NOTES

LET US GO BACK AND STAND UPON THE CONSTITUTION: FEDERAL-STATE RELATIONS IN SCOTT V. SANFORD

The decision in Scott v. Sanford1 placed the Supreme Court in the center of the debate over slavery.2 President Buchanan, aware of advance reports about the Court’s deliberations, asserted in his inaugural address two days before the decision that the question of slavery in the territories was about to be decided.3 The question of slavery, Buchanan added, “is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will . . . be speedily and finally settled.”4 The decision did not fulfill Buchanan’s prediction, for by invalidating the Missouri Compromise,5 which had prohibited slavery in the territories north of Missouri’s southern border, Chief Justice Taney’s opinion effectively enjoined any prohibition of slavery, at least in the new territories of the burgeoning United States, and set the stage for extended debate over whether slavery could be excluded anywhere.6

1. 60 U.S. (19 How.) 393 (1857).
2. In deciding Scott, the Court broke with its tradition of not deciding cases involving political questions. See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law § 2.15(b) (3d ed. 1986) (discussing origins of political question doctrine). The Court nevertheless was sensitive to the political nature of the dispute. See 60 U.S. (19 How.) at 454–55 (Wayne, J., concurring) (“The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.”).
3. 5 Messages and Papers of the Presidents 431 (J. Richardson ed. 1897). Other contemporary commentators realized the political nature of the dispute. See, e.g., T. Benton, Historical and Legal Examination of that Part of the Decision of the Supreme Court of the United States in the Dred Scott Case, which Declares the Unconstitutionality of the Missouri Compromise Act, and the Self-extension of the Constitution to Territories, Carrying Slavery Along with It 30 (New York 1857).
4. 5 Messages and Papers of the Presidents, supra note 3, at 431.
6. For example, Abraham Lincoln questioned the validity of any restrictions on slavery following Scott in his “House Divided” speech:

[T]he opinion of the Court, by Chief Justice Taney, in the Dred Scott case, and the separate opinions of all the concurring Judges, expressly declare that the Constitution of the United States neither permits Congress nor a Territorial legislature to exclude slavery from any United States territory . . . . In what cases the power of the states is so restrained by the U.S. Constitution, is left an open question . . . . We have another nice little niche, which we may, ere long, see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a state to exclude slavery from its limits.
This Note argues that Taney's opinion in Scott employs both the Southern concept of the Constitution as a compact among equal states and a fifth amendment due process argument that, but for the intervention of the Civil War and the fourteenth amendment, would have strengthened states' rights. Commentators have plowed the opinion thoroughly and have provided an explanation for seemingly all of Taney's divergences from accepted constitutional law, but they have not considered the opinion's innovation in federal-state relations. The Chief Justice wrote an expansive, radical opinion that sharply limited Congress's power, gave broad powers to the states to define property and then employed the federal judiciary to protect that property, even outside the state.

Part I discusses the interplay between early legal precedent and subsequent theories of federal-state relations that either supported the extension or the limitation of slavery and the guarantees of states' rights. Part II describes Taney's opinion in Scott and elaborates how Taney used Southern constitutional theory to create new protection of the states against the federal government. It shows some of the ways in which Taney's new vision of federalism was used in the Supreme Court and the lower courts. Part III examines Taney's vision for the protection of states' rights against the federal government and the potential implication of his vision for federalism in the nineteenth century.

I. SLAVERY AND THE CONSTITUTION TO SCOTT

The slavery cases in the late eighteenth and early nineteenth centuries established the principle that slavery was based on positive law and therefore was limited to areas that specifically enacted laws providing for slavery. The Marshall Court read the Constitution expansively to restrict state powers, which might have the effect of further limiting slavery. Southern constitutional theorists attempted to rebut the Marshall Court's federalism with the theory that the Constitution was a compact among equal states and that Congress could not discriminate against the individual states by legislating against their domestic institutions. In the mid-1830s, the Taney Court began retreating from Justice Marshall's federalism and was moving toward increased protection of state control; simultaneously, Southern theorists expanded their con-

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Scott eliminated the possibility of local control over slavery in the territories, as Senator Stephen Douglas had proposed in Kansas. Such a solution would have allowed the residents of Kansas to decide whether or not they wanted slavery. Scott mandated slavery in all of the territories, including those obtained in the Louisiana Purchase (1803), the Texas Annexation (1845) and the Mexican Cession (1848). See D. Potter, The Impending Crisis: 1848–1861, at 291 (1976).

7. One of the best modern discussions of Taney's divergence from accepted constitutional law is D. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 540–64 (1978). For a contemporary criticism, see T. Benton, supra note 3.
cept of equality among states to include a state’s right to protect its citizens’ slave property in the Territories.

A. Development of the Law of Slavery and the Marshall Court

Before the 1840s there was a general recognition that slavery was legal only where positive law established it—in some states and in international waters. A state could, within its borders, legalize slavery; but beyond the state’s border, where the state’s positive law could not reach, the status of the owner’s property was less clear. The English case *Somerset v. Stewart*, holding that slavery could be established only by positive law, served as the foundation case for limiting slavery in both North and South. *Somerset* was interpreted as meaning that a slave became free upon setting foot in a free jurisdiction. Through the early 1840s American courts generally relied upon *Somerset* and its notion that slavery violated natural law and required a positive state law to support it. Though natural law did not rise to the importance of statutory or constitutional law, or even well-settled precedent, courts might invoke it to limit the scope of slave law and to free slaves in close


9. Southerners believed that the Constitution provided the positive law to protect slavery. They pointed to the fugitive slave clause, U.S. Const. art. IV, § 2, cl. 3; the three-fifths compromise, id. art. I, § 2, cl. 3 (slaves were counted as three-fifths of a person for representation); and the nonimportation clause, id. art. I, § 9 (Congress could not restrict importation until 1808). Taney used these provisions as the basis for his assertion that the Constitution “distinctly and expressly” recognizes “the right of property in a slave.” Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857); see also United States v. Amy, 24 F. Cas. 793, 809 (C.C.D. Va. 1859) (No. 14,445) (Taney, C.J.) (opinion while on circuit listing reasons why slavery is “explicitly recognized” by the Constitution).


11. See id. at 510.


13. As Judge Denio stated in 1860: The case was decided in 1772, and from that time it became a maxim that slaves could not exist in England. The idea was . . . fixed in the public mind by a striking metaphor which attributed to the atmosphere of the British Islands a quality which caused the shackles of the slave to fall off. Lemmon v. People, 20 N.Y. 562, 605 (1860).

14. As Justice Shaw explained, a slave became free when she entered a free state because there was no positive law to support slavery. Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 207–08 (1836). But see, e.g., Scott, 60 U.S. (19 How.) at 487 (Daniel, J., concurring) (insisting that *Somerset* was not controlling); Cleland v. Waters, 19 Ga. 35, 41–42 (1855) (Lumpkin, J.) (“For myself, I utterly repudiate the whole current of decisions, English and Northern, from Somerset’s case down to the present time, which hold that the bare removal of a slave to a free country ... will give freedom to the slave.”); see also infra note 97 (Missouri state court also repudiated *Somerset*).
cases. In Northern states that had enacted statutory reforms providing for gradual abolition, courts applied *Somerset* easily, invoking both natural law and public policy to free slaves brought into the state. Even courts in slaveholding states often opposed expansive interpretation of the slave law. Virginia courts, for example, interpreted the state’s voluntary manumission statute to make it easier for owners to free their slaves. Moreover, in 1787 the Articles of Confederation Congress had passed the Northwest Ordinance, which prohibited slavery in the Northwest territories. Courts then freed slaves who were brought into the Northwest territories to penalize masters for introducing slavery into the territories.

Courts also construed the common law to favor freedom even against the wishes of the owners. In 1820, in the path-breaking case *Rankin v. Lydia*, the Kentucky Court of Appeals, echoing *Somerset*, freed a slave who had resided for seven years in the free territory of Indiana. Until the hardening of attitudes toward slavery in the late 1840s and early 1850s, Southern states followed Kentucky’s lead and

15. See, e.g., Rankin v. Lydia, 9 Ky. 467, 2 A.K. Marsh. 813 (1820) (freeing slave based on time spent in free jurisdiction, using the rhetoric of *Somerset*, but not citing it specifically, presumably because of Kentucky’s aniconic law bias); Hugins v. Wright, 11 Va. (1 Hen. & M.) 134 (1806) (freeing Indians because of presumption that all people are free); R. Cover, supra note 12, at 8–41; cf. G. White, 3 History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35, at 129 n.190 (1988) (questioning place of natural law in slavery cases).


17. For example, Chief Justice Lemuel Shaw of Massachusetts in 1836 refused to apply a foreign jurisdiction’s law because the law was contrary to both “natural right” and “the fundamental laws of this State.” Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 217 (1836). Aves became the leading American case on application of conflict of slavery laws, holding that a slave brought, even temporarily, from a slave state into a free state was freed. See Note, American Slavery and the Conflict of Laws, 71 Colum. L. Rev. 74, 95 (1971).


20. See, e.g., Harry v. Decker & Hopkins, 1 Miss. (1 Walker) 36 (1818).

21. 9 Ky. 467, 2 A.K. Marsh. 813 (1829).

22. Although the judge in *Rankin* disclaimed any preference for construing the law in favor of liberty, he noted that slave property was “a right existing by positive law, without foundation in the law of nature, or the unwritten and common law.” Id. at 470, 2 A.K. Marsh. at 815.
freed slaves who had semipermanent residence in free states or free territories. 23 Before *Scott*, courts in Missouri itself had adopted a preference for freedom. 24

As the individual states wrestled with slavery within their borders, the Marshall Court consistently limited state powers. 25 The Marshall Court limited the right of states to decide federal constitutional issues, 26 to regulate federal institutions 27 and to exempt their own state-chartered institutions from any outside control. 28 Decisions such as *McCulloch v. Maryland* 29 and *Gibbons v. Ogden* 30 convey the impression that the Court was dissolving local barriers to trade that—consistent with federalist intentions—would foster economic development. 31 However, the Court’s restrictions of state sovereignty rarely amounted to an affirmative grant of federal regulatory power. 32

23. See, e.g., Smith v. Smith, 13 La. 441 (1838) (slave taken into free country of France freed); *Harry*, 1 Miss. (1 Walker) 36 (slave taken into Northwest territory freed by virtue of the Northwest Ordinance). Temporary residence and travel through a free state would not, however, free a slave. See LaGrange v. Chouteau, 2 Mo. 20 (1828); *Raskin*, 9 Ky. at 478, 2 A.K. Marsh. at 820–21 (dictum).

