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In Re Turner (1867)

Introduction

The Supreme Court decision in *Brown v. Board of Education of Topeka* (1954)[1] has been justifiably hailed as one of the most important decisions ever rendered by the Supreme Court.[2] Despite the fact that the *Brown* court obviously reached the correct result, it has never been free of its detractors. Among its most prominent critics was Herbert Wechsler, who was especially critical of the social science evidence used as a partial basis for the decision.[3] While it is likely that the *Brown* decision would have met with hostility from most proponents of segregation regardless of its basis, the case would rest on a much more sound footing if the *Brown* court had paid more attention to the history of the Thirteenth Amendment and its accompanying case law.

In choosing to focus on the Fourteenth Amendment and the cases interpreting it, the *Brown* court overlooked a great deal of evidence indicating that equal access to education (and equal protection in general) was guaranteed to all citizens by the Thirteenth Amendment. This evidence is found throughout the legislative history and early case law interpreting the Thirteenth Amendment. In focusing on the Fourteenth

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[1] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[2] See generally Richard Kluger, *Simple Justice*, (New York, 1976), x. Kluger states that the *Brown* decision was "the turning point in America's willingness to face the consequences of centuries of racial discrimination."
[3] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Wechsler suggested that the *Brown* court would have found a more sound basis for the decision in the "freedom of association" guaranteed by the First Amendment.

Amendment as the basis for equal protection, the *Brown* court disregarded a number of important cases that would have provided a stronger foundation for the decision.

Among the most important of these cases was *In Re Turner* (1867), a case decided by Chief Justice Chase in his capacity as circuit judge. *In Re Turner* (1867) was decided under the authority of the Thirteenth Amendment and held that the Maryland apprenticeship system for African-American children was unconstitutional because it did contain the same provisions for educating African-American apprentices as were applicable to white apprentices.[4] In disregarding *In Re Turner* (1867), and other cases decided under the Thirteenth Amendment, the *Brown* court effectively acted as if that amendment had never been passed, or had only the most limited effect. Because of this, it is interesting to compare *In Re Turner* (1867), with another case decided in Maryland that dealt with the same law, *Adeline Brown v. State* (1865). *Adeline Brown* upheld the same statute struck down in *In Re Turner* (1867), because it was decided by the Maryland Court of Appeals prior to the passage of the Thirteenth Amendment. *Adeline Brown* makes a useful foil to *In Re Turner* and illustrates the fundamental importance of the Thirteenth Amendment in securing equal protection to all United States citizens.

The 1954 reargument of the *Brown* decision focused on the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868."[5] In searching for an original interpretation of the Fourteenth Amendment, the *Brown* court considered the legislative history, the ratification debates and the existing practices within the states.

[4] *In Re Turner*, 24 F. Cas. 337 (1867).
[5] *Brown*, 347, U.S. 483, 489 (1954).

Having considered the views of "proponents and opponents of the Amendment," the court found that the historical sources were "At best… inconclusive."[6]

In considering the legislative history of the Fourteenth Amendment, the *Brown* court gave equal weight to the views of proponents and opponents of the amendment. In looking at both sides of the debate, the *Brown* court was no doubt being evenhanded, but it hardly makes sense to give such great weight to the opinions of opponents of any piece of legislation. If a group of persons are "antagonistic to both the letter and the spirit of the Amendments," it hardly seems logical to accept their interpretation of the law as being just as valid as the opinions of those who enthusiastically support that law.[7] If a law has been passed, or an amendment has been ratified, it makes much more sense to look at the views of those who supported the amendment as to what they thought it means, rather than those who opposed it. This is especially important when one considers the typical views of opponents and proponents of the amendment.

In House of Representatives Report No. 30, on the Bureau of Freedmen and Refugees, Thomas D. Eliot, a Republican representative from Massachusetts, recorded a typical attitude of Democratic politicians in regards to African-Americans. In the report, Eliot recounted a recent incident that occurred when he was in New Orleans. On their way to the statehouse, Eliot and a Democratic member of the State legislature happened to walk past a school attended by African-American children. The children were playing in the schoolyard as the two men passed by and Eliot noted:

> He stopped and looked intently, then earnestly inquired, 'Is this a school?' 'Yes,' I replied. '*What! of niggers?*' 'These are colored children, evidently,' I answered. 'Well! Well!' said he, and raising his hands, 'I have seen many an absurdity in my lifetime, but *this is the climax of*

[6] *Ibid.*
[7] *Ibid.*

> *absurdities!'* I am sure that he did not speak from effect, but as he felt. He left me abruptly, and turned the next corner to take his seat with legislators similarly prejudiced.[8]

Eliot's comments are especially useful because they deal explicitly with the education of African-Americans and they are entirely typical of the attitudes of opponents of the Civil War Amendments. Further examples of the attitudes of opponents of the Civil War Amendments abound throughout the legislative history of those amendments.[9] It is clear from the legislative history that opponents of the Civil War Amendments were motivated primarily by racism and a desire to maintain the regime of white supremacy.

The attitudes of proponents of the Civil War Amendments are much less rooted in racism and are in general more principled than those of their opponents.[10] In keeping with their antislavery traditions, Republicans intended the Civil War Amendments to benefit all Americans, regardless of color.[11] Typical of the comments made by proponents of the amendments, are those of John A. Bingham, a Republican Representative from Ohio. During the course of debates on African-American suffrage in D.C., Bingham declared that, "The spirit, the intent, the purpose of our Constitution is to secure equal and exact

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[8] *Congressional Globe*, 40th Congress, 2nd Session, (House Report No. 30).

[9] For example, Senator James McDougall, a Democrat from California argued on the Senate floor that African-Americans and whites were so different as to be almost different species. See *Congressional Globe*, 38th Congress, 1st Session, (S.p. 1490).

