CONSTITUTIONAL LIMITATIONS ON EXTRATERRITORIAL STATE POWER: STATE REGULATION, CHOICE OF LAW, AND SLAVERY

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INTRODUCTION

Modern legal scholarship has failed to provide a satisfying answer to a fundamental question about state power in our federal system: when can a state regulate conduct that occurs in another state? The Supreme Court has developed two separate doctrines for determining when a state can apply its law extraterritorially, depending on whether the law is applied by the state courts or the state legislature. According to many modern legal scholars, these doctrines are confusing, inconsistent, and unworkable as a matter of policy.[1]

By providing the first in-depth look at how the country struggled with this issue during the antebellum era, this Article defends the Court's modern precedent and contends that it can be reconciled into a coherent approach to extraterritorial state power. During this time, extraterritoriality concerns were rarely implicated in ordinary civil disputes, since subjects such as contract and tort law were generally governed by a shared common law.[2] Only the southern states, however, had a legally sanctioned system of slave labor. In a federal union between free and slaveholding states, the reach of southern slave law was often the subject of intense debate. These debates reveal the importance of the concept of state sovereignty to extraterritoriality under the antebellum constitution, a concept that helps to explain the Court's modern doctrines.

The issue of extraterritorial state law arises in two circumstances, each of which is currently governed by a separate legal doctrine. First, a state court may decide to apply forum law

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[1] *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1112 (2009) (asserting that "the current doctrine lacks coherence, clear boundaries, and ease of application"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521 (2007); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885-86 (1987); Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 MICH. ST. L. REV. 115, 115-16 (2003).

[2] *See* Clyde S. Spillenger, *Risk Regulation, Extraterritoriality, and the Constitutionalization of Choice of Law, 1865-1940*, 26 (UCLA School of Law Working Paper Series, Paper No. 12-01), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006719.

through its choice of law analysis even when the underlying facts occurred in another state.[3] In this situation, the Supreme Court has placed few limitations on a state court's ability to apply its own law—it requires only that the state have sufficient contacts with the dispute such that the choice of forum law is not fundamentally unfair.[4] Second, a state may pass legislation that purports to directly regulate conduct beyond its borders. For example, a state could pass a law saying that no company that sells products in the state may offer a lower price in any other state. The Supreme Court has held that, due to the inherent limits of state power, a state cannot regulate conduct that "takes place wholly outside of the State's borders."[5] While a state *court* therefore usually may apply state law to conduct that occurred elsewhere, a state *legislature* may not. Because the Court has not provided a convincing policy justification for this distinction, modern legal scholars have criticized these doctrines as being inconsistent.[6]

Not only do scholars criticize the Court's approaches to extraterritoriality as being inconsistent, but they also attack the content of each doctrine. Many conflict of laws scholars routinely call on the Court to create more robust and meaningful constitutional limitations on state choice of law.[7] In particular,

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[3] For example, a state court may have jurisdiction over a negligence case when the allegedly negligent conduct took place in another state. Through its choice of law analysis, the state court must decide whether to apply forum law or the law of the state where the conduct occurred.

[4] *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985).

[5] Healy v. Beer Inst., 491 U.S. 324, 336 (1989); Edgar v. MITE Corp., 457 U.S. 624, 626 (1982); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571-72 (1996); CTS Corp. v. Dynamics Corp., 481 U.S. 69, 93 (1987); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575-76, 582-83 (1986).

[6] *See supra* note 1. While other scholars have defended the Court's modern doctrine, they have failed to justify the Court's differing treatment of state courts and state legislatures. *See* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1135-38 (2010).

[7] *See, e.g.*, Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 41, 74 (1998) [hereinafter Fruehwald, *Constitutional Constraints*]; Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 293 (2004) [hereinafter Fruehwald, *Horizontal Federalism*]; Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771, 1804-06 (2012); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1988-90 (1997); Douglas Laycock, *Equal*

they often argue that principles of state sovereignty, state equality, or horizontal federalism[8] should prohibit a state court from favoring the application of forum law. Under this argument, when a state court applies forum law only because it is the "better law," the court denies the equality of the sister state and its laws. Moreover, the Court's prohibition on extraterritorial state legislation has been criticized as being both unnecessary and unworkable. According to such critics, states should have the power to regulate out-of-state conduct that produces effects within the forum state.[9] Such critics also argue that a strict prohibition against extraterritorial legislation makes little sense because a state legislature can enact in-state regulations that have significant out-of-state effects.[10]

By analyzing how the issue of extraterritorial legislation was addressed under the antebellum Constitution, this Article attempts to explain and defend the Court's divergent extraterritoriality doctrines. Although prior scholarship has examined the basic structure of the antebellum approach as laid out in Justice Joseph Story's *Commentaries on the Conflict of Laws*,[11] little, if any, attention has been given to how the

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Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 251 (1992); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 872, 881 (1980); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1590 (1978); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 738-48 (1987); *but see* Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 443-44 (1982) (arguing against proposals to limit a state's choice of law based on federalism concerns).

[8] The term 'horizontal federalism' refers to the allocation of power between the several states, whereas 'vertical federalism' refers to the allocation of power between the states and the federal government.

[9] Florey, *supra* note 1, at 1128-33; Rostron, *supra* note 1, at 115-16.

[10] Am. Beverage Ass'n v. Snyder, 700 F.3d 796, 812-13 (6th Cir. 2012) (Sutton, J., concurring).

[11] Most articles merely mention that, in the nineteenth century, each state was thought to have had exclusive legislative power within its territorial borders. *Cf.* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 981 (2013); Alex Ellenberg, *Due Process Limitations on Extraterritorial Tort Legislation*, 92 CORNELL L. REV. 549, 554 (2007); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 467 (1992); Laycock, *supra* note 7, at 252; James Y. Stern, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1516-17 (2008). Many others simply start their historical analysis after the addition of the Reconstruction Amendments. *See* Chad

constitutional debates over slavery both revealed and shaped the prevailing understanding of constitutional limitations on extraterritorial state power. In the decades leading up to the Civil War, the most important legal, political, and social issue of the day—slavery—caused constant and intense inter-state legal disputes. In particular, Southerners attempted to require northern states to apply southern slave law when masters travelled with their slaves, to force southern slave law into the federal territories, and, eventually, even to compel the northern states to accept slavery on a permanent basis.

In these legal disputes over the reach of slave law, Southerners argued that implicit principles of federalism required northern states to apply southern law. They contended that, when general choice of law rules would ordinarily result in the application of southern law, a rejection of southern law because of hostility to slavery would constitute a denial of the equality of the southern states. In rejecting this argument, northern courts reasoned that the sovereign authority of the northern state would be infringed if the forum's court—an instrumentality of the sovereign power of the state—were commandeered and compelled to enforce the will of another sovereign. Under the antebellum conception of dual sovereignty, the federal and state governments each had complete sovereignty within their respective spheres; thus, the Constitution did not empower a state to control the conduct of a sister state. To these northern antebellum jurists, state sovereignty trumped any concern for equal treatment of the laws of the various states.[12]

This antebellum approach in fact eased tensions between the states in the decades leading up to the Civil War. When attitudes on slavery sharply diverged in the mid-nineteenth century, many

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DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1047 (2011); Fruehwald, *Constitutional Constraints*, *supra* note 7, at 40; Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 871 (2002). The nineteenth century approach to extraterritoriality is conventionally seen as a hopelessly simplistic system, suitable only for a time when disputes rarely crossed state borders. *See* Ellenberg, *supra* note 11, at 571; *see also* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1467-68 (2008) (arguing that the territorial regime's demise was tied to the rise of the legal realism movement).

[12] *See infra* Part II B 1.

Southerners demanded that northern states extraterritorially apply the law of slavery. In rejecting those demands based on the supremacy of state sovereignty, northern courts avoided further escalation of the sectional conflict without seriously antagonizing the South. However, when the Supreme Court appeared ready to overturn such northern precedent and force northern states to apply southern slave law, many Northerners were willing to risk Civil War. This antebellum experience suggests that, when a state is deeply committed to the policy behind its laws, forcing that state to apply a foreign law can be more destructive of national unity than allowing it to deny the equality of the laws of a sister state.[13]

Understanding the importance of state sovereignty in the antebellum constitutional structure helps to make sense of the Court's modern extraterritoriality doctrines. If state sovereignty is taken seriously as a fundamental tenant of federalism—and the Court has very recently suggested that it should be[14]—any limitations on a state's ability to apply its own law should come only from the Due Process rights of individual litigants. Moreover, a robust view of state sovereignty fully supports the Court's prohibition on extraterritorial legislation. A state that projects its legislation into another state infringes on the sovereign authority of that state, even if the legislation does serve an important public policy.

Antebellum ideas of state sovereignty also provide a way to reconcile the apparent inconsistency between the Supreme Court's choice of law and extraterritoriality precedent. Modern scholars have struggled to identify why state courts should be able to effectively apply forum law extraterritorially, while state legislatures cannot pass extraterritorial legislation. The answer lies in the difference between holding a state statute to be unconstitutional and forcing a state court to apply the law of another sovereign. Under the antebellum regime of dual sovereignty, there was nothing problematic about a federal court finding state legislation to be unconstitutional; in fact, this was a

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[13] *See infra* Part II B 2-3.

[14] *See e.g.*, Shelby County v. Holder, 133 S. Ct. 2612, 2623 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of *equal* sovereignty among the States.") (internal quotation marks omitted).

fairly regular occurrence. Forcing a state court to apply the law of another sovereign state, however, would have violated prevailing ideas of dual sovereignty.[15] Under this system, each state possessed complete sovereignty with respect to its proper sphere of authority, and the Constitution gave no state the power to require other states to enforce its legislation. The Supreme Court's modern distinction between the choice of law decisions of state courts and extraterritorial regulations passed by state legislatures thus makes sense when viewed through the lens of historical ideas of federalism and state sovereignty.

By providing a theoretical basis from which to reconcile the Supreme Court's extraterritoriality doctrines, this Article provides an answer to the question posed above: when can a state regulate conduct that occurs beyond its borders? Under our federal system, a state ordinarily may apply its law to a legal dispute in its court system, regardless of where the dispute arose, because a state court is generally under no obligation to apply and enforce the laws of another sovereign state. A state, however, may not enact legislation that directly regulates conduct that occurs wholly outside that state's borders, because the sovereign power of each state does not reach beyond its territory.

This Article will proceed in three parts. Part I summarizes modern law and legal scholarship regarding a state's extraterritorial power. Part II examines the antebellum understanding of extraterritorial power, with a focus on disputes regarding the law of slavery. Part III discusses how the antebellum understanding can inform modern scholarship.[16]

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[15] Forcing a state court to apply *federal law*, however, presented a different issue. Since the Supremacy Clause essentially makes federal law the supreme law of the state, there is nothing problematic about forcing a state court to apply federal law. Dual federalism envisions a division of power between the state and federal governments rather than between the various state governments. While each state government shared power with the federal government, a state did not cede authority directly to any other state (with limited enumerated exceptions). *See infra* Part III C.

[16] Although this Article argues that the Court's extraterritoriality doctrines can be explained in terms of antebellum conceptions of state sovereignty, it makes no argument regarding their continuing viability. The modern debate over Reconstruction's effect on antebellum notions of state sovereignty is beyond the scope of this Article. For a discussion of this debate, see generally Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013), *available at* http://www.yalelawjournal.org/images/pdfs/1174.pdf, and Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113 (2001).

I. MODERN LAW AND SCHOLARSHIP

The Supreme Court has developed two separate doctrines for evaluating a state's exercise of extraterritorial power. Legal scholars have both criticized the content of each doctrine and argued that they are impossible to reconcile.

A. Constitutional Limitations on State Choice of Law

The Supreme Court has imposed few constitutional limitations on a state court's application of forum law to disputes which arose in another state. Under modern doctrine, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[17] Because more than one state may have such contacts, "a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction."[18]

The facts of *Allstate Insurance Co. v. Hague* demonstrate how far the Court has gone in allowing a state court to apply forum law to a dispute which arose in another state. In *Allstate*, the plaintiff sued her insurance carrier in a Minnesota state court to collect under her uninsured motorist coverage after her husband died in a motorcycle accident.[19] The accident took place in Wisconsin, the insurance policy was delivered in Wisconsin, and, at the time of the accident, all parties involved were citizens of Wisconsin.[20] Despite the accident's overwhelming connection to Wisconsin, the Minnesota courts applied forum law, largely because it thought

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However, it is important to note that, while Reconstruction arguably may have weakened any claim of reliance on state sovereignty as a limitation on *federal power*, it is not clear that Reconstruction had the same effect on using state sovereignty to limit the power *of other states*. In other words, Reconstruction arguably did not affect horizontal federalism in the same manner in which it affected vertical federalism. This Article discusses only how state sovereignty limits the powers of other states.

[17] Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting *Allstate*, 449 U.S. at 312-13).

[18] *Allstate*, 449 U.S. at 307; *see also Phillips*, 472 U.S. at 818.

[19] *Allstate*, 449 U.S. at 305.

