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From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase

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Georgetown Public Law and Legal Theory Research Paper No. 12-122

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63 Case W. Res. L. Rev. 653-702 (2013)

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FROM ANTISLAVERY LAWYER TO CHIEF JUSTICE: THE REMARKABLE BUT FORGOTTEN CAREER OF SALMON P. CHASE

Randy E. Barnett†

ABSTRACT

The name Salmon P. Chase is barely known and his career is largely forgotten. In this Article, I seek to revive his memory by tracing the arc of his career from antislavery lawyer, to antislavery politician, to Chief Justice of the United States. In addition to explaining why his is a career worth both remembering and honoring, I offer some possible reasons why his remarkable achievements have largely been forgotten.

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INTRODUCTION: CONSTITUTIONAL ABOLITIONISM

For several years, I have been studying a long-forgotten band of constitutionalists who, in the 1830s, '40s, and '50s, denied that the U.S. Constitution was proslavery.[1] They advocated enforcing the text of the Constitution without any gloss put upon it by intentions, understandings, or deals that were not expressly included therein. They contended that Congress not only had the power to ban the international slave trade, it also had the power to ban the interstate slave trade and to abolish slavery in the District of Columbia, in the territories under its jurisdiction, and in any states formed from these territories. They also contended that the Fugitive Slave Acts of 1793 and 1850 were unconstitutional. These positions put them at odds with the Garrisonian abolitionists who claimed that the Constitution was "a covenant with death, and an agreement with hell"[2] because it sanctioned slavery.

When I finally began writing this Article, I wanted to include biographical information about each member of this forgotten group. Gradually, I came to realize that most of them had something in common. Unlike the Garrisonians, many of whom became anarchists, these antislavery constitutionalists favored political action. Most were involved in organizing the expressly antislavery Liberty Party as an alternative to the proslavery Democrats and the compromising, equivocating Whigs.

To learn more about the Liberty Party, I turned to historian Richard Sewell's *Ballots for Freedom: Antislavery Politics in the United States 1837–1860.*[3] In his book, Sewell describes what he calls "political abolitionism" that, unlike the Garrisonians, favored political action to attack what was then called the Slave Power.[4] Sewell relates

1. *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011) (highlighting the contributions and tactics of key abolitionist constitutionalists).

2. Resolution Adopted at the Annual Meeting of the Massachusetts Anti Slavery Society, in Faneuil Hall, January 26, 1843, *in* THE LIBERATOR, Apr. 21, 1843, at 63. ("*Resolved, That the Compact which exists between the North and the South is a 'covenant with death, and an agreement with hell,' —involving both parties in atrocious criminality,—and should be immediately annulled.*").

3. RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837–1860 (1976).

4. *See id.* at ix (describing "political abolitionists" as those "who, though never attached to an antislavery society or insistent on *immediate* emancipation, nonetheless embraced non-extension in part because they thought it a perfectly constitutional way to hasten slavery's downfall"). Indeed, Sewell did not invent the term "political abolitionist." In June of 1855, a convention of "Radical Political Abolitionists" was called by Lewis Tappan,

a very clear chronology: the Liberty Party, founded in the 1840s by these political abolitionists, soon led to the Free Soil Party, which led briefly to the Free Democrat Party, and finally in the mid-1850s to the founding of the Republican Party.

Like many other historians of the period, Sewell gave very short shrift to the constitutional theorizing of these political abolitionists. What my study showed, however, is that this very same group of political activists advanced a powerful constitutional case against slavery—a case that was based on the protection of natural rights, the original meaning of the text of the Constitution, the limits on the enumerated powers of Congress, and the Due Process Clause of the Fifth Amendment. What is more, their constitutional arguments are remarkably persuasive compared to those advanced by the Supreme Court in cases such as *Dred Scott v. Sandford.*[5]

The constitutional approach of this group deserves its own label: constitutional abolitionist, a term actually used by some at the time or shortly thereafter to describe this movement.[6] Like the radical abolitionists, constitutional abolitionists desired the complete abolition of slavery. But unlike some radical abolitionists, like Garrison and his legal compatriot Wendell Philips, who believed that the Constitution was a covenant with death and an agreement with hell and who favored disunion,[7] the constitutional abolitionists believed that the Constitution was fundamentally antislavery.

W.E. Whiting, William Goodell, James McCune Smith, Gerrit Smith, George Whipple, S.S. Jocelyn, and Frederick Douglass and held in Syracuse, New York. *See* PROCEEDINGS OF THE CONVENTION OF RADICAL POLITICAL ABOLITIONISTS 3–4 (1855).

5. Scott v. Sandford, 60 U.S. 393 (1857).

6. *See* Benjamin F. Shaw, *Owen Lovejoy, Constitutional Abolitionists and the Republican Party, in* 111 TRANSACTIONS OF THE MCCLEAN CNTY. HISTORICAL SOC'Y 60, 62 (Ezra M. Prince ed., 1900) ("[T]he fight for liberty in this land was begun by the Radical Abolitionist long before the final battle. . . . They were, however, followed by a class known as the Constitutional Abolitionists; equally bold and brave, but more practical. It was the labor of the latter that accomplished glorious results; fought the good battle to a finish and destroyed the slave power. They were among the organizers of the Republican Party."); DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 676 (2005) (quoting Lincoln's Attorney General James Speed as saying "I am a thorough Constitutional Abolitionist").

7. *See generally* LEWIS PERRY, RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT (1973) (reviewing radical antislavery movements and their respective weaknesses in execution); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977) (tracking shifts in Constitutional attitudes and movements regarding slavery).

Yet, the constitutional abolitionists were divided among themselves on one key issue. Some like Lysander Spooner, William Goodell, Joel Tiffany, and Gerrit Smith contended that slavery was unconstitutional anywhere in the United States. Others believed that, while slavery should be abolished everywhere, as a matter of positive law, slavery was constitutional within those of the original thirteen states that retained the practice.

The leading figure in this second camp was Salmon P. Chase. Of all the figures I surveyed, none was more important than he. Indeed, in a previous article I considerably underestimated his influence.[8] In this Article, I seek to rectify that error. My goal is to help revive the memory of Salmon P. Chase to its rightful place in our constitutional history.

Whether they know it or not, all those reading this Article have heard Chase's name, many have used it, and most see it every day. Yes, that's right. Chase Bank, originally founded in 1877, some four years after his death, was named in his honor.[9] As one drives down the street in most cities, one sees Chase's name prominently displayed, even illuminated in the darkness. But, though some readers have also heard the name Salmon P. Chase, if these readers are like me, they may not remember exactly who he was and what he did to earn this posthumous honor.

Perhaps they know that he was Chief Justice of the United States. Perhaps they even know he was a politically ambitious rival of Lincoln who also wanted to be president. But what he stood for throughout his accomplished career has largely been forgotten. Long before he was Chief Justice of the United States, Salmon P. Chase was among the most prominent, brilliant, and ultimately politically effective members of this group of constitutional abolitionists. By forgetting them, we have also forgotten him.

I. CHASE'S RISE TO THE CHIEF JUSTICESHIP

A. Chase's Early Years

Salmon Portland Chase was born in New Hampshire in 1808, the year Congress abolished the slave trade.[10] He was nine when his father

8. Because I neglected Chase's argument in the *Matilda* case, he entered my chronology in mid-1840s, rather than the 1830s. *See* Barnett, *supra* note 1, at 210. As a result, my account failed to notice the degree to which he influenced the constitutional analysis of others I discuss in the late 1830s and early 1840s. In short, Chase was far more influential than I gave him credit for being.

9. J.P. MORGAN CHASE & CO., THE HISTORY OF JPMORGAN CHASE & CO. 4 (2008).

10. Unless otherwise noted, the facts in the next several paragraphs are taken from the excellent biography, JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY (1995). This is the biography of Chase that is sold in the U.S. Supreme Court's gift shop.

died, and, by the time he was twelve, his mother found herself unable to support him and his siblings. She prevailed upon her brother-in-law and Chase's uncle, Philander Chase, to take him into his care. Philander had just become the Protestant Episcopal bishop of Ohio and was running a boy's school in Worthington, Ohio, just north of Columbus.

The trip to the Western Reserve was an adventure for the young boy. His twenty-three-year-old brother and a neighbor, who were both joining an expedition to Michigan and Wisconsin, would take him by steamship as far as Cleveland. In 1820, Cleveland "was not much to see: a hamlet with a population of about 500 people, dwellings straggled across the heavily wooded bluffs that rose abruptly from the lake."[11] As there was no harbor, small boats conveyed the party to the mouth of the Cuyahoga River.

In Cleveland, Chase boarded with a local judge named Barber until someone could be found to take the boy to Worthington. Eventually, an Episcopal minister took him as far as Medina, where two other clergymen got him to his uncle's place. Chase lived with his uncle there for two years until, no longer able to sustain the school, Philander accepted the presidency of Cincinnati College, which brought Salmon to the city where his legal and political career would begin.

But first Chase went back east for college at Dartmouth very near his boyhood home. After graduating in 1826, he moved to Washington, D.C. He first tried his hand as a school teacher, before deciding to study law with Attorney General William Wirt. Studying in Washington gave Chase the opportunity to watch cases argued before the Supreme Court. His association with Wirt and Wirt's family enabled him to meet many of the most prominent political and legal figures of his day.

When, after two years of study, Chase applied for the bar, his examination by the judges went well until he was asked about the length of his legal training. When he admitted it was not the required three years, the presiding judge instructed him he would need to study another year. Chase pleaded with the court. "Please your honors, . . . I have made arrangements to go to the Western country and practice law" there.[12] After a brief conference, the judges decided to swear him in as a member of the bar.

By a strange coincidence, Lysander Spooner, perhaps the leading figure of abolitionist constitutionalism, also achieved bar membership prematurely after two years of study. At the time, Massachusetts required three years of apprenticeship for college graduates, while those who, like Spooner, had not gone to college had to study for five. Spooner defied the rule by opening his own practice in Worchester after apprenticing for just two years with two prominent

11. *Id.* at 11.

12. *Id.* at 27.

Massachusetts political and legal figures: John Davis and Charles Allen. A few months later, he published a lengthy petition to the Massachusetts legislature in the *Worchester Republican*, in which he urged it to end the restriction on bar admission. Among his many arguments, Spooner maintained that

> the Courts were made for and by the people, and not the people for or by the Courts. Suitors, when in Court, are the people, and it is their right to present their causes to their own Courts, by whatever counsel they may think it for their interest to present them . . . .[13]

During its 1836 session, the legislature agreed, and Spooner was allowed to become a member of the bar.[14]

Chase's law license secured, in 1830, he returned to Ohio, where he practiced law in Cincinnati. In those days, Cincinnati was a political cauldron. Its proximity to the slave state of Kentucky enmeshed it in the slavery economy, and much of its citizenry was sympathetic. But Cincinnati's location also made it a nearby refuge for antislavery Southerners who no longer felt welcome in their home states. One such refugee was James G. Birney, a former Kentucky slave owner and Princeton educated lawyer who turned against slavery and left his state for Cincinnati. There, Birney founded an abolitionist newspaper called the *Philanthropist.*

In 1836, Chase was drawn into antislavery activities when a mob attacked Birney's paper, destroying his press. At the time, Chase had yet to take any public stance on the slavery question. But when he heard that the mob was heading to the Franklin House to tar and feather Birney, Chase raced to the hotel to warn the publisher.

> As the mob surged forward, Chase braced his arms against the door frame, blocking the hotel's entrance with his body. Six feet two, with broad shoulders, a massive chest, and a determined set to his jaw, Chase gave the rioters pause. The crowd demanded to know who he was. "Salmon P. Chase," the young lawyer replied.

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13. Lysander Spooner, *To the Members of the Legislature of Massachusetts*, WORCHESTER REPUBLICAN—EXTRA 4 (Aug. 26, 1835), *reprinted in* 2 THE COLLECTED WORKS OF LYSANDER SPOONER (1971). *See also id.* at 1 ("Any man, who is allowed the management of his own affairs, has the right to decide for himself whom he will employ as counsel. . . .").

