

COGNITIVE DISSONANCE IN THE ANTEBELLUM SOUTH ABOUT THE LAWFULNESS OF SLAVERY

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INTRODUCTION

The institution of slavery, by its nature, was necessarily grounded in law. For whenever a society adjudges one class of persons as free and another as enslaved, law-like norms must exist to identify and distinguish the free from the enslaved. And whenever a society institutionalizes slavery, law-like norms must exist to establish the privileges and disabilities possessed by masters, by the enslaved, and by third persons in relation to masters and slaves.¹ Such master-slave norms may not always be enforced. But, until societies disavow or disremember them, they constitute standards of right and wrong that master-slave societies profess to embrace.²

American slaveholding colonies and states implicitly understood slavery's dependence on law by adopting comprehensive slave codes³, enacting thousands of statutes and issuing thousands of judicial opinions that addressed the rights and duties of slaveholders, slaves, and third persons in relation to masters and slaves.⁴ Judicial opinions in particular provide unique insight into

¹ See MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH* 6 (2003); *Scott v. Sanford*, 60 U.S. 393, 625 (1857) (Curtis, J., dissenting):

[N]ot only must the *status* of slavery be created and measured by municipal law, but the rights, powers, and obligations, which grow out of that *status*, must be defined, protected, and enforced, by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

² See PETER KOLCHIN, *AMERICAN SLAVERY 1619-1877* 4-5 (1st ed. 1993) (“[Masters] [everywhere] had to create a ‘we-they’ dichotomy necessary to distinguish those who might legitimately be enslaved from those who could not . . .”).

³ See Edward B. Rugemer, *The Development of Mastery and Race in the Comprehensive Slave Codes of the Greater Caribbean During the Seventeenth Century*, 70 WM. & MARY Q. 429, 430, 432 n.6 (2013) (describing the comprehensive slave codes of the colonies of South Carolina and Virginia of 1691 and 1705, respectively). See also ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 63-82 (1989).

⁴ See STATE SLAVERY STATUTES: GUIDE TO THE MICROFICHE COLLECTION (Paul Finkelman ed., 1989) (providing a bibliography of what its editorial adviser describes as

master-slave norms because, unlike legislators who can promulgate rules without accompanying justifications, judges are institutionally obliged to justify their rulings by referencing established norms or, at least, endeavoring to do so.⁵

This essay examines a set of antebellum southern judicial opinions in the 1850s that I believe reflect growing cognitive dissonance among southern public officials in general and southern judges in particular about the legitimacy of slavery. The cases involve litigants like Dred Scott—persons who had been slaves by law when they lived in the South, who had moved North with their owners where they were deemed legally free, and who then returned South where their owners successfully reclaimed them as slaves. Southern cognitive dissonance stemmed from southerners' embracing two norms, whose subjects were all Black—namely, one governing Black slaves who *lacked* valid claims to freedom under southern law, and another governing Black persons who, regardless of whether they were currently held as slaves, *possessed* valid claims to freedom under southern law. Southern public officials widely and publicly embraced both norms: they supported Black slavery as institutionalized in the South, yet, they simultaneously supported liberty for Black persons who, though they might be currently held as slaves, had valid claims to freedom under southern law, whether by virtue of (i) deriving their free status from descent from maternal ancestors who, rather than having been lawfully enslaved when giving birth, were rightly free; (ii) manumission; (iii) state-ordered emancipation; or (iv) residence in a free state or territory the laws of which southern states recognized.⁶

more than 7,100 slave-state statutes on slavery); *See also* JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1926) (providing excerpts from and citations to judicial decisions regarding slavery); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 (1996) (providing a comprehensive modern account of the American law of slavery); *see also* THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA. TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY (1858) (providing an 1858 treatise on the law of slavery by a proslavery southerner).

⁵ *See* ALFRED L. BROPHY, UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF THE CIVIL WAR 254-55 (2016).

⁶ *See infra* Section II(B).

Dred Scott-type cases help reveal how southern judges and southern public officials, in general, justified Black slavery while simultaneously demanding emancipation for Black persons who possessed valid claims to freedom. They did so by invoking a legal distinction that many slaveholders in the South would have embraced as well – the normative distinction between (1) the legitimacy of *holding* in slavery Black persons who had either been lawfully enslaved abroad (and who had not since been lawfully manumitted or emancipated) and/or Black persons who descended in an uninterrupted maternal line from such persons (and who had not since been lawfully manumitted or emancipated), and (2) the illegitimacy of *enslaving* Black persons of other origins and descriptions.

Antebellum public officials relied upon the distinction to reject out of hand abolitionist criticism that, by virtue of *holding* slaves, they were “man-stealers,” “pirates,” “robbers,” “kidnappers,” and “enslavers.”⁷ By the early 19th century, however, the distinction between norms 1 and 2 became increasingly incompatible in the minds of southern public officials, though they may not have been fully conscious of it.

I. PERTINENT ELEMENTS OF SOUTHERN SLAVE LAW

Slave laws perform diverse functions. At their core, however, they identify persons who are subject to bondage, and they further establish whether such bondage is for a term of years, for a person’s lifetime, or “perpetual,” that is, a condition of bondage inherited at birth passed on in perpetuity. Thus, the first legal code in New England, the Massachusetts Body of Liberties of 1641, authorized lifelong bondage of (i) Indians taken as “[lawful] [c]aptives” in “just [wars];” (ii) bondage of “such strangers as . . . are sold to us,” including Africans; and (iii) slavery as form of criminal

⁷ Deborah A. Rosen, *The Concept of Piracy in Nineteenth-Century American Abolitionist Rhetoric*, 38 *SLAVERY AND ABOLITION* 697, 700-04 (2017) (stating that abolitionists argued that slave owners acted as “pirates” each time they subjected a newborn to slavery).

punishment.⁸ Within decades, Massachusetts treated Black slavery as a perpetual condition that newborns inherited from slave mothers.⁹ Similarly, the Virginia slave code of 1705 declared that persons who were brought to Virginia and who were neither “[C]hristians in their native country” nor previously “free” in a Christian country were “slaves” for life and that children of slave “mothers” were perpetual slaves from birth.¹⁰

With rare exceptions, by the early 19th Century, slavery no longer included Indians and was confined through North America solely to Black persons.¹¹ It was a perpetual condition—a status analogous to illegitimacy inherited at birth from a newborn’s mother¹²—with two exceptions. Slavery was non-perpetual in northern states with gradual-emancipation laws that provided that slaves who were thereafter born to slave mothers became legally free at specified ages.¹³ And slavery was non-perpetual for slaves whose owners manumitted them *in futuro*, resulting in them remaining slaves in the meantime for a term of years (“term

⁸ 1641: *Massachusetts Body of Liberties*, Online Library of Liberty, <https://oll.libertyfund.org/page/1641-massachusetts-body-of-liberties> [<https://perma.cc/TB66-MLZS>] (last visited July 5, 2024) (“There shall never be any bond slaverie villinage or Captivitie amongst us, unless it be lawfull Captives taken in just warres, and such strangers as willingly belie themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.”).

⁹ See JARED ROSS HARDESTY, *BLACK LIVES, NATIVE LANDS, WHITE WORLDS: A HISTORY OF SLAVERY IN NEW ENGLAND* 15-17 (2019).

¹⁰ *An Act Concerning Servants and Slaves (1705)*, ENCYC. VA., <https://encyclopediavirginia.org/entries/an-act-concerning-servants-and-slaves-1705/> [<https://perma.cc/4LDT-PUMQ>] (last visited July 5, 2024).

¹¹ MORRIS, *supra* note 4, at 19-21; ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* 218 (2016). Mexico prohibited bondage of all kinds in the early 19th century. Peonage continued in California after it became a state in 1850, and Indian slavery in violation of Mexican law existed in practice in Utah and territories that the United States acquired from Mexico in 1848. *See Id.* at 2, 6-9, 218-40, 264-65, 279-80. In practice, non-black persons, including white persons, were occasionally revealed to have been held in bondage in the South, but their bondage was unlawful. Carol Wilson & Calvin D. Wilson, *White Slavery: An American Paradox*, 19 *SLAVERY AND ABOLITION* 1, 5-6 (1998).

¹² *See* COBB, *supra* note 4, at 68-78; MORRIS, *supra* note 4, at 43-49.

¹³ *See* SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* 31-41 (2018).

slaves”).¹⁴ Moreover, because Congress banned the foreign importation of slaves after 1807, nearly all persons lawfully held as slaves on the eve of the Civil War were slaves by virtue of birth.¹⁵ The rare exceptions were a scant number of formerly free persons of color who either agreed to forego their freedom and become slaves,¹⁶ or who forfeited their freedom for terms of years or for life as punishment for crimes.¹⁷

II. ACCEPTING SLAVEHOLDING, REJECTING ENSLAVEMENT

Antebellum southern public officials, who accepted the practice of holding in bondage Black persons who had been born as lawful slaves and had not thereafter emancipated, nevertheless condemned the enslaving of free Black persons. They expressed their views in judicial condemnations of the enslavement of free Black persons, in enacting legal safeguards against enslavement of free Black persons, and in speeches in state legislatures and the U.S. Congress. They also professed to believe, with some

¹⁴ See LOREN SCHWENINGER, *APPEALING FOR LIBERTY: FREEDOM SUITS IN THE SOUTH* 36 (2018).

¹⁵ As many as 50,000 Black persons may have been illegally imported to the South from abroad between 1808 and 1860, and many may have been alive in 1860, see HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440-1870* 616 (1997). But, having been imported illegally, they were not lawful slaves. See *id.*

¹⁶ See MORRIS, *supra* note 4, at 31-36.

