



## PODCAST TRANSCRIPT

# In the Supreme Court

### HASAN KWAME JEFFRIES

On a mid-August day in 1990, Uncle Johnny dropped my father and I off at New York City's Grand Central Station, where we boarded a not quite midnight train to Georgia. That spring, I had graduated from Midwood High School in the Flatbush section of Brooklyn and now I was off to Morehouse College in Atlanta. Morehouse is one of only 100 or so historically black colleges and universities—and the only one that is all male. It was founded in 1867 at the daybreak of freedom and its mission was simple: to be the light for newly freed African-American men who had known nothing but the darkness of slavery their entire lives. Morehouse has been educating African-American men ever since.

Morehouse sits high on a red clay hill, just west of downtown Atlanta. Its campus isn't the prettiest. Some buildings are new but most of them are old, and it isn't very large—a couple of neighborhood blocks at best. But manicured lawns and high-tech facilities are not what drew me to Morehouse. They don't draw anyone to Morehouse. Tradition draws people to Morehouse.

The tradition of first-year students arriving on campus a week before classes to learn the history of the school. The tradition of meeting your Spelman College sister. The tradition of playing the Negro national anthem before basketball and football games. The tradition of staying up late in dormitories named after African-American luminaries to debate the black past, argue about the black present and speculate about the black future. And, of course, the tradition of singing the soul-stirring college hymn “Dear Old Morehouse” whenever and wherever Morehouse men gathered.

There is another tradition, too. A tradition rooted in college pride but also in the black cultural practice of playing the dozens. There is a saying about Morehouse graduates, one that has more than a kernel of truth. It's that “You can always tell a Morehouse man, you just can't tell him much.” You certainly can't tell him that Morehouse is not better than that other black college on a hilltop, Howard University, in Washington, D.C.

To be sure, Howard is much bigger, but it needs to be, in order to accommodate all those students who applied to Morehouse and didn't get in. It's worth noting, too, that Howard was led for 34 years by one of the greatest educators and religious orators of the 20th century, Mordecai Johnson. It's also worth noting that that very same Mordecai Johnson was a Morehouse man, class of 1911, as was Dr. Martin Luther King Jr., director Spike Lee and actor Samuel L. Jackson.

Now, Howard's list of alumni is certainly distinguished. Folklorist Zora Neale Hurston got her start at Howard, while King T'Challa, Chadwick Boseman (the Black Panther—Wakanda forever!), learned his stagecraft there as well. But no list of notable Howard alumni is complete without Omarosa Manigault

and Rachel Dolezal. Just saying: they're Howard, too.

But when it comes to using the law to fight for African-Americans' civil and human rights, there is no dispute: Howard University is the mecca. Charles Hamilton Houston laid the groundwork for black legal activism, transforming Howard Law School during the first half of the 20th century from a struggling night school into a training ground for a cadre of civil rights lawyers who transformed America—a group that included future Supreme Court justice, Thurgood Marshall.

Houston understood the centrality of the law to the African-American experience. He knew that racial discrimination codified in law, from the Three-Fifths Clause in the Constitution to the Fugitive Slave Act of 1850, and racial discrimination sanctioned by the Supreme Court, from the court's ruling about black citizenship rights and *Dred Scott* in 1857 to its support of segregation in *Plessy versus Ferguson* in 1896, had to be eliminated if African-Americans were ever to enjoy equal rights.

Houston also knew that black lawyers had to be the ones to right these legal wrongs. Racist laws were certainly a problem, but so, too, were the racist lawyers who argued in defense of these laws and the racist judges who upheld them. For Houston, black lawyers were either social engineers fighting for equal justice under the law for African-Americans, or they were parasites, living off of black folks' meager earnings.

It may be that “You can always tell a Morehouse man, you just can't tell him much,” but no Morehouse man needs to be told about the significance of Charles Hamilton Houston. That much we understand. If anything, we want to be told *more*—told more about the intersection of race and law and the Constitution to better see what Houston saw, to better understand what Houston knew about the central role that the law and the courts have played in shaping America. And that's the focus of this episode.

I'm Dr. Hasan Kwame Jeffries and this is *Teaching Hard History: American Slavery*, a special series from Teaching Tolerance, a project of the Southern Poverty Law Center. This podcast provides a detailed look at how to teach important aspects of the history of American slavery. In each episode we explore a different topic, walking you through historical concepts, raising questions for discussion, suggesting useful source material and offering practical classroom exercises. Talking with students about slavery can be emotional and complex. This podcast is a resource for navigating those challenges, so teachers and students can develop a deeper understanding of the history and legacy of American slavery.