14. Charles Shively, *Biography, in* 1 THE COLLECTED WORKS OF LYSANDER SPOONER 17–18 (1971). Like Chase, Spooner had an Ohio connection. Having gone West to seek his fortune, Spooner purchased the land that now constitutes Grand Rapids, Ohio, as a speculative venture. *Id.* at 20–21. When the speculation failed, Spooner returned to his family's home in Athol, Massachusetts, to turn his attention to the issue of slavery. *Id.* at 24.

> "You will pay for your actions," a frustrated member of the mob told him. "I [can] be found at any time," Chase said.[15]

In fact, it was members of the mob who were made to pay damages when Birney retained Chase to bring a successful tort action against them for the property damage they had caused.

B. Chase as an Antislavery Lawyer

In 1837, Birney also enlisted the twenty-nine-year-old Chase to represent a young runaway slave named Matilda, who had been seized by slave catchers. Matilda was the light-skinned daughter of her owner, who had brought her with him on a long trip through free territory passing as his white daughter. Having tasted freedom, she pleaded with her father for a certificate of emancipation, but he refused. She then fled to the small neighborhood of free blacks in Cincinnati where she found refuge before coming into Birney's employ as a maid.[16]

Chase brought a writ of habeas corpus for her freedom and argued the case before the local judge. Based in part on ideas developed by Birney in the *Philanthropist*, Chase's hastily prepared argument was multifaceted.[17] The Fugitive Slave Act of 1793[18] authorized a slave owner to seize a fugitive slave in a free state and return her to bondage after obtaining a certificate of removal from a federal judge or a state magistrate in the free state. One of Chase's principal claims was that the Fugitive Slave Act was unconstitutional because it was beyond the delegated powers of Congress to enact.

Article IV says that

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[19]

Chase asked,

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15. GOODWIN, *supra* note 6, at 109.

16. The events surrounding the *Matilda* case and Chase's involvement are discussed in NIVEN, *supra* note 10, at 50–54. *See also* Frederick J. Blue, *From Right to Left: The Political Conversion of Salmon P. Chase,* 21 N. KY. L. REV. 1, 9–12 (1993).

17. SALMON P. CHASE, SPEECH OF SALMON P. CHASE IN THE CASE OF THE COLORED WOMAN, MATILDA, WHO WAS BROUGHT BEFORE THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, BY WRIT OF HABEAS CORPUS (Mar. 11, 1837) [hereinafter MATILDA SPEECH].

18 Ch. 7, 1 Stat. 302, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

19. U.S. CONST. art. IV, § 2, cl. 3.

> Does this clause confer any power on government, or on any officer or department of government?—Clearly not. It says nothing about the government, or its officers, or its departments. It declares that the citizens of no state in the Union, legally entitled to the service of any person, shall be deprived of that right to service, by the operation of the laws of any state into which the servant may escape; and it requires such state to deliver him up, on the claim of the lawful master.[20]

But it gives no power of enforcement to Congress.

According to Chase, the provisions of the first three articles of the Constitution create, define, and empower the national government, with Congress's powers defined primarily in Article I. In contrast, Article IV constitutes a compact among the states themselves. "[T]he creation of a government and the establishment of a compact, are entirely distinct in their nature."[21] Most importantly, "clauses of compact confer no powers on the [national] government: and the powers of [that] government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact."[22]

Article IV, Chase contended, provides articles of compact among the several states, amounting to treaty obligations to be enforced like other treaties by the parties themselves, not by the federal government.

> The clause has nothing to do with the creation of a form of government. It is, in the strictest sense, a clause of compact. The parties to the agreement are the states. The general government is not a party to it, nor affected by it. If the clause stood alone in the constitution, it would mean precisely what it does now, and would be just as obligatory as it is now. Nothing can be plainer, then, than that this clause cannot be construed as vesting any power in the government, or in any of its departments, or in any of its officers; and this is the only provision in the constitution which at all relates to fugitives from labor.[23]

To further support his "compact" interpretation of Article IV, Chase contrasted the Fugitive Slave Clause with Article IV's Full Faith and Credit Clause.[24] After imposing a duty on each state to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State," Article IV there, and only there, gives Congress a

20. MATILDA SPEECH, *supra* note 17, at 20.

21. *Id.* at 19.

22. *Id.*

23. *Id.* at 20–21 (footnote omitted).

24 *Id.* at 21–22.

power to "by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."[25] Chase then posed the following challenge to the court: "Am I not right in saying that the framers of the constitution were aware, that without this special provision, congress would have no power to legislate upon the subject of the section?"[26] If the first clause, by its own force, "confers on Congress legislative power," he asked, "why add the second? Why add it, if legislative power is conferred by the general grant, or by any other provision in the constitution?"[27]

Nor could the Necessary and Proper Clause be used to support the Fugitive Slave Act. "[T]he general grant of legislative power is expressly confined to the enactment of laws, necessary and proper to carry into execution" only those enumerated powers that are vested in Congress.[28]

> The constitution restrains the operation of the state constitutions and the state laws, which would enfranchise the fugitive. It also binds the states to deliver him up on the claim of the master, and by necessary inference, it obliges them to provide a tribunal before which such claim may be asserted and tried, and by which such claims may be decided upon, and, if valid, enforced: but it confers no jot of legislative power on congress.[29]

Chase quoted the Tenth Amendment as authority for his claim that the power to enforce the duty to return runaway slaves is reserved to the states.[30]

Chase proceeded to connect his textual argument to the founders.

> The framers of the constitution were men of large experience, comprehensive knowledge, sound judgment, and great ability. Among them were Hamilton, and Madison, and Washington. Such men, in framing such an instrument would avoid all needless repetition. They would not incorporate into the constitution a special provision upon any subject unnecessarily. To them, therefore, the second clause of the section under consideration, must have appeared not only fit, but necessary. But if a special provision was necessary to enable congress to legislate in regard to the authentication and effect of records,

25. U.S. CONST. art. IV, § 1.

26. MATILDA SPEECH, *supra* note 17, at 22.

27. *Id.*

28. *Id.* at 21.

29. *Id.*

30. *Id.*

> why is not a special provision necessary to enable congress to legislate in regard to fugitive servants?[31]

Chase's argument failed to convince the local judge who remanded Matilda to the slave catchers. She was swiftly taken "down the river" to be sold at auction in New Orleans, her fate then lost to history.[32] Birney was then prosecuted and convicted on the charge of harboring a fugitive slave in violation of Ohio's black code.[33] The Supreme Court of Ohio reversed his conviction on the narrow ground that Birney lacked knowledge of Matilda's legal status, rather than the constitutional grounds asserted by Chase in his appeal of Birney's conviction.[34]

Chase's argument in the *Matilda* case was published as a pamphlet and distributed widely throughout the country where it elevated his visibility and provided the legal basis for other challenges to the constitutionality of the Fugitive Slave Act. In Wisconsin, for example, it constituted the main line of Byron Paine's successful defense of editor Sherman Booth, who had been charged under the Fugitive Slave Act of assisting in the escape of a captured slave.[35] Payne's challenge was successful,[36] that is, until the ruling was reversed by the U.S. Supreme Court in *Abelman v. Booth* in an opinion by Chief Justice Taney.[37]

Chase's legal defense of Matilda and other fugitives earned him the nickname the "attorney general for runaway negroes" from his critics in Kentucky.[38] "Chase soon was using the title with pride,

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31. *Id.* at 22. Chase made his argument in *Matilda* well before Spooner shifted the interpretive methodology of constitutional abolitionism from focusing on framers' intent to the legal or objective meaning of the text. *See* Barnett, *supra* note 1, at 199–205 (describing Spooner's interpretive approach). When, after Spooner's book was published, Chase made his argument in *Van Zandt* the next year, his methodology had changed. *See infra* text accompanying notes 40–61.

32. Blue, *supra* note 16, at 11.

33. *Id.*

34. *Id.*; *see also* HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE 45 (Peter Charles Hoffer & N. E. H. Hull eds., 1997).

35. BYRON PAINE, UNCONSTITUTIONALITY OF THE FUGITIVE ACT: ARGUMENT OF BYRON PAINE, ESQ., AND OPINION OF HON. A. D. SMITH 5–6, 18 (1854); *see also* Barnett, *supra* note 1, at 240–43 (discussing Payne's defense of Booth).

36. *In re* Booth, 3 Wis. 13, 18 (1854) (opinion of Smith, J.); *id.* at 67 (opinion of the court).

37. Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1859).

38. Blue, *supra* note 16, at 12.

although it was not meant as a compliment, for 'I never refused my help to any person black or white.'"[39]

His enumerated powers argument, like so many of the abolitionist constitutional claims, seems powerful and almost obvious when first encountered. Yet these arguments, and the men who developed them, are largely unknown today. They are rarely mentioned in law schools, even when the topic of slavery and the Constitution arises. In Part III of this Article, I will consider possible explanations for this widespread neglect.

Years later, in 1846, Chase would present a more developed version of this argument to the United States Supreme Court in the case of *Jones v. Van Zandt*.[40] In his *Van Zandt* brief, Chase renewed his structural objection to the Fugitive Slave Act as outside the enumerated powers of Congress. "[N]o power to legislate on the subject is conferred, unless by very remote implication, upon Congress, by the constitution."[41] To this he added a Due Process Clause objection of the sort that had become popular among constitutional abolitionists beginning with the writings of Theodore Dwight Weld in 1838.[42]

"Now, unless it can be shewn that no process of law at all, is the same thing as due process of law," Chase contended, "it must be admitted that the act which authorizes seizures without process, is repugnant to a constitution which expressly forbids it."[43] Slaves were entitled to the protection of the Clause, he argued, because they were persons. "It is vain to say that the fugitive is not a person: for the claim to him can be maintained only on the ground that he is a person."[44] Chase was here referring to the wording of the Fugitive Slave Clause, which begins, "[n]o *Person* held to Service or Labor in

39. *Id.* (referencing Chase's language a letter he sent to John T. Trowbridge in 1864).

40. Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847). The lawyer filing the formal appearance in the case was William Seward, who would serve with Chase in Lincoln's cabinet as the Secretary of State.

41. S.P. CHASE, AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF *WHARTON JONES V. VANZANDT* 72 (1847). In this pamphlet the defendant's name is spelled "Vanzandt," unlike in the United States Reports where it is spelled "Van Zandt."

42. *Compare id.* at 88–89 ("I submit, further, that the act is unconstitutional . . . [because i]t authorizes seizure and confinement, by private force, without legal process."), *with* THEODORE DWIGHT WELD, THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA 37–41 (4th ed. 1838). *See generally* Barnett, *supra* note 1, at 176–83 (discussing Weld's argument and situating it against Due Process Clause arguments on behalf of slave owners).

43. CHASE, *supra* note 41, at 89.

44. *Id.*

one State . . . ."[45] To show that fugitive slaves were considered persons under the Due Process Clause, Chase noted that, while the Virginia ratification convention had proposed a clause reading, "no free man shall be deprived of life, liberty, or property, but by the law of the land," Congress changed its scope to "[n]o person."[46]

Chase's Due Process Clause challenge rested on the "summary manner" by which slaves were to be recaptured under the Act.[47] Suppose an owner of a horse should find the animal in the possession of his neighbor and, "instead of resorting to due process of law, and the old fashioned replevin," were to simply seize the animal and "take him before *his own hired magistrate*, and prove his claim by affidavits."[48] Or if he claims a failure to provide services, "instead of suing him for breach of contract, let him drag his reluctant neighbor before his magistrate, establish his claim, and then remove him to his task."[49] Chase then asked, "How long would society hold together, if this principle were carried into general application?"[50]

Near the end of his brief, which in pamphlet form runs 107 pages, citing *Calder v. Bull*,[51] Chase identified "certain great principles of natural right and justice," which were intended "to establish as written law" in the Constitution, but "which exist independently of all such sanction."[52] These great principles are:

> No Legislature is omnipotent. No Legislature can make right wrong; or wrong, right No Legislature can make light, darkness; or darkness, light. No Legislature can make men, things; or things, men. Nor is any Legislature at liberty to disregard the fundamental principles of rectitude or justice. Whether restrained or not by constitutional provision, there are acts beyond any legitimate or binding legislative authority.[53]

Such acts beyond legislative authority include:

> The Legislature cannot authorize injustice by law; cannot nullify private contracts; cannot abrogate the seeurities [sic] of life, liberty and property, which, it is the very object of society, as

45. U.S. CONST. art. IV, § 2, cl. 3 (emphasis added).

46. CHASE, *supra* note 41, at 89.

47. *Id.* at 96.

