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Madison's Theory of General Law versus Property and Slavery

IN FEDERALIST 57, James Madison articulated a version of the rule of law demand of generality that would be echoed almost two centuries later by Friedrich Hayek: freedom is preserved by preventing legislators from passing laws that do not apply to themselves.¹ But Madison tied his 'Constitution of Liberty' to popular sovereignty:

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society.

This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty. Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people.

The American Founders had recent experience with legislators who enacted oppressive laws that didn't apply to themselves: one of the main precipitating factors of the American Revolution was special taxation for the colonies, even though Parliament was entirely composed of representation from the English metropole. (Every American schoolchild learns 'no taxation without representation' as the slogan of the Revolution.) The Stamp Act of 1765 is the most famous example. It imposed a fee on effectively every legal act to be done by an

¹ FA Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 155.

American by requiring tax stamps to be on every piece of paper used for such ordinary tasks as filing a document in court, accepting a public office, carrying out a land survey, giving a bond of debt, and many other acts.² Strictly speaking, stamp taxes themselves were not novel or unique to the colonies, as there had been stamp taxes in England proper at least since 1694.³ However, it appears that the American stamp act was somewhat broader in scope, and, at any rate, the real novelty, and the piece which would not have been permitted in England, was the use of the vice-admiralty courts to enforce such an internal tax – a point which I will discuss further in the next chapter.⁴

To understand Madison's Federalist 57 argument, we must attend to a classical theoretical binary in the intellectual history of the American founding. In that historical period, the United States occupied a position of intellectual tension between two ways of viewing a citizen's relationship to the state that are traditionally called 'republican' and 'liberal' – and many of the complexities of our constitutional institutions can be seen as the product of the cross-pollination of those two sets of ideas and their development through time.⁵

On the republican way of thinking, reaching the constitutional framers through the likes of Harrington and Montesquieu, the individual citizen is a

²ES Morgan, *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766* (Norton, 1973) 35 et seq.

³S Dowell, *A History and Explanation of the Stamp Duties: Containing Remarks on the Origin of Stamp Duties, a History of the Duties in This Country ... An Explanation of the System and Administration of the Tax, Observations on the Stamp Duties in Foreign Countries and the Stamp Laws at Present in Force in the United Kingdom, with Notes, Appendices, and a Copious Index* (Butterworths, 1873) 16.

⁴The use of admiralty jurisdiction for tax enforcement 'was a principle, however, that Englishmen had successfully resisted in the past and that could not have been applied in England itself without raising a storm of protest'. ES Morgan and HM Morgan, *The Stamp Act Crisis: Prologue to Revolution* (University of North Carolina Press, 1995) 73.

⁵By making that statement, I begin this book with a framework that may seem obsolete, even passé, to cutting edge constitutional scholars and historians: this chapter situates the intellectual tension at the founding of the United States in a theoretical binary between republicanism and liberalism largely following mid-20th-century historians such as Gordon Wood, Bernard Bailyn, and John Pocock; a historical tradition which spawned a kind of 'republican revival' in constitutional scholarship toward the end of that century. Since then, however, historians have complicated the question rather substantially, and constitutional scholarship has partly moved on. See discussion in J Gienapp, 'Beyond Republicanism, Back to Constitutionalism: The Creation of the American Republic at Fifty' (2020) 93 *The New England Quarterly* 275. As early as the 1990s, historians were already shaking their head sadly at the belated adoption by academic lawyers of the republican framework. GE White, 'Reflections on the Republican Revival: Interdisciplinary Scholarship in the Legal Academy' (1994) 6 *Yale Journal of Law & the Humanities* 1. Yet I heavily rely on Gordon Wood in this chapter, and – perhaps also disappointing to cutting edge constitutional scholars steeped in modern techniques such as corpus linguistics – also rely heavily on the Federalist Papers. But to the extent constitutional theory has moved past a previously myopic emphasis on those sources and theories, it is only because of their strength – they have receded into the background of more contemporary work. In examining a particular dimension of American constitutionalism and politics, its orientation toward the rule of law, which has not yet been the subject of focused attention through such an analytic lens, recourse to the previously hegemonic framework in combination with modern rule of law theory is appropriate.

kind of repository of civic virtue who would subordinate his (with, alas, the pronoun used intentionally) private interests to the public interest; elected representatives would share a universal conception of the public good with the people. Traditionally, republican theory is associated with a civic conception of liberty according to which the most important sense of freedom is political freedom.⁶ It is also associated with ideas such as separation of powers and the 'mixed' or 'compound' republic; small, homogeneous states; and the simultaneous endorsement of property qualifications for voting to ensure independence and civic virtue in the electorate and egalitarian efforts to promote equal property ownership to mitigate the corrupting influence of wealth. At heart, republicanism is the ideology of the yeoman farmer-citizen. The people are an organic whole with substantial common interests, the duty of the individual is to suppress their private interest in favour of the public interest, and the conception of liberty that most matters is the political liberty of a self-governing people, not individual liberty in the sense of the freedom to pursue one's private good.⁷ The republicanism of the framers of America's constitution can be seen, for example, in John Jay's Federalist 2, an encomium to 'one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs' which declares that the land and the people 'seem to have been made for each other'.

An important recent gloss on the republican view of the founding, and one which has heavily influenced this book, is Aziz Rana's account of settler ideology.⁸ For Rana, American civic (ie, republican) freedom as independence rested on an imperial expansionist drive – one which could secure the predicates of republican citizenship for all (white men), where those predicates are understood in terms of a high-status economic role revolving around landownership. Such a conception of freedom rests on the unfreedom of others, for the land, and the people to do the low-status, dependent, work on it, must come from somewhere – ie, from Native Americans and the enslaved, respectively.

By contrast, the liberal way of thinking, which reached the framers primarily through writers such as John Locke, is more familiar as the dominant ideology of the contemporary United States. It sees the individual as having a right to pursue his or her private interests without interference from the state, and, in conjunction with that idea, emphasises a conception of liberty as non-interference with those private interests and, in effect, the capacity to ignore the state if one desires just so long as one obeys the rules it lays down. The contemporary literature on the rule of law is replete with liberal assumptions; most famously,

⁶ Although modern neorepublican historians have argued that it ought to be associated with a conception of liberty as nondomination.

⁷ GS Wood, *The Creation of the American Republic, 1776–1787*, 2nd edn (University of North Carolina Press, 1998) 57–65.

⁸ A Rana, *The Two Faces of American Freedom* (Harvard University Press, 2014).

Frederick Hayek's account of the importance of the rule of law to liberty in *The Constitution of Liberty* is liberal through and through, and does much to drive the contemporary emphasis on ideas such as predictability as core aims of the rule of law. The liberal view is rather more compatible with a diversity of views and interests in the public, and rather less demanding on civic virtue. Property rights are important on liberal views as well, because property, when guarded by robust liberal protections, provides a determinate sphere of autonomy through which individuals can pursue their private goals. At heart, liberalism is the ideology of the aspirational wealthy merchant. And its influence on America's constitutional framers can also be seen in the Federalist Papers, perhaps most saliently in Federalist 10, Madison's famous disquisition on faction, which emphasises not the unity of the American people but their unavoidable differences, in religion, in abilities, and in wealth, and the conflicts which arise among 'A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests.'

In Federalist 57, Madison appears to straddle the liberal/republican binary. His account of how the rule of (general) law is to be preserved rests on the presumption of a common interest between the people and their representatives – and hence implicitly, on a fairly homogenous conception of the public, like the one traditionally associated with classical republican political thought. For a liberal with a presumption of social diversity, it's hard to see how the argument from democratic representation to laws protecting the interests of minorities could possibly work: imagine, for example, a House of Representatives composed entirely of Christians and the application of a law requiring work on Saturday and rest on Sunday to Jews. But a republican who assumes a homogenous English Protestant civic community would not naturally focus on that sort of diversity. Yet, in the same document, Madison appears to move in a more liberal direction in his conception of the value of this generality, via the articulation of a kind of libertarian fear of oppressive laws that might regulate the behaviour of the people but not of the government.

From the rule of law standpoint, we can read Federalist 10 as an answer to that worry, and to another obvious objection to the republican side of Federalist 57. To wit: a dominant view of the period, following Montesquieu, suggested that large countries could not sustain republican governments because republicanism depended on close relations among the people and their representatives (a kind of dense social capital, in contemporary terms), which would be much harder to achieve in a large country.⁹

But Madison was not ignorant of the diversity in his political world – particularly the diversity between rich and poor, which could easily lead either group to pass laws perceived as oppressive by the other (land reforms for the

⁹See CM Kenyon, 'Men of Little Faith: The Anti-Federalists on the Nature of Representative Government' (1955) 12 *The William and Mary Quarterly* 3, 6–10.

first, debtor's prisons for the second, perhaps). The framing generation was also obviously aware of disparate interests between the states.¹⁰ Federalist 10 is taught to American schoolchildren as Madison's theory of how the Constitution prevents 'faction'. But, in the context of Federalist 57, we can understand it as a second take at why Congress could be trusted to act like a genuine representative of the public good as a whole in enacting general laws. Not, on this particular Madisonian argument, because the people in fact have homogeneous interests, for Madison recognises in Federalist 10 that this is not the case. Thus, he draws on the Lockean rule of law objection to a person being judge in their own case to explain the risk of abuses like steep taxes on the property of other factions but not on the faction represented by a majority of Congress. Instead, his response to the worry is his theory of enlargement, according to which larger constituencies are safer against faction, because they are more likely to have qualified representatives available and because demagoguery and conspiracy are harder to pull off in larger constituencies. Moreover, he argues that larger constituencies are likely to contain a larger variety of interests, and hence to be more likely to resist capture by a single interest controlling a majority of voters. The same argument applies at least in principle for Congress's representation of the entire nation: because it contains representatives from a vast number of interest groups, it might arguably be more resistant to capture, and hence more obliged to enact truly general laws.

