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## The Supreme Court and the Forging of Federalism: 1789–1864

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Symposium

## THE UNITED STATES SUPREME COURT A HISTORICAL SYMPOSIUM

*The following three articles examine the effect of United States Supreme Court decisions upon American government during three distinct historical periods. In the first of these articles, a distinguished political scientist discusses the role of the Supreme Court as an instrument of the forging process by which American federalism was attained prior to the Civil War. In the second article, which covers the intermediate period between the Civil War and the Great Depression, America's most noted jurist analyzes the continued development of a responsible government of law as controlled by the Supreme Court. The Solicitor General of the United States, in the concluding article, details the short but fascinating history of the Court during the New Deal era. The Nebraska Law Review is indebted to the Institute for Public Affairs of the University of Omaha for the opportunity to publish this interesting collection.*

—The Editors

### The Supreme Court and The Forging of Federalism: 1789-1864\*

Dr. Carl B. Swisher\*\*

#### I. INTRODUCTION

It is a far cry back to the establishment of the American constitutional system, a system set up for thirteen isolated, thinly populated, and largely primitive agricultural states. Yet because

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of, as well as in spite of, the vast changes which have occurred since that time, we can better understand our American heritage if we return from time to time to look at the conditions of our ancestry.

Unlike Congress and the various executive offices, which existed in some form before the Constitution was drafted, the Supreme Court was the creation of the Constitution itself. Its purpose was to bring to the newly organized government an instrument for enforcing the rule of law. It was to enforce as the supreme law of the land, the federal Constitution, statutes, and treaties. It was to subordinate the constitutions and statutes of the states to the supreme law, the end being that we should live as one nation and not merely as an aggregation of lesser sovereignties. At the time of the Revolution the states were held together by little more than a common determination that they would no longer be ruled by the mother country. A common hate can bring temporary unity and cooperation but it offers no guarantee of survival of togetherness. Our pattern of federal relations was the product of a forging process; it had to be forged not merely by the traumatic experience of the Revolution but also in the crucible of continuing struggle after the adoption of the Constitution, with the Supreme Court as one of the major instruments of the forging process.

## II. THE MARSHALL ERA

In this short article it is necessary to leave largely unmentioned the work of the Supreme Court in its first decade, that of the 1790's, and go to that period of Chief Justice John Marshall's dynamic leadership after the turn of the century. During the 1790's there were sporadic significant decisions with respect to federalism, but perhaps even more important was the negative action of the Court in refusing to act other than as a court; in refusing to act officially as an adviser to the government except as it could do so in the decision of actual cases or controversies. It limited itself to its own appropriate field of action. Herein was to lie much of its strength: it was to speak only within the discipline of adversary proceedings, and was to speak not in the name of politics but only in the name of the law. In doing so it appealed to the deep instinct for order then felt by the American people, and felt even to this day. The Court limited itself to judicial action—to deciding cases according to law. During its first decade the Court established itself well within this judicial groove.

When, near the close of his administration, he selected John Marshall of Virginia for the Chief Justiceship, President John

Adams showed no sign of awareness that he was determining the course of American constitutional development for a long time to come. His first choice was John Jay, who had been the first Chief Justice, but who, disliking the circuit riding which was then required of Supreme Court justices and, perhaps, failing to see the potentialities of his judicial office, had resigned from the Court to become governor of New York. When Jay declined reappointment, Adams turned to Marshall who for a brief period had been serving as his Secretary of State and who held firmly to the principles of federalism which were, at the time when Thomas Jefferson was about to enter the presidency, very much out of style.

John Marshall became a great Chief Justice not by virtue of great learning in the law, although for a lawyer of his times he showed no want of preparation, but by virtue of other qualities. He had an unswerving conviction as to the need for preserving and strengthening the American Union. He had a fine sense of strategy in human relations and great skill in implanting his own ideas in the minds of other men and making them acceptable. Beyond the point of his personal qualifications, he had the good fortune to be appointed to the office at a time of greatest challenge. The Supreme Court, indeed the federal judiciary as a whole, was on the defensive with respect to Congress and the new President. Although the federal courts were courts of law and not instruments of partisan politics, it was obvious that the federal judges were Federalists in origin, sentiments, and associations. With the power of impeachment in the hands of a Jeffersonian Republican Congress, it was clear that the judiciary would have to be most circumspect if it was not to suffer for its Federalism.