24. From 1824 until 1852, when the Missouri Supreme Court decided *Scott v. Emerson*, 15 Mo. 576 (1852), Missouri cases had universally held that taking a slave into a free state or free territory for permanent residence freed the slave. See *Winny v. Whitesides*, 1 Mo. 259 (1824) (first reported Missouri decision freeing slave who spent three to four years in free territory of Illinois); see also *Wilson v. Melvin*, 4 Mo. 592 (1837) (master who moved to Illinois and kept his slaves with him for one month before hiring them out to work in Missouri freed his slaves); *Rachael v. Walker*, 4 Mo. 212 (1836) (slave of army officer became free when officer went to assignment in free territory); *Nat v. Ruddle*, 3 Mo. 400 (1834) (permanent residence in free state would free slave, although temporary work in free state insufficient to free); *Julia v. McKinny*, 3 Mo. 270 (1833) (freeing slave, but carefully noting difference between interstate commerce, which would not free slave, and semipermanent residence); *Ralph v. Duncan*, 3 Mo. 194 (1833) (hiring out a slave to work in free territory violates Northwest Ordinance); *Milly v. Smith*, 2 Mo. 36 (1828) (freeing slave brought into Illinois territory by master who resided there). But cf. *La Grange v. Chouteau*, 2 Mo. 20, 22 (1828) (not freeing slave because owner did not intend to "introduce 'voluntary servitude or slavery,' against the terms of the express [Northwest] ordinance").


32. "The 'nationalism' inherent in those decisions was not a nationalism in the
One recent analysis argues that the "nationalism" of the Marshall Court was actually an attempt to preserve the union as a political body as the nation expanded. The Court sought to preserve the federal government against Southern attempts to construe the Constitution as a "compact" among the states, which would limit the federal government's power to control the states. Accordingly, the Marshall Court interpreted the Constitution as a document created by the people; thus, the federal government derived its authority directly from the people and could act for the people as a whole, without considering the individual states. However, the Supreme Court's agenda was transformed when Chief Justice Marshall died in 1835 and the Senate confirmed his successor, Roger B. Taney, in March 1836.

B. The Southern View of Federalism

As a response to the Marshall Court's restriction of states' power, Southern constitutional theorists attempted to limit the federal government's power and to expand states' power. They widely supported the Compact Theory, which held that the states, rather than the people, formed the Constitution, and that states were the basic unit of government. The Southern-dominated Taney Court also represented a shift toward greater deference to state power.

1. The Compact Theory. — The Compact Theory took many forms, all of which included several key elements: the Constitution was a compact among sovereign bodies (the states); those bodies had delegated some rights to the federal government; the Constitution bound the federal government to protect inalienable rights. According to compact

modern sense of support for affirmative plenary federal regulatory power; the Court's posture can more accurately be described as a critique of reserved state sovereignty."

35. See 5 C. Swisher, History of the Supreme Court of the United States, The Taney Period: 1836–64, at 1 (1974). Less than two years earlier, the Senate had rejected Taney as Secretary of the Treasury. See id. at 20–21. Taney, a Jacksonian Democrat from Maryland, was opposed because he had been instrumental in President Jackson's dismantling of the Bank of the United States. Taney had diverted federal deposits to state banks, which deprived the Bank of crucial funds. See id.

Taney was only a part of the shift to a Democratic, Southern-dominated Court in the 1830s. By 1836, Jackson had appointed a majority of the Supreme Court: Henry Baldwin (Georgia), Phillip Barbour (Virginia), John McLean (Ohio), Roger Taney (Maryland), and James Wayne (Georgia). Taney's states' right philosophy and its relationship to Jacksonian principles remains inadequately explored, despite some excellent studies. See, e.g., R. Newmyer, The Supreme Court Under Marshall and Taney (1968); C. Swisher, supra; Harris, Chief Justice Taney: Prophet of Reform and Reaction, 10 Vand. L. Rev. 227 (1957).

36. The doctrine was first given popular expression by Jefferson and Madison in the Virginia and Kentucky Resolutions of 1798. See Kentucky Resolutions of 1798 and 1799, reprinted in J. Elliott, Debates in the Several State Conventions, on the Adoption of the Federal Constitution 540 (2d ed. Philadelphia 1866); Virginia Resolutions of
theorists, the thirteen sovereign states of 1787 retained "all the powers belonging to distinct and separate States, excepting such as are delegated to be exercised by the General Government." 37 The individual states were to be treated as "sovereign and independent communities," 38 which meant that states possessed all the rights of sovereign nations and that the federal government was merely their agent.

Compact theorists pointed to both textual and contextual evidence to support their argument. The states themselves, rather than the people as a whole, ratified the Constitution; 39 even its title, "The Constitution of the United States of America," indicated that the states had created it. John C. Calhoun, one of the preeminent Southern constitutional theorists, said, "It everywhere recognizes the existence of the States, and invokes their aid to carry its powers into execution." 40

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1798, reprinted in 4 J. Elliott, supra, at 528; Koch & Ammon, The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties, 5 Wm. & Mary Q. 145 (1948). The Resolutions argued that each state should have the right to judge the nature of the compact for itself. The federal government was not the final arbiter. Instead, "as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." Kentucky Resolutions of 1798 and 1799, reprinted in 4 J. Elliott, supra, at 540.

For contemporary statements of the Compact Theory, see John Marshall's Defense of McCulloch v. Maryland (G. Gunther ed. 1969) (reprinting debate over nature of Constitution that followed McCulloch); 1 A. Stephens, A Constitutional View of the Late War Between the States (Philadelphia 1868) (wide-ranging discussion on Southern constitutional theory by the Vice-President of the Confederacy); 1 Tucker's Blackstone, supra note 15, 140–42 app. n.D. For a thorough response to the Compact Theory, see 1 J. Story, Commentaries on the Constitution of the United States §§ 306–72 (Boston 1853) (Story's discussion of the "Nature of the Constitution—Whether a Compact?").

57. Report from the Select Committee on the Circulation of Incendiary Publications [hereinafter Report], in 13 The Papers of John C. Calhoun 58 (C. Wilson ed. 1980) [hereinafter Calhoun's Papers]. The tenth amendment, which was then considered more than a tautology, was invoked to prove that states reserved all nondelegated powers. See J. Calhoun, A Discourse on the Constitution and Government of the United States [hereinafter J. Calhoun, Discourse], in 1 The Works of John C. Calhoun 111, 144–45 (R. Cralle ed. 1851) [hereinafter Calhoun's Works].


38. 13 Calhoun's Papers, supra note 37, at 61.


40. Id. at 137. Unionists, such as Joseph Story, also pointed to the Constitution's text to prove the opposite point—that the Constitution was not a compact among the states. Story, for example, cited the Preamble's declaration that "We, the people of the United States, do ordain and establish this constitution," U.S. Const. preamble, to support the belief that the Constitution was formed directly by the people. See 1 J. Story, supra note 36, § 360.

Unionists responded to the argument that the Constitution was ratified by the states by questioning how else the Constitution could have been ratified. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C.J.) ("It is true, they [the people] assembled in their several states—and where else should they have assembled?
For example, he noted, members of Congress were chosen by the states, and amendments were made through the states. Calhoun thus concluded in his *Discourse on the Constitution* that sovereignty "must reside in the people of the several States . . . as separate and distinct communities."

The Compact Theory used the states' sovereignty to protect them from regulation by the federal government. The powers of states extended to the right to control their own domestic institutions and such "national" issues as immigration. In addition, the states reserved the right to regulate internal matters, which allowed them to adopt police regulations. They might even prohibit "incendiary" abolitionist literature from being mailed into their states. Because the states had the right to protect their own domestic institutions, the federal government had the reciprocal duty of protecting and facilitating those institutions. The federal government could not discriminate against any one state or group of states by hindering its domestic institutions—hence the popular Southern view that the federal government could not pass any laws prohibiting slavery. The most extreme Southern argument was that if the federal government did not respect states' rights, the states, as the individual contracting parties, could judge the constitutionality of federal action for themselves and then act to "nullify" the federal government's action. Compact theorists, like unionists, believed that the basic goal of the United States was preservation of individual liberty, which Compact theorists believed could best be achieved by protecting states' autonomy.

A more moderate strain of Southern Compact Theory held that states were bound by the federal government, but maintained the importance of state police power and the exemption of states from undue

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... Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be measures of the people themselves ... 

42. Id. at 140.
43. See id. at 195–97.
44. See 2 Calhoun's *Works*, supra note 37, at 518–21.
45. See id. at 521–23.
46. See 4 Calhoun's *Works*, supra note 37, at 359.
47. See, e.g., 4 Calhoun's *Works*, supra note 37, at 344–48, 382–84 (arguing that the Constitution protected slavery in the territories); Cong. Globe, 36th Cong., 1st Sess. 917 (1860) (statement of Sen. Jefferson Davis) (Constitution protects states against federal government's interference with slavery in the territories).
49. See Amar, supra note 48, at 1448.
federal regulation. This local control was advanced as a way of avoiding secession; as long as the slave states could protect themselves against the federal government there was no reason to secede.

2. Taney and the Balancing of National and State Interests. — The Taney Court’s retreat from the nationalism of the Marshall Court, while still balancing national and state interests, can be seen in its earliest decisions. In 1837, in Mayor of New York v. Miln, the Taney Court upheld a local regulation on ships entering New York as within the police power of New York, even though the regulation interfered with commerce. The Taney Court’s commerce decisions, such as Miln, recognizing the concurrent power of states to regulate commerce, were thought by unionists like Daniel Webster to threaten the general system of commerce that was necessary to “repe[l] all tendencies to separation and dismemberment.” The License Cases, Cooley v. Board of Wardens and Taney’s dissent in the Passenger Cases argued that local police regulations could displace federal control of interstate commerce. Taney’s expansive view of the police power was part of the Southern attempt to give states the right to exclude free blacks; South Carolina’s 1822 law excluding black sailors from Charleston was another example. Later, Taney tried to construe Congress’s interstate

50. See 3 C. Wiltse, John C. Calhoun, Sectionalist, 1849–1850, at 187–97 (1951); see also Bestor, supra note 48, at 119–20 (until 1860, secession was not a widely accepted possibility; states rights and proslavery theories were reconciled within the federal system). The Taney Court’s use of federal judicial review is one example of its moderate states’ rights stance. Cf. R. Ellis, supra note 37, at 178–98 (moderate states’ rights theorists advocated granting wide power to states, while maintaining federal judicial review).


