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Hargrave’s Nightmare and Taney’s Dream

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An energetic government is our true policy, and it will at last be discovered, and prevail.

—Charles Pinckney¹

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Shortly after the conclusion of the Federal Convention of 1787, Charles Pinckney of South Carolina published a pamphlet. Entitled *Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia, on the 28th of May, 1787*, Pinckney’s pamphlet suggested that it represented a speech given in Congress, although, as the title page indicated, the thoughts were presented “at different Times in the course of their [the Convention’s] Discussions.”² Several oddities present themselves in the pamphlet: there was no plan of government submitted on May 28,³ Pinckney’s own plan was presented on May 29 and pushed aside,⁴ and the pamphlet itself does not detail either his plan or his critique of other plans that had been presented to the Convention⁵ (although it does offer a critique of the Articles of Confederation⁶). Nor was the pamphlet particularly influential. I mention both the oddities and the marginality because I am not claiming that the pamphlet deserves extended analysis because of its centrality to constitutional debate. But I do want to spend time with it because it takes us to the heart of the

* Department of History, University of California, Los Angeles. I would like to thank Ruth Bloch, Holly Brewer, Al Brophy, Trevor Burnard, Matthew Crow, Helen Deutsch, David Garland, Edward Gray, Steven Hahn, Norman Spaulding, Chris Tomlins, and the participants in the “Law As . . .” II workshop at the University of California, Irvine School of Law for their helpful comments and criticisms.

1. Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention, in Philadelphia, on the 28th of May, 1787*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 106 (Max Farrand ed., 1911) [hereinafter RECORDS].

2. *Id.*

3. *Id.* at 108.

4. Appendix D, The Pickney Plan, in 3 RECORDS, *supra* note 1, at 595, 595.

5. Pinckney, *supra* note 1, at 106.

6. *See id.* at 108–21.

issues that I want to raise in this Essay and because the pamphlet takes us to Charles Pinckney.

Pinckney, a scion of an old planter family, son of an alleged loyalist, and spokesman for slave-holding interests, is perhaps most famous for his assertion in the Federal Convention that “if the Committee should fail to insert some security to the Southern States ag[ainst] an emancipation of slaves, and taxes on exports, he sh[ould] be bound by duty to his State to vote ag[ainst] their Report.”⁷ Pinckney appears here as the predictable voice of the slave-owning class, threatening the existence of the Union if there was no accommodation on slavery (or perhaps, more accurately, if the northern states did not concede to the will of southerners on slavery). In this pose, he appears as a familiar figure in the political history of the United States—the aggressively localistic planter, curbing national power with the unbridled confidence of his class. It is easy enough to trace a line from this posture down through the Nullification Crisis⁸ to John C. Calhoun’s famous speech on the Compromise of 1850⁹ and then into Civil War.

But two things suggest a different way of approaching his intervention. The first was his ongoing insistence in the *Observations* on the importance of “energetic government.”¹⁰ Pinckney rivaled Alexander Hamilton in his advocacy of a firm national state. The second is the almost palpable anxiety in his statement to the Committee on Detail: the fear that the Constitution might move against slaves or exports.¹¹ Pinckney thereby found himself caught in a dilemma as he strove to create a powerful national state, but also sought to make sure it did not have the power to emancipate slaves or intrude into the southern economy. To be sure, in a traditional way of accounting for the Constitution, this issue seems beside the point: Pinckney had served in Congress, and so, one might argue, he simply had become a nationalist and his desire for a stronger government grew out of his fear of the excesses of democracy. Slavery, while important for hobbling the new State, played little role in creating it. His desire for “energetic government” and his fear of it simply played in different registers.

But, despite the herculean efforts of Gordon Wood,¹² it is no longer possible to understand the construction of the American constitutional state disconnected from the history of slavery. As scholars such as Mark Graber, George William Van Cleve, and David Waldstreicher have argued, slavery was essential to the American

7. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 355 (Adrienne Koch ed., Ohio Univ. Press 1966) (1840) (statements by Charles Pinckney). Pinckney’s comments took place on July 23 as a warning to the Committee on Detail. *See id.*

8. WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836, at xi (1966).

9. IRVING H. BARTLETT, JOHN C. CALHOUN: A BIOGRAPHY 371 (1993).

10. *See* Pinckney, *supra* note 1, at 108.

11. *See* MADISON, *supra* note 7, at 355.

12. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (2d ed. 1998) (studying the various modes of American political thought from the Declaration of Independence to the ratification of the Constitution).

Constitution in the pre-Civil War period.¹³ For Christopher Tomlins, to take another recent example, slavery all but defined the first constitutional order of the United States in its power to shape both labor relations and civic personality.¹⁴ In the aftermath of these scholars, any work that claims that the history of slavery was not central to the meaning of America's statehood or law fails to comprehend the American past as a whole.¹⁵

However, while these works all demonstrate the importance of slavery in shaping the constitutional order, there is another equally important issue that we need to confront: the ways that the Constitution and its new order reshaped the visibility and security of slavery itself. The new historiography insists that slaveholders imagined themselves under siege in the Revolutionary period and dominated the outcome of constitutional struggle. But it does so without addressing how the Constitution and constitutionalism enabled the transition from imagined weakness to consolidated strength. But the preeminent importance of slavery to the history of the United States was itself an effect of the Constitution; the constitutional settlement ensured that slavery would be simultaneously vulnerable, reinforced, concealed, and made visible from 1789–1865. It is that issue—the question of constitutional alchemy—that I want to raise in this Essay. To do that, I want to start by retelling some old stories.

