

ANTEBELLUM ENIGMA: JUSTICE WOODBURY DAVIS, THE MAINE SUPREME JUDICIAL COURT, AND THE ANTISLAVERY CONSTITUTION

Abstract: In 1856, abolition activist Woodbury Davis joined the Maine Supreme Judicial Court (SJC) and quickly became its most radical member. Davis was an antebellum enigma: a high-ranking judge who advocated for Black voting rights, rejected the federal consensus that Congress could not pass laws interfering with slavery, denied that the Fugitive Slave Clause even applied to slaves, and believed that the Constitution was an engine for abolition. While Davis was on the SJC, the court issued advisory opinions on two of the most explosive issues in American politics: Black voting rights after *Dred Scott v. Sandford* and the Fugitive Slave Act. This Note explores the evolution of the law on slavery and race in the United States prior to the Civil War, focusing on Maine and the political pressures surrounding the SJC at that time. Next, this Note examines the SJC's *Voting Rights Opinion* (1857) and the *Personal Liberty Law Opinion* (1861), focusing especially on Justice Davis's novel constitutional arguments. Finally, drawing on these two cases, this Note argues that radical modes of antislavery constitutionalism were embedded in the American judiciary prior to the Civil War and evaluates the impact of this discovery on current debates in legal history.

But to find it here in our sunlight, here in the heart of Puritan traditions in an intellectual country, in the land of schools, of sabbaths and sermons, under the shadow of the White Hills, of Katahdin and Hoosac, under the eye of the most ingenious, industrious, and self-helping men in the world,—staggeres our faith in progress.

—Ralph Waldo Emerson¹

¹ Ralph Waldo Emerson, *American Slavery*, in *THE LATER LECTURES OF RALPH WALDO EMERSON, 1843–1871, VOLUME 2: 1855–1871*, at 1, 3 (Ronald A. Bosco & Joel Myerson eds., 2001). In this acclaimed 1855 address at Boston's Tremont Temple before the Massachusetts Anti-Slavery Society, Ralph Waldo Emerson emphasized how the Fugitive Slave Act of 1850 made it impossible for white New Englanders to escape complicity with slavery. *Id.* at 1. The year before, tens of thousands of Bostonians saw the Fugitive Slave Act in action when armed marines carried a Black man, Anthony Burns, through the streets of Boston and back into bondage. EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE* 92–93 (2010). When Burns arrived in Richmond, Virginia, he spent “four months shackled hand and foot in an unsanitary cell no more than eight feet square” with “little food or water.” *Id.* at 95–96.

INTRODUCTION

What should judges do with unjust laws? That was the question behind Robert Cover's landmark book *Justice Accused: Antislavery and the Judicial Process*; the text explores why antislavery judges issued proslavery decisions.² Cover divides the antislavery legal movement into three groups: (1) Garrisonians who believed that the Constitution was irredeemably proslavery;³ (2) moderates who believed that the Constitution was both pro- and anti-slavery;⁴ and (3) "constitutional utopians" who believed that the Constitution was unabashedly antislavery.⁵ In Cover's telling, this last group—the constitutional utopians—simply never made it onto the bench.⁶

² ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6 (1975). Cover's book remains the standard account on why antislavery judges so uniformly issued proslavery opinions. See Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 797 (2011) (engaging with *Justice Accused*); Sanford Levinson & Mark A. Graber, *Justice Accused at 45: Reflections on Robert Cover's Masterwork*, 37 TUL. L. REV. 1851, 1852 (2022) (same). Cover's book, however, was about far more than just judges deciding cases involving fugitive slaves. See Daniel Farbman, *Judicial Solidarity?*, 33 YALE J.L. & HUMANITIES 1, 12, 53 (2022) (summarizing *Justice Accused* as "a book about the legal profession and slavery, judicial psychology, the 'moral formal dilemma,' and even about the foundations of classical legal thought"). More broadly, the book contended that "the leading legal theory of the age—legal positivism—so dominated [antebellum] judges that they could see but not act upon the appeals made from natural law in their courtrooms." Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1837 (1991).

³ See COVER, *supra* note 2, at 150–54 (describing the Garrisonian position on the Constitution). William Lloyd Garrison was an abolitionist who infamously burned the Constitution on July 4th, 1854, in Framingham, Massachusetts, denouncing it as "a covenant with death, and an agreement with hell." Helen J. Knowles, *Seeing the Light: Lysander Spooner's Increasingly Popular Constitutionalism*, 31 LAW & HIST. REV. 531, 531–32 (quoting *The Meeting at Framingham*, THE LIBERATOR, July 7, 1854, 106). For the Garrisonians, "[t]he 1840 publication of James Madison's *Notes of Debates in the Federal Convention of 1787* made it clear that the Framers struck a compromising deal with the devil; 'slavery' may have been textually absent from the Constitution, but its presence was implicitly obvious." *Id.* at 532. Garrisonians believed that judges were duty-bound to uphold slavery. COVER, *supra* note 2, at 151–53. As such, they called on antislavery judges to resign. *Id.*

⁴ See generally COVER, *supra* note 2, at 155 (distinguishing constitutional utopians from more moderate "lawyers and writers who appealed to a not yet accepted antislavery version of some constitutional issue[s]"). Moderate antislavery proponents stayed "well within the mainstream of legal thought." *Id.* Moderate proponents thought that the Constitution was partly antislavery. See *id.* at 156 (describing moderate William Jay's belief that "the Constitution [held] out the promise of dealing limited blows to slavery, through national legislative action against the trade and against slavery in all islands of national legislative competence"). Nevertheless, moderates also accepted that the Constitution was partly proslavery. See *id.* at 155 (noting that moderates accepted "states' rights to determine their own domestic institutions"). The moderate antislavery belief that the Constitution prohibited Congress from interfering with slavery in states where it already existed has become known as the "federal consensus." See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 16 (1977) (defining the "federal consensus" as the belief that "(1) only the states could abolish or in any way regulate slavery within their jurisdictions; (2) the federal government had no power over slavery in the states").

⁵ See COVER, *supra* note 2, at 154–58 (describing how some antislavery constitutionalists believed that the Constitution outlawed slavery within the United States). This Note uses the term "constitutional utopians" to refer to antislavery radicals who believed that Congress could abolish slavery

Today, the conventional view among scholars is that the Garrisonians were correct in characterizing the Constitution as proslavery.⁷ Revisionist scholars have challenged this view, highlighting the role of antislavery constitutionalists in the antislavery movement.⁸ Nevertheless, revisionist scholars have focused almost exclusively on the political sphere rather than the judicial.⁹ This Note seeks to fill this gap by exploring how antislavery constitutionalism impacted Maine's highest court.

From 1857 to 1861, the Maine Supreme Judicial Court (SJC) issued advisory opinions on two of the most explosive issues in American politics at that time: Black voting rights and fugitive slave rendition.¹⁰ First, in 1857, in the

by normal legislation. *See id.* (coining the term). Historians have not always taken these thinkers seriously. *See, e.g.,* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 1, 15 n.59 (1999) (dismissing constitutional utopian Lysander Spooner's arguments as "more polemical than serious"). Cover himself dismissed these thinkers as engaged in a "forced reading of positive law instruments" that judges would never take seriously. COVER, *supra* note 2, at 158.

⁶ *See* COVER, *supra* note 2, at 215 (asserting that "I know of no instance of a judge referring to or citing the antinomian literature of abolitionism"). For a scholar complicating this narrative, see Daniel Farbmán, *Judicial Solidarity?*, *supra* note 2, at 13.

⁷ *See* John Mikhail, *The Original Federalist Theory of Implied Powers*, 46 HARV. J.L. & PUB. POL'Y 57, 67 (2023) ("The conventional wisdom among contemporary historians is that the Constitution was a thoroughly pro-slavery document, which gave slaveholders practically everything they wanted, including protecting slavery from interference by Congress in perpetuity."); *see also* Jeffrey Schmitt, *Slavery and the History of Congress's Enumerated Powers*, 74 ARK. L. REV. 641, 687 (2022) (defending the Garrisonian view of the Constitution).

⁸ *See, e.g.,* Jason Ross, *William Lloyd Garrison's Shattered Faith in Antislavery Constitutionalism: The Origins and Limits of the "Garrisonian Critique,"* 9 AM. POL. THOUGHT 199, 202 (2020) (contributing to "the emerging line of challenge against the persistent Garrisonian critique of the Constitution"). This Note uses the term "antislavery constitutionalism" to refer to the belief that the Constitution was wholly or partly antislavery.

⁹ *See, e.g.,* JAMES OAKES, *THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION*, at xxx-xxxi (2021) (focusing on Abraham Lincoln); Ross, *supra* note 8, at 199–203 (focusing on William Lloyd Garrison's participation in and eventual rejection of antislavery constitutionalism); SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING* 22 (2018) (focusing on the Framers).

¹⁰ *See* Ops. of the Justs. of the Supreme Jud. Ct., On Question Propounded by the Senate (*Voting Rights Opinion*), 44 ME. 505, 505–95 (1857) (involving Black voting rights); Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 ME. 561, 561–616 (1861) (involving fugitive slave rendition). The *Voting Rights Opinion* has received some minor consideration in the scholarly literature. *See, e.g.,* Millington W. Bergeson-Lockwood, "In Accordance with the Spirit of the Times": African American Citizenship and the Civil Rights Act of 1866 in New England Law and Politics (using the *Voting Rights Opinion* as a case study in how New England judges responded to *Dred Scott v. Sandford*), in *THE GREATEST AND THE GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY* 92–97 (Christian G. Samito ed. 2018); David M. Gold, *Constitutional Problems in Maine During the Civil War Era, 1857–1872*, 22 ME. HIST. 127, 127–34 (1983) [hereinafter *Constitutional Problems*] (discussing the *Voting Rights Opinion* as one of several notable Civil War-era opinions by Maine's Supreme Judicial Court (SJC)); Martha S. Jones, *Hughes v. Jackson: Race and Rights Beyond Dred Scott*, 91 N.C. L. REV. 1757, 1772–73 (2013) (situating the *Voting Rights Opinion* within broader judicial resistance to *Dred Scott*). The *Personal Liberty Law Opinion* has also received a small

Voting Rights Opinion, the SJC considered whether Black males were “citizens of the United States” who could vote in Maine after *Dred Scott v. Sandford*.¹¹ Next, in 1861, in the *Personal Liberty Law Opinion*, the SJC considered whether Maine’s anti-slavecatching laws were constitutional.¹² The radical words of abolition activist-turned-Justice Woodbury Davis are what make these texts more than mere historical curios.¹³ Many antislavery judges stayed within the mainstream of legal thought.¹⁴ Davis, however, was an antebellum enigma: a constitutional utopian who advocated for Black civil rights, denied

amount of consideration in the scholarly literature. See, e.g., Jerry R. Desmond, *The Attempt to Repeal Maine’s Personal Liberty Laws*, 37 ME. HIST. 194, 194–209 (1998) (discussing the *Personal Liberty Law Opinion* in-depth); Gold, *Constitutional Problems*, *supra*, at 134–39 (considering the *Personal Liberty Law Opinion* as one of several notable Civil War-era opinions by the SJC); DAVID M. GOLD, AN EXEMPLARY WHIG: EDWARD KENT AND THE WHIG DISPOSITION IN AMERICAN POLITICS AND LAW 186–88 (2012) [hereinafter AN EXEMPLARY WHIG] (focusing on Justice Edward Kent’s contribution to the *Personal Liberty Law Opinion* as well as his personal views on the fugitive slave question).

¹¹ See *Voting Rights Opinion*, 44 Me. at 505 (detailing the question presented to the SJC by the Maine Senate). The Senate wanted to know whether “free colored persons, of African descent, having a residence established in some town in this state, for the term of three months next preceding any election, [were] authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives.” *Id.* The Senate requested the advisory opinion on March 26, 1857. *Id.* This was just weeks after *Dred Scott* had been decided by the Supreme Court. Todd F. McDorman, *Challenging Constitutional Authority: African American Responses to Scott v. Sandford*, 83 Q.J. SPEECH, 192, 195 (1997).

¹² See *Personal Liberty Law Opinion*, 46 Me. at 561 (detailing the question presented to the SJC by the Maine House of Representatives). The Maine House of Representatives wanted to know whether the state’s anti-slavecatching laws were “repugnant to the constitution of the United States, or in contravention of any law of the United States made in pursuance thereof.” *Id.* The House requested the advisory opinion on February 13, 1861. *Id.* South Carolina had seceded on December 20, 1860, only two months before this request. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 235 (1988) (describing South Carolina’s secession). Over the next two months, the lower south—Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas—seceded. *Id.* The upper south—Virginia, North Carolina, Tennessee, and Arkansas—seceded after the fall of Fort Sumter in April of 1861. *Id.* at 236.

¹³ See *infra* notes 120–189 and accompanying text (describing Davis’s contribution to the *Voting Rights Opinion* and the *Personal Liberty Law Opinion*). Davis was a “deeply religious, former Liberty party lawyer.” Gold, *Constitutional Problems*, *supra* note 10, at 132. The Liberty Party was the antislavery third party predecessor to the Republican Party. See generally Richard R. Wescott & Edward O. Schriver, *Reform Movements & Party Reformation, 1820–1861* (describing Maine’s Liberty Party), in MAINE: THE PINE TREE STATE FROM PREHISTORY TO THE PRESENT 203–06, 215 (Richard W. Judd, Edwin A. Churchill & Joel W. Eastman eds., 1995). One scholar has observed that Davis, alongside his fellow SJC Justice Seth May, “boasted long records of antislavery activism.” VAN GOSSE, *THE FIRST RECONSTRUCTION: BLACK POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 216 (2021). Nevertheless, many scholars have missed the most remarkable part of Davis’ activism—that he barnstormed Maine for three years as an abolitionist speaker. *Celebration in Portland*, THE LIBERATOR, Feb. 5, 1864, at 1. By 1864, Davis had been a member of the antislavery movement for two decades. *Id.*

¹⁴ See COVER, *supra* note 2, at 199 (noting how judges were “very reluctant to resort to, and thus legitimate, substantial doctrinal innovations that might have made certain cases less a choice between law and morality and more a choice between alternative legal formulations”).

the federal consensus that Congress could not meddle with slavery in the states, maintained that the Fugitive Slave Clause did not apply to slaves, and believed that the Constitution was a wholly antislavery document.¹⁵ Part I of this Note summarizes laws concerning slavery, both in the United States generally and in Maine specifically, and explores the history of the SJC.¹⁶ Part II evaluates the various viewpoints that constitute the *Voting Rights Opinion*.¹⁷ Part III similarly discusses the *Personal Liberty Law Opinion*.¹⁸ Finally, Part IV contends that radical proponents of antislavery constitutionalism existed at high levels of the American judiciary prior to the Civil War and evaluates the impact of this discovery on current debates regarding legal history.¹⁹

I. HISTORICAL BACKGROUND

Slavery is central to the American story, and the debate over whether the Constitution was a pro- or anti-slavery document has raged for over 200 years.²⁰ Section A of this Part provides a brief overview of how the law surrounding slavery and race evolved on the national level.²¹ Section B focuses on how Maine and its courts addressed the issue of slavery prior to the Civil War.²² Finally, Section C examines the broader political context of the SJC from 1856 to 1861.²³

A. Slavery and the Law on the National Stage

Authorized by positive law but contrary to natural law, slavery was an aberration in late 18th century Anglo-American law.²⁴ Sir William Blackstone's

¹⁵ See *infra* notes 166–190, 249–269 and accompanying text.

¹⁶ See *infra* notes 20–119 and accompanying text.

¹⁷ See *infra* notes 120–189 and accompanying text.

¹⁸ See *infra* notes 190–268 and accompanying text.

¹⁹ See *infra* notes 269–319 and accompanying text.

²⁰ Compare Frederick Douglass, Oration, Delivered in Corinthian Hall, Rochester (July 5th, 1852), <https://archive.org/details/orationdelivered00fred/mode/2up> [<https://perma.cc/QK2E-9LUL>] (characterizing the Constitution as a “GLORIOUS LIBERTY DOCUMENT” that lacked “a single pro-slavery clause”), with David Waldstreicher, *How the Constitution Was Indeed Pro-Slavery*, THE ATLANTIC (Sept. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/> [<https://perma.cc/NM7C-KTYW>] (arguing that “the Constitution was deliberately ambiguous—but operationally proslavery”). This debate is beyond the scope of this Note but, for a brief yet thorough bibliography on the topic, see OAKES, *supra* note 9, at xxiii n.5.

²¹ See *infra* notes 24–70 and accompanying text.

²² See *infra* notes 71–97 and accompanying text.

²³ See *infra* notes 98–119 and accompanying text.

²⁴ See generally COVER, *supra* note 2, at 8–28 (providing a lucid overview of how slavery, natural law, and positive law intersected in late 18th century Anglo-American law). During the antebellum period, even courts in the deep South acknowledged that slavery was contrary to natural law. See, e.g., *Harry v. Decker*, 1 Miss. 36, 42 (1818) (“Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in matters of doubt, is it not an unques-

Commentaries maintained that slavery was against the spirit of English liberty and that slaves who came to England would be immediately freed.²⁵ In 1772, in *Somerset v. Stewart*, the English Court of King's Bench embraced Blackstone's view when it freed an enslaved Black man who came to England from America.²⁶ In the decades to follow, *Somerset* came to stand for the propositions that (1) slavery was contrary to natural law and (2) slaves who stepped foot on free soil should be instantly freed.²⁷

On the other side of the Atlantic, slavery was legal in all thirteen colonies in 1776 and wholly or partly abolished in five states by 1787.²⁸ Although the U.S. Constitution did not explicitly mention slavery, it did contain several notorious compromises over the institution: the Slave Trade Clause, the Three-Fifths Clause, the Fugitive Slave Clause, and several others.²⁹ Americans had mixed reactions to the new Constitution: in South Carolina, slaveholder Charles Cotesworth Pinckney boasted that the document denied the federal

tioned rule, that courts must lean 'in favorem vitae et libertatis [viz. all things are to be presumed to be in favor of life, liberty, and innocence].').

²⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *127. Blackstone wrote that:

[T]his [English] spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman; though the master's right to his service may *possibly* still continue.

Id. Blackstone's *Commentaries* was the primary text for early American legal education. COVER, *supra* note 2, at 16.