It was under these circumstances that Marshall developed as a master strategist. He persuaded his brethren to abandon their decade of *seriatim* opinions in which the justices spoke, not through an official opinion of the Court, but with separate opinions even when arriving at the same final decision. Under the old procedure the justices often sounded more like differing members of Congress than like an impersonal tribunal speaking only in the name of the law. From the beginning of the Marshall regime, however, the device of the Opinion of the Court was used, and the spokesman was quite frequently the Chief Justice himself. To a high degree individual differences were submerged, and with Marshall's smoothly flowing and highly persuasive legal style, his opinions sounded not like the individual opinions of one man but like the voice of the law. Speaking as such, he wrote the principles of federalism into a vast body of constitutional interpretation even

though Jeffersonian Republicanism constituted the prevailing political philosophy.

Chief Justice Marshall was able to entrench the Supreme Court in a position of growing strength even through the process of self-denial. In the famous 1803 case of *Marbury v. Madison*,<sup>1</sup> for example, he entrenched in constitutional law the principle of judicial review of acts of Congress by striking down a provision of a statute which gave power to the Court itself. Although he did it in such a way as to enrage Jefferson and his admirers by reflections on the legality of their acts, it was hard to find fundamental fault with a decision that the Court could not exercise a power which Congress had allocated to it but which the Constitution could be said not to authorize.

It was characteristic of the work of the Marshall Court that it curbed, in many directions, the exercise of power by the states and asserted the existence of power in the federal government. This usually took place in the area of private property rights. In a time when gigantic corporate enterprise control is often exercised yet largely divorced from ownership, and when among the rank and file the use of a credit card is often prized more than evidence of outright ownership, it is hard to comprehend the reverence in which titles to property were held by conservative statesmen of our distant past. When movements were started in the states to curtail the rights of property, the Marshall Court interpreted the Constitution in such a way as to give protection to rights of property and curb the powers of the states.

Marshall's firm leadership of the Supreme Court, during its formative period, brought into our constitutional law the basic principles of nationalism for the preservation of the rights of property while leaving to the states vast areas of power for local government. He operated with a fine capacity for statement of principle and for persuading his brethren to accept his pattern of federalist ideas. He rooted his opinions not merely in legalistic dogma but in a "public philosophy." That philosophy, it is true, did not yield a body of universally accepted rules of law, but there was a degree of universality in the growing awareness of American nationhood, as well as in the awareness that the prosperity of the future depended on living up to well-recognized rules with respect to rights of property.

Marshall's contribution should be judged somewhat in terms of the pattern of his opportunities. Two other Chief Justices, John Jay and Oliver Ellsworth, had held the office before him, but they

<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

had brought it little resembling the leadership which Marshall provided. It was Marshall, and not his predecessors, who had the vision, the persuasiveness, and the strategy, however, to make the Court into a prime instrument of American federalism.

### III. MR JUSTICE STORY AND THE TRANSITION BETWEEN THE MARSHALL COURT AND THE TANEY COURT

For all that we may justly say, however, about the leadership of Chief Justice Marshall in strengthening the nation and giving protection to property in the face of attempted encroachments by the states, we must recognize the fact that the force of his leadership was declining well before the time of his death in 1835. With respect to national affairs, the balance of public sentiment was changing as new states were admitted west of the Appalachians and the institution of slavery in the South became more and more a critical issue. Jacksonian Democracy marked a welling up of the power of the West to compete with the eastern seaboard from which all pre-Jacksonian presidents had come. It marked resentment at control of the country by eastern capital and demanded relaxation of the bonds of governmental control from Washington.

It was during the 1830's and during the Jackson administration that the Bank of the United States was overthrown, to the detriment of centralized financial control of the country. It was then and thereafter, in the midst of expansion of credit through local banking institutions, that the states attempted to restrict the right of those institutions as well, oftentimes in violation of the contracts in their charters. In short, it was a period of growing resistance to control, whether in some sense by the dead hand of the past or by the current institutions of government. Except in the matter of South Carolina's attempted resistance to the tariff, the period did not mark outright rebellion against the power of the federal government. That was to come later.