¹⁷ Some southern states provided that, upon conviction, free persons of color could be enslaved for discrete periods of years, until fines be paid, until restitution was made, for certain terms of years, or for life. See 2 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 16 (1862) (Kentucky, 1808); *id.* at 21 (Maryland, 1825-26); *id.* at 77 (Delaware, 1807); *id.* at 151 (Alabama, 1832); *id.* at 191 (Florida, 1826). Virginia enacted statutes in 1806 and 1823 that provided enslavement for free persons of color who refused to leave the state or committed serious offenses, respectively. See *id.* at 7; JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA, 1619-1865*, 106 (1913). However, local efforts to enforce the 1806 statute were largely ineffectual. See IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 146-48 (1974); see generally EVA SHEPPARD WOLF, *RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION* (2015). The Virginia legislature repealed the 1823 statute in response to public outrage at its implementation. See RUSSELL, *supra* note 17, at 106. Virginia enacted a statute on the eve of the Civil War in 1860, authorizing “absolute slavery” for free persons of color who remained illegally within the state. See Acts of the General Assembly of the State of Virginia of 1859-1860, Ch. 54. But there is no apparent evidence that the statute was actually enforced.

justification, that their refusal to enslave free Black persons was logically consistent with their acceptance of slavery as a condition of birth.

A. Judicial Condemnation of the Enslaving of Free Blacks.

Judicial cases in South Carolina in 1817 and Louisiana in 1857 illustrate judicial condemnation of enslavement of free Black persons. The plaintiff Phebe in the 1817 South Carolina case, *Pepoon, Guardian of a Phebe (a woman of color) v. Clark*, was a Black woman.¹⁸ She alleged that her mother was a free person of color in the slave city of Baltimore who had hired Phebe out at age 12 to a wealthy white Baltimore family whose members thereafter abducted Phebe and held her as a slave in South Carolina. The South Carolina trial court ruled in Phebe's favor, freeing her and awarding her \$400 in unpaid wages. A South Carolina appellate court affirmed the trial court ruling, describing Phebe's abduction as a "base attempt to consign to slavery for life, this unfortunate being, whose very situation called loudly for the protection of every feeling and honest man."¹⁹

The 1857 Louisiana case, *Barclay v. Sewell*²⁰ affirmed the principle that, absent legislation to the contrary, once a Black person was free, he or she was *always* free.²¹ The lawsuit began

¹⁸ SCHWENINGER, *supra* note 14, at 137.

¹⁹ *Id.* at 136.

²⁰ 12 La. Ann. 262 (1857). *See generally* JUDITH KELLEHER SCHAFER, BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846-1862 111-12 (2003).

²¹ *See* *Spencer v. Dennis*, 8 Gill 314 (Md. Ct. of App., 1849) stating the principle, "once free and always free."). The slaveholder in *Spencer* provided in his will that his slaves become free at age of thirty-eight, provided that they leave the state within 30 days of attaining that age and not return. *Id.* at 315. One of his slaves, having remained in the state for more than thirty days, was claimed as a slave by the testator's beneficiaries. *Id.* The Court ruled that once the slave became free at age thirty-eight, neither his master nor his master's beneficiaries had power to "convert [him as] a freeman into a slave," absent explicit legislation to that effect. *See id.* at 321:

with the death of a slave trader named Botts whose Black mistress of seventeen years, Ms. Barclay, claimed that certain property in the deceased's house was hers.²² The executor of the estate argued that Ms. Barclay was a slave and, as such, incapable of buying or owning property.²³ Ms. Barclay replied that, though she had been born a slave in the Botts' household, Botts had taken her to Ohio in 1839 where he manumitted her before returning with her to live in Louisiana.²⁴ A Louisiana trial court ruled for Ms. Barclay, declaring her a free person with the right to buy and own property.²⁵ The Louisiana Supreme Court affirmed, ruling that Botts had validly manumitted Barclay in Ohio and that, because Barclay entered Louisiana with "the status of a free person of color," no law of Louisiana in existence could change it:

A testator, under this enactment, is explicitly empowered to limit or prescribe the period at which manumission shall commence or take effect, but there his power ceases. Freedom having once commenced, the act of Assembly confers no power to the testator, and he possesses none without it, to put an end to a state of freedom, and restore the condition of slavery.

"Once free and always free," is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and liberated slave, nor by any condition subsequent, attached by the master to the gift of freedom, can a state of slavery be reproduced. Nothing short of legislative power, duly exercised, can . . . convert a freeman into a slave.

²² *Barclay*, 12 La. Ann. at 262.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 263-64.

“The power of the master to manumit his slave within the limit of Louisiana, has always been qualified by her laws; but no law of Louisiana in existence in 1839, placed any restraint upon the power of the master domiciled here, to manumit a slave in a foreign State who had been carried thither for that purpose. There is no question but that it was lawful in Ohio for a master resident in Louisiana, to disfranchise his slave who had been carried thither. There is no question but that the emancipation in this instance was complete and formal under the laws of Ohio. *There* the slave became free by the formal act and consent of her master. Her *status* was changed. Upon her subsequent return hither, did she relapse into her original condition? Not unless some law of Louisiana in force at the time entailed such a penalty upon her for her return. We have been referred to no such law; we think there was none.”²⁶

The Louisiana Court then went further and ruled that, although Ms. Barclay had returned from Ohio to Louisiana in violation of a Louisiana law that prohibited free Black persons from entering the state, the prohibition did not carry the penalty of enslavement:

“The plaintiff went away a slave; in Ohio she became free by a lawful act of manumission from her master; upon her return hither she subjected herself to all the penalties imposed upon free persons of color for entering the State in contravention of law. But we do not find one of those penalties to have been a forfeiture of her freedom acquired abroad. She could be ejected from the State; but she could not be reduced to slavery by the master who had emancipated her”²⁷

In Virginia in 1851, William John Clark, a lawyer and slaveholder, claimed to speak for “most all persons in our state” when, after successfully representing a free Black man who had

²⁶ *Id.* at 262-63.

²⁷ *Id.* at 263.

been kidnapped in Pennsylvania and brought to Virginia as a slave, wrote:

“[but like most] holders and owners, we do not mean to see the liberty of any person entitled to it taken from them. . . . [While] I will . . . arrest and punish the intermeddlers with our property and institutions . . . I will go to any lengths, as will most all persons in our state, to vindicate the freedom of those entitled to it.”²⁸

Similarly, in Mississippi in 1826, Duncan Walker, a Mississippi lawyer who acted pro bono to represent Black persons who were kidnapped from Pennsylvania, wrote the Mayor of Philadelphia that “while our laws protect slave property, they will restore the free,” adding that “our forests supply gallows for the kidnapper.”²⁹ The Attorney General of Mississippi similarly wrote the Mayor of Philadelphia that “[t]here is no community that holds in greater abhorrence, that infamous traffic carried on by negro stealers.”³⁰ And a Natchez newspaper published an editorial in connection with the case, declaring that “[p]olicy, as well as humanity, requires that our citizens take every measure in their power to assist in restoring these unfortunate beings to their homes, and their families.”³¹

B. Legal Safeguards Against Enslaving Free Black persons.

The *Pepoon* and *Barclay* cases are examples of “freedom suits” that arose in the South as early as 1646 and that Black litigants ultimately brought in every southern state.³² Every antebellum

²⁸ SCHWENINGER, *supra* note 14, at 68 (alteration in the original).

²⁹ See CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865*, 28-29 (1994).

³⁰ *Id.* at 25.

³¹ *Id.* at 25-30.

³² In 1646 the General Court of the Massachusetts Bay Company ruled that “negroes,” whom the transatlantic Captain Smith had claimed as property of “his” were, in fact, victims of the “haynous [heinous] and crying sinn [sin] of man stealing” whom Smith had “stolen” in Guinea and brought to the Americas, and that the Africans were to be returned as free persons to their home in Guinea. The Court further delivered a letter to the victims, expressing its “indignation” at what it described as Smith’s “vile & most odious conduct.” Records of the Governor and Company of Massachusetts Bay, vol. 2

southern state provided judicial procedures by which putative slaves, who were otherwise barred by their putative status from filing lawsuits, could bring judicial actions to prove that their enslavement was unlawful.³³ Indeed, in an important sense, southerners' own ideology committed them to provide forums for freedom suits. By proclaiming their devotion to "liberty,"³⁴ they were ideologically committed to protect Black persons who, by virtue of the South's own norms, were entitled to liberty rather than slavery.³⁵

The latter point was put best by Benjamin Mills, a judge on the Court of Appeals of Kentucky, in *Rankin v. Lydia*.³⁶ *Rankin* involved a slaveowner who took his slave Lydia with him to live in the free territory of Indiana for seven years and then sold her to a local buyer who, in turn, sold her in a succession of sales to a slaveholder in Kentucky.³⁷ Lydia sued for her freedom in Kentucky.³⁸ In declaring Lydia to be free, Judge Mills wrote that, although "[s]lavery is sanctioned by the laws of this state," the laws of the state also "liberate" slaves on certain grounds, and "every argument which supports the right of the master on one side . . . must be equally conclusive in favor of the slave when he can point out in the statute the clause which secures his freedom."³⁹ Further, Judge Mills opined:

"Slavery is sanctioned by the laws of this state, and the right to hold them under our municipal regulations is unquestionable. . . . If, by their positive provisions in our code,

(1642-1649), p. 168, and vol. 3 (1644-1657), pp. 49, 58 (Nathaniel Shurtleff ed., 1853-54); COBB, *supra* note 4, at 248; SCHWENINGER, *supra* note 14, at 7, 34.

³³ SCHWENINGER, *supra* note 14, at 291-92.

³⁴ See KENNETH S. GREENBERG, MASTERS AND STATESMEN: THE POLITICAL CULTURE OF AMERICAN SLAVERY 85-87 (1985); JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 28 (1982).

³⁵ See *in re* Bodine's Will, 34 Ky. 476, 477 (1836) ("[Slaves] may be emancipated by their owners; and must, of course, have a right to seek and enjoy the protection of the law in the establishment of all deeds, or wills, or other legal documents of emancipation . . .").

³⁶ 9 Ky. 467 (1820).

³⁷ *Id.* at 467-68.

³⁸ *Id.* at 468-70.