²⁶ Lofft. 1, 98 Eng. Rep. 499, 510 (K.B. 1772). Lord Mansfield held that slavery was contrary to the natural law and "so odious, that nothing can be suffered to support it, but positive law." *Id.*

²⁷ WIECEK, *supra* note 4, at 38. Despite its broad language, *Somerset* did not end slavery in England; the practice persisted in England until 1833. *Id.* at 32.

²⁸ See generally *id.* at 40–61 (detailing abolition efforts during and after the Revolution). When the Constitutional Convention met in May of 1787, Pennsylvania, Rhode Island, Connecticut, and New York had all passed abolition statutes (although New York's was overruled by the state's Council of Revision). OAKES, *supra* note 9, at 9–10. The soon-to-be-state of Vermont abolished slavery by 1787. *Id.*

²⁹ U.S. CONST. art. I, § 9, cl. 1 (prohibiting Congress from banning the slave trade before 1808 or imposing a duty on the trade "exceeding ten dollars for each Person"); *id.* § 2, cl. 3 (counting slaves as three-fifths of a person for apportionment of representation and direct taxation); *id.* art. IV, § 2, cl. 3 (requiring that persons "held to Service or Labour . . . be delivered up on Claim of the Party to whom such Service or Labour may be due"). In 1845, abolitionist Wendell Phillips marked two additional proslavery parts of the Constitution: Congress's power to "suppress insurrections" and to protect states "against domestic violence." WENDELL PHILLIPS, THE CONSTITUTION A PRO-SLAVERY COMPACT: OR SELECTIONS FROM THE MADISON PAPERS, &C., at vi (New York: American Anti-Slavery Society, 2d ed. 1845), <https://archive.org/details/ASPC0005229600/mode/1up> [<https://perma.cc/3R22-7VNT>]. Contemporary scholars have argued that close to one third of the eighty-four clauses in the Constitution implicated slavery. See MICHAEL F. CONLIN, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR, at xviii (2019) (noting how "mid-nineteenth-century Americans sparred over a long list of constitutional provisions that at first blush seemed to have little or even nothing to do with slavery, including the domestic violence clause, the federal district clause, the guarantee clause, the military installations clause, the militia clause, and the privileges and immunities clause to name just a few").

government power to interfere with slavery.³⁰ In Rhode Island, however, a group of free Blacks in Providence celebrated the Fourth of July by toasting to the Constitution and its ban of the slave trade.³¹

Of all the compromises over slavery, the Fugitive Slave Clause was perhaps the strangest. It referred to “persons”—not slaves.³² It did not explain how slaves were to be “delivered up.”³³ It denied the *Somerset* principle that enslaved people were free when they stepped foot on free soil.³⁴ And yet, it did not explicitly give Congress any power to pass laws governing fugitive slave rendition.³⁵

Despite all this, Congress enacted the first Fugitive Slave Act on February 12, 1793.³⁶ Under this Act, slavecatchers did not need any proof to make the

³⁰ WILENTZ, *supra* note 9, at 139. Pinckney was also pleased with the Fugitive Slave Clause because it granted a new right to slaveholders—the right to recover fugitive slaves. *Id.*

³¹ *Id.* at 16 (noting that “[a]t least one group of free blacks in Providence, Rhode Island, mounted a celebration of the Constitution and its slave trade provision on July 4, 1788, and toasted the proposition, ‘May the Natives of Africa enjoy their Natural Privileges unmolested’”).

³² U.S. CONST. art. IV, § 2, cl. 3.

³³ See H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1137 (2012) [hereinafter Baker, *The Fugitive Slave Clause*] (noting the interpretive difficulties stemming from the clause’s syntax). The Fugitive Slave Clause was vague and incomplete: “[it] admonished the free states not to extirpate the slave status from refugees who crossed their borders, but the real question left unanswered by the clause was who was to decide the status of an alleged fugitive slave.” H. ROBERT BAKER, *PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION* 47–48 (2012) [hereinafter BAKER, *PRIGG V. PENNSYLVANIA*].

³⁴ See EARL M. MALTZ, *DRED SCOTT AND THE POLITICS OF SLAVERY* 65 (2007) (noting that “the application of the *Somerset* principle to escaped slaves was flatly prohibited by the fugitive slave clause of the Constitution”).

³⁵ See BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 59 (discussing the absence of an enabling provision in the Fugitive Slave Clause). An enabling clause is “[t]he part of a statute or constitution that gives governmental officials the power and authority to put the law into effect and to enforce it.” *Clause*, BLACK’S LAW DICTIONARY (11th ed. 2019). Abolitionists argued that the lack of an enabling provision in the Fugitive Slave Clause meant that Congress had no power to pass laws concerning fugitive slaves. BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 59. The fact that other Article IV clauses did contain enabling clauses bolstered this argument. See, e.g., U.S. CONST. art. IV, § 1 (granting Congress the power to safeguard the “Full Faith and Credit” of states by passing “general Laws”); *id.* art. IV, § 3, cl. 2 (granting Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”). Notwithstanding this argument, in 1842, in *Prigg v. Pennsylvania*, the Supreme Court held that the Fugitive Slave Clause gave Congress the implied power to pass legislation concerning fugitive slave rendition. See 41 U.S. (16 Pet.) 539, 541 (1842) (holding that “[i]t cannot well be doubted, that the constitution requires the delivery of the fugitive, on the claim of the master; and the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it”).

³⁶ See generally Jeffrey M. Schmitt, *The Federal Right to Recover Fugitive Slaves: An Absolute but Self-Defeating Property Right*, 2 SAVANNAH L. REV. 21, 22–25 (2015) (discussing fugitive slave rendition in the early republic). Sections 1 and 2 of the Fugitive Slave Act of 1793 involved interstate rendition of criminals; sections 3 and 4 involved interstate rendition of fugitive slaves. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864). Although early versions of the Act contained a “provision protecting free blacks and [a] provision allowing slaveholders recourse to state officers for arresting fugitives,” these were both stricken from the final Act. Baker, *The Fugitive Slave Clause*, *supra* note 33, at 1139.

initial seizure of an alleged fugitive slave.³⁷ Slavecatchers simply haled the alleged fugitive into court, where a federal or local judge could send him or her back into slavery.³⁸ The Act also imposed a fine of \$500 on anyone who obstructed or hindered a slavecatcher, rescued a fugitive slave, or harbored or concealed a fugitive slave.³⁹

Over the next few decades, the rendition of fugitive slaves grew more and more controversial.⁴⁰ Antislavery northerners, concerned about the kidnapping of free Blacks, pushed for anti-slavecatching laws—also known as personal liberty laws.⁴¹ In 1826, Pennsylvania abolitionists successfully passed a personal liberty law that prohibited the kidnapping of Black Pennsylvanians.⁴² The law made slavecatching in Pennsylvania all but impossible.⁴³

Backlash arose in response to the law's passage, and, in 1842, in *Prigg v. Pennsylvania*, the Supreme Court held that Pennsylvania's personal liberty law was unconstitutional.⁴⁴ Justice Joseph Story concluded that the Fugitive Slave Clause recognized a positive right of slaveholders to recapture fugitive slaves

³⁷ Fugitive Slave Act of 1793, 1 Stat. at 302. In contrast, the initial seizure of an interstate "fugitive from justice" required "a copy of an indictment" or "an affidavit made before a magistrate." *Id.*

³⁸ *Id.* at 303–04. Judges could send slaves back into slavery upon "proof to [their] satisfaction." *Id.* The Act appears to permit judges to consider all kinds of oral testimony and affidavits, including from the alleged fugitive slave. *See id.* (omitting any prohibition of such testimony). This was not the case with the Fugitive Slave Act of 1850, which expressly prohibited courts from considering the testimony of alleged fugitive slaves. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 463 (1850) (repealed 1864).

³⁹ Fugitive Slave Act of 1793, 1 Stat. at 305. This amount would later be doubled to \$1,000 in the Fugitive Slave Act of 1850. Fugitive Slave Act of 1850, 9 Stat. at 464.

⁴⁰ *See generally* BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 91–92 (discussing the reaction to the Fugitive Slave Act of 1793).

⁴¹ THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861*, at ix (1974). Personal liberty laws sought to protect the freedom of Black northerners by guaranteeing certain due process rights, limiting state participation in slavecatching, and protecting civil disobedience. *See generally* Norman L. Rosenberg, *Personal Liberty Laws and Sectional Crisis: 1850–1861*, 17 *CIVIL WAR HIST.* 25 (1971) (providing a general overview of personal liberty laws). By 1841, personal liberty laws had been passed in Maine, New York, Indiana, Connecticut, Ohio, Pennsylvania, Michigan, Wisconsin, and Vermont. *Id.* at 26 n.6. This initial wave of laws protected rights like trial by jury and habeas corpus for alleged fugitive slaves. *Id.* at 27.

⁴² WIECEK, *supra* note 4, at 158. Pennsylvania's new statute made two changes to existing Pennsylvania law. *Id.* First, only sheriffs or constables with a warrant could seize a fugitive. *Id.* With this provision, Pennsylvania abrogated the common law right of recapture that slave masters previously enjoyed. *Id.* Under this statute, if a slave master or his agents tried to seize a fugitive, they could be charged with kidnapping. *Id.* Second, the oath of slave masters or slavecatchers was inadmissible for purposes of securing a warrant. *Id.* Under the new law, to secure a warrant, a slaveowner had to rely on testimony from impartial witnesses. *Id.* The cost of bringing such witnesses to Pennsylvania made the whole process "impractical." William R. Leslie, *The Pennsylvania Fugitive Slave Act of 1826*, 8 *J.S. HIST.* 429, 442–43 (1952).

⁴³ *See* Leslie, *supra* note 42, at 443 (finding that "after the enactment of the law of 1826 there was no way for a slaveowner to recapture a fugitive and be safe from prosecution as a kidnapper unless he resorted to complicated legal processes prescribed by the law").

⁴⁴ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842).

that could not be infringed upon by states.⁴⁵ Of course, states could still prohibit state officials from participating in the rendition of fugitive slaves.⁴⁶ Congress, however, had exclusive jurisdiction over fugitive slave rendition.⁴⁷

After *Prigg*, it remained difficult for slaveholders to recapture fugitive slaves because northern judges and juries continued to rule against slaveholders.⁴⁸ This changed when Congress passed the Fugitive Slave Act of 1850, which federalized fugitive slave rendition.⁴⁹ The Act gave federal commissioners the power to decide fugitive slave cases.⁵⁰ Federal marshals and deputies who refused to cooperate faced \$1,000 fines.⁵¹ Black persons accused of being fugitive slaves had no due process rights and lacked the right to a trial by jury.⁵² Their testimony was inadmissible in court.⁵³ Private citizens were also subject to the law: anyone who assisted a fugitive slave could be fined up to \$1,000.⁵⁴ Finally, the Act empowered federal marshals to force private citizens to assist with slavecatching.⁵⁵ Enraged by these provisions, several Northern states, including Maine, strengthened their personal liberty laws during the 1850s.⁵⁶

⁴⁵ *Id.* (affirming that the Fugitive Slave Clause recognized “a positive, unqualified right, on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain”). *Prigg* revolved around Margaret Morgan, a Black woman born into slavery, who moved from Maryland to Pennsylvania, where she was kidnapped in the middle of the night by slavers who tried to drag her back into bondage. See generally BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 24.

⁴⁶ *Prigg*, 41 U.S. at 561 (holding that “state magistrates may, if they choose, exercise the authority [of facilitating fugitive slave renditions], unless prohibited by state legislation”).

⁴⁷ *Id.* at 598.

⁴⁸ See Baker, *The Fugitive Slave Clause*, *supra* note 33, at 1160 (detailing how northern judges and juries resisted ruling in favor of slaveholders). “State courts refused . . . to cede jurisdiction over the writ of habeas corpus to the process of reclamation described in the Fugitive Slave Act [of 1793].” *Id.* Northern states also passed additional personal liberty laws in the wake of *Prigg* that prohibited state officials from assisting in the capture of fugitive slaves. DAVID M. POTTER, *THE IMPENDING CRISIS 1848–1861*, at 139 (Don E. Fehrenbacher ed., 1976).

⁴⁹ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864); see also Baker, *The Fugitive Slave Clause*, *supra* note 33, at 1163 (discussing the mechanisms of the law).

⁵⁰ Baker, *The Fugitive Slave Clause*, *supra* note 33, at 1163 (noting that “[i]n order to provide the judicial infrastructure necessary to execute rendition, the Act authorized federal district judges to appoint commissioners with the authority to issue warrants for arrest, hear fugitive slave rendition cases, and issue certificates of removal”).

⁵¹ Fugitive Slave Act of 1850, 9 Stat. at 463.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 464.

⁵⁵ *Id.* at 463. Marshalls were enabled to appoint “any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties.” *Id.* All Americans were required to “aid and assist in the prompt and efficient execution of this law, whenever their services may be required.” *Id.*

⁵⁶ See, e.g., MARK PETERSON, *THE CITY-STATE OF BOSTON: THE RISE AND FALL OF AN ATLANTIC POWER, 1630–1865*, at 611–17 (2019) (detailing the impact of the Fugitive Slave Act in Boston and the violence deployed against the city’s Black residents). One part of the Fugitive Slave Act that

Although some states bolstered their personal liberty laws, many more denied basic rights to Black Americans.⁵⁷ For example, in Illinois, Black persons could not sue or testify against white persons.⁵⁸ African Americans could not vote.⁵⁹ They could not travel without the right papers.⁶⁰ They were prohibited from even entering the state unless they were already residents.⁶¹

Amidst these anti-Black laws, some antislavery leaders gravitated toward an antislavery reading of the Constitution.⁶² They especially fixated on a phrase from James Madison's Constitutional Convention Notes suggesting that the Framers denied that there could be property in man.⁶³ In 1852, Frederick Douglass summed up this approach when he declared that the Constitution was a "GLORIOUS LIBERTY DOCUMENT" that lacked "a single proslavery clause."⁶⁴

Antislavery constitutionalism, however, was not persuasive for the Supreme Court. In 1857, in *Dred Scott v. Sandford*, the Court held that the U.S. Congress could not ban slavery in the territories,⁶⁵ and that African Americans

drew special ire from northerners was a provision that gave federal commissioners ten dollars if they sent a fugitive back into bondage but only five dollars if they affirmed a fugitive's freedom. Fugitive Slave Act of 1850, 9 Stat. at 464. Many northerners viewed this provision "as a bribe to commissioners." MCPHERSON, *supra* note 12, at 80. For a discussion of personal liberty laws in Maine, see Jerry R. Desmond, *The Attempt to Repeal Maine's Personal Liberty Laws*, *supra* note 10, at 199.

⁵⁷ See generally KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION*, at xi–xxi (2021) (characterizing the struggle for Black citizenship and Black rights during the antebellum period as part of America's first civil rights movement).

⁵⁸ Roger D. Bridges, *Antebellum Struggle for Citizenship*, 108 J. ILL. STATE HIST. SOC'Y 296, 301 (2015).

⁵⁹ *Id.* For a broader discussion of Northern states that denied Black people the right to vote, see generally David A. Bateman, *Partisan Polarization on Black Suffrage, 1785–1868*, 18 PERSPS. ON POL. 470 (2019).

⁶⁰ Bridges, *supra* note 58, at 301.

⁶¹ *Id.* Under Illinois law, "if a free African American deigned to come into the state and remain for more than ten days he or she was to be fined, jailed, and if not a runaway slave, sold to the highest bidder for the shortest period of time, in order to pay the fine and jail costs." *Id.* at 297.

⁶² See generally WIECEK, *supra* note 4, *passim* (providing the definitive account of antislavery constitutionalism before the 1850s). Although William Lloyd Garrison and his Constitution-burning compatriots loom large in the American imagination, most antebellum antislavery leaders saw the Constitution as an aid to their cause rather than an impediment. See OAKES, *supra* note 9, at 51 (discussing antislavery constitutionalism).

⁶³ 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 478 (Jonathan Elliot ed., 1845) [hereinafter ELLIOT'S DEBATES] (revealing that the Framers "thought it wrong to admit in the Constitution the idea that there could be property in men"). Elliot's 1845 book was the most widely read version of Madison's Notes before the Civil War. MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 237 (2015). The phrase from Madison's Notes has appeared time and time again in the antislavery literature. OAKES, *supra* note 9, at 51. It was mirrored by the antislavery rallying cry "freedom is the rule . . . slavery is the exception." *Id.*

⁶⁴ Douglass, *supra* note 20.

⁶⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447–48 (1857).

could never be citizens.⁶⁶ The decision sparked a firestorm in the North.⁶⁷ Three years later, on November 6, 1860, Abraham Lincoln was elected president.⁶⁸ When South Carolina seceded on December 24, 1860, it cited the personal liberty laws of the North as a primary motivation.⁶⁹ Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas also seceded over the months to come, and the nation careened toward civil war.⁷⁰

B. Slavery and the Law in Maine

Long before the Civil War, Black people had lived in Maine. In fact, the earliest recorded Black person in the state was a boy named Mingo who, in 1663, lived in the town of York.⁷¹ As a part of Massachusetts, colonial Maine was subject to the Massachusetts Body of Liberties, New England's first legal code.⁷² The Body of Liberties prohibited slavery.⁷³ The prohibition meant little

⁶⁶ *Id.* at 404 (holding that Black Americans “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States”). According to Chief Justice Roger Taney, Black Americans were considered at the time of the Founding to be “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.” *Id.* at 404–05. Taney even noted that “in no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.” *Id.* at 416. For some doubts about whether Taney truly spoke for a majority of the Supreme Court in *Dred Scott*, see *infra* note 120 and accompanying text.

⁶⁷ See, e.g., OAKES *supra* note 9, at 103–04 (detailing the furious response to *Dred Scott* in the North). Republicans “denounced the decision as ‘sheer blasphemy . . . an infamous libel on our government . . . a lasting disgrace to the court from which it was issued.’” *Id.* (quoting KENNETH M. STAMPP, *AMERICA IN 1857: A NATION ON THE BRINK* 104 (1990)).

⁶⁸ POTTER, *supra* note 48, at 485.

⁶⁹ See *Confederate States of America—Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, AVALON PROJECT, https://avalon.law.yale.edu/19th_century/csa_scarsec.asp [<https://perma.cc/5GC3-QA6M>] (“The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them.”). South Carolina thundered that “[i]n many of these States the fugitive is discharged from service or labor claimed, and in none of them has the State Government complied with the stipulation made in the Constitution.” *Id.*

⁷⁰ MCPHERSON, *supra* note 12, at 234.

