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## LINCOLN'S EMANCIPATION PROCLAMATION AND THE FAILURE TO COMPLY WITH THE FIFTH AMENDMENT TAKING REQUIREMENT

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### I. INTRODUCTION

On January 1, 1863, Abraham Lincoln declared all slaves in the Confederate States to be free through his Emancipation Proclamation. It was a significant step toward the national abolition of slavery – it was neither the first nor the last step. It also violated the Fifth Amendment's just compensation requirement. Following the Civil War, the Supreme Court attempted to rectify this constitutional crisis by ruling that the Constitution did not apply to the states in rebellion during the war.<sup>1</sup> Following the War, the Thirteenth Amendment formally made slavery unconstitutional throughout the United States. Had the Emancipation Proclamation applied to the northern states, it would have constituted a Fifth Amendment taking. However, it was not a taking because it only applied to the southern states which did not receive Constitutional protection, according to the Court in *Texas v. White*.<sup>2</sup>

Section II will show the Constitutional basis for a governmental taking; Section III will examine the value that slavery represented to the Confederacy and the South's economic motivation for perpetuating slavery. Section IV will analyze the Supreme Court's removal of Constitutional

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<sup>1</sup> *Texas v. White*, 74 U.S. 700, 703 (1868).

<sup>2</sup> *Id.*

protections for the Confederacy in its *Texas v. White* decision. Section V will reconcile the Emancipation Proclamation, the *White* decision, and the Thirteenth Amendment in this context.

## II. A TAKING IN 1863

### A. FEDERAL AUTHORITY FOR TAKING

Eminent domain is the power of the government to take private property for public use.<sup>3</sup> The Framers recognized the potential for the public good to outweigh the need to preserve private property rights. The Fifth Amendment in the Bill of Rights addressed this circumstance, stating: “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>4</sup> This provision is important because it guarantees that the federal government cannot take an individual’s property without compensating him, nor could it deny him due process regarding the taking.

For most of the nineteenth century, the federal government did not have the power to exercise eminent domain over real property; that was exclusively a state power.<sup>5</sup> In 1860, while debating federal legislation regarding condemnation of land in California, then-Senator Jefferson Davis said:

The men who framed this Government looked with great jealousy to the encroach of the Federal power on the domain of the States. Hence the expressions of the Constitution are very guarded; and I cannot believe that the character of property which it was in consideration that the Government might take for public uses, by making just compensation therefore, was the real estate or land lying within the limits of a State. I rather suppose it was that character of property which might be needed for immediate use—horses, corn, and other things which may

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<sup>3</sup> U.S. CONST. AMEND. V.

<sup>4</sup> *Id.*

<sup>5</sup> *Kohl v. United States*, 91 U.S. 367, 369 (1875).

be necessary for the Government to use immediately, such as a transport ship; but real estate within the limits of a State I think the Government should only acquire, first by consent of the people, and then under the operations of laws enacted by the State.<sup>6</sup>

In 1875, the Supreme Court held in *Kohl v. United States* that an act of Congress which appropriated funds “to obtain by purchase, or to obtain by condemnation in the courts” real estate to construct post offices in Boston and Cincinnati indicated that Congress anticipated the need to take the real estate against the will of the owner.<sup>7</sup> Through this holding, the Court extended the federal government’s eminent domain power to include real property.<sup>8</sup>

While the Fifth Amendment required just compensation for a federal government taking, that protection did not apply to the states. In *Barron v. Baltimore*, the Supreme Court held that the Constitution applied exclusively to the federal government. The Court’s justification was that the states were free to impose limitations on themselves through their own constitutions. The Court said:

The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.<sup>9</sup>

There, to improve city infrastructure and improve drainage, the city of Baltimore created several new roads and diverted several streams from draining into the Chesapeake Bay.<sup>10</sup>

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<sup>6</sup> Cong. Globe, 36th Cong., 1st Sess. 1790 (1860).

<sup>7</sup> *Kohl*, 91 U.S. 367 at 369.

<sup>8</sup> William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1777 (2013).

<sup>9</sup> *Barron v. Baltimore*, 32 U.S. 243, 247 (1833).

<sup>10</sup> *Id.* at 244.