48. *Id.*

49. *Id.*

50. *Id.*

51. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

52. CHASE, *supra* note 41, at 93.

53. *Id.*

> well as of our constitution of government, to provide; cannot make a man a judge in his own case; cannot repeal the laws of nature; cannot create any obligation to do wrong, or neglect duty. No court is bound to enforce unjust law; but, on the contrary, every court is bound, by prior and superior obligations, to abstain from enforcing such law.[54]

Chase then allowed that it "must be a clear case, doubtless, which will warrant a court in pronouncing a law so unjust that it ought not to be enforced; but, in a clear case, the path of duty is plain."[55]

Chase also made some methodological claims about constitutional interpretation. He countered a proslavery construction of the Constitution based on "the intention of [the] framers" by appealing to what he called the "plain import" of the text.[56] In today's parlance, he rejected framers' intent originalism in favor of public-meaning originalism. It is likely no coincidence that just the year before, Lysander Spooner made the case against reliance on framers' intent in his widely read book, *The Unconstitutionality of Slavery*.[57] Also like Spooner, Chase contended that natural rights should govern the construction of positive laws.[58] If there is a conceivable construction

54. *Id.* at 93–94.

55. *Id.* at 94.

56. *Id.* at 105.

57. *See* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845). Spooner developed his interpretive approach in response to abolitionist Wendell Phillips's use of James Madison's recently disclosed notes of the Philadelphia convention in his book, WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT; OR, EXTRACTS FROM THE MADISON PAPERS, ETC. (1844). *See* Barnett, *supra* note 1, at 203–05 (discussing how Spooner formulated his constitutional argument and the link between the arguments of Spooner and Phillips). Spooner was hopeful of Chase. "I have been in the habit of considering him the most important anti-slavery man in the west, and therefore I am anxious he should be on the right ground." Lysander Spooner, Letter to George Bradburn (December 7, 1846). But the cantankerous Spooner was also disappointed in Chase's failure to embrace some of Spooner's substantive arguments. "As to Chase, if I had him within arm's length, I would break every bone in his body, if I could not otherwise make him understand, and either yield to, or answer the arguments in my book." *Id.* A year later, Spooner assumed that a respectful but unsigned review of his book in the *Cincinnati Herald* was by Chase. *See* Lysander Spooner, Letter to George Bradburn (December 5, 1847) ("Did you see the Cincinnati Herald's review of my book? It was respectful towards me, and complimentary of the ability of the book. It was such a farrago of absurd crotchets! It appeared as editorial—but I conjecture it was from Chase.").

58. Spooner's emphatic use of this language from Chief Justice Marshall's opinion in *United States v. Fisher* was picked up and emulated by other constitutional abolitionists:

that would harmonize positive and natural law, it should be adopted by the courts. Indeed, Chase adopts a "presumption in favor of liberty."[59]

In addition to this methodological claim, Chase employed a standard abolitionist technique of meeting claims about the supposed intentions of the framers with an opposite supposition. Given that the preexisting state constitutions had "guarantied the absolute, inherent and inalienable rights of all the inhabitants or citizens," it could "hardly be supposed that any state, especially any non-slaveholding state, would have agreed to a constitution which would withdraw, from any of these rights, the ample shield of the fundamental law, and leave them exposed to the almost unlimited discretion of Congress."[60] As authority for this claim, Chase quoted the words of the Tenth Amendment.[61]

Notice here another forgotten fact. Before the Civil War, it was the Slave Power who enlisted the power of the federal government to impose the Fugitive Slave Acts. And it was the Northern states who complained about the interference with their rights to protect their free blacks from being kidnaped by slave catchers and sold down the river. "States' rights" was as much an antislavery doctrine as it was a proslavery doctrine.

Chase's argument in *Van Zandt*, however, came four years after the Court had rejected similar arguments in the case of *Prigg v. Pennsylvania*.[62] In *Prigg*, Justice Story upheld the constitutionality of the Fugitive Slave Act by adopting an expansive interpretation of the Necessary and Proper Clause.

> No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers, or enact laws beyond the powers delegated to it by the Constitution; but it has, on

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> Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.

United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805).

59. CHASE, *supra* note 41, at 97 ("It is certainly incumbent, then, on those who claim, that, by the constitution, the general law and presumption in favor of liberty are set aside to give room for this right of recaption, to make out a clear case, and produce express words.").

60. *Id.* at 106.

61. *See id.* ("Am I mistaken, then, in thinking that the whole argument establishes the proposition, that the power to legislate, in reference to escaping servants, is 'a power not delegated to the United States by the Constitution, nor prohibited by it to the states, and is, therefore, reserved to the states respectively, or, to the people?' ").

62. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

> various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.[63]

Though widely condemned at the time by abolitionists, some constitutional abolitionists like Joel Tiffany would later assert that the precedent provided by *Prigg* empowered Congress to legislate against slavery.[64] Later still, some Republicans in Congress would also claim *Prigg* as authority for its Reconstruction legislation. None of this later use of *Prigg* undermines the weakness of Story's analysis of the enumerated powers.

Chase's argument in the *Matilda* case in the 1830s shows that Story's capacious reading of the Necessary and Proper Clause was far from inevitable.[65] Story's analysis only seems compelling when the arguments on the other side are omitted. We are accustomed to hearing that a sweeping interpretation of the Necessary and Proper Clause is needed to ensure, for example, the constitutionality of Civil Rights laws. Yet, Story's use of the Necessary and Proper Clause in *Prigg* shows that a broad reading of congressional power can also be used to uphold evil.

Because Chief Justice Taney had previously adopted a rule that denied oral argument on matters that had already been adjudicated by the Court, Chase's challenge in the *Van Zandt* case was dismissed on the pleadings and he never appeared before the Court to present his argument in person.[66] But his *Van Zandt* brief was also published as a pamphlet and received a wide circulation. The case "added

63. *Id.* at 618–19.

64. *See* JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT 99–100 (1849). I discuss Tiffany's views in Barnett, *supra* note 1, at 221–31.

65. *See supra* Part I.B.

66. *See, e.g.*, JULES LOBEL, SUCCESS WITHOUT VICTORY 61 (2003) ("Chief Justice Roger B. Taney objected to hearing oral argument [in *Van Zandt*], for he thought the constitutional question was already settled."); *see also* Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229–30 (1847) ("This court has already, after much deliberation, decided that the act of February 12th, 1793, was not repugnant to the constitution. . . . We do not now propose to review at length the reasoning on which this act has been pronounced constitutional. . . . That this act of Congress, then, is not repugnant to the constitution, must be considered as among the settled adjudications of this court." (citing *Prigg*, 41 U.S. 539)).

considerable luster to Chase's national reputation," as both a principled opponent of slavery and a defender of the Constitution.[67]

C. Chase as an Antislavery Political Leader

Unlike the Garrisonian abolitionists who eschewed political action,[68] Chase engaged in electoral politics to pursue his antislavery agenda. In the 1840s, together with Birney and others, Chase helped form the Liberty Party, and became one of its leaders. Chase came to the Liberty Party after a less than successful initial association with the Whig Party.[69]

Even as he was working to build the Liberty and then the Free Soil parties, Chase came to view himself as a Democrat. Like others, he sometimes called himself an "Independent Democrat" or a "Free Democrat," a movement he hoped would one day capture the heart of that party.[70] Part of his motivation was practical as "Cincinnati was solidly Democratic . . . ."[71] But principle also played a major role. Chase was of the "belief, confirmed after years of intense study, that Jeffersonian idealism was basically much more appropriate to the abolitionist objective than the Whig program of economic development through national planning, which a strong central government would devise and execute."[72] "I do not concur in Whig views of public policy," he wrote, "either as an antislavery man or as simply a citizen."[73] Chase "opposed a high tariff, a recharter of the now defunct Bank of the United States, (a Whig priority), or any system of government support for corporate banking."[74] Moreover, even Chase's "views on slavery comported with Jeffersonian states' rights doctrine. His arguments on fugitive slave cases consistently proclaimed slavery to be the creature of local custom and law."[75]

That Chase came from a Democratic background will explain much about his political sympathies: his strict constructionist views of the Constitution, his belief in laissez-faire, his opposition to economic

67. GOODWIN, *supra* note 6, at 113.

68. *See generally* PERRY, *supra* note 7.

69. Chase was elected to the Cincinnati city council as a member of the Whig Party in 1840, but, despite Whig triumphs in most of the states, he lost reelection due to his refusal to support liquor licenses. *See* NIVEN, *supra* note 10, at 58–59.

70. *Id.* at 146.

71. *Id.* at 88.

72. *Id.*

73. *Id.* at 96 (noting that Chase's comments were made when he turned down an invitation to an antislavery conference in Columbus, Ohio).

74. *Id.*

75. *Id.* at 88.

(as opposed to revenue) tariffs, and his support of hard money over paper. It also explains the antipathy that later developed towards him by the Whigs who dominated Northern Ohio, and, later, by the former Whigs who joined the new Republican Party. Indeed, in the 1850s, he initially opposed adopting the name "Republican" for the new antislavery party in favor of what he sometimes called himself, an independent or free Democrat. This background also helps to explain the tensions that arose between former-Democrat Chase and ex-Whig Abraham Lincoln.

In 1845, Chase addressed the Southern and Western Convention of the newly formed Liberty Party on the question of the constitutionality of slavery. No less than one hundred thousand copies of Chase's speech were printed and circulated in pamphlet form.[76] In his speech, Chase declined to adopt the view expressed by other abolitionists "that no slaveholding, in any State of the Union, is compatible with a true and just construction of the Constitution,"[77] but favored instead "its removal from each State by State authority."[78] On the other hand, like every constitutional abolitionist I have surveyed, Chase "would have it removed at once from all places under the exclusive jurisdiction of the National Government"—meaning the District of Columbia and the territories—pursuant to the "true sense and spirit" of the "Constitution rightly construed and administered."[79]

In sum, Chase contended that Congress had the power to outlaw slavery in the District of Columbia and in the territories. Once again, given that Congress has a police power in these places akin to the police powers of states within their territories, this would seem like an obvious proposition. And, yet, it was vehemently denied by proslavery Democrats in Congress, beginning with an 1836 report of a special committee of the House of Representatives that claimed abolishing slavery would deny slaveholders their property rights in violation of the Due Process Clause of the Fifth Amendment.[80] Twenty years later in *Dred Scot*, Chief Justice Taney would extend the same Due Process clause reasoning to the territories.[81]

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76. Charles Dexter Cleveland, *Prefatory Remarks* to Salmon Portland Chase, The Address of the Southern and Western Liberty Convention (June 11, 1845) [hereinafter Liberty Convention Address] in SALMON PORTLAND CHASE & CHARLES DEXTER CLEVELAND, ANTI-SLAVERY ADDRESSES OF 1844 AND 1845, at 72 (1867).

77. Chase, Liberty Convention Address, *supra* note 76, at 101.

78. *Id.* at 121.

79. *Id.*

80. *See* Barnett *supra* note 1, at 179–80 (discussing the Due Process Clause reasoning of the House select committee report and the antislavery response developed by Theodore Dwight Weld).

81. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

Yet, if Chase and the other constitutional abolitionists were right in their reading of the Constitution, and Story and Taney were wrong, then this means that, while the Constitution accommodated slavery in the states in which it already existed, the Constitution was otherwise an antislavery document. And, if this is so, then the persistent criticism of the Founders for having ratified slavery is, at best, an exaggeration.