⁷¹ Randolph Stakeman, *Slavery in Colonial Maine*, 27 ME. HIST. 58, 64 (1987). Slavery in Maine was “concentrated in the hands of a few very wealthy men,” mostly in towns in the southern part of the state, such as Kittery and York. *Id.*

⁷² See generally Daniel R. Coquillette, *Radical Lawmakers in Colonial Massachusetts: The “Countenance of Authority” and the Lawes and Libertyes*, 67 NEW ENG. Q. 179, 189–92 (1994) (discussing the Body of Liberties). When the Body of Liberties was adopted in 1641, Ferdinando Gorges still personally held Maine. Stakeman, *supra* note 71, at 58. By 1658, Massachusetts had annexed all of Maine. *Id.*

⁷³ WILLIAM H. WHITMORE, *A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686*, at 53 (1890), <https://www.mass.gov/doc/1641-massachusetts->

in practice, however, because the law still permitted the sale of people initially enslaved outside of Massachusetts.⁷⁴ Further, although the document granted slaves *some* rights, violent masters faced little punishment.⁷⁵ Slavery continued in Maine and Massachusetts throughout the colonial period.⁷⁶ Slavery was supported by the common law right of recaption, which allowed masters to extrajudicially seize alleged fugitive slaves.⁷⁷

In Massachusetts, slavery ended quietly through a combination of judicial action and voluntary emancipation.⁷⁸ In 1780, the Massachusetts Declaration of Rights proclaimed the equality of all men.⁷⁹ Soon thereafter, in 1783, in *Commonwealth v. Jennison*, Chief Justice William Cushing of the Massachusetts Supreme Judicial Court instructed a jury that slavery was inconsistent with the Massachusetts Constitution.⁸⁰ The case undermined the legal founda-

body-of-liberties/download [<https://perma.cc/SS56-EHKK>]. The Body of Liberties proclaimed that “[t]here shall never be any bond slavery, villinage or Captivite amongst us unless it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us.” *Id.*

⁷⁴ See *id.* (allowing for slavery of “lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us”).

⁷⁵ See *id.* (providing that slaves “shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require”). In May 1685, the Superior Court of Judicature for the Province of Maine tried and convicted Nathaniel Crane for killing his female slave, Rachel. LORENZO JOHNSTON GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND, 1620–1776*, at 232–34 (1942). Even though Cane’s “cruel beating and hard usage” killed Rachel, he was only fined five pounds as punishment plus five pounds, ten shillings in court costs. *Id.* at 234.

⁷⁶ See generally WENDY WARREN, *NEW ENGLAND BOUND: SLAVERY AND COLONIZATION IN EARLY AMERICA passim* (2016) (discussing slavery in New England).

⁷⁷ See MORRIS, *supra* note 41, at 3–4 (discussing the right of recapture at common law). During the colonial period, the right of recapture encompassed all kinds of relationships: masters could recapture servants, husbands could recapture wives, and fathers could recapture children. BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 24; see also 3 WILLIAM BLACKSTONE, *COMMENTARIES* *4 (defining recaption as a private remedy where “one hath deprived another of his property in goods or chattels personal, or wrongfully detains one’s wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace”).

⁷⁸ See WIECEK, *supra* note 4, at 43–45 (discussing the end of slavery in Massachusetts). In 1779, Thomas Hutchinson, the acting Governor of Massachusetts, wrote that, post-*Somerset*, “all the Americans who had bought Blacks, had, as far as I knew, relinquished their property in them, and rather agreed to give them wages, or suffered them to go free.” WIECEK, *supra* note 4, at 44 (quoting 2 *THE DIARY AND LETTERS OF HIS EXCELLENCY THOMAS HUTCHINSON, ESQ.* 276–77 (Peter Orlando Hutchinson ed., 1886)). Whatever the effect of *Somerset*, the Quock Walker cases show that slavery was not entirely abolished in Massachusetts in 1781. *Id.* at 45.

⁷⁹ See MASS. CONST. of 1780, pt. I, art. I, <https://www.nhinet.org/ccs/docs/ma-1780.htm> [<https://perma.cc/FT5S-KJ33>] (declaring that “all men are born free and equal, and have certain natural, essential, and unalienable rights”).

⁸⁰ *Massachusetts Constitution and the Abolition of Slavery*, MASS.GOV, <https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery#the-quock-walker-case> [<https://perma.cc/HRE5-3NB3>]. *Commonwealth v. Jennison* was the third in a trio of cases concerning the assault and battery of Quock Walker, a former slave who was attacked by his purported owner. *Id.* In his charge to the jury in *Jennison*, Chief Justice William Cushing of the Massachusetts Supreme Judicial Court stated that “[t]he court are [sic] therefore fully of the opinion that perpetual servitude can no

tions of slavery in the state and, by 1790, there were no slaves listed in the federal census for Massachusetts.⁸¹

When Maine became a state in 1820, delegates to its constitutional convention explicitly considered and rejected a proposal to restrict Black voting rights.⁸² As such, Maine's Constitution granted the right to vote to *all* men over the age of twenty-one, excepting untaxed Native Americans and paupers.⁸³ Around the same time, other states moved in the opposite direction, disenfranchising free Blacks.⁸⁴

Aside from its Constitution, Maine also passed six personal liberty laws during the antebellum period.⁸⁵ First, on January 27, 1821, Maine codified the right to a writ of replevin, which allowed alleged fugitive slaves in detention to be released through a jury trial.⁸⁶ Then, on February 20, 1821, Maine criminal-

longer be tolerated in our government, and that liberty can only be forfeited by some criminal conduct or relinquished by personal consent or contract." *Id.* Some historians have emphasized that Cushing did not end slavery "by judicial fiat" but simply charged a jury. BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 24; *see also* WIECEK, *supra* note 4, at 47 (downplaying the significance of the Quock Walker cases).

⁸¹ BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 27 (noting that Cushing "signaled to Massachusetts slaveholders that the judiciary would not support their property claims in human beings under the 1780 constitution").

⁸² JEREMIAH PERLEY, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, OF THE CONVENTION OF DELEGATES, ASSEMBLED AT PORTLAND ON THE 11TH, AND CONTINUED UNTIL THE 29TH DAY OF OCTOBER, 1819, FOR THE PURPOSE OF FORMING A CONSTITUTION FOR THE STATE OF MAINE 95 (1820), <https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=1123&context=mainebicmainebic> [<https://perma.cc/JK4X-PSXL>]. Maine's Constitution granted the right to vote to "[e]very male citizen of the United States of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this State for the term of three months next preceding any election." *Id.* at 8. At the Convention, Mr. Vance of Calais moved to insert "*Negroes*" after the words "Indians not taxed." *Id.* at 95. Following a speech by Mr. Holmes, the Convention voted down Mr. Vance's amendment. *Id.*

⁸³ *Id.*

⁸⁴ *See* Bateman, *supra* note 59, at 472 (tracing how the United States became a "white man's republic"). During the antebellum period, free Blacks gradually lost the right to vote in many states and, by 1840, "equal voting rights were recognized in only four New England states, with New York enfranchising only a small number of wealthy men." *Id.*

⁸⁵ *See* MORRIS, *supra* note 41, at 219 (listing Maine's personal liberty laws); *see also* JOHN CODMAN HURD, 2 THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 34–35 (1862), <https://archive.org/details/lawfreedombondag02hurdrich/page/n9/mode/2up> [<https://perma.cc/K8A9-HDJ9>] (surveying Maine's laws).

⁸⁶ An Act Establishing the Right to the Writ for Replevying a Person, ch. 66, 1830 Me. Laws 266; *see also* MORRIS, *supra* note 41, at 15–16 (discussing use of replevin to free alleged fugitive slaves). In 1821, Maine granted the right to a writ of replevin to persons "imprisoned, confined, or held in duress" who were not facing felony charges. 1830 Me. Laws 266. The writ of replevin was similar to the writ of habeas corpus, but replevin allowed for a jury trial and habeas corpus did not. MORRIS, *supra* note 41, at 15–16. For more on the historical use of the writ of replevin, also known as the writ de homine replegiando, *see* Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 281–87 (1965). Today, the writ of replevin survives as a remedy to recover wrongfully seized property. *See, e.g., Children's Hosp. Corp. v. Cakir*, 183 F. Supp. 3d 242, 248 (D. Mass. 2016) ("To prevail on a replevin claim, a plaintiff must show that (1) the goods in question were unlawfully

ized all kidnapping—including slavecatching.⁸⁷ Perhaps realizing this law conflicted with the Fugitive Slave Act of 1793, Maine passed a new law on March 15, 1838 that banned slavecatching, but included an exception for slavecatching pursuant to federal law.⁸⁸ Next, in 1855, Maine passed a law that prevented, *inter alia*, certain public officials from participating in fugitive slave renditions.⁸⁹ Two years later, the legislature amended this law to provide public legal assistance to alleged fugitive slaves.⁹⁰ Finally, also in 1857, Maine's legislature enacted a law that freed all enslaved persons brought into the state by slaveholders.⁹¹

In 1834, Maine had the second highest number of antislavery societies of any state in the United States.⁹² Despite this, Maine's legislature equivocated on slavery throughout much of the 1830s.⁹³ Then, in 1837, Maine encountered its first fugitive slave case when a 21-year-old enslaved man named Atticus stowed away on a ship in Savannah, Georgia that was bound for Thomaston, Maine.⁹⁴ Slavecatchers found Atticus in Maine and forced him back into bond-

taken from their owner's possession or have been unlawfully detained (2) the owner has a right to possession and (3) the value of the goods exceeds \$20.”).

⁸⁷ An Act for the Protection of the Personal Liberty of the Citizens, and for Other Purposes, ch. 22, § 1, 1830 Me. Laws 90 (repealed 1840). Although Maine's law included an exception for military service and criminal renditions, it contained no exception for fugitive slave renditions. *Id.* Without this exception, slavecatchers in Maine could have been subject to kidnapping claims. *See id.* (omitting any exception for fugitive slave rendition).

⁸⁸ An Act Against Kidnapping or Selling for a Slave, ch. 323, § 1, 1838 Me. Laws 470 (repealed 1840). The new law only criminalized kidnapping of alleged fugitive slaves done “without lawful authority.” *Id.*

⁸⁹ An Act Further to Protect Personal Liberty, ch. 182, 1855 Me. Laws 207 (repealed 1857). That same year, Maine's Senate passed a resolution proclaiming “[t]hat human slavery is, in all its aspects, an unqualified evil and wrong, and as such merits the reprehension of mankind.” S. Res. 22, 34 Leg. (Me. 1855). The Senate also asserted that the Fugitive Slave of 1850 was “unconstitutional.” *Id.*

⁹⁰ An Act Additional to “An Act Further to Protect Personal Liberty,” ch. 43, 1857 Me. Laws 28 (repealed 1870). The law required county attorneys to “summon such witnesses as he shall deem necessary to substantiate such defense, whose fees, and all other necessary and legal expense incurred in making such defense, shall be paid by the state.” *Id.*

⁹¹ An Act Declaring All Slaves Brought by Their Masters Into this State Free, and to Punish Any Attempt to Exercise Authority Over Them, ch. 53, 1857 Me. Laws 38 (repealed 1870).

⁹² John L. Myers, *The Antislavery Agency System in Maine, 1836–1838*, 23 ME. HIST. 57, 57 (1983). In 1834, only Massachusetts had more antislavery societies than Maine. *Id.* In 1830, Maine had a total population of approximately 400,000; fewer than 1,200 of them were Black. *Id.* at 61. By 1840, Maine's total population had risen to more than 500,000 while its Black population had risen to 1,355. Wescott & Schriver, *supra* note 13, at 215.

⁹³ *See* GOLD, AN EXEMPLARY WHIG, *supra* note 10, at 71 (noting that “[m]ost antislavery petitions either died in committee or failed in the Senate”). For example, in 1836, when southerners demanded that northern abolitionist newspapers be suppressed, Maine's legislature “concluded that the absence of abolitionist papers in Maine at the time made official action unnecessary.” *Id.* The next year, the legislature referred antislavery petitions to whatever legislature was in power in 1897. *Id.*

⁹⁴ HENRY S. BURRAGE, MAINE HISTORICAL MEMORIALS 1–2 (1922). Even historians who have examined Maine's personal liberty laws have missed the story of Atticus. *See, e.g.,* Desmond, *supra* note 10, at 194–209 (observing that “there were no such celebrated [fugitive slave] cases in Maine”).

age.⁹⁵ Later, when Georgia officials sought the extradition of the ship's master and mate for theft charges, Maine's Governor refused the extradition request, which led to a bitter and protracted dispute between the two states.⁹⁶ Following this dispute, Maine amended its personal liberty laws in 1838: the new law decriminalized slavecatching pursuant to the Fugitive Slave Act of 1793.⁹⁷

C. Crisis After Crisis: Maine's SJC in the 1850s

In 1856, with the secession crisis looming, Maine faced a constitutional crisis when Democratic Governor Samuel Wells removed Republican Justice Woodbury Davis from the SJC.⁹⁸ Governor Wells was incensed at one of Da-

⁹⁵ BURRAGE, *supra* note 94, at 1–2. Atticus was seized in a barn on the estate of Revolutionary War hero Henry Knox. *Id.* When the slavecatchers disembarked for Georgia, there were “strong demonstrations of indignation” from the people of East Thomaston, Maine. *Id.*

⁹⁶ GOLD, AN EXEMPLARY WHIG, *supra* note 10, at 72. Maine's refusal to extradite the master and mate infuriated Georgia: its legislature contemplated banning Maine ships from Georgia ports. *Id.* The Governor of Georgia even floated a proposal declaring that:

[A]ll citizens of Maine who may come within the jurisdiction of this state, on board of any vessels, as owners, officers, or mariners, shall be considered as doing so with the intent to commit the crime of seducing negro slaves from their owners, and be dealt with accordingly by the officers of justice.

BURRAGE, *supra* note 94, at 21. The conflict between Georgia and Maine was so bitter that, years later in 1844, southerners blocked former Maine Democrat John Fairfield's bid for the vice presidency because he had refused to extradite the two mariners when he was Governor. *Id.*

⁹⁷ An Act Against Kidnapping or Selling for a Slave, ch. 323, § 1, 1838 Me. Laws 470. The new law only criminalized the kidnapping of alleged fugitive slaves when done “without lawful authority.” *Id.* At least one historian has written that Maine legislators passed this law because they were “horried by the seizure of an escaped slave [i.e., Atticus] in Maine.” GOLD, AN EXEMPLARY WHIG, *supra* note 10, at 71. Nevertheless, the 1838 law actually narrowed Maine's anti-slavecatching law because it decriminalized slavecatching done with lawful authority. *Compare* An Act for the Protection of the Personal Liberty of the Citizens, and for Other Purposes, ch. 22, § 1, 1830 Me. Laws 90 (repealed 1840) (criminalizing “every person so offending, and every person aiding and abetting [a fugitive slave rendition]”), *with* 1838 Me. Laws 470 (criminalizing “every person, who, without lawful authority,” participated in a fugitive slave rendition). Given this context, it seems highly unlikely that Maine legislators passed the 1838 Act out of humanitarian concern for fugitive slaves; instead, they probably passed the 1838 Act to appease an angry Georgia. *See supra* note 90 and accompanying text (detailing Maine's dispute with Georgia).

⁹⁸ *See* Leslie C. Cornish, *The Removal of Judge Woodbury Davis*, 4 ME. L. REV. 237, 237–45 (1911) (providing a thorough account of the Davis removal). Interestingly, Governor Samuel Wells was a former Justice on the SJC, serving from 1847 to 1854. *Id.* Outside of Maine, one of the most famous judicial removal cases was that of Judge Edward G. Loring. *See* Louis A. Frothingham, *The Removal of Judges by Legislative Address in Massachusetts*, 8 AM. POL. SCI. REV. 216, 219–20 (1914) (outlining the procedures by which Loring was removed). Loring was removed from office for participating in the rendition of fugitive slave Anthony Burns. *Id.* In other words, Loring was put “on trial for having been a slave commissioner.” COVER, *supra* note 2, at 179. For a good account of Anthony Burns and Edward Loring, *see* EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE*, *supra* note 1.

vis's rulings that limited the Governor's appointment power.⁹⁹ Like *Marbury v. Madison*, the underlying dispute involved a contested commission: two men, a Republican-appointee and a Democratic-appointee, both claimed to be Sheriff of Cumberland County.¹⁰⁰ After Justice Davis refused to recognize the Democratic-appointee's commission, he was removed from the SJC by address.¹⁰¹

Davis believed that he was still a member of the SJC, so he took his case to the SJC.¹⁰² There, in 1856, in *Ex parte Davis*, the court confronted the unique question of whether Justice Davis was still a Justice.¹⁰³ At oral argu-

⁹⁹ See 2 LOUIS CLINTON HATCH, *MAINE: A HISTORY* 393–94 (1919) (noting the frustration of the Democrats). Prior to 1855, Maine sheriffs were appointed by the Governor. Cornish, *supra* note 98, at 238. Then, in 1855, Maine's Republican legislature (and a majority of voters) passed a constitutional amendment that provided for popular election of sheriffs and other public officials. *Id.* Notwithstanding this amendment, Democratic Governor Wells replaced a group of Republican sheriffs with Democratic Sheriffs in January of 1856. *Id.* Although it was a "close question" as to when the amendment took effect, Justice Davis refused to recognize the Democratic-appointee's commission. *Id.*

¹⁰⁰ Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), with *Ex parte Davis*, 41 Me. 38 (1856). In *Marbury*, President John Adams had appointed several judges and Justices of the Peace during his last few days in office. *Marbury*, 5 U.S. at 137. William Marbury's commission was signed, sealed, but not delivered. *Id.* The new President, Thomas Jefferson, refused to deliver the commission to Marshall. *Id.* Several decades later, Justice Davis confronted a similar dilemma when two sheriffs came before him, both asking to be recognized as Sheriff of Cumberland County. Cornish, *supra* note 98, at 238.