Barron owned a wharf on that bay. Following these infrastructure improvements, the water level in the area of the wharf was significantly lower. The new level prevented larger ships from docking at the wharf, causing Barron to lose dock fees from these ships.<sup>11</sup> Barron sued Baltimore, alleging the city violated his Fifth Amendment right to just compensation.<sup>12</sup> The Supreme Court ruled in favor of the city, holding that the city could not violate Barron's right to just compensation because the Fifth Amendment only applied to the federal government.

The Fifth Amendment's eminent domain power and just compensation requirement was substantially narrower in 1863 than the modern version. Specifically, that power only applied to personal property and only required just compensation only when the federal government did the taking.<sup>13</sup>

#### B. SLAVES AS PROPERTY

The Constitution recognized slaves as property from its inception. For example, Article IV, section two, clause three:

No *person* held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.<sup>14</sup> (emphasis added)

In 1859, the Circuit Court for the District of Virginia held in *U.S. v. Amy* that the government owed no compensation to a slave owner when the slave committed a crime that required the slave to be jailed. No compensation was warranted because jailing the slave only incidentally burdened the property rights of the owner.<sup>15</sup> The court further examined slaves as property:

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 245.

<sup>13</sup> See Kohl, 91 U.S. at 367, 369; Barron, 32 U.S. at 243, 247.

<sup>14</sup> The Thirteenth Amendment repealed this clause.

<sup>15</sup> *U.S. v. Amy*, 24 F.Cas. 792, 810 (C.C.D. Va. 1859).

In expounding this law, we must not lose sight of the twofold character which belongs to the slave. He is a *person*, and also *property*. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it; and he may be embraced in the provisions of the law, either by the description of property or as a person, according to the subject-matter upon which congress or a state is legislating. (emphasis added)

In contrast, Congress exercised its direct control of Washington, D.C. when it passed the Compensated Emancipation Act in 1862, a law freeing all slaves in the District of Columbia.<sup>16</sup> This law compensated all slaveholders three hundred dollars per slave. Both the law and *Amy* recognized that slaves were people; both recognized that slaves were also property. The circuit court did so explicitly, while the Congress did so implicitly by complying with the Fifth Amendment.

By June of 1862, attitudes toward compensation for emancipation had changed. Congress acted consistently with *Amy* by freeing all slaves in the territories without compensation.<sup>17</sup> This likely violated the Fifth Amendment, according to *Barron v. Baltimore*, because the territories derived their power from the federal Constitution, not a state constitution.<sup>18</sup> Both *Amy* and *Dred Scott v. Sandford*,<sup>19</sup> one of the most famous Supreme Court cases in American history, recognize slaves were property. Congress also endorsed this idea by compensating slave owners in the District of Columbia for emancipation. By the standards of the time, the Fifth Amendment required just compensation for emancipating the territories, yet none was given.

In 1862, Congress again recognized that emancipation required compensation when it passed a resolution stating that Northern states could voluntarily emancipate in exchange for

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<sup>16</sup> 12 Stat. 376, 377 (1862).

<sup>17</sup> 12 Stat. 432 (1862).

<sup>18</sup> Baude, *supra* note 8, at 1792-93.

<sup>19</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

compensation.<sup>20</sup> President Lincoln famously wrote to the Philadelphia Inquirer newspaper encouraging the states to accept the proposal.<sup>21</sup> The states did not accept the proposal, but it demonstrated Congress's recognition of the Fifth Amendment requirement of compensation for emancipation.

Congress passed two statutes that permitted Northern slave owners whose slaves fought for the Union Army to file a claim with the federal government for the loss of that slave's services.<sup>22</sup> The only requirements to file a claim were proof of ownership of the slave and proof of the slave's military service.<sup>23</sup> A successful claim earned the slave-owner three hundred dollars and the slave his freedom.<sup>24</sup> Of note, section twenty-four of the act says "award to each loyal person to whom a colored volunteer may owe service a *just compensation*."<sup>25</sup> (emphasis added)

Article IV, section 2 of the Constitution is evidence that the Framers viewed slaves as property that warranted protection from the federal government. Compensation claims based on voluntary military service show a contemporaneous acceptance of the Framers' notion during the Civil War period. The notion that slaves were the type of property the Fifth Amendment was designed to protect is further shown by the term "just compensation" in the military service compensation act—the exact language used in the Fifth Amendment.