³⁹ *Id.*

we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free.”⁴⁰

Admittedly, the liberality of freedom suit procedures varied from one state to another. Some states appointed counsel to represent indigent Black persons in suits for freedom, allowed Black persons to sue in their own names, provided trial by jury, allowed Black persons to testify against white persons, awarded back-pay to Black persons wrongly held in bondage, and, pending the outcome of litigation, required owners to post bond in the amount of the value of putative slaves to feed and protect the putative slaves *pendente lite* and forego selling them outside the jurisdiction of the court.⁴¹ Other states, particularly in the lower South, made it more difficult for Black persons to sue for freedom by requiring white guardians *ad litem* to sue on behalf of Black plaintiffs, barring Black persons from testifying against whites, and, after Chief Justice Marshall’s influential decision for the District of Columbia in *Mima Queen and Child v. Hepburn*,⁴² barring Black persons from introducing hearsay or reputation evidence of their descent from free mothers, which made it difficult to show descent from a free woman who had died generations earlier.⁴³ Despite such obstacles, slaves who sued for freedom between 1776 and 1860 prevailed in two-thirds of all cases, and the proportions of freedom suits did not change over time from the early, middle, and late antebellum periods.⁴⁴

Nearly all freedom suits involved Black litigants who claimed that they had been wrongly enslaved after being born free or after becoming free during their lifetimes.⁴⁵ They prevailed in more than

⁴⁰ *Id.*

⁴¹ See SCHWENINGER, *supra* note 14, at 10-11, 16, 21, 29, 32, 109, 319.

⁴² *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 295-97 (1813).

⁴³ See SCHWENINGER, *supra* note 14, at 24.

⁴⁴ See *id.* at 264-65, 290.

⁴⁵ Some freedom-suit plaintiffs claimed to be descended from American Indians who were legally free at the time they gave birth. See, e.g., *Hudgins v. Wrights*, 11 Va. 134 (1806).

a thousand cases⁴⁶ by proving that they fell into one or another of several classes of persons including Black persons who descended from mothers who, at the time of giving birth, were free persons of color by law;⁴⁷ Black persons who, though born into slavery, had since become free through explicit or prescriptive manumission by their owners;⁴⁸ Black persons who had become free in the eyes of the state by presence, sojourn, or residence in a free state or territory with consent of their owners;⁴⁹ Black persons whose bondage as “term slaves” had expired pursuant to northern gradual emancipation laws;⁵⁰ and Black persons whom southern states had emancipated as reward for meritorious conduct or as deterrents against owners wrongfully importing them from sister states.⁵¹

Southern legislators’ views regarding the enslaving of free persons of color came into focus in the late 1850s, when sectional tensions over slavery reached a breaking point. Southern states had

⁴⁶ See SCHAFFER, *supra* note 20, at 98.

⁴⁷ See, e.g., *Foster v. Mish*, 15 La. Ann. 199 (1860) (freeing a man who, while living as a free person of color in Ohio, was kidnapped and sold as a slave in Louisiana, based upon evidence that he had been born to a free person of color).

⁴⁸ See, e.g., *Bazil v. Kennedy*, 1 D.C. 199 (C.C.D.D.C. 1804) (freeing a woman who had been sold as a slave, based upon evidence that her deceased owner’s husband had concealed his wife’s last will and testament manumitting her); *Eulalie v. Long*, 9 La. Ann. 9 (1854) (freeing a woman and her six children and ten grandchildren who had been sold for \$12,000 at a slave market, based upon evidence that the woman’s former owner had effectively freed her by allowing her to marry and live as a free person 45 years previously). Also see Rebecca J. Scott, *Social Facts, Legal Fictions, and the Attribution of Slave Status: The Puzzle of Prescription*, 35 LAW & HIST. REV. 9, 24-28 (2017) (providing a detailed examination of the *Eulalie* case).

⁴⁹ See e.g., *Josephine v. Poultney*, 1 La. Ann. 329 (1846) (freeing a woman who was claimed as a slave in Louisiana, based upon evidence that her owner had previously taken her to live three years in Pennsylvania where, by Pennsylvania law, she had become free).

⁵⁰ See, e.g., *Gentry v. McMinnis*, 33 Ky. 382 (1835) (freeing a Pennsylvania woman who, in moving to Kentucky, was claimed as a slave, upon evidence that the woman had been born in Pennsylvania following the enactment of its 1780 gradual emancipation act and, hence, had become free at age 28).

⁵¹ See, e.g., HURD, *supra* note 20, at 151 (containing the Alabama Act of Jan. 17, 1834, which allowed masters to emancipate slaves for meritorious service); *Lucy v. Slade*, 15 F. Cas. 1091 (C.C.D.D.C. 1807), SCHWENINGER, *supra* note 14, at 57 (freeing a woman who was held as a slave in the District of Columbia, upon evidence that her owner had brought her into the District in violation of a D.C. law that penalized slaveowners for wrongfully importing slaves into the District by freeing them).

become increasingly repressive toward and fearful of free persons of color, particularly after free Black persons joined John Brown at Harper's Ferry to foment slave uprisings in the South.⁵² The state of Arkansas led the way in seeking to expel free persons of color.⁵³

Arkansas enacted an expulsion statute, directing that free persons of color leave the state within a year and providing that, if free persons of color remained in the state and failed to choose a master who was willing to post bond to prevent them from "act[ing] as free," they would be sold into slavery.⁵⁴ The legislatures of Virginia, Maryland, North Carolina, South Carolina, Georgia, Kentucky, Alabama, Mississippi, Florida, Louisiana, Tennessee, and Missouri debated similar legislation.⁵⁵ Then, public reaction in the South set in.⁵⁶ In Tennessee, for example, members of the public and state legislators strongly opposed a House bill that enforced expulsion by means of enslavement, taking the position that "regardless of the morality of holding those already enslaved, enslaving a free person against his will was inhumane."⁵⁷ Instead, legislators replaced the previous bill with a House bill that provided for expulsion without enslavement, and even that measure was eventually rejected.⁵⁸ Ultimately, no state other than Arkansas adopted such legislation, and even Arkansas allowed its legislation to lapse, first by postponing its effective date until 1863, and only then allowing it to become operative.⁵⁹ As Ira Berlin observes, "in the shadow of secession and the creation of a slaveholding republic, one Southern state after another drew back from expelling or enslaving the free Negro" because "most Southerners" had a "horror of enslaving free blacks."⁶⁰

⁵² See BERLIN, *supra* note 17, at 375.

⁵³ *Id.* at 372-74.

⁵⁴ *Id.*

⁵⁵ *Id.* at 374.

⁵⁶ BERLIN, *supra* note 17, at 375-76.

⁵⁷ See Jonathan M. Atkins, *Party Politics and the Debate over the Tennessee Free Negro Bill, 1858-1860*, 71 J. OF S. HIST. 245, 261 (2005).

⁵⁸ *Id.* at 266-67, 273-74.

⁵⁹ BERLIN, *supra* note 17, at 380.

⁶⁰ BERLIN, *supra* note 17, at 377, 379.

C. Congressional Debates

In 1698, Cotton Mather published “A Pastoral letter to English captives in Africa,” decrying Barbary coast “pyrates“ who captured English Christians and sold them into slavery.⁶¹ Samuel Sewell, invoking a story from the Bible, published *The Selling of Joseph* in 1700, characterizing as “man stealers” persons who captured and enslaved Africans in unjust wars and persons who thereafter sold or purchased them⁶² —”man stealing” having derived from the King James translation of *Exodus*.⁶³ Abolitionists, in turn, used “land pirates” to refer to persons who did on land what the Barbary pirates did by sea.⁶⁴ The terms “pirates,” “man-stealers,” “kidnappers,” and “enslavers” originally referred to brigands who seized free persons and delivered them into slavery—much as Joseph’s malicious brothers seized Joseph and sold him into slavery in Egypt.⁶⁵ By the 1830s, however, abolitionists were using all four terms to refer to slaveholders in general, including masters whose slaves who had inherited their slave status from their mothers.⁶⁶

Antebellum slaveholders abhorred abolitionism for many reasons, including because they feared that abolitionism would foment slave uprisings and jeopardize their economic interests in slaves.⁶⁷ However, prominent slaveholders took particular offense

⁶¹ “*Terribilia Dei. Remarkable judgements of God, on several sorts of offenders, in several scores of instances; among the people of New-England. Observed, collected, related, and improved; in two sermons, at Boston-lecture in the month of July 1697*” In the digital collection *Evans Early American Imprint Collection*, UNIV. OF MICH. LIBR. DIGITAL COLLECTIONS, <http://name.umdl.umich.edu/N00653.0001.001> [<https://perma.cc/VJW3-8RQT>] (accessed Oct. 19, 2024).

⁶² See SAMUEL SEWALL, *THE SELLING OF JOSEPH: A MEMORIAL* 1 (1700). See also Mark A. Peterson, *The Selling of Joseph: Bostonians, Antislavery, and the Protestant International, 1689-1733*, 4 MASS. HIS. REV. 1 (2002).

⁶³ EXODUS 21:16 (KJV) (“[H]e that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.”).

⁶⁴ For example, Senator Charles Sumner referenced Barbary “pirates” and “land-pirates” in his speech, *The Crime Against Kansas*. CHARLES SUMNER, *THE CRIME AGAINST KANSAS: THE APOLOGIES FOR THE CRIME: THE TRUE REMEDY* 29, 41 (1856).

⁶⁵ See GENESIS 37:18-36, 39:1 (KJV).

⁶⁶ See WILSON, *supra* note 29, at 5; Rosen, *supra* note 7, at 701-04.

⁶⁷ See OAKES, *supra* note 34, at 134, 149, 233.

at abolitionists who impugned their personal honor, and they tended to regard anti-slavery rhetoric as personal attacks.⁶⁸

They specifically resented being called “pirates,” “man-stealers,” “kidnappers,” “robbers,” and “enslavers.”⁶⁹ An illustrative instance occurred during what William Freehling has called the “Pearl Harbor of the slavery controversy,”⁷⁰ *viz.*, the gag-rule debates in the U.S. Senate and House in 1836, where Congress addressed whether and, if so, how to process citizen petitions demanding an end to slavery in the District of Columbia.⁷¹ John Calhoun, the intellectual leader of southerners in the Senate, famously took the floor in 1836 to argue that, despite the constitutional right of citizens to petition the federal government for redress of grievances, the Senate ought to refuse even to *receive* anti-slavery petitions.⁷² Calhoun’s predominant reason for not receiving the petitions was that they “deeply, basely, and maliciously slandered” the slaveholding states of the Union.⁷³

⁶⁸ See generally WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS 136 (1998) (Southern Senators and Representatives felt that, “[w]hen you attack slavery, you attack the *South*. And when you attack the South, you attack—me.”). See also *id.* at 131; JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR 70, 211 (2018).

