Chapter I: The Contradictions of American Democracy in the Antebellum Years: The Inadequacy of the Constitution; The Rise of the Anti-Slavery and Woman’s Rights Movements

Between 1815 and 1860, the new nation consolidated its identity and expanded its boundaries. This was a time of economic growth and internal improvements. The *antebellum* era witnessed a “transformation” of the private law of torts, contracts, property, and commercial law that has been said to have unleashed “emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society,” all in the name of promoting economic growth. These years also witnessed significant democratization of the American polity. Even though the new nation’s charter incorporated the revolutionary principle of “popular sovereignty” or the consent of the governed, its political structures and practices had been designed to be far from democratic in the beginning. After 1815, however, the spreading trend in the states toward universal white adult male suffrage accelerated significantly, culminating with the election of Andrew Jackson in 1828. The people and party operatives who put this man of humble origins into the White House poured into Washington D.C. for his inauguration. “Never before had an American ceremony of state turned into such a democratic and charismatic spectacle.” From the perspective of divisions between the social classes, Jacksonianism represented important gains for egalitarian thinking in politics.

The subsequent decades before the Civil War saw a flowering of reform ferment in the United States. The progress of “The Second Great Awakening” transformed the spiritual lives of many Americans (both inside and outside of mainstream churches) through camp meeting revivals and other personal religious experiences. Evangelicalism and the post-millenarian...
attitudes that it encouraged influenced many, especially women of the middle class, to join in a variety of movements to bring about all sorts of reform.\textsuperscript{9} The rate of literacy and education for white women rose significantly during these years.\textsuperscript{10} Many such women turned their attention to benevolent campaigns to improve manners and mores, to enforce Sabbatarianism and to encourage temperance, to fight for prison reform and to struggle against Indian removal and against slavery, among other causes. Most middle-class women no doubt conceived of their expanded activities as lying well within the accepted female sphere of domesticity. However, at least some American women followed a reform trajectory that led them from anti-slavery advocacy to the founding of the first woman’s rights movement in the United States.\textsuperscript{11}

There was an underside to the economic growth, territorial expansion, and democratization of the \textit{antebellum} years. Concurrent with, and concomitant to, the democratizing of politics in this era, free black men in the North lost their votes, as did the few women of property who once had enjoyed limited electoral privileges in New Jersey.\textsuperscript{12} Moreover, white supremacy over slaves, Indian tribes, and Mexicans was extended.\textsuperscript{13} Among other Indian removals, the Cherokee were driven out of Georgia and the Seminole out of Florida to accommodate white expansion.\textsuperscript{14} Texians determined to become part of the United States, in part because they feared that Mexico would not let them keep their slaves, engineered a revolution against Mexico.\textsuperscript{15} After a brief period of independence, Texians achieved the hoped-for annexation to the United States of America in 1845. Following in the wake of annexation, the Mexican-American War of 1846-1848 led to the Mexican cession\textsuperscript{16} and enormous new territorial gains for the United States, setting the scene for additional struggles over the expansion of slavery.
Along with the new nation that it represented, the Constitution was to be severely tested at this time by the inherent contradictions between popular consent, on the one hand, and slavery and white supremacy on the other. The compromises about slavery both contained within the original Constitution, and struck by Congress and the U.S. Supreme Court thereafter, failed to contain the growing tensions. Among others, Thomas Jefferson had assumed that there would be a peaceful resolution of the issue though the gradual fading away of slavery. But two developments ensured that conflicts over slavery would continue. First, instead of becoming more marginal economically, slavery flourished, especially with the invention of the cotton gin and the opening of new territories in the west to a plantation economy. Even as internal improvements and legal changes nurtured a developing market economy in one section of the country, the political economy of slavery became ever more important to the fate of another section, driving their interests further apart. Second, continued territorial expansion ensured that these sectional conflicts took political form over the balance of power in Congress. Each time a new State was proposed for admission to the Union, there was a battle over whether it would come in as “slave” or “free.” Each time, new compromises had to be struck, such as the Missouri Compromise of 1820 or the Kansas-Nebraska Acts in 1854. In the long run, however, all these failed and it took a civil war to hold the Union together against the forces of disintegration.

The inherent contradictions deepened in the 1840s as two social justice movements began to raise challenges to the prevailing systems of legal subordination. The first campaign to develop was the abolitionist movement, which rejected the practicality or morality of gradualism (the idea that slavery would fade away) and instead demanded “immediate” emancipation. While captive Africans and their American descendants had never had been purely passive victims of the
slave system, by the early 1830s there was a new element of resistance evident. “If any single event may be said to have triggered the Negro revolt,” it was the publication by a free black man, David Walker, of his *Appeal to the Coloured Citizens of the World* in September, 1829. In addition, the radical and pacifist white reformer William Lloyd Garrison started publishing his anti-slavery newspaper, *The Liberator*, in 1831 and the American Anti-Slavery Society was founded at the very end of 1832. The anti-slavery movement gathered force throughout the 1830s.

A second social justice movement emerged from abolitionist ranks. When female reformers sought to play a “public” role in the anti-slavery crusade and were turned aside in the name of keeping women in their proper sphere, they developed a “woman’s rights” agenda and established a national movement. The new analysis condemned the consignment of women by law and by society to a separate and a subordinate sphere of life. In 1848, in the first of a series and perhaps the most well-known of the woman’s rights conventions, activists met in Seneca Falls, New York and voted to issue a “Declaration of Sentiments” patterned on the Declaration of Independence. The document condemned the many ways that law and society subordinated women to men. It demanded redress and even suffrage for women.

In this era of economic growth and territorial expansion, democratization and the spread of slavery, reform enthusiasm and tension in the Union, the Supreme Court was called upon to decide cases that helped define constitutional ideas about sovereignty, dependency, citizenship, liberty and property, manhood and womanliness. As interpreted by the Supreme Court, however, the Constitution proved inadequate to the challenges of the antebellum years. It could not contain the spread of white supremacy and it had nothing to offer with respect to legal wrongs against
women. In the period leading up to the Civil War, great changes were brewing on the ground. But they were not promoted by constitutional decision-making in the Court. At best, the Constitution was not up to the challenge or seemed to be beside the point; at worst, it actually deepened the contradictions and the tension. It was not until after civil war exacted a huge toll on the nation that the demand for reconstruction led to a new revolution and the redesign of significant parts of the original constitutional framework.28

Jacksonian Democracy

Andrew Jackson was elected the seventh President of the United States in 1828 and served for two terms, but the entire period from 1815 to 1848 (including the administration of Jackson’s protege, Martin Van Buren) is often called the Jacksonian era.29 An American military hero and the first westerner to hold the high Executive office, Jackson was a self-made man of humble origins.30 He has been said to represent democracy in two senses: He was the founder of the Democracy, or Democratic Party that has had a continuous existence to today;31 he also was a symbol of the spread of popular political participation to the property-less “common man.”32

Jackson’s election marked the culmination of a thirty-year trend in the states toward more widespread voting privileges.33 “By 1828, the principle of universal white adult male suffrage had all but triumphed–and accompanying that victory, much of the old politics of deference still left over from the Revolutionary era had collapsed.”34 Jackson’s victory was stunning. He garnered 68% of the electoral college vote, unlike in 1824 when a stalemate had thrown the disputed results into the House of Representatives.35 The House picked John Quincy Adams in ‘24, giving rise to the angry belief among Jacksonians that the election had been stolen from their candidate.36 In 1828, however, Andrew Jackson not only won the electoral college by a landslide,
but he picked up 56% of the popular vote, “the latter figure representing a margin of victory that
would not be surpassed for the rest of the nineteenth century.” The number of white men who
voted in the presidential election of 1828 more than quadrupled from four years before. In
addition to sheer numbers, the style of Jackson’s campaign also was much more democratic than
any preceding national race. He organized national political committees, utilized newspapers
and campaign sheets, and pioneered fund-raising gimmicks. Jackson’s campaign emphasized
the theme that the people should rule and that there should be a popularly inspired “reform” of the
excesses of the powerful and influential.

The triumph of democracy, however, contained contradictory impulses. The long drive
toward universal white male suffrage came at the expense of those free black men who had voted
up until that period, and of the few white women of property who enjoyed the franchise.
Connecticut completely disfranchised its free black voters in its 1812 constitutional convention
and New Jersey’s racial line set a precedent for other northern states. New Jersey, where a few
white women of property had once voted, disfranchised them in 1807. New York State had a
significant population of free people of color or those due to be emancipated shortly, of sufficient
size to constitute a swing voting bloc. Under New York’s 1777 constitution, free black men
voted alongside white men on the same wealth-qualified basis. These voters had traditionally
been Federalists, i.e. political opponents of the Jeffersonians. During the state convention to
revise the New York constitution in 1821, there was a focus on removing the property
requirement to vote. Those who expected to gain politically from an expanded electorate in terms
of class wanted to restrict the vote by race. In the end, there was a compromise under which
whole categories of free blacks (including those who were to be emancipated in 1827) lost the
vote, while the number of white male voters went up significantly. As late as 1860, the democratically expanded white electorate in New York rejected a proposed constitutional amendment that had been passed by the legislature and that would have abolished the property qualification for black male suffrage.

The new states added to an expanding Union generally followed a liberalized class, but racially discriminatory pattern: “Of the states admitted after 1819, every one but Maine disenfranchised African Americans. The United States was well on its way to becoming a ‘white republic’.” There were many reasons that the new states disfavored property qualifications. One of them was that more liberal suffrage rules for whites “would also, in time, become a powerful means of blurring the class lines between slaveholders and nonslaveholders, by appealing to their basic equality as white citizens regardless of property–creating a Master Race democracy.”

Indian Removal, White Supremacy, and the Inadequacy of the Constitution

The democratizing Jacksonian movement ironically also stood for the protection of slavery and the promotion of continental expansion. One way in which additional territory was opened was through state and federal action coercing or inducing “Indian removal.” Indeed, the demands of white settlers and state governments for cession of Indian lands and removal of the southeastern tribes beyond the Mississippi reached a crescendo during the Jacksonian years. The Indian nations responded with a variety of strategies of resistance, negotiation, and litigation. Moreover, white evangelicals such as Jeremiah Evarts were drawn into the battles against Indian removal, a campaign that only narrowly failed to defeat the congressional removal law of 1830. Evangelical women led by Catherine Beecher launched the first-ever national women’s petition.
initiative in protest of the policy. Influenced in part by the campaign against Indian removal, anti-slavery radicals turned against gradualist plans for African colonization and became “immediatists” who favored immediate emancipation instead. Indeed, William Lloyd Garrison’s newly established newspaper *The Liberator* soon graphically portrayed on its masthead the significance of Indian removal to the anti-slavery reformers. The masthead was revised immediately after the rendering of the *Cherokee Nation v. Georgia* Court decision to show “scenes of a slave auction and a flogging, and under these were sheaves of trampled paper printed with the words ‘Indian treaties’.”

Indians have been called “the real losers” of the War of 1812 between the United States and Great Britain. Andrew Jackson gained national fame originally as an Indian fighter in that war and was known as the hero of the battle of New Orleans. His actions against the rebellious Muskogee “Red Sticks” included the forced cession of more than one-half of their holdings, in excess of twenty-three million acres of land, to the United States. Today, this territory includes about three-fifths of Alabama and one-fifth of Georgia. A huge migration of white settlers and their slaves followed, swelling the population of what is now Mississippi, Louisiana, and Alabama. The federal government sold over a million acres of public lands in 1815 alone, and more than twice that in 1818. “What made migration . . . so attractive was the high price of cotton.” As the British industrial revolution expanded the demand for cotton, so also did the “cotton kingdom” and slavery grow, in concert with the loss of tribal lands and with U.S. territorial expansion at the expense of Mexico.

Even after these vast transfers of land and the recession of the frontier across the Mississippi, however, some 60,000 Cherokees, Creeks, Choctaws, and Chickasaws continued to
occupy twenty-five million acres of land in Georgia, North Carolina, Tennessee, Alabama, and Mississippi. From the late eighteenth century onwards, the “five civilized tribes” (including the Seminoles) of the southeast had developed their institutions in directions that did not correspond to the desires of state governments who wanted the Indians to retreat away from the boundaries of white settlement. Native American tribal authorities entered into sequential treaties with the United States in an ultimately futile effort to stem the oncoming tide of white settlement. Moreover, in what has been called a “passive defense” against “American aggression,” the tribes “invited missionaries into their territories, centralized their governments, and supported literacy programs. . . .” Sequoyah created a Cherokee alphabet in 1821 that made possible the 1828 publication of the first Native American newspaper, called the Cherokee Phoenix. In 1827, the Cherokee Nation framed a written constitution that resembled those adopted by some of the southern states themselves. Some Cherokee, particularly among the more assimilated elite of the Nation, became gentlemen planters, accumulating wealth through the use of hired white labor and unfree black labor to cultivate their land. Far from withdrawing voluntarily, in the 1820s and 1830s the five civilized tribes of the southeastern United States demonstrated a marked reluctance to surrender their land and remove themselves beyond the frontier without pressure. Their resistance ultimately led the Cherokee Nation to undertake two test cases, heard by the United States Supreme Court in 1831 and 1832. Taken together with an earlier ruling in 1823, these cases compose the famed trilogy of Indian law opinions written by Chief Justice John Marshall. The sum total of Marshall’s rulings certainly cannot be said to have halted or even seriously inhibited the progress of Indian removal or the spread of white control. Indeed, Marshall’s first opinion added the authority of the Supreme Court to justifications for the
derogation of Indian sovereignty. The ramifications of the so-called “discovery doctrine” embraced in the decision burdens Indian law to this day. On the other hand, old Federalist that he was, the Chief Justice also was no friend of either President Jackson or of the expansionist states’ claims that they could do whatever they wanted to the Indians without interference by anyone, including the national government. After having avoided a direct confrontation through a jurisdictional maneuver in the second case of the trilogy, in the third case Marshall ruled squarely against the State of Georgia. Even then, however, he implicitly acknowledged that the Court had no way of enforcing its mandate. Thus, he left the Cherokee Nation with a hollow victory.

Marshall did not invent the pernicious “discovery doctrine” that determined the outcome in the first case of the trilogy. However, he treated it as a fait accompli, and his opinion effectively entrenched the doctrine firmly in Supreme Court jurisprudence. Decided in 1823, Johnson v. M’Intosh was a dispute between white land speculators with conflicting claims. The Johnson plaintiffs derived their putative title to land in Illinois from a “purchase and conveyance” from Piankeshaw Indians to the Illinois and Wabash Companies. By contrast, the defendant derived his title from the United States government. The specific question at issue, therefore, was which land title was good—the one passed on by “the chiefs of certain Indian tribes” to private individuals before the American Revolution or the one subsequently conveyed by the U.S. government (which had obtained the same land by cession from the State of Virginia)?

The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country. C.J. Marshall, Johnson v. M’Intosh
The Supreme Court was the last stop for the land company claims, which had been repeatedly rejected by lower courts and legislatures alike. The land companies’ experienced advocates wanted to keep the argument narrowly focused. Did individuals have the right to purchase land rights directly from the Indians or not? In order to answer that question, it was “unnecessary,” in their view, to “specula[te]” about “the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live.”

M’Intosh, on the other hand, made much more sweeping claims. He denied that Indian communities had any “permanent property in the soil” that they could convey away to a private purchaser. He claimed that as an inferior race of people, Indians fell under a species of government guardianship and that they consequently lacked the rights of citizens. The opinion of Chief Justice Marshall fell somewhere in between the two extremes. Marshall recognized that Indians retained some rights to the land that they occupied when the Europeans arrived. However, he also endorsed a doctrine that had questionable legal antecedents-- the doctrine of “discovery.”

By this theory, discovery “gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.” On the one hand, this rule regulated relationships among the European powers themselves, “in order to avoid conflicting settlements, and consequent war with each other.” As explained by the Court, however, the doctrine went further and also determined the relations “between the discoverer and the natives.” As the Chief Justice said, the discovering nations “found no difficulty in convincing themselves” that they had made a fair bargain with the
natives of the discovered lands by exchanging the benefits of “civilization and Christianity” for European “dominion” over the hitherto “unlimited independence” of the natives.\textsuperscript{97} The unanimous opinion in \textit{M’Intosh} did not offer any more justification than this (and the bald fact that it was “unthinkable” to upset the law of property within this nation).\textsuperscript{98} It was clear that this was just the way it was.

The Chief Justice insisted that discovery principles did not mean that the “rights of the original inhabitants were. . . entirely disregarded.”\textsuperscript{99} Indeed, they were the “rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.”\textsuperscript{100} At the same time, however, discovery \textit{impaired} and \textit{diminished} the natives’ “rights to complete sovereignty, as independent nations, . . .and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”\textsuperscript{101} In other words, the Europeans assumed “ultimate dominion, a power to grant the soil,” subject solely “to the Indian right of occupancy.”\textsuperscript{102}

The conclusion of this legal reasoning was that even though the Europeans were too weak to eject the existing occupants by force or by negotiation or to settle all the land themselves when they first arrived, the bare fact of “discovery” immediately transferred to them an exclusive right to grant valid title to all the land discovered. Reciting the long history of wars and treaties, leading to the grant of all U.S. land even \textit{while still subject} to the occupation of the Indians, Marshall reiterated that “all the nations of Europe” had recognized this right of discovery, as had the States themselves.\textsuperscript{103} “Civilized” peoples thereby gained both title and the subsequent opportunity to finally “extinguish” the subordinate Indian right of occupancy “either by purchase
or by conquest,” when circumstances would permit. In other words, discovery gave Europeans title right away and they could thereafter consummate their possession in any way that they could.

The Johnson decision did not even discuss the U.S. Constitution. Rather, it was a tour de force of realism conjoined with myth in order to explain the inevitability of a thorough-going (if gradual and hopefully humane) dispossession of the natives by white settlers. On the one hand, the opinion told a story about proud savages, whom the Europeans found it impossible to wholly subdue, contain, or assimilate, describing the “tribes of Indians inhabiting this country [as] fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.” They could not “mix” with the Europeans, nor could they be entirely conquered. Under the press of the advance of the more advanced agriculturist white population, the Indians “necessarily receded,” following the game that they hunted ever more deeply into “thicker and more unbroken forests.” In light of the unavoidable clash of Indians and whites, “however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear,” Chief Marshall wrote, the illusion that the pretension fostered had to be treated as “law.” Thus, the realism of the doctrine followed ineluctably. Once the Europeans arrived and staked their claims between and among themselves, the Indians automatically forfeited the ultimate measure of sovereignty. They may have continued to occupy and control most of the land in practice, but “discovery” meant that the Indian nations lost legal dominion in the eyes of the European powers, and therefore also the ability to grant title to anyone else (such as the land companies who lost their argument in Johnson).

Unfortunately for Jacksonian politics, however, the allegory of natural Indian retreat failed to correspond to the realities of the southeastern tribes. Far from being nomads content to follow
the game deeper into the untamed forests on the other side of the Mississippi, the five civilized tribes had refused to withdraw in the face of the encroaching white population. Instead, the Cherokee Nation had taken a lesson from the never-ceasing claims for more and more concessions in successive treaties, and from the removal of the Creeks and Choctaws, and had begun to resist. On their part, the State of Georgia was fast losing patience with any pretense of recognition of tribal rights. In exchange for the cession to the national government of Georgia’s claims to all western lands occupied by the Indians, the U.S. had promised the State in 1802 that the tribes would be completely removed, “as soon as it can be done peaceably and upon reasonable terms.” After the discovery of gold on Cherokee land in 1827 further inflamed Georgia’s interest, state demands for Indian removal escalated. Chief John Ross and the Cherokee Nation, however, determined to fight any further concessions of land non-violently, through all possible political and legal means. Sadly, the Cherokee Nation’s faith in the willingness or power of the American legal system to protect their rights proved to be misplaced.

Encouraged by the election of President Jackson, “known to be a friend of states rights and an opponent of Indian national sovereignty,” in late 1828 Georgia had passed an Act imposing state law within Cherokee territory. When it came into full effect, that enactment also treated any Cherokees who remained on the incorporated territory as “second-class citizens of color lacking the political and legal rights of whites, including the right to testify against whites in a Georgia court.” Thus, these “Cherokee Codes” anticipated the infamous “Black Codes” that later limited the rights of free black people after the Civil War (the Black Codes, in turn, inspiring the drafting of the Fourteenth Amendment.) On his part, President Jackson supported a congressional initiative to pass a so-called voluntary Indian removal bill, that one commentator
has characterized as being designed “to cover removal with a neat veneer of legality.”¹¹⁵ The Cherokees were put between a rock and hard place—they could “choose” either to submit to laws which deprived them of self-government and subjected them to second-class citizenship, or they could “voluntarily” remove. The choice made by the Cherokee Nation, however, was to rely on their treaty rights, testing them via law suits that arrived before the Supreme Court in 1831 and 1832.¹¹⁶

The Cherokee Nation’s arguments were anticipated by Jeremiah Evarts, a legally trained missionary for the American Board of Commissioners of Foreign Missions (ABCFM). Under the pseudonym of “William Penn,” he had published a series of political essays in 1829, arguing in favor of Cherokee sovereignty and right to self-government.¹¹⁷ These pieces appeared just as Congress was debating Jackson’s Indian removal bill.¹¹⁸ To further influence Congress, Evarts and the ABCFM unleashed a nationwide flood of petitions.¹¹⁹ His work inspired Catherine Beecher, “best known as a leader of the nineteenth-century domestic economy movement and as an active, life-long proponent of women’s education,”¹²⁰ to organize the very first national women’s petition campaign, also addressed to Congress.¹²¹ Between 1829 and 1831, nearly 1500 women followed her lead.¹²² Yet, a mere eight years later, when an incipient feminism was blossoming from the female anti-slavery ranks, Beecher entered into a debate with other prominent women over this very issue of petitioning. Beecher took a different tack by 1837, now arguing that it was not appropriate for women to petition the federal government.¹²³ That was because “In this country, petitions to congress, in reference to the official duties of legislators, seem, IN ALL CASES, to fall entirely without the sphere of female duty.”¹²⁴ In an effort to reconcile Beecher’s actions, one scholar has examined the equivocal possibilities of the female
domestic role. Reform-minded but conservative women could view their petition activities as non-political efforts, undertaken in the private sphere where women belonged, to lobby influential men of power. In this capacity, such activities reinforced ideas about “true womanhood.” Although the anti-Indian removal petitions demanded women’s right to speak, they did so in a context of “women’s piety, benevolence, and morality.” They also did so out of a paternalistic interest in the fate of the tribal peoples and their Christianization, and not out of any sense of supporting their right to self-determination. As will be discussed below, however, the female petition, writing, and oratory campaigns against slavery ultimately carried a much more radical message about woman’s role in the public sphere.

The federal Indian Removal Act of 1830 passed Congress by a narrow margin and the Cherokee Nation launched its litigation. The Nation hired William Wirt for its lead attorney. Wirt was a distinguished Supreme Court advocate with a less than perfect record on Indian issues. Chief Ross and the Cherokee National Council presented Wirt with a specific list of legal questions that they wanted him to address. Wirt proceeded cautiously to feel out the political options in Georgia (to no avail) and even to try and get a preliminary reading from Chief Justice Marshall on how the Court might rule on an original case brought by the Cherokee Nation. Before the papers were ready, however, Georgia made its own attitude toward any potential Supreme Court ruling quite clear in a kind a dress rehearsal. Relying on its newly asserted powers over tribal people, the State of Georgia had arrested a Cherokee citizen named Corn Tassel for the murder of another Indian on Cherokee land. When the Georgia Superior Court upheld this assertion of jurisdiction, Corn Tassel’s lawyers asked Chief Justice Marshall for a stay in order to allow an appeal to the U.S. Supreme Court. Marshall granted a writ of error, but
Georgia officials did not miss a beat: they refused to attend the federal court and after a special session of the state legislature voted to execute the prisoner, they did so on December 24, 1830.\footnote{136} After the Corn Tassel fiasco, it was quite clear that the Supreme Court faced a clash of major proportions with state authorities.