In the United States, Lady Justice was never blind when it came to slavery. In this episode, legal historian Paul Finkelman examines the Supreme Court's decisions regarding slavery, which span nearly a century from the Constitutional era through the Civil War. He illustrates how the politics of slavery became entangled with the opinions of the court, offering insight into the political debate surrounding key cases in early American legal history and the impact those decisions had on free and enslaved African-Americans. I'll see you on the other side. Enjoy.

#### **PAUL FINKELMAN**

At the founding of the American nation in 1775-76, slavery is legal everywhere in what becomes the United States. In fact, slavery is legal everywhere in the New World, from the Arctic Circle to the Straits

of Magellan. Every colony all across both South America and North America has slaves and slavery is legal. During the revolution, this begins to change. Americans who were fighting for their liberty are faced with the dilemma of “how can we fight for our liberty when we deny liberty to other people?” Starting in 1780, some Americans will begin to dismantle slavery.

Nevertheless, slavery influences the creation of the nation at the Constitutional Convention. It overwhelmingly influences politics from the adoption of the Constitution to even the Civil War. Indeed, if there is any theme that runs through American political history from 1776 until 1861, it is the theme of slavery and race because that is always at the back of the minds of everybody. The Supreme Court, to give you one example, hears numerous cases on the power of Congress to regulate commerce—it’s known as the Commerce Clause, the Commerce Power.

If we look at the Commerce cases, there is a subtext of slavery in all of them. In some of the Commerce Clause cases, the lawyers actually argue that the courts should decide a particular way because otherwise, it will harm slavery. Even though the cases are not about slavery, the court is hearing arguments about slavery. Slavery is a theme that runs through United States politics from the beginning until the Civil War, and it shapes the nature of the Constitution. Our constitutional law is heavily tied to the needs of protecting and preserving slavery, and many of our important constitutional doctrines that we still live with today came out of slavery.

Much of what I’m going to talk about today deals with law, deals with the Constitution, deals with Supreme Court decisions. These are often hard for students to wrap their heads around and it’s even hard for teachers to deal with it because law’s a little scary—it uses technical language and it is sometimes very complicated. But the important issue is this: the United States is a self-created nation. The Constitution, the Declaration of Independence, are, in part, political documents and, in part, legal documents that create a nation. Our nation has been shaped in part by court decisions, court interpretations of the Constitution. We created a Constitution to bring 13 states into “a more perfect union”—not a perfect union, by the way, a *more* perfect union. That more perfect union is woven into our history in a variety of ways.

There is almost nothing important in the United States that doesn’t sooner or later end up in courts. We are a people who are ruled by the rule of law. We are a people who turn to law. We are a people who turned to the Constitution, to the fundamental principles of the Declaration of Independence, to the Bill of Rights. Americans all know “their rights.” “I know my rights,” and that’s incredibly important to understanding the way the Constitution and Supreme Court interacted with the politics of slavery and race and ultimately, the ending of slavery and then the struggle against segregation in the 20th century.

Slavery came before the U.S. Supreme Court in a variety of ways. In the early years, the District of Columbia, Washington, D.C., did not have a Supreme Court. Rather, all cases from the District of Columbia could be appealed to the United States Supreme Court. Thus, in the period from 1801 until 1835, the Supreme Court heard a number of cases in which African-Americans in the District of Columbia claimed that they were legally entitled to be free. There are actually 14 cases in the court involving the freedom of slaves. Curiously, Chief Justice John Marshall, often called “The Great Chief Justice,” wrote the opinion of the court in seven of these cases. In each of these cases, the slaves lost.

In a couple of them, they had actually won at jury trials because a jury of 12 white men in Washington thought that this particular slave was free, either because of a will or because some other legal technicality or because the person was never a slave to begin with. In one case it was proven that a slave's mother had always been a free person, so he couldn't have been a slave at birth, but Marshall overturned every one of these verdicts.

In a number of the other cases not decided by Marshall, slaves got their freedom. These, of course, were minor cases. They didn't involve big issues of American politics, but they did involve, of course, big issues for the particular slaves who either got their freedom or didn't get their freedom, depending upon the court.

The court also heard a number of cases involving the African slave trade. While Congress could not prohibit the African slave trade before 1808, Congress could rein it in and regulate it in a variety of ways. One of the regulations was that American ships were not allowed to participate in the slave trade. Nevertheless, many Americans wanted to participate because it was a very lucrative business. So, slave traders were sometimes captured, their ships would be seized and they would be subject to prosecution. And, they would appeal to the U.S. Supreme Court.

