Almost a Free State

The Indiana Constitution of 1816 and the Problem of Slavery

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> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.
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> 1816 Indiana Constitution, Article 1, Section 1

In 1816, Indiana entered the Union as the second state carved out of the Northwest Territory. Before statehood, Indiana had been governed by the Northwest Ordinance of 1787, which prohibited slavery and involuntary servitude in the territory. Despite the Ordinance, white settlers in Indiana held hundreds of African Americans as slaves and indentured servants throughout the territorial period. Two strong and relatively complex provisions of Indiana's new state constitution continued the Ordinance's formal ban on slavery. Article 8 provided that

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> as the holding any part of the human Creation in slavery, or involuntary servitude, can only originate in usurpation and tyranny, no alteration of this constitution shall ever take place so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.

Article 11, Section 7, went on to declare: "There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state be of any validity within the state."[1] While these constitutional provisions presumably ended slavery, for more than a quarter of a century after the adoption of the 1816 constitution, some African Americans in Indiana were held as slaves or as indentured servants in a form of involuntary servitude that was not exactly slavery, but something close to it.[2]

Meanwhile, in the three-and-a-half decades under its first constitution Indiana built a legal structure that was enormously hostile to free blacks and solicitous of the rights of slave owners. Early Indiana was never a slave state, but neither was it fully free. Building on this tradition, Indiana's second constitution, adopted in 1851, was more hostile to free blacks than the fundamental political document of any other antebellum northern state. In the decade between the adoption of the second constitution and the beginning of the Civil War, Indiana emerged the most Negrophobic state in the North.[3]

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[1]In addition, Article 1, Section 1 of the 1816 constitution began with a general affirmation of liberty quoted at the beginning of this article. A similar provision had been used by the Supreme Judicial Court of Massachusetts to end slavery in that state. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, N. C., 1981), 41.

[2]In both 1830 and 1840, the U.S. Census found three slaves still in Indiana. It is likely that others were held in bondage but not recorded as slaves. In 1830, a local census found 32 slaves just in the town of Vincennes, and slaves were certainly held in other places as well. Jacob P. Dunn, Jr., *Indiana: A Redemption from Slavery* (New York, 1905), 441.

[3]Illustrative of Indiana's hostility to free blacks is the lack of growth in the state's black population between 1850 and 1860. The 1851 constitution prohibited free blacks from entering the state. Between 1850 and 1860, the state's black population grew from 11,262 to 11,428. This growth would have come from African American children born in the state. By contrast, Illinois, which made it difficult for blacks to move into the state, nevertheless saw its African American population grow from 5,436 to 7,628. An even more stark contrast is with Ohio, which had similar laws to discourage black migration from statehood in 1803 until they were repealed in 1849. "An Act To authorize the establishment of separate schools for the education of colored children, and for other purposes." Act of February 10, 1849, 47 Ohio Laws 17 (1849). During this period the free black population grew from 198 in 1800 to over 25,000 in 1850. The free black population virtually doubled every decade from 1810 to 1840, and then grew by about 8,000 people between 1840 and 1850.

Thus, when the Civil War began there were no slaves in Indiana, but the status of blacks was worse than in any other free state.[4] Unlike virtually all other free states,[5] Indiana provided no legislation or precedents to emancipate slaves owned by visiting or sojourning masters, and instead explicitly allowed them to bring slaves through the state.[6] Blacks in the state could not vote, serve on juries, hold office, serve in the militia,[7] practice law, testify against whites,[8] or even legally reside there without proof of their freedom. While other states passed personal liberty laws to protect free blacks from southern kidnappers and to withdraw state participation in the return of fugitive slaves,[9] Indiana went in the opposite direction, providing state support for return of fugitives and making it a crime to harbor or help fugitive slaves.[10] A year after statehood, Indiana—

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[4]The received wisdom among historians, based on Eugene H. Berwanger, *The Frontier Against Slavery: Western Anti-Negro Prejudice and the Slavery Extension Controversy* (Urbana, Ill., 1967) and Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago, 1961), is that the antebellum North, especially the Midwest, was deeply hostile to black rights. This thesis works for Indiana and Illinois, but is clearly not as viable for much of the rest of the North and even the Midwest. For example, in 1849 Ohio repealed almost all its anti-black legislation. See "An Act To authorize the establishment of separate schools . . ." cited in note 3. This statute was directed at all sorts of discrimination beyond schools and provided that "all parts of other acts, so far as they enforce any special disabilities or confer any special privileges on account of color, are hereby repealed," except as relating to jury service and poor relief. See also the discussion of interracial marriage in footnote 13, below.

[5]The law in Illinois was similar to that of Indiana.

[6]"An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, chap. 66, *The Revised Laws of Indiana* (Indianapolis, Ind., 1831), 375-76. Section 5 states: "That the right of any person or persons to pass their slaves, through this state, with his, her or their negroes or mulattoes, servant or servants, when emigrating or travelling to any other state or territory, or country, making no unnecessary delay, is hereby declared and secured."

[7]The 1816 constitution specifically excluded "negroes, mulattoes, and Indians" from militia service. Ind. Const. art. 7 (1816). Article 12 of the 1851 constitution limited militia service to "white male persons."

[8]"An Act, reducing into one all the acts and parts of acts now in force in this state, regulating proceedings in actions at law, and suits in Chancery," Act of January 28, 1818, chap. 3, sec. 52-53, *Laws of the State of Indiana* (Corydon, Ind., 1818), 39-40; "An Act regulating the Practice in Suits at Law," Act of January 29, 1831, sec. 37, *The Revised Laws of Indiana* (Indianapolis, Ind., 1831), 399, 407.

[9]See Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore, Md., 1974); and Paul Finkelman, "*Prigg v. Pennsylvania* and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* 25 (March 1979), 5-35.

[10]"An act relative to Fugitives from Labour," Act of January 22, 1824, chap. 47, *The Revised Laws of Indiana* (Corydon, Ind., 1824), 221; "An Act relative to crime and punishment," Act of February 10, 1831, sec. 37, *The Revised Laws of Indiana* (1831), 188; "An Act concerning Crimes and Punishment, and Proceedings in Criminal Cases," chap. 53, sec. 115 ("Giving Free Papers or Assisting Slaves to Escape") and sec. 116 ("Obstructing Process; Rescue"), *The Revised Statutes of the State of Indiana* (Indianapolis, Ind., 1843), 984.

in contrast to the neighboring state of Ohio—banned interracial marriage and specifically criminalized interracial sex by providing fines for white men—and jail time for white women—who had sex with blacks.[11] Antebellum Indiana continued to prohibit interracial marriage at a time when most other northern states did not, and its prohibition on such marriages remained on the books well into the next century.[12] When the 1851 constitution was ratified, two-thirds of the states in the North allowed interracial marriage, but Indiana was not in that group.[13] Blacks were denied a free public education,[14] and could not legally attend public schools with whites even if they paid tuition and no white parents of school children

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[11]"An Act to reduce into one act, all the acts and parts of acts relative to Crime and Punishment," Act of January 20, 1818, chap. 5, sec. 59, *Laws of the State of Indiana* (1818), 75, 94. The act reads: "If any white person shall have sexual intercourse, with any negro within this state, he or she so offending, shall, on conviction by presentment or indictment, if a male be fined in any sum not exceeding one hundred dollars, and if a female, be imprisoned not exceeding ten days; and it shall not hereafter be lawful for any white person to intermarry with any negro in this state." Significantly, the law did not punish blacks who were involved in intimate interracial relationships.

[12]An article published in 1944 noted that laws banning interracial marriage were found throughout the South and in parts of the West but were "non-existent in New England, and the Middle Atlantic States outside of Delaware, and in the North Central States except Indiana." Irving G. Tragen, "Comment: Statutory Prohibitions Against Interracial Marriage," *California Law Review* 32 (September 1944), 270.

[13]Act of January 20, 1818, chap. 5, sec. 59, *Laws of the State of Indiana* (1818), 75, 94; "An Act to prohibit the amalgamation of whites and blacks," Act of February 24, 1840, chap. 14, *Laws of a General Nature…of the State of Indiana* (Indianapolis, 1840), 32, amended by "Act to amend an act entitled an act to prohibit the amalgamation of whites and blacks," Act of January 14, 1841, chap. 46, *General Laws of the State of Indiana* (Indianapolis, 1841), 128.

Iowa, which became a state in 1846, five years before Indiana's second constitution, never prohibited interracial marriage. Wisconsin, which became a state in 1848, also did not prohibit interracial marriage. In 1859, Democrats in the Wisconsin legislature proposed such a law but it failed. Peter Wallenstein, *"Tell The Court I Love My Wife: Race, Marriage, and Law—An American History* (New York, 2002), 41, 57. In 1851, when the new Indiana Constitution went into effect, interracial marriage was legal in at least eleven northern states, including New Hampshire, Vermont, Massachusetts, Connecticut, New York, Pennsylvania, New Jersey, Ohio, Iowa, Wisconsin, and Minnesota. This history illustrates that many scholars have been mistaken in believing that the North was overwhelmingly hostile to black rights at the end of the antebellum period. For a comprehensive discussion of the emergence of black rights in this period see Paul Finkelman, "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North," *Rutgers Law Journal* 17 (1986), 415-82; and Finkelman, "The Strange Career of Race Discrimination in Antebellum Ohio," *Case Western Reserve University Law Review* 55 (Winter 2004), 373-408.

