2007

Foreign Authority, American Exceptionalism, and the *Dred Scott* Case

Sarah H. Cleveland
*Columbia Law School, sclve@law.columbia.edu*

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Comparative and Foreign Law Commons, Constitutional Law Commons, Human Rights Law Commons, Law and Race Commons, and the Law and Society Commons

Recommended Citation
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2214

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact donnelly@law.columbia.edu.
FOREIGN AUTHORITY, AMERICAN EXCEPTIONALISM, AND THE
DRED SCOTT CASE

SARAH H. CLEVELAND*

"La situation des Américains est donc entièrement exceptionnelle, et il
est à croire qu’aucun people démocratique n’y sera jamais placé.”
—Alexis de Tocqueville, 2 De La Démocratie En Amérique, Ch. IX

INTRODUCTION

At least since Alexis de Tocqueville wrote in 1831, the idea that
America is distinctive from other nations has permeated much political and
social commentary. The United States has been variously perceived as
unique in its history, its culture, its national values, its social movements,
and its social and political institutions. While the term technically refers
only to distinctiveness or difference, “exceptionalism” may have positive
or negative aspects—what Harold Koh has called “America’s Jekyll-and-
Hyde exceptionalism.” In the legal realm, claims of exceptionalism have
been offered to support what Michael Ignatieff identifies as “legal iso-
lationism”—or refusal by domestic courts to consider foreign practices and
international legal rules in the construction of U.S. law.

Arguments from American exceptionalism currently are particularly
acute in the context of constitutional adjudication. Proponents of the excep-
tionalist position justify “legal isolationism” on the grounds that the U.S.
system of government is sufficiently distinct from other national practices

* Marrs McLean Professor in Law, University of Texas School of Law; Bemis Visiting Profes-
University; J.D. 1992, Yale Law School. This project has benefited from the thoughtful comments of
Paul Finkelman, Mark Graber, Randall Kennedy, Sanford Levinson, William Marshall, Gerald Neum-
man, Louise Weinberg, and the participants at the International Law Workshop at Harvard Law School
and the Dred Scott 150th Anniversary Symposium at the University of Texas School of Law. Gratitude
is also due to the Harvard Law School librarians and to the editors of the Chicago-Kent Law Review for
their support and assistance.

1. The passage may be translated as “the situation of the Americans is entirely exceptional, and
there is reason to believe that no other democratic people will ever enjoy anything like it.” Alexis De
Exceptionalism and Human Rights, supra note 2, at 8, 11.
and international rules to render foreign rules irrelevant to constitutional analysis. And at its origins, the U.S. legal system was understood to be distinctive in at least three ways. The design of the national government as a government of limited, delegated powers governed by a written Constitution was something new under the sun at the time the Constitution was adopted, and clearly set the U.S. governmental system apart from the authoritarian systems of Europe. Likewise, the Framers' decision to "split the atom of sovereignty"⁴ and allocate sovereign powers among the national government, the states, and the people created a distinctively American system of federalism with no direct foreign analogue. Finally, the design and content of most, if not all, of the individual protections in the U.S. Bill of Rights are frequently viewed as the product of a unique American political heritage. A national government of limited and delegated powers, federalism, and fundamental individual rights thus form core elements of the American exceptionalist narrative.

Justice Scalia, for example, has argued that comparative analysis is inappropriate in construing U.S. federalism principles, since the Framers established a distinctly American federal system.⁵ He also has rejected consideration of international and foreign authority in individual rights contexts, asserting the uniqueness of American practices with respect to free speech, the right to jury trial, the exclusionary rule, the death penalty, and abortion, among others.⁶ Justice Scalia accordingly has argued that "modern foreign legal materials can never be relevant to an interpretation of... the meaning of... the U.S. Constitution."⁷

The extreme exceptionalist position has led to the introduction of legislation in Congress such as the Constitutional Preservation Resolution, which expressed the sense of the House that "the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States."⁸ Other commentators have expressed concern about the legitimacy of judicial decision making if foreign authorities are consulted. Thus, scholars have warned that consideration of foreign authorities would "expand" the "canon" of "authoritative materials" considered valid in constitutional deci-

sion making.9 The possibility of opening a Pandora’s box of new sources of law in domestic adjudication raises “integrity-anxiety” about preserving the sanctity of American constitutional discourse.10

Proponents of considering foreign authority in U.S. constitutional analysis, led prominently by Justices Breyer and Ginsburg and former Justice O’Connor, in turn have argued that it makes good sense in the modern era to look to foreign practices for possible solutions to vexing legal questions. The rise of foreign constitutional systems based on the American model, the proliferation of foreign constitutional courts that are adjudicating similar questions, the rise of international human rights law as a common standard of acceptable conduct, and globalization all have increased the pressures, and the opportunities, for looking to foreign authority for persuasive guidance in the resolution of shared problems. In a global community, in other words, judges need a transnational perspective. In various modern contexts, Justices have looked to international law and comparative foreign practices with respect to constitutional issues of separation of powers,11 federalism,12 and individual rights.13 Implicit, though generally not explicit, in this position is an assumption that many U.S. legal practices, and even many U.S. constitutional practices, are not so distinctive from the rest of the world as to render international approaches irrelevant.

Against the above background, when rereading the Dred Scott decision one is struck by the extent to which the Justices relied upon international and foreign legal authority14 to support their positions. In all, seven members of the Court, including the Chief Justice, explicitly looked to foreign authority in considering aspects of the case. The other two members of the Court—Justices Wayne and Grier—joined opinions that refer-

11. In his famous concurrence in the Steel Seizure case, Justice Jackson looked to the practices of Britain, France, and Weimar Germany to conclude that any effective check on executive power required placing the nation’s emergency powers in Congress. See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 651–52 (1952) (Jackson, J., concurring).
12. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (observing that foreign approaches to federalism may “cast an empirical light” on constitutional interpretation, as one consideration among many).
enced foreign authority. Given the decision’s arguable status as “the most reviled opinion in American judicial history,”\textsuperscript{15} it is not surprising that \textit{Dred Scott} has become a poster child for modern critics of the use of foreign authority in judicial analysis. Critics of the practice point to \textit{Dred Scott}, together with \textit{Reynolds v. United States} and \textit{Roe v. Wade}, to argue that the Court has cited foreign authority “in some of its most problematic opinions,”\textsuperscript{16} and condemn the use of foreign sources in these cases as signs of “illegitimate policymaking.”\textsuperscript{17} Scholars point to Chief Justice Taney’s reliance on foreign practice to conclude that blacks could not be citizens as a cautionary warning that reliance on foreign authority can “produce results that . . . we abhor.”\textsuperscript{18} Justice Ginsburg likewise has criticized Chief Justice Taney’s reification of foreign attitudes toward blacks at the Framing as an interpretive methodology that is “frozen-in-time.”\textsuperscript{19}

This article explores the use of foreign authorities in the various opinions in \textit{Dred Scott} in search of lessons for the contemporary debate. The article first examines the role of international and comparative legal arguments in pre–Civil War slavery cases. The article then turns to four issues in which foreign authorities were raised in the case: (1) whether blacks could be citizens within the meaning of the Court’s Article III diversity jurisdiction (“the citizenship question”); (2) whether choice-of-law principles obligated Missouri to recognize freedom that Scott might have acquired in another jurisdiction (“the choice-of-law question”); (3) whether Congress possessed legal authority to invalidate slavery in the territories pursuant to the Article IV Territory Clause (“the Territory question”);\textsuperscript{20} and finally (4) whether Fifth Amendment due process nevertheless prevented Congress from abolishing “property” rights in slaves (“the due process question”). International or comparative law arguments were posed in each of these contexts, often on both sides of the question.


\textsuperscript{17} Id. at 756.


\textsuperscript{20} U.S. CONST. art. IV, § 3 (authorizing Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ”).
The article closes with observations regarding the lessons that may be drawn from Dred Scott for the modern debate over American exceptionalism and the use of foreign authority. The article concludes that the critics' focus on the use of foreign authority in the case is misguided. It was not the use of foreign authority that opened Dred Scott to condemnation, or that led the members of the Court to reach a “political” decision. The members of the Court frequently agreed on the relevance of foreign authorities to their analysis, though those authorities were subject to interpretation and to some extent were in a state of flux. Neither foreign authority nor domestic authority offered the Justices easy solutions. The case nevertheless demonstrates that foreign authority was a valued sounding board for the Court well before the modern era of globalization. The debates in Dred Scott—constitutional and otherwise—thus offer a robust nineteenth-century example of transnational judicial discourse.\footnote{See, e.g., Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. RICH. L. REV. 99, 101 (1994) (discussing theory of “transjudicial communication”).}

This is not to say that arguments from American exceptionalism did not appear. To the contrary, Justices did assert the distinctiveness of American law in some contexts. All members of the Court agreed that Congress’s powers to govern the territories were defined by the Constitution, rather than by international law free of constitutional constraint. Chief Justice Taney adopted a particularly extreme exceptionalist position with respect to the due process question, to hold that Congress lacked constitutional power to abolish slavery in the territories. The assertions of U.S. exceptionalism, however, were made on a retail rather than wholesale basis. No member of the Court adopted a blanket position that foreign law and practice were irrelevant to domestic legal questions.

Finally, the case demonstrates that exceptionalism, no less than transnationalism, is capable of opportunistic use. On the citizenship question, Chief Justice Taney and Justice Daniel badly misrepresented foreign authority to hold that “universal” opinion at the time of the Framing denied citizenship to free blacks. With respect to the due process question, the Chief Justice then staked out a stridently exceptionalist position to hold that abolishing slavery in the territories was a taking of property in violation of due process. In so doing, Taney both ignored contrary evidence regarding the meaning of due process at the time of the Framing and forcefully opposed prevailing international trends against the institution of slavery. The decision thus stands as a warning that a blind refusal to consider foreign norms may be as fraught with hazards as their indiscriminate use.

I. FOREIGN AUTHORITY AND THE ANTEBELLUM SLAVERY DEBATE

International and comparative law played an important role in pre-Civil War slavery debates, both in the courts and elsewhere. Slavery and the slave trade were international phenomena in the early to mid-nineteenth century. International cooperation was critical to efforts to abolish the slave trade, and formal treaties promoting cooperation in this effort were entered between Great Britain and various European powers. Moreover, both abolitionism and proslavery efforts were transborder movements, with advocates on both sides of the issue drawing strength and inspiration from developments in Europe, and particularly in Great Britain.\(^22\)

Slavery's status under international law was evolving rapidly during this period, with growing recognition of slavery's invalidity as nations gradually abolished slavery and condemned the slave trade as piracy. The United States prohibited the slave trade in 1808, and slavery and the slave trade were outlawed in various European and colonial jurisdictions during the antebellum period. By the mid-1700s, French courts were holding that slavery could not exist in France, and the French Code Noir governed the rights of slaveholders from French colonies who wanted to bring slaves into France.\(^23\) Napoleon declared the trade abolished for France in 1815,\(^24\) and France ultimately prohibited slavery in its colonies in 1848.\(^25\) Great Britain abolished the slave trade in 1807, denounced the trade as piracy in 1824, prohibited slavery throughout the British Empire in 1833, and prohibited the trade in all of its colonies by 1840.\(^26\) Denmark prohibited the slave trade as of 1802. Sweden abolished the trade in 1813, as did the Netherlands in 1814. The 1814 Treaty of Ghent between the United States and Great Britain pledged both nations to "use their best endeavors" to eliminate the entire trade.\(^27\) The eight European states represented at the 1815 Congress of Vienna resolving the Napoleonic Wars denounced the


\(^{23}\) *See* 1 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 342 (1858).


\(^{26}\) *Id.* at 769, 771.

\(^{27}\) FLADELAND, *supra* note 22, at 110 & n.17 (internal quotations omitted).
slave trade as disgraceful and degrading. The Congresses of London and Aix-la-Chapelle also condemned the trade.

By 1850, Great Britain had entered treaties with thirty-one nations to suppress the trade, including treaties with Portugal and Spain (1817), Holland (1818), Sweden (1824), and Brazil (1827). Brazil pronounced the trade illegal in 1830. During the late 1830s and early 1840s, Britain entered agreements on suppression of the trade with Latin American countries, including Chile, the Argentine Confederation, Uruguay, Bolivia, Venezuela, Texas, Equator (now Ecuador), and Mexico. Multilateral treaties aimed at suppressing the trade were entered among Britain, France, Denmark, Sardinia, Naples, Tuscany, the Hansa towns, Russia, Austria, and Prussia between 1830 and 1840. Thus, by 1857 American slavery itself was a “peculiar institution”—an increasingly exceptional practice within the international community.

International publicists reflected these evolving attitudes toward the validity of slavery. Publicists took different positions on the legality of slavery under international law in the eighteenth and early nineteenth centuries, as well as different positions regarding the effect of the perceived international law rule on domestic law. Thus, Vattel’s 1758 treatise *The Law of Nations* condemned the practice of holding enemy prisoners captured in wartime as slaves, even though international law writers since the Romans had recognized the practice. In the 1820s, Chancellor Kent’s *Commentaries on American Law* invoked Montesquieu’s admonition that slavery was “useless and unjust.” Kent found that the slave trade was “illegal, when declared so by treaty, or municipal law,” but he concluded that it was not yet “piratical or illegal by the common law of nations,”

28. *Id.* at 112–13.
29. *Id.* at 113, 115.
31. Fehrenbacher, *supra* note 24, at 388 n.102. The treaty with Spain abolished the Spanish trade above the equator immediately and below the equator by 1820. Portugal retained the right to trade in slaves south of the equator and did not completely abolish that aspect of the trade until 1836. *Id.*
34. *Id.* at 91.
35. *Id.* at 83.
38. *Id.* at 771, 773 (internal quotations omitted).
given the extent of recent state practice. Henry Wheaton's treatise *Elements of International Law*, first published in 1836, was also sharply critical of slavery and the slave trade.

Transnational judicial dialogue also was common to nineteenth-century slavery jurisprudence. Judges in the United States were familiar with decisions addressing similar problems from other national jurisdictions and invoked foreign authorities to the extent that they found them appropriate. This was particularly true for cases that involved the movement of slaves between jurisdictions that recognized and prohibited slavery. The problem presented in *Dred Scott* of the relocation of a slave from a jurisdiction that protected slavery (Missouri) to jurisdictions that prohibited it (the State of Illinois and the Minnesota Territory) was replicated overseas in the movement of slaves between slaveholding colonies and the non-slaveholding metropolis, and the passage of slaves and their masters into national jurisdictions that prohibited slavery, such as France. The movement of slaves accordingly injected principles of comity among foreign nations, private international choice-of-law principles, and international rules regarding the territorial jurisdiction of sovereign states into antebellum debates over slavery. At the international level, these principles governed the question of whether one nation should respect the status of slave or free bestowed by another nation (or colony). In controversies between jurisdictions within the United States, the same principles were applied. Jurists commonly assumed that the several states were equivalent to international sovereigns for purposes of applying international principles of territorial jurisdiction and choice of law.

Impulses of American exceptionalism also emerged in political debates over slavery. Proslavery forces combined with anti-British and anti-European sentiments to lead the United States to be a reluctant participant in transnational efforts to abolish the slave trade. Efforts to include the United States in cooperative search arrangements with other nations fell victim to concerns about British aspirations to abolish slavery *in toto*, a desire to protect the freedom of U.S. ships on the high seas, and raw parti-

39. *Id.* at 773 (internal quotations omitted); see also Paul Finkelman, *The Centrality of Slavery in American Legal Development, in Slavery and the Law* 4 (Paul Finkelman ed., 1997) (contending that slavery "was not considered illegal under nineteenth-century notions of international law").

40. See *Henry Wheaton, Elements of International Law* (1836); see also Janis, *supra* note 25, at 777–78.

san politics. Senator Troup of Georgia opposed "entanglement" with foreign nations in this area on explicitly exceptionalist grounds. The United States ultimately entered a treaty with Great Britain in 1842 to cooperate in intercepting slaving vessels off the coast of Africa, but it did not accept foreign search or bilateral adjudication of American vessels until 1862.

