fact prefer.38 What I want to do, therefore, in the remainder of these remarks is to discuss with some specificity the various uses I make of the slavery materials in my own course and, of course, to try to persuade my academic readers to do likewise.

III. SLAVERY IN THE SYLLABUS

Slavery overtly enters my course in its fourth week, following two classes on the place of unenumerated rights in constitutional analysis. The first class in this sequence focuses on *Fletcher v. Peck*39 and, more particularly, the role of what Chief Justice Marshall terms "general principles which are common to our free institutions"40 or, even more strikingly, of what Justice Johnson describes as "the reason and nature of things: a principle which will impose laws even on the deity."41 I use this as the occasion for mentioning an important debate in seventeenth and eighteenth century theology about the extent to which God is "bound" by the principles of justice, a debate which goes back, of course, at least as far as Plato's *Euthyphro*.42 If one meaning of popular sovereignty, a concept introduced earlier in the course via *McCulloch v. Maryland*,43 is that "the voice of the people is [equivalent to] the voice of God," then it is no small matter to discuss whether either of these voices is unconstrained in the commands they might enunciate.

The second class focuses on *Griswold v. Connecticut*,44 particularly Justice Harlan's invocation of American traditions to strike down Connecticut's egregious law regulating the use of contraceptives.45 A central question, of course, is how one delineates the American political tradition. Among other things that we include in our discussion of that tradition's "fundamental values" is Garry Wills's pithy comment that "[r]unning men out of town on a rail is at least as much an American tradition as declaring unalienable rights."46

38. I am grateful to Mark Tushnet for forcing me to address this point.
39. 10 U.S. (6 Cranch) 87 (1810).
40. *Id.* at 139.
41. *Id.* at 143.
43. 17 U.S. (4 Wheat.) 316 (1819).
44. 381 U.S. 479 (1965).
45. In his concurring opinion, Justice Harlan incorporated by reference his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 522-55 (1961), which we, like many other casebook editors, reprint as part of the *Griswold* materials.
46. Quoted in BREST & LEVINSON, supra note 2, at 965. We are quoting not only Wills, but
At this point, attention turns to Chief Justice John Marshall's opinion in *The Antelope*, which dealt, broadly speaking, with the duty of the United States to return certain slaves to their "lawful" Spanish or Portuguese "owners." These slaves had been captured by pirates while in transit from Africa to some other country in which the slave trade was still legal. The pirates in turn were captured by the United States Coast Guard, which brought them and their booty, including the slaves, into the territory of the United States, which had, of course, in 1808 outlawed participation in the international slave trade. What, then, was to be done with the captured slaves?

In his opinion answering this question, Marshall draws a very sharp contrast between the "jurist" and the "moralist": "[T]his court must not," Marshall insists, "yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law." Thus, at least some of the slaves were indeed returned to their owners. Yet Marshall certainly does not overtly defend slavery. On the contrary, he denounces both the international slave trade and, indeed, slavery itself as violative of natural rights, natural law, and Christian morality. Students cannot take refuge in a historicist argument that Marshall did not share, in at least some respect, our own opposition to slavery. To be sure, I scarcely believe that Marshall's world is our own, though a principal difference, ironically enough, may be that Marshall was considerably more confident about the existence of transcendental principles of justice or injustice than most of us "postmoderns." However, in this instance at least, these epistemological differences are secondary to the brute fact that Marshall had no hesitation in denouncing the morality of slavery. Far more important is that the denunciation, whatever its epistemological sources, is treated as irrelevant, for, contrary to what Marshall seems to have been suggesting in *Fletcher*, law and justice appear to have precious little to do with one another. Indeed, much of his own argument is predicated on the international tradition of recognizing the continuing legitimacy of the slave trade (though any given nation could, of course, withdraw from the trade).

Also John Hart Ely, who uses the Wills quotation as part of his own attack on the notion of traditionalism.

47. 23 U.S. (10 Wheat.) 66 (1825).
48. Id. at 123-24.
49. Id. at 121.
50. Id. at 114.
51. Id. at 131-32.
52. Id. at 120-21.
53. See supra text accompanying notes 39-40.
In addition to obvious questions about the relevance of morality to legal analysis, I also ask students to explain Marshall’s (and Johnson’s)
seemingly different postures in the two cases. Is it, for example, relevant,
for interpretive purposes, that, as a formal matter, Fletcher is a constitu-
tional case, whereas The Antelope involved international law? This seems
unlikely, unless, of course, there was some kind of particular textual pro-
vision that commanded judges to treat natural justice as part of constitu-
tional law but not otherwise to be enforced.