[10] Although the Republicans were generally principled proponents of equal rights for African-Americans, it should be noted that they could be, and often were, quite racist. For an excellent discussion of the racial attitudes of Republicans following the war, see LaWanda Cox and John H. Cox, *Politics, Principle and Prejudice, 1865-1866* (London, 1963). See also, Donald G. Neiman, ed., *Freedom, Racism, and Reconstruction: Collected Writings of LaWanda Cox* (Athens, 1997).

[11] Note that prior to the Civil War many antislavery activists were opposed to the institution of slavery as much for its effect on white persons as for the horrible conditions under which African-Americans were forced to labor. For more on the racial attitudes of the Republican Party prior to the Civil War, see Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (Oxford, 1995). Thus, the Republican Party, which was initially antislavery for reasons on the grounds that it was harmful to all persons, regardless of skin color, was being entirely consistent in seeking amendments that would provide protections to all persons regardless of skin color.

justice to all men."[12] This attitude is typical of proponents of the amendments and is seen throughout the legislative history of the Civil War Amendments.

In considering the legislative history, the *Brown* court gave the same weight to the racist attitudes of opponents of the Civil War Amendments as it did to the egalitarian attitudes of proponents of those amendments. Moreover, in disregarding the Thirteenth Amendment as a meaningful source of authority for their decision, the *Brown* court amplified the power of opponents of the amendments by focusing on the cases decided under the authority of the Fourteenth Amendment. While the Fourteenth Amendment is today regarded as the most important of the Civil War Amendments, it was originally intended merely as a supplement to the Thirteenth Amendment.[13] The first section of the Fourteenth Amendment laid out in explicit language the changes that had already been wrought by the Thirteenth Amendment, thereby providing further support for the Civil Rights Act of 1866.[14] The clarification of the meaning of the Thirteenth Amendment in § 1 of the Fourteenth Amendment allowed opponents of equal rights and emancipation to greatly narrow the meaning of the prior amendment.[15] In focusing on the Fourteenth Amendment and its accompanying case law, the *Brown* court greatly restricted the logical basis for its opinion and made the segregationist's case appear much stronger than it should have been.

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[12] *Congressional Globe*, 39th Congress, 1st Session, (H.p. 157). Some Republicans were also noted for their support of equal rights for Asian-Americans as well as African-Americans. For more on this, see the speech in favor of equal rights for Chinese immigrants given by Senator Richard Yates, a Republican from Illinois, on February 17, 1870. This speech was quoted from and derided by James A. Johnson, a Democrat from California, in some of the most appalling language recorded in any of the legislative history of the Civil War Amendments. See *Congressional Globe*, 41st Congress, 2nd Session, (H.p. 3878).

[13] For more on this point, see George Hoemann, *What God Hath Wrought: The Embodiment of Freedom in the Thirteenth Amendment* (New York, 1987).

[14] Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 Cal. L. Rev. 171, 190-200 (1951). Elsewhere, tenBroek notes that Congress ratified the Fourteenth Amendment in order to ensure the constitutionality of the Civil Rights Act of 1866. Jacobus tenBroek, *Equal Under Law* (New York, 1965), 201-33.

[15] See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1 (1995).

Congress passed the Thirteenth Amendment on January 31, 1865, thereby providing that neither slavery nor involuntary servitude would be permitted in the United States.[16] The passage of the Thirteenth Amendment marked the culmination of nearly half a century of efforts by abolitionists to end the abominable and peculiar institution of slavery. The Thirteenth Amendment had been hotly debated in both houses of Congress and ultimately passed only because of careful political maneuvering by Lincoln and other Republican leaders, who convinced sixteen retiring Democrats to support the amendment, which passed 119 to 56.[17]

Despite this small measure of bipartisan support, news of its passage met with very different receptions. According to the House reporter, "the members on the Republican side of the House instantly sprang to their feet, and, regardless of parliamentary rules, applauded with cheers and clapping of hands."[18] The audience in the packed galleries, which included many African-Americans, "waved their hats and cheered loud and long."[19] William Lloyd Garrison, abolitionist editor of *The Liberator*, declared that they were celebrating the emancipation not only of four million African-Americans, but thirty-four million whites as well.[20]

The immediate reaction of Democratic politicians and former slave owners does not make the same impression on the historical record, but the vast majority of Democrats continued to oppose equal rights for African-Americans. As the drafter of an 1872 Senate report noted, while commenting on the reports from the Army, the southern

[16] Thirteenth Amendment – § 1 – Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. – § 2 – Congress shall have power to enforce this article by appropriate legislation.
[17] *Congressional Globe*, 38th Congress, 2nd Session, (H.p. 531).
[18] *Ibid.*
[19] *Ibid*.
[20] Henry Mayer, *All on Fire: William Lloyd Garrison and the Abolition of Slavery* (New York, 1998), 576.

States were extremely reluctant to accept the change that the Thirteenth Amendment brought about:

> It appears from these reports that the whites were bitterly opposed to the liberty of the freedmen, and only conceded their rights upon compulsion. The opposition arose from a desire to hold on to them as property, or at least control them as serfs, and from prejudice against every advance toward equal rights. This feeling was almost universal…[21]

Opposition to the amendment was not limited to the South, but was also rampant among Northern Democrats, fifty-six of whom had voted against the passage of the amendment.[22]

Opposition to the Thirteenth Amendment continued in the former slave States following the ratification of the amendment on December 6, 1865. Unwilling to concede defeat, Democrats now passed "Black Codes" that denied African-Americans many of their basic civil rights. As noted in Senate Report No. 41:

> [Democratic] leaders met in convention and revised and remodeled constitutions and enacted laws which disenfranchised and disqualified more than three and one-half millions of citizens, and under pretense of regulating their labor bound them to involuntary servitude in the name of apprenticeship—a form of slavery which would have had many of the evils of the old system without its compensations.[23]

In response to this State legislation, on December 13, 1866 Congress passed the Civil Rights Act of 1866 under the authority of the Thirteenth Amendment. Despite the passage of the act, the oppressive State laws remained on the books and the newly freed slaves required immediate assistance. Yet even as Federal judges and agents of the Freedmen's Bureau moved to alleviate the recently freed slaves' condition, opponents of

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[21] *Congressional Globe*, 42nd Congress, 2nd Session, (Senate Report No. 41, pt. 1).
[22] *Congressional Globe*, 38th Congress, 2nd Session, (H.p. 531). For more on Democratic opposition to emancipation and equal rights for African-Americans, see Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (New York, 1998).
[23] *Congressional Globe*, 42nd Congress, 2nd Session, (Senate Report No. 41, pt. 1).

emancipation and equal rights for African-Americans denied that Congress had the authority to pass the Civil Rights Act.

While Republican Congressmen began to prepare a fourteenth amendment to clarify their interpretation of the Thirteenth Amendment, Federal and State judges were forced to decide cases before them and render their own interpretation of the meaning and scope of the Thirteenth Amendment. Two of the most important cases interpreting the Thirteenth Amendment were decided in Maryland, *In Re Turner* (1867) in Federal court, and *Adeline Brown v. State* (1865) in State court.[24] These two cases arose from challenges to the Maryland apprenticeship law, which was enacted after the abolition of slavery to control African-American labor.

When analyzed and compared alongside one another, *In Re Turner* and *Adeline Brown v. State* demonstrate two very different views of the scope and meaning of the Thirteenth Amendment at the time of its enactment. When viewed in light of contemporary Congressional records, it is clear that *In Re Turner*, written by Chief Justice Chase in his capacity as circuit judge, is a proper interpretation of the scope and meaning of the Thirteenth Amendment in regard to the issues before the court. Chase's opinion is consistent his arguments in earlier cases, such as "Matilda's Case" or *State v. Birney* (1838). Chase's opinion is also consistent with the meaning of the Thirteenth Amendment and the Civil Rights Act of 1866 as they were intended to be applied by their supporters.

Adeline Brown v. State, on the other hand, is a reactionary opinion that attempts to act as if nothing substantial had been changed by emancipation. Because the opinion was issued approximately one month before the Thirteenth Amendment was ratified, *Adeline*

[24] *In Re Turner*, 24 F. Cas. 337 (1867); *Adeline Brown v. State*, 23 Md. 503 (1865).

Brown v. State treats the question of whether an African-American apprenticeship law is valid as entirely a question of State law. *Adeline Brown v. State* is reactionary because it goes out of its way to justify a law that clearly violated contemporary standards of equal protection.

The Thirteenth Amendment was intended to not only abolish slavery, but also to overturn that part of the Supreme Court's holding in *Dred Scott v. Sanford* (1857) that denied that African-Americans could be citizens of the United States and were consequently not entitled to the privileges and immunities of United States citizenship. Because it was silent on the issue, it is clear that the Thirteenth Amendment changed nothing in regard to those masterful portions of *Dred Scott* in which Taney laid out the privileges and immunities of United States citizens. A proper interpretation of the Thirteenth Amendment indicates that it was intended to extend even further than eradicating slavery and the badges and incidents of slavery.[25] Rather, to the men who supported the amendment, in Congress and in the courts, the Thirteenth Amendment gave them the authority to totally reorganize the political system throughout the former slave States to provide for a republican form of government for all citizens.[26] Thus, while *The Slaughterhouse Cases* (1873) treated all of the Civil War Amendments as applying only to African-Americans, it is clear that Congress intended the Thirteenth Amendment to provide protections for all Americans, regardless of race or color.

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[25] For modern Supreme Court cases on "the badges and incidents of slavery" see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

[26] As numerous scholars have noted, one of the principal evils of slavery, from the perspective of a racist Northern Republican was the immense power that it gave to the slave owning aristocracy in the South. For more on this, see Michael F. Holt, *The Political Crisis of the 1850s* (New York, 1978). Holt notes that prior to the war Republicans were irritated by the protections given to slavery by the Constitution, which in their opinion conflicted with their own right to a republican form of government. Ensuring that all persons in the United States had the benefits of equal protection and eventually suffrage was seen as a way of ensuring a republican form of government to the people.

It is no accident that these two cases arose in courts in Maryland. According to reports from the Freedmen's Bureau and the statements made in Congress, the condition of freedmen in Maryland was particularly oppressive. The Freedmen's Bureau records list dozens of African-American men and women who were beaten or killed for the most trifling or imagined offenses.[27] In the opinion of Thaddeus Stevens, a Republican representative from Pennsylvania, "Maryland although near to the free States in geographical position, [was] more bitterly imbued with the old virus of slavery than any of the southern States that have been conquered."[28]

Stevens stated that in his opinion the reason for this was that the electoral system in Maryland gave an enormous advantage to the plantation region of the Eastern Shore. Stevens declared "in the State of Maryland one hundred thousand white men, in that portion of the State where the slave population formerly abounded, exercise equal political power with six hundred thousand in the free portion of the State."[29] Stevens urged the House to find a way to rectify this situation and restore Maryland to a republican form of government, in accordance with Congress' powers under Article IV, § 4 of the Constitution. Thus we see that Congress was very mindful not only of the need to legislate for the protection of the freedmen, but also to legislate for the good of white citizens.