⁶⁹ Vermont Representative William Slade’s speech of December 23, 1835, condemning southern slavery as “man-stealing,” “roused the resentment and anger of the slaveholders to a veritable fury.” MILLER, *supra* note 68, at 58. Virginia Representative James Garland responded, criticizing Slade for using “every opprobrious epithet which [he] could string together” to frame slavery as being “in every mien and every form” a “system of piracy and man-stealing.” *Id.* at 60. Illinois Representative Owen Lovejoy’s 1860 speech, “The Barbarism of Slavery,” equated slaveholders with “robbers” and “pirates” and caused Virginia Representative Roger Pryor—who found Lovejoy’s language “insulting”—to challenge a defender of Lovejoy’s to a duel. See Owen Lovejoy, *the Barbarism of Slavery*, N. ILL. U. DIGIT. LIBR., <https://digital.lib.niu.edu/islandora/object/niu-lincoln%3A35381> [<https://perma.cc/X92F-7MJA>] (last visited July 11, 2024); FREEMAN, *supra* note 68, at 253. Senator Charles Sumner, in his own 1860 speech, “The Barbarism of Slavery,” equated slaveholding with kidnapping, robbery, and enslavement. See CHARLES SUMNER, THE BARBARISM OF SLAVERY 21, 50, 67, 94, 110 (1856).

⁷⁰ WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854 38 (1990).

⁷¹ See generally MILLER, *supra* note 68.

⁷² *Id.* at 177.

⁷³ *Slavery in the District*, CONG. GLOBE, (D.C.) Jan. 7, 1836, at 75 [hereinafter *Slavery in the District*].

Calhoun said that “had he no other objections” to the petitions, “the *language* in which they were couched” constituted an “imperious” objection—the “unjust, false and malicious language” being the “calumny” and “slander” that southerners were “kidnappers” and “pirates.”⁷⁴ To demonstrate his point, he singled out Senator Bedford Brown of North Carolina (a slaveholder who urged the Senate to receive the petitions and table them rather than exclude them altogether)⁷⁵ and pointedly asked Senator Brown how *he* would respond to being called “kidnapper and pirate.”⁷⁶ Would Brown “quietly submit?”, Calhoun asked, or “would he not, as a man of honor, knock the calumniator down.”⁷⁷

The most notorious assault on the floor of the Senate was Representative Preston Brooks’ near-fatal beating of Senator Charles Sumner in May 1856.⁷⁸ Sumner, in his speech, “The Crime Against Kansas,” castigated the slave states for inciting violence in the Kansas Territory for the purpose of turning it into a slave state, and he directed particular contempt at Brooks’ cousin, Senator Andrew Butler of South Carolina.⁷⁹ Brooks, declaring that Sumner’s speech was a “libel” against his cousin Butler and the state of South Carolina, beat Sumner mercilessly with a cane.⁸⁰ We do not know what particular parts of Sumner’s speech Brooks regarded as “libel,” but, among other things, Sumner accused Butler of trying to replicate in the Kansas Territory the “wretched piracy” that slave traders committed in Africa by “enslaving” people in the Territory of Kansas.⁸¹

⁷⁴ *Id.* at 80-81. See MILLER, *supra* note 68, at 129 (“What was the vile slander and malicious libel against the South that made [John] Calhoun stalk out of the chamber and Hammond call for ‘Terror Death’? The epithet ‘land pirates’ seems to have been particularly offensive, and also ‘man-stealers’...”).

⁷⁵ See Houston G. Jones, *Bedford Brown: State Rights Unionist: Part I: The Senator*, 32 THE N.C. HIST. REV. 321, 338-39 (1955).

⁷⁶ *Slavery in the District*, *supra* note 73 at 80-81.

⁷⁷ *Id.*

⁷⁸ See FREEMAN, *supra* note 68, at 217-18.

⁷⁹ *Id.* at 218-19.

⁸⁰ *Id.* at 219-21.

⁸¹ See SUMNER, *supra* note 64, at 13, 29.

D. The Logical Consistency of Southerners' Refusal to Enslave and Their Acceptance of Slavery as a Condition of Birth

All southern states embraced the Roman law doctrine, *partus sequitur ventrem*, i.e., that a newborn's status as free or slave was inherited from his or her mother's status at the time of birth.⁸² The doctrine was logically consistent with southern reluctance to *enslave* free Black persons because, on its face, the doctrine did not attach slavery to anyone who had ever been previously free.⁸³ "Freedom" and "slavery" are legal and social characterizations, not biological facts. Until laws define newborns as either free or slave, newborns possess neither legal status and, hence, no legal status of "freedom" that the doctrine of *partus sequitur ventrem* could change to a legal status of "slavery." To be sure, by 1805 northern states deemed newborns to be legally free, while southern states deemed the children of slave mothers to be lawful slaves.⁸⁴ But just as northern states did not attach legal freedom to newborns who had previously been slaves, southern states did not attach slavery to newborns who had previously been free.

III. A REVEALING CONCEPTUALIZATION IN SOUTHERN *DRED SCOTT*-TYPE CASES

Why did Calhoun and other slaveholders take such offense at being called "pirates," "robbers," "man-stealers," "kidnappers," and "enslavers"? Why did they regard such terms as "slander," "libel," and "calumny"? Hints can be found in judicial opinions in *Dred Scott*-type cases in the late 1850s in which southern judges rationalized holding in slavery Black persons who, before returning South, had acquired valid claims to emancipation in the North by virtue of having resided in the North.

Northern laws manifestly differed from southern laws regarding the status of Black persons as free or slave. And the

⁸² See COBB, *supra* note 4, at 68-78; MORRIS, *supra* note 4, at 43-49.

⁸³ See COBB, *supra* note 4, at 68 n.1 (analogizing the legal status of slavery imposed at birth to the legal status of illegitimacy imposed at birth, both of which impose legal status where none previously existed, and neither of which alter any legal status that previously existed).

⁸⁴ See BERLIN, *supra* note 17, at 21.

differences posed choice-of-law problems for northern and southern courts alike when southern slaveholders traveled with their slaves to free states and territories. When slaves who had traveled North with their masters petitioned for freedom, northern courts had to decide whether to grant “comity” to the laws of southern states by treating the petitioners as the slaves that southern law deemed them to be or, instead, to apply northern laws and emancipate them. Similarly, when such itinerant Black persons filed freedom suits only after returning south, southern courts had to decide whether to grant comity to northern laws and treat them as the free persons that northern law deemed them to be or to apply southern laws and adjudge them to be slaves.

With some exceptions, northern and southern courts initially agreed on how to resolve these choice-of-law issues: courts, both North and South, made comity dependent upon whether or not slaveowners who traveled North with their slaves established *residence* in free states or territories.⁸⁵ Thus, if slaves brought freedom suits in the North against slaveholders who were merely *transiting* through northern states or territories or merely visiting or staying there temporarily, northern courts tended to apply the laws of the slaveholders’ domiciles and refrain from emancipating slaves.⁸⁶ But where such slaveholders had made northern states or territories their residences—that is, moved there with the intent to remain there indefinitely—northern courts tended to apply northern laws of freedom and emancipate slaves.⁸⁷

Significantly, southern courts adopted the same approach with respect to slaves who, having traveled with their owners in the North, brought freedom suits in the South after returning home with their owners. Southern courts applied northern laws of freedom to emancipate slaves whose owners had established residence in the North, but applied southern laws to owners who had merely transited, visited, or temporarily sojourned in the

⁸⁵ See PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 339-43 (2000).

⁸⁶ *Id.* at 339.

⁸⁷ See, e.g., *In re Archy*, 9 Cal. Unrep. 147 (1858).

North.⁸⁸ Neither the Constitution nor other federal law dictated this common approach.⁸⁹ Rather, it resulted from a desire on the part of individual states—which were free to adopt whatever choice of law rules they chose—to accommodate sister states that possessed laws regarding slavery that manifestly differed from their own.⁹⁰

This consensus about comity, both in the North and South, began to fracture in the 1830s. The first departure occurred in 1836, when a Massachusetts high court rejected comity in order to emancipate a six year-old slave girl whose Louisiana owner had temporarily traveled with her to Massachusetts while fully intending to return to the family's domicile in Louisiana.⁹¹ The departure culminated in the North in 1860, when New York's high court rejected comity by emancipating eight slaves from Virginia whom abolitionists had forcibly removed from their owner's possession on a steamship in New York harbor, as the slaveholder traveled by sea from one slave state to another.⁹² By the commencement of the Civil War, only Illinois and New Jersey invoked comity to protect slaveowners who were in transit with their slaves.⁹³ Southern courts, in turn, also broke ranks with comity, beginning with the Missouri Supreme Court's 1852 decision in which the Court adjudged Dred Scott to be a slave, even though Dred Scott's owner had previously established residence with him in the free territory of Wisconsin and free state of Illinois before returning to Missouri.⁹⁴ Southern judges in Kentucky, Louisiana,

⁸⁸ See, e.g., *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401 (La. 1824).

⁸⁹ See *Strader v. Graham*, 51 U.S. 82, 93-94 (1851).

⁹⁰ *Id.*

⁹¹ *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 193-95 (1836). The *Aves* court emancipated the girl in the same limited sense that English Chief Justice Mansfield in *Somerset v. Stewart*, 20 How. St. Tr. 1 (1772), emancipated a West Indian slave living in England, namely, by ruling that, by voluntarily taking slaves with them in visiting jurisdictions like England and Massachusetts in which slavery was unlawful, slave owners had no legal authority to remove the slaves without the slaves' consent. *Id.* at 198-201.

⁹² *Lemmon v. People*, 20 N.Y. 562, 562-64 (1860).

⁹³ See FINKELMAN, *supra* note 85, at 179.