On this basis, Congress regarded slaves as property like any other, making just compensation due for their emancipation. This attitude was likely derived from slavery's significant economic value and reinforced by the Court's decision in *Dred Scott*.

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<sup>20</sup> H.R.J. Res. No. 26, 37th Cong. (1862).

<sup>21</sup> Abraham Lincoln, *Message From the President*, PHILADELPHIA INQUIRER (Mar. 7, 1862), available at <https://www.sethkaller.com/item/1346-30001.28-Lincoln's-Compensated-Emancipation-Proposal>.

<sup>22</sup> ST. LOUIS COUNTY LIBRARY, *SLAVE COMPENSATION CLAIMS, U.S. COLORED TROOPS* (2018), available at <https://www.slcl.org/content/slave-compensation-claims-us-colored-troops-index-last-name-soldier>.

<sup>23</sup> 13 Stat. 11 (1864).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

### III. THE ECONOMIC IMPACT OF A SLAVE

#### A. *DRED SCOTT V. SANDFORD* EXPLICITLY CALLS SLAVES PROPERTY

Dred Scott was a slave purchased by John Emerson in 1832.<sup>26</sup> Emerson took Scott with him when he moved around the country; first from Virginia to Missouri, then throughout the Northwest Territory, and finally to Wisconsin. While they were in Wisconsin, Congress passed the Missouri Compromise, which outlawed slavery north of Missouri, including in Wisconsin.<sup>27</sup> Emerson left Scott in Wisconsin, with Scott's wife and children, when Emerson moved to Louisiana.<sup>28</sup> In 1843, Emerson died in Missouri, leaving his estate to his wife, Irene Sanford, including Scott and his family.<sup>29</sup> Scott sued Sanford for his and his family's freedom in Missouri. The Supreme Court of Missouri ruled for Sanford because Missouri was a slave state. Scott sued in federal court, eventually appealing to the United States Supreme Court.<sup>30</sup>

The Supreme Court held that Scott had no standing to sue because he was not a United States citizen by sole virtue of his race.<sup>31</sup> In its holding, the Court continued: "[t]he only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of *property* and to hold as slaves."<sup>32</sup> (emphasis added) The Court expanded Scott's lack of citizenship to all people of African descent.<sup>33</sup>

The Court's rationale was that its job was to interpret the Constitution as written, not influence public policy. Chief

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<sup>26</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 397 (1857).

<sup>27</sup> Specifically, the Missouri Compromise outlawed slavery north of 36°30', permitted Missouri to enter the Union as a slave state, Maine to enter as a free state, and required new states to enter the Union in pairs: one free, one slave. Roberta Alexander, *Dred Scott: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 644 (2007).

<sup>28</sup> *Dred Scott*, 60 U.S. at 397-98.

<sup>29</sup> Due to a clerical error, Sanford's name was spelled "Sandford" in the case name. *Dred Scott*, 60 U.S. at 393, 397.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 394.

<sup>32</sup> *Id.* at 393.

<sup>33</sup> *Id.*

Justice John Marshall famously said: “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>34</sup> By “saying what the law is” the *Dred Scott* majority stripped the citizenship of millions of people and explicitly endorsed the notion that African-descended slaves were property with “no rights which the white man was bound to respect.”<sup>35</sup>

#### B. SLAVERY HAD IMMENSE ECONOMIC VALUE.

Racial superiority was not the sole motivation for perpetuating slavery. By 1860, slavery was the single most valuable asset in the South; more valuable than land, the railroads, and the banks. The total value of Southern agricultural land in 1860 was 2.3 billion dollars; slaves were valued at 3.1 billion dollars.<sup>36</sup> Emancipation would eliminate the value of slavery completely; that aspect of the economy would no longer exist. The complete elimination of the institution was a rational fear of the slave owners based on this immense value. To put this value in perspective, in 1860 the total valuation of all real property, personal property, and machinery, in the United States, was 16.1 billion dollars.<sup>37</sup> That value was not distributed evenly—the industrial North was worth 9.7 billion dollars while the agrarian South was worth 6.3 billion dollars.<sup>38</sup> In the North, where many states had abolished slavery, the value of slavery was virtually nothing. However, in the South, slaves represented 3.1 of that 6.3 billion dollar whole. Slavery represented approximately 49% of the *entire* value of all property—real estate, personal property, and machinery—in the South.