Stevens and other Republican leaders saw themselves as restoring a republican form of government to all citizens by ensuring that all persons had equal rights and equal protection of the law. While this attitude was characterized as radical by opponents of emancipation and equal rights, the Republicans who drafted the Thirteenth Amendment

[27] See http://freedmensbureau.com/washintondc/outrages2.htm, accessed on November 24, 2004.
[28] *Congressional Globe*, 39th Congress, 2nd Session, (H.p. 153-154).
[29] *Ibid*.

and the Civil Rights Act of 1866 were actually quite conservative in their ideology. The Republicans added no new rights to the bill of rights, nor did they invent any new legal principles. Rather, they simply declared that equal protection of the laws must apply to everyone, regardless of race or color. In stating this, the Republicans were acting in the best traditions of classical republicanism, the dominant ideology in England and the United States since at least the early seventeenth century.[30]

The Maryland Apprenticeship Law

The Maryland apprenticeship laws at issue in *In Re Turner* and *Adeline Brown v. State* were typical of laws passed in all of the former slave States following emancipation. Moreover, they were precisely the kind of laws that the Civil Rights Act of 1866 was designed to do away with. The Maryland apprenticeship law was enacted following the drafting of a new Maryland constitution in 1864. That constitution, which went into effect November 1, 1864, abolished slavery.[31] In addition to abolishing slavery, the Maryland constitution of 1864 provided for establishing a new apprenticeship system for African-Americans. Furthermore, the Maryland legislature also established new penalties for African-Americans convicted of crimes. Under the new laws, African-Americans could be bound out to hard labor in accordance with the exception in the constitution for involuntary servitude.[32]

On December 19, 1866, only six days after the passage of the act, Robert Schenck of Ohio submitted a resolution to the House of Representatives in which he noted that

[30] For more on the importance of classical republicanism during the debates on the Civil War Amendments, see Charles Olmsted, *The Ideological Origins of the Fifteenth Amendment*, (unpublished thesis, University of Virginia, 2003). See also J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975).
[31] *Turner*, 24. F. Cas. 337, 338 (1867).
[32] *Brown*, 23 Md. 503, 509 (1865).

African-Americans were being sold into slavery for the commission of crimes in Maryland, allegedly in accordance with the exception in the Thirteenth Amendment.[33] During the discussion following this resolution, Thaddeus Stevens noted that Maryland was "not the only State of the South that under the exception I have mentioned has taken occasion to pass laws providing for selling freedmen into slavery."[34] All of the Republican speakers on this topic were clearly of the opinion that this law violated the Civil Rights Act of 1866.

On January 3, 1867, Senator Charles Sumner of Massachusetts brought this same advertisement to the attention of the Senate. Sumner noted that this was not the only instance of this outrage, but cited several more examples from Maryland.[35] Senator Reverdy Johnson, a Democrat from Maryland, attempted to defend his State's record on slavery, declaring:

> … that perhaps there was no State in the Union in which there is a more fixed determination that slavery, in the common acceptation of the term, slavery of the innocent, slavery on account of color, slavery on any account except for crime, shall not exist in Maryland.[36]

Johnson's assertions notwithstanding, Senator Thomas Fessenden of Maine pointed out that this law did not extend the punishment of slavery for conviction of crime to white persons, but that it only applied to African-Americans.[37] In the face of this point, even Johnson, who had been the winning attorney in *Dred Scott*, was forced to concede:

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[33] 39th Congress, 2nd Session, (H.p. 153). Mr. Schenck's resolution quoted the following official newspaper advertisement:
"Public Sale.—The undersigned will sell at the courthouse door in the city of Annapolis at 12 o'clock m. on Saturday, 8th December, 1866, a negro man named Richard Harris, for six months, convicted at the October term, 1866, of the Anne Arundel circuit court for larceny, and sentenced by the court to be sold as a slave. Terms of sale, cash…. December 3, 1866."
[34] *Ibid.*
[35] 39th Congress, 2nd Session, (S.p. 238).
[36] *Ibid.*
[37] [37] 39th Congress, 2nd Session, (S.p. 239).

> If there be a distinction between black and white with reference to this kind of punishment, I have no doubt the Legislature will promptly correct it—I am sure they ought to do so—or if they do not, then the question will arise whether it does not fall within the inhibition of the civil rights bill, and whether the courts will enforce that measure.[38]

As seen from Johnson's statements, equal protection was clearly an issue for Congress as they dealt with the issues brought about by emancipation.

Moreover, the Senate debates make it clear that an involuntary servitude was impermissible if the person was bound out for service to an individual by way of punishment. During the course of this same debate, Senator John A. Creswell, a Republican from Maryland, noted that involuntary servitude in punishment for a crime, was "never intended to authorize any individual, by reason of a decree of court or a public sale, to hold any other human being in bondage."[39]

It is quite clear that Congress was well aware of conditions in Maryland at the time that they passed the Thirteenth Amendment and the Civil Rights Act of 1866. Supporters and opponents of those acts clearly understood what they meant for equal protection, emancipation and labor conditions in the future. The future of those acts would now rest with the courts.

In Re Turner **(1867)**

In Re Turner arose from a habeas corpus petition brought by Elizabeth Turner, a young African-American woman from Talbot County, Maryland, in alleged contravention of the Constitution and laws of the United States. Turner and her mother were owned by Mr. Hambleton prior to the abolition of slavery in Maryland in 1864. Almost immediately after her emancipation Elizabeth Turner was apprenticed to

[38] *Ibid.*
[39] *Ibid.*

Hambleton by an indenture dated November 3, two days after the new constitution went into operation. Thus, having been freed for less than two days, Turner was once more bound to her former master.[40] According to the terms of her indenture, Elizabeth was to be "taught the art or calling of a house servant," but she was not entitled to any further education or training.[41]

On September 20, 1867, Turner's mother's new husband, Charles Henry Minoky, filed a habeas corpus petition on her behalf in the Federal Circuit court for the district of Maryland, presided over by Chief Justice Salmon P. Chase. During the 1830s, Chase had made a name for himself representing fugitive slaves in Ohio. Chase represented these clients *pro bono* and became known as the "Attorney General of Fugitive Slaves." The most important of these cases were "Matilda's Case" and *Birney v. State* (1838). It is extremely unlikely that Minoky could have found a more reasonable or favorable court in which to file his petition.