Generally, the U.S. Supreme Court supported the rights of slaveowners and slave traders more than the federal law. Again, curiously, Chief Justice John Marshall never ruled in favor of the government in a slave trading case—always seemed to find some technicality to let the slave trader go free. So, slaves were illegally brought into the United States and no one was punished for it. Again, these were not major cases. They did not lead to gigantic emotional issues or political issues in the country.

Three big issues that did lead to huge political questions involved a Spanish ship known as the *Amistad* (which probably all of you have heard of), the question of fugitive slaves and the status of slaves in the territories. Let me start with the *Amistad*. The *Amistad* was a Cuban ship transporting slaves from Havana to other parts of Cuba. The slaves took over the ship, killed a number of the crew members and forced the remaining whites to steer the ship east towards Africa. But at night, they would reverse course and go north and west, hoping to reach the United States South. Instead, the ship ended off the coast of Connecticut, was towed into Connecticut and the question is, "What is the status of these slaves?"

It turned out that all of them had been illegally imported into Cuba with the exception of the cabin boy on the ship, who was a Cuban-born slave. After a number of trials and a number of decisions, the case reached the U.S. Supreme Court, where Justice Joseph Story wrote an opinion saying that these Africans, by this time called the *Amistads* for the name of the ship, were entitled to go back to Africa because they had been illegally imported into Cuba. The entire case turned on the interpretation of a treaty with Spain and on the interpretation of Spanish law banning the importation of slaves to Cuba.

It is not an anti-slavery case in any real way. Story doesn't condemn slavery. Story doesn't attack slavery, but, of course, for the *Amistads*, it's an anti-slavery case because they get to go home. The poor Cuban cabin boy did not get to go home, again showing that it's not about liberating slaves. It's about something else. Nevertheless, the anti-slavery movement uses this case to teach the American people about the horrors of slavery, and the *Amistad* becomes an iconic moment in helping Americans understand just how awful slavery actually is.

Fugitive slave cases were more complicated. They almost always involved African-Americans who made it to free states and then were grabbed by slave catchers and dragged back to the South. The first big fugitive slave case was *Prigg v. Pennsylvania*. Prigg was a Marylander. With three other men, he went to Pennsylvania. He grabbed a woman and her children, brought them before a justice of the peace in Pennsylvania and said, “These are Maryland slaves. We are bringing them back to Maryland.”

The justice of the peace listened to the evidence and said, “You have to let them go.” It turned out the woman, Margaret Morgan, had lived her life entirely as a free person in Maryland and, later, research shows that in 1830, she was declared to be a free black person by the U.S. Census. By the way, the census in Maryland was taken by the local sheriff, so local authorities in Maryland said she was free. It also turns out that at least one and maybe two of her children had been born in Pennsylvania and thus, they were free by birth.

Nevertheless, after the judge ruled that they should go free, Prigg and his friends kidnapped them and brought them to Maryland. Prigg was later prosecuted for kidnapping in Maryland, convicted, appealed to the Supreme Court, and, as I mentioned earlier in this talk, the Supreme Court overturned his conviction by saying that Pennsylvania had no right to protect the liberty of its own citizens, no right to interfere with fugitive slave cases and Justice Story said that a slave catcher has “a common-law right of re-capture.” That is, has a right without going into any court to recapture his property and bring it south.

This led to a number of Northern laws in which the Northern states, specifically, prohibited state officials from becoming involved in fugitive slave cases. That led to a number of Northern state judges refusing to help Southerners capture fugitive slaves, and that led to the 1850 Fugitive Slave Law. A draconian law with heavy penalties for people who helped fugitive slaves, the Fugitive Slave Law of 1850 prohibited the alleged slave from testifying at a hearing on her behalf or his own behalf. If you were seized as a fugitive slave, you could not even stand up in court and say, “You got the wrong person. I’m not the person you are looking for.”

The law allowed for the Army, the Navy, the Marines, the state militia, to enforce the Fugitive Slave Law. It led to enormous conflicts between local authorities and federal authorities. Fugitive Slave Law was upheld in a number of decisions; perhaps the most important was *Ableman v. Booth*. Ableman was the U.S. Marshall. Booth was an abolitionist in Milwaukee. Booth had led a mob, which helped a slave escape through Marshall Ableman. Marshall Ableman then arrested Booth, and the Wisconsin Supreme Court declared that the Fugitive Slave Law was unconstitutional and let Booth go. Eventually, it goes to the Supreme Court, where Chief Justice Taney says no, the Fugitive Slave Law is constitutional, and Sherman Booth goes to jail for helping a slave escape.