¹⁰¹ Cornish, *supra* note 98, at 242–43. Davis was removed by legislative address on April 11, 1856. *Id.* at 244. In 1856, Maine judges could be removed by impeachment or by address. HATCH, *supra* note 99, at 394. Removal by impeachment is a "distinctly judicial remedy" whereby "[t]he Senators who are the triers of the impeachment are on oath, witnesses are called, the forms of a court observed and a two-thirds vote is required to convict." *Id.* In contrast, removal by address "is voted in the same manner that any bill is passed, although the judge whose removal is sought is entitled to a notice and hearing." *Id.* In other words, it was a political circus—not a real legal proceeding. Nevertheless, Justice Davis was well-represented in the proceedings: his defense team included Rufus Choate and Richard Henry Dana. *Id.* at 394–95. Choate was one of the most acclaimed orators in America. James M. Farrell, *The Last Orator: Rufus Choate and the End of Classical Eloquence in America*, in BRILL'S COMPANION TO THE RECEPTION OF ANCIENT RHETORIC 430 (Sophia Papaioannou, Andreas Serafim & Michael Edwards eds., 2022). His closing address for Davis lasted two-and-a-half hours. HATCH, *supra* note 99, at 395. Meanwhile, Richard Henry Dana was a Boston-based antislavery lawyer who defended fugitive slaves like Anthony Burns. *Richard Henry Dana Jr.*, NAT'L PARK SERV. (Mar. 24, 2023), <https://www.nps.gov/people/richard-henry-dana-jr.htm> [<https://perma.cc/999H-DVJ5>]. Dana also happened to be the author of the acclaimed nautical memoir, *Two Years Before The Mast*. *Id.* For Dana, the Davis affair was perhaps "the first instance in this country of an attempt to remove a judge solely on grounds of party policy." CHARLES FRANCIS ADAMS, RICHARD HENRY DANA: A BIOGRAPHY 350 (3rd ed. 1891). He condemned Davis's removal as "a bold attempt to reduce the judiciary under the control of party and caucus." *Id.* at 350–51.

¹⁰² See generally *Ex parte Davis*, 41 Me. 38. (1856).

¹⁰³ *Id.* at 39. Given the strange posture of the case, Davis's plea is described as a:

MEMORIAL by one of the Justices of this Court, who had been removed from office by the Governor, with the advice of the council, on the address of both branches of the Legislature, alleging that the proceedings by which he had been removed were null and void, and praying that notice might be ordered to be given him at what term of the Court his services would be required.

ments, Davis was represented by U.S. Senator William Pitt Fessenden who argued that Davis had been illegally removed by address instead of impeachment.¹⁰⁴ Fessenden also argued that procedures for removal by address had not been followed.¹⁰⁵ Whatever the merits of Davis's case, the SJC did not challenge Governor Wells' assault on judicial independence, and it dismissed the case for lack of jurisdiction.¹⁰⁶ Only one of Justice Davis's colleagues, Justice Goodenow, dissented.¹⁰⁷

The next year, Davis was back from the dead—reappointed to the SJC by Maine's next Republican Governor, Hannibal Hamlin.¹⁰⁸ Indeed, the SJC was thoroughly Republicanized by the Hamlin administration.¹⁰⁹ Two SJC Justices, Woodbury Davis and Seth May, were antislavery activists and former members of the Liberty Party.¹¹⁰ Another Justice, John Appleton, maintained a friendly correspondence with the fiery abolitionist Senator Charles Sumner.¹¹¹ By the

¹⁰⁴ *Id.* at 44. William Pitt Fessenden was a Whig-turned-Republican who represented Maine in the U.S. Senate during the 1850s and 1860s and later served as Lincoln's Secretary of the Treasury. Robert Cook, "The Grave of All My Comforts": William Pitt Fessenden as Secretary of the Treasury, 1864–65, 41 CIV. WAR HIST. 208, 209 (1995). Fessenden was elected in 1854 as an antislavery and antiliquor man and "quickly proved himself to be one of the South's staunchest opponents in Congress." *Id.* At Davis's quasi-trial, Fessenden argued that removal for official acts had to be done by impeachment—not address. *Ex parte Davis*, 41 Me. at 46.

¹⁰⁵ *Ex parte Davis*, 41 Me. at 47. Fessenden argued that "even if, for such causes, the Legislature had authority to pass an address for [Davis's] removal from office, they have attempted to do this in a manner which is in violation of the provisions of the constitution." *Id.* The Maine Constitution, at that time, provided that "[b]efore such address shall pass either house, the causes of removal shall be stated and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defense." ME. CONST. of 1819, art. IX, § 5. Fessenden argued that the causes of removal had not been stated and that Davis had not been admitted to a hearing in defense. *Ex parte Davis*, 41 Me. at 47.

¹⁰⁶ MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 10 (2d ed. 2013) (noting that, from the Davis affair to today, "the [Maine] legislature has never since expelled a judge from office or launched so blatant an attack on the independence of the judiciary"). While disclaiming any jurisdiction over Davis's appeal, the SJC provided plenty of lofty words about the importance of an independent judiciary. *See Ex parte Davis*, 41 Me. at 50 (noting that "[e]very government must be, in its essence, unsafe and unfit for a free people, where a judicial department does not exist"). Chief Justice John S. Tenney, however, was no John Marshall. *Compare Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."), with *Ex parte Davis*, 41 Me. at 62 ("[I]t is . . . our intention to withhold all intimation of what the decision would be, touching the rights of the memorialist . . .").

¹⁰⁷ *Ex parte Davis*, 41 Me. at 63–64 (declaring that "[i]n my opinion, it is the right and the duty of the Court to determine who are its members").

¹⁰⁸ Cornish, *supra* note 98, at 245. Hamlin was a former Democrat who would later become Abraham Lincoln's vice president. MCPHERSON, *supra* note 12, at 220.

¹⁰⁹ Gold, *Constitutional Problems*, *supra* note 10, at 128. By 1861, Justice Rice was the only Democrat left on the SJC. *Id.*

¹¹⁰ GOSSE, *supra* note 13, at 216.

¹¹¹ *See* Gold, *Constitutional Problems*, *supra* note 10, at 128; *see also* David M. Gold, *Chief Justice John Appleton*, 18 ME. HIST. 193, 206 (1979) (describing Appleton's "ardent Republican" views). Senator Charles Sumner was "[a]n advocate of independent antislavery politics by the end of the Mexican War [who] believed that an antislavery party would act as the American equivalent of the 1848

end of the 1850s, Maine was the fourth-most Republican state in the United States.¹¹²

It was in this context that the SJC issued two politically charged advisory opinions to questions from the Maine legislature. First, in 1857, in the *Voting Rights Opinion*, the SJC considered whether Black males were citizens who could vote under the Maine Constitution after *Dred Scott*.¹¹³ Issued just weeks after *Dred Scott*, the *Voting Rights Opinion* was one of the earliest official, legal responses to that ignoble decision.¹¹⁴ Second, in 1861, in the *Personal Liberty Law Opinion*, the SJC considered whether Maine's anti-slavecatching laws were constitutional.¹¹⁵ This opinion was written at the height of the secession crisis, right between Abraham Lincoln's inauguration and the Battle of Fort Sumter.¹¹⁶

Although federal courts cannot issue advisory opinions, Maine's SJC is required to provide such opinions in response to questions submitted by the Governor, Senate, or House of Representatives.¹¹⁷ Advisory opinions are not

revolutions in Europe and destroy all the social injustices plaguing the country, slavery, and economic inequality." Manisha Sinha, *The Caning of Charles Sumner: Slavery, Race, and Ideology in the Age of the Civil War*, 23 J. EARLY REPUBLIC 233, 239–40 (2003). In 1856, Sumner was savagely beaten by a South Carolina congressman on the floor of the U.S. Senate. *Id.* at 240.

¹¹² Jerry R. Desmond, *Maine and the Elections of 1860*, 67 NEW ENG. Q. 455, 466 (1994). Although Lincoln's share of the national popular vote was only 39.8%, his share of the Maine vote was 62.2%. *Id.* In 1860, a majority of voters in all sixteen of Maine's counties cast ballots for Lincoln. *Id.*

¹¹³ Ops. of the Justs. of the Supreme Jud. Ct., On Question Propounded by the Senate (*Voting Rights Opinion*), 44 Me. 505, 505–95 (1857).

¹¹⁴ See Todd F. McDorman, *Challenging Constitutional Authority: African American Responses to Scott v. Sandford*, 83 Q.J. SPEECH 192, 195 (1997) (noting that *Dred Scott* was decided on March 6, 1857). Soon after the SJC issued the *Voting Rights Opinion*, New Hampshire's highest court upheld a law designed to protect Black rights after *Dred Scott*. See Op. of the Justs. of the Supreme Jud. Ct., 41 N.H. 553, 557 (1861) (holding that "the act entitled 'An act to secure freedom and the rights of citizenship to persons in this State,' passed June 26, 1857, is constitutional"). For a consideration of mixed-race citizenship after *Dred Scott*, see *Anderson v. Millikin*, 9 Ohio St. 568, 580 (1859).

¹¹⁵ Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 561–62 (1861). Maine's personal liberty laws guaranteed free legal assistance for persons claimed as fugitive slaves (§ 20 of ch. 79), prevented county jails from imprisoning alleged fugitive slaves (§ 37 of ch. 80), prohibited public officials from aiding or abetting kidnappings (§ 53 of ch. 80), and protected civil disobedience (§ 4 of ch. 132). *Id.*

¹¹⁶ See *supra* note 12 and accompanying text (discussing secession and Fort Sumter). Lincoln delivered his First Inaugural address on March 4, 1861. Abraham Lincoln, *First Inaugural Address*, in THE WRITINGS OF ABRAHAM LINCOLN 324, 324 (Steven B. Smith ed., 2012). The *Personal Liberty Law Opinion* was mostly written in February of 1861. See *Personal Liberty Law Opinion*, 46 Me. 561, 578, 595, 607 (providing February dates for various opinions).

¹¹⁷ ME. CONST. of 1819, art. VI, § 3. (stating that the justices of the Supreme Judicial Court "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate or House of Representatives"). Federal courts are prohibited from issuing advisory opinions by Article III of the U.S. Constitution. See *Flast v. Cohen*, 392 U.S. 83, 95–96 (1968) (reiterating the prohibition against advisory opinions). The prohibition dates from a 1793 letter from the Supreme Court to President George Washington. See The Letter of the Supreme Court Justices to President Washington (Aug. 8, 1793) (citing separation of powers and the Supreme

precedential or binding.¹¹⁸ Nevertheless, the *Voting Rights Opinion* and the *Personal Liberty Law Opinion* help illustrate how the SJC approached legal issues involving slavery on the eve of the Civil War.¹¹⁹

II. THE *VOTING RIGHTS OPINION*: CHALLENGING THE SUPREME COURT

On March 6, 1857, in *Dred Scott v. Sandford*, the Supreme Court denied that Black Americans could be citizens.¹²⁰ This was a problem for Black suffrage in Maine. At the time, Maine allowed Black men to vote.¹²¹ The state, however, also required that voters be “citizens of the United States.”¹²² As a

Court’s status as the court of last resort as “strong arguments against the propriety of our extra-judicially deciding the question alluded to”), in *THE CONSTITUTION OF THE UNITED STATES* (Michael Stokes Paulsen et al. eds., 3d ed. 2017).

¹¹⁸ See Op. of the Justs. of the S.J. Ct. Given Under the Provisions of Section 3 of Article VI of the Constitution, 396 Me. 219, 223 (1979) (“Even when the Justices are constitutionally empowered to render an advisory opinion, that opinion has no precedential value and no conclusive effect as a judgment upon any party, and is not binding upon even the individual Justices rendering it in any subsequent litigated matter before their Court.”). Nineteen state supreme courts have—at one time or another—issued advisory opinions. James R. Rogers & Georg Vanberg, *Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective*, 46 AM. J. POL. SCI. 379, 379 (2002). In 2002, eleven state supreme courts had the power to issue advisory opinions. *Id.*

¹¹⁹ See *infra* notes 120–268 and accompanying text (discussing the *Voting Rights Opinion* and the *Personal Liberty Laws Opinion*).

¹²⁰ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857) (holding that Black Americans “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States”). This Note follows the overwhelming majority of commentators who have said that *Dred Scott* held that Black Americans could never be citizens. See, e.g., Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 55, 58 (2007) (treating Taney’s opinion as the holding of *Dred Scott*). That said, *Dred Scott* contained no fewer than nine (notoriously dense) separate opinions. See Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMMENT. 37, 40 (1993) (“Almost nobody, however, has read *Scott* The case covers about 250 pages of the United States Reports, and much of it is balderdash.”). Although Justice Taney’s opinion purported to be the “opinion of the court,” it is not entirely clear which portions of Justice Taney’s opinion commanded majority support. See generally John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373, 373 (1988) (discussing the ambiguities of *Dred Scott* and purporting to resolve some of them). On the issue of Black citizenship, “only three Justices explicitly held that [Blacks] could not be citizens.” *Id.* at 390. Perhaps “silent acquiescence suggests that the other Justices who did not dissent may have agreed with that view.” *Id.* Can we really read that much into the other opinions? According to one contemporary analysis, *Dred Scott* stood for the much less contentious proposition that *enslaved* persons were not citizens of the United States. See HORACE GRAY & JOHN LOWELL, A LEGAL REVIEW OF THE CASE OF DRED SCOTT 12 (1857), <https://www.loc.gov/item/22004418/> [<https://perma.cc/GRK4-YKZF>] (finding that “[t]he conclusion of the majority of the court . . . was, that, upon all the facts in the case, the plaintiff was a slave, and therefore not capable of suing as a citizen”). That’s far narrower than Taney’s view. As such, although this Note proceeds on the assumption that Taney spoke for a majority of the Court, the reality may be far more complicated.

¹²¹ See Bergeson-Lockwood, *supra* note 10, at 92–97 (noting how New England states like Maine permitted Black voting).

¹²² See ME. CONST. of 1819, art. II, § 1 (providing that “[e]very male citizen of the United States of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indi-

result of this conflict, on March 26, 1857, the Maine Senate asked the Maine SJC for an advisory opinion on whether Black men could still vote in Maine following *Dred Scott*.¹²³ Soon thereafter, in 1857, in the *Voting Rights Opinion*, the SJC gave its answer: Black men were still citizens who could vote.¹²⁴

In so doing, the SJC rejected Chief Justice Roger Taney's reasoning in *Dred Scott*.¹²⁵ According to Taney, Black Americans lacked citizenship because they were not citizens at the time of the Founding.¹²⁶ Taney's history, however, was all wrong.¹²⁷ As the *Voting Rights Opinion* pointed out, several states *did* grant citizenship to Black Americans at the Founding.¹²⁸ That fact suggested that the original understanding of the word "citizenship" included Black Americans.¹²⁹

But wasn't *Dred Scott* still the law of the land? On this question, the *Voting Rights Opinion* splintered into four camps. Section A of this Part considers the majority opinion, which affirmed that Black Mainers were citizens while side-stepping direct conflict with *Dred Scott*.¹³⁰ Section B discusses Justice Joshua Hathaway's dissent, which chided the SJC for so blatantly defying the

ans not taxed, having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives, in the town or plantation where his residence is so established; and the elections shall be by written ballot").

¹²³ Ops. of the Justs. of the Supreme Jud. Ct., On Question Propounded by the Senate (*Voting Rights Opinion*), 44 Me. 505, 505 (1857). Specifically, the Senate asked whether "free colored persons, of African descent, having a residence established in some town in this state, for the term of three months next preceding any election, authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives." *Id.*

¹²⁴ See *infra* notes 134–134 and accompanying text (discussing the majority opinion). When the *Voting Rights Opinion* was issued, "[m]embers of Maine's new Republican Party celebrated [it] as a fierce rebuke of *Dred Scott* and a proud celebration of Maine and equal rights." Bergeson-Lockwood, *supra* note 10, at 97.

¹²⁵ See *Voting Rights Opinion*, 44 Me. at 515–16 (holding that free Black Mainers were "citizens of the United States" under the Maine Constitution).

¹²⁶ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857) (maintaining that "every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several states, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else" (emphasis added)). For a fresh reading of *Dred Scott* using the concept of general citizenship, see Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 663–71 (2023).

¹²⁷ See generally Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of the Revolution and Chief Taney's Originalism in Dred Scott*, 24 J. CONST. L. 676, 677 (2022) (concluding that Taney was "fundamentally wrong" in asserting that Black Americans lacked citizenship); see also Stanton D. Krauss, *New Evidence That Dred Scott Was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25, 27 (2004) (using a 1793 case to show that "the Founders believed free blacks could count for the purposes of federal diversity jurisdiction").

¹²⁸ See *infra* note 141 and accompanying text (detailing how New York, New Jersey, Maryland, North Carolina, and Massachusetts granted citizenship to Black persons at the Founding).

¹²⁹ See generally *Voting Rights Opinion*, 44 Me. at 510–14 (countering Taney's assumption in *Dred Scott* that Black people lacked citizenship at the Founding).

¹³⁰ See *infra* notes 134–145 and accompanying text.

Supreme Court.¹³¹ Section C examines Justice John Appleton's concurrence, which went further than the majority by attacking *Dred Scott*'s reasoning and authority.¹³² Finally, Section D probes Justice Woodbury Davis's radical concurrence, which contended that the Constitution was an antislavery document that needed no amendment to abolish slavery.¹³³

A. Majority Opinion

The majority opinion of the *Voting Rights Opinion* held that, under the Maine Constitution, Black people were citizens of the United States who could vote.¹³⁴ Antebellum legal opinion was deeply divided on the question of Black citizenship, and the Supreme Court had recently held that Black Americans could never be citizens.¹³⁵ Nevertheless, the majority opinion asserted that the SJC was not bound by prior precedent because this was a question of state constitutional law.¹³⁶ As such, in a few short paragraphs, the majority dodged direct conflict with *Dred Scott*.¹³⁷

Next, the SJC challenged *Dred Scott*'s originalism.¹³⁸ In that decision, Taney used history to decide who was a citizen of the United States.¹³⁹ The SJC similarly relied on history, but it reached the opposite conclusion.¹⁴⁰ Drawing liberally upon Justice Benjamin Curtis's dissent in *Dred Scott*, the SJC found that Black Americans could vote in several states at the Founding.¹⁴¹ As such, reasoning that voting was a hallmark of citizenship, the SJC concluded that Black Americans could be citizens.¹⁴²

¹³¹ See *infra* notes 146–150 and accompanying text.

¹³² See *infra* notes 151–164 accompanying text.

¹³³ See *infra* notes 165–189 and accompanying text.