[20] *Id.* at 305-06.

Minnesota had the "better law" on the issue in dispute.[21] The Supreme Court held that the application of Minnesota law was constitutionally permissible because the decedent had worked in Minnesota, the plaintiff moved to Minnesota *after* the accident, and the insurance company issued other, *unrelated*, policies in Minnesota.[22] The Court thus permitted Minnesota to apply its law to events which took place in another state, merely because the lawsuit had a weak connection to Minnesota. The Court also found it irrelevant that Minnesota based its decision on a finding that its law was superior to that of Wisconsin.[23]

Scholars have long criticized the Court's failure to impose meaningful limitations on a state's choice of law. In a particularly influential article, Douglas Laycock, argues that, under implicit constitutional principles, "[s]tates must treat sister states as equal in authority to themselves."[24] According to Laycock, when a state court rejects the application of sister-state law merely because of disagreement with the content of such law, the court essentially denies the equality of sister-state law.[25] Laycock and numerous other scholars therefore argue that the Supreme Court should find that constitutional principles of federalism and state equality require stricter limitations on when a state court can apply forum law.[26] According to such critiques, in *Allstate*, for example, the Minnesota court's decision to apply the "better law" of Minnesota should have been held unconstitutional because the decision denied the equal authority of Wisconsin law.

B. Constitutional Limitations on Extraterritorial State Legislation

The Supreme Court has imposed a much stricter prohibition against extraterritorial state legislation. Under this doctrine, the Court has held that the Constitution prohibits a state from applying its statutes to conduct that "takes place wholly outside of

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[21] *Id.* at 306-07. Minnesota allowed the plaintiff to "stack" her insurance coverage for each of her vehicles, while Wisconsin law would not have permitted the plaintiff to stack her policy limits together. *Id.* at 306.

[22] *Id.* at 313-20.

[23] *Id.* at 313.

[24] Laycock, *supra* note 7, at 250.

[25] *Id.* at 251.

[26] *See supra* note 7 and accompanying text.

the State's borders."[27] Thus, a state may not "project its legislation into other States."[28] The Court has based this doctrine both on the Dormant Commerce Clause and "the inherent limits of the enacting State's authority."[29]

In *Healy v. Beer Institute*, for example, the Court struck down a Connecticut law which essentially prohibited any company that sold beer in Connecticut from offering a lower price in any neighboring state.[30] According to the Court, "the Connecticut statute has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."[31] The Court found that Connecticut could not regulate the price of goods sold by an out-of–state seller to an out-of-state buyer, regardless of whether such prices had an effect on the price of goods sold in Connecticut.

Although the Supreme Court has not applied the extraterritoriality doctrine in a number of years, the Sixth Circuit recently used the doctrine to strike down a Michigan statute in *American Beverage Ass'n v. Snyder*.[32] To facilitate a state recycling program, the Michigan statute at issue required beverage containers sold in Michigan to bear a certain marking and prohibited containers containing such markings from being sold in other states.[33] The Sixth Circuit held that the Michigan statute had an impermissible extraterritorial effect because it both

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[27] Edgar v. MITE Corp., 457 U.S. 624, 642 (1982).

[28] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583 (1986). The Eighth Circuit has perhaps advanced the most helpful statement of the principle: "a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995).

[29] Healy v. Beer Inst., 491 U.S. 324, 336 (1989); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) (citing "principles of state sovereignty and comity"); CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987). Other scholars have likewise found that the extraterritorial doctrine has applicability outside the context of the dormant commerce clause. *See* Florey, *supra* note 1, at 1060, 1093; Regan, *supra* note 1, at 1885; David S. Welkowitz, *Preemption*, *Extraterritoriality*, *and the Problem* of *State Antidilution Laws*, 67 TUL. L. REV. 1, 40 (1992).

[30] 491 U.S. at 337.

[31] *Id.*

[32] No. 11–2097, 2013 WL 5584487 (6th Cir. Jan. 7, 2013). Although Denning argues that lower courts have narrowly interpreted the Court's extraterritoriality precedent, "significantly" limiting its continued vitality, *American Beverage* illustrates its continuing relevance. *See* Denning, *supra* note 11, at 992-95.

[33] *American Beverage*, 2013 WL 5584487, at *1.

dictated what the container manufacturers could sell in other states and essentially forced other states to comply with its regulations.[34]

In a strongly-worded concurring opinion, Judge Sutton wrote "separately to express skepticism about the extraterritoriality doctrine."[35] First, Judge Sutton argued that the doctrine was "a relic of the old world with no useful role to play in the new."[36] He asserted that, historically, the doctrine was created to restrict the states to their proper local sphere of regulation, so that they would not interfere in the exclusively federal regulation of interstate commerce.[37] For Judge Sutton, when the lines between "local" regulation and regulation of interstate commerce blurred over time, the extraterritoriality doctrine ceased to have a purpose.[38] Second, Judge Sutton argued that the doctrine does not meaningfully limit state power because "[t]he modern reality is that the States frequently regulate activities that occur entirely within one State but have effects in many."[39] He offers the following example: a California law that establishes emissions standards for cars sold in California. Such a law, he asserts, would practically have the effect of setting standards for—or perhaps influencing the price of—cars sold in every state in the country.[40] According to Judge Sutton, there is no real difference between the California law and a state law that directly regulates commerce in another state, such as the Michigan law at issue in *American Beverage.*[41]

Scholars have also strongly criticized the extraterritoriality doctrine, claiming that it is both unworkable in practice and inconsistent with the constitutional rules governing a state's

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[34] *Id.* at *8-11.

[35] *Id.* at *11.

[36] *Id.* at *13.

[37] *Id.* at *12.

[38] *Id.* at *12-13.

[39] *Id.* at *13.

[40] *Id.*

[41] *Id.* For more on *American Beverage,* and Judge Sutton's concurrence, see Recent Case, *Dormant Commerce Clause – Extraterritoriality Doctrine – Sixth Circuit Invalidates Michigan Statute Requiring Bottle Manufacturers to Use Unique Mark on All Bottles Sold within Michigan.* – American Beverage Association v. Snyder*, 700 F.3d 796 (6th Cir. 2012)*, 126 HARV. L. REV. 2435 (2013).

choice of law.[42] According to these scholars, strict territorial limitations on state legislative power are unworkable for the same reasons that *Pennoyer*'s territorial regime for personal jurisdiction proved impractical in the modern world: a state needs the flexibility to regulate behavior and decide cases that have significant effects within the state, regardless of where the conduct at issue occurred. Moreover, scholars have pointed out that states routinely reach the same results prohibited by the extraterritoriality doctrine through their courts' choice of law analyses.[43] Some scholars have thus asserted that the Supreme Court could not have possibly meant what it said about extraterritoriality, and have suggested a more narrow way to understand the result in each case which has applied the doctrine.[44]

II. EXTRATERRITORIAL STATE LEGISLATION IN THE NATION'S EARLY HISTORY

The Supreme Court's modern doctrine makes sense only by appreciating the history of extraterritorial state regulation. Modern scholarship typically focuses only on Justice Joseph Story's famous and influential *Commentaries on the Conflict of Laws*, which contains a masterful description of the law as it stood when the treatise was written in 1834. While the doctrinal framework of the antebellum era is thus well known, comparatively little has been written on how this doctrine was applied in practice or developed after Story's writing. According to many scholars, this is because the doctrine was rarely applied since relatively few disputes crossed state borders.[45] Moreover, of those few disputes that did cross state lines, the vast majority were governed by the common law, which was of universal application and thus did not implicate choice of law concerns.[46]

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[42] Florey, *supra* note 1, at 1060-63; Metzger, *supra* note 1, at 1521; Regan, *supra* note 1, at 1885-86; Rostron, *supra* note 1, at 115-16.

[43] Florey, *supra* note 1, at 1093; Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 (2001).

[44] *See* Florey, *supra* note 1, at 1090; Goldsmith & Sykes, *supra* note 43, at 804; Regan, *supra* note 1, at 1904, 1905.

[45] *See supra* note 11 and accompanying text.

[46] *See generally* Spillenger, *supra* note 2.

Thus, under the conventional account, the antebellum framework was suited only for a time when issues regarding choice of law and extraterritorial legislation were rare and of little importance.

With respect to the legal battles over slavery, however, this conventional account accurately describes only the nation's first few decades. Before Justice Story wrote his famous treatise, northern states largely either retained some form of slavery or were willing to extend comity to the South on slavery-related issues. Beginning with the abolitionist movement of the 1830s, however, the states increasingly clashed over which state's law should apply to disputes involving slavery. In a range of circumstances, Southerners began to argue that northern states should be forced to apply southern law regarding slavery, while Northerners replied that slave law had no effect outside of the southern states. A close examination of this dialogue helps to highlight a key insight of the antebellum framework expounded earlier by Justice Story—an insight that helps to make sense of the law today.

A. The Territorial Approach to State Law

Justice Story's *Commentaries on the Conflict of Laws* is the classic account of the historical approach to extraterritorial legislation. Justice Story famously asserted that,

> the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. . . . Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them . . . .[47]

According to Justice Story, a state thus had no power to enact extraterritorial legislation. Any state that allowed the law of

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[47] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7 (Boston, Hilliard, Gray, & Co. 1834).

another state to have force within its territory did so only as a matter of comity.[48]

Justice Story further asserted that there were no limitations on a state court's ability to apply forum law. According to Justice Story, "[w]hen [a state statute] speaks positively on the subject, it must be obeyed by all persons, who are within the reach of its sovereignty."[49] Thus, if a state passed a statute that was meant to apply to the parties' dispute, Justice Story envisioned no analysis of whether application of forum law was unconstitutional. "When both [the state's statutes and the common law] are silent, then, and then only, can the question properly arise, what law is to govern in the absence of any clear declaration of sovereign will."[50] A state's choice of law analysis was unconstrained by the Constitution.

This historical approach to state power was based on the prevailing understanding of state sovereignty. As Justice Story explained, "every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[51] He further states: "It is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty."[52] Thus, "no state or nation can, by its laws, directly affect, or bind property out of its territory, or persons not resident therein."[53] Moreover, a state court "cannot be commanded by another" state to recognize or enforce its laws.[54] As another influential commentator, Chancellor James Kent, explained, "if a statute . . . was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow."[55]

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[48] *Id.* at § 23 ("[W]hatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say . . . upon its own express or tacit consent.")

[49] *Id.*

[50] *Id.*

[51] *Id.* at § 18.

[52] *Id.* at § 8.

[53] *Id.* at § 20.

[54] *Id.* at § 8.

[55] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 100 (New York, O. Halsted 1827).

While a sovereign state could not be forced to apply the law of another state, Justice Story believed that states would choose to do so as a matter of comity in most circumstances. When deciding whether to apply the law of another state, he asserted that "the interest of all nations is consulted, and not that of one only."[56] In fact, he went so far as to argue that "the laws of every people in force within its own limits, ought to have the same force every where, so far as they do not prejudice the power or rights of other governments, or of their citizens."[57] In practice, Justice Story thus envisioned a system where a state would voluntarily recognize the law of other states unless such laws conflicted with its public policy.

This territorial approach was endorsed in a number of antebellum cases. In *Ogden v. Saunders*, for example, the Supreme Court asserted that

> when . . . the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.[58]

Moreover, in *Dearing v. Bank of Charleston*, the court stated that

> [b]y the comity of States, the laws of each State are respected in foreign States, unless they are prejudicial to their national rights, or to the rights of their subjects. But not, if they are so prejudicial. The independence of every State requires that all other States should concede to it, the right of

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[56] STORY, *supra* note 47, at § 36.
[57] *Id.* at § 29.
[58] 25 U.S. 213, 369 (1827).

> protecting its own citizens and their rights, and of enforcing obedience to their own laws.[59]

The antebellum Court also endorsed Justice Story's anti-commandeering principle. In *Prigg v. Pennsylvania*, the Court held that Congress could not force state magistrates to enforce the Federal Fugitive Slave Act of 1793.[60] Moreover, the prevailing antebellum concept of dual sovereignty dictated that each state had complete sovereignty within its proper sphere, meaning that only the Supreme Court could arbitrate disputes between the states.[61]

B. Slavery and the Territorial Approach

While the basic framework of the territorial approach is relatively well-known, very little has been written on how this framework was applied and challenged in the antebellum era. This Part details the debates over the extraterritorial reach of southern slave law regarding: (1) the status slaves voluntarily brought into the free states by their masters while on a sojourn;

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[59] 5 Ga. 497, 511 (1848); *see also* Dred Scott v. Sandford, 60 U.S. 393, 460 (1856) (Nelson, J.) ("[N]o State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties. Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent."); Strader v. Graham, 51 U.S. 82, 94 (1850) ("[T]he government of a particular territory, could have no force beyond its limits."); Flower v. Parker, 9 F. Cas. 323, 324-25 (C.C.D. Mass. 1823) (No. 4891) (Story, J.) ("[T]he principle seems universal, and is consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction.").