There were other similar cases involving fugitive slaves—far too many to discuss here. It is safe to argue, however, that the conflict over the Fugitive Slave Law was one that undermined the Union and led to enormous conflicts between the North and the South. Southerners saw the opposition to the return of fugitive slaves as a direct violation of the constitutional compact, a violation of the agreement between the states to support the Constitution. Northerners saw the Fugitive Slave Law as an outrageous denial of liberty, due process of law, a violation of the Bill of Rights, an overreaching of the federal government and simply said we cannot allow this kind of behavior by the national government.

One could have imagined a compromise. One could imagine a Fugitive Slave Law where the alleged fugitive is allowed to testify, where the fugitive is guaranteed a jury trial, where the writ of habeas corpus could be used to bring the case to a higher court. But none of these things were allowed in the Fugitive Slave Law of 1850. It is generally considered to be one of the most outrageous denials of rights of any statute ever passed by Congress.

### HASAN KWAME JEFFRIES

This is *Teaching Hard History: American Slavery*. I'm your host, Hasan Kwame Jeffries. Politics and ideology shaped Supreme Court decisions regarding slavery, but the court's decisions also sparked deep cultural resentment about the legality of slavery in pre-Civil War America. The Dred Scott case is the most significant example, but to understand Dred Scott, we need to talk about the westward expansion of slavery. Once again, here's Dr. Paul Finkelman.

### PAUL FINKELMAN

The other big constitutional issue is the status of slavery in the territories. To understand the status of slavery in the territories, we have to go back to the nation before the Constitution was written. One of the oddities of American political history from, really, the time of the Constitutional Convention until the Civil War is that the debate over slavery is often the debate over slavery where it isn't, rather than where it is.

At no time does Congress debate whether it should abolish slavery in Virginia or Mississippi because that was clearly the province of the states, so the debate is always about slavery in the territories. Do you allow slavery into Ohio? Do you allow slavery in Illinois? Do you allow slavery west of the Mississippi? Do you allow Missouri to become a slave state? What do you do with the territories acquired from Mexico during the Mexican War? In all of these debates, there is this strong issue of whether you allow slavery in these places.

While the Constitutional Convention is meeting in Philadelphia, the Congress, under the Articles of Confederation, is meeting in New York City. There, the Congress passes something called The Northwest Ordinance, which allows for the creation of a government in the territories north and west of the Ohio River, which today encompasses the states of Ohio, Indiana, Illinois, Michigan, Wisconsin and the very eastern tip of Minnesota. The law said that "There shall be neither slavery nor involuntary servitude" north and west of the Ohio River in the Northwest Territory. This was the first federal ban on slavery somewhere.

Implicit in this was that you could have slavery in the Southwest territories, which become Tennessee, Alabama, Mississippi. As long as the United States ended with the Mississippi River, there's no conflict. The Northern part of the country would become free; the Southern part will probably become slave. And that's what happens. Ohio comes in as a free state; Mississippi comes in as a slave state. Indiana comes in as a free state; Alabama comes in as a slave state. Then, of course, during this period, the United States buys Louisiana.

When Missouri seeks to enter the Union in 1819, the question is, "Will Missouri be a slave state or a free state?" Northerners argue that Missouri should come in as a free state because under the Northwest Ordinance, it had to be free. Southerners argued this is complete and utter nonsense because the Northwest Ordinance didn't apply to west of the Mississippi, and the Ohio River ended at the Mississippi,

so how could anything be either north or west of the Ohio River?

But the real debate is not about geography and when you think about this, when you teach this, you shouldn't get caught up in where the Ohio River ends or begins. What you should see is this is the first great political debate over whether or not slavery should spread into the West. What the Northerners are really saying is it's time to stop the spread of slavery west by not letting Missouri come in as a slave state. Southerners are saying we demand the right to carry our slaves to any part of the country, to all of the new territories.

In the end, a compromise is reached. Missouri comes in as a slave state. Maine breaks off from Massachusetts to come in as a free state. So, you have the same number of slave and free states. The Missouri Compromise says "There shall be neither slavery nor involuntary servitude" north and west of the southern boundary of Missouri. Missouri sits out there like a thumb sticking in the air from the rest of the South. But around Missouri, what becomes the states of Kansas and Nebraska and Iowa, will be free states, and everything north of Iowa will always be free.

This is maintained until the war with Mexico in 1847-48. Suddenly, the United States is much bigger because we've acquired vast new territories, some of which are south of the Missouri Compromise line, like New Mexico and Arizona, parts of Nevada, and some of which are north of the Missouri Compromise line. California, of course, is divided by the Missouri Compromise line.