¹³⁴ *Voting Rights Opinion*, 44 Me. at 516. The majority opinion was joined by Justices John S. Tenney, Richard R. Rice, Jonas Cutting, Seth May, and Daniel Goodenow. *Id.*

¹³⁵ See *id.* at 508 (contrasting Chancellor James Kent's view that free Blacks could be citizens with Justice Taney's view that no Black person could ever be a citizen). James Kent was a 19th century jurist who served as Chief Judge of the Court of Appeals of the State of New York as well as Chancellor of New York's Chancery Court. See generally Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 CHI.-KENT L. REV. 11 (1998) (discussing the legacy of Chancellor Kent). Kent was well-known for his *Commentaries on American Law*, the first modern treatise of American law. *Id.* at 27.

¹³⁶ See *Voting Rights Opinion*, 44 Me. at 508 (declaring that “[e]ach [precedent] must stand upon its own intrinsic merits, and they will undoubtedly receive that degree of respect to which, as legal productions, they are justly entitled. They do not, however, affect the question now before us”).

¹³⁷ See Gold, *Constitutional Problems*, *supra* note 10, at 130 (characterizing the majority's skimpy treatment of *Dred Scott* as an attempt “designed to minimize controversy and unite the court as much as possible”).

¹³⁸ See Balkin & Levinson, *supra* note 120, at 68–73 (examining Chief Justice Taney's originalism).

¹³⁹ See *id.* (discussing Taney's use of history in *Dred Scott*).

¹⁴⁰ See *Voting Rights Opinion*, 44 Me. at 511–14 (tracing the history of citizenship at the Founding).

¹⁴¹ Compare *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (Curtis, J., dissenting) (quoting a North Carolina opinion), with *Voting Rights Opinion*, 44 Me. at 513 (quoting the same); see also *Voting Rights Opinion*, 44 Me. at 511–14 (mirroring Justice Curtis's historical arguments in *Dred Scott*). Five states granted citizenship to Blacks at the Founding. First, New York's 1777 constitution

Finally, the majority turned to Maine's own constitutional convention.¹⁴³ There, delegates had explicitly rejected a proposal to restrict the franchise to white men.¹⁴⁴ Given this history, the words "citizens of the United States" in the Maine Constitution plainly included Black Mainers.¹⁴⁵

B. Justice Hathaway's Dissent

In his dissent, Justice Hathaway chided the majority for weaseling around *Dred Scott*.¹⁴⁶ Citizenship was a national issue.¹⁴⁷ Non-uniformity in citizenship was a recipe for chaos.¹⁴⁸ And the Supreme Court had the final authority to decide national issues arising under the Constitution.¹⁴⁹ As such, the SJC

extended the franchise to "every male inhabitant of full age," subject to a property and residency requirement. *Voting Rights Opinion*, 44 Me. at 510. Second, New Jersey's 1776 constitution extended the franchise to "all inhabitants of this colony, of full age," subject to a property and residency requirement. *Id.* at 511. Third, Maryland's 1776 constitution extended the franchise to "[a]ll freemen above twenty-one years of age," subject to a property and residency requirement. *Id.* Fourth, North Carolina's 1776 constitution extended the franchise to "all freemen of the age of twenty-one years," subject to a property and residency requirement. *Id.* at 512. Finally, Massachusetts's 1780 Constitution recognized that "every person shall be considered an inhabitant, for the purpose of electing and being elected into any office." *Id.* at 514. The fact that some of these states later amended their constitutions to restrict the franchise to white men only bolstered the SJC's point. *See id.* at 511–14 (detailing racially restrictive amendments). Interestingly, during the early republic, New Jersey's Constitution extended the franchise to single, propertied women. *See* Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776–1807*, 63 RUTGERS L. REV. 1017, 1018 (2011) (exploring female suffrage in New Jersey).

¹⁴² *See Voting Rights Opinion*, 44 Me. at 510 (treating suffrage as a hallmark of citizenship). For the majority, it would be the height of absurdity for states to allow people to vote who were not citizens. *See id.* (contending that "no instance can be found in which the right to vote at our general elections has been conceded to persons born on our soil, who were not at the time deemed citizens of the states in which they enjoyed the right [to vote]").

¹⁴³ *See id.* at 515 (discussing Maine's constitutional convention).

¹⁴⁴ *Id.* The SJC quoted a Convention speech by one Mr. Holmes from Calais: "I know of no difference between the rights of the negro and the white man; God Almighty has made none—our declaration of rights has made none." *Id.*

¹⁴⁵ *See id.* at 515–16 ("[W]e are of the opinion that our constitution does not discriminate between the different races of people which constitute the inhabitants of our state; but that the term, 'citizens of the United States,' as used in that instrument, applies as well to free colored persons of African descent as to persons descended from white ancestors.").

¹⁴⁶ *Id.* at 520–21 (Hathaway, J., dissenting) (concluding that descendants of slaves were not citizens of the United States under Maine's Constitution).

¹⁴⁷ *See id.* at 517 (listing the parts of the federal Constitution that concern citizenship).

¹⁴⁸ *Id.* at 518 ("There might be as many different classes of citizens as there are states, all citizens of some one state, and yet utterly powerless to enforce their constitutional rights to 'all privileges and immunities of citizens in every other state.'" (quoting U.S. CONST. art. IV, § 2, cl. 1)).

¹⁴⁹ *See id.* at 519 (limning the Supremacy Clause). The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

was duty-bound to follow the Supreme Court's holding in *Dred Scott* and hold that descendants of slaves could never be citizens of the United States.¹⁵⁰

C. Justice Appleton's Concurrence

In his concurrence, Justice Appleton agreed that Black Mainers were citizens of the United States who could vote.¹⁵¹ Unlike the majority, however, Appleton explicitly challenged the reasoning in *Dred Scott*.¹⁵² He began by defending a democratic conception of citizenship that extended to all free persons.¹⁵³ Yes, the law made certain distinctions—for example, married women could not purchase property and minors could not vote.¹⁵⁴ Nevertheless, women and children were still citizens.¹⁵⁵ As such, so too were slaves who had been emancipated.¹⁵⁶ History supported his position.¹⁵⁷

Next, Appleton challenged *Dred Scott*'s assertion that the national government had the sole power to confer general citizenship.¹⁵⁸ Citizenship could only be acquired by birth, naturalization, or treaty.¹⁵⁹ The Framers gave the

U.S. CONST. art. VI, cl. 2. In light of the Supremacy Clause, Hathaway believed that the Supreme Court had the final say on cases like this. *Voting Rights Opinion*, 44 Me. at 519–20 (Hathaway, J., dissenting).

¹⁵⁰ See *Voting Rights Opinion*, 44 Me. at 519–20 (Hathaway, J., dissenting) (concluding that *Dred Scott* was “legally conclusive and binding upon the several states”).

¹⁵¹ *Id.* at 575 (Appleton, J., concurring).

¹⁵² See *id.* at 563 (rejecting Taney's approach).

¹⁵³ See *id.* at 522 (declaring that “[t]he constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest—the equality of all before the law”). Appleton waxed poetically about democracies, where “[t]he Cornish miner burrowing in the earth, the princely nobleman in his palatial residence, or the beggar at his gate, are alike members of the same civil community—fellow subjects and fellow citizens.” *Id.* at 522–23.

¹⁵⁴ See *id.* at 523 (discussing the numerous legal “disabilities” of women and children).

¹⁵⁵ See *id.* (affirming citizenship of women and children). For Appleton, suffrage was divorced from citizenship. Otherwise, “three-fourths of the free people of the country would, by reason of age, sex, or the poverty of their condition, be disfranchised.” *Id.* At the time, disfranchisement involved far more than voting—Noah Webster defined it as “[t]o deprive of the rights and privileges of a free citizen; to deprive of chartered rights and immunities; to deprive of any franchise, as of the right of voting in elections, &c.” 1 Noah Webster, *Disfranchise*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828).

¹⁵⁶ See *Voting Rights Opinion*, 44 Me. at 525 (Appleton, J., concurring) (affirming that enslaved persons become citizens upon emancipation).

¹⁵⁷ See *id.* at 529–44 (discussing, inter alia, the Articles of Confederation, state citizenship at the Founding, and the Constitution). For Appleton, the Constitution acknowledged only status-based distinctions—not race-based ones. See *id.* at 543–44 (discussing the Constitutional Convention).

¹⁵⁸ See *id.* at 549 (concluding that Blacks “were, are, and must remain citizens of the United States”). Unlike Chief Justice Appleton, Taney did not think that state citizenship automatically gave one the benefits of general citizenship, i.e., the privileges and immunities of Article VI of the Constitution. See Jud Campbell, *supra* note 126, at 664 (discussing Taney's view of general citizenship). Nor did state citizenship automatically give one the right to sue in federal court under Article III of the Constitution. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1857) (discussing state citizenship).

¹⁵⁹ *Voting Rights Opinion*, 44 Me. at 545 (Appleton, J., concurring).

national government the exclusive power to grant citizenship by naturalization and treaty.¹⁶⁰ The states, however, maintained the right to grant citizenship by birth.¹⁶¹

Finally, Appleton suggested that *Dred Scott* was not actually the law of the land.¹⁶² A majority of the Court had not actually held that free Blacks were not citizens.¹⁶³ Even if they had, Taney's bunk history was not binding.¹⁶⁴

D. Justice Davis's Concurrence

Also in concurrence, Justice Davis delivered the most radically anti-slavery opinion of the justices.¹⁶⁵ Davis affirmed that citizenship was defined by residence and allegiance.¹⁶⁶ At the time of the Founding, the federal government gained the exclusive power over naturalization and the states gained a guarantee that other states would respect the privileges and immunities of their citizens.¹⁶⁷ For Davis, the federal government had no power to deprive people

¹⁶⁰ *Id.* at 547.

¹⁶¹ *See id.* at 547–48 (concluding that, under the Tenth Amendment, states had the “sovereign and unlimited” power to recognize citizens by birth); *see also* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁶² *See Voting Rights Opinion*, 44 Me. at 557–58 (Appleton, J., concurring) (minimizing the authority of the Supreme Court). For one likely inspiration behind Justice Appleton's contention that judicial opinions did not themselves have the force of law, *see Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

¹⁶³ *Voting Rights Opinion*, 44 Me. at 560 (Appleton, J., concurring). *See generally, supra* note 120 and accompanying text (discussing the ambiguities of *Dred Scott*'s holding).

¹⁶⁴ *See Voting Rights Opinion*, 44 Me. at 561 (Appleton, J., concurring) (dismissing Taney's history). Appleton wrote that “whatever may be the authoritative force of a decision of the Supreme Court of the United States, there can be no doubt that its statements, as to the past history of the country, are binding neither on the historian nor the jurist.” *Id.*

¹⁶⁵ *Id.* at 576 (Davis, J., concurring). In answering the Senate's question, Davis assumed that they referred only to free Blacks born within the United States because antebellum naturalization laws only allowed white aliens to become citizens. *Id.* The first citizenship act, passed by Congress in 1790, extended only to “free white person[s].” Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795). Davis acknowledged the exclusionary nature of Maine's suffrage laws, writing that the State Constitution “so restricts the right of suffrage that only about one fifth part of the population possess it, as a personal franchise.” *Voting Rights Opinion*, 44 Me. at 577 (Davis, J., concurring).

¹⁶⁶ *Voting Rights Opinion*, 44 Me. at 595 (Davis, J., concurring). Suffrage could not be the test of citizenship because not all voters were citizens (states could theoretically extend suffrage to aliens) and not all citizens were voters (women, children, and paupers could not vote). *Id.* at 577. For Davis, citizenship was defined by “residence and allegiance.” *Id.* at 578. As a result, “[a]ll persons, wherever born, residing in the United States at the time of the declaration of independence, and yielding to it an express or implied sanction, became parties to it, and are to be considered as natives, their social tie being coeval with our existence as a nation.” *Id.* at 579.

¹⁶⁷ *Id.* at 580–81; U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”). As Davis noted, “the states, when they entered into this compact, reserved no right to exclude from citizenship any class of free persons born in the United States.” *Voting Rights Opinion*, 44 Me. at 581 (Davis, J., concurring).

of citizenship.¹⁶⁸ He was not alone in this position: Republicans in the 1850s routinely made states-rights arguments to counter proslavery federal actions like *Dred Scott*, the Fugitive Slave Act, and the Kansas-Nebraska Act.¹⁶⁹

Having established that the federal government lacked power to strip individuals of their citizenship, Davis rejected race-based citizenship on historical grounds: Blacks had been citizens at the Founding.¹⁷⁰ Next, he rejected race-based citizenship on policy grounds: if color was the test of citizenship there would be no certainty and no uniformity in citizenship.¹⁷¹ Finally, Davis rejected race-based citizenship on moral grounds: because both Blacks and whites had fought in the Revolutionary War, both deserved the fruits of citizenship.¹⁷²

Davis deployed an armamentarium of historical facts to prove that the Founders were against slavery: the First Continental Congress had pledged to abolish the slave trade and denied the idea of property in man;¹⁷³ the Declaration of Independence had affirmed the equality of all men;¹⁷⁴ the Second Continental Congress had rejected a proposal to deny Black Americans the privileges and immunities of free citizens;¹⁷⁵ the 1787 Northwest Ordinance had prohibited slavery in the territories;¹⁷⁶ and a near-majority of states had banned

¹⁶⁸ *Voting Rights Opinion*, 44 Me. at 582–83 (Davis, J., concurring) (finding that “as no state, though it may withhold the elective franchise from citizens, can deprive them of their citizenship, so the federal government cannot deprive any class of persons of their citizenship”). Citizenship, once gained, was “*indefeasible*.” *Id.* at 583.

¹⁶⁹ See generally Michael E. Woods, “*Tell Us Something About State Rights*”: Northern Republicans, States’ Rights, and the Coming of the Civil War, 7 J. CIV. WAR ERA 242, 242–44 (2017) (exploring Republican states-rights advocacy from 1854 to 1860).

¹⁷⁰ *Voting Rights Opinion*, 44 Me. at 583 (Davis, J., concurring).

¹⁷¹ *Id.* 586. First, race-based citizenship was too uncertain because it was near-impossible to accurately identify the race of every single mixed-race American. *Id.* Second, race-based citizenship would lead to non-uniform citizenship laws between states because there was no single definition of citizenship. *Id.*

¹⁷² *Id.* at 586. Davis argued that Blacks and whites “all resided together, participants of that freedom which was the fruit of their common struggles and sacrifices.” *Id.* Consequently, “[w]hatever their disparity in numbers, or condition, neither had the right to, eject the other from the common purchase, or make them aliens from the commonwealth.” *Id.*

¹⁷³ *Id.* at 587.

¹⁷⁴ *Id.* at 587–88.

¹⁷⁵ *Id.* at 588.

¹⁷⁶ *Id.* The Northwest Ordinance provided that:

There shall be neither slavery nor involuntary servitude in the said territory . . . *Provided, always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Northwest Ordinance; July 13, 1787, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/nworder.asp [<https://perma.cc/G4GU-RQMD>]; cf. Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343, 369 (1986) (noting that slavery still persisted in the Northwest Territory, even after passage of the Northwest Ordinance).

slavery by the start of the Constitutional Convention.¹⁷⁷ For Davis, these facts proved that the Founders intended to give Black Americans the benefits and protections of citizenship.¹⁷⁸

Perhaps Davis's most explosive argument was that the Constitution needed no amendment to abolish slavery.¹⁷⁹ This argument came from the most radical corners of the antislavery movement.¹⁸⁰ Alvin Stewart cited the Fifth Amendment as the source of this power.¹⁸¹ Joel Tiffany looked to the Republican Form of Government Clause, Gerrit Smith looked to the Preamble, and William Goodell looked to the Necessary and Proper Clause.¹⁸² All men were far outside of mainstream legal opinion, which almost uniformly affirmed that Congress did not have the power to abolish slavery.¹⁸³

Nevertheless, Davis believed that the Constitution was drafted with the expectation that slavery would soon be abolished.¹⁸⁴ After all, the Framers had

¹⁷⁷ *Voting Rights Opinion*, 44 Me. at 588–89 (Davis, J., concurring). Massachusetts was the only state that had wholly abolished slavery by 1787. 1 JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 1 (1990).

¹⁷⁸ See *Voting Rights Opinion*, 44 Me. at 588–89 (Davis, J., concurring) (“Does not this record prove, beyond any doubt, that during this formative period of our national institutions, the people of this country, instead of entertaining any design to deprive colored persons of their rights, and exclude them from citizenship, recognized them as citizens of the United States, and adopted effectual measures to protect them as such?”).

¹⁷⁹ *Id.* at 589, 595 (contending that “[t]he [C]onstitution was, therefore, so framed, that . . . it would need no change or amendment when slavery should be abolished” and that “[the Constitution] was designedly so made as to need no amendment when slavery should be abolished”). With this language, Davis rejected the federal consensus that Congress had no power to interfere with slavery. See generally Maeve Glass, *Slavery’s Constitution: Rethinking the Federal Consensus*, 89 FORDHAM L. REV. 1815 (2021) (providing a contemporary view of the federal consensus).

¹⁸⁰ See CONLIN, *supra* note 29, at xix (noting that “all but a coterie of radical abolitionists believed that the Founders had placed slavery in the states out of the federal government’s reach”). Even if this argument was radical, “[i]t was hardly conceivable that so dynamic a movement led by men who breasted the wrath of the mob and put at hazard life and fortune in a humanitarian crusade would easily or long be confined by iron curtains or universally accepted constitutional dogmas.” JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 42 (1951).

¹⁸¹ TENBROEK, *supra* note 180, at 43 (noting how, “[i]n an argument characterized, on the one hand, by bold imagination and, on the other hand, by an illuminating disregard for historical fact, Stewart built his constitutional case for this radical proposition solely on the due process clause of the Fifth Amendment, converting an apparent prohibition on power into a source of authority”).

¹⁸² *Id.* at 188.

¹⁸³ See, e.g., DANIEL W. CROFTS, *LINCOLN AND THE POLITICS OF SLAVERY: THE OTHER THIRTEENTH AMENDMENT AND THE STRUGGLE TO SAVE THE UNION* 25 (2016) (“Almost all white Americans of the [antebellum] era considered it axiomatic that ‘only the states could abolish or in any way regulate slavery within their jurisdictions’ and that ‘the federal government had no power over slavery in the states.’” (quoting WIECEK, *supra* note 4, at 16)). Even the American Anti-Slavery Society maintained that the federal government had no power to interfere with slavery in the states. *Id.* at 26.

