SYMPOSIUM

Slavery and the Magna Carta in the Development of Anglo-American Constitutionalism

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If English and American constitutional thought rests on one shared foundation, it is the principle that executive power, in order to be legitimate, must be subject to law. In the thirteenth century, the English jurist Henry de Bracton declared that "the law makes the King"—rather than the King makes the law—and urged, "Let the King … bestow upon the law what the law bestows upon him, namely dominion and power, for there is no King where will rules and not law" (White 1908, 268). Bracton no doubt had in mind some of the recent provisions of the Magna Carta (1215), which provided a formal codification of this principle. The rebel barons who imposed the Magna Carta on King John were animated by a desire to limit arbitrary executive power, and, in Article 39, they secured a promise from the monarchy that "no free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land" (Turner 2003, 231). In the fourteenth century, Article 39 was redrafted by Parliament to apply not only to free men but also to any man "of whatever estate or condition he may be," and this process of reinterpretation continued throughout the next several centuries as Parliament expanded "the Charter's special 'liberties' for the privileged classes to general guarantees of 'liberty' for all the king's subjects" (Turner 2003, 3).

The principle that a person ought not be "in any way victimised … except by the lawful judgment of his peers or by the law of the land" was given legal force in the common law through the writ of habeas corpus, which allowed an individual to challenge the grounds of his detention or molestation. As Bailyn notes, moreover, the American "colonists' attitude to the whole world of politics and government was fundamentally shaped by the root assumption that they, as Britishers, shared in a unique inheritance of liberty" (Bailyn 1967, 67). As such, the Charter's principle of individual liberty was so well enshrined in the canons of jurisprudence operating in the American colonies that the U.S. Constitution of 1787 simply assumed that the principle was operative in the newly created federal regime as well. Article 1 of the Constitution provided that "the privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it," and, in a concession to the Anti-Federalists, the Fifth Amendment succinctly reiterated the principle behind habeas corpus review: "No person … shall be deprived of life, liberty, or property without due process of law."

NATURAL RIGHTS AND THE RIGHTS OF ENGLISHMEN

One jurisprudential and philosophical question implicated by the common law tradition was whether the protections and privileges associated with the Magna Carta were conventional rights inhering in Englishmen *qua* Englishmen, or whether they were natural rights owed by virtue of a common humanity. The rise of a tradition of antislavery constitutional thought in the Anglo-American world was the result of a theoretical fusion of these claims to natural and historic rights. It was the natural right of all men, in other words, to be free from arbitrary exercises of power while the particular constitutional structure was, in fact, founded to secure and protect this natural right. In the phraseology of Blackstone—read perhaps as much in America as in England—"the principal aim of society [was] to protect individuals in the enjoyment of those absolute rights, which were invested in them by the immutable laws of nature," and such rights, "founded on nature and reason," were "coeval with [the English] form of government" (Blackstone 1899, 63).

In the late eighteenth century, antislavery activists in England adopted this theoretical framework to begin a two-pronged assault on colonial slavery, claiming that it was both contrary to natural law and repugnant to the English Constitution. In an early abolitionist tract, Granville Sharp argued in this vein that slavery was a "gross infringement of the common and natural rights of mankind" and was "plainly *contrary* to the laws and constitution of this kingdom" (Sharp 1769, 40–41). Sharp's invocation of the English Constitution as a bulwark against slavery rested primarily on the principles of the Magna Carta, and the practical viability of Sharp's argument was soon tested when he helped to mount a legal challenge to the detention, in England, of a Virginia-born plantation slave named James Somerset. In the pivotal case of *Somerset* v. *Stewart* (1772), the English judge William Murray, Lord Mansfield, then asserted from the bench that the nature of slavery was "so odious … [that] nothing could be suffered to support it but positive law." As Somerset's treatment could be approved neither by the laws of nature nor by the laws of England, Mansfield declared, moreover, that "the black must be discharged" (*Somerset* v. *Stewart* 1772, 19).

Although the *Somerset* judgment was limited in its scope and application, the idea that slavery was contrary both to natural law and English common law was influential in the development of American antislavery constitutionalism. The guarantee of due process of law in the Constitution's Fifth Amendment was, as Joseph Story argued, "but an enlarge-

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ment of the language of Magna Charta . . . So that this clause, in effect, affirm[ed] the right of trial according to process and proceedings of common law" (Story 1873, 537). But what exactly did it mean that no *person* should be deprived of his liberty without due process of law? Were persons who were being claimed or held as slaves entitled to such legal procedures, and might they, in fact, challenge the grounds of their detention in American courts?