A. European Approaches to Slavery Conflicts

1. Slavery and the English Common Law

Two decisions from the British courts played a critical role in influencing U.S. decisions regarding both the legality of slavery under international law and the appropriate choice-of-law rules in cases that involved the interjurisdictional movement of slaves. In the Somerset case, Lord Mansfield famously declared for the King's Bench that slavery was "so odious, that nothing can be suffered to support it, but positive law." Slavery, in other words, was not protected by international law, but only by the positive law of the jurisdiction in which the slave was found. James Somerset was a slave in Virginia who had been brought by his master to England, and later was forcibly returned to a ship to be sent to Jamaica and sold. While the boat was docked in the Thames River, Somerset challenged his confinement by writ of habeas corpus, claiming that the owner could not assert his rights to a slave on English soil. Lord Mansfield framed the question as "whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws?" Mansfield recognized that "[t]he power of a master over his slave has been extremely different, in different countries." English law did not explicitly prohibit slavery, but Mansfield nevertheless concluded, "I cannot say this case is

42. In 1818, with fresh scars from the War of 1812, the United States refused to join a British proposal to cooperate in the search and seizure of slave vessels and for the establishment of bilateral mixed commissions to adjudicate claims involving captured vessels. See Fladeland, supra note 22, at 113, 115–20. The Senate also fatally amended a proposed 1824 anti-slave trade convention with Great Britain. Id. at 125–44; see also Resnick supra note 22, at 1586 n.82. See generally Fehrenbacher, supra note 24, at 158–60.
43. 31 ANNALS OF CONG. 100 (1818) (remarks of Mr. Troup) ("You are admonished against entangling alliances; for what reason? Because our Government is of its own kind, insulated, the only Republic in the world, between which and other Governments there is no common principle, no common feeling, no common sympathy . . . ").
44. Fehrenbacher, supra note 24, at 169; Resnick, supra note 22, at 1586–87.
46. Id. at 499.
47. Id. at 509.
48. Id. at 510.
allowed or approved by the law of England; and therefore the black must be discharged." 49 The decision itself did not outlaw slavery in England, but it established that English law would not protect enslaved status on English soil, and that the writ of habeas corpus was available to discharge any person held as a slave there. 50 Interestingly, the arguments and the decision did not address the length of Somerset’s stay in England or whether Somerset had changed domicile in England and therefore had changed his status from slave to free. The decision held instead that the status of slavery was not recognized and would not be enforced in England.

In the 1827 decision in *The Slave, Grace,* 51 Lord Stowell (Sir William Scott) sought to clarify and restrict the *Somerset* holding. Grace was a slave who had been brought by her mistress from Antigua to live in England for a year. Grace had returned to Antigua with her mistress and later was seized by a customs official who assumed, under the principles of *Somerset,* that her time in England had rendered her free. Writing for the High Court of Admiralty (and thus lacking legal authority to modify the holding of the King’s Bench in *Somerset*), Lord Stowell nevertheless ruled that the return to Antigua had resurrected Grace’s enslaved status. In contrast to Mansfield’s assertion that slavery was odious and derived only from positive law, Stowell held that slavery, like the common law, legitimately originated from “ancient custom,” which was “generally recognised as a just foundation of all law . . . .” 52 The invalidity of slavery in England itself was only a matter of positive law and turned on the “peculiar nature” of the English context. 53 Slavery could exist in the colonies, and residence in England did not permanently manumit slaves, but only suspended their condition. It “put their liberty . . . into a sort of parenthesis.” 54 Their status as slaves could therefore revive, or reattach, upon their return to the slave-holding jurisdiction. It is no small irony that the effort to retrench slavery in *Grace* came roughly five years before Great Britain abolished slavery throughout its colonies.

*Somerset* and *Grace* grappled with three questions of importance to later slavery cases. First, what was the status of slavery under international law? Was slavery protected by international law? Was it prohibited? In either event, how did international law interface with municipal laws on the

49. *Id.* (emphasis added).
52. *Id.* at 107, 166 Eng. Rep. at 183.
53. *Id.* at 109, 166 Eng. Rep. at 184.
54. *Id.* at 131, 166 Eng. Rep. at 192.
subject? Lord Mansfield's answer to the first part of this question was no. Slavery was "odious" as a matter of natural law and was not protected by international law. It therefore could only be established by positive municipal law. Mansfield did not go so far, however, as to say that international law prohibited slavery even where it was recognized by positive law. Lord Stowell's answer was less clear. He suggested that international law, derived from longstanding custom, recognized slavery. He also suggested that international custom might be sufficient to establish slavery where positive domestic law did not explicitly prohibit it.

Second, a choice-of-law question—did international principles of comity obligate a free jurisdiction to recognize the enslaved status of a foreign slave brought into the jurisdiction, out of deference to the laws of the foreign jurisdiction? Mansfield's answer again was no. Slavery required a complex and comprehensive municipal legal regime to enforce it, and that regime did not exist in England. Thus, England was not obligated to recognize the slave laws of the foreign forum.

*The Slave, Grace* posed the opposite choice-of-law question—assuming that a slave was rendered free by presence in a non-slave jurisdiction, did that free status prevail if the person returned to a slaveholding jurisdiction? Was the status of liberty, in other words, sufficiently powerful to be nonrescindable? Lord Stowell's answer to this question was no.

One possible reading of *Somerset* and *Grace* together was that the positive law of the local jurisdiction controlled, whether slave or free. But the differing approach in the two cases also could be reconciled based on the slave's length of stay in England—based on an implicit finding that Somerset's longer stay in England had changed his domicile, while Grace's shorter stay had not. Under this approach, enslaved status could reattach only if the slave had not acquired a new domicile—and full freedom—in the free jurisdiction.

*Somerset* was decided in 1772 and formed part of the corpus of the English common law that was operative in the colonies at the time of the American Revolution. To the extent that the opinion stood for the proposition that English law did not allow slavery, it raised difficult questions regarding how slavery could be valid in the British colonies if it was invalid under the law of England. The operation of the English common law in the colonies was not perfect, however, and the direct legal force of the decision in the American colonies therefore was unclear. Even in the colonial era, the various colonies incorporated the English common law only as

55. Wiecek, *supra* note 50, at 112.
As the South Carolina Supreme Court observed in 1796,

In the act of the legislature . . . extending that [English common law] system to Carolina, then a province to Great Britain, there is a proviso or exception as to all those parts of [the common law], which were inconsistent with the particular constitutions, customs and laws of this (then) province, which left an opening for this . . . custom of tolerating slavery, and every thing relative to the government of slaves in Carolina.57

Following the Revolution, the various states individually determined what aspects of the English common law they would receive into their domestic systems,58 thus further qualifying any direct applicability of the Somerset decision.

By the 1800s, in other words, Somerset could have been rejected as irrelevant by the American slaveholding states. This is particularly true since Somerset could have been distinguished from the American situation both because the case did not involve the presence of a slave in a jurisdiction that explicitly prohibited slavery through positive law (as the Northern states and territories did) and because the case involved the legal relationship between Great Britain and her subordinate colonies, rather than comity between equal sovereigns. Alternatively, the decision could have been viewed as purely advisory or persuasive—as evidence from a legal system that shared certain common values with American jurisprudence.

The decision in The Slave, Grace brought no similar legal ambiguity. Decided in the 1820s, Grace came well after the Revolution and thus was part of the common law of the American states only to the extent that the decision was affirmatively embraced by those states. The legal status of the two decisions, however, whether as part of American common law or as purely persuasive foreign authority, appears to have made little difference to American jurists. Both decisions were given extensive and substantial consideration in the American jurisprudence of slavery, including in the Dred Scott case.

56. Id. at 122 (internal quotations omitted) (quoting Lord Mansfield); see also Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8,411) (Marshall, J.) ("When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation . . . ").


The status of slavery under the English common law also inspired arguments based on American exceptionalism. American advocates and jurists on both sides of the slavery question at times sought to distance U.S. law from the common law heritage. William Cushing, Chief Justice of the Supreme Judicial Court of Massachusetts, accordingly charged the jury in *Commonwealth v. Jennison* that English legal principles that supported slavery were inapplicable in the United States. "[W]hatever usages formerly . . . slid in upon us by the examples of others," he urged, "they can no longer exist. Sentiments more favorable to the natural rights of mankind . . . have prevailed since the [Revolution]."

2. Huber and the Civil Law Tradition

The English common law approach in *Somerset* and *Grace* coexisted with a distinct international choice of law principle, articulated by the seventeenth-century Dutch jurist Ulrich Huber (also known by his Latinized name Huberus), who was the leading authority on international choice-of-law principles of the era. Huber's work on conflicts was heavily relied upon by Justice Story in his *Commentaries*, and Huber's ten-page essay on choice-of-law principles was appended in full to a 1797 U.S. Supreme Court decision. Huber asserted three principles as established by "the law of nations":

1st. The laws of every [country] have force within the limits of that government, and are obligatory upon all who are within its bounds;

2nd. All persons within the limits of a government are considered as subjects;

3rd. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not . . . prejudice . . . the rights of the other governments, or their citizens.

Huber further reasoned that "[p]ersonal rights or disabilities obtained, or communicated, by the laws of any particular place, are of a nature which accompany, the person wherever he goes . . . " As such, a person's status was entitled to respect under his third principle.


61. Emory, 3 U.S. (3 Dall.) at 370 n.*.

62. Id. at 375 n.*.
Huber’s thinking on personal status drew upon vestigial Roman law concepts of the right of transit and the recognition of status that continued to inform international law. Under Roman law, a person’s status was determined by the law of his domicile. That status traveled with him and was to be respected by foreign jurisdictions, unless and until he changed his domicile. Under this approach, the status of a slave would change only if the master moved to free territory with the intent to change domicile. If the requisite intent were present, however, the slave was freed, no matter how brief the stay. Moreover, the new status fixed permanently, and the slave status would not reattach upon return to the prior domicile.

Antislavery advocates accordingly understood this “rule of Huberus” to provide that personal liberty acquired in one forum could not be divested by the laws of a subsequent jurisdiction. This principle was in apparent tension with the holding in The Slave, Grace that slave status could be resurrected. Abolitionists, however, distinguished Grace on the grounds that the case had not involved a change in domicile and that no positive English law explicitly prohibited slavery, in contrast to the law of northern U.S. states and territories.

B. The International Law of Slavery in American Courts

International and foreign authorities were commonly invoked in early U.S. cases, and slavery cases were no exception. Early American judicial decisions addressing slavery drew widely from aspects of international and

---

64. See, e.g., Bush’s Representatives v. White, 19 Ky. (3 T.B. Mon.) 75 (1825); Winny v. Whitesides, 1 Mo. 472 (1824) (finding an intent to change residence).
65. Note, supra note 63, at 90; see also S. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 28 (1828) (observing that states “cannot pretend to legislate upon the state and condition, the capacity or incapacity, of persons not subject to them. They may refuse to admit such persons to enter their territory; but if they do receive them, they are bound to receive them with that character, which has been imprinted on them, by the laws of the country, to which they are subject.”). See generally THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 116–37 (1858).
66. Although popular in the U.S., Huber and the Netherlands school of conflicts law were not popular in England, which may account for the differing outcome in The Slave, Grace. Or the Grace decision may have implicitly found that no change of domicile had occurred in England.
foreign law. In the 1822 case of United States v. La Jeune Eugenie, Justice Story, sitting as Circuit Justice in Massachusetts, held that slavery violated the contemporary law of nations. The case involved an allegedly French vessel that had been seized as a prize off the coast of Africa for engaging in the slave trade. Both France and the United States had prohibited the slave trade, but the U.S. prohibition could not be enforced against a foreign vessel. The case therefore raised the question whether U.S. nationals could lawfully seize the foreign vessel for violating "the general law of nations." Justice Story identified three sources for the law of nations: (1) natural law or "general principles of right and justice"; (2) customary practices of civilized nations; and (3) positive law, in the form of treaties and municipal laws. Natural law included principles "that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation," and could be enforced by American courts unless it was "relaxed or waived by the consent of nations . . . ." Justice Story found that all three sources of international law established slavery's invalidity. From the perspective of natural law, slavery was "repugnant to the general principles of justice and humanity." This sentiment was also confirmed by the other two sources—custom and positive law. Slavery was allowed by the municipal laws of some nations (and of the slaveholding U.S. states), and many nations continued to engage in the slave trade. Nevertheless, citing recent developments in the U.S. and Europe, Story observed that nearly every maritime nation of Europe had condemned the slave trade as unjust through treaties and other solemn acts, and the traffic was "vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman." Story emphasized that the law of nations was continually evolving and that the establishment of an international rule required only consistent widespread practice among states, not universal acceptance. He thus found that the slave trade was "reprehended by the present sense of nations" and "prohibited by univer-

68. For further discussion of the role of international law regarding slavery and the slave trade in the years leading up to Dred Scott, see generally Janis, supra note 25, at 764-81, and William M. Wiecek, Slavery and Abolition Before the United States Supreme Court, 1820-1860, 65 J. AM. HIST. 34 (1978).
69. 26 F. Cas. 832, 840 (C.C.D. Mass. 1822) (No. 15,551).
70. Id. at 846.
71. Id.
72. Id.
73. Id. at 845.
74. Id. at 847.
75. See id. at 846.
76. Id. at 845.
Foreign-flagged vessels engaged in the slave trade accordingly could be seized as prize unless the trade was affirmatively protected by the ship's own flag state. The slave trade was prohibited by international law and universally enforceable unless the positive law of the flag state allowed it.

Justice Story's view that the slave trade was prohibited by both natural law and the law of nations was revisited, and significantly qualified, by the Supreme Court three years later in *The Antelope*. That case involved an American vessel illegally engaging in the slave trade that had pirated slaves from Portuguese and Spanish vessels. The ship's slave cargo ultimately was seized by U.S. authorities while it was under the command of U.S. citizens. One-third of the slaves had died during the journey. The resulting condemnation proceeding presented the question whether the remaining slaves should be freed under U.S. law (since the pirating American ship was engaging in the trade illegally), or whether the slaves should be returned to their prior Spanish and Portuguese owners (who apparently had been lawfully engaging in the trade under their national laws).

Writing for the Court, Chief Justice Marshall concluded that slavery originated in force and was "contrary to the law of nature." Unlike Justice Story, however, Marshall concluded that it was not prohibited by the positive law of nations. Marshall distanced himself from Story's view that natural law could inform international law. International law derived, he wrote, not from morality, but solely from "the usages, the national acts, and the general assent" of nations (Justice Story's second and third sources).

With respect to positive law, where Story had found a recent evolving international norm prohibiting the trade, Marshall took a longer view of the relevant state practice and gave less weight to recent developments. Nations of antiquity had once recognized the right to enslave wartime captives, and although the United States and Britain recently had worked aggressively to eliminate the slave trade, all the civilized nations of the world had engaged in the practice for many years. The Chief Justice concluded that "[t]hat trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations . . . ."

77. *Id.* at 851.
78. 23 U.S. (10 Wheat.) 66 (1825).
79. *Id.* at 121.
80. *Id.* at 120.
81. *Id.* at 121.
82. *Id.*
83. *Id.* at 115.
FOREIGN AUTHORITY

Marshall bolstered his conclusion that the slave trade was allowable under international law with an international choice-of-law principle—that "[t]he Courts of no country execute the penal laws of another . . . ." The fact that slavery might be illegal in one country did not obligate other countries to invalidate the practice, nor did it authorize one state to enforce its penal laws on another. Accordingly, the slave trade remained lawful to citizens of nations that had not forbidden it, and "the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs." Marshall ruled that surviving slaves would be returned to the Spanish owner in proportion to the number that had been originally seized from the Spanish ship. The remaining slaves, because their ownership was indeterminate, were turned over to U.S. authorities to be freed. Marshall thus articulated a choice-of-law principle analogous to that in The Slave, Grace—that local law determined the validity of slavery. Marshall nevertheless had conceded that slavery was contrary to natural law, and required positive law in the forum—in the form of municipal law or clearly established international law—to sustain it. The principle that slavery was contrary to natural law also permeated state court opinions regarding slavery, and would prove important to the debate over whether due process limited Congress's power to regulate slavery.

