



A first edition, octavo volume of *The Case of Dred Scott