Based on these relative values, the Emancipation Proclamation had an immense effect on the Southern economy and little effect on the North. While the Emancipation Proclamation did not apply to the Northern states, the value of

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<sup>34</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>35</sup> *Dred Scott*, 60 U.S. at 407.

<sup>36</sup> GAVIN WRIGHT, *SLAVERY AND AMERICAN ECONOMIC DEVELOPMENT* 59-60 (2013) (citing U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES* 460-462); figures are in 1860 dollars.

<sup>37</sup> U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES* A 3-41, Table 2.

<sup>38</sup> WRIGHT, *supra* note 36, at 60.



slavery to the North was essentially zero, so its effect was minimal. However, the instantaneous elimination of 49% of the property value in the South would affect every individual Southerner, slaver owner and non-slave owner alike.

Abolition would have been a devastating economic blow to the South. While racial superiority is indisputably a significant motivating factor for the perpetuation of slavery, the economic factor likewise cannot be denied. Absent the racial factors, it is possible that the South would have just as aggressively pursued the war effort because abolition disproportionately affected the South to such a degree. Simply put, it was easy to be a Northern abolitionist because their livelihood did not depend on slavery. It was much harder to be a Southern abolitionist when the entire economy was structured around the institution.

### C. THE ARMY BECOMES THE TOOL OF EMANCIPATION

Lincoln was conflicted by the *Dred Scott* decision.<sup>39</sup> He valued and respected the law greatly but disagreed with the decision; he said: "[the Republican Party] think[s] the *Dred Scott* decision is erroneous . . . we shall do what we have to over-rule this."<sup>40</sup> In early 1861, General John C. Frémont, commander of the Union army in the West, escalated his approach to the prosecution of the war. He declared martial law in Missouri, proclaiming that any person caught bearing arms against the Union would be tried in a military court and executed if convicted.<sup>41</sup> Furthermore, any person caught aiding the rebels would have their slaves seized and emancipated.<sup>42</sup> Lincoln did not agree with Frémont's heavy-handed tactics and privately ordered him to cease.<sup>43</sup> Lincoln needed the support of the pro-Union slave states of Kentucky, Maryland, Missouri, and Delaware and did not want to risk turning them Confederate. When Frémont would not relent, Lincoln publicly reprimanded

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<sup>39</sup> DAVID HERBERT DONALD, *LINCOLN* 201 (1995).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 314.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

him, revoked his order, and removed Frémont from command.<sup>44</sup>

In May 1861, Confederate General John Cary entered Union Fort Monroe, in Virginia, under a flag of truce seeking the return of two escaped slaves.<sup>45</sup> He invoked the Fugitive Slave Clause of the Constitution as justification for their return.<sup>46</sup> General Benjamin Butler, commander of the fort, declared the slaves were “contrabands of war,” and were the equivalent of military property which could not be returned because they were directly furthering the war effort.<sup>47</sup> Butler further considered the Confederacy to be a foreign country, in which the Fugitive Slave Clause did not apply.<sup>48</sup>

By August, the Secretary of War issued guidance that all military commander should follow Butler’s precedent and to deny Confederates the return of their slaves.<sup>49</sup> After the war, the Supreme Court of Texas derided this action as unconstitutional, stating in *Hall v. Keese*:

Because the Constitution gives Congress the power to declare and fund war, any “contrabands of war” go to the Congress. The President merely *prosecutes* the war on behalf of Congress, so his orders to capture and free slaves was unconstitutional. If the people of Texas were citizens of the United States during the rebellion they could not be deprived of their property without due process of law. If they were a part of another state or a de facto government, and they and their property were captured by the forces of the United States, it belonged to

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<sup>44</sup> *Id.* at 315.

<sup>45</sup> Robert Fabrikant, *Lincoln, A Reluctant, But Still Great Emancipator: A Review of James Oakes, Freedom National: The Destruction Of Slavery In The United States, 1861-1865*, 57 HOW. L. J. 93, 98 (2013).