La Jeune Eugenie and The Antelope both involved prize courts applying the law of nations to vessels captured in the slave trade. But international authorities also informed some constitutional slavery cases. In invalidating Pennsylvania's law forbidding the return of fugitive slaves in Prigg v. Pennsylvania, for example, Justice Story held that the Constitution's Fugitive Slave Clause had been explicitly intended to supersede international choice-of-law rules. "By the general law of nations," Story

---

84. Id. at 123.
85. Id. at 122.
86. Id. at 118; see also Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836) (applying Somerset to hold that a slave temporarily residing in Massachusetts was free, but recognizing that slavery was not prohibited by the law of nations in countries that had not prohibited it through treaty or domestic law).
88. In Rankin v. Lydia, for example, the Supreme Court of Appeals of Kentucky described slavery "as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten and common law." 9 Ky. (2 A.K. Marsh.) 467, 470 (1820), quoted in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 624 (1857) (Curtis, J., dissenting).
89. See discussion infra Part II.D.
90. 41 U.S. (16 Pet.) 539 (1842). In his concurrence in Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 512 (1841), Justice Baldwin looked to U.S. treaties from the Founding era to demonstrate that slaves were viewed as property subject to the Commerce Clause.
wrote, "no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions . . . . This was fully recognised in Somerset's Case, which was decided before the American revolution."91 To Justice Story, slavery, instead, was "a mere municipal regulation, founded upon and limited to the range of the [state's] territorial laws."92 Story observed that before the Constitution was adopted, the right to reclaim a slave from another state was recognized only "as a matter of comity and favour, and not as a matter of . . . international obligation . . . ."93 He concluded that "[i]t is manifest from this consideration, that if the Constitution had not contained this [Fugitive Slave] clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits . . . ."94 Story therefore asserted an argument of American exceptionalism: the Constitution set the United States apart from international rules on this issue. International law otherwise would have allowed Pennsylvania to prohibit slavery and the return of fugitive slaves. English cases, for example, had held that a slave escaping to free or neutral territory became free.95

Somerset and Grace also figured into the arguments before the Court in Strader v. Graham,96 the immediate predecessor to Dred Scott. Graham was a Kentucky slave owner who sued Strader for allegedly helping Graham's slaves escape to Canada. Strader asserted, as a defense, the claim that the slaves had already been freed as a result of brief periods they had spent on free soil in Ohio and Indiana with their owner's consent, before they returned to Kentucky. Counsel for Strader argued that the Northwest Ordinance's antislavery provision had been adopted after the rule in Somerset and established a similar principle Indiana and Ohio stood "as to the subject of slavery like England," and under Somerset, the slaves were free.97 He rejected the reasoning in Grace as "a monstrosity."98 Counsel for the slaveholder, on the other hand, cited The Slave, Grace for the proposi-

92. *Id.* at 611.
93. *Id.* at 623.
94. *Id.* at 612. In *Jones v. Vanzandt*, Justice McLean, sitting as circuit justice, similarly observed that "no general principle in the law of nations . . . would require a surrender" of a fugitive slave, and that the rule that a slave who entered a jurisdiction where slavery was not tolerated became free "would be the law of these states, had the constitution of the United States adopted no regulation upon the subject." 13 F. Cas. 1040, 1042 (C.C.D. Ohio 1843) (No. 7,501).
96. 51 U.S. (10 How.) 82 (1851).
97. *Id.* at 85–86 (argument for plaintiffs in error).
98. *Id.* at 92.
tion that, regardless whether the slaves gained freedom in Ohio, their slave status reattached upon their return to Kentucky.99

The choice-of-law question that would be confronted in Dred Scott thus was almost squarely presented. The Supreme Court, however, dismissed the case for lack of jurisdiction. Chief Justice Taney’s opinion for the Court nevertheless addressed the merits in dicta. The Chief Justice did not explicitly mention the English authorities, but he nevertheless asserted that every state had the authority to determine the status of persons within its jurisdiction. Thus “[i]t was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return.” Taney went on to assert that a federal law “could have no more operation” in Kentucky than the laws of another state.100 If credited, the Chief Justice’s dicta foreclosed the argument in Dred Scott that the Missouri Compromise, as a federal law explicitly prohibiting slavery, was entitled to greater deference by states than another state’s laws. Justice McLean condemned the discussion as “extra-judicial” dicta,101 but the Chief Justice had clearly shown his hand on the choice-of-law question that Dred Scott would bring to the Court.

The use of international authority was not unique to the adjudication of slavery questions. The antebellum slave cases simply formed part of a broader, ongoing dialogue in the nineteenth-century courts over the extent to which the U.S. national government and the state governments possessed the powers of international sovereigns. Were principles deduced from international law regarding the rights of sovereign states relevant to determining the powers of the national government? To determining the powers of the state governments? Likewise, could relations between the several states be analogized to interstate relations under international law? Or was the United States’ peculiar divided sovereignty so exceptional as to render prevailing international rules irrelevant?

Construing the constitutional powers of the national and state governments and their relations with each other thus presented a nineteenth-century version of the debate over American exceptionalism. Did the Constitution’s “horizontal” federalism provisions governing relations between the states replicate or alter existing international law principles governing relations between independent nations? In addition to Justice Story’s analysis of the Fugitive Slave Clause, discussed above, this debate was visible in

99. Id. at 90 (citing Rex v. Allan (The Slave, Grace), 2 Hagg. 94, 166 Eng. Rep. 179 (Adm. 1827)) (argument for defendant); see also id. at 92 (argument for plaintiffs in error).
100. Id. at 94.
101. Id. at 97 (McLean, J., concurring).
cases construing the Compact Clause,\(^{102}\) interstate and international extradition,\(^{103}\) and Supreme Court original jurisdiction over disputes between states.\(^{104}\) To pre-Civil War jurists, the states were commonly understood as equivalent to international sovereigns except to the extent that their powers were constitutionally limited by the federal system and the national government. Questions regarding which state's law determined the status of a slave were also analogous to conflicts-of-law questions confronted under the Full Faith and Credit Clause\(^ {105}\) and later under the Fourteenth Amend-

\(^{102}\) U.S. CONST, art. I, § 10, cl. 3. See, e.g., Holmes v. Jennison, 39 U.S. (14 pet.) 540, 573 (1840) (construing the Compact Clause in light of international law); Poole v. Fleeger's Lessee, 36 U.S. (11 pet.) 185, 209 (1837) (holding that the Compact Clause preserved for the states, with the consent of Congress, the international law authority of sovereigns to resolve boundary disputes).

\(^{103}\) In Holmes v. Jennison, 39 U.S. (14 pet.) 540, Chief Justice Taney interpreted the Constitution's Treaty and Compact Clauses in light of foreign practice and the writings of Vattel and other publicists to conclude that international extradition was an exclusive federal power. The Court later rejected the applicability of international rules to interstate extradition. See Lascelles v. Georgia, 148 U.S. 537 (1893) (holding that an international rule that a person extradited to stand trial for one offense could not be tried for another offense did not apply to interstate extradition); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 99–100 (1861) (holding that the Article IV, Section 2 Extradition Clause did not incorporate the exception for political crimes recognized in international extradition).

\(^{104}\) See, e.g., Kansas v. Colorado, 185 U.S. 125, 143 (1902) (defining the Court's original jurisdiction as extending to disputes between states which, "prior to the Union, would have been just cause for reprisal by the complaining State" under international law); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888) (holding that the Full Faith and Credit Clause was not intended to confer... jurisdiction of a suit...[that] could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all").

\(^{105}\) James Wilson argued at the Constitutional Convention that the Full Faith and Credit Clause was designed to require "more than what now takes place among all Independent Nations." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (Max Farrand ed., rev. ed. 1966). The Supreme Court nevertheless looked to private international rules regarding conflicts of law throughout the nineteenth century. See Haddock v. Haddock, 201 U.S. 562, 582 (1906) (holding that the Full Faith and Credit Clause incorporates the "principle[] of international law [that a marriage was entitled to obligatory extraterritorial effect...") (citing 1 FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS 441, § 209 (3d ed. 1905)); Grover & Baker Sewing Mach Co. v. Radcliffe, 137 U.S. 287, 296 (1890) (finding that matters of state jurisdiction under the Clause were "international" rather than "municipal" questions, and that the principle that states did not enjoy extraterritorial jurisdiction was "the familiar, reasonable and just principle of the law of nations" (quoting STORY, supra note 60, at 451 (1865) (internal quotations omitted))); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462–63 (1874) (finding that the Full Faith and Credit Clause preserved the power [under international law] to inquire into the jurisdiction of the sister court); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1851) (construing the Full Faith and Credit Clause based on the "well-established rules of international law" that foreign states disregard a judgment where the person has not been served with process); McElmoyle v. Cohen, 38 U.S. (13 pet.) 312, 327 (1839) (holding that through the Full Faith and Credit Clause, "[t]he Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state" (quoting STORY, supra note 60, at 183 (emphasis added) (internal quotations omitted))). For the contrary view that the Full Faith and Credit Clause abolished international law rules, see Broderick v. Rosner, 294 U.S. 629, 643 (1935) ("[T]he constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity."); Milwaukee County. v. M.E. White Co., 296 U.S. 268, 276–77 (1935) (asserting that "[t]he very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws...of the others, and to make them integral parts of a single nation throughout which... enforcement of an obligation...might be
FOREIGN AUTHORITY

ment Due Process Clause, and international law was employed in both contexts.

A separate question was brewing in the courts and Congress regarding the nature of Congress’s powers of governance in the territories. As discussed below, the Dred Scott decision temporarily answered (in the negative) the question whether Congress possessed the plenary powers to govern territories that were enjoyed by other nations under international law.

In short, given the comfort of the nineteenth-century courts with foreign and international legal authorities as interpretative references, it is unsurprising that foreign sources featured prominently in the arguments of the members of the Dred Scott Court.

C. Foreign Authority in the Courts of Missouri

From the above, it is apparent that at the time Dred Scott came to the Supreme Court, a number of foreign and international law principles had developed that proved relevant to Scott’s claim for freedom. With respect to the substantive legality of slavery, slavery was acknowledged as a violation of natural law and as entirely a creation of positive law. Courts, however, had disagreed whether even the slave trade was prohibited by international law. Chief Justice Marshall had suggested in The Antelope that international law recognized the trade, and that the positive law validating slavery could include international law.

With respect to the question of what jurisdiction’s law controlled, Somerset and choice-of-law principles recognized that no nation would

demanded as of right”); Hilton v. Guyot, 159 U.S. 113, 180–82 (1895) (noting that the Full Faith and Credit Clause was adopted to ensure uniform enforcement of judgments among the several states, in contrast to international practice, where a foreign judgment generally was only prima facie evidence of the claim); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (holding that both the Full Faith and Credit Clause and the implementing statute required full recognition of sister state judgments).

106. Cf: Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (holding that the ability of state courts to exercise jurisdiction over out-of-state defendants is based on “two well-established principles of public law”: “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,” and that “no State can exercise direct jurisdiction and authority over persons or property without its territory” (citing STORY, supra note 60; WHEATON, supra note 40)).

107. Indeed, in Huntington v. Attrill, 146 U.S. 657 (1892), Justice Gray invoked The Antelope to hold that the Full Faith and Credit Clause incorporated “the fundamental maxim of international law . . . [that] ‘[t]he courts of no country execute the penal laws of another.’” Id. at 666 (quoting The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825); see also id. at 670 (describing “the international rule which forbids such laws to be enforced in any other country”); id. at 669 (quoting Blackstone’s report of Chief Justice DeGrey’s statement of the general rule of international comity that “[c]rimes are in their nature local and the jurisdiction of crimes is local”).

108. See Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542–43 (1828) (examining the source of Congress’s powers in the territories); see also discussion infra Part II.C.
enforce the penal laws of another and that a free jurisdiction could decline to respect slavery imposed by a foreign jurisdiction. The Slave, Grace recognized the possibility that slave status could reattach upon return to a slaveholding jurisdiction. Huber and the continental civil law tradition, on the other hand, contended that a slave who established a new domicile in a free jurisdiction was manumitted and forever free.

Southern state courts in the antebellum period generally followed Somerset and Huber to recognize freedom for a slave who became domiciled in a free jurisdiction and then returned to a slave holding state. The "rule of Huberus" also prevailed in Missouri state jurisprudence (and in other states) prior to the state court decision in Dred Scott's case. In Winny v. Whitesides, the first Missouri Supreme Court decision addressing the status of a slave who had entered free territory and had then returned to Missouri, the court cited Huber for the international law principle that a slave carried to reside in the Illinois territory was thereby emancipated. The court indicated that respecting such freedom was particularly important in the federal system. As the court put it,

Huberus, quoted 3 Dallas, 375, says, personal rights or disabilities, obtained or communicated by the laws of any particular place, are of a nature, which accompany the person wherever he goes. If this be the case, in countries altogether independent of each other, how much more in the case of a person removing from [federal territory], to one of those States. . . . We are clearly of the opinion, that, if by a residence in Illinois, the plaintiff in error lost her right to the property in the defendant, that right was not revived by a removal of the parties to Missouri.

The court relied upon English precedent for the proposition that freedom was the necessary result of a slave residing in a territory where slavery was prohibited. The court reasoned that if this principle applied in England, where no positive municipal law explicitly prohibited slavery, it surely was applicable when a slave entered a state or U.S. territory where slavery was expressly forbidden by the Northwest Ordinance.

The defendant had argued that the status of slavery "revived" upon Winny's return to Missouri, but the court flatly rejected this proposition. Winny was decided before The Slave, Grace, but the Missouri court continued to reaffirm this approach in later cases.

109. 1 Mo. 472.
110. Id. at 475.
111. Id. at 475–76 ("The common law judges of England, without any positive declaration of the will of the legislative body, availed themselves of every indirect admission of the master or lord, in favor of the liberty of his slave . . . and the lord . . . was never after permitted to claim the benefit of his services as a slave.").
By *Scott v. Emerson*, however, the political winds had changed in Missouri, and the state supreme court reversed *Winny* to deny Scott freedom. The decision reflected hardening attitudes toward slavery in both Northern and Southern states, and a corresponding reluctance of courts to continue to respect the laws regarding slavery of the other. Northern states became increasingly willing to recognize freedom when a slave simply entered the jurisdiction, thus abandoning the requirements of a lengthy stay or domicile. Slave states like Missouri, by contrast, were less willing to respect freedom bestowed by a Northern state after the former slave returned home. These developments facilitated the parallel evolution of international choice of law rules which increasingly advocated primacy of the law of the home forum.

International rules and foreign precedent again played a role in the state court decision. Counsel for Scott’s master, Emerson, argued that Missouri should follow the international principle that one jurisdiction was not obligated to give effect to the penal laws of another, and that the antislavery provisions of the Northwest Ordinance and the Missouri Compromise thus could have no effect in Missouri. Counsel further urged that Scott’s status as a slave had reattached upon his return to the state under *The Slave, Grace*. Both arguments had been rejected in *Winny* and its progeny.

The Missouri high court opened the decision in *Scott v. Emerson* with an assertion of international territorial sovereignty: the states of the union were the equivalent of foreign nations in their municipal relations, and under international concepts of territorial sovereignty and choice of law, the laws of one state had no effect in the jurisdiction of another. The court quoted at length from Story’s *Conflict of Laws*, and forcefully asserted that it was not obligated to recognize foreign laws that were “prejudicial” to the state’s own interests. The question was “a matter of the comity of nations,” and any contrary conclusion would “annihilate the sovereignty and equality of every nation.” Turning to the writings of Chancellor Kent, the court maintained that the principle that acts valid in one state were valid everywhere applied only to private civil acts, and not to those that “proceed from the sovereign power.” The court recognized

---

113. *See Scott v. Emerson, 15 Mo. 576, 579–81 (1852).*
114. *Id.* at 581.
115. *Id.* at 583 (“This doctrine is declared and maintained, not only with respect to nations strictly foreign to each other, but also to the several States of this Union. Every State has the right of determining how far, in a spirit of comity, it will respect the laws of other States.”).
116. *Id.*
117. *Id.* (internal quotations omitted) (quoting *STORY, supra* note 60, §§ 32, 36).
118. *Id.* at 585 (internal quotations omitted).
that slave status could be lost when a slave traveled to a free jurisdiction and was declared free by the local courts. But in the absence of such a decree of manumission, the Grace reattachment principle applied when Scott returned to Missouri. 119

Justice Gamble dissented vociferously to the court’s reversal of its longstanding approach to choice of law. Gamble invoked foreign practices across history—from Justinian’s Institutes to the rules of English villenage, Lord Coke, and early Spanish laws—for the proposition that “[i]n all ages, and in all countries,” slaves were regarded as capable of acquiring rights to freedom through the actions of the master. 120 In the slaveholding states of the United States as well, the act of the master in traveling to a free jurisdiction was considered a voluntary act of emancipation, and courts had consistently had applied the law of the place where the right to freedom was acquired. 121 Indeed, Gamble observed, the Louisiana legislature had had to adopt positive legislation to establish the Grace reattachment principle and to override the prevailing American rule (based on Huber) that with a change of domicile, the status of freedom attached permanently. 122 Gamble offered extensive citations to prior decisions of the Missouri and other state courts, and quoted Winny’s reference to Huber. 123

Both sides of the state supreme court, in other words, treated the question as one governed by international choice of law rules applicable to sovereign nations. Their disagreement turned on the substantive content of those rules and whether the Missouri court should be bound by its prior interpretation.