[14]"An Act concerning the Boundaries, Jurisdictions, Divisions, Civil Government, and Internal Administration of the State of Indiana," part 1: "Of Common Schools," chap. 15, sec. 102 provided that "When any school is supported in any degree by the public school funds or by taxation, so long as the money so derived shall be expending thereon, such school shall be open and free to all the white children resident within the district, over five and under twenty-one years of age." *The Revised Statutes of the State of Indiana* (1843), 320.

objected to their presence in the school.[15] As the Indiana Supreme Court noted in its subsequent interpretation of the 1816 constitution, "black children were deemed unfit associates of white, as school companions."[16] After 1851, free blacks from other states could not legally move to Indiana. While Indiana legislators made no move to expel blacks from the state, as some slave states wanted, the 1851 constitution did provide funding to "colonize" blacks outside the state if they were willing to move.[17] The anti-black provisions of the 1851 constitution were the logical outcome of trends set in the 1816 constitution and developed by the legislature and the courts over the next thirty-five years. This dismal history began under the Northwest Ordinance of 1787 and continued with the subsequent failure of Congress, the executive branch, and Indiana's territorial government to enforce its antislavery provision.

THE NORTHWEST ORDINANCE AND THE PERSISTENCE OF SLAVERY IN INDIANA

The Congress under the Articles of Confederation spent years trying to craft legislation that would allow the new national government to sell land in the territories north of the Ohio River—what came to be known as the "Northwest," or what historians today call the "Old Northwest."[18] By late spring of 1787, Congress had agreed on a fundamental plan, but a persistent lack of a quorum delayed a vote until July 11, when a committee presented what appeared to be the final version of the Ordinance.

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[15]In some parts of Indiana in the early nineteenth century, public schools were not "free" but were "common pay schools." Because tax revenues did not generate enough money to support the schools, "parents pooled funds to build schoolhouses and paid tuition to hire teachers." Martha McCarthy and Ran Zhang, "The Uncertain Promise of Free Public Schooling," in Randall T. Shepard and David J. Bodenhamer, eds., *The History of Indiana Law* (Athens, Ohio, 2006), 214.

[16]See *Lewis v. Henley and Others*, 2 Ind. 332 (1850). The court noted that the statutes allowed for taxpayer supported schools which would be "open and free to all the white children resident within the district." Ibid. at 333. In 1855, the legislature created a statewide public school tax system that specifically exempted blacks from paying the tax, did not count black children in the school census, and denied them any "benefits" from the school system. "An act to provide for a general system of Common Schools . . ." Act of March 5, 1855, chap 86, sec. 1, *Laws of the State of Indiana* (Indianapolis, Ind., 1855), 161. This contrasts with Ohio, which allowed for integrated schools as a local option and provided for state-funded segregated schools. See Finkelman, "The Strange Career of Race Discrimination in Antebellum Ohio," 373.

[17]On the eve of the Civil War, Arkansas, for example, passed legislation to force free blacks to leave the state, and South Carolina put enormous pressure on its free blacks to leave the state.

[18]This nomenclature reflects the later acquisition of the Oregon Country—the Pacific Northwest—which most Americans today refer to as the "Northwest."

The bill would provide for an interim government in the region, allow for land sales, and lead to an elected legislature and eventually to statehood.[19] On July 12, there was a second reading of the bill with a final reading and vote scheduled for the next day.

On July 13, Massachusetts delegate Nathan Dane proposed an amendment—Article Six of the Ordinance—which provided:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.[20]

The impetus for this clause came from Manasseh Cutler, a lobbyist for a consortium of New England investors who were poised to purchase five to six million acres of land in Ohio after the Ordinance became law.[21] These investors, who had formed the Ohio Land Company, were ready to provide the bankrupt Congress with a much-needed infusion of cash. The investors would buy this land at wholesale prices and sell to New Englanders and others who were anxious to move to the rich lands of the Ohio Valley. Every New England state had, by this time, either ended slavery outright or was doing so through gradual emancipation laws.[22] Prospective settlers from this region opposed slavery on moral, religious, philosophical, political, and economic grounds. They simply wanted no part of the institution.

The southern delegates to the Congress were not overly concerned about the emergence of free states north of the Ohio River because they assumed that any new western states would support their interests—and until the late 1840s the positions on slavery taken by the senators and

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[19]For a detailed history of the writing of the evolution see Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 3rd ed. (New York, 2014), chap. 2: "Slavery and the Northwest Ordinance, 1787: A Study in Ambiguity."

[20]Northwest Ordinance, Article 6.

[21]Finkelman, *Slavery and the Founders*, 40-44.

[22]See Finkelman, *An Imperfect Union*, 40-45; and Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago, 1967).

representatives from Indiana and Illinois (and indeed most of the Midwest) generally proved these southern politicians correct. Southerners also understood—correctly, as well—that in banning slavery in the Northwest Territories they implicitly guaranteed its legality in the Southwest—what became Kentucky, Tennessee, Alabama, and Mississippi.[23] In addition, most southern politicians believed that slavery would be less profitable north of the Ohio River than it would in the South, and thus that reserving the Northwest for slavery was unnecessary.

The most important factor in this vote was the nation's desperate need for money, which the Ohio Land Company had to offer. Congress had a quorum—something it had lacked earlier in the spring—and members were anxious to get this vital piece of legislation behind them. Hurriedly, Congress accepted Dane's amendment banning slavery without any apparent debate or discussion. Nor did the delegates bother to rewrite the rest of the Ordinance to make all of its language consistent with the new clause. Thus Section 9 of the Ordinance provided that the settlers would elect officials after there were "five thousand free male inhabitants" in the territory—language that implied the territory would also include "unfree" inhabitants. Similarly, statehood required the presence of "sixty thousand free inhabitants."[24] No one in Congress considered what the implications of the new clause might be for slaves already living in the territory, or for slaves brought into the territory after 1787. Many of the delegates probably assumed that any slaves brought in would immediately become free. This would have been consistent with law in Great Britain and some of the northern states, which had ended slavery or passed gradual abolition laws. This analysis is supported by the presence of Article 6's fugitive slave provision, which in protecting the property interest of masters whose slaves escaped across the Ohio River seemed to recognize that slaves entering the new territory would become free.[25] But, at the same time, southern members of Congress might also have assumed that the Ordinance did nothing to prevent them from travelling through the territory with their slaves.

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[23]See Finkelman, *Slavery and the Founders*; and also Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution: Ten Essays* (Indianapolis, Ind., 1967), 185-213.

[24]Northwest Ordinance, Section 9 and Article 5.

[25]Everyone in Congress would have been familiar with the English case of *Somerset v. Stewart*, Lofft 1 (1772), which held that when a slave entered a free jurisdiction, the slave was immediately free. The fugitive slave provision of the Ordinance can be seen as an exception to that rule. The delegates were probably also familiar with the Pennsylvania gradual abolition act of 1780 which explicitly allowed masters to bring slaves into the state for up to six months, but also provided that if they kept slaves longer than that, the slaves were immediately free. For more on this, see Finkelman, *An Imperfect Union*, chap. 2.

More importantly, no one in Congress appears to have been aware that a substantial number of slaves were already living in the territory—not in Ohio where the Congress was focusing its energies but further west, in what is today southern Indiana and southern Illinois. Most of these slaves were owned by the "old French settlers" who had moved into the region before 1763, when France claimed the region. France ceded all claims to this land in the Peace of Paris in 1763, ending the French and Indian War. That treaty guaranteed the property rights of the old French settlers, who now found themselves under British rule. This protected property included the French settlers' slaves. The British had made no significant effort to govern this region by the time the American Revolution broke out. Before and during the Revolution, Virginia claimed this land, and of course slavery was legal there, as it was in *every* American colony before the Revolution and in every state at the time of independence. Other new states also asserted a right to the territory, but during the Revolution, Virginia and all the other new American states ceded their western land claims to the United States government. Congress made no effort to govern the region during the war, and slavery remained legal and vibrant in what would become southern Indiana.

In 1783, the Treaty of Paris, ending the American Revolution, guaranteed the property rights of those people who had previously owed allegiance to Britain and now found themselves under American jurisdiction. This included the old French settlers in Indiana and Illinois. Thus, if the Ordinance of 1787 was meant to free immediately all the slaves in Indiana and Illinois, the Congress may have been in violation of the recently signed treaty of peace with Great Britain. But no one in Congress seems to have known that there were already slaves in the Northwest and thus no one in Congress contemplated the legal effect of the Ordinance on the slave property of the old French settlers and the few American slaveholders who had been trickling into the region.

Congressman Dane and the lobbyist Cutler, who both came from Massachusetts, may have assumed that the language of Article 6 would immediately end slavery in the territory. Their home state's 1780 constitution had included a simple declaration that all people were born "free and equal," which judges immediately interpreted as ending slavery there.[26] However, an alternative understanding might have been that the Ordinance was prospective only, and that all slaves already in the territory would therefore remain in bondage, although any children they had after 1787

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[26]See Zilversmit, *The First Emancipation,* 109-117.

might be free. All of this is speculation, because no one in Congress seems to have considered these problems.