THE SPECIAL POSITION OF PROPERTY

There's still an obvious problem. Even if we grant republican assumptions about common fundamental interests, and even if 'enlargement' could prevent faction within the various classes who elected the House of Representatives, the Federalist 57 claim is quite implausible. After all, the American constitutional structure manifestly failed to prevent caste legislation: the entire country began as one giant legal discrimination in favour of whites against the enslaved, against Native Americans, and, in different respects, against women as well. Even among white men, early American suffrage (and hence access to the representative mechanisms that were supposed to protect the generality of legislation) was notoriously exclusionary – property qualifications were widespread in the early constitutional period, and even when those were repealed, they were replaced with laws that excluded 'paupers'.¹¹ There were unquestionably differences in interest between the enfranchised and all those classes of persons.

The case of the propertyless is particularly important. From the modern point of view, we intuitively think of those without property as full members

¹⁰ Wood (n 7) 356, 527.

¹¹ RJ Steinfeld, 'Property and Suffrage in the Early American Republic' (1989) 41 *Stanford Law Review* 335.

of the political community. And while it's easy to recognise the moral failures of the framers in excluding women, Native Americans, and Black Americans from suffrage, and hence from the democratic guarantee of general law – we're familiar with misogyny and racism – the exclusion of the propertyless isn't as comprehensible in 2021. For that reason, unpacking it will be particularly fruitful in making sense of how property was and continues to be foundational to the American conception of the rule of law.

The rhetoric surrounding property qualifications for the electoral franchise drew on a republican conception of independence according to which holding property shields a citizen from domination by others, and only the vote of such an independent citizen can be trusted. Hence, justifications for the exclusion of the propertyless from the franchise referred to their lack of an independent will.¹² At least in some of the early state constitutions, higher amounts of property also permitted the identification of a wiser or more virtuous class of citizens, as well as and eventually standing in for an interest in itself – and for both reasons seemed suitable for justifying the existence of a quasi-aristocratic legislative upper house.¹³ Enfranchisement of the propertyless could be seen as futile as well as pernicious – pernicious because the propertyless were likely to simply vote how their patrons commanded, but also futile because, already being under the domination of others, there's a sense in which they already lacked the autonomy which representative democracy as well as the rule of law were meant to protect.¹⁴

The conception of property as independence and, with that independence, a kind of civic virtue had longstanding origins, tracing at least back to Florentine humanist republicanism and then Harrington. Pocock explains:

The Englishman had begun to envisage himself as civic individual through the use of Aristotelian and civic humanist categories, which required among other things that there be a material foundation, the equivalent of Aristotle's *oikos*, for his independence, leisure and virtue. The nature of this equivalent had been described for him, first by Machiavelli in terms of arms, second by Harrington in terms of property; and the realities of the seventeenth-century social structure had established as paradigmatic the image of the freeholder, founded upon real or landed property which was inheritable rather than marketable, was protected by the ancient sanctions of the common law, and brought with it membership in the related structures of the militia and the parliamentary electorate, thus guaranteeing civic virtue.¹⁵

¹² *ibid* 337–44; Wood (n 7) 168–69.

¹³ Wood (n 7) 218, 244.

¹⁴ See also B Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (Cambridge University Press, 2010) on how the concept of property wove through the inequalities and exclusions of early America, encompassing not just race but also gender, nativity, and abledness.

¹⁵ JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, 2nd pbk edn (Princeton University Press, 2003) 450.

This conception of the republican importance of property also contributes to an explanation of why the framing generation's individual rights so often seem to be oriented around the protection of property, as with the formulation 'life, liberty, and property', as in the Due Process clauses of the Fifth and (later) Fourteenth Amendments, and, in thinly veiled form, in the Declaration of Independence.¹⁶

Because property was a precondition of independence and full citizenship, its protection was a paramount concern of the rule of law. A state that could deprive a citizen of their property could reduce them to a subordinate social, economic, and political status.

Property was not only a precondition for full citizenship, citizenship was originally a precondition for property ownership. At the dawn of the United States, the states applied common-law doctrines restricting alien rights to own real property.¹⁷ In a kind of yeoman republic, this makes some intuitive sense: if property ownership is a marker of citizenship and civic virtue, extensive property ownership by non-members may seem to threaten the integrity of that relationship – or may simply deprive citizens of the opportunity to attain full status through pricing them out of landownership. Perhaps unsurprisingly (given the lack of land scarcity and need for labour) such laws began to fall away with the growth of the west, before rising again with nativist prejudices in the Chinese Exclusion era.¹⁸ As late as 1923, the Supreme Court appealed to republican ideas about land and civic virtue in upholding a Californian law excluding Japanese people (and others ineligible under openly race-based federal law of the time for citizenship) from land ownership:

We agree with the court below that 'It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the State, and, so lacking, the State may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the State might pass to the ownership or possession of noncitizens.'... The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance, and affect the safety and power of the State itself.¹⁹

¹⁶ For an account of the 'pursuit of happiness' which centres property and, indeed, even reaffirms in modern times the claim that possession of property makes one independent and hence particularly capable of serving as a democratic citizen, see LW Levy, 'Property as a Human Right' (1988) 5 *Constitutional Commentary* 169, 175–76.

¹⁷ A Brownell Tirres, 'Property Outliers: Non-Citizens, Property Rights and State Power' (2012) 27 *Georgetown Immigration Law Journal* 77, 91–2; PJ Price, 'Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm' (1999) 43 *American Journal of Legal History* 152; A Brownell Tirres, 'Ownership without Citizenship: The Creation of Noncitizen Property Rights' (2013) 19 *Michigan Journal of Race & Law* 1. According to Justice Story's discussion of the common-law rule inherited from England in *Fairfax's Devisee v Hunter's Lessee* 11 US 603, 619–20 (1812), an alien could purchase but not inherit land, and the sovereign had the right to dispossess the alien's land at will.

¹⁸ Tirres (n 17) 94–95. Of course, the 'growth of the west' was nothing more than the removal of one particular category of noncitizens, namely the Native Americans, from their land and replacing them with citizen settlers.

¹⁹ *Terrace v Thompson* 263 US 197, 220–21 (1923) (internal citation omitted).

Vestiges of these laws persist today. As recently as 1980, the John Marshall Law Review could publish an article calling for federal legislation restricting foreign land ownership, and there are alien-restrictive land laws on the books in the majority of states even into the twenty-first century.²⁰

However, even as property provided the foundation (as it were) of citizenship, there's also an inherent tension between some of the revolutionary and founding-era ideas surrounding property and the rule of law and a republican conception of equal citizenship. For legal equality even among property holding citizens – especially if that equality is protected by equal shares of democratic suffrage, as on the Federalist 57 argument – may also pose a threat to concentrations of property.

The tension between legal and civic equality and the protection of property was a basic background problem of the Constitution (and much of the rest of this book traces it through to the present). Consider state senates, sometimes openly understood to be a way to provide substantial property holders with special representation and a veto over legislation that might otherwise expropriate them – Madison himself characterises state senates that way in Federalist 54. On the one hand, surely such a protection against expropriation is itself part of the rule of law. But on the other, because that protection against expropriation entailed giving the wealthy disproportionate power in government, it also gave them the prospect of using that power to oppress the less wealthy, and undermined the notion of equal citizens on which republican conceptions of civic virtue and common interest rested.²¹

The same fundamental conflict was the constitutional heart of the problem of slavery from the standpoint of many Northerners: by giving the slave states disproportionate power in government to protect their 'property' in humans – such as with the three-fifths clause, which granted the slave states Congressional representation on the partial basis of the enslaved people whom they held, although the slaves obviously could not vote – the Constitution also gave them the power to dominate the North. This is what abolitionists came to call the 'slave power': the fact that their government was structurally rigged to empower slaveholders to preserve slavery-as-property.²²

Another way to think about the problem is that strong property rights protections and popular government can only be wholly compatible under conditions of relative economic equality – but the revolutionary generation recognised that the aggressive protection of private property leads to the creation of wealth, which undermines the equality on which republican virtue is founded.²³

²⁰RL Bell and JD Savage, 'Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation' (1980) 13 *John Marshall Law Review* 679; Tirres (n 17) 97–101.

²¹Wood (n 7) 221.

²²LL Richards, *The Slave Power: The Free North and Southern Domination, 1780–1860* (Louisiana State University Press, 2000).

²³Wood (n 7) 65.

Perhaps it is for this reason that classical republican influences like Harrington had favoured land reform legislation to distribute property on an egalitarian basis, and prominent members of the framing generation such as Adams and Jefferson favoured similar legislative measures, such as the reform of inheritance laws and the distribution of western lands.²⁴ Such policies were implemented at least in part and at some points, by the early Americans.²⁵

The Affinity between Republican Property and Liberal Property

For a country whose normative foundations oscillate so noticeably between republicanism and liberalism it is notable that the legal protection for property might shift seamlessly between them as well. In liberalism's emphasis on individual rights to pursue a person's independent conception of the good, property can serve as the primary means by which those individual conceptions of the good may be pursued – and hence American solicitude toward property also invites interpretation as a built-in bias toward more capitalistic versions of individual legal rights, which emphasise the liberties of the market over those of the forum.²⁶

In one of his more liberal moods, Madison even saw other individual rights as mere flavours of property. In a 1792 essay simply entitled 'Property', he claims that property has both narrow and broad senses, the narrow sense being the conventional physical things over which one exercises 'dominion'; and the broad sense something like a modern conception of equal liberty: 'every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage'.²⁷ For Madison, it was possible to understand even the most historically salient noneconomic liberal right, religious toleration, as a subspecies of property: a person 'has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them'. Accordingly, he argues that governments should protect freedoms like individual religious liberty because a government that fails to do so violates property rights just as if it expropriated their land or burgled their houses.