I

The relationship between revolution, constitutional order, and slavery was formed around the 1772 case *Somerset v. Stewart*.¹⁶ The basic facts of the case are well known. James Somerset, enslaved to Charles Stewart in Virginia, having been brought to England by Stewart, left his master and refused to return to colonial slavery.¹⁷ Stewart hired Captain John Knowles to seize Somerset and to hold him in his ship's brig until Stewart was able to return Somerset to Virginia, slavery, and likely sale.¹⁸ In response, Granville Sharp and a coterie of antislavery lawyers and activists filed for a writ of Habeas Corpus under which Somerset was delivered up to King's Bench and the authority of Lord Mansfield.¹⁹ In the end, Mansfield ruled that, under the Laws of England, neither Knowles nor Stewart had the legal right to seize and forcibly remove Somerset.²⁰ Consequently, Mansfield granted

13. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 93–96 (2006); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION* 2–9 (2010); DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION* 3–11 (2009).

14. CHRISTOPHER L. TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 512–15 (2010).

15. *Id.*; see GRABER, *supra* note 13; VAN CLEVE, *supra* note 13; WALDSTREICHER, *supra* note 13.

16. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 510.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Somerset his release, and Somerset moved into the Afro-British population and disappeared from the historical record.²¹

Somerset v. Stewart was a cause célèbre in its time as it has been since. Despite Mansfield's efforts to find some settlement and to avoid having to deliver a verdict, forces on both sides of the issues—antislavery activists in England and West Indian Planter interests in the colonies and metropolis—were determined to press the case forward. Somerset's lawyers—among the most esteemed attorneys available—pressed a wide range of arguments against slavery itself, including, but not limited to, claims that the nature of English liberty precluded it from occurring in Britain.²² Equally impressive, attorneys for Stewart pressed the long history of slavery, its importance to the British Empire, and the many ways in which it had been both explicitly and implicitly acknowledged in imperial law. The trial, in other words, provided a forum for a wide-ranging debate over the legitimacy of the slave trade and colonial slavery. And the contemporary public knew it. Newspapers in England and the colonies reported on the case, while versions of the case's history and Mansfield's judgment circulated in both Britain and the colonial world. Much of the discussion—then and now—has focused on what exactly Mansfield meant: Did he really intend to outlaw slavery in England? Was the decision secretly an attack on colonial slavery? Did he simply reaffirm earlier decisions or dramatically change the law of slavery itself?²³

In part, this controversy stems from Mansfield's cryptic language. Rather than basing his decision on slavery per se (as Somerset's attorneys had urged) or dismissing it as simply a question of protecting property rights (as Stewart's attorneys had argued), Mansfield narrowed the decision to the question of the forcible seizing of the body and whether or not “[s]o high an act of dominion” could take place without the sanction of “the country where it is used.”²⁴ Noting that “[t]he power of a master over his slave has been extremely different, in different countries,”²⁵ Mansfield ruled that this particular power of seizure failed to have the necessary legal authority within England.²⁶ And so, he found, “the black must be discharged.”²⁷ Mansfield's decision, thereby, did not address slavery per se but rather its multiple forms and privileges while limiting those forms in England (perhaps to conform to what George Van Cleve has recently dubbed “near slavery”²⁸).

Although narrowly tailored as a decision, Mansfield did use more sweeping

21. *Id.* at 499.

22. *Id.* at 503.

23. For a recent review and rehearsal of those questions, see the debate between George Van Cleve, Daniel Hulsebosch, and Ruth Paley in George Van Cleve, *Somerset's Case and Its Antecedents in Imperial Perspective*, 24 LAW & HIST. REV 601, 619, 624–27 (2006).

24. *Somerset*, 98 Eng. Rep. at 510.

25. *Id.*

26. *Id.*

27. *Id.*

28. Van Cleve, *supra* note 23, at 607–10.

language in his justification. Slavery, he insisted, “is of such a nature, that it is incapable of being introduced on any reasons, moral or political [I]t’s so odious, that nothing can be suffered to support it, but positive law.”²⁹ Mansfield’s language led to a long-standing belief that he had outlawed slavery in England, a point that would help fuel antislavery activity in both Britain and the United States. There are reasons to doubt the validity of this claim (even while acknowledging its political import). England continued to be the home of enslaved people and *Somerset v. Stewart* did not provide a stable legal precedent. Moreover, Mansfield was doing little but paraphrasing Grotius’ much earlier position on the basis of slavery: “[A]part from human institutions and customs, no men can be slaves; and it is in this sense that legal writers maintain that slavery is repugnant to nature.”³⁰

Still, as is so often the case with history, context is all. *Somerset v. Stewart* struck at the rights of colonial slaveholders and the relationship between colonial slavery and Britain. That it occurred in 1772 was not insignificant. As David Waldstreicher has argued, Mansfield’s decision should not be separated from the larger crises besetting the British Empire.³¹ Indeed, Waldstreicher suggests we would do well to think of *Somerset* as opening up what he terms a “Mansfieldian moment,”—defined as that point “when it becomes impossible to deal with key constitutional questions without engaging in the politics of slavery.”³² More specifically, *Somerset*, occurring as it did in the midst of the imperial crisis, seemed to open up a chasm between English and colonial institutions by implicitly denying colonial claims to a common law justification for their institutions. *Somerset* thereby undermined the presumed parity between colonial and metropolitan legal rights and potentially threw colonists into the ambit of Blackstone’s theory of colonial governance.³³ And that was not a stable place for the colonists to be.

Blackstone, after all, explicitly denied to colonists their claims to the English common law. In his famous exposition of the constitutional status of colonies, Blackstone differentiated between those colonies that were merely settled (and therefore whose colonists carried the common law with them) and those either conquered or ceded (in which the constitutional order was at the discretion of the King).³⁴ When conquest was of another Christian country, the old laws remained in force till the King decided otherwise; when of an “infidel” country, the old laws

29. *Somerset*, 98 Eng. Rep. at 510.