Nonetheless, the Cherokee Nation went ahead with its plans to bring an original suit in the Supreme Court. According to Chief Justice Marshall, the complaint attacked the Georgia enactments taking jurisdiction over Indian territory on the grounds that they “go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.”\footnote{137}

“The legislation of Georgia proposes to annihilate [the Cherokees], as its very end and aim. . . . The laws of Georgia profess no other object. . . . If those laws be fully executed, there will be no Cherokee boundary, no Cherokee nation, no Cherokee lands, no Cherokee treaties, no laws of the United States in the case. They will all be swept out of existence together, leaving nothing but the monuments in our history of the enormous injustice that has been practised [sic] towards a friendly nation.” \textit{Oral Argument before the Supreme Court March 5, 1831 in The Cherokee Nation v. The State of Georgia.}

The Cherokee Nation wanted the highest federal court to enjoin Georgia from enforcing its laws within Cherokee territory.\footnote{138} Article III of the Constitution (modified by the Eleventh Amendment in 1798) lays out the judicial power of federal courts generally and further specifies certain instances in which a party can bring its case straight to the Supreme Court as an original matter (instead of through an appeal from a state or lower federal court).\footnote{139} Before deciding on the merits of the Cherokee argument, therefore, the Supreme Court had to determine whether or not it could exercise its jurisdiction at all. The answer to that question, in turn, rested on a
definition. Was the Cherokee Nation a “foreign state” (in a suit in which the state of Georgia was the other “Party”) for purposes of the federal judicial power outlined in Article III of the U.S. Constitution?140

“[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between a State, . . . and foreign States. . . .”

“[2] In all Cases . . . in which a State shall be Party; the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction. . . .” Article III, Section 2, U.S. Constitution.

The state of Georgia disdained the entire proceeding and refused to acknowledge the legal papers served on them or to send anyone to argue the state’s side.141 The two lawyers for the Cherokee Nation, William Wirt and John Sergeant, on the other hand, delivered a lengthy oral argument to the U.S. Supreme Court.142 They argued in essence that the Cherokees had to fall into one of the only two possible categories-- either they were domestic states or foreign states.143 The numerous treaties between the United States (or its predecessor government) and the Cherokee, “all of them with the solemnities that belong to public national compacts made between independent states or nations,” called the Cherokee a “nation,” in essence the opposite party in a negotiation between this nation and another.144 As such, the Cherokees argued that they therefore constituted a “foreign state” for Article III purposes as well.145 European discovery, moreover, only settled the relative claims of those sovereigns among themselves; it did not make the Indians vanquished subjects or extinguish their independence.146 Each European power then was left to deal with the Indian nations within their own sphere as they would.147 “In some portions of the discovered hemisphere they were hunted with blood hounds and exterminated,”
elsewhere, “their soil was forcibly seized by the invaders, and the native inhabitants became . . . slaves. Where these things happened, nations, of course ceased to exist.”¹⁴⁸ Without demanding judgment on those more severe circumstances, the Cherokee Nation argued that it was not in the same position.¹⁴⁹ Instead, their lawyers argued (citing of all things, Johnson v. M’Intosh) that Great Britain had asserted only a “limited claim.” Together with subsequent treaty concessions, this restraint left the Cherokee nation as “the same nation now, that it was when the soil of their country was first pressed by the foot of an European.”¹⁵⁰ Thus, the argument continued, from the beginning of the constitutional period the U.S. found the Cherokee Nation just as it remained thereafter, a state that clearly was not “of the union.”¹⁵¹ If not a domestic state, “what could it be but a foreign state?” and therefore within the meaning of Article III.¹⁵² Even as “dependent or inferior allies,” moreover, that fact of nationhood remained:

> A state is still a state, though it may not be of the highest grade, or even though it may have surrendered some of the powers of sovereignty. . . as a man is still a man, though mutilated and deprived of some its limbs.¹⁵³

The Cherokees further argued that the numerous treaties still in force and the federal intercourse act of 1802¹⁵⁴ guaranteed them “the right, within their own boundary, of self government.”¹⁵⁵ Similarly, they enjoyed “the right of property, modified, but still exclusive and absolute against all interference.”¹⁵⁶ Georgia, however, had not only violated these rights but had moved to destroy and extinguish them entirely: “the legislation of Georgia proposes to annihilate them, as its very end and aim. . . .”¹⁵⁷ The nation would in effect be swept away and individual Cherokee would become “outlaws, neither citizens nor aliens, nor competent to be witnesses in courts of justice.”¹⁵⁸ Property rights, too, were compromised by the application of Georgia law.¹⁵⁹ These concrete injuries to rights arising under treaties ensured that there was a case or controversy
for adjudication by the federal courts within the meaning of Article III of the Constitution. That was why the Cherokee Nation asked the Supreme Court for an injunction against Georgia’s imposition of its laws.

Faced with a one-sided oral argument by the plaintiffs, on the one hand, and total defiance by Georgia on the other hand, Chief Justice Marshall found a way to avoid the most inflammatory questions. In an opinion joined by only one other Justice, Marshall declared that the Supreme Court lacked jurisdiction and thus the ability to rule on the Cherokee Nation’s request for an injunction. The Court found that the Cherokee did constitute a separate “state” or political society “separated from others, capable of managing its own affairs and governing itself.” Unfortunately for them, however, that conclusion did not mean that they were “foreign states” within the meaning of Article III’s federal judicial power. Instead, with lasting and often negative consequences for Indian law, Marshall created a new legal construct—a so-called “domestic dependent nation” which was neither a state of the union nor a “foreign state” but fell into a third category entirely. According to Marshall, Indian nations are situated within the geographical boundaries of the U.S. and had acknowledged themselves to be under its “protection.” Although they occupy their own territory until such time as their possession ends, Indians also are in a “state of pupilage.” “Their relation to the United States resembles that of a ward to his guardian.” Marshall concluded that it was unlikely that the framers of the Constitution meant to include such dependents when “they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states.”

In non-binding dicta, Marshall suggested that even if Indians were found to be “foreign nations,” there would be additional hurdles to overcome, “at least in the form in which those
Thus, insofar as the challenge was to Georgia’s imposition of its criminal laws on the Cherokee Nation, Marshall virtually invited another test case, in another posture, to determine that issue. But as to the request for federal assistance against acts by the state legislature to possess Cherokee land, that was another question entirely, one that today we might call a “political question” not amenable to judicial resolution: “It savours too much of the exercise of political power to be within the proper province of the judicial department.” In other words, the Supreme Court was not about to go head to head with Georgia “to restrain the exertion of its physical force.”

Whatever one might think of Chief Justice Marshall’s opinion (which was joined only by Justice McClean), it fell between two extremes. The two Justices who also voted in favor of denying the Cherokee an injunction against Georgia, held an even darker view of tribal identity, sovereignty, and treaty rights. Justice Johnson argued that one could not even apply “the epithet state, to a people so low in the grade of organized society as our Indian tribes generally are.” He endorsed the prevailing hierarchical view that placed savage nomads at the bottom rank of civilizations, ascending upwards to the settled, Christianized, agricultural, mechanical and industrial institutions of white society. Although he was forced to concede that the Cherokee nation “under their present form. . . must be classed among the most approved forms of civil government,” they still did not have a “consistency” that “entitles that people to admission into the family of nations.” Like it or not, therefore, they were going to be lumped with all other Indian tribes.

In Justice Johnson’s harsher version of the discovery doctrine, the natives were hunters who were entirely dispossessed of sovereignty by European discovery. Instead of signifying
partial concessions by still viable Indian nations, treaties merely marked the allotment to the natives by their conquerors of certain “pre-emptive rights” to use the hunting grounds until the game retreated and the Indians followed their prey away. Moreover, insofar as a people who were “restless, warlike, and signally cruel” adapted to a more peaceable and settled life, that would not do them any good either. Perhaps in time they would become fully integrated and incorporated into civilized white society, but the government never contemplated that the tribes would somehow become self-defining states themselves free of the jurisdiction of the states within whose boundaries they fell. However, if they departed, then they could retain such right of self-government that they had. For Justice Johnson, the Indian tribes represented an “anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.” That is why they were treated as a third category in the U.S. constitution’s commerce clause. There were states of the union, foreign states, and then there were the Indian tribes.

The two dissenters (who were willing to hear the case) represented the other extreme of the range of opinions in Cherokee Nation v. Georgia. The long history of the treaties between the U.S. and the Indian tribes, and the language and concessions contained therein, persuaded the dissenters that Indians like the Cherokees had never lost their identity as nations or their right to self-governance, regardless of their dependent or subordinate status. When the Europeans arrived, the Indians were self-governing states. Although they yielded the right “to transfer the absolute title of their lands to any other than ourselves,” they retained the right of “occupancy” of
their soil and the attendant political rights to be “governed by [their] own laws, usages and customs,” subject only to the concessions made in duly authorized treaties.191

According to the dissenting Justices, each and every one of the long line of treaties reaffirmed by their nomenclature and by the nature of the guarantees contained therein that the U.S. was dealing with an “independent people.”192 For example, the 1785 Treaty of Hopewell provided that the Cherokee Nation would deliver for punishment under U.S. law, any Indian, person residing among them, or fugitive who committed a robbery, murder, or other capital crime against a U.S. citizen.193 This provision exactly paralleled a similar one in a treaty with England in 1794. It would be totally unnecessary if Georgia already had jurisdiction to punish anyone who resided within Cherokee territory. Therefore, “the necessity for the stipulation in both cases [Hopewell and the English treaty] must be, because the process of one government and jurisdiction will not run into that of another; and separate and distinct jurisdiction, as has been shown, is what makes governments and nations foreign to each other in their political relations.”194 In other words, this treaty provision was just one of many that demonstrated an agreement between two independent nations—the U.S. as a party on one side, and the Cherokee as a foreign (albeit subordinate) nation party on the other.

Justice Thompson’s opinion continued, refuting any suggestion that minor differences in constitutional language (“tribe,” “nation,” or “state”) signified any departure from the basic acknowledgment that Indian tribes who retained their territorial and political integrity were self-governing nations.195 Indeed, by definition Indians were not citizens of the U.S. or the states wherein they resided.196 What was the alternative? They were foreign citizens of a foreign state.197 Moreover, the Cherokee were complaining about infringements of their property rights
that had been guaranteed by treaties still in force. In contradiction to those rights, among other steps, Georgia had seized the Cherokee gold mines by an Act of 1830. State law ejected Cherokees from their mines and opened that land up to white settlement, to be platted and then distributed by lottery among the people of Georgia. This dispossession under state law directly infringed guarantees contained in treaties and also in the federal statute of 1802 (which made it an offense to survey any land secured by treaty to any Indian tribe). The U.S. had promised Georgia in its compact with the State only that it would try to peaceably remove the tribes. Despite the successive concessions, however, the Cherokee Nation still had not agreed to withdraw entirely. Therefore, the treaty guarantees of their property rights remained unimpaired. Moreover, because all Cherokee lands were held in common, it was the Cherokee Nation as a unit that had the sole right and responsibility to complain about the violation of any property right.

All in all, the dissent reached three conclusions favoring the Cherokee Nation. The first was that it “compose[d] a foreign state within the sense and meaning of the constitution, and constitute[d] a competent party of [sic] maintain a suit against the state of Georgia.” Next, the suit “presents a case for judicial consideration,” involving as it did, a “direct and palpable” harm to the rights of the Cherokee arising under the laws and treaties of the U.S. Finally, Justices Thompson and Story thought that an injunction directing Georgia to cease its infringement of Cherokee property rights was a proper remedy for that injury. On the other hand, the dissent was more negative about the non-property related issues. It was not eager to declare void all the laws Georgia enacted virtually doing away with the separate existence of the tribe and its right to self-governance. While the judiciary may not be the right body to ensure
“mere political rights” under a treaty, however, the dissenters believed that it certainly had the capacity to protect property.\textsuperscript{209}

The competing opinions\textsuperscript{210} in \textit{Cherokee Nation} represented quite different views of the adequacy of the U.S. constitution in the face of the push for Indian removal and expansion of white settlement in the southeast. As Roger Taney later did for African-Americans in the 1857 \textit{Dred Scott}\textsuperscript{211} decision, concurring Justice Johnson essentially defined the Indian tribes out of the constitution as being too “degraded” a people to have ever been considered a foreign “state.” The other concurrence operated to similar effect, transforming the tribes from self-governing treaty parties to mere recipients of an “allotment of hunting grounds” with “no assurance of their continued sovereignty.”\textsuperscript{212} On the other end of the spectrum, the dissent recognized that whatever else was true of the relationship, Indian tribes who entered into treaties with the U.S. remained self-governing nations within their own territory. Therefore, those two Justices were willing to rule on the infringement of property rights claims.

Displaying the same political dexterity that lay behind \textit{Marbury v. Madison}\textsuperscript{213} (which established judicial review while simultaneously ducking a direct confrontation with President Jefferson), Chief Justice Marshall took a third course. He asserted that the Cherokee retained rights of self-government and he virtually invited them to bring another test case. At the same time, however, he ruled that the tribes were neither fish nor fowl: They were neither states of the Union nor “foreign” states, but rather constituted a special category called “domestic dependent nations.” As a result, they could not bring their suit in federal court. This holding rescued the Chief Justice from the dilemma of issuing an order that Georgia would defy and that President Jackson would ignore. As domestic dependent nations in the nature of “wards,” moreover, the
Cherokee and other Indian tribes fell under the special guardianship of the *federal* government which implicitly was charged with a duty to protect them. This reasoning allowed Marshall to perform his usual slight of judicial hand: He reasserted Federalist principles of the primacy of federal power, while at the same time avoiding an immediate confrontation with Georgia.

The Cherokee Nation took up the gauntlet not so subtly thrown down by Chief Justice Marshall and got involved in another test case, with greater judicial success this time. Surprisingly, *Worcester v. Georgia*\(^{214}\) was not the anticipated property rights case and did not even involve an Indian party directly.\(^{215}\) Instead, it arose out of the refusal of white missionaries to either apply for a residential permit and swear an oath of allegiance to the state of Georgia or to leave Cherokee territory, as required by state legislation passed in December of 1830.\(^{216}\) Samuel Worcester was a white missionary from the American Board of Commissioners of Foreign Missions (ABCFM) who was sympathetic to the Cherokee cause and had worked with the editor of their newspaper, the *Cherokee Phoenix*.\(^{217}\) He and his fellows were determined to resist Georgia’s law.\(^{218}\) Two of the missionaries who had been imprisoned for their defiance deliberately refused a pardon, creating the next test for the Cherokee Nation. William Wirt and John Sergeant once again represented the tribe before the U.S. Supreme Court, together with a local attorney.\(^{219}\) The politics had not really changed from 1831–Georgia was just as recalcitrant, President Jackson was just as unreliable, and the Cherokee Nation had exhausted its funds fighting the prior year’s case. This time, however, Marshall and a majority\(^{220}\) of the Court did not flinch. They found that they had *jurisdiction* on a writ of error appealing the conviction by the state court. *On the merits* of the dispute, they found in favor of the missionaries.\(^{221}\)
On behalf of the Cherokee Nation, Wirt and Sergeant argued that the Supreme Court’s jurisdiction was properly invoked by the defendants’ filing of a “writ of error” and that it therefore extended to this criminal case involving a question arising under the “constitution and laws of the United States,” just as it would in a civil proceeding. Moreover, the Georgia statute “under which the [missionaries] were indicted and convicted, was unconstitutional and void. . . .” That was because by the U.S. constitution “the establishment and regulation of intercourse with the Indians belonged, exclusively, to the government of the United States.” As this exclusive power had been exercised through numerous treaties with the Cherokee, no state could interfere with the agreements contained therein. The attorneys argued that Georgia’s bid to impose its criminal punishments in a way that was contrary to the treaty obligations therefore was invalid and “ought to be reversed.”

An argument based on the exclusivity of national power was well-suited to appeal to Chief Justice Marshall, who was in the final years of his long reign as the careful architect of federal judicial power. This time, Marshall spared little ink on jurisdiction. The Judiciary Act provided for an automatic right of appeal from a final judgment of a state court that had ruled against a claim based on the federal constitution or laws. The missionaries had raised their treaty defense in state court and lost. They now sought to vindicate their rights through an appeal to the Supreme Court. Marshall had invited another bite of the apple in his 1831 opinion and now he was primed to make his ruling.

In his opinion, Marshall once again grappled with the significance of the “discovery doctrine” for Indian law. While Great Britain’s discovery conferred upon them the right to convey title to all the land so discovered, it was an “extravagant and absurd idea, that the feeble
settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea.”\textsuperscript{231} Indeed, such a thought “did not enter the mind of any man.”\textsuperscript{232} In light of the warlike Indians’ ability to defend themselves quite ably, all that transpired was that Great Britain claimed the “exclusive right of purchasing such lands as the natives were willing to sell.”\textsuperscript{233} This somewhat softer version of the discovery doctrine gave Great Britain (and the U.S. as its successor in title) a kind of pre-emptive first option on buying Indian land, and nothing more. Consequently, it could hardly be argued that it created any right to interfere with the internal affairs of these independent Indian nations, “farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.”\textsuperscript{234} The discoverer thus acquired the exclusive right to treat with the Indians, freezing out all European competitors.

Marshall went on to demonstrate that the terms of treaties such as Hopewell and Holston demonstrated the nature of the relationship between the U.S. and its dependent, but self-governing, allies.\textsuperscript{235} He insisted that even Hopewell, whose harsher language perhaps reflected that the Cherokee had supported the losing side in the American Revolution, was a pact between nations.\textsuperscript{236} The U.S. offered its protection, but made no claims therein to occupy Cherokee lands nor exercise personal dominion over the Indians. Protection, Marshall wrote, “does not imply the destruction of the protected.”\textsuperscript{237} In delineating hunting grounds, the treaty did not imply a “surrender of self-government.”\textsuperscript{238} Having failed to secure a lasting peace, Hopewell was superceded by the Treaty of Holston in 1791.\textsuperscript{239} Once again, Marshall discerned in its provisions an agreement between unequals, but not between subject and master.\textsuperscript{240}
All in all, the Court ruled that the Cherokee had never lost their identity. Indeed, from the beginning and continuing to that day, the Indian nations constituted

... distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. 241

In other words, the European claims, at least those inherited by the U.S. from Great Britain, did not destroy the self-governing character of the Indian nations within their own territories.

Georgia at one time conceded as much, even if its laws now tried to make a novel claim. 242 Contrary to Georgia’s new statutes, however, states do not play a role in the special relationship between the Indian and U.S. nations. Instead, “the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.” 243 By passing its laws and then seizing and convicting the missionaries under them, Georgia illegally interfered with the exclusive relationship between the Indian and the U.S. nations and its acts consequently were “void” and its judgment a “nullity.” 244 The opinion then boldly declared that the Supreme Court had the power to reverse the convictions entered by the state court and that it was doing so. 245

Having set itself on this collision course with both the state of Georgia and a President who was unlikely to back up the ruling with the force of the U.S. government, the Court adjourned without waiting to see what Georgia would do with the mandate issued by the U.S. Supreme Court. 246 As a result, it was unclear what could happen in the face of continuing state defiance. 247 While the story of President Jackson’s alleged remarks (“John Marshall had made his
decision, now let him enforce it!”) may not be accurate, no habeas issued to authorize the release of the missionaries. Some erstwhile white allies of the Cherokee now seemed to have surrendered to the idea of Indian removal. The American Missionary Board withdrew its support of any further appeal; the two defendants followed suit, asking for and receiving “pardons” from the state instead of continuing to fight their convictions. Worcester himself became pro-removal, although Butler, the other defendant, did not. Because the Cherokee were not direct parties to this suit, they could not halt the withdrawal of the appeal. Thus, in practical effect the last, and boldest, case of the trilogy ended no better for the Cherokee Nation than their prior legal challenge.

The denouement of the Cherokee battle against removal was tragic. Despite continued efforts by the Cherokee to defend their rights legally and politically, in 1835 the U.S. government entered into a removal agreement at New Echota with a small rump “Treaty Party” that had no authority to represent the Nation. The U.S. military subsequently forcibly removed 15,000 Cherokee men, women, and children along the “Trail of Tears” to Oklahoma, leading to much illness and many deaths. For years afterwards, white lawyers who played some role in the Cherokee cases wrangled disgracefully, trying to collect on inflated claims for fees that they submitted to be paid out of the removal settlement promised to the tribe.

The legal legacy of the trilogy of cases and the politics that surrounded them was ambiguous. The constitution clearly proved inadequate to delineate the full contours of the complex relationships among the Indian nations, the federal government, and the states. Chief Justice Marshall first looked entirely outside of the four corners of that document for the relevant legal theory and later found in the constitution itself a jurisdictional barrier to consideration of
the Cherokee Nation’s claims.\textsuperscript{258} When the Supreme Court finally took a stand in favor of Cherokee independence and, not so coincidentally, federal power over the states,\textsuperscript{259} however, it was unable to force Georgia to release its prisoners. Instead, with President Jackson newly alarmed about an extreme version of states’ rights asserted by South Carolina in the nullification controversy over tariffs, federal and state authorities reached a political compromise which had nothing to do with the Court’s rulings.\textsuperscript{260} The missionaries withdrew their appeals and were pardoned, but the Cherokee were left to false treaties and the Trail of Tears. The constitution proved inadequate to control or halt the press of white settlement or to define the rights of Indian tribes who were apparently neither citizens nor subjects, but placed in a third category as “domestic dependent nations.” The Court’s constitutional jurisprudence also failed to authoritatively settle the question of states’ rights, an issue that eventually would lead to the break up of the Union and to civil war.

\textbf{Rebellion, Reform, and Reaction: The Flowering of the Anti-Slavery Movement\textsuperscript{261}}

Fed by the expansionist imperative, slavery remained the most serious constitutional and political contradiction haunting the nation. Pursuant to the Missouri Compromise of 1820, Congress attempted to settle the dispute about the balance of national power between free and slave states, but only succeeded in a temporary expedient that exacerbated sectional feelings on all sides.\textsuperscript{262} As part of the “Missouri compromise,” Missouri joined the Union as a slave state and Maine came in as a free state. This meant that despite the growing gap between the population of the North and of the South (reflected in seats in the lower house), political balance would be maintained in the Senate, where the twenty-two existing states were already split evenly.\textsuperscript{263} The measure included a provision that slavery was to be excluded from the rest of the Louisiana
Purchase territory north of the 36°30′ latitude line. (This part of the compromise was doomed to failure in the coming years and was reversed in the Kansas and Nebraska Acts of 1854.) The machinations that led up to the 1820 Missouri Compromise only succeeded in arousing strong feelings about slavery, pro and con, and in detonating party rifts.

Between 1829 and 1833, a number of developments ensured that slavery and anti-slavery increasingly would occupy center stage in the nation’s politics. Denmark Vesey’s 1822 abortive slave rebellion in Charleston had already provoked Southern panic out of proportion to the actual extent of the conspiracy. In 1829, a free black man named David Walker published the first edition of his *Appeal to The Coloured Citizens of the World, but in particular, and very expressly, to those of the United States of America.* He reprinted it twice, until he was found dead and presumably murdered in 1830. It was a direct and self-conscious appeal to the slaves themselves to take action.

“It is expected that all coloured men, women and children, who are not too deceitful, abject, and servile to resist the cruelties and murders inflicted upon us by the white slave holders, our enemies by nature, of every nation, language, and tongue under heaven, will try to procure a copy of this Appeal and read it, or get some one to read it to them, for it is designed more particularly for them.” *David Walker’s Appeal, Preamble to Third Edition, 1830.*

In his *Appeal,* Walker roundly rejected meliorative African colonization proposals. He claimed that colonization was only a front to remove the most free-thinking of African-Americans from the United States, leaving the masses still bound in chains. He invoked the shades of the Haitian slave revolution and the contradictions of Thomas Jefferson’s Declaration of
Independence to rally his “brethren” and warn the white citizens of the U.S. of the whirlwind that slavery sowed.