Madison's caveat about 'like advantage' resembles Locke's famous proviso, which permits the acquisition of private property in a state of nature just so long

²⁴ GS Alexander, 'Time and Property in the American Republican Legal Culture' (1991) 66 *New York University Law Review* 273, 291–99.

²⁵ *ibid* 313.

²⁶ Alexander, *ibid* 328, associates the shift from republican to liberal views of property in American law with the Scottish Enlightenment and the shift from land to more commercial conceptions of property. On the influence of Locke's conception of property as well, see Schultz, 'The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence' (1991) 13 *Western New England Law Review* 155.

²⁷ J Madison, 'Property', available in *The Founders' Constitution*, Vol 1, ch 16, Document 23, press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (The University of Chicago Press).

as ‘there is enough, and as good, left in common for others’.²⁸ Madison also sounds quite Lockean when he says that ‘Government is instituted to protect property of every sort’, and also offers a kind of foreshadowing of the early twentieth century *Lochner*-era constitutional rejection of economic regulation, arguing that government violates property rights when it legislates anticompetitive market regulations and high taxes – in part on the basis that such regulations amount to invasions of a person’s property right in their own labour.

In the contemporary period, from the fully-fledged liberal standpoint of the contemporary American rule of law, property rights are widely seen as at its centre.²⁹ Thus, in the United States, more so than many other countries, there is a real sense that private property comes with a domain of rights not just against other citizens, but against certain kinds of government regulation. We can see this, for example, in our ‘regulatory takings’ doctrine, under which government land use rules for things like environmental purposes are sometimes classified as ‘takings’ of property under the Fifth Amendment – that is, expropriations of property in the traditional language of the rule of law – and hence as requiring compensation.³⁰ Leading ‘classical liberal’ Richard Epstein has argued that strong private property rights are instrumental in achieving the constraint of state power by reducing the scope of discretionary government decision.³¹

Republican Property and Slavery

But the unjust face of property and its threat to the popular protections of the rule of law cannot be ignored. Whether through a liberal or a republican lens the limitation of representation to property holders – let alone the far more dramatic exclusions, particularly of slaves – undermined the claim that ‘communion of interests and sympathy of sentiments’ could ensure that Congress would only make general laws. It is true, perhaps, that thanks to the House of Representatives Congress could not make law that applied to ordinary property holders but not to elected officials. But they easily could make law that applied to non-property holders but not to property holders. And, of course,

²⁸ Second Treatise, ch 5, s 27.

²⁹ This began early: Scheiber suggests that the protection of ‘vested rights’, centrally including vested property rights, was ‘an absorbing concern for the Supreme Court in the early history of the republic’. H Scheiber, ‘Public Rights and the Rule of Law in American Legal History’ (1984) 72 *California Law Review* 217, 218–19. Tamanaha views the protection of property as the central ideal of the ‘classical liberal’/laissez-faire period of American jurisprudence. B Tamanaha, ‘The Dark Side of the Relationship Between the Rule of Law and Liberalism’ (2008) 3 *New York University Journal of Law & Liberty* 516, 519–21.

³⁰ eg, *Lucas v South Carolina Coastal Council* 505 US 1003 (1992). See J Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) for discussion.

³¹ R Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard University Press, 2011) 95.

they could make law that brutally oppressed people who were held as property. Regardless of what Madison believed would happen when he wrote Federalist 57, the representative character of the government did not keep the Slave Power from enacting the Fugitive Slave Act of 1850, widely and correctly believed in the North to be oppressive and to savagely disregard the interests of free Black Americans and also the political liberties of all Northerners who wished to make their own decisions in their own states about such things as freedom and kidnapping.

Alas, the framers' vision of themselves as creating a system that could generate laws applicable to all rested ineluctably on their foundational unwillingness to actually think of the enslaved and the subordinated as members of the political community. Again Wood's account of American republicanism casts the problem into sharp relief: he attributes to the revolutionary generation a self-image of themselves, drawn from European perceptions of America, as egalitarian and free of social caste, a society in which 'almost every man is a freeholder' and in which '[n]o man held his land by feudal tenure, for "every cultivator" was "lord of his soil"'.³² But that self-image was total nonsense, as the South was politically and economically dominated by a class of massive landowners relying on enslaved labour to carry out the actual cultivation.³³ And this contradiction existed in the very persons of the founders – most infamously, in Thomas Jefferson, who simultaneously defended republican theories of the relationship between property ownership, equality, and civic virtue while owning an immense wealth in plantation land and slaves.³⁴

From the contemporary point of view, it seems bizarre that Thomas Jefferson could write a letter contrasting the inherent virtue of 'those who labor in the earth' with the 'dependence' of those who were employed in manufacturing, even while those who laboured on the earth he owned were kept in the most abject state of dependence known to humanity.³⁵ It's understandable from the standpoint of Rana's theory of settler ideology, but only if we force ourselves to remember that the enslaved weren't even eligible for republican virtue on that ideological framework. Similarly, it requires a kind of wilful self-delusion to, with John Adams, contrast a slave state with a feudal 'tyranny' and conclude that the former somehow comes out ahead.³⁶ While many in the revolutionary generation were aware that the vision of America as a bunch of hardy virtuous smallholder farmers didn't match the reality, and particularly didn't match the

³² Wood (n 7) 100.

³³ Evidence from economic history shows an immense concentration of wealth in large slaveholders in 1860; evidence from the end of the 18th century is scarcer, but L. Soltow, 'Economic Inequality in the United States in the Period from 1790 to 1860' (1971) 31 *The Journal of Economic History* 822, argues that the degree of inequality was similar.

³⁴ SN Katz, 'Thomas Jefferson and the Right to Property in Revolutionary America' (1976) 19 *The Journal of Law & Economics* 467, 467, 473–74, 483.

³⁵ *ibid* 473.

³⁶ Alexander (n 26) 309–10.

reality of the Southern planter elite, their worries focused on things like monarchical influences and extravagant fashion.³⁷ One would have hoped that they might be a bit more worried about the fact that the people who did the actual work in their economy were not counted as members of the republican polis at all, except, of course, in the infamous proportion of 3/5 for the purposes of representative apportionment to their masters. And even when they favoured land redistribution, that hardly seemed to show any solicitude to the enslaved, or to Native Americans, or to women excluded from political power.³⁸

The deepest contradiction of all between the republican and later liberal emphasis on property as the bulwark of a free society and the institution of slavery was not merely that slaves were disenfranchised and denied (with some complications) the capacity to hold property. Rather, it is that slaves *were* property. And property, in the framing conception, was a kind of ‘absolute dominion’, what Blackstone described as ‘despotic’.³⁹ Madison, too, used that term ‘dominion’ in his essay on property. Necessarily, then, slaves could not be the independent republican agents deemed suitably virtuous for citizenship – if being subject to the will of an employer or the regulations of a pauper made one unfit for republican citizenship, how much more so if the control another was definitionally entitled to exercise over one was outright ‘despotic’?

There’s a vicious kind of circularity at the heart of republican slavery: a slave was dependent, so they couldn’t be a citizen with the power to hold property or otherwise protect their interests under law; the slave’s lack of citizenship and property in turn made them dependent. Indeed, the republican character of the United States made slavery more robust as well as more brutal. This is a core insight of recent comparative work by Alejandro De La Fuente and Ariela Gross: in a regime like Cuba where traditional monarchical social hierarchies ruled, slaves could be permitted to obtain freedom on an individual basis (and, as I read their account, some degree of softening of the treatment of the enslaved as a group) without threatening the overall hierarchical status of the master class; by contrast, in the United States, such measures appeared to pose the risk of raising the formerly enslaved to the same status of free and equal citizenship as whites, and hence was more robustly resisted.⁴⁰

³⁷ Wood (n 7) 109.

³⁸ To be sure, some antifederalists at least identified the corruption of the idea of representation captured in the three-fifths clause. D Waldstreicher, *Slavery’s Constitution: From Revolution to Ratification* (Hill and Wang, 2009) 116–24.

³⁹ I take the phrase ‘absolute dominion’ from KJ Vandavelde, ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29 *Buffalo Law Review* 325, 330–31, who also quotes the relevant part of Blackstone, and who notes, *ibid*, that ‘Blackstone divided all legal rights into two categories: rights over persons and rights over things. The law of property concerned only the latter’. So, on the Blackstonian conception, slaves would be things to the early Americans.

⁴⁰ A de la Fuente and AJ Gross, *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana* (Cambridge University Press, 2020) 130, 180–81, 221–23.

SLAVERY AS LAWLESSNESS

I contend that slavery as a regime was incompatible with the rule of law from the start. This is a conceptual claim: to have slaves is to identify a class of persons who are wholly excluded from legal personality and protection. As Patterson argued in his influential account of the institution, socially and legally a slave is a kind of walking dead: the condition of slavery is inevitably represented as an alternative to the death which would have otherwise been the slave's lot, where the master holds that death in abeyance; as a result, 'the slave had no socially recognised existence outside of his master, he became a social nonperson'.⁴¹ Unsurprisingly, the legal texts of the antebellum period are replete with the parallel proposition that the enslaved (and those racially liable to enslavement) were legal nonpersons as well, most famously captured in the claim of *Dred Scott v Sandford* that Black Americans had been understood by the Constitution's authors as having 'no rights which the white man was bound to respect', and hence could not avail themselves of the protection of the federal courts.