¹⁸⁴ *Voting Rights Opinion*, 44 Me. at 589 (Davis, J., concurring) (indicating that “[n]early one half of the states had abolished slavery, either absolutely or prospectively; and the general expectation was that the others would do the same, at some future time”).

deliberately excluded slavery from the Constitution.¹⁸⁵ Further, the Fugitive Slave Clause recognized the humanity of enslaved people because the Framers had substituted the word “service” for “servitude” in the text.¹⁸⁶

Finally, Davis reiterated his opposition to *Dred Scott* on states-rights grounds: the Supreme Court simply had no power over Maine’s citizenship determinations.¹⁸⁷ *Dred Scott* was also unjust because, in denying Black Americans the protections of citizenship, it permitted slave states to take life and liberty with impunity.¹⁸⁸ Above all, Davis indicated that *Dred Scott* falsely denied the great principle of equality embedded in the Declaration of Independence.¹⁸⁹

¹⁸⁵ *Id.* at 589. The full passage in Madison’s convention notes, from Saturday August 25, 1787, provided that “Mr. MADISON thought it wrong to admit in the Constitution the idea that there could be property in men. The reason of duties did not hold, as slaves are not, like merchandise, consumed, &c.” ELLIOT’S DEBATES, *supra* note 63, at 478.

¹⁸⁶ *Voting Rights Opinion*, 44 Me. at 589 (Davis, J., concurring). The relevant passage in Madison’s convention notes provided that, on Thursday, September 13, 1787, “[o]n motion of Mr. RANDOLPH, the word ‘servitude’ was struck out, and ‘service’ unanimously inserted, the former being thought to express the condition of slaves, and the latter the obligations of free persons.” ELLIOT’S DEBATES, *supra* note 63, at 540. A few years later, Davis utilized this passage to argue that the fugitive slave clause did not apply to slaves at all. Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 610 (1861) (Davis, J., concurring).

¹⁸⁷ *Voting Rights Opinion*, 44 Me. at 591 (Davis, J., concurring). Davis maintained that the Supreme Court’s power did not “extend to cases in which the powers of the state courts and of the United States courts are collateral, co-extensive and independent.” *Id.* Simply put, the Supreme Court had no jurisdiction over Maine’s citizenship laws. *Id.* at 592.

¹⁸⁸ *Id.* at 592. For example, Black seamen took their lives in their hands when they travelled to the South: “[w]hen a ship-master from Boston enters any port in South Carolina, his colored seamen may be taken from him, confined in jail, and sold into slavery to pay the jail fees, and there is no redress.” *Id.*

¹⁸⁹ *See id.* at 594 (discussing the Declaration). Davis’s powerful words are worth quoting in full:

If the Declaration of Independence “was not intended to include the enslaved African,” but was a mere compact of their oppressors for their own advantage, while “the unhappy black race were never thought of or spoken of, except as property, and when the claims of the owner or the profit of the trader were supposed to need protection,” then a decent respect for the opinions of mankind should have kept its authors silent. Such compacts had long been common enough, in limited monarchies, in aristocracies; even among brigands and pirates. Freedom of privileged classes, and equality among themselves, while trampling on the rights of others, was no new thing . . . As the manifesto of such a doctrine, the Declaration of Independence would not have merited the respect of mankind; it would not have justified a revolution; it would have given Washington and his compatriots no glory to fight for it, and their toil, and sacrifice, and blood, were offered in vain.

Id. Although he does not provide any citations for these quotations, Davis is clearly referencing *Dred Scott*. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 409–10 (1857) (mirroring Davis’s language).

III. THE PERSONAL LIBERTY LAW OPINION: SPLIT-DECISION ON AN ANTI-SLAVECATCHING LAW

After the SJC decided the *Voting Rights Opinion* in 1857, the country became more and more polarized on the issue of slavery. On January 3, 1861, Maine Governor Israel Washburn, Jr. asked the Maine state legislature to repeal or modify personal liberty laws that conflicted with the Constitution or federal law.¹⁹⁰ Like many northern states in 1861, Maine had personal liberty laws to protect Black people from slavecatchers.¹⁹¹ These laws infuriated the South, because the South believed such laws violated the Fugitive Slave Act of 1850.¹⁹² In fact, when South Carolina seceded on December 20, 1860, it cited the North's personal liberty laws as one reason for secession.¹⁹³

During the secession winter of 1860–61, Governor Washburn was part of a larger group of Northern Republican Governors who considered repealing personal liberty laws in order to appease the South and stem the tide of secession.¹⁹⁴ But they were running out of time: in January of 1861, six more states seceded.¹⁹⁵ Then, on February 13, 1861, the Maine House of Representatives kicked the can to the judiciary by asking the SJC for an advisory opinion on the constitutionality of Maine's personal liberty laws.¹⁹⁶

Four laws were at-issue. First, Section 20 of Chapter 79 required county attorneys to provide legal assistance to persons claimed as fugitive slaves.¹⁹⁷ Second, Section 37 of Chapter 80 prevented county jails from imprisoning alleged fugitive slaves.¹⁹⁸ Third, Section 53 of Chapter 80 prohibited any "sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other of-

¹⁹⁰ Address of Governor Washburn to the Legislature of the State of Maine (Jan. 3, 1861), http://lldc.mainelegislature.org/Open/Rpts/PubDocs/PubDocs1861v1/PD1861v1_00D.pdf [<https://perma.cc/EN45-SHQ6>]. Governor Washburn believed that such laws, even if they "they may be mere waste paper and void," nonetheless undermine the rule of law through "mischievous example." *Id.* at 22.

¹⁹¹ See *supra* notes 85–91 and accompanying text (discussing Maine's personal liberty laws).

¹⁹² See, e.g., Rosenberg, *supra* note 41, at 25–44 (detailing how southern politicians viewed personal liberty laws as a venomous form of "Northern nullification").

¹⁹³ See *Confederate States of America—Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, *supra* note 69 (citing the personal liberty laws of the north as a primary reason for the state's secession).

¹⁹⁴ See Desmond, *supra* note 10, at 201–03 (characterizing the attempt to repeal Maine's personal liberty laws as part of an attempt to appease the South). Republican governors in Pennsylvania, New York, and New Jersey "unequivocally" called on their state legislatures to heed southern demands for repeal. Rosenberg, *supra* note 41, at 41.

¹⁹⁵ MCPHERSON, *supra* note 12, at 235.

¹⁹⁶ Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 561 (1861).

¹⁹⁷ ME. REV. STAT. tit. 8, ch. 79, § 20 (Wheeler & Lynde 1857).

¹⁹⁸ *Id.* ch. 80, § 37.

ficer of [Maine]” from helping kidnap fugitive slaves.¹⁹⁹ Finally, Section 4 of Chapter 132 stripped “magistrates” of jurisdiction over fugitive slave-related cases.²⁰⁰

In the subsequent *Personal Liberty Laws Opinion*, decided by the SJC in 1861, the court was split. A majority held that Section 37—the prohibition against state officer participation in slavecatching—was unconstitutional.²⁰¹ For a majority of the justices, this law conflicted with the Fugitive Slave Act’s requirement that all citizens assist in slavecatching.²⁰² Nevertheless, a majority of the SJC upheld the constitutionality of the other three laws at issue.²⁰³ Although the Maine legislature ultimately refused to repeal Section 37, the *Personal Liberty Law Opinion* is a remarkable snapshot of American jurisprudence on the brink of the Civil War.²⁰⁴ Section A of this Part considers the opinion of Justices Tenney and Cutting, which held that two of Maine’s personal liberty laws were unconstitutional.²⁰⁵ Second B examines Justice Rice’s opinion, which came to a similar result.²⁰⁶ Section C probes Justices Appleton and Kent’s opinion, which held that all of Maine’s laws were constitutional.²⁰⁷ Section D explores Justices May and Goodenow’s opinion, which held that Section 37 was unconstitutional.²⁰⁸ Finally, Section E considers the radical opinion of Justice Davis who upheld all the laws as constitutional.²⁰⁹

A. Opinion of Justices Tenney and Cutting

Justices Tenney and Cutting held that two of Maine’s personal liberty laws were unconstitutional.²¹⁰ The justices affirmed that Congress had the

¹⁹⁹ *Id.* ch. 80, § 53. Violation of this provision was punishable by a fine of up to \$1,000 or by imprisonment for less than one year. *Id.* The \$1,000 fine mirrored the amount imposed by the Fugitive Slave Act of 1850. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 464 (1850) (repealed 1864).

²⁰⁰ ME. REV. STAT. tit. 11, ch. 132 § 4 (Wheeler & Lynde 1857).

²⁰¹ See *infra* notes 210–268 and accompanying text (discussing how Justices Tenney, Cutting, Rice, May, and Goodenow believed that Section 37 was unconstitutional).

²⁰² See, e.g., Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 566 (1861) (Tenney, C.J., & Cutting, J.) (concluding that Section 37 conflicted with the Fugitive Slave Act).

²⁰³ See *infra* notes 210–268 and accompanying text (discussing the various opinions of the *Personal Liberty Law Opinion*).

²⁰⁴ See Desmond, *supra* note 10, at 207 (detailing how the Maine Senate voted seventeen-to-ten in favor of the repeal while the Maine House voted forty-seven-to-sixty-seven against repeal).

²⁰⁵ See *infra* notes 210–216 and accompanying text.

²⁰⁶ See *infra* notes 217–229 and accompanying text.

²⁰⁷ See *infra* notes 230–238 and accompanying text.

²⁰⁸ See *infra* notes 239–247 and accompanying text.

²⁰⁹ See *infra* notes 248–268 and accompanying text.

²¹⁰ Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 566 (1861) (Tenney, C.J., & Cutting, J.).

power to legislate on the issue of fugitive slave rendition.²¹¹ From there, they focused on the laws forbidding state officers from participating in fugitive slave renditions (Section 53 of Chapter 80) and prohibiting justices of the peace from participating in fugitive slave renditions (Section 4 of Chapter 132).²¹² On the one hand, state legislatures had the power to regulate their own officers.²¹³ The Fugitive Slave Act of 1850, however, required that *all* citizens aid in the rendition of fugitive slaves whenever their service was required.²¹⁴ To square these competing demands, the justices relied on a distinction between official and private capacity: Maine could restrict state officers from participating in fugitive slave renditions while they were on the clock.²¹⁵ When state officers were off-duty, however, they had the same obligation as every other American to assist in slavecatching.²¹⁶

B. *Opinion of Justice Rice*

Like Tenney and Cutting, Justice Rice determined that two of Maine's personal liberty laws—Section 53 of Chapter 80 and Section 4 of Chapter 132—were unconstitutional.²¹⁷ Justice Rice also addressed some arguments from antislavery constitutionalism. First, he explained that the Fugitive Slave Clause applied to slaves.²¹⁸ Next, he noted that the Fugitive Slave Acts of 1793 and 1850 were constitutional.²¹⁹ After all, the Supreme Court's 1842 decision

²¹¹ *Id.* at 564. Although Justices Tenney and Cutting did not provide a citation for this proposition, they might have cited *Prigg v. Pennsylvania*. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 561 (1842). That being said, it was far from clear that the Fugitive Slave Clause granted Congress the power to legislate on the fugitive slave issue; unlike other provisions of Article IV, the Fugitive Slave Clause did not contain an enabling clause vesting any power in Congress. See BAKER, *PRIGG V. PENNSYLVANIA*, *supra* note 33, at 59, 93 (discussing how antislavery lawyers employed this argument).

²¹² *Personal Liberty Law Opinion*, 46 Me. at 564–66 (Tenney, C.J., & Cutting, J.).

²¹³ *See id.* at 565 (finding that the state legislature may “define the powers of those who hold office under it, in the exercise of its sovereignty, with such qualifications and exceptions as it shall deem proper”).

²¹⁴ *See id.* at 564 (discussing the requirements of the Fugitive Slave Act of 1850). Specifically, the Fugitive Slave Act of 1850 announced that “all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose.” Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 463 (1850) (repealed 1864).

²¹⁵ *Personal Liberty Law Opinion*, 46 Me. at 565 (Tenney, C.J., & Cutting, J.).

²¹⁶ *Id.* at 566 (finding that state officers “are not exempt from obedience to this law, when no act of an official character is required or commanded”). In coming to this conclusion, the justices cited no case law. *Id.*

²¹⁷ *Id.* at 578.

²¹⁸ *Compare id.* at 567 (Rice, J.) (affirming that the Fugitive Slave Clause applied to slaves), *with id.* at 609 (Davis, J.) (denying that the Fugitive Slave Clause applied to slaves). For Justice Davis's view on this issue and others, see *infra* notes 248–268 and accompanying text.

²¹⁹ *See Personal Liberty Law Opinion*, 46 Me. at 569–73 (Rice, J.) (affirming the constitutionality of both Fugitive Slave Acts). Rice noted that the constitutionality of the Fugitive Slave Act had been “affirmed by the Supreme Courts of Pennsylvania, New York and Massachusetts, and reaffirmed by

in *Prigg v. Pennsylvania* had already held that (1) the Fugitive Slave Act of 1793 was constitutional; (2) the federal government had exclusive jurisdiction over the rendition of fugitive slaves; and (3) states could not regulate the rendition of fugitive slaves.²²⁰ Although the Fugitive Slave Act of 1850 differed from the 1793 version, the character of both was basically identical.²²¹

Justice Rice also affirmed that the Fugitive Slave Act of 1850 did not unconstitutionally deprive alleged fugitives of the right to trial by jury or the right to a writ of habeas corpus.²²² First, it would be impracticable to have a full jury trial upon the mere arrest of a fugitive.²²³ On this point, Rice cited the colonial-era Articles of Confederation of the United Colonies of New England, which did not give alleged fugitive slaves the right to a trial by jury.²²⁴ Second, alleged fugitives properly held under the Fugitive Slave Act of 1850 were not entitled to the writ of habeas corpus.²²⁵ Ultimately, although the Supreme Court had not yet affirmed the constitutionality of the Fugitive Slave Act of 1850, it had affirmed the constitutionality of the 1793 Fugitive Slave Act, and that was enough for Rice.²²⁶

the Supreme Court of the United States; and has been acquiesced in by all departments of the national government, and *has long been deemed settled law both by courts and jurists.*" *Id.* at 569 (emphasis added). It is hard not to read this passage as a direct response to Justice Davis, who brazenly asserted that the Fugitive Slave Act was unconstitutional. *See infra* note 266 and accompanying text (discussing Davis's position).

²²⁰ *Personal Liberty Law Opinion*, 46 Me. at 568–69 (Rice, J.) (citing *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)).

²²¹ *Id.* at 569.

²²² *Id.* at 569–73. During the antebellum period, national courts could not grant habeas corpus relief to persons held under state authority. MORRIS, *supra* note 41, at 10–11. Nevertheless, it was hotly contested whether there was a state remedy for people restrained by federal authority. *Id.*

²²³ *Personal Liberty Law Opinion*, 46 Me. at 571 (Rice, J.).

²²⁴ *See id.* at 571–72 ("It is also agreed that if any servant run away from his master into any other of these confederated jurisdictions, that in such case, upon certificate of one magistrate in the jurisdiction out of which the said servant fled, or upon other due proof, the said servant shall be delivered either to his master or any other that pursues and brings such certificate or proof."); *see also The Articles of Confederation of the United Colonies of New England; May 19, 1643*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/art1613.asp [<https://perma.cc/CK2E-LCTS>]. The United Colonies of New England was the first confederation in America, bringing together the four Puritan colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven. *See generally* HARRY M. WARD, *THE UNITED COLONIES OF NEW ENGLAND—1643–1690*, at 49–59 (1961) (describing the confederation). Aside from dealing with intercolonial disputes, the Articles imposed mutual military obligations on member colonies. *See id.* (describing various components of the Articles). Most importantly, it was America's "first fugitive slave law." *Id.* at 56.

²²⁵ *Personal Liberty Law Opinion*, 46 Me. at 572–73 (Rice, J.) Justice Rice found that, if an alleged fugitive slave did not have the required certificate, he or she had to be discharged. *Id.* at 573.

²²⁶ *Id.* Justice Rice cites the case of Thomas Sims, in which the Massachusetts Supreme Judicial Court waved away arguments that the Fugitive Slave Act of 1850 was unconstitutional. *In re Sims*, 61 Mass. 285, 310 (1851). The Supreme Court did not affirm the constitutionality of the Fugitive Slave Act of 1850 until 1858. *See Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858) (holding that "the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States").

Given all this, Section 53 of Chapter 80, the statute forbidding certain state officers from participating in fugitive slave renditions, clearly conflicted with the Fugitive Slave Act of 1850.²²⁷ Rice rejected the argument that Section 53 applied only to state officers who were acting in their official capacity.²²⁸ On similar grounds, he suggested that Section 4 of Chapter 132, the provision prohibiting justices of the peace from participating in fugitive slave renditions, was also unlawful.²²⁹

C. Opinion of Justices Appleton and Kent

Justices Appleton and Kent held that all the statutes at issue were constitutional.²³⁰ Although they quickly affirmed that Sections 20 and 37 were constitutional, Section 53 of Chapter 80 proved more troublesome.²³¹ Section 53 prohibited state officials from participating in slavecatching.²³² Was this just a prohibition on state officials acting in their official capacity? Or did the statute also cover state officials acting in their private capacity? Appleton and Kent agreed that Maine could only prohibit state officials from participating in slavecatching while in their official capacities.²³³ In 1857, however, Maine had removed the words “official capacity” from the statute.²³⁴ In order to save the statute, Appleton and Kent had to read these words back into the statute; in 1857, they argued, the Maine legislature just wanted to tidy up the statute, not change its meaning.²³⁵ This history meant that the statute was capable of multiple meanings so, under the doctrine of constitutional avoidance, the statute was constitutional.²³⁶ So too was Section 4, which stripped Maine judicial offi-

²²⁷ See *Personal Liberty Law Opinion*, 46 Me. at 575 (Rice, J.) (concluding that “these laws are in direct and irreconcilable conflict”).

²²⁸ *Id.* at 577. Rice thought it was absurd that the Act could cover “any minister of the gospel duly appointed and commissioned to solemnize marriages; any selectman or assessor; any inspector of beef and pork, lime and lime casks, and the like.” *Id.*

²²⁹ *Id.* at 578.

²³⁰ *Id.* at 595 (Appleton & Kent, JJ.).

²³¹ See *id.* at 579–81 (considering Sections 20 and 37).

²³² *Id.* at 581–82.

