Race at the Founding: Did a Pro-Slavery Constitution Mandate Racial Exclusion?[1]

Robert J. Cottrol[2]

No action by the Supreme Court haunts our national conscience more than the *Dred Scott* case. Applauded and reviled at the time it was handed down, the Taney opinion has vexed generations of students of American history and the Constitution. Most modern commentators agree that the decision was a bad one with bad consequences. It strengthened the South's "Peculiar Institution" and probably hastened secession and Civil War as well. But the case disturbs us for another reason. The Taney opinion tells us that the original Constitution was fatally flawed not only because it supported slavery, but also because it prescribed a regime of racial exclusion, one that declared that the broad guarantees of individual freedom implicit and explicit in the text of the nation's fundamental charter were meant only for white people and forever denied men and women of African descent.[3]

Two elements of the Taney opinion are important for what they had to say about race and citizenship in the United States. First Taney's opinion endorsed a robust view of the rights of

---

[1] Paper delivered at conference:"The American Constitution: 225th Anniversary of the Ratification," University of Georgia, Athens, Ga. March 23rd 2013. This paper is an adaptation of some ideas that I have developed more fully in my just published book *The Long, Lingering Shadow: Slavery, Race, and Law in the American Hemisphere* (University of Georgia Press, Studies in the Legal History of the South series, 2013

[2]Harold Paul Green Research Professor of Law, and Professor of History and Sociology, The George Washington University

[3]*See* generally Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil*, (New York, 2006); Paul Finkelman, "Was *Dred Scott* Correctly Decided? An "Expert Report" for the Defendant," *Lewis and Clark L. Rev.* V. 12:4 (2008) pp 1219-1252

citizens. Citizenship meant equality, a freedom from legal discrimination and an untrammeled enjoyment of those rights specified in the Constitution and that were part of the Anglo-American heritage. Second, according to Taney, people of African descent, slave or free, native or foreign born, could not be citizens. A brief passage captures both Taney's robust view of the rights of citizens and his belief in the United States as an exclusively white republic:

> ...[I]t would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies,. Without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went...[4]

Dred Scott was the clearest expression of a view unique to the law of the United States. Throughout the Americas differing legal regimes supported systems of slavery based on race. Taney's opinion took American law a step further. It endorsed race based citizenship. Some have argued that Taney's opinion was the logical and inevitable result of the system of race based slavery that had developed on the North American continent. Others have contended that it stemmed from a unique hostility to manumission and citizenship embedded in Anglo-American law. Still others have argued that the Constitution itself inexorably led to Taney's exclusionary

[4] *Dred Scott v. Sandford*, 60 U.S. 393 (1857), 417.

vision, that Taney was simply expressing the framers' vision that the new nation was to be exclusively a republic of free white people. These views rest on a somewhat problematic foundation. The path to Taney's jurisprudence of exclusion was tortured and difficult, filled with roads not taken, detours, near misses and influential advocates for alternative visions. It was not primarily the product of the colonial experience with African and Afro-American slavery. Nor was it, as Taney insisted, largely the result of the world view that informed the men who wrote and ratified the Constitution. It was, ironically enough, more related to the greater democratization and heightened egalitarianism of the United States in the antebellum era and how the nation would handle the tensions inherent in a society that celebrated freedom and equality while also practicing slavery and racial inequality.

All of the slave societies of the Americas were societies with strong racial and color prejudices, especially toward people who were visibly of African descent. The antebellum South was unique in that it was the slave society that put up the most in the way of legal obstacles to manumission. It was also the slave society that offered the most explicitly racial defense of holding humans beings in bondage. The law in antebellum America was also singular in preventing free Afro-Americans from enjoying the rights of citizens.

And yet this focus on race and slavery in antebellum South and indeed the nation more broadly America in the first five decades of the nineteenth century, can leave us with an incomplete indeed distorted picture of the development of race as both a social and legal phenomenon in American history. It is easy to see why the nation's historians have traditionally focused on the issues of race and slavery in the five decades after the War of 1812. The politics of slavery and sectional conflict that played out in that brief era provided the prelude to the American Civil War.