II. THE DRED SCOTT OPINIONS

No official transcript was recorded of the two arguments before the Court in Dred Scott, and only some of the briefs to the Court have been preserved, primarily those submitted by the attorneys for Scott. 124 Contem-

119. See id. at 586.
120. Id. at 587 (Gamble, J., dissenting).
121. Id. at 588.
122. Id. at 591.
123. Id. at 590.
124. Two oral arguments were held, the first in February 1856 (during the 1855 term), and the second in December 1856 to consider specific additional questions posed by the Court regarding the plea in abatement and whether Scott could be a citizen. See DON E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 288–93 (1978). From the February 1856 argument, only the ten-page brief by plaintiff’s counsel Montgomery Blair appears to have survived. See Brief of the Plaintiff, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), reprinted in 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 167 (Philip B. Kurland & Gerhard Casper eds., 1978) [hereinafter LANDMARK
poraneous newspaper accounts shed no light on the issue. The complete arguments from international authorities that were made to the Court accordingly are difficult to determine. In particular, the plaintiff’s argument from the law of nations referenced in Chief Justice Taney’s due process analysis appears to have been lost. The briefs and arguments that are available indicate that counsel for both sides invoked some foreign and international authority, but not nearly to the extent that foreign sources were employed by the Justices themselves.

Foreign and international law sources were relied upon by the Justices primarily with respect to four areas of controversy. The first was whether Scott, as a black born in the U.S., could be considered a “citizen” for purposes of the Court’s Article III, Section 2 diversity jurisdiction over disputes between citizens of different states. The second controversy was the now familiar choice-of-law question regarding what jurisdiction’s law determined Scott’s status as free or enslaved—the law of Missouri, Illinois, or the Minnesota Territory? The third was the question whether Congress possessed delegated constitutional power to prohibit slavery in the territories, under the Article IV Territory Clause or otherwise. The final question addressed whether Fifth Amendment substantive due process prohibited Congress from outlawing property rights in slaves. Only the first, third, and fourth of these questions were constitutional ones; the second, choice-of-law issue was not.

Scott’s suit could have been resolved against him narrowly based on the second, choice-of-law question, which formed the critical element of his tort claim that he had been wrongfully assaulted and imprisoned by Sanford. This had been the approach of the Missouri Supreme Court in the state court proceedings, and Justice Nelson adopted this approach in the United States Supreme Court. Nelson’s concurrence applied the Grace reattachment principle to hold that Missouri law determined Scott’s status after he returned to that state.

BRIEFS. From the December 1856 argument, one twelve-page brief by defense counsel Geyer has been preserved, see Brief for Defendant in Error, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), reprinted in 3 LANDMARK BRIEFS, supra, at 227 [hereinafter Brief for Defendant], as well as the arguments of Montgomery Blair and George Curtis for the plaintiff, and an additional brief for the plaintiff. See Argument of Montgomery Blair, of Counsel for the Plaintiff in Error, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), reprinted in 3 LANDMARK BRIEFS, supra, at 179 [hereinafter Argument of M. Blair]; Argument of Mr. Curtis on Behalf of Plaintiff, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), reprinted in 3 LANDMARK BRIEFS, supra, at 241 [hereinafter Argument of Mr. Curtis]; Additional Brief for Appellant, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), reprinted in 3 LANDMARK BRIEFS, supra, at 219.

125. See discussion infra Part II.D.

126. Scott’s owner at the time of the federal suit was John Sanford. The name was misspelled as “Sandford” in the Supreme Court caption.
Chief Justice Taney's opinion, which was in some respects the opinion of the Court, ranged much more broadly, holding with regard to the first question that Scott, as a black, could never be a citizen capable of suing in the U.S. courts. The Supreme Court thus lacked jurisdiction over the suit. Taney also agreed with Nelson that Missouri law controlled the second, choice of law, issue. Either of these holdings would have resolved the suit without addressing the politically charged question of the validity of the Missouri Compromise. Taney nevertheless reached the latter two questions as well, holding that the Missouri Compromise was invalid because Congress lacked delegated authority to abolish slavery in the territories and that due process also prohibited Congress from doing so.\textsuperscript{127}

The remaining members of the Court addressed various aspects of the first three questions, but only Justice Curtis, in dissent, responded to Chief Justice Taney with respect to the fourth, due process argument. The following section examines the Justices' use of foreign sources in their debates over each of these questions.

A. Citizenship

A threshold constitutional question posed by the case was whether Scott was a "citizen" of a state such that he could bring a diversity suit in the federal courts. If he was not a citizen, the federal courts had no subject matter jurisdiction over the suit. Perhaps surprisingly, the question whether free blacks were citizens remained an open one, despite the fact that nearly a half million free blacks were living in the U.S. at the outbreak of the Civil War.\textsuperscript{128} Although the Constitution mentioned citizenship in various places, it left open the question of who was a citizen, other than to indicate in Article II, Section 1 that the President had to be "a natural born Citizen."\textsuperscript{129} The Constitution therefore implied that citizenship would be acquired by birth in the United States, but it did not otherwise indicate who could or would become a citizen, or under what circumstances. In particular, it did not indicate whether "natural born citizenship" applied to all persons born on U.S. territory or only to some subset of that population.\textsuperscript{130} The Constitution did not restrict the privileges and immunities of citizenship or the def-

\textsuperscript{127} See Fehrenbacher, supra note 124, at 305–14 (discussing Chief Justice Taney's reasons for reaching all the issues).

\textsuperscript{128} Randall Kennedy, Dred Scott and African American Citizenship, in DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD 101, 117 n.16 (Gary Jeffrey Jacobsohn & Susan Dunn eds., 1996).

\textsuperscript{129} Article I, Section 8 also provided that Congress had the power of naturalization.

tion of "We the People" to "white" citizens,\footnote{Kennedy, supra note 128, at 103–04. See also Alexander M. Bickel, Citizenship in the American Constitution, 15 Ariz. L. Rev. 369, 369–70 (1973) (discussing concept of citizenship in the Constitution).} and free blacks had formed part of the voting polity that adopted the Constitution in a number of states. But the Constitution also did not explicitly recognize citizenship status for persons who were neither aliens nor slaves—e.g., free blacks who were born in the United States. Whether free blacks were citizens was hotly contested in the debates over the Missouri Compromise\footnote{See Kennedy, supra note 128, at 105–108.} and remained contentious through the decision in \textit{Dred Scott}.\footnote{In 1839 the Massachusetts legislature protested the imprisonment of Massachusetts citizens "solely on account of [their] color," while three years later the Georgia legislature resolved that "negroes, or persons, of color, are not citizens of the United States; and that Georgia will never recognize such citizenship." Id. at 108 (internal quotations omitted); see also Kettner, supra note 130, at 311–24 (examining pre–Civil War approaches to citizenship of free blacks).} Both sides of the Supreme Court looked to foreign authority to some extent in attempting to answer this question, though foreign sources were used the most extensively by the Justices ruling against Scott.

When the case brought this question to the Supreme Court, Scott's counsel Montgomery Blair argued that both the Constitution and U.S. practice recognized that free blacks born in the United States had rights of citizenship. Blair urged that by providing that only natural-born citizens could be President, the Constitution adopted the British common law principle that citizenship was based on birth in the country.\footnote{Argument of M. Blair, supra note 124, at 187–88.}

Blair raised other international authorities, including Vattel's treatise on \textit{The Law of Nations} and Justinian's \textit{Institutes}, in support of the proposition that free blacks born in the United States must be citizens. Vattel's treatise recognized that some nations had categories of "perpetual inhabitants" who were neither citizens nor aliens. But Vattel also acknowledged that England recognized birthright citizenship and that these distinctions accordingly were "inapplicable to... the United States."\footnote{Id. (citing M.D. \textit{Vattel}, \textit{The Law of Nations}; or \textit{Principles of the Law of Nature; Applied to the Conduct and Affairs of Nations and Sovereigns} bk. 1, ch. 19, §§ 212–214, at 162–63); Brief of the Plaintiff, supra note 124, at 175.} Turning to Justinian, Blair observed that although Roman law had once withheld citizenship from "freed" (manumitted) persons, by Justinian's era, citizenship was extended to all. "We have adopted to a great extent the rules of Justinian and the civil law with respect to slavery," Blair argued, "and there is nothing in the character of our institutions which warrants the establish-
ment here of a less liberal rule on the subject of freedmen.” ¹³⁶ All of these authorities supported the conclusion that the Framers would have regarded free blacks born in the United States as citizens. ¹³⁷

The sole extant brief for the defendant did not cite foreign authorities with respect to the citizenship issue.

The citizenship question presented Chief Justice Taney’s most notable, and controversial, invocation of foreign authority in the case. ¹³⁸ In all, three members of the Court—the Chief Justice (whose opinion was joined in full by Justice Wayne) and Justice Daniel—explicitly invoked foreign practice to conclude that persons of African descent could not be citizens of the United States for the purpose of establishing Article III jurisdiction.

Taney asserted that in “the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution . . . was framed and adopted,” persons of African descent were “an inferior order . . . [who] had no rights which the white man was bound to respect . . . .” ¹³⁹ According to Taney, this attitude was “fixed and universal in the civilized portion of the white race” of the day, ¹⁴⁰ and was part of “the public history of every European nation . . . .” ¹⁴¹ Taney reasoned that the drafters of the Declaration of Independence, in calling upon the international “opinions of mankind” to recognize the equality of men, could not have intended to include the descendants of enslaved Africans:

They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. ¹⁴²

Chief Justice Taney asserted that this international understanding was also reflected in domestic legislation in place during the Founding era. Thus, “universal” opinion led the Chief Justice to conclude that African descendents were not embraced by the word “citizens” in the Constitu-

¹³⁶. Brief of the Plaintiff, supra note 124, at 175 (citing THE INSTITUTES OF JUSTINIAN, lib. 1, tit. V, § 3).
¹³⁷. Id.
¹³⁸. But see Calabresi & Zimdahl, supra note 16, at 794 (arguing that Chief Justice Taney did not rely on foreign authority in his constitutional analysis).
¹⁴⁰. Id.
¹⁴¹. Id.
¹⁴². Id. at 410.
tion.\footnote{Dred Scott was not a citizen of Missouri and could not sue in diversity.\footref{144}} Justice Daniel echoed this assertion that the practices of civilized nations precluded persons of African descent from being citizens. Daniel proffered the "truths" that

the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognised by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase...\footnote{Daniel's analysis quoted lengthy passages from Vattel regarding the relationship between citizenship and sovereignty,\footref{146} including Vattel's distinction (from countries where citizenship was based on blood descent) between "citizens," and "inhabitants." As Vattel put it:}

to be of the country, it is necessary to be born of a person who is a citizen; for if he be born there of a foreigner, it will be only the place of his birth, and not his country. The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle or stay in the country.\footnote{Justice Daniel used this discussion of continental practices to support his conclusion that a slave could not become a part of the sovereign polity.}

Following Montgomery Blair's invitation, Justice Daniel maintained that U.S. slavery was more analogous to slavery under Roman law than to English customs, and he devoted several pages to examples from Roman practice.\footnote{Daniel quoted Justinian's distinction between "free" and "freed" men, and the proposition that persons became slaves "either by the law of nations, as by capture, or by the civil law."\footref{149} Under Roman law, he contended, emancipation did not automatically confer citizenship, which}

\footnote{143. \textit{Id.} at 404. In 1858, Taney elaborated on this view in a supplement to his opinion in \textit{Dred Scott}, which he drafted "to prove the truth of the historical fact stated in the opinion... and the principle decided by the Court." Roger Brooke Taney, Supplement to the Dred Scott Opinion (Sept. 1858), \textit{in SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY, L.L.D.} 578, 578 (1872). In the supplement, Taney asserted that it had been the "fixed, unvarying" opinion of the English people for the century before the Constitution was adopted that blacks were property who had no rights a white man was obligated to respect. Taney maintained that the same view was held "in Spain, in France, in Holland, in Denmark, and in Sweden... It was the unwavering opinion of the civilized world during the period of which I am speaking." \textit{Id.} at 593–94.}
\footnote{144. \textit{Dred Scott}, 60 U.S. (19 How.) at 426–27.}
\footnote{145. \textit{Id.} at 475 (Daniel, J., concurring).}
\footnote{146. \textit{Id.} at 476–77.}
\footnote{147. \textit{Id.} at 477 (internal quotations omitted) (quoting VATTEL, \textit{supra} note 135, at bk. 1, ch. 19 (emphasis added)).}
\footnote{148. See \textit{id.} at 477–80.}
\footnote{149. \textit{Id.} at 479 (quoting THE INSTITUTES OF JUSTINIAN, \textit{supra} note 136, at lib. 1, tit. 3 (emphasis added)).}
required a separate sovereign act. Daniel acknowledged (as Blair had argued) that by Justinian’s day, “freed” persons were granted citizenship under Roman law. But Daniel dismissed this practice as contributing to the fall of the Roman Empire through the “degrad[ing]” of Roman citizenship. All of this led Daniel to conclude that blacks were not, and could never be, members of a political society.

Chief Justice Taney’s approach to the question of citizenship was one of strict originalism. The duty of the Court, as he saw it, was to administer the Constitution “according to its true intent and meaning when it was adopted.” Thus, while foreign laws and practices might inform the original meaning of constitutional terms, their use was limited to that function. Any subsequent change in public or international opinion was irrelevant. Taney accordingly insulated his view of constitutional citizenship from the progressive change in attitudes toward blacks and slavery that had occurred at home and abroad in the half century since the Founding:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

For Chief Justice Taney, the appropriate response to changed attitudes, if any, was a constitutional amendment. Any other approach “would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.”

Taney’s approach to originalism was not required, however. Even if one adopts an originalist approach to constitutional interpretation, an alternative, organic originalist conception is available. This approach would view the Framers as having understood that the United States would be a member of the international community and governed by its rules, that the Constitution and other U.S. laws should be construed against a backdrop of international law (either generally or with respect to particular clauses), and that those international norms would evolve as international law developed. In other words, an organic originalism would view the Framers as understanding that the Constitution should be interpreted in light of an evolving

150. Id. at 478.
151. Id. at 478–80 (internal quotations omitted) (citing 2 Edward Gibbon, The Decline and Fall of the Roman Empire 81–82 (Robert Maynard Hutchins, ed., Encyclopedia Britannica 1952) (1825)).
152. Id. at 477, 481.
153. Id. at 405 (opinion of the Court).
154. Id. at 426.
155. Id.

body of international law. The point here is that even an originalist approach should be open to referencing international authority in constitutional analysis. And perhaps particularly an originalist approach, since the drafters of our Constitution were heavily influenced by international and foreign law and would not have drawn many of the sharp distinctions between American and foreign law that we draw today.

Furthermore, neither Chief Justice Taney nor Justice Daniel provided support for their asserted "truism" that blacks were not part of the polity of any civilized state at the time of the Founding, and their position was factually incorrect. The Chief Justice did not confront the reality, which he himself later acknowledged, that civil law countries such as France had long prohibited slavery on metropolitan soil "and that a negro brought there became thereby emancipated and free." The 1685 Code Noir specifically stated that all manumitted slaves would have the same rights and responsibilities as natural born French subjects, although the rights of free blacks in France and its colonies waxed and waned during the eighteenth and nineteenth centuries. As Taney portrayed it, French law eventually provided that slaves could be brought from the colonies temporarily under certain conditions, but if these conditions were not complied with, the black became free. England had no racial restrictions on citizenship, despite the fact that there were estimated 14,000 slaves in the country at the time of the Somerset decision and an uncertain number of free blacks.

156. See Sosa v. Alvarez-Machain, 542 U.S. 692, 732-33 (2004) (recognizing international law as evolving); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43 (1934) ("The framers of the Constitution did not contemplate that the maritime law should remain unalterable."); cf. Willard Hurst, Discussion, The Role of History, in SUPREME COURT AND SUPREME LAW 59, 61 (Edmond Cahn ed., 1954) (statement of Paul A. Freund) (observing that constitutional interpretation should recognize that institutions such as habeas corpus involve an evolutionary or "dynamic element which itself was adopted by the framers"); Henry Paul Monaghan, Doing Originalism, 104 COLUM. L. REV. 32, 37-38 (2004) (recognizing, in the common law context, the evolutionary nature of the common law and noting that accordingly "[e]ven a strict form of originalism... must acknowledge that the original understanding of some clauses could be fairly read to have included a background assumption of further judicial development").