Because of the federal character of the American Constitution (and the jurisdictional limitations on the national courts in Article 3), controversies regarding slavery were largely decided under the laws of the individual states. Nonetheless, for the few slavery-related cases that were taken up by the Supreme Court in the antebellum period, jurists were divided regarding the extent or even existence of legal protections for alleged slaves. The proposition that slavery was contrary to the law of nature was, as Chief Justice John Marshall conceded, "scarcely to be denied" (*The Antelope* 1825, 120). But whether foreign or domestic slaves could present claims to the federal judiciary for legal redress was a more difficult question. For one thing, the constitutional document crafted in Philadelphia was replete with concessions to the delegates from South Carolina and Georgia, who insisted that there would be no union if their "peculiar institution" were left to the whims of the national government. The most obvious concessions to the slave interest included a representation scheme that counted each slave as three-fifths of a person (Article 1§2), a guarantee that the African slave-trade would not be federally proscribed for a period of twenty years (Article 1§9), and a provision calling for the interstate return of fugitive slaves (Article 4§2).

In the case of *The Antelope*, Spanish and Portuguese governments had petitioned the Court for the return of slaves that were illegally imported into the United States. Such a request brought up difficult questions of international law and international relations in addition to basic constitutional considerations. In his argument before the Court, however, U.S. Attorney General William Wirt made his case for the freedom of the slaves, in part by asking the judges to consider that the "Africans stand before the Court as if brought up upon a habeas corpus" (*The Antelope* 1825, 108). The protections of habeas corpus, in other words, ought not to be limited to subjects of the English Crown or citizens of the United States, and the very logic of habeas corpus review would demand that the Court examine the grounds and legitimacy of each individual detention. Although the Court ultimately declined to entertain the *Antelope* Africans' individual claims to liberty (approving instead a lottery system that returned a proportion of the slaves to Spain and Portugal), controversy over the legal rights of alleged slaves did not soon subside.

PRIGG, HABEAS CORPUS, AND FUGITIVES FROM LABOR

Indeed, one of the most contentious constitutional questions involved issues related to the Constitution's ambiguously worded Fugitive Slave Clause, which stipulated that any "person held to Service or Labour in one State" must be "delivered up on Claim of the Party to whom such Service or Labour may be due." But whether it was a state or federal function to deliver up the fugitive, and whether state laws protecting black citizens against kidnapping were unconstitutional preemptions of federal law, were not made explicit by the text. These became particularly thorny issues for Joseph Story, who, despite his own antislavery inclinations, provided far-reaching protections to slave catchers in his decision in *Prigg* v. *Pennsylvania* (1842). In the mid-1820s, the state of Pennsylvania had passed a statute which "provided that if any person shall, by force and violence, take and carry away . . . any negro or mulatto from any part of the Commonwealth," then such person would be guilty of felony kidnapping (*Prigg* v. *Pennsylvania* 1842, 543). After being indicted in Pennsylvania under the statute for forcibly carrying a runaway slave and her children back to Maryland, the slave catcher Edward Prigg initiated a suit against the state of Pennsylvania.

Story wrote a self-styled pragmatic opinion for the Court, declaring that "no uniform rule of interpretation" could be applied to the Fugitive Slave Clause that did not attain the ends for which it was written. And it was historically "well known," Story insisted, that the clause was written "to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State in the Union into which they might escape from the State where they were held in servitude." The judicial interpretation, then, had to reflect that historical reality, and the Constitution guaranteed a "positive unqualified right on the part of the owner of the slave which no state law or regulation can in any way qualify, regulate, control, or restrain." As the national government was "clothed with the appropriate authority and functions to enforce it," moreover, federal law necessarily superseded any state law to the contrary (*Prigg* v. *Pennsylvania* 1842, 611).

In an odd way, Story paid homage to the antislavery tradition, citing the principle posited in *Somerset*—that the "state of slavery is deemed to be a mere municipal regulation" contrary to natural law—as the *reason* why the fugitive slave clause was historically necessary (*Prigg* v. *Pennsylvania* 1842, 611). For

> if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters—a course which would have created the most bitter animosities and engendered perpetual strife between the different States (612).