²³³ See *id.* at 592 (discussing the unconstitutional reading of Section 53).

²³⁴ *Id.* at 591.

²³⁵ See *id.* (detailing how Section 53 was amended). In 1856, former Chief Justice of the SJC Ether Shepley was charged with revising Maine’s laws. *Id.* Nevertheless, Appleton and Kent argued that Shepley had no mandate to substantively change the law—just to simplify it. See *id.* at 591–92 (discussing Shepley’s revisions). Moreover, Shepley could not have accidentally made a change that “escaped his accurate observation and acute intellect.” *Id.* at 592. For more on Chief Justice Shepley’s revisions, see Israel Washburn, Jr., *Memoir of Hon. Ether Shepley, LL.D.*, in 8 COLLECTIONS OF THE MAINE HISTORICAL SOCIETY 416 (1881).

²³⁶ See *Personal Liberty Law Opinion*, 46 Me. at 595 (Appleton & Kent, JJ.) (considering Section 53 in light of the canon of constitutional avoidance). The canon of constitutional avoidance provides that, “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.” Eric S. Fish, *Consti-*

cials of jurisdiction over fugitive slave-related cases.²³⁷ Throughout their opinion, Appleton and Kent remained strictly focused on statutory interpretation, and they declined to consider broader questions like whether the Fugitive Slave Act was constitutional.²³⁸

D. Opinion of Justices May and Goodenow

Justices May and Goodenow found that some of Maine's personal liberty laws were unconstitutional.²³⁹ The justices began their opinion with a primer on federalism, noting that citizens have dual loyalties to their state and to the federal government.²⁴⁰ Each sovereign may seek the assistance and aid of its citizens,²⁴¹ but the federal government may not commandeer state officers or facilities.²⁴²

For May and Goodenow, Section 20 of Chapter 79 and Section 37 of Chapter 80 were clearly constitutional.²⁴³ The constitutionality of Section 4 of Chapter 132 turned on whether the provision applied to every act of judges and justices of the peace or whether it applied just to actions within their official

tutional Avoidance as Interpretation and as Remedy, 114 MICH. L. REV. 1275, 1282 (2016) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)). Justice Kent also wrote a short supplemental note to apply the canon of constitutional avoidance to Section 53. *Personal Liberty Law Opinion*, 46 Me. at 596–98 (Kent, J.).

²³⁷ See *Personal Liberty Law Opinion*, 46 Me. at 593–95 (Appleton & Kent, JJ.) (discussing Section 4).

²³⁸ See *id.* at 579 (“Inasmuch as, for the purposes of the present examination, the constitutionality of those laws is not questioned, we have deemed all investigations as to their origin, all defence [sic] of their provisions, all laudation of their humanity, and all denunciation of their harshness as alike unnecessary and supererogatory.”). This was a striking change for Justice Appleton who, just a few years prior, dropped a tome of an opinion attacking Chief Justice Taney’s reasoning in *Dred Scott*. See *supra* notes 151–164 and accompanying text (discussing Appleton’s contribution to the *Voting Rights Opinion*).

²³⁹ See *Personal Liberty Law Opinion*, 46 Me. at 607 (May & Goodenow, JJ.) (finding that section 80 of chapter 50 of Maine’s personal liberty laws was unconstitutional).

²⁴⁰ See *id.* at 599 (suggesting that the federal and state constitutions “provide for two separate governments, each an absolute sovereignty within its proper sphere”).

²⁴¹ *Id.* at 600. Justices May and Goodenow spent an entire paragraph addressing the possibility that a citizen might have to render services to both sovereigns at the same time. *Id.* They offered the absurd hypothetical of a citizen who, while helping a local sheriff catch a murderer, is asked by a federal marshal to help catch a different criminal. *Id.* In such a situation, the justices adopted a first-in-time rule: the first sovereign to enlist the citizen got his help. See *id.* (explaining that “the government which first begins to be served acquires a jurisdiction over the services of the citizen, which cannot be defeated by the command of the other”).

²⁴² *Id.* at 601; see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (articulating a modern version of this principle). For a good overview of the anti-commandeering doctrine, see Kevin J. O’Brien, *Federal Regulation of State Employment Under the Commerce Clause and “National Defense” Powers: Constitutional Issues Presented by the Public Safety Employer-Employee Cooperation Act*, 49 B.C. L. REV. 1175, 1193–95 (2008).

²⁴³ *Personal Liberty Laws Opinion*, 46 Me. at 602 (May & Goodenow, JJ.). The justices cheekily noted that even Virginia had a provision requiring free legal assistance to alleged fugitive slaves. *Id.*

capacity.²⁴⁴ Finding that the statute was susceptible to both interpretations, the justices found that the statute was constitutional.²⁴⁵

Finally, the justices determined that Section 53 of Chapter 80, which prohibited certain state officers from aiding or abetting slavecatchers, was unconstitutional because it conflicted with the Fugitive Slave Act of 1850.²⁴⁶ The justices bemoaned that they had no option but to assume that the Fugitive Slave Act, in all its injustice, was constitutional.²⁴⁷

E. Opinion of Justice Davis

Justice Davis, in the most aggressively antislavery of the several opinions, determined that all of Maine's personal liberty laws were constitutional.²⁴⁸ Davis began his opinion with the presumption that all men were free.²⁴⁹ Slavery was contrary to natural law, so any slave who escaped became free the moment he or she stepped foot on free soil.²⁵⁰ Next, Davis declared that the so-called Fugitive Slave Clause did not actually apply to enslaved persons.²⁵¹ The text of that clause referred to persons held to "service or labor"—not slaves.²⁵² He

²⁴⁴ See *id.* at 603 (outlining the two different interpretations).

²⁴⁵ See *id.* at 603–04 (noting that "[w]hen a statute is, from its language, fairly susceptible of two meanings, the one constitutional and the other not, that which is consistent with the constitution must be preferred"); see also *Constitutional-Avoidance Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the doctrine of constitutional avoidance as "[t]he doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion").

²⁴⁶ *Personal Liberty Laws Opinion*, 46 Me. at 604 (May & Goodenow, JJ.) (finding that "there can be no doubt that, when taken in its literal sense, it is in direct conflict with the Acts of Congress passed in 1850, commonly known as the fugitive slave Act").

²⁴⁷ *Id.* at 605. The justices acknowledged the inhumanity of sending fugitives back into bondage with less legal protection than establishing "title to the smallest article of property." *Id.* Nevertheless, even if fugitive slave rendition was intrinsically "harsh," the justices believed they had no power to decide differently. *Id.* Justices May and Goodenow likely experienced "dissonance between antipathy to a result that would condemn a man, fundamentally innocent, to undeserved slavery and the knowledge or belief that such an action was required by fidelity to role expectations and rules." COVER, *supra* note 2, at 228. Both justices would doubtless agree with Supreme Court Justice John McClean's belief that "[i]f the law be wrong in principle, or oppressive in its exactions, it should be changed in a constitutional mode But the law, until changed or abrogated, should be respected and obeyed." *Id.* at 247 (quoting *Jones v. VanZandt*, 13 F. Cas. 1047, 1049 (C.C.D. Ohio 1843)).

²⁴⁸ *Personal Liberty Law Opinion*, 46 Me. at 608 (Davis, J.). At the time Davis was deciding this opinion, his friend, Senator William Pitt Fessenden, was the leader of the radical Republican faction that opposed all compromises with the South. Michael Todd Landis, "A Champion Had Come": William Pitt Fessenden and the Republican Party, 1854–60, 9 AM. NINETEENTH CENTURY HIST. 269, 280 (2008).

²⁴⁹ *Personal Liberty Law Opinion*, 46 Me. at 608 (Davis, J.) ("I assume that every man is presumed to be free, and that slavery nowhere exists except by positive provisions of statute.").

²⁵⁰ See *id.* at 608 (discussing slavery and natural law). *Somerset v. Stewart*, decided by the King's Bench in 1772, is the clear inspiration for this passage. See *supra* notes 26–27 (describing *Somerset*).

²⁵¹ *Personal Liberty Law Opinion*, 46 Me. at 609 (Davis, J.).

²⁵² See U.S. CONST. art. IV, § 2, cl. 3. (requiring that persons "held to Service or Labour . . . be delivered up on Claim of the Party to whom such Service or Labour may be due").

reasoned that because slaves were property rather than persons, they were not covered by the Fugitive Slave Clause.²⁵³

Davis believed that the Framers purposefully put language into the Constitution that could never really apply to slaves.²⁵⁴ Davis bolstered this textual argument with two appeals to the original intent of the Framers.²⁵⁵ First, the Framers voted to substitute the word “service” for the word “servitude” in the Fugitive Slave Clause.²⁵⁶ Second, the Framers made this substitution because, in the words of James Madison, they knew “that it was wrong to admit into the constitution the idea that there could be property in man.”²⁵⁷

Davis’s arguments mirrored those of constitutional utopian Lysander Spooner who, in *The Unconstitutionality of Slavery*, advanced seven arguments for why the Fugitive Slave Clause did not apply to slavery.²⁵⁸ First, Spooner argued that the clause had to be interpreted, if possible, in a way that did not violate natural law.²⁵⁹ Second, he asserted that the clause could not ap-

²⁵³ See *Personal Liberty Law Opinion*, 46 Me. at 609 (Davis, J.) (“A slave is not held to *service* or *labor* under the laws of a slave State. Those laws make him an article of property, to be *bought* and *sold*, like other chattels. They do not require him to *labor*.”).

²⁵⁴ *Id.* at 609–10. This was, for Davis, in accordance with the Framer’s belief “that slavery was speedily to be abolished.” *Id.* at 610.

²⁵⁵ *Id.* Madison’s Notes of the Constitutional Convention sparked a revolution in constitutional interpretation when they were published. See WILENTZ, *supra* note 9, at 22–23 (noting the impact of Madison’s Notes). The Notes were used to support both antislavery and proslavery readings of the constitution. On the one hand, in 1845, abolitionist Wendell Phillips used the Notes to argue that “the Constitution of the United States has been, and still is, a pro-slavery instrument, and that any one who swears to support it, swears to do pro-slavery acts, and violates his duty both as a man and an abolitionist.” PHILLIPS, *supra* note 29, at viii. On the other hand, that same year, abolitionist Lysander Spooner used Madison’s Notes to argue that “the constitution of the United States, not only does not recognize or sanction slavery, as a legal institution, but that, on the contrary, it presumes all men to be free; that it positively denies the right of property in man; and that it, *of itself*, makes it impossible for slavery to have a legal existence in *any* of the United States.” LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 56–57 (1860), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2206/Spooner_1487_Bk.pdf [<https://perma.cc/5TAG-JZMG>].

²⁵⁶ *Personal Liberty Law Opinion*, 46 Me. at 610 (Davis, J.).

²⁵⁷ *Id.*; see also ELLIOT’S DEBATES, *supra* note 63, at 478 (providing the original language).

²⁵⁸ See SPOONER, *supra* note 255, at 56–57 (providing seven reasons why the so-called Fugitive Slave Clause did not actually apply to enslaved people). Spooner’s book is “the most complete of the arguments for the [constitutional] utopians.” COVER, *supra* note 2, at 156. Scholars have praised the book’s creativity but critiqued its “haphazard ingenuity of rule and phrase manipulation [that ignores] the ‘method’ of the judge in any real sense.” *Id.* at 157. Scholars have also critiqued “Spooner’s constitution” for being “amputated from any societal context.” *Id.* For a more positive appraisal of Spooner’s work, see Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner’s Theory of Interpretation*, 28 PAC. L.J. 977, 1110–14 (1997). In Spooner’s time, his book was “officially accepted by the Liberty Party in 1849.” A. John Alexander, *The Ideas of Lysander Spooner*, 23 NEW ENG. Q. 200, 202 (1950). This was the same time that Justice Davis would have been a member of the Liberty Party. See *supra* note 13 and accompanying text (discussing Davis’s antislavery activism).

²⁵⁹ See SPOONER, *supra* note 255, at 68 (arguing that the Fugitive Slave Clause “must be construed, if possible, as sanctioning nothing contrary to natural right”). For Spooner, there was an easy way to construe the text in an antislavery way: the words “service or labor” applied to indentured

ply to enslaved persons because slaves were considered property and not persons.²⁶⁰ Third, he maintained that the “laws” of slave states did not recognize any “claim” of slaveowners to service or labor from slaves.²⁶¹ Fourth, he argued that, even if the terms “service” and “labor” were ambiguous, they would have to be construed strictly to not include slavery.²⁶² Fifth, he reasoned that slave laws could not properly be called “laws” under the act.²⁶³ Sixth, he contended that other parts of the Constitution affirmed that persons held to “service” were free.²⁶⁴ Finally, he argued that a canon of construction militated against construing the Fugitive Slave Clause as including slaves.²⁶⁵

After embracing Spooner’s radical arguments about the Fugitive Slave Clause, Davis declared that the Fugitive Slave Act of 1850 was unconstitutional

servants—not slaves. *See id.* (discussing how the law referred to servants). The argument that the law should be strictly construed against slavery was not uncommon. *See, e.g., The Constitution of the United States: Is It Pro-slavery or Antislavery? Speech delivered in Glasgow, Scotland, March 26, 1860* (maintaining that “[w]here a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose, we must in all cases adopt that which makes it accomplish an innocent purpose”), in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS* 380, 387 (Philip S. Foner ed., 1950) Spooner’s work was a catalyst for Frederick Douglass’s conversion to antislavery constitutionalism. *See* Jeannine Marie DeLombard, *Law* (discussing Douglass’s embrace of antislavery constitutionalism and his break with William Lloyd Garrison), in *FREDERICK DOUGLASS IN CONTEXT* 220–21 (Michaël Roy ed., 2021)

²⁶⁰ *See* SPOONER, *supra* note 255, at 69 (arguing that the words “[h]eld to service or labor” could not apply to slaves because “[t]he essence of slavery consists in a person’s being owned as property—without any reference to the circumstances of his being compelled to labor, or of his being permitted to live in idleness, or of his being too young, or too old, or too sick to labor”).

²⁶¹ *See id.* (contending that slave state law recognized only a right to property in slaves—not a right “to compel the slave to labor”). In fact, Spooner contended that “[i]f the master . . . be not able, to compel the slave to labor, the law takes no more cognizance of the case than it does of the conduct of a refractory horse.” *Id.* This distasteful analogy came from Madison’s Convention Notes, where Roger Sherman is recorded as saying that there was “no more propriety in the public seizing and surrendering a slave or servant than a horse.” *ELLIOT’S DEBATES, supra* note 63, at 487.

²⁶² *See* SPOONER, *supra* note 255, at 70 (arguing that the term “service” applied to indentured servants and that the term “labor” applied to criminals). Spooner does not mention that there is a separate provision, located right next to the Fugitive Slave Clause in the Constitution, that applies to criminals. *See* U.S. CONST. art. IV, § 2, cl. 2 (providing for interstate rendition of people charged “with Treason, Felony, or other Crime”).

²⁶³ *See* SPOONER, *supra* note 255, at 70–72 (arguing that “Slave acts were not ‘laws’ according to any State constitution that was in existence at the time the constitution of the United States was adopted”). Spooner believed in the supremacy of natural law; for him, an unjust law was no law at all. *See* Helen J. Knowles, *Securing the “Blessings of Liberty” for All: Lysander Spooner’s Originalism*, 5 N.Y.U. J.L. & LIBERTY 34, 49 (sketching Spooner’s view of natural and positive law).

²⁶⁴ *See* SPOONER, *supra* note 255, at 72–73 (comparing the use of the word “service” in both the Fugitive Slave Clause and the Three-Fifths Clause to argue that it was not meant to be applied to enslaved persons). Spooner pointed out that the Three-Fifths Clause counted “persons bound to service for a term of years” as free persons—not slaves. *Id.* (quoting U.S. CONST. art. I, § 2, cl. 3). As such, persons “held to service” under the Fugitive Slave Clause had to be free persons. *Id.*

²⁶⁵ *See* SPOONER, *supra* note 255, at 73 (arguing that “[t]he words ‘service or labor’ cannot be made to include slavery, unless by reversing the legal principle, that the greater includes the less, and holding that the less includes the greater”).

al.²⁶⁶ Davis knew that the Supreme Court disagreed with him, and he came close to denying the authority of the Court.²⁶⁷ For Davis, the Court was not right as a matter of law or principle.²⁶⁸

IV. RADICAL ABOLITION ON THE BENCH: LESSONS FROM THE MAINE SJC

The *Voting Rights Opinion*, decided by the SJC in 1857, and the *Personal Liberty Law Opinion*, decided by the SJC in 1861, prove that antislavery constitutionalism was embedded in the SJC in the years before the Civil War. Two modes of antislavery constitutionalism emerged: a moderate strain and a radical strain.²⁶⁹ Section A of this Part compares Justice John Appleton's moderate antislavery constitutionalism with Justice Woodbury Davis's more radical variant.²⁷⁰ Section B of this Part then evaluates the impact of these two opinions on current debates in legal history.²⁷¹

A. Davis v. Appleton: A Tale of Two Judges

Justice Woodbury Davis's radicalism is most apparent when he is compared to another antislavery member of the SJC: Justice John Appleton.²⁷² Davis was a former member of the Liberty Party who barnstormed Maine for

²⁶⁶ See Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 611 (1861) (Davis, J.) (assailing the unconstitutionality of laws like the Fugitive Slave Law of 1850 that deprived persons of due process rights). Davis didn't mince words on this point: "any law that subjects [a person] to the loss of his liberty without such a trial is, in my opinion, unconstitutional and void." *Id.* Three years prior, the Supreme Court held the exact opposite. See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858) (holding that "the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States").

²⁶⁷ See *Personal Liberty Law Opinion*, 46 Me. at 614 (Davis, J.) (conceding that "in all our official relations, we are bound by their decision, until it shall be reversed").

²⁶⁸ See *id.* ("But while, in regard to the constitutionality of the laws of the United States, we yield to the authority of the Supreme Court, if we believe the decisions of that court to be wrong, it is our privilege, if not our duty, so to declare, in order that such decisions may be overruled, or that the laws may be repealed. *No weight of authority, and no lapse of time, can establish that which is wrong, or prevent it from ultimately being overthrown.*" (emphasis added)). Here, Davis echoed Abraham Lincoln, who had his own tumultuous relationship with the Supreme Court. See, e.g., Lincoln, *supra* note 116, at 329–30 (stating that "if the policy of the government . . . is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal").