⁹⁴ See *Scott v. Emerson*, 15 Mo. 576 (1852). For background on the case, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 239-49 (1978).

and Mississippi subsequently followed with rulings comparable to Missouri's.⁹⁵

These latter *Dred Scott*-type rulings are revealing due to the rationale southern judges invoked to explain why, despite their having possessed valid claims to freedom in the North, Black persons like Dred Scott were nonetheless slaves. Southern judges could have followed the path that the English judge, Lord Stowell, adopted in *The Slave, Grace* in 1827. Lord Stowell had ruled that, although a West Indian slave named "Grace" had ceased to be a slave while she and her master resided in England, slavery nevertheless "attached" to her when she voluntarily returned to the West Indies.⁹⁶ Southern courts could have followed Judge Stowell and ruled that, although Black persons like Dred Scott had ceased to be slaves while they resided with their masters in the North, their legal status changed from free to enslaved when they returned to the South. Significantly, however, southern judges consciously rejected that rationale, perhaps for fear of being—or appearing to be—what they and other southerners so vigorously denied being, namely, "kidnappers," "man-stealers" or "pirates," that is, persons who subjected hitherto legally free Blacks to slavery.⁹⁷ Instead, southern judges consciously adopted a rationale that was consistent with both slavery and their refusal to enslave Black persons who were free. Judges insisted that by reference to the laws that they deemed to be controlling, i.e., their own choice-of-law rules, the Black litigants had *never* been free.

Dred Scott's initial suit for freedom, *Scott v. Emerson*,⁹⁸ provides a good example. Dred Scott brought his initial suit in a Missouri trial court from which an appeal was subsequently taken to the Missouri Supreme Court.⁹⁹ Dred Scott argued that Missouri ought to grant comity to the laws of the Wisconsin territory and of Illinois by which he had become free by virtue of his having resided

⁹⁵ See *Liza v. Puissant*, 7 La. Ann. 80 (1852); *Graham v. Strader and Gorman*, 44 Ky. 173 (1844); *Mitchell v. Wells*, 37 Miss. 235 (1859).

⁹⁶ *The Slave, Grace*, 2 Haggard 94, 20 St. Tr. 273, 286 (UK 1827).

⁹⁷ See, e.g., *Strader v. Graham*, 51 U.S. 82, 93-94 (1851).

⁹⁸ *Scott v. Emerson*, 15 Mo. 576 (1852).

⁹⁹ See generally *id.*

there.¹⁰⁰ Judge William Scott of the Missouri Supreme Court refused to apply northern law.¹⁰¹ Judge Scott invoked Justice Joseph Story's seminal treatise on the conflict of laws for the proposition that states are free to refuse to apply laws of sister states that threaten their institutions.¹⁰² Yet, significantly, Judge Scott rejected Story's *conceptualization* of the rule.¹⁰³ Story was an anti-slavery northerner who had personally corresponded with Lord Stowell of *The Slave, Grace* and who had written that, although slaves were free as long as they resided in free states, slavery could "re-attach" to them if they returned.¹⁰⁴ Rather than accept Story's conceptualization that slavery "re-attached" to slaves who were once free, Judge Scott ruled instead that, because Dred Scott had left and returned to Missouri with his master, his condition as a slave had at all times remained "[un]changed."¹⁰⁵

This contrast in the way the northern Justice Story and the southern Judge Scott conceptualized the status of returning slaves manifested itself again when Dred Scott's second case reached the U.S. Supreme Court. Dred Scott again argued that, having been "made free" in the North, he could not be "reduced to a state of slavery by being brought back to Missouri."¹⁰⁶ Justice McLean, an anti-slavery Justice from Ohio who voted to free Dred Scott, followed Story and Lord Stowell in stating that the issue was whether, once Dred Scott had become free in the North, slavery would "attach" to him again upon returning to Missouri.¹⁰⁷ Similarly, Justice Curtis, a dissenting anti-slavery Justice from Massachusetts who also voted to free Dred Scott, wrote that the issue was whether, once Scott had become free, he would be "reduce[d] ... to slavery" upon returning to Missouri.¹⁰⁸ In contrast, Justice Nelson, who joined the majority in adjudging Dred Scott to

¹⁰⁰ *See id.* at 579.

¹⁰¹ *Id.*

¹⁰² *Id.* at 581.

¹⁰³ *See id.*

¹⁰⁴ *See* PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 121, 123-24 (2018).

¹⁰⁵ *Scott v. Emerson*, 15 Mo. at 586 (alteration in original) (emphasis added).

¹⁰⁶ *Scott v. Sandford*, 60 U.S. 393, 452 (1857).

¹⁰⁷ *Id.* at 555, 557, 559-60 (McLean, J., dissenting).

¹⁰⁸ *Id.* at 601, 603 (Curtis, J., dissenting).

be a slave, rejected McLean and Curtis' conceptualization of the issue and stated that in leaving and returning to Missouri, Dred Scott's "original condition" as a slave "continued unchanged."¹⁰⁹

A more graphic example is the dual opinions of Kentucky Judge Marshall in *Graham v. Strader*, first in 1844 and later in 1847.¹¹⁰ The issue in *Graham* was whether a Kentucky slaveowner could sue the owners of a steamboat for transporting two of the slaveholder's slaves by river from Louisville to Ohio, from which they escaped to Canada.¹¹¹ The steamboat owners defended on the ground that by the time they transported the two slaves to Ohio, the slaves had already become free persons of color because their owner had for years allowed them to travel and live as free persons in the North where they worked as traveling musicians.¹¹²

Kentucky Judge Marshall rejected the steamboat owners' claim, ruling instead that in returning to Kentucky, the two slaves subjected themselves to Kentucky law by which they were slaves.¹¹³

Judge Marshall's 1844 opinion is significant because it appears to have led to a misunderstanding that Marshall later corrected in an 1847 opinion in the same case.¹¹⁴ Marshall reasoned in 1844 "that a slave returning voluntarily with his master from a free State, is *still a slave* by the laws of his own country."¹¹⁵ However, he also quoted Joseph Story's statement that slavery might "re-attach" to Black persons who, having become free in the North, returned to states in which they had been slaves.¹¹⁶ Marshall's reference to Story apparently persuaded a fellow judge in a subsequent, unnamed case to conclude that Judge Marshall had allowed slavery to *re-attach* to a Black person who was formerly free.¹¹⁷ Clearly concerned by what he regarded as a "misconstruction," Marshall took pains in his 1847 opinion, to

¹⁰⁹ *Id.* at 459 (Nelson, J., concurring).

¹¹⁰ *Graham v. Strader*, 44 Ky. 173 (1844), *aff'd*, 46 Ky. 633 (1847).

¹¹¹ *Graham*, 44 Ky. at 173.

¹¹² *Id.* at 173-74.

¹¹³ *Graham*, 44 Ky. at 180.

¹¹⁴ 46 Ky. 633 (1847).

¹¹⁵ 44 Ky. at 182 (emphasis added).

¹¹⁶ *Id.* at 182-83.

¹¹⁷ 46 Ky. at 635.

“reliev[e]” the unnamed judge of his error.¹¹⁸ In his earlier opinion, Judge Marshall wrote, he did *not* state that “the slave though once free by reason of such visit [to the North], *becomes a slave again* by a voluntary return to Kentucky.”¹¹⁹ On the contrary, he said, the earlier opinion “contains no concession, either express or implied, that the slaves in question were *ever* free.”¹²⁰

There is, therefore, no room for further question in this Court upon [the procedural] part of the case. Having seen, however, that in another case so much of the opinion formerly rendered in this case as discusses the effect of a transient visit made by master and slave to a State in which slavery is prohibited by the fundamental law, has been supposed to involve the principle or inference, (so far at least as the opinion of the writer was concerned,) that the slave though once free by reason of such visit, becomes a slave again by a voluntary return to Kentucky, we take this opportunity of relieving the opinion from such a misconstruction. The opinion contains no concession either express or implied, that the slaves in question were ever free, or could properly have become so by being temporarily in a free State with their master or other citizen of this State, having control over them. On the contrary, it is clearly and repeatedly stated, that the Court does not admit that in consequence of such a fact, and by force of the mere general prohibition of slavery in the fundamental or declaratory law of the State, which might be thus visited, the relation of master and slave, as existing under the laws of their own State, would be affected.¹²¹

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 46 Ky. at 635. This is consistent with the way authorities in Territory of Orleans (later Louisiana) conceptualized the status of some 3200 Blacks from Saint-Domingue (later Haiti) who, having been emancipated by Toussaint Louverture’s revolutionary government and having their emancipation ratified by Robespierre’s National Convention, fled Haiti for Spanish-controlled Cuba in 1803 and, six years later, were expelled from Cuba to New Orleans. The territorial governor of Orleans classified the refugees as “slaves” for several reasons, including because of confusing translations of ship manifests and the refugees’ understandable reluctance to invoke the Haitian

This judicial pattern in conceptualizing *Dred Scott*-type cases also suggests how those like John Calhoun conceptualized their relationship to slaves. They did not regard themselves as kidnappers, enslavers, and pirates because they did not believe they were enslaving Black persons who by law had ever been free. Instead, they regarded themselves as continuing to hold in bondage Black persons who had either been lawfully enslaved by others or who derived their slave status from maternal ancestors who were themselves in lawful conditions of slavery when giving birth (provided that the slaves at issue had not since been lawfully manumitted or emancipated). Thus, Henry Laurens, a South Carolina slaveholder put it to his son, “I abhor slavery [but] I am not the man who enslaved them.”¹²² William Harper, a former U.S. Senator from South Carolina, defended slavery in 1837 on the ground that Africans were “a race of men—not [to] be enslaved by us but *already* enslaved.”¹²³ Slavery, he wrote, “was . . . fastened upon us, by the superior authority of the mother country. . . . Nor did we institute Slavery. The Africans brought to us had been, speaking in the general, slaves in their own country, and only underwent a change of masters.”¹²⁴

James Murray Mason, a proslavery Senator from Virginia, claimed in 1848 that, rather than perpetual bondage being an institution that southern states had to create by statute, it was a preexisting “condition” that Africans brought with them when they arrived from Africa—a condition of “property” and one that, like any other form of property, the common law recognized:

revolution in their defense but also because authorities in Cuba—which did not recognize the Haitian revolution—had classified them as slaves. Orleans authorities thus had grounds for viewing the Haitians as persons whose slave status had never lawfully changed. See Rebecca J. Scott, *Paper Thin: Freedom and Re-Enslavement in the Diaspora of the Haitian Revolution*, 29 *LAW & HIST. REV.* 1061, 1061-63, 1067-68, 1087 (2011).