Like many other abolitionists, Chase drew much of his inspiration from the *Declaration of Independence*, from which he derived the self-evident axiom that all men are born "equally free."[42] Unlike William Lloyd Garrison and Wendell Phillips, who condemned the Constitution as a pact with the devil, Chase never gave up on the U.S. Constitution as a source of freedom and protection for all.[43] Rather, he found a declaration of positive rights for all citizens in the Bill of Rights, especially in the Fifth

[40] For more on the relationship between Elizabeth Turner and Philemon T. Hambleton, see Hyman, Harold M., *The Reconstruction Justice of Salmon P. Chase: In Re Turner and Texas v. White* (Lawrence, 1997), 125. Hyman speculates that Hambleton was Elizabeth's father. This could account for his not having pursued the case very vigorously.
[41] *Turner*, 24. F. Cas. 337, 338 (1867).
[42] Hyman, *The Reconstruction Justice of Salmon P. Chase*, 41.
[43] Mayer, *All on Fire*, 313.

Amendment's protection of life, liberty and property.[44] In taking this stance, Chase heaped contempt upon decisions such as *Corfield v. Coryell* (1823) and *Barron v. Baltimore* (1833), which narrowly defined the protections of the Constitution and the Bill of Rights and maintained that they applied only against the Federal government.[45] Although Chase was an advocate of full legal equality for African-Americans, he was probably not in favor of total racial equality. Indeed, like many antislavery activists, he was opposed to slavery because it threatened everyone's rights, not just those of African-Americans.[46]

In filing the petition for habeas corpus, Minoky was assisted by two attorneys from the Freedmen's Bureau, Henry Stockbridge and Nathan M. Pusey.[47] Of these two lawyers, Stockbridge appears to have exercised the dominant role during the two-day hearing. Indeed, Stockbridge was a central figure in the case; he presented not only

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[44] Chase was not the only person to advocate this position, it was taken by many other abolitionists as well. Moreover, it was also the position taken by Chief Justice Henry Lumpkin in *Nunn v. Georgia*, 1 Ga. 243, 249-250 (1846). In *Nunn*, Lumpkin declared that state constitutions "confer no new rights on the people which did not belong to them before." The same can be said for the federal Constitution and the Bill of Rights, which merely declare the rights already possessed by citizens. For more on this, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, 1998), 149. Amar notes that certain fundamental rights and freedoms preexisted their declaration in the Constitution. The Constitution, of course, derives all of its authority from the people. It should be stressed that "the people" can only be construed as consisting of the body of the citizenry, not all of the inhabitants of a country.

[45] Hyman, *The Reconstruction Justice of Salmon P. Chase*, 48. Note that opponents of the idea that the Civil War Amendments "incorporated" the Bill of Rights so as to apply to the States have entirely ignored this aspect of antislavery legal theory. Charles Fairman continually derided the Radical Republicans for in his opinion failing to understand cases such as *Barron* and *Corfield*, while disregarding the fact that they simply saw them as bad cases with very low value as binding precedent.

[46] *Ibid.*, 51. Many Northern whites had little or no respect for African-Americans, but they had a great deal of distaste for the arrogant plantation owners of the South as well. Moreover, many Northerners disliked the rabid "States Rights" position advocated by John C. Calhoun and others, because it placed Southern States rights above their own. For more on this, see Michael F. Holt., *The Political Crisis of the 1850s* (New York, 1978).

[47] Agents of the Freedmen's Bureau rendered invaluable assistance to African-Americans during this era, despite the huge demands made upon their time and limited resources. In commenting on the condition of freedmen on June 16, 1866, George W. Julian, a representative from Indiana, noted, "But for the partial succor afforded by the Freedmen's Bureau their condition would be far more deplorable than that of slavery itself." 39th Congress, 1st Session, (H.p. 3210).

arguments on behalf of Turner, but also presented the opposing arguments because Hambleton refused to hire an attorney (and then refuted them).[48]

The strongest argument in support of Hambleton's position was that Turner had been apprenticed prior to the passage of the 13th Amendment and the Civil Rights Act of 1866 and that the Civil Rights Act of 1866 should not apply retroactively. Stockbridge refuted this argument by noting that the 13th Amendment was self-executing and that the Civil Rights Act of 1866 was designed to remedy existing wrongs, not merely prospective ones. Under questioning from Chase, Stockbridge acknowledged that many State laws prior to the adoption of the Thirteenth Amendment made distinctions between "the white ruling race, and the black subject one." Stockbridge noted that under Maryland's pre-emancipation laws, "the free negro, while having no political rights, was entitled to civil or legal rights to a large degree, but not equally with whites."[49]

Stockbridge made two primary arguments in support of Turner's habeas corpus petition. Stockbridge's primary argument was that Elizabeth Turner's apprenticeship constituted an involuntary servitude and was consequently prohibited by the Thirteenth Amendment to the United States Constitution and the Maryland constitution. Stockbridge argued that the apprenticeship was merely an evasion of the constitutional amendment prohibiting slavery. [50]

Stockbridge's second. argument centered on the fact that Hambleton, as master, was not bound by the indenture to give Turner any education, in reading, writing, and arithmetic; all of which were required in the case of the binding of white children.

