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*Blackwell
Companions to
Philosophy*

A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY



Edited by
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 Blackwell
Publishing

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Social Contract Theory, Slavery, and
the Antebellum Courts

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Introduction

Social contract theory holds that political order "is legitimate if and only if it is (or could be) the outcome of a collective agreement of free, equal, and rational individuals" (Anderson, 1990: 1794). American law has a special relationship to social contractarian theory. According to some scholars, American colonists relied upon liberal, Lockean notions of a social contract to justify revolution against British rule (Henkin, 1989: 1029; McLaughlin, 1900: 467; Sutherland, 1965: 6; Tate, 1965: 376). Historians maintain that social contractarian theories of political order significantly influenced the people who wrote and defended the Declaration of Independence, the original Constitution, and the Bill of Rights (Bailey, 1967: 59; Wood, 1969: 282-91).

Although much has been written about the contractarian foundations of the Declaration of Independence and the Constitution, little has been written about the role contractarian thought played in subsequent jurisprudence. One scholar has even concluded that "the idea of the social contract implicit in America's rights ideology served the new nation well at the beginning, but had no further use" (Henkin, 1989: 1033). Yet, social contract theory has had noteworthy further uses.

The idea of the social contract as a source of legitimate authority has surfaced in important constitutional, statutory, and common law cases in this century and the last. For example, in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), the Supreme Court of Georgia became the first American court expressly to recognize a right to privacy. The Georgia court argued that, although the right to privacy was not yet a part of the positive law, the social contract implied by natural law required common law judges to recognize privacy rights protecting interests in personal identity. To take another example, one of the leading constitutional decisions establishing the right of government to restrict individual liberty in the interest of public health, *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905), relied on contractarian reasoning. There the United States Supreme Court argued that one of the purposes for which persons embrace civil society is to reap the benefits of government police powers

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exercised in the interest of public health. *Pavesich* and *Jacobson* are nearly a century old. But contractarian rationales like theirs are no mere historical artifacts found only in older precedents. Judges continue to offer contractarian rationales for everything from criminal punishment to civil forfeiture.

Of central concern here is a particular use judges made of contractarian thought in the nineteenth century. A number of state and federal judges explicitly used social contractarian rationales in their written opinions defending slavery. The defense of slavery is perhaps the most troubling use of social contract theory in the history of American law. Today social contract theorists disdain human chattel slavery. John Rawls rejects hereditary forms of involuntary servitude outright (Rawls, 1971: 248). Some nineteenth-century contractarian sympathizers similarly rejected slavery (Miller, 1977; Morrow, 1985-6). Yet, respected judges in the Antebellum period appealed to contractarian ideas in opinions supporting the inequality of people of African ancestry.

Nineteenth-century jurists employed an arsenal of arguments in defense of slavery, only some which owed a debt to social contractarian philosophy. A popular class of non-contractarian pro-slavery arguments relied on Biblical texts and non-textual understandings of divine teleology. Another familiar class of arguments relied on the paternalistic premise that, as a practical matter, blacks were incapable of caring for themselves and would perish or degenerate without the protection of white owners. Other popular classes of arguments justified slavery as the consequence of fair commercial exchanges and conquests. Judges combined these several categories of argument with distinctly contractarian arguments to shape a powerful, pro-slavery jurisprudence. According to Edmund S. Morgan, "the central paradox of American history [is that] the rise of liberty and equality was accompanied by the rise of slavery" (1972: 5-6). Social contract theory was an intellectual tool nineteenth-century lawyers and judges manipulated to avoid a sense of paradox. They reconciled the enslavement of blacks with white freedom and equality by depicting slavery as the product of rational choices.