¹²² See OAKES, *supra* note 34, at 118.

¹²³ William Harper, *Memoir of Slavery*, in *THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860* 120 (Drew Gulpin Faust ed., 1981) (emphasis added).

¹²⁴ *Id.* at 96.

“[T]he condition of slavery is fixed in the country [from whence] the subject comes. . . . The first slaves imported into Virginia, were landed from a Dutch ship, in 1620, and were purchased by the planters. The common law was then the law of the colony. . . . [and it recognized] their condition as property . . . and under its pervading principle, that the issue follows the condition of the mother, (*partus sequitur ventrem*,) their descendants . . . have remained in bondage.”

* * *

“[T]he African population brought to the shores of North America in bondage, and sold to the inhabitants as bondsmen, brought slavery as their condition from the shores of Africa, and the law recognized it here. That is all. . . . [T]hey brought [their condition] with them from Africa. It was given to them, fixed upon them there There never was a law in Virginia creating slavery; and I doubt if there has been such a law in any of the Southern States.”¹²⁵

IV. COGNITIVE DISSONANCE ABOUT LAWFUL ENSLAVEMENT IN AFRICA

We have seen that prominent antebellum southerners held two public beliefs about the morality of holding Black persons in perpetual bondage, namely: (1) it was morally permissible to hold Black persons in slavery who either had themselves been lawfully enslaved abroad or whose slave status derived from maternal ancestors who were themselves in lawful conditions of slavery when giving birth (provided that the slaves at issue had not since been lawfully manumitted or emancipated); and (2) it was morally wrong—indeed, it was “kidnapping,” “manstealing,” and “piracy”—to hold in bondage Black persons who descended from maternal ancestors who were rightly free, or who, despite having once been

¹²⁵ JAMES MURRAY MASON, SPEECH OF JAMES M. MASON, OF VIRGINIA, ON THE BILL TO ORGANISE A TERRITORIAL GOVERNMENT FOR THE TERRITORY OF OREGON 12-13 (1848). *See also* ROBERT W. YOUNG, SENATOR JAMES MURRAY MASON: DEFENDER OF THE OLD SOUTH 47 (1998).

lawful slaves, had since been lawfully manumitted or emancipated. Belief 1 is evidenced by slaveholders' public embrace of slavery as it was institutionalized in the South. Belief 2 is supported by evidence in section II. And belief in both Beliefs 1 and 2 is evidenced by southern judges who, in ruling in favor of slaveholders in *Dred Scott*-type cases, claimed that rather than "re-attaching" slavery to Black persons who had previously become free in the North, their holdings instead revealed that the slave status of such Black persons had "continued unchanged."

Cognitive dissonance is the psychology of simultaneously embracing two beliefs about the world that are empirically or normatively inconsistent with one another.¹²⁶ Beliefs 1 and 2 are not *logically* inconsistent with one another. However, the two beliefs became increasingly incompatible in the minds of antebellum southern lawmakers and jurists by virtue of new understandings—understandings engendered by the outlawing of the Atlantic slave trade from 1807 to 1823—regarding the manner by which African ancestors of American slaves had become enslaved in Africa. This new understanding undermined the premises of Belief 1, namely, that American slaves derived their slave status from maternal ancestors in Africa who were lawfully enslaved.

It goes without saying that antebellum America was profoundly divided over slavery, including over the propriety of interstate slave trade *within* southern states. Yet, regardless of their views of domestic slavery, Americans shared a broad consensus regarding the Atlantic slave trade.¹²⁷ Between 1780 and

¹²⁶ Cognitive dissonance is defined as "...the state of discomfort felt when two or more modes of thought contradict each other." *Cognitive Dissonance*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/cognitive-dissonance> [https://perma.cc/HU66-TAG3] (last visited Oct. 19, 2024).

¹²⁷ See *The Antelope*, 23 U.S. 66, 116 (1825) ("Public sentiment has, in [the United States and Britain], kept pace with the [anti-slave trade] measures of government; and the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed."). See also the request of Representative Charles Mercer of Virginia, author of a House Resolution, requesting President James Monroe to enter into a convention with the maritime powers of Europe to prosecute Atlantic slave traders as pirates. 40 ANNALS OF CONG. 1151 (1823) ("The time is not very remote, when men of high standing in our country openly and unblushingly prosecuted this profitable commerce [in African slaves]. Is there now remaining a single man in America, who

1798, every state passed laws barring the importation of foreign slaves, though South Carolina repealed its prohibition in 1803.¹²⁸ The U.S. Constitution of 1787, which was ratified by states North and South, gave Congress the authority to prohibit the importation of slaves from abroad starting in 1808.¹²⁹ Congress did not wait until 1808, but joined with President George Washington in 1794 to prohibit the use of U.S. ships to import slaves from abroad.¹³⁰ Congress followed in 1800 by banning Americans from trafficking slaves between foreign ports and in 1803 by penalizing persons who imported slaves into states that had already outlawed the importation of slaves.¹³¹ Under President Thomas Jefferson's leadership in 1807, the United States prohibited *all* importation of slaves from abroad, effective on the first day of 1808.¹³² More significantly, and again with the concurrence of a slaveholding President, Congress in 1820 made it a crime of "piracy," punishable by death, for any U.S. citizen—or any person of any nationality upon a ship owned by a U.S. citizen—to serve on a ship that "decoy[ed]," "receive[d]," "forcibly confine[d]," "deliver[ed]," or "attempt[ed] to sell" any "negro or mulatto" from a foreign shore with the intent to make such persons slaves, even if the latter were slaves under African law.¹³³ The 1820 statute directed that victims

would brave the public sentiment, not to speak of the public justice, by avowing himself a participant in this guilty traffic?"

¹²⁸ Craig B. Hollander, *Against a Sea of Troubles: Slave Trade Suppressionism During the Early Republic* 4 (Aug. 2013) (Ph.D. dissertation, Johns Hopkins University) (on file with ProQuest).

¹²⁹ U.S. CONST. art. I, § 9, cl. 1.

¹³⁰ Slave Trade Act of 1794, Pub. L. No. 3-11, 1 Stat. 347 (1794) (prohibiting the carrying on the slave trade from the United States to any foreign place or country).

¹³¹ Hollander, *supra* note 128, at 4.

¹³² Act Prohibiting Importation of Slaves, Pub. L. No. 9-22, 2 Stat. 426 (1807) (prohibiting the importation of slaves into any port or place within the jurisdiction of the United States, from and after Jan. 1, 1808). Kevin Gauch, *The Destiny of the Slave States? The Southern Debate over Reopening the Transatlantic Slave Trade, 1853-1861* 5 (Mar. 25, 2020) (B.A. Honors Thesis, University of North Carolina) (on file with Carolina Digital Repository, University of North Carolina).

¹³³ "An Act to continue in force 'An act to . . . punish the crime of piracy' . . ." Pub. L. 16-113, 1 Stat. 600, 600-01 (1820); "An act making appropriations for the support of government, for the year [1820]." Pub. L. 16-34, 2 Stat. 628 (1821). The 1820 Act was effective for only two years, but it was made perpetual in 1823. *See* Pub. L. 17-7, 2 Stat. 721 (1823) ("an Act in addition to 'An Act to continue in force 'An act to protect the commerce of the United States, and punish the crime of piracy'"").

of unlawful trafficking be freed and returned to Africa.¹³⁴ The 1820 act explicitly declared that for Americans to intentionally transport Black persons from Africa for the purpose of holding them as slaves constituted “piracy,” and it thereby implicitly declared that Americans who engaged in such trafficking were precisely what southerners like Calhoun disclaimed being themselves, namely, “pirates”.¹³⁵

Antebellum Americans rejected the Atlantic slave trade for numerous reasons, including the violence of African captivity and cruelty of the Middle Passage.¹³⁶ Yet a salient reason was their belief that the great bulk of Black persons who were imported as slaves from the coasts of Africa had either in themselves or through their ancestors been originally enslaved by means that civilized nations no longer regarded as legitimate, specifically, through native wars and raids that had no other purpose than to enslave captives.¹³⁷ The view that American slaves or their ancestors were the victims of kidnapping and man-stealing was reflected in Thomas Jefferson’s draft grievance in the Declaration of Independence.¹³⁸ Jefferson wrote that by perpetuating the slave trade, King George III “[V]iolat[ed] ... life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere.”¹³⁹ Jefferson, who had since become President, successfully urged Congress in 1807 to end the slave trade by condemning those “violations of human rights which have been so long continued on the unoffending inhabitants of Africa.”¹⁴⁰

The view that African slaves were victims of illegitimate kidnapping was made salient to white Americans by America’s

¹³⁴ “An Act in addition to the Acts prohibiting the slave trade,” Pub. L. 15-101, 2 Stat. 532 (1819).

¹³⁵ See generally MILLER, *supra* note 68.

¹³⁶ Slave Trade Act of 1794, *supra* note 130. See also Hollander, *supra* note 128, at 15-16; STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AM. LIFE 17 (2005); DON FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE U.S. GOV’T REL. TO SLAVERY 144, 152 (2001).

¹³⁷ See MASON, *supra* note 125, at 12-13; Gauch, *supra* note 132, at 43, 48-49.

¹³⁸ See KOLCHIN, *supra* note 2, at 88.

¹³⁹ THE PAPERS OF THOMAS JEFFERSON, vol. 1 (1760-1776), 243-47 (J. Boyd ed., 1950).