The period which brought these changes in public sentiment brought also a successor to Chief Justice Marshall and the appointment of still other new members to the Supreme Court. The new Chief Justice, Roger B. Taney, of Maryland, had been one of the prime instruments of the Jackson administration in doing away with the Bank of the United States. Although a Federalist in his youth, he had become an ardent Jacksonian and could be expected to interpret the Constitution in terms of Jacksonian principles. The leading Whigs of the country seem to have expected abandonment of the rule of law in the Supreme Court and the use of the Court as a bare-faced instrument of Democratic politics.

While there was reason for expecting a gradual change in the trend of decisions, there were also reasons for expecting that the change would not be cataclysmic. Of these latter reasons, a lesser one, but one nevertheless important, was the continuation on the Court of men who had sat with Chief Justice Marshall and who were steeped in the Marshall tradition. By far the most outstanding of these was Justice Joseph Story, who, since his appointment to the Court in 1811, had been Marshall's close companion and friend. In addition to serving on the Court, Justice Story had taught law at Harvard University and had incorporated the principles of Marshall's great constitutional decisions into a three-volume work of Commentaries on the Constitution. For his published commentaries in other fields of law he had, or was building at the time of the Taney appointment, a fine international reputation. Colleagues even far less sensitive than the new Chief Justice would have hesitated in the presence and under the critical eye of Justice Story to have abandoned abruptly the course of settled decisions.

It is, of course, true that in dissenting opinions at the first term of the Taney Court, Justice Story voiced lamentations at the passing of the old order and implied distortion by the Court of the correct line of constitutional interpretation in cases of major importance dealing with contracts, commerce, and currency. He called up the voice of the deceased Chief Justice to prove his point. In letters to, and conversations with, his friends he portrayed himself as the last living member of a dying club. He predicted that not again in the foreseeable future would an act of Congress or of a state legislature be held unconstitutional—as if striking down statutes from time to time was essential therapy for the body politic—and he talked much of resigning from the Court. But for all his distress and despair, he remained a member of the Court until his death in 1845, and Chief Justice Taney, as well as some other members of the Court, seem to have leaned heavily upon him as a man of wisdom and learning in the law.

Probably even more important than the influence of Justice Story and other older members in preserving the continuity of constitutional decisions was the fact that the new justices were also steeped in the traditions of the law. For all the criticisms that Democrats, including some of the new justices themselves, had poured upon the judiciary of the Marshall period, they, as justices, coveted the respect which the bar and much of the public normally gave to the courts. Beyond that, it seems not too much to say that they wished to be worthy of that respect. They knew that to be worthy of it they had to hand down decisions in terms of law and

not merely of politics; they had no desire to break continuity with the line of past decisions.

#### IV. THE TANEY COURT

##### A. DEVELOPMENT OF THE CONSTITUTIONAL RIGHTS OF CORPORATIONS

While the new justices accepted the decisions of the Marshall Court as valid for what they actually decided, they refused to extend Marshall's principles beyond the holdings of those previous cases. It is interesting to note the manner in which the Taney Court marked the end of trends characteristic of the Marshall Court. In the *Dartmouth College* case,<sup>2</sup> decided in 1819, the Marshall Court had held that the charter of a private corporation constituted a contract which a state was forbidden by the Constitution to impair. In the *Charles River Bridge* case,<sup>3</sup> the Taney Court accepted that decision without question, but it refused to follow the argument of Daniel Webster, who was of counsel in both cases, to the point of holding that charters were to be construed broadly to give the maximum power to the corporation created by the charter. Instead, said Chief Justice Taney, the rights given were to be construed narrowly. "While the rights of property are sacredly guarded," the Chief Justice explained, "we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."<sup>4</sup> In other words, would-be incorporators were still free to seek broad grants from the state and to have those grants protected by the Contract Clause of the Constitution, even if public attitudes toward the grants might later change to the point of conviction that the original grant had been made in error. The people were permanently committed by the acts of their legislatures when those acts constituted contracts. The Supreme Court would not, however, compound the error of the legislature by reading into a grant more than was clearly given. In interpreting charters it would look to the rights of the people at large as well as to those of the corporation. The emphasis, protested in a sharp dissenting opinion by Justice Story, marked an important change from the attitude of the Marshall Court.