More to the point, I believe, is the different thrust in the two cases of
what might be termed “prudential” factors. That is, in Fletcher, Mar-
shall suggests that disruption of the land claims at issue in that case
would have negative consequences to the pace of American economic
development, for holders in due course would be ever fearful that appar-
et title to their property could be attacked by reference to problems
much earlier in the chain of title. “General principles” of justice hap-
pily coincided with the prudential cause of economic development. In
The Antelope, on the other hand, no such joyful congruence of deontol-
ogy and consequence is present.

It takes little imagination to summon up a series of dire conse-
quences had Marshall vindicated natural rights or natural law by freeing
the hapless slaves. Portugal and Spain, however weakened as interna-
tional powers, might have felt under some pressure to respond to this
astounding breach in international law—whether through military re-
response (admittedly unlikely) or (more plausibly) commercial retaliation
against American interests. Far more to the point, of course, is the likely
reaction of Marshall’s fellow Southerners, especially South Carolinians
who had already begun their baleful analyses of the necessity for seces-
sion if the Southern way of life were to be maintained. Already, in
McCulloch, Marshall had explicitly referred to the possibility of “hostil-
ity of a . . . serious nature” occurring within the still new nation as a
result of the serious tensions present in it. Again, the obvious question
to ask students is whether any of these concerns are within the ambit of
“thinking like a lawyer” and, if so, whether “law” can be so neatly sepa-
rated from “politics,” or “principles” from “results,” as is often
suggested.

This point is made with frightful clarity in *Prigg v. Pennsylvania*.

55. *See supra* text accompanying note 41. Justice Johnson, of course, joined Justice Marshall’s
56. *Fletcher*, 10 U.S. (6 Cranch) at 133-34.
59. 41 U.S. (16 Pet.) 539 (1842).
in which Justice Story, for the Court, among other things upholds the constitutionality of the Fugitive Slave Act of 1793 and strikes down Pennsylvania’s “personal liberty law” that attempted to put some constraints on the ability of slavecatchers to exercise “self-help” in the recapture of purported runaway slaves. What I find striking is the strain of instrumentalism in Story’s opinion. He notes, for example, that “no uniform rule of interpretation” is available in regard to the construction of the Fugitive Slave Clause of Article IV, though he ultimately seize on the notion of “purpose” to give him guidance:

How, then, are we to interpret the language of the clause? The true answer is, in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it. If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end; and by another mode it will attain its just end and secure its manifest purpose; it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No Court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.

The great purpose of the Constitution, according to Story, was the creation of a political union, which, he says, necessitated the making of various guarantees to slaveowning states that might otherwise have refused the invitation to union. Adherence to the purpose of maintaining the Union thus required continuing acquiescence to the interests of slaveholders, lest they become antagonistic to it. As we all know, of course, there was nothing paranoid about such concerns.

Indeed, it is worth noting that Story describes the Fugitive Slave Clause as a “fundamental article” of the Constitution, “without the adoption of which the Union could not have been formed.” Its status

61. 41 U.S. (16 Pet.) at 610.
62. The Fugitive Slave Clause provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation thereof, be discharged from such Service or Labour, but shall be delivered up on Claim of the Part to whom such Service or Labour may be due.

U.S. CONST., art. IV, § 2, cl. 3.
64. *Id.* at 611.
65. *Id.* There is some dispute about this:

The clause was not a significant issue in the convention. Introduced late in the proceedings by a South Carolina delegate, it aroused little debate and received unanimous approval. There is little evidence to support the assertion frequently made in later years that without the clause the constitution would have failed.
as a "fundamental" linchpin of the constitutional structure made it im-
portant that states be prevented from placing any burden on its effectua-
tion.66 Prigg may be, ironically enough, the debut in American con-
stitutional analysis of the notion of a "fundamental interest" that
would be vigilantly protected by the Court.67

All of this being said, I find it immensely useful, for both histori-
ographical and pedagogical reasons, to compare the paragraph quoted
above from Story's opinion to one found in Frederick Douglass's great
speech, "The Constitution of the United States: Is It Pro-Slavery or
Anti-Slavery?"68 Douglass's adversary in a Glasgow, Scotland debate
had suggested that the Constitution should be interpreted by reference to
the historical circumstances surrounding its adoption. Like Story, the
adversary pointed to the undoubted fact that the Constitution's framers
were willing to collaborate with slavery.69 Douglass, in contrast, empha-
sized the priority of what Philip Bobbitt would describe as "textualism,"
a relentless focus on the words of the text quite independent of any his-
torical referents they might be thought to have had.70 He then goes on to
offer a maxim of interpretation quite different in its implications from
those of Story's:

[My opponent] laid down some rules of legal interpretation. These
rules send us to the history of the law for its meaning. I have no objec-
tion to such a course in ordinary cases of doubt. But where human
liberty and justice are at stake, the case falls under an entirely different
class of rules. There must be something more than history—some-
thing more than tradition. The Supreme Court of the United States
lays down this rule, and it meets the case exactly—"Where rights are
infringed—where the fundamental principles of the law are over-
thrown—where the general system of the law is departed from, the
legislative intention must be expressed with irresistible clearness." The
same court says that the language of the law must be construed strictly
in favour of justice and liberty. Again, there is another rule of law. It
is—Where a law is susceptible of two meanings, the one making it ac-
complish an innocent purpose, and the other making it accomplish a
wicked purpose, we must in all cases adopt that which makes it accom-

66. Of course Story objected not only to "burdens," but also to any participation by states in
the enforcement of the Clause. Prigg, 41 U.S. (16 Pet.) at 613. Taney, dissenting, sensibly ques-
tioned this assignment of exclusive power to Congress, though, needless to say, he agreed that states
could not act to hinder its enforcement. Id. at 627-29.
67. I owe this suggestion to my colleague Scot Powe.
68. 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS 467-80 (P. Foner ed., 1950) [hereinafter
LIFE AND WRITINGS], reprinted in BREST & LEVINSON, supra note 2, at 207-11.
69. Id.
70. See PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); PHILIP BOBBITT, CONSTITUTIONAL
INTERPRETATION 12-13 (1991) (offering six "modalities" of constitutional interpretation, of which
"textualism" is one).
plish an innocent purpose.\textsuperscript{71}

To put it mildly, students (not to mention their teachers) should be encouraged to reflect on the difference it might make to adopt one or the other of these two purposive ends—maintenance of the Union, made possible, according to Story, only by collaboration with slavery, or respect for the principles of liberty, presumably even if risky to the maintenance of the Union (or does maintenance of the Union become a “compelling state interest” that in effect justifies chattel slavery or, more precisely, doing nothing to challenge its legal legitimacy at least in the states wherein it already existed?)

The term “compelling state interest” is, of course, drawn from modern constitutional law with its emphasis on the untenability of reading any part of the Constitution as stating any absolutes. The standard example is the jurisprudence of the First Amendment, where the apparently unequivocal command that Congress and, because of the Fourteenth Amendment, state legislatures pass “no law” abridging freedom of speech has been (sensibly) interpreted to mean that speech can indeed be abridged if the state presents a “compelling interest” justifying the abridgement. The obvious issue, of course, has always been what constitutes such a compelling interest and, more particularly, if abridgment of speech as a purported defense against a perceived threat to the maintenance of basic American institutions counts as one.

I find it immensely useful to discuss such issues through presenting an 1857 opinion by Attorney General Caleb Cushing upholding the propriety of Mississippi's prohibition of the delivery of mail sent into the state by outside abolitionists.\textsuperscript{72} One reason for assigning this opinion is simply to make the point, an important emphasis of the casebook as a whole, that many important acts of “constitutional interpretation” occur outside the courts, whether engaged in by other public officials like Cushing, or by distinguished citizens like Frederick Douglass.\textsuperscript{73} Another reason, more important in the context of this Essay, is that the issues raised by Cushing’s opinion continue to resonate even 135 years later, for there is a decidedly “modern” tone to his opinion.

Cushing emphasizes that all states must have the “power of self-preservation” and the concomitant ability to guard themselves against “insurrection.”\textsuperscript{74} Indeed, he regards this as a basic constitutional right,

\textsuperscript{71} 2 LIFE AND WRITINGS, supra note 68, at 467-80, reprinted in BREST & LEVINSON, supra note 2, at 210.


\textsuperscript{73} It was, of course, part of Taney's thesis in Dred Scott that Douglass could not be an American citizen. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 406.

\textsuperscript{74} 80 p. Att'y Gen. at 493.
“inalienable and imprescriptible.”75 Against this background assumption, he derives "the main question very much simplified. It is this: Has a citizen of one of the United States plenary indisputable right to employ the functions and the officers of the Union as the means of enabling him to produce insurrection in another of the United States?"76 Does a citizen of Ohio in effect have the constitutional right to conscript federal employees, such as postal officers, to aid them in their purpose of promoting insurrection in another State? It is this way of stating the question that, I suspect, helps to explain Cushing's utter lack of reference to the First Amendment, for even if he accepted its application to the executive branch (and not simply to congressional legislation), he almost certainly would have rejected any argument that "the freedom of speech" included the liberty (or, in the language of an earlier age, the "license") to counsel "insurrection."