Throughout the territorial period, white settlers held blacks as slaves or as servants under what amounted to lifetime indentures. Residents of the territory, including its political leaders, persistently asked Congress to modify the Ordinance to allow some form of slavery or long-term indentures, and even though that never happened, the territorial government also did nothing to liberate those blacks who still lived in servitude.[27] Thus, the Ordinance clearly did not end slavery in the territory, or lead to freedom for very many (if any) slaves; at best it slowed down the movement of more slaves into the territory. During this period, some masters in Indiana converted their slaves into indentured servants, as a way of avoiding the emancipatory provisions of the Ordinance. Some southerners who moved into the territory did the same thing with the slaves they brought with them. These indentures were essentially frauds, because they were often for absurdly long periods of time, such as fifty years or even ninety-nine years, and thus created lifetime bondage that was virtually indistinguishable from slavery. A vigorous trade in slaves and black indentured servants in fact continued during the territorial period.[28] To the extent that the territorial government enforced these indentures, and helped masters to control their servants, territorial Indiana supported slavery and involuntary servitude.

As I have already noted, the state's first constitution *did* formally end slavery. So the great legal and constitutional issues for the new state focused on 1) how to end the status of "slave" for those people still held as slaves; 2) the status of indentured blacks; 3) the status of visiting or sojourning slaves who came into Indiana with their masters; and 4) the status and rights of free blacks who lived in Indiana or migrated into the state.

THE 1816 CONSTITUTION AND SLAVERY IN INDIANA

As indicated above, two articles in the Indiana Constitution of 1816 dealt directly with slavery. Article 8, Section 1 declared that slavery could "only originate in usurpation and tyranny," and thus "no alteration of this constitution shall ever take place so as to introduce slavery or involuntary

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[27]Finkelman, *Slavery and the Founders*, 55-66.

[28]See James H. Madison, "Race, Law, and the Burdens of Indiana History," in *The History of Indiana Law*, 39; Emma Lou Thornbrough, *The Negro in Indiana Before 1900: A Study of a Minority* (Indianapolis, Ind., 1957), 10-24; and Finkelman, *Slavery and the Founders*, chap. 3.

servitude in this State."[29] This was both an emphatic moral attack on slavery and a promise never to allow it in the state. It is not clear whether the ban on altering this provision was constitutionally defensible, since presumably, an "unamendable" provision could be amended out of existence, and then a second amendment could have allowed slavery. However, the clause was a clear and emphatic statement of political principle and an unambiguous condemnation of slavery.

Article 11, Section 7 declared: "There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state be of any validity within the state." The first sentence of this provision mirrored the Northwest Ordinance, while the second was a frontal assault on attempts to evade the ban on slavery through the subterfuge of indentures.

In addition to these two direct statements on slavery, the institution was affected, albeit ambiguously, by the constitution's first provision: "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." The "born equally free and independent" clause alone might have sufficed to end slavery in the new state, as similar wording had done in Massachusetts and New Hampshire. At the same time, however, Indiana masters might have used the emphatic defense "of acquiring, possessing, and protecting property" to protect their right to continued possession of their slaves.

Taken together, these three provisions created a unique constitutional prohibition on slavery. They made Indiana's constitution the *first* state constitution explicitly to end slavery in a jurisdiction where a significant number of slaves lived and where prominent members of the political and social elite were slave owners. This fact may surprise most readers and requires some explanation.

During the Revolution and its aftermath, five states—Pennsylvania (1780), Connecticut (1784), Rhode Island (1784), New York (1799), and New Jersey (1804)—passed gradual abolition acts. Under these laws, the

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[29]William P. McLauchlan, *The Indiana State Constitution: A Reference Guide* (Westport, Conn., 1997), 4, argues, incorrectly I think, that "this provision was required by the Northwest Ordinance." There is no evidence for this contention. More likely, the Indiana Constitution makers were simply borrowing this phrase from the Ohio Constitution of 1803. None of the other states carved out of the Old Northwest had such a provision in their constitutions.

children of all slave women were born free (but subject to an indenture to their mother's owner) and no new slaves could be permanently brought into the state.[30] Thus, in these states (which contained most of the slaves in the North), slavery would literally die out, as the existing slaves passed away and no new slaves were born or permanently brought into the state. These laws allowed for a smooth transition from slavery to freedom that protected existing property claims of masters while at the same time ending bondage. In 1790, more than 44,000 slaves lived in these states; by 1850, only 230 remained, all of them very elderly.[31]

The constitutions of Massachusetts (1780) and New Hampshire (1783) included clauses declaring "All men are born free and equal" and "all men are *born* equally free and independent." These were not explicit rejections of slavery, but the courts and public opinion in both states interpreted them to end slavery. It is important to note that during the Revolution many adult male slaves in both states served in the army and became free by doing so.[32] Many masters then emancipated their family members, and most slave owners in the two states came to accept that slavery was finished in both places. In neither state was slavery particularly strong, economically important (although slaveowners always profited from their human property), or popular. No important civic leaders in the states owned slaves, and many of them, such as John Adams and his cousin Samuel, despised the institution. John Hancock's family owned a few slaves when he was a child, but all were emancipated before the Revolution, and he never personally owned any. Thus slavery disappeared without an explicit constitutional provision ending the institution. In 1791, Vermont entered the Union with an explicit ban on slavery, but by this time none of the 291 blacks in the state (three-tenths of one percent of the population), were held as slaves. Similarly, in 1803 Ohio entered the Union with an explicit constitutional ban on slavery, but in 1800, three years before statehood, the U. S. Census reported that none of the territory's 198 blacks were slaves.

Indiana was different. The 1810 census found 237 slaves residing in the territory, along with 393 free blacks—together about 2.5 percent of

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[30]Pennsylvania allowed visiting masters to keep slaves in the state for up to six months and New York allowed them a nine-month transit.

[31]Campbell Gibson and Kay Jung, "Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States," Population Division, U. S. Census Bureau, September 2002, at http://www.census.gov/population/www/documentation/twps0056/twps0056.html.

[32]Benjamin Quarles, *The Negro in the American Revolution* (Chapel Hill, N. C., 1961), 51-58.

the population. Many of these free blacks were probably held under indentures that constituted a system of unfree labor. Many of the territorial leaders, including longtime territorial governor William Henry Harrison, were slave owners. Proslavery sentiment in the territory was strong, and opposition to slavery was weak. However, even those Hoosiers who owned slaves understood that they could not achieve statehood without a ban on slavery in their constitution. The state accomplished this goal with Article 11, Section 7, which provided: "There shall be neither slavery nor involuntary servitude in this state." Thus, Indiana became the first slaveholding jurisdiction in America (or indeed anywhere else) to have immediately and directly abolished slavery.

Yet, despite its language, the 1816 constitution had little immediate impact on bondage, as historian Emma Lou Thornbrough notes: "After Indiana became a state indentured servants continued to be bought and sold."[33] The first legislature, meeting in December 1816, provided for a tax of two dollars (a significant sum at the time) "for every bond servant of color, above the age of twelve years, other than apprentices."[34] Clearly the legislators in the new state assumed that blacks would be held in bondage, despite the provisions of the new constitution. Four years after statehood, the census reported a slight decline in the slave population, which now stood at 190. Meanwhile, Indiana's free black population had jumped from 393 to 1230.[35] However, these numbers are suspect. A significant number of the free blacks were probably held under long-term indentures, and some slaveowners likely reported that the blacks living on their property were "free" or "indentured," when in fact they were slaves. Evidence also suggests that the census simply failed to count many slaves. For example, while the 1830 U. S. Census reported only three slaves in Indiana, a local census that year found thirty-two slaves in the town of Vincennes alone, and slaves were certainly held in other places as well.[36]

The new constitution, which emphatically condemned slavery as based on "usurpation and tyranny," seemed to have ended bondage in the

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[33]Thornbrough, *The Negro in Indiana Before 1900*, 27.

[34]"An Act providing for the assessing and collecting of Revenue," Act of January 3, 1817, chap. 19, sec. 4, *Laws of the State of Indiana* (Corydon, Ind., 1816), 133. See also "An Act for assessing and collecting revenue," Act of January 28, 1818, chap. 42, secs. 9 and 11, *Laws of the State of Indiana* (1818), 256, 259-60, for other examples of taxing "bond servants."

[35]These numbers suggest that the 1810 census was incomplete, since it is unlikely that the total black population doubled between 1810 and 1820.

[36]Dunn, *Indiana: A Redemption from Slavery*, 441.

state.[37] Why, then, did slavery and indentured servitude persist? First, the Indiana Constitution (like the Northwest Ordinance), used language that was simultaneously emphatic and ambiguous. The phrase "there shall be neither slavery nor involuntary servitude," which came from the Northwest Ordinance, seemed to prohibit slavery, but at the same time, the words "shall be" plausibly could have been understood as a promise to be kept some time in the future, rather than a statement that all slaves were immediately free. This is how Governor Harrison and other territorial leaders read the Northwest Ordinance, and thus they did nothing to end slavery during the territorial period. Slaveowners in Indiana preferred this reading because it allowed them to keep any slaves they owned at the time of statehood.