It was also the era in which American racial attitudes including strong patterns of racial exclusion crystalized.

But that focus on the last half century of American slavery has served to obscure a larger history, that of the two centuries of slavery and race that occurred before the onset of the Cotton Kingdom. What the law and the broader culture said about slavery and race during those two centuries was complex, often contradictory. At times the law's protection of slavery was clear, at other times less so. Race mattered, but not in the all consuming way suggested in Taney's opinion. At certain times, in certain places the law protected manumission, at other times not. The law at times treated free people of color as citizens with rights and duties similar to those of other citizens. At other times the law limited the privileges of free African-Americans, although rarely with the rigidity that would occur in the nineteenth century. If we want to understand how race became the critical dividing line in American culture and if we want to understand how the law in antebellum America became uniquely hostile to Negro citizenship, this is a history we must engage.

The often harsh and hierarchical world that was colonial America was significantly less race obsessed than the Jacksonian and post-Jacksonian eras of which Taney was a part. Race and racial discrimination were, to be sure, part of the law and culture. Blacks were for the most part in bondage, but then again many whites spent a significant portion of their lives in servitude before finally becoming fully free men and women. Slavery in the century and a half between its introduction on the North American continent and the American Revolution took place in an environment that was largely unapologetic about hierarchy, servitude and slavery.

This largely unquestioned acceptance of hierarchy and servitude co-existed with a tolerance

for manumission and possibilities for equal rights for free Negroes that would become more strained later in the nineteenth century. If Spanish law provided specific protection for the manumission contract and the slave's ability to sue for its enforcement, the courts in some colonies also allowed slaves to sue their owners to enforce manumission agreements despite the absence of a generalized source of law like Las Siete Partidas specifying the contractual rights of slaves.

The legal status of free Afro-Americans before the Revolution varied. At a time when citizenship was not formally defined, it is probably best to approach the question of free Negro citizenship by looking at how hostile or receptive a colony's laws might be to manumission and the rights granted free Afro-Americans. There are certainly places and times in the colonial American experience where free Negroes enjoyed rights commonly associated with citizenship. Virginia's eastern shore in the seventeenth century was home to a small, free and somewhat prosperous African-American community. A few purchased bondsman of their own, African slaves and even some white indentured servants. Some of the men from this community appeared to have voted and served on juries. South Carolina's code in the eighteenth century allowed free black men to serve in the militia and those with the requisite property qualifications were allowed to vote. Free Afro-American men were not explicitly barred from voting in eighteenth century New England, and our best student of the subject indicates that it is likely that several of them did. The law in the colonial era could and often did prescribe racial restrictions that limited the rights of free Negroes, but rarely with the systematic rigor that would develop in the early and middle decades of the nineteenth century.[5]

[5] See generally, T. H. Breen and Stephen Innes, "*Myne Owne Ground": Race and Freedom on Virginia's Eastern Shore, 1640-1676* (New York, 1980); Peter H. Wood, *Black Majority: Negroes in Colonial South Carolina from 1670 through the Stono Rebellion* (New York, 1974) pp

The development of laws governing race and status took place against a background of a world in which slavery was largely unquestioned. If the common law early on had pronounced slavery illegal, the institution nonetheless thrived throughout the American colonies. By the middle of the eighteenth century, the holding of slaves was rarely challenged. The yearning of slaves for freedom was recognized. Individual slaves were set free. But there were few broader anti-slavery stirrings. The Quakers in Pennsylvania to be sure had early on come around to the view that the practice violated God's law and should not be part of the law of their earthly commonwealth, but they were not able to turn this new revelation into law, at least not immediately.