This article identifies distinctly contractarian "justifications" for black slavery found in antebellum court opinions. We elaborate three lines of contractarian argument. The first justifies permitting slavery on the ground that the US Constitution is a white-only social contract under which blacks are not free and equal. The second justifies permitting slavery on the ground that slavery is blacks' best deal for escaping the state of nature, given (putative) black inferiority. The third justifies slavery on the ground that death to the vanquished is a just consequence of war; and that slavery is a rationally preferable fate to death. We limit our attention here to social contractarian arguments. Judges also embraced commercial contract-based arguments for slavery, according to which the slave holder's "power over his slaves is derived from bargaining and purchase, explicitly equating slaves with other chattels" (Drescher, 1988: 502). The judges who routinely enforced agreements to buy, sell, and hold blacks were typically silent about what legitimated the free market in involuntary servants. Judges may sometimes have assumed that persons of African descent were properly bought, sold, and held as property by reasons of social contract.

In a provocative study, African-American philosopher Charles Mills posits the existence of what he terms "the Racial Contract," a centuries old global agreement among

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white men to restrict the possession of freedom and equality to their own kind (Mills, 1997: 20). Mills would doubtless greet our evidence of pro-slavery jurisprudential contractarianism without surprise, having already concluded in his book that "legal decisions" reflect the historical reality of the Racial Contract (*id.*). Mills does not go into detail about the jurisdiction and era of the legal decisions he has in mind. We offer no opinion about the overall plausibility of Mills' case for the existence of a global Racial Contract; we merely present objective evidence that some white jurists put contractarian thought to use in the interest of black subjugation. The small, striking selection of judicial opinions cited here expressly exclude blacks from the privileges of liberal society on contractarian grounds.

The Constitution as a White-Only Social Contract

St. George Tucker wrote of the Founding that "the American Revolution has formed a new epoch in the history of civil institutions, by reducing to practice what, before, had been supposed to exist only in the visionary speculations of theoretical writers" (1803: 4). The American Constitution is "an instrument of democratic sovereignty, created and sustained by the sovereign people to provide for conditions enabling them effectively to exercise these basic rights" (Freeman, 1992: 28). Yet, the Founders did not construe slaves as among those sovereign people. In support of this observation scholars cite three specific provisions of the original Constitution that clearly presuppose the perpetuation of slavery as a legal institution. The Fugitive Slave Clause, Article IV §2, permitted the forcible return of runaway slaves to their owners. The so-called "3/5ths Compromise," Article I §3, counted slaves as only partial persons for purposes of allocating Congressional representation to the states. The Slave Trade Clause, Article I §9 prohibited a national ban on the slave trade before the year 1808.

Notwithstanding the document's unequal treatment of persons based on race, courts have long construed the original United States Constitution as a social contract. In *Calder v. Bull*, 3 U.S. 386, 388, 397 (1798), Supreme Court Justice Samuel Chase tied the erection of the United States Constitution to the formation of a "social compact" whose "nature and term" depends upon the "purposes for which men enter society." One of those purposes was the protection of slavery as a social and economic institution. Justice Roger B. Taney, author of the Supreme Court's opinion in the notorious *Dred Scott* case of 1856, observed that "[f]ree states had obligated themselves to respect the institution of slavery because they had bound themselves by the social compact of the Constitution to uphold it" (Baade, 1991: 1055). Taney vindicated the opinion of Supreme Court Justice Joseph Story in *Prigg v. Pennsylvania*, 41 U.S. 539, 660 (1842), who defended slave-holding as a "cherished right, included in the social compact, and sacredly guarded by law."

Judges supported chattel slavery on the ground that blacks were not parties to the social contract embodied in the U.S. Constitution. Judges opined that blacks were not entitled to any of the federal protections afforded by the Bill of Rights because they were not parties to the federal social contract forged by and among whites. The usual form of argument excluding blacks from the U.S. social contract was an argument about positive law and its history. The argument did not go so far as to exclude slaves as parties

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to the political moralists' social contract proper, sometimes termed *pactum societatis*. It only excluded them as parties to the *pactum subjectionis*, the pact that established the formal, legal government in the Antebellum United States. It was not uncommon in the nineteenth century for judges to embrace natural law as a constraint on positive law. Judges failed, however, to write opinions condemning slavery on the natural law ground that slaves ought ideally to have been included in the United States' *pactum subjectionis*.