He recited the many cruelties of slavery and exposed the hypocrisies of many preachers. Walker cast the inequities of slavery side by side with all the promises made “in this Republican Land of Liberty!!!!!!” He predicted that although “the whites want slaves, and want us for their slaves, . . . some of them will curse the day they ever saw us.” Whether it was threat or warning, Walker predicted coming violence:

As true as the sun ever shone in its meridian splendor, my colour will root some of them out of the very face of the earth. They shall have enough of making slaves of, and butchering, and murdering us in the manner which they have. No doubt some may say that I write with a bad spirit, and that I being a black, wish these things to occur. Whether I write with a bad or a good spirit, I say if these things do not occur in their proper time, it is because the world in which we live does not exist, and we are deceived with regard to its existence. It is immaterial however to me, who believe, or who refuse—though I should like to see the whites repent peradventure God may have mercy on them, some however, have gone so far that their cup must be filled.

The “slave-holding South saw in [The Appeal] only incitement to servile rebellion, and went to fantastic lengths to suppress it.” Moderate Northerners who favored the gradual elimination of slavery were not any happier with a pamphlet that they agreed was incitement to rebellion.

After producing the third edition, David Walker was found dead, apparently poisoned for his beliefs and his publications. Other events followed hard on the heels of the Appeal’s appearance: In January of 1831, the “immediatist” (but pacifist and non-political) white
abolitionist William Lloyd Garrison began publication of his anti-slavery newspaper, *The Liberator.* He and others then established the New England Anti-Slavery Society. Later in the same year, a black preacher and field hand named Nat Turner led what is considered the greatest slave rebellion in U.S. history in a county in southeastern Virginia, thereby giving the lie to the alleged contentment of slaves with their lot. Thomas Gray, a white pro-slavery lawyer, published a book that allegedly transcribed the full “confession” of Nat Turner, thereby publicizing the event in the most inflammatory way.

In the wake of Turner’s rebellion, a huge debate ensued among white Virginians between advocates of gradual reform, who mostly came from the western part of the state, and plantation owners of the tidewater, who were adamant in their support for a way of life grounded on a slave economy. There were three female petitions submitted to the Virginia legislature as part of this debate. While it was “unexampled,” in their own words, for women to participate in this way, the petitioners of Augusta County acted within what they perceived to be the well accepted role of women and at the invitation of an influential man. Although petitioning later became an important part of the northern abolitionist movement, Southern women would never again be involved in an anti-slavery petition effort after this brief flurry of activity. Indeed, the question of slavery became much more polarized in the South. After the defeat of the reform resolution in early 1832, Virginia tightened its controls over movement of slave or free blacks and restricted slave literacy and religious gatherings even more. After this, it became very difficult indeed to believe in any possibility of anti-slavery activism in the South.

The story of immediatist abolitionism has been told many times and with many different emphases. It is a story about a reform movement that started out as avowedly nonpolitical,
relying instead on “moral suasion.” It never encompassed more than a small minority of Americans. But abolitionist publicists, orators, and lecturers who traveled and worked as agents in the field for years had an uncommon impact on the debate over slavery. Abolitionist newspapers and pamphlets kept the cause alive, even if they did not sell in the numbers that Harriet Beecher Stowe’s novel *Uncle Tom’s Cabin* achieved nearly twenty years later.

Abolitionist tracts were held up in the U.S. mails, precipitating a potential federal/state impasse. The literally hundreds of thousands of petitions sent to Congress became embroiled with a major censorship campaign over the “gag rule” which prevented reception and response by the national legislature. Abolitionism was inspired by or associated closely with criticism of Indian Removal and involved overlapping groups of reformers. The experience of female anti-slavery activists led them to question the separate spheres sex role division of labor that kept women out of public life. After the collapse of old political parties and the creation of new ones, and then the trauma of civil war, former abolitionists became Radical Republicans, playing a role in congressional Reconstruction disproportionate to their relatively small numbers. Feminist former abolitionists also established the first independent woman’s rights movement in the U.S., which was dedicated, among other things, to achieving woman’s suffrage. Thus, the history of abolitionism is entwined with some of the most important developments of the antebellum and of the post-war Reconstruction period.

The tensions that arose within abolitionist ranks also illuminate the dilemmas and schisms that faced social justice movements in the nineteenth century, and that sometimes continue to do so today as well. The relationships between black and white reformers and between the men and women of these interrelated movements were often troubled. The leading abolitionist
organizations, which were overwhelmingly white and male dominated, often operated paternalistically, poorly treating their free black male allies, much less their white and black female allies. White middle-class female reformers also could be as guilty as white men of the same condescension toward those whom they considered less fortunate or less enlightened. In addition, there were sharp disagreements in the ranks about strategies and even goals and about distinctions between mere reform and true insurgency.

Except for the almost infamous slave rebels and the inspirational careers of some selected famous subjects, like Frederick Douglass or Sojourner Truth, the story told about abolitionism often overlooks the history of activism within the black community itself. For example, we may not have ever heard about *The Freedom Journal*, which began publication in New York in 1827 as the first Negro periodical.\(^{291}\) One scholar has called it “the beginning of a race-conscious movement which culminated in the Negro Conventions and laid the basis for the abolition movement.”\(^{292}\) It predated Garrison’s *Liberator* newspaper by four years.\(^{293}\) *The Freedom Journal* lasted for two years, after which it was briefly followed by *The Rights of All* periodical.\(^{294}\) Both papers addressed the social condition of blacks and demonstrated their dissatisfaction with slavery, the African colonization (gradualism) movement, and racial prejudice.\(^{295}\) The journals were supported by traveling agents and Negro societies that welded together free blacks in different communities, serving as precursors to abolitionist organizations.\(^{296}\) After it began to be published, Garrison’s *Liberator* also attracted an important coterie of free black subscribers, contributing writers, promotional agents, and financial supporters.\(^{297}\)

When the path-breaking New England Anti-Slavery Society was organized in 1832, its first meeting was in the school room of the African Baptist Church in Boston.\(^{298}\) Its first address,
subscribing to the doctrine of immediate abolition of slavery, was signed by over 70 individuals, one-fourth of whom were Negro.\textsuperscript{299} For three years running between 1830 and 1832, black abolitionists organized Negro Conventions in Philadelphia.\textsuperscript{300} Some Negro Associations thereafter accepted the invitation from Garrison to become “auxiliaries” of the New England Anti-Slavery Society.\textsuperscript{301} “Numerous meetings of free Negroes were held between 1832 and 1834 and anti-slavery societies were started by them.” These free black societies opposed the idea of gradual emancipation to be accompanied by colonization in Africa designed to remove the freed Negroes from American society.\textsuperscript{302} When the American Anti-Slavery Society (“AA-SS”) was organized at the very end of 1833,\textsuperscript{303} black abolitionists took part.\textsuperscript{304} Interestingly, after one day’s delay, so did female anti-slavery crusaders. On the second day of the conference, “apparently as an afterthought,” the organizers extended an invitation to Lucretia Mott and the anti-slavery Quaker women of Philadelphia, who joined in for the rest of the meeting.\textsuperscript{305} Although it appears that Mott helped draft the founding document, none of the women signed and it was issued under the names of the male participants only.\textsuperscript{306} The stated purpose of the “AA-SS” was to achieve immediate emancipation, without the payment of compensation.\textsuperscript{307} While the important AA-SS was to remain dominated by white males during its life, and some abolitionists were discomforted by and even opposed to the presence of black activists among them,\textsuperscript{308} the work of black men and women and white women in the anti-slavery cause also was critical.\textsuperscript{309}

By 1835, abolitionist activity had not attracted a great deal of public attention. The AA-SS conceived of a plan to raise more money and to focus a spotlight on the cause.\textsuperscript{310} As part of the reaction to Nat Turner’s rebellion, Southern states had enacted censorship rules designed to prevent the circulation of pamphlets like David Walker’s \textit{Appeal} or other literature considered
Lewis Tappan, a leader of the AA-SS along with Garrison, planned a campaign to flood the U.S. mails with pamphlets addressed to more than 20,000 influential white readers in the South. When the first steamer carrying mailbags of this literature arrived in Charleston Harbor, however, it was met by a mob dedicated to blocking its delivery. They stole the mailbags and burned the hated contents. Thus began an overt resistance campaign by whites determined to block abolitionist literature from reaching any one in the South, especially free or enslaved blacks. Abolitionist leaders were threatened with violence and even indicted. Ironically, the immediate result of the postal ruckus was to draw public attention to the anti-slavery cause and to dramatically increase membership in anti-slavery societies in the North. On the national political stage, Congress enacted a law affirming the sanctity of the federal post. “In practice, however, [the U.S. Postmaster] found ways to allow southern postmasters to continue deferring to the censorship laws of their states.”

The American Anti-Slavery Society also organized a rising tide of anti-slavery petitions addressed to Congress, flooding that body with more than 400,000 petitions at its peak. Beginning in 1834, the AA-SS printed and circulated form petitions seeking the abolition of slavery and the internal slave trade in the United States and opposing slavery in the District of Columbia and the territories. Later petitions opposed the annexation of Texas and the admission of Florida as a slave state. As dealing with the petitions took up a lot of congressional time and brought unwanted attention to the issue of slavery, Henry Pinckney of South Carolina and other Southern Democrats proposed what came to be called the “gag rule,” first adopted in the 1835-36 session and lasting in this form until 1840. It stated that all petitions “on the subject of slavery, or the abolition of slavery, shall, without being either printed
or referred, be laid upon the table and . . . no further action shall be had thereon.”

This automatic tabling without action represented a departure from a long tradition that required Congress (and Parliament before them) to receive and respond to petitions addressed to lawmakers, although perhaps only by referring them to a committee. The legislative battles over the anti-slavery petitions and the gag rule induced former President John Quincy Adams to lead an attack from the floor of the House on what he perceived to be censorship. With this high profile response, the gag rule failed in its purpose to remove anti-slavery from the public agenda, but the battle may have permanently weakened the practice of the constitutional right of the people to petition Congress for redress of grievances. Although he opposed slavery in private, Adams was not an abolitionist (i.e. he did not favor immediate uncompensated emancipation) and always would have accepted referring anti-slavery petitions to committee. However, he felt obligated to present petitions coming from his own constituents and was offended deeply by the congressional refusal to entertain them. After the first “gag” rule, abolitionists seized the opportunity to “embarrass Congress” by flooding it with petitions. The tabling of the petitions did not stop Adams from carrying on his campaign against censorship to great effect on the floor of the House, utilizing all kinds of procedural maneuvers. Even a proposed personal censure motion failed to stop him. As a result of his actions, the anti-slavery debate actually received even more publicity despite the gag rule.

Anti-Slavery and The Emergence of Feminism

From its inception, the abolitionist newspaper The Liberator included a “Ladies Department” particularly designed to appeal to the reform sensibilities of women who could be recruited to the anti-slavery cause. This approach fell clearly within the accepted role of women
in society. By the end of the 1830s, however, a number of developments combined to create an entirely new dynamic. As a result, some activist women came to play a self-conscious public role, first in the cause of the slaves, and then on their own behalf as woman’s rights advocates and feminists.

Inspired by William Lloyd Garrison’s all-male New England Anti-Slavery Society, Maria Weston Chapman and three of her sisters organized a female auxiliary in 1832, called the Boston Female Anti-Slavery Society. Their initial job was to raise funds for the movement, but Chapman later moved on to organizing petition campaigns and publishing reports. After the founding of the American Anti-Slavery Society in 1833, “she became, in effect, its general manager.” Garrison also recruited Lydia Maria Child to the cause, a woman who was already famous for her romantic novels and for publishing the first periodical directed to children. Her Appeal on Behalf of That Class of Americans Called Africans was published in 1833 and had a significant influence on Boston anti-slavery circles. Like David Walker’s Appeal, Child’s tract rejected colonization and called for immediate emancipation, the hallmark of the Garrisonian approach.

The explicit transition from anti-slavery to the case for woman’s rights was an outgrowth of a controversy over the appropriate role for women in the petition and public speaking campaigns. Sarah and Angelina Grimké were daughters in a large family of a Charleston, South Carolina “planter, slaveholder, lawyer and politician” who was an integral part of the “ruling elite in his state.” After her father’s death, Sarah experienced a severe emotional and religious crisis, during which she turned away from her Episcopalian upbringing and toward Quakerism. She moved to Philadelphia and lived there during the 1820s, temporarily separated from her much
younger sister Angelina, with whom she had a maternal relationship. Meanwhile, Angelina, too, experienced an evangelical religious conversion that led her to leave her parents’ church. Eventually, the younger sister followed the elder to Quakerism. After a long period of personal development and at great cost to family relationships and reputation, by 1835 both sisters were adherents of the anti-slavery cause. In 1836, Angelina wrote *An Appeal to the Christian Women of the South*, a largely unsuccessful effort to recruit other southern women to the anti-slavery cause. In it, she urged women to petition state legislatures. This document is remarkable as “the only appeal by a Southern abolitionist woman to Southern women.” Even her Quaker friends in Philadelphia were critical of Angelina’s step into anti-slavery activism. But after Angelina committed herself to work for the AA-SS as a traveling lecturer, Sarah joined her and “the sisters from South Carolina [became] the first female abolitionist agents in the United States.”

Back in Charleston, feelings ran high against Angelina’s public debut in print. Her *Appeal* was burned by the local postmaster along with other abolitionist literature and her family was warned that it was not safe for her to visit. Meanwhile, the AA-SS made plans to establish a Female Anti-Slavery Society which would organize the Grimkés’ lectures to female audiences in private homes. The sisters attended an agents’ training session led by Theodore Dwight Weld (later to become Angelina’s husband), the only females among the forty abolitionists there. When the Grimkés held their first talks in January and February of 1837, there was so much interest that they ended up renting public space instead of remaining in a private home. Sarah had joined her younger sister in anti-slavery print, publishing her *Epistle to the Clergy of the Southern States* late in 1836. Thus, between their publications and their lectures, both sisters...
were immediately thrust into a debate about the propriety of women’s intrusion into the public sphere.

As their reasoning and experience developed, the Grimkés began to make connections in their minds between anti-slavery and race prejudice. Angelina also suggested that white women should feel a “peculiar sympathy in the colored man’s wrong, for, like him, she has been accused of mental inferiority, and denied the privileges of a liberal education.” When they set forth on a New England tour, they had every expectation of a warm reception by sympathetic anti-slavery crowds. Instead, they walked into a maelstrom of controversy over their public addresses to mixed gender audiences. Their talks became so controversial that it often was impossible to secure a public hall in which to hold the meetings.

We have given great offense on account of our womanhood, which seems to be as objectionable as our abolitionism. The whole land seems aroused to discussion on the province of woman, and I am glad of it. We are willing to bear the brunt of the storm, if we can only be the means of making a break in that wall of public opinion which lies right in the way of woman’s rights, true dignity, honor, and usefulness. Letter from Angelina E. Grimké, July 15, 1837, reproduced in Lerner at 183.

Catharine Beecher, who herself had organized a female anti-Indian Removal petition campaign in 1829-31, became Angelina Grimké’s antagonist over the role of women in the anti-slavery movement. After reading Angelina’s Appeal to the Christian Women of the South, Beecher felt compelled to reply. In her Essay on Slavery and Abolitionism with Reference to the Duty of American Females, Beecher opened up a “two-year printed debate, wherein the Grimké sisters
linked the cause of women’s rights with that of abolitionism, and Catharine Beecher urged the unification of American culture around a new image of politically transcendent womanhood.361 As Beecher’s biographer has explained, both Catharine Beecher and the Grimké sisters “believed that women should play important social roles, . . . Their differences lay in the way in which they believed female influence should be exerted and the kind of society that would foster such influence.”362 Thus, Beecher was against women stepping outside of the private domestic sphere in order to engage in public abolitionism, instead of trying to privately and discretely influence their men.363 The erstwhile leader of the first national women’s petition campaign to Congress (against Indian removal) now declared that it was totally inappropriate for females to engage in anti-slavery public petitioning.364

While Beecher sought to elevate the status of women within a traditional hierarchical and paternalist society, however, the Grimkés were moving on to a more thoroughgoing indictment of hierarchy, inequality, and the separate spheres doctrine. Angelina wrote a series of letters in response to Catharine Beecher365 and Sarah composed her Letters on the Equality of the Sexes: Addressed to Mary S. Parker, President of the Boston Female Anti-Slavery Society.366 These letters have come to be regarded as a founding document of the first wave of the U.S. woman’s rights movement.367

The investigation of the rights of the slave has led me to a better understanding of my own. I have thought the Anti-Slavery cause to be the high school of morals in our land—the school in which human rights are more fully investigated, and better understood and taught, than in any other . . . Human beings have rights, because they are moral beings: the rights of all men grow out of their moral nature; and as all men have the same moral nature, they have essentially the same rights. These rights may be wrested from the slave, but they cannot be alienated. . . Now if rights are founded in the nature our moral being, then the mere circumstances of sex does not give to man higher rights and responsibilities, than to women. . . To suppose that it does, would be to break up utterly the relations, of the two natures. . . exalting the animal nature into a monarch, and humbling the moral into a slave . . .

Angelina Emily Grimke, Letter XII, October 2, 1837, Letters to Catherine E. Beecher,
In her essays on sex equality, Sarah Grimké objected to a recent Pastoral Letter of the General Association of the Congregational Ministers of Massachusetts\textsuperscript{368} that had attacked Garrisonianism and the Grimkés, albeit not by name.\textsuperscript{369} The Pastoral letter had been read from pulpits and published and was followed by other clerical appeals.\textsuperscript{370} Sarah’s answer was to claim the same moral character for women that God had ordained for men. Women, she wrote, had the right \textit{and} duty to speak on public issues, because “men and women were CREATED EQUAL; they are both moral and accountable beings, and whatever is \textit{right} for man to do, is \textit{right} for woman.”\textsuperscript{371} Therefore, women should not be restricted to the “private and unobtrusive” exercise of “influence” and prayers, but could take their place alongside men as active participants in the public sphere of the anti-slavery fight.\textsuperscript{372}

The \textit{Letters} went on to address the “condition of women” elsewhere in the world and in the United States, “the intellect of women,”\textsuperscript{373} dress reform,\textsuperscript{374} and the “Legal Disabilities of Women,” among other topics.\textsuperscript{375} The disabilities which Sarah indicted included laws falling heavily on women, denying them a “political existence,” and creating “civil death” for married women.\textsuperscript{376} The \textit{Letters on Sex Equality} explicitly drew a comparison between slavery and the oppression of women. Laws governing married women were “not very unlike the slave laws of Louisiana.”\textsuperscript{377}:

\begin{quote}
All that a slave possesses belongs to his master; he possesses nothing of his own, except what his master chooses he should possess.
\end{quote}
By the marriage, the husband is absolutely master of the profits of the wife’s lands during
the coverture, and if he has had a living child, and survives the wife, he retains the whole
of those lands, . . . during his life; but the wife is entitled only to one third if she survives . . .
With regard to the property of women, there is taxation without representation; for they
pay taxes without having the liberty of voting for representatives. 378

Thus, Sarah Grimké’s Letters on Sex Equality demonstrated the progression from one battle
against inequality and for social justice to another, a pattern that was to be repeated again in the
civil rights and feminist movements of the 1960s and 1970s. At the same time, however, after
the work and the writings of the Grimkés squarely embraced the woman question as part of the
anti-slavery crusade, abolitionists divided over the issue. This unfortunate schism among
progressive thinkers over priorities and strategies also was repeated in later years, most notably
during Reconstruction over the drafting of the Fourteenth and Fifteenth Amendments to the
United States Constitution. 379

We ask no favors for ourselves, but claim rights for our sex.
From an 1837 Letter by Angelina Grimké to Theodore Weld of the AA-SS
Executive Committee, cited in Lerner at 198.

Through their work, the Grimkés struggled not only with slavery and racism, but also with their
identity as women and with the political ramifications of their growing awareness of the legal and
social inequities of woman’s condition. 380

The sisters continued touring and speaking throughout 1837, 381 until Angelina suffered a
life-threatening illness that put a temporary end to their travels, but not to their anti-slavery work
or their correspondence with Theodore Weld about republication of Angelina’s earlier work. 382
Angelina and Theodore’s correspondence also turned personal as the two reformers admitted their
feelings for each other and made plans to marry. 383 On February 21, 1838, Angelina addressed the
Massachusetts legislature on anti-slavery, in the very first appearance by any woman before a
state legislative body. In May, she married Weld in the Quaker fashion, signing a marriage contract before the assembled guests and witnesses. The wedding took place in her sister’s home and included white and black guests, as a testimonial to their connections and beliefs. By the same reasoning, the couple deliberately evaded the conditions of Pennsylvania marriage law that would have given Weld the property rights of a husband over his wife.

The sisters’ next major speaking appearance was scheduled to be held at Pennsylvania Hall, a newly opened facility that abolitionists built after they were shut out of many religious and secular venues. But three days after it was built, a mob assembled outside of the hall while female anti-slavery orators including Angelina Grimké and Lucretia Mott were on stage defending the right of women to address mixed audiences. There were rumors of white and black attendees walking arm in arm. Mobs reassembled the next day, and in a violent act of arson burned Pennsylvania Hall to the ground. The inaction of the city’s police and firefighters was later whitewashed. The day after the burning, the routed convention of anti-slavery women met and passed (albeit not unanimously) a resolution drafted by Sarah Grimké that “denounc[ed] race prejudice and assert[ed] that it was the duty of abolitionists to identify themselves with free blacks ‘by sitting with them in places of worship, by appearing with them in our streets, by giving them our countenance in steam-boats and stages, by visiting them at their homes and encouraging them to visit us, receiving them as we do our white fellow citizens’.”

Angelina and Theodore’s marriage ultimately redirected the shape of their reform activities and their lives. They moved with Sarah into a home along the Hudson, where the women tried to demonstrate that they were as capable of running a household as they were of crusading for causes. Their reform work continued together with Weld, who had agreed to
produce for the AA-SS purposes a detailed examination of *American Slavery As It Is.*\(^{395}\) The sisters contributed to the research, but also added their own personal insights and testimony to events they had witnessed or heard about as southern ladies growing up within slaveholding society.\(^{396}\) Published in 1839, *American Slavery As It Is* has been called “the most powerful pamphlet in the anti-slavery literature until the advent of *Uncle Tom’s Cabin,* which is partially based on [its] content. . . ”\(^{397}\) The Weld-Grimké pamphlet sold over 100,000 copies in its first year in print, was widely distributed in Great Britain, and reportedly “sold more copies than any antislavery pamphlet ever written.”\(^{398}\)
Turning Point Year of 1840: Schism in the American Anti-Slavery Society But A New Feminist Partnership Is Formed

The appointment of the Grimké sisters as agents precipitated a protracted debate within the ranks of the American Anti-Slavery Society (“AA-SS”) itself over the appropriate role of women. This dispute, linked as it was to an important disagreement about entry into politics, came to a head in 1840 when the followers of William Lloyd Garrison, who favored the equal participation of anti-slavery women, prevailed. They took control of the Society, voted to permit the election of women officers, and proceeded to put Abby Kelley (Foster) of Massachusetts on the national convention’s business committee. As a result, the Society formally split, with opponents of this move withdrawing to establish a rival organization called the American and Foreign Anti-Slavery Society (“A&F A-SS”) under the leadership of Arthur and Lewis Tappan. Membership in the A&F A-SS was limited to men and its newspaper was called *The Emancipator.* In counterpoint, the Garrisonians who dominated the old AA-SS created the *National Anti-Slavery Standard* as their news outlet, and elected women to the new organization’s executive committee. While the immediate cause of the schism was the selection of Kelley, there also were wider tactical differences that prompted the split. While both sides adhered to immediatism, the Garrisonian “radical-utopian group...was concerned with conducting a moral crusade and bearing witness to arouse the conscience of a nation.” Thus they were willing to sacrifice garnering the greatest number of adherents in the interest of preserving “purity of purpose.” As a result, they also were willing to follow the most radical implications of their positions, including the right of anti-slavery women to take a public role. The “orthodox-practical wing,” on the other hand, held high hopes of coalition politics achieving
their goal. Therefore, they were more willing to compromise with contemporary prejudices against a public role for women in an effort to win allies and increase their numbers. They also supported the creation of the Liberty Party to enter the political fray.