Furthermore, even if "shall be" meant "right now," the constitution was not self-executing. Slaveowners and some judges and politicians may have assumed that the clause required legislation to implement it. In this respect, the slavery provision might have been seen as similar to the new constitution's requirement that the state provide "a general system of education" as "soon as circumstances permit."[38] But, in fact it took a very long time to implement the latter clause, and for many years (long after circumstances would have permitted it) Indiana lacked a statewide free public school system.[39] Similarly, the Indiana Constitution mandated the creation of public schools without any racial restrictions, but when the state finally created public schools, they were only for white children. Constitutional mandates did not always lead to public policy changes.

Alternatively, slaves could immediately gain their freedom under the clause if masters told them they were free and treated them accordingly, or if they abandoned their masters and found employment with whites who were sympathetic to liberty. Abandonment might also require the slaves to find a lawyer who would file a freedom suit on their behalf or in some other way use the courts to protect their liberty.

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[37]Ind. Const. arts. 8 and 11 (1816).

[38]Ind. Const. art. 9, sec. 2 (1816).

[39]Indiana did not, in fact, implement the education provision of the 1816 constitution "in any serious way"; although the document "at least promised free public education for everyone…this promise was not realized." McCarthy and Zhang, "The Uncertain Promise of Public Schooling," in *The History of Indiana Law*, 215. Another example of this type of analysis can be seen in the Mississippi Constitution of 1832, which prohibited the import of slaves as merchandise for sale within the state. This was not an antislavery provision but was designed only to prevent capital from flowing out of the state. In *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), the U. S. Supreme Court held that this clause was not self-executing, but would go into effect only after the state adopted legislation to implement it.

Such tactics had been used in Massachusetts immediately after the adoption of the 1780 constitution, with its "free and equal clause." Thus, in 1781 the slave Quock Walker left his master, Nathaniel Jennison, to work for a neighbor. When Jennison dragged Walker back to his farm, the former slave successfully sued for assault and battery. Meanwhile, the local prosecutor indicted Jennison for assault.[40] This outcome was possible because few slaves lived in Massachusetts at the time; most whites in the state abhorred slavery; there were lawyers in the community who were willing to take freedom cases; and many blacks were literate and aware of their new status. Indeed, for more than a decade, slaves and free blacks in Massachusetts had been fighting slavery in the legislature and in public discourse. They were supported in these struggles by numerous powerful and prominent whites, including many politicians and lawyers.

Similar tactics helped lead to the liberation of numerous slaves in Pennsylvania, where the Pennsylvania Abolition Society vigilantly brought suits on behalf of slaves and free blacks under the state's gradual abolition acts of 1780 and 1788. Slave owners in southwestern Pennsylvania (in Washington and Westmoreland Counties) who had local support for their institution nevertheless had to contend with powerful opponents of slavery in Philadelphia.[41]

But conditions in early Indiana were different. Most slaves were owned by the old French settlers or recent migrants from the South. None of these masters had any interest in giving up their property. In addition, a majority of the early settlers in Indiana were southerners, and while most were not slaveholders and some were hostile to slavery,[42] it is likely that the majority of these were hostile to the presence of free blacks and also sympathetic to slaveowners. Most of Indiana's slaves were concentrated in Knox County, where there was little or no public or private opposition to slavery and few white residents were willing to hire a black claimed as a slave by one of their neighbors. Furthermore, unlike Massachusetts in the 1780s, Indiana lacked either a vibrant free black community or a cohort of black military veterans who had "earned" their freedom by serving in the Continental Army and helping to win liberty for all Americans.

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[40]John D. Cushing, "The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker' Case," *American Journal of Legal History* 5 (April 1961), 132-33.

[41]See Gary B. Nash and Jean R. Soderlund, *Freedom by Degrees: Emancipation in Pennsylvania and Its Aftermath* (New York, 1991), esp. 119-37; Finkelman, *An Imperfect Union*, 44-69; and Zilversmit, *The First Emancipation*, 124-38.

[42]Most famously, of course, Thomas Lincoln moved to Indiana in about 1816, in part because of his opposition to slavery in Kentucky.

At this time few, if any, political or civic leaders opposed the institution. Most importantly, unlike Pennsylvania and Massachusetts, Indiana lacked a cadre of experienced and prominent attorneys who were willing and able to litigate on behalf of slaves, indentured former slaves, and free blacks. On the contrary, prominent civic and business leaders in Vincennes and the surrounding area were themselves slave owners. In this sense, Knox County might have been like the southwestern counties in Pennsylvania. However, unlike Pennsylvania, Indiana had no antislavery society and no large urban center with significant and organized opposition to slavery. Slave owners in southern Indiana had no interest in freeing their slaves if they did not have to do so, and the local courts reflected this view. Thus slavery in the new state continued in the wake of a constitution which prohibited the institution.

Gradually, however, some slaves and their few white allies challenged the continuation of bondage in the state. Local courts, sympathetic to slave owners, almost always ruled in favor of masters in early freedom suits. In the two years after statehood, the Knox County Circuit Court, in the county which had the state's highest concentration of slaves, heard at least seven freedom suits from slaves and indentured blacks, only one of which was successful.[43] In the other cases, those held in bondage and servitude were returned to their masters. Thus, for a variety of reasons, the constitution did not lead to an immediate end to slavery in a state where slavery was presumably prohibited.

During the territorial period and immediately after statehood, many masters converted their slaves into indentured servants, shrewdly trying to avoid the emancipatory language of the Ordinance and the constitution. The Ordinance said nothing about indentured servitude, but the new constitution implied that it was permissible: "Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state be of any validity within the state." The clause, part of the section prohibiting slavery, clearly provided that slaves from the South could not be brought into Indiana as indentured servants, dovetailing with Indiana's hostility to any blacks coming into the state. But the clause implies that out-of-state indentures were valid if made before 1816, and that in-state indentures of slaves (or free blacks) remained valid even after 1816. Thus, masters who worried about the implications of the slavery ban could indenture their slaves and hold them in bondage for the long-term future.

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[43]Madison, "Race, Law, and the Burdens of Indiana History," in *The History of Indiana Law*, 41; Thornbrough, *The Negro in Indiana Before 1900*, 25.

The early cases on slavery and bondage to reach the Indiana Supreme Court illustrate how masters and local judges believed the constitution's prohibition of slavery was prospective and actually protected long-term indentures of blacks who had only recently been slaves.

POLLY'S CASE

The first slave case to reach the Indiana Supreme Court was *State v. Lasselle*,[44] which is also known as *Polly v. Lasselle*. Polly, sometimes called Polly Strong, was the slave of Hyacinthe Lasselle, a prominent citizen of Vincennes. He had purchased Polly and inherited another slave, Jim (or James), from his father François.[45] Significantly, both Hyacinthe and François had purchased the two slaves after the passage of the Northwest Ordinance.

Two years after the adoption of the new constitution, Polly and Jim asserted their freedom with the help of Amory Kinney, a native of Vermont who had studied law in New York before moving to Vincennes.[46] Kinney was a rare antislavery northerner living in a community populated mostly by old French settlers and transplanted southerners, who were generally hostile to black rights and sympathetic to slave owners. On July 15, 1818, the circuit court at Vincennes issued a writ of habeas corpus directing Lasselle to bring Jim and Polly to the court to explain why he held them against their will.[47]

On August 4, Lasselle responded by claiming that he held Polly and Jim not as slaves, but as indentured servants. To support this claim, he presented the court with indentures Polly and Jim had signed, agreeing to work for him for four years. At first glance, these indentures can be seen as an attempt either to evade the state constitution or as an attempt by a master to strike a deal with his slaves to ensure that he gained some labor from them while they gained their freedom. At the time they signed their indentures, Polly was twenty-two and Jim was seventeen.

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[44]*State v. Lasselle*, 1 Blackf. (Ind.) 60 (1820). As with many names in this period, the defendant's is spelled many different ways. Following the lead of former Indiana Supreme Court Chief Justice Randall T. Shepard, I am using the spelling the reported case uses. See Randall T. Shepard, *Slavery Cases in the Indiana Supreme Court: Where Slaves & Former Slaves Found Hope* (Indianapolis, Ind., 2007), 3.

[45]Dunn says that Francois Lasselle was Hyacinthe's uncle. Dunn, *Indiana: A Redemption from Slavery*, 437.

[46]Thornbrough, *The Negro in Indiana Before 1900*, 25.

[47]Knox County Court Record #2325 in the case of *Polly v. Lasselle* and *Jim v. Lasselle*, at http://www.in.gov/judiciary/citc/files/a-transcript.pdf. The statement in Jim's indentures is almost identical to this.

Before turning to the substance of the indentures and the outcome of the case, it is worth considering the options for both parties. Because the indentures were similar, and because Polly's case is the one that ultimately went to the Indiana Supreme Court, I will focus on her situation. Polly claimed her freedom under the 1816 constitution, but the Knox County courts were generally unsympathetic to such claims, and almost all of the community's leaders believed that the constitution only freed slaves born after 1816 and could not affect any slaves living in Indiana at the time of statehood.