But the generalisation of that claim immediately faces a challenge from the fact that the enslavers understood themselves as a people of law. And even the organisation of slavery helped itself to the forms of law: contracts for the hire of slaves could be enforced in court, slaves could be punished by law for their crimes. Moreover, slaveholders also asserted claims to slaves and defences of slavery against political challenges in the language of the rule of law.

Even the implementation of the slave system's most brutal provisions was wrapped in the language of legalism. Thus, Harriet Jacobs recounts that one would-be slavecatcher characterised his activity not as the kidnapping for profit that it was in reality, but as an act of noble self-subordination to the laws (in terms that eerily resemble Socrates's explanation in Plato's *Crito* of why he must submit to execution): 'There are enough of us here to swear to her identity as your property. I am a patriot, a lover of my country, and I do this as an act of justice to the laws.'⁴² Antislavery judges who saw themselves as forced to enforce the enactments reinforcing that institution expressed a (perhaps more sincere, but misguided) version of the same idea.⁴³

Yet the intellectual framework of the period also identified the fundamental lawlessness of slavery. Even as the American colonists were brutalising their slaves, they were conducting a revolution under the influence of an idea that intellectual historians have since named 'antityrannicism'. As the term suggests, the rhetoric of antityrannicism identifies slavery and lawlessness in the form of tyranny, but puts the focus in the opposite direction from the one we might

⁴¹ O Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press, 1982) 5.

⁴² H Jacobs in L Maria Child (ed), *Incidents in the Life of a Slave Girl* (Pub For the Author, 1861) 270 (written under the pen name Linda Brent).

⁴³ See RM Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975); R Dworkin, 'The Law of the Slave-Catchers' (1975) *Times Literary Supplement* 1437.

expect: revolutionaries under the influence of antityrannicism fought against forms of government identified as tyrannical by wielding the claim that to live under lawless government is to be delivered into a state of slavery.

Antityrannicism was an important part of the intellectual background to the American Revolution.⁴⁴ Mary Nyquist has written the most important book on the subject, and she identifies that John Locke was deeply invested in antityrannicism – and that for Locke, a key objection to lawless government was the impossibility of voluntarily agreeing to the ‘Absolute, Arbitrary Power’ associated with enslavement.⁴⁵ On the other side of the race divide, the great Black abolitionist and revolutionary David Walker directly engaged with the intellectual framework of antityrannicism in his famous Appeal to the Coloured Citizens of the World, in which he deployed American rejection of tyranny to motivate a demand for the end to slavery.⁴⁶

Notwithstanding the fact that even the framing generation could identify slavery with lawless tyranny, some contemporary scholars resist the idea that slavery was incompatible with the rule of law. For example, Tushnet accused legal scholars who claim that slavery and basic legal values are incompatible of spouting ‘nonsense’ and ‘Whigishness’ on the basis of ‘contemporary standards of fairness and justice.’⁴⁷

I disagree with Tushnet: even if the forms of the legal system are used to organise a relationship, to the extent that relationship gives one person the effectively unlimited capacity to do violence to another, then it is force that regulates that relationship, even if a court occasionally decides to describe it in legal terms. As North Carolina Chief Justice Thomas Ruffin said in the infamous case of *State v Mann*:

We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.⁴⁸

Ruffin further explained that such legally unconstrained power was necessary in order to achieve the ‘uncontrolled authority over the body’ (ie, unlimited right to do violence) that was in turn necessary to bring it about that the slave ‘surrenders his will in implicit obedience to that of another’, which in turn was necessary to compel the labour of a person ‘doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing

⁴⁴ eg, L Benton, ‘Just Despots: The Cultural Construction of Imperial Constitutionalism’ (2013) 9 *Law, Culture and the Humanities* 213.

⁴⁵ M Nyquist, *Arbitrary Rule: Slavery, Tyranny, and the Power of Life and Death* (2015) 329–52.

⁴⁶ E Duquette, ‘Tyranny in America, or, the Appeal to the Coloured Citizens of the World’ (2021) 33 *American Literary History* 1.

⁴⁷ M Tushnet, *The American Law of Slavery, 1810–1860: Considerations of Humanity and Interest* (Princeton University Press, 1981) 25–26.

⁴⁸ *State v Mann* 13 NC 263 (1829).

his own, and to toil that another may reap the fruits'. The mere fact that Ruffin announced that doctrine from the bench of a courtroom while wearing a robe does not make its content any less lawless.

Another way to think of the problem is that 'slave law' was only coherent from what Williams called the 'experiential perspective' of masters.⁴⁹ For slaves, there was no such thing; indeed, slaves could not be allowed to know that there might be such a thing or to integrate it into their plans and their lives, and Ruffin explained exactly why: even if there were legal rules constraining masters, the enslaved couldn't be allowed to perceive them lest the totality of enslaver power be undermined thereby.

I will fill out the lawlessness of slavery in more detail. At the grossest level, American slavery could be described as the conjunction of four legal/social facts about the relations between slaves and their masters as well as the rest of the society. First, slaves were considered the property of their masters, and, as property, could be deprived of all other social ties at will, such as by selling them away from their families. Secondly, was the radical unfreedom of slaves, who were subject to the absolute command of their masters and were further denied the social and legal prerequisites of freedom, such as the right to own property or to be literate.⁵⁰ Thirdly was the complete or near-complete subjection of the slave to violence at the unrestrained will of the master, a subjection necessary in order to enforce the other facts about slavery, as, of course, no human not subject to extreme violence would ever submit to such a regime (as Ruffin explained). Fourthly was the status hierarchy between masters and slaves; and between those who were subject to slavery and citizens as a body; a hierarchy constituted in part by the prior three facts, but also by a broad-based exclusion of the enslaved from legal rights, and even of free Black Americans in the North from most of the rights of citizenship. The conjunction of those facts achieved Patterson's 'social death': 'the permanent, violent domination of natively alienated and generally dishonored persons'.⁵¹

Practically (as opposed to legally) speaking, the most important of those facts is the pervasive threat of arbitrary violence. On Patterson's analysis, the 'social death' of slavery is a substitute for (and a social simulacrum of) the physical death to which a slave is subject: the traditional theory of justifiable enslavement is that those who were subject to permissible killing (as in war) may be enslaved instead.⁵² Accordingly, across slave societies, slaves typically had

⁴⁹ P Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401, 417.

⁵⁰ Property holding by slaves is further discussed below. On literacy, and on many other legal disabilities, see AB Mitchell, 'Self-Emancipation and Slavery: An Examination of the African American's Quest for Literacy and Freedom' (2008) 2 *Journal of Pan African Studies* 78; J Cornelius, "'We Slipped and Learned to Read': Slave Accounts of the Literacy Process, 1830-1865' (1983) 44 *Phylon* (1960-) 171; B Brander Rasmussen, "'Attended with Great Inconveniences": Slave Literacy and the 1740 South Carolina Negro Act' (2010) 125 *PMLA* 201.

⁵¹ Patterson (n 41) 13.

⁵² *ibid* 5, 38-44.

death continually hanging over their heads, to be inflicted at the master's will – some 75 per cent of slave societies in Patterson's study imposed no or minimal penalties on a master who killed their slave.⁵³ To the extent American slaves were protected from violence by whites, it was primarily from violence by whites who were not their masters, for, after all, a master may destroy his own property but some third person may not.⁵⁴

Because of the linkage between slavery and status, the power of arbitrary violence necessarily extends, at least in part, to the entire free community against the entire slave community – susceptibility to violence becomes the mark of the enslaved. This is also true of slavery across cultures. The first reference to it of which I am aware comes from Pseudo-Xenophon (also known as the Old Oligarch), in his *Constitution of the Athenians*, where he contrasts ancient Athens to other (implicitly more virtuous – and implicitly meaning Sparta) polities with reference to the unusual fact that Athenians were not allowed to generally hit slaves: 'Now among the slaves and metics at Athens there is the greatest uncontrolled wantonness; you can't hit them there, and a slave will not stand aside for you.'⁵⁵ In other words: Athens was aberrant in virtue of the fact that arbitrary public violence could not be used to demarcate the line between free and slave and enforce subordinate behaviour in slaves by terror. Colonial Virginia did not share Athens's aberration: a law of 1680 provided for 30 lashes for any enslaved person who 'shall presume to lift up his hand in opposition against any christian' – thus suggesting, as Morgan plausibly interprets it, 'that it allowed servants [ie, poor whites] to bully slaves without fear of retaliation'.⁵⁶ Similarly, in French colonial Louisiana the law outright instructed whites to do violence to presumptively-enslaved Black strangers encountered on the street who seemed insufficiently respectful.⁵⁷

If the rule of law prohibits anything at all, it prohibits the law authorising one class of people to engage in violence against another for any reason, or no reason at all. Indeed, doing so is the essence of what, in other work, I have called

⁵³ *ibid* 190–93.

⁵⁴ More on this below; for some nuances see A Fede, 'Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States' (1985) 29 *American Journal of Legal History* 93.

⁵⁵ From the EC Marchant translation, online at the Perseus Project, www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.01.0158.