The question of whether free blacks were parties to the *pactum subjectionis*, remained unsettled in American law until the Supreme Court handed down its decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). Dred Scott was a slave of African ancestry owned by Dr. John Emerson. Emerson was employed as an army surgeon and traveled from the slave holding state of Missouri to Illinois and Wisconsin territory (areas prohibiting slavery) as a part of his duties. Emerson brought Scott with him to serve as his slave. Three years after Emerson's death Scott sued Emerson's widow, Irene Emerson, for formal declaration of his freedom. Scott argued he was free because he had resided in areas that prohibited slavery. A state court in Missouri declared Scott free, relying on the state's long standing legal principle "once free, always free." John F. A. Sanford, took over the interests of the Emerson estate and sought to reestablish ownership of Scott. Scott then instituted a suit in federal court against Sanford. Sanford argued that because Scott was of African descent, he could never attain the citizenship status necessary to sue in federal court. The Supreme Court agreed.

The stunning holding of *Dred Scott* was that neither free blacks nor slaves were citizens of the United States entitled to the protection of the federal courts. Earlier cases, of which *Ely v. Thompson*, 3 A.K. Marshall 73 (1820) is an example, had held that free blacks, at least, were parties to the social contract with some Constitutional rights. Chief Justice Taney offered a contractarian justification both for upholding slavery and for denying federal citizenship to free blacks. Taney argued that the Founders intended to extend no rights under the Constitution to black people, free or enslaved. Blacks were: "[n]ot included, and were not intended to be included under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States" (*Dred Scott*: 404-5). Taney contended that, in the eyes of the Founding Fathers, blacks were: "[b]eings of an inferior order, and altogether unfit to associate with the white race either in social or political relations: and so far inferior, that they had no rights which the white man was bound to respect" (*Dred Scott*: 417). Taney's support for this bold claim included the false observation that slavery then existed in all the civilized nations of Earth (Fehrenbacher, 1978: 359).

Nevertheless, Taney was right about the intentions of the men who established the United States (Finkelman, 1996). Principal author of the Declaration of Independence, Thomas Jefferson considered the black race inferior to the white race in both body and mind. Moreover, examination of the debates in the Constitutional convention and in state ratification conventions reveals clearly that the Founders were fully aware of achieving constitutional agreement by adopting a document that reserved a place of inequality for persons of black African descent. The Supreme Court's decision in *Dred Scott*'s case vindicated lower court judges' perception of black exclusion from the United States' social contract.

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Slavery as the Best Deal

A second way in which judges used social contract theory to support slavery was by positing a hypothetical "contract" under whose terms rational blacks agreed to subordinate themselves to whites. Judges argued, in effect, that if blacks were parties to a social compact with whites to escape the anarchy of the state of nature, blacks would assent to their own enslavement. Why? In light of blacks' (imagined) limited natural endowments, reason would compel voluntary submission to the authority and protection of (presumably) better endowed whites. Out of practical necessity, persons of African ancestry would strike a deal less favorable than the deal white European males strike seeking to escape the perils of the state of nature.

This version of the justification of slavery embraced by members of the judiciary was a twist on basic Hobbesian political theory (Allen and Morales, 1992). According to Hobbes, the natural condition of humankind is a condition of war. Virtually equal in body, mind and hope, human beings in a state of nature will employ violence to gain and defend power, possessions, and reputation. So conceived, the natural predicament of humanity is the "warre of every man against every man" (Hobbes, 1991: 90). Two dispositions incline rational, self-interested human individuals to seek peace. First, they fear death. Second, they desire necessities, comforts, and the fruits of personal industry. To escape the perils of violent competition among equals over resources and social standing, individuals seek the protection of a common power or sovereign "to keep them all in awe" (*id.* at 88). To escape a life that is "solitary, poore, nasty, brutish, and short," rational persons will compact to form a commonwealth in which they are all subject to a single sovereign with absolute political authority and the ability to maintain peace (*id.* at 89).