52. See id. at 157–43. Justice Barbour’s opinion implied that all police regulations are exempt from federal regulation. The Taney Court may have been an advocate of the police power because it could be used to protect the states’ exclusive control of slavery. See H. Hyman & W. Wieck, Equal Justice Under Law: Constitutional Development, 1835–1875, at 24, 78–80 (1982). The concept of police power was intimately related to the Southern view of the Constitution as a compact in which each state had reserved certain powers, including the right “to defend itself against internal dangers.” Report, supra note 37, at 59.


54. 3 The Writings and Speeches of Daniel Webster 206 (J. McIntyre ed. 1903).

55. 46 U.S. (5 How.) 504 (1847).

56. 53 U.S. (12 How.) 299 (1851).

57. 48 U.S. (7 How.) 283, 477–87 (1849) (Taney, C.J., dissenting) (denying that restriction on immigration is restriction on commerce and allowing regulations as part of the police power).

58. See 7 S.C. Stat. 461 (1822). The statute was invalidated by Justice Johnson on circuit as a violation of the commerce clause. Elkison v. Deliesseline, 8 F. Cas. 493, 494–96 (C.C.D.S.C. 1829) (No. 4366); see also Speech on the Circulation of Incendiary Papers, in 2 Calhoun’s Works, supra note 37, at 517–20 (states may exclude people, such as free blacks, who are likely to lead to insurrection).
commerce power narrowly in Pennsylvania v. Wheeling & Belmont Bridge Co. to allow Virginia and Ohio to build a bridge over a navigable river.

Taney's tilt toward a moderate states' rights stance is apparent in noncommerce clause cases as well. In Charles River Bridge v. Warren Bridge, for example, the Court gave Massachusetts wide discretion in its state charters by narrowly construing such a charter to avoid interference with the contracts clause. Later, in Ohio Life Insurance & Trust Company v. Debolt, Taney stated that "with the exception of powers surrendered by the Constitution . . . , the people of the several States are absolutely and unconditionally sovereign within their respective territories." Taney included the power of taxation within that sphere of state power. He also recognized the states' eminent domain power, over Daniel Webster's protest that such power would lead to "the most levelling ultrasms of Anti-resentism . . . or Abolitionism." Furthermore, in Briscoe v. Bank of Kentucky, the Taney Court allowed a state-owned bank to issue bills of credit, even though a state itself could not constitutionally issue them.

60. 36 U.S. (11 Pet.) 420 (1837).
62. Id. at 428.
63. Taney would, however, recognize commercial interests when such interests were explicitly protected by the Constitution. See, e.g., Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (bank may do business outside the state).
64. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 521 (1848) (Webster's argument for West River Bridge, plaintiff in error). Presumably, Taney would find specific constitutional protection for slavery, thus exempting slaves from the states' eminent domain power. Thus, Taney's deference to states on eminent domain, which relaxed protection for vested property rights, might be reconciled with his strict protection of slave property from interference by the federal government by this exemption. See Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1857); see also 60 U.S. (19 How.) at 490. (Daniel, J., concurring) (slavery is the only form of property explicitly recognized by the Constitution). Alternatively, the key may be Taney's deference to states and his restriction of the federal government's powers.

Nevertheless, the Taney Court occasionally found an overriding need for national power. The declaration in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1835), that federal courts sitting in diversity were not bound by local law but could create their own commercial law, is a prominent example of the Taney Court's concern for uniform business law and its balancing of state and federal government interests.

One might use Swift to argue that the Supreme Court should not follow local law in slavery cases, but instead should have a national slave law. Taney's rejection of a universal slave law points to his distinction between issues of national and local control. But, even while Taney was restricting federal powers in some areas such as interstate commerce, his Court protected federal powers against some minor state infringements. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516–17 (1839), protected federal property against inconsistent state regulations, and United States v. Chicago, 48 U.S. (7 How.)
In opinions dealing specifically with slavery, the Taney Court echoed Marshall in his reinforcement of a strong federal judiciary, but differed in his expansion of state legislative and executive power. Taney's concurrence in *Groves v. Slaughter* argued that slaves were not subjects of interstate commerce; hence, Congress had no right to regulate the interstate slave trade. In 1851, *Strader v. Graham* held that the states themselves could decide the status of persons within their borders. *Strader* represented a shift away from *Somerset*'s rationale that slavery existed only where positive law sanctioned it. Half a century after *Somerset*, the English High Court of Admiralty qualified *Somerset* in *The Slave Grace*, which held that a slave brought from the slave jurisdiction of Antigua to England, where she resided for a year before being taken back to Antigua, was still a slave. Upon return to the slave jurisdiction, her status as a slave reattached. American commentators and some Southern courts used *Grace* as a way of supporting slavery. Justice Story adopted its reasoning in his *Commentaries on the Conflict of Laws*, and courts in slave states began applying their own proslavery policies to slaves who had been in free states and then returned to slave states. After *Strader*, the courts more consistently held that a slave

185, 193–95 (1849), held that Congress has the power to regulate territory owned by the federal government free from state interference. The interstate commerce clause was held to protect vessels passing through a state temporarily. See *Hays v. Pacific Mail Steam-Ship Co.*, 58 U.S. (17 How.) 596, 598–99 (1854).

67. See H. Hyman & W. Wieck, supra note 52, at 199; supra notes 30–32 and accompanying text. Professor Cover reads Taney's slavery opinions as "highly nationalistic" and similar to traditional Marshall opinions. See R. Cover, supra 12, at 166 n. *But see infra notes 140–150 and accompanying text (aside from establishing federal judicial supremacy, *Scott* deferred to states)."


69. See id. at 509–11. Thus interpreted, *Groves* gave individual states power to exclude slavery.

70. 51 U.S. (10 How.) 82, 93–94 (1851) (Taney, C.J.).

71. See supra notes 10–18 and accompanying text.


73. It has been solemnly decided that the law of England abhors and will not endure the existence of slavery within the nation, and consequently, so soon as a slave lands in England, he becomes, *ipse dixit*, a free man . . . and there is no doubt that the same principle pervades the common law of the non-slaveholding States in America . . . . [But] it is a very different question how far the original state of slavery might re-attach upon the party, if he should return to the country by whose laws he was declared to be and was held as a slave . . . . There is uniformity of opinion among foreign jurists and foreign tribunals, in giving no effect to the state of slavery of a party, whatever it might have been in the country of his birth, or that, in which he had previously been domiciled, unless it is also recognized by the laws of the country of his actual domicile, and where he is found . . . .

J. Story, *Commentaries on the Conflict of Laws* §§ 93–96 (Boston 1854); see also *Note*, supra note 17, at 93–94.

who traveled to a free territory might later be held in slavery when she was returned to a slave state.75

Prigg v. Pennsylvania,76 written by Justice Story in 1842, invalidated Pennsylvania legislation that prohibited a master from reclaiming his slave without a warrant from a magistrate77 as inconsistent with the Constitution’s fugitive slave clause78 and Congressional statutes enforcing the clause. Prigg established the supremacy of explicit constitutional protections of slavery over inconsistent state regulation. Finally, Moore v. Illinois,79 an important though rarely cited case, upheld an Illinois statute that extended the fugitive slave clause by imposing penalties on people helping fugitive slaves.80 Taney thereby denied Congress the power of exclusive regulation of fugitive slaves and gave states the power to facilitate slavery. All four cases reflect Taney’s belief in the supremacy of proslavery elements of the Constitution, and the belief that states could fortify those provisions without interference from Congress. The slavery opinions sought to protect slave property and, ultimately, the slave states.


75. See, e.g., Emerson, 15 Mo. at 586 (1852).
76. 41 U.S. (16 Pet.) 539 (1842).
78. The fugitive slave clause read:
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 therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. Const. art. IV, § 2, cl. 3.

Professor McCloskey argues that Justice Story’s opinion in Prigg hindered slavery by prohibiting state cooperation in apprehension of slaves. See R. McCloskey, The American Supreme Court 92 (1960); see also Finkelman, Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision, 25 Civil War Hist. 5, 21–35 (1979) (discussing Northern courts’ use of Prigg). Taney’s concurrence would have given power to a state to facilitate but not to restrict slavery. See 41 U.S. (16 Pet.) at 626–33 (Taney, C.J., concurring).


80. Moore settled the question whether states could regulate fugitive slaves at all once the federal government had acted. In keeping with other Taney Court police power opinions, Moore recognized a substantial amount of state power. The Illinois statute criminalizing aiding the escape of a fugitive slave was, it said,

but an exercise of the power which every State is admitted to possess, of defining laws. The power to make municipal regulations for the restraint and punishment of crime, and of the public peace, has never been surrendered by the States . . . .

Experience has shown . . . that the results of such conduct as are prohibited by the statute . . . are . . . to destroy the harmony and kind feelings which should exist between citizens of this Union . . . . No one can deny or doubt the right of a state to defend itself against evils of such magnitude . . . .

Id. at 20–21.
3. The Debate Over Slavery in the Territories. — With the expansion of the territories, Southern fears that slave states would eventually be greatly outnumbered by free states increased. 81 Solution of the continuing dispute over the territories appeared impossible. At one point, Congress, hoping for a nonpolitical solution, even invited a comprehensive statement from the Supreme Court. 82

Concern among Southerners that they would lose their slave property continued to grow. Although the Missouri Compromise had temporarily settled the question of the expansion of slavery by excluding slavery in territories north of Missouri's southern border and allowing it in territories south of it, that was not a permanent solution. Fearing the waning of their political strength, Southerners began to hope that a political solution could be found and turned to arguments based on the Constitution. As John C. Calhoun said:

I see my way in the constitution; I cannot in a compromise. A compromise is but an act of Congress. It may be overruled at any time. It gives us no security. But the constitution is stable. It is a rock. On it we can stand, and on it we can meet our friends in the non-slaveholding States. It is a firm and stable ground, on which we can better stand in opposition to fanaticism than on the shifting sands of compromise.