⁵⁶ ES Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (2005) 331. This vesting of a de facto arbitrary power of violence in every white person against every slave was not, however, entirely unproblematic even in the South. After all, if one white person could do violence to another white person's slave, they might accidentally or intentionally damage that other's 'property'. This is an important contrast between a system of individually-owned chattel slavery and something like publicly-owned Spartan helotage. T Figueira, 'Helotage and the Spartan Economy', *A Companion to Sparta* (John Wiley & Sons, Ltd, 2017) 566. There was at least the potential, even, sometimes for slave self-defence, albeit under disadvantageous conditions relative to that of whites and with the caveat that random whites were permitted to do violence to slaves owned by another as punishment for 'insolence', as in *State v Jarrott* 23 NC 76 (1840).

⁵⁷ Fuente and Gross (n 40) 35.

terror: the use of the power of violence to reduce another to submission and force the other to act out their subordinate status.⁵⁸ Although the conventional form of terror is a power vested in state officials – consider the Gestapo or KGB secret police – slave societies are distinctive in part by their formal separation of the class who gets to inflict arbitrary violence from the state. Slave terror is inflicted by owners rather than by lords or soldiers, but it is nonetheless authorised by the state and backed up by the force of the state such that the slaveholder and the state operate hand in hand upon the body of the slave as a person wholly without legal protections.

The dynamic of terror explains why the ability of slaves to sometimes defend themselves could be seen as deeply transformative – a kind of simulacrum of the rule of law. This is the lesson of Frederick Douglass's famous fight with the vicious overseer Covey: 'I found my strong fingers firmly attached to the throat of my cowardly tormentor; as heedless of consequences, at the moment, as though we stood as equals before the law.'⁵⁹ That one sentence captures the essence of slavery's lawlessness. In essentially every society there's a right to self-defence against violence from others. Recall that Thomas Hobbes saw it as the one inalienable natural right; on his theory one can fight back even against the sovereign if he comes to kill you. Not so a slave. The law stripped Douglass of that right, and thus enabled the notoriously brutal overseer. By standing up for himself with violence, Douglass claimed legal equality and legal personhood.

Another important recognition of the relationship between the slave's potential capacity not merely to receive but also to inflict violence and a claim to even humanity itself comes from none other than James Madison. In Federalist 43, Madison defended that clause of the Constitution which permitted the federal government to militarily intervene to put down rebellions in the states (the Guarantee Clause, Art IV, Sec 4) on the basis that, after all, the citizens of a state could get overwhelmed by the military force of a majority of noncitizens:

May it not happen, in fine, that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves. In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms, and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends.

⁵⁸ P Gowder, 'The Rule of Law and Equality' (2013) 32 *Law and Philosophy* 565; P Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016).

⁵⁹ F Douglass, *My Bondage and My Freedom* (Miller, Orton & Co, 1857) 242.

That passage is an astonishing confession on a number of levels. First, of course, is that Madison openly admits that the framing vision of a republic encompasses the possibility of rule by force rather than consent – that citizens or some faction thereof might make up a minority yet still claim, and militarily enforce, the right to rule over the rest. But for present purposes the most important part is the next sentence, in which the ‘unhappy species of population’ obviously refers to slaves.⁶⁰ That sentence agrees with Douglass that the capacity for the violent defence of one’s own personhood is indeed a precondition of that personhood, and hence identifies that under ‘regular government’, the enslaved are subhuman because of the asymmetry in violence in their condition. He then cynically appeals to the rule of law value of judicial impartiality to suppose that the United States would step in as a partisan of one side – including, at least implicitly, the side of the slaveholders – in such a case, and hence once again reduce the enslaved to the status of sub-persons overawed by the power of violence held over their heads – while delicately admitting some uncertainty as to the justice of such a course. (Left unexplained is precisely how the impartiality of judges and the affection of friends are meant to be compatible.)

So what was the theory according to which the masters convinced themselves that they still ran a legal state? It was all about property.

SLAVERY AS PROPERTY

The law of slavery might be summarised in the words of Justice William Tilghman of the Pennsylvania Supreme Court: ‘I know that freedom is to be favored, but we have no right to favor it at the expense of property.’⁶¹

Even as property was the heart of classical republican citizenship and freedom, it was also the material out of which the chains of the enslaved were built. From the legal perspective, perhaps the foundational principle of American slavery was the idea that a person could be property. Foundational, that is, because we can cogently trace the other evils of slavery to property – if not necessarily in a historical or a causal sense then certainly analytically, logically, doctrinally. In the words of Moses Finley: ‘All forms of labor on behalf of another, whether “free” or “unfree”, place the man who labors in the power of another; what separates the slave from the rest, including the serf or peon, is the totality of his powerlessness in principle, and for that the idea of property is juristically the key – hence the term “chattel slave”.’⁶² Abolitionists recognised this connection;

⁶⁰ Waldstreicher (n 38) 136 agrees.

⁶¹ *Marchand v Peggy* 2 Serg & Rawle 18, 1815 WL 1280 (Pa 1815).

⁶² MI Finley, ‘Slavery’ in DL Sills (ed), *International Encyclopedia of the Social Sciences*, vol 14 (Macmillan Co and Free Press, 1968) 307. Jagmohan has convincingly argued that the property nature of American chattel slavery is the foundation of the natal alienation that Patterson identified as the key feature of slavery in the abstract. D Jagmohan, ‘Peculiar Property: Harriet Jacobs on the Nature of Slavery’ [Forthcoming] *Journal of Politics* 25.

for just one example, William Goodell in his *American Slave Code* organised the entire book around the notion of slaves as property, with chapter headings like 'Slaves can possess nothing: being Property themselves, they can own no property nor make any contract.'⁶³

The logical passage from status as property to bearer of no rights is inexorable. Start with the susceptibility to violence that makes the primary factual rather than legal condition of the enslaved: the property owner is traditionally considered to have the power to waste or destroy his or her property – this is the *jus abutendi* of Roman law. Thus, a slaveholder had the perfect legal right to do immense physical harm, sometimes (although not always) onto death, to his slaves, and the protection of slaves' physical persons, to the extent it had any kind of standing in law at all, was rooted in the slaveholder's right to protect his 'property' against harm from third persons.⁶⁴ Sometimes third parties who had 'hired' slaves were liable to their owners because they were put to excessively dangerous work – essentially on the same sort of theory according to which you or I might be held liable for negligently wrecking a rented car.⁶⁵

In addition to providing legal justification for violence, the idea of the slave as property also supplied an economic story to explain it away. Morgan quotes a particularly striking 1669 Virginia statute 'about the causall killing of slaves' which purported to excuse a master's murder of his slave in the course of punishment with reference to the slave's status as property, and hence as valuable asset: 'it cannot be presumed that prepensed malice (which alone makes murther Felony) should induce any man to destroy his own estate'.⁶⁶ In other words: if a master killed their slave, the law would presume that they had no real choice about the matter – because the slave was a valuable piece of property, subject to rights of use and of alienation, and so what master in his or her right mind would destroy such property without good reason? Moreover, the law recognised that because masters had this economic investment in their slaves, they might actually *lack* sufficient incentive to use potentially damaging violence to control them – and hence laws were enacted permitting any person to kill runaway slaves, and the master would receive compensation for the loss out of the public purse, thus guaranteeing that masters' economic incentives would not undermine the social interest in controlling loose slaves who might otherwise start rebellions or encourage others to escape, and partially reconciling the

⁶³ W Goodell, *The American Slave Code in Theory and Practice: Its Distinctive Features Shown by Its Statutes, Judicial Decisions, and Illustrative Facts* (American and Foreign Anti-Slavery Society, 1853).

⁶⁴ For a summary of the *jus abutendi*, see L Strahilevitz, 'The Right to Destroy' (2005) 114 *Yale Law Journal* 781. For further discussion of the right to harm slaves, and its limits in North Carolina, see PS Brady, 'Slavery, Race, and the Criminal Law in Antebellum North Carolina: A Reconsideration of the Thomas Ruffin Court' (1979) 10 *North Carolina Central Law Journal* 248.

⁶⁵ TD Morris, *Southern Slavery and the Law, 1619–1860* (University of North Carolina Press, 1996) 142.

⁶⁶ Morgan (n 56) 312.

tension between property rights and the universal violent enforcement of white supremacy noted above.⁶⁷

Property owners also have the right to alienate their property. The susceptibility of the slave to being sold or rented and the susceptibility of the slave to violence come together in the slave's status as property, which made the slave permanently vulnerable, not merely to the person who happened to be their owner, but to any other such person who they might happen to sell or lend the slave to. The formerly enslaved James Pennington, in the preface to his narrative, fleshed this idea out in the form of what he called 'the chattel principle'.⁶⁸ In Pennington's words, 'The being of slavery, its soul and body, lives and moves in the chattel principle, the property principle, the bill of sale principle; the cart-whip, starvation, and nakedness, are its inevitable consequences to a greater or less extent, warring with the dispositions of men.' By this, Pennington means to suggest that by making the slave chattel, it held out against even those with supposedly 'mild' masters the ever-present possibility of being sold 'down the river' into more extreme brutality.⁶⁹

Finally, property owners have the right to the use and the fruits of their property. The combination of the right to alienate and the right to the fruits provides a legal ground for the power of the slaveowner to rent out his slave and take the wages that would otherwise be due even from a third party, as well as to seize property which would under normal circumstances be owned by the slave.

The *usus* right and the *fructus* right came together to reward one of American slavery's most notorious evils. One way in which masters 'used' their human property was to rape them – a point that Pennington also emphasises in talking about the 'degradation' to which women in slavery were subject.⁷⁰ The property character of slavery supplied a financial incentive: the children of an enslaved woman were the 'fruits' who were themselves enslaved, so a master could increase his own wealth by raping the women held in bondage to him.⁷¹

⁶⁷ *ibid* 312–13. Moreover, as Harriet Jacobs saw, see discussion in Jagmohan (n 62), a master's incentive to protect his property could give way: if he were sufficiently wealthy, he needn't worry so much about maiming or killing one slave, and it might be worth doing so in order to terrify more productive work out of the others.