As a states-rights Democrat, Cushing was intensely sensitive to local interests. Thus, he goes on to state that "the citizens of the State of Mississippi are the only competent judges of how much they may be inconvenienced by the impeded circulation among them of this or that pamphlet or newspaper."77 Sounding almost like Felix Frankfurter discussing the deference owed Congress upon that institution's decision to criminalize advocacy of a Communist revolution in the United States, Cushing writes that determining "inconvenience" is:

> a question of self-government, which it belongs to [the citizenry of Mississippi] to answer for themselves . . . . Moreover, there is here a balance of inconveniences. Insurrections are inconvenient things . . . . If the non-circulation of this or that foreign [sic] newspaper in a particular State be an inconvenience to somebody, it is, in the aggregate of all public interests, a much less inconvenience than the occurrence, or even the danger, of insurrection in the State.\(^{78}\)

As suggested by my reference to Frankfurter and the Smith Act prosecutions upheld in *Dennis v. United States*,79 Cushing is asking very basic questions that structure political debate even today. Most students, one suspects, will pronounce themselves horrified by the Mississippi prohibition; to the extent they are surprised by the absence of First Amendment analysis, one can note, in addition to the point made above, the Court's decision in *Barron v. Baltimore*\(^{80}\) that the Bill of Rights applied only to the national government.

75. Id.
76. Id.
77. Id. at 496.
78. Id. at 496-97.
80. 32 U.S. (7 Pet.) 243 (1833).
However, as already suggested, it is useful to ask precisely what difference it would have made had the First Amendment been addressed. Does the Amendment truly require states to be indifferent to the possible consequences of insurrectionary propaganda? Does the Constitution, contrary to Justice Jackson's famous jibe, in fact establish a "suicide pact" by which we are unable to defend our institutions against those who have announced themselves their sworn enemies and seek to enlist others in their hostility? One might, especially if a member of the American Civil Liberties Union, well find these questions tendentious and "rhetorical." Nevertheless, to put it mildly, opinions differ about this. Thus, I think it is pedagogically useful to ask students to specify exactly what does perturb—or horrify—them about Cushing's opinion. Most will surely emphasize the iniquity of slavery itself, but that is, of course, to beg the basic question fearlessly addressed by Justice Story in *Prigg*. Does the iniquity of slavery justify taking measures that, however favorable to liberty, threaten the maintenance of the Union? If one has been able to swallow Story's invocation of "practical necessity" and "implied" power, then it scarcely seems very difficult to go the next step and recognize the justifications, at least from the point of view of Mississippi's ruling elites, of the policy upheld by Cushing.

One would hope that students might suggest that this perspective scarcely deserves the priority I am implicitly giving it, but that, of course, is to raise the whole question of the importance of perspective in the construction of our notions of rationality or "compelling interests" in regard to the regulation of speech acts. Consider also the contemporary debate about the propriety of regulating racially-oriented hate speech, which Akhil Reed Amar has tried to place within the promise of the Thirteenth and Fourteenth Amendments of overcoming the residue of slavery.

This emphasis on the role of perspective in determining constitutional norms is at the heart of much "post-modernist" and feminist theory, and it can effectively be raised through consideration of slavery. When Marshall claims in *The Antelope* that "the world has agreed" and

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81. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

82. *See supra* text accompanying notes 59-67.


has given "general consent" to the practice of enslaving captives in war,\textsuperscript{85} one might scream out the obvious questions about who constitutes the consent-giving groups.