In his 1845 Cincinnati address, Chase reiterated the standard abolitionist positions that "slaveholding is contrary to natural right and justice" and therefore "can subsist nowhere without the sanction and aid of positive legislation."[82] From the fact that the Constitution, "expressly prohibits Congress from depriving any person of liberty without due process of law,"[83] Chase derived the following antislavery political program:

(1) "repealing all legislation, and discontinuing all action, in favor of slavery, at home and abroad;"

(2) "prohibiting the practice of slaveholding in all places of exclusive national jurisdiction, in the District of Columbia, in American vessels upon the seas, in forts, arsenals, navy yards;"

(3) "forbidding the employment of slaves upon any public work;"

(4) "adopting resolutions in Congress, declaring that slaveholding, in all States created out of national territories, is unconstitutional, and recommending to the others the immediate adoption of measures for its extinction within their respective limits;" and

(5) electing and appointing to public office only those who "openly avow our principles, and will honestly carry out our measures."[84]

Chase maintained that the "constitutionality of this line of action cannot be successfully impeached."[85]

Chase's program was enormously influential. Historian Harold Hyman described Chase as "the antislavery crusaders' premier legal strategist."[86] Historian Eric Foner has observed that, in these and other strenuous efforts, "Chase developed an interpretation of American history which convinced thousands of northerners that anti-

82. Chase, Liberty Convention Address, *supra* note 76, at 101.

83. *Id.*

84. *Id.* at 100.

85. *Id.*

86. HYMAN, *supra* note 34, at 168.

slavery was the intended policy of the founders of the nation, and was fully compatible with the Constitution."[87] Within a few years, it provided the core position of a new antislavery political party that would supplant the Whigs and capture the presidency and Congress. "Chase's interpretation of the Constitution," wrote Foner, "formed the legal basis for the political program which was created by the Liberty Party and inherited in large part by the Free Soilers and Republicans."[88] "[B]ecause of Chase's efforts," this antislavery interpretation of the Constitution "eventually came to form the constitutional basis of the Republican Party program."[89]

That the Republican Party's national platforms for the elections of 1856 and 1860 largely adopted Chase's constitutional views on slavery helps explain why Lincoln's victory in 1860 provoked the Southern states to secede. Though Lincoln insisted he would not interfere with slavery where it existed—a doctrine on which Chase also insisted over the vigorous dissent of Lysander Spooner and some other constitutional abolitionists—Southerners apparently feared that the Republican program would hasten the extinction of slavery throughout the United States.

The Liberty Party included many who, like Spooner, believed slavery to be unconstitutional within the existing slave states. Its strategy was to take enough votes away from the Whigs and Democrats that they would have to accommodate its antislavery demands.[90] When the single-issue, antislavery Liberty Party failed to provide the leverage between the Whigs and Democrats its founders were seeking, they attempted to broaden their appeal by founding the Free Soil Party around an antislavery program that conceded the power of existing states to perpetuate slavery within their borders—as Chase had long maintained.[91] (Because of this, the Liberty Party continued in greatly diminished form.[92]) Chase coined its motto: "Free Soil, Free Labor and Free Men."[93]

Because he conceded that slavery was constitutional in the original slave states, today Chase is considered to be an "antislavery"

87. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73 (1970).

88. *Id.* at 87.

89. *Id.* at 75.

90. *See* SEWELL, *supra* note 3, at 43–79 (describing the formation and strategy of the Liberty Party). Spooner himself remained apolitical, though he generally kept these views quiet lest he alienate his fans among the political abolitionists.

91. *See id.* at 170–201 (describing formation of the Free Soil Party).

92. *See id.* at 247.

93. *See* NIVEN, *supra* note 10, at 110.

moderate, with the term "abolitionist" reserved to those "radicals" who would see slavery abolished throughout the Union. But Sewell makes clear that this "dispute was one among friends, since both sides equally desired the overthrow of slavery everywhere."[94] As Sewell puts it, "the great mass of Free Soilers were as much committed to uprooting slavery everywhere as were the most dedicated Garrisonians."[95] Indeed, given that the Garrisonian abolitionists maintained that the Constitution was a proslavery document because they too believed it authorized slavery in the South, the distinction between abolitionist and antislavery becomes considerably muddy when the interpretation of the Constitution is at issue.

From 1849 to 1855, Chase served as a United States Senator from Ohio as a member of the Free Soil Party.[96] The manner by which he attained this position would haunt him politically for the rest of his career. When the Free Soilers successfully obtained the balance of power in the 1848 election for the state legislature, Chase struck a deal with the Democrats whereby they would agree to abolish the black codes that imposed legal discrimination on Ohio's free blacks, and they would vote to name Chase a U.S. Senator.[97] The Democrats agreed to, and fulfilled, both conditions.

This deal infuriated the disappointed Whigs from the Northern part of the state and they would never forget or forgive Chase for what they said was his ruthless ambition. "It lost to him at once and forever the confidence of every Whig of middle age in Ohio," said one fellow politician.[98] "Its shadow never wholly dispelled, always fell upon him, and hovered near and darkened his pathway at critical places in his political after life."[99] Twelve years later, the Whig enmity towards the ex-Democrat Chase lingered. In part because the Ohio delegation to the 1860 Republican presidential convention in Chicago was divided, with some of his nominal Ohio supporters working against him behind the scenes, Chase's candidacy for President was fatally undermined, eventually allowing the former-Whig Abraham Lincoln to capture the nomination.[100]

In Washington as a Free Soiler, Chase was marginalized in the Senate. Still, he forged lasting bonds with the few other antislavery senators he met there, most notably Massachusetts Senator Charles Sumner, the only other Free Soiler, who in 1851, like Chase two years

94. SEWELL, *supra* note 3, at 90.

95. *Id.* at 189.

96. *Id.* at 204–06.

97. *Id.* at 180.

98. GOODWIN, *supra* note 6, at 136.

99. *Id.*

100. *See id.*

before, had been sent to the Senate in a deal struck with Democrats. Sumner considered Chase to be among his closest and most principled allies in the fight against the Southern Slave Power.[101] In one lengthy floor speech, Democrat Senator Stephen Douglas of Illinois repeatedly condemned Sumner and Chase together as the "abolitionist confederates," saying they were "the pure, unadulterated representatives of Abolitionism, Free Soilism, Niggerism in the Congress of the United States."[102]

In opposing the repeal of the Missouri Comprise, "Chase assumed the leadership of the antislavery forces."[103] In collaboration with Sumner and Joshua Giddings, he drafted an "Appeal of the Independent Democrats in Congress to the People of the United States," which was "a brilliantly effective piece of antislavery propaganda."[104] "[T]he Appeal was reprinted in pamphlet form to organize opposition to the Kansas-Nebraska Act."[105] Chase's past connections to the more radical elements in Congress would be a potent source of his clout during the Lincoln presidency.

After the formation of the Republican Party, Chase was elected the governor of Ohio in 1855 on the Republican ticket, making him the first Republican governor in any state and the highest Republican office-holder in the country at that time.[106] After successfully dealing with a financial crisis involving the embezzlement by the outgoing Democratic treasurer of some half a million dollars, Chase was reelected Governor in 1857. The Ohio governorship was a largely powerless position, but Chase was responsible for shepherding several antislavery resolutions through the legislature.

After he failed in his bid for the Republican presidential nomination, the Ohio legislature returned Chase to the Senate, this time as a Republican, in 1861. When Lincoln appointed him secretary of the treasury, Chase vacated his Senate seat after serving all of two days. (He was replaced by Clevelander and former-Whig John Sherman, the future author of the Sherman Antitrust Act and brother of Union General William Tecumseh Sherman.)

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101. Chase's close relationship with Sumner is discussed throughout DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR (Sourcebooks, 2009). Chase comes off better in Sumner's biography than he does in his own, most likely reflecting Sumner's high regard for his Free Soil antislavery colleague.

102. *Id.* at 210.

103. GOODWIN, *supra* note 6, at 161.

104. DONALD, *supra* note 101, at 210. It was the "Appeal" that provoked the wrath of Douglas who was sponsoring the repeal of the Compromise. *Id.*

105. GOODWIN, *supra* note 6, at 162.

106. NIVEN, *supra* note 10, at 175–76. Except where noted, the biographical details in the next several paragraphs are taken from this source.

Chase's "appointment of thousands of Treasury agents, many of whom were black and/or female, was an important step toward the nationwide implementation of one of his major goals: broadening opportunities for segments of society usually neglected in mid-nineteenth-century urban America."[107] Chase was "alone among cabinet heads [when he] hired thousands of blacks and females as civil servants and even placed an impressive number of black males in supervisory positions over white females."[108] Also, "[a]lone among Lincoln's cabinet, Chase openly called for the abolition of slavery as early as 1862 and privately criticized the president for being so dilatory on the subject."[109]

At the beginning of the war when Union casualties overwhelmed the hospitals in Washington, Secretary Chase, like others, opened his large house at Sixth and E as a hospital ward. Among the gravely wounded soldiers who were nursed there was future Justice Oliver Wendell Holmes, Jr.[110]

As treasury secretary, Chase was charged with the herculean task of financing the Civil War, preferably without raising taxes. His success at this endeavor made him invaluable to Lincoln's administration. "Chase had been indispensable to the war effort. More than any other member of Lincoln's cabinet, he realized the need for fiscal solvency as well as military supremacy if the Union was to survive."[111] Eventually, and reluctantly given his views of hard money, Chase acquiesced to the Republicans' plan for paper money. But never shy about promoting himself politically, Chase saw to it that his picture appeared on the one dollar bill,[112] earning him the new nickname of "Old Mr. Greenbacks" - a title that, as we will see, later became ironic.

Chase's supreme competence in financing the war, along with his close ties to the radical Republicans in Congress, gave him political leverage with Lincoln, the former Whig, who came late in his career to the antislavery cause and who was distrusted by the radicals. Initially, Chase's working relationship with Lincoln was warm. Early in the war, they sojourned together on a treasury cutter off the coast of Virginia, where, with Secretary of War Edwin Stanton, they would plan a

107. JONATHAN LURIE, THE CHASE COURT 22 (2004).

108. HYMAN, *supra* note 34, at 81.

109. LURIE, *supra* note 107, at 23.

110. NIVEN, *supra* note 10, at 269.

111. LURIE, *supra* note 107, at 22.

112. GOODWIN, *supra* note 6, at 510. Chase's picture later adorned the $10,000 bill.

military invasion to secure the port of Norfolk. The three men even personally went ashore to survey possible sites for landing troops.[113]

Over time, however, Chase's often stiff and prickly personality, his incessant criticisms of Lincoln's vacillation, coupled with his public political maneuvering for the Republican presidential nomination in 1864, put Chase at odds with the President.[114] As Lincoln became increasingly close to his Secretary of State, William Seward, his relationship with his Secretary of Treasury deteriorated. In June of that year, after Chase protested Lincoln's appointment of someone to the Treasury department without his approval, Chase tendered his resignation (as he had done several times before). Chase expected Lincoln to yield, but he miscalculated. By this time, Lincoln's Emancipation Proclamation, as well as the success of the military campaign, had greatly raised Lincoln's own standing with the radicals in Congress. He could now afford to be rid of his difficult secretary.

So, to Chase's surprise, Lincoln accepted Chase's resignation with considerable relief.[115] When a number of Chase supporters protested privately to Lincoln, knowing his words would get back to Chase, he reassured them that, "if I have the opportunity, I will make him Chief Justice of the United States."[116] Perhaps in part because of this, when Chase's bid for the 1864 Republican presidential nomination quickly collapsed, he nevertheless actively campaigned for Lincoln and the Republicans, traveling by train, boat, and horseback throughout Ohio, Kentucky, Pennsylvania, Michigan, Illinois, and Missouri.[117] Such travel was arduous under the best of circumstances, but these were dangerous times. "En route to Toledo Chase was recognized and several McClellan Democrats tried to force him off the train. He held his ground and reached his destination safely."[118]

Among the towns at which Chase spoke during the 1864 campaign was Covington, Kentucky, where he had previously spoken on Lincoln's behalf in 1860, and where the Northern Kentucky University's Salmon P. Chase College of Law is now named after him. On that day in October when Chase spoke in Covington, Chief

113. For two accounts of this remarkable tale, see NIVEN, *supra* note 10, at 287–89, and GOODWIN, *supra* note 6, at 436–39.

114. Chase's relationship with Lincoln is vividly described at length in GOODWIN, *supra* note 6, at 280–639.

115. *See id.* at 631–39 (describing the events surrounding Chase's resignation).

116. *Id.* at 635.

117. *Id.* at 657.

118. NIVEN, *supra* note 10, at 373.

Justice Roger Taney died.[119] When Lincoln came under pressure by several of Chase's powerful rivals for the Chief Justiceship, he characteristically delayed his decision. But as soon as his reelection was secured, Lincoln nominated Chase, his political nemesis, to be the sixth Chief Justice of the United States.

