The Court's Supreme Injustice

By Allen Mendenhall

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PAUL FINKELMAN is an anomaly: a historian with no law degree who's held chairs or fellowships at numerous law schools, testified as an expert witness in high-profile cases, and filed amicus briefs with several courts. Federal appellate judges, including justices on the United States Supreme Court, have cited his work. Liberal arts professors anxious about the state and fate of their discipline might look to him to demonstrate the practical relevance of the humanities to everyday society.

Supreme Injustice

Slavery in the Nation's Highest Court

By Paul Finkelman

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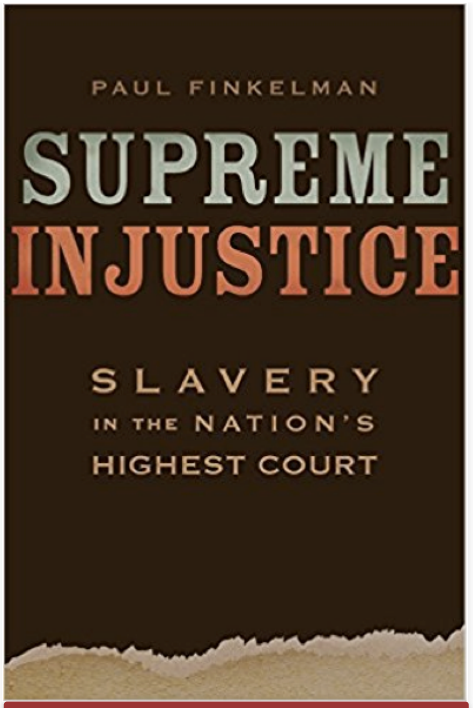
Finkelman specializes in American legal history, slavery and the law, constitutional law, and race and the law. His new book, *Supreme Injustice*, tells the story of three United States Supreme Court Justices — John Marshall, Joseph Story, and Roger B. Taney — and their "slavery jurisprudence." Each of these men, Finkelman argues, differed in background and methodology but shared the belief that antislavery agitation undermined the legal and political structures instituted by the Constitution. Had they aligned their operative principles with the ideals of liberty, equality, and justice enshrined in the Declaration of Independence, liberty rather than racism and oppression might have defined antebellum America.

Finkelman insists that the legacy of Marshall, Story, and Taney had enormous implications for the state of the nation, strengthening the institutions of slavery and embedding in the law a systemic hostility to fundamental freedom and basic justice. These are strong allegations, attributed to only three individuals. Yet the evidence adds up.

Start with Marshall, a perennially celebrated figure who, unlike many of his generation, in particular his occasional nemesis Thomas Jefferson, has escaped scrutiny on matters of race and slavery. Finkelman submits that scholarship on Marshall is "universally admiring" — an overstatement perhaps, but one that underscores the prevalence of the mythology Finkelman hopes to dispel.

Finkelman emphasizes Marshall's "personal ties to slavery" and "considerable commitment to owning other human beings." He combs through numerous records and presents ample data to



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establish that Marshall, a life member of the American Colonization Society, "actively participated in slavery on a very personal level." Finkelman then turns to Marshall's votes and opinions in cases, several of which challenged state laws and rulings that freed slaves. In fact, Marshall would go so far as to overturn the verdicts of white Southern jurors and the judgments of white Southern judges who, in freedom suits, sided with slaves and against masters.

Marshall could be an ardent nationalist attempting to effectuate the supremacy of federal law. One is therefore tempted to attribute his rulings against state laws in cases about slavery to his longstanding desire to centralize federal power. But that is only part of the story. Finkelman brings to light exceptions, including when Marshall selectively deferred to state law if doing so meant that slaves remained the property of their masters. Finkelman highlights these decisions to show that Marshall was hypocritical, compromising his otherwise plenary nationalism to ensure that contractual and property arrangements regarding slaves were protected by law.

Story was also a nationalist, having evolved from Jeffersonianism to anti-Jeffersonianism and eventually becoming Marshall's jurisprudential adjunct. Unlike Marshall, however, Story could sound "like a full-blown abolitionist." His opinion in *United States v. La Jeune Eugenie* (1822) was "an antislavery tour de force," decrying slavery and the slave trade as "repugnant to the natural rights of man and the dictates of judges."

Yet he prioritized radical nationalism over the rights of humans in bondage. In *Prigg v. Pennsylvania* (1842), writing for the Court, he

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deemed unconstitutional a state ban on the extradition of blacks out of Pennsylvania for purposes of slavery. Story jumped at the chance to pronounce the primacy of federal law over state law even if it meant employing the Supremacy Clause to validate the Fugitive Slave Act of 1793. "A justice who had once thought slavery was deeply immoral," Finkelman bemoans,

> rewrote history, misstated precedents, and made up new constitutional doctrine to nationalize southern slave law and impose it on the entire nation. The decision jeopardized the liberty of every black in the North, whether free or fugitive. The injustice of this opinion was profound.