It would take the American Revolution to cause large scale public questioning of slavery. It would also cause American law to begin to focus on questions of race and citizenship in ways that had not occurred before. The Revolution that began with Jefferson's ringing declaration proclaiming the equality of all men helped generate for the first time strong, public anti-slavery sentiment. That sentiment would in turn help create a free Negro class with sufficient numbers to be a significant social category and not an anomaly as had been the case in most colonies. Between the 1770s and 1810 the free black population of the North went from an insignificant few hundred persons to a size of 50,000. The Revolution helped create this class in different ways. As was the case in the Republics carved out of the Spanish Empire a number of black men gained their freedom by fighting with the forces struggling for independence. This was particularly true in New England. Although Afro-Americans from that region made up only five percent of the new nation's total black population, they were fifty percent of the black men in the

---

124-126; Lorenzo Johnston Greene, *The Negro in Colonial New England* (New York, 1968) pp 294-297, 303

American forces.[6]

The Afro-American role in the Revolution played a major role in weakening northern slavery. But slavery would also be weakened by the new sentiments brought about by the Revolution. What had begun as a fight to reaffirm the traditional rights of Englishmen had for many broadened into a greater struggle for human rights. The very rhetoric of the Revolutionary era pamphleteers with their constant comparison of the colonists' plight to slavery and the likening of British rule to the chains of bondage doubtless caused some to re-examine the previously unquestioned practice of holding men and women as slaves. Many came to recognize slavery's incompatibility with the liberal spirit of the new age. [7]

In wake of the Revolution, many in the new nation began to act on these new ideals. State Supreme Courts in Massachusetts and Vermont acted boldly, taking declarations in their new state constitutions proclaiming all men free and equal seriously. They rendered decisions abolishing slavery on the grounds that it was incompatible with the new constitutional principles.[8] Other states, Connecticut, Rhode Island, Pennsylvania, New Jersey and New York, passed gradual emancipation statutes freeing children born after the enactment of the legislation – – usually after serving terms of indenture well into their twenties. There was a danger in these

---

[6]Ira Berlin, *Generations of Captivity: A History of African American Slaves* (Cambridge, Mass.: Harvard University Press, 2003), 103-4; and Debra L. Newman, comp., *List of Black Servicemen Compiled from the War Department Collection of Revolutionary War Records* (Washington, D.C.: National Archives and Record Service, 1974). The War Department records indicate that although the northern states had only 10% of the nation's black population, they furnished 75% of the black soldiers.

[7] A. Leon Higginbotham Jr., *In the Matter of Color*: *Race and the American Legal Process: The Colonial Period* (New York, 1978) p. 49.

[8]*See e.g. Commonwealth v. Jennison,* in *Proceedings of the Massachusetts Historical Society, 1873-1875* (Boston, Mass.: Massachusetts Historical Society, 1875).

emancipations. Northern slave owners who owned the labor of black children who were to be freed in their twenties had a wasting economic asset one that could be made much more valuable by sale to purchasers in the slave states. This occurred, although it was often prevented by legislation and by adverse public sentiment. If the progress of northern abolition was gradual and at times halting, it was nonetheless the first large scale emancipation in the Western Hemisphere, a testament to the power of the ideals generated by the Revolution.[9]

This new anti-slavery sentiment would also spread to at least the upper South. Thousands of slave owners inspired in part by the ideals of the new age manumitted their slaves. Virginia in 1782 passed legislation specifically permitting manumission, removing restrictions passed earlier in the century. In Maryland a 1796 "Act Concerning Negroes," provided for relatively liberal procedures for manumission, including the right of slaves to petition courts in disputed cases. [10]

Virginia jurist St. George Tucker in his "On the State of Slavery in Virginia," captured the conflicting sentiments of some anti-slavery Virginians in the post-Revolutionary era. Tucker saw profound evil in slavery and its utter inconsistency with the ideals of the Revolution. He captured the tragic irony of race in the United States in ways that would remain prophetic for generations to come:

"...[W]hilst America hath been the land of promise to Europeans and their descendants, it hath been the vale of death to millions of the wretched sons of Africa.[11]

---

[9]Claudia Dale Goldin, "The Economics of Emancipation," *Journal of Economic History* 33, no. 1 (March 1973): 67-8.