The next critical event for abolitionist-feminism occurred in London. In June of 1840, American anti-slavery activists attended an international meeting called by the British and Foreign Anti-Slavery Society that included more than 500 delegates. The women of the AA-SS were told that they were not welcome to participate officially. Nevertheless, the Philadelphia Female Anti-Slavery Society sent a delegation led by Lucretia Mott and others. She also held credentials from state and national societies that accepted women officers. The Quaker activist Lucretia Mott had been a mainstay of the Philadelphia group since its founding in 1833. The Pennsylvania women protested their exclusion from the main floor and their exile to the gallery. The male delegates debated admitting them, but rejected the women’s bid. However, Garrison sat with the exiled women in symbolic protest. More significantly, Lucretia Mott, known as the “Lioness of the Convention,” made the acquaintance of Elizabeth Cady Stanton (accompanying her new husband, the American delegate Henry Stanton) at the London proceedings. Lucretia Mott and Elizabeth Cady Stanton formed an alliance that signaled the beginning of the formal woman’s rights and suffrage movement. In London, they vowed to work toward the holding of a woman’s rights convention, a project whose accomplishment was realized a few years later in 1848 in Seneca Falls, New York.

Battles Over Territorial Expansion in the 1840s: “Manifest Destiny,” The Extension of Slavery, Sectionalism, and White Supremacy.
Territorial expansion and its political fall-out provided the backdrop for the tensions between abolitionist camps in the 1840s and for the Amistad and Prigg decisions by the Supreme Court. While slavery became an inescapable issue of the “crisis of American democracy” during this decade, that does not mean that the abolitionists succeeded at this time in engaging the nation in a political debate about immediate emancipation. Rather, they remained a marginal group. Further, abolitionists themselves remained divided about the whole idea of participating in politics at all. Despairing of the prospects of “moral suasion” alone, the practical-political wing of abolitionism joined in the new Liberty Party (“the first political party expressly dedicated to eliminating slavery”) to contest the election of 1840. The party stood for emancipation in the territories and in the District of Columbia, plus the abolition of the internal slave trade between states. It attracted support from “middling people,” chiefly in the small towns of the North, and also from among free black activists concerned about growing racist trends in northern suffrage, schooling, transportation and other laws. The really momentous political change, however, occurred in the major political parties as they jockeyed over issues related to territorial expansion of the United States. In the antebellum years, the Whig Party first consolidated as an alternative to Jackson’s Democrats, and then disintegrated, disappearing forever in the election of 1860. Meanwhile, the Democrats also suffered from the centrifugal forces provoked by sectional controversies over the annexation of Texas, the Mexican-American War, and the acquisition of huge swaths of additional territory under the Mexican Cession.

In the wake of serious economic panic and recession and in light of the unpopularity of Martin Van Buren, the Whig ticket handily defeated Andrew Jackson’s Democratic “people’s party” in the election of 1840. Upon President Harrison’s untimely death a mere one month
after being sworn in, he was succeeded in office by his Vice-President, John Tyler.  

This political transition occurred in the middle of the Supreme Court’s consideration of the *Amistad* case.  

The *Amistad* controversy arose from a mutiny by kidnapped Africans who had been introduced into Cuba in violation of local laws banning the African slave trade.  

They were being transported along the Cuban coast in a ship called the *Amistad* when they rebelled and tried to force the crew to sail them back to Africa. Deceived by the sailors, the rebels ended up stranded in Long Island Sound, where the ship was taken into U.S. custody and brought to the port of New London, Connecticut in August of 1839.  

Under the Van Buren administration, it seemed like the U.S. might accede to the Spanish government’s demand to extradite the Africans of the *Amistad*. Instead, however, the case became a cause celebre which attracted the championship of Lewis Tappan (of the American and Foreign Anti-Slavery Society). He hired a legal team to defend the alleged slaves and to demonstrate that they had been taken in violation of Spain’s own law in the first place.  

From the admiralty trial court up, the Africans kept winning and the federal government kept appealing, until the case finally reached the Supreme Court.  

In the meantime, Tappan recruited John Quincy Adams to join the legal team. The former president delivered a lengthy and stunning oral argument before the high Court. The Supreme Court rendered its decision favoring the Africans just four days after the inauguration of the new Whig president, William Harrison. 

When Harrison died a month later, he was succeeded in office by his Vice-President, John Tyler. Issues related to the protection of slavery, sectional conflict and, most critically, to the extension of slavery, continued to intrude. In 1842, the same Justice Story who ruled on behalf of the Africans against Spain in *Amistad*, rendered a quite different opinion in *Prigg v.*
*Pennsylvania*, a case involving the conflicting laws of two American states. Without getting a court order or warrant, a Maryland slave taker named Prigg forcibly seized escaped slave Margaret Morgan in Pennsylvania, in order to return her to an owner recognized under Maryland law. Pennsylvania law, however, made it a crime to remove a black person from its jurisdiction by force or violence with the intention of detaining that person as a slave. The Supreme Court ruled that the federal Constitution and the federal fugitive slave law of 1793 overrode Pennsylvania’s statute.

This ruling heightened sectional tensions and further exposed the inadequacies of the Constitution.

Above all else, the growing political tensions in the 1840s derived from issues surrounding U.S. expansion and the related extension of the reach of slavery—the annexation of Texas, the Mexican-American war that followed predictably in its wake, and the problem of how to organize the resulting accessions of territory. In the ten years after 1844, the U.S. added a million and a quarter square miles to its territory in four waves of expansion. There was an enormous flow of population that migrated to the new areas and demanded the organization of
some kind of civil society. Issues about who could constitutionally control slavery, Congress or the states, therefore immediately became entangled with the pressing questions of how the new territories would be organized. Anglo-American settlers had begun flooding into Texas even before Mexico achieved its independence from Spain in 1821. After independence, the Mexican government first invited additional settlement. The land grant to Stephen F. Austin in 1823 legally introduced slavery to Texas, even though officially it otherwise no longer existed in Mexico. The Mexican Imperial Colonization Law of 1824 “recognized slavery as being legal but attempted to make it terminal.” The transition was to be accomplished by declaring all children born as slaves to be free at age fourteen, but this attempt at a compromise failed resoundingly in the face of the flood of U.S. settlers bringing their slaves with them. The Mexican government then tried to block further immigration and assert more centralized control over the province. It failed, however, to stem the influx of migrants. In short order, the Texians broke away from Mexican rule. Two things were clear from the outset: Texans intended to protect their unfree labor system; Texas wanted to be annexed to the United States. Negotiations for annexation opened under the Jackson administration, but proved impossible to conclude because of opposition to the extension of slavery, but also for other reasons. Congress was deluged with petitions concerning the annexation of Texas, both major political parties were divided on annexation, among other issues, and the move toward completion was temporarily stalled. The election of 1844, however, incited a nationwide political debate about Texas annexation. The issue divided the Democratic Party, with some northerners disagreeing that it was a purely sectional issue. The disagreements about the annexation issue doomed Martin Van Buren’s hopes of recapturing the Democratic nomination and catapulted dark horse
James Polk onto the ticket instead, and then, by a narrow margin, into the White House. The losing side of “disconsolate Whigs” complained that “the Texas question did more to beat us than anything.”

President Polk took office committed to expansion—the annexation of Texas, staking a claim against the British for Oregon, and the acquisition of California from Mexico. The unsuccessful Whig candidate Henry Clay had made it clear during the campaign that he opposed annexation of Texas because he thought that war with Mexico was a likely outcome. This prediction quickly came true. The congressional joint resolution for annexation was passed in February 1845, with Texas entering the Union as a slave state. Tensions quickly rose thereafter, fueled by American designs on California and New Mexico, to be obtained by purchase or other means. By May 11, 1846, when Mexico failed to accede to American demands and instead took what it considered defensive action, President Polk sent a war message to Congress asserting that the conflict had already begun because Mexican troops had crossed U.S. borders. U.S. troops moved quickly to occupy provinces in northern Mexico, including New Mexico and California, clearly staking its claim for acquiring new territory. Despite Polk’s initial denials of territorial ambition, the outcome was the transfer of territory worth far in excess of the combined payment of $15 million and indemnity for debts allegedly owed. By the Treaty of Guadalupe Hidalgo in 1848, Mexico agreed to set the boundary with Texas at the Rio Grande and ceded upper California and New Mexico to the United States.

Territorial ambition was not confined to any one political party or to any single geographical section of the United States. Therefore, it would be misleading to see the Mexican American war and the cession that followed as some sort of pro-slavery conspiracy perpetrated by
southerners eager to extend slavery. However complex the *causes* of the spread of the American empire, however, the *result* of the policies followed over Texas and the Mexican cession and over Oregon roiled the slavery waters and created sectional tensions. Taken together with the peculiar pattern of Jacksonian “democratization” and popular sovereignty (which enfranchised more white men, but disenfranchised free northern black voters), territorial expansion further promoted the sweep of white supremacy throughout the nation. The foremost historian of the civil war has observed that “if any event can be singled out as the beginning of a path which led almost inevitably to sectional controversy and civil war, it was the introduction of the Wilmot Proviso.”

The proposal of Pennsylvania’s Democratic Congressman David Wilmot, that slavery be excluded from any territory acquired from Mexico, threw the issue of slavery into the center of the political arena—a place it would retain for twenty years. The resolution by an anti-slavery Democrat was introduced in 1846 as an amendment to an appropriations bill. It was not intended to be a measure against the continued prosecution of the Mexican war, but it did constitute an answer of sorts to increasingly strident pro-slavery positions by southerners like John C. Calhoun. The Proviso was not so much pro equality for blacks, as much as it was against the spread of slavery at the perceived expense of free white workingmen. Politically, the Wilmot Proviso tended to rally anti-slavery sentiment in one section of the country (the North), and put another section (the South) on the defensive.

The Mexican war and its resolution, moreover, impinged on other non-white groups such as the native Indian tribes who were drawn into the American ambit as a result. Between the annexation of Texas and the new territory acquired under the Treaty of Guadalupe Hidalgo, an additional 150,000 Indians were now subject to American Indian policy. The discovery of gold
in California exacerbated the unceasing flow of Anglos westward in Texas, intruding further on what had been Indian lands.\textsuperscript{473} California was already a complicated multi-ethnic culture before the new influx of gold-seeking Anglos complicated matters even more.\textsuperscript{474} Congress rejected a provision of the Treaty of Guadalupe Hidalgo which would have guaranteed the integrity of Mexican land grants after the transfer.\textsuperscript{475} Instead, the federal Land Act of 1851 threw land titles open to litigation. As a result of “fraud, manipulation, and indebtedness, nearly 40 per cent of the land held by Californios before 1846 was transferred to American ownership.”\textsuperscript{476} The Indians of California, who lacked “civil and property rights,” suffered even more “when the treaty was abrogated.”\textsuperscript{477} The United States government refused to recognize their claims to ancestral lands that previously had been accepted by the Mexican government.\textsuperscript{478} Under the California constitution, moreover, citizenship was defined by “whiteness” but it was not clear what defined whiteness. Citizenship in that founding document apparently included every “white male citizen” of the U.S. and every “white male citizen of Mexico” (regardless of actual ancestry), but the state legislature would have to act if it wanted to extend the suffrage further to Indians. It did not chose to do so.\textsuperscript{479} While California barred slavery within its borders, its constitutional convention only rejected a proposal to exclude free black residents because it feared that such a provision might jeopardize statehood.\textsuperscript{480} Even though California did not fit into a simple black or white paradigm, its history also demonstrates the close tie between territorial expansion and “white supremacy” in the era of annexation, war, and cession.

From Reform Ferment to Woman’s Rights Conventions: The “Burned Over” District of New York and Beyond
The story of the origins of the first wave of the organized woman’s rights movement has been recounted many times, by the pioneering foremothers in the first instance and by historians after the fact.\textsuperscript{481} The meeting of Lucretia Mott and Elizabeth Cady Stanton at the 1840 London Anti-Slavery conference, and the fruition of their initial idea of a “woman’s rights convention” eight years later in Seneca Falls, New York, have iconic significance in this narrative. More recently, however, historians of women and social change have emphasized the context of reform ferment that surrounded these events, thereby downplaying to a degree the accepted “single account of the quest for suffrage.”\textsuperscript{482} Indeed, the changes in the antebellum years were dramatic and fascinating. Reform-minded women of the antebellum years initially were bent on using only their “moral suasion” or influence to achieve social changes in religion, temperance, anti-slavery, dress reform, sabbatarianism, benevolence, etc.\textsuperscript{483} By the 1840s, activists such as the Grimkés, Lucretia Mott, and the Garrisonian wing of the anti-slavery activists had already demanded that women be permitted a more “public” role in the abolitionist crusade. With the 1848 Seneca Falls and Rochester, New York conventions and the activities in the decade following, however, woman’s suffrage emerged as a \textit{political} demand of an organized movement that embraced an entire agenda of change in women’s status, as expressed in the famed \textit{Declaration of Sentiments} of Seneca Falls and in other proclamations.\textsuperscript{484}

In trying to understand the sources of the ferment, historians have studied the identities, backgrounds, and close kinship, religious, and community connections of the reformers.\textsuperscript{485} In the antebellum years, there were significant changes afoot in the upstate New York communities that have been called the “burned-over district.”\textsuperscript{486} Economically, this was still a primarily agrarian area, but with small towns that were beginning to feel the invigorating effects of canals and other...
improvements in the transportation and commercial system. Western New York in this era is called the “burned-over” or “burnt district” due to sweeps of intense religious revivalism that began in 1825 with Charles Grandison Finney’s preaching tour and continued with recurrent revivals every few years thereafter. Revivalism affected many mainstream churches, converting many churchgoers, especially women. Evangelical reform inspired women’s work in Sunday schools, benevolent and missionary associations, and temperance activity. While some commentators therefore have concluded that there was a direct line from “benevolent work through evangelicalism and abolition to woman’s rights,” others contend that there was no such singular path. Indeed, there were overlapping but competing networks of women in the burned over district, with different reform trajectories and outcomes. For example, at least one-quarter of the approximately 100 signers of the 1848 Declaration of Sentiments at Seneca Falls, were not from mainstream churches at all, but were radical Quakers who were part of a like-minded community of neighbors and kin.

Elizabeth Cady Stanton was newly married and on her honeymoon trip when she accompanied her husband Henry Stanton to the London Anti-Slavery Conference where she met Lucretia Mott, a Quaker and experienced female anti-slavery leader. The younger woman of the pair, Elizabeth Cady Stanton had grown up in an influential family in Johnstown, New York in the western part of the state. Her father Daniel Cady was a conservative judge with strong Federalist and strict Calvinist (Presbyterian) beliefs and her mother came from an elite family. All of her brothers eventually died and Elizabeth grew up in and out of her father’s law office, thereby gaining what amounted to an informal education in the law. Through her cousin, Gerrit Smith, Elizabeth Cady also was connected to a quite different network in Peterboro, New York,
where her family often visited despite the long trip. Smith’s career followed a typical reformer’s trajectory of his time and place: He broke away from pessimistic Calvinism to support various benevolent reforms in the 1820s and thereafter stayed at the center of reform ferment. “In moving from religious benevolence to temperance, a secular reform still centered on personal regeneration, to abolitionism, which focused on social change but still stressed exhortation and regeneration, Smith followed a path common to pre-Civil War reformers.” Smith’s house became a station in the Underground Railroad for fugitive slaves and a meeting place for reformers. It was on a visit to Peterboro (and after experiencing her own religious crisis) that Elizabeth Cady met her future husband, Henry Stanton, who was ten years her senior and already a traveling agent and an executive of the American Anti-Slavery Society.

In the early years of Cady Stanton’s marriage, she was too pre-occupied with the rigors of child-bearing and housekeeping on a limited budget to plunge deeply into reform activism, while Henry Stanton often was away on anti-slavery business. The growing Stanton family was headquartered in Boston until their move to Seneca Falls in New York in 1847. However, a network of interrelated Quaker families already was active in reform activities in the areas surrounding Waterloo, Rochester, and Auburn, New York, and was linked to Lucretia Mott’s Philadelphia cohort through family ties. These reform families were deeply interested in sex equality within their own religious institutions. Historically, Quaker women and men met separately to conduct business (as contrasted to worship), but the men’s meetings held veto power over decisions by the women’s groups. Quaker radicals in New York, however, demanded equality in this arena, as well as being active on behalf of Seneca Indians and abolitionism. The local battles over anti-slavery exploded in Seneca Falls in 1843 when the lecturer Abby Kelly
came to town. Her election to the AA-SS executive had been one of the precipitating factors in
the 1840 split among abolitionists about women’s right to take a “public” role. It had also
provoked Kelly’s resignation from her Massachusetts Quaker meeting, which disapproved of
engagement in such secular campaigns. The Presbyterian church, which supported only
colonization and gradual emancipation of enslaved African-Americans, put one of its female
members on “trial” for, *inter alia*, attending Kelly’s uncompromisingly abolitionist lectures in
August of 1843. After hearing a number of witnesses, some of whom challenged male religious
authority explicitly, the church body reached a verdict of “disorderly and unchristian conduct.”
The net result was to drive committed abolitionists out of that religious body and to rehearse some
of the arguments about equality that would resurface later in Seneca Falls at the woman’s rights
convention of 1848.

Still another reform movement had been gathering steam in the early 1840s. The
common law concept of “marital unity” dictated that upon marriage husband and wife became
one unit, legally represented by the husband. A wife, on the other hand, lost her separate legal
identity. This legal regime of *covenant* and “civil death” deprived married women of the
ability to enter into contracts without joinder by their husbands and of the power to control their
own property, even if owned before marriage or inherited thereafter. Interestingly, the first wave
of important legal changes in the status of married women, the Married Women’s Property Acts
(“MWPA”) that were passed beginning in Mississippi in 1839, cannot be attributed to any
proto-feminist demand. Instead, state legislatures initially enacted these laws as a measure of
debtor relief in the wake of economic uncertainties brought on by the Panic of 1837. Laws that
allowed married women to manage and control property that they inherited or brought into the
marriage also sheltered those assets from the claims of their husbands’ creditors during hard times. The early MWPA campaigns sought equitable exceptions to the prevailing law, rather than posing an equality-based full-on challenge to the common law of marriage. On the other hand, even in the 1830s there were isolated instances of legislators pressing the women’s equality argument. By the late 1840s, woman’s rights advocates “began uncoordinated efforts to lobby for married women’s property rights in several northeastern states.” In New York State, reformers acted from a wide spectrum of motives, from the purely economic to the more equality-oriented. Some well-known woman’s rights advocates such as Ernestine Rose were associated with the push that led to adoption of New York’s MWPA in April of 1848. On the other hand, the statute was narrow and quite consistent with the legal codifications that were already in progress.

The 1846 legislative convention called to amend the New York State constitution became a focus for reform petitions for property reform such as the MWPA, but also for suffrage for black men and for women. “Six ladies of Jefferson county” in upstate New York printed and submitted a suffrage petition to the constitutional convention, demanding the vote for their sex. This predated by nearly two years the Seneca Falls Convention, where a closely divided body of woman’s rights advocates barely agreed to endorse a suffrage plank. Very little is known about the lives of the female petitioners of 1846 and their names are not well known in the woman’s suffrage canon. Their argument relied openly on “James Madison’s Federalist number 39, thus demonstrating their own familiarity with at least the essential texts of republicanism.”
The suffrage petition relied upon principles of popular sovereignty and the consent of the governed. It made “self-evident” claims based on natural law, impliedly rejecting the traditional justification that adult females were virtually represented by the adult males in their family and therefore did not need a separate electoral voice of their own.

Thus, the people, the demographic and political background, the reform ferment, and the terms of the debate over woman’s rights were in place by July of 1848. On July 11, Elizabeth Cady Stanton (who had moved from Boston to Seneca Falls the year before) and a group of radical Quaker women which included Lucretia Mott (who was visiting family in the area), submitted a newspaper advertisement calling for a local woman’s rights convention to be held eight days later in Seneca Falls.

A Convention to discuss the social, civil, and religious condition and rights of woman, will be held in the Wesleyan Chapel, at Seneca Falls, N.Y., on Wednesday and Thursday, the 19th and 20th of July, current, commencing at 10 o’clock a.m. During the first day the meeting will be exclusively for women, who are earnestly invited to attend. The public generally are invited to be present on the second day, when Lucretia Mott, of Philadelphia, and other ladies and gentlemen, will address the convention. Notice in Seneca County Courier, July 11, 1848.

Cady Stanton then became the chief drafter of the proposed Declaration of Sentiments, which was openly modeled on the Declaration of Independence.
“We hold these truths to be self-evident: that all men and women are created equal;” that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. ...But when a long train of abuses and usurpations, ... Evinces a design to reduce them under absolute despotism, it is their duty to throw off such government. ... The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. Declaration of Sentiments, 1848

The Declaration of Sentiments declared as a matter of natural law and self-evident truths that women as well as men were entitled to “unalienable rights.” When a government consisting solely of men usurped those rights, then women were justified in withholding their consent to be governed and “throwing off” the “absolute despotism” under which they labored.

Like its July 4, 1776 forerunner, the Declaration of Sentiments included a detailed list of the “abuses and usurpations” of “absolute tyranny.” The counts of the indictment covered citizenship, the property of married women, criminal law and the law of divorce and child custody, taxation, employment and the professions, education, the Church, the standard of morality, and the separate spheres doctrine itself. Thus, woman was denied the vote and forced to submit to laws “in the formation of which she had no choice,” even though the “most ignorant and degraded men-- both natives and foreigners,” enjoyed a voice in their own governance. “Having deprived [woman] of this first right of a citizen,” man exercised his monopoly so as to “[oppress] her on all sides.” This oppression included the common law of marriage, under which wives were rendered “civilly dead” and subject to their husbands’ economic and physical control. Law deprived married women of their rights to property, even
including the wages that they earned. Oppressive laws constructed a married woman as a morally “irresponsible being” who could “commit many crimes with impunity, provided they be done in the presence of her husband.”\textsuperscript{541} A wife was “compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master--the law giving him power to deprive her of her liberty and to administer chastisement.”\textsuperscript{542} Man also shaped the law of divorce so as to make woman even more subject to his mastery. He controlled the grounds for divorce and dictated that guardianship of children was under his control, “regardless of the happiness of women.”\textsuperscript{543} Even single women did not escape the tyranny by men, because they were taxed without representation and denied all significant employment, educational and professional opportunities.\textsuperscript{544} Women were consigned to a “subordinate position” in State and Church alike, and then subjected to a double standard of morality.\textsuperscript{545} Indeed, man had “usurped the prerogative of Jehovah himself, claiming it as his right to assign for [woman] a sphere of action, when that belongs to her conscience and to her God.”\textsuperscript{546} In other words, the \textit{Declaration of Sentiments} asserted that law, religion, and society conspired to consign women to a separate, and inferior, sphere in which they enjoyed none of the democracy, liberty or equality enjoyed by men. The one hundred signers of the document (with separate lists for women and for men) pledged that they would employ all the tools developed in the antebellum reform campaigns (agents, tracts, petitions, the pulpit, and the press) to reverse the wrongs done to women and to gain “immediate admission to all the rights and privileges which belong to them as citizens of these United States.”\textsuperscript{547} They expressed their hope that Seneca Falls would only be the first of a series of conventions, to be held throughout the United States.\textsuperscript{548}
The language of the text struck familiar and resounding chords. Interestingly, however, there were signs of hesitation and discord even within this reform-minded body. On the first day of speeches, none of the women wanted to preside over the audience of 300, and they asked James Mott to do the honors. The second day was devoted to debating the resolutions. While all of the other provisions passed unanimously, Cady Stanton’s call for female suffrage was much more controversial. Because they were pacifists, some Quakers opposed “any participation in a polity that condoned war as national policy.” Some abolitionists, like Elizabeth Cady Stanton’s own husband and even Lucretia Mott feared that the demand for the female vote would make the convention look foolish. As a result of all the cross-currents, the suffrage resolution passed only after Frederick Douglass, a former slave who was an abolitionist agent and editor of the newspaper *The North Star*, rose to speak. He argued that like slaves, women had the right to liberty. But suffrage, he proclaimed “is the power to choose rulers and make laws and the right by which all others are secured.” His oratory narrowly carried the day for the demand for the vote. Even so, a number of the signers retracted their support for the *Declaration* in the days and weeks after the convention, after having been pressured by unhappy relatives.