By this reasoning, a practice contrary to natural law was sanctioned and protected in order to secure the Constitution's very existence. The act by the Pennsylvania legislature, Story argued, was thus "unconstitutional and void," because it purported "to punish as a public offense against the State the very act of seizing and removing a slave by his master which the Constitution of the United States was designed to justify and uphold" (626–27).

There were, however, other avenues open to Story in his construction of the constitutional principles. John McLean, for instance, dissented from Story's opinion, arguing that there was "no conflict between the law of the state and the law of Congress" written to enforce the Fugitive Slave Clause (*Prigg* v. *Pennsylvania* 1842, 669). The alleged runaway slave, McLean

noted, was found "in a State where every man, black or white, is presumed to be free, and this State, to preserve the peace of its citizens, and its soil and jurisdiction from acts of violence, has prohibited the forcible abduction of persons of color" (671). On its face, the state statute did "not include slaves, as every man within the State is presumed to be free, and there is no provision in the act which embraces slaves" (671). If, after an alleged slave had been brought before a federal judicial officer and determined to owe service or labor to a citizen of another state under the laws of another state, then the federal remedy would stand. But, McLean insisted, such a remedy was not inconsistent with state protections against arbitrary force.

The constitutional question, for McLean, hinged on the protections of habeas corpus. Although the Constitution protected the claim of a person to whom labor or services were due, McLean insisted that the legality of such a claim had to be proved. The logic that would allow the seizure of any alleged slave, without legal redress, would provide a pretext for every man to "carry off any one whom he may choose to single out as his fugitive from labor"—a "most unheard of violation of the true spirit and meaning of the whole of [the Constitution]." Under this "most monstrous assumption of power," McLean then asked, where would be "our boasted freedom?" The Ohio jurist insisted, moreover, that the chief evidence for his interpretation of the "true spirit and meaning" of the Constitution as one that was meant to limit and prevent the exercise of arbitrary force was in the manner in which the framers "carefully guarded the writ of habeas corpus" in Article 1 and then reiterated, in the Constitution's early amendments, that one ought not be "deprived of liberty, without due process of law." Additionally, McLean carefully untangled the general principles behind habeas corpus review from the racial overtones present in this case. Residents in Philadelphia—black as well as white—were presumed to be free. Suppose, then, that a state prisoner—"not a negro"—wanted for labor or service was kidnapped in circumstances similar to those at issue in this case. "Under [the Court's] construction," McLean asserted, "you cannot try the question; and a free citizen goes promptly and without redress into slavery!" (*Prigg* v. *Pennsylvania* 1842, 576–78).

In light of McLean's dissent, which tried, at a minimum, to ameliorate the severity of the constitutional remedy provided to masters for the reclamation of fugitive slaves, Story's opinion for the majority was notable for its unbending affirmation of the absolute right of a master to seize and recapture his slave and its assertion that state laws against kidnapping blacks and carrying them across state lines were therefore unconstitutional. The severity of Story's opinion is also puzzling, given his previous assertion that the "existence of slavery, under any shape," was "so repugnant to the natural rights of man and the dictates of justice, that it seem[ed] difficult to find for it any adequate justification" (Story 1835, 358). Nor is there reason to suppose that Story's estimate of the evils of slavery had changed by the time *Prigg* was decided. On the contrary, according to Story's son, the eminent jurist considered his opinion in *Prigg* to be a great "triumph of freedom." But a triumph of freedom in what sense? The younger Story suggested that his father's opinion promoted the cause of liberty principally in two ways: (1) by resting power over fugitive slaves exclusively in the hands of the "whole people" (i.e., the federal government) rather than a section of the people (i.e., state governments), it allowed Congress to "remodel the law and establish . . . a legislation in favor of freedom" (Story 1851, 392); and (2) by limiting the national constitutional protections (as opposed to municipal or local protections) for slavery only to masters of runaway slaves, it implied that "the authority of a master does not extend to those whom he voluntarily takes with him into a free State where slavery is prohibited" (398–400).