[10]Tucker, "On the State of Slavery in Virginia," 66; T. S. Whitman, *The Price of Freedom: Slavery and Manumission in Baltimore and Early National Maryland* (Lexington, Ky.: University of Kentucky Press, 1997), 63-9.

[11]Tucker, 31.

These sentiments did not lead him to support immediate abolition. Like Jefferson, Tucker had a vision of Virginia as a republic of free white people where Negroes could not be citizens and indeed would be tolerated in only very small numbers, if at all. It was a vision quite close to the one Taney would later enunciate in *Dred Scott.* Tucker proposed that Virginia end slavery through a gradual emancipation scheme that by his calculations would have taken a century to complete. The Virginia jurist argued that his proposal would ultimately end slavery while also protecting the property rights of masters. He went further. People emancipated by his scheme or by voluntary manumissions would not be citizens:

> 7. Let no negro or mulatto be capable of taking, holding or exercising any public office, freehold, franchise or privilege or any estate in lands.... Nor of keeping or bearing arms,... Nor of contracting matrimony with any other than a negroe or mulattoe; nor be an attorney; nor be a juror; nor a witness in any court of judicature, except against, or between negroes and mulattoes. ... nor capable of making any will or testament; ....[12]

Tucker proposed these stark restrictions in an effort to further his dream of a white republic. Writing in 1805 with fears that the Haitian rebellion that had traumatized slave societies throughout the Americas might be replicated in Virginia, Tucker wanted to promote free Negro emigration. Realizing large scale expatriation to Africa was impractical, Tucker proposed a regime of severe legal restrictions for free Negroes that would prompt many to voluntarily emigrate, perhaps to the western frontier, but in any event away from settled white society.

Tucker's essay also discusses how the new debate over slavery helped bring about legal change. Virginia law changed both in response to the critics of slavery and probably in response to the internal doubts of slave-holders as well. Tucker tells us how the law began to change. A 1788 statute specifically placed slaves within the law's protection making it an unlawful homicide

[12] Tucker, 78.

to kill a slave without lawful justification or excuse. Benefit of clergy was extended to slaves. The outlawing of runaway slaves was prohibited. Slaves were allowed counsel in criminal cases. These ameliorations of the criminal code had significant limitations. A white person, even a master, could be prosecuted for the murder of a slave. But as a practical matter it would be hard to bring such a case to trial. Distinguishing between murder and the master's right to discipline his slaves would be difficult and a case most authorities would be reluctant to look into. Even in those egregious cases that might cause authorities to prosecute, the most likely witnesses, other slaves, were forbidden by law from testifying against whites. Slaves could have defense counsel but African-Americans slave or free were barred from juries. If the rigors of Virginia's slave code were softened somewhat after the Revolution, the law still left considerable room for harsh treatment.[13]

Tucker's proposal to deny free Negroes the rights of citizens reflected Virginia law. But surprisingly, Virginia was something of an exception. The libertarian sentiment that put the northern states on the path to emancipation and that brought about tens of thousands of private manumissions in the upper South seemed to have taken place with an amazing openness to free black citizenship. We know this best by looking at black suffrage. In his dissent in the *Dred Scott* case, Justice Benjamin Curtis argued that one way of determining citizenship at the time of the ratification of both the Articles of Confederation and the Constitution was to look at state practice, which states allowed free black men to vote. The Massachusetts born Whig noted that five states, New Hampshire, Massachusetts, New York, New Jersey and North Carolina, permitted free black men to vote at the time of the adoption of the adoption of the Articles of Confederation. By the time of the adoption of the Constitution the list was more extensive.

[13]Tucker, 56-8.