*The Antelope* involved, of course, international commerce in human beings. Central to almost all first-year courses on constitutional law is the regulation of commerce, and it should occasion no surprise to discover that slavery was implicated in the controversies surrounding the limits of commercial regulation. In the first century or so of the history of the United States, states rather than Congress tended to take center stage. Marshall's invocation in *Gibbons v. Ogden*\textsuperscript{86} of Congress's extraordinarily broad power over commerce was, even in the context of that case, dicta, and Congress asserted precious little of its potential reserve of power until the turn of the twentieth century. *Gibbons*, of course, only tangentially involved congressional regulation at all; the central arguments in that case concerned the "exclusivity" of congressional power over commerce and, therefore, whether a state retained any power to regulate commerce even in the absence of congressional regulation.\textsuperscript{87} Marshall, after announcing his strong inclination to adopt an exclusivity analysis, settled for emphasizing instead New York's purported conflict with a federal statute, thus transforming the case into a much tamer invocation of the Supremacy Clause.\textsuperscript{88} Justice Johnson, on the other hand, articulated a strong exclusivity view in a concurring opinion in *Gibbons*,\textsuperscript{89} which had been presaged by his opinion a year earlier in *Elkison v. Deliesseline*,\textsuperscript{90} a case involving South Carolina's Negro Seaman's Act of 1822. That Act, among other things, provided that "any free negroes [sic] or persons of color" brought by ship into a South Carolina port "be seized and confined in gaol until such vessel shall clear out and depart from this state. . . ."\textsuperscript{91} As suggested by its title, the law was especially concerned with the crews of ships entering Charleston harbor, and *Elkison* involved a British ship whose crew presumably included persons coming under the Act's description\textsuperscript{92}. Johnson struck the Act down as an unconstitutional regulation of commerce.\textsuperscript{93}

\textsuperscript{85} 23 U.S. (10 Wheat.) 66, 121 (1825).
\textsuperscript{86} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{87} Id. at 228-40.
\textsuperscript{88} Id. at 209.
\textsuperscript{89} Id. at 227.
\textsuperscript{90} 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366).
\textsuperscript{91} Id. at 493.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 496.
I bring up *Elkison* following my presentation of another key case on state regulation, *Mayor of New York v. Miln*,94 which presents quite vividly the issue of a state’s right to control what might be termed its “social character” through immigration restrictions. In this particular case, the central concern was the possible invasion (and contamination) of New York by “the moral pestilence of paupers”;95 the state, therefore, required ships’ captains to prepare detailed lists of their passengers and to post security for the maintenance of anyone likely to become a ward of the city.96 Describing New York’s law as an invocation of its “police power” in behalf of the health, safety, and welfare of the local citizenry, the majority, through Justice Barbour, upheld it.97 Justice Thompson characterized the law as indeed a regulation of commerce, but deemed this irrelevant, for states had concurrent power to regulate interstate commerce in the absence of overriding congressional regulation.98 Justice Story agreed with Thompson’s characterization, but went on to argue that only Congress could regulate commerce.99 New York’s law was, Story insisted, therefore unconstitutional.100

One way of understanding both *Miln* and slavery is to ask students whether the 1822 South Carolina statute would be unconstitutional under either Barbour’s or Thompson’s analyses. South Carolina clearly regarded free persons of color as the equivalent of a “moral pestilence” because of the potential discontent that might be generated within the slave community simply by observing the possibility of free persons of color possessing their own dignity. South Carolina may well have been evil, but were they “irrational” in deeming free blacks to be potential social dangers? If not, then why should the state be deprived of its power to protect itself, at least in the absence of explicit congressional legislation preventing this? Again, it should be obvious, students will be forced to confront the extent to which the basic decision in 1787 to enter a union with slaveholders had consequences for every aspect of American constitutional doctrine.

The racialist implications of *Miln* are further brought out by a discussion question, following that case,101 referring to Chief Justice Taney’s opinion in *The Passenger Cases*,102 in which he raises the specter of

94. 36 U.S. (11 Pet.) 102 (1837).
95. *Id.* at 142.
96. *Id.* at 153-54.
97. *Id.* at 142.
98. *Id.* at 146-47.
99. *Id.* at 156.
100. *Id.* at 162.
101. BREST & LEVINSON, supra note 2, at 162-63.
102. 48 U.S. (7 How.) 283 (1849). Stone et al. also mention *The Passenger Cases* for similar
the migration to the United States of "the emancipated slaves of the West Indies . . . ."103 "I cannot believe," says Taney, "that it was ever intended to vest in Congress" the power in effect to command the states to offer haven to such persons.104 Why not? The answer, for Taney (and for many others) was obvious. The unregulated entry of such persons into states unwilling to welcome them would "produce[e] the most serious discontent, and ultimately lead[] to the most painful consequences,"105 including, presumably, secession and warfare.