Let us be done with compromise. Let us go back and stand upon the constitution! 83

Relying upon states' rights theory, Calhoun introduced several resolutions in the Senate in 1837 declaring that the territories were the joint property of the states and that, as such, Congress could do nothing that would deprive any state of "its full and equal right in any territory of the United States." 84 Calhoun's argument rested on the

81. See, e.g., 4 Calhoun's Works, supra note 37, at 399-42. Southerners liberated the Texas territory in the 1840s in the hope of carving as many as six additional slave states from the territory, see D. Potter, supra note 6, at 25-26, and even considered the possibility of adding Cuba as a slave state, see H. Hyman & W. Wieck, supra note 52, at 129.

82. See H. Hyman & W. Wieck, supra note 52, at 174. In the Kansas-Nebraska Act, Congress included a clause giving the Supreme Court mandatory appellate jurisdiction over "all cases involving title to slaves and 'questions of personal freedom' " that arose in the territories. Kansas-Nebraska Act, ch. 59, § 27, 10 Stat. 277, 280, 287 (1854). One Senator went so far as to say that Congress had enacted not a law but a lawsuit. See D. Potter, supra note 6, at 271. Putting the decision into judicial hands worried both Northern and Southern Congressmen, however. See id. at 74. Nevertheless, Senator Jefferson Davis wanted a judicial hearing. See 4 Papers of Jefferson Davis, 1849-1852, at 106-07 (L. Crist ed. 1983) ("I rest ... upon the Constitution, and when that right is denied, we will test it before the Constitutional umpire, the Supreme Court of the United States.").

83. 4 Calhoun's Works, supra note 37, at 347 (speech of Feb. 19, 1847).

84. Cong. Globe, 25th Cong., 2d Sess., 55, app. 61-65 (1837) (Calhoun's six resolutions and accompanying debate); see 3 Calhoun's Works, supra note 37, at 140-202 (Calhoun's speeches supporting his resolutions); 4 Calhoun's Works, supra note 37, at 344 (stating that the territories are the "common property of the states"); see also
premise that all states were "equal" and that Congress could do nothing to discriminate against a state, such as excluding its domestic institutions from the territories. The corollary of this doctrine was that Congress could not prevent slaveowners from entering the territories, and that the residents of the territories themselves had the right to choose slavery or freedom. Calhoun's theory rested on the notion that Congress held the territories as trustee for all of the states. As trustee, Congress had limited power to regulate the territories and could not exclude citizens of slave states or the property the slave states recognized. The "trustee theory" could severely limit Congress' power to regulate the territories.

In 1849 Calhoun, anticipating the annexation of California, New Mexico and Oregon, expanded his theories to argue that the Constitution followed the American flag. Application of the proslavery Constitution to the territories thus would protect slavery within them. Calhoun contended that the Constitution's explicit language that Congress has the power to "make all needful Rules and Regulations respecting the Territory or property belonging to the United States" applied only to territories that were part of the United States when the Constitution was signed. He acknowledged that Congress had some power to establish basic regulation of the territories, but denied that it had plenary power over the territories; the Constitution restrained Congress from discriminating against the existing slaveholding states by excluding slavery.


85. Calhoun had originally used the argument during debate over slavery in the District of Columbia in 1837 and in 1838 when he had entered a resolution declaring that an attempt to condition the admission of a state upon its restriction of slavery would violate the fundamental equality of the states. See Cong. Globe, 25th Cong., 2d Sess. 55 (1837); 3 Calhoun's Works, supra note 37, at 140-202; M. Peterson, The Great Triumvirate: Webster, Clay, and Calhoun 275 (1987).

86. See 4 Calhoun's Works, supra note 37, at 399-49.

87. See id. at 399-48, 496-97.

88. See id. at 496-99, 535-36, 541; D. Fehrenbacher, supra note 7, at 145.

89. U.S. Const. art. IV, § 3. Congress's right to rule the territories without restriction had been fairly well established before Scott. See, e.g., American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 527 (1828) (Florida territory subject to federal regulatory power); Sere v. Piot, 10 U.S. (6 Cranch) 332, 336 (1810) ("The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold territory").

90. See 4 Calhoun's Works, supra note 37, at 511.
Congress ultimately rejected Calhoun’s theory by rejecting the Walker Amendment, which would have applied the Constitution through statute to the territories.\textsuperscript{91} In the meantime, in 1854, Congress repealed the Missouri Compromise\textsuperscript{92} and thereby opened more room for debate over the extension of slavery to the territories. Even though the law was repealed, the Supreme Court proceeded to hear a suit based upon the time a slave had spent in a free territory while the Missouri Compromise was still valid.

II. THE SCOTT DECISION

Dred Scott began his quest for freedom in the late 1840s. After a series of unsuccessful suits in Missouri and federal courts, he appealed to the Supreme Court. Chief Justice Taney’s opinion first denied that Scott was a citizen of the United States, so that Scott could not sue in federal court. Taney went on to hold, on grounds of state equality and the fifth amendment, that Congress could not prohibit slavery in the territories. Although often viewed as an incomprehensible justification of slavery with little relationship to existing constitutional law, the opinion was an innovative application of Southern constitutional theory and of the due process clause, which foreshadowed a constitutional theory that protected the states from federal regulation.

A. The Scott Case

Dred Scott’s suit for freedom originated in a Missouri state court in 1847.\textsuperscript{93} Beginning in 1836, his owner took him from the slave state of Missouri into the free state of Illinois and then into a part of the Louisiana Purchase, called the Upper Louisiana territory, near what is now St. Paul, Minnesota, which was free by virtue of the Missouri Compromise.\textsuperscript{94} In 1840 Scott’s owner brought him back to the slave state of Missouri. Scott based his claim for freedom upon the four years he spent in “free” jurisdictions. Despite favorable precedent,\textsuperscript{95}

\textsuperscript{91} See Cong. Globe, 30th Cong. 2d Sess. app. 255 (1849) (proposing “(t)hat the Constitution . . . be applied to the territory . . . acquired from Mexico”). The Walker Amendment would have had the effect of prohibiting Congress from taking away slave property. See M. Peterson, supra note 85, at 448–49. Debate over the Walker Amendment between Calhoun and Webster explored the same issues Taney confronted when he adopted Calhoun’s theory. See Cong. Globe, 30th Cong., 2d Sess. 269, 272–74 (1849) (Calhoun-Webster debate); 4 Calhoun’s Works, supra note 37, at 535–41; infra notes 105–17 and accompanying text (Taney’s equality argument); see also D. Fehrenbacher, supra note 7, at 155–57 (discussing Calhoun’s argument).

\textsuperscript{92} Kansas-Nebraska Act, ch. 59, § 14, 10 Stat. 277 (1854) (Kansas-Nebraska Act repealed Missouri Compromise by allowing slavery above 36° 30’ latitude); see H. Hyman & W. Wieck, supra note 52, at 161–66; D. Potter, supra note 6, at 51.

\textsuperscript{93} See Scott v. Emerson, 15 Mo. 576 (1852).

\textsuperscript{94} See Scott v. Sandford, 60 U.S. (19 How.) 393, 397–98 (1857) (Sandford’s pleadings); D. Fehrenbacher, supra note 7, at 240–41.

\textsuperscript{95} See supra note 24.
the Missouri courts used the recent decision in *Strader v. Graham* to support Missouri's proslavery policy and deny Scott freedom. Scott initiated a new suit in federal court based on diversity of citizenship between himself and his owner, who was now a resident of New York. After losing in the trial court, Scott appealed to the United States Supreme Court. The Court initially heard arguments on narrow grounds such as whether Scott was a citizen of the United States for diversity purposes. It later entertained the broad questions of whether Scott was free by virtue of having been brought into a free state—supposedly answered by *Strader*—or a free territory, and whether Congress could prohibit slavery in the territories.

Chief Justice Taney, who wrote the opinion of the Court, crafted a long, fifty-six page opinion that began by denying blacks the right to sue in federal court. He asserted that at the time of the adoption of the Constitution blacks were not citizens of the United States, and he

96. 51 U.S. (10 How.) 82, 93–94 (1851). See supra note 70 (holding that every state had "an undoubted right to determine the status . . . of the persons domiciled within its territory"; slave's status depended upon law of forum state). Taney interpreted *Strader* as holding that a slave's "status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that [slave] State, and not of Ohio." *Scott*, 60 U.S. (19 How.) at 452.

97. The Missouri Supreme Court held that the status of a person could be determined by the forum state. Thus, a slave who entered England would be freed immediately. "This is the law of England, where it is said her air is too pure for a slave to breathe in, and that no sooner does he touch her soil than his shackles fall from him." *Emerson*, 15 Mo. at 586. Yet the Missouri Court was not willing to acknowledge that the free status would follow the slave back to slave territory. "Judge Shaw . . . intimates very clearly that if the slave returns to his former country where slavery obtains, his condition would not be changed." Id. Subsequent Missouri cases followed *Emerson*. See, e.g., *Sylva v. Kirby*, 17 Mo. 434 (1853); *Note*, supra note 17, at 85–98 (discussing the approach of slave-state courts in increasingly proslavery application of conflict of laws).

98. See 13 American State Trials 242 (1911) (federal trial court opinion).
100. See id. at 431–32. Although the Missouri Compromise was repealed before the Supreme Court decided *Scott*, Scott still had a claim based on his residence in territory that had been free at the time he lived there.