<sup>2</sup> Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

<sup>3</sup> Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

<sup>4</sup> *Id.* at 548.

In the interpretation of the Commerce Clause, the Taney Court refused to go beyond previously decided cases in limiting the power of the states to act upon interstate and foreign commerce. In the great steamboat case of 1824, *Gibbons v. Ogden*,<sup>5</sup> the Marshall Court had held unconstitutional a state commercial regulation which was in conflict with an act of Congress under which steamboats were licensed for the coasting trade. Chief Justice Marshall had indicated the persuasiveness of Daniel Webster's argument that the very existence of the federal commerce power debarred state regulation of interstate and foreign commerce whether or not Congress had passed a regulatory measure; but, since a federal licensing measure was involved in the *Gibbons* case, it was not necessary there to say what the Court would have done if there had been no such measure. Justices Story, McLean, and Wayne took the position on the Taney Court that states could not in any event regulate interstate and foreign commerce as such, but the majority of the Court were unwilling to close the door on state regulation unless Congress had seen fit to exercise its powers. The majority, in other words, tried to preserve a kind of balanced federalism, with commerce powers taken away from the states only as Congress saw fit to exercise those powers. Eventually, in 1852, the Court worked out sort of a compromise, holding that some aspects of interstate commerce could be regulated by the states while others could not be regulated even if Congress had taken no action. State rights were to a limited extent preserved until Congress saw fit to take over, in spite of the absolutist nationalism that had stemmed from the Marshall Court.

For all its limitation of the extremist trends of the Marshall Court, however, the Taney Court quickly achieved respectability with the rank and file of both the public and the Bar. It was operating in a new era and in the face of new problems, and it came to be taken for what it was and not merely as a deviant from the Marshall Court.

#### B. LEGISLATIVE ATTACKS ON CORPORATE CHARTERS

One of the Court's major tasks continued to be that of defining the constitutional rights of corporations in the face of an ambivalent attitude of the people, and of the state governments which created them, toward corporations. It must be remembered that the Taney period was a get-rich-quick period in which adventurous

<sup>5</sup> 22 U.S. (9 Wheat.) 1 (1824).

people hoped to garner wealth by creating corporations to build and operate turnpikes, bridges, canals, railroads, and other facilities, to carry on trade, and to operate banks. Some got rich, but many did not. Without an adequate body of law to protect corporations, and an equally-needed body of law to protect the people against their creatures, a great deal of ugly activity took place. Whether with or without corrupt methods, incorporators lobbied successfully for charters which gave them broad corporate rights. The people at large woke up to the fact that legislatures had given rights that ought not to have been given. Taxpayers stormed particularly over tax exemptions granted to corporations at times when the tax burden was cruelly felt. New legislatures, under popular pressure, sought to revoke these exemptions and ran into the prohibition of the Contract Clause which the Supreme Court had to enforce. This gave the impression that the Court was the special friend of corporations and the enemy of the sovereign states. The Court was often blamed in situations wherein the fault lay not with the Court but with the legislatures, which, corrupt or not, had made the initial grants. In such situations, the Court began to build the same reputation as a friend of property which had characterized the Marshall Court.

### C. CORPORATIONS AND DIVERSITY OF CITIZENSHIP

In certain cases, the entire federal court system, and not merely the Supreme Court, came to be regarded as the friend of private corporations and the enemy, or at least a potent rival, of the state courts. These were cases which were tried in federal courts rather than state courts, not because federal law was involved, but because the parties were citizens of different states. The framers of the Constitution and the Judiciary Act of 1789 had sensed the possibility that a citizen of a distant state might not receive adequate justice in a state court where judges could be subjected to local prejudice and influence. They had therefore provided that suits between citizens of different states might be brought in, or transferred to, federal courts where judges were appointed for life from the nation's capitol.