30. Sally E. Hadden, *The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 253, 257 (Michael Grossberg & Christopher Tomlins eds., 2008) (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS bk. III, ch. VII, § 1 (1625)).

31. WALDSTREICHER, *supra* note 13, at 40–41.

32. *Id.* at 41.

33. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 4, at 104–06 (William S. Hein & Co. 1992) (1765).

34. *Id.* at 104–05.

were abrogated immediately and legal order was dependent on the sovereign.³⁵ The American colonies, as the home of Native Americans, fell under the latter category:

Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions.³⁶

For Blackstone, the aim of this claim lay in his successive assertion that the colonies “are subject however to the control of the parliament” and his implication that although the colonies had forms of government that aped that of England, they had no real sovereign power in them.³⁷

Blackstone therefore elevated the history of territory over the history of the subject (at least in the colonies). In his telling, the relationship between the sovereign and a particular space determined which rights inhered in any settlement. To be sure, there was an ambiguity here: was Blackstone implying that individual colonial subjects had no claim on the common law or was he speaking only of corporate rights? (And it may be that this Blackstonian background is one powerful argument for the corporate rather than individualist reading of the Declaration of Independence.) But, when combined with Mansfield’s ruling in *Somerset*, colonists (and colonial slaveholders in particular) were thrown back on their own territories if they wished to ensure their property rights and forced to confront the limits of their own authority in any conflict with Parliament. In this light, it is no surprise that colonial newspapers covered the *Somerset* case and its implications with great avidity.³⁸

There is, however, one more aspect of the structure laid out by Blackstone and Mansfield that I want to raise here. For Mansfield, despite the narrowness of his ruling, the question turned on the issue of high dominion. As Mansfield indicated, the case arose because Somerset had refused to leave England when commanded to do so: “[T]he slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used.”³⁹ Here the question exceeds the relationship of the slave owner to the enslaved and moves to the question of the possible forms of dominion within a country.

It is not hard to hear in this phrasing a diminished echo of part of Francis Hargrave’s arguments in support of James Somerset:

The right, claimed by Mr. Steuart to the detention of the negro, is

35. *Id.*

36. *Id.* at 105.

37. *Id.*

38. VAN CLEVE, *supra* note 13, at 33–37.

39. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 510.

founded on the condition of slavery, in which he was before his master brought him into England; and if that right is here recognized, domestick slavery, with its horrid train of evils, may be lawfully imported into this country, at the discretion of every individual foreign and native. It will come not only from our own colonies, and those of other European nations; but from Poland, Russia, Spain, and Turkey, from the coast of Barbary, from the Western and Eastern coasts of Africa; from every part of the world, where it still continues to torment and dishonour the human species. It will be transmitted to us in all it's various forms, in all the gradations of inventive cruelty; and by an universal reception of slavery, this country, so famous for publick liberty, will become the chief seat of private tyranny.⁴⁰

To be sure, Hargrave was engaged in a certain form of political myth making. There were enslaved men, women, and children in England, and the “publick liberty” of England had many limits.⁴¹ Moreover, the effort to exoticize slavery either as a colonial growth or as a sign of the backwardness of Eastern Europe, the Mediterranean, and Africa served to avoid confronting metropolitan England's role in shaping modern slavery.

But there is something more at work here. Hargrave is doing more than anticipating Jefferson's famous depiction of the effects of slavery on owners and slaves.⁴² Instead, he dissolves the distinction between the right to own human beings and the systematic effects of slavery on the surrounding society and constitutional order. At stake in Hargrave's peroration is not only the liberty of Somerset, but also the liberty of all those around him—whether enslaved or not. Slavery in this telling will infect any constitutional order in which it is placed—infect it with tyranny that is.

The tag team of Blackstone and Mansfield then opened up a large front of danger for colonial slaveholders. Admittedly, Blackstone himself was more concerned with Parliamentary Supremacy during the Imperial Crisis, and Mansfield sought to shield West Indian interests as well as he could. But the dual effect of their writings was to reduce colonial slavery to a mere local, legal institution. Denied either common law support or the protection of the rights of Englishmen, slavery could not assert constitutional status and faced the danger of legislative intervention.

Indeed, for the Jamaicans Edward Long and Bryan Edwards the ultimate result of Mansfield's decision was the opposite of Hargrave's worries. For them, the potential effect of the decision was to erode slavery everywhere and to eliminate the distinctions between British subjects and enslaved individuals.⁴³ As

40. FRANCIS HARGRAVE, AN ARGUMENT IN THE CASE OF JAMES SOMMERSETT, A NEGRO 11 (London, W. Otridge 1772). There was also a Boston edition in 1774.

41. *Id.*

42. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 288–89 (Richmond, VA, J.W. Randolph 1853).

43. *See Somerset*, 98 Eng. Rep. at 510.

they argued, the Empire depended on slavery and the labor of slavery, and the Parliament and judges of England had long approved it. To strike at the power of the master in England was to lift the power of a judge over the power of Parliament. Its result would be to encourage disobedience among the enslaved, cause them to try to escape their masters, seek out liberty in England, and dissolve the boundaries of law and race.⁴⁴ Eighty years before Abraham Lincoln's famous remark, figures on both sides of the *Somerset* case began to suggest that a "house divided against itself can not stand."⁴⁵

In mainland British America, the intensification of freedom suits—assertive political claims by the enslaved, the effort of Lord Dunmore to enlist the slaves of patriots, the eager response of the slaves, and, not to mention, the disruption of the power of colonial state authority to impose itself in protection of slave owners' property rights during the Revolutionary War—all deepened the challenge to the legal security of slavery. It is true, as both George William Van Cleve and Aziz Rana have insisted, there were powerful countervailing forces supporting slavery—not least the widespread racism and indifference to the plight of the enslaved that existed through the mainland colonies and England.⁴⁶ No one should imagine that the institution of slavery faced an imminent threat of destruction in the 1770s and 1780s. But we need to recognize the possibility that slave owners would lose "their" property and that slavery might have faced unprecedented political and legal challenge.