After the war with Mexico is over, Congress spends two years almost totally paralyzed by what to do about the territories. Northerners now have enough votes to stop anything in the House of Representatives. Southerners are insisting that all of the new territories be open to slavery. Northerners are insisting that none of the new territories be open to slavery, and in the meantime, Gold is discovered in California. The California Gold Rush suddenly brings in a huge population to California. Overnight, it has a population of 100,000—far more than it needs to be a state, and California is insisting on coming into the Union as a free state. There are almost no slaves in California, and the sentiment in California is hugely in favor of a free state.

Meanwhile, Southerners are complaining about the lack of effective fugitive slave laws because, under Prigg, Northern states are ignoring the Fugitive Slave Law of 1793 and Texas is demanding that all of New Mexico should become part of Texas. Furthermore, Texas is complaining that it has debt because the Republic of Texas was deeply in debt when it became part of the United States, and so Texas is literally asking for, what today we would call, the first federal bailout. Texas is begging the rest of the nation to bail it out of its debt because it had huge debts. It spent more than it took in in taxes and it wants the rest of the nation to rescue it.

All of these are thrown into a series of laws, which become the Compromise of 1850. In the Compromise of 1850, after a summer of debate, we settle the Texas boundary with giving a substantial portion of New Mexico to Texas. The United States government agrees to pick up the Republic of Texas debt. Slavery is allowed in New Mexico, Arizona, Utah and Nevada, and slavery is also allowed in parts of what are today Colorado and Wyoming.

In other words, slavery is allowed in all of the territories acquired from Mexico, except California, which is admitted as a free state. The Fugitive Slave Law of 1850 is passed and as a sop to the North, Congress bans the public sale of slaves in Washington, D.C. The only problem with that is it's not going to prevent the private sale of slaves, and it doesn't prevent masters from simply taking their slaves across the river to Virginia and selling them there. That's the Compromise of 1850.

Following the Compromise of 1850, Southerners insist that much of the Missouri Compromise be repealed, so that slaveowners can move into Kansas and Nebraska, where slavery had been banned under the Compromise of 1820, which is also known as the Missouri Compromise. That leads to the Kansas-Nebraska Act of 1854, which opens up Kansas, Nebraska, the Dakotas, most of Montana and some of Wyoming to slavery.

Sometimes, historians have looked at these debates and thought everybody was crazy. "Why would you debate whether you could have slavery in Montana?" historians would say, since, after all, you couldn't grow cotton, you couldn't grow tobacco, you couldn't grow any of the slave crops in Montana.

But the answer is this: historically, slaves had always been used for mining. They had been used for raising cattle. They had been used for growing wheat. The Roman Empire grew wheat with slaves. The Roman Empire mined with slaves. There's no reason to believe that the great mining strikes of the West—the silver, the gold, the copper—couldn't have been mined with slaves. It's wrong to think of slavery as geographically bound to warm climates. Slavery is profitable wherever free labor can turn a profit.

If you looked at a map in 1855, a year after the Kansas-Nebraska Act, what you would find is that every place in the West is open to slavery, except Minnesota, which is not yet a state, and what is today Washington, Oregon and part of Idaho. Everywhere else, slavery is legal in the West, except California, which is a free state. You could take your slaves to Colorado, Wyoming, the Dakotas—Slavery is everywhere.

In this mix comes the most famous slave case, Dred Scott. Dred Scott was a slave living in Missouri when his owner, an Army captain, who was also an Army doctor, took him to Illinois where he lives at Fort Armstrong for about a year and a half or two years. Now, Illinois is a free state. Presumably he became free the moment he was brought to Illinois because you can't bring slaves into Illinois. He is also not on the base for much of this time. He is working on private land that his owner, Dr. John Emerson, owns.

Dr. Emerson is then transferred to Fort Snelling in what is today St. Paul, Minnesota, where, again, slavery is illegal, according to the Missouri Compromise. Nevertheless, Dred Scott is kept there for a while. Dred Scott later goes all the way down the Mississippi River with his slave wife and then all the way back up the Mississippi River back to Fort Snelling. While they are on their way to Fort Snelling, his wife gives birth to a daughter, who is born on the Mississippi River between the free state of Illinois and the free territory of Iowa. Presumably this will be a free birth.

The Scotts end up in Fort Snelling, then they end up back in St. Louis, and when Dr. Emerson dies, Dred Scott offers to buy his freedom. He has some white friends who are the sons of his former owner before he was sold to Dr. Emerson, and these white friends are willing to come up with the money so he can buy his freedom for his family and himself. Mrs. Emerson refuses to sell Dred Scott, and so, instead, he sues.