[60] 41 U.S. 539, 622 (1842). The Court's opinion in *Prigg* was written by Justice Story. This anti-commandeering language from *Prigg* was used by a number of northern states to justify the passage of personal liberty laws, which prohibited state officials from aiding in the recapture of fugitive slaves. *See, e.g.*, THOMAS D. MORRIS, FREE MEN ALL 109, 127 (1974).

[61] *See, e.g.*, Ableman v. Booth, 62 U.S. 506, 519 (1858) ("Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, [the States] have bound themselves to submit to the decision of this court, and to abide by its judgment."); 1 ALFRED H. KELLY ET. AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 201-02 (7th ed. 1991).

(2) the application of the law of slavery in the territories; and (3) the possibility of slavery being forced on the northern states.

1. Sojourning Slaves

A classic choice of law issue arose when a Southerner brought a slave into the North on a temporary basis. The status of the slave depended entirely on whether the state court applied the law of the forum or that of the master's domicile.[62] Before slavery became a major subject of sectional strife, the legal community seemed to agree that nothing in the Constitution dictated which law must apply. As sectional tensions mounted in the decades leading up to the Civil War, however, Southerners began to argue that they had a constitutionally guaranteed right to bring their slaves into the Free States, at least on a temporary basis. Tracing this national debate on the issue of sojourning slaves reveals much about the antebellum understanding of extraterritoriality.

The framers appear to have assumed that, in the absence of any specific constitutional provision saying otherwise, a non-slaveholding state could free any slave voluntarily brought into the state. For example, while urging ratification in Virginia, James Madison stated: "At present, if any slave elopes in any of those states where slaves are free, he becomes emancipated by their laws . . . [The Fugitive Slave Clause] is a better security than any that now exists."[63]

Prior to 1830, however, northern courts voluntarily applied southern slave law to slaves temporarily brought into the North. In other words, northern states did not free slaves that were brought into the Free States temporarily.[64] Pennsylvania and New

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[62] While the Fugitive Slave Clause of the Constitution commanded northern states to return any slave who escaped from a slave state, U.S. CONST. art. IV, § 2, the Constitution contained no such provision relative to sojourning slaves. For more on interpretation of the Fugitive Slave Clause, see generally Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797 (2011).

[63] 3 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453 (1891); *see also Prigg*, 41 U.S. at 612 ("[I]f the Constitution had not contained [the Fugitive Slave C]lause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters").

[64] PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 70 (1981).

York, for example, had statutes which explicitly provided that a slave would be freed only after a given period of time within the state.[65] Connecticut statutes allowed unlimited slave transit until 1837.[66] And, in many other states, such as Massachusetts, there is simply no record of anyone challenging a Southerner's right to carry slaves within the state.[67] Northern states therefore voluntarily applied southern law to slaves temporarily brought within their borders out of comity.[68] Similarly, southern state courts recognized the freedom of slaves who had resided with their masters in a Free State for an extended period when the former slave returned to the South.[69]

Beginning in the 1830s, however, northern states began to change course and apply their own law of freedom rather than allow the law of slavery to follow a master who was temporarily within a Free State. Two seminal cases, each of which attracted national attention, are representative of the larger national debate over this contentious choice of law issue.

In 1836, the Supreme Judicial Court of Massachusetts broke new ground in *Commonwealth v. Aves* by holding that any slave voluntarily brought into the commonwealth would be free under Massachusetts law.[70] The facts of the case are straightforward: Med, a young slave girl, was brought to Boston while her owner, a resident of Louisiana, visited with family.[71] Learning of this, antislavery lawyers filed a petition for a writ of habeas corpus on Med's behalf, claiming that, because the law of Louisiana had no

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[65] *Id.* at 72. Pennsylvania allowed masters to remain in the state with their slaves for up to six months, while New York allowed nine months. *Id.*

[66] *Id.* at 80.

[67] *Id.* at 81.

[68] Ohio is perhaps the only exception. In dicta, the Ohio Supreme Court indicated that a slave who temporarily lived and worked within Ohio would become free. *See* Ohio v. Carneal, Ohio Unrep. Cas. (1817), *reprinted in*, OHIO UNREPORTED DECISIONS PRIOR TO 1823 133, 141 (Ervin H. Pollack ed., 1952). However, the court, in an opinion written by future Supreme Court Justice John McLean, explicitly reserved the question of whether a slave brought through the state while in transit would be freed under the laws of Ohio. *Id.* at 140.

[69] *See, e.g.*, Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467 (1820).

[70] Commonwealth v. Aves, 35 Mass. 193, 207, 217 (1836).

[71] FINKELMAN, *supra* note 64, at 103; REPORT OF THE ARGUMENTS OF COUNSEL, AND OF THE OPINION OF THE COURT, IN THE CASE OF COMMONWEALTH VS. AVES 4 (Bos., Isaac Knapp 1836) [hereinafter REPORT OF COMMONWEALTH VS. AVES].

legal force within Massachusetts, Med's owners had no legal right to hold her as a slave.[72]

Counsel for both parties in *Commonwealth v. Aves* accepted the underlying premise that Massachusetts had the constitutional authority to choose which law to apply to determine Med's status. Future Supreme Court Justice Benjamin R. Curtis, who represented Med's owners, recognized that the slave law of Louisiana had no independent force within Massachusetts. For example, he asserted: "We must find in this case some law, which will permit this master to remove the slave, *and it must be Massachusetts law too*."[73] Relying heavily on Justice Story's treatise, Curtis acknowledged that nothing in the Constitution required Massachusetts to adopt Louisiana law.[74] Instead, he asserted that the Massachusetts court should apply Louisiana law to determine Med's status "as a favor and as a matter of comity."[75] Curtis then spent most of his time arguing that the application of Louisiana law would be consistent with the interests and public policy of Massachusetts.

In his argument on behalf of Med, prominent antislavery lawyer Ellis Gray Loring not only argued that Massachusetts had no obligation to apply the law of Louisiana, but he also asserted that no comity should be extended on the subject of slavery. Loring first contended that the law of Massachusetts directly applied on its own terms and that "there is no room for comity where the subject has been the matter of express regulation."[76] According to Loring, comity was appropriate only when the forum had not yet spoken on the subject; thus, in a case of direct conflict between forum law and the law of another state, the former must always control.[77] Like Curtis, Loring also asserted that "the right of the master, which is *founded on the municipal law of the*

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[72] REPORT OF COMMONWEALTH VS. AVES, *supra* note 71, at 3.

[73] *Id.* at 12 (emphasis added).

[74] *Id.* at 10.

[75] *Id.* Curtis argued that, while ordinarily the law of a person's domicile is applied to determine issues of personal status and property, there were "two well settled exceptions, . . . I. When [the law of the party's domicile] would work injury to the state, or its citizens. II. When the law is in itself immoral." *Id.* at 7.

[76] *Id.* at 15.

[77] *Id.* at 29 ("[I]n this conflict of foreign and domestic laws, the former must yield.").

particular place only, does not continue" into Massachusetts.[78] If Med were still a slave, it would thus be by the force of Massachusetts law rather than Louisiana law.

Loring contended that no constitutional provision or principle of Union forced Massachusetts to adopt the law of slavery. He asserted that "[e]ach state is sovereign in regard to [the relation of master to slave within such state], and Massachusetts only owes Louisiana—it being a case not provided for in the constitution—the same consideration that would be due to Spain, or any other friendly power."[79] Not only was the Constitution silent on this issue, but,

> [t]o assert that the new relations and close union created by the Federal Constitution required a comity to the local law of the slave States, which did not exist before, avails nothing. The court will require evidence, that this State determined, upon the adoption of the constitution, to extend such comity. But there is no evidence of an intention to do any thing, to give any thing, but the constitution itself.[80]

Loring thus argued that nothing in the text of the Constitution or implicit constitutional principles of federalism forced Massachusetts to apply Louisiana law to determine Med's status.

Writing for the court, Chief Justice Lemuel Shaw held that Massachusetts law applied because Med had been voluntarily brought within the territorial boundaries of the state.[81] Shaw explained that

> if a slave is brought voluntarily and unnecessarily within the limits of this State, he becomes free . . . not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his status, or condition, as settled by the law of his domicile, as

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[78] *Id.* at 24.

[79] *Id.* at 22.

[80] *Id.* at 31.

[81] Commonwealth v. Aves, 35 Mass. 193, 207-08 (1836). For more on Chief Justice Shaw's slavery jurisprudence, see Schmitt, *supra* note 62, at 798.

> because by the operation of our laws, there is no authority on the part of his master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into custody in order to his removal.[82]

Shaw reasoned that the law of Louisiana had no force in Massachusetts because "no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state."[83] While Shaw acknowledged that the court would ordinarily apply the law of the party's domicile out of comity, he asserted that extending comity would be inappropriate in this case because allowing slavery within Massachusetts would violate the state's public policy.[84]

Justice Shaw's decision in *Aves* received a fair amount of national attention. While *Aves* drew criticism from most of the South,[85] it was not universally condemned. The *Louisville Advertiser*, for example, stated:

> As we understand this case, we see nothing to irritate or alarm the South. Nearly all—perhaps all the free States—have laws, which prohibit a slaveholder from carrying his slave into the State, and there retaining it as property. Such laws are not only admissible, but proper and necessary, in States that do not tolerate slavery. If southerners could remove into Indiana, and carry their negroes with them, and hold them under the laws of the United States, as property, by merely professing to be citizens of South Carolina or Georgia, how could the Legislature of Indiana prevent that State from becoming, in time, a slave State? But the

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[82] *Aves*, 35 Mass. at 207-08.

[83] *Id.* at 211.

[84] *Id.* at 219.

[85] *See, e.g.*, *Decision of Judge Shaw*, LOUISVILLE ADVERTISER (Ky.), *reprinted in* THE LIBERATOR (Bos.), Oct. 8, 1836. (quoting the editor of the BALTIMORE CHRONICLE as asserting: "Every Southerner will hear of this decision with feelings of indignation and surprise.").

> constitution or laws of the United States will not justify a southern man in acting thus . . . .[86]

Moreover, at least until sectional tensions escalated in the late 1840s, most southern courts agreed with the principle from *Aves* that slavery existed only where created by positive law.[87] In the North, *Aves* was widely cited and followed throughout the decades leading up to the Civil War.[88]

The second major debate on the subject of slaves voluntarily brought into the Free States arose in the *Lemmon* case, which was litigated at various levels of the New York court system throughout the 1850s. While *Aves* had held that southern law would not apply to a slave brought on a sojourn in a Free State, the court in *Lemmon* took the doctrine a step further by holding that southern law would not apply when a slave was merely passing through a Free State while in transit between two slave states.

The *Lemmon* case arose in 1852 when Jonathan Lemmon and his wife moved from Virginia with eight slaves, intending to relocate to Louisiana. At this time, the fastest and most convenient route was to travel by ship from Virginia to New York, and then from steamship to Louisiana. After arriving in New York City, the Lemmons and their slaves went to a hotel, intending to stay only until their ship was ready to leave for Louisiana. However, when local residents discovered that the Lemmons were holding slaves in the city, they filed a petition for a writ of habeas corpus in a New York trial court, seeking to have the court declare that the Lemmons had no legal right to hold slaves while on New York soil.[89]

Judge Elijah Paine of the Superior Court of New York granted the writ and discharged the Lemmons' slaves, who, after being escorted from the courthouse by a crowd of supporters, fled

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[86] *Decision of Judge Shaw*, THE LIBERATOR (Bos.), Oct. 8, 1836, at 162 (quoting *Decision of Judge Shaw* in the LOUISVILLE ADVERTISER).

[87] *See* FINKELMAN, *supra* note 64, at 182; Alfred L. Brophy, *Let Us Go Back and Stand on the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 194 (1990).

[88] *See, e.g.*, Jackson v. Bulloch, 12 Conn. 38, 40-41 (1837); Polydore v. Prince, 19 F. Cas. 950, 955 (D. Me. 1837).

[89] FINKELMAN, *supra* note 64, at 296.

north to Canada. Judge Paine's reasoning mirrored that of Justice Shaw in *Aves*. He reasoned that, because slavery existed only by force of the positive law and the slave law of Virginia had no force in New York, the Lemmons had no legal basis to restrain their former slaves. Judge Paine further explained that, while states generally recognized the property rights of a foreigner out of comity, New York would not extend comity on the subject of slavery because it was contrary to natural law and New York policy.[90]

Unlike in *Aves*, where the parties had assumed that Massachusetts had the authority to reject the application of southern slave law, the Lemmons advanced several constitutional arguments for the extraterritorial application of Virginia law. Specifically, the Lemmons argued: (1) the Privileges and Immunities Clause required New York to recognize the rights conferred on them by Virginia; (2) the Fugitive Slave Clause constituted a tacit recognition of a constitutionally protected right to property in slaves; and (3) the dormant Commerce Clause prohibited the states from regulating interstate travel with slave property.[91]

Judge Paine rejected each of the Lemmons' constitutional arguments. He found that the Privileges and Immunities Clause meant only that the Lemmons were entitled to the same rights as any citizen of New York.[92] Because New York did not allow its citizens to hold slaves within its borders, the Privileges and Immunities clause conferred no such right on the Lemmons. Judge Paine also held that the Constitution did not recognize a universal right to slave property. He reasoned that, because the Constitution explicitly required the recognition of slavery only with respect to fugitive slaves, by implication it did not require the recognition of slavery in any other context.[93] Finally, Judge Paine ruled that slaves were not commerce (rendering the Commerce Clause inapplicable) and that the states had complete power to

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[90] REPORT OF THE LEMMON SLAVE CASE: CONTAINING POINTS AND ARGUMENTS OF COUNSEL ON BOTH SIDES, AND OPINIONS OF ALL THE JUSTICES 9 (N.Y.C., Horace Greeley & Co. 1860) [hereinafter REPORT OF THE LEMMON CASE].