Somerset v. Stewart marked the emergence, in Michel Foucault's terms, of a new constitutional and juridical "problematization" of slavery.⁴⁷ Foucault argued in his late work that we could most productively approach the history of thought as a series of problematizations (i.e., as historically localizable structures of argument and reflection that defined the space of a discursive controversy or object).⁴⁸ Importantly, a problematization could not be reduced to either its background social practices or one of its arguments. It was not ideology, but rather a space in which ideologies, laws, questions, and answers could emerge and be meaningful to actors.⁴⁹ My suggestion, then, is that regardless of any of the actors' intentions, and even in the absence of an organized antislavery

44. See A PLANTER, CANDID REFLECTIONS UPON THE JUDGEMENT LATELY AWARDED BY THE COURT OF KING'S BENCH IN WESTMINSTER-HALL, ON WHAT IS COMMONLY CALLED THE NEGROE-CAUSE § 5, at 46–62 (London, T. Lowndes 1772); SAMUEL ESTWICK, CONSIDERATIONS ON THE NEGROE CAUSE COMMONLY SO CALLED, ADDRESSED TO THE RIGHT HONOURABLE LORD MANSFIELD, LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH, & C. 69–77, 92–93 (London, J. Dodsley 3d ed. 1788).

45. *Somerset*, 98 Eng. Rep. at 502, 504.

46. AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 85 (2010); VAN CLEVE, *supra* note 13, at 34–40.

47. *Polemics, Politics, and Problematizations: An Interview with Michel Foucault*, in 1 THE ESSENTIAL WORKS OF MICHEL FOUCAULT, 1954–1984: ETHICS: SUBJECTIVITY AND TRUTH 111, 117–19 (Paul Rabinow ed., Robert Hurley et al. trans., New Press 1997) (1994).

48. *Id.*

49. *Id.*

movement,⁵⁰ *Somerset* established a problematization within which the question of the constitutional status and visibility of slavery, the relationship between the constitutional claims of slavery and local, legal regimes, and the necessity to slavery of the support of the state became unavoidable.

II

There were three national constitutional moments in Revolutionary America: the Articles of Confederation, the Federal Constitution of 1787–1789, and the flourish of amendments produced by the First U.S. Congress that have come down to us as the “Bill of Rights.” Traditionally, scholars have seen a dialectic between these moments⁵¹ whereby the engaged democracy and localism of the moment of independence—local sovereignties reinforced in their resistance to an expanding and transforming Imperial power—led, as a result of ongoing domestic and international crises, to an elite diagnosis of excessive democracy which in its turn led—in the Federal Constitution of 1787—to a more formidable but less democratic nation-state and constitutional order. But given the degree of resistance to that last turn, opponents of the new Federal Constitution forced its supporters to enact a series of amendments restricting the reach of national power, and securing those rights that have become almost synonymous with American self-understanding.

In terms of this story of national consolidation and rights, slave owners qua slave owners play a limiting role—insisting throughout the process on the limitation of federal power. Slave owners as nationalists figure largely in this story, but when their interests as owners of human property are at stake, it seems the emphasis is consistently on limiting the power of the national state.⁵² But this story understates the connections between slavery and the strengthening of the national state, and why slave owners viewed that strengthening as necessary not simply for the State but for slavery itself. Instead, the constitutional moments of revolutionary America served successively to provide slave owners with a system of support to guard them, and their institution, from internal and external threats.

50. In making this point, I do not want to deny that *Somerset*'s allies (beginning with Granville Sharp) and Stewart's backers (especially the West Indian Planter Interest) did not force a test case as a way of testing the power of antislavery arguments. But I do think that these intentions fall short of the sort of organized antislavery movements that emerged beginning in the 1780s and that helped propel forward a new politics of slavery. For more on these issues, see CHRISTOPHER LESLIE BROWN, *MORAL CAPITAL: FOUNDATIONS OF BRITISH ABOLITIONISM* 100–01 (2006).

51. See, e.g., Christopher L. Tomlins, *The Threepenny Constitution (and the Question of Justice)*, 58 ALA. L. REV. 979, 988–1001 (2007).

52. The classic statement of this dialectic remains in WOOD, *supra* note 12. But for one recent version of this story, see Jack N. Rakove, *Confederation and Constitution*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815) 482, 482–517 (Michael Grossberg & Christopher Tomlins eds., 2008). His treatment of Madison and Randolph's constitutional visions as disconnected from their representing a slave-owning class is symptomatic of this narrative perspective. *Id.* at 491–508.

Slavery was central to the United States constitutional order, but the new constitutional order also transformed and reconstituted slavery on a new terrain.

Let me begin with the Articles of Confederation and the way that the Articles structured the problem left to revolutionary politicians by the *Somerset* case. In Articles IV and IX, arguably the two key clauses of the Articles concerning slavery, the Continental Congress took up the challenge of *Somerset* in such a way as to limit Mansfield's reach without committing the new nation to a deeper immersion in the international system of slavery and the slave trade.