Author of the notorious *Dred Scott* opinion, Taney is the most predictable of Finkelman's targets. By the end of the Civil War, he was vehemently denounced and widely despised. Progressives in the early 20th century, most notably Felix Frankfurter, rehabilitated his reputation in part because progressive economic policy during that era promoted Taney's approach to states' rights and political decentralization. The mood has changed; most historians now probably agree that Taney "aggressively protected slavery" and "made war on free blacks." Few law professors would recall Taney's "early ambivalence about slavery and his defense of the Reverend Jacob Gruber," who was arrested for sermonizing against slavery at a Methodist camp meeting and subsequently charged with inciting slave rebellion. Finkelman's chapter on Taney thus runs with the grain, not against it.

At times Finkelman exaggerates or wishfully portrays the role of judges. He asserts that, prior to the Civil War, courts rather than Congress or the executive had "room for protecting the liberty of

free blacks, liberating some slaves, providing due process for alleged fugitive slaves, enforcing the federal suppression of the African slave trade, or preventing slavery from being established in federal territories." This claim may hold up in some of the cases Finkelman discusses (e.g., *LaGrange v. Choteau* [1830], in which Marshall declined the opportunity to enforce federal law that could have freed a slave who had traveled into free territory), but not in all of them. If a judge were faced with a problem of statutory construction, he (there were only male judges then) could have asked what the language of the statute meant, how it applied to the concrete facts and material rules before him, and whether it was constitutional, but anything more would have arguably exceeded the scope of his office.

The Constitution was silent about slavery until the Civil War Amendments, also known as the Reconstruction Amendments. Prior to them, any attempt to render slavery *unconstitutional* would have required appeals to natural law, natural rights, or other like doctrines that appear in the Constitution only in spirit, not in letter. The abolitionist William Lloyd Garrison believed the Constitution was affirmatively proslavery, calling it a "covenant with death" and "an agreement with Hell." If this is true, then when judges swear an oath to defend the Constitution (the basic framework of government with which all other laws in the United States must comport), they are also inadvertently vowing to defend the institution of slavery — unless the law is more than what statutes and the Constitution provide, in which case these judges could reach beyond the positive law to principles pre-political and universal.

Finkelman suggests another alternative: that certain constitutional provisions supplied a basis in positive law for antislavery strategies and stratagem. He cites, among other things, the congressional powers exercised in the reenactment of the Northwest Ordinance and the enactment of the Missouri Compromise and Oregon Territory; the admission of new free states into the United States; the due process guarantees of the Fifth Amendment; the rights of criminal defendants protected by the Sixth Amendment; the Privileges and Immunities Clause; and the guarantees of the First Amendment.

Each of these would have been problematic during the period Finkelman covers. There was not yet a 14th Amendment through which provisions of the Bill of Rights could have been incorporated to apply against the several states, although state constitutions contained protections of fundamental rights that federal judges recognized and affirmed. Moreover, the provisions Finkelman enumerates empowered Congress, not the courts, to pursue robust antislavery measures. Courts could have responded to and interpreted actions and directives of Congress, but they could not have initiated legislation or litigation. Had the Constitution enabled federal judges and the United States Supreme Court to strike down proslavery laws and regulations with ease, the Civil War Amendments might not have been necessary. But they were necessary to facilitate the demise of slavery.

Finkelman speculates about what the courts could have done to advance antislavery causes, but courts cannot do anything unless the right litigants bring the right cases with the right facts before the right tribunals while making the right arguments. Judges do

not commence lawsuits but handle the ones brought before them. Finkelman could have examined some cases more closely to reveal how the facts, issues, reasoning, and holdings should have differed in rationale, not just in result. Too many cases receive only cursory treatment; lawsuits are more than picking winners and losers.

At one point, Finkelman accuses Marshall of reading a statute "in favor of slavery and not freedom," but the statute isn't quoted. Readers will have to look up the case to decide if Marshall's interpretation was reasonable or arbitrary — if, that is, his hermeneutics adequately reflected a common understanding of the statutory language or intolerably controverted congressional purpose and prerogative. Finkelman chides departures from precedent, but rarely analyzes the allegedly controlling cases to verify that they are, in fact, dispositive of the later controversy by analogy of received rules.

One is regularly left with the impression that the only issue in the cases Finkelman evaluates was whether a slave should be free or not. Many of the cases, however, involved procedural and jurisdictional complexities that had to be resolved before grand political holdings implicating the entire institution of slavery could be reached. We're still debating the ambiguities of federalism (e.g., how to square the Supremacy Clause with the Ninth and 10th Amendments) that complicate any exposition of the interplay between state and federal law, so it can seem anachronistic and quixotic to condemn Marshall, Story, or Taney for not untangling state and federal law in a manner that in retrospect would appear to have occasioned more freedom and less bondage.

Then again, it's hard to fault Finkelman for subjecting these giants of the law to such high standards. That men like Marshall and Story have not been investigated as their contemporaries have in light of the horrors and effects of slavery speaks volumes about the willful blindness of the legal profession and the deficiencies of legal scholarship. Finkelman remains an important voice in legal education and has pushed scholarly conversations about slavery in new directions. At 68, he's likely got more books left in him. Anxious readers await the next.

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Allen Mendenhall is associate dean and executive director of the Blackstone & Burke Center for Law & Liberty at Faulkner University. Visit his website at AllenMendenhall.com.