Although secession may no longer threaten, debates about immigration clearly remain part of the contemporary political scene, and every one of these debates inevitably involves the basic right of a sovereign state to control its borders against those it deems threats.106 It is, I think, useful for students to realize that the basic arguments made in Miln and successor cases have not vanished, even if the states comprising the United States are no longer viewed as having such "sovereign" power. Only this past year, for example, California passed a law that attempted to limit the welfare entitlements of new residents of that state to the level they would have received had they remained in their home states.107 It was held unconstitutional108 under Shapiro v. Thompson,109 but there is little reason to believe that that case, which garnered only five votes in the heyday of the so-called Warren Court (and Chief Justice Warren dissented!), would necessarily be reaffirmed by the contemporary Supreme Court. Moreover, as a political matter, Taney's concern is reflected today in regard to the justice of the national government's changing the social character of given states or areas of the country through national immigration policies (consider, for example, Cubans or Haitians in Florida).

purposes in GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 150 (2d ed. 1991) (discussing "commerce, national power, and slavery) and 269 (discussing "exclusive power" and the slavery issue").

103. 48 U.S. (7 How.) at 474.
104. Id. One might also note that the acknowledgement, in Article I, § 9, of Congress's power to bar the importation of slaves in 1808, might be taken as implied recognition of the states' retained powers to control immigration. Congress's power to prohibit the immigration of certain persons—i.e., slaves from abroad—scarce[ly seems to imply a power to require the states to accept any given category of immigrants. I owe this point to Paul Finkelman.

105. Id.
106. Indeed, while teaching Miln and its implications, I passed out an editorial from the New York Times criticizing President Clinton's announcement that he would order the removal of the AIDS virus from the list of diseases that automatically excludes potential immigrants into the United States. The decision was quickly attacked in Congress, and the Times endorsed a Senate vote turning the current administrative ban into statutory law. Immigrants Infected With AIDS, N.Y. TIMES, Feb. 20, 1993, § 1, at 18.
108. Id. at 523.
Miln involves the regulation of commerce as a means to a presumed permissible purpose, the protection of the non-economic health, safety, or welfare of the citizenry. What if the regulation is best described as a means of protecting local economic interests? This question is directly presented by an obscure but fascinating 1841 case, Groves v. Slaughter, which involved a provision of the 1832 constitution adopted by Mississippi that seemingly prohibited the importation of slaves for purposes of sale into that state. It was, however, perfectly legal to buy and sell local slaves; moreover, settlers entering Mississippi could bring with them any slaves they might possess. The prohibition was attacked as an illegitimate regulation of commerce. A majority of the Supreme Court deflected the attack by holding that the Mississippi Constitution was not self-executing and, therefore, that the failure of the state legislature to enact a law enforcing the provision deprived it of any legal force. This did not prevent three justices—Baldwin, Taney, and McLean—from conducting an important and illuminating debate.

Students should certainly realize that Justice Baldwin is stating “good” doctrine when he writes that “no state can control this [slave] traffic, so long as it may be carried on by its own citizens, within its own limits.” As Donald Regan has reminded us, perhaps the central meaning given the “dormant commerce clause” is the illegitimacy of a state’s trying to prevent the interstate shipment of goods in order to protect a local market. As it happens, Justice Baldwin relies more on the Privileges and Immunities Clause of Article IV than on the Commerce Clause, but the operational import is similar. Once more, students will probably want to argue that slavery is “different,” as did Justice McLean, so that ordinary Commerce Clause and Privileges or Immunities analyses should not be applied to a system so monstrous. Once more, students should be reminded of the practical impossibility of firmly differentiating “legal” from “political” analysis.

All of the questions treated above are present, of course, in what is certainly the most (in)famous of all slave cases, Dred Scott. The crux of Chief Justice Taney’s opinion is, in effect, that there can be no such category as “African Americans,” for membership in the American com-

111. Id. at 509.
112. Id. at 499-503.
113. Id. at 525.
115. Groves, 40 U.S. at 515.
116. Id. at 507-08.
117. 60 U.S. (19 How.) 393 (1857).
munity, as recognized by the basic status of citizenship, is limited to whites. One must, of course, point out to students the extravagance of Taney's denial that blacks had been accepted as part of the political community by some states at the time of the Constitution's drafting and ratification. That being said, it should also be noted that Taney undoubtedly expressed the views of many members of America's ruling elite, and it is misleading in the extreme to assume that Taney's basic argument is foolish.

_Dred Scott_ obviously raises a variety of questions about what former Attorney General Meese labeled "the jurisprudence of original intent," which received its first eloquent defense in Taney's opinion. According to Taney, the formally unamended Constitution "must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning . . . ." Taney sounds altogether like Robert Bork, who pronounced original intent the only legitimate modality of constitutional interpretation, when he insists that "[a]ny other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

If one wishes to attack _Dred Scott_, therefore, an obvious question is whether one must go after Taney's originalist modality or, instead, after his specific historical analysis. Many students, for example, endorse Justice Curtis's dissent, which attacks Taney's history. I ask them if this means that they would in fact support Taney if further historical research called Curtis's assertions into question and supported Taney's account instead. In the alternative, of course, one might decide that history should be regarded as irrelevant, though that decision itself raises all sorts of obvious questions.