⁶⁸ JWC Pennington, *The Fugitive Blacksmith, or, Events in the History of James W.C. Pennington, Pastor of a Presbyterian Church, New York, Formerly a Slave in the State of Maryland, United States*, 2nd edn (Charles Gilpin, 1849) iv–v.

⁶⁹ I take this interpretation from Johnson's introduction to an edited volume on slave trading. W Johnson (ed), *The Chattel Principle: Internal Slave Trades in the Americas* (Yale University Press, 2004) 1. Morris notes that there was an early debate about whether slaves were attached to real property – and hence essentially tied to the land like serfs – rather than chattel, and that some argued that had slaves been defined as realty, at least they could have been free of cruelties like the separation of families by sale. Morris (n 65) 63–65.

⁷⁰ Pennington (n 68) v–vii.

⁷¹ CI Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707, 1719–20; Jagmohan (n 62).

Internal Tensions in the Law of Slavery as Property

Notwithstanding the foregoing, it was not possible to fully transpose the laws pertaining to property to the enslaved, because slaves when given the opportunity behaved like persons they were rather than like the property the law saw them as.⁷² In particular, they had the capacity to work collectively and assert their human interests. Thus, even though formally speaking slaves were not able to hold property, and the law certainly wouldn't defend them in any property claims, there were informal arrangements under which they did hold property.⁷³ Some slaves even managed to buy their own freedom, though there was inconsistency across both time and space in whether courts would enforce such bargains.⁷⁴ Hahn suggests that the *de facto* capacity of many slaves to hold property was a product of self-assertion of rights rooted in social ties among slaves and their latent capacity for coordinated action.⁷⁵ Even their presence as property within the courts sometimes undermined the stark contrast between persons and property, for disputes about slaves sometimes required evidence of their behaviour and characteristics, which in turn necessarily presented their personhood to the court.⁷⁶

However, when the law or the rhetoric of the time made concessions to the personhood of slaves, it was often only to inflict further wrongs on

⁷² It is on the basis of the unavoidable dissonance between how slaves were treated and how they behaved, particularly as people who needed incentives, reasons, albeit supplied by coercion, to be induced to do what they were told, that Cohen offers slavery as an illustration of the instability of extreme injustice. J Cohen, 'The Arc of the Moral Universe' (1997) 26 *Philosophy & Public Affairs* 91. It was particularly challenging when slaves committed crimes and needed state punishment; punishment which was premised on the idea of humans addressed by the law, eg cases described in Tushnet (n 47).

⁷³ DC Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (The University of North Carolina Press, 2004); DC Penningroth, 'The Claims of Slaves and Ex-Slaves to Family and Property: A Transatlantic Comparison' (2007) 112 *The American Historical Review* 1039, 1054–55; J Forret, 'Slaves, Poor Whites, and the Underground Economy of the Rural Carolinas' (2004) 70 *The Journal of Southern History* 783.

⁷⁴ AL Higginbotham and BK Kopytoff, 'Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law' (1989) 50 *Ohio State Law Journal* 511, 526–27; JEK Walker, 'Racism, Slavery, and Free Enterprise: Black Entrepreneurship in the United States Before the Civil War' (1986) 60 *The Business History Review* 343, 364–70; KM Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (The University of Georgia Press, 2017) 128–32; Fuente and Gross (n 40) 128; S Lubet, *The 'Colored Hero' of Harpers Ferry: John Anthony Copeland and the War Against Slavery* (Cambridge University Press, 2015) 35; G Binder, 'The Slavery of Emancipation Bondage, Freedom and the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography' (1995) 17 *Cardozo Law Review* 2063, 2086–93.

⁷⁵ S Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South, From Slavery to the Great Migration* (Belknap Press of Harvard University Press, 2003) 24–33. This seems to me to be an instance of the general truth that rules, even *de facto* rules, protecting the powerless from the powerful only ever exist in the context of a credible threat of collective action, see discussion in P Gowder, 'What the Laws Demand of Socrates – and of Us' (2015) 98 *The Monist* 360.

⁷⁶ AJ Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton University Press, 2000).

them. For example, in one infamous court case, *US ex rel John Wheeler v Passmore Williamson*, a slaveowner turned no less an institution than the writ of *habeas corpus* to the purposes of slavery, using it to demand the return of his slaves who were held by an abolitionist who had spirited them away when he entered Philadelphia with them.⁷⁷ The slaveowner claimed that the slaves were held involuntarily by the abolitionist, and convinced a district court judge to hold him in contempt for refusing to bring them to court to be turned over.

In the same cynical vein is a statement of Madison's in Federalist 54. In that essay, he took it upon himself to defend the three-fifths clause against the Northern Anti-Federalist argument that 'Slaves are considered as property, not as persons. They ought therefore to be comprehended in estimates of taxation which are founded on property, and to be excluded from representation which is regulated by a census of persons.' In response, he puts into the mouth of a hypothetical Southerner the claim that:

But we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property.

In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another, the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others, the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property.

The claim that slaves were protected against a master's violence was just a lie – and a lie that blatantly contradicted the previous sentence according to which a slave may be 'chastised in his body, by the capricious will of another'. Even if the law occasionally protected slaves from outright murder, that was merely a deviation from their general vulnerability to arbitrary violence. But more telling for present purposes is the way that Madison strategically used the argument that slaves were not *pure* property to defend the undemocratic empowering of the South to exercise disproportionate suffrage based on their slaves. Yet in practically the same breath, Madison also appeals to a kind of hyperactive republican

⁷⁷ *US ex rel John Wheeler v Passmore Williamson* 28 F Cas 686 (ED Pa 1855). LM Litman, 'The Myth of the Great Writ' (forthcoming 2022) 100 *Texas Law Review* discusses a number of additional cases in which the supposed great writ of freedom was used to facilitate the capture of alleged slaves.

preference for property, asserting that the existence of state senates and other special forms of representation for property justified the three-fifths clause:

We have hitherto proceeded on the idea that representation related to persons only, and not at all to property. But is it a just idea? Government is instituted no less for protection of the property, than of the persons, of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government.

Upon this principle it is, that in several of the States, and particularly in the State of New York, one branch of the government is intended more especially to be the guardian of property, and is accordingly elected by that part of the society which is most interested in this object of government. In the federal Constitution, this policy does not prevail. The rights of property are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands.

There, ultimately, we see the slave's status as property and the American rule of law instinct to give special legal privileges to property holders to protect their property used to justify the political dominance of the South altogether, what abolitionists would aptly call the 'slave power'.

THE IMPOSSIBILITY OF HOLDING SLAVERY WITHIN ITS BOUNDS

A key challenge that slavery raises to the rule of law is that once a community admits of some who are without the protection of law, the legal tools used to institutionalise that rightslessness tend to promote the expansion of that rightslessness to more persons. Thus, slavery in the South inevitably posed a danger to freedom in the North.

For some Northerners, that worry was ideological; for example, Tewell interprets Lincoln before his presidency as opposing the expansion of slavery because making concessions in principle to the idea that people might be enslaved threatened the broader ideological content of documents like the Declaration of Independence, and hence the basis of American liberty more generally.⁷⁸ In Lincoln's words:

Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors. Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you.⁷⁹

⁷⁸ JJ Tewell, 'Assuring Freedom to the Free: Jefferson's Declaration and the Conflict over Slavery' (2012) 58 *Civil War History* 75.

⁷⁹ *ibid* 94; see also LE Morel, 'The Dred Scott Dissents: McLean, Curtis, Lincoln, and the Public Mind' (2007) 32 *Journal of Supreme Court History* 133, 143–44.

Frederick Douglass cogently explained how the risk of expansion also arose from the character of the slave as property, which necessarily impaired freedom in the North:

Never, in our judgment, will the North be roused to intelligent and efficient action against slavery, until it shall become the settled conviction of the people, that slavery is anarchical, unconstitutional, and wholly incapable of legalization. While men admit that slavery can be lawful anywhere, they concede that it may be made lawful everywhere; the morality which concedes the legality of slavery in Missouri, is impotent as against slavery in Kansas or anywhere else. Slavery cannot be legal and illegal at the same time. It cannot be constitutional and unconstitutional at the same time. Grant that the constitution recognizes the right of slaveholders to their slaves in any State of this Union; and all the laws of comity, good neighborhood, and good faith, require that the parties to the constitution should respect the slaveholder's right of property everywhere in the Union. Free Soilism is lame, halt and blind, while it battles against the spread of slavery, and admits its right to exist anywhere. If it has the right to exist, it has a right to grow and spread. The slaveholder has the best of the argument the very moment the legality and constitutionality of slavery is conceded. There is much reason in the logic of the late John C. Calhoun. If slaves are property in the eye of the constitution of the United States, they are subject to the same condition of all other property contemplated in that instrument, and their owners are entitled to all the advantages of this property equally with other citizens in their property. We repeat, slaves are property, or they are not property. They are persons, or they are beasts of burden. The constitution must recognize them as one or the other. It cannot regard them as men and regard them as things at the same time. If it regards them as things, legitimate objects of property, then the laws that govern the rights and privileges of property must prevail in respect to them. But if it regards them as persons, then all the thunders of the constitution may be launched at the head of him who dares to treat them contrary to the rights sacred to persons in the constitution.⁸⁰

There are many ideas embedded in this passage. First, the commercial character of slavery as property: the basic constitutional framework of the United States presupposed free economic interchange among the states, and required each state to respect property, contract, and other commercial rights established in others. Through Hamiltonian commercial ideas like the Full Faith and Credit Clause, slavery would inevitably leak out onto free soil. I think Douglass is making an ideological point as well: in a yeoman republic in which property is the central legal idea, calling slavery a form of property is a strong ideological endorsement of its compatibility with the legal mode of ordering society.