The main point here is that the power of the sovereign is not imposed on the individual, but rather, is *chosen* by the individual. Human beings are by nature free. Individuals exercise their autonomy by rationally choosing to cede some power to a Leviathan in order to escape the perils of violent competition. It is sometimes viewed as a corollary of this principle that those who are especially vulnerable in the real world (e.g., children, women, and blacks) might have to make bigger sacrifices to enter into the social contract. Since "[a]ll contract law is mutual translation or exchange of right," if one party is in an inferior position, then he has no choice but to agree to the disadvantageous terms offered by the superior party (Hobbes, 1991: xiv).

The premise that blacks would be in an inferior position in a state of nature, supports the argument that blacks have rationally compelling grounds for consenting to subordination. Or so concluded Justice James S. Nevius of the New Jersey Supreme court in *State v. Post*, 20 NJL 368 (1845). The issue in *State v. Post* was the status of slavery in New Jersey after the adoption of a new state Constitution. Prior to the enactment of the then new New Jersey constitution, the New Jersey legislature enacted the "Act for the Gradual Abolition of Slavery" which accounted for the freeing of slaves born after July 4, 1804. Unaccounted for by the aforementioned law were slaves born prior to the year 1804. William and Flora were both owned by John A. Post. The abolitionist law left their status as slaves unaltered because the dates of their births preceeded 1804. On its face, the state constitution enacted in 1844 seemed to promise

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freedom to them as well as those similarly situated in bondage, as the document declared *all* persons free and equal. The Abolitionists argued that slavery in New Jersey ended completely with the ratification of the new constitution and that the law calling for gradual manumission was therefore invalid.

The Supreme Court of New Jersey argued that slavery was consistent with the egalitarian language of the state constitution, much as slavery was consistent with similar language in the Declaration of Independence and the US Constitution. Furthermore: "[a]uthority and subordination are essential under every form of civil society, and one of its leading principles is that the citizen yields a portion of his natural rights for the better protection of the remainder" (*id.* at 374). But slaves must give up more than others, the judge implied.

The logic of bargain and consent seemed to dictate that blacks accept slavery as their "best deal." The defense of slavery on these grounds, rests ultimately on bias. Specifically it rests upon ethnological prejudice. The "best deal" argument assumes that the Negro is inferior and that he belongs to an inferior race (Frederickson, 1987). In the last century experts expended much effort trying to demonstrate black inferiority empirically. They used tainted historical data to show that blacks had always occupied a position of inferiority. They tried to show that by virtue of anatomical and physiological differences blacks are inferior to whites (Wilson, 1949: 242-3).

The "best deal" argument is distinguishable from a non-contractarian paternalistic argument for slavery mentioned earlier. The "best deal" argument tries to explain why an arrangement which seems unfair is really quite fair, by maintaining that Negroes are so inherently inferior that they would be willing to strike whatever deal they could for white protection. The paternalistic argument, on the other hand, characterizes slavery as a fair and beneficial institution to help persons of an inferior race.

Paternalists did not use the inferiority assumption to justify implied rational consent to the best available deal; they used it to justify interference with liberty. After the ratification of the Constitution, it became increasingly obvious that "in order to explain the contradiction of slavery in liberal society, nineteenth century Southerners developed the . . . paternalist myth as a necessary corollary" (Cottrol, 1987: 364-5). The paternalists' depicted slavery as the caring option (McGary and Lawson, 1992: 24-9). Paternalists sometimes argued that slaves were better off than free wage laborers whom employers could simply fire when they were no longer of use (Fitzhugh, 1857: 205). Thus, "[m]asters enjoy the labor and obedience of their slaves, but provide them in return food, housing, moral and religious guidance, and care in their infancy and old age" (Fischer, 1993: 1065). In *State v. Mann*, 13 N.C. 263 (1829) the court concluded that slavery on balance "has a beneficial influence . . . rendering both [races] better and happier than either would be without the other."