Thus, Polly faced a substantial possibility of losing her suit in the Knox County court (which in fact is what happened) and remaining a slave for life. Her master then might mistreat Polly for having the audacity to challenge his authority over her and for costing him money to defend the case. If Lasselle won the case, he might also have decided to sell Polly out of the state to nearby Kentucky, where she would be separated from family and friends and doomed to lifetime bondage. Thus, the indenture gave Polly the opportunity to secure her freedom for the cost of only four more years of bondage. This was an attractive compromise for any slave.

For Lasselle the indenture was also somewhat attractive. He would lose Polly's lifetime service, but gain her labor for the short term. While the local court was likely to favor Lasselle (as in fact it did), he could not be sure what the outcome would be in the Indiana Supreme Court, if the case went that far. The language of the new constitution might mean that Polly was free and even that he owed her compensation for her labor from the time of the document's adoption. He would probably also be required to pay Polly's legal fees. But an indenture avoided all these problems. He would get Polly's labor while she was most healthy and vigorous and avoid future litigation, court costs, and legal fees. At the end of the indenture period, he might still retain Polly as a free laborer. Thus, the indenture provided Lasselle with a certain outcome at a minimal cost.

On its face, therefore, Polly's indenture might be seen as a legitimate compromise between the needs of both parties. But since the case continued even after the indentures were signed, it does not appear, in the end, that Polly was ready to accept this compromise.

Polly's indenture was, in fact, a transparent attempt to avoid the constitutional clause. It is not clear that Polly knew what she was signing or that she agreed to it. In her indenture, Polly acknowledged she was first purchased as a slave and was legally held as such, even though she was born *after* Congress passed the Northwest Ordinance. If Polly was twenty-two in 1818, she was born some time in 1795 or 1796, nearly a

decade after slavery's supposed end under the Ordinance. She also claimed to have accepted this status, until the time of her indenture, when she was told that she was actually free. Thus, Polly's indenture stated that Lasselle "purchased me Polly, called Polly Strong, as a slave, and under the beleif [*sic*] that he could and of right ought to hold me as such, I have remained quietedly [*sic*] & contentedly in his employment until the present time, when I am taught & induced to beleive [*sic*] that I am freed." If she were free at this point, she had no reason to enter into an indenture, so Polly's indenture then went on to assert: "I conceive it would be the height of ingratitude not to make a just retribution & compensation by my service, for the care & attention he has bestowed upon me in my infancy & minority." [48]

By structuring the indenture in this way, Lasselle accomplished three things. First, he acknowledged that Polly was no longer his slave, thus hopefully (from his perspective) avoiding any entanglement with the new constitution. Second, by acknowledging Polly's freedom, Lasselle avoided the argument that as a slave she was not capable of signing a legally binding contract.[49] Finally, by having Polly give a reason for the indenture (gratitude for Lasselle raising her), the indenture plausibly avoided the claim that there was no "consideration" for the indenture. In the colonial

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[48]Knox County Court Record #2325 in the case of *Polly v. Lasselle* and *Jim v. Lasselle*. Polly's indenture reads: "Whereas Hyacinthe Lasselle of the County of Knox, heretofore purchased me Polly, called Polly Strong, as a slave, and under the beleif that he could and of right ought to hold me as such, I have remained quietedly & contentedly in his employment until the present time, when I am taught & induced to beleive that I am freed — but in as much as I conceive it would be the height of ingratitude not to make a just retribution & compensation by my service, for the care & attention he has bestowed upon me in my infancy & minority: Therefore, this Indenture, Witnesseth, That I Polly called Polly Strong a free woman of colour, now of the age of twenty two years, of the county of Knox & State of Indiana, for & in consideration of the above premises, and the stipulations, & agreements herein after mentioned on the part of the said Hya. Lasselle, Have put placed & bound myself, and by these presents Do put, place & bind myself as an Indented & Domestic servant to the said Hyacinthe Lasselle his heirs, Exors, Admors & assigns, with him & them to dwell & serve from the day of the date hereof until the full end & term of twelve years, next ensuing the date of these presents to be fully compleat & ended; during all which term or time of twelve years, the said Polly, called Polly Strong, the said Hyacinthe Lasselle his heirs, Exors, Admors & assigns shall & will well & faithfully serve in all things appertaining to the duty of a good, honest & attentive Indented or Domestic Servant. And the said Hya. Lasselle for himself, his heirs, Exors, Admors & Assigns, doth hereby covenant, grant & agree to & with the said Polly, his servant, that he shall & will find, provide & allow unto her, during all her said term of servitude, good & wholesome meat, drink, lodging, washing & apparel, both linen & woolen, fit & convenient for such a servant. And she serving out her time quietly & faithfully shall & will give unto her Thirty dollars in wearing apparel at the expiration thereof."

[49]However, he does not avoid the problem that Jim was a minor and thus incapable of signing a binding contract.

period, Europeans had signed indentures as a way of gaining transportation to America, and parents indentured their children as apprentices to learn a skill. But if she were already free, Polly gained nothing for giving Lasselle free labor for four years. Thus, the indenture was structured to indicate that she truly wanted to compensate Lasselle for his "kindness."[50]

All of this, of course, was a lie. First, it is important to note the date of the indenture: July 16, 1818, was two days after the court issued a writ of habeas corpus on Polly's behalf. Polly had not "remained quietedly & contentedly in his employment until the present time," as she stated in the indenture. On the contrary, she challenged her bondage in court because she believed she was free under the new constitution. This chain of events does not suggest that she felt she owed Lasselle gratitude and wanted to work for him as thanks for raising her. Rather, she sued him to gain her freedom, and most likely signed the indenture (with her mark) under duress from Lasselle, and without any advice from her attorney, who had after all, just petitioned for a writ of habeas corpus on her behalf. Finally, it is clear that if Polly had truly wanted to serve Lasselle for four years, an indenture was unnecessary. He could have signed a contract for her to work for him in return for room and board and some payment (what in an indenture would be freedom dues) at the end of the contract period; alternately, she could have stayed and worked for him without any formal agreement. The indenture was clearly for his benefit, not hers.

The fraudulent nature of the indenture is underscored by the fact that the case did not end with Lasselle's answer to the writ of habeas corpus, producing the indenture. Had Polly agreed to this compromise, her attorney would not have continued to pursue the case because it would, in effect, have been settled. But that is not what happened.[51]

Instead, Lasselle contested the habeas corpus, and argued that he was entitled to hold Polly as slave, despite the fact that he had presented the Knox County Circuit Court with an indenture acknowledging Polly's freedom. The court then determined that Polly's mother had been a slave in the Northwest before 1787, and held as such under the laws of

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[50]The most important freedom suit in Anglo-American law was *Somerset v. Stewart*, Lofft 1 (1772) 98 ER 499 (1772). In that case, Lord Chief Justice Mansfield indicated that similar suits had been "settled," implying some sort of indenture or labor contract.

[51]The connection of the indenture to the habeas proceeding and Lasselle's willingness to spend two years securing Polly as his slave—not as his indentured servant—suggests that there is little substance to the contention of some scholars, starting with Jacob Piatt Dunn Jr., that this was a "friendly" lawsuit presumably to test the meaning of the Indiana Constitution. See Dunn, *Indiana: A Redemption from Slavery*, 438-39; Shepard, *Slavery Cases in the Indiana Supreme Court*, 3.

Virginia. Under Virginia law, the child of a slave woman was born a slave. Lasselle did not explain why Virginia slave law would have applied to the region, especially in face of the Northwest Ordinance which declared that there could not be slavery in the territory. The county court might have concluded that it was not possible for a slave to be born in the Northwest Territory, because the Ordinance banned slavery. But the court held the opposite, declaring that the Ordinance had not emancipated Polly's mother, and that Polly was a slave under Virginia law and continued in this status under the Indiana Constitution. The court concluded that "Polly was born a slave," and Lasselle could "hold her as such."[52] After these proceedings, Polly's lawyer appealed to the Indiana Supreme Court.

What is striking about Polly's case is the refusal of the Knox County judges to accept that the Northwest Ordinance or the 1816 constitution had any effect on slavery in Indiana. This case illustrates the difficulty of changing public policy and public behavior through constitutional mechanisms—not that such change cannot happen, but that the process may not always work well. The behavior of the Knox County judges may also reflect the special nature of slavery and race, as well as the proslavery culture of southern Indiana.

STATE V. LASSELLE

Two years after the Knox County court declared that Polly was still a slave, her case reached the Indiana Supreme Court as *State v. Lasselle*. The caption reflected that this was still a habeas corpus proceeding in which, in theory, the state was contesting Lasselle's right to hold Polly in bondage. However, the case was really brought by Polly, and it was her attorney, and not the attorney for the state, who argued the case. Lasselle no longer pretended to hold Polly as an indentured servant. Rather, he asserted his right to Polly "by purchase as a slave" before "the treaty of Greenville and cession of that Territory to the United States."[53] This was a curious argument. During the Revolution, Virginia had ceded its claims to the Northwest to the United States; in 1783, the Treaty of Paris confirmed American ownership of the region. The Treaty of Greenville

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[52]Sandra Boyd Williams, "The Indiana Supreme Court and the Struggle Against Slavery," *Indiana Law Review* 30 (1997), 305-306, citing the record of *Polly (a woman of colour) v. Lasselle*, Knox Circuit Court (1820), contained in the Indiana Supreme Court case file for *State v. Lasselle*, in Indiana State Archives, Indianapolis.