In a remarkable turn of events, the racist author of *Dred Scott* was succeeded as Chief Justice by Salmon Portland Chase, the "attorney general for fugitive slaves."[120] Lincoln assured critics of his pick that "[h]e trusted that Chase would help secure the right of the black man, for which he had fought throughout his career, a belief that outweighed concerns about Chase's restless temperament."[121]

II. THE CHIEF JUSTICESHIP OF SALMON P. CHASE

A. Chase's Duties as Chief Justice

On March 4, 1864, Chief Justice of the United States, Salmon P. Chase, administered the oath of office to his political rival Abraham Lincoln, inaugurating Lincoln's second term. The evening before, Chase was visited in his Sixth Street home by the radical abolitionist orator, and future U.S. Marshall of the District of Columbia, Frederick Douglass. Douglass recalled helping Chase's dynamic daughter Kate "in placing over her honored father's shoulders the new robe then being made in which he was to administer the oath to the reelected President."[122] Douglass recalled the "early anti-slavery days" of their first meeting, when Chase had "welcomed [Douglass] to his home and his table when to do so was a strange thing."[123]

Douglass's faith in Chase was not to be disappointed. Chase readily agreed to the proposal by his friend Charles Sumner that Massachusetts attorney John Rock be admitted to the Supreme Court bar. The previous year, Rock, a black, had been denied admission by the Taney Court on the basis of his race. Now, upon Sumner's formal motion, Rock was sworn in as the first black lawyer admitted to the Supreme Court bar. *Harper's Weekly* observed that this event represented an "extraordinary reversal" of *Dred Scott*, and would "be regarded by the future historian as a remarkable indication of the revolution which is going on in the sentiment of a great people."[124]

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119. *Id.*

120. FONER, *supra* note 87, at 77.

121. GOODWIN, *supra* note 6, at 681.

122. *Id.* at 697.

123. *Id.*

124. *Id.* at 681 (quoting *John H. Rock, Colored Counselor*, 9 HARPER'S WKLY. 124 (February 25, 1865)).

When Lincoln was murdered by the Maryland-born actor and Southern sympathizer John Wilkes Booth on April 14, 1865, Chief Justice Chase administered the oath of office to Vice President Andrew Johnson, a Democrat from Tennessee. Two years later, when Johnson was impeached by the Republican House of Representatives for resisting its efforts to "reconstruct" the South, Chase presided over his trial in the Senate.

Without any precedent to guide him, the physically imposing Chase swept into the Senate chamber in his flowing judicial robes, dramatically dominating the scene.[125] Chase assumed control of the proceedings and insisted on them being administered as a judicial rather than a political tribunal. In part because of this, Johnson escaped conviction and removal from office by a single vote.

Chase conducted Johnson's trial "in a manner that diminished public anxiety about a rigged judgment either way and so fended off possibly recrudescing mob violence."[126] But it also cost him political support among congressional Republicans. "[O]ld comrades of the antislavery crusade berated him for his scrupulously neutral conduct during the impeachment. His relative evenhandedness at the trial . . . helped to kill his chances to be either party's 1868 presidential candidate . . . ."[127]

B. Chase's Opinions on Reconstruction

As Chief Justice, Chase had two opinions affecting Reconstruction that vindicated Lincoln's confidence in him. One, *Texas v. White*, is well known, though criticized. The other, *In re Turner*, a case he decided while riding circuit, is now forgotten.[128]

1. *In re Turner*

In re Turner[129] involved Elizabeth Turner, a "young person of color" in Maryland who was freed after the passage of its new Constitution.[130] After her emancipation, she and others were gathered by local authorities and pressed into apprenticeships, typically to their previous owners. The century-long fight by Southern Democrats to reimpose the subordination of the freed blacks after the abolition of

125. NIVEN, *supra* note 10, at 3–4.

126. HYMAN, *supra* note 34, at 167.

127. *Id.* at 138.

128. *See generally* HYMAN, *supra* note 34 (discussing the significance of *In re Turner* and *Texas v. White*); LURIE, *supra* note 107, at 26–27, 67–68 (same).

129. *In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

130. HYMAN, *supra* note 34, at 124. The facts surrounding *Turner* related in the following paragraphs are taken from *id.* at 124–26 unless otherwise noted.

slavery was just beginning. Turner's apprenticeship to her former master had been entered into by her mother on her behalf. After she came of age, Turner brought suit for her freedom.

In 1867, Chase heard the case as a circuit court judge in the same courtroom in which Chief Justice Taney delivered his circuit court opinion in *Ex Parte Merryman*.[131] Turner's lawyer argued that Turner's apprenticeship contract, entered into by her mother, violated the Thirteenth Amendment and the Civil Rights Act of 1866.

In a case of first impression, Chase agreed and issued a writ of habeas corpus for Turner. Chase ruled that the apprenticeship contract constituted involuntary servitude in violation of the Thirteenth Amendment.[132] He also ruled that, because it did not conform to Maryland regulations concerning indentures of whites, the indenture was also in violation of the Civil Rights Act.[133] He then went on to rule that the Civil Rights Act was constitutional under Congress's enforcement powers under the Thirteenth Amendment a then-controversial position, even among some Republicans in Congress.[134] Notably, his decision affirmed that a woman such as Turner was among those protected by both the Thirteenth Amendment and by the reference to "all persons" in the Civil Rights Act. As we will see, this assumption about the legal equality of women will reappear at the end of Chase's life.

Harold Hyman tells us that Chase hoped that the *Turner* case would make it to the Supreme Court to provide a national platform on which "to clarify in concrete, workaday terms the ways that the Thirteenth Amendment and the Civil Rights Act had altered federalism."[135] To Chase, "even a black female juvenile who as a slave had almost no legal rights was [now] a national citizen, according to the Civil Rights Act,"[136] a proposition that was not completely accepted until the ratification of the Fourteenth Amendment. Chase

131. *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (holding that Congress, and not the President, has the power to suspend habeas corpus). President Lincoln disregarded this decision.

132. *In re* Turner, 24 F. Cas. at 339 ("The first clause of the thirteenth amendment to the constitution of the United States interdicts slavery and involuntary servitude . . . . The alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the amendment.").

133. *Id.* ("[T]he 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 [the Civil Rights Act] . . . .").

134. *Id.*

135. HYMAN, *supra* note 34, at 131.

136. *Id.*

believed that his *Turner* decision "resolved inarguably not only the issue of blacks' legal rights and status of both in the former slave states and throughout the nation but also of all Americans' basic civil rights."[137] According to Hyman, "Elizabeth Turner's situation caught Chase's conscience because slavery, though illegal, was regenerating under covert guises provided by states' black codes."[138]

Turner never made it to the Supreme Court. But Chase's 1867 ruling protecting the citizenship rights of blacks, and other like actions, contributed to his failure to capture the Democratic presidential nomination in 1868.[139] Some Democrats hoped, with the antislavery activist Chase as its standard bearer, "the party could advertise itself as purged of Copperheadism, a reformed and penitent new party."[140] But "Chase and his supporters failed adequately to gauge the passion with which unregenerate Democrats viewed his antislavery past, wartime record, role in the Johnson impeachment, and postwar rulings on the legal status of emancipated blacks like Elizabeth Turner."[141] At the same time, his impartial conduct while presiding over Johnson's impeachment trial in the Senate in 1867 alienated him from some of his former radical Republican allies.[142]

Whatever else can be said about Chase's presidential ambitions, he always expected the presidency on his terms, rather than deviate from his core principles to acquire his coveted prize. Perhaps this fact undercuts to some degree the harsh assessments of his character discussed below.

2. *Texas v. White*

In *Texas v. White*[143] the Court considered a claim by the provisional reconstruction government of Texas that United States bonds owned by Texas since 1850 had been illegally sold by the Confederate state legislature during the American Civil War.[144] The

137. *Id.*

138. *Id.* at 135.

139. *See id.* at 133 ("[*In re Turner*] imposed federal standards on private labor contracts sanctioned by a state and on behalf of a black woman. . . . [Such a ruling] made Chase politically unacceptable as a presidential candidate in 1868 to white social conservatives in both parties, North and South, but particularly unacceptable to Democrats.").

140. *Id.* at 142.

141. *Id.*

142. *See id.* at 138 (noting that Chase's "evenhandedness at the [impeachment] trial . . . helped to kill his chances to be either party's 1868 presidential candidate").

143. Texas v. White, 74 U.S. (7 Wall.) 700 (1869).

144. The facts surrounding *Texas v. White* are taken from HYMAN, *supra* note 34, at 140–50. *See also* LURIE, *supra* note 107, at 67–68.

Court ruled that Texas had remained a state ever since it first joined the Union, despite its joining the Confederate States of America and its being under military rule at the time of the decision in the case. For this reason, the ordinances of secession, and all the acts of the legislatures within seceding states intended to give effect to such ordinances, were "absolutely null."[145]

The case was politically tricky. By the time the suit was filed, Republicans in Congress were opposing President Johnson's reconstruction policy of extending swift recognition of southern state governments upon their ratification of the Thirteenth Amendment. Some Republicans began to abandon the position adopted by Lincoln and others that the states had never left the Union. Instead, they considered the South as legally similar to conquered provinces over which they could exercise the same authority as they had to regulate territories. On this theory, the Supreme Court should reject jurisdiction in the case because Texas, as yet, had no legally recognized government.

Conversely, Democrats wanted the Court to acknowledge the existence of an official state government in Texas. Such a ruling would have the effect of accepting Texas as fully restored to its place in the Union and thus render unconstitutional the Military Reconstruction Act, which listed Texas as a "rebel State[]" with reduced status.[146] Wall Street was also concerned with the case, being opposed to any actions that threatened bondholders and investors. For this reason, as Hyman observes, Chase's decision to assign himself the writing of the majority opinion, rather than dodge the task, was not one that "a truly driven would-be presidential candidate or mere placeholder" would have made.[147]

In his opinion upholding the jurisdiction of the Court, Chase began by identifying what is meant by "state." He distinguished the territory and people of a state, which remained in the Union, from its government, which was hostile to the United States and therefore properly unrepresented in Congress. In the text of the Constitution, wrote Chase, "a plain distinction is made between a State and the government of a State."[148]

Chase then affirmed Lincoln's position that the Southern states, properly defined, had never legally left the Union. Although the states continued to maintain their separate existence, they were bound in perpetuity to the Union until they received its consent for them to secede. The Articles of Confederation, said Chase, had "solemnly

145. *White*, 74 U.S. at 726.

146. HYMAN, *supra* note 34, at 146.

147. *Id.* at 147.

148. *White*, 74 U.S. at 721.

declared" this union to "be perpetual."[149] And the Constitution was created "to form a more perfect Union."[150] "What can be indissoluble," he asked, "if a perpetual Union, made more perfect, is not?"[151] In what may be the most famous line of any Chase opinion, he wrote: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[152]

So, when

> Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.[153]

Because the government of the state of Texas was acting unconstitutionally and illegally when it refused its obedience to the Constitution, it could properly be denied representation in Congress until it was reconstructed to establish a republican form of government for all its citizens, including those persons who had been emancipated from bondage. But because both presidential and congressional reconstruction policies had resurrected its government, that provisional government had standing to sue.

Having affirmed that the state of Texas had remained within the Union, what was the legal status of the actions taken by its government while it was in open rebellion against the United States? Chase answered that there were two categories of state action. First were those acts that are "necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate . . . ."[154] These and other similar acts, "would be valid if emanating from a lawful government," and therefore "must be regarded in general as

149. *Id.* at 725.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 726.

154. *Id.* at 733.

valid when proceeding from an actual, though unlawful, government."[155]

In contrast were acts "in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens."[156] These "and other acts of like nature, must, in general, be regarded as invalid and void."[157] Because the particular act of the rebellious government of Texas in selling the bonds, unlike many of its other actions of maintaining the peace, was done in aid of treason and insurrection, it was null and void. "It follows that the title of the State was not divested by the act of the insurgent government in entering into this contract."[158]

Chase's distinction between the territory and people of a state and its government harkened back to the Supreme Court's first great constitutional decision in *Chisholm v. Georgia*,[159] where the Court found that, because sovereignty resided in the people as individuals rather than in the government of their state, individuals of one state may sue the government of the other, as apparently authorized by the Constitution, and that state governments cannot plead sovereign immunity in defense.[160]

Chase's opinion also harkened back to his ruling in *Turner* that blacks were now citizens of the United States. After grounding the authority of Congress to suppress the rebellion in "the power to suppress insurrection and carry on war," he derived the power to reconstruct the governments of the rebellious states from "the obligation of the United States to guarantee to every State in the Union a republican form of government."[161] Because "[t]he new freemen necessarily became part of the people, and the people still constituted the State," he concluded, "it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty."[162] In other words, the freeman were part of the people who deserved representation in any republican government,

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 734.

159. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

160. *See* Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007) (discussing the significance of *Chisholm* despite being infrequently taught in law schools).

161. *White*, 74 U.S. at 727.

162. *Id.* at 727–29.

and it was Congress's constitutional duty to guarantee to them that form of government by means of reconstruction.[163]

Had Chase been guided solely by his political ambition, he would have attempted to please either the Republicans, by denying jurisdiction, or the Democrats, by upholding the sale of the bonds and vindicating the legal status of the existing government of Texas, which would then entitle it, and all other states with provisional governments, to immediate representation in Congress. Instead, his decision in *Texas v. White* pleased no one entirely, while remaining true to his vision of the Union, which he shared with the murdered President who had nominated him to be Chief Justice.

C. Chase on the Enumerated Powers of Congress

Chase decided two cases concerning the scope of Congress's power under the Necessary and Proper Clause that continue to resonate today. The first is still good law, and is consistent with the majority in *NFIB v. Sebelius*[164] who found that the Affordable Care Act's individual insurance mandate was beyond the power of Congress under the Commerce and Necessary and Proper Clauses. The second was quickly reversed by the Court itself after the completion of what amounted to a court packing scheme by Congressional Republicans.

1. *United States v. Dewitt*

The very first Supreme Court decision invalidating an act of Congress for exceeding its powers under the Commerce Clause was *United States v. Dewitt.*[165] In 1867, Congress enacted a law prohibiting both the interstate and intrastate sale of a mixture of "naphtha and illuminating oils" or "oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit."[166] The violation of this prohibition was a misdemeanor punishable by fine or imprisonment.[167] In his opinion for the Court, Chief Justice Chase posed the question presented as whether "Congress [has] power, under the Constitution, to prohibit trade within the limits of a State?"[168]

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163. Other more radical constitutional abolitionists had contended that this had always been the case, and therefore the Guarantee Clause empowered Congress to protect blacks even in states that authorized slavery. *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 136–37 (1972).

164. NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

165. United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

166. *Id.* at 42.

167. *Id.*

168. *Id.* at 43.

Chase began his analysis by affirming the following first principle: The "express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States."[169] Notice that Chase referred not merely to the internal *commerce* of a state, but also to its "trade and business," which is a broader category.[170] The only exception to the prohibition on congressional interference with the internal trade and business of states, Chase said, is when doing so is "a necessary and proper means for carrying into execution some other power expressly granted or vested."[171]

First, he rejected the analogy to a statute that uses the tax power to regulate "the business of distilling liquors, and the mode of packing various manufactured articles."[172] The analogy fails because, with the statute under consideration, "no tax is imposed on the oils the sale of which is prohibited."[173] In short, Chief Justice Chase distinguished between penalizing conduct and taxing it. Here the statute (a) expressly prohibited the conduct in question and (b) punished violations of the prohibition with fine or punishment or both. Hence, the statute itself was not an exercise of the tax power.

Chase then considered the argument that the prohibition of the sale of the illuminating oil described in the statute "was in aid and support of the internal revenue tax imposed on other illuminating oils."[174] By this reasoning, prohibiting these oils would lead people to use the other illuminating oils that were being taxed, thereby "increasing the production and sale of other oils, and, consequently, the revenue derived from them."[175] He dismissed this assertion of Congress's power under the Necessary and Proper Clause as "too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."[176] And he reached

169. *Id.* at 44.

170. *Id.* For a discussion of the original meaning of "commerce," see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623.

171. *Dewitt*, 76 U.S. at 44.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

this conclusion notwithstanding that the prohibition was included in "an act imposing internal duties."[177]

"Standing by itself," wrote Chase, this "is plainly a regulation of police."[178] To this he added that it was

> so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.[179]

Chase ended his opinion by invoking the same theory of federalism that, years before, had led him to contend that, while Congress could ban slavery in the District of Columbia and the territories under its control, it could not prohibit the practice within the original states. Because the law in question is "a police regulation, relating exclusively to the internal trade of the States," he reasoned, "it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation."[180] For Chase, this proposition was "so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."[181]

The relevance of *Dewitt* to the constitutional challenge to the Affordable Care Act[182] did not go unnoticed during that litigation. The case was relied upon by the National Federation of Independent Business in its brief to the Court.[183] But, although this precedent by his predecessor went unmentioned by Chief Justice Roberts in his opinion for the Court in *NFIB v. Sebelius*,[184] his reasoning about the tax power takes at least some of *Dewitt*'s holding into account.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 45.

181. *Id.* (citations omitted).

182. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

183. Brief for Private Respondents on the Individual Mandate at 43, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398).

184. NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

In his *NFIB* opinion, Chief Justice Roberts adopted what he called a "saving construction" by rewriting the individual insurance mandate to eliminate the "requirement" that everyone purchase private health insurance.[185] Section 5000A of the Affordable Care Act "reads more naturally as a command to buy insurance than as a tax," he wrote, and he "would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question."[186] Although the statute expressly speaks of a "requirement" to purchase qualifying health insurance,[187] like Chief Justice Chase concluded of the prohibition in *Dewitt*, Chief Justice Roberts flatly affirmed that "Section 5000A would . . . be unconstitutional if read as a command" under both the Commerce Clause and the Necessary and Proper Clause.[188]

Discarding the "requirement" in the statute, Roberts adopted the saving construction that "[t]hose subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes."[189] He then upheld the "penalty" in § 5000A standing alone as a tax, in part because it is not so punitive as to coerce people to purchase health insurance, which would render the mandate an unconstitutional command. "[W]e need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it."[190]

Chief Justice Roberts's opinion, however, skirted the issue that Chase squarely considered in *Dewitt*: Did Congress consider § 5000A to be a Commerce Clause regulation or a tax? In *Dewitt*, Chase considered the question and answered in the negative. Roberts elided the question by rejecting the "more natural[]"[191] reading of the statute, which would best evidence congressional intent, and then adopting his "saving construction" without regard to whether or not Congress intended the "penalty" to be a tax.

On the basis of his opinion in *Dewitt*, I think there is little question that Chief Justice Chase would agree with Chief Justice Roberts that the more natural reading of § 5000A is as a penalty enforcing a prohibition, which is beyond the enumerated power of Congress. Although it went uncited, *Dewitt*, therefore, both supports this aspect of Chief Justice Roberts's opinion and remains good law.

185. *Id.* at 2600–01.

186. *Id.* at 2600.

187. § 5000A, 124 Stat. at 244.

188. *NFIB*, 132 S. Ct. at 2601.

189. *Id.* at 2600 n.11.

190. *Id,* at 2600.

191. *Id.* at 2600–01.

The *Dewitt* case is noteworthy in another respect. Having been decided in 1869, it undermines the narrative that the judicial enforcement of limits on the Commerce power—beginning 1895 with *E.C. Knight*[192] and continuing up until 1935 in *Schechter Poultry*[193]—was a judicial invention reflecting the more conservative Justices' disapproval of progressive and populist legislation. If the judicial enforcement of the limits on Congress's power under the Commerce and Necessary and Proper Clauses is a judicial invention, it is one that began some eighty years after the adoption of the Constitution, and well before the rise of the Progressive and Populist movements, which sought to label the Supreme Court activist for enforcing the enumerated powers scheme.

2. The *Legal Tender Cases*

Chase's stance in the *Legal Tender Cases* is much better known. In the 1869 case of *Hepburn v. Griswold*,[194] he wrote the majority opinion that laws compelling contracting parties to accept paper money in settlement of debts—called "legal tender laws"—were unconstitutional. After the appointment of two additional Justices by President Grant, this decision was reversed just two years later in *Knox v. Lee*.[195]

Hepburn and *Knox*—like *Prigg* and *Dewitt*—are actually Necessary and Proper Clause cases. In *Hepburn*, Chase began by reaffirming the first principle he had enunciated in *Dewitt*: "[I]t is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution."[196] Chase never questioned the existence of implied powers, though he noted that "the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution."[197] He found evidence for this concern in the wording of both the Necessary and Proper Clause and the Tenth Amendment.[198]

Sometimes the *Legal Tender Cases* are loosely described as involving the power to issue paper money. But Chase identified the power being asserted by Congress, not as the power to issue paper notes, a power he says was held by Congress under the Articles of

192. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

193. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

194. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

195. Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).

196. *Hepburn*, 75 U.S. at 613.

197. *Id.*

198. *See id.* at 613–14.

Confederation, but as the power to make these notes a "legal tender."[199] This requires that they be accepted as settlement of debts even by those who stipulated in their contracts for payment in specie. Is this power both necessary and proper for carrying into execution an enumerated power?

As he did in *Dewitt*, Chase then sought to apply the standard provided by *McCulloch v. Maryland*.[200] After identifying the power in question, Chase first considered whether it is "implied in, or incidental to" any enumerated power, such as the power to coin money.[201] The power to make paper notes a legal tender "is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power."[202] Neither is the power claimed "implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins."[203] Chase defined this as "a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States."[204]

Much like the Court in *NFIB v. Sebelius*, Chase distinguished between the concepts of "necessary" and "proper." Unlike the modern doctrine that largely defers to Congress's assessment of "necessity," Chase addressed this issue. "[W]hatever benefit is possible from that compulsion to some individuals or to the government," Chase recognized that "there is abundant evidence" that this benefit "is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money."[205]

Applying the standard from *McCulloch*, Chase considered whether this measure is "plainly adapted" to any enumerated power. As to the power to declare and carry on war, because "it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued."[206] Further, "while facilitating in some degree the circulation of the notes, it debases and

199. *Id.* at 616.

200. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

201. *Hepburn*, 75 U.S. at 616.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 621.

206. *Id.*

injures the currency in its proper use to a much greater degree."[207] For the same reason, Chase found this measure is not justified under the powers to regulate commerce or to borrow money. "Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts."[208]

Although the modern Court might shy away from so fact bound an inquiry into the "necessity" of a law, Chase's approach resembles the view expressed by Justice Kennedy in his concurring opinion in *United States v. Comstock.*[209] The Court's modern Commerce Clause precedents, he wrote, "require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical.*"[210] For Justice Kennedy, "[t]he rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as *Lee Optical* described it."[211]

Like the majority in *NFIB*, Chase then separately assessed the issue of the law's propriety. Quoting Chief Justice Marshall in *McCulloch*, he asked whether the means employed, however plainly adapted they may be, are "not prohibited, but consistent with the letter and spirit of the Constitution."[212] He then did a broad survey of how the power to compel the acceptance of paper money in satisfaction of debts violate the "cardinal principles"[213] embodied in the Contracts, Takings, and Due Process Clauses—an analysis that is too lengthy to summarize here.

With respect to the Due Process Clause, he offered the following analogy: "No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary privation of property."[214] Yet he was then "unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their

207. *Id.* at 622.

208. *Id.*

209. United States v. Comstock, 130 S. Ct. 1949 (2010).

210. *Id.* at 1967 (Kennedy, J., concurring).

211. *Id.*

212. *Hepburn*, 75 U.S. at 622.

213. *Id.*

214. *Id.* at 625.

terms."[215] For this reason, he said, it "is difficult to conceive what act would take private property without process of law if such an act would not."[216]

In this way, Chase adopted what today would be called a "substantive" reading of the Due Process Clause, years before the so-called *Lochner* Court is said to have invented the concept for political reasons. Chase used the Due Process Clause to protect what would later be characterized as an "economic" liberty. And he found that a law that violates due process is not a proper means of carrying into execution the enumerated powers.