<sup>46</sup> *Id.*

<sup>47</sup> UNITED STATES NATIONAL PARK SERVICE, FORT MONROE AND THE “CONTRABANDS OF WAR” (2018), *available at* <https://www.nps.gov/articles/fort-monroe-and-the-contrabands-of-war.htm>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

congress and not the commander-in-chief of the army to make rules concerning those captures.<sup>50</sup>

President Lincoln later relied on this authority as Commander and Chief of the Army and Navy in the Emancipation Proclamation, which is based on the contraband of war theory first adopted by General Butler in 1861.<sup>51</sup>

Congress codified Butler's "contrabands of war" theory in the Confiscation Act of 1861.<sup>52</sup> The Act statutorily authorized Union troops to seize rebel property used to further the rebellion.<sup>53</sup> It explicitly included slaves, lumping them in with other property like horses, food, and weapons.<sup>54</sup> This Act codified the military order, which itself was based on the popular notion that slaves were property. That notion was reinforced by *Dredd Scott*. Each action—*Dredd Scott*, the Confiscation Act of 1861, and Butler's proclamation—are an endorsement by the Executive, Legislative, and Judicial branches that the federal government regarded slaves as property; taking property required just compensation.

#### IV. IN LIGHT OF *TEXAS V. WHITE*, DID THE CONFEDERATE STATES WARRANT CONSTITUTIONAL PROTECTION?

##### A. THE CONFEDERATE STATES NEVER LEFT THE UNION.

In 1851, the United States government issued \$5,000,000 in bonds to the state of Texas.<sup>55</sup> The terms of the bond stated they were payable to the state of Texas or the bearer of bonds.<sup>56</sup> Each bond contained a statement that the debt was authorized by an act of Congress and was "transferable on delivery."<sup>57</sup> In 1861, Texas still held the majority of the bonds.<sup>58</sup> Later that year,

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<sup>50</sup> *Hall v. Keese*, 31 Tex. 504 (Tex. 1868) (emphasis added); this decision was published two months before *Texas v. White*.

<sup>51</sup> Emancipation Proclamation, *infra* note 74.

<sup>52</sup> Confiscation Act of 1861, 12 Stat. 319.

<sup>53</sup> DONALD, *supra* note 39, at 149.

<sup>54</sup> *Id.*; Confiscation Act, *supra* note 52.

<sup>55</sup> *Texas v. White*, 74 U.S. 700, 703 (1869).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Texas joined the Confederacy in rebellion against the United States.

By 1862, Texas needed funds to prosecute the war. January 11, 1862 the Texas legislature passed an act “to dispose of any bonds and coupons which may be in the treasury on any account, and use such funds or their proceeds for the defence of the State”<sup>59</sup> The United States bonds were sold for medicine and other supplies to support Texan and Confederate soldiers.<sup>60</sup>

Following the Confederate defeat, Texas was readmitted into the United States as part of the broader reconstruction plan. In 1866, a state convention passed an ordinance seeking recovery of the bonds.<sup>61</sup> It declared the sale was invalid because the rebel government was not authorized to sell or redeem the bonds, and the proceeds were used to take up arms against the United States.<sup>62</sup> The Supreme Court ruled that Texas never left the Union:

When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.

Considered as transactions under the Constitution, the ordinance of secession, adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The State did not cease to be a State, nor her citizens to be citizens of the Union.<sup>63</sup>

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<sup>59</sup> *Id.* at 705.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 708.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 700-01.

The Court explained its holding by saying: "for States, like individuals, retain their identity, though changed, to some extent, in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the Constitutional guaranty."<sup>64</sup>

Based on *White*, it is for Congress to decide what government is the established government in a state. During the Civil War, the rights of Texas as a member of the Union, and the people of Texas as citizens of the Union were suspended. The state of Texas continued to be one of the United States, notwithstanding the ordinance of secession.<sup>65</sup>

The holding in *White* contradicts the Constitution. For example: article IV, section two, clause one: "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>66</sup> *White* created a different set of rules for individuals depending on what state those individuals were in. According to *White*, the Constitution did not protect a citizen of Tennessee, being from a state in rebellion. However, a citizen of Kentucky, being just across the border, would have merited Constitutional protections based on that state's status as a loyal member of the Union. On its face, this situation is adverse to article IV, section 2 because it creates different privileges and immunities depending on the individual's citizenship. Additionally, *White* is agnostic to the individual's loyalties. *White* justifies this position by stating that individuals in rebellion gave up their Constitutional protections by taking arms against the Union.<sup>67</sup> Almost certainly there were pro-Confederacy Kentuckians and Tennesseans loyal to the Union. *White* does not make individual loyalty to the Union a necessary condition, only state citizenship.