¹⁴⁰ See THOMAS, *supra* note 15, at 551.

travails with the Barbary pirates of North Africa. The Barbary pirates had for centuries been capturing European Christians, including women, and enslaving them.¹⁴¹ However, after the United States became independent and lost the protection of the British navy, white Americans were themselves subjected to capture, enslavement, and detention for ransom.¹⁴² Between 1785 and 1830 nearly 700 white Americans were enslaved by Barbary states.¹⁴³ And predations by the Bashaw of Tripoli in 1803 and the Dey of Algiers in 1812, both provinces of the Turkish-controlled Ottoman Empire, drew the United States into its first wars abroad.¹⁴⁴ Publicity regarding the kidnappings and enslavements—and celebrations regarding their later rescues—gripped the nation and induced Americans to attribute slavery in Africa to kidnapping and piracy.¹⁴⁵ Thus, in a freedom suit involving a Black woman who, after living for years with her master in the free state of Ohio, was forcibly transported South and sold as a slave in Louisiana, the Louisiana Supreme Court affirmed a trial court that described the sale as “a species of kidnapping worse than was ever practiced by the Turks”¹⁴⁶

¹⁴¹ See Christine E. Sears, *A Different Kind of Slavery: American Captives in Barbary, 1776-1830*, at 1 (2007) (Ph.D. dissertation, University of Delaware) (on file with ProQuest); RICHARD ZACKS, *THE PIRATE COAST: THOMAS JEFFERSON, THE MARINES, AND THE SECRET MISSION OF 1805*, at 1-10, 276-77, 320-29 (2005).

¹⁴² See LAWRENCE A. PESKIN, *CAPTIVES AND COUNTRYMEN: BARBARY SLAVERY AND THE AMERICAN PUBLIC, (1785-1816)* 101-103, (2009).

¹⁴³ Sears, *supra* note 141, at 6.

¹⁴⁴ See ZACKS, *supra* note 141 at 12; PESKIN, *supra* note 142, at 149-58, 192.

¹⁴⁵ See PESKIN, *supra* note 142, at 2. (“[M]illions of Americans who, in what is sometimes known as an age of sensibility, felt their hearts ache and tears well up as they read or listened to the stories told by their captive countrymen.”); Jennifer Margulis, *Swarthy Pirates and White Slaves: Barbary Captivity in the American Literary Imagination* 2-3 (1999) (Ph.D. dissertation, Emory University) (“[S]lavery in the Barbary Coast influenced many of the major literary figures of the nineteenth century, including Edgar Allen Poe, Herman Melville, Washington Irving, Lydia Maria Child, Royall Tyler, and Frederick Douglass.”); Paul Michel Baepler, *White Slavery in Africa: The Barbary Captivity Narrative in American Literature* 96 (1996) (Ph.D. dissertation, University of Minnesota) (James Riley’s narrative of his 1815 captivity reportedly had sales of nearly a million volumes); ZACKS, *supra* note 141, at 4-6.

¹⁴⁶ JUDITH KELLEHER SCHAFFER, *SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* 265 (1994); see *Lunsford v. Coquillon*, 2 Mart. (n.s.) v. 401 (La. 1824). Abolitionist, Charles Sumner, saw such a link as late as 1860 when, in his speech, *The*

This association of African slavery with kidnapping and piracy culminated in 1820 when Congress denounced the Atlantic slave trade as “piracy”.¹⁴⁷ In 1823, House of Representatives, by a near-unanimous vote of 131-9, adopted a Resolution requesting President Monroe to negotiate with European maritime powers to prosecute such piracy.¹⁴⁸ Representative Charles Mercer, a slaveholder from Virginia and author of the 1823 Resolution, spoke in support of the Resolution by comparing African slave traders to piratical “stealers of men,” accusing slave traders of going to Africa “to enslave” and then “sell [their] spoil,” and condemning slave traders for seizing not the “property of [a] man, but the man himself” in order to “consign him, and not himself only, but his latest posterity, to hereditary slavery”¹⁴⁹ Just one year later, a select House committee reported in 1824 that the slave trade was piratical because it consisted of the “detestable crime of kidnapping the unoffending inhabitants of one country, and chaining them to slavery in another.”¹⁵⁰ Twenty-one years later, James Henry Hammond, an outspoken promoter of slavery from South Carolina, wrote, “Doubtless great evils arise from [the African slave trade] as it has been, and is now conducted: unnecessary wars and cruel kidnapping in Africa both secretly and by war made for the purpose. . . .”¹⁵¹

Barbarism of Slavery, he accused “every Slave-master on his plantation [of being] a Bashaw, with all the prerogatives of a Turk.” SUMNER, *supra* note 55, at 55.

¹⁴⁷ See PESKIN, *supra* note 142; An Act to continue in force ‘An act to . . . punish the crime of piracy’” Pub. L. 16-113, 1 Stat. 600, 600-01 (1820).

¹⁴⁸ See 40 ANNALS OF CONG. 1147-55 (1823) (“*Resolved*, That the President of the United States be requested to enter upon and prosecute from time to time such negotiations with the several maritime powers of Europe and America as he may deem expedient for the effectual abolition of the African slave trade and its ultimate denunciation as piracy under the law of nations, by the consent of the civilized world.”). The President successfully negotiated such a convention with England in 1824, which the Senate ultimately failed to ratify. However, the Senate balked not because it sympathized with Atlantic slave traders but because it objected to a provision of the convention that allowed British ships to search American vessels off the coasts of America. See THOMAS, *supra* note 15, at 608.

¹⁴⁹ See 40 ANNALS OF CONG. 1150 (1823).

¹⁵⁰ See *generally* DOCUMENTS ACCOMPANYING THE MESSAGE OF THE PRESIDENT OF THE UNITED STATES, TO BOTH HOUSES OF CONGRESS 70 (1824).

¹⁵¹ JAMES HENRY HAMMOND, GOV. HAMMOND’S LETTERS ON SOUTHERN SLAVERY: ADDRESSED TO THOMAS CLARKSON, THE ENGLISH ABOLITIONIST (1845), *reprinted in* THE

Significantly, even pro-slavery conservatives who wished to reopen the Atlantic slave trade recognized that Americans, including southerners, associated it with kidnapping. Thus, as the Civil War approached, some southern “Fire-Eaters,” i.e., pro-slavery Democrats who advocated secession, insisted that states in the Lower South repeal bans on foreign slave trade.¹⁵² Among other reasons, they feared that if state and federal laws continued to treat the African slave trade as piracy, southerners would regard *American* slaves as the fruits of “plunder.”¹⁵³ Leonidas Spratt, whom Horace Greeley sarcastically dubbed “the philosopher of the new African slave trade,” acknowledged that “[t]here was that feeling [among southerners] that, in some sense, they [slaves] were plunder” and argued that the prohibition of the African slave trade represented a moral defeat for the South.¹⁵⁴ For the prohibition declared that the African slave trade and, hence, American slavery were wrong in principle: “I regard the slave trade as the test of [slavery’s] integrity. If that be right, then slavery is right, but not without . . . [T]he institution cannot be right if the trade be not”¹⁵⁵ William P. Miles, a House representative from South Carolina, criticized the prohibition on foreign slave trade in 1859, claiming that it “stamp[ed] the people of my section [of the country] as pirates, and put a stigma upon their institutions.”¹⁵⁶ James H. Adams, Governor of South Carolina, observed in 1856 that “if the trade be piracy, the slave must be plunder.”¹⁵⁷ South Carolina Senator Robert Barnwell Rhett told the British consul in 1860 that “to prohibit the Slave trade was, virtually, to admit that the

IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860, at 170-71 (Drew G. Faust ed., 1981).

¹⁵² Ronald Takaki, *The Movement to Reopen the African Slave Trade in South Carolina*, 66 S.C. HIST. MAG. 38, 38 (1965).

¹⁵³ *Id.* at 45.

¹⁵⁴ *Id.* at 45-46, 53; Leonidas W. Spratt, *The Philosophy of Secession: A Southern View*, DOCSOUTH (Apr. 24, 2001), <https://docsouth.unc.edu/imls/secession/secession.html> [<https://perma.cc/Y67X-LVVB>].

¹⁵⁵ *Id.* at 45-46, 53; Leonidas W. Spratt, *The Philosophy of Secession: A Southern View*, DocSouth (Apr. 24, 2001), <https://docsouth.unc.edu/imls/secession/secession.html> [<https://perma.cc/Y67X-LVVB>].

¹⁵⁶ Takaki, *supra* note 152, at 46.

¹⁵⁷ *Id.* at 45.

Institution of Slavery was an evil and a wrong. . . .”¹⁵⁸ Despite these efforts, every southern state that possessed laws against the Atlantic slave trade retained them, and, when the Confederacy came to draft a constitution of its own, it followed the U.S. government in prohibiting foreign slave trade.¹⁵⁹

Of course, there is no real way to know how widely antebellum southerners shared the view that Africans brought to the U.S. as slaves were the victims of man-stealing, but it is true that this view was expressed by southerners in the highest levels of government.¹⁶⁰ To the extent antebellum southerners shared the view, it discredited the moral distinction they sought to draw between holding slaves who through their ancestry were slaves from birth and enslaving Black persons who were previously free. This is not to say that southerners realized the distinction was problematic. On the contrary, Missouri Judge Hamilton Gamble’s opinion in *Dred Scott* manifests both an eagerness to embrace the distinction and a lack of awareness that it had become untenable.¹⁶¹ Judge Gamble wrote that it was natural for slaveowners to feel “exasperated” at abolitionists who denounced them in “wanton and unfounded” language that would be appropriate only if they had “actually kidnapped the slaves from the coast of Africa, or had

¹⁵⁸ Takaki, *supra* note 152, at 45. George Fitzhugh, who regarded himself as the first true defender of slavery, see Drew Guplin Faust, *Introduction*, in *THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH*, *supra* note 123, at 18, wrote in 1857, “The [British and U.S. anti-slave trade] fleets on the African coast are the . . . inferential condemnation of condemnation of negro slavery, which that trade superinduces. . . . We are *now* satisfied that the South cannot, consistently, approve the sentence passed by christendom on the slave trade, and yet justify slaveholding. We claim in her [christendom’s] name a re-hearing.” George Fitzhugh, *The Conservative Principle, or Social Evils and Their Remedies, Part II: The Slave Trade*, in 22 *De Bow’s Review* 449, 462 (1857) (original emphasis).

¹⁵⁹ See Barton J. Bernstein, *Southern Politics and Attempts to Reopen the African Slave Trade*, 51 *J. OF NEGRO HIST.* 16, 29 (1966),

¹⁶⁰ Thus, James Murray Mason, an outspoken advocate of slavery from Virginia, conceded on the floor of the Senate in 1848 that “in Africa, this relic of barbarism, which places the captive at the absolute disposal of the captor, remains, and the larger portion of slaves sent over to this country before the prohibition of the trade were those taken in battle or seized by the strong arm of power.” MASON, *supra* note 125, at 13.