The character of slavery as property also promoted its expansion in more prosaic ways: like any other capital asset, slaves were the objects of investment. That investment gave slaveholders an incentive to promote the geographic expansion of slavery in order to increase or maintain the value of their slaves by

⁸⁰ From an 1855 editorial. F Douglass, *Frederick Douglass: Selected Speeches and Writings*, 1st edn (P Sheldon Foner and Y Taylor eds, Lawrence Hill Books, 1999) 374.

expanding their potential markets and the scope of the land on which they could be put to work.⁸¹ Of course, there were political reasons for slaveholders to want expansion too: more slave territories meant more people with slaves on the land who would want to form slave states when they were fully incorporated into the Union; that in turn would reinforce the Slave Power dominance in Congress and the Electoral College.

Unsurprisingly, slaveholders argued from property rights to their continued right to own other humans even in territories outside the old South.⁸² The infamous Lecompton Constitution of Kansas expressed the idea in the clearest terms: 'the right of property is before and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its issue is the same and as inviolable as the right of the owner of any property whatever'.⁸³

Dred Scott as the Triumph of Property Over Personhood

Douglass's fear that the property character of slavery would require its expansion proved prescient. Two years after his editorial which I quoted above, the Supreme Court, in *Dred Scott v Sandford*, used the constitutional protection of property to invalidate restrictions on slavery in the territories under the Missouri Compromise.⁸⁴ The Compromise was an Act of Congress under which Maine was admitted as a free state and slavery was prohibited in federal territory north of the 36°30' latitude in exchange for Missouri's admission as a slave state. But in

⁸¹ J Clegg and D Foley, 'A Classical-Marxian Model of Antebellum Slavery' (2019) 43 *Cambridge Journal of Economics* 107. There is longstanding debate about the economics of slavery. However, there is no question that slaves represented a substantial investment for slaveholders. Random and Sutch, for example, estimated that a slave was worth 10 times the annual per capita crop production in 1860, and represented fully 44% of the wealth in the region in 1859. R Ransom and R Sutch, 'Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation' (1988) 62 *Agricultural History* 133, 135, 138–39. In at least one respect the economic investment in slaves turned out for the good: in order to protect the value of their slaves from external competition, the Southern states supported ending the overseas slave trade. G Wright, 'Slavery and Anglo-American Capitalism Revisited' (2020) 73 *The Economic History Review* 353, 370.

⁸² EM Maltz, 'Fourteenth Amendment Concepts in the Antebellum Era' (1988) 32 *The American Journal of Legal History* 305, 309, 318–20. Such arguments persisted, with astonishing *chutzpah*, even after the Civil War. Southerners dared to demand compensation for the value of their emancipated slaves on the basis of the constitutional protections embedded in the Fifth Amendment – and even continued to petition for compensation after the enactment of the Thirteenth Amendment. A Laury Kleintop, 'Life, Liberty, and Property in Slaves: White Mississippians Seek "Just Compensation" for Their Freed Slaves in 1865' (2018) 39 *Slavery & Abolition* 383. (It's hard to see how that argument was supposed to work, since the Thirteenth Amendment as an after-enacted provision presumably prevails over the Fifth – as best as I can figure, the idea may have been that the Thirteenth Amendment could be read as one big act of eminent domain, ie, to divest slaveholders of their property right but not to deny their alleged entitlement to compensation. Section 4 of the Fourteenth Amendment ultimately precluded any such argument by explicitly prohibiting compensation for slaves.)

⁸³ Richards (n 22) 202.

⁸⁴ *Dred Scott v Sandford*, 60 US 393 (1857).

Dred Scott the Court turned property rights into the grounds to declare that Congress could not prohibit slavery in the territories.

Dred Scott was a slave who was allegedly owned by Sandford. The suit alleged his freedom on the grounds (with some simplification) that his prior owner had taken him to a military base north of the Missouri Compromise line before later taking him to Missouri and selling him to Sandford. The theory of the case (again, somewhat simplified) was that he was freed when he was taken to free territory, and hence could not be re-enslaved later on.

Technically speaking, the Court disposed of the case before even reaching the substance. Scott had brought suit in federal court, under the court's diversity jurisdiction; the complaint, in the Court's words, 'contain[ed] the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York'.⁸⁵ And according to the Court only citizens could claim 'the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution'.

But the Court held that because Scott was Black he could not be a citizen; therefore the federal courts could not exercise jurisdiction over his claim. It is this argument that occasioned Chief Justice Taney uttering what must be the most notorious and universally condemned statement ever produced by the Supreme Court: that, in the eyes of the legal tradition under which the US Constitution was built, Black persons

had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.

So far, so bad. But under normal judicial standards, the Court should have stopped right there. No jurisdiction, the case is over. Instead – obviously motivated to maximise the legal defence of slavery, but perhaps further motivated by egregious executive interference in the courts, and hence by the violation of the core rule of law idea of judicial independence – the court went on to make an unnecessary bonus holding invalidating Congress's power to declare part of its territories to be free soil and hence striking down the Missouri Compromise.⁸⁶

There were two key points the Court made in this legally extraneous part of the opinion. First, it denied that Congress had comprehensive legislative power over federal territories. Secondly, it argued that even with Congress's (limited)

⁸⁵ Apparently, Congress had not yet provided for general federal question jurisdiction in the federal courts. DT Hardy, 'Dred Scott, John San(d)ford, and the Case for Collusion' (2014) 41 *Northern Kentucky Law Review* 37, 46; R Berger, 'Congressional Contraction of Federal Jurisdiction' (1980) 1980 *Wisconsin Law Review* 801, 804.

⁸⁶ See DA Farber, 'A Fatal Loss of Balance: Dred Scott Revisited' (2011) 39 *Pepperdine Law Review* 13, 21, 39–40.

legislative power over territories, it could not violate individual constitutional rights established in the Bill of Rights – plausible enough so far, but here comes the unbelievable kicker – and that banning slavery violated the protection of property rights in the Due Process Clause of the Fifth Amendment:

These powers, and others in relation to rights of person which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government, and the rights of private property have been guarded with equal care. Thus, the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

and a few paragraphs later:

Now, as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words – too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident.

Thus were Douglass's fears immediately realised: property rights became the foundation for spreading slavery even into formerly free territory.

Some have understood this holding as an example of 'substantive due process' – that is, the Constitutional doctrine according to which the Supreme Court may find an unenumerated 'fundamental' individual right to be protected against governmental intrusion, such as the right to abortion.⁸⁷ Indeed, dissenting justices have criticised the Court's contemporary fundamental rights jurisprudence in part for hearkening back to *Dred Scott*. Perhaps the most egregious example is Chief Justice Roberts's dissent in *Obergefell v Hodges*, which

⁸⁷ eg, P Finkelman, 'Slavery and the Northwest Ordinance: A Study in Ambiguity' (1986) 6 *Journal of the Early Republic* 343, 355.

compares extending the long-established fundamental right of marriage to gay couples to *Dred Scott*.⁸⁸ Yet it seems to me to be an analytic mistake to assimilate the *Dred Scott* opinion to anything like the modern notion of substantive due process or the discovery of unenumerated constitutional rights. Property is unquestionably an enumerated right, and the Court was quite specifically invoking it. I discuss the general misuse of the notion of ‘substantive due process’ in chapter three; for present purposes, let’s just note that the Court was treating the claim that Mr Scott was freed by operation of federal law when he was taken to free soil under the statute enacting the Missouri Compromise as a legislative expropriation, a concept within the core of due process in historical context, no ‘substantive’ gloss required – although it might perhaps have been more textually appropriate if it were treated as a federal taking of private property without compensation, unconstitutional under a different clause of the Fifth Amendment.

Yet that claim, whether due process or takings, should not have been terribly plausible in the *Dred Scott* case. After all, the possibility of property rights changing as a result of a voluntary change of jurisdiction is not an outrageous legal concept; nor is the idea that what sorts of things might be legal to own vary across jurisdictions. In the United States, as of this writing, marijuana is legal in some, but not all, US states. If I purchase marijuana in Colorado, I acquire a property right to it under Colorado law, but I am not free to transport it across the border to Idaho; should I do so, it’s subject to confiscation by the Idaho state authorities (in addition to criminal consequences).⁸⁹ This hardly amounts to expropriation; rather, I am under a duty to learn in which states it’s legal to possess marijuana and refrain from carrying any weed which I wish to keep into any other states. The same argument could have been applied to property in human beings. This concept surely would have been familiar to American law at the time, for it had been applied decades earlier in England: in *Somerset’s Case* (1772), the Court of King’s Bench is often understood to have decided that a slave purchased elsewhere and transported to England was free by virtue of setting foot on English soil. While much remains controversial and difficult to parse about the effect of *Somerset’s Case* on American abolition and legal culture, the legal strategy, at least, of bounding property rights by territory could not have been totally novel.⁹⁰

⁸⁸ *Obergefell v Hodges*, 576 U.S. 644, 695-6 (2015) (Roberts, CJ, dissenting). For a further discussion of the idea of *Dred Scott* as substantive due process, see Maltz (n 82) 319.

⁸⁹ This analogy leaves off some complexities with respect to federal marijuana prohibition as well as potential dormant Commerce Clause or similar issues should the federal prohibition be repealed; none of those federalism issues are relevant for the analogy with the Missouri Compromise, as under that legal regime it was the federal government that prohibited slavery in the Northern territories.