[91] *See id.* at 10.

[92] *Id.*

[93] *Id.*

regulate slavery under their police powers.[94] After disposing of the Lemmons' constitutional arguments, Judge Paine held that the slave law of Virginia had no force in New York, meaning that the Lemmons had no legal authority to hold their former slaves.[95]

Rather than relying on any specific constitutional provision, most critics of Judge Paine's ruling argued that principles of federalism inherent in the nature of the Union required the Free States to apply southern law. In his annual message to the Georgia legislature, Governor Cobb, for example, offered the following remarks on the *Lemmon* case: "[b]y the comity of nations the personal status of every man is determined by the law of his domicil . . . . This is but the courtesy of nation to nation . . . ."[96] Governor Cobb continued to ask:

> Can it be possible that the courtesy yielded by independent nations to each other can be rightfully denied by one of these States to the others? . . . Did the framers of the Constitution, so wise and so provident as to all other possible causes of disturbance between the States, permit so pregnant a source of discord to pass unheeded and unprovided for?[97]

Moreover, while asking for appropriations to fund an appeal of Judge Paine's ruling,[98] Governor Johnson of Virginia warned that "If sustained, [the decision] will . . . destroy that comity which should ever subsist between the several States composing this

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[94] *Id.*

[95] *Id.* at 11. Although New York had a statute which allowed a Southerner to keep a slave within New York for up to nine months, the state legislature repealed this act in 1841. *Id.* at 12.

[96] *Id.*

[97] *The Lemmon Case – Interference of Governor Cobb*, THE NAT'L ERA (D.C.), Jan. 12, 1854, at 6.

[98] *Id.* The legislature of Virginia appropriated funds because the Lemmons no longer had an active interest in the case. Their former slaves had relocated to Canada (out of the court's jurisdiction to grant relief) and northerners had collected thousands of dollars to compensate the Lemmons for their financial loss. *See id.*; *see also* REPORT OF THE LEMMON CASE, *supra* note 90, at 13.

confederacy . . . ."[99] A number of newspaper editors made similar pronouncements.[100]

Many Southerners thus saw no room for the traditional rule—recognized in Story's treatise and relied upon in cases like *Aves* and *Lemmon*—that a state had unfettered discretion in deciding whether to extend comity to the law of another state. While these commentators may have simply misunderstood traditional choice of law doctrine, it is also possible that, like some modern commentators,[101] they believed such discretion was inconsistent with our federal system. In other words, they believed that federalism values prohibited a northern court from discriminating against southern law in its choice of law analysis merely because of disapproval of the content of the southern law.

Northern supporters of Jude Paine's decision asserted both that it was correct under prevailing legal principles and that such principles were implied by the nature of the federal union. In an address to the legislature, New York Governor Myron Clark discussed the *Lemmon* case at length while requesting funds to defend the state's interest in the pending appeals. Following the traditional reasoning from *Aves*, Governor Clark stated: "Slaves are property only by virtue of local law; where that ceases to have

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[99] REPORT OF THE LEMMON CASE, *supra* note 90, at 13.

[100] *See, e.g.*, *From Bennett's Herald*, THE LIBERATOR (Bos.), Dec. 3, 1852, at 193 (quoting an excerpt from BENNETT'S HERALD) (stating that, by Judge Paine's decision, "the spirit and intent of the Constitution are subverted and at an end, and the work of separating the two sections is practically commenced."); *From the N.Y. Courier*, THE LIBERATOR (Bos.), Dec. 3, 1852, at 193 (quoting an excerpt from the N.Y. COURIER) (asserting that Judge Paine's decision "is certainly diametrically opposed to the spirit of the Constitution"); *From the Richmond Whig*, THE LIBERATOR (Bos.), December 3, 1852, at 193 (quoting an excerpt from the RICHMOND WHIG) ("Is it to be contended that, as to slavery, Virginia and New York occupy the same position as Virginia and England? The answer to this question goes at once to the very foundations of our Federal institutions."); *Judge Paine's Decision—Comments of the Pro-Slavery Press*, THE NAT'L ERA (D.C.), Nov. 25, 1852, at 190 (quoting *The Recent Slave Case – Decision of Judge Paine* in THE WASHINGTON UNION) (asserting that the decision "is in conflict, if not with the letter, with the spirit of the Constitution of the United States, and is at war with the object and intent of the Federal Union"); *Slave Case*, THE LIBERATOR (Bos.), Nov. 19, 1852, at 186 (reprinting *Slave Case* from the N.Y. JOURNAL OF COMMERCE) (calling the decision "an utter breach of the national compact" and asserting that "a decision adverse to the rights of Southern citizens will be regarded as an unfriendly act, and as a ground that treats them rather as strangers than as brothers").

[101] *See* sources cited *supra* note 7.

jurisdiction, they cease to be property, and cannot be recognized or treated as such."[102] According to Governor Clark, this concept of territorial-bound legislative jurisdiction was implicit in each state's "equal sovereignty over her own domestic institutions. . . . If this right be denied her, she will be deprived the most essential attribute of sovereignty, that of deciding upon the civil condition and securing the personal rights of those who may be brought under the protection of her laws."[103] Governor Clark thus thought any attempt to force a New York court to apply southern law would be inconsistent with the nature of state sovereignty implicit in the federal system. This view was shared by many of Judge Paine's supporters in the press,[104] including at least two major southern newspapers.[105] According to one paper, the pro-slavery argument was a "flagrant demonstration of the worst kind of Federalism."[106]

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[102] *Governor's Message*, FREDERICK DOUGLASS' PAPER (Rochester, N.Y.), Jan. 4, 1855.

[103] *Id.*

[104] *See, e.g.*, *Judge Paine's Decision–Comments of the Pro-Slavery Press*, *supra* note 100, at 190 ("When a man held as a slave under the laws of Virginia passes beyond her jurisdiction, he becomes free, for her laws have no extra-territorial force."); *The Lemmon Case – Interference of Governor Cobb*, *supra* note 97, at 6 ("The law under which a slave is held in Virginia, is municipal, and has no extra-territorial force. . . comity cannot justify the Judiciary of New York in violating the organic law of the State, nor in any case can it justify a breach of justice."); *The New York Slave Case*, THE LIBERATOR (Bos.), Dec. 3, 1852, at 193 (reprinting *The New York Slave Case* from PHILA. TRIBUNE OF THE PEOPLE, which quotes the PROVIDENCE JOURNAL) ("[W]e confess that the case seems so plain to us that any other decision would have been most unaccountable. . . . If the owners of slaves choose to bring them into States which do not recognize them as property, they have no right to complain."); *Transportation of Slaves*, THE LIBERATOR (Bos.), Jan. 28, 1853, at 14 (reprinting an excerpt of *Transportation of Slaves* from THE ALBANY ARGUS) ("This test of our subservience has been demanded by the sovereign State of Virginia: The duty of the sovereign State of New York is to obey.").

[105] *See The Lemmon Case*, FREDERICK DOUGLASS' PAPER (Rochester, N.Y.), Dec. 31, 1852 (quoting THE RICHMOND ENQUIRER) ("[No] citizen can take the local law [of Virginia] with him, but must be subject to the laws of the place he is in. . . . How absurd, therefore, to argue that what can only be called into being by local law [slavery], can exist where that law has no jurisdiction."); *The Lemmon Case*, THE NAT'L ERA, Dec. 16, 1852, at 203 (quoting the September 27, 1852 edition of THE DAILY ORLEANIAN) ("Why had the Lemmon case been brought before the Supreme Court of Louisiana, the Supreme Court of Louisiana would have decided precisely as Judge Paine has . . . .").

[106] *The Lemmon Case – Interference of Governor Cobb*, *supra* note 97, at 6.

With counsel funded by the state of Virginia, the Lemmons appealed Judge Paine's decision to the New York County Supreme Court. The Lemmons raised the same constitutional arguments they had made before Judge Paine, and the Supreme Court affirmed his ruling with similar reasoning on December 30, 1857.[107]

While the court's short opinion reveals little of the underlying rationale for its decision, the argument of W.M. Evarts, on behalf of the state, explains the theoretical framework supporting the northern position. Citing Justice Story's treatise, Evarts started with the proposition that "so far as 'by comity' the *laws of other sovereignties* have force within this state, they derive their efficacy, not from their own vigor, but by administration as a part of the law of this state."[108] In other words, Virginia law did not directly apply to the Lemmons' slaves in New York, because "the municipal law, which makes men the subject of property, is limited with the power to enforce itself, that is, by its territorial jurisdiction."[109] Thus, if the court were to hold that the Lemmons had a right to hold slaves in New York, they would be doing so as a matter of New York law. Moreover, to make such a right meaningful, Evarts argued, New York would in effect need to adopt a slave code which would enable the master to control his slaves, something New York had long ago abolished.[110] By putting the issue in such stark terms, Evarts attempted to demonstrate that the Lemmons' vision of federalism, where each state is bound to accept rights created in another state, would undermine New York's sovereignty as an independent state.

Public reaction largely mirrored the reaction to Judge Paine's earlier ruling.[111] While northern opinion was predominantly

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[107] Lemmon v. People, 26 Barb. 270, 287 (N.Y. App. Div. 1857).

[108] *Id.* at 277.

[109] *Id.* at 281.

[110] *Id.* at 280. Newspapers stressed this argument, and warned that overturning Judge Paine's decision would practically make New York a slave state. *See, e.g.*, *The New York Slave Case*, *supra* note 104, at 194 (quoting THE N.Y. EVANGELIST) ("The State of New York is not and cannot be made a slave State. Having outgrown the barbarism, injustice and decrepitude of a State of slavery, she can never be brought back to it, either in whole or in part.").

[111] Some extremists, however, decried the decision as recognizing that slavery may be constitutionally established in Virginia. *See e.g.*, *Letter from Hon. Gerrit Smith*, THE

supportive, southern opinion was predictably negative. One southern editor opined that "[t]here is no longer any such thing as protection under a common Constitution," because, "[f]rom the sublime elevation of her moral superiority, New York looks down upon Virginia with horror and contempt."[112] Another southern paper exclaimed: "A beautiful state of affairs! No protection under the common constitution!"[113]

The *Lemmon* case was finally argued before the New York Court of Appeals on January 24, 1860. While Charles O'Connor, counsel for the Lemmons, continued to press constitutional arguments based on the Privileges and Immunities, Fugitive Slave, and dormant Commerce Clauses, he focused much of his attention on the argument that had been developed in the national dialogue over the case: he argued that implicit constitutional principles of federalism required New York to give extra-territorial effect to Virginia's law of slavery. For example, O'Connor asserted that "[c]omity, as understood in speaking of the practice of friendly nations toward each other . . . has no place in the relation between the States of this Union."[114] Instead, O'Connor asserted that "the comity which did exist between these States at the adoption of the Constitution, when they were entirely independent, was incorporated into the Constitution, and by force of that instrument, put into a permanent form."[115] He explained that New York

> ought to respect [a Virginian's] right of property . . . , while he is a way-farer and stranger in our territory, out of respect to the laws of his country and out of respect to the obligations which we have assumed toward those laws. The comity of nations binds us to so treat Englishmen, the

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LIBERATOR (Bos.), Apr. 3, 1857, at 53. These abolitionists argued that the Constitution prohibited slavery everywhere within the Union. *Id.*

[112] *Retaliation*, THE NAT'L ERA (D.C.), Dec. 24, 1857, at 207 (reprinting *Retaliation* from THE SOUTH).

[113] *The Slaves in Virginia*, THE LIBERATOR (Bos.), Jan. 1, 1858, at 1 (quoting the Newbury, S.C. newspaper, the RISING SUN).

[114] REPORT OF THE LEMMON SLAVE CASE*, supra* note 90, at 26.

[115] *Id.* at 45.

> Constitution of the United States binds us so to treat our fellow-citizens coming from another State.[116]

O'Connor thus argued that principles of federalism prohibited a state from denying comity to a sister state on the grounds that its law is immoral or otherwise inferior to forum law.