Article IX seeks to thread a needle between the demands for nation-building (the supremacy of Confederal treaties and diplomacy) and the perpetuation of state sovereignty over its own borders (treaties cannot grant foreigners trade rights denied to the citizens of a state or deny states the right to determine what can and cannot be imported and exported within their borders). Part of Article IX laid out the parameters of the Confederation Congress's treaty-making powers:

The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, *provided, that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever*—of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.⁵³

But, in a world fractured by *Somerset*, Article IX left a gaping hole: What were the obligations of the Confederation to the internal rules of each state and what were the obligations of each state to each other?

The answers to those questions can be found in Article IV and they demonstrate the continuation of the problematization inaugurated in *Somerset*. Article IV moved through three steps. The first aimed to secure property rights across state borders:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, (paupers, vagabonds, and fugitives from justice excepted,) *shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and*

53. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1 (emphasis added).

*regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.*⁵⁴

The second ensured that states would be obliged to turn over fugitives from justice:

If any person guilty of or charged with, treason, felony or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.⁵⁵

And the third ensured that each state would act with juridical comity: "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State."⁵⁶

Between Article IV and Article IX, then, the Confederation Congress sought to reestablish, within the new nation, the colonial understanding of the imperial law of slavery prior to Mansfield's decision. Importantly, Article IX allowed states to control imports—thus allowing Virginia to ban slave importation and South Carolina to continue it—but only from international sources.⁵⁷ Article IV aimed to prevent the possibility for a state to insist—as did England in *Somerset*—that slave owners risked their full control over their human property by crossing state lines.⁵⁸ Nor is this structure only apparent in retrospection. As George William Van Cleve has shown in a careful analysis, the Continental Congress added Article IV in order to protect slave owners from the implications of an unbridled Article IX.⁵⁹ Indeed, the Privileges and Immunities Clause of Article IV was only added after the addition of Article IX. As Van Cleve concludes, the Continental Congress shaped these Articles to protect slave owners from the obvious implications of the *Somerset* decision.⁶⁰

In the moment, the Articles were unable to provide the safe harbor that slave owners desired. There were several reasons for this failure: despite successfully prosecuting Independence, the Confederation government did not have the coercive power to maintain social order throughout the southern states, its ability

54. *Id.* at art. IV, para. 1 (emphasis added).

55. *Id.* at art. IV, para. 2.

56. *Id.* at art. IV, para. 3 (emphasis added).

57. *Id.* at art. IV, para. 1–3; *id.* at art. IX, para. 1.

58. As various tensions around Pennsylvania's gradual emancipation law would show, this effort was not entirely successful.

59. VAN CLEVE, *supra* note 13, at 50–56.

60. *Id.* Van Cleve has provided the most engaged reading of the drafting of these clauses and the struggles they engendered.

to command state courts to obey its injunctions was limited, and the claim of the Articles to supremacy over state laws was always contested. To be sure, some of these problems were due to southern resistance, at the moment of independence, to a stronger national union and, particularly, to a more powerful taxation regime.⁶¹

But the problems rebounded back on the slave-holding states and intensified their danger from war and internal uprising. George Washington articulated the particular logic of real weakness of the slave-holding states—while of course never making it explicit—in a letter to his nephew Bushrod Washington. First, in taking on the critics of the Constitution in Virginia he ridiculed the notion that they had any effective alternative to approving the new Union:

What line of conduct they would advise it to adopt, if nine other States would accede to it, of which I think there is little doubt? Would they recommend that it should stand on its own basis—seperate & distinct from the rest? Or would they connect it with Rhode Island, or even say two others, checkerwise, & remain with them as outcasts from the Society, to shift for themselves? Or will they advise a return to our former dependence on Great Britain for their protection & support?⁶²

We should not overlook Washington's absolute certainty that Virginia could not survive on its own. And the reason it could not survive on its own ultimately lay in its slave system:

I am sorry to add in this place that Virginians entertain *too* high an opinion of the importance of their own Country. In extent of territory—In number of Inhabitants (*of all descriptions*) & In wealth I will readily grant that it certainly stands first in the Union; but in point of *strength*, it is, comparatively, weak. To this point, my opportunities authorise me to speak, decidedly; and sure I am, in every point of view, in which the subject can be placed, it is not (considering also the Geographical situation of the State) more the interest of any one of them to confederate, than it is the one in which we live.⁶³

Washington's distinction between wealth and strength points to the chasm at the heart of the slave societies. As Van Cleve points out, it is likely that Washington's reference to inhabitants "*of all descriptions*" is a clear reference to slaves (and much like the similar code in the Constitution itself).⁶⁴ Moreover, Washington's reminder of his own military expertise hearkens back to the 1786 debate over the treaty with Spain and the recognition—on the part of at least some southern leaders—that, under the Confederation, the United States simply

61. On these points, see ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006); VAN CLEVE, *supra* note 13, at 114–34.

62. Letter from George Washington to Bushrod Washington (Nov. 9, 1787), in *GEORGE WASHINGTON: WRITINGS* 659, 660–61 (John Rhodehamel ed., 1997).

63. *Id.* I am indebted to George Van Cleve's reading of this passage. See VAN CLEVE, *supra* note 13, at 111.