[53]*State v. Lasselle* at 60.

(1795) had only ended Indian occupation of Ohio and other parts of the Northwest, including parts of Indiana. But Lasselle seemed to be arguing that before the Indians were displaced from Ohio, the national government had no jurisdiction over the region. This seems to have been an attempt to argue that because Polly was born in Indiana *before* the Treaty of Greenville, her lifetime status was set before the Northwest Ordinance took effect in Indiana and, therefore, that she was still a slave under Virginia law. This was a weak argument at best, but in the face of the language of the Ordinance and the 1816 constitution, Lasselle's attorney was clearly grasping for justification for keeping Polly in slavery. Lasselle also argued that when Virginia had ceded the Northwest to the United States the existing settlers were allowed to keep their slaves, and thus the Northwest Ordinance had no effect on his ownership of Polly. But this argument was equally weak, because Polly was born *after* the adoption of the Ordinance.

The Indiana Supreme Court was not distracted by Lasselle's arguments about when Indiana came under federal jurisdiction. The court also avoided an extended discussion of whether the Northwest Ordinance had ended slavery in the territory. The operative document for Indiana was its own constitution and the power of its legislature to enact laws. The court simply asserted that it could "hardly be denied" that "the legislative authority, uncontrolled by any constitutional provision, could emancipate slaves." This had been done in other places, and "no doubt has been entertained, either of the power of the Legislature to enact such a Statute, or of the binding force and efficacy of the law when enacted." If the legislature had the power to regulate or abolish slavery, then a constitutional convention could do so because it was "vested with full power to form a Constitution which is to define, limit and control the power of the Legislature."[54] Thus the court declared that the convention had the full power to regulate or end slavery.

Hoosiers had "then only to look to our own Constitution to learn the nature and extent of our civil rights." The court pointed out that the Indiana Constitution had declared that "all men are born equally free," and presumably this clause by itself ended slavery. But the constitution also specifically declared "there shall be neither slavery nor involuntary servitude in this State," and this wording was sufficient to end slavery.[55]

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[54]*Id.* at 62.

[55]*Id.*, quoting Ind. Const. art. 1, sec. 1 and art. 11, sec. 7 (1816).

The court concluded by addressing Lasselle's claim that he had a "preexisting right" in Polly, which the Indiana Constitution could not change. The court simply noted that "a special reservation can not be so enlarged by construction as to defeat a general provision"—a preexisting right could not counter the specific language of the constitution. The court might also have noted that since a constitution created a fundamental law, it could undermine preexisting rights, and could even take property without compensation. But the justices apparently felt no great need to explore this level of constitutional theory. Instead, the court emphatically concluded "under the present form of government, slavery can have no existence in Indiana, and, of course, the claim of the said Lasselle can not be supported." Polly was "discharged" and Lasselle had to pay her costs.[56]

The decision of the lower court in Polly's case illustrates the willingness of proslavery judges to ignore the constitution, or to twist it, to prevent an end to slavery in the new state. It was consistent with the jurisprudence and public policy of territorial Indiana. Had the old French settlers and their southern-born allies had their way, Indiana would have evolved into a slave state, not a free state. The county court's ruling on Polly's habeas corpus proceedings illustrates this.

But in *State v. Lasselle* the state supreme court offered a far more plausible reading of the new constitution, one that was consistent with what its authors clearly intended: that the constitution immediately ended slavery in Indiana. The court emphatically rejected alternative readings of the term "shall be"—such as that slavery would end in the future or that existing rights to slaves were not affected by the constitution. However ambiguous the "shall be" language was, it was reasonable to understand the clause in the context of Article 8 of the Indiana Constitution which forever prohibited the legislature from introducing slavery into the state and at the same time emphatically condemned slavery as "usurpation and tyranny."[57] Thus, the Indiana Supreme Court unambiguously, and correctly, interpreted the constitution to have immediately freed every slave in the state.

INDENTURED SERVITUDE

While *State v. Lasselle* destroyed the legal support for slavery in Indiana, it did not end bondage in the state. Throughout the territorial period,

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[56]*Id.* at 62-63.

[57]Ind. Const. art. 8 (1816).

masters in what became Indiana had signed indentures with their former slaves, in an attempt to evade the Ordinance's prohibition of slavery, or to comply with the Ordinance in a way that would allow them to hold their former slaves in some form of servitude. Because the indentures required that the former slave sign the agreement, there was a prima facie claim that the servant had agreed to the indenture. In Indiana this was rarely the case. Many of the indentured blacks were brought in from Kentucky and given the choice of signing an indenture or being returned to slavery in Kentucky or sold further south. Others, like Polly, were effectively ordered to sign indentures by masters who held enormous power over them.

The 1816 constitution, of course, banned "involuntary servitude," but if the indenture was signed, the master could claim the agreement was voluntary. Indeed, by its nature, an indenture was a voluntary contract. The constitution specifically banned the introduction of indentured servants from other states, providing: "Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state be of any validity within the state."[58] This provision might easily have been interpreted as allowing existing indentures to remain in force and also allowing new indentures for blacks in the state, because the constitution only addressed out-of-state indentures. Indeed, this provision could have been seen as supporting the "voluntariness" of indentures made in Indiana. The argument would have been that indentures in slave states were by their nature involuntary because the blacks were slaves and had no free will, while indentures in Indiana were voluntary because there were no slaves in the state. Under the strict language of this provision, southern slave owners might have brought their slaves into Indiana and then indentured them. Presumably, they could have visited Indiana with the slave, executed the indenture while there, and then remained in the state with the now indentured "free" black.[59]

The counterargument to this analysis was that all of the pre-statehood indentures (as well as post-statehood indentures, like Polly's) were involuntary, because all those blacks who had signed these indentures were held as slaves at the time of the signing. This argument would have been bolstered by the fact that none of the indentures could have been legitimate contracts because the master offered nothing to those who were indentured in return for their labor. Under this analysis, the indentures

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[58]Ind. Const. art. 11 (1816).

[59]McLauchlan, *The Indiana Constitution*, 3. McLauchlan writes: "The actual wording of the constitution would allow earlier indentures (i.e., before 1816)."

were inherently coercive and involuntary, and only existed to evade the bans on slavery in the Northwest Ordinance and the Indiana Constitution. Thus, these fraudulent contracts were truly examples of the "involuntary servitude" prohibited by the Northwest Ordinance and later the Thirteenth Amendment of the U. S. Constitution.[60]

The issue of indentures reached the Indiana Supreme Court in 1821, just a year after Polly's case. Mary Clark had been born a slave in Kentucky, and in 1815 her master, Benjamin L. Harrison,[61] brought her to Indiana, where he claimed to have freed her in return for her agreeing to work for him for thirty years as an indentured servant. This was clearly an attempt to avoid any emancipatory implications of the Northwest Ordinance. On June 29, 1816, the new Indiana Constitution went into effect, and less than four months later, on October 24, Harrison purported to release Clark from her servitude in return for her agreeing to a new indenture—this time for only twenty years—to General Washington Johnston,[62] a prominent lawyer and politician in Vincennes. That Johnston was willing to invest in Clark—he paid $350 for her—suggests how confident lawyers and slave owners in Vincennes were that the new constitution would not affect existing indentures. Johnston argued that the indenture, which had Clark's "mark" on it, proved that she had voluntarily agreed to work for him.[63] The fact that the new indenture to Johnston reduced her servitude implied, in Johnston's mind, that the arrangement was voluntary, and in Clark's best interests.

Like Polly, Mary Clark's quest for freedom began with a writ of habeas corpus in the Knox County Circuit Court brought by Amory Kinney, who had also represented Polly.[64] Johnston claimed her under the indenture and because of his purchase of her from Harrison. The county court accepted this argument and remanded Clark to Johnston. Before the state supreme court, Justice Jesse Holman summarily rejected the idea that this relationship was "voluntary." He argued that Clark's "application" for the writ of habeas corpus "clearly evinces that the service she renders to the obligee

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[60]U. S. Const., Amend. XIII (1865): "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."

[61]I can find no evidence that he was related to the former territorial governor, William Henry Harrison, whose father and grandfather were also named Benjamin Harrison.

[62]"General" was his first name, not a military title. George R. Wilson, "General Washington Johnston," *Indiana Magazine of History* 20 (June 1924), 123-53.

[63]*In re Mary Clark*, 1 Blackf. 122-25 (1821); Sandra Boyd Williams, "The Indiana Supreme Court and the Struggle Against Slavery," 305, 307-308.