DRED SCOTT, DUE PROCESS, AND THE LEGACY OF THE MAGNA CARTA

If the younger Story's explanation of his father's reasoning is sufficient, then the federal Fugitive Slave Law of 1850 and the *Dred Scott* decision of 1857 surely cast doubt on the extent to which Story's decision in *Prigg* was actually a boon to liberty. Granting exclusive claim to the federal legislature to implement the relevant constitutional provision certainly did not engender national legislation in "favor of freedom," and, as Lincoln maintained, the logic of Roger Taney's subsequent opinion in *Dred Scott* seemed to protect the rights of a master who took his slave voluntarily into free jurisdictions (Lincoln 1953, 24). Indeed, Chief Justice Taney's *Dred Scott* opinion provided the Court's most notorious statement on the constitutional status of slavery in the nineteenth century, and the case seemed to foreclose any constitutional protection or judicial remedy for African slaves and their descendants.

After traveling with his master to the free state of Illinois and the free territories north of Missouri, the slave Dred Scott sued for his own freedom, alleging that his residence in free jurisdictions effectively manumitted him from his former state of servitude. While examining the preliminary question of whether Scott was eligible to file suit in federal court, Taney asserted, in words that have become familiar, that at the time of the American Founding, members of that "unfortunate race"

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. (*Dred Scott* v. *Sanford* 1857, 407)

This history of racial animosity and racial prejudice (though certainly lacking nuance) was evidence for Taney that the "negro race" was not "regarded as a portion of the people or citizens of the Government then formed" by the Constitution (411).

The practical result of Taney's historical excursion was the assertion that Scott could not be a citizen "within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts" (*Dred Scott* v. *Sanford* 1857, 406). Beyond the initial question of citizenship, however, Taney went on to argue further that the "right of property in a slave" was "distinctly and expressly affirmed in the Constitution." When considering the Fifth Amendment's procedural protections for life, liberty, and property, Taney

then asserted that an "act of Congress" depriving a man of slave property in the federal territories "could hardly be dignified with the name of due process of law" (450–51). There was, in other words, a substantive element to the due process clause, which explicitly insulated slave property from the reach of federal territorial legislation.

In their challenge to Taney's opinion, dissenters John McLean and Benjamin Curtis essentially contested the meaning and legacy of the constitutional heritage embodied in the Fifth Amendment. First, McLean disputed Taney's contention that slavery was distinctly and expressly affirmed in the Constitution, suggesting that "Madison, that great and good man … was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man" (*Dred Scott* v. *Sanford* 1857, 537). Citing Lord Chief Justice Mansfield's decision in *Somerset* v. *Stewart*, McLean then asserted that "property in a human being does not arise from nature or from the common law" but rather, as Story himself acknowledged in *Prigg*, was "a mere municipal regulation, founded upon and limited to the range of territorial laws" (549). Slavery was, as such, legal only under the laws of individual states and not by an explicit constitutional guarantee. Curtis, as well, brought the issue full circle by tying it back to the origin of the Fifth Amendment's Due Process Clause:

> It must be remembered that this restriction on the legislative power [in the Fifth Amendment] is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta, was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the states, usually in the very words of that great charter. (626–27)

Yet prohibitions on slave property had been the subject of legislation in various states and, significantly, by the national government in the Northwest Ordinance of 1787. Cutting to the heart of the matter, McLean additionally insisted that the slave was, by his very nature, more than "mere chattel." Rather, he bore "the impress of his Maker, and [was] amenable to the laws of God and man, and he [was] destined to an endless existence" (550). According to McLean, there was a certain dignity about human nature that precluded a man from being a morally legitimate species of chattel. This was not an insignificant suggestion, and questions regarding what was owed to man simply by virtue of his humanity became the subject of national deliberation in the wake of the Court's decision.

After the constitutional breakdown that came on the heels of *Dred Scott* v. *Sanford*, the process of reinterpreting the meaning of the Great Writ continued throughout the Civil War (beginning with Lincoln's decision to suspend its protections during wartime) and on to the Reconstruction Amendments, which altered the design of the federal Constitution by abolishing slavery and proscribing state (in addition to federal) deprivations of "life, liberty, and property" outside of legal protections and procedures afforded equally to all. There was in these discussions, moreover, a "chain of descent from Magna Carta through the medieval Parliaments to the nineteenth-century American anti-slavery movement and the origins of the due process and equal protection clauses of the Fourteenth Amendment" (Wiecek 1977, 26). In our own day as well, the task of reinterpreting the meaning and legacy of the Magna Carta continues as we balance the demands of national security with the claims of individual liberty, combat modern slavery and international sex trafficking within the confines of a fragile international order, and reexamine the extension and growth of the principles of freedom implicit in our constitutional tradition. ■

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