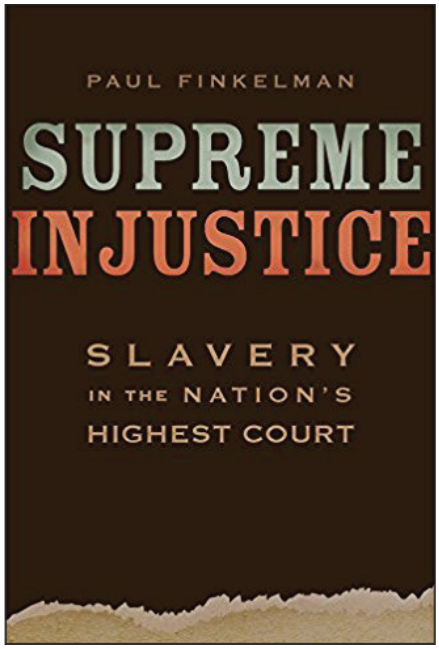

Supreme Injustice: Slavery in the Nation's Highest Court

By Paul Finkelman

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Reviewed by Henry Cohen

Reading *Supreme Injustice: Slavery in the Nation's Highest Court*, by Paul Finkelman, the president of Gratz College in Pennsylvania and an excellent writer, made me think of the #MeToo movement. *Supreme Injustice*, of course, does not accuse famous actors and politicians of sexual harassment and assault. But it reveals that two of the most respected Supreme Court justices—Chief Justice John Marshall and Justice Joseph Story—used their positions to keep people enslaved. Finkelman discusses a third justice as well—Marshall's successor as chief justice, Roger Taney—but, as the author of the *Dred Scott* decision, his position on slavery is already well known.

In revealing the truth about Marshall and Story, Finkelman relies primarily on their Supreme Court opinions, so the evidence has been there all along. Previous historians, however, have generally ignored it. G. Edward White, for example, in *The American Judicial Tradition*, wrote that "Marshall was not a slave owner" and "had a strong and consistent commitment to the general inalienability of natural rights." In fact, Marshall was a slave owner as Finkelman shows. Marshall owned numerous slaves throughout his life, and, in his 34 years as chief justice, he never wrote an opinion "supporting black freedom or attempts to punish slave traders." He wrote seven opinions in cases in which a slave sought freedom, and in all seven the slave plaintiff lost, with Marshall sometimes overruling apparently correct lower court decisions.

In *Wilson v. Belinda* (1817), for example, Pennsylvania law required that slave owners register their slaves, providing each slave's name, age, and sex. The slave owner had not provided the slave's sex, which resulted in Pennsylvania's Chief Justice William Tilghman liberating her. Her owner argued that the slave's name (Belinda) indicated her sex, but Tilghman pointed out that some people have names that are usually given to people of the opposite sex, and, in any event, the statute required disclosure of both the name and the sex. Hardly a controversial ruling, but Marshall reversed, citing the "spirit" of the law. Yet, as Lord Mansfield had held in *Somerset v. Steuart* (1772), slavery was contrary to natural law and was "so odious that nothing can be suffered to support it but positive law." Therefore, one could argue that it should have been upheld in Belinda's case only when the statute was strictly complied with. In another case, *Mima Queen and Child v. Hepburn* (1813), Marshall upheld the exclusion of a juror who opposed slavery while jurors who supported it were allowed to serve. In case after case, Finkelman shows, Marshall was apparently result-oriented. He'd rule inconsistently in different cases in order to avoid giving a slave freedom.

Marshall also used his power as chief justice to protect slave traders. In *Adams, qui tam v. Woods* (1805), Adams provided evidence of Woods' having illegally engaged in slave trade, which would have entitled him to half the fine that Woods would have to pay. Although this was a civil action, Marshall applied a two-year statute of limitations that on its face applied only to criminal prosecutions. Moreover, he ruled that the statute of limitations started to run when the slave ship set off from the United States for Africa to kidnap people into slavery. The problem with this ruling was that the crime of slave trading was ongoing, continuing until the ship returned to the United States, and slave ships never returned within two years from when they left the United States. Marshall effectively made the statute unenforceable.

Finkelman writes, "Slaves were a constant factor in [Marshall's] personal life, his economic success, and his children's future." In his will, Marshall purported to emancipate one slave—a man of close to 70 named Robin Spurlock, whom Marshall had owned since Spurlock was about 18. (He'd been a wedding present to Marshall.) But there was a catch. Marshall didn't want free black people living in Virginia, or even in the United States, so he provided $50 for Spurlock if he left Virginia or $100 if he moved to Liberia, but nothing if he stayed in Virginia, where his friends and family (including his daughter, whom Marshall owned) lived. Rather than leave the state or be left penniless in Virginia, he chose to be a slave to Marshall's daughter. Marshall, Finkelman notes, "must have known Spurlock would not be able to accept freedom under these conditions." This was the closest Marshall ever came to emancipating a slave.

Justice Story's record on slavery was more mixed, as he started as an opponent of slavery. Unlike Marshall, Finkelman writes, Story "never owned a slave, personally found slavery abhorrent, and made that clear in his early decisions and comments on the African slave trade." In *United States v. La Jeune Eugenie* (1822), Story noted that the slave trade "begins in corruption, plunder, and kidnapping … and end[s] in disease, and death, and slavery." Finkelman writes, "Never before or after this would a Supreme Court justice so emphatically and boldly condemn slavery."