157. Taney, supra note 143, at 596.

158. French law from 1716 to 1777 provided that slaves could be brought from the colonies temporarily under certain conditions, but if these conditions were not complied with, the black became free or would be returned to the colonies. Parisian courts refused to register these laws, however, and freed hundreds of slaves throughout the eighteenth century, where they enjoyed the status of French subjects. Sue Peabody, There Are No Slaves in France: The Political Culture of Race and Slavery in the Ancien Régime (1996); Email from Sue Peabody, Professor of History, Wash. State Univ. Vancouver, to author (Mar. 26, 2007) (on file with Chicago-Kent Law Review).

159. Taney, supra note 143, at 596 (citing 1 WILLIAM BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER, AND WITH THE LAW OF ENGLAND 740 (1838)). Taney later dismissed all of the European examples as being motivated not by the view that slavery was "unjust or immoral," but by the nations' self-interest. Id. at 597.

Latin American colonies and countries, such as Brazil, allowed citizenship for blacks who owned sufficient property. Moreover, courts in the United States generally defined "blacks" based on the "one-drop rule" (e.g., any trace of African blood). But many such persons would have qualified as citizens in other nations, which recognized citizenship for persons of mixed blood such as mulattos, quadroons, or the children of European colonists and Afro-descended women. Haiti's 1805 constitution limited citizenship to blacks, although later constitutions recognized citizenship more broadly.\footnote{161}

Chief Justice Taney likely would have excluded the examples from Latin America from his category of "civilized" nations. His originalist approach also would have excluded Haiti, which was founded in 1804 after the U.S. Constitution was adopted. In 1857, Taney was writing during an ascendant period of white supremacist racial thought throughout the west and many whites probably shared his uninformed view of black citizenship. But even with respect to the practices of the "civilized" nations of England and France, he was decidedly incorrect in his characterization of black citizenship.

The two dissenting Justices did not offer contrary evidence of foreign practice. Instead, Justices McLean and Curtis sought to align the United States' approach to citizenship with the British tradition of natural-born citizenship. Echoing Montgomery Blair's argument, Justice Curtis argued that the Article II, Section 1 requirement that the President be a natural-born citizen incorporated "that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth."\footnote{162} Under this principle, "free colored persons born within some of the States are . . . citizens of the United States."\footnote{163} Justice Curtis rejected the relevance of Roman law, arguing that whatever the distinctions regarding freed persons under Roman law, "they are unknown to our institutions."\footnote{164}

The dissenters supported their position with the observation that both before and after the Constitution's adoption, the domestic practice had been to grant political membership to free blacks in some contexts.\footnote{165} Under the Articles of Confederation, five states had granted blacks political member-

\footnote{161. Constitution Impériale d'Haiti, art. 14 (1805), reprinted in Recueil général des lois & actes du gouvernement d'Haiti 1:49 (L'instant de Pradine ed., 1886). This and later Hatian constitutions are available at http://www.webster.edu/~corbetre/haiti/misctopic/constitution/listof.htm.}
ship, including the franchise, and free blacks thus were part of the polity that had ordained and established the Constitution.\textsuperscript{166} The U.S. treaties acquiring California, Florida, and the Louisiana Territory also had bestowed citizenship on inhabitants of all races, and such persons had “exercised all the rights of citizens, without being naturalized under the acts of Congress.”\textsuperscript{167}

Justice McLean pointedly objected to Chief Justice Taney and Justice Daniel’s constitutional reification of historical attitudes towards blacks from home and abroad. In particular, Justice McLean rejected Taney’s static conception of originalism. Constitutional meaning, he believed, should not be fixed based on historical attitudes toward slavery, such as those of the Romans, that pre-dated that instrument. “[I]f we are to turn our attention to the dark ages of the world, why confine our view to colored slavery?” he asked. “On the same principles, white men were made slaves.”\textsuperscript{168} Justice McLean also rejected Taney’s view that attitudes toward blacks had been monolithically negative at the time of the Framing. James Madison had been careful to ensure that the word slavery did not appear in the Constitution, and he had drafted a document that could accommodate improved attitudes toward blacks and a future end to slavery. The Constitution thus reflected the mixed attitudes toward slavery that prevailed during the Founding era. “I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings,” McLean wrote, “rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground.”\textsuperscript{169}

The arguments over Scott’s capacity to be a citizen were framed in part by the Justices’ competing approaches to constitutional interpretation. Justice McLean began from the presumption that the Constitution was ambiguous in its treatment of slavery, and he adopted an evolutionary approach to constitutional construction that allowed for consideration of progressive changes in attitudes toward blacks, both at home and abroad. Chief Justice Taney, on the other hand, ignored contrary evidence regarding the status of blacks at the time of the Framing and viewed the Constitution as cementing a fixed view of blacks as non-citizens that no subsequent societal changes could alter. Justice Ginsburg has specifically criticized Chief Justice Taney’s originalism here, and particularly his refusal to con-

\textsuperscript{166} Id. at 572–73, 582 (Curtis, J., dissenting); id. at 533 (McLean, J., dissenting).
\textsuperscript{167} Id. at 533 (McLean, J., dissenting); see also id. at 586 (Curtis, J., dissenting).
\textsuperscript{168} Id. at 538 (McLean, J., dissenting).
\textsuperscript{169} Id. at 537.
sider later changes in attitudes, as reflecting a jurisprudence "frozen-in-time."\textsuperscript{170}

But the Justices' disagreements also turned in part on what foreign practices the U.S. Constitution embraced regarding slavery and citizenship. They disagreed about the meaning of natural-born citizenship, including the extent to which the Constitution embraced the British common law tradition and the relevance of other foreign attitudes regarding the citizenship of blacks. They also clashed over the relevance of historical practice, including ancient Roman practices that recognized citizenship for former slaves. With respect to the question of natural-born citizenship, the argument was a dress rehearsal for the debate at the end of the century over whether Chinese descendants and Native Americans could be natural-born citizens under the Fourteenth Amendment.\textsuperscript{171}

The debate within the Court over the role and implications of foreign practices—both historical and contemporary—in determining the citizenship status of freed slaves has interesting parallels to the modern Court's dialogue over the constitutional protections enjoyed in same-sex relationships. Like the approach of Chief Justice Taney and Justice Daniel, Chief Justice Burger's concurrence in \textit{Bowers v. Hardwick} contended that homosexual conduct had been universally condemned by western civilization and had been a capital crime under Roman law, to support his conclusion that Georgia's sodomy statute was not unconstitutional.\textsuperscript{172} In the litigation leading to \textit{Lawrence v Texas}, the Texas appellate court likewise justified its reaffirmation of \textit{Bowers} with references to Roman law, Blackstone, and the ancient Goths, as well as Jewish, Christian, and Islamic traditions.\textsuperscript{173} In reaching the opposite conclusion in \textit{Lawrence v. Texas}, the members of the U.S. Supreme Court majority, like Justices McLean and Curtis, contended that Burger's assumption had been incorrect, since laws prohibiting homosexual sodomy had been declared invalid by the European Court of Human Rights before the decision in \textit{Bowers}.\textsuperscript{174} Justice Kennedy's majority opin-

\begin{itemize}
  \item \textsuperscript{170} See Ginsburg, supra note 19, at 352–53, 355.
  \item \textsuperscript{171} See United States v. Wong Kim Ark, 169 U.S. 649 (1898) (Chinese descendants); Elk v. Wilkins, 112 U.S. 94, 109 (1884) (Native Americans).
  \item \textsuperscript{172} See 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (asserting that homosexual sodomy had been a capital crime under Roman law).
  \item \textsuperscript{173} Lawrence v. Texas, 41 S.W.3d 349, 361 (Tex. App. 2001) ("Under Roman law, Justinian states that a \textit{lex lita} imposed severe criminal penalties against 'those who indulge in criminal intercourse with those of their own sex.' Blackstone states that the 'infamous crime against nature, committed either with man or beast' was a grave offense among the ancient Goths and that it continued to be so under English common law . . . . Montesquieu was prompted to conclude that 'the crime against nature' is a 'crime, which religion, morality, and civil government equally condemn.'" (footnotes omitted)).
  \item \textsuperscript{174} Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing Dudgeon v. United Kingdom, 4 EUR. Ct. H.R. (ser. A) 149, 164–65 (1981)).
\end{itemize}
ion in *Lawrence* also gave constitutional significance to recent changes in attitudes toward homosexual conduct, both at home and abroad. Both cases thus raise questions regarding what historical and modern foreign sources are relevant to determining constitutional meaning, and the role that those sources can and should play in originalist or evolutionary approaches to constitutional interpretation.

Which, if any, Justices were “right” about the foreign sources they selected and the manner in which they used them? Both sides looked to foreign practice to define U.S. citizenship. Their disagreement over the meaning of natural-born citizenship was warranted, since the question was unresolved in U.S. constitutional law. But Chief Justice Taney’s use of foreign authority was cavalier to the point of disingenuous. The Chief Justice invoked a “universal” international understanding without evidence to support it, and he ignored the contrary evidence from both domestic and foreign practices at the time of the Framing. His rigid approach to originalism also led him to ignore any more recent positive developments regarding black citizenship in the U.S. or overseas. Scott’s counsel had cited Roman practice for the proposition that even the Romans had recognized citizenship for freed slaves. But Justice Daniel dismissed that same practice as a cause of the collapse of the Roman Empire. Although the definition of citizenship in the Constitution was unclear, domestic practice as well as international and foreign practice going back to the Romans recognized that citizenship could be bestowed on freed slaves and free blacks.

**B. Choice of Law**

Neither the question of Dred Scott’s citizenship nor the constitutionality of the Missouri Compromise had been presented in the Missouri state court case, and the Missouri Supreme Court addressed only the choice-of-law issue in denying Scott’s tort claim. At the U.S. Supreme Court, arguing for the defendant, U.S. Senator Henry S. Geyer of Missouri invoked *Somerset* and *The Slave, Grace* to argue for the reattachment of Scott’s status. Montgomery Blair’s briefs in turn distinguished *Grace*, arguing that where, as in Illinois, the local law explicitly emancipated slaves that entered the state, a person’s enslaved status could not be revived. In England, by contrast, the local law had been silent. Blair cited Huberus for

175. See id. at 576–77 (“The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”).

176. Brief for Defendant, supra note 124, at 233–34.

177. See Brief of the Plaintiff, supra note 124, at 168–69; Argument of M. Blair, supra note 124, at 198–99.
the proposition that the status of liberty controlled in foreign jurisdictions. 178 He invoked Justinian’s Institutes for the principle that bestowing property on a slave impliedly set him free and that “[l]iberty, once admitted, cannot be recalled . . .” 179

All members of the Court appear to have agreed that international conflict-of-law principles applied to relations among the several U.S. states and informed the question whether Scott was a slave or free. The seven members of the majority also agreed that Missouri law determined Scott’s status once he returned to Missouri, although they took various approaches to resolving this question. The dissenting Justices McLean and Curtis disagreed with the majority both about the content of the relevant international law principles and about their application to the facts of Dred Scott’s case.

Chief Justice Taney spent little time on this question other than to indicate that the question of whose law controlled was answered in favor of Missouri by his dicta in Strader. Like the Missouri Supreme Court, Justice Nelson would have resolved the case exclusively on the choice-of-law question. His opinion, which was joined by Justice Grier, cited the familiar territorial jurisdiction principles that “[e]very State or nation possesses an exclusive sovereignty and jurisdiction within her own territory,” and that “no State or nation can affect or bind property out of its territory.” 180 These principles were “the necessary result of the independence of distinct . . . sovereignties.” 181 Illinois law therefore could not determine Scott’s status in Missouri. Nelson also concluded that these international choice-of-law principles prevented federal law, in the form of the Missouri Compromise, from having any greater effect on Dred Scott’s status than another state’s law once Scott returned to Missouri. Like Chief Justice Taney’s dicta in Strader, Nelson also concluded that these international choice-of-law principles prevented federal law, in the form of the Missouri Compromise, from having any greater effect on Dred Scott’s status than another state’s law once Scott returned to Missouri. Any other interpretation would be “subversive of the established doctrine of international jurisprudence . . . that the laws of one Government have no force within the limits of another, or extra-territorially, except from the consent of the latter.” 182 Thus, Missouri municipal law alone determined the effect of for-

178. Brief of the Plaintiff, supra note 124, at 169–70.
179. Id. at 171 (internal quotations omitted) (quoting THE INSTITUTES OF JUSTINIAN, supra note 136, at lib. 1, tit. 6, § 6).
181. Id.
182. Id. at 464.
eign law within its jurisdiction. If the Missouri courts declined to recognize any change in Scott’s status, that ended the inquiry. Nelson pointed to *The Slave, Grace* and other cases to conclude that this position was consistent with decisions from England and other U.S. states.

Justice Nelson, as well as Justices Daniel and Campbell, distinguished Huber and the civil law tradition of finding freedom based on a change in domicile by holding that Scott had not acquired a new domicile in Illinois or the federal territory. Nelson concluded that Scott had merely sojourned in free territory and had remained domiciled in Missouri. Nelson further noted that even Huberus had recognized that deference to the law of the place of domicile was only appropriate when that law was consistent with the law of the forum and not prejudicial to its interests. He finally rejected Huber altogether, asserting that “this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law.”

Justice Daniel’s concurrence cited Chancellor Kent, Vattel, and Grotius, among other international law publicists, to contend that the several states, like independent nations, enjoyed “perfect equality” under international law that protected Missouri from extraterritorial operation of the rules of other states (e.g., Illinois) or the Missouri Compromise.

Apparently in response to the dissenters’ suggestion that international law prohibited slavery, Justice Daniel further rejected the contention that state sovereignty was subject to “some implied and paramount authority of a supposed international law . . . .” To Daniel, the Missouri Court’s recognition of slavery prevailed over any contrary rule in international law. His response to *Somerset* was exceptionalism: *Somerset* was only relevant within the realm of England. At any rate, it was superseded by *The Slave, Grace*.

183. See id. at 460.
184. See id. at 467. Nelson noted that the Maryland courts had rejected the English rule in *Somerset* in 1799.
185. Id. at 461–62.
186. See id. at 484–85 (Daniel, J., concurring) (“This perfect equality and entire independence of all distinct States is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper . . . .”); id. at 486 (arguing that on the regulation of slavery, states of the Union stand as “nations or Governments entirely separate, and absolutely independent of each other”); see also id. at 484 (quoting Vattel for the proposition that “no other nation can compel [a nation] to act in . . . a particular manner, for any attempt at such compulsion would be an infringement on the liberty of nations”).
187. See id. at 488.
188. Id. at 485.
189. Id. at 486.
Like Justice Nelson, Justice Campbell evaded Huber by contending that Scott’s time on free soil had been a mere sojourn that had not changed his domicile. Campbell cited examples from “[t]he public law of Europe” and from U.S. history to demonstrate that slaves who temporarily sojournerd into free jurisdictions with their masters were not liberated. The international law principle that the status of a person was governed by the law of the new domicile therefore was inapplicable.  

Justice Campbell went still further, citing Wheaton and other international and domestic authorities for the proposition that slavery was protected by international law and was preserved unless altered by the positive law of a new jurisdiction:

> It will be conceded, that in countries where no law or regulation prevails, opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign State would not be liberated by the accident of their introgression. The relation of domestic slavery is recognised in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause, is a violation of that law.  

Justice Campbell contended that the Constitution incorporated this international rule. Contrary to Justice Story’s opinion in *Prigg* that the Fugitive Slave Clause altered international choice-of-law rules, Campbell opined that the Clause was a constitutional “recognition of this ancient right [to reclaim a runaway slave], and of the principle that a change of place does not effect a change of condition.”

Campbell acknowledged that the power of a master to reclaim an escaped slave had diminished in Europe with the rise of jurisdictions prohibiting slavery. William the Conqueror had recognized that a servant’s unimpeded residence in England entitled him to “perpetual liberty.” According to the sixteenth-century French philosopher Jean Bodin, the rule in France since that era had been that “the slaves of strangers, so soon as they set their foot within France, become frank and free . . . .” *Somerset* had also upheld this principle. Campbell questioned the correctness of the interpretation of English law in *Somerset*. He then distinguished all of these foreign precedents as turning on the existence of positive laws prohibiting slavery. In Scott’s case, however, no such positive law had changed his

190. *See id.* at 494–96 (Campbell, J., concurring).
191. *Id.* at 495 (citing HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA 724 (1845)).
192. *Id.* at 496.
193. *Id.*
194. *Id.* (internal quotations omitted).
status in the Minnesota Territory, because Congress lacked constitutional authority to prohibit slavery through the Missouri Compromise. Campbell further found Scott's circumstances indistinguishable from those in *The Slave, Grace*, so that Scott, even if freed by a sojourn onto free soil, had been reenslaved by his return to Missouri.196

To prevail on the choice-of-law question, the dissenters had to demonstrate that Scott had been freed by his residence on free soil and that the State of Missouri was obligated to respect that freedom. Their positions drew upon the approach in *Somerset* as well as the domicile principle from *Huber*.