Conquest

A third kind of argument for slavery found in nineteenth-century jurisprudence relied on notions of assent, but had less clear ties to social contract philosophy than the "best deal" or "white-only Constitution" arguments. This is the argument from conquest.

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according to which slavery is justified on the ground that blacks were enslaved as a consequence of just wars. Conquered blacks assent to their own enslavement as the preferred alternative to death.

The argument from conquest constructs the slave as a rational person who chooses slavery over death: "[a]rchetypically, slavery was a substitute for death in war, . . . a conditional commutation. The execution was suspended only as long as the slave acquiesced in his powerlessness" (Patterson, 1982: 5). Thomas R. Dew, relying on Grotius and Pufendorf, defended slavery on these grounds in his *An Essay On Slavery* (Wilson, 1949: 2). John Locke justified slavery on these grounds in the course of advising Governor Nicholson of Virginia in 1698. Locke argued that "Negro slaves were justifiably enslaved, having been taken captives in a 'just war' thus forfeiting their liberty" (Morrow, 1985-6: 237).

Locke indeed held that slavery is just if the slaves were "captives taken in just war" (Locke, 1948: 42). A just war is one waged against unjust aggressors by an innocent people defending its rights and its property. Thus, slavery is nothing else but the state of war continued. The slave, by violating the rights of the innocents, "forfeited his own life, by some act that deserves death; he, to whom he has forfeited it, may (when he has him in his power) delay to take it, and make use of him to his own service, and he does no injury by it" (Locke, 1948: 13-14).

The jurist Blackstone perceptively questioned this justification as "built on false foundations" (Jones, 1973: 115). He attributed Locke's defense of slavery arising from *jure gentium*, from a state of captivity in war, where slaves are called *mancipia quasi manu capti*, as one of the three origins of slavery assigned by Justinian. Yet, Blackstone argued that "war is itself justified only on principles of self-preservation, and therefore it gives no other right over prisoners but merely to disable them from doing harm to us. . . ." Furthermore "[s]ince the right of making slaves by captivity depends on a supposed right of slaughter, [and] that foundation fails, the consequence drawn from it must fail likewise" (*id.* at 115).

The conquest justification for slavery took on a strongly consensual character in Hobbesian philosophy. In Hobbes' theory conquest counts as a form of consent. If one individual manages to conquer another in the state of nature, the conqueror will have obtained a servant. Hobbes assumed that no one would willingly give up his life; so, with the conqueror's sword at his breast, the defeated man will make a contract to obey his victor" (Pateman, 1988: 47). Of course, neither Hobbes nor Locke adequately explains why the children and grandchildren of conquered persons should become slaves from birth.

Justice Taney relied upon the conquest justification of slavery in addition to his more formalistic white-only Constitution arguments. Explaining that blacks were not citizens, he wrote, "[o]n the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." In *Mitchell v. Wells*, 37 Miss 235, 263 (1859), Judge Harris also insisted that slavery presumed that Africans were a "subjugated" race. The Supreme Court itself noted that "war confers rights in which all have acquiesced," one of them "that the victor might enslave the vanquished," *Antelope*, 23 U.S. 66, 120-1 (1825).

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Conclusion

Slavery is antithetical to contemporary ideals of liberal social contract theory. Nevertheless, nineteenth-century judges were able to deploy the apparatus of social contract theory to lend support to slavery in the United States. Social contract thought and rhetoric remain popular in American culture and jurisprudence despite its ignoble applications on behalf of slavery before the Civil War. Resurrecting that past and remaining mindful of it makes repetition unlikely. Judges today may be less able to prevail with social contractarian argument to the extent that the public is familiar with repressive uses of the rhetoric of rational agreement.

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