101. A perennial question for commentators on *Scott* is, "What did the Court hold?" All nine of the Supreme Court Justices filed opinions in *Scott*. Taney's opinion, the longest and the most ambitious of them all, was called the "Opinion of the Court" by the Court reporter and is usually considered to be the Court's opinion. See, e.g., *Corwin, The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 Am. Hist. Rev. 52, 54–57 (1911) (arguing that nothing in Taney's opinion was obiter dictum; hence it was opinion of Court). The most comprehensive recent analysis of the case concludes: "As a matter of historical reality, the Court decided what Taney declared that it decided." D. Fehrenbacher, supra note 7, at 334. But see 2 G. Curtis, *Constitutional History of the United States* 276 (1902) (because of the diversity of reasoning, Court held only "the circuit court be directed to dismiss the suit for want of jurisdiction"). Curtis argued *Scott* 's case before the Court, so he may be biased as a commentator.

103. 60 U.S. (19 How.) at 407. Taney argued that the proclamation of the
argued that since 1787 blacks had not acquired any additional rights to
the Constitution's privileges. The Chief Justice went on to argue
that because all states were equal, Congress was precluded from dis-
criminating against certain states by prohibiting slavery in the territori-
es and that a prohibition of slavery violated the fifth amendment.
Finally, he asserted that Congress had the power only to promote slav-
ery, not to restrict it. Together Taney's arguments limited Congress's
power over the territories and gave extraordinary power to the states,
including the recognition of a state's law of slavery outside the state
itself. Taken together, the doctrine of equality of the states and the
fifth amendment presaged a shift in power from the federal govern-
ment to the states.

1. Taney's Equality Argument. — After disposing of Scott's citizen-
ship claim, Taney turned to the politically most critical part of
the opinion: the invalidation of the Missouri Compromise. Many
Southerners feared the loss of property rights in their slaves. Taney,
seeking to protect those rights, needed to invalidate Congress's alleged
power to regulate slavery in the territories. He first rejected the well-
settled interpretation of article IV of the Constitution, which explic-

Declaration of Independence that all men were created equal conferred no rights. See
id. at 410. Calhoun had made a similar argument. See 4 Calhoun's Works, supra note
97, at 507-08.

104. See id. at 418. Taney was no newcomer to these arguments. In 1832, as
Andrew Jackson's Attorney General, he had issued an unpublished opinion holding that
blacks were not citizens within the context of the Constitution and hence were not en-
titled to any of its protections. Taney wrote:

The African race in the United States even when free, are everywhere a de-
graded class, and exercise no political influence. . . . They were not looked
upon as citizens by the contracting parties who formed the Constitution. They
were evidently not supposed to be included in the term citizen. And were not
to be embraced in any of the provisions of that Constitution but those which
point to them in terms not to be mistaken.

Swisher, Roger B. Taney, in Mr. Justice 45 (A. Durham & P. Kurland eds. 1964).
Taney's 1832 opinion is discussed in C. Swisher, Roger B. Taney 151-59 (1935).
Taney's arguments have been thoroughly discredited. See, e.g., Scott, 60 U.S. (19 How.)
at 602 (Curtis, J., dissenting); Gray & Lowell, A Legal Review of the Case of Dred Scott
15-21 (1857), reprinted in 3 Southern Slaves in Free State Courts: The Pamphlet Lit-
terature, Series I, at 305 (P. Finkelman ed. 1988) [hereinafter Southern Slaves]. For a dis-
cussion of the use of historical arguments in constitutional decision making before the
Civil War, see Kahn, Reason and Will in the Origins of American Constitutionalism, 98

Calhoun) (Southern mind filled with fear of destruction of "property [and] domestic
institutions"); 4 Calhoun's Works, supra note 97, at 339.

106. See, e.g., S. Foot, An Examination of the Case of Dred Scott against Sandford
13 (Boston 1859), reprinted in 3 Southern Slaves, supra note 104, at 285, 297 (general
understanding was that Congress had power to prevent slavery in the territories); see
also supra note 89 (discussing Marshall Court opinions giving Congress plenary power
over the territories).
idy grants Congress the right to control the territories, by adopting the Southern position that the territories clause applied only to those in existence at the Constitution's adoption. Territories formed later thus had to be regulated through an implied congressional power—the power to admit new states—which meant that Congress did not have plenary power over the territories, but instead had to govern them under the Constitution.

Taney then introduced the concept of the fundamental equality of the states. All states, according to Southern theory, were equal, and the federal government could not constitutionally prevent "the citizens of any State . . . from emigrating, with their property, into any of the territories of the United States."

The equality of the states theory held that each territory should be governed without discrimination against the laws or customs of any extant state. Excluding slavery from the territories would have the effect of excluding slave owners. Thus, under the theory, although any individual state might prohibit slavery, the territories would be open to all citizens and their property. The decision expresses this view through the "trustee theory": Congress held the territories in trust for the states, and it had the duty to enact legislation that would allow the states "by whose authority [the federal government] acted to reap the advantages anticipated from its acquisition." Taney stated the trustee theory:

A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

Indeed, Southerners such as Calhoun posited that the federal government had the duty of protecting each state's equality and autonomy, so that the federal government had the duty of protecting slavery. This argument appeared in Taney's conclusion that "the only power conferred [to Congress] is the power coupled with the duty of guarding and protecting the owner in his rights." Congress, therefore, could

107. Article IV provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.
108. See 60 U.S. (19 How.) at 441-42; cf. 4 Calhoun's Works, supra note 37, at 583-86.
109. See id. at 447.
110. 4 Calhoun's Works, supra note 37, at 348.
111. 60 U.S. (19 How.) at 448.
112. Id.
113. Id. at 452. Calhoun had applied the theory that the American flag protected
not exclude slavery from the territories.

Despite the usual interpretation that Scott protected slave owners' rights, the doctrine of the equality of states led directly to the protection of group (states'), as well as individual, rights. Taney recognized the dual nature of his opinion:

The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society require. The States evidently intended to reserve this power exclusively to themselves.\textsuperscript{114}

In his dissenting opinion, Justice Curtis criticized the new power given to "individual claims founded on local circumstances" by Taney's opinion.\textsuperscript{115} Curtis maintained that the territories had been acquired for the mutual benefit of all citizens, which gave Congress discretion in regulating the territories. Taney, on the other hand, had bound Congress to the individual states' wishes, much as the importation clause had allowed a single state to decide whether it would admit slaves or not, regardless of Congress's position on the slave trade.\textsuperscript{116}

Taney also protected states' police power when he drew a distinction between state and federal citizenship. He rejected the claim that a single state could confer federal citizenship. Taney hypothesized that if a single state could confer federal citizenship, then Pennsylvania could make blacks federal citizens, and his home state of Maryland, following the privileges and immunities clause, would have to accord them all the privileges of Maryland citizenship. According to Taney, if a manumitted slave were given the privileges of citizenship,

he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the State officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the

\textsuperscript{114} 60 U.S. (19 How.) at 426.

\textsuperscript{115} Id. at 626 (Curtis, J., dissenting) ("Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognized in this court . . . .").

\textsuperscript{116} The importation clause stated: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ." U.S. Const. art. I, § 9, cl. 1. This allowed a single state to frustrate Congress's wishes and to continue to import slaves until 1808.
laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety. 117

Taney's narrow definition of federal citizenship protected states from the imposition of federal duties.

2. Taney's Fifth Amendment Argument. — In addition, Taney argued that Congress was subject to constitutional restrictions, so that, in areas in which the Constitution recognized specific individual rights, it had no power to infringe on those rights. 118 Taney boldly asserted that "the right of property in a slave is distinctly and expressly affirmed in the Constitution." 119 So read, the right of the federal government to restrict slave ownership was eliminated by the fifth amendment. Taney argued:

[The rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. 120

Taney thus invoked the fifth amendment in a substantive due process manner. 121 Though Taney did not again cite the fifth amendment, one may reasonably conclude that that provision served as the basis for his general conclusion that "the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void." 122

Previous commentators have asserted that the Scott reference to the fifth amendment, the first citation of the amendment to invalidate a congressional act, 123 was "almost a throwaway line, a weak and passing allusion to one idea potentially great but here underdeveloped and

117. 60 U.S. (19 How.) at 425 (discussing Legrand v. Darnall, 27 U.S. (2 Pet.) 664 (1829)). Again, Taney's reasoning closely follows Calhoun's. Calhoun had argued that states cannot confer rights of national citizenship upon a person. See 2 Calhoun's Works, supra note 37, at 496.
118. See 60 U.S. (19 How.) at 450.
119. Id. at 451.
120. Id. at 450.
122. 60 U.S. (19 How.) at 452.
123. See J. Nowak, R. Rotunda & J. Young, supra note 2, § 3.1 n.11.
unexploited." Some historians point to the novelty of the use of the fifth amendment and to Taney's failure to specify that he was relying upon it. Furthermore, Taney ignored the argument made by abolitionists that the fifth amendment's protection of "liberty" freed slaves, and he arguably never showed that prohibiting slavery was a deprivation of property.

Nevertheless, some evidence indicates that Taney took his fifth amendment argument seriously. His colleague Justice Curtis thought the argument substantial enough to warrant refutation in dissent. Curtis showed that the fifth amendment and similar clauses in state constitutions had not previously been invoked when Congress prohibited slavery in the territories or when states freed a slave who was brought into the state illegally.

More importantly, the due process clause had a long history as a protector of slave property. Fifteen years before Scott, the fifth amendment had been invoked by Justice Baldwin in dictum in his concurrence in Groves v. Slaughter to protect property from congressional regulation.