Virginia along with South Carolina and Georgia were alone in restricting the vote to white men. All the other states drafted state constitutional provisions or suffrage statutes allowing free black men to vote. There were property qualifications to be sure and these kept the number of black voters relatively small in the late eighteenth century. But it is significant that the founding generation had made a determination that property and not race would determine who would be enfranchised.[14]

This was no accident, no slip of the drafter's pen. There was strong opposition to black suffrage. Measures designed to limit the vote to white men were proposed, debated and defeated. In Massachusetts, a proposed state constitution containing a provision restricting the ballot to white men was defeated in a 1778 referendum. The state constitution adopted in 1780 had no such restriction. In 1785, New York's Council of Revision rejected proposed legislation limiting the ballot to white men. Pennsylvania's Constitution of 1790 had no racial restrictions on voting.[15]

Perhaps it is not so remarkable that northern states permitted black suffrage. The black populations were small. Slavery was being abolished. The former slaves had done their part and then some in the War for Independence. So what if a few got to vote? Why write restrictions into the new constitutions so clearly contrary to the spirit of the new age? That is an understandable explanation of what went on in the emerging free states. What is somewhat harder to explain is that this same unwillingness to write explicit racial restrictions existed in a number of slave states as well. Delaware allowed black men to vote. Black men who were born free could vote in

[14] *Dred Scott*, Curtis dissent pp 572-573, 582-583; Robert J. Cottrol, "Law, Politics and Race in Urban America: Towards a New Synthesis," *Rutgers Law Journal* 17, no. 3-4 (Spring & Summer 1986): 504-5.

[15]Cottrol, "Law, Politics and Race in Urban America: 504-5.

Maryland, although those who were manumitted could not. Ira Berlin informs us that in Maryland one black man was actually a candidate for the House of Delegates in 1792. Kentucky also permitted black suffrage in this period. Black voting rights would be lost in these states early in the nineteenth century.[16]

North Carolina and Tennessee in the late eighteenth century are particularly important to any discussion of Afro-American citizenship in the founding era. Both states allowed free black men to vote and would continue to do so well into the nineteenth century. The original eighteenth century constitutions of both states allowed Afro-American suffrage. Both states also allowed free Negroes to serve in the militia well into the nineteenth century. North Carolina law also extended to free Negroes another privilege normally reserved for whites, immunity from having slaves testify against them in court. If the law supported slavery, it was less inclined to demand racial exclusion than it would later in the state's history.[17]

This eighteenth century equality thesis can be pushed too far. The law discriminated. In northern states a number of cities and towns passed ordinances requiring free Negroes to post bonds and prove their free status before moving into a new town. The Militia Act of 1792 restricted membership in the militia to white men. Congress enacted legislation restricting postal employment to white men. There was considerable social prejudice and free black people often had to wage a difficult struggle to exercise their rights. Black merchant Paul Cuffee had to bring

[16]David Skillen Bogen, "The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks, 1776-1810," *American Journal of Legal History* 34, no. 4 (October 1990): 383-5, 388-400.

[17]Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York: Random House, Inc., 1974), 91; Eugene Genovese, *Roll Jordan Roll: The World the Slaves Made* (New York: Vintage Books, 1974), 398-412; and Roger Wallace Shugg, "Negro Voting in the Ante-Bellum South," *Journal of Negro History* 21, no. 4 (October 1936): 357-64.

a lawsuit in Massachusetts in the 1790s in order to vote. Prejudice and discrimination existed but the absence of official legal discrimination in the nation's fundamental charters in the first generation after the Revolution was remarkable. There were conscious, albeit contested decisions, not to make racial exclusion a part of those laws that defined the rights of the American people.

But can we reasonably speak of citizenship for a population that was clearly designated as inferior? If the Constitution did not use the word slave or slavery, it was clearly designed to protect the institution. If the words "white" or "Negro" are not to be found in the nation's fundamental charter, everyone at the time of the founding knew that blacks were enslaved, indeed in many of the debates over the Constitution the term Negro is used as a synonym for slave. Can the late eighteenth century Afro-American citizenship thesis survive what was in fact the widespread inequality that was an integral part of American life at the time the Constitution was written? This tension between citizenship and inequality was part of the conflict between the constitutional visions articulated by Taney and Curtis in *Dred Scott*. Taney argued that citizenship required equality. Curtis argued, in part, that inequality and citizenship were compatible, noting the legal disabilities of naturalized citizens and women as examples.[18]