Another woman’s rights convention was held in nearby Rochester, New York, less than two weeks later. Conventions followed in other parts of the country, such as the one in Salem, Ohio in April of 1850, with the first national meeting convening in Worcester, Massachusetts on October 23 and 24 of that year. Indeed, between 1848 and 1860, there were many woman’s rights conventions in the states of Indiana, Massachusetts, New York, Ohio, and Pennsylvania. Moreover, “during every year except 1857, national women’s rights conventions convened in Worcester, Syracuse, Cleveland, Philadelphia, Cincinnati, and New York City.” The
emergence of the first organized woman’s movement did not portend an overwhelming wave of support for political and citizenship rights for women, even among reformers. None of the political arms of abolitionism ever embraced votes for women wholeheartedly. Thus, the “lack of commitment to woman suffrage [of the Liberty League] would be passed on to the Free-Soil Party and the Republican Party, eventually reemerging after the Civil War in the failed attempt to include women under the terms of the Fourteenth and Fifteenth Amendments in 1868-70.”\textsuperscript{562} On the other hand, it “generated a rights discourse of its own,”\textsuperscript{563} that provided the basis for the constitutional struggles over Reconstruction and for the emergence of a separate and independent woman suffrage movement thereafter.\textsuperscript{564}

The Conflict Over Slavery and Sectionalism: The Supreme Court Fans the Flames

The growing sectional conflict over the expansion of slavery into the territories sharply underlined the contradictions of American constitutionalism. Two decisions by the Supreme Court deepened the contradictions, further fanning the flames of sectionalism. In 1842, the Court ruled in \textit{Prigg v. Pennsylvania},\textsuperscript{565} that a Maryland slave taker could forcibly seize Margaret Moran, an alleged slave, without obeying the barest of procedures established by Pennsylvania law, in order to deliver her to an “owner” recognized under Maryland law.\textsuperscript{566} In 1857, the Supreme Court decided \textit{Dred Scott v. Sandford}.\textsuperscript{567} Dred and Harriet Scott were a married couple who brought a typical freedom suit of the day in a federal trial court, claiming that since they had resided in free territory with their master they had became free.\textsuperscript{568} They argued that under established principles governing conflicting state laws, slavery did not reattach when they reentered slave territory.\textsuperscript{569} But the Supreme Court, according to the opinion issued by Chief
Justice Roger Taney, ruled that federal courts lacked jurisdiction under the constitution’s Article III “diversity of citizenship” provision (cases between citizens of different states) to hear this lawsuit. He argued that since the framers regarded even free black people to be members of an inferior and degraded race, they could not have intended to include such people in the meaning of “citizen” in Article III. Perplexingly, after denying that they had the right to hear the case in federal court at all, the Supreme Court ruled on the merits of the Scott family’s freedom claims and determined that they were still slaves. The case also laid down some constitutional principles of due process and property rights and of federalism that put the power of the nation firmly in the anti-liberty pro-slavery camp, thereby helping to precipitate the looming crisis of disunion.

Much ink has been spilled over these two decisions. This may seem surprising in view of the fact that the events that followed and that led to civil war and to reconstruction of the Constitution firmly repudiated the most problematic rulings from these cases. Yet we continue to pick at them like gigantic scabs that legal and other scholars cannot leave alone. There are several reasons for this. First of all, Prigg and Scott tell dramatic stories about African-Americans who contested their claims to liberty during a time of slavery. Furthermore, while it would be misleading to say that any mere judicial decision “caused” the Civil War, these rulings had an immediate and dramatic impact on the politics of the day. Consideration of the rulings therefore is an inescapable part of any explanation of the American descent into disunion and civil war. The multitude of opinions produced by the Supreme Court Justices involved also have taxed us with a seemingly paradoxical moral question—how is it that “good” men can do “evil” things? For example, what explains how Justice Joseph Story, who was reputedly an opponent of slavery,
could rule so decisively to protect that very institution? Finally, although the immediate results in these cases were overturned long ago, for better or for worse they left doctrinal and rhetorical legacies that still characterize legal thinking today.575

Margaret Moran and the Slave-Catcher Edward Prigg: Prigg v. Pennsylvania (1842)

Margaret Moran and her children lost their liberty as casualties of the shrinking legal accommodation between the southern interest in protecting property in slaves and the northern interest in protecting free blacks within their own borders. Born in Maryland, Moran was the daughter of a married couple who were legally slaves owned by John Ashmore.576 While he never manumitted her parents, Ashmore “allowed them to build a home and live in freedom on his Maryland estate.”577 After Ashmore’s death in 1824, Margaret married Jerry Morgan, an emancipated black man from Pennsylvania. She moved with him to that state in 1832. By the time of the kidnapping that gave rise to the Prigg controversy, the family included perhaps as many as six children, some of whom had been born in the slave state of Maryland, but others of whom were born later over the border in the free state of Pennsylvania.578 Unfortunately, Margaret Moran’s family life became hostage to the vagaries of the Ashmore family fortunes. John had sold off his real property to his married daughter Susanna Ashmore Bemis before he died; his will left his personal property to his widow, specifically including two young slaves named in the document.579 There was no mention, however, of Margaret Moran or her parents anywhere.580 The Moran family lived undisturbed in their liberty until 1837, when an heiress of John Ashmore “hired four prominent Maryland citizens—Nathan S. Bemis, Jacob Forward, Stephen Lewis, and Edward Prigg” to go to Pennsylvania and retrieve Margaret and her children.581
The only applicable federal statute was the Act of 1793, which provided only the barest of guidelines for how fugitives were to be rendered up from one state to another. Slave-owners or their agents were authorized to cross state lines to seize an alleged fugitive slave. After appearing before a federal judge or local magistrate and proving ownership, the slave-catcher received a certificate granting safe passage home with his captive. The statute has been characterized as an “invitation to kidnapping” or a “vigilante’s license” because it dispensed with virtually all procedural legal protections. In response, northern states began to enact “personal liberty laws” that were designed to provide a bit more protection to black people living in freedom within their borders but subject to erroneous or deliberately false allegations of slave status. The continuing tensions around this issue between the bordering states of Pennsylvania (free) and Maryland (slave), led the former to strengthen its personal liberty law in 1826. Under this provision, Edward Prigg and his fellow slave-catchers applied for and received the required warrant to arrest Margaret Moran and her children. However, “for unexplained reasons,” the justice of the peace who had issued the warrant in the first place refused to grant the certificate of removal. Prigg and company then resorted to self-help in violation of Pennsylvania law. They stole the family away in the dead of night when their husband and father was away from home and carried them back to Maryland. While the family’s ultimate fate is not certain, it is clear “that a woman who had lived her entire life in near-freedom became a slave and saw her children also taken into bondage, and that her husband, Jerry Moran, lost his entire family to slavery.”

This familial tragedy soon led to a political impasse between the two states. Pennsylvania indicted the four slave catchers for kidnapping under the terms of the personal liberty law. The Governor of Pennsylvania demanded that Maryland produce them for trial, but Maryland’s
governor instead tried to negotiate a settlement. When that failed, the Maryland legislature also tried to intervene to stop the prosecutions. Together, the two states agreed to create a test case that would go to the United States Supreme Court. Pursuant to that plan, Edward Prigg was found guilty with dispatch, “his conviction was upheld pro-forma by the Pennsylvania Supreme Court, and the case was appealed to the U.S. Supreme Court.” In a sense, Margaret Moran and her children no longer counted. Instead, as it went to the highest court of the nation, Prigg was transformed from an ordinary contest about the legality of one family’s loss of liberty into a constitutional case about federalism—was Pennsylvania’s personal liberty law unconstitutional in light of a clause in the founding document of Union?

“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 Constitution, Article IV, Section 2, clause [3]*

Unfortunately, the path chosen by the Court and Chief Justice Joseph Story had the effect of supporting the pro-slavery position of one section of the country at the expense of anti-slavery sentiment in another. Even more explicitly and directly than in the Cherokee cases (in which Justice Story had dissented), the U.S. Supreme Court put the authority of the nation itself behind protection of white supremacy.

Pennsylvania and Maryland joined issue over the meaning of what we call the “fugitive slave clause.” The arguments of the lawyers representing the states of Pennsylvania and Maryland in *Prigg* reminds us that until very close to the opening shots fired in the civil war, it was the North that was more likely to embrace a “state’s rights” position, while the South was
eager for national protection for their “peculiar institution” of slavery. Pennsylvania insisted that while the Constitution extended a limited reassurance to the slave states, it left the free states the latitude to differ in many other respects: “They [the slave states] desired a guarantee from the general government; not that that government should provide for the redelivery of their fugitive slaves, but that the Constitution of the Union should prohibit the states from passing laws declaring them to be free.”593 This was the substance of the deal, “it was never intended for more.” 594 In fact, the Pennsylvania Attorney-General argued that if the southern states had pressed the issue at the time of the drafting of the Constitution, maybe there would have been no agreement and no Union at all.595 That being the extent of the federal power, each state retained the sovereign right to legislate about other issues, such as the proper procedures to be followed before certifying an alleged fugitive for removal from its own sovereign territory.596 It was all a matter of the respect due the sovereign state of Pennsylvania and the proper balance struck with federal power.597 By contrast to this agreement-for-limited-disagreement position, Maryland’s lawyers argued that the Constitution imposed the will of the nation and ended the right of states to make their own laws regarding fugitive slaves.598 They insisted that Pennsylvania was disabled from enacting its personal liberty laws either by the “self-executing” terms of the Constitution itself, or at a minimum by the 1793 federal legislation that essentially pre-empted and prohibited any state law on the same subject.599

Justice Story’s opinion for the U.S. Supreme Court embraced the most extreme vision of the fugitive slave clause. It concluded in sum that (1) the disputed clause was absolutely essential to obtain southern ratification of Union;600 (2) the clause itself was “self-executing,” i.e. that it needed no further enabling legislation in order to become effective; 601 (3) the national government
had the power to provide a remedy for recapture (as it had done in the 1793 statute)⁶⁰²; and, in a
ruling fatal to Pennsylvania’s personal liberty laws, (4) state legislatures have no right to interfere,
even to the limited extent of requiring some bare bones judicial procedure in their own state
before surrendering alleged slaves.⁶⁰³ The power to regulate redelivery of alleged fugitive slaves
lay in the exclusive control of Congress.⁶⁰⁴ Justice Story,⁶⁰⁵ federalist from Massachusetts,
erstwhile passionate anti-slavery advocate, and respected author of Amistad,⁶⁰⁶ explained that he
felt bound by the letter and spirit of the Constitution to strike down Pennsylvania’s personal
liberty laws in the name of national power. There was no room in the interstices of the federal
system for any state-by-state variation. Only Congress could regulate about fugitive slaves; states
apparently could do nothing, from either the anti-slavery or the pro-slavery perspective.⁶⁰⁷

There has been debate about the whys and wherefores of this result. Was it really
necessary for the Court to go as far as it did? Why did Story rule as he did?⁶⁰⁸ Did he face a
dilemma between what he experienced as the demands of legal formalism and his moral
conscience?⁶⁰⁹ Suffice it to say that whatever the reasons for it, “among Supreme Court decisions
dealing with slavery, Prigg v. Pennsylvania rivals Dred Scott v. Sandford in historical
importance.”⁶¹⁰ Its immediate impact was paradoxical. By giving Congress exclusive power, the
decision released state governments from the obligation to enforce the fugitive-slave law of
1793.⁶¹¹ One historian calls that “a concession to state sovereignty, with an antislavery purpose
that backfired.”⁶¹² Slave-owning states that felt more insecure as a result demanded that Congress
extend enforceable guarantees and become more involved in the protection of slavery, a step that
was accomplished with the Fugitive Slave Act of 1850.⁶¹³ In turn, those developments played no
small role in the further exacerbation of sectional conflict.⁶¹⁴ Moreover, historians have come to
re-evaluate the *Prigg* decision on its own terms, as a ruling that “carried forward the involvement of the federal government in the protection of slavery.”

The Freedom Case of Harriet and Dred Scott: The Supreme Court and the Shrinking Accommodation Between Slavery and Anti-Slavery Sectional Interests

While the story of Margaret Moran and her children has largely been lost to history, there has been a somewhat more successful effort to reconstruct the fate of the Harriet and Dred Scott family. Recently, moreover, scholars have considered the freedom claims of Harriet and Dred Scott separately, along with the potential legal distinctions that were overlooked as the couple’s cases wended their way up through two court systems. Interestingly, the Scotts’ fight for freedom for themselves and for their children began not where it ended, that is, in federal court, but in Missouri state court, where Dred and Harriet Scott each sought and received permission to file suit in 1846, on the grounds that their prior residence on free soil had the legal effect of emancipation. Their petitions were among more than 280 such “freedom suits” filed in the Circuit Court of St. Louis County alone between 1806 and 1857, a number of which succeeded. There was even a set procedure to follow in these cases: Harriet and Dred Scott filed actions of trespass for assault and false imprisonment, alleging that they were free persons and seeking damages against Irene Emerson. Irene Emerson was the widow of Dr. John Emerson, who had taken Dred Scott with him in 1833 when he left St. Louis, Missouri to take up a U.S. military commission as a surgeon first at Fort Armstrong in Illinois (a free state), and then again in 1836 when he was stationed even further north at Fort Snelling (in territory declared “forever free” under the Missouri Compromise of 1820). In Fort Snelling, Dred met and, with
Emerson’s permission, married Harriet Robinson Scott, a young woman held in slavery there by
the resident Indian agent, a man who officiated at the formal wedding of the couple (an event of
potential legal significance for Harriet’s freedom claim).622

Dr. Emerson was a man often dissatisfied with his military postings, who lobbied actively
for various transfers. In 1837, he ended up for a time in Fort Jessup in Louisiana, where the
Scotts apparently joined him by traveling down river by steamboat.623 By this time, the doctor
had married Eliza Irene Sandford.624 Emerson, however, was unhappy in Louisiana, and managed
a transfer back to Fort Snelling in 1838, once again bringing the Scott couple back into free
territory with him.625 When the doctor was sent to a Florida post in 1840, however, he left his
family in St. Louis, Missouri, where the Scotts once again resided in a slave state.626 Dismissed
from the military in 1842, Dr. Emerson rejoined his family in St. Louis, moving to Iowa territory
(most likely leaving the Scotts in St. Louis where he probably hired out their labor)627 shortly
before the birth of his only daughter. He died in December of 1843, leaving his widow a life
estate in his property (with powers of management), with his daughter taking as a remainderman,
i.e., as the successor in interest upon her mother’s death.628

What is the significance of all this moving about from slave state to free state, from there
to free territory and back to slave state, and then back to free territory, and then back to Missouri,
a slave state that in the end was the scene of the Scotts’ freedom suits? First, one might question
why Harriet and Dred Scott went along with these transitions, not seeking to escape or file for
their freedom long before 1846, perhaps during the years that they were located in more
hospitable, non-slave holding fora. Lea Vandervelde and Sandhya Subramanian addressed these
very questions in their article on “Mrs. Dred Scott.” Their answer was that “focusing on the
specific details of the Scotts’ lives and the sociolegal context in which they lived . . . suggests that the impetus for freedom may have lain in the Scotts’ desire to preserve the integrity of their family.”

VanderVelde and Subramanian posit that until Dr. Emerson’s death, the Scott family enjoyed a certain kind of security. Their marriage had been afforded a degree of formality and recognition by white society that was highly unusual for slave couples; children were born to them and the whole family was kept together; their work as personal servants to an army doctor’s family on various posts was not onerous; and the family was allowed to live with a degree of independence. Dr. Emerson’s death, however, threatened the peace and integrity of the family, which might be split up and sold separately. Based on the experiences and suits of other slave women, the scholars concluded that “keeping the family together was Harriet’s primary focus,” above all other considerations. The idea that the family simply could have fled and escaped at some earlier time, moreover, is susceptible of serious practical objections. There was no place to go from the isolated frontier garrison of Fort Snelling. Even in the free state of Illinois, the legal outcome would be uncertain, and the family could always be kidnaped and sold back into slavery. As long as Dr. Emerson lived, being attached to him might be the better choice in light of all the risks of the alternatives.

The other significance of the peripatetic history of the Scotts’ experience lies in the role of interstate comity (“defined . . . as ‘the courtesy or consideration that one jurisdiction gives by enforcing the laws of another, granted out of respect and deference rather than obligation’”) in settling issues that implicated the laws of more than one state. On June 16, 1858, after the rendering of the Dred Scott decision and the hardening of political positions that was occurring in the late 1850s, Abraham Lincoln famously asserted that a house divided against itself cannot
stand, i.e. that the fate of the Union was to go one way or the other, to become entirely free or to
have slavery legalized everywhere. But at the time that the Scotts initiated their freedom suits,
the legal system of the U.S. was divided, as it had been virtually from its origins. Moreover, there
still existed some room for accommodation in the interstices of the two legal systems (slave and
free). “Freedom suits” bubbled up in those junctures, sometimes achieving liberty for enslaved
individuals, for example in the 1820s and 30s in Missouri courts.

“The basic legal principles of the freedom suit were clear and simple: ‘once free, always
free’.” One scholar found Missouri freedom suits to be dominated by claims that the petitioner
had become emancipated due to residing on free soil, an attractive claim in a state surrounded by
places where slavery had been legally banned (in the east by the Northwest Ordinance and to the
north by the Missouri Compromise). Freedom suit petitioners “were allowed to sue as paupers
and were assigned counsel” in Missouri, while they attempted to find white witnesses willing to
testify before a jury to the facts forming the basis for their claims. In the meantime, they could
not be sold out of the jurisdiction; the defending “owners” might have to post a bond; or the
sheriff could hire out the freedom-seeker, “whose accumulated wages he would hold pending the
outcome of the suit” for damages. Filed in 1846 by a lawyer that the Scotts selected
themselves, their freedom suits against the widow Emerson have been described as “strong”
cases under Missouri law. “Again and again, the highest court of the state had ruled that a master
who took his slave to reside in a state or territory where slavery was prohibited thereby
emancipated him.” Even the special circumstance that the doctor was in the military was not
insurmountable. In an 1836 case called Rachel v. Walker, the Missouri Supreme Court ruled
against an owner who took his slave to the very same Fort Snelling also involved in the Scott
In *Rachel*, the court ruled that even though the officer may have had no choice in his assignment outside of slave soil, he voluntarily took the petitioner with him, something that he did not have to do, thus subjecting himself to the claims made in Rachel’s freedom suit.644

Unfortunately for Harriet and Dred Scott, their attorneys made some initial missteps in the original cases. Caught short by surprise testimony, they failed to establish that the named defendant, Irene Emerson, was even a putative owner of the Scotts.645 As a result, the jury had to return a verdict in Irene’s favor. The Scotts’ attorneys then tried to fix the technical mistake by simultaneously moving for a new trial on the grounds of the unexpected testimony, but also by filing new law suits naming three potential defendants, including Irene, the man who had hired the Scotts’ labor, and Irene’s father, who had accepted the money for their hire. By late in 1847, the grant of a new trial in the now-consolidated cases was on appeal in the Scotts’ first trip to the Missouri Supreme Court.646 The results proved disappointing for the couple. Even though they successfully defended their right to the new trial, they remained mired in continued litigation in Missouri state courts for years to come and were hired out for their labor in the meantime.647

When the second jury returned a verdict in his favor at the new trial, “as a matter of course [it] made Dred Scott nominally a free man.”648 That victory, however, was short-lived. On a second appeal to the Missouri Supreme Court, the attorneys stipulated that the Dred and Harriet Scott cases were controlled by identical law and therefore would rise or fall together.649 Unfortunately, the changes in the political and legal landscape that had occurred during the long years of the state court battles yielded a negative ruling at the end.650 This time around, the Missouri Supreme Court ignored their own prior precedent that strongly favored the Scotts and instead took a much less sympathetic position on “comity” (or respect for another state’s law under which the Scotts
were considered emancipated).\textsuperscript{651} When the Missouri Supreme Court handed down its final decision in 1852, it declared Dred (and therefore Harriet and their children) slaves after all.\textsuperscript{652}

For reasons that historians have debated, there was no effort to appeal the Missouri state court decision \textit{directly} to the United States Supreme Court.\textsuperscript{653} Instead, after a lapse of time during which no action was taken on the Missouri judgment,\textsuperscript{654} the momentous decision was made to start all over again in federal circuit court, bringing a fresh freedom suit against defendant John Sandford, the Scotts’ new “owner.”\textsuperscript{655} Although the form of the freedom complaint in \textit{Dred Scott v. Sandford} was familiar (an action in trespass alleging that Sandford assaulted and wrongfully imprisoned Dred Scott, his wife Harriet, and their two children), the change of venue was significant. Federal courts must have a constitutional basis for jurisdiction, either because the case arises under federal law \textit{or} because of “diversity of citizenship” between the parties to the lawsuit.\textsuperscript{656} The latter basis allows federal courts to hear ordinary legal disputes that occur between citizens of different states, thereby providing a forum that is theoretically more impartial than the courts of either state would be. The new \textit{Dred Scott} lawsuit allegedly qualified because by 1853 the Scott family was either owned or controlled by John F.A. Sandford, the brother of Irene Emerson. Sandford was a citizen of the state of New York, while the Scotts claimed to be free citizens of Missouri.\textsuperscript{657} According to its opponents, however, the Scotts’ freedom claim did not belong in federal court. They questioned whether Negroes, \textit{even if free}, ever legally constituted “citizens” of \textit{any} state, for purposes of invoking “diversity of citizenship” jurisdiction in federal court. The U.S. Supreme Court’s answer to that question,\textsuperscript{658} and to other issues it perhaps gratuitously injected, ensured that \textit{Dred Scott v. Sandford}\textsuperscript{659} would have broad implications for legal doctrines not just about slavery and race, but also about the federal -state relationship. The
net result was that the case signally failed to settle sectional controversy, exacerbating tensions instead.660

We have already seen how the U.S. Supreme Court interpreted Article III under the clause granting jurisdiction over suits between a state (or citizens of a state) and “foreign States, Citizens or Subjects.”661 In 1831, the Supreme Court declined to entertain the Cherokee Nation’s complaint against Georgia for its high-handed actions which the tribe claimed tended to “annihilate the Cherokees as a political society, and to seize for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.”662 In Cherokee Nation v. Georgia,663 Chief Justice Marshall downgraded Indian nations from “foreign states” that could invoke Article III jurisdiction against Georgia to “domestic dependent nations,” who could not.664 He based this ruling on the purported intent of the framers at the time of the ratification of the Constitution. Even though in his mind Indian nations did constitute their own separate and even self-governing political societies, because they resided within U.S. territory in a “state of pupilage” or wardship they did not come within the Article III meaning of “foreign state.”665 A concurring Justice, Johnson of South Carolina, would have gone even further. As far as he was concerned, Indians were mere savages, nomads and hunters, “restless, warlike, and signally cruel,” who could not be considered organized and self-governing political communities at all.666

Like Cherokee Nation, Dred Scott raised issues about the meaning of Article III and, more critically, about the meaning of political community. Justice Taney’s opinion also invoked the original intent of the framers and relied upon the kind of deep-seated racial imagery of white supremacy that had animated Justice Johnson in the earlier case. Justice Taney insisted that there
was no “diversity of citizenship” jurisdiction over Dred Scott’s federal freedom suit because
whether slave or free, no person descended from an African brought to the U.S. in chains could
ever qualify as a “citizen” under the terms of the U.S. Constitution.\textsuperscript{667} Taney argued that in the
original understanding of the framers, African-Americans never constituted part of “we, the
people,” they were considered completely inferior and subordinate, and “and can therefore claim
none of the rights and privileges which [the U.S. Constitution] provides for and secures to citizens
of the United States.”\textsuperscript{668}

Ironically, Taney was willing to concede that Indians, while subject to white domination and
wardship, nonetheless constituted a political community of “foreigners,” unlike the benighted
African-Americans.\textsuperscript{669} While free white women might not enjoy the same privileges and
immunities as their male counterparts, moreover, they nonetheless clearly qualified as “citizens”
within the meaning of the U.S. Constitution.\textsuperscript{670}

As a result, it mattered not to Justice Taney that an individual state might choose to afford
a free Negro more dignity and “all of the rights and privileges of the citizen of a State” (even
including the franchise).\textsuperscript{671} Bound by the supposed original intent of the framers of the
Constitution, the Court ruled that such state citizenship failed to make an African-American a
member of the U.S. political community or to convey federal citizenship.\textsuperscript{672} (After the Civil War

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and during Reconstruction, of course, this separation between state and federal citizenship was deliberately reversed by ratification of the Fourteenth Amendment.) In a long exegesis, Taney argued that from British colonial days on Negroes had always been “regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.” He found this view broadly shared in the states and also entrenched in the very meaning of the Constitution itself. Indeed, in his view, the only parts of the Constitution that conferred federal power over Africans were designed to protect the rights of their owners over them as property. The Court, Taney contended, was bound by this original intent and was not permitted to give a “more liberal construction in their favor than [the words of the Constitution] were intended to bear when the instrument was framed and adopted.” Indeed, it was the high judicial duty of the Court to adhere to this original intent. Taney’s rhetoric about original intent and the proper role of the Court continues to be controversial to the present day. It is one explanation for why the case continues to draw attention, even though its exact ruling on “citizenship” was long ago overruled by the Fourteenth Amendment.