Justice McLean argued at length that international law and practice recognized slavery only in territories where it was established by positive municipal law.197 McLean cited the international law works of Grotius, Martin, and Phillimore; English legal authority; and practices ranging from contemporary France and Spain to ancient Rome, to argue that liberty was acquired when a slave entered a free jurisdiction, and could not be rescinded:

The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by some express stipulation. (Grotius, lib. 2, chap. 15, 5, 1; lib. 10, chap. 10, 2, 1; Wicqueposts Ambassador, lib. 1, p. 418; 4 Martin, 385; Case of the Creole in the House of Lords, 1842; 1 Phillimore on International Law, 316, 335.)

There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did not allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him . . . .

... [B]y the general law of nations, no nation is bound to recognise the state of slavery, . . . where it is in opposition to its own policy and institutions . . . . If it does it, it is as a matter of comity, and not as a matter of international right.198

McLean observed that this principle had been recognized in the *Somerset* case, which had been decided before the American Revolution and thus formed part of American law.199

196. Id. at 499–500.
197. Id. at 534 (McLean, J., dissenting); id. at 594 (Curtis, J., dissenting).
198. Id. at 534 (McLean, J., dissenting).
199. Id.
Conducting a wide survey of practices regarding the treatment of slaves in free jurisdictions, Justice Curtis found that nations and the several U.S. states exhibited three different approaches. His analysis is particularly interesting because he employed domestic and foreign authorities interchangeably in examining the different potential solutions to the question.

The first approach was to “dissolve the relation” of master and slave and terminate the master’s rights under the law whence they came. Curtis portrayed this as the law of France as well as the law of several U.S. states.\(^\text{200}\)

The second approach was to refuse to assist a master’s exercise of control over the slave, and to prevent the exercise of any authority that derived solely from the master-slave relationship. Curtis described this law as the law of both England and Massachusetts.\(^\text{201}\)

The third was to distinguish between the temporary and permanent residence of the master and slave in the territory, only the latter of which would alter a slave’s status. “This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union.”\(^\text{202}\) Justice Curtis observed that this third category was only applicable where no local law directly dissolved the relationship of master and slave. This was also the situation that gave rise to reattachment in *The Slave, Grace.*\(^\text{203}\) If the British Parliament had adopted an act declaring that a slave coming to England would no longer be deemed a slave, however, this would have directly operated to permanently change the status of the slave to free.\(^\text{204}\) To Curtis, the Missouri Compromise was such a law; it was “a law operating directly on the status of a slave.”\(^\text{205}\) The law did not simply fail to protect slavery, as in England Instead the status of slavery was absolutely prohibited.\(^\text{206}\) The principle of reattachment was therefore inapplicable.

Justice Curtis further contended that “fundamental principles of private international law” provided that a person’s status was fixed by the law of her place of domicile,\(^\text{207}\) and that the evidence in the record supported a finding that Scott’s domicile had changed as a result of his time outside of Missouri. Scott therefore had been rendered free.

\(^{200.}\) *Id.* at 591 (Curtis, J., dissenting).
\(^{201.}\) *Id.*
\(^{202.}\) *Id.*
\(^{203.}\) *Id.*
\(^{204.}\) *Id.* at 591–92.
\(^{205.}\) *Id.* at 592.
\(^{206.}\) *Id.* at 593.
\(^{207.}\) *Id.* at 602; see also *id.* at 595.
The most difficult part of the dissenters' task was to show that the Missouri court's determination of Scott's status was not controlling, contrary to the dicta in Strader. Here, the dissenters turned forcefully to international law, arguing that international practices regarding the recognition of free status could only be overturned by positive state law. Like Justice McLean, Justice Curtis saw international law as establishing a powerful principle of comity:

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status.208

Curtis recognized that states could affirmatively "depart from a rule of international law" and refuse to recognize a change in status wrought by time spent in a foreign jurisdiction.209 But he concluded that Missouri had not adopted positive laws that would accomplish this result.210 Citing Vattel, both dissenters observed that "[i]n 1816, the common law, by statute, was made a part of the law of Missouri; and that includes the great principles of international law."211 Thus, "in the absence of positive law to the contrary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law."212 Because no Missouri statute altered the international principle that was operative through the common law, Missouri must recognize the effect of the law of Illinois and the territories. The Missouri courts lacked authority themselves to alter the international rule. Under the common law of Missouri, therefore, Dred Scott had been freed by his residence in Illinois and the Minnesota Territory.

Part of the disagreement on the Court involved whether the law of Illinois or the Missouri Compromise actually wrought freedom on slaves who resided there. The disagreements on the Court with respect to international choice of law then turned, first, to the circumstances under which a slave was liberated by entering free soil: Was a change of domicile required? A lengthy sojourn? Or mere presence on free soil? This, in turn, led to the factual question whether Dred Scott's four-year stay satisfied the international law requirement. The Justices further disagreed on whether

208. Id. at 595.
209. Id. at 594.
210. Id. at 595, 601.
211. Id. at 556-57 (McLean, J., dissenting); see also id. at 595 (Curtis, J., dissenting) (finding that "[t]he customary law of Missouri is the common law, introduced by statute in 1816," and quoting Blackstone for the proposition that "the common law adopts, in its full extent, the law of nations . . . ").
212. Id. at 594 (Curtis, J., dissenting).
Huberus or The Slave, Grace would be followed with respect to the possibility of reattachment of status when Scott reentered Missouri. Here the majority and dissent clashed over the relationship between international rules and Missouri law and the degree of deference that was owed to the Missouri courts in determining that relationship.

These disagreements were, to a large extent, the product of indeterminance in the choice of law rules of the day, which were in a state of infancy and flux at the time of the decision. Here, the members of the majority were riding the modern trend toward territorial absolutism with regard to conflicts of law, while the dissenters were drawing upon conflicts principles from an older era that was more willing to respect foreign rules.

C. Congress’s Power over the Territories

Although often overlooked by modern commentators, the controversy over the Article IV Territory Clause also implicated international law. Since the Louisiana Purchase, the question of Congress’s power to govern the territories, including its power to abolish slavery there, was intertwined with arguments regarding the powers of sovereigns deduced from international law. In the 1828 case of American Insurance Co. v. Canter, Chief Justice Marshall suggested that Congress’s power to govern the territories either derived from the Territory Clause or was “the inevitable consequence of the right to acquire territory” under international law.213 Justice Johnson, sitting as circuit justice below, had concluded that the Territory Clause applied only to territories in U.S. possession when the Constitution was adopted. With respect to new territories, only the law of nations limited Congress’s powers of governance.214 In the 1850 case of Benner v. Porter, the Court suggested that territorial governments were “not organized under the Constitution, nor subject to its complex distribution of the powers of government . . . .”215

The debate over slavery in the territories raised questions regarding the source and content of Congress’s power there: Did Congress’s power arise from the Territory Clause? Or was it implied from the sovereign power to acquire territory? And regardless of the source, what was the scope of that power? Did it involve only authority to make “needful rules and regulations” for the management and disposal of federal lands, and

213. 26 U.S. (1 Pet.) 511, 542-43 (1828); accord Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336-37 (1810) (stating that Congress’s “absolute and undisputed power” to govern territory was either “the inevitable consequence of the right to acquire and to hold territory” or arose from the Territory Clause).
214. 26 U.S. (1 Pet.) at 517 (unnumbered footnote).
215. 50 U.S. (9 How.) 235, 242, 244 (1850).
thus not extend to regulation of personal rights such as slavery? Or if the power was more plenary, were Congress’s powers of governance in the territories limited by the Constitution (such that the Due Process Clause might still protect the institution of slavery), or was Congress limited only by international law? The debate had broad implications beyond the Dred Scott case to the power of Congress to govern colonial possessions in the Insular Cases at the end of the century.\footnote{216}

In the Dred Scott case, George Curtis, the brother of sitting Justice Benjamin Curtis, appeared on behalf of Scott to address the territory question. Curtis sought to resolve the uncertainty created in American Insurance Co. v. Canter over whether Congress’s power in the territories derived from international law or from the Territory Clause. He asserted that the power derived from both. Curtis argued that while the power to acquire territory through conquest or treaty derived from the Constitution, “[t]he right to govern . . . is derived from and regulated by the law of nations . . . .”\footnote{217} Thus, when the United States acquired new territory through war or treaty,

\begin{quote}
they may hold and govern the country acquired in any manner, and for any length of time in any manner, that they may see fit, so long as they choose to keep it in the position of a dependency external to the Union. They may give it a military government or a civil government, or no government other than the arbitrary will of a proconsul; and this power continues indefinitely until Congress shall determine that the country shall be incorporated into the Union.\footnote{218}
\end{quote}

This did not mean, however, that Congress exercised power in the Minnesota Territory unlimited by constitutional due process or other individual rights limitations. Curtis read the Article IV Territory Clause in conjunction with the adjacent New States Clause to conclude that once Congress determined that the people of a territory could form a state, the Territory Clause provided the source of Congress’s constitutional authority to establish a temporary government, and “the power to govern them under the war or treaty power ceases . . . .”\footnote{219} The Territory Clause, in other words, only addressed Congress’s authority to govern territories destined for statehood. But at least with respect to those territories, constitutional limitations on congressional power applied.\footnote{220} Curtis read Congress’s Article IV power with respect to these regions as “plenary” (e.g., reaching the

\footnotesize
\begin{itemize}
\item[216.] E.g., Dorr v. United States, 195 U.S. 138, 140 (1904); Downes v. Bidwell, 182 U.S. 244 (1901).
\item[217.] Argument of Mr. Curtis, supra note 124, at 278 (emphasis added).
\item[218.] Id. at 278–79.
\item[219.] Id. at 279.
\item[220.] See id. at 259–61.
\end{itemize}
The brief for Sanford, on the other hand, denied that Congress derived any power to legislate from the right to acquire. Limited government was a core tenet of American exceptionalism: "The legislative power of Congress depends on the constitution, not on the law of nations." "By the laws of nations the sovereign may change the municipal laws, but Congress represents the sovereign only to the extent of the powers granted by the constitution."²²²

All members of the Court took an "exceptionalist" position on this point, at least to the extent that they looked to the Constitution rather than to international law to define the scope of congressional power. Chief Justice Taney offered his own idiosyncratic (and ahistorical) solution to the question of the source of Congress’s power to govern the territories. Taney contended that the Territory Clause was limited to the specific territories held by the United States when the Constitution was adopted. It was "a special provision for a known and particular territory, and to meet a present emergency, and nothing more."²²³ Taney’s conclusion was strategic. It allowed him to acknowledge the validity of the prohibition on slavery in the Northwest Ordinance, which established a government for the original U.S. territory, but to "put aside" that example for the later-acquired territory as "altogether inapplicable to the case before us."²²⁴

But this did not mean that Congress could not govern new territories. Having eviscerated the Territory Clause, Chief Justice Taney awkwardly maintained that the power to govern nevertheless was implied from the Article IV power to admit new states.²²⁵ But this power must be exercised consistent with constitutional limitations on the powers of Congress. Here Taney offered a robust argument from American exceptionalism: Congress did not possess general despotic powers allowed under international law. As Taney put it,

[W]hen the Territory becomes a part of the United States, the Federal Government . . . enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. [The Government] has no power of any kind beyond it; and it cannot, when it enters a Territory of the United

²²¹. Id. at 259.
²²². Brief for Defendant, supra note 124, at 238.
²²⁴. Id. at 442.
²²⁵. Id. at 443.
FOREIGN AUTHORITY

States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it.226

Taney concluded that the Bill of Rights applied equally to Congress’s actions in the territories.227 He accordingly rejected the possibility that the United States could govern territories as colonies:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.228

Taney thus denied that the Constitution gave the United States any enumerated power to govern territories other than in preparation for statehood. In his view, “citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists . . . .”229 He concluded, somewhat obliquely, that Congress lacked delegated power to prohibit slavery in the territories.230

All the Justices apparently agreed with Taney’s view that the Constitution’s principles of limited and delegated powers applied in the territories.231 No member of the Court adopted the position that Congress’s power to govern territories derived from international law unimpeded by the Constitution. Taney failed to garner a majority, however, for the view that the Territory Clause was restricted to the original U.S. territories.232

226. Id. at 449.
227. See id. at 450–51.
228. Id. at 446, 448. Justice Campbell concurred in this view:

I look in vain, among the discussions of the time [of the Constitution’s adoption], for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. . . . I find nothing to authorize these enormous pretensions . . . .

Id. at 505 (Campbell, J., concurring) (emphasis added).

229. Id. at 447 (opinion of the Court). Taney also acknowledged that the United States could acquire territory with inhabitants unfit for immediate statehood and govern it as a territory “until it was settled and inhabited by a civilized community capable of self-government . . . .” Id. at 448.

230. Id. at 450 (holding that the power to prohibit slavery is “not only not granted to Congress but [is] in express terms denied”); see also FEHRENBACKER, supra note 124, at 373–79 (discussing Taney’s analysis of Congress’s power in the territories).

231. See, e.g., Dred Scott, 60 U.S. (19 How.) at 542 (McLean, J., dissenting) (“In organizing the Government of a Territory, . . . . [n]o powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit . . . .”); id. at 614 (Curtis, J., dissenting) (arguing that Congress’s power in the territories “finds limits in the express prohibitions on Congress not to do certain things . . . .”).

232. Three members of the majority and both dissenters rejected Taney’s position. See id. at 489 (Daniel, J., concurring); id. at 501 (Campbell, J., concurring); id. at 519–21 (Catron, J., concurring); id. at 540–42, 544 (McLean, J., dissenting) (arguing that Congress’s power to legislate arose from the Territory Clause and the power to conquer territory); id. at 613 (Curtis, J., dissenting) (ridiculing Taney
Justices Daniel, Campbell, and Catron simply contended that Congress's delegated authority under the Territory Clause did not include the power to prohibit slavery.\textsuperscript{233} Justice Campbell elaborated further to argue that the Clause could not be read as bestowing general powers of governance in the territories, as the British or Europeans might have construed it.\textsuperscript{234} Instead, Campbell asserted an exclusively American understanding of the power to "make rules and regulations," which was informed by the American struggle against authoritarian British rule.\textsuperscript{235} In a forceful assertion of American exceptionalism, he asked,

> Are these words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons, and Dunmores—in a word, as George III would have understood them—or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson; to the sage Franklin, or to Hamilton, who from his early manhood was engaged in combating British constructions of such words?\textsuperscript{236}

According to Campbell, under the American system of limited and delegated powers, the Territory Clause delegated to Congress only a limited power to preserve and dispose of the public domain in the territories; it did not include power to change the status of persons. The power to define property in persons had been reserved to the states, and the Territory Clause "confer[red] no power upon Congress to dissolve the relations of the master and slave on the domain of the United States, either within or without any of the States."\textsuperscript{237}

Justice Catron limited his opinion to addressing the invalidity of the Missouri Compromise. He concluded that the Privileges and Immunities Clause affirmatively prevented Congress from prohibiting slavery in the territories.\textsuperscript{238} Congress could no more ban slavery there than it could exclude cattle, horses, tools, or any other form of property.\textsuperscript{239}

Catron believed, however, that international law, in the form of the treaty power, \textit{could} give Congress power to prohibit slavery in a territory.\textsuperscript{240} Thus, Virginia, as the equivalent of a sovereign nation, had validly contracted with the other twelve states to prohibit slavery in the territories for rejecting the Territory Clause but nevertheless implying the authority to govern from "suppositious powers" found nowhere in the Constitution).

\textsuperscript{233} See, e.g., id. at 488–92 (Daniel, J., concurring).
\textsuperscript{234} See id. at 509–17 (Campbell, J., concurring).
\textsuperscript{235} See id. at 511–13.
\textsuperscript{236} Id. at 511.
\textsuperscript{237} Id. at 517.
\textsuperscript{238} See id. at 527 (Catron, J., concurring).
\textsuperscript{239} Id.
\textsuperscript{240} See id. at 523, 528.
it ceded to the Union prior to the Constitution, thereby legitimating the Northwest Ordinance. France could have imposed a similar restriction on the Louisiana Purchase as a condition of cession, and Congress thereby would have been both empowered and obligated by the treaty to prohibit slavery in that region while it remained a territory. (Catron did not explain why the Privileges and Immunities Clause would not still have prevented Congress from adopting such legislation.) By promising the inhabitants "free enjoyment" of their property (including property in slaves), however, the Treaty of Paris had done the opposite. Catron felt that the treaty stood "protected by the Constitution" and could not be repealed by Congress. The provision in the Missouri Compromise prohibiting slavery in part of that territory thus violated both the United States' treaty obligation and the equality of privileges and immunities. Catron accordingly appeared to argue both that Congress could not supersede treaties by later-in-time legislation and that the treaty power could override explicit constitutional limitations on congressional power. He thus adopted an understanding of the treaty power more robust than that articulated in Missouri v. Holland.