Our ability to wade through this difficult terrain of of race, inequality and citizenship might be enhanced by looking at the problem through a comparative perspective. The experience of African and Afro-American slavery in the United States was but a small part of the experience of slavery in the American hemisphere. Our best estimates indicate that some 4 to 5 percent of the Africans who were brought to the Americas came to what is now the United States. Brazil by way of contrast received between 4 and 5 million, or better than 45 percent of the 10 million Africans

[18] *Dred Scott*, 583-584

forcibly brought to the Americas. The dynamics of slavery worked differently in the Lusophonic colony and Empire. Colonial Brazil had a small Portuguese population. That small population allowed a social space for free Afro-Brazilians that was generally denied free Afro-Americans in what would become the United States. Free Afro-Brazilians might be stigmatized as a class, but those individuals with the proper familial connections or the support of powerful patrons could rise to the upper echelons of not simply Afro-Brazilian society, but Brazilian society more broadly. Some would become prominent leaders in law, government, business and the military forces.[19] The ability of free mulattoes to rise to the upper echelons of Brazilian society was further enhanced by Portuguese and Brazilian law which allowed marriage across racial lines and permitted the adoption and legitimation of children who were the offspring of slave owners and slave women.[20]

Brazil achieved independence in 1822, declaring itself an empire with Dom Pedro I of the Portuguese Royal family as its emperor. The new empire would need a new constitution, but how would that document handle the issues of race and slavery? The liberal ideals that had produced the break with Portugal were very much in evidence in the Constituent Assembly that drafted the 1824 Constitution. Emperor Dom Pedro I in his speech before the Assembly in May of 1823 stressed the need for a constitution that was in tune with the enlightened thinking of the early nineteenth century. Among other measures the emperor called for a constitution that

[19] For a portrait of an Afro-Brazilian who rose to the highest levels of Brazilian society at a time when the Brazilian Empire was the largest slave-holding society in the Americas, see Brazilian historian Keila Grinberg's biography of Brazilian lawyer and statesman Antiono Rebouças. Keila Griberg, *O fiador dos Brasileiros: Cidadania, escravidão e direito civil no tempo de Antonio Pereira Rebouças* (Rio de Janeiro, 2002)

[20] See generally, Linda Lewin, *Surprise Heirs. Vol 1 Illegtimacy, Patromonial Rights and*

recognized the separation of powers, dividing the government into distinct executive, legislative and judicial branches. He also called for a constitution that protected the freedom of the Brazilian people. The emperor's speech touched off a bit of controversy because Dom Pedro 's call for a constitution worthy of his acquiescence was seen as an implicit threat to veto a constitution he deemed inappropriate. Many representatives attacked this threat as undemocratic, but a majority seemed prepared to allow the emperor this power.[21]

The constitution would ultimately be drafted by a small committee picked by the Emperor, but the Constituent Assembly's deliberations greatly influenced the final draft. The assembly's work would range over a number of topics. The overall liberal influence on the process of constitution making can be seen in the final product, the Constitution of 1824 which among other things specified that the empire was to be a constitutional monarchy. Citizenship was granted to all native born free people regardless of race. The constitutional text specifically included libertos or manumitted slaves in this group. All citizens were equal before the law and equally entitled to the law's protection. Citizens were guaranteed freedom from religious persecution, provided their actions did not offend public morals. Harsh physical punishment was prohibited. People were guaranteed security in their homes, due process before punishment, and the right to property and personal security. In the Constituent Assembly a minority went even further in their advocacy of human rights urging the abolition of the death penalty. Their efforts failed, but it showed the

---

Legal Nationalism in Luso-Brazilian Inheritance (Stanford, 2003)