Having rejected jurisdiction of the freedom suit, however, the Supreme Court strangely did not stop there. Instead, it proceeded into deeper waters in order to decide the “merits” of the dispute. First, there was the question of congressional power over the territories. The Scott family’s freedom claim rested in no small measure on the two periods of time that they resided with Dr. Emerson at Fort Snelling. This outpost was in federal territory located north of the 36°30’ latitude line in the Louisiana Purchase. In the package of congressional statutes
comprising the Missouri compromise of 1820, Congress had banned “forever” the introduction of slavery into territory north of that line (a decision that it modified later in the Kansas and Nebraska Acts). But in his *Dred Scott* opinion, Justice Taney proclaimed that Congress acted *unconstitutionally* when it did this because it lacked the power to prevent the citizen of any state, whether slave or free, from bringing his or her “property” (including slaves) into territory acquired after the ratification of the U.S. Constitution. These rulings thus stood for two entwined propositions: Justice Taney insisted that while the Constitution denied Congress the ability to ban slavery as part of its Article IV right to prescribe “all needful rules and regulations” for the governance of territories on their way to becoming states, it contained a federal guarantee under the Due Process clause of the Fifth Amendment that protected slave holders from the deprivation of their human property. In this view, the Constitution tilted definitively toward the interests of the southern slave states and away from the interests of the northern free states. This one-sided interpretation could not help but exacerbate sectional antagonisms that were already inflamed in 1857.

Dred Scott’s other claim of “once free, forever free” was based on his stay with Dr. Emerson at Fort Armstrong in Illinois, a state in the old Northwest Territory, free land where slavery was undisputedly legitimately banned. Justice Taney’s disposition of this argument was “very brief.” Here, he found the reasoning of the Missouri state court in *Scott v. Emerson* completely persuasive. *Missouri* law, not Illinois’ approach, governed the issue of whether or not Scott became emancipated when his master took him to a military post in the free state of Illinois, and also controlled the further question of whether he remained free or reverted to slave status when he re-entered Missouri. Unfortunately for that claim, Missouri had made itself quite clear
in the *Dred Scott v. Emerson* litigation. Missouri need not respect Illinois law and the Scott family were slaves under the law of Missouri, as expressed in its most recent interpretation.\(^{688}\)

By contrast to Taney’s opinion “for the Court,” the dissenting Justices disagreed on virtually all fronts.\(^{689}\) While Justice Curtis, the Whig from Massachusetts,\(^{690}\) thought that the question of jurisdiction was before the Court,\(^{691}\) he propounded a quite different view on the question of African-American citizenship than Taney did in his opinion.\(^{692}\) He argued instead that free persons of African descent had been treated as “citizens” in some of the states under the Articles of Confederation, even to the extent of enjoying the suffrage in some places.\(^{693}\) Such individuals thus constituted part and parcel of the body politic of “we, the people” that actually voted to ratify the U.S. Constitution in those states.\(^{694}\) Aside from the exclusive power of Congress to decide on naturalization of the foreign born, the federal government therefore had no power to impinge on the state’s grant of citizenship as they wished.\(^{695}\) Once a “citizen” recognized by one state, moreover, then the privileges and immunities clause of the U.S. Constitution ensured that a free African-American was entitled to all the “national rights of citizenship,” including entrée to the federal courts under the diversity of citizenship provision of Article III.\(^{696}\)

Justice Curtis consequently rejected the argument “that the Constitution was made exclusively by and for the white race.”\(^{697}\) The preamble of the Constitution spoke about “we, the people.” “And as free colored persons were then citizens of a least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.”\(^{698}\) That was not to say, however, that all citizens enjoy identical rights. Indeed, in many states, some citizens could not vote, “either on account of their age, or sex, or the want of the necessary legal qualifications.”\(^{699}\) Women, of
course, provided a case in point, with some states depriving them of the vote or excluding married women from the right to “convey property and transact business.” Lesser privileges, however, did not make such persons non-citizens who formed no part of the political community created by the Constitution.

Curtis explained that the decision forced him to go further and also dissent “both from what I deem [the Court’s] assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion.” He questioned why, having decided it had no jurisdiction over the case at all, the Court gratuitously pressed on to determine the merits. Assuming, as he did, that there was jurisdiction, he then reached a different conclusion on those merits. Certain legal effects followed when Dr. Emerson brought Dred Scott to Fort Snelling, located in free territory governed by the Missouri compromise. By the rules of comity, or respect for the laws of another state or nation, moreover, unless it enacted some law to the contrary, Missouri was bound to recognize the change in status that was effected. Here, however, Curtis found the trial in federal court of the Scotts’ freedom case defective. The court stopped the jury from considering facts favorable to the petitioners and instructed it that the law favored the defendant. Yet the facts were as follows: “Dr. Emerson, the plaintiff’s master, resided about two years at the military post of Fort Snelling,” with no showing that he did anything to avoid establishing a “domicile” there during that time. That being the case, “on what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs?”
officer of the U.S. military, he went to U.S. territory to serve the U.S. and therefore was bound by the laws governing that territory.

Other facts on the record, moreover, lent additional credence to the emancipation claim by the Scotts. There was evidence that while residing at Fort Snelling, Dred and Harriet married with the consent of Dr. Emerson. How then, could the inconsistent claim be made that they were anything but free people? This marriage, in fact, constitutes a significant part of the Vandervelde and Subramanian argument that Harriet’s claim to freedom would have been even stronger than Dred’s had it been considered separately instead of being subsumed in his. Harriet’s “owner” Mr. Taliaferro, was a civilian who served as an Indian agent in the territory and whose only prior domicile was in the free state of Pennsylvania. Thus, at the outset he clearly illegally introduced slavery into the free territory voluntarily (and not because he was subject to military transfer). Later, rather than the even more troublesome idea of his transferring ownership of a slave while under the law of a free territory, Taliaferro instead appears to have conducted a public marriage between Harriet and Dred. Since slaves could not be legally married, that action is much more consistent with the idea of his recognition of her emancipation.

According to Justice Curtis’s dissent, the U.S. law of the territory controlled the status of the Scott family as it was to be decided in federal court, the Missouri Supreme Court state decision notwithstanding. The only remaining question was the constitutionality of the Missouri compromise in which Congress dictated that the territory north of the 36°30’ latitude line would be “forever free.” In counterpoint to the stiff and artificial originalism of Taney’s opinion, Curtis offered a view of the Constitution as a practical document that was meant to last for the
The “language, the history, . . .[and] the subject matter of this article” (Article IV, Section 3. [2]) related to all territory either currently possessed by the U.S. or acquired later. Congress had the power and Congress exercised the power to exclude slavery north of the line under its express constitutional right to make “‘all needful rules and regulations’ respecting the territory belonging to the United States.” Moreover, there was nothing unique about slavery that inhibited such congressional action. The Court’s ruling to the contrary was merely a bold exercise of judicial activism in order to achieve political ends, a result not countenanced by the Constitution. Regardless of the fact that some may claim various rights, including the privilege to carry their slaves with them anywhere they want, “all” needful rules means all, and there is no exception for slavery.

Justice Curtis repeated a commonly accepted legal precept, that “slavery, being contrary to natural right, is created only by municipal law.” For him that implied that the deprivation of property without due process of law argument necessarily failed. While individuals may constitute slave “property” under the positive (enacted) law of the state that recognizes them as such, “they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exists. . . .” Otherwise, a free state could be forced to tolerate the establishment within its own borders of a foreign system of law in dire conflict with its own enactments. These “anomalies” would become entrenched. Under this approach, if an owner brought a slave woman into a free state and she gave birth, the status of that child also would be determined by the slave state’s “foreign” law. Such a result would perpetuate further the subordination of the local law to some other state’s rules.
Curtis also noted that it was clear that Congress could ban the slave trade after 1808 and that even some slaveholding states themselves adopted prohibitions upon importation of slaves into the state. Neither action ever had been held to constitute a deprivation of property without due process of law. Similarly, Congress could prevent owners from bringing slave property into free territory. Justice Curtis’s dissent therefore rejected the majority’s contention that the Missouri compromise ban was in any way “unconstitutional.”

The Taney-Curtis debate was by no means a dispassionate exercise. The rival Justices pursued a bitter dispute over Chief Justice Taney’s refusal to release an advance copy of the “Court’s opinion” to his fellow jurist. The dissents were published in a separate pamphlet that came out ahead of the official record and Justice Curtis claimed that in the official version Taney added numerous pages to his original opinion designed to refute the dissent after the fact. In the wake of the Dred Scott case, Taney virtually forced his younger colleague off the bench. The specific outcome for the Scott family was that they once again lost their legal battle for freedom. However, they were saved from the horrible fate of Margaret Moran and her children, who had been sold deeper south into slavery. After an ordeal lasting more than a decade, in May of 1857 ownership of the Scott family was transferred to long-time supporters who “promptly manumitted” them. Dred Scott died within two years of his emancipation and it is unclear what happened to the rest of the family thereafter.

On the political stage, the judgment and especially the reasoning employed in the Chief Justice’s opinion aroused great controversy. The debate included wild disagreements about which part of the various opinions, especially Taney’s, constituted a “holding” necessary to the judgment of the Court and supported by a clear majority, and which parts were mere obiter dicta,
i.e. unnecessary surplus statements that failed to control future rulings.\textsuperscript{735} Scholars continue to contest this issue to this day.\textsuperscript{736} To the extent that there was a backlash against the racism of the decision, it does not seem to have helped the status of free Negroes, even in the North.\textsuperscript{737} Whatever the Court’s intention may have been, the opinion’s decided tilt toward slave-owning interests did nothing to settle sectional controversy once and for all.\textsuperscript{738} The debates continued to become ever-more polarized, while political re-alignments led ultimately to the election of Abraham Lincoln in 1860 and the secession of southern states. Thus, while perhaps not a “cause” of the civil war, the Supreme Court’s action in \textit{Dred Scott v. Sandford} interpreting the U.S. Constitution to lend the power of the federal government to the pro-slavery side could be said to have accelerated the descent into sectionalism and disunion.\textsuperscript{739}

A “Diversity of Citizenship” Coda: The Antebellum Supreme Court and Married Women

The year after the \textit{Dred Scott} decision, another case came before the Supreme Court that also raised the jurisdictional issue of “diversity of citizenship.” In \textit{Barber v. Barber}\textsuperscript{740} a woman appealed to the federal court’s diversity jurisdiction in order to collect on an alimony judgment owed to her by her husband under a New York court order.\textsuperscript{741} On the grounds of cruel and inhuman treatment, abandonment and neglect,\textsuperscript{742} New York had granted her a type of divorce called “\textit{a mensa et thoro},” which was actually a form of permanent legal separation that did not affect the status of children or deprive the innocent wife of her right to continued support from a guilty husband.\textsuperscript{743} Presumably to avoid paying, the recalcitrant husband had fled the jurisdiction, removing himself to Wisconsin.\textsuperscript{744}

The jurisdictional question was whether a married woman could ever have a different domicile (and therefore “citizenship” for diversity purposes) than her husband had.\textsuperscript{745} The starting
point for the Court’s analysis was that under English and American common law a *feme covert*, i.e. a married woman, lacked the ability to sue or be sued in her own name in a court of law. There were exceptions, however, to this general rule, and the U.S. Supreme Court concluded that this case qualified for such exception. Acting in “equity,” courts “will interfere to prevent the [alimony] decree from being defeated by fraud.”

Federal courts, of course, also need a constitutional basis to take jurisdiction, such as “diversity of citizenship” between the contending parties. In *Barber*, the U.S. Supreme Court reasoned that despite the common-law rule of “marital unity,” by which husband and wife are treated as a single unit for legal purposes, judicial separation typically allows a wife to establish a separate domicile from her husband. Since the husband was domiciled in Wisconsin and a citizen thereof, and New York considered the wife capable of establishing her own domicile in its state, the preconditions for diversity of citizenship were satisfied.

Interestingly, Justices Taney, Daniel, and Campbell dissented. They insisted that while still bound in marital unity, a wife could not be made a citizen at all in the sense of an independent legal existence. A wife simply could not “become a citizen of a State or community different from that of which her husband is a member.” This view, no doubt, was shaped by the dissenters’ desire to keep federal courts out of having to rule on cases involving “domestic relations.” While the majority agreed that they did not want to get involved in ordering divorces or making allowances of alimony, they distinguished this action seeking full faith and credit for a money judgment already rendered by a state court of competent jurisdiction.

*Barber* lacked the heat of the jurisdictional debates in *Dred Scott* (and in *Cherokee Nation*). However, it was not without its own significance. Clearly, white women even if
married, could be “citizens” or members of the political community. The majority was even willing to recognize a limited exception to the common-law rule of marital unity for these exceptional circumstances. However, it was evident that no Justice balked at the implicit idea that “citizenship” did not guarantee married women all the same privileges as enjoyed by free white men. This was not even an issue until after the ratification of the Fourteenth Amendment in 1868. The first clause of that Amendment put the question of citizenship front and center, essentially reversing the ruling of *Dred Scott*: From 1868 on “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, [were] citizens of the United States and of the State wherein they reside.” Moreover, the very next clause provided that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .” As it turned out, however, neither of these clauses settled issues about the content or meaning of what became a federally-guaranteed citizenship. Feminists who later attempted to use the privileges and immunities clause of the Fourteenth Amendment to claim the right to engage in an occupation as an attorney, or even to vote, were to be disappointed within a very few years of the adoption of the new constitutional proviso. Even the freed people, who one would think Congress had in mind when it reversed the *Dred Scott* ruling, failed to benefit much from the new national protection for the privileges and immunities of citizens. Indeed, in 1873, a bare five years after ratification and for some counter-intuitive reasons, the U.S. Supreme Court stripped the privileges and immunities clause of the Fourteenth Amendment of most of its potential meaning. In other words, the question of who may be a “citizen” and thus a putative part of “we, the people” while important, is not the whole story. Great battles remained to be fought about the content of national citizenship, and about the meaning of the other two operative
provisions of the Fourteenth Amendment, the equal protection and the due process clauses. In the aftermath of civil war, issues about citizenship were clearly on the table. The organized social justice movements of the antebellum period (the abolitionists and early feminists) matured further in the course of the campaigns over the drafting and passage of the Reconstruction Amendments and their interpretation by the U.S. Supreme Court. The road to maturity, however, put strains on even the most progressive allies, as they parted ways over strategy and goals.
References

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Library of Congress digital maps:

e.g. 1839 map of NYS with post offices, canals, post roads, rrs at http://memory.loc.gov/cgi-bin/map_item.pl

(Doesn’t work–get there thru

http://memory.loc.gov/ammem/gmdhtml/rrhtml/rrhome.html (Railroad maps of library of Congress, 1828-1900)

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http://antislavery.eserver.org/  The Anti-Slavery Literature Project (home) [I signed up as loren; old ph. # pw] neat site, academic Arizona State, award-winning humanities

DUBOIS, ELLEN CAROL & LYNN DUMENIL, THROUGH WOMEN’S EYES: AN AMERICAN HISTORY WITH DOCUMENTS (2005) (? Too simplistic? See Mintz above instead? Or Boisterous Sea?)

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See Dubois and Smith book Intro p. 12 for websites with original ECS documents:
_not for Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony_ (PBS-WETA), http://www.pbs.org/stantonanthony/resources/index.html?body=resources.html

Votes for Women website, Selections from the National American Woman Suffrage Association Collection, 1848-1921 (library of Congress: American Memory, Historical Collections for the National Digital Library), http://lcweb2.10c.gov/cgi-bin/query/D?nawbib:q:./temp/~ammem_5zgO:

References to historiography in Wellman at page 243, footnote 37; what is video by Ken Burns referred to on page 12?

Underground rr & African-Am history western NY: (student constructed? Find something better?) http://www.math.buffalo.edu/~sww/0history/hwny.html
see the links cited there

www.npg.si.edu/col/seneca/senfalls1.htm from the Smithsonian. (Declaration of Sentiments)

www.cherokeephoenix.org/

www.library.wustl.edu/vlib/dredscott/
(Dred Scott case documents collection)
Collection of Missouri freedom cases:  
http://stlcourtreports.wustl.edu/index.php  
(“Freedom Suits”)
ENDNOTES

1 Louisiana Purchase had been acquired in 1803; but to existing 18 states after 1813, Statehood to Indiana (1816); Mississippi (1817); Illinois (1818); Alabama (1819); Maine (1820); Missouri (1821); Arkansas (1836); Michigan (1837); Florida (1845); Texas (1845); Iowa (1846); Wisconsin (1848); California (1850); Minnesota (1858); Oregon (1859); Kansas (1861).


3 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977). He says that he wants to study the relationship between private law (tort, contract, property, commercial law) and economic change in the nineteenth century.” Deliberately not focusing on constl law because that had too many “atypical great cases’” that were unrepresentative “either as intellectual history or as examples of social control. Indeed, constl law in America represents episodic legal intervention buttressed by a rhetorical tradition that is often an unreliable guide to the slower (and often more unconscious) processes of legal change in America.” xii. Also, doesn’t like “excessive equation of const law with ‘law’”. Tends to focus on how courts interfere with statutory control, whereas way courts enforce cl rules more typical “of the use of law throughout most of the 19th c”. Picked on those areas of law that give appearance of “neutral, apolitical legal system”--which they are not, wanting to challenge consensus history. In fact xiv one of chief ways antebellum period promoted economic growth was through legal, not tax system. (Xvi) major transformation which unleashed “emergent entreprenurial and commercial groups to win a disproportionate share of wealth and power in Amn society.” Naturally, they claimed it was in public interest. (1-2) judges were at forefront and aware of their role in shaping. (20) needed to fit into “an emerging system of popular sovereignty” to give it legitimacy.

4 Founders did not intend them to be; built in all kinds of protection against “faction” and the tyranny of the majority. Federalist papers citation? Farber & Sherry; Ackerman? Also suffrage itself left up to individual states to decide. Art.?

5 WILENTZ, supra note 2, at 309, 196 (NY)? ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1945) (the original?)

6 WILENTZ, supra note 2, at 312.

7 Id. at xix.

8 Id. at 265ff, esp after 1825, lasting through 40s; Wellman,

9 See, e.g., HOWE, supra note 2, at 173? Post-millenarianists believe that 1000 year period before Second Coming has already started, and therefore try to improve as much as possible in life on Earth? WILENTZ, supra note 2, at (ch 8) 154ff

10 HOWE, supra note 2, at 234; Troy Female Seminary established by Emma Willard in 1821, pioneered higher education for women. Id. at 464.

11 HOWE, supra note 2, at 605-608?

12 See, e.g., HOWE, supra note 2, at 497, 357. (2007) WILENTZ, supra note 2, at 196 re NYState

13 HOWE, supra note 2, at 848; WILENTZ, supra note 2, at 136 (who, while praising accomplishments of Jeffersonian era, says there were victims Indians and blacks, tho positive legacy overall).

14 HOWE, supra note 2, at 342ff, 349, 386, 416; WILENTZ, supra note 2, at 262, 322, 427ff

15 John Hart? Or a reference from him?

16 Describe what it did to Mexicans so swallowed up?

17 WILENTZ, supra note 2, at 220.

18 Id. at 220-221. Genovese? Engerman?

19 For critique of that market economy and the law that supported it, see Horwitz? Genovese?

20 Refer to legislation? WILENTZ, supra note 2, at (on Mo Compromise of 1820) 222-237; Id. on K-N at 637, 669ff, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970) on Missouri Compromise rpeal 94-95 on Kansas-Nebraska Act 93-97,
21 E.g. WILENTZ, supra note 2, at 792?
24 IR in masthead
25 WILENTZ, supra note 2, at 337 & 392 (1833?)
27 For Declaration of Sentiments and excerpts from proceedings, et. al., see BERNHARD, VIRGINIA AND ELIZABETH FOX-GENOVESE, THE BIRTH OF AMERICAN FEMINISM: THE SENECA FALLS WOMAN’S CONVENTION OF 1848 (1995);
28 Too late for the Indians? Who weren’t part of it anyway?
30 WILENTZ, supra note 2, at 31 HOWE, supra note 2, at 489. Howe says his Democracy Party that had supplanted Jefferson’s Democratic-Republicans represented by 1836 popular sovereignty, opposition to the national bank and to national economic planning, the promotion of continental expansion and the protection of slavery,
33 WILENTZ, supra note 2, at 201-202, 309. Explain that suffrage qualifications were determined by states under Constitutional provision Article I, section 4 [1], in pertinent part “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” Plus Article II, section 1 [2]–“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . .” to electoral college that chooses President;
34 WILENTZ, supra note 2, at 309-10.
35 HOWE, supra note 2, at 210ish.
36 Id. It was last time House decided Presidential election until 1876, (and then a special commission did it in “compromise “of ’76 that ended Reconstruction, see next chapter). Cf. Bush v. Gore, when instead of going to House, S.Ct. Intervention determined outcome of 2000 election by thwarting recount of Florida votes ordered by Fla. S.Ct. WILENTZ, supra note 2, at 302 on stolen election.
37 WILENTZ, supra note 2, at 309.
38 Id.
39 WILENTZ, supra note 2, at 302.
40 Id. at 302-304.
41 Id. at 302-304. E.g. purging political entrenched appointees from office; Wilentz at 314-315, in name of rotating which unfortunately became known as “spoils system” which Wilentz said was exaggerated against him.
42 Id. at 186-87. New Jersey extended the franchise to white men who either owned property worth $7, or were militiamen or state taxpayers, at the same time that it deprived free blacks of their vote. HOWE, supra note 2, at 497, says that blacks males lost vote in Ct in 1818; RI 1822; North Carolina 1835, Pa. In 1838. See, e.g., WILENTZ, supra note 2, at 201.
43 HOWE, supra note 2, at 497; WILENTZ, supra note 2, at 201-02.
44 WILENTZ, supra note 2, at 192.
45 WILENTZ, supra note 2, at 189-196. Wellman at 139-143, 149-151 (use of women’s vote as jest in this debate).
(1939). See also Philip Foner (1983) at 207; Fehrenbacher at 433-34, explains as in part reaction to Dred Scott decision, successful equation of anti-DS, a-s standpoint with “Negophilism,” so that in racist context of the day, the Republican majority in NYS evaporated in election of 1860, and electorate which had previously supported Lincoln, now defeated suffrage amendment by twice the margin had supported Lincoln! (I.e. Republicans had to be voting against it) Concedes other forces at play (435), including economic downturn; and off year losses by a majority party, but Republicans of the day clearly thought this was part of explanation, e.g. Lincoln himself, tho he wasn’t that sympathetic to blacks personally either, witness his anti-miscegenation statements of the time.