After 1822, however, Story's jurisprudence, Finkelman writes, "would be

increasingly deferential to slavery and the South," culminating in *Prigg v. Pennsylvania* (1842), which Finkelman finds to be "as proslavery as anything Chief Justice Taney would conjure up in the *Dred Scott* case. Indeed, in *Prigg*, Story went out of his way to offer a proslavery interpretation of the Constitution." "Arguably," Finkelman writes, "for the lives of northern free blacks, fugitive slaves, and southern slave owners, *Prigg*, while less well-known today, was actually more important than *Dred Scott*."

The story behind *Prigg* started around 1812, when a farmer in Harford County, Md., freed a slave couple and their daughter Margaret. Margaret later married Jerry Morgan, a free black from Pennsylvania, and the couple lived in Harford County, where they had two children. By 1832, they had moved to Pennsylvania, where they had at least one more child. In 1837, four Marylanders, including Edward Prigg, came to Pennsylvania to claim the Morgans as fugitive slaves. Acting under a Pennsylvania law designed to prevent kidnappings of free blacks, they secured a warrant and brought the Morgans to court. The justice of the peace released them because they were not fugitive slaves. In response, Prigg and his cohorts kidnapped them, took them to Maryland, and sold them to slave traders; after that, the Morgans disappear from the historical record.

Maryland extradited Prigg to Pennsylvania, where he was convicted, and the Pennsylvania Supreme Court affirmed the conviction without an opinion. In 1842, Justice Story wrote the majority opinion reversing the conviction. He held that the federal fugitive slave law of 1793 pre-empted any state law that could interfere with the return of fugitive slaves, and that no one seized as a fugitive slave was entitled to any due process beyond a determination that he or she was the person the purported slave owner sought. Story wrote that, under the Constitution's Fugitive Slave Clause (art. IV, § 2), "the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence." The last phrase was almost meaningless, because one could easily seize a slave at night or in an isolated area without creating a breach of the peace, and no amount of force used against a slave was illegal.

Story's opinion in *Prigg*, Finkelman writes, "left the northern states without any legal authority to prevent kidnapping of free blacks.… The fact that slave catchers could now operate in the North without having to prove the seized person's slave status threatened all northern blacks. In reaching these holdings, Justice Story ignored the language of the fugitive slave clause and the structure of the Constitution, rewrote the history of the Constitution, reshaped or ignored relevant precedents, and ignored the facts of the case to justify his opinion." The nullification crisis of 1832 to 1833 had frightened Story, and his desire to keep the South in the Union overrode any opposition to slavery that he might have still had.

We now come to Chief Justice Roger B. Taney, who was from Maryland, and statues of whom were removed in 2017 from the Maryland State House in Annapolis and from Baltimore. Finkelman writes, "Taney lacked any theoretical mooring for his opinions. He could flit back and forth from states' rights to federal supremacy. When it benefited slavery … Taney was happy to support states' rights and allow states to determine the status of people within their jurisdiction. But … Taney denied that states could determine questions of citizenship or racial status [when to do so] would have allowed free blacks … to sue in federal court.… Taney was uninterested in constitutional principles; only in proslavery results that protected the South."

Finkelman bases this conclusion on several cases that Taney decided, but this review will discuss only *Dred Scott v. Sandford* (1857), in which Scott's owner had taken him from Missouri to the Wisconsin Territory, in what is now Minnesota, and to Illinois. Congress had prohibited slavery in the former, and the Illinois constitution did the same in Illinois. Scott sued for freedom based on his residence in these two jurisdictions. He won his case before a jury of 12 white men in St. Louis, but the Missouri Supreme Court reversed. Scott then brought the case to federal court, where he lost. He appealed to the U.S. Supreme Court.

There was no chance that Taney would free Dred Scott, but he could have simply declared that, when Scott moved back to Missouri, he had lost whatever claim to freedom he might have had. But Taney instead ruled that Scott had no standing to sue in federal court, not only because in Missouri free blacks were not citizens, but also because, under the U.S. Constitution, no blacks—even those allowed to vote in the states where they lived—were citizens, and "they had no rights which the white man was bound to respect."

At this point, Taney should have dismissed the case for lack of jurisdiction. Instead, he found that the Missouri Compromise's ban on slavery in the territories violated the Fifth Amendment by limiting a slave owner's right to move his property where he pleased—this despite the fact that Article IV, § 3 of the U.S. Constitution empowers Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States." Finkelman writes, "The use of the Fifth Amendment was particularly cynical since that amendment asserted that no person could be 'deprived of life, liberty, or property, without due process of law.' Taney protected 'property' in slaves, but ignored the obvious hypocrisy that slavery denied people liberty without due process."

Like the reputations of the actors and politicians who have been accused by the #MeToo movement, the reputations of Marshall and Story should plummet as a result of *Supreme Injustice.* Taney's reputation, however, cannot go any lower than it is. ⊙

Henry Cohen was a legislative attorney with the Congressional Research Service, Library of Congress, from 1975 to 2010 and was the book review editor of The Federal Lawyer *from 1989 to 2017.*