In his argument for the people, Evarts contended that, rather than forcing New York to apply Virginia law, principles of state sovereignty inherent in the nation's federal system dictated that no state could force another state to apply its laws. Evarts reiterated his earlier argument that, "so far as, 'by comity' the laws of other sovereignties have force within this State, they derive their efficacy, not from their own vigor, but by administration as a part of the law of this State." [117]

Thus, according to Evarts, when the Lemmons argued that principles of federalism forced New York to recognize their property in slaves, they implied that federalism forced New York to use its sovereign power to recognize and enforce the law of Virginia. Evarts explained:

> if a sovereign State has not the power of determining the political, the civil, the social, the actual conditions of the persons within its borders, it is because some other power has that control. . . . [H]ow this admission can consist with the fundamental idea of sovereignty, or of the separateness of a political community, it passes my intelligence to comprehend.[118]

In Evarts' view, state sovereignty necessarily carried with it the power to prescribe the applicable regulatory law and legal status of everything within its borders. The states had given up such power only to the extent explicitly mentioned in the Constitution. Thus, New York lacked the power to prescribe the legal status of a fugitive slave, because the state had ceded such power in the Fugitive Slave Clause of the Constitution.[119] With

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[116] *Id.* at 42.
[117] *Id.* at 66.
[118] *Id.* at 72.
[119] *Id.* at 85, 92.

respect to slaves voluntarily brought into the state, however, New York's sovereign power was complete.[120] According to Evarts, while the states had agreed in the Constitution to recognize the law of another state as having effect within the jurisdiction of that state, with very few exceptions, the states had not agreed to surrender their sovereign power to regulate conduct and legal status within their borders. For example, while New York had to recognize the Lemmons' legal right to slave labor in Virginia—and thus New York could not allow a claim for wages for slave labor performed in Virginia—New York need not recognize any such Virginia-created right to slave labor within the territorial borders of New York.[121] According to Evarts, the court's resolution of this issue "concerns what is of more vital importance to a political community, than anything else, its *sovereignty*."[122]

A deeply divided New York Court of Appeals affirmed the rulings of the lower courts, holding that the Lemmons had no legal claim to their slaves after voluntarily bringing them into New York. The majority based its opinion on the vision of federalism and state sovereignty advanced earlier by Evarts. The court explained that "[t]he question [presented] is one affecting the State [of New York] in her sovereignty. As a sovereign State she may determine and regulate the status or social and civil condition of her citizens, and every description of persons within her territory."[123] The court continued:

> The relation [of slavery] exists, if at all, under the laws of Virginia, and it is not claimed that there is any paramount obligation resting on this State to recognize and administer the laws of Virginia within her territory, if they be contrary or repugnant to her policy or prejudicial to her interests.[124]

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[120] *Id.* at 69.
[121] *Id.* at 103.
[122] *Id.* at 72.
[123] *Id.* at 131.
[124] *Id.* at 137.

The court thus held that, although a forum state may voluntarily choose to recognize the law of a sister state, the application of such sister-state law is not "allowed on account of any supposed power residing in another State to enact laws which should be binding on our tribunals, but from the presumed assent of the law-making power, to abide by the usages of other civilized States."[125] Under the Constitution's federal system, Virginia had no power to force New York to apply and enforce the laws of Virginia.

In a dissenting opinion, Justice Clerke offered a competing notion of state sovereignty and federalism.[126] He agreed with the majority's reading of New York statutory law: it was "intended to declare that all slaves voluntarily brought into this State, under any circumstances whatever, should become instantly free."[127] Justice Clerke, however, would have found this statute to be unconstitutional. He started from the acknowledged premise that, under the law of nations, a country normally extends comity to the laws of another state with respect to a foreign citizen in transit. While such comity is voluntary with respect to foreign nations, Justice Clerke argued that "the relations of the different States of this Union toward each other are of a much closer and more positive nature than those between foreign nations toward each other."[128] He continued: "For many purposes they are one nation; . . . and this comity impliedly recognized by the law of nations, ripens, in the compact, cementing these States, into an express conventional obligation. . . ."[129] In sum, Justice Clerke believed that inherent principles of federalism placed a limit on a state's ability to apply forum law, and, in this instance, required the New York court to apply the law of Virginia extraterritorially.

The differing positions taken in the *Lemmon* case illustrate the values at stake in the debates over the extraterritorial

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[125] *Id.* at 123.

[126] Three justices dissented from the court's decision. Chief Justice Comstock dissented without opinion. *Id.* at 145. Justice Selden asserted in a brief opinion that the New York statute, which the court interpreted to free the Lemmons' slaves, was "a gross violation of those principles of justice and comity, which should at all times pervade our inter-State legislation, as well as wholly inconsistent with the general spirit of our national compact." *Id.* at 146.

[127] *Id.* at 140.

[128] *Id.* at 144.

[129] *Id.*

application of southern slave law. Judge Paine (and his many supporters) thought New York's sovereign power to regulate people and conduct within its borders could not be limited by the law of Virginia. If New York could be forced to apply the law of Virginia, New York would lose its ability to regulate its own affairs. In the issue of slave transit, Northerners feared that, if the Lemmons' argument prevailed, New York would be transformed into a quasi-slave state, where Southerners could work, brutalize, and even sell slaves within the state so long as they did not acquire a New York domicile.

The Lemmons and their advocates, however, argued that the nature of the Union required New York to give effect to Virginia law when the court's normal choice of law rules so dictated, regardless of New York's conflicting public policy. Under this view, the states had not only ceded part of their sovereignty to the national government, but they had also given up the power to give anything less than full and equal respect to the law of their sister states. By refusing to extend comity to Virginia out of moral disapproval of its law, New York was denying the equality of Virginia law and thus violating implicit constitutional principles of federalism.

Because of its focus on state sovereignty, *Lemmon* was one of many cases in the ongoing antebellum debate over states' rights; however, it was fundamentally different than the more well-known debates involving nullification and slavery. Those conflicts usually involved a zero-sum trade-off between state and national power. In such an equation, Southerners almost always preferred state power, which was seen as more protective of slavery.[130] Here, however, the debate was between a state's right to determine its own domestic institutions and a state's obligation to respect the legal systems of its sister-states. By supporting the Lemmons' claim, most Southerners valued national recognition of the legitimacy of slavery over abstract ideals of states' rights.

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[130] An important exception to this typical trend was the issue of fugitive slaves. Under the Fugitive Slave Act, Southerners relied on the federal government to force Northerners to return slaves. As a result, in debates over fugitive slave issues Southerners often called for strong national power, while Northerners occasionally defended a lack of enforcement in terms of states' rights. *See generally* Jeffrey Schmitt, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007).

2. Slavery in the Territories

The leading constitutional theorists of the antebellum era also discussed the extraterritorial reach of southern slave law in the debates over slavery in the territories. Because of its centrality to secession crisis, the literature on the issue of slavery in the territories is legion. This Part discusses only a minor aspect of that important debate—constitutional arguments for the extraterritorial application of southern law in the territories.

Much like with sojourning slaves, in the early part of the nineteenth century, before sectional differences over slavery became disruptive, the states managed to reach a political solution without resort to extensive constitutional argument on the reach of state law. The Northwest Ordinance, which was passed in 1787 with unanimous approval from the southern states, banned slavery in the territories north of the Ohio River.[131] Moreover, in the Missouri Compromise of 1820, slavery was excluded from the territory acquired in the Louisiana Purchase north of the 36°30′ parallel, with the exception of Missouri.[132] At that time, it was generally assumed that Congress had the power to exclude slavery under its power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[133]

When additional federal territory was acquired in the Mexican War in 1848, however, the debate over slavery's application suddenly took on constitutional dimensions.[134] While many continued to believe that Congress had complete discretion to establish or ban slavery in the territories under the Territories

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[131] *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 255 (2002). Although the Northwest Ordinance was initially passed under the Articles of Confederation, the First Congress reenacted it in 1789. *Id.* at 256.

[132] *See id.* at 265.

[133] U.S. CONST. art. IV, § 3. *See, e.g.*, FEHRENBACHER, *supra* note 131, at 263-67.

[134] FEHRENBACHER, *supra* note 131, at 268 (describing this period as having "an environment that was rapidly reducing all political questions to matters of constitutional imperative. . . .").

Clause,[135] antebellum constitutional theorists developed at least three additional doctrines to govern slavery in the territories.

First, John C. Calhoun, one of the period's most influential and extreme defenders of southern rights, argued that any restriction on slavery within the territories would violate constitutional principles of federalism.[136] Calhoun's constitutional argument relied on two premises: first, the Constitution was founded by the states (as opposed to the people) on a principle of state equality;[137] second, the federal territories were the "common property of the States of this Union," which was "held jointly for their common use."[138]

Calhoun contended that, when these premises were accepted, the very nature of federalism implied that Congress could not prohibit slavery within the territories.[139] If Congress were to do so, Southerners would be unable to move to the territories with their property. According to Calhoun, such discrimination against the property of the citizens of the southern states would be inconsistent with the ideals of state equality inherent in the federal system.[140]

Calhoun turned slavery in the territories into a constitutional imperative because he feared that, if slavery were to be excluded, the South would eventually become a permanent minority in the

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[135] Most Republicans advocated this doctrine. *Cf.* Scott v. Sandford, 60 U.S. 393, 540 (McLean, J., dissenting); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 438-39 (1978).

[136] *See* John C. Calhoun, Speech on presenting his Resolutions on the Slave Question, made in the Senate (Feb. 19, 1847), *in* 4 THE WORKS OF JOHN C. CALHOUN 339, 344 (Richard K. Cralle ed., New York, D. Appleton & Co. 1854). Calhoun advanced this theory in his response to the Wilmot Proviso, a proposal that would have banned slavery from any territory acquired from Mexico. *Id.*

[137] *Id.* at 344 ("Ours is a Federal Constitution. The States are its constituents, and not the people. . . . The whole system is based on justice and equality—perfect equality between the members of this republic.").

[138] *Id.* at 344-45.

[139] *Id.* at 345.

[140] *Id.* at 344-45. Calhoun included this argument in his Address of the Southern Delegates in Congress, which was signed by nearly 50 southern congressmen. *See* John C. Calhoun, Address of the Southern Delegates, to their Constituents (Feb. 2, 1849), *in* 6 THE WORKS OF JOHN C. CALHOUN 285, 304 (Richard K. Cralle, ed., New York, D. Appleton & Co. 1854) ("To deprive, then, the Southern States and their citizens of their full share in territories declared to belong to them, in common with the other States, would be in derogation of the equality belonging to them as members of a Federal Union. . . .").

federal government. Unwilling to rely on the "shifting sands of compromise," Calhoun sought more permanent protection for the South on the "firm and stable" ground of the Constitution.[141]

Daniel Webster, one of the most influential politicians and constitutional theorists in the North,[142] responded to Calhoun by arguing that an exclusion of slavery from the territories would not "deprive [Southerners] of the privilege of going into these newly acquired territories with all that, in the general estimate of human society, in the general, and common, and universal understanding of mankind, is esteemed property."[143] Webster continued: "The real meaning, then, of Southern gentlemen, in making this complaint, is, that they cannot go into the territories of the United States *carrying with them their own peculiar local law*, a law which creates property in persons."[144] According to Webster, because no state had the right to an extraterritorial application of its laws in the federal territories, an exclusion of slavery would not be contrary to the principle of equality between the states.[145] In fact, Webster further asserted that, because free and slave labor could not easily coexist, a rule requiring slavery in the territories would deny equality to the northern states.[146]

In a second approach, abolitionists argued that the Constitution forbid the introduction of slavery into the territories. Although this approach was not politically influential due to the marginal status of the abolition movement in the antebellum era,[147] antislavery forces mounted power arguments. For example, William Goodell, a founder of the American Antislavery Society

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[141] Calhoun, *supra* note 136, at 347; *see also, e.g.,* John C. Calhoun, 25 THE PAPERS OF JOHN C. CALHOUN, at xiv-xvii (Clyde N. Wilson & Shirley Bright Cook eds., 1999).

[142] Webster was the leading figure in the Whig Party in the North. He was often referred to as the "Expounder of the Constitution" or (my personal favorite) the "Godlike Daniel." *See, e.g.*, ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 28-29, 162 (1997). Webster had squared off against Calhoun earlier in the constitutional debates over South Carolina's Nullification Crisis.

[143] Daniel Webster, Speech on the Exclusion of Slavery from the Territories (Aug. 12, 1848), *in* THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 569, 572 (Bos., Little, Brown, & Co. 1879).

[144] *Id.* at 573 (emphasis added).

[145] *Id.* at 574 ("There is, then, no exclusion of Southern people; only an exclusion of a peculiar local law. Neither in principle or in fact is there any inequality.")

[146] *Id.* at 573-74.