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[48] *Turner*, 24. F. Cas. 337, 338-339 (1867).
[49] *Ibid.*, 127. For more on the status of free African-Americans in Maryland prior to the Civil War, see Wright, James M., *The Free Negro in Maryland: 1634-1860*, (New York, 1971).
[50] *Turner*, 24. F. Cas. 337, 338 (1867).

Because it thus treated African-American children differently than white children, Stockbridge argued that it was invalid as being in violation of the Thirteenth Amendment and the Civil Rights Act of 1866.[51] Stockbridge also argued that Turner was liable to be assigned and transferred at the will of her master to any person in the same county; while a white apprentice was not so liable. Finally, the authority of the master over the apprentice was described in the law as a "property and interest;" and no such description is applied to authority over a white apprentice.[52]

This was not the first time that Stockbridge had made this argument. In 1864, Stockbridge had been a member of the Maryland legislature, where he led the movement to call the constitutional convention that ended slavery in that State. During the course of the convention debates, Stockbridge opposed the adoption of the section that authorized the African-American apprenticeship program. Failing that, Stockbridge proposed an amendment that would have required "all masters to whom any such apprentice shall be indentured, to cause said apprentice to be taught to read and write; and any violation of which obligation on the part of any master shall cancel the indenture of apprenticeship."[53] This language would have made the rules pertaining to African-American apprentices the same as those applying to white apprentices. Stockbridge argued that if the law treated African-American children differently than white children, than it constituted a special law and was therefore unconstitutional. Mr. Stockbridge's amendment was not accepted.

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[51] *Ibid.*
[52] *Ibid.*
[53] Proceedings and Debates of the 1864 Constitutional Convention, Volume 102, Volume 1, Debates 1577, http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000102/html/am102d--1577.html, accessed on November 29, 2004.

After hearing Stockbridge's arguments, Chase rendered his decision in favor of Turner. Rather than writing a lengthy opinion, Chase contented himself with a brief statement of conclusions, which seemed to him to be sound law:

> 1. The first clause of the thirteenth amendment to the constitution of the United States interdicts slavery and involuntary servitude, except as a punishment for crime, and establishes freedom as the constitutional right of all persons in the United States.
> 2. The alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the amendment.
> 3. If this were otherwise, the indenture set forth in the return does not contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indenture of white apprentices, and is, therefore, in contravention of that clause of the first section of the civil rights law enacted by congress on April 9, 1866, which assures to all citizens without regard to race or color, "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."
> 4. This law having been enacted under the second clause of the thirteenth amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.
> 5. Colored persons equally with white persons are citizens of the United States.[54]

Based on these five conclusions, Chase ruled that Hambleton must discharge Turner from restraint. While not all of his contemporaries would have agreed with Chase's conclusions, nearly everyone in favor of emancipation and equal rights would have supported them.

Chase's first proposition, while it at first appears to simply mirror the exact text of the Thirteenth Amendment, was actually quite a contentious point. In stating that the amendment "establishes freedom as the constitutional right of all persons in the United States," Chase was declaring that the Thirteenth Amendment guaranteed positive rights to the individual. Chase's conclusion therefore ran contrary to the antebellum interpretation

[54] *Turner*, 24. F. Cas. 337, 339-340 (1867).

of the rest of the *Bill of Rights*, that it provided no positive rights to the individual, but merely prevented government from doing a certain action.[55] Strict textualists steeped in the Calhoun tradition might have argued vociferously against Chase's interpretation, but most of his contemporaries would probably have agreed with him or conceded the point.

Indeed, even in *The Slaughterhouse Cases* (1873), Justice Miller would write that the Thirteenth Amendment was a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government."[56] Chase's Republican contemporaries in Congress would also have agreed with his statement. During the debates on the Civil Right Act of 1866, James F. Wilson, a representative from Iowa, would declare that the end of the amendment is "the maintenance of freedom to the citizen."[57] In keeping with this line of reasoning, the principles of classical republicanism would have authorized Congress to pass laws allowing citizens to maintain their free and independent status. This is precisely what Congress intended to do in passing the Civil Rights Act of 1866.[58]

Chase's second contention, that the apprenticeship in question constituted an involuntary servitude was also at least somewhat controversial. The point most in Chase's favor was the conditions under which Turner had been apprenticed. In the opinion, Chase noted that soon after the abolition of slavery, "many of the freed people of Talbot county were collected together under some local authority, the nature of which

[55] As had been the reasoning of the Supreme Court in *Barron v. Baltimore*, 32 U.S. 243 (1833).
[56] *The Slaughterhouse Cases*, 83 U.S. 36 (1873).
[57] 39th Congress, 1st Session, (H.p. 1118).
[58] On this point, see the speech by Martin Thayer of Pennsylvania given on March 2, 1866. Thayer argues, "The sole purpose of the bill is to secure to that class of persons the fundamental rights of citizenship; those rights which constitute the essence of freedom…" *Ibid*., (H.p. 1152). The same purpose is avowed for much of the other Reconstruction legislation, such as the Freedmen's Bureau Bill, which expressed an intention to protect freedmen's right to keep and bear arms. On this point, see *Congressional Record*, 39th Congress, 1st Session, (S.p. 40).

does not clearly appear, and the younger persons were bound as apprentices, usually, if not always, to their late masters."[59] Turner was among those apprenticed under these circumstances. This state of affairs certainly cast doubt upon whether Turner's mother had actually voluntarily committed Turner to the apprenticeship.

The Congressional Record also makes it clear that Congressional Republicans would have agreed with his characterization of the apprenticeship as involuntary. During the debates on the Civil Rights Act of 1866, George W. Julian, a representative from Indiana, noted that many of the former slave States authorized that, "A magistrate may take colored children and apprentice them for alleged misbehavior without consulting the parents."[60] In Julian's opinion, and surely in the opinion of many others supportive of emancipation and equal rights, this clearly constituted an involuntary servitude.