He wins in a jury trial. A jury of 12 white men in St. Louis say Dred Scott is free because he lived in Illinois where slavery is illegal. He lived in what is today Minnesota where slavery is illegal. He is free.

Mrs. Emerson appeals to the Missouri Supreme Court and in 1852, the Missouri Supreme Court says, “No, Dred Scott is still a slave,” and the court explicitly says, “We will no longer follow our own precedents. We will no longer follow our own rules—the old rules—that if you take a slave to a free state, the slave becomes free.” Dred Scott remains a slave.

At this point, a lot of strange things happen. Mrs. Emerson is remarried, moved to Massachusetts. She marries a doctor in Springfield, Massachusetts, named Chaffey, who is anti-slavery. He will later become a Republican Congressman, and he is an anti-slavery Congressman. He doesn’t know that his wife is technically the owner of a family of slaves in Missouri when he marries her.

She immediately transfers ownership of Dred Scott and his family to her brother, a man named John Sandford. John Sandford, while living in Missouri and owning slaves in Missouri, moves to New York, where he’s a business agent for his father-in-law, who is based in St. Louis. This is all very complicated, but the bottom line is this: Sandford’s living in New York and he’s become a resident of New York.

Scott and his family are living in Missouri as slaves and Scott’s new lawyer sues Sandford in federal court saying that “I am illegally held in slavery by a resident of New York, John Sandford.” Therefore, it’s a federal case because it’s between citizens of two states, Missouri and New York, and therefore, the federal courts can hear it. “I’m entitled to my freedom because of the Missouri Compromise.”

The local judge (the local federal judge) in St. Louis allows Dred Scott to sue. He says, “If you are free, then you are entitled to sue in federal court as a citizen of Missouri.” Mr. Sandford’s lawyers argue that even if Dred Scott’s free, he can’t sue because free blacks can never be citizens of Missouri. When it goes to trial, Sandford wins. The judge and the jury rule that they should follow the Missouri Supreme Court and Scott remains a slave. He then appeals to the Supreme Court. He appeals the decision that he is not free.

Sandford does not appeal the ruling that a black can sue in federal court because Sandford won, so he doesn’t have to appeal anything. It goes to the Supreme Court. It is argued in the spring of 1856, and the court refuses to decide it; 1856 is an election year. Many people speculate that the court does not want to decide it before the election.

### HASAN KWAME JEFFRIES

You are listening to legal historian Paul Finkelman as he discusses the relationship between liberty, slavery and the courts in the new nation. This is *Teaching Hard History: American Slavery*, and I’m your host, Hasan Kwame Jeffries. Along with this podcast, you can find a detailed framework for teaching slavery with sample units and primary source material at [tolerance.org/hardhistory](http://tolerance.org/hardhistory). Here is Paul Finkelman.

### PAUL FINKELMAN

James Buchanan is elected president that fall. Buchanan runs arguing that slavery should be legal everywhere in the federal territories. Even though he’s a Pennsylvanian, he’s what’s called a doughface. He’s a Northern man with Southern principles. He’s a pro-slavery, Northern Democrat. Buchanan wins in

a pretty close election against a brand-new political party, the Republican Party, running a national hero named John C. Fremont, who had mapped the route to California, and he had been one of the heroes in the Mexican War in the 1840s.

After Buchanan is elected, the court hears another set of arguments in the case and after Buchanan is inaugurated, the Supreme Court finally decides the case. The curiosity is this: at his inauguration, when Buchanan got up to give his inaugural address, Chief Justice Taney stood up and shook his hand. These guys were old friend—they had been Jacksonian Democrats since the 1830s. Taney whispered something to Buchanan.

There, in front of the whole audience, Taney, the Chief Justice of the United States, is shaking hands with the president-elect and whispering something to him, and then Buchanan gets up and says that the question of slavery in the territories has bedeviled the nation, but it is not a political question. It's a judicial question.

This is fascinating because since 1787, Congress has been passing laws on slavery in the territories. The Northwest Ordinance, the Compromise of 1820, the Compromise of 1850, the Kansas-Nebraska Act, various territorial laws creating territories all over the country had always regulated slavery in the territories, and suddenly, Buchanan says, "Oh, no, no, this is not political." Even though, as a U.S. senator, he voted on some of these laws, "It's not political, it's judicial." Then he says, "I will abide by whatever the Supreme Court decides."

Two days later, the court says that Congress cannot pass any laws regulating slavery in the territories and that no black can ever be a citizen of the United States. Immediately, Republicans complained that Buchanan must have known about the outcome of the decision because, after all, why would he say he'll support whatever the court does without knowing what the court was going to do? Lots of people say that in this whispering, as they call it, Buchanan was told what the court's going to decide.