As with Story's opinion in _Prigg_, Taney's opinion also raises

118. _Id._ at 406.
120. 60 U.S. (19 How.) at 426.
122. 60 U.S. (19 How.) at 426.
123. _Id._ at 574-76.
124. For a suggestion that this might be the case, see Paul Finkelman, _The Constitution and the Intentions of the Framers: The Limits of Historical Analysis_, 50 U. PITT. L. REV. 349, 390-95. Finkelman notes, "[t]hose who revere the framers and the Constitution can find solace only in the fact that some of the founders in 1776 and 1787 (though probably a minority of both groups) did not intend the results that Taney reached." _Id._ at 395.
125. See supra text accompanying notes 59-67.
profound questions for anyone committed to interpreting the Constitution in light of tradition-based "fundamental values." Usually, of course, the values that are mentioned are admirable ones, such as liberty or equality. But Taney, in substantial measure, suggests that racism is a fundamental value underlying the American political tradition, as he ruthlessly dissects patterns of American law and behavior that rest on assumptions of white superiority and black inferiority. At the very least, one must wrestle long and hard with the question of how one extracts from the extraordinarily complicated mosaic of the American past a particular pattern that allows one to identify some (admirable) traditional values as "fundamental" while dismissing the fundamentality of other, less praiseworthy, traditions that are arguably all too well represented in the actual behaviors of our culture. How do we decide which is the "authentic" depiction of our tradition? Is this even a sensible question to ask?

_Dred Scott_, of course, was a central focus of the Lincoln-Douglas debates in 1858 for many reasons, not the least of which was that Lincoln strongly suggested, in effect, that he refused to treat the case as establishing what we might today refer to as the "law of the land." That is, Taney's retrospective invalidation of the Missouri Compromise would not prevent Lincoln from supporting the prohibition of further slavery in the territories. Douglas, on the other hand, proudly stood as a purported man of "the law" acknowledging the supremacy of the Supreme Court as a constitutional interpreter. The questions clearly resonate even today. Consider anti-abortionists who are often castigated for introducing laws that, if enacted, would almost certainly violate the Constitution as interpreted by the current Supreme Court.

A collateral issue involved the standards to be used in appointment of new members of the Court. Lincoln suggested that _Dred Scott_ might well be overturned by a Court reflecting the views of new members. Douglas denounced such suggestions, accusing Lincoln of supporting the full-scale politicization of the judiciary:

[H]e is going to appeal to the people to elect a President who will appoint judges who will reverse the Dred Scott decision. Well, let us see how that is going to be done .... [W]hy, the Republican President is


128. Id. at 36.

129. Id. at 212.
to call up the candidates and catechize them, and ask them, "How will you decide this case if I appoint you judge." [Shouts of laughter.]

Suppose you get a Supreme Court composed of such judges, who have been appointed by a partisan President upon their giving pledges how they would decide a case before it arises, what confidence would have in such a court? ["None, none."]

It is a proposition to make that court the corrupt, unscrupulous tool of a political party. But Mr. Lincoln cannot conscientiously submit, he thinks, to the decision of a court composed of a majority of Democrats. If he cannot, how can he expect us to have confidence in a court composed of a majority of Republicans, selected for the purpose of deciding against the Democracy, and in favor of the Republicans? [Cheers.] The very proposition carries with it the demoralization and degradation destructive of the judicial department of the federal government.¹

Here, too, the questions resonate. How, indeed, can one have confidence in a judiciary chosen for "political" reasons, but how else can one imagine a judiciary being chosen? This is the perfect occasion to ask students to reflect on questions about the fealty due the Court and about the considerations that should go into appointing members of that body. Such questions, which often occupy the front pages of daily newspapers, are certainly worth discussing in a course designed to introduce students to the complexities of determining what it might mean to inhabit a Constitution-oriented regime.