In dissent, Justices McLean and Curtis both considered Congress's power over territories to be broad—certainly broad enough to prohibit slavery. Both dissenters agreed that Congress could not exercise powers, in the territories or elsewhere, that the Constitution prohibited. But the dissenters found nothing in that document that withheld from Congress the power to prohibit slavery.

The international law arguments offered by the plaintiff with respect to territorial governance thus were not embraced by the Dred Scott Court. To this extent, the "exceptionalist" approach with respect to power in the territories was accepted by all members of the Court. Principles of delegated powers and limited government were applicable there, as well as elsewhere.

Chief Justice Taney's conclusion that the Constitution limited Congress's powers of governance in the territories governed this question for

241. Id.
242. Id.
243. Id. at 528.
244. Id. at 528–29.
246. Dred Scott, 393 U.S. (19 How.) at 542 (McLean, J., dissenting); id. at 623 (Curtis, J., dissenting) (arguing that Congress's discretion was limited by "those positive prohibitions to legislate, which are found in the Constitution").
the next half century. The revival of international law arguments in territorial governance would have to await another day, in the *Insular Cases*. In the meantime, the choice between international law versus the American exceptionalist approach did not resolve the question of Congress’s power to prohibit slavery. The members of the Court agreed that congressional powers were limited by the Constitution and were not defined by international law free of constitutional constraint. But within this exceptionalist framework, the Justices still divided over whether or not Congress’s limited powers included the power to prohibit slavery.

**D. Due Process and Property in Slaves**

The discussion to this point has focused on the role of international and foreign authority in determining the validity of slavery, the obligation of governments to recognize it, and their authority to prohibit it. But international law arguments also informed nineteenth-century discussions of slavery from an individual rights perspective.

The principle that the Fifth Amendment Due Process Clause provided a basis for invalidating legislation on substantive grounds was nascent at the time of the *Dred Scott* decision. But the authority of courts to invalidate legislation on the grounds of “vested rights” or “law of the land” clauses, based on principles of universal law, was well established. Eminent domain jurisprudence in the early to mid-nineteenth century also was informed by a blending of international law and natural law principles.

---

247. *But see* Wynehamer v. People, 13 N.Y. 378 (1856) (finding violative of due process a state statute criminalizing the possession of alcohol for any reason and requiring the destruction of alcohol upon conviction, even if legally possessed prior to enactment of the statute).


249. In *Gardner v. Trustees of Newburgh*, for example, Chancellor Kent relied upon Grotius, Pufendorf, Bynkershoek, and Blackstone for the proposition that just compensation was owed for damage to or takings of property even where no constitutional provision required it, and that the power of eminent domain was limited to takings for “public purposes” 2 Johns. Ch. 161, 166–167 (N.Y. Ch. 1816) (citing HUGO GROTIUS, *DE JURE BELLII AC PACIS*, bk. 8, ch. 14, § 7 (1775); SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM*, bk. 8, ch. 5, § 7 (1688); CORNELIS VAN BYNKERSHOEK, *QUAESTIONES JURIS PUBLICI*, bk. 2, ch. 15 (1737)). On the issue of takings for public purposes, see Varick v. Smith, 5 Paige Ch. 136, 146–47 (N.Y. Ch. 1835); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 339–40 (Charles M. Barnes ed., 13th ed. 1884); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 377–79 (1911). *See also* Young v. McKenzie, 3 Ga. 31, 44 (1847) (unanimously concluding that the eminent domain principle in the Fifth Amendment “does not create or declare any new principle of restriction, ... but simply recognize[s] the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments, and which derived no additional force ... from being incorporated into the Constitution ... .”); Henry v. Dubuque & Pac. R.R. Co., 10 Iowa 540, 544 (1860) (finding the protection of property to be “a right which a written constitution may recognize and declare, but which existed independently of and before such recognition, and which no government can destroy”). *See generally* J.A.C. Grant, *The Natural Law Background of Due Process*, 31 Colum. L. Rev. 56 (1931).
Both pro- and antislavery constitutional theorists in the antebellum era argued that principles of fundamental rights such as due process supported their positions, and international and natural law arguments informed their analysis.\textsuperscript{250} Proslavery advocates invoked natural law concepts of property rights, as well as historical foreign precedents, to argue that property in slaves was protected by due process. Thus, U.S. Senator William Smith of South Carolina argued that slavery was "universal throughout history, sanctioned by the Bible, [and] honored by the Greeks ... ."\textsuperscript{251} Others emphasized that the Constitution gave slaveholders vested rights in slaves as a form of property that could not be abolished.\textsuperscript{252}

Explicit substantive due process arguments appeared in proslavery opposition to Congress's prohibition of slavery in the 1820 Missouri Compromise.\textsuperscript{253} Representative Smyth of Virginia argued that the compromise violated the constitutional principle that "no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation."... [I]f you cannot take away the land, you cannot take the future crops; and if you cannot take the slaves, you cannot take their issue, who, by the laws of slavery, will be also slaves. You cannot force the people to give up their property. You cannot force a portion of the people to emancipate their slaves\textsuperscript{254}

In the 1836 debates over prohibiting slavery in the District of Columbia, Representative Charles Pinckney of South Carolina reasserted the due process objection. Pinckney's report to Congress argued that abolition of slavery in the District would be "directly repugnant to the principles of natural justice and of the social compact" and inconsistent with the Fifth Amendment.\textsuperscript{255} Pinckney quoted Vattel's observation that "the peaceful possession of property" was "[t]he great end of civil society," as a "great

\textsuperscript{250} See EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 8 (2003). Arguments from equal protection and privileges and immunities were offered by slavery theorists as well. See id. at 34–50
\textsuperscript{251} 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION 150 (1990).
\textsuperscript{252}  MALTZ, supra note 250, at 8.
\textsuperscript{253} In 1819, Representative McLane objected to an effort to ban slavery in the Arkansas territory on the grounds that Congress could not destroy property rights in slaves. 34 ANNALS OF CONG. 1229–30 (1819).
\textsuperscript{254} 35 ANNALS OF CONG. 998 (1820); see also 36 ANNALS OF CONG. 1492, 1521 (1820). Mr. Scott of Missouri: Let the restriction become a law, and the emigrant would stand attainted and convicted of a crime that operated a forfeiture of his property, if he removed to the State of Missouri, and took his slaves with him; and that amendment to the 5th article of the Constitution which declared that no person should be deprived of life, liberty, or property, without due course of law, became inoperative, and the citizen was divested of his property without Constitution, or law, or judge, or jury.
\textsuperscript{255}  H.R. REP. NO. 24-691, at 14 (1836).
principle[]” that was “expressly incorporated in the Constitution.”

Pinckney doubted that abolishing slavery could be considered a taking for “public use,” but even if it were, it required just compensation.

The same year, Representative John C. Calhoun of South Carolina offered a due process justification for the proposed gag rule on antislavery petitions in the House. Foreshadowing the argument of Chief Justice Taney in *Dred Scott*, Calhoun urged that the Fifth Amendment recognized that “no man shall be deprived of his liberty or property without due process of law. The property of the citizen cannot be taken from him but by process of law—by a trial by jury, and were not . . . slaves . . . property?”

Justice Baldwin’s concurrence in *Groves v. Slaughter* also asserted that because slaves were “property by the law of any state, the owners are protected from any violations of the rights of property by Congress, under the fifth amendment of the Constitution . . .”

These arguments found support in the fact that when Great Britain prohibited slavery in the British colonies in 1833, Parliament had appropriated £20 million as compensation for the dispossessed slaveholders.

Due process arguments were not limited to the proslavery side. For abolitionists, the relevant substantive value protected by due process was liberty, not property. Following the lead of Salmon P. Chase, abolitionists contended from 1844 onward that recognition of slavery in the territories violated slaves’ due process rights. Abolitionists reasoned that under *Somerset*, property in humans was a peculiar form of property. It was purely a creation of municipal law and violated natural law. Recognition of slavery in the territories thus violated the person’s natural, vested right to liberty.

The battle over whether due process protected or prohibited slavery spurred an aggressive debate over whether constitutional due process applied in the territories at all—a debate that for some traveled hand-in-hand with the debate over the source and nature of Congress’s authority in the territories. If Congress possessed delegated power to abolish slavery in the territories, did the Due Process Clause nevertheless prohibit it from doing so? The argument placed antislavery forces in the position of arguing that due process did not protect slavery, or, more awkwardly, that constitutional

256. *Id.* (internal quotations omitted).


259. Maltz, *supra* note 250, at 8 & n.13; see also 8 *Annals of Cong.* 1306, 1310–11 (1798) (Mr. Thatcher of Massachusetts, arguing that the U.S. government could not establish slavery in the Mississippi territory because “by nature these enslaved men are entitled to rights . . .”); 35 *Annals of Cong.* 1114, 1135 (1820) (Rep. Hemphill of Pennsylvania supporting a provision emancipating children born in Missouri on the basis of “natural rights”).
due process did not apply to the territories at all and that Congress's power was relatively unlimited there. 260

Due process receives very limited treatment in the existing Supreme Court briefs from Dred Scott, though George Curtis's argument to the Court suggests that the topic received greater treatment in oral argument. According to Curtis's argument in the second hearing on the case, Reverdy Johnson, one of the leading constitutional law advocates of the day and a close friend of Chief Justice Taney, argued aggressively for Sanford that the Due Process Clause prohibited Congress from banning slavery in the territories. Congress could only exercise such power based on the "extravagant" notion that the Due Process Clause did not apply and that Congress exercised unlimited power there. The view that Congress could outlaw slavery in the territories meant that citizens entering a territory would move into "the pale of an enormous, unlimited, and irresponsible power, and so subject themselves to an 'inequality.'"261 Sanford's consideration of due process otherwise was limited to the final sentence of Henry Geyer's brief, which observed that it was neither "just [n]or defensible . . . to deprive any citizen of his right to remove to a country . . . with any property recognized by the constitution of the United States and protected by the local laws."262

The existing briefs and arguments by counsel for Scott did not raise foreign authorities in their due process analysis. Indeed, according to the available record, Montgomery Blair's discussion of due process was limited to a single page.263 Chief Justice Taney's opinion nevertheless suggests that Scott's counsel made an international law argument, as discussed below. Both Blair and Curtis conceded that due process applied in the territories (at least in territories destined for statehood).264 Counsel for Scott denied, however, that the Due Process Clause prevented Congress from outlawing slavery. Instead, a consistent line of legislation since the Northwest Ordinance demonstrated that the Framers, and later, legislators, had

260. See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 189–191 (2002). Properly understood, the question "Did the Constitution apply to the territories at all?" was a red herring. The Constitution unquestionably applies wherever the U.S. government acts. Certain constitutional provisions, such as the right of "states" to a republican form of government, are geographically defined and do not apply in all contexts, while other general limitations on government power surely do. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 5–6 (1996).

261. Argument of Mr. Curtis, supra note 124, at 259.

262. Brief for Defendant, supra note 124, at 239.

263. See Additional Brief for the Appellant, supra note 124, at 225–26.

264. See Argument of Mr. Curtis, supra note 124, at 261; Additional Brief for Appellant, supra note 124, at 225.
presumed that Congress had power to legislate over slavery there without violating due process.

As elaborated below, due process also received very limited treatment from the Court. Justice Catron viewed slavery in the territories as protected by the Privileges and Immunities Clause. But only the opinions of Chief Justice Taney and Justice Curtis addressed constitutional due process.\(^\text{265}\) As Don Fehrenbacher observed, even Chief Justice Taney's opinion did not appear completely committed to the due process argument.\(^\text{266}\)

Roger Taney has been celebrated by some modern commentators for declining to consider foreign authorities in his due process analysis.\(^\text{267}\) The Chief Justice explicitly rejected consideration of arguments from the law of nations on the critical question whether slaves were "property" within the meaning of the Fifth Amendment Due Process Clause. He addressed the question as follows:

> It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

> But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations . . . can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal . . . has a right to draw such a distinction . . .

> . . . [N]o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description.\(^\text{268}\)

---


266. See Fehrenbacher, supra note 124, at 381–82 (describing Taney's due process contribution as "meager and somewhat obscure").


Taney thus rejected the contention that "the laws and usages of nations, and the writings of eminent jurists" established "a difference between property in a slave and other property" which might be relevant to the construction of the Fifth Amendment. Due process therefore confirmed Congress's inability to eliminate property rights in slaves in the territories, and the Missouri Compromise was unconstitutional.\(^{269}\)

Chief Justice Taney's argument is provocative for modern purposes, because it rejects the suggestion that international law is relevant to the construction of constitutional due process. The claim resounds with contemporary American exceptionalism viewpoints in cases such as *Lawrence v. Texas* and *Roper v. Simmons*.\(^{270}\) His statement on this point, however, is something of a cipher. Most of the parties' arguments regarding the international law status of slavery were directed at the three questions examined previously. The extant briefs and arguments for the plaintiff did not raise an international law argument regarding property in slaves. Because most of the oral argument was not recorded, it is unclear precisely what argument from the law of nations Chief Justice Taney was referencing.

It appears likely, though, that Taney was responding to the international law argument, going back to the *Somerset* case, that slavery was a unique form of property that existed only as a matter of positive law. Some support for this proposition may be gleaned from Justice Curtis's response to the Chief Justice. Curtis argued that Congress's abolishment of slavery in the Missouri Compromise had altered Dred Scott's status as a slave "in conformity with the rules of international law." These rules recognized that the status of a slave was determined by positive law, and that, consistent with the international rule, nothing in the Fifth Amendment Due Process Clause limited Congress's power to abolish slavery.\(^{271}\) Justice McLean also maintained that slavery was a peculiar form of property, since no other form of property depended so entirely on the municipal law of the jurisdiction.\(^{272}\) Arguments that slaves constituted a special (and less protected) form of property had appeared in *The Antelope* and *La Jeune Eugenie*, and

---

269. Don Fehrenbacher carefully parses Taney's analysis here to observe that Chief Justice Taney never explicitly declared the Missouri Compromise in violation of the Fifth Amendment, though the implication was clear. See Fehrenbacher, supra note 124, at 382–84.

270. See, e.g., Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (arguing that the view "that American law should conform to the law of the rest of the world . . . ought to be rejected out of hand"); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (describing the Court's reference to foreign authority as "dangerous" and "meaningless dicta").


272. See id. at 548–49 (McLean, J., dissenting).
had been rejected by Justice Baldwin's concurrence in *Groves v. Slaughter*. But Taney’s precise meaning is unclear.

Taney’s argument that the law of nations could not “enlarge” the delegated powers of the government, moreover, begged the question of the proper relationship between international law and the Constitution on the specific issue before the Court. Arguing that constitutional powers should not be “enlarged” assumes that the constitutional powers have a preexisting content that international law is altering. But it does not resolve the question of whether the constitutionally delegated powers and rights themselves are informed by international norms. As Taney put it, “if the Constitution . . . makes no distinction” between slavery and other forms of property, then no court could rely upon international law to “draw such a distinction.”

But whether the Constitution protected slavery equally with other forms of property was precisely the question at issue. The Constitution was at least ambivalent on this point. It did not mention slavery explicitly and treated slaves as “persons” rather than “property” for purposes of the Migration Clause, the Three-Fifths Clause, and the Fugitive Slave Clause. If the Due Process Clause was ambiguous on the question of whether it protected slavery equally with other forms of property, as many in the era believed, then international law distinctions between property in slaves and other forms of property recognized by natural law could well be relevant to the constitutional question at issue. It was Taney’s answer to this question—that “the right of property in a slave is distinctly and expressly affirmed in the Constitution”—that made any contrary understanding of property in slaves under international law irrelevant. Taney’s elision of the interpretive question and his own answer to it thus denied any role for international law.