Chase's third conclusion stated that the apprenticeship was invalid because it did not meet the requirements called for by the law pertaining to white children. Chase noted that the Civil Rights Act of 1866 guaranteed all persons the "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[61] No one could really argue with this statement, but they could deny Chase's fourth conclusion, that the Thirteenth Amendment provided sufficient authority to pass the Civil Rights Act of 1866. While this was the consensus opinion among most

[59] *Turner*, 24. F. Cas. 337, 339 (1867).
[60] 39th Congress, 1st Session, (H.p. 3210).
[61] The Civil Rights Act of 1866 – §1 – Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Republicans, many Southerners and a substantial number of Northern Democrats probably disagreed with it.[62] Doubts as to whether courts would agree that Congress had the authority under the Thirteenth Amendment to pass the Civil Rights Act of 1866 were the prime motives in proposing the Fourteenth Amendment. With that said, it was clear the proponents of the Civil Rights Act of 1866 intended it to apply retroactively and address existing grievances.[63]

Chase's fifth contention, that African-Americans were citizens of the United States would also have aroused some degree of opposition. Indeed, only ten years earlier Roger B. Taney had written in *Dred Scott v. Sanford* (1857) that African-Americans could not be citizens of the United States.[64] This argument would soon become moot with the passage of the Fourteenth Amendment, but in the meantime a strong conservative argument existed to support Chase's assertion that African-Americans were citizens of the United States.

The assumption in *Dred Scott* that African-Americans could not be citizens rested upon the classical republican division of society into two classes—slaves and citizens. The American conception of classical republican ideology held that only intelligent, economically independent, arms bearing, Protestant, adult males were able to exercise their free will and make decisions without the improper influence of others. Therefore, they alone possessed full civil and political rights, which ensured their status as citizens and allowed them a part in the decision-making processes of government. In the classical republican conception, all those who lacked the independence required to function as

[62] Mayer, *All on Fire*, 605.
[63] See 39th Congress, 1st Session, (H.p. 3210) for the comments of George Julian as typical of the existing problems the Civil Rights Act of 1866 was intended to address.
[64] *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

citizens were slaves, at least metaphorically if not literally. This tenet of classical republican ideology spawned two arguments for granting African-Americans citizenship under the Thirteenth Amendment.

The first argument began from the premise that the world was divided into citizens and slaves. Once slavery was abolished, it naturally followed that the freed slaves were now citizens. This argument was made by Senator Jacob Howard of Michigan during the debates on the Civil Rights Act of 1866. Howard declared that the intention of the Thirteenth Amendment was make everyone "the opposite of a slave, to make him a freeman." Howard went to declare that "The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?"[65]

The second argument supporting the notion that the Thirteenth Amendment made the freedmen into citizens stemmed from the classical republican emphasis on military service as a prerequisite for citizenship. This theory was clearly current during the debates on the passage of the Civil Rights Act of 1866. Daniel Clark of New Hampshire argued that the Constitution was irrelevant for determining the citizenship status of African-Americans on the grounds of classical republican ideology. When closely questioned by Garrett Davis of Kentucky, Clark declared that African-Americans had possessed the rights of full citizens even before the Constitution, and that they became citizens when they, "helped to achieve the independence of the country equally with the white man."[66] This argument was fully in accordance with classical republican theory, which held that citizens gained their rights through the possession of the necessary

[65] *Congressional Record*, 39th Congress, 1st Session, (S.p. 504).
[66] *Congressional Record*, 39th Congress, 2nd Session, (S.p. 528).

attributes for citizenship, not because governments chose to bestow those rights upon them.[67]

While Chase's opinion probably found little support among antagonists of emancipation and equal rights for African-Americans, it was by no means a radical opinion. The decision was firmly grounded in contemporary Republican notions concerning the scope and extent of the Thirteenth Amendment. Moreover, the decision was widely accepted as good law during the 1860 and 1870s. *In Re Turner* was praised by Republican speakers in Congress. In 1874, William Lawrence, a representative from Ohio, noted that the "power of Congress to enact the civil-rights bill… [was] settled by the reasoning and authority of adjudicated cases and elementary writers."[68] *In Re Turner* was among the cases cited by Lawrence in support of this proposition.

In Re Turner was also largely accepted by the vast majority of Federal and State judges who heard cases arising from the Thirteenth Amendment.[69] Among the other important cases, by far the most important was Justice Noah Swayne's opinion in *United States v. Rhodes* (1866). Swayne decided this case acting in his capacity as circuit judge for Kentucky. In *Rhodes*, Swayne decided that Kentucky's law barring the testimony of an African-American woman in the prosecution of a white vigilante violated the 13th Amendment and the Civil Rights Act of 1866.[70]

Adeline Brown v. State **(1865)**

This case involves the conviction of Adeline Brown for having unlawfully enticed and persuaded an African-American apprentice, named George Brown, to run away from

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[67] For more on classical republican ideology, see J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975).
[68] 43rd Congress, 1st Session, (H.p. 413).
[69] Hyman, *The Reconstruction Justice of Salmon P. Chase*, 130.
[70] *Ibid.*

the service of his master, Lancelot Warfield, Jr. Adeline Brown was found guilty in trial court of violating Md. Code, Pub. Gen. Laws Art. VI, §§ 31-40, which allowed the courts to order an African-American child to be apprenticed to a white person.[71] She then appealed to the Court of Appeals. Brown argued that the law allowing the court to order an African-American child to be apprenticed to a white person violated Maryland constitutional provisions outlawing involuntary servitude and was further unconstitutional because it was a special law.[72] The Court of Appeals rejected both of these arguments in a rather cursory opinion written by Judge Daniel Weisel.