[64]Thornbrough, *The Negro in Indiana Before 1900*, 28.

is involuntary."[65] The fact that she wanted to be free proved that she was involuntarily held in bondage. Holman asserted that a contract for personal services could never be enforced through "specific performance"—that is, no one could be forced to labor against her or his will.[66] A legal ruling requiring specific performance "would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours . . . would be productive of a state of feeling more discordant and irritating than slavery itself." Indiana law acknowledged "personal equality," and under such a system people could not be forced to labor against their will.[67] If specific performance of labor contracts was enforceable by courts, "a state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law." Justice Holman's conclusion was clear. Because Clark had sought a writ of habeas corpus, she was not voluntarily working for Johnston, and thus she was "in a state of involuntary servitude" and the court was "bound by the constitution, the supreme law of the land, to discharge her therefrom." Mary Clark was free, and the court ordered Johnston to pay her attorney's fees and other legal costs.[68]

Sandra Boyd Williams notes that Johnston never paid these costs, and that "the return of the writ of execution states that Johnston had no property or real estate to satisfy the judgment."[69] Johnston was a successful lawyer, a territorial and federal officeholder, and at the time he bought Clark, he owned a number of tracts of land in the state. He died a respected leader of the community. It seems unlikely that he lacked the funds to pay his judgment. More likely, he successfully evaded payment and the local officials in Vincennes protected their neighbor and fellow slave owner from what they probably saw as an unfair judgment which deprived Johnston of his legal right to Clark's labor.

SLAVERY, RACE, LEGISLATION, AND THE 1816 CONSTITUTION

Polly Strong and Mary Clark had both beaten the odds—and their masters—in their struggles for freedom. Their cases solidified the meaning of the slavery provisions of the 1816 constitution. But their personal

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[65]*In re Mary Clark*, at 123.

[66]*Id.*

[67]*Id.*

[68]*Id.*

[69]Williams, "The Indiana Supreme Court and the Struggle Against Slavery," 308.

victories did not immediately end all bondage in the state. Some blacks continued to be held in servitude in Indiana over the next two decades. In southern Indiana, support for slavery and servitude was strong, and masters tenaciously held on to those they could coerce and exploit. The constitution would eventually be fully implemented, but it would take about a quarter of a century for the reality of life in Indiana to comport totally with the language of the 1816 document.

While these changes were taking place, new laws and interpretations combined to undermine the liberty of blacks and to destroy the "personal equality" that Justice Holman had discussed in Mary Clark's case. During the territorial period, and after statehood, Indiana discouraged the immigration of free blacks with laws requiring them to prove their freedom, register with local authorities, and provide sureties for their good behavior and economic independence.[70] Blacks moving to Indiana often ignored these laws. In an effort to further limit black immigration, in 1831 the state provided that blacks who failed to comply with these laws could be hired out for six months or be expelled from the county.[71] In 1839, in *State v. Cooper*, the Indiana Supreme Court upheld this law.[72] Curiously, the procedural history of this case was the mirror image of the two earlier cases from the 1820s. Edward Cooper, a free black, had moved to Indiana after the passage of the 1831 law, but had failed to register under the law. A justice of the peace ordered that he be hired out, but the circuit court reversed this order, asserting that the 1831 law violated the state constitution's ban on involuntary servitude. The judge on the circuit court was Amory Kinney, who had represented both Polly and Mary Clark in their freedom suits. By this time Kinney had moved further north, to Terre Haute, where his antislavery views were more acceptable.[73] Kinney discharged Cooper, but the state supreme court reversed his decision. In doing so, the court allowed a new form of involuntary servitude to creep into the state.

The court might have found that hiring Cooper out was the equivalent of sentencing him to "involuntary servitude" for punishment of a crime, which was allowed under the constitution. However, the court did not do this, because failure to comply with the 1831 law was not a

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[70]Finkelman, *Slavery and the Founders*, 84-89.

[71]"An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, chap. 66, *The Revised Laws of Indiana* (1831), 375-76.

[72]*State v. Cooper*, 5 Blackf. 258 (1839).

[73]A mob attacked Kinney after the Clark case, which suggests the intensity of proslavery sentiment in Knox County. See http://www.marybatemanclark.org and http://visions.indstate.edu:8888/cdm/ref/collection/vchs/id/559.

crime and the process for dealing with a violator was purely administrative. Under the 1831 law, blacks migrating to the state could be brought before a justice of the peace for a factual determination of whether they had complied with the law. At this hearing, the accused was given the opportunity to comply with the law. If he or she did not, then the individual would be remanded to the overseers of the poor, who could hire the offender out for six months, with "the proceeds arising from such hiring . . . paid into the county treasury of the proper county, for the use of such negro or mulatto, in such manner as shall be directed by the overseers of the poor aforesaid."[74] This was a bizarrely cumbersome process, predicated on assumptions about race and anti-black prejudice, but it was not a criminal procedure.

Thus, by any rational understanding, Cooper had been placed in "involuntary servitude" without breaking any laws, costing the county any money, or threatening anyone. He had not sought public welfare, but he had not found people to vouch for him and guarantee that he would never become poor or that he would never be convicted of a crime.

In the face of what was clearly involuntary servitude—imposed for nothing more than being in the county—the state supreme court lamely declared that it would uphold the statute "unless its unconstitutionality is so obvious as to admit no doubt."[75] The court offered no analysis, rationale, or explanation as to why Cooper's involuntary servitude was not an "obvious" violation of the constitution. The justices simply accepted the strong cultural opposition to the mere presence of blacks in Indiana, reflecting the prevailing notions of the time that they constituted a threat to the social and economic welfare of the community. All of this took place under a constitution that prohibited "involuntary servitude."

A year later, in *Baptiste v. The State*,[76] the state supreme court retreated slightly from its support for repressive treatment of blacks who moved into the free state of Indiana. Here the court refused to allow a county to expel George Baptiste from the state for failing to comply with the 1831 law. The court reaffirmed the constitutionality of the 1831 law, pointing to its decision the previous year in *State v. Cooper*. This reaffirmation of the validity of the 1831 law should have led the court to uphold Baptiste's

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[74]"An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, sec. 2, 376.

[75]*State v. Cooper*, 5 Blackf. 258-59 (1839).

[76]*Baptiste v. The State,* 5 Blackf. 283 (1840).

removal. In addition to hiring out a black woman or man who did not comply with the law, the statute provided "that it shall be lawful for the overseer of the poor, to remove such negro or mulatto, without the jurisdiction of this state, in the same manner and under the same rules and regulations as are pointed out in the act for the relief of the poor, instead of hiring such negro or mulatto out, at the discretion of said overseers."[77]

But the court found narrow reasons for overturning the order: A justice of the peace had ordered Baptiste's removal and he had appealed to the circuit court. The Indiana Supreme Court first noted that under the 1831 statute Baptiste lacked the right to appeal the decision of the justice of the peace—an analysis which would have allowed the court to duck the whole case and allow Baptiste to be removed to Kentucky. But the justices were apparently uncomfortable with this outcome and thus looked for a way both to accept jurisdiction and then to overturn the lower court decision. Thus, the court found a right of appeal "within the general provision of the justice's act, authorizing appeals from all judgments rendered by those magistrates." [78] Having decided it could hear the appeal, the court then found procedural reasons to reverse the circuit court's ruling. [79]

Under the 1831 law, a justice of the peace was authorized to determine if the defendant had complied with law. This procedure had been followed in Baptiste's case. The statute then provided that after the justice of the peace determined the facts under the 1831 law, it was the job of the overseers of poor—and not the justice of the peace—to decide whether to hire out the offender or expel him from the county. The court noted that the justice of the peace had no authority to punish Baptiste under the law. The court also asserted that *if* the overseers decided to expel him from the county they had to follow the general poor law—not the 1831 law regulating blacks—and send him back to the county he came from. The court noted that no one "can be removed from this state without a warrant or order specifying the place to which he is to be taken, which must be the state where he was last legally settled."[80] Thus the court concluded: "The statute does not confer upon the justice, or the Circuit Court, the

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[77]"An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, sec. 2, 376.

[78]*Baptiste v. The State*, at 284.

[79]*Id.*

[80]*Id.* at 286.

authority to decide, in the first instance, that the defendant be removed if he fail to give bond, &c. That is a matter which rests in the discretion of the overseers of the poor, who may think proper to hire him out, instead of removing him."[81] Because neither the justice of the peace nor the circuit court could order the removal, the sentence of removal was overturned. Presumably the county officials could begin the case again, and allow the overseers of the poor to decide if they wished to expel Baptiste or hire him out for six months, but there is no evidence this happened. Indeed, the state supreme court made expulsion less likely because it required that the officials determine which county Baptiste came from. The case came from Jefferson County, which is on the Ohio River, and presumably Baptiste had come there directly from Kentucky. But he might have crossed the river somewhere else, and thus it could have been difficult to figure out exactly where to send him.

As former Indiana Supreme Court Chief Justice Randall Shepard has correctly noted, in this case "the justices 'fly specked' the statute nearly to death" to avoid expelling Baptiste from the state.[82] There is no clear explanation for this outcome. The case can be understood as narrowly based on procedural irregularities in the circuit court, but the court's decision in *Cooper* the year before makes it seem more likely that the justices simply could not accept the notion of exiling free black men and women—even though they were unwanted residents—from the state.

But while the Indiana justices seemed unwilling to send a black man back to the slave South, the court was not moving away from the idea that barriers to black immigration were constitutional. Thus, in *Hickland v. State*, decided in 1847, the court upheld the prosecution of Thomas Hickland, a white man from Jennings County, for hiring a black man who had entered the state without complying with the 1831 law.[83] "Hickland" was actually Thomas Hicklin, a Jennings County antislavery

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[81]*Id.* at 286-87.