64. VAN CLEVE, *supra* note 13, at 111.

lacked the military capacity to defend southern interests regarding the Mississippi River and more generally the old Southwest.⁶⁵

The danger facing the slave regimes from both internal and external violence becomes even clearer if we recall Robin Blackburn's important reminder that "one way of describing New World slavery would be to say that it embodied a frozen war of the races."⁶⁶ If we recall that the slave-owning states had just completed one war against Britain and were surrounded by hostile New World empires, the military threats become even clearer. During the Revolutionary War, one reason behind the willingness of some South Carolinians to let African Americans join the Continental Army was their recognition that free white men could not be spared because they were needed in the state to police the enslaved population. As they explained to a committee of Congress, "by reason of the great proportion of citizens necessary to remain at home to prevent insurrection among the Negroes and to prevent the desertion of them to the enemy," the South Carolina militia was not strong enough to carry the fight.⁶⁷ And if we further recall the weaknesses of southern tax systems, the impossibility of fighting on their own becomes even clearer again. For all of the deep-rooted localism of the southern states, they needed a powerful, legitimated, national constitutional order to protect them.

It is this peculiar situation that helps explain one of the most striking aspects of the Federal Convention of 1787: that the two most nationalistic and centralized proposals before the convention were proffered by slave-owning states.⁶⁸ Both the Virginia Plan⁶⁹ (presented by Edmund Randolph, although mostly the handiwork of James Madison) that established the tone of the Convention and Charles Pinckney's plan⁷⁰ (tabled almost immediately but with serious overlap with the Virginia Plan) each demonstrated a slave-owning class that was not powerfully self-assured but one that recognized the many vulnerabilities of its social system. Whereas the southerners would fight hard, and successfully, to ensure that the new constitutional order posed little threat to their institution, it is important to recognize that they wanted that new constitutional order badly. Indeed, they were convinced they needed a system in which their fellow citizens would come to the aid of slavery when required.

I am not going to revisit the details of the Federal Convention here, nor am I going to revisit the numerous clauses devoted to the protection of slavery (the clauses tying representation and taxation to the enslaved, the postponement of the right to abolish the slave-trade, the fugitive slave clause, the assurance of

65. *Id.* at 111–14.

66. ROBIN BLACKBURN, *THE AMERICAN CRUCIBLE* 35 (2011).

67. Quoted in DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765–1820*, at 119 (1971). Robinson's analysis of the incident can be found at 117–20.

68. Mark Graber offers the contrary argument to mine on this issue. GRABER, *supra* note 13, at 93–96. I return to my disagreement with him below.

69. *See* Pinckney, *supra* note 1, at 109–10.

70. *Id.* at 108–22.

suppression of domestic insurrection, the privileges and immunities clause, the contracts clause, etc.).⁷¹ But I do want to point to one moment in the Convention as a way of bringing home this issue of southern anxiety: Rufus King's provocative antislavery speech. King, a member of the Massachusetts delegation, sought to mobilize opposition within the Convention over the clear proslavery drift of the discussions and the definition of representation. He did so by pointing to the inherent instability and inequality that the slave trade produced:

The admission of slaves was a most grating circumstance to his mind, & he believed would be so to a great part of the people of America. He had not made a strenuous opposition to it heretofore because he had hoped that this concession would have produced a readiness which had not been manifested, to strengthen the Genl Govt and to mark a full confidence in it. The Report under consideration had by the tenor of it, put an end to all those hopes. In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed. Is this reasonable? What are the great objects of the Genl System? 1. defence agst foreign invasion. 2. agst internal sedition. Shall all the States then be bound to defend each; & shall each be at liberty to introduce a weakness which will render defence more difficult? Shall one part of the U.S. be bound to defend another part, and that other part be at liberty not only to increase its own danger, but to withhold the compensation for the burden?⁷²

In his inimitably unsubtle way, King had managed to put his finger on the constitutional revolution that the southern states were accomplishing: securing a nation-state powerful enough to protect them and ensure their expansion while limiting their burdens. And it is important here to recognize that King's objections were rooted in the fundamental nature of a constitutional accord—that it removed issues from the power of the political branches. These were not questions of political balance but underlying structures. For all of the debates about balancing sectional interests in politics, it was regarding the fundamental law characteristics of the new order that King issued his challenge to the proslavery Constitution. If the structure of federalism combined with the organization of representation and taxation appeared, from the vantage point of slave-owning states, to contain the dangers raised in *Somerset*, King's comments reveal another potentiality written into the constitutional accord—that the curtailment of *Somerset* would reduce the

71. For a thorough discussion of the explicit and implicit supports given to slavery, see WALDSTREICHER, *supra* note 13, at 3–10.

72. MADISON, *supra* note 7, at 409–10 (debate comments by Rufus King); *see also id.* at 411–12 (supporting speech by Gouverneur Morris); *id.* at 503–04 (debate comments by Colonel George Mason stating that England could have effectively used the enslaved as a powerful weapon during the Revolutionary War). Although, see John Rutledge of South Carolina's dismissal of the danger of insurrection. MADISON, *supra* note 7, at 502. Rutledge had seen things differently during the War when he had supported the proposal to allow the recruitment of African Americans.

north to the status of "distinct (though dependent) dominions," in Blackstone's words.⁷³

In this context, the Bill of Rights easily assumes its place. For the most part, a series of amendments designed to secure the right to a collective politics, the Bill of Rights,⁷⁴ like the body of the Constitution, can also be read as providing double meaning in support of slavery: militias guaranteed in the Second Amendment, while present throughout the states, were essential in the south, whereas the Ninth and Tenth Amendments, while rarely drawn upon, were bulwarks against any tampering with slave laws. And, famously, the Fifth Amendment, which was designed to protect citizens against political prosecution could also, as Roger Taney would demonstrate, protect slave owners against the laws of nonslave states. But for the analysis I am offering, the Bill of Rights was most immediately significant for the added legitimacy it gave to the new Constitution.