[147] As noted above, the mainstream antislavery approach was simply that Congress has complete discretion under the Territories Clause. *See supra* note 133.

and leader in the antislavery Liberty Party, argued that the Due Process Clause prohibited Congress from introducing slavery into the territories.[148] Goodell began by contending that any laws authorizing slavery within a territory "ceased to be in force at the moment when said Territories . . . were ceded to the United States, and consequently every slave therein, became, at that moment, free."[149] Goodell therefore started from two premises: (1) like Judge Shaw in *Aves*, he assumed that slavery could exist only where authorized by positive law; and (2) at the moment of acquisition of federal territory, no such positive law allowing slavery was in effect.[150]

From these premises, Goodell argued that any attempt to introduce slavery would violate the Due Process Clause of the Fifth Amendment. Interestingly, he did not rely on what has become known as "substantive Due Process." Instead, quoting from Justice Story's influential *Commentaries on the Constitution*, he defined the "process" that was "due" under the Clause as "the right of trial, according to process and proceedings of common law." For Goodell, these common law processes included "indictment by a grand jury, trial and conviction by a petit jury, and corresponding judgment of a Court."[151] Goodell further contended that, because the Clause applies to a "person" rather than a citizen, its protections applied to any "human being."[152] Applying these definitions to slavery in the territories, he argued that, since slavery did not initially exist, any Congressional attempt to introduce it would violate the Due Process Clause by depriving a human being of his liberty without indictment, conviction by a jury, and judgment by a court of law.[153] According to Goodell's procedural due process argument, Congress thus

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[148] *See* WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 57-65 (2d ed. 1971).

[149] *Id.* at 64.

[150] In other words, the laws France and Spain permitting slavery no longer had any legal force. This second assumption would be unnecessary for the territory acquired from Mexico, however, since Mexico had prohibited slavery.

[151] *Id.* at 61.

[152] Although this definition may seem like a tautology to a modern reader, the Supreme Court's later ruling in *Dred Scott* would imply that the protections of the Due Process Clause would not apply to blacks, because they were not members of the original constitutional compact. *See infra* note 166.

[153] GOODELL, *supra* note 148, at 61-64.

could pass no law creating slavery in a federal territory unless it also created a procedure by which to try each alleged slave in a common law court.[154] Other antislavery leaders held similar views.[155]

Third, conservative northern democrats struck a middle-ground with their theory of "popular sovereignty."[156] The Democratic presidential candidate in 1848, Senator Lewis Cass, put forth the most well-known account in his "Nicholson Letter."[157] Cass believed that Congress lacked the power to regulate slavery in the territories; instead, he was "in favor of leaving to the people of any territory, which may be hereafter acquired, the right to regulate it for themselves."[158] While the Constitution granted Congress the power to make "all needful rules and regulations respecting the territory or other property of the United States," Cass narrowly construed this Clause to grant Congress power over only the land itself.[159] The Constitution thus did not grant Congress any power to regulate "the lives and persons of our citizens, with the vast variety of objects connected with them."[160]

Cass justified popular sovereignty in both theoretical and practical terms. He asserted that the issue of slavery "should be kept out of the National Legislature" because, "[o]f all the questions that can agitate us, those which are merely sectional in

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[154] Goodell's argument, however, would not prohibit a state from creating slavery, since the Fifth Amendment's due process clause applied only to the federal government. Moreover, he argued that, even if the original Constitution recognized slavery within the states through compromises like the Fugitive Slave Clause, any inconsistency between the original Constitution and the Amendments must be resolved in favor of the later-enacted Amendments. *Id.* at 57-60.

[155] Salmon P. Chase, the future Governor of Ohio and Chief Justice of the United States Supreme Court, for example, had a similar position. *See* Letter from Salmon P. Chase to James Birney (April 2, 1844), *in* 2 LETTERS OF JAMES GILLESPIE BIRNEY, 1831-1857, at 806 (Dwight L. Dumond ed., 1938).

[156] *See, e.g.,* ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS 227-28 (1973).

[157] *See* Lewis Cass, *Nicholson Letter*, WASHINGTON UNION, Dec. 30, 1847, *reprinted in* THE LIFE OF GENERAL LEWIS CASS, WITH HIS LETTERS AND SPEECHES ON VARIOUS SUBJECTS 65 (1848) [hereinafter *Nicholson Letter*].

[158] *Id.* at 67; *see also* WILLARD CARL KLUNDER, LEWIS CASS AND THE POLITICS OF MODERATION 168 (1996).

[159] *Nicholson Letter*, *supra* note 157, at 66.

[160] *Id.*

their character are the most dangerous."[161] Cass recognized that, because of rising sectional tensions, the national government was ill equipped to deal with the issue.[162] On a theoretical level, Cass argued that his interpretation was supported by fundamental values of self-governance and democracy. He explained:

> [t]he theory of our Government presupposes that its various members have reserved to themselves the regulation of all subjects relating to what may be termed their internal police. They are sovereign within their boundaries, except in those cases where they have surrendered to the General Government a portion of their rights.[163]

While he acknowledged that, "[i]n various respects the Territories differ from the States," Cass believed that traditions of local sovereignty favored a narrow interpretation of Congress's powers.[164]

Like the abolitionist position, popular sovereignty therefore denied the extraterritorial application of southern slave law in the territories.[165] In fact, popular sovereignty was based on the idea of local sovereignty.

In the Compromise of 1850, Congress temporarily resolved the conflict over slavery in the territories by established territorial governments in the Mexican Cession without mentioning the status of slavery.[166] Because it did not address whether the territorial governments could exclude slavery before statehood,

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[161] *Id.* at 65, 67.

[162] *Id.* at 67*; see also* JOHANNSEN, *supra* note 156, at 240 (asserting that popular sovereignty was motivated by a desire to remove the politically explosive issue of slavery in the territories from the national debate).

[163] *Nicholson Letter*, *supra* note 157, at 66.

[164] *Id.* Cass's biographer, Willard Carl Klunder, explains that popular sovereignty was supported by "a blending of the ideals of self-government, democracy, federalism, and the national Union." KLUNDER, *supra* note 158, at 170. Cass also asserted that popular sovereignty would not lead to the expansion of slavery, because none of the remaining territory was hospitable to the cash-crops needed to make slavery profitable. *Nicholson Letter*, *supra* note 157, at 68-69.

[165] *See, e.g.*, JOHANNSEN, *supra* note 156, at 237.

[166] California was directly admitted as a state, bypassing the territorial phase. *See* DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 99-100 (Don E. Fehrenbacher ed., 1976).

the Compromise could have been seen as consistent with either Calhoun's theory requiring slavery or popular sovereignty.[167] With the South avoiding the humiliation of a ban on slavery and the North assured that, as a practical matter, slave labor would be economically incompatible with the arid West, the Compromise was widely accepted as a sectional settlement on the slavery issue.

This sectional truce over slavery in the territories, however, came to an abrupt end with the introduction of the Kansas-Nebraska Act in 1854. Introduced by Stephan A. Douglas, a champion of popular sovereignty, this Act organized the Kansas and Nebraska territories and repealed the prohibition on slavery found in the Missouri Compromise.[168] The Kansas-Nebraska Act thus opened these territories to slavery for the first time.[169]

The Kansas-Nebraska Act raised a torrent of antislavery feeling in the North. The Missouri Compromise had been viewed in the North as a "sacred pledge," and, for many, its repeal was seen as a terrible betrayal.[170] Many Northerners who had endorsed the Compromise of 1850 now agreed with antislavery Senators Charles Sumner and Salmon Chase that the bill was "part and parcel of an atrocious plot" to place the nation under "the yoke of a slaveholding despotism."[171]

With sectional tensions escalating, Kansas was seen by many as a test case to determine if popular sovereignty could be a viable resolution of the sectional conflict over slavery in the territories.[172] By any standard, popular sovereignty proved to be a miserable failure. In the initial territorial elections, Missourians

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[167] FEHRENBACHER, *supra* note 131, at 269. The key practical difference between the two theories was whether the territorial government had the power to ban slavery. This issue was not addressed in the Compromise. The Compromise's failure to mention slavery also could have been consistent with the traditional view that Congress had complete power over the territories. *Id.*

[168] POTTER, *supra* note 166, at 146-60.

[169] The Act, however, did not address whether the territorial governments could themselves ban slavery. NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 2-3 (2004).

[170] *Id.* at 164. Douglas claimed that "he could have traveled to Chicago by the light of his own burning effigies." *Id.* at 165.

[171] MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 815 (1999) (quoting Senators Charles Sumner and Salmon Chase).

[172] FEHRENBACHER, *supra* note 131, at 280; ETCHESON, *supra* note 169, at 2-3.

fraudulently cast ballots in Kansas, giving the proslavery forces control. In response, antislavery forces refused to recognize the proslavery territorial government and created their own competing legislature. The ensuing conflict between these factions, which became popularly known as "Bleeding Kansas," ensured that slavery in the territories—and Congress's inability to deal with the issue—remained at the top of the nation's consciousness.

Because Congress had been unable to agree on the legal status of slavery in the territories—particularly with respect to whether a territorial government could ban slavery prior to statehood—prominent national figures had long looked for a judicial resolution of the issue.[173] With Bleeding Kansas stirring sectional agitation, political leaders called on the Court to resolve the sectional dispute. In his inaugural address on March 4, 1857, President Buchanan announced that the Supreme Court would soon rule on the constitutional aspects of slavery in the territories.[174]

In *Dred Scott v. Sandford*, the Court held that Congress lacked the power to ban slavery in the territories.[175] In his opinion for the Court, Chief Justice Taney largely adopted the reasoning earlier proposed by Calhoun to rule that the prohibition against slavery in the Missouri Compromise was unconstitutional. Although Justice Taney did not explicitly argue that the Constitution required the extraterritorial application of southern slave law, as Webster had pointed out with respect to Calhoun's formulation, extraterritoriality was an unstated premise of Taney's argument.

Like Calhoun, Justice Taney started from the premise that the territories were "acquired by the General Government, as the representative and trustee of the people of the United States, and [the territories] must therefore be held in that character for their common and equal benefit."[176] In other words, Justice Taney

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[173] FEHRENBACHER, *supra* note 131, at 280.

[174] *Id.* As discussed below, Buchanan's speech was perceived by many Northerners as evidence that the president was conspiring with a majority of the Supreme Court to nationalize slavery.

[175] 60 U.S. 393, 395 (1857). Of course, the Court also held that African-Americans could not be United States citizens. *Id.* at 393.

[176] *Id.* at 448.

reasoned that because the federal government was the mere trustee of the territories and each state had an equal claim to them, the federal government could not discriminate against the property of the citizens of any state. Justice Taney ultimately held that, "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[177]

Although Justice Taney based his holding on the Due Process Clause, he, like Calhoun, implicitly justified his decision in terms of state equality and federalism.[178] Justice Taney's due process analysis does not depend on the denial of any constitutionally recognized right to hold slaves throughout the Union.[179] Instead, he recognized that a sovereign state may choose to exclude slavery by asserting that "[t]he principle upon which our Governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns."[180] Justice Taney thus fully recognized the ability of a state like New York to prohibit slavery within New York (at least with respect to a domiciliary of New York).

How then, did he reach the conclusion that the exclusion of slavery from the territories would deprive a Southerner of his property without due process of law? As Webster pointed out with respect to Calhoun's similar reasoning, Justice Taney must have assumed that the southern law permitting slavery applied within the territories. If the law of South Carolina, for example, had no application outside of the borders of that state, Congress would in no way discriminate against South Carolina or its laws by

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[177] *Id.* at 450.

[178] There is some scholarly debate about whether Justice Taney based his holding on the Due Process Clause or Calhoun's theory of state equality. *See* Brophy, *supra* note 87, at 211-12. This distinction seems to be immaterial for purposes of this Article, since both theories call for the extraterritorial application of state slave law.

[179] Although Justice Taney did assert that "the right of property in a slave is distinctly and expressly affirmed in the Constitution," he merely meant to refute the argument from cases such as *Aves* that slavery is inconsistent with natural law. *Dred Scott*, 60 U.S. at 451.

[180] *Id.* at 447-48.

prohibiting slavery in the territories. It would only make sense to say that Congress treated South Carolina's laws as unequal by banning slavery if the laws of South Carolina would have applied in the absence of action by Congress.

In sum, Justice Taney, like Calhoun, argued that the federal government held the territories for the benefit of states. Since every state has an equal claim to the territories, Congress has no power to discriminate against any particular state or state law. An implicit assumption in this line of argument is that the slave law of the southern states applies extraterritorially in the territories.

In his dissent in *Dred Scott*, Justice John McLean responded to Justice Taney's Due Process argument with the same basic reasoning used earlier by Judge Shaw in *Aves* and by Webster in his reply to Calhoun: southern slave law had no extraterritorial effect.[181] In this particularly powerful passage, McLean asked:

> By virtue of what law is it, that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are made property by the law of the State, and no such power has been given to Congress. Does the master carry with him the law of the State from which he removes into the Territory? And does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty, which every person

[181] McLean had publically expressed similar views regarding slavery in the territories a decade earlier in a letter published in the National Intelligencer. *See Has Congress Power to Institute Slavery*, DAILY NATIONAL INTELLIGENCER (D.C.), Dec. 22, 1847, at 3.