125. See, e.g., D. Fehrenbacher, supra note 7, at 382 ("Certainly the few lines Taney devoted to the subject barely scratched the surface."); H. Hyman & W. Wieck, supra note 52, at 187 (Taney "did not explicitly state that the Missouri Compromise was unconstitutional because it contravened the Fifth Amendment's due process clause.").
126. See D. Fehrenbacher, supra note 7, at 382. Abolitionists argued that slavery was everywhere unconstitutional because of the fifth amendment's guarantee of liberty. See E. Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 76-77 (1970) (future Chief Justice Salmon Chase advanced this position in the 1840s). However, it was the view of only the most radical abolitionists, and it seemed to have had little validity as long as the Bill of Rights was not applied to the states. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833). But see J. ten Broek, The Anti-Slavery Origins of the Fourteenth Amendment 91 n.16 (1951) (abolitionist argument that Barron was incorrect and that fifth amendment applied to states).
127. See D. Fehrenbacher, supra note 7, at 382-83.
128. See 60 U.S. (19 How.) at 626-27 (Curtis, J., dissenting) ("I think I may at least say, if the Congress did then violate the Magna Charta [fifth amendment] by the [Northwest] ordinance, no one discovered that violation."). But see D. Potter, supra note 6, at 276 (maintaining that fifth amendment was basis for invalidating the Missouri Compromise).
129. 40 U.S. (15 Pet.) 449, 515 (1841) (Baldwin, J., concurring). The fifth amendment thus had a greater history than Fehrenbacher recognizes. See D. Fehrenbacher, supra note 7, at 382 ("But only once previously [Murray v. Hoboken Land Co., 59 U.S. (18 How.) 272 (1856)] had the subject received even passing mention in a decision of the Taney Court."). However, the fifth amendment and similar clauses in state constitutions, which were all based upon the Magna Charta, received increasing attention in the courts in the years preceding the Civil War. See generally Scheiber, The Road to Mann: Eminent Domain and the Concept of Public Purpose in the State Courts, in Law in
Baldwin argued:

Being property by the law of any state, the owners are protected from any violations of the rights of property by Congress, under the fifth amendment of the Constitution; these rights do not consist merely in ownership, the right of disposing of property of all kinds, is incident to it, which Congress cannot touch. 130

The fifth amendment had been used at least once before by a state court to invalidate a prohibition of slavery in the obscure 1852 case In re Perkins. 131 Perkins involved a petition for habeas corpus by three slaves who had been brought into California by their master, C.S. Perkins, while California was still a territory, and who had apparently

American History 329 (D. Fleming & B. Bailyn eds. 1971) (tracing development of constitutional limitations on states’ power to take property through eminent domain); Stoeckel, A General Theory of Eminent Domain, 47 Wash. L. Rev. 555 (1972) (discussing pre-Civil War cases). The degree of intellectual continuity between slavery cases invoking state and federal due process arguments and nonslavery cases remains unclear. The origins of the post-Civil War substantive due process reasoning are best seen in the general economic regulation cases such as Wynehamer v. People, 13 N.Y. 432 (1856) (invalidating New York prohibition law as a taking without due process). Thomas Cooley’s extraordinarily influential treatise relies upon general economic regulation cases rather than slavery cases to argue for substantive due process. A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 455–517 (4th ed. 1878).


The relationship between popular conceptions of the fifth amendment and the Supreme Court’s interpretation has been inadequately explored. See Fisher, The Significance of Public Perceptions of the Takings Doctrine, 88 Colum. L. Rev. 1774, 1792 & n.92 (1988).

For discussion of the nature of slave property and the reach of the fifth amendment, see the arguments of counsel in United States v. Amy, 24 F. Cas. 792, 801–09 (C.C.D. Va. 1859) (No. 14,445) (slave owner complained that punishment of his slave who committed a federal crime was a taking without due process of law).

130. 40 U.S. (15 Pet.) at 515 (Baldwin, J., concurring).


Justice Anderson’s opinion in Perkins is strikingly similar to Taney’s opinion in Scott. They both use the unconstitutionality of congressional control of religion in the territories as one example of the limits of the Constitution, before going on to say that the Constitution protects the right of all citizens to bring their property into a territory. Compare Perkins, 2 Cal. at 455 with Scott, 60 U.S. (19 How.) at 450. The similarities are so great that one is led to suspect that the ideas were much more popular than historians of Scott have previously believed.
been free and working for themselves for several months.\textsuperscript{132} Although California's Constitution outlawed slavery, Perkins had the slaves arrested under an 1852 California statute similar to the 1850 fugitive slave act, which provided for the arrest and deportation of slaves brought into California when it was a territory.\textsuperscript{133}

The slaves objected to their arrest on several grounds, including the claims that Congress had preempted the field through the fugitive slave clause, that the California Constitution outlawed slavery and that slavery had been illegal in the California territory. The opinions of the justices of the California Supreme Court surveyed many of the important legal questions surrounding slavery and experimented with Southern constitutional theory. One justice used the fifth amendment to invalidate the portion of the California Constitution that outlawed slavery.\textsuperscript{134} He also stated that slavery became legal in the territory when Congress originally annexed it from Mexico.\textsuperscript{135} Another justice, prefiguring the United States Supreme Court's decision in \textit{Moore v. Illinois},\textsuperscript{136} argued that the states had concurrent power with the federal government to facilitate the return of fugitive slaves.\textsuperscript{137}

Significantly, the argument that the fifth amendment supported slavery had also circulated in Congress. In 1836 a House committee used the fifth amendment to argue that abolition of slavery in the District of Columbia was unconstitutional.\textsuperscript{138} Calhoun had also used the amendment in the 1830s as a simple way of protecting slave property, before he began to use the equality of the states argument.\textsuperscript{139}

3. Taney's Protection of States' Rights. — Taney could have protected slave property just as effectively by relying wholly on \textit{Strader} and finding, as he did parenthetically in \textit{Scott}, that "[a]s Scott was a slave when taken into the State of Illinois by his owner, . . . and brought back in that character, his status, as free or slave, depended on the laws of Mis-

\begin{footnotesize}
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\item See 2 Cal. at 426–27.
\item See id. at 445.
\item See id. at 455–56 (applying fifth amendment to California through supremacy clause) (Anderson, J., concurring).
\item See id. at 454–55 (reasoning that Mexican law, which outlawed slavery, was superseded by the Constitution).
\item 55 U.S. (14 How.) 12 (Dec. Term 1852).
\item See 2 Cal. at 435 (Murray, C.J.) (relying upon Taney's concurrence, mistakenly reported as a dissent, in Prigg v. Pennsylvania, 42 U.S. (16 Pet.) 559, 629 (1841) (Taney, C.J., concurring)).
\item See 13 Calhoun's Papers, supra note 37, at 25–26 (1836).
\end{enumerate}
\end{footnotesize}
souri.'\footnote{140} Much of the importance of the new constitutional order invoked by Taney involved the extension of slavery to the territories, which this single opinion facilitated, and the protection of group rights (those of the states) as well as those of the individual master.

The opinion created a sphere of state control free from national interference. Like \textit{Miln}\footnote{141} and \textit{Cooley},\footnote{142} which gave the states their own sphere of regulation in matters of local concern, and Taney's concurrence in \textit{Prigg},\footnote{143} which argued for concurrent federal and local control over return of fugitive slaves, \textit{Scott} preserved local control of property rights. In protecting the right of individuals to own property, Taney protected the right of states to define legitimate property and to set proper limits upon Congress's control over individuals. Although much of the opinion was framed in the language of federal control and individual rights (such as Taney's statement that powers of government and rights under it are positive\footnote{144}), the opinion also relied upon state definitions of property rights to decide what should receive protection against federal regulation. Through the vehicle of the fifth amendment, specific well-defined groups (the states) were protected against the federal government. Sandford's right was protected, but so was Missouri's. Taney's opinion may be read as establishing a doctrine that some rights of a state were so fundamental that they could not be abridged by federal legislation.\footnote{145}

Taney used a substantive due process argument as the basis for

\footnote{140}{60 U.S. (19 How.) at 452. Taney used \textit{Strader} as a basis for decision, but if he had wanted only a narrow ruling, he could have relied solely upon it, holding that because \textit{Scott} was in a slave state, he was subject to the state's law, which declared him a slave. Justice Nelson observed that Taney relied upon \textit{Strader} 's holding that ``every state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory.`` Id. at 463 (Nelson, J., concurring).

141. Mayor of New York v. \textit{Miln}, 36 U.S. (11 Pet.) 102, 139 (1837) (``[A]ll those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called \textit{internal police}, are not thus surrendered or restrained, ... consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.``).


144. [If the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.


145. The Southern press claimed victory upon hearing the decision. See, e.g., \textit{Constitutionalist} (Augusta, Ga.), Mar. 15, 1857 (``Southern opinion upon the subject of southern slavery ... is now the supreme law of the land ... and opposition to southern
expanded protection of states’ rights. In what some have identified as a precursor of later expansive use of the fifth amendment prohibition on taking without due process, Taney rested his invalidation of the Missouri Compromise upon the fifth amendment prohibition of deprivation without due process. Taney reaffirmed that property in a slave had special protection in the Constitution. Although the Constitution did not give Congress any specific right to regulate slave property, Taney reasoned that the Constitution acted to protect the “owner in his rights.”

The decision was only the second ever to invalidate a congressional act. This extreme action indicated a willingness to protect states from unduly burdensome federal action. While Taney never explicitly stated his reasons for restricting Congress’s power over slavery in the territories, the equality of the states and the fifth amendment together gave substantial protection to the states.

B. Taney’s New Federalism In Practice

Taney’s theory in Scott granted states extra power to protect themselves against action by the federal government. He did not go as far as the nullifiers, who wanted states to be able to invalidate congressional action themselves. Taney, after all, wanted a strong federal judi-

opinion upon this subject is now opposition to the Constitution, and morally treason against the Government.”), quoted in D. Fehrenbacher, supra note 7, at 418.  

146. See E. Corwin, supra note 121, at 114; I A. Nevins, The Emergence of Lincoln 94 n.7 (1950).  

Perhaps state constitutional law, which universally incorporated a due process or “law of the land” clause, could have been applied by the United States Supreme Court to invalidate Northern abolition statutes; but that seems unlikely because the Court should have deferred to state supreme courts on matters of state constitutional interpretation. Strader v. Graham, 51 U.S. (10 How.) 82 (1851), as interpreted by Taney in Scott, provided that the Supreme Court had no right to revise a state court holding on state law. 60 U.S. (19 How.) at 453.  


147. See 60 U.S. (19 How.) at 449; see supra notes 118–39 and accompanying text.

148. See id. at 451.

149. Id. at 452.

150. See J. Nowak, R. Rotunda & J. Young, supra note 2, § 3.11 n.11 (first invalidation was Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). Some historians have interpreted Scott as a limitation upon Congress’s power but not necessarily as giving additional power to the states. See, e.g., Newmyer, John Marshall and the Southern Constitutional Tradition, in An Uncertain Tradition: Constitutionalism and the History of the South 105, 118 (K. Hall & J. Ely eds. 1989).
ciary. Nevertheless, Taney established separate spheres of state and federal control. This moderate states' rights stance is especially evident in his later decisions, which both subjected states to federal judicial control and exempted them from federally imposed duties. State judges interpreting Scott occasionally used it to promote extreme states' rights positions, and they also used it to invalidate congressional abolition of slavery. Taney's vision protected states, while maintaining a workable federal framework.