III

Fair enough, one might easily say, but what is really different about this telling? Has it not been clear since the work of Donald Robinson and his contemporary heirs like David Waldstreicher and George William Van Cleve (from whom you borrow so liberally) that slavery shaped the Constitution? And if Waldstreicher and Van Cleve have so powerfully looked at the place of slavery in the early Republic, have Christopher Tomlins and Mark Graber not told this story from the other end, working backwards from the Crisis of the Union? Is this discussion much ado about what we already know?

The answer is no. But in order to see that we need to step back from the narrative and examine some of its categories. Having done so, I hope I can then return to the narrative by focusing on *Dred Scott* and *Somerset* to show why the constitutional dimension of this history of slavery and the state matters so deeply.

The recent historiography of the slaveholder's constitution (Graber, Van Cleve, and Waldstreicher) makes two fundamental assumptions that need to be questioned. The first, that slavery's power and security was fully formed and established, I have challenged in the previous sections. Although both Van Cleve⁷⁵ and Waldstreicher⁷⁶ begin their accounts, as I have, with *Somerset*, and although Waldstreicher at least suggests that possibility of a meaningful antislavery moment in the 1780s⁷⁷ (something Van Cleve downplays), by the point that they reach the Federal Convention of 1787, the instabilities and geopolitical challenges facing the slaveholding class are subsumed within a narrative of slavery's power. But it is the second assumption that makes the first possible: for the recent history of what

73. BLACKSTONE, *supra* note 33, at 105.

74. U.S. CONST. amends. I–X.

75. VAN CLEVE, *supra* note 13, at 7.

76. WALDSTREICHER, *supra* note 13, at 39–41.

77. *Id.* at 11–12.

Waldstreicher and Van Cleve have called “slavery’s constitution” and “a slaveholders’ union,” respectively, is predicated on a reading of the constitutional settlement as a straightforward political compromise in juridical disguise.⁷⁸ One can see this point most clearly in Van Cleve’s claim that the Missouri Controversy of 1819–1821 (when the United States almost split over the question of the admission of new states to the Union), which revealed that “the Constitution lacked the essential elements of a rule of law—agreed-upon moral foundations, allocations of political authority between levels of government, and judicial dispute resolution—where slavery was concerned.”⁷⁹

But to take this position is to ignore the most fundamental accomplishment of the Federal Convention and subsequent process of ratification: the constitutionalization of slavery itself. The recurrent crises and the ongoing judicial struggles over the relationship between slavery, slaveholders, non-slaveholders, slave states, and those states with few or no enslaved human beings were not a result of a failure of the rule of law. They were, instead, the effect of the very constitutionalization of slavery achieved in the late 1780s and 1790s. The United States’s response to the problem of *Somerset* was to raise it to the level of fundamental law, an act that ensured its constant visibility and the conflicts that resulted from that visibility and status.

In this regard, the fundamental difference between the Articles of Confederation and the Federal Constitution lie less in specific clauses (after all, many of the most important clauses in the Constitution were preformed in the Articles) than in the latter’s elevation to fundamental law through the process of ratification. That the Federalists were disingenuous about their commitment to the sovereignty of the people seems clear,⁸⁰ but their intentions, in this regard, are not the end of the matter. The decision to create special ratification conventions—a Revolutionary Era invention—established the distinction between constitutional and legislative law, and the insistence on a fixed text for ratification, whatever the resultant amendment process, meant that the written quality of the Constitution would itself be ratified through the process. This process of the ratification of a written constitution led to the peculiar trajectory of American constitutionalism (which still haunts constitutional debate today) as a popular tradition of reverence for a written text that serves to sacralize the constitutional order and consequently provides a potential moral basis for those institutions it recognizes. It was this movement from local positive law, under threat after *Somerset*, to a new constitutional status as an element of a fundamental legal system that transformed the nature of slavery and secured it at the heart of the American system.

Indeed, one way to recognize this effect is to think through the space

78. VAN CLEVE, *supra* note 13; WALDSTREICHER, *supra* note 13.

79. VAN CLEVE, *supra* note 13, at 226.

80. See EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 280–83 (1988); WOOD, *supra* note 12, at 519–64.

between the British and the American consequences for the “Mansfieldian Moment,” starting with *Somerset*. When Mansfield denied slavery a fundamental status, and Parliament let his judgment stand, the British Empire remained multiple houses regarding slavery.⁸¹ But despite the weak tea of Federalism, the Constitution of 1787 did not allow for multiple houses—there was a nation-state not a composite empire. At that point, one must reverse David Waldstreicher’s formulation: it was not in the American “Mansfieldian Moment,” that “it becomes impossible to deal with key constitutional questions without engaging in the politics of slavery,” but that it became impossible to deal with key questions of slavery without engaging in constitutional debate.⁸² There was nothing pre-ordained about these debates. But the persistence of slavery was interwoven with the persistence of the Constitution of 1787 and the Bill of Rights. And it was not a failure of law that slavery constantly returned to the Courts—it was the law’s effect.

The significance of this transformation becomes clear when we try to understand and situate Roger Taney’s opinion in *Scott v. Sandford*.⁸³ *Dred Scott* (as it is more commonly known) was, as you will recall, the result of the claim of Dred Scott that by virtue of his having been brought into “free” territory for an extended period, he was free.⁸⁴ In taking this position, Scott and his attorneys drew upon a long-standing tradition of “sojourn” and “domicile” law that had developed in the early Republic in order to achieve comity between states.⁸⁵ Unfortunately for Dred Scott, the earlier emphasis on comity, which had encouraged deference to the state of residence rather than the state of enslavement, had broken down, and courts, especially southern courts, were insistently asserting the primacy of their own rules. As a result, courts that most likely would have ruled in favor of Scott (and his wife in a parallel suit) twenty years earlier now ruled against him. But what brought *Scott v. Sandford* before the Supreme Court was the claim that Scott and Sandford were citizens from different states and that, therefore, the Supreme Court had appropriate jurisdiction. In speaking for a divided Court, Taney famously ruled that Scott could not bring suit because slaves and the descendants of slaves “are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”⁸⁶ But he went further, establishing a firm distinction between state citizenship and Federal

81. On the political reception of *Somerset*, see VAN CLEVE, *supra* note 13, at 32–38; JAMES WALVIN, *THE ZONG: A MASSACRE, THE LAW, AND THE END OF SLAVERY* 133–37 (2011).