[21] *Diário da assembléia geral constituinte e legislativa do império do Brasil, (Tomo I), Vol 1*, *Diário no. 3* (3 de Maio de 1823) (Rio de Janeiro: Imprensa Nacional, 1823). pp 17-19

influence of the modern Enlightenment on at least some of the members. The 1824 Constitution was clearly influenced by enlightenment ideals of equality, freedom and human dignity. However much the new constitution was also willing to sanction a system of representation that limited political participation to a propertied few, or however hierarchical the new empire's social structure might be, the acceptance of the ideals of equality, freedom and human dignity as constitutional norms was an impressive accomplishment as the new Brazilian nation emerged from the shadow of the Portuguese Empire.[22]

But the Constituent Assembly also had to wrestle with the issues of race and slavery and how would the new empire that recognized equality and the rights of man deal with the greatest of inequalities. The Brazilian Empire, like the southern states of the United States and unlike the Republics that were formed from the former colonies of the Spanish Empire, would continue slavery after independence. Some members of the assembly recognized slavery as an evil incompatible with the liberal ideals of the new age and the new empire. One Deputy Silva Lisboa condemned slavery and called for gradual emancipation combined with moral instruction for the slave population. Others agreed that slavery was an evil, but in their view necessary one that could not be abolished without wrecking the Brazilian economy. One deputy argued for the good of slavery by noting that it was maintained in the United States a nation known for its justice, humanity and moderation. Still others argued the inferiority of the slave population and the dangers of emancipation.[23]

---

[22] Ibid., *(Tomo I) V. I Diario no. 21*. (7 de Junho, 1823) Pp 177-179

[23] Ibid. *(Tomo III), V. II Diario no. 10* (30 de Setembro, 1823) pp 133-140

If there was relatively little support for or debate over general emancipation, the status of free Afro-Brazilians and the rights of slaves to have access to the courts excited considerable interest amongst deputies debating the new constitution. A number of deputies raised questions concerning the rights of slaves to have access to the Courts. Several deputies expressed the view that slaves and former slaves were entitled to representation in court. Former slaves should be provided lawyers either in cases where there was an attempt to re-enslave them or in cases where an individual had been manumitted only to join the ranks of the impoverished, "the miserable classes," as a number of deputies put it. This latter concern was probably motivated by more than pure humanitarian considerations. In Brazil, as indeed was the case throughout the Americas, public authorities feared that slaves who were elderly or infirm who could no longer work and who had ceased to have any economic value would end up being manumitted and becoming public charges. Many jurisdictions passed legislation in attempts to prevent these kinds of manumissions or to require slave owners to provide surety for such slaves. The discussions in the Constituent Assembly concerning the rights of some former slaves for support and access to the courts seem to have been partially motivated by these concerns.[24]

If the treatment of impoverished ex-slaves concerned a number of deputies in the Constituent Assembly, no issue relating to race and slavery seemed to have concerned them more than the question of citizenship for Afro-Brazilians, both libertos and those who were fully free. Different proposals were put forth. A few radicals seemed to suggest that the new constitution might even include slaves among the ranks of citizens, but the majority of deputies adhered to the

[24] Ibid. (*Tomo I), v. 1 Diario No. 28* (19 de junho 1823) p. 249

view that slaves while entitled to the law's protection and to fair treatment by the Courts were not citizens. Citizenship, they argued, meant membership in the political community, or at least the possession of full civil rights, both of which were incompatible with slavery. Others wanted to create classes of citizens, Brazilians consisting of native born free persons, presumably a category meant to cover libertos and Brazilian citizens, native born free persons with full political and civil rights, a category that at a minimum would probably have exclude libertos.[25]

The final product of the Constituent Assembly's deliberations, the 1824 Constitution, was more reflective of the liberal idealism that informed the document's drafter than it was of the harsh realities of slavery and its critical place in the Brazilian economy. Slavery is nowhere mentioned in the document[26] Instead Title 2 of the constitution recognized citizenship for all free born Brazilians, with a specific inclusion of libertos . Title 8 recognized the principles of freedom of speech and the press, freedom from religious persecution, freedom in the home from government searches, the right to due process in criminal procedures. Title 8 also recognized freedom from ex-post facto law and prohibited torture. The constitution's enumeration of rights also prohibited special privileges and recognized the equality of all citizens before the law. Beneath the grand pronouncements of the 1824 Constitution was also a determination to insure that power would remain in the hands of the slaveholding elites. Property and income qualifications for voting