Taney’s assertion that “no law of nations” stood between the American people and their government also cannot be understood as a blanket assertion that he viewed international and foreign authority as irrelevant to constitutional analysis. Taney himself had invoked foreign authority in the same case in determining the original understanding of “citizen” in the

---


274. *See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 149–58 (1975) (discussing differences of opinion among abolitionists regarding whether the Constitution protected or undermined slavery); see also FEHRENBACKER, supra note 24, at 4–9 (describing debates in the pre–Civil War Congress over whether slaves were property); WINTHROP D JORDAN, WHITE OVER BLACK 322–24 (1968) (discussing debate over slaves as property at the constitutional convention).*

Constitution. In other cases, Taney recognized that international law could provide substantive content for constitutional principles. In *Holmes v. Jennison*, for example, he correctly argued that the scope of the Treaty Clause was defined by international law, to the extent that international rules were "consistent with the nature of our institutions, and the distribution of powers between the general and state governments." In the 1852 case of *Kennett v. Chambers*, he found that the duty of a citizen to be at war with its government's enemy was "universally acknowledged by the laws of nations." In *Fleming v. Page*, Taney agreed that in a military occupation the United States possessed powers recognized by the international laws of war and conquest. And in sweeping dicta in *United States v. Rogers*, Taney asserted that the international law doctrine of discovery gave Congress plenary authority over Native American tribes. In other words, Chief Justice Taney apparently took a question-by-question approach to the relationship between international law and constitutional analysis.

Taney's assertion in *Dred Scott* that the national government did not enjoy the full panoply of powers held by sovereign nations, given the "peculiar" limited sovereignty of the national government, is fully consistent with this approach. Conceding that the Constitution limits the national government to fewer powers than those enjoyed by other eighteenth-century governments says nothing about the extent to which the powers conferred by the Constitution, or the limits imposed by that instrument, remain informed by international rules. It simply recognizes that the operation, if any, of international rules is filtered through principles of limited government established by the nation's founding document.

It is also interesting that the Chief Justice was willing to consider foreign authority in construing citizenship for purposes of Article III, but denied the relevance of international law to his construction of due process. An originalist approach might have suggested that foreign and international rules were, in fact, relevant to due process. *Somerset* had been decided nearly twenty years before the Fifth Amendment was adopted. English law had a fully developed concept of due process and takings without just compensation. And yet nothing—not even the decision in *The Slave, Grace*—

277. 55 U.S. (14 How.) 38, 50 (1852).
279. 45 U.S. (4 How.) 567, 571–72 (1846); see also Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409 (1842) (Taney, C.J.) ("According to the principles of international law, ... the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European [discoverer] ... "). See Cleveland, supra note 260, at 44–47 (discussing use of international law in *Rogers*).
suggested that Lord Mansfield’s conclusion that English law did not recognize slavery violated due process. Mansfield’s decision also suggested that slavery’s status under international law was relevant to its legality. Recognizing that the American principle of due process derived from the English one, tracing back to the Magna Carta, international and English authority should have been relevant even to an originalist due process analysis. But the idea that due process protected slavery had been crafted by pro-slavery advocates in the 1820s and 1830s. Taney did not offer an originalist justification for his interpretation of due process.

Justice Curtis was the only other member of the Court to address the due process argument. Curtis responded to Chief Justice Taney’s assertion that Congress lacked power to outlaw slavery in the territories by invoking the Prigg/Somerset truism that slavery was purely a creation of positive law, without foundation in the law of nature or the common law. Curtis cited Burge’s treatise on Colonial and Foreign Laws for the proposition that the positive-law character of slavery was unquestioned. Curtis asserted that the Framers of the Constitution must have known that the rights and duties of the slave and slaveholder were purely creations of positive law, and that the Framers accordingly must have given Congress power to regulate slavery in the territories, including the right to abolish it. Otherwise, the rights and duties of slaves and slaveholders in the territories would continue to be governed by the different laws of the states where they had previously resided, creating a legal cacophony unknown to the law of any other civilized country. Curtis did not otherwise hint at international law implications for due process. He instead argued that the principle of due process had descended from the Magna Carta, and was common to the law of all the U.S. states when the Northwest Ordinance was adopted. Northern states had laws prohibiting slavery, and slaveholding states had laws that freed foreign slaves who entered the state. Yet neither these laws, nor Congress’s laws prohibiting the slave trade, had ever been considered to violate due process.

280. In his supplement to the Dred Scott opinion, Taney reinterpreted English precedents as standing only for the proposition that slaves were a particular form of property that could not be imported into England, not that in England slaves were free. See Taney, supra note 143, at 594. Even at the time of Somerset, English slave trade laws regarded slaves as property, as The Slave, Grace later recognized. Id. at 597.
282. Id. at 624 (citing I BURGE, supra note 159, at 738–41).
283. See id. at 625–26.
284. Id. at 627.
American slavery by 1857 was a "peculiar institution"—an increasingly exceptional practice within the international community. The Constitution was also exceptional in defining the powers and limitations of the national government. And yet much of American law was drawn from foreign and international law of the era, creating a tension between the exceptional and transnational character of American law that remains to this day. A fundamental question posed by the *Dred Scott* case was the extent to which the Constitution reified America's peculiar approach to slavery. In other words, was the protection of slavery itself an element of American constitutional exceptionalism? Or did the Constitution allow Congress to abolish the peculiar institution, at least in the territories?

Members of the Court embraced a transnationalist approach to most of the questions posed by the case. Justices on both sides of the citizenship question looked to foreign authority, though they disagreed over what foreign sources were relevant. All members of the Court who extensively considered the choice-of-law question agreed that international practices informed the U.S. approach. Chief Justice Taney staked out an explicitly exceptionalist position on the due process question, but that position was challenged by Justice Curtis. The Territory question was the only question for which all members of the Court treated the U.S. as exceptional. The Justices uniformly agreed, implicitly or explicitly, that whatever powers of government a nation might possess over its territory under international law, in the United States those powers were filtered and limited by the Constitution.

What is to be learned by modern readers from the uses of foreign authority in *Dred Scott*? The case offers at least three lessons. First, the members of the Court generally were highly transnational in their approach. The comfort and frequency with which foreign and international law was considered by the Justices suggests that they had a fluid view of the relationship between U.S. law and the law of other nations. To a significant extent, U.S. law was not, and could not be, sharply distinguished from foreign and international law. United States law was built upon, and permeated by, concepts and principles derived from other locales, and it continued to be impacted by legal developments elsewhere. A bright line distinction between "American" and "foreign" law therefore was often elusive. American law, in other words, was not considered to be as exceptional by members of the *Dred Scott* Court as many people today assume it to be.

Given this perspective, it is not surprising that members of the nineteenth-century Court generally viewed foreign and international authorities
as legitimate sources of constitutional analysis. These sources were a common and accepted part of constitutional discourse; they were viewed as part of the constitutional canon. Consideration of foreign sources thus did not inject "integrity-anxiety" about the legitimacy of constitutional analysis, though a foreign source might prove irrelevant to any particular question if a constitutional provision precluded the approach that foreign law suggested.

Arguments from foreign authority that were in play in the case drew upon lengthy traditions from abroad that did not sharply distinguish between international and foreign comparative law. Huber’s choice-of-law principles, for example, represented the views of the Netherlands school of choice of law. Today we would think of them more as comparative foreign rules than as principles of international law. Huber, however, derived his principles from his understanding of international law, and the members of the Court treated the principles as international, rather than comparative authority. The fact that the practices of nations were (and remain) evidence of international rules simply further blended distinctions between the foreign and the international.

Just as the Court did not distinguish sharply between international law and foreign law, it also did not sharply distinguish between constitutional and statutory or common law interpretation. Invocations of foreign authority were equally acceptable to members of the Court in each of these contexts. United States statutory and common law practices could be “exceptional” or distinct from foreign practice, just as constitutional provisions could be. And constitutional analysis was not to be peculiarly insulated from the influence of foreign law.

Furthermore, international and foreign law were understood as relevant to many aspects of our constitutional regime that today are often considered exceptional, including principles of limited government, federalism, and individual rights. Foreign authority was applied in each of these areas. With respect to limited government, the Justices frequently stressed the unique aspects of the American system as a national government of delegated powers. But various Justices also recognized that the national government possessed many powers analogous to those of foreign sovereigns which were informed by international law. Chief Justice Taney and Justice Daniel as well as the dissenters took this approach with respect to governmental powers in relation to citizenship, as did Justice Curtis with respect to the government’s power to abolish slavery. As for federalism, although the American system of federalism and divided sovereignty is unique in some respects, the Justices looked extensively to international
law to help define the powers of the several American states in horizontal relations with each other. Finally, in the area of individual rights, members of the Court recognized that personal rights arising from concepts such as citizenship and due process could be informed by foreign and international law. Aspects of the international law arguments before the Justices also were later embraced by the Court in decisions ranging from personal jurisdiction\textsuperscript{285} to territorial governance.\textsuperscript{286}

Like domestic authority, foreign and international authority did not necessarily yield simple answers, however. At times the Dred Scott Justices disagreed over both the relevance and content of particular foreign sources. Scott's citizenship posed difficult questions regarding which foreign national practices (historical and contemporary) were appropriate to consider. The choice-of-law question confronted the Court with international and domestic choice-of-law rules that pointed in different directions and offered a variety of possible answers for the Justices to draw upon. Disagreements also arose from the application of those rules to the particular facts at hand. Where foreign or domestic law proved indeterminate, the Justices' arguments focused on the fault lines within domestic and foreign authority. In other words, the law's work in Dred Scott—including the work of foreign authorities—ended where the argument began. Indeterminance, however, is a factor in all forms of legal interpretation. It is not unique to international or foreign law.\textsuperscript{287} In short, while the use of foreign authority did not cause the politicized opinion, neither did it offer a panacea for the difficult task of judging.

Second, alongside the tradition of looking to foreign law, the case exhibits a parallel historical tradition of American exceptionalism, or differentiating aspects of the U.S. legal system from foreign laws and practices. All of the Justices agreed, particularly with respect to the Territory question, that American principles of limited government and delegated powers to some extent altered the powers of the national and state governments

\textsuperscript{286} E.g., Downes v. Bidwell, 182 U.S. 244, 285–86 (1901) (Brown, J.) (holding that “[i]f it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them”); \textit{id.} at 301–02 (White, J., concurring) (asserting that the United States largely enjoyed the powers of governance over conquered territories enjoyed by other nations under international law). The Supreme Court in the later \textit{Insular Cases} ultimately concluded that fundamental constitutional rights did limit Congress's power on U.S. territories. Dorr v. United States, 195 U.S. 138, 142–43 (1904).
relative to those of foreign sovereigns. Chief Justice Taney emphasized "the peculiar character of the Government of the United States" as a government of enumerated powers, which "does not possess all the powers which usually belong to the sovereignty of a nation." 288 In addressing the threshold jurisdictional questions posed by the case, both Chief Justice Taney and Justice Daniel distinguished the limited jurisdiction of the U.S. courts from that of the English and common law courts, and argued that jurisdictional decisions from those foreign courts had no bearing in determining Supreme Court jurisdiction. 289

The extent of American distinctiveness, though, was unclear and at times was hotly contested. Outside of the context of the Fugitive Slave Clause, none of the Justices argued that the U.S. system was particularly unique for purposes of applying international rules to the choice-of-law question. Even with respect to the Fugitive Slave Clause, Justice Story in Prigg had viewed the Clause as explicitly separating the U.S. from international choice of law rules, which he believed would have allowed a jurisdiction to decline to return an escaped slave. Yet in Dred Scott, Justice Campbell viewed that clause as incorporating a distinct international rule that protected the reclamation of escaped slaves. Chief Justice Taney asserted American distinctiveness with respect to due process, even though that concept had lengthy roots in the English common law. Justice Curtis looked to overseas practices to inform both the nature of slavery and the meaning of due process. In other words, all of the Justices exhibited some transnationalist and exceptional tendencies in their struggle to identify the appropriate relationship between the U.S. Constitution and foreign law. To some extent, our modern debate over American exceptionalism in domestic adjudication is déjà vu all over again.

Strikingly, however, no Justice asserted the view now prevailing in parts of American political and judicial discourse, that consideration of foreign authority is never appropriate in constitutional analysis. To the contrary, Justices on all sides of the vexing question before the Court recognized that the case posed some problems that had been confronted in analogous contexts abroad. The question on which they differed was whether, and to what extent, specific aspects of the Constitution differentiated the United States from foreign rules and practice. The claim of exceptionalism was asserted on a retail basis with respect to discrete

289. Id. (emphasizing the "peculiar and limited jurisdiction" of the federal courts); see also id. at 472–74 (Daniel, J., concurring) (distinguishing the "limited and special" jurisdiction of the federal courts from common law courts in England).
constituton questions. No member of the Court, including Chief Justice Taney, made the wholesale, blanket assertion that international and foreign authority was irrelevant to constitutional analysis.

Third and finally, the disagreements within the Court demonstrate that like the use of text or history in constitutional analysis, both the transnational and the exceptionalist approaches are capable of abuse. Foreign (and domestic) authority was egregiously abused with respect to the citizenship question. Chief Justice Taney’s references to universal opinion in the Founding era were unsupported, and he refused to consider contrary evidence regarding attitudes toward black citizenship, including evidence from France and the Romans. He then applied a strict originalist analysis to exclude any subsequent evolution in international or domestic attitudes.

Selective invocation of foreign authority is also a concern. One of the hotly contested contemporary questions regarding the use of foreign examples is which countries count in constitutional analysis. Like the modern Court, the members of the Taney Court looked primarily to European authority as the relevant comparative example, and international law often was equated with European, or even British, practice. The only other commonly invoked example was Rome. At times, little or no effort was made to justify the selection of particular examples, or to demonstrate their relevance. Nor did the Justices appear to feel that such justification was necessary. With the exception of the debates over the relevance of Roman authority, various members of the Court assumed that practices in other European states were germane to U.S. understandings of a range of constitutional and sub-constitutional questions.

But if considering foreign sources does not yield easy answers, the Dred Scott decision is a reminder that exceptionalism also can bring abhorrent results. Chief Justice Taney’s controversial holding that the antislavery provisions of the Missouri Compromise violated constitutional due process was based in part on a rigidly exceptionalist position that refused to consider any viewpoints from foreign or international law, including common law traditions at the Framing. Exceptionalism here was used to stake a position against the prevailing international winds, which by 1857 were blowing strongly against the institution of slavery. The decision thus underscores both the hazards of not considering foreign authority and the need to use such authority responsibly.

In the end, the decision in Dred Scott demonstrates that transnational judicial dialogue is not a phenomenon of globalization. It was a practice well-known to the nineteenth century. The decision does not, however, answer the vexing question of how international and foreign law appropria-
ately interface with any particular constitutional provision, or whether a particular constitutional rule is "exceptional" or not.290 This was a live question before the Court, and one with which modern judges continue to struggle.

The decision also raises complex questions about translation. There is little question that we now have a more positivistic understanding of law than did jurists a century and a half ago; and the natural law traditions that informed much of their writing are not widely accepted today. Our understanding of the judicial process and the role of judges has been transformed as well.

While a complete examination of the translation question is beyond the scope of this article, a few observations are warranted. Ideas of the universality of law do appear in various aspects of the opinions. But the members of the Dred Scott Court did not draw upon foreign authority solely as part of a natural law tradition, nor did they look to foreign authority simply because domestic law was not yet fully developed. Instead, they looked to foreign practice where domestic law posed no clear answers and where foreign forums with similar legal traditions had confronted analogous problems. In this respect, practices from abroad were as informative as the approaches of the several U.S. states.

The Justices also looked to foreign practices and international law because they understood that foreign law had played a role in the formation of U.S. law and helped to give it meaning. And they looked to international and foreign authority because they recognized that while aspects of American law were exceptional, the United States and the several states were nevertheless governments operating in an ordered international system. International law thus established rules that governed the behavior of nations and the several states. In short, foreign law and international law were relevant for their persuasive value. But international law was also informative as a set of binding legal norms regarding the powers of governments and their relation to personal rights.

CONCLUSION

In the end, it appears that the prevailing criticism of the use of foreign and international authority in Dred Scott is misplaced. It was not consideration of foreign authority that led the Court to reach a "political" decision, nor did the use of foreign authority in the case reflect "efforts to impose

290. I have offered some threshold guidelines for confronting these questions elsewhere. See Cleveland, supra note 14.
foreign morals on the American people in the guise of interpreting the Constitution . . . ”291 The Dred Scott case suggests that American judges a century and a half ago were familiar with the possibility of American exceptionalism and with the idea of commonality between American constitutional law and “foreign” law. They recognized both that American law might be distinctive from that of the international community and that aspects of American law were illuminated by international norms. Undoubtedly, the Justices were attempting to answer an intensely politically charged question, and the members of the Court were engaged in a struggle, not only over the future of the American Union, but over the soul of the Constitution. Their struggle in some sense was an intensely modern one over the extent to which that document mirrored or distinguished foreign experience.