82. WALDSTREICHER, *supra* note 13, at 41.

83. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

84. For a succinct explanation of the facts of the case, see TOMLINS, *supra* note 14, at 512–15.

85. *Id.*

86. *Dred Scott*, 60 U.S. (19 How.) at 404.

citizenship⁸⁷, denying to Congress the right to forbid the spread of slavery into territories, and refusing to allow any state to forbid the holding of human property within its borders.⁸⁸

Essential to Taney's argument was his effort to elide the distinction between the constitutional order of the United States and its colonial and confederation predecessors. Taney's insistence that former slaves and their descendants could never be considered citizens of the United States was based not on any consistent denial of citizenship in the Confederation (as Donald Fehrenbacher demonstrated there was none⁸⁹) or the bearing of rights in the Empire (where, after all, a post-revolutionary notion of the citizen would have been anachronistic), but through a presentation (somewhat haphazard it has to be said) of laws relating to the different policing of "whites" and "blacks." Taney's argument made no effort to distinguish time and place or to think through the different constitutional systems within which they occurred.⁹⁰ Indeed, to make these distinctions would have undermined the case he was building. Strikingly, Taney's constitutional claims depend on his denying the singularity of the constitutional system he is interpreting. Taney seeks to make the Federal constitutional order coterminous with the entirety of the colonizing process. The history of America, in this telling, was a war of the races and the Constitution simply one moment in that history.⁹¹ Law—even constitutional law—was a simple symptom of this underlying racial structure. Put another way, Taney aimed to make his constitutional argument by insisting that the Constitution—at least regarding the enslaved and their rights—made no difference at all.

Mark Graber and Christopher Tomlins have argued recently for the constitutional coherence of Taney's opinion as it related to citizenship and its declaration that Congress could not ban slavery from the territories. They each, in different ways, take this position because of their understanding of the Constitution as an implicit sectional balancing act and of the Union as largely a result of transformed demographic realities (i.e., the competition for territories). I think that their arguments about Taney's constitutional plausibility are persuasive but fail to see the true ground of that plausibility. In Graber's case, his commitment to viewing the Constitution as the juridical form of an ongoing sectional compromise with "constitutional evil" causes him to follow Taney in

87. *Id.* at 405.

88. *Id.* at 451–52.

89. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 340–54 (1978).

90. See, for just one example, Taney's treatment of laws in Massachusetts of 1705, 1786, and 1836. *Dred Scott*, 60 U.S. (19 How.) at 410–13.

91. I do not think that Taney's willingness to distinguish between African Americans and Native Americans displaces this fact. In the end, he viewed the Native American as on the road to extinction just as his master Andrew Jackson did. That he was forced to acknowledge their historical sovereignty and the possibility of their becoming citizens by naturalization served only to project an aura of care over his treatment of the enslaved and their descendants.

failing to recognize the importance of the distinct shift in the nature of jurisprudence from the early republic to the 1840s and 1850s.⁹² In Tomlins's case, his acceptance of Graber's historical reconstruction leads him to follow Taney in eliding the discontinuity introduced into the organization of slavery that occurred with the Federal Constitution of 1787 as well as its subsequent elaboration through the development of contested and constantly recurring constitutional struggle in the courts.⁹³ The result is to render the Constitution qua Constitution as fundamentally unimportant.⁹⁴ Paradoxically, the constitutionalization of slavery had proven so complete that it was impossible for Taney to imagine slavery's history without the constitutional order; instead, he projected that Constitution back into the nature of the colonization process.

To see what is missed in this perspective, we need to return to the arguments in *Somerset*. As you recall, Francis Hargrave envisioned a dystopian world in which polities would be unable to prevent the systematic expansion of slavery because individual slaveholders would be enabled to take their property wherever they pleased.⁹⁵ It was that prospect that underwrote the political challenge of slavery to English liberty.⁹⁶ Taney, in his recitation of colonial laws relating to the mixture of the "races,"⁹⁷ hearkened back to the fears of Hargrave's opponents (of the breaking of the color line) and instead solved that problem by embracing Hargrave's nightmare. That he did so—overturning the entire problematic of *Somerset* as he did—by invoking the takings clause of the Fifth Amendment is a sign of the profound political discontinuity and disruption that the constitutional settlement enacted as fundamental law:

Thus 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.⁹⁸

By the alchemy of the Constitution, liberty became the right to expand slavery, and due process of law became the capacity to create disposable people beyond the law. By naming this alchemy so boldly, of course, Taney inadvertently

92. GRABER, *supra* note 13, at 91–167.

93. TOMLINS, *supra* note 14, at 515.

94. For further reading of this argument, see my review of Christopher Tomlins's *Freedom Bound*. Michael Meranze, Book Review, 46 LAW & SOC'Y REV. 663 (2012).

95. HARGRAVE, *supra* note 40, at 11.

96. *Id.*

97. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, at 407–17 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

98. *Id.* at 450.

contributed to overcoming this particular iteration of the constitutional construction of statelessness. But, as both the Bush and Obama administrations have shown so forcefully, that constitutional option has not been foreclosed.