Both because of a lack of sufficient means-end fit, and because it violates the letter and spirit of the Constitution, Chase concluded that the legal tender law is unconstitutional. Requiring creditors to accept paper money as payment for debts "is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution."[217]

Before ending his opinion, however, Chase implicitly acknowledged his own role as Treasury Secretary in promoting the use of paper money, including the making of it a legal tender. The "tumult of the late civil war" when "apprehensions for the safety of the Republic [were] almost universal," was "not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts."[218] Perhaps referring to himself, he wrote, "Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure."[219] Now "since the return of peace, and under the influence of the calmer time," many "who then insisted upon its necessity, or acquiesced in that view, have . . . reconsidered their conclusions, and now concur in those which we have just announced."[220]

Notwithstanding this explanation, Chase has sometimes been criticized for the inconsistency of his stances on legal tender laws as the Secretary of the Treasury and as Chief Justice. Yet another Justice is not similarly rebuked for a similar switch. In 1952, during the height of the Korean conflict, President Truman took control of

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 625–26.

the Youngstown Sheet and Tubing company facilities by an executive order. As Attorney General, Robert Jackson had previously advised President Roosevelt that such a seizure would be allowed as an exercise of the President's war power. Yet later as a Justice in *Youngstown Sheet & Tube Co. v. Sawyer*,[221] Jackson voted to invalidate the seizure by Truman as unconstitutional.

Like Chase, Jackson obliquely acknowledged his change of heart. "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety."[222] History has been kinder to Jackson than to Chase for his switch in opinion from war-time cabinet member to Supreme Court Justice. But, if consistency is a virtue, then perhaps we too should be consistent in our praise or condemnation of Justices who find decisions they once approved as members of the executive branch in time of national emergency to be unconstitutional when they are confronted with the same question as a Justice in peacetime.

In any event, Chase's decision was not to survive. Considerable intrigue surrounds the reversal. During the Johnson administration, the Republicans in Congress employed the first court-packing scheme, reducing the number of Justices to eight, to deny Johnson any nominations to the Court.[223] The *Hepburn* case was heard by the full complement of eight Justices, and the initial vote in conference on November 27, 1869, was 4–4. Shortly thereafter, claiming confusion, Justice Grier changed his vote to make the count 5–3 in favor of declaring legal tender unconstitutional.

In December, Congress enacted a law restoring the number of Justices to nine, giving President Grant an additional vacancy to fill. The law also gave full salary to any Justice who had served for ten years and was over the age of seventy. Grier met both of these qualifications and was in failing health. Upon the urging of his colleagues, he resigned effective January 29, 1870. Chase hoped to announce the majority decision on January 31 while Grier was still sitting, but, perhaps to prevent this, the dissenters asked for more time to prepare their dissenting opinion.[224] Consequently, by the time the decision was announced in February, there were two vacancies on the Court, and the vote to invalidate the law was reduced to 4–3,[225] a

221. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

222. *Id.* at 634 (Jackson, J., concurring).

223. LURIE, *supra* note 107, at 73.

224. *Id.* at 73–74.

225. In his opinion, Chase dealt with that situation by noting the following:

fact the dissenters would exploit when they formed a new majority to reverse.

The very day that *Hepburn* was announced, President Grant appointed William Strong and Joseph Bradley to fill the vacancies created, directly and indirectly, by the December statute. Strong had upheld the constitutionality of a state legal tender law as a Pennsylvania Supreme Court justice,[226] and Bradley too had voiced his support for that position.[227] To the charge that Grant had engaged in court packing, Jonathan Lurie replies that "[t]here is no evidence that he intentionally sought out nominees in favor of paper money as legal tender."[228] Still he acknowledges that "the government moved for reconsideration of Chase's decision only *after* Grant's two nominations had been confirmed."[229]

Be this as it may, in his motion for rehearing, Grant's Attorney General Rockwood Hoar stressed that the case had hinged on the vote of one man, Justice Grier, whose switch in votes created the 5 3 majority.[230] The motion created much consternation among the Justices. Justice Miller, a dissenter in *Hepburn*, wrote his brother-in-law of the "desperate struggle in the secret conference of the Court," and that "the fight has been bitter."[231] In the end, rather than rehear *Hepburn*, a majority instead decided to revisit the issue in the new case of *Knox v. Lee*.[232] The new majority opinion in *Knox*, which reversed *Hepburn*, stressed the fact that *Hepburn* had been decided by less than the full complement of Justices.[233]

> It is proper to say that Mr. Justice Grier, who was a member of the Court when this cause was decided in conference, [November 27, 1869] and when this opinion was directed to be read, [January 29, 1870] stated his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment, but that upon the construction given to the act by the other judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution.

Hepburn, 75 U.S. at 626. Chase included the dates in brackets in footnotes.

226. *See* LURIE, *supra* note 107, at 48.

227. *See id.* at 50.

228. *Id.*

229. *Id.*

230 *Id.* at 75–76.

231. *Id.* at 76 (quoting Letter from Justice Miller to his Brother-in-Law (Apr. 21, 1870)).

232. Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871).

233. *Id.* at 553–54.

Judicial intrigue aside, what is especially noteworthy about *Knox* is its capacious and deferential approach to Congress's powers under the Necessary and Proper Clause. In his opinion for the new majority, Justice Strong stressed that the Constitution must have granted to the national government the "power of self-preservation."[234] It would "be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties."[235] Nor need the power being claimed "be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers."[236] It is enough that its "existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined." Indeed, it "is allowable to group together any number of them and infer from them all that the power claimed has been conferred."[237]

Of course, if Congress is the sole judge of necessity, then this gives Congress a power limited only by express prohibitions, not by the "spirit of the Constitution," as Marshall had said and Chase had stressed. Sure enough, the new majority adopted a highly deferential approach to the issue of "necessity." The choice of means, wrote Strong, was "*left to the discretion of Congress*, subject *only to the restrictions that they be not prohibited*, and be necessary and proper for carrying into execution the enumerated powers given to Congress."[238] This deference was also emphasized in Strong's summary of the legal issue confronting the Court:

> Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, *not appropriate in any degree* (*for we are not judges of the degree of appropriateness*), or we must hold that they were prohibited.[239]

Under this deferential standard, Congress apparently has any power it deems to be appropriate that is not expressly prohibited to it by the Constitution. This means that Congress's Article I powers are essentially plenary so long as they satisfy something like the modern rational-basis test. That they may only be trumped by *other* express

234. *Id.* at 533.

235. *Id.* at 533–34.

236. *Id.* at 534.

237. *Id.*

238. *Id.* (emphasis added).

239. *Id.* at 539 (emphasis added).

prohibitions in the Constitution underscores the proposition that, on this reading of the Necessary and Proper Clause, the enumerated powers in Article I, in and of themselves, provide little or no constraints on the power of Congress.

Today, it is considered retrograde to question the constitutionality of legal tender laws. Yet, Chase's opinion in *Hepburn* shows just how problematic the case for such laws is, provided one takes seriously the enumerated powers scheme. Equally problematic is the expansionist reading of the Necessary and Proper Clause adopted by the Court in *Knox* combined with its highly deferential stance toward Congress to define the scope of its own power.

But wait, there's more. One fair reading of *Knox* is that it limited its finding of the unlimited choice of congressional means to emergency situations involving the "self-preservation" of the government itself. After all, both *Hepburn* and *Knox* involved the implementation of legal tender laws in wartime. In 1884, however, the Court in *Juilliard v. Greenman*[240] held that legal tender laws were also constitutional in peacetime. "[W]hether at any particular time, in war or in peace, the exigency is such . . . that it is, as matter of fact, wise and expedient to resort to this means," wrote Justice Gray, "is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts."[241] Yet, it would only be a few years later that the Court managed to march back up the slippery slope.

If *Dewitt* shows that the judicial policing of the enumerated powers scheme long predates the so-called "*Lochner* era," *Knox* and *Juilliard* show that a highly expansionist reading of the Necessary and Proper Clause adopted by the New Deal Court can be traced back as far as the Reconstruction era. Indeed, as mentioned above, it can be traced still further back to Justice Story's reasoning upholding the constitutionality of the Fugitive Slave Act in *Prigg*.[242]

Whichever of these stances is correct, it is quite clear that, as Chief Justice, Salmon P. Chase was on the side of construing Article I to provide judicially enforceable limits on the legislative power of Congress, beginning with his enumerated powers objection to the Fugitive Slave Act and ending with his same objection to legal tender laws.

D. Chase on the Privileges and Immunities of Citizens of the United States

As we saw in *In re Turner*, Chase did not abandon his stance on the equality of civil rights that he had advocated for thirty years

240. Juilliard v. Greenman, 110 U.S. 421 (1884).

241. *Id.* at 450.

242. *See supra* Part I.C.

when he became Chief Justice.[243] After his decision in *Turner*, in response to Southern denials of the economic and personal liberties of freed blacks, as well as of white Republicans, Republicans in the Thirty-Ninth Congress enacted the Fourteenth Amendment. One key provision of this amendment was the Privileges or Immunities Clause, which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,"[244] language that was drafted by Ohio Republican Congressman John Bingham.[245]

In 1873, in the *Slaughter-House Cases*,[246] the Supreme Court gutted this Clause by limiting it to only those rights that stem from the federal government, such as the protection of life, liberty, and property while on the high seas, or the right to access the American embassy—as though these were the privileges or immunities that Republicans in Congress amended the Constitution to protect. In his opinion for the majority, Justice Miller (who had so vehemently clashed with Chase in the *Legal Tender Cases*) claimed that the basic economic liberties of property and contract were to be protected solely by state governments,[247] a conclusion that was hotly contested in three dissenting opinions by Justices Bradley, Swain, and Field.

Slaughter-House is well known to be a five-to-four decision. Yet, likely because he wrote no opinion in the case and because the name of the Chief Justice was not included in the Supreme Court Reports, it is generally overlooked that the fourth dissenter was Salmon P. Chase.

That same day, the Supreme Court also announced its decision in *Bradwell v. Illinois*,[248] a lawsuit in which Myra Bradwell contested the state's refusal to allow her to practice law because she was female. Bradwell, forty-three, "had been editing one of the country's best law periodicals, the *Chicago Legal News*, for some years, meanwhile studying law under the tutelage of her husband, a regionally prominent attorney and later a judge."[249] She clearly fit the statutory requirement specifying "that any adult person of good character and having the requisite training, was eligible for admission to the bar."[250]

243. *See supra* Part II.B.

244. U.S. CONST. amend. XIV, §1.

245. *See* Barnett, *supra* note 1, at 166–67 (describing Bingham's role in the drafting of Section 1 of the Fourteenth Amendment).

246. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

247. *Id.* at 74–79.

248. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

249. HYMAN, *supra* note 34, at 163.

250. LURIE, *supra* note 107, at 84.

For Justice Miller, *Bradwell* was an easy case. If the privileges or immunities of citizens of the United States did not include the economic liberty to pursue a lawful occupation, it protected neither butchers nor lawyers. But because Justice Bradley had strongly asserted that the Privilege or Immunities Clause *did* protect this liberty, he was obligated either to justify the discrimination against women as reasonable, or invalidate the restriction.[251] He opted for the former. In a now notoriously misogynistic concurring opinion, he explained why the legal incapacities of married women, coupled with "the paramount destiny and mission" of women "to fulfil the noble and benign offices of wife and mother" justified the legislative classification.[252] In sum, whereas Miller found the Fourteenth Amendment inapplicable, Bradley found that the amendment applied, but the classification by the state was a reasonable one. In this opinion he was joined by Justices Swain and Field, the two Justices who had joined Bradley in filing dissenting opinions in *Slaughter-House*.

Only the frail and ailing Salmon P. Chase (in the words of the reports) "dissented from the judgment of the Court *and from all the opinions.*"[253] Chase was too weak and ill from a series of previous stokes to write opinions in either case. Three weeks after the decisions on *Slaughter-House* and *Bradwell* were announced, a final stroke took his life.

Robert Kaczorowski wonders how the outcome of *Slaughter-House* might have been different if Chase had retained some of his early vigor. "Would he have been able to persuade one justice to transform

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251. Lysander Spooner's defense in 1835 of his own bar admission would have supported Bradwell's too.

> If the admission be to anyone a *privilege*, all, who desire that privilege, have as good a right to it as any *one* can have. None of us are entitled to exclusive privileges: and therefore, if this privilege be granted to one, the obligations of equity are imperative that be also granted to each and every other one, who may desire it.

Spooner, *supra* note 13, at 2.

252. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

253. *Id.* at 142 (emphasis added). It is reasonable to surmise that Chase, who lost three wives to illness, was influenced by his close working relationship with his brilliant and politically savvy daughter, Kate, who managed both his social and political life. Indeed, some of Chase's well-known political ambitions might be attributable to her influence. *See* FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS, at xi, 245 (1987). But female activists made up an important contingent of the abolitionist movement and, both for this reason and because of its natural-rights and free-labor ideology, it was closely aligned with the women's movement. *See* Ruth Bogin & Jean Fagan Yellin, *Introduction* to THE ABOLITIONIST SISTERHOOD: WOMEN'S POLITICAL CULTURE IN ANTEBELLUM AMERICA 3 (Jean Fagan Yellin & John C. Van Horne eds., 1994).

the dissenters into the majority?"[254] Kaczorowski thinks Chase might very well have succeeded.

> Just weeks before the Court announced its decision in *Slaughter-House*, Justice William Strong issued an opinion as circuit justice for Delaware in which he, and the district court judge, Edward Bradford, ruled that the Reconstruction amendments affirmatively secured the fundamental rights of citizens. Strong's opinion in this circuit court case would have placed him with the dissenters in *Slaughter-House*. We do not know how and why he changed his understanding of the Reconstruction amendments. Had a healthy Chase been able to hold him with the dissenters, American legal and constitutional history very likely would have been very different.[255]

Regardless of whether a healthy Chase might have changed the outcome of *Slaughter-House*, most certainly he could not have assembled a majority in *Bradwell* in which he alone "stood on the far broader ground of race-free and gender-free access to life's opportunities, benefits, and hazards."[256] Given its beginning in the fight to emancipate blacks held in bondage, to its very ending to vote to uphold the equal civil rights of women, the long career of Salmon P. Chase deserves to be remembered, and remembered fondly.

III. WHY HAS CHASE'S CAREER BEEN FORGOTTEN?

I hope I have told you enough about the remarkable career of Salmon P. Chase to lead you to ask the question: So why don't we all know the story of Salmon P. Chase? The most obvious answer lies in the thing for which Chase is most known today, if he is remembered at all: his life-long political ambition, which has diminished his

254. Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 191 (1993). I sometimes wonder the same thing about another Chief Justice. William Rehnquist was ill from cancer such that he was unable to attend oral argument in the medical marijuana case of *Gonzales v. Raich*, 545 U.S. 1 (2005), and he had to participate in the conference on the case by telephone. In *Raich*, the Court upheld the constitutionality of applying the Controlled Substances Act to the possession and distribution of marijuana for medical purposes as authorized by state law. The vote was six to three with Rehnquist, together with Justices O'Conner and Thomas, in dissent. Had he been in his prime, could the Chief Justice have held Justice Kennedy's and Scalia's votes to make a majority for invalidating the CSA? As with the *Slaughter-House Cases*, we will never know.

255. Kaczorowski, *supra* note 254, at 191.

256. HYMAN, *supra* note 34, at 165.

memory. In other words, it is not Chase's deeds that account for his neglect, but his alleged deficiencies of character.

Chase's later successor as Governor of Ohio and Republican President Rutherford Hayes wrote in his diary that Chase "possessed noble gifts of intellect" as well as "great culture and commanding presence." But, "[w]hen this is said, about all that is favorable has been said. He was cold, selfish, and unscrupulous . . . . Political intrigue, love of power, and a selfish and boundless ambition were the striking features of his life and character."[257] Rockwood Hoar, who as Grant's Attorney General moved for the reversal of *Hepburn*, was even more critical, calling Chase "insincere, selfish and intriguing."[258] Justice Miller, with whom Chase contended in the *Legal Tender Cases*, the *Slaughter-House Cases*, and *Bradwell*, wrote that Chase's strengths were "warped, perverted and shrivelled by the selfishness generated by ambition."[259]

So, truth be told, there was much to dislike about the personality of Salmon P. Chase that affected his contemporaries and, through them, his memory. But this cannot be a sufficient explanation for Chase's neglect by history. For one thing, ambition is rampant among persons in public life who achieve what Chase achieved - even if we limit our focus to Chase's contemporary political rivals. Doris Kern Goodwin's book, *Team of Rivals*, makes evident the enormous political ambitiousness of Chase's competitors: William Seward, Edward Bates, and Abraham Lincoln himself.

What emerges from Goodwin's fascinating treatment is that Chase was simply not as gifted as the others in concealing his ambitiousness in an age when ambition was so frowned upon that presidential candidates were not even supposed to campaign on their own behalf. In the end, despite his many political accomplishments, try as he might, Chase was simply not a very good politician. Especially in contrast to Abraham Lincoln, Chase was not, we might say, a people person, which even then was extraordinarily important both to achieve high office, and to succeed in the offices one achieves.

Remember as well, that Chase was a former Democrat whose core political convictions put him at odds with the more numerous former-Whigs who formed the Republican Party. In many respects, then, Chase had much more intellectually in common with Thomas Jefferson's small government republican party than he did with the political successor to Alexander Hamilton's big government Federalist Party. So Chase was condemned to be distrusted and resented by

257. LURIE, *supra* note 107, at 85.

258. *Id.*

259. *Id.* For what is worth, "Miller blamed his opinion [in *Slaughter-House*] and the intrigue of Bradley and Swayne for being passed over to replace Chase as chief justice." Kaczorowski, *supra* note 254, at 188.

both his Democratic enemies and his Republican friends. Although he helped found at least three political parties—the Liberty, Free Soil, and Republican parties—in the end, he was truly a man without a party in an age of violent partisanship. In a sense, Salmon Chase was simply his own man for better, but also for worse.

This brings me to another of Chase's character traits that comes through his various biographies. Chase, both consciously and unconsciously, aspired to be a man of great principle, and he largely achieved this aspiration. In very few instances can he be found betraying these principles for the purpose of attaining the offices he held or the one office that eluded his grasp.[260] No, as we have seen in various contexts, he always tried to win while championing his principles, something we might consider admirable rather than deficient.

Chase was what we today would call a "conviction politician." "He won elections as rewards for his activism and because he understood early the need to match existing means with antislavery ends."[261] As even his harsh critic Justice Miller conceded, Chase "was a great man and a better man than public life generally leaves one."[262] Or as George Templeton Strong eulogized: "He leaves an honest record behind him, though in [public] office nearly all his days."[263]

Strong's observation that Chase "was an anti-slavery man long ago when anti-slavery opinions seemed an absolute bar to all hope of social or political advancement"[264] is also telling. And what this tells us is that, however personally ambitious he was, ultimately Chase put his principles ahead of even those powerful ambitions. This must mitigate the charge that Chase was all about ambition and nothing more.

Indeed, it is ironic that, to some extent, Chase's very public proclamation of his principles might well have contributed to his negative reputation. For one thing, some reacted to this character trait as phony, arrogant, or self-righteous. But, more importantly, how does one politically attack a conviction politician who justifies what he does on the ground of such great and noble principles as liberty and equal rights? One way is to attack his character. Say he does what he does, not because of the principles he espouses, but because of his naked ambition. That way, we are free to disregard the principles along with the man who is advocating them. In short, you counter a conviction political figure with an ad hominem argument

260. *See* FONER, *supra* note 87, at 75 n.7 ("Chase's views on the constitutional relations of slavery remained relatively constant throughout his career.").

261. HYMAN, *supra* note 34, at 55.

262. LURIE, *supra* note 107, at 85.

263. HYMAN, *supra* note 34, at 167.

264. *Id.*

that undermines his apparent commitment to principle, which is all the more effective if there is a basis in fact in his character that even his friends would acknowledge.

Such ad hominem arguments should not be used to conceal the career of a man who contributed so importantly to the end of chattel slavery. But this very accomplishment may also figure among the possible reasons why we don't remember the story of Salmon P. Chase. For that matter, why don't we know the story of the constitutional abolitionists and their role in establishing the Republican Party? Why don't we know the names of the Republicans in the Thirty-Ninth Congress who, like John Bingham, wrote and approved the Fourteenth Amendment the way we know the names of the Founders? Why don't we know that the Justice Department of Republican President Ulysses S. Grant obtained convictions of Southern terrorists from Southern juries only to have the Republican-enacted Civil Rights laws under which they were prosecuted held unconstitutional by the Supreme Court? Why don't we know that Grant's administration successfully wiped out the Ku Klux Klan (until it was revived in the twentieth century)?

Chase's political ambitiousness is no answer to these questions, so let me offer another. The early twentieth century saw the rise of a revisionist Southern historiography that retold the nineteenth-century battles for freedom. In this retelling, abolitionists became crazed extremists, congressional Republicans became dangerous radicals, and Reconstruction became a period of Northern oppression of the South and black fecklessness at self-governance. And Ulysses S. Grant became one of the worst presidents in American history.

This narrative certainly fit the need of both the North and South for a story that would contribute to national reconciliation. So the fight to perpetuate slavery became the great Lost Cause for states' rights. But, not coincidentally, the narrative also fit the needs of the defeated and morally discredited Democratic Party—the same Democratic Party that, under Woodrow Wilson, would formally segregate the federal government.

It was not until the 1960s and '70s that revisionist historians—most notably Eric Foner—began to reexamine antebellum abolitionism, the Civil War, and Reconstruction, including the life and achievements of one of its founders, Salmon P. Chase.[265] But even forty years later, their revisionist accounts have yet to permeate the popular culture. Despite their efforts, far more Americans know the term "carpet-baggers" than know the names John Bingham or Salmon P. Chase.

265. *See generally* FONER, *supra* note 87 (reexamining this biased historical account).

CONCLUSION

With all this in mind, let me close my account of Salmon P. Chase with the assessment of him rendered by his greatest political rival, Abraham Lincoln. As we saw, if anyone had a complaint about Chase, it was he. Yet, as was his wont, Lincoln adamantly refused to let his judgment of Chase's personality cloud his assessment of Chase's abilities and his principled commitment to the equal protection of civil rights.

On the morning Lincoln intended to reveal his choice of Chase to replace Roger Taney as Chief Justice, Lincoln was visited by Chase's supporter John Alley of Massachusetts. When Lincoln informed Alley of the news he knew would make his visitor happy, Alley responded,

> Mr. President, this is an exhibition of magnanimity and patriotism that could hardly be expected of any one. After what he has said against your administration, which has undoubtedly been reported to you, it was hardly to be expected that you would bestow the most important office within your gift on such a man.[266]

(Of course, if this is what your friends say about you, it is clear you have a problem.) Lincoln's succinct response puts the issue of Chase's character in what I think is the precisely right light: "To have done otherwise," he said, "I should have been recreant to my convictions of duty to the Republican party and to the country."[267] And, "[a]s to his talk about me, I do not mind that. Chase is, on the whole, a pretty good fellow and a very able man. His only trouble is that he has 'the White House fever' a little too bad, but I hope this may cure him and that he will be satisfied."[268] As Lincoln told others who criticized his choice of Chase, "[n]ow, I know meaner things about Governor Chase than any of those men can tell me," but "we have stood together in the time of trial, and I should despise myself if I allowed personal differences to affect my judgment of his fitness for the office."[269]

So, when you drive down the street, and you see the name "Chase" illuminated every few blocks, think of all that the man being honored by those signs accomplished and of how Lincoln characterized him: a pretty good fellow and a very able man. Oh, and one of the persons most responsible for ending slavery in the United States. Were it not for Chase, the Republican Party might not have adopted the

266. GOODWIN, *supra* note 6, at 680.

267. *Id.*

268. *Id.*

269. *Id.* at 679–80.

constitutional stance it did. It was that stance that provoked the South to secede, that led to the Civil War, and that led to slavery's demise.

Upon his death, the *New York Tribune* eulogized: "To Mr. Chase more than any other one man belongs the credit of making the anti-slavery feeling, what it had never been before, a power in politics. It had been the sentiment of philanthropists; he made it the inspiration of a great political party."[270] Or, as Eric Foner put it, Salmon P. Chase "lived to see his political approach to the slavery issue spread from a handful of abolitionists to become the rallying-cry of a victorious political party."[271] Each of us should envy that accomplishment. All of us should remember it.

270. FONER, *supra* note 87, at 74.

271. *Id.* at 102.