47 WILENTZ, supra note 2, at 198--
48 HOWE, supra note 2, at 497.
49 WILENTZ, supra note 2, at 198.


51 HOWE, supra note 2, at 489, (in 1836).

53 By 1829, Congress took the position that the tribes should comply with state laws demanding jurisdiction over Indian territory Portnoy at 578.. ???? When tribal peoples resisted, the federal government supported forced removal. Portnoy, Alisse Theodore, “‘Female Petitioners Can Lawfully be Heard’:Negotiating Female Decorum, United States Politics, and Political Agency, 1829-1831,” 23 J.OF THE EARLY REPUBLIC573-610 (2003). Not best source? Necessary?
54 Young, Mary, “Conflict Resolution on the Indian Frontier,”16 J. Of the Early Republic 1, 4-10 (1996) (contrasts Chocotas and Chickasees of Mississippi persuaded by various devices to sign removal treaties 1830-32 to warfare with Seminoles to Creek resistance in Alabama to legal efforts of Cherokee Nation). Between 1830 and 1832, state pressure on Indian lands and federal removal policies resulted in the displacement of the majority of the Chocatas of Mississippi and the Creeks of Alabama. The Chickasaws were also relocated. WILENTZ, supra note 2, at 417. Generally non-violent, Wilentz compares western at 426,( but for Seminole resistance, which was effective for quite a while?)
57 Hershberger at 35.
58 Id. at 37.
59 31 U.S. 515 (1832).
60 Id. Despite fact that more assimilated tribes themselves had adopted practice of owning slaves?
61 WILENTZ, supra note 2, at 177. LINDSAY ROBERTSON. CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS. NEW YORK: OXFORD UNIVERSITY PRESS, 2005. (Look at this?)
62 WILENTZ, supra note 2, at 171-173.
63 (called Creeks by the Americans) Id. at 171.
64 When he was a military commander, Jackson had demanded land from his former allies among the Indians, as well as from those whom he had defeated in battle. WILENTZ, supra note 2, at 172. Also HOWE, supra note 2, at 125 Also involved in operations against the Seminole Indians in Florida. At 243-44.
65 HOWE, supra note 2, at 125. President Madison’s subsequent eviction order was not enforced and failed to stem this rush.
66 Id. at 126-27.
67 Id. at 128.
68 Id. at 130-32.
70 And had been promised that result by the feds? 1803 ish
January 5, 2011

R-s-c ch 2antebellum 6 wordfix

Johnson at 573.

Id.

Id.

Id.

Id. at 572.

Id. at 574

Id.

Id. at 574.

Id. at 584-85.

Id. at 587.

Despite fact that reporter put “Constitution” heading on it; no headnotes to that.

Id. at 589-590.


591.

Berutti at 293. Georgia Compact, cite?; says one of Tho Jefferson’s chief purposes in making La. Purchase was to fulfill this promise. Id. See Cherokee Nation, Thompson dissent at 76.


Norgren at 261.

Id. at 261-62.

Id. at 262.


Norgren at 262.

Id. at 264 (on discussions about litigation).

Id. at 264-67.


Id. at 49-54.


Id. at 574. See the convoluted history of anti-slavery petition campaigns of 1830s and the gag rule imposed by Congress to refuse to hear them; subsequent women’s rights petition campaigns at state and federal level, including “new departure,” next chapter, and the hugely successful women’s petition campaign in favor of passage of the Thirteenth Amendment banning slavery and involuntary servitude. Hershberger, Mary, “Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s,” 86 J of Amn Hist. 15, 25-29 (1999).

Id. check number

Id.

Id. at 575-76.

126 Id. at 575-76, citing Anne M. Boylan and Catherine Allgor
127
128 Portnoy at 577. (Identifies them as Whig or proto-Whig)
129 E.g. Id. at 585--"par
130 Norgren at 267.
131 Id. at 268.
132 Norgren at 269–72.
133 Id. at 272-74.
134 Id. at 274-75. Other prominent lawyers recruited Id. at 275-77.
135 Id. at 279.
136 Id. at 279-80.
137 Cherokee Nation v. Georgia, 30 U.S. 1 (1831) at 15.
138 Id.
139 Article III, Section 2 [1] & [2]. [modified by Eleventh Amendment in 1798, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Construed in Hans v. Louisiana; Principality of Monaco v. Mississippi?]
140 But for later interpretation of the 11th Amendment, see Principality of Monaco v. State of Mississippi, 292 U.S. 313, 330 (1934) (holding that Cherokee Nation was not to the contrary and left open the question here decided, that a foreign state cannot sue a State or vice versa without defendant waiving sovereign immunity). Is there an ex parte Young ultra vires approach that might apply? D.k
141 Norgren at 281.
142 For the arguments of the attorneys, see 2 KURLAND, PHILIP B. & GERHARD CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 159-193(1978).
143 But see Id. at 164–where they say even if “imperfect view” that are neither one, then still shouldn’t change the result, because arises under a treaty, and a state is a party.– Also not way Monaco ult. Ruled?
144 14 treaties, one under the Articles of Confederation; 13 under the US Constitution, spanning from 1785 to 1819, Id. at 166.
145 Id. at 166.
146 Id. at 168.
147 Id. at 168-69.
148 Id. at 169.
149 Id.
150 Id.
151 Id. at 170.
152 Id.
153 Id. at 179.
154 “An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,” 3 Laws U.S. 460 (1802).
155 Id. at 188.
156 Id.
157 Id. at 189.
158 Id. at 190.
159 Id.
160 Id. at 191.
161 Id. at 192-93.
162 Justice McClean; separate concurrences by Justice Johnson and by Justice Baldwin; and dissent by Thompson (joined by Story); Duvall didn’t participate?
163 Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831).
164 Id. at 16.
165 Id. at 17.
166 E.g. in Berutti?, Ball, burke, Fletcher !, , Williams?
Id. at 17. Also argued from ICC which gave Congress power to control interstate commerce, commerce with foreign states, AND commerce with Indian tribes—or else why distinguish those? Id. at 20. “Unnecessary to decide this question” For the political question doctrine see?

Id. at 20. [sic] Apparently appointed by Thomas Jefferson; from South Carolina.

Id. at 21 (Johnson, J., concurring in j?) Source for the ranks?

Id. at 21. (Could hardly say different in light of Written constitution very similar to existing state constitutions; elective chief, etc.)

Id. at 22. Id. at 23. Id. Id. at 24. Id. at 27-28.

Id. at 28. On top of that their complaints were political ones that could not be entertained. ..... and, and. Id. Leaving out Henry Baldwin op., apted by Jackson, anti-slavery, admirer of CJMarshall, who took the view that “there is no plaintiff in this suit” Id. at 31 (Baldwin, J., concurring). In his view, all Indian tribes were mere occupants of allotted hunting grounds and in no way constituted a recognized “nation” in any of the treaties. Id. at 40; lacking any attributes of nationhood or sovereignty Id. at 48-49.

Justice Thompson (with Justice Story) Id. at 50, dissenting. Smith Thompson from NY, appointed by Jackson, mostly opposed Marshall on the Court; (was he one of those Van Buren Nyers, what did they call them?); and Joseph Story from Massachusetts who wrote Martin v. Hunters Lessee and Amistad (1841), apted by James Madison, federalist in Marshall mode?

Cherokee Nation at 54-55 (Thompson, J., dissenting).

Id. at 52-53. Id. at 55-57. Id. at 58. Goes through the treaties 58-6?

Id. at 61, citing Treaty of Hopewell, 1 Laws U.S. 322 (1785) 6th article. Id. at 61. Id. at 62-65. There were provisions in the treaties of 1817 and 1819 that allowed individual Cherokees to apply for citizenship, but that merely showed that without this they were not citizens. id. At 66. Didn’t change until 1924?

Id. at 67. He interpreted 11th A to apply only when citizens of foreign state sued a U.S. state, not when the foreign state itself sued, a position no longer considered valid today?

Id. at 69-70. Id. at 75, citing “An act to authorize the governor to take possession of the gold and silver and other mines lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the states, and for punishing persons who may be found trespassing on the mines.” (December 2, 1830).

Id. at 76-77, citing act of December 21, 1830.

Id. at 77. Id. at 76. Id. at 74. Id. at 80. Id. at 80.
Only add up to 6 of 7 justices because J. Duvall had been absent during oral argument, Norgren at 283.

31 U.S. 515 (1832).

Norgren at 286.

Id. at 286-87 – Worcester v. Georgia, 31 U.S. at 523.

Norgren at 287.

Id.

Id. at 289- also in Worcester case 31 U.S. at 534.

Again, only 6 of 7 participating, Norgren, Johnson ill; 4-1-1.


31 U.S. at 534. Norgren on Sergeant’s notes for oral argument at 290-291.

Id. at 534.

Id. at 535.

Id.

Id.

Id.

By contrast to McClean concurrence Id. at 564-573, which showed much more concern to tie that down.

31 U.S. at 541. Now cert. Not automatic right of appeal.....

Id. at 516(?) (Numbering is weird)

Id. at 544-545.

Id. at 545.

Id.

Id. at 546.

Id. at 551-557.

Id. at 551.

Id. at 552.

Id. at 553-554.

Id. at 554-55.

Id. at 555.

Id. at 559.

Id. at 559.

Id. at 561.

Id. at 561.

Id. at 562.

Norgren at 293.

Id. at 293-94.

Id. at 292 n. 133.

Id. at 295-96.

Id. at 298-300.

Id. at 300.

Id. at 301.

Id. at 305-07.

Id. at 307-08. Other?

Id. at 308-311.

For argument about original understanding of Constitution with respect to Indians (no plenary power in feds exc for ICC aspect); that Constn deliberately left open potentially divisive issue of whether states or feds had “sovereignty” over Indian lands, decided not to decide and leave status quo, see Savage, Mark, “Native Americans

257 (Johnson v. M’Intosh) Despite reporter putting “Constitutional” descriptor on it; no constitutional law in it–source? 21 U.S. 543 (1823). Procrustean bed of trilogy? Make it fit bc of political, moral pragmatic needs?

258 Cherokee Nation v. Georgia, 30 U.S. 1 (1831).


Check out Alexander Tsesis book? Goluboff?

262 See WILENTZ, supra note 2, at 222-240

263 Va, Md., Del. Ky, Tenn, N.C., S.C., Ga, Ala, Miss, La=slave; while Mass, Ct, R., Vt, N.H., NY, NJ, Pa Oio, Ind, Ill=free. But in the House, where represented by population, even with the boost of the 3/5s clause counting slaves, slave states had only 81 Reps. To 105 free states; population of North growing rapidly at 5,152,000 versus South 4,485,000. RICHARD B.MORRIS (ed.) ENCYCLOPEDIA OF AMERICAN HISTORY (1961) at 159.

264 WILENTZ, supra note 2, at 222-237–came unstuck after Texas annexation? Or already?

266 HOWE, supra note 2, at 160-163.

267 (with an introduction by Charles M. Wiltse) (1965) (reprinting June 1830 edition, last one, he was apparently murdered for his pains thereafter)

268 Intro Id. at xi.

269 Id. at Article IV “Our Wretchedness in Consequence of the Colonizing Plan.”

270 Id. at

271 Id. at Article III 39-49.

272 Id. at Preamble, page 5. Contrasting to allegedly less enlightened societies.

273 Id. at pg. 23.

274 Id. at 23-24.

275 Id. at Introduction to Appeal at viii.

276 Id. In his 3d edition, Walker himself referred to the suppression efforts at p. 82.

277 Id. at Intro at xi.

278 Intro. Id. at xi. HOWE, supra note 2, at 425; WILENTZ, supra note 2, at 337.

279 HOWE, supra note 2, at 426. Check date late ’32?


281 Daniel S. Fabricant, “Thomas R. Gray and William Styron: Finally, A Critical Look at the 1831 Confessions of Nat Turner, “37 AM’N J. OF LEGAL HIST. 332-361 (1993) at ? (demonstrating little effort made to separate fact from fiction, e.g. the so-called confession was never read in court, and made Gray lots of money.)

282 HOWE, supra note 2, at 325-26.


284 Id. at 381.

285 Id. at 396-98?

286 HOWE, supra note 2, at 327.

287 WILENTZ, supra note 2, at 403. and the great anti-slave trade crusader William Wilberforce died; South. In 1833, Great Britain adopted emancipation with compensation


289 On connection between Quaker abolitionists and anti-Indian Removal see Wellman 106-107, also discusses activity by Seneca women themselves.


HOWE, supra note 2, at 428. Curtis at 805-806 And northern whites often agreed; anti-abolition activity in the North Wyatt-Brown at 235. Curtis at 823.

Id. at 237. HOWE, supra note 2, at 430. Curtis at 818?


Id. Frederick at 139–after penultimate battle in 1840, referred to standing committee where quietly died.

Id. citing Cong. Globe, 24th Cong., 1st Session 383-87, 405-06. HOWE, supra note 2, at 512-15; WILENTZ, supra note 2, at 451-52. Hessler at 209.


Frederick at 119, but see McPherson who thinks wasn’t really denial of the right?

Id. at 121-22. Id. at 126.

Id. at 132. For 1837 petition of Rochester women, see Hewitt, Women’s Activism at 91 (“800 women opposed to
annexation of Texas, extension of slavery into new territories, and the continuation of slavery and the slave trade in the nation’s capital.”).

329 Frederick at
330 Id. at 134-37.
331 HOWE, supra note 2, at 515.
333 Id. at 11.
334 Id. at 11-12.
335 Id. at 12.
336 Id.
337 Id. at 13. Cite to the book?Http://utc.iath.virginia.edu/abolitn/childhp.html reproduces it in part; put in references.; where??ADD from Isenberg 1836 case initiated by Boston Female A-S Society fs Commonwealth v. Aves, known as “little Med’s case”–young female slave what could state do? What was status of child and parent/child relationship?
340 At 19? Later to spend rest of their lives together, even after marriage of Angelina to abolitionist Theodore Weld in 1838, Lerner at 233ff.
341 At 24.
342 Lerner at 118? See also Birney, Catherine H., SARAH AND ANGELINA GRIMKÉ: THE FIRST AMERICAN WOMEN ADVOCATES OF ABOLITION AND WOMAN’S RIGHTS (greenwood Press–1885 ed. 1969) (Birney was student of whom?) Angelina first?
343 Lerner at 138.
344 Id. at 140.
345 Id. at 141.
346 Id. at 143.
347 Id. at 145.
348 Id. at 147.
349 Id. at 147-48.
350 Id. at 148.
351 Id. at 153.
352 Id. at 155. Appealed to southern clergy about contradictions of slave law and christianity.
353 Id. at 161. Angelina Grimke, Appeal to the Women of the Nominally Free States; Sarah Grimke, Address to Free Colored Americans.
354 Lerner at 162.
355 Id. at 163-64.
356 Id. at 170.
357 Id. at 171.
358 Beecher is daughter of evangelical reformer Lyman Beecher and she was inspired to her petition campaign by her father’s friend Jeremiah Evarts, Portnoy at 573. There was great concern about Indian removal and publicity from the American Board of Commissioners for Foreign Missions (ABCFM), who employed Evarts to lobby Congress, and other Christian missionary groups such as Missionary Society of the Methodist Episcopal Church. Portnoy at 578-79. Lyman Beecher and transformation of “staid New England Protestantism” through revivals and local lay moral reformgroups and mass circulation religious magazine. “Vital evangelizing creed, distinct from rationalist Unitarians and traditional Calvinists and from southern camp-meeting Methodists and Baptists”—new kind of political power “democratic in tone and sophisticated in its organisational tactics, but very different from the main forms of democratic politics that had emerged since the Revolution.” WILENTZ, supra note 2, at 272. evangelical Sabbatarian campaign Id. at 270-272. By contrast, anti-slavery and feminist activists? Quaker and Unitarian and? Methodist? Where is article on them?
359 Lerner at 184. SKLAR, KATHRYN KISH, CATHARINE BEECHER: A STUDY IN AMERICAN
DOMESTICITY (1973) at 132-137.

361 Sklar at 132.
362 Id. at 134.
363 Lerner at 184.
364 Id. at 184; see supra? Sklar at 134-135.
366 Grimké, Sarah, LETTERS ON THE EQUALITY OF THE SEXES AND OTHER ESSAYS (ED. AND WITH AN Intro by Elizabeth Ann Bartlett) (1988); which also appeared in newsprint. Lerner at 187.
367 Bartlett intro to letters at 1, 4?
369 Lerner at 189-194. See Letter III.
370 Id. at 190.
373 Letter X.
374 Letter XI.
375 Letter XII.
376 Letters XII & XIII.
377 Letter XII at 75.
378 Letter XII at 75-76.
379 See next chapter at
380 E.g. exchange with Theodore Weld about their status as AA-SS agents and what support they had from New York Executive Committee on speaking to mixed (“promiscuous”) audiences. Lerner at 196-198. Refuses to excuse the speaking on grounds it’s a Quaker tradition, but says “we ask no favors for ourselves, but claim rights for our sex.” 198.
381 6 month speaking tour through over 60 N.Eng towns; addressed about 40,500 people and inspired est. of six new societies. Lerner at 227
382 Id. at 204-214.
383 Id. at 214-224.
384 Lerner at 240? Quaker wedding didn’t require minister to preside, see Wellman 99, 53 Grimke-Weld marriage “ceremony”;
385 Id. at 242.
386 Id. at 238.
388 Brown at 130. Lerner at 244-46.
389 Brown at 130;
390 Id. at 131. Lerner at 247-48.
391 Brown at 131-35. Lerner at 249.
392 Brown at 136, citing the Proceedings of the Anti-Slavery Convention of Women Held in Philadelphia, May 15th, 16th, and 18th, 1838 (Philadelphia, Merrihew and Gunn 1838) at 8. Lerner at 251–her second resolution, and one of few not unanimously adopted at convention.
393 Lerner at 252-53.
394 Lerner at 262=66/
395 Id. at 266. In another irony, Uncle Tom’s Cabin was written by Harriet Beecher Stowe, sister of Catharine Beecher.
396 Id. ADD nancy Isenberg, Sex & Citizenship in Antebellum America???
397 Isenberg, Gerda Lerner student, Sex & Citizenship in Antebellum America questions this, a narrative created by

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ECS later? C. 63 Check out what she says about literature, including Ellen DuBois, and what else was going on in 40s.

Ira Brown, Cradle, at 162.

Id.

Id. Also Lerner at 283-86.

Lerner at 286; Brown at 162.

Lerner at 286.

Id.

Lerner at 283.

Id. at 283-84.

Id. at 284.

Id.

[Divided loyalties of Grimke-Welds]


Brown, Cradle at 163.


Brown, Cradle at 147.


165.

Cradle at 165.


Sklar, Women Who Speak at 455.

On origins of term, see Pratt, Julius, “The Origins of ‘Manifest Destiny’,” 32 AHR 795-798 (1927). Starts as Texas annexation reference, but picked up for Oregon debate at 797-98.

ADD from Isenberg, 133 ff on women & M-A war?

WILENTZ, supra note 2, at (ch III title) 521.

WILENTZ, supra note 2, at 479.

HOWE, supra note 2, at 652.

Id. See also Bretz, Julian P., “The Economic Background of the Liberty Party,” 34 AHR 250-264 (1929).

WILENTZ, supra note 2, at 551-553

Id. at 491-507.

Id. at 522.

40 U.S. 518 (1841).

HOWE, supra note 2, at 520.

Id. at 521. See below for more details on background of case.

Id. at 521.

Id. at 522.


Argument of John Quincy Adams, Before the Supreme Court of the United States, in the Case of the United States, Appellants, vs. Cinque, and Others, Africans (NY, 1841).

HOWE, supra note 2, at 523.

41 U.S. 539 (1842).

[Cut some here if use below? At least the box]
Bestor, Arthur, “The American Civil War as a Constitutional Crisis,” 69 AHR 327-352 (1964) says by 1860 more than ½ of slaves were held outside of original 13 states. At 335. ADD more from Mexican; M-A point of view, see e.g. LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (NYUP2007). “Manifest destiny” coined when by whom and for what?

Bestor at 335.

Id. at 337. Doubled area with organized govs

Id. at 338.

Garrison, George P., “The First Stage of the Movement for the Annexation of Texas,” 10 AHR 72-96 (1904). At 72. In 1819 US gave up claims to Texas in order to settle Florida boundaries.

Id. at 73.


Id.

Id. at 407.

Garrison at ?


Garrispm


Morrison, MVB, 715, 722-23–he says not just sectional, because Dem gains everywhere. Merk on arguments designed to appeal to northerners that wasn’t really going to be extension of slavery, more relocation from exhausted lands to fresher ones; slavery as self-destroying institution; ultimately the Africans would go to South America! 417

WILENTZ, supra note 2, at 570 -71? Morrison, Westward the Curse at 221? What contemporaries believed–whigs thought they were defeated over it primarily. Morrison, MVB, Polk won by “narrow plurality” of 38,367 popular votes out of 2.7 million; and electoral college 170 to Whig Henry Clay’s 105; Liberty Party went up from 6225 votes in 1840 to 61999 in 1844. Id. at 721-22.

Morrison, Westward at 221.

Oregon issue didn’t assume importance until Dec. 1845, according to Miles, Edwin A., “‘Fifty-four Forty or Fight’—An American Political Legend,” 44 Mississippi Valley Hist. Rev. 291-309 (1957). At 302; and Polk was quite willing to settle for 49 parallel, not 54 40. At 304. Accomplished in June 15, 1846 by The Oregon Treaty. HOWE, supra note 2, at 712-22. Polk cleverly submitted Treaty to Congress for its approval before he signed it, instead of after.

WILENTZ, supra note 2, at 577.

Morrison, MVB article at 710, letter by Henry Clay so saying; Morrison, Westward, 234- Where does East-West conflict come in?.


Lee at 522.

Id. at 525.
Id. at 528.


Id. See also Michael A. Morrison, “New Territory versus No Territory: The Whig Party and the Politics of Western Expansion, 1846-1848,” 23 Western Historical Quarterly 25-51 (1992) (“With the slavery question now afoot in earnest,” Virginia Democrat Fulton concluded that “the future was pregnant with evil.” And so it was.” Id. at 51.

Id. (see supra note 2, at 596.

See also Michael A. Morrison, “New Territory versus No Territory: The Whig Party and the Politics of Western Expansion, 1846-1848,” 23 Western Historical Quarterly 25-51 (1992) (“With the slavery question now afoot in earnest,” Virginia Democrat Fulton concluded that “the future was pregnant with evil.” And so it was.” Id. at 51.

Id. See also Morrison,

Id. at 600. See also Morrison,

Id. See also Morrison,

Id. at 528-98; Foner at ?

Id. supra note 2, at 598.

Id. at 600. See also Morrison,

Id. at 381.


Id. at 102.

Id.

Id.

Id.

Id. Ritchie? Title not invalid just because was an Indian, since Mexico recognized?

Id. at 103.

Id.

Id.


Id. See Isenberg xvi; 3-6. Wellman, by contrast, says Seneca Falls has become a “myth,” but that nonetheless it is “not untrue” and represents a “fulcrum point.” Judith Wellman, The Road to Seneca Falls: Elizabeth Cady Stanton and the First Woman’s Rights Convention 11 (2004); Hewitt, Activism (interested in conflicts between various women’s networks—among women themselves at 17-23 (challenging accepted version of domesticity, evangelicism, to women’s activism, finding instead 3 competing networks of women).