The Court of Appeals rejected Brown's first argument by stating that an apprenticeship had never been considered either slavery or an involuntary servitude.[73] While this may have been technically true, the Court did not inquire into the circumstances under which the apprenticeship contract was made. Weisel's opinion simply states the prior precedents in conclusive terms, without any inquiry into the facts of the case. In many instances the conditions under which such apprenticeships were made can only be regarded with horror. One freedman, Basil Croudy, and his wife were brought before the Calvert County orphans' court in order to agree to the indenture of their three children. The Croudys "steadily refused to consent to the binding." The constable, irritated by their intransigence, and "finding the mother obstinate, and deaf to reason… struck her in the face with his fist in the presence of the Judges."[74] While we do

[71] *Adeline Brown*, 23 Md. 503 (1865).
[72] *Ibid.*
[73] *Ibid.* Weisel notes correctly that the phrase "involuntary servitude" was imported from the Ordinance of 1787, for the government of the North West Territory, was more comprehensive than the term "slavery," but had never been applied to apprenticeships. Perhaps that is because people had not tried to impose apprenticeships on white children prior to the Civil War without the consent of their parents.
[74] Richard P. Fuke, "Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland," *Agricultural History*, 62, 66 (1988). Fuke records a number of similar instances

not know the circumstances under which this apprenticeship was made, it is likely to have been done under less than optimal circumstances.

Having made no effort to inquire into the conditions under which the apprenticeship was imposed, Weisel next rejected Brown's argument that the law in question was a special law. Once again, Weisel made no attempt to compare the law relating to African-American apprentices with the law relating to white apprentices. Rather, Weisel concluded that the law was not a special law, despite the fact that it was different from the law that previously existed for white apprentices. Weisel seems to have considered it perfectly reasonable that a law would treat white apprentices differently than African-American children.[75] Weisel's brief opinion therefore reflects a typical attitude of an opponent of equal rights and emancipation.

Conclusion

Weisel's opinion in *Adeline Brown v. State* (1865) preceded the ratification of the Thirteenth Amendment, so it is hardly surprising to see such a recalcitrant and obtuse interpretation of the meaning of freedom and emancipation. *Adeline Brown* (1865) underscores the fundamental importance of the Thirteenth Amendment in guaranteeing equal protection to all persons, because it clearly demonstrates the ease with which State courts could disregard the true meaning of freedom within their own jurisdiction. With the ratification of the Thirteenth Amendment and the passage of its explanatory Civil Rights Act of 1866, State courts should have no longer been able to construe the law in

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as well. Note that Chase's opinion in *In Re Turner* (1867) did note that the indenture was made under suspicious circumstances.

[75] As noted by Charles W. McCurdy and many others, an aversion to "special" or "class" legislation was one of the hallmarks of the abolitionist movement, and ultimately of the supporters of the Civil War Amendments. McCurdy argues convincingly that this antislavery aversion to special legislation was a major contributing factor in leading to the rise of *Lochner*-era jurisprudence. For more on this, see Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897." *Journal of American History* 61 (1975): 970-1005.

the manner in which they did. That they were able to do so for almost another century before the Federal government intervened is a testament to the power of the opposition to equality and freedom for all within the United States.

This opposition to freedom and equality was given an unequal voice in *Brown v. Board of Education of Topeka* (1954), although the *Brown* (1954) court ultimately rejected segregation and separate but equal. In choosing to focus on the Fourteenth Amendment and the cases interpreting it, in the Supreme Court overlooked *In Re Turner* (1867), a case that would have provided some much needed legal support for the opinion. *In Re Turner* (1867) held that the Maryland apprenticeship system for African-American children was unconstitutional because it did contain the same provisions for educating African-American apprentices as were applicable to white apprentices. *In Re Turner* (1867) was entirely consistent with the views of supporters of the Civil War Amendments, who clearly intended those amendments to provide positive guarantees of rights to all Americans.

In basing their opinion on race-specific social science data, rather than a color-blind legal analysis, the *Brown* (1954) court undermined the strength of its own argument and further catalyzed opposition to segregation. Moreover, the *Brown* (1954) court seemed to concede that history was not on their side, when it fact it was soundly in support of the opinion. If the law is going to change the opinions of Americans, as C. Vann Woodward suggested, it is important that the Civil War Amendments be interpreted as their supporters intended: with an understanding that they are designed to provide freedom equal protection without regard to skin color, that they protect the rights of all Americans and that they do not countenance special legislation.

In disregarding *In Re Turner* (1867), and other cases decided under the Thirteenth Amendment, the *Brown* court effectively acted as if that amendment had never been passed, or had only the most limited effect. The true effect of the Thirteenth Amendment is clearly demonstrated by cases such as *Adeline Brown v. State* (1865). *Adeline Brown* (1865) upheld the same statute struck down in *In Re Turner* (1867), because it was decided by the Maryland Court of Appeals prior to the ratification of the Thirteenth Amendment. In *Adeline Brown* (1865), the Court of Appeals upheld a statute that did not even meet contemporary standards of "special legislation" jurisprudence, in as much as it explicitly treated one class differently than another without any justification whatsoever.

Contemporary supporters of the Thirteenth Amendment clearly would have rejected both the reasoning and the result in *Adeline Brown* (1865), as Justice Chase did in *In Re Turner* (1867). The Congressional Record clearly shows that supporters of the Thirteenth Amendment intended it to guarantee the protections of the Bill of Rights to all citizens, regardless of race or color. In his opinion in *In Re Turner* (1867), Chase understood and correctly applied their intention. Contemporary arguments in favor of incorporating the Bill of Rights would do well to look to the support provided for total incorporation via the Thirteenth Amendment. The Congressional Record and the jurisprudence contemporary with the Thirteenth Amendment clearly indicate that this was the goal of supporters of that amendment.