Finally, there is President Lincoln and his remarkable leadership of the nation during the events of 1861-1865.¹但实际上他从未使用过总统权力,而且他也从未像这样使用过总统权力。一个显而易见的问题是,什么使林肯获得了如此高的尊敬?在任何情况下,这种关系是指维护联邦还是帮助摧毁奴隶制?在这两者的争论中,塔尼和林肯之间的论点不同。¹³十三他引用了《梅里曼案》,¹³十四其中,林肯坚定地回答说,“所有的法律,但一个,都将被执行,政府本身将保持完整,以免被一个法律所违背?”¹³十二

Even more interesting in many ways, though, is the critique by former Justice Benjamin Curtis, who had written a strong dissent in Dred

¹. Id. at 57-58.
¹. BREST & LEVINSON, supra note 2, at 220-23.
¹. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), reprinted in BREST & LEVINSON, supra note 2, at 221-22.
Scott, of Lincoln’s assertion of presidential power in the Emancipation Proclamation.\textsuperscript{135} Now Curtis emphasized instead the limits on executive power: “It is among the rights of all of us that the executive power should be kept within its prescribed constitutional limits, and should not legislate, by its decrees, upon objects of transcendent importance to the whole people.”\textsuperscript{136} Curtis was fearful that the Proclamation, together with other of Lincoln’s decrees, would ultimately sap the republican political order: “Among all the causes of alarm which now distress the public mind,” according to Curtis, “there are few more terrible . . . that the tendency to lawlessness which is manifesting itself in so many directions.”\textsuperscript{137} Exemplary, in this regard, was “the open declaration of a respectable and widely circulated journal, that ‘nobody cares’ whether a great public act of the President of the United States is in conformity with or is subversive of the supreme law of the land.”\textsuperscript{138} Down that road, for Curtis, lay the possibility that “our great public servants may themselves break the fundamental law of the country, and become usurpers of vast powers not intrusted to them, in violation of their solemn oath of office; and ‘nobody cares.’”\textsuperscript{139} Confirmation of sorts for Curtis’s bleak view was provided by the noted diarist George Templeton Strong, who, after first noting that “[r]espect for written law and constitutions may be excessive and no less deadly than hypertrophy of the heart,”\textsuperscript{140} went on to write that should “learned counsel prove by word-splitting that [Lincoln] saved [the country] unconstitutionally, I shall honor his memory even more reverently than I do now.”\textsuperscript{141}

Indeed, Abraham Lincoln is in some ways the central figure of my course, for I ask why precisely it is Lincoln who is honored in the most important temple of our civil religion and whose portrait is on our currency. I ask my students, “what precedent did Lincoln set?” Is it possible to cabin his assertions of a strong presidential power to the specific context of a civil war? This debate should be readily applicable to events within American life over the past decades.\textsuperscript{142} After all, it is now standard governmental practice to proclaim “wars” on drugs, terrorists, and

\textsuperscript{135.} 2 A Memoir of Benjamin Robbins Curtis, LL.D With Some of His Professional and Miscellaneous Writings 306 (Benjamin R. Curtis ed., 1879).
\textsuperscript{136.} Id. at 331-32.
\textsuperscript{137.} Id. at 332.
\textsuperscript{138.} Id.
\textsuperscript{139.} Id.
\textsuperscript{140.} The Diary of George Templeton Strong 20-21 (Allen Nevins & Milton H. Thomas eds., 1952), quoted in Levinson, supra note 32, at 142.
\textsuperscript{141.} Id.
\textsuperscript{142.} See especially Monaghan’s excellent article, supra note 131, for a thorough discussion of the dangers of interpreting the Constitution as placing a significant degree of “inherent” untrammelled power in the hands of the President.
other social evils, not to mention more non-metaphorical wars such as that in the Persian Gulf. It is no coincidence, then, that this chapter of the casebook concludes with the famous exchange between David Frost and Richard Nixon about presidential power:

Mr. Frost: So what in a sense you’re saying is that there are certain situations . . . where the President can decide that it’s in the best interests of the nation or something, and do something illegal.

Mr. Nixon: Well, when the President does it, that means that it is not illegal. 143

IV. CONCLUSION

A “purist” might well defend teaching the constitutional law of slavery for its own sake. Although I think there is much to be said for that, it should be clear that my own argument is more pragmatic inasmuch as I insist that comprehension of contemporary constitutional problems, whether of the interstate shipment of goods, or of war and peace, is significantly helped by reflection on past struggles involving slavery. What I want to do, in effect, is to shift the burden of proof to those who do not assign materials on slavery on the ground that, however intellectually interesting, they are simply “outdated” and thus disserve our students, who are understandably interested in grasping more contemporary constitutional dilemmas. If I have not persuaded you that this is a much overstated concern, then there may be no reason to readjust the canon, at least without accepting quite radical revisions of the central purpose of the course on constitutional law within the law school curriculum. If, however, my analysis is persuasive, then much must change, beginning with the editing of our casebooks and going on to the design of our syllabi.