[82]Shepard, *Slavery Cases in the Indiana Supreme Court*, 6.

[83]*Hickland v. The State*, 8 Blackf. 365 (1847); http://incite.in.gov/DataEntryApp/RecordDetailspubView.aspx?SrItemNumber=20149. The 1831 law read: "Should any person or persons knowingly engage or hire, or harbour such negro or mulatto hereafter coming or being brought into this state, without such coloured person first complying with the provisions of this act, such person or persons so offending, shall pay a fine of not less than five, nor more than one hundred dollars, to be recovered by presentment or indictment." "An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, sec. 4, 376.

activist well-known for helping fugitive slaves.[84] Thus, the prosecution may have been as much about politics as law. The original prosecution of Hicklin took place in 1845, and the appeal was filed in March of that year. Thomas Hicklin died in December 1845, at the relatively young age of 57. The Indiana Supreme Court upheld the conviction in *Hickland v. State* in May 1847 with a stunningly short opinion—just one long sentence—that gives no information about the facts of the case.[85] Because the defendant had been dead for a year-and-a-half, the short and spare opinion makes sense. The court could uphold the criminal portion of the 1831 law without actually having to punish a living human being. The fine under the statute—anywhere from five to one hundred dollars—would have been levied on Hicklin's estate.

Ironically, the facts of this case illustrate the absurdity of the 1831 law, or at least section 4 of the law. The statute was ostensibly passed to prevent blacks from moving into the state and then needing public assistance. In this case, the unnamed migrant had a job and thus was not in danger of needing public support. Prosecuting Hicklin for hiring a black man made no rational sense. It did, however, play into the overall theme of many of Indiana's laws regarding blacks: a racist desire to keep them out of the state.[86]

The *Cooper*, *Baptiste*, and *Hickland* cases all turned on statutory interpretation. These laws reflected Indiana's persistent hostility to its African American population and to any growth in that population. From 1816 until 1851, when the new constitution went into effect, the state legislature used its powers to craft laws that generally oppressed blacks. Between 1805 and 1810, the territorial legislature had passed a series of laws to limit black immigration into the state. Blacks coming into the territory had to prove their status as free people and provide surety bonds in case they failed to support themselves or failed to maintain "good behavior." At the same time, migrants passing through the

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[84]Indictment for September 1844, Civil Order Book 4, Jennings Circuit Court, Jennings County Courthouse, Vernon, Indiana. Thanks to Sheila Kell of the Jennings County Public Library for obtaining these county court records. Thornbrough identifies Hickland as Thomas Hicklin; see *The Negro in Indiana Before 1900*, 61, however, she did not cite to these county records. On Thomas Hicklin and his antislavery activities, see http://www.ingenweb.org/injennings/AfrAnti.html and http://www.nps.gov/subjects/ugrr/ntf_member/ntf_member_details.htm?SPFID=11805. At one point "in Kentucky there was a reward of $100.00 offered for Thomas Hicklin, dead or alive, on account of his anti-slavery activities." http://www.rootsweb.ancestry.com/~injennin/afr.html.

[85]*Hickland v. The State*, 8 Blackf. 365 (1847).

[86]*Id.*

territory were specifically allowed to bring slaves with them.[87] These laws remained on the books after statehood,[88] and were codified and updated in 1824 and 1831. In 1816, the new state legislature had specifically criminalized the harboring of slaves, and this law was repeated verbatim in the state's 1824 and 1831 revised codes.[89]

Thus, by 1851, when a new constitution was adopted, a full understanding of the 1816 constitution's relationship to slavery and race had emerged. No one could legally be held as a slave and no blacks could be held as indentured servants against their will. The constitution's provisions against slavery and involuntary servitude led to these results. Free blacks, could, however, be forced to work against their will. The 1831 statute reiterated that visiting masters were guaranteed the right to pass through the state with their slaves.[90] Whites who helped slaves escape while in Indiana were subject to fines as well as

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[87]"A Law concerning Servants. Adopted from the Virginia code," September 21, 1803, in Francis S. Philbrick, ed., *Laws of Indiana Territory, 1801–1809* (Springfield, Ill., 1930), 42; "A Law in addition to a law intitled a law to regulate the practice of the General Court upon Appeals and Writs of Error, and other purposes. Adopted from the Virginia and Kentucky codes," September 20, 1803, ibid., 33, 40; "An Act concerning the introduction of Negroes and Mulattoes into this Territory," August 26, 1805, ibid., 136-39; "An Act concerning Slaves and Servants," December 3, 1806, ibid., 203-204; "An Act concerning servants," Act of September 17, 1807, *Laws of the Indiana Territory* (Vincennes, 1807) , 463-67. All of the early Indiana statutes are available at Hein-on-Line's state session law library, http://www.heinonline.org/HOL/Index?collection=ssl&set_as_cursor=clear; they are discussed in Finkelman, *Slavery and the Founders*, 84-89.

[88]Ind. Const. art. 12, sec. 4 (1816). Section 4 specifies: "All laws and parts of laws now in force in this Territory not inconsistent with this constitution, shall continue and remain in full force and effect, until they expire or be repealed."

[89]"An Act to prevent Manstealing," Act of December 30, 1816, chap. 24, sec. 5, *Laws of the State of Indiana* (Corydon, Ind., 1817), 150, 152; "An Act relative to Crime and Punishment," Act of January 20, 1824, chap. 29, sec. 24, *The Revised Laws of Indiana* (1824), 143; "An Act relative to Fugitives from Labour," Act of January 22, 1831, chap. 43, *The Revised Laws of Indiana* (1831), 278-80.

[90]"An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, sec. 5, 376. This provision seems to have been adopted in response to an 1829 case in which William Sewall, a slave owner from Virginia on his way to Illinois, stopped in Indiana, where his slaves ran away from him. A Judge Morris, in Marion County, ruled that the slaves were free because the owner had voluntarily given up his Virginia citizenship and was planning on going to Illinois, where slavery was illegal, as it was in Indiana. Judge Morris conceded that if Sewall had been heading to Missouri, a slave state, there might have been a different outcome, since he was transferring his citizenship from one slave state to another. But, since Sewall was headed to Illinois, he was no longer a citizen of a slave state, and therefore he could not "exercise rights which are denied to our own citizens, and which are incompatible with the fundamental principles of our government." Morris cited the *Lasselle* case for the proposition that the Indiana Constitution "prohibited the existence of slavery within the state, in the strongest and most emphatic terms." "Rights of Slave Holders," *American Jurist and Law Magazine* 3 (April 1830), 404- 407.

civil suits,[91] as were whites who hired blacks from other states who had not complied with all of the registration rules.[92] However, when whites were convicted of rioting while trying to capture an alleged runaway slave, the state supreme court overturned their convictions.[93]

In other ways consistent with the spirit of the 1816 constitution, life for blacks in Indiana was particularly hard. The document specifically barred black men from militia service, voting, and office holding. The constitution counted only whites when allocating seats in the legislature. Following this lead, the legislature placed numerous burdens in the way of blacks who wanted to move to the state. Those who were in the state were not allowed to send their children to public schools, and the state supreme court had no problem with this legislation. On the contrary, it offered a racist explanation for it. All of this set the stage for the 1851 constitution, which continued the ban on slavery in the state, but also specifically prohibited blacks—slave or free—from coming into the state.[94] This act put the Hoosier state in the unique position of banning both slavery and free blacks,[95] while still allowing visiting masters to enter the state with their slaves, and still allowing for poor blacks or those without the proper papers to be hired out against their will. These were all the legacies of Indiana's 1816 Constitution.

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[91]"An Act concerning Free Negroes and Mulattoes, Servants and Slaves," Act of February 10, 1831, sec. 4, 376.

[92]*Hickland v. The State*, 8 Blackf. 365 (1847).

[93]*Graves and Others v. The State*, 1 Ind. 368 (1849).

[94]Ind. Const. art. 13 (1851): "Section 1. No negro or mulatto shall come into or settle in the State, after the adoption of this Constitution. Section 2. All contracts made with any Negro or Mulatto coming into the State, contrary to the provisions of the foregoing section, shall be void; and any person who shall employ such Negro or Mulatto, or otherwise encourage him to remain in the State, shall be fined in any sum not less than ten dollars, nor more than five hundred dollars. Section 3. All fines which may be collected for a violation of the provisions of this article, or of any law which may hereafter be passed for the purpose of carrying the same into execution, shall be set apart and appropriated for the colonization of such Negroes and Mulattoes, and their descendants, as may be in the State at the adoption of this Constitution, and may be willing to emigrate. Section 4. The General Assembly shall pass laws to carry out the provisions of this article."

[95]McLauchlan, *The Indiana Constitution*, misrepresents the 1851 constitution by noting that the voters who ratified the document "displayed a clear preference for excluding slaves from the state" (p. 11). The provision was not about "slaves"—slaves were already excluded from the state in another provision of the constitution, as they had been under the 1816 constitution. Rather, the provision excluded free blacks from the state.