The difficulty with respect to suits involving corporations lay in the question whether a corporation, in a sense which would permit federal courts to take jurisdiction in cases involving diversity of citizenship, could be a citizen of a state. For many years the Court took the position that a corporation could not itself be a citizen, and that federal courts could take jurisdiction only in cases wherein the stockholders of a corporation were citizens of a state

other than that of the opposing party. But as stock ownership spread more and more widely throughout the states it became more difficult to be sure of the complete diversity of citizenship that was necessary for federal jurisdiction. Then, in *Louisville, C. & C. R. R. v. Letson*,<sup>6</sup> decided in 1844, the Supreme Court abandoned the requirement that all stockholders be citizens of a state other than that of the opposing party, and held that a corporation could be treated as a citizen of the state in which it was incorporated and operated its principal place of business.

This decision, which threatened to give to corporations not merely the right to sue in federal courts, but also all other rights of citizenship under the Privileges and Immunities Clause, brought criticism from members of the Court, friends of state rights, and enemies of corporate enterprise. Ten years later the Court again shifted its ground. In *Marshall v. Baltimore & O. R.R.*,<sup>7</sup> the Court held that, while a corporation could not itself be a citizen, its rights to sue or be sued in a federal court depended upon the citizenship of the people who composed it, and then adopted the enormous fiction that all component shareholders were citizens of the state wherein the corporation was formed, and refused to admit any evidence to the contrary. Thus, by fiction, the right to sue and be sued in the federal courts was preserved without involving other rights of citizenship. By and large, this resort to legal fiction increased the power of the federal government at the expense of that of the states, gave added protection to corporate enterprise, and supported the idea of the sanctity of private property. It marked an increase in the centralization of power in our federal system, along with the involvement of many factors other than that of centralization alone.<sup>8</sup>

#### D. CENTRALIZATION, SLAVERY, AND REGIONAL CONFLICT

During the Taney period, factors other than those specifically involving corporations pointed toward centralization of power in the federal government. These factors included the increase in interstate and international business, and that involved jurisdiction

<sup>6</sup> 43 U.S. (2 How.) 497 (1844).

<sup>7</sup> 57 U.S. (16 How.) 314 (1854).

<sup>8</sup> Its further extension was to come in the post-Civil War period with the classification of corporations as "persons" whose liberty and property could not be taken without due process of law, and the preservation of whose rights as against the states seemed to become the special concern of the federal judiciary. See U.S. CONST. amend. XIV, § 1.

beyond that of any one state. Included also was the admission of new states, states which were newly settled and which had had no long periods of development of local patriotism such as that found in the original thirteen states. The newer states belonged more to the Union by which they had been settled and erected into statehood and had somewhat less sovereign identity than the original states seemed to possess. But these unifying factors ran counter to a disintegrating factor, the regional conflict over slavery, which pretty much determined thought about the pattern of our federal system until the outbreak of the Civil War.

Because the slavery issue was involved, the struggle between centralization of power on the one hand and state rights on the other led to a number of items which are significant even though they may seem to mark obstructions to the forging of federalism rather than evidence of its achievement. A unique item, for example, was the opinion written by the nationalist Justice Story in *Prigg v. Pennsylvania*<sup>9</sup> in 1842. Pennsylvania had provided by statute for the recapture of fugitive slaves found in the state and had set up its machinery in such a way as to protect free Negroes from southern raiders. But in this case, as in so many others, the machinery was used to prevent the lawful recovery of slaves who had fled from Maryland, whereupon the owner sent Edward Prigg to recapture them without the aid of state officers. Prigg was indicted for kidnapping, convicted, and the case was brought before the Supreme Court.

Speaking for the Court, Justice Story held that the State of Pennsylvania could not prevent the recapture of fugitive slaves and that the judgment of conviction must be reversed. In so doing he seemed to be giving way to the pro-slavery cause. But in writing the opinion he went further to say that not only could a state not interfere with the recapture of fugitive slaves, it could not participate in such matters in any way, since the power over the return of fugitive slaves was exclusive in the federal government.

Justice Story seems to have persuaded some of the pro-slavery justices on the Court that the exclusion of the states was necessary to the effective protection of slavery interests. When he went back to Boston at the end of the term, however, where he was among friendly abolitionists, he seems to have boasted that he had struck a blow for freedom in excluding the states from the recapture of fugitive slaves. The abolitionist states took his broad hint and repealed legislation permitting the use of their courts and their jails

<sup>9</sup> 41 U.S. (16 Pet.) 539 (1842).

in connection with the recovery of fugitive slaves. Since the Fugitive Slave Act of 1793<sup>10</sup> had assumed the availability of state officers and state facilities, the Act was virtually nullified until enactment of a new measure in 1850,<sup>11</sup> the struggle over which further deepened the rift between the North and the South.