> carries with him from his late domicil? One thing is certain, that its origin has been very recent, and it is unknown to the laws of any civilized country. [182]

McLean thus correctly identified that Taney's opinion relied on the assumption that a Southerner would carry the slave law of his state into the territories. According to McLean, this assumption lacked support. Because state law conferring property in slaves had no effect outside of the enacting state, Congress did not deprive a Southerner of any property (and thus could not violate due process) by declaring that slavery could not exist in the federal territories. Instead of depriving a Southerner of property, Congress had merely decided not to extend the reach of state laws creating property in slaves into the territories.

Dred Scott, and especially Taney's holding that Congress could not prohibit slavery in the territories, quickly became the most heavily-criticized decision in the Court's history. The exclusion of slavery from the territories was a central tenant of the fledgling Republican Party. As Don Fehrenbacher documented in his Pulitzer Prize winning account, the Republican press therefore denounced the decision in the harshest possible terms, and Republican-controlled state legislatures passed resolutions condemning the decision and extending additional protections to free blacks.[183] While Republicans mercilessly attacked Taney's reasoning regarding the territories, perhaps more significantly, they also warned that it could have ominous consequences for the Free States.

3. Slavery in the States

Throughout most of the antebellum period, there was a strong federal consensus that, with very few exceptions, Congress

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[182] *Dred Scott*, 60 U.S. at 548-49 (McLean, J., dissenting). Justice Benjamin R. Curtis expressed a similar position in his dissent as well. *See id.* at 626-27 (Curtis, J., dissenting).

[183] *See generally* FEHRENBACHER, *supra* note 135, at 417-37. For example, the Republican press called the decision "atrocious," "wicked," "abominable," and a "collation of false statements and shallow sophistries." *Id.* at 417.

had no power to legislate on the subject of slavery.[184] For example, in *Groves v. Slaughter*, Chief Justice Taney explained:

> [T]he power over this subject is exclusively with the several states; . . . and the action of the several states upon this subject cannot be controlled by congress, either by virtue of its power to regulate commerce, or by virtue of any power conferred by the constitution of the United States.[185]

Moreover, Congress's inability to regulate any aspect of slavery within the states was never seriously questioned by any major political party, including the Republican Party.[186] After *Dred Scott*, however, many Northerners began to fear that a proslavery federal government would nationalize slavery.

In "perhaps the most famous local political contest in American history," Abraham Lincoln made the nationalization of slavery the central theme in his senatorial campaign against Stephen Douglas in Illinois.[187] Lincoln began his campaign by declaring:

> A house divided against itself cannot stand. I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved* – I do not expect the house to *fall* – but I *do* expect it will cease to be divided. It will become *all* one thing or *all* the other. [188]

Lincoln therefore asserted that the constant sectional conflict over slavery could not endure—slavery would either be nationalized or put on the road to extinction.

Throughout his debates with Douglas, Lincoln charged that there was "a conspiracy among those who have engineered this

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[184] *See, e.g.*, FEHRENBACHER, *supra* note 131, at 10. The exceptions were the issues of fugitive slaves and the international slave trade, both of which were specifically addressed in the Constitution.

[185] 40 U.S. 449, 507-08 (1841).

[186] *See, e.g.*, FEHRENBACHER, *supra* note 131, at 10.

[187] POTTER, *supra* note 166, at 333; FEHRENBACHER, *supra* note 135, at 451. While Republicans had denounced *Dred Scott* as laying the groundwork for the nationalization of slavery since the decision was rendered, *id.* at 437, 451, Lincoln's is the classic account.

[188] Abraham Lincoln, A House Divided, Address Before the Republican State Convention (June 6, 1858), *available at* http://www.nps.gov/liho/historyculture/housedivided.htm.

slavery question for the last four or five years, to make slavery perpetual and universal in this nation."[189] He stated:

> Then what is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision. It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial Legislature can do it. When that is decided and acquiesced in, the whole thing is done.[190]

Lincoln's fears that the federal government would seek to nationalize slavery were not idiosyncratic. Since *Dred Scott*, Republican leaders across the North had similarly warned the electorate that the Democratically-controlled federal government could use it as a precedent to nationalize slavery.[191] According to historian Don Fehrenbacher, *Dred Scott*'s most significant effect was making Northerners distrust southern intentions regarding slavery's expansion.[192]

Lincoln and other Republicans identified the issue that could precipitate "the next Dred Scott decision:" the status of sojourning slaves. In his famous Cooper Union Address, Lincoln cited O'Connor's arguments from the *Lemmon* case as a southern demand to overthrow the Free State constitutions.[193] As one Republican newspaper asked: "If a man can hold a slave one day in a free state, why not one month, why not one year? Why could not his 'transit' be indefinitely lengthened, his 'visit' a practical permanency?"[194] Other prominent Republican leaders and newspapers also explicitly linked the issue raised in the *Lemmon*

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[189] First Lincoln-Douglas Debate: Ottawa, Illinois, Aug. 21, 1858, *available at* http://www.nps.gov/liho/historyculture/debate1.htm. Lincoln specifically identified Douglas, Chief Justice Taney, and Presidents Pierce and Buchanan as being involved in the conspiracy. *See id.*

[190] *Id.*

[191] *See* FEHRENBACHER, *supra* note 135, at 437; *see also, e.g.,* HORACE GREELEY & JOHN LOWELL, A LEGAL REVIEW OF THE CASE OF DRED SCOTT 36 (Boston, Crosby, Nichols, & Co. 1857).

[192] FEHRENBACHER, *supra* note 135, at 451.

[193] *See* FINKELMAN, *supra* note 64, at 319.

[194] *Id.* at 314 (quoting *A Distinction but no Difference*, THE SPRINGFIELD DAILY REPUBLICAN, Dec. 12, 1857, at 4).

case to a potential Supreme Court decision nationalizing slavery.[195]

C. Summary and Interpretation of the Antebellum Experience

Before the rise of sectional tensions over slavery, it was generally accepted that each state had total discretion when deciding whether to apply the law of another state as a necessary incident of state sovereignty. In early slave transit cases like *Aves*, most agreed that nothing compelled the Free States to apply southern slave law. The debate was instead over whether the Free States should voluntarily extend comity. Similarly, Congress's early bans on slavery in portions of the territories were recognized as constitutional because it was generally agreed that southern slave law would not apply in the territories of its own force. And certainly, prior to the eve of the Civil War, no one would have imagined that the Free States could be constitutionally required to recognize southern slave law in the North. At a time when the North had relatively ambivalent feelings towards slavery, a robust understanding of state sovereignty seems to have caused few problems.

As sectional conflict emerged over the issue of slavery, however, Southerners began to argue for the extraterritorial application of the law of slavery. In *Lemmon*, proslavery forces argued that implicit constitutional principles of federalism prohibited New York from rejecting the law of a sister state simply because of moral disapproval of such law. They argued that, by accepting the Constitution, New York had accepted the institutions and laws of Virginia as being equal to its own. In rejecting this argument, the New York courts stressed that no sovereign state could be forced to follow the commands of another state. If Virginia could force New York to recognize slavery, New

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[195] *See, e.g.*, *Ohio Politics—Speech of Governor Chase*, THE NAT'L ERA (D.C.), Sept. 15, 1859, at 148; *Speech of Hon. Lyman Trumbull, of Illinois, at a Mass Meeting in Chicago, August 7, 1858*, THE NAT'L ERA (D.C.), Sept. 2, 1858, at 140; *Slavery Agitation – Nulification – The Lecompton Constitution*, THE NAT'L ERA (D.C.), Apr. 22, 1858, at 61; *Speech of Hon. Mason W. Tappan*, NEW YORK DAILY TRIBUNE, Apr. 16, 1860; *The Lemmon Case*, THE JEFFERSONIAN DEMOCRAT (Chardon, Ohio), Feb. 10, 1860; FEHRENBACHER, *supra* note 135, at 444-45 (stating that antislavery leaders warned that *Lemmon* could be used as a vehicle to nationalize slavery).

York would lose its sovereign power to legislate for the good of its citizens. While the rulings of the New York courts angered many in the South, the backlash was not particularly drastic (by antebellum standards), and some Southerners actually agreed with the legal principles announced by the courts.[196]

On the issue of slavery in the territories, the Supreme Court eventually held in *Dred Scott* that southern slave law applied extraterritorially in the federal territories. As Webster and McLean recognized,[197] the Court seems to have implicitly found that, because the territories were held for the benefit of each state, a citizen moving to the territories carried the law of his state with him, at least with respect to slavery. The Court therefore based this extraterritorial application of state law on principles of state equality.

Compared to southern reaction to *Lemmon*, the backlash against *Dred Scott* was profound. Most significantly, many prominent Republicans came to plausibly believe that these same arguments could have been used to force the Free States to recognize the right of a Southerner to hold slaves in the North. The Republicans' rise to power, and especially Lincoln's election, was intimately connected to northern concern that the South was forcing slavery on the territories and might do the same in the North.

While the backlash against *Dred Scott* was a complex phenomenon with many contributing factors, the comparison between it and the reaction to *Lemmon* is suggestive of the values at stake.[198] When positions hardened on slavery, the states had a profound interest in which law would apply. The approach taken in the *Lemmon* case—allowing New York to reject Virginia law out of belief that New York had the better law—damaged feelings of state equality within the Union. Virginians thought New York failed to show proper respect for the laws of Virginia. The prospect of New York being forced to recognize slavery, however, threatened to infringe New York's sovereignty. Northerners

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196 *See supra* notes 110-11 and accompanying text.

197 Although Webster had passed away by the time of the Court's ruling, he had made this point with respect to Calhoun's similar argument.

198 Of course, one major factor is that *Dred Scott* was a Supreme Court decision, whereas *Lemmon* was merely a ruling from the highest court in New York.

thought that, if their courts could be compelled to apply and enforce an offensive law passed by another sovereign, they would lose an essential right to self-governance. In retrospect, the position taken by the Court in *Dred Scott*, and especially the hypothetical "next Dred Scott decision," seems far more damaging to federalism and national unity than the alternative.

III. APPLYING THE ANTEBELLUM EXPERIENCE TO MODERN LAW REGARDING EXTRATERRITORIAL STATE POWER

The antebellum experience provides support for each of the Court's doctrines relating to extraterritorial state power. Moreover, appreciating the full scope of the values at stake also helps to reconcile the Court's divergent doctrines.

A. Constitutional Limitations on State Choice of Law

Antebellum doctrine supports the Supreme Court's "modest restrictions" on a state's choice of law.[199] In fact, under the antebellum understanding, there were no constitutional limitations on a state court's choice of law. As Justice Story famously stated in his *Commentaries*,

> the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. . . . Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them.[200]

Under this view, no state could be forced to apply the law of another sovereign. Constitutional limits on a state's choice of law therefore cannot be justified under principles of federalism, at least with respect to the antebellum constitution.

The Supreme Court's modern limitations on a state's choice of law are thus consistent with the antebellum constitution only if

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[199] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985).

[200] STORY, *supra* note 47, at § 7.

they are based in the Due Process Clause of the Fourteenth Amendment. Much like modern Due Process law in the personal jurisdiction context, the Court has held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[201] As long as the Court is focused on fairness to the parties, its test, unlike the more robust proposals of many scholars, is fully supported by antebellum treatment of the issue.

Occasionally, however, the Supreme Court has cited the Full Faith and Credit Clause in addition to the Due Process Clause to support its choice of law analysis.[202] According to the Court, the Full Faith and Credit Clause is relevant because it "require[s] the forum to respect the laws and judgments of other States."[203] I have argued elsewhere that, with respect to state laws, the Full Faith and Credit Clause was originally understood to have only required recognition that the laws of State X were valid within State X.[204] The historical evidence reviewed in this Article likewise suggests that the Full Faith and Credit Clause was not thought to impose any limitations on state choice of law in the antebellum era. The Clause was not even mentioned in *Lemmon* or *Aves*. The Court should therefore base its choice of law test only in Due Process.

To be fair, the Court's modern invocation of Full Faith and Credit, though unsupported by the clause's history, can be seen as a textual grounding for the idea that principles of state equality should limit state choice of law. Such arguments have been advanced most forcefully by the many scholars who think that greater constitutional limitations should be placed on a state court's choice of law. Much like O'Connor's argument on behalf of the Lemmons, these scholars contend that principles of state equality inherent in our federal system dictate that no state can

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[201] *Phillips*, 472 U.S. at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

[202] *See, e.g.*, *Allstate*, 449 U.S. at 308.

[203] *Phillips*, 472 U.S. at 819.