¹⁶¹ See *Scott v. Emerson*, 15 *Mo.* 576, 590 (1852) (Gamble, J., dissenting).

inherited the fortunes accumulated by such iniquitous traffic.”¹⁶² Judge Gamble thus both acknowledged that it was appropriate to denounce southerners who had “inherited . . . fortunes” derived from “kidnapped . . . slaves from the coast of Africa” and, yet, seemed unaware that, for many of his countrymen, their understanding of the Atlantic slave trade meant that Black persons currently held in bondage in America *were, indeed*, the descendants of kidnapping.¹⁶³

How might slaveholders have defended themselves against this claim of cognitive dissonance? They might have argued that freedom based on distant ancestry lapsed with time and that slaveholders could rightly acquire ownership of slaves prescriptively by possession over time.¹⁶⁴ However, that argument conflicts with the normative principles to which southerners publicly claimed to be committed. Regardless of how long they were held in bondage, Black persons who derived their supposed slave status from maternal ancestors who by law were free, were themselves entitled to freedom. Thus, a Virginia court granted freedom to a Black woman in 1783 on the ground that her grandmother in the maternal line was Eleanor Butler, a white woman who married a Black man in 1681.¹⁶⁵ Maryland courts granted freedom to twenty-six Black persons in the 1790s on the ground that they all descended in a maternal line from a woman of color named “Maria”, who was free when she arrived on a Guinean ship from the coast of Africa in 1683.¹⁶⁶ And Louisiana rejected the claim that possessing a woman of color as a slave for fifteen years

¹⁶² *Id.* at 590 (“That the present owners of slaves, when denounced, in terms that would be appropriate, if they had actually kidnapped the slaves from the coast of Africa, or had inherited the fortunes accumulated by such iniquitous traffic, should feel exasperated by such wanton and unfounded attacks, is but natural.”).

¹⁶³ *Id.*

¹⁶⁴ *See, e.g.*, HAMMOND, *supra* note 151, at 172 (“That time does not consecrate wrong, is a fallacy which all history exposes. . . . The means . . . , whatever they may have been, by which the African race now in this country, have been reduced to slavery, cannot affect us, since they are our property . . . by inheritance or purchase and prescriptive right.”).

¹⁶⁵ *See* SCHWENINGER, *supra* note 14, at 10-12.

¹⁶⁶ *Id.*

was a defense to her claim to have been manumitted in Kentucky.¹⁶⁷ No southern court appears to have invoked lapse of time as a justification for denying Black persons freedom based on ancestry.¹⁶⁸

Alternatively, slaveholders might have argued that owners who were *bona fide* purchasers (*i.e.*, slaveholders who purchased slaves in the good faith belief that neither the slaves nor their maternal ancestors were victims of kidnapping) took valid title to slaves, regardless of the slaves' actual status. However, that argument, too, conflicted with southern law because southern courts invariably emancipated persons who could show that they were victims of kidnapping, regardless of whether their purchasers were aware of it.¹⁶⁹

Conversely, slaveholders might have argued that, despite the fact that their slaves descended from African ancestors who were victims of kidnapping, their ancestors were not victims of *unlawful* enslavement because African nations embraced the practice of subjecting war captives and their descendants to perpetual slavery. This argument might have had purchase in the 17th and 18th centuries.¹⁷⁰ However, by the 1820s, Americans, both North and South, no longer assumed that the African practice of capturing natives in wars and raids was a legitimate basis for subjecting them and their descendants to perpetual slavery. This is evidenced by wide-spread abhorrence, both North and South, of the Atlantic slave trade for profiting from kidnapping; by enactment of the 1820 statute that freed Africans seized from Atlantic slave traders, even if they were slaves under African laws; and by southern efforts to distinguish the Atlantic slave trade from domestic slave trade on the ground that, though the domestic slave trade involved hundreds

¹⁶⁷ See *Matilda, v. Autrey*, 10 La. Ann. 555, 555-56 (1855).

¹⁶⁸ William Harper, *Memoir of Slavery*, in *THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH*, *supra* note 123, at 120.

¹⁶⁹ See *WILSON*, *supra* note 29, at 43-45, 53, 77. See, e.g., *Foster v. Mish*, 15 La. 199 (1860) (freeing a man who, after being born to a manumitted slave woman in Kentucky, was kidnapped in Ohio where he was living as a free person of color, transported to Louisiana, and sold to an unwitting purchaser).

¹⁷⁰ See *COBB*, *supra* note 4, at 65.

of thousands of slaves,¹⁷¹ it did not involve the kidnapping of free persons as the Atlantic slave trade did.¹⁷²

Chief Justice John Marshall, a southerner and himself the owner of hundreds of slaves,¹⁷³ provided further evidence in 1825 in *The Antelope*.¹⁷⁴ Speaking for a Court the majority of whose members were slaveholders, Marshall wrote that although nations in Africa continued to treat prisoners of war as slaves, “throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives.”¹⁷⁵

Finally, slaveholders might have argued that, although their slaves *might* have descended from maternal African natives who had been enslaved as war captives in Africa, they might instead have descended from African natives who were enslaved in Africa for other reasons — e.g., as criminal punishment or for debt — and, as such, had no right to freedom unless they could *prove* that they descended from African war captives. This argument is problematic for two reasons. First, just as many 19th century Americans, including prominent southerners, doubted that war justified the perpetual enslavement of a war captives and their descendants, they were also likely to have doubted that debt or criminal punishment justified perpetual slavery for themselves and their descendants.¹⁷⁶ Second, the argument assumes that, in freedom suits based upon descent from Africans enslaved as war captives, American slaves would have had to *prove* such descent rather than their owners having to *disprove* it. It is true that most southern

¹⁷¹ More than a million slaves were traded from the Upper South to the Lower South between 1790 and 1806. See STEVEN DEYLE, *The Domestic Slave Trade in America: The Lifeblood of the Southern Slave System*, in THE CHATTEL PRINCIPLE: INTERNAL SLAVE TRADE IN THE AMERICAS 91, 93 (Walter Johnson ed., 2004).

¹⁷² See Gauch, *supra* note 132, at 48-49.

¹⁷³ See FINKELMAN, *supra* note 104, at 5, 31, 36-48.

¹⁷⁴ See *generally* *The Antelope*, 23 U.S. 66 (1825).

¹⁷⁵ *Id.* at 26.

¹⁷⁶ WOLF, *supra* note 17, at 137-38. Southerners were reluctant to use slavery for *life* as a criminal punishment, much less *perpetual* slavery for a criminal defendant's innocent descendants.

states required Black persons to bear the burden of proof in freedom suits.¹⁷⁷

However, the South's legal rationale for its routine rule was that Black persons who possessed legitimate claims to freedom were so rare that those who claimed to be free ought to bear the burden of proving it.¹⁷⁸ This probability-based rationale does not apply to freedom suits based on African war-captive ancestry because, by the 1820s, *most* American slaves were assumed to have descended from war captives in Africa.¹⁷⁹ Indeed, the South's probability-based rationale for assigning burdens of proof in freedom suits would have dictated that slave owners bear the burden of *disproving* such descent.¹⁸⁰

Relatedly, slaveholders might have claimed that Black persons bore the burden of proving African ancestry because they possessed greater knowledge of African ancestry than their masters did.¹⁸¹ However, because hearsay and reputation evidence were inadmissible everywhere to prove ancestry except, perhaps, in Maryland, Black persons had no more access to *legal* evidence of ancestry than their masters did.¹⁸²

CONCLUSION

Antebellum southern lawmakers and jurists widely and publicly embraced two norms regarding slavery, viz., that the institution of slavery as defined in the South was morally acceptable, and that it was morally wrong to enslave Black persons who by right were free. However, southern lawmakers failed to perceive the cognitive dissonance between the two commitments

¹⁷⁷ See SCHWENINGER, *supra* note 14, at 32.

¹⁷⁸ See COBB, *supra* note 4, at 67 ("As all the negroes introduced into America were brought as slaves, the black color of the race raises the presumption of slavery . . .").

¹⁷⁹ See *generally* Gauch, *supra* note 132; FINKELMAN, *supra* note 104; *The Antelope*, 23 U.S. 66 (1825).

¹⁸⁰ See *Hawkins v. Vanwickle*, 6 Mart. 418 (La. 1828) (an instance of a court refusing to require a Black litigant to prove freedom and instead obliging a slaveholder to prove slavery, on the ground that the usual presumption did not apply to a Black litigant who had lived for years as a person of color).

¹⁸¹ See SCHWENINGER, *supra* note 14, at 25 ("[S]laveholders' knowledge of their slaves' personal history, let alone their familial history, was extremely limited. . .").

¹⁸² See COBB, *supra* note 4, at 254; SCHWENINGER, *supra* note 14, at 25.

because they were unaware of the implications of their burgeoning belief that African wars and raiding parties, like those of the Barbary pirates in North Africa, did not justify perpetually enslaving war captives and their descendants.¹⁸³

How would southern lawmakers and jurists have responded if obliged to surrender one commitment or the other? Some might have responded by disavowing slavery. However, given white southerners' economic stake in slavery and their fear of freeing millions of Black persons, the majority is unlikely to have disavowed slavery. Yet, in adhering to the status quo, candor would have obliged them to acknowledge that, rather than merely *holding* slaves, they were veritable *enslavers* who, to quote Judge Gamble, had "inherited" their "fortunes" from the "iniquitous traffic" in "kidnapped slaves from the coast of Africa".¹⁸⁴

¹⁸³ James Murray Mason, a proslavery advocate from Virginia, illustrated the dissonance. He conceded that the "larger portion of slaves sent over to this country" were victims of the practice of the "savage race of Africa" of enslaving their war captives. Yet he insisted that, "be this as it may," and "let their condition result from what it might," those victims and their maternal descendants were to be rightly regarded as "property ever afterwards." MASON, *supra* note 125, at 12-13; 35 CONGRESSIONAL GLOBE 925 (Mar. 2, 1858).

¹⁸⁴ See *Scott v. Emerson*, 15 Mo. 576, 590 (1852) (Gamble, J., dissenting).