²⁶⁹ See *infra* notes 272–302 and accompanying text (comparing the moderate antislavery constitutionalism of Justice John Appleton with the more radical antislavery constitutionalism of Justice Woodbury Davis).

²⁷⁰ See *infra* notes 272–302 and accompanying text.

²⁷¹ See *infra* notes 303–319 and accompanying text.

²⁷² See generally Gold, *supra* note 111, at 193–216 (providing a general overview of Appleton's life and 31-year tenure on the SJC).

three years in the 1840s as an antislavery activist.²⁷³ He worked as a postmaster in the backwater of Brooks, Maine,²⁷⁴ never went to college,²⁷⁵ was a pillar of the temperance movement,²⁷⁶ and penned a millenarian Christian book.²⁷⁷ Davis was kicked off the SJC in 1856.²⁷⁸ In contrast, Appleton was a former Whig who, although personally opposed to slavery, spent the 1840s ensconced in private practice in Bangor, Maine.²⁷⁹ He was a graduate of Bowdoin College,²⁸⁰ a correspondent of John Stuart Mill,²⁸¹ a relative of President Franklin Pierce through marriage,²⁸² and a Universalist in religion.²⁸³ Although both men were against slavery, they came from drastically different backgrounds.²⁸⁴

In the *Voting Rights Opinion* and the *Personal Liberty Law Opinion*, Davis and Appleton agreed on many issues.²⁸⁵ They both believed that slaves were only enslaved by positive law and that, once freed, they became citi-

²⁷³ See *Celebration in Portland*, *supra* note 13, at 1 (containing Justice Davis's remarks at an antislavery gathering held in Portland in 1864 to celebrate the one-year anniversary of Lincoln's Emancipation Proclamation).

²⁷⁴ SETH W. NORWOOD, SKETCHES OF BROOKS HISTORY 160 (1935), <https://archive.org/details/sketchesofbrooks00norw/page/n11/mode/2up> [<https://perma.cc/286J-V72D>] (noting that Davis served as Postmaster of Brooks from 1843 to 1845). Davis is remembered as "a man of strong character, tender and sympathetic, but strong and extreme in his political views." *Id.* at 83. In 1840, Brooks had a population of 910. *Id.* at 41.

²⁷⁵ See *id.* at 83 (listing Belfast Academy as the highest educational institution attended by Davis).

²⁷⁶ See PETER TURNER WINSKILL, THE TEMPERANCE MOVEMENT AND ITS WORKERS 271 (1892) (describing Davis as "staunch pillar of prohibition").

²⁷⁷ See generally WOODBURY DAVIS, THE BEAUTIFUL CITY, AND THE KING OF GLORY (1860) (containing Davis's religious views). Davis's book, *The Beautiful City, and the King of Glory*, was reviewed in 1861 in the *Congregational Quarterly*:

The author is an earnest millenarian,—a sincere believer in the personal reign of Christ on earth for a thousand years before its destruction, or rather its renovation, by fire; and also a believer in the location of heaven on earth, with its myriads of angelic and other superhuman hosts, to all eternity.

Books of Interest to Congregationalists, 3 CONGREGATIONAL Q. 204, 206 (1861). The review critiqued Davis's literal construction of biblical text, concluding that the book was unlikely to make many converts. *Id.*

²⁷⁸ See *supra* notes 98–108 and accompanying text (describing Davis's removal from the SJC).

²⁷⁹ See Gold, *supra* note 111, at 198–200 (tracing Appleton's time in private practice and appointment to the bench).

²⁸⁰ *Id.* at 195–96. Appleton's uncle, Jesse, was the President of Bowdoin. *Id.*

²⁸¹ See T. Peter Park, *John Stuart Mill, Thomas Carlyle, and the U.S. Civil War*, 54 THE HISTORIAN 93, 100–01 (1991) (discussing an 1863 letter from Mill to Appleton on slavery).

²⁸² See Gold, *supra* note 111, at 194–95 (noting that John Appleton's uncle, Jesse Appleton, was president of Bowdoin College); Lloyd C. Taylor, Jr., *A Wife for Mr. Pierce*, 28 NEW ENG. Q. 339, 339–48 (1955) (discussing the life of Jesse Appleton's daughter, Jane, who married future President of the United States, Franklin Pierce).

²⁸³ Gold, *supra* note 111, at 203.

²⁸⁴ See *supra* notes 272–283 and accompanying text (comparing Justices Davis and Appleton).

²⁸⁵ See *supra* notes 120–268 (exploring the various opinions that made up the *Voting Rights Opinion* and the *Personal Liberty Law Opinion*).

zens.²⁸⁶ They also both used states-rights arguments to try to nullify *Dred Scott v. Sandford*.²⁸⁷ Davis, however, went farther than Appleton: in the *Personal Liberty Law Opinion*, Appleton treated the relevant legal question as one of narrow statutory interpretation while Davis treated it as an issue of morality.²⁸⁸

Beyond his general approach to cases, Davis was radical for several reasons.²⁸⁹ First, he was passionate about Black citizenship at a time when even Northern states routinely denied civil rights to Black Americans.²⁹⁰ Second, Davis rejected the federal consensus that Congress could not interfere with slavery in the states.²⁹¹ Third, he denied that the Fugitive Slave Clause applied to slaves.²⁹² Fourth, he believed that the Constitution itself was an engine for

²⁸⁶ Compare Ops. of the Justs. of the Supreme Jud. Ct., On Question Propounded by the Senate (*Voting Rights Opinion*), 44 Me. 505, 525 (1857) (Appleton, J., concurring) (affirming that enslavement was a status imposed by municipal law and that, upon emancipation, slaves became citizens), with *id.* at 584 (Davis, J., concurring) (affirming that “slaves are citizens whose rights are held in abeyance by the power of the master”).

²⁸⁷ Compare *Voting Rights Opinion*, 44 Me. 505 at 573–74 (Appleton, J., concurring) (affirming the sovereignty of each state to define citizenship), with *id.* at 583 (Davis, J., concurring) (affirming that “the federal government cannot deprive any class of persons of their citizenship”).

²⁸⁸ Compare Ops. of the Justs. of the S.J. Ct., On the Constitutionality of the Pers. Liberty L. of the State of Maine (*Personal Liberty Law Opinion*), 46 Me. 561, 588–90 (1861) (Appleton & Kent, JJ.) (engaging in an intensive statutory interpretation analysis), with *id.*, at 614 (Davis, J.) (making broad pronouncements such as that “[n]o weight of authority, and no lapse of time, can establish that which is wrong, or prevent it from ultimately being overthrown”).

²⁸⁹ See *infra* notes 290–294 and accompanying text (outlining why Davis’s jurisprudence was so radical).

²⁹⁰ Compare Abraham Lincoln, *Speech at Columbus Ohio* (“I have no purpose to introduce political and social equality between the white and the black races.”), in THE WRITINGS OF ABRAHAM LINCOLN, *supra* note 116, at 246, with *Voting Rights Opinion*, 44 Me. at 594 (Davis, J., concurring) (“If the Declaration of Independence ‘was not intended to include the enslaved African,’ but was a mere compact of their oppressors for their own advantage, . . . then a decent respect for the opinions of mankind should have kept its authors silent.”). Republican ire at *Dred Scott* was mostly focused on Justice Taney’s ruling that Congress could not prohibit slavery in the territories. See, e.g., Abraham Lincoln, *First Lincoln-Douglas Debate, Ottawa, Illinois*, in THE WRITINGS OF ABRAHAM LINCOLN, *supra* note 116, at 172 (expressing fear that the Supreme Court was one step away from legalizing slavery in every state).

²⁹¹ See *supra* note 179 and accompanying text (detailing the two occasions when Davis rejected the federal consensus). As noted previously, this was a very radical position. See Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 468 (1992) (“None but a handful of the most radical abolitionists—well out of the mainstream of American political thought—believed that the Constitution by its terms abolished slavery, or that the federal government possessed the power to outlaw slavery in existing states.”).

²⁹² See *supra* notes 251–257 and accompanying text (discussing Davis’s views of the Fugitive Slave Clause). Not even the Wisconsin Supreme Court dared claim that the Fugitive Slave Clause did not apply to slaves. See *In re Booth*, 3 Wis. 13, 26 (1854) (“Let it be taken for granted, that this clause was intended to refer exclusively to fugitive slaves; of which I think the history of its adoption into the constitution leaves no doubt.”).

abolition.²⁹³ Together, these beliefs put Davis far outside the mainstream of antislavery judges.²⁹⁴

Davis was uniquely positioned to make these radical arguments as a former abolition activist.²⁹⁵ He had deep connections to the Maine and Massachusetts antislavery scene.²⁹⁶ He was also the first judge on the SJC to be removed from office.²⁹⁷ When he got back on the court, it is hard to imagine that Davis felt constrained in his role as a judge.²⁹⁸

In *Justice Accused*, Robert Cover argued that no judge ever made constitutional utopian arguments.²⁹⁹ This Note suggests that Cover was wrong. As a Justice on the SJC, Davis penned radical opinions influenced by extreme antislavery theorists.³⁰⁰ To be sure, Davis's view of the Constitution as a wholly antislavery document was an outlier among judges; Appleton's view of the Constitution as a pro- and anti-slavery document was far more common.³⁰¹ Nevertheless, by making these arguments as a Justice on the SJC, Davis helped legitimize constitutional utopianism.³⁰²

²⁹³ See, e.g., *supra* note 254 and accompanying text (detailing Davis's esoteric reading of an antislavery purpose into the Fugitive Slave Clause).

²⁹⁴ See *supra* notes 4–5 and accompanying text (discussing the difference between moderates and constitutional utopians).

²⁹⁵ See *supra* note 273 and accompanying text (discussing Davis' dedication to abolitionism). The antislavery movement "was rooted in ideas of collective guilt and corporate responsibility, in the belief that there can be no escape from responsibility for one's brother man and that no individual rights exist which can justify indifference." WILSON CAREY MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* 273 (1973). In this way, the movement's ideas were "derived from religious ideas of sin and of community, especially from the spirit of the revival." *Id.* As a devout, millenarian Christian, Davis was no stranger to this spirit of revival. See *supra* note 277 and accompanying text (detailing Davis's religious beliefs).

²⁹⁶ See *supra* note 101 and accompanying text (detailing how Davis was represented by luminaries of the New England antislavery movement during the removal ordeal).

²⁹⁷ See *supra* notes 98–108 and accompanying text (detailing Davis's removal and reappointment to the SJC).

²⁹⁸ See generally COVER, *supra* note 2, at 228 (discussing how antislavery judges were constrained by "role expectations").

²⁹⁹ See *id.* at 215 (stating that "I know of no instance of a judge referring to or citing the antinomian literature of abolitionism"). According to one scholar, Cover held a "dismalist" view of judges who, "although in possession of immense privilege and power, do not have the capacity to do anything with that power except uphold the status quo order within which they work." Farberman, *supra* note 2, at 12.

³⁰⁰ See *supra* notes 285–294 and accompanying text (discussing how Davis, as a Justice on the SJC, adopted radical constitutional utopian views).

³⁰¹ See COVER, *supra* note 2, at 178. By 1854, alleged fugitive slaves could find no refuge before antislavery jurists. *Id.* The most prominent "independent and high-minded judges" had all upheld the Act of 1850 as constitutional: "McLean in Ohio and Michigan; Kane in Pennsylvania; Grier in Pennsylvania; Miller in Wisconsin; Conkling in New York; Woodbury and Curtis in Massachusetts; and of course, as always, [Lemuel] Shaw." *Id.*

³⁰² See *supra* notes 285–294 and accompanying text (exploring Davis's opinions).

B. The Importance of Antislavery Constitutionalism

The *Voting Rights Opinion* and the *Personal Liberty Law Opinion* have several broader implications for current debates in legal history.

First, these opinions underscore how unsettled constitutional interpretation was on the eve of the Civil War—even within the judiciary.³⁰³ The 1850s included a trifecta of proslavery pronouncements from the federal government: the Fugitive Slave Act of 1850, *Dred Scott* (1856), and *Ableman v. Booth* (1859).³⁰⁴ These documents were clear about the subordinate place of Black Americans in the United States.³⁰⁵ Nevertheless, the Supreme Court was not the final word on these issues.³⁰⁶ Both political and judicial actors resisted the Court's mandates.³⁰⁷ These SJC opinions show how, in an age before judicial supremacy, one state supreme court pushed back against Justice Taney's proslavery judicial activism.³⁰⁸

Second, these opinions clarify the distinction between radical and moderate modes of antislavery constitutionalism.³⁰⁹ Although some scholars have characterized Abraham Lincoln as a standard-bearer for antislavery constitu-

³⁰³ See COVER, *supra* note 2, at 150–58 (discussing the different factions within the political antislavery movement); *supra* notes 272–302 and accompanying text (discussing the different approaches from two antislavery members of the judiciary).

³⁰⁴ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

³⁰⁵ See, e.g., *Dred Scott*, 60 U.S. at 407 (claiming that Black Americans “had for more than a century . . . 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”).

³⁰⁶ See Don E. Fehrenbacher, *Lincoln and Judicial Supremacy: A Note on the Galena Speech of July 23, 1856*, 16 CIV. WAR HIST. 197, 202 (1970) (discussing Lincoln's view “that the three departments—legislative, executive, and judicial—were coequals in their authority to interpret the Constitution”). Lincoln rejected judicial supremacy, which has been defined as “the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone.” LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 125 (2004).

³⁰⁷ See, e.g., Timothy S. Huebner, “*In Defiance of Judge Taney*”: *Black Constitutionalism and Resistance to Dred Scott*, 45 J. SUP. CT. HIST. 215, 220–26 (2020) (detailing how Black Americans resisted *Dred Scott*). In the judicial sphere, resistance came from places like the SJC, which denied the legitimacy of *Dred Scott* in Maine. See *supra* notes 120–189 and accompanying text (discussing the *Voting Rights Opinion*).

³⁰⁸ See *supra* notes 120–268 and accompanying text (detailing the *Voting Rights Opinion* and the *Personal Liberty Law Opinion*). Justice Taney's opinion in *Dred Scott* is widely viewed as the paradigmatic example of judicial activism. See, e.g., *Judicial Restraint*, GOOD GUYS INJ. L. (Aug. 31, 2021), <https://christensenhymas.com/legal-glossary/judicial-restraint/> [<https://perma.cc/JF2K-S65A>] (characterizing *Dred Scott* as a case study in judicial activism).

³⁰⁹ See *supra* notes 272–302 and accompanying text (distinguishing radical and moderate modes of antislavery constitutionalism in the opinions of Justices Davis and Appleton).

tionalism, this narrative is incomplete.³¹⁰ Lincoln had moderate antislavery goals: abolition of slavery in Washington, D.C., banning of slavery in the territories, and upholding due process rights for alleged fugitive slaves.³¹¹ Compared to Davis, Lincoln's positions were far from radical.³¹² Consequently, historians should be careful not to overstate Lincoln's beliefs.³¹³

Third, these opinions complicate narratives of the Constitution as an exclusively proslavery document.³¹⁴ Today, the dominant view among historians is that the Constitution was a proslavery document that left the federal government powerless to abolish slavery.³¹⁵ Davis had no patience for this argument; like Frederick Douglass, Davis believed that the Constitution was thoroughly antislavery.³¹⁶ Though radical, Davis's arguments were not unique: during the ratification debates, proslavery anti-federalists suggested the same thing.³¹⁷ Of course, it is easy to dismiss constitutional utopianism.³¹⁸ Nevertheless, at the very least, Davis's opinions show that at least one antebellum judge took these arguments seriously.³¹⁹

CONCLUSION

The *Voting Rights Opinion* and the *Personal Liberty Law Opinion* offer a valuable look into how antislavery judges approached legal issues involving

³¹⁰ See OAKES, *supra* note 9, at xxv-xxvii (emphasizing the consistency and radicalism of Lincoln's antislavery constitutionalism).

³¹¹ See *supra* notes 3–5 and accompanying text (discussing the different groups within the antislavery movement).

³¹² Compare Lincoln, *supra* note 116, at 325 (“I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists”), with Ops. of the Justs. of the Supreme Jud. Ct., On Question Propounded by the Senate (*Voting Rights Opinion*), 44 Me. 505, 595 (1857) (indicating that the “[Constitution] was designedly so made as to need no amendment when slavery should be abolished”).

³¹³ See generally JOHN CHANNING BRIGGS, LINCOLN'S SPEECHES RECONSIDERED 5–6 (2020) (discussing the “interpretive problems” that Lincoln scholars face).

³¹⁴ See generally Dennis J. Goldford, *The Political Character of Constitutional Interpretation*, 23 POLITY 255, 266–71 (1990) (discussing different modes of constitutional interpretation).

³¹⁵ Mikhail, *supra* note 7, at 67.

³¹⁶ See *supra* notes 165–189 and accompanying text (discussing Davis's radical opinion in the *Voting Rights Opinion*).

³¹⁷ See Mikhail, *supra* note 7, at 67 (noting how certain Anti-Federalists believed that Congress could abolish slavery “by means of its taxing authority, its war powers, or even just its implied power to promote the general welfare”).

³¹⁸ See, e.g., COVER, *supra* note 2, at 158 (dismissing constitutional utopians).

³¹⁹ See *supra* notes 272–302 (contextualizing Davis's radical beliefs). Indeed, pockets of radicalism emerged on courts across the country during the 1850s. See, e.g., *Ex parte Bushnell*, 9 Ohio St. 77, 227 (1859) (Brinkerhoff, J., dissenting) (denying that the constitutionality of the Fugitive Slave Act was settled law). In 1859, one Ohio Supreme Court judge wrote that “[t]he federal legislature has usurped a power not granted by the constitution, and a federal judiciary has, through the medium of reasonings lame, halting, contradictory, and of far-fetched implications, derived from unwarranted assumptions and false history, sanctioned the usurpation.” *Id.*

slavery and race in the period between the Supreme Court's decision in *Dred Scott v. Sandford* and the Civil War. Justice Woodbury Davis's opinions demonstrate that at least one semi-prominent American jurist was willing to make radical antislavery arguments from the bench: voicing support for Black voting rights, casting doubt on the federal consensus, arguing that the Fugitive Slave Clause did not apply to slaves, and characterizing the Constitution as an engine for abolition. In the face of increasingly proslavery federal policy, state courts offered one avenue for antislavery resistance.

JAMES CALLAHAN