Today, we in fact know that Buchanan did know the outcome, that at least two justices, and probably three, had already told Buchanan what the outcome was going to be. We know, in fact, he had been told months before and two days later, the court says, "no bans on slavery in the territory" and that no black can ever be a citizen of the United States. This wasn't even argued; the court just decided it.

The court says that, even though blacks are citizens of some states. They could vote in half a dozen states. They had held public office in states. There had been a representative in the Vermont state legislator who was black. There had been an elected official in New Hampshire who was black. There was a judge in Massachusetts who was black. They were lawyers; they were doctors. They were voters in a number of states. Even though all of this is going on, Taney says, "They are not citizens of the United States."

This, by the way, raises a really peculiar issue because if you were a black voter in Massachusetts or Rhode Island or New Hampshire or Vermont or Maine or New York, you could vote in the presidential election. You could vote for members of Congress. What Taney is saying is non-citizens are being allowed to vote for the president, and that's okay because the rules for voting were determined by the states—very peculiar.

The other thing is that, at the time of the ratification of the Constitution, blacks could vote in at least

six states, and so the question is if blacks were voting to ratify the Constitution, presumably they were citizens of the United States at the time. But Taney says, “No, no, no, blacks have never been citizens of the United States. They can’t be citizens.”

This leads to an enormous backlash in the North. Even Northerners who are racist, even Northerners who don’t like the idea of blacks living in their neighborhoods, are shocked by these two holdings. One, that blacks cannot be citizens of the United States, and two, that you can’t ban slavery in the territories.

This becomes an enormous boost to the new Republican Party, and the most articulate critic of the Dred Scott decision is a fairly obscure, mostly failed politician from Illinois named Abraham Lincoln. By this time, Lincoln had had one term in the House of Representatives. He had served a number of terms in the Illinois legislature. He had quit politics, basically, in 1850—stopped becoming involved, stopped running for office. He was concentrating on his law practice, and then Dred Scott comes along, and Lincoln spends the next three years criticizing Dred Scott. That catapults him to the White House.

Meanwhile, Taney is vilified. His decision is overwhelmingly racist. He says things about blacks, which are, by modern standards, horrifying. He says, “They have no rights that the white men need respect. They are not entitled to any rights.” People are shocked by this, and this helps set the stage for the election of Lincoln, the election of the Republican Party. That, in turn, sets the stage for secession.

The final thing to understand about the Constitution is that secession in 1860-61 is about slavery. It is not about states’ rights because, as we’ve seen, the Southerners hate states’ rights because states’ rights are what Northerners are using to fight slavery. In fact, in their secession documents, a number of Southern states complained about Northerners allowing abolitionists to speak freely about Northern criticism of slavery. That Northerners won’t let Southerners travel through their states with slaves. In other words, they complain that the Northerners are using states’ rights to preserve freedom.

Southerners also say, “We are seceding,” as South Carolina says, “because a man has been elected president who believes that slavery should ultimately be put on the road to extinction.” The Texas Secession Convention says that “Slavery will exist forever in the state of Texas.” Mississippi says, “Slavery is the most important institution in the world,” and they’re seceding to preserve slavery. That is what secession is about.

The other thing secession is about is a racial ideology. The Vice President of the Confederacy, Alexander Stephens, gives a speech on the eve of the Civil War, after secession but before the war has started. He says that in the North, people believe in racial equality. Whether this is true or not is irrelevant. This is what he says. Then he says, “Our government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests upon the great truth that the Negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and normal condition.” Thus, our new government “is the first in the history of the world based upon this great physical, philosophical and moral truth.” Then he goes on to say that Northerners assume that the Negro is equal and “we do not.”

The South becomes the first country in the history of the world to be created on the basis of racial inequality and racial subordination. In addition, of course, Stephens goes on to say that the cornerstone of the Confederacy is both slavery and racism. This becomes a new Confederate nation.

When we see the revival of the Confederacy, when we see the demands for a Confederate Heritage, what we are sadly looking at is a heritage that is deeply steeped in hate and in racism and in slavery. This doesn't mean that every Confederate soldier felt that way. Most Confederate soldiers, like any other soldiers, don't think a lot about politics. They are in the Army because everybody in their town is in the Army. I'm talking about the leadership. I'm talking about the generals, the people who went to West Point, the people who were educated by the dollars of Northerners and Southerners and then made war on their own country, not to protect states' rights, but to protect slavery, and they said so over and over again.