I. Taney's Later Cases. — Two cases that dealt with slavery and federalism arose between Scott and the Civil War: Ableman v. Booth,\(^{152}\) in which the Wisconsin state courts had tried to nullify the Fugitive Slave Act\(^{153}\) by freeing a man accused of failing to help recapture a fugitive, and Kentucky v. Dennison,\(^{154}\) in which the federal courts refused to order the extradition of an Ohio resident who had helped a slave escape from Kentucky.

Both of these cases can be viewed as part of Taney's new federalism. Ableman is traditionally viewed as aggressive federal judicial review designed to protect slavery.\(^{155}\) It subjected Wisconsin courts to federal judicial control, holding that state courts could not grant habeas corpus for a federal crime.\(^{156}\) In addition to testifying to Taney's proslavery bias, this case also supported the theory of spheres of exclusive federal control.\(^{157}\) Federal courts, according to Taney, should have exclusive control over federal crimes grounded in the Constitution's fugitive slave clause.\(^{158}\) The case is viewed accurately as part of the moderate states' rights position of the Taney Court that avoided both the unionism of the Marshall Court and the fire-eating doctrine of the nullifiers.\(^{159}\)

In Dennison, Taney exempted a state from federal control. The de-

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151. See, e.g., H. Hyman & W. Wieck, supra note 52, at 184–99. A strong federal judiciary could be used to keep Congress at bay and thereby protect against legislative restriction of slave property. Thus, Taney followed the usual Southern approach of resting rights upon the Constitution, rather than the fickle legislature, in which Southerners were outnumbered. See J. Carpenter, The South as a Conscious Minority, 1789–1861, at 127–70 (1990).

152. 62 U.S. (21 How.) 506, 509 (1858).

153. Ch. 60, 9 Stat. 462 (1850).


156. See 62 U.S. (21 How.) at 524.

157. See id. at 516 ("[T]he sphere of action appropriate to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye.").

158. See id.

cision also hindered slavery, which seems antithetical to the Taney Court’s doctrine, but in this case was consistent with its view of federalism. Ohio refused to extradite a person accused of helping a slave to escape her Kentucky master. Taney held that the federal courts could not compel an Ohio state officer to perform the federal constitutionally imposed duty of extraditing a person who had committed a crime under Kentucky law. Therefore, the Ohio governor did not have to extradite the accused.

The Supreme Court denied extradition because, although the extradition clause explicitly imposed a duty upon state officers to deliver fugitives upon proper demand, “there was no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.” This expressed Taney’s notion that the federal government could not interfere with a state’s internal definition of crime—or property. Once the asylum state had control of the defendant, it would not be any more correct for the federal government to enforce another state’s criminal code than for it to take away property that the asylum state had recognized. This states’ rights position had received endorsement from Virginia, which had refused to extradite a person accused of kidnapping a slave in Pennsylvania because Virginia considered the act only a misdemeanor. Dennison may be taken as a representation of the new federalism under which one state would not be compelled to recognize a duty imposed by another state’s law. Definition of crime was within the state’s sphere of control; the federal government could not compel Ohio to recognize what was a crime only under Kentucky law. The decision was the first invalidation of federal control of states on the basis of an implied immunity from federal legislation.

The picture of federal-state relations in other areas of the law is rather hazy in the few years between Scott and the Civil War. There was no wholesale conversion to state nullification, but the Taney Court continued to move in the direction of increased state power. It restricted federal commerce power, and Taney would have restricted presidential power to declare war. Perhaps the most accurate characteriza-

161. Id. at 109–10.
162. See Finkelman, supra note 48, at 134–35.
164. See D. Currie, supra note 66, at 246. Taney’s invalidation of federal control is also reminiscent of Scott.
165. See, e.g., Sinnott v. Davenport, 63 U.S. (22 How.) 227, 243–44 (1859) (finding exclusive state power over internal commerce but maintaining congressional supremacy over areas that “[a]ll clearly within the power conferred upon that body by the Constitution”).
166. The Prize Cases, 67 U.S. (2 Black) 655, 698–99 (1862) (Taney, C.J., dissenting) (Taney would invalidate presidential proclamation of blockade of Southern ports). But see D. Currie, supra note 66, at 234, 275 (characterizing Taney Court as generally
tion of the direction of the Supreme Court was made by the Ohio Supreme Court when it reluctantly refused to grant state habeas corpus relief to prisoners convicted by a federal court of interfering with the recapture of a fugitive slave. The Ohio court stated, "This is only the commencement of our history. The constitutional limitations of power between the state governments and the federal government are yet, to a great extent, open questions." 167

2. State Courts' Use of the New Federalism. — During the Civil War, Kentucky's highest court invoked the Fifth Amendment in discussing the federal government's taking of property. In Corbin v. Marsh, 168 decided in 1865, the Kentucky Court of Appeals ruled that the Constitution prevented the federal government from emancipating the wives and chil-

supporting broad federal commerce powers). Taney took a narrower view of the Fifth Amendment and state property rights in United States v. Amy, 24 F. Cas. 792 (C.C.D.Va. 1859) (No. 14,445), a case he decided while on circuit. A slave belonging to Amy had been convicted of a federal offense—stealing United States mail—and was sentenced to labor. Amy claimed a deprivation of his Fifth Amendment right. Taney said that in this case the federal government had the right to punish a slave and the loss of property was only incidental to punishment. See id. at 809-11.

167. Ex parte Bushnell, 9 Ohio St. 62, 208 (1859).
168. 63 Ky. (2 Duv.) 195, 195-96 (1865); see also W. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 41 (1988) (Congress complained that Kentucky courts subjected federal government to suits in state court for property taken during Civil War).

The obscure Corbin opinion contains debate over some of the significant constitutional issues of Reconstruction. One dissenting judge maintained that the Southern states had denied their allegiance to the United States Constitution and had themselves taken slaves into military service. See 63 Ky. (2 Duv.) at 207-11 (Williams, J., dissenting). The dissent concluded that the emergency of the war justified enlistment of slaves. See id. at 211-12; see also Norris v. Doniphan, 61 Ky. (4 Met.) 385, 400, 437-39 (1865) (finding that congressional act confiscating property of traitors did not comport with due process of law). But see Miller v. United States, 78 U.S. (11 Wall.) 268, 304-10 (1870) (finding confiscation constitutional because of War Power); H. Hyman, To Form A More Perfect Union: Impact of the Civil War and Reconstruction on the Constitution 177-78, 227-28 (1973) (discussing Confiscation Acts' relationship to federalism).

State courts could interpret Taney's opinion as providing additional power to the states. In 1858, one California Supreme Court justice argued in a dissenting opinion that the Judiciary Act of 1789, ch.20, 1 Stat. 75 (1789), was unconstitutional because the United States Supreme Court did not have appellate jurisdiction over state courts. See Ferris v. Couper, 11 Cal. 186 (1858) (Terry, C.J., dissenting). "The decisions of the United States Supreme Court...embolden the political principles of a party which has passed away." Id. at 194. The new political party, led by Taney on the Supreme Court, had expounded different rules of constitutional interpretation, so that the "reasoning by which it is attempted to sustain [the Marshall Court's Federalist interpretation] is based upon rules of construction now universally regarded as unwarranted by the letter and spirit of the Constitution, and directly opposed to those adopted by the same tribunal in... Dred Scott." Id.

One creative litigant in California used Scott to argue that Congress could not make a treaty with China that affected a California resident's property. See Forbes v. Scammell, 15 Cal. 243, 282 (1859). Supposedly, Scott prevented the federal government's interference with state-created property rights. The challenge was not sustained. See id. at 283-84.
dren of slaves who enlisted in the army. Following *Scott*, the Kentucky court held that the Constitution gave Union states complete power over slavery within their borders and that, given the Constitution's "protection to slave property[,] there can be neither military nor civil power in the national government to abolish it."¹⁶⁹ Both the state court's invalidation of federal action that infringed on state-recognized rights and the invocation of the fifth amendment echo *Scott*.¹⁷⁰

### III. IMPLICATIONS OF TANEY'S FEDERALISM

Viewed against a background of a half century of Southern constitutional theory and the ongoing struggle between proponents of Chief Justice Marshall's brand of federalism and states' rights advocates, *Scott* emerges not as a concoction of loosely reasoned arguments,¹⁷¹ but as the basis for a different constitutional order that was an alternative to the unionism of Marshall. Taney's theory in *Scott* suggests a pivotal change in the structure of federal-state relations that protected states'...


¹⁷⁰. This picture contrasts with the one painted by Robert Cover. He suggests that Taney's *Scott* opinion was highly nationalist. See R. Cover, supra note 12, at 166 n.*.

¹⁷¹. See J.J. Currie, supra note 66, at 272 ("From a lawyer's viewpoint *Scott* was a disreputable performance. The variety of feeble, poorly developed, and unnecessary constitutional arguments suggests, if nothing else, a determination to reach a predetermined conclusion at any price."). Most historians have given only passing attention to the theoretical background of Taney's opinion. For example, even Fehrenbacher, who discusses Calhoun, is puzzled by Taney's reading of the territories clause, without noting that the strict interpretation of the clause had substantial support. See e.g., D. Fehrenbacher, supra note 7, at 367. A few historians, however, have viewed *Scott* as part of the evolution of nineteenth century constitutional theory. See P. Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 281–84 (1981) (implications of *Scott*).

H. Hyman & Wiecek, supra note 52, at 180–87 (noting consistency between Taney and previous constitutional thought; Bestor, supra note 48, at 170 (interpreting *Scott* as culmination of Southern attempts to nationalize slavery).
rights. In the case of slavery, *Scott* provided a plausible basis for its nationalization. Finally, it broadly expanded state sovereignty and restricted federal powers, even in such areas as police power and finance.