Furthermore, article VI, clause 2, the Supremacy Clause, declares "[t]his Constitution . . . shall be the supreme Law of the Land; and . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>68</sup> This means that the Constitution trumps any other federal and state law. The Supremacy Clause establishes a base line that every law must

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 708.

<sup>66</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>67</sup> *White*, 74 U.S. at 733-34.

<sup>68</sup> U.S. CONST. art VI, cl. 2.

conform to the provisions of the Constitution; therefore, the Constitution *always* applies. According to the Supremacy Clause, in a conflict between the Fifth Amendment and the Emancipation Proclamation, which is an executive order, the Fifth Amendment is controlling because it is a part of the Constitution. If the Fifth Amendment governs the action, then just compensation is required for a taking. Whether intentional or not, the *White* holding ran counter to the Supremacy Clause by favoring the Emancipation Proclamation over the Fifth Amendment. While freeing the slaves was undoubtedly the right moral action to take, the Supreme Court attempted to shoe-horn right moral action with the law with its *Texas v. White* decision. Rather than consistently apply the Constitution, the Court chose to do the morally right thing, and created law to do it.

B. *WHITE* AS APPLIED BY A LOWER COURT.

The Supreme Court of Tennessee applied *White* in *State v. President of Bank of Tennessee*.<sup>69</sup>

Tennessee existed as one of the States of the Union before the rebellion; it continued so during the rebellion. In the language of Chief Justice Chase, in *Texas v. White*, 'the obligation of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union.' The corresponding right of the citizens of the State to the protection of the laws of the United States was, for the time of the rebellion, suspended.

Like Texas, Tennessee remained part of the United States, but the Constitution did not apply. There, the Bank of Tennessee was ordered to pay back debts outstanding prior to 1861. Priority was given first to the state, then to debts owed prior to

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<sup>69</sup> *State v. President of Bank of Tenn.*, 64 Tenn. 1, 73 (Tenn. 1875).

May 6, 1861.<sup>70</sup> All claims after May 6, 1861, while the state was in rebellion, were “absolutely null and void” because the funds had been raised to further the war effort.<sup>71</sup> Creditors whose claims were based on loans made after May 6 argued that the Constitution prohibited the nullification of a private contract. The Supreme Court of Tennessee applied *White* when it held that Constitutional protections did not apply during the Civil War, therefore the General Assembly was justified in barring those debts.<sup>72</sup>

This case is instructive as an example of the application of *Texas v. White* because it shows how a court was likely to rule in a case for emancipation-based compensation. A claim for just compensation based on emancipation would essentially claim that the government owed a debt to an individual slave owner. Like the creditors in *Bank of Tennessee*, the debt would arise out of the events of the Civil War. Applying *White* like the Supreme Court of Tennessee did, a court would likely hold that the Fifth Amendment did not protect the slave owner and no debt was owed. While that seems like the type of tyranny the Framers intended the Fifth Amendment to guard against, that is the logical conclusion to which the *White* decision leads.

The *White* decision was a retroactive justification for right moral action. These cases are attempts to reconcile emancipation with practicality and the law. While emancipation was the right thing to do morally, the notion that the states never left the Union implies that the Constitution continued to apply to them. While paying just compensation for every slave in the South was an impractically large sum, that is what the Constitution required. However, emancipation was the right moral action and the courts constructed a justification for it.

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<sup>70</sup> On May 6, 1861 a referendum was held for the question of secession; it passed overwhelmingly. Tennessee officially became part of the Confederacy June 8, 1861. JAMES WALTER FERTIG, *THE SECESSION AND RECONSTRUCTION OF TENNESSEE* 24-26 (1898).

<sup>71</sup> *Bank of Tenn.*, 64 Tenn. at 101.