[25] Ibid. *(Tomo III) v. 2 Diario No. 7* (23 de Setembro 1823) 90-93, *Diario no. 10* (30 de Setembro) 132-136

[26]Brazilian legal scholar Eunice Prudente informs us that the Constitution's provisions protecting property rights were generally understood to protect slavery and that the Brazilian courts at least earlier in the nineteenth century tended to interpret the Constitution with a pro-slavery bias. See, Eunice Prudente, *Preconceito racial e igualdade jurídica no Brasil* (Campinas,

allowed few men who were not of the elite, slaveholding class the opportunity to participate in politics. Racial liberalism and race based slavery, support for a government that protected individual rights and disallowed special privileges combined with political participation in the hands of an elite few. The Brazilian Constitution like the empire it ostensibly governed had more than its share of paradoxes and contradictions.[27]

And it is those paradoxes and contradictions that might help us to better understand or at least ask better questions about slavery, race and inequality and our own constitutional beginnings. African and Afro-American slavery in both Brazil and the United States immediately raised questions about the citizenship of free Afro-Americans. The drafters of the Brazilian Constitution of 1824 moved immediately and unambiguously to declare free Afro-Brazilians citizens. The drafters of the American Constitution of 1787 remained silent on the subject, as indeed they remained silent on the subject of white citizenship. Evidence of prevailing sentiment on the subject in the United States in the late eighteenth century must be gleaned from indirect evidence, a contrasting of the right of black men to vote against the legally mandated racial restrictions that existed at the time. Like Justice Curtis, I am persuaded that late eighteenth century statutory and state constitutional provisions permitting African-American suffrage were more important as indicators of citizenship than the restrictions that the law often placed on the rights of free Negroes. How might we explain this granting of one of the more critical rights of the citizen to a few members of a population that as a whole was clearly considered inferior? And

---

1989) pp 30-31.

[27]Emilia Viotti da Costa, *The Brazilian Empire: Myths and Histories,* (Chapel Hill, 2000) pp

does the parallel Brazilian history of Constitution making and the efforts of the Empire's Constituent Assembly further our understanding?

Time won't permit a detailed exploration of this issue, but let me suggest that one lens through which we might look at the problem is that of a society's relative comfort with hierarchy and inequality and, at least in the context of the slave societies of the Americas, the willingness to extend citizenship to free Afro-Americans. The 1824 Constitution's clear grant of citizenship to free Afro-Brazilians took place in a strongly hierarchical society, one whose social structure ran from Emperor to slave. The Brazilian Empire had a noble class, large landowners, few opportunities for the poor to own land, and a highly restricted franchise. The United States in the late eighteenth century while nowhere near as hierarchical as the Brazilian Empire was nonetheless a society of legally recognized inequalities for its white population. Property qualifications restricted voting, probably leaving the poorer 1/4th to 1/3rd of white men un-enfranchised. Indentured servitude still existed. It is one of the ironies of the history of slavery in the Americas that the United States in the nineteenth century, the slave society that displayed the greatest discomfort with inequality, as measured by the expanded franchise, the elimination of indentured servitude and other measures, also displayed the least comfort with Afro-American citizenship. That history places the Taney opinion and the disturbing question of racial exclusion at the founding in broader and more accurate perspective.[28]

58-62.

[28] Harvey Strum, "Property Qualifications and Voting Behavior in New York, 1807-1816. *Journal of the Early Republic* 1 no. 4 (Winter, 1981) 347-71, 357-63; Robert J. Steinfeld, *Coerciaon, Contract and Free Labor in the Nineteenth Century* (New York, 2001) pp 29-30