⁹⁰ P Hagler Minter, ‘“The State of Slavery”: Somerset, The Slave, Grace, and the Rise of Pro-Slavery and Anti-Slavery Constitutionalism in the Nineteenth-Century Atlantic World’ (2015) 36 *Slavery & Abolition* 603, has a very helpful discussion of the reception of *Somerset’s Case* and subsequent caselaw surrounding the geographical boundedness of freedom and slavery. See also DA Webb, ‘The Somerset Effect: Parsing Lord Mansfield’s Words on Slavery in Nineteenth Century America’ (2014)

To the extent the slaveholders had a serious argument, the best they could say is that while Dred Scott and his wife were free when they were on free territory, if they were transported to slave territory again, they could be re-enslaved; in effect, that the authority entitled to govern free territory (free states or Congress for unincorporated territories) could divest property rights only in that territory, to be reacquired in territories that allowed slavery. This was known as the doctrine of 'reattachment'.⁹¹ Moreover, by the time of *Dred Scott*, the Supreme Court had already adopted the theory of reattachment in *Strader v Graham*, a case concerning two slaves who had been taken from Kentucky to Ohio with the permission of their owner and then been returned to Kentucky. After they escaped (from Kentucky), the owner sued the captain of the steamboat which they used to escape, and Taney, writing for the Supreme Court, rejected the steamboat captain's defence that their sojourn to Ohio made them free.⁹²

As unfortunate as *Strader v Graham* was, it could have been a boon to Congress if Taney had taken his own prior opinion seriously, for it made totally unsustainable the argument that Congress's creating free soil in the territories amounted to a divestiture of Sandford's property. After all, under the rule of *Strader*, Sandford would have still prevailed: he was back in a slave state, that state's law permitted slavery, he could have his 'property' back – and therefore, Congress took away nothing to which Missouri law entitled Sandford. In other words, Congress would not have had any more ability to 'expropriate' a slave in the territories than any free state did in banning slavery on its own territory, so the Missouri Compromise could not be invalidated.

For that reason, the only way to redeem the due process argument in *Dred Scott* even accepting the notion that people could be property is to make it dependent on the limited federal power in the territories argument Taney also makes, that is, to suppose that the powers of the federal government to legislate for the territories did not encompass a right to make laws proscribing specific noxious kinds of property which couldn't be owned (a power which states clearly had, and which free states exercised); to hold, in effect, that persons entering the territories carried with them the property law of the states from which they'd departed.⁹³

32 *Law and History Review* 455 and WM Wiecek, 'Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World' (1974) 42 *University of Chicago Law Review* 86.

⁹¹ See discussion in Minter (ibid) 604–06. The marijuana analogy also applies here: if I buy marijuana in Illinois, where it is legal, take it across the border to Iowa, where it is not, but escape detection of my contraband in Iowa and successfully take it back across the border to Illinois, I can probably expect Illinois law to respect my property right in my bag of weed notwithstanding the fact that I briefly took it to a state in which it is illegal and got away with it.

⁹² *Strader v Graham* 51 US 82 (1851).

⁹³ Moreover, the perfectly plausible argument that Congress might have the power under the Commerce Clause to ban the transportation of slaves across state lines into free territory and to set the legal consequence of that unlawful transportation as freeing of the enslaved person apparently didn't even cross the Court's mind, although Justice Curtis vaguely hinted at it in dissent. 60 US at 622–23.

This seems like a fairly unbelievable argument. The closest thing to a plausible defence of it may be Graber's idea that excluding slavery from the territories amounted to excluding slaveowners from the territories.⁹⁴ But that view, notwithstanding the historical pedigree that Graber describes, seems too easily to fall prey to a kind of *reductio* under which the set of things that may be owned in the territories necessarily becomes the union of the sets of the things that may be owned in each individual state. Transposing it to the contemporary context for illustrative purposes, suppose one state went rogue and passed laws permitting all kinds of bizarre things to be owned in that state – corpses, heroin, nuclear weapons, the moon, a person's own grandmother, Ireland, the number seven. The viral property rights argument seems to entail that even though every other state rejects such property interests, Congress would be obliged to permit the residents of our rogue state to claim ownership of those things in Puerto Rico and Guam.⁹⁵ Perhaps that is the idea the framers had – but I'm reluctant to credit them with the notion that it was constitutionally required that territories would exist in a void of sovereignty until such time as they were incorporated as states – a void that seems to unavoidably follow from the notion that Congress lacks the power to sort out what kinds of property may be held in federal territory.⁹⁶

Slavery, Land, and Territorial Expansion

Through an economic lens, slavery in the South followed from the easy acquisition of property in its more conventional sense: the availability of vast amounts of land, combined with the potential wealth to be made from tobacco, gave the new-formed planter elite strong incentives to turn to slavery to resolve their labour shortage problem.⁹⁷ By doing so, they could also ameliorate smallholders' disaffection, as smallholders could enjoy the benefits of republican equality on the backs of the capacity for all whites to own land and to rely on the labour of an oppressed group of outcastes.

⁹⁴ MA Graber, 'Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory' (1997) 14 *Constitutional Commentary* 271, 302–10.

⁹⁵ This is true, at least, unless state laws permitting property in slaves were somehow of higher constitutional status than hypothetical state laws permitting property in things like heroin. Against such a claim, see S Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding*, 2nd edn (Harvard University Press, 2019), arguing that the Constitutional Convention intentionally left off such a federal-level sanction for slaveholding.

⁹⁶ Such a view would disrupt even common law-style judging: what happens the first time someone shows up in Guam with a novel property claim, or two people from different states claim property in Guam under conflicting law from their home states? Could a federal judge constitutionally make any new doctrine at all to sort it out? On one reading of American history, these questions would not be resolved until the US Supreme Court was forced to deal with America's colonial possessions following the Spanish-American War, about which see further discussion in ch 6.

⁹⁷ Morgan (n 56) 296, 308–09, 380.

In more abstract terms, Domar argues that bonded labour arises from the incompatibility of three conditions: 'free land, free peasants, and non-working landowners'.⁹⁸ The essential logic of the argument is that when land is abundant, labour is scarce and demands a high price, because workers have the capacity to acquire their own land. Hence there cannot be a class of elite landowners who merely live off agricultural rents – at least not unless they can acquire the political power to reduce a labouring class to bondage.

But this casts a rather darker light on Thomas Jefferson's ambitions for land reform and indeed on the expansion of the United States westward more generally.⁹⁹ With the distribution of potentially productive agricultural land in the west to still more poor whites, one must ask: who would have worked that land? Westward expansion and land distribution both would, on Domar's logic, create even more of an incentive for southern whites to demand the further expansion of slavery, in order that those who benefited from enslaved labour could continue to so benefit, and those who did not yet benefit could begin to benefit on their newly acquired land. This is a point that also brings together slavery and the other great American crime of the period, namely, the policy of Indian Removal – which can be understood as driven in part by the motivation to make room for the further expansion of slavery.¹⁰⁰

These points have a political valence too. Republicanism, as with all thick conceptions of political life, rests on a certain amount of economic independence and even leisure, insofar as a person whose life is organised around economic production cannot, for that reason, fully participate in politics – a fact known at least since the introduction of pay for jury and assembly service in Athens.¹⁰¹ In an agrarian republic, that entails extending landownership to all citizens and finding ever more people reduced below the status of citizenship to do the actual work. This is what Aziz Rana identifies as the 'settler ideology': an entwined economic and political conception of freedom that ties together imperial expansion and unfree labour as the preconditions for establishing freedom for those who are considered the core members of society.¹⁰² In the legal domain, a settler society is under continual pressure to permit the transfer of land from non-members (in this time period, Native Americans) as well as to

⁹⁸ ED Domar, 'The Causes of Slavery or Serfdom: A Hypothesis' (1970) 30 *Journal of Economic History* 18, 21.

⁹⁹ On Jefferson and land reform, see Alexander (n 24) 291–99. To be fair to Jefferson, he did introduce legislation to ban slavery from the west. W Cohen, 'Thomas Jefferson and the Problem of Slavery' (1969) 56 *The Journal of American History* 503, 510. Steve Lubet reminds me that the Northwest Ordinance of 1787 also serves as a counterexample to any theory according to which the relationship between expansion and slavery was conscious. On the other hand, Finkelman argues that the Northwest Ordinance wasn't actually all that anti-slavery, and may even have facilitated its expansion south of the Ohio River. Finkelman (n 87) 345.

¹⁰⁰ C Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory*, 1st edn (WW Norton & Company, 2020).

¹⁰¹ MM Markle, 'Jury Pay and Assembly Pay at Athens' (1985) 6 *History of Political Thought* 265.

¹⁰² Rana (n 8) 12.

permit members to control the labour of non-members (ie, the enslaved); in both cases this goes through the deprivation of legal rights.

Thus, the economic incentives of property holding worked hand in hand with the law of property and the ideology of settler republicanism to make it difficult to keep slavery in its bounds. Because the economic and political benefits of slavery for the slaveholders were not in principle restricted to the South, there was substantial suspicion in abolitionist circles that the next step after the forced legalisation of slavery in federal territories would be the forced legalisation of slavery even in free states.¹⁰³

But Black leaders realised that they had been effectively enslaved across the nation long before *Dred Scott* was decided – the Fugitive Slave Act of 1850 had removed the protections of law from them even in the North and rendered them vulnerable to kidnapping at the whim of an enslaver. That statute, and its role as the procedural face of slavery's lawlessness, is the subject of the next chapter.

¹⁰³ P Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (University of North Carolina Press, 1981) 313; Richards (n 22) 15.