Cogan, Jacob Katz & Lori D. Ginzberg, “1846 Petition for Woman’s Suffrage, New York State Constitutional Convention,” 22 Signs 427-439 at 427(1997): [explaining reassessment of SF by historians as if not until then did Amn women have any political consciousness: “Their aim, however, has been not to reevaluate the place of Seneca Falls as a watershed in women’s political history but to explore other means through which women expressed those identities: setting up charitable societies, speaking out agst intemperance and slavery, organizing agst their employers, and demanding expanded prop. Rts, educ. And employment opportunities for women.” Cites Ellen DuBois, Feminism and Suffrage; Lori D. Ginzberg, Women and the Work of Benevolence: Morality, Politics, and Class in the Nineteenth-Century United States (1990); Nancy Hewitt,


Wellman at 81. Where I had privilege to briefly live in an historic house (Warrant Homestead 1956 W. Henrietta Road–what are they doing to it now? Thomas Warrant was the founder of the Rochester Anti-Slavery Society) that had been a way station for the underground railroad for fugitives from slavery. Http://www.rochester.history.edu/class/ugrr/hor11.html


Wellman at 81; HEWITT, WOMEN’S ACTIVISM, at 28-29, 32-33; 74-76.

Lori Ginzberg, “moral suasion” at 602.

Id. at 81-86. Isenberg ?41-59? HEWITT, Women’s Activism (55) says inspired men and women “to join in movements to eradicate immorality and thereby hasten the millennium”.)

HEWITT’s argument abt differences among women, at 22-23.

HEWITT on the 5 clusters 40-43.

Hewitt, Feminist Friends?; Wellman 206 Congregational Friends wing of Quakerism after schism too. 300 attendees but what is known about all of the rest? For significance of network of Quaker women, see HEWITT, Women’s Activism at 3-4.(only ones interested in radical racial and economic equality)


Wellman 19-21

Banner at 1-4; Wellman

Wellman 26-28

Banner at 17; Wellman on Smith household 37-42.

Banner at 17.

Id. at 18.

Id. at 13; while at Emma Willard’s Female Seminary in Troy New York.

Id. By 1836, NY state already had 104 local a-s societies, 2nd in nation, usually in small upstate towns; sent lots of petitions Wellman at 47.

Banner at 27-30; Wellman? (Easy to forget just how hard that was then, without support? Cf. Grimke sisters and Weld household.

Banner at 30.

Wellman at 92. Hewitt agrarian friends article about rochester?

Wellman at 104-105. (Versus meeting for worship?)

Id. at 105; also interested in resisting loss of Seneca Indian reservation near Rochester (107) and in abolitionism (107).

Wellman at 123. HEWITT, WOMEN ACTIVISTS? At

Wellman 111.

Id.

Id. at 130-134.

Id. at 133.

Id. at 134.

Chapter 1? See, e.g., NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK 26 (1982). The standard English treatise was WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND. The first American treatise was TAPPING REEVE, THE LAW OF BARON AND FEME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, OF

January 5, 2011 R-s-c ch 2antebellum 6 wordfix
See also, JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826-30).

515 Laws of Mississippi, 1839, chap. 46.


517 Chapter 17 Wellman at 145-149- 154 on NY debates.


519 Id. at 311-12 but see for some equality arguments made e.g. by Thomas Herttell of NY in 1837, at 307-08; Ernestine Rose e.g. Pula, James S., “‘Not As a Gift of Charity’: Ernestine Potowska Rose and the Married Woman’s Property Laws,” 58 POLISH AM’N STUDIES 33-73 (2001).

520 Basch also says that in 1840s at 317, citing Mary Upton Ferrin in Mass; Paulina Wright, Ernestine Rose, and ECS in NY; Clarina Howard Nichols on behalf of 1847 VT statute; Lucretia Mott, Jane Grey Swisshelm, and Mary Grew for Pa. 1848 statute; Mar. 48 petition to NY lege “on egalitarian rather than on equitable grounds”

521 Basch at 356;

522 Wellman on legal reform in NYS ch. 6 135-154; 146-147 on Thomas Herttell, and Enrestine Potoski Rose for MWPA, equal rights argument; Ernestine Rose e.g. Pula, James S., “‘Not As a Gift of Charity’: Ernestine Potowska Rose and the Married Woman’s Property Laws,” 58 POLISH AM’N STUDIES 33-73 (2001).

523 Richard Chused, “Married Women’s Property Law, 1800-1850, 71 GEO L.J. 1410-1411 (1983); By the 1850s, reform of the law of married women’s property clearly was associated with woman’s rights. Basch calls it “pivotal”

524 Id. “reached a crescendo”Defeated elimination of property requirement for black male suffrage.

525 Cogan, Jacob Katz & Lori D. Ginzberg, “1846 Petition for Woman’s Suffrage, New York State Constitutional Convention,” 22 SIGNS 427-439 (1997 Id. at 431. August 15, 1846

526 Id. at 429?

527 Id. at 431.


529 Id. at 439.


531 Banner at 39-41; For Declaration of Sentiments and excerpts from proceedings, et. al., see BERNHARD, VIRGINIA AND ELIZABETH FOX-GENOVESE, THE BIRTH OF AMERICAN FEMINISM: THE SENECA FALLS WOMAN’S CONVENTION OF 1848 (1995); Wellman at 190.

532 Fox-Genovese at 85.

533 Id. at 85-86.

534 Id. at 86-87.

535 Id.

536 Id. at 86.

537 Id.

538 Id.

539 Id. at 86-87.

540 This generalization, of course, only applied to free people. For better or for worse, slave marriages enjoyed no legal recognition. Instead, enslaved families of color were subjected to the economic and physical control of their owners.

541 Id. at 86.

542 Id. at 87.

543 Id.

544 Id.
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Id.
Id. at 88.
Id.
Banner at 41.
Id. at 42.
Id.
Id. also Wellman at 195
Henry Stanton therefore refused to attend.
Id. at 88. Only identifiable AA to sign Wellman at 205, altho by 1850s along with him Sojourner Truth, Mary Ann Shadd Cary, Sarah Remond, and William C. Nell also active AA woman's suffrage supporters. See for analysis of signers in terms of religion, Free Soil support, economics, locale etc. 205-208.
Id. at 47.
Id. at 41. Wellman at 211-12. HEWITT, WOMEN ACTIVISTS at 130-134.
Id. at 15.
Id. at 32.
Id. at 20-21.
Id. at 21. Women's Conventions of 1850s Terry
Id. at 20. Liberty League was the radical wing of the Liberty Party, which was the effort of political abolitionists to create a party around their issue. Wellman at 173 on Liberty League? In 1847, Gerrit Smith supported, made the argument Constn actually really was anti-s
Id. at 191.
NANCY HEWITT, WOMEN'S ACTIVISM at 189 describes “dramatic events of the late 50s as “revivals, recession and recovery, resurgences of proslavery legislation and antislavery sentiments, murder and ‘treason’ and the execution of their perpetrators—reshaped the concerns of female activists.” (Panic of 1857).
41 U.S. 539 (1842).
60 U.S. 393 (1857).
Marian and her family disappeared into slavery; Scotts and their families didn’t but no thanks to the Court decision.

Such as Scalia’s claim in Casey?


Despite the trial court’s mention of only one child born in Pennsylvania, it actually is unclear from the surviving records how many of these children were born in Maryland, and how many in Pennsylvania. Id. at 62.

D.E. Fehrenbacher, THE DRED SCOTT CASE (1978) some confusion about what class of property, like real property; more commonly, in the nature of personalty? 32

Id. at 62-63.


“An Act respecting fugitives from justice, and persons escaping from the service of their masters,” U.S. Statutes at Large, I, 302-305.

Fehrenbacher at 41.

Holden-Smith at 1120-23. Modest provisions preserved earlier prohibitions and penalties for kidnapping of free blacks; and “codified safeguards” requiring slave-catcher to apply to a judge, jp or alderman for a warrant to arrest alleged fugitive. They then had to go before judge for a hearing to establish entitlement to a certificate of removal based on a valid claim of ownership established by evidence from some non-interested party. The alleged slave could look for evidence and give security for his or her appearance in the meantime, if they could manage it; otherwise they were retained in jail at the expense of the claimant until the hearing could be held. Id. at 1120-1121. WIECEK, WILLIAM THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 at 157-159 on Pa’s personal liberty laws, starting in 1820 and conflict with Maryland dating back to then too (1977)
Amistad (40 U.S. 518 (1841)) involved the efforts of Africans to free themselves from Cuban slavers who had kidnapped them from Sierra Leone. They had staged a rebellion aboard ship, but ended up in U.S. territorial waters. Spain demanded their return, but there was no clearly applicable treaty or law that required rendition of the African men, women, and children to their captors. Arguing the case before the Supreme Court, former President and the Africans’ lawyer John Quincy Adams gestured to two copies of the Declaration of Independence that hung on the wall. He appealed to “the law of nature and of Nature’s God on which our father’s placed our own national existence.” He successfully argued that since the Amistad was part of the slave trade, by then illegal under the laws of all European nations including Spain, the Africans who took the ship over were “self-emancipated,” “free,” “and had a right to assert their liberty.” “Argument of John Quincy Adams Before the Supreme Court of the United States in the case of the United States, Appellants, vs. Cinque, and others, Africans, captured in the schooner Amistad, by Lieut. Gedney, Delivered on the 24th of February and 1st of March 1841, found at www.law.umkc.edu/faculty/projects/ftrials/amistad/adamsarg.html. (9/22/07) (Pg. 4). Joseph Story wrote the opinion for the Court refusing to render the Amistad rebels to Spain. In 1997 Steven Spielberg made an award-winning movie about this 1839 mutiny, starring Morgan Freeman, Nigel Hawthorne, and Anthony Hopkins. For a treasure trove of materials about the Amistad mutiny and trials, see www.law.umkc.edu/faculty/projects/ftrials/amistad/AMISTAD.HTM

Story also dissented in Cherokee cases from Marshall’s ruling that Indian tribes were not Article III “foreign states” for purposes of diversity jurisdiction.

Prigg, at 623-25.

Cover, Justice Accused, formalism-moral dilemma at 119; apparently, Story’s son was the one who said did it to sabotage practical enforcement of fugitive slave act, but questionable? Cover at 241. Holden-Smith says?

Robert Cover, Justice Accused, at 240-241.

Fehrenbacher at 43.


See, e.g. laws passed as result of Prigg decision between 1842 and FSA of 1850 in MA, VT, CT, NH, PA, and RI, which prohibited state officers from “performing the duties required of them by the Act of 193 as well as prohibiting the use of state jails in fugitive slave cases.” Nogee, Joseph “ The Prigg Case and Fugitive Slavery, 1842-1850: Part I, The Journal of Negro History, Vol. 39, No. 3 (Jul., 1954), at 198, 202-206 (though nothing really new in Prigg decision that actually facilitated resistance to slave catching, dicta did shore up determination not to help them, 205).


VanderVelde, Lea and Sandhya Subramanian, “Mrs. Dred Scott,” 106 Yale L.J. 1033 (1996-1997). Arguments of counsel in Landmark Briefs? V says that in 1850 agreement made to treat 2 cases the same and only the Dred Scott v. Irene Emerson case went forward in Mo, with understanding would apply to her too, 2059 citing Erhlich, Walter, THEY HAVE NO RIGHTS: Dred Scott’s Struggle for Freedom (1979) at 43.

Fehrenbacher at 250. See, Emmerson [sic]v. Harriet (of color); Emmerson [sic] v. Dred Scott (of color), 11 Missouri 413 (1848) (Missouri Supreme Court case) (check citation case name spelling)


Id. at 69. For website containing many of these records, see St. Louis Circuit Court Historical Records Project, “Freedom Suits,” (references below).

Fehrenbacher at 250-51. Id. at 250-51, 240, 244. Later to be St. Paul, MN. Fehrenbacher says VanderVelde at 1050. One of their children was born on a steamboat in free territory, one in Missouri.

Fehrenbacher at 245. Id. at 245. Id. at 246. Id. at 247. Id. at 249 Id. at 248. V at 1069. Id. at 1069-71. Id. at 1069-71. Id. at 1078-83. Id. at 1079. Id. at 1081. Konig at 70, citing in the classic study by Paul Finkelman , An Imperfect Union 4, 11-12.


Konig at 68. Cited in dissent by McClean & Curtis, 60 U.S. at 560-61, citing Spencer v. Negro Dennis, 8 Gill’s Rep. 321) on Maryland law as example.

Id. at 68. Konig at 68.

Id. Note that in the later decades, things got worse. Konig cites Finkelman on the breakdown of “‘interstate comity’ as early as 1820s “and was well on the road to self-destruction by the 1840s.” Konig at 70, citing PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 4, 11-12 (1981). For more on Missouri context of freedom suits, see also Dennis K. Boman, “ The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri,” 44 AmJ.Legal Hist. 405, 407 (2000) (re Winn v. Whitesides, 1 Mo. 472-76 (1824) (in first and most imp freedom suit until overturned by Scott v. Emerson in 1852, Mo S.Ct ruled that when Winn, who had resided with her owner for 3-4 years in Illinois returned to Mo, she remained free and did not revert to her former status, because she had been taken into territory where Congress had prohibited slavery, introducing slavery there in violation of federal law). (Later cases established could pass through in transit, sojourn, with slaves, so long as wasn’t “introducing slavery” by hiring out, residing there 408ff and that Rachael v. Walker, 4 Mo. 350-54, been taken to Ft Snelling by military officer, just because he was military officer, didn’t mean he was not domiciled there, because he didn’t have to bring her with him. Note also successful suit in 1834 alleging maternal ancestor was a native American, and thus she could not be a slave, as “indian ancestry was prima facie evidence of freedom” (411), on rehearing of prior failed case 2 Mo. 71-93 (1828) Marguerite v. Chouteau, reheard 1834 trm, freed on jury finding “This determination ended Indian slavery in Missouri.” (411) [in transit? reattachment & Reversion?]

VanderVelde & Subramanian conclude that the evidence suggests that it was Harriet who initiated the lawsuits. At 1084. Harriet had a connection to the first lawyer through her own church membership and her minister, and was reaching the age of 28, a fact of some potential legal significance if, as is possible, Harriet had been taken by a
previous owner to Pennsylvania in her early years. 1084-88.

Fehrenbacher at 252.

4 Missouri 350 (1836).

F at 252-3, citing Rachel v. Walker, 4 Missouri 350, 352, 345 (1836).

Id. at 254.

Id.

Id. at 255.

Id. at 257.

Id.

Id. at 257-265.

Id. at 264-265.

Id. at 254-257. See, e.g., Emmerson v. Harriet (of color); Emmerson v. Dred Scott (of color), 11 Missouri 413 (1848) (denying Mrs. Emerson’s appeal from the grant of a new trial). The new trial, however, did not take place until January of 1850, F at 256. Scott v. Emerson, 15 Mo. 576 (1852). F at 264.

Id. at 268-70.

Id.

Id.

Id.

F at 270.

See Fehrenbacher’s “Questions Before the Court” chart on p. 303; and “Box Score” (324) and “Counter Box Score” on 327. Dred Scott v. Sandford, 60 U.S. 399 (self-proclaimed “opinion for the Court” by Justice Taney); 60 U.S. at 454 (Wayne, J., concurring); 60 U.S. at 457 (Nelson, J., “stating the grounds upon which I have arrived at the conclusion, that the judgment of the court below should be affirmed”); 60 U.S. at 469 (Grier, J., concurring in the Nelson opinion and agreeing with Justice Taney’s conclusion about the Missouri Compromise); 60 U.S. at 469 (Daniel, J., agreeing that “the judgment should be affirmed, on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded, that the suit may be dismissed”); 60 U.S. at 518 (Catron, J., addressing the merits only and concluding that Scott was a slave); 60 U.S. at 529 (McClean, J., dissenting); 60 U.S. at 564 (Curtis, J., dissenting). ??E.g. ?Vishneski, III, John S. III, “What the Court Decided in Dred Scott v. Sandford,” 32 AM J. LEGAL HIST.373 (1988); Burke, Joseph C. “What Did the Prigg Decision Really Decide?” The Pennsylvania Magazine of History and Biography, Vol. 93, No. 1 (Jan., 1969), pp. 73-85 Stable URL: http://www.jstor.org/stable/200902613. Fehrenbacher chapter on “The Judges Judged” at 417ff

60 U.S. 393 (1857).

For briefs and oral argument in Dred Scott v. Sandford, 19 HOW. 393, 60 U.S. 393 (1857), see 3 PHILIP B. KURLAND & GERHARD CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (1978). “Brief of Plaintiff” (167-177); Brief for Plaintiff in Error,” (179-218); “Additional Brief for Appellant,” (219-226); “Brief for Defendant in Error” (227-239); “Argument of Mr. Curtis on Behalf of Plaintiff,” (241-283). F on briefs, oral argument and reargument and context 285-302; 305-321 on maneuvering in Court writing opinions; What the Court Decided ch. 14, 322-334;

Article III, Section 2 [1]; See supra at ?

Infra at 26; Cherokee Nation at Georgia, 30 U.S. 1 (1831) at 15 –the arguments?

30 U.S. 1 (1831).

Id. at 17.

Id. at 17.

Id.

Id. at 23. 27-28? (Johnston, J., concurring in j?) From South Carolina appointed by Jefferson; the John McLean who dissented in Cherokee Nation was the other dissenter with Curtis in Dred Scott. Term of service, p. 284 Fehrenbacher 1829-61, from Ohio, appointed by ? Was then Republican? ????; Curtis appointed in 1851-57 Whig from Massachusetts. Taney was Andrew Jacksons A-G and Secy of Treasury, Democrat, appted by Jackson 1836-64. Dred Scott 60 U.S. at 404-405.

Id. at 404. Of course, explicitly reversed by first clause of 14th A.

Id. at 403-404. Distinguished Indians who “although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws.”—framers treated them as foreign govt, negotiated treaties with them “the people who compose these Indian political communities have always been treated as foreigners not living under our Government”—even tho in state of putilage and under subjection of “white
“But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.” Id. at 404.

Id. at 422. So however tied up questions of political community and citizenship, white supremacy and male supremacy might be, there were all these constitutional distinctions being made.

Id. at 405. Compare dissent on this point—to refute could have been original intent Curtis Id. at 572-75.

Id. at 405-406. Also Id. at 407-427.

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Constitution, Amendment XIV.

DS at 407.

Id. At 411-412.

Id. at 425-26.

Id. at 426.

Id.


Dayenu; references on why did this, is it dicta, etc. Fehrenbacher and what? Dissent: Curtis said, once decided no jurisdiction, that should have been the end of it, and everything else is mere obiter dictum, i.e. without authoritative weight. 60 U.S. at 564-565 (Curtis, J., dissenting). However, taking up jurisdictional issue sua sponte, which Court can do, decides it affirmatively, because can’t presume he was a slave, 569, and contrary to what Court said, clear some states treated Negroes as citizens, even to extent of voting, and the citizens of those states entitled to p& is of citizens guaranteed in federal constn 5th A; Where does this go? . . .

Map in HOWE, supra note 2, at 153; package by which Missouri admitted as slave state; Maine as free state; ban north of 36 30 line, HOWE, supra note 2, at 152-54; Fehrenbacher, 107-110? WILENTZ, supra note 2, at 231-236

Had checked out its constitutionality before passing? Repealed in 1854 by Kansas-Nebraska Act.

D.S. 60 U.S. at 452. And Northwest Ordinance which was repassed after ratification? Some territory was about to be ceded by states, not quite done when Constn ratified, but that included too in congressional power, just nothing thereafter? Fehrenbacher at ?(i.e. other than the old Northwest Territory that the States had already ceded to the U.S. government or anticipating ceding at the time of constitutional ratification)

Dicta?

Article IV, Section 3 [2].

Fehrenbacher? Articles?

60 U.S. at 452.

Id. at 452.

Id. at 453.

Without agreeing with each other on everything, contrast 60 U.S. at 529 (McClean, J., dissenting); 60 U.S. at 564 (Curtis, J., dissenting) (e.g. Curtis says pleas in abatement properly before the Court; while other dissenter, McClean, said it was not). McClean was on the Court for Prigg, and disagreed on one point in J. Story’s ruling in that case, i.e. a compromise on slavery was necessary for the initial forging of Union, 660, but that compromise in fugitive slave clause included that once seized the alleged fugitive, had to go to court for authorization, instead of engaging in forcible self-help. Id. at 670-71. Curtis only appointed to Supreme Court in 1851, after Prigg, , and resigns in 1857 after DS. Wayne wrote Barber in 1858, and Taney, Daniel, and Campbell dissented thee because H&W can’t be citizens of different states; besides domestic relations exception to jurisdiction of federal courts.

60 U.S. at 565 (Curtis, J., dissenting).

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60 U.S. at 572-73 (NH, MA, NY, NJ, No Carolina) (of course subject to same property owning requirement as white persons at that time before Jacksonian “democratization.”

Id. at 576.

Id. at 579.

Id. at 579-80. Had to presume on hearing the case that was free, until proven otherwise, for purposes of jurisdiction, allegations taken as true.

Id. at 582.

Id.

Id. at 583.

Id. at 583. Cf. Barber?

Id. at 584. He found a contrary conclusion exceedingly strange in light of laws and treaties that admitted “large bodies of Mexican and North American Indians as well as free colored inhabitants of Louisiana” to citizenship of the U.S. Id. at 587.

Id. at 588-89.

Id. at 589.

Id. at 590.

Id. at 592-594.

Id. at 594-95.

Id. at 596.

Id. at 596-97.

Id. at 598.

Id. at 599.

Vandervelde at 1092-93.

Id. at 1097.

Id. at 1098. As agent, he had authority to conduct marriages?

Id. at 1099. For summary of legal significance of slave marriage see id. at 1103-1109.

60 U.S. at 601-603 (Curtis, J., dissenting).


See, e.g. Id.at 611.

Id. at 612.

Id. at 615.

Id. at 620-21.

Id. at 620-21.

Id. at 624, citing Prigg v. Pa, inter alia.

Id. at 625.

Id. at 626.

Id. at 627.

Id. at 633. Fehrenbacher calls Curtis’s dissent “very impressive” especially as compared to Taney at 414.


George Ticknor Curtis, at ? Fehrenbacher at 417-437 (over what it ruled and what was dicta too)

Fehrenbacher at 319.

Although with help of supporters, freedom bought and they were emancipated, but after having had to hide their children for fear of what could happen, and go through all of this?

Fehrenbacher at 568.

Id. at 569. Ran away, he says; who says they hid them out for a while?

Id. at 417.

Id. at 439.

E.g.?

Fehrenbacher at 437.

Not to say sectional controversy all about slavery (rather than complex economic, social, political conflicts), with
wonderful North who loved blacks, they sure didn’t—e.g. remember 1860 NYS refused to let black citizens vote on same basis as white men, in referendum? See supra.

Didn’t get to talk about lasting rhetorical and legal legacy—about due process and originalism?

Since state law did not permit a married woman to initiate a lawsuit on her own, she had to bring the original action for legal separation/divorce through a “next friend,” a male authorized by the court to sue on her behalf. *Id.* at 584-85. The federal lawsuit was also brought by the same “next friend.”


In the meantime, he filed for an absolute divorce in Wisconsin, without ever revealing the prior New York proceedings. *Id.* at 588.

“Whether a wife divorced a mensa et thoro may not have a domiciliation in a State of this Union different from that of her husband in another State, to enable her to sue him there by her next friend, in equity, in a court of the United States, to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject-matter of divorce?”

For the domestic relations exception to federal jurisdiction, see majority opinion in Barber, “We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board.” *Id.* at 584. The exceptions that have developed to this well-established doctrine include enforcement of a money judgment already rendered, where a federal question is involved; ….?

And that was entitled to full faith and credit under the Constitution?

Amendment XIV

Amendment XIV

See chapter 4--infra

Chapter 4-infra at ?

MacDonald case, argued in S.Court 3/3 or 4, 2010, trying to revivify p& I clause in gun control?