<sup>72</sup> *Id.* at 165-66.; *But see* 12 Op. Att’y. Gen. 19 (1866) (stating “private debts are not annulled by war,” and further recommending that the government make restitution to a loyalist living in Virginia whose property was taken pursuant the Confiscation Act of 1861 but did not use that property to further the Confederate war effort.).

## V. RECONCILING THE EMANCIPATION PROCLAMATION WITH WHITE — THE THIRTEENTH AMENDMENT.

### A. THE EMANCIPATION PROCLAMATION

Lincoln issued the “Preliminary Emancipation Proclamation” on September 22, 1862.<sup>73</sup> This preliminary order declared that on January 1, 1863 all slaves held in the Confederate States would be free; those states had one hundred days to reconcile and accept a gradual emancipation or that “the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons.”<sup>74</sup> Lincoln was aware of the legal implications of freeing slaves without compensation. Paragraph thirteen of the Preliminary Proclamation:

And the executive will in due time recommend that all citizens of the United States who shall have remained loyal thereto throughout the rebellion, shall (upon the restoration of the Constitutional relation between the United States, and their respective States, and people, if that relation shall have been suspended or disturbed) be compensated for all losses by acts of the United States, including the loss of slaves.

This means Lincoln, as the executive, would recommend that loyal slaveholders in the North be justly compensated for taking their slaves, pursuant to the Fifth Amendment.

Lincoln was careful to invoke his powers as Commander and Chief, enforcing the Proclamation through military force and limiting the scope to only states-in-rebellion. This may indicate he may have been unsure if the Constitution applied to the Confederacy or not; he distinguishes the point by saying: “if that relation has been suspended or disturbed,” not simply “that relation *has* been suspended.”<sup>75</sup> (emphasis added)

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<sup>73</sup> DONALD, *supra* note 39, at 374.

<sup>74</sup> Proclamation No. 16 (Preliminary Emancipation Proclamation), 12 Stat. 1267, para. 3 (Sept. 22, 1862).

<sup>75</sup> *Id.*



It seems Lincoln recognized that a conflict existed: the morally right action was freeing the slaves, but the law regarded these individuals as property that required compensation. The constitutionality of the Emancipation Proclamation was never tested because of the Thirteenth Amendment.<sup>76</sup>

## B. THE THIRTEENTH AMENDMENT

**Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**Section 2.** Congress shall have power to enforce this article by appropriate legislation.<sup>77</sup>

The Thirteenth Amendment constitutionalized the Emancipation Proclamation.<sup>78</sup> The concise, clear meaning of the Thirteenth Amendment solves the Constitutional problem with emancipation: namely, the Fifth Amendment requirement of just compensation was no longer applicable and military force was not required for enforcement. The Thirteenth Amendment and *Texas v. White* attempted to legitimize the right moral action of emancipation with the law. Freeing the slaves was undoubtedly the right moral thing to do; in 1863 it was not yet the legal thing to do.

When the states ratified the Thirteenth Amendment the abolition of slavery became Constitutional. With the *White* decision, the Emancipation Proclamation became retroactively legal. These acts attempted to reconcile the right moral action with the law. The Justices and Congressmen recognized the enormous economic impact of slavery's abolition, and the Civil War in general, that would motivate compensation claims. Their only option was to fundamentally change the law. These

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<sup>76</sup> Henry L. Chambers, Jr., *Lincoln, The Emancipation Proclamation, And Executive Power*, 73 MD. L. REV. 100 (2013).

<sup>77</sup> U.S. Const. amend. XIII.

<sup>78</sup> Lauren Kares, *The Unlucky Thirteenth: A Constitutional Amendment in Search of A Doctrine*, 80 CORNELL L. REV. 372, 373 (1995).

laws were part of the broader reconstruction context which sought to rebuild, reconcile, and move on from the war. The most effective way to do that was to ratify a broad change to the Constitution and reinterpret the law in such a way as to retroactively legitimize it.

The Thirteenth Amendment is the answer to the inconsistency between the Fifth Amendment and the Emancipation Proclamation. It prevented the condition of slavery which led to the taking by the Emancipation Proclamation. The Thirteenth Amendment effectively prevented any future litigation from arising because it made slavery explicitly, and indisputably, unconstitutional. The *Texas v. White* decision effectively cut off any potential takings litigation that might arise out of the Emancipation Proclamation.