A. Nationalization of Slavery

The decision catalyzed Northern fears of the nationalization of slavery. *Scott* limited congressional power, reaffirmed the doctrine of *Strader* that slavery could be determined by the policy of the forum state and, most importantly, lent credence to the notion that the Constitution protected slavery. Once the Constitution was interpreted as recognizing slavery, many feared that the nationalization of slavery was imminent. Lincoln, when running against Douglas, constructed a hypothetical argument that would force slavery upon all the states: the Constitution "expressly affirms slavery" according to Taney; because of the supremacy clause, nothing in the Constitution or laws of a state can destroy a right expressly affirmed in the Constitution. Therefore, the right to property in a slave cannot be abridged by any state or by the United States Constitution.

Similarly, the contracts clause might be used to maintain slavery once it had been established in a territory, even if the territory later became a free state. The privileges and immunities clause was already acknowledged by some to be grounds for protection of transient slave owners. For many observers, it was not too fanciful to argue that the answer to Lincoln's question "what is necessary for the nationalization of slavery?" was "the next Dred Scott decision."

The 1860 New York case *Lemmon v. People* would have, but for the Civil War, presented a good test of the implications of *Scott* for in-

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172. See supra note 150 and accompanying text.
173. See supra note 140 and accompanying text.
174. Taney explicitly said that the Constitution recognizes slavery. See 60 U.S. (19 How.) at 451. Justice Daniel went further and asserted that slavery was the only form of property explicitly recognized by the Constitution. See id. at 490 (Daniel, J., concurring).
175. See The Political Thought of Abraham Lincoln, supra note 6, at 95.
177. U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").
178. See S. Foot, supra note 106, at 13–14. The contracts clause would be a particularly fertile possibility in place of the due process clause. The Taney Court had used it to invalidate state laws before. See, e.g., Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); G. White, supra note 15, at 572.
180. 3 The Collected Works of Abraham Lincoln, supra note 176, at 27.
181. 20 N.Y. 562 (1860).
terstate, as opposed to federal-state, relations. New York had outlawed all slavery and provided that all slaves voluntarily brought into the state became free immediately upon entering the state.182 When the Lemmons, who were traveling from Virginia to Texas with their eight slaves, disembarked in New York for a short layover, the New York courts freed their slaves.183 Thus, the conflict in Lemmon was between two sovereign states and their conflicting laws, rather than between federal and state governments.

The arguments of the Lemmons’ counsel reveal ways that Scott might be applied to protect slaves in transit. He argued that comity required that New York allow a slave owner to pass through the state with his slaves.184 While in transit, especially while on board a ship, the property would be protected by general law: “those laws should know no distinction between the rights of property, as recognized in one part of the Union, and the rights of property as recognized in any other part of the Union.”185 He went on to argue, following Scott closely, that settlers in territories ought to be able to bring their own law into the territories and so should be allowed to carry their slaves with them on their way to the territories.186 Had the issue come before it, the Taney Court might have agreed and acted to protect slaves in transit, either through the interstate commerce clause187 or, more likely, by finding a constitutional duty of comity.188 The Taney Court did not have a chance to hear the case, however, because the Civil War intervened.189

Nevertheless, under Taney’s reasoning, a convincing argument can

183. 20 N.Y. at 564–65; see also Report of the Lemmon Case, supra note 146, at 3–6, reprinted in 3 Southern Slaves, supra note 104, at 551–54.
185. Id. at 110, reprinted in 3 Southern Slaves, supra note 104, at 658.
187. This would be an unlikely route because slaves were not subject to the commerce clause. See Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 508–09 (1841) (Taney, C.J., concurring) (interstate slave trade inappropriate subject of congressional regulation).
188. One dissenter in Lemmon used a comity argument. See Report of the Lemmon Case, supra note 146, at 145, reprinted in 3 Southern Slaves, supra note 104, at 693 (Clerke, J., dissenting). A comity argument could be based on the privileges and immunities clause. See, e.g., Willard v. People, 5 Ill. (4 Scam.) 461, 472 (1843) (Mississippi citizen has constitutional protection from deprivation of his slave while traveling through Illinois based upon privileges and immunity clause). Alternatively, the “law of nations” (nonconstitutional grounds) might be used. See, e.g., Rankin v. Lydia, 9 Ky. 467, 2 A.K. Marsh. 813 (1820) (international law may demand comity).
189. Professor Foner reports that Lemmon was on appeal to the Supreme Court, although no formal record remains in the United States Reports of the case. See E. Foner, supra note 126, at 98. The New York Daily Tribune worried that the decision in Scott indicated that the Supreme Court would be hostile to New York’s state freeing the Lemmons’ slaves. See N.Y. Daily Tribune, Mar. 11, 1857, at 4, col. 3.
also be made that he would not have forced slavery upon the North. As he explained in Dennison, each state is sovereign; Virginia, therefore, could not expect that its laws would extend to New York. When the slaves entered New York, New York would have exclusive control over their status.  

B. Protection of States Beyond Slavery

After Scott, the state’s sphere of power would have received protection against the federal government in other areas, such as free speech and finance: the states thus would set borders on constitutional rights. The Compact Theory and the doctrine of equality of the states buttressed this concept by focusing attention upon the rights of individual states. It is difficult to know whether Scott’s reasoning would have been expanded to other areas of the law. One can speculate, however, how the Taney Court would have applied Scott’s reasoning outside of slavery.

1. State Limits on Free Speech. — One potential scenario in which the new federalism would have protected the states comes from the debates over abolitionist literature mailed to Southern states. In the 1830s, abolitionists began mailing literature to Southern states.  

Although Southerners wanted to restrict the abolitionist mailings, they opposed the legislation because they believed that such a law would abridge freedom of the press. Moreover, the legislation gave Congress the power to destroy slavery, because to admit the constitutionality of the legislation would admit Congress’s power to “break[] down all the barriers which the slave holding States have erected for the protection of their lives and property.”  

Instead of congressional regulation of the literature, Calhoun asserted that the states had the exclusive right to determine what was “incendiary” literature and so to protect themselves by regulating the literature themselves. Calhoun introduced a bill that would give states the specific right to prevent any

190. For excellent arguments that Taney would have forced slavery upon the North, see P. Finkelman, supra note 171, at 334–38; Wieck, Slavery and Abolition Before the United States Supreme Court, 1820–1860, 65 J. Am. Hist. 34, 43–58 (1978) (Taney Court was consistently proslavery).
191. See Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 508–10 (1841) (Taney, C.J., concurring). That police power might, however, only allow for exclusion of slaves, but give New York no power to free slaves brought into the state.
193. Jackson’s proposal is discussed in Report, supra note 97, at 56–57.
194. Id. at 57–58.
195. See 2 Calhoun’s Works, supra note 37, at 518–21.
literature a state thought “incendiary” from entering the state’s borders. 196 This reliance upon state definitions of incendiary literature is closely linked to the reliance upon state definitions of property law inherent in Scott. 197

2. Protection of States Against Federal Taxation. — The equality of the states argument could also have been employed in areas such as the invalidation of taxes that unfairly burdened a state. A similar argument, based on the inequity of taxing some states disproportionately, had already been leveled at congressional taxes for internal improvements. 198 A primary area of Southern concern was the inordinate burdens imposed by the federal government upon Southern states, especially in the form of protective tariffs. 199 One might envision a Southern-dominated Supreme Court, which rigidly adhered to the belief that all states were equal, invalidating a tax that unfairly burdened a single state or a group of states. Scott led the way for increased judicial scrutiny and for protection of states against an aggressive federal government. 200

196. See id. Similarly, the Taney Court was already recognizing a state’s police power over immigration. See supra note 52.


198. See, e.g., M. Peterson, supra note 85, at 80, 170–75 (federal government’s taxes opposed because they unfairly burdened Southern states).

199. Excessive taxes were the basis of South Carolina’s first nullification efforts in the 1830s. Southern theorists raised the equality of the states to protest taxation and the federal government’s regulations that indirectly burdened a state. See W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836, at 219–59 (1966).

The Lemmons’ counsel in Lemmon used the equality of the states argument to claim that there could be no discrimination based on ownership of slaves or any other commercial interests. Counsel argued that restrictions on the interstate trade in rice, which was exclusively a Southern product, would similarly violate the “great pervading principle of equality between the States and their respective interests.” Report of the Lemmon Case, supra note 146, at 112, reprinted in 3 Southern Slaves, supra note 104, at 660.

Similarly, but more modestly, the Taney Court already had allowed concurrent regulation of other commerce matters by the states and Congress. See, e.g., Smith v. Maryland, 59 U.S. (18 How.) 1 (1855) (fishing); Cook v. Moffat, 46 U.S. (5 How.) 295 (1847) (bankruptcy).

200. Many additional calls might have been heard to go back and stand upon the Constitution’s protection for states. Specific constitutional provisions, such as the fifth amendment, might have been used. Alternatively, Southerners might have argued, as South Carolina had during the nullification crisis, that federal action was unconstitutional because there was no constitutional authorization for the action. See W. Freehling, supra note 199, at 138–40 (South Carolina declared federal tariffs unconstututional because the tariff was used to promote economic development, a goal not enumerated in the Constitution); M. Peterson, supra note 85, at 187–94.

Finally, Southerners might have looked to general equality of the states arguments. One could imagine counsel for a state disproportionately burdened with taxes stating: “All we demand is to stand on the same level with yourselves, and to participate equally
CONCLUSION

The Civil War and the fourteenth amendment altered the relationship between the federal government and the states, making the federal government clearly superior to the states and allowing active federal enforcement of individual rights. Before the Civil War, however, the Southern constitutional theory holding that the states were coequal sovereigns with the federal government and that each state’s rights had to be protected to preserve individual liberty achieved a prominent place in *Scott*. *Scott* used the Bill of Rights and an inference from the structure of the Constitution that states are equal to protect the rights of the state against infringement by the federal government. Under *Scott*, a state’s rights were secure; the federal government would have had to defer to state legislation on a wide range of issues, from slavery and taxation to freedom of speech. Most commentators on *Scott* have focused narrowly on the political nature of the decision and have not noted its potential for lasting implications in nineteenth-century constitutional law. *Scott* presaged a new constitutional order that reached beyond the slavery implications of the decision. As Justice Marshall commented recently while overturning one of the vestiges of that order:

The fundamental premise of the holding in *Dennison*—“that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today”...

... *Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away.201

*Alfred L. Brophy*

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