Moreover, they are sometimes putting up monuments to war criminals because many of the Confederate officers allowed the murder of black Union troops who were surrendering. They allowed for the enslavement of free blacks in the North. When Lee's army marched into Pennsylvania, it captured free black people and dragged them to the South and enslaved them. This was a violation of every known rule of war in the Western world. It violated the Confederate military codes. When free black soldiers surrendered at Fort Pillow, they were massacred. They were shot. Some of them were buried alive. General Lee and President Jefferson Davis did nothing to reprimand the Southern commanders who did this.

When Southerners insist on flying the Confederate flag over their state capital or insist on having monuments to the leaders of the Confederacy, they are, in fact, supporting a regime. They are, in fact, remembering a regime that was created to support and preserve white supremacy and slavery.

If they look at their own secession documents, they see the Southern states saying, "We are seceding to protect slavery." When they put up monuments to "the heroes of the Confederacy," they are putting up monuments to men who fought and killed, and sometimes died for, the preservation of slavery. They may or may not know that Alexander Stephens said the Confederacy was created to preserve white supremacy and to preserve the subordination of blacks to white people. But, certainly, that concept is inherent in part of our cultural DNA, and it is what makes race so difficult to deal with in this country.

The new Confederate nation goes to war because they have lost the presidential election. For the first time, at least since the election of John Quincy Adams, but maybe the first time ever, the United States has a president who is openly opposed to slavery. That leads to secession and Civil War, and the end result, of course, will be the complete rewriting of the Constitution, ending slavery and creating racial equality, and ultimately, guaranteeing that people should be able to vote without regards to race.

The legacy of slavery is still with us. In the Constitution, we still have the electoral college, created to make sure that slave owners got a bonus in electing presidents, but more precisely, to deny fundamental democracy to all Americans. In the constant tension over race, we have the problem that, for so many generations, so many decades, so many years, Americans viewed black people as inherently dangerous, as an inherent threat to the legal and political and social order and, at least where slavery was preserved and working, as fundamentally inferior. We have written into our constitutional law, Chief Justice Taney's decision that "blacks have no rights that whites need to respect." These are theories of law, these are theories of race, that are built into our DNA.

What is the takeaway from all of this grim history? What do we take away from a nation built on slavery? What do we take away from a region of the nation that made war on the rest of the nation to preserve slavery? Part of the takeaway, I think, is that we have to learn how to overcome our past. We can only

move on and move forward if we know where we are coming from. We can't obliterate the past. I wouldn't ban the teaching of the Civil War, but I wouldn't memorialize traitors, either, and I wouldn't memorialize people who fought against their nation to preserve slavery.

But what I would do is say you have to understand what their motives were, and that means, in part, getting rid of the nonsense that the Civil War was about states' rights or the Civil War was about Northern economic power versus Southern economic power, about agrarian versus industrial. If it was agrarian versus industrial, it would have been New York City against upstate New York. If it were about the Northern oppression of the South, why is it that all the Northern industrialists didn't want the war?

It's not about that. It's about slavery, and that's part of our dark, ugly past. In a sense, the only way we can deal with our modern world is to understand how we got to where we are. My friends used to say, "You are what you eat," and that's true for nutrition. For history, you are where you have been. This history tells us where we have been. It's not pretty, but it's who we are, and it's what we have to deal with.

#### HASAN KWAME JEFFRIES

Paul Finkelman is the president of Gratz College in greater Philadelphia. He received his Ph.D. in history from the University of Chicago and later studied at Harvard Law School. He's the author of more than 50 books and over 200 scholarly articles. The U.S. Supreme Court has recognized his legal expertise by citing him in four of its decisions. *Teaching Hard History* is a podcast from Teaching Tolerance, with special thanks to the University of Wisconsin Press. They are the publishers of a valuable collection of essays called "Understanding and Teaching American Slavery."

In each episode, we are featuring a different scholar to talk about material from a chapter they authored in that collection. We've also adapted their recommendations into a set of teaching materials, which are available at [Tolerance.org](http://Tolerance.org). These materials include over 100 primary sources, sample units and a detailed framework for teaching about the history of American slavery. Teaching Tolerance is a project of the Southern Poverty Law Center, providing free resources to educators who work with children from kindergarten through high school. You can also find these online at [Tolerance.org](http://Tolerance.org).

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If you like what we are doing, please let your friends and colleagues know, and take a minute to review us on iTunes. We always appreciate the feedback. I am Dr. Hasan Kwame Jeffries, associate professor of history at the Ohio State University and your host for *Teaching Hard History: American Slavery*.