Although Justice Story's opinion in the *Prigg* case may have been a blow for freedom, it looks, from the historical point of view, as if it marked one of those instances in which the Court created more difficulties than it solved by going beyond the necessities of the case at hand. Anti-slavery sentiment was not yet universal enough to bring general acceptance of the holding; the result was that the abolitionist states deepened the rift between themselves and the South. The Southern states were still strong enough in Congress to secure legislation substituting federal machinery for that of the states, and fugitive slaves benefited but little from the temporary judicial interference in their behalf.

Likewise from the point of view of history, the Supreme Court made a further mistake in the *Dred Scott* case<sup>12</sup> in 1857, though this time the mistake was made on the opposite side. Here a case which could have been decided in such a way as to deal with the fate of only one Negro family was used as an instrument for pronouncing that Congress had no power to exclude slavery from the territories—the subject of a major regional conflict. In so using the case, it seems clear that the motives of the majority of the Court were eminently patriotic. They seem to have believed that the Union could be saved only by the reduction of sectional strife, and that that strife could be reduced only by repressing abolitionist agitation. They believed that abolitionist agitation over slavery in the territories could be terminated only by a pronouncement from the Court that slavery could not be excluded. But here, as so often happens, patriotism and soundness of prediction failed to coordinate. Instead of giving up the controversy over slavery in the territories, abolitionists, and others who would benefit thereby, made the case a political issue, used it as an instrument to condemn the Court and the Buchanan administration, brought about the election of a Republican president, and precipitated the Civil War.

The *Dred Scott* case provided grounds for criticism not of the patriotism but of the judgment of the majority of the Supreme Court. This is not to imply that in matters of political judgment

<sup>10</sup> Act of Febr. 12, 1793, c. 7, 1 Stat. 302.

<sup>11</sup> Act of Sept. 18, 1850, c. 60, 9 Stat. 462.

<sup>12</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

members of the Court should be expected always to be supremely wise, but it is to imply that even in the very best sense of the term they should not play politics with the judicial process unless they have sound judgment as to outcome. In this instance, their judgment proved to be wrong. In so appraising their performance in the *Dred Scott* case it is not necessary to say whether they were right or wrong in the interpretation of the power of Congress to govern the territories. It is necessary only to note the fact that the case could have been decided without discussion of the issue at all, and indeed was initially scheduled to be so decided. Then the intention of the minority to discuss the issue was disclosed, and the majority felt that if the minority was to speak, they too must have their say.

## V. CONCLUSION

The implication that the personnel of the Taney Court were primarily politicians rather than judges is not intended. Some of them were far from outstanding, but there were able men among them and it is doubtful that they were inferior to the membership of the Court in most periods of our history. Indeed, in the *Booth* cases,<sup>13</sup> decided two years later and dealing with Wisconsin's nullification of the fugitive slave law, the entire Court gave support to an opinion by Chief Justice Taney which marks one of the finest expositions of our federal system that exists anywhere in our judicial history. But for the *Dred Scott* decision which lay behind it and which drowned its voice in the storm of criticism, the *Booth* decision might have done something to preserve clarity of thought about federalism where slavery issues were involved. But by 1859 it was too late for effective appeals to cool heads and sound judgment, if indeed we had not been faced with an irrepressible conflict from the beginning. That conflict was to be settled by force and not by law. In such a settlement a judiciary has little place, and it is therefore not surprising that for the period of the War, and particularly with respect to the issues of federalism, the Supreme Court slipped into the background.

In that War force of arms determined the meaning of the Constitution as it then stood, and gave rise to amendments greatly changing that instrument. Thereafter the Supreme Court, primarily with newly appointed personnel, resumed the task of delineating the pattern of American federalism—a federalism all the more firmly established for the ordeal it had had to endure, and all the more ready for delineation in terms of fundamental law.

<sup>13</sup> *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).