[204] Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 531-32 (2013). Professor Regan has also argued that the Court's doctrine cannot be based in the Full Faith and Credit Clause. *See* Regan, *supra* note 1, at 1892-94.

choose to apply forum law over the law of a sister state merely because of a belief that the forum has the better law.[205]

The historical evidence cited in this Article suggests that the Court should not rely on implicit principles of federalism to force one state to apply the law of another state. As cases like *Lemmon* demonstrate, principles of state equality can conflict with those of state sovereignty. If the Supreme Court had heard an appeal from *Lemmon* in the hypothetical "next Dred Scott decision," it would have faced a clear choice. While a ruling in favor of the Lemmons would have forced New York to show equal respect to the laws of Virginia, it also would have taken away New York's right to local self-governance of its domestic institutions.[206] As an historical matter, there is little doubt that forcing slavery on New York would have placed a tremendous strain on state relations within the Union. The mere prospect of a decision nationalizing slavery helped propel the sectional Republican Party to power, despite fervent warnings from the Democratic Party that a Republican triumph would result in a bloody Civil War. The antebellum experience thus suggests that, if strict limitations on a state's choice of law had been in place, they would have undermined the very federalism goals such limitations are supposed to serve.

This is not to say that states should ignore the law of their sister states. In ordinary cases, where states are relatively indifferent as to which law should apply, states routinely apply the law of other states without complaint. For example, when Northern states were ambivalent about slavery, they regularly applied southern law. However, in those instances where a state refuses to apply the law of another state, important policy objectives are often at stake. *Lemmon* and *Dred Scott* suggest that constitutional rules which would force a state to adopt and enforce the law of a sister state in such circumstances would only undermine harmony in the federal system.

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[205] *See supra* note 7.

[206] State equality would demand this result because normal choice of law rules would dictate that property rights are determined by the law of the sojourner's domicile, which, in *Lemmon*, would have meant the application of Virginia law.

B. Constitutional Limitations on Extraterritorial State Legislation

Although it has received strong criticism from modern legal scholars and courts,[207] the Supreme Court's strict prohibition on extraterritorial state legislation is strongly supported by notions of state sovereignty that date back to the antebellum period.[208] As Justice Story explained nearly two-hundred years ago, state sovereignty implies that "no state or nation can, by its laws, directly affect, or bind property out of its territory, or persons not resident therein."[209] Although conduct in state A may have a significant effect within state B, the nature of state sovereignty in our federal system implies that state B may not directly regulate such conduct.

Moreover, the extraterritoriality doctrine is not "a relic of the old world with no useful role to play in the new," as Judge Sutton recently argued in *American Beverage*.[210] Judge Sutton's statement is driven by his view that, historically, the extraterritoriality doctrine was created to facilitate the allocation of power between the state and federal governments. He asserts that the doctrine served to restrict the states to their proper local sphere, so that they would not interfere in the exclusively federal regulation of interstate commerce.[211] For Judge Sutton, when the lines between "local" regulation and regulation of interstate commerce blurred over time, the extraterritoriality doctrine ceased to have a purpose. He therefore asserts that courts should be concerned only with whether state law discriminates against out-of-state commerce or in favor of in-state commerce.[212] Academics have advanced similar viewpoints.[213]

Judge Sutton's argument, however, misses the mark. I agree that, for the reasons advanced by Judge Sutton, extraterritoriality does not help in the allocation of power between the state and

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[207] *See supra* notes 42, 44.

[208] As detailed in Part I, the Court has prohibited a state from applying its statutes to conduct that "takes place wholly outside of the State's borders." Edgar v. MITE Corp., 457 U.S. 624, 642 (1982).

[209] STORY, *supra* note 47, at § 20.

[210] American Beverage Ass'n v. Snyder, 700 F.3d, 796, 812 (6th Cir. 2012).

[211] *Id.* at 811.

[212] *Id.* at 811-14.

[213] *See* Denning, *supra* note 11, at 981.

federal governments, or vertical federalism. As the debates over the extraterritorial application of southern slave law demonstrate, however, the historical antecedents of the doctrine are grounded in concern over the proper allocation of power between the states, or horizontal federalism.[214] In *Lemmon*, for example, the issue was whether New York was constitutionally required to apply the law of Virginia, not a federal law.[215] The fact that the state and federal governments may have overlapping authority does not provide a reason to abandon a tool designed to ensure the proper allocation of power between the states. The question of which state has such overlapping authority with the federal government remains.

Judge Sutton's more powerful critique is that the doctrine is essentially meaningless because "[t]he modern reality is that the States frequently regulate activities that occur entirely within one State but have effects in many."[216] In *American Beverage*, Judge Sutton offers the following example: a California law establishing emissions standards for cars sold in California practically has the effect of setting standards for cars sold in every state in the country.[217] According to Judge Sutton, there is no real difference between the California law and a state law that directly regulates commerce in another state, such as the Michigan law at issue in *American Beverage*.[218]

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[214] Judge Sutton's treatment of the extraterritoriality doctrine is driven in part by the context of *American Beverage Association,* which seems to have been argued solely in terms of the dormant commerce clause. As detailed above, however, the extraterritoriality doctrine is grounded in both the commerce clause and implicit principles of federalism. *See supra* notes 31, 131.

[215] Although the facts of *Lemmon* represent a choice of law problem, it is easy to the situation in the context of the extraterritoriality doctrine. For example, Virginia could have passed a law stating that Virginians could travel to New York with their slaves.

[216] *American Beverage*, 700 F.3d. at 812.

[217] *Id*. at 812-13. Although Judge Sutton does not explain why the California law does not violate the extraterritoriality doctrine, he cites *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), which deals with an analogous law. In *Sorrell*, the Second Circuit upheld a Vermont law requiring all mercury-containing light bulbs to have labeling instructions regarding safe disposal of the product. The court held that the Vermont statute was not impermissibly extraterritorial because it did not inevitably require the manufacturers to label light bulbs in any other state. *Id.* at 110. According to the court, the manufacturers could instead stop selling in Vermont or create Vermont-specific products and charge consumers in Vermont a higher price. *Id.* at 110-11.

[218] 700 F.3d at 813.

If we are to take the antebellum idea of state sovereignty seriously, however, Judge Sutton's argument should not spell the end of extraterritoriality. Judge Sutton is correct that a regulation like the California emissions law can have the same practical effect on conduct in other states as a direct regulation like the Michigan container law. However, these statutes have very different implications for state sovereignty, a core aspect of the federal system created in the Constitution of 1787. As the Supreme Court pronounced nearly 200 years ago in *Ogden v. Saunders*, "when . . . the States pass beyond their own limits, . . . there arises a conflict of sovereign power, . . . which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States."[219] Despite significant constitutional change in the intervening years, this core aspect of state sovereignty at least arguably remains.

Although reliance on abstract notions of sovereignty may seem to create overly formalistic distinctions between permissible and impermissible regulations that lack a practical justification, such formalistic distinctions are necessary if sovereignty is to be respected. To build on Judge Sutton's example, if Canada, which has an economy roughly equal in size to that of California, were to pass new automobile regulations that differed materially from those in the United States, such regulations could have significant practical effects in the United States, as American auto manufacturers both manufacture and sell large numbers of automobiles in Canada. However, no one would seriously argue that Canada can therefore directly regulate activity in the United States. While such an argument seems laughable in the international context, it appears plausible in the context of state regulation only because of a lack of respect for state sovereignty.

Such distinctions based on legal formalism are common in constitutional law. For example, in *South Dakota v. Dole*,[220] the Supreme Court held that, under the spending power, Congress could withhold highway funds to states that did not increase their legal drinking age to twenty-one.[221] Although the practical effect of this legislation was to require all states to raise their legal

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[219] 25 U.S. 213, 369 (1827).

[220] 483 U.S. 203 (1987).

[221] *Id.* at 212.

drinking age, this does not imply that Congress can directly set a nation-wide legal drinking age. Similarly, although a state can regulate in-state behavior in such a way as to practically affect out-of-state conduct, this does not necessarily imply that the state should be able to directly regulate such out-of-state conduct. The formal legal manner in which a legislature structures its regulations can be constitutionally significant.

In addition to the concerns raised by Judge Sutton, scholars have also argued that states should be able to regulate extraterritorial conduct because such conduct can have serious in-state effects.[222] First and foremost, such an argument raises the same concerns for state sovereignty already discussed. Secondly, these scholars overstate the nature of the potential problem. The extraterritoriality doctrine does not mean that a state is helpless to regulate conduct that occurs beyond its borders. Under the antebellum framework, the states essentially treated each other as foreign powers, and, like with foreign countries, the extraterritorial application of state law was possible with cooperation and comity. The choice confronted by the Court is thus not one between allowing extraterritorial regulation and prohibiting it; instead, it is between, on the one hand allowing a state to unilaterally force its legislation on other states and, on the other hand, requiring the states to compromise and cooperate with each other. The antebellum experience suggests that, when the states care deeply about which law will apply, allowing one state to force its legislation on another may be worse than a failure of cooperation.

C. Reconciling Limitations on Choice of Law with the Prohibition against Extraterritorial Legislation

Even if these arguments are correct, and the Supreme Court's doctrine is defensible, scholars have argued that there is no theoretical justification for allowing a state court to apply forum law extraterritorially through its choice of law analysis, while at the same time prohibiting a state legislature from directly regulating conduct that occurs outside the state.[223]

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[222] *See supra* note 42.

[223] *See supra* note 1.

According to these scholars, regardless of the historical pedigree of the Court's analysis, it should nevertheless be rejected because it is internally inconsistent.

The antebellum focus on state sovereignty, however, presents a potential way to justify the Court's differing treatment of state courts and state legislatures. Although a state may be able to reach the same results through its courts' choice of law analysis as it could through direct legislation, the manner in which the Supreme Court regulates these activities has very different implications. When a state legislature passes a statute that regulates conduct which occurs wholly in another state, the Supreme Court merely serves its delegated function by finding the statute unconstitutional and restricting the state to its proper sphere.[224] As the Supreme Court found in *Ableman*, "[i]nstead of reserving the right to seek redress for injustice from another State by their sovereign powers, [the States] have bound themselves to submit to the decision of this Court, and to abide by its judgment."[225]

When the Supreme Court forces a state court to apply the law of another state, however, the Court essentially makes the courts of one state the instrumentality of the sovereign power of another state. At least under antebellum notions of federalism, this situation was impermissible, as no state could commandeer the courts of another sovereign. As Justice Story explained, because "[i]t is an essential attribute of every sovereignty, that it has no admitted superior," a state court could "not be commanded by another" state to recognize or enforce its laws.[226] While state courts regularly applied the law of other states, this was done voluntarily, as a matter of comity.

In sum, under the antebellum theory of dual sovereignty, the Supreme Court uniquely possessed the power to declare when a state exceeded its power and infringed on the rights of another sovereign state. The Court could thus hold that such state legislation had no extraterritorial effect. Dual sovereignty, however, did not contemplate that states had given up part of

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[224] Here, the Court would not be telling the state what legislation to enact; in fact, the state law would potentially still be operative within the enacting state.

[225] Ableman v. Booth, 62 U.S. 506, 519 (1858).

[226] STORY, *supra* note 47, at § 8.

their sovereign power to the legislature of another state. While the Court could declare legislation void, it could not force the judges of one state to apply and enforce the laws of another.[227]

CONCLUSION

The legal battles over the territorial reach of southern slave law were perhaps the most significant and contentious debates over the extraterritorial application of state law in American history. For the South, northern rejection of slavery when normal choice of law provisions would dictate its application was insulting and inconsistent with equality within the Union. To Northerners, however, forced application of slavery within their states would have undermined a core aspect of state sovereignty.

The southern argument for equal treatment of state laws can be seen as an early precursor to modern scholarship calling for stricter constitutional limitations on state choice of law. Often missing from the modern debate, however, is any serious consideration of the northern position that such constitutional limitations would infringe on important aspects of state sovereignty. The antebellum experience strongly suggests that in the choice of law situations that are most important—those where the states care deeply about which law will be applied—placing a higher value on state sovereignty than state equality is more conducive to national harmony. The Supreme Court's decision to impose very modest limitations on a state's choice of law is thus fully supported by the antebellum experience.

Antebellum debates over the reach of southern slave law also help to make sense of the Court's much-maligned prohibition on extraterritorial legislation. Although the extraterritoriality doctrine does not prohibit all state regulation which affects conduct in other states, some limitations are necessary if we are to take state sovereignty seriously. For example, although California practically affects car sales in Nevada when it imposes regulations on all cars sold in California, this type of regulation is fundamentally different from a California law that directly

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[227] While the Court could force state judges to apply and enforce *federal* law, this was fundamentally different than the Court forcing a state to apply the law of another *state*. Under dual sovereignty, while the states and federal government each shared elements of sovereignty, there was no similar sharing of power between the states.

regulates such sales in Nevada. While the line between permissible and unconstitutionally extraterritorial legislation may not always be clear at the margins, the antebellum concept of state sovereignty demands that a line be drawn.

Moreover, when viewed through the lens of antebellum notions of state sovereignty, the extraterritoriality doctrine is consistent with the Court's permissive approach to choice of law. Under the antebellum understanding of the Constitution, the Supreme Court has the unique role of making sure that the states and federal government operate within their respective spheres. The Supreme Court therefore unquestionably has the power to hold that extraterritorial state law is unconstitutional. The Court, however, lacks the power to make one state apply and enforce the laws of another state. State sovereignty dictates that, while state courts may decide to extend comity, they cannot be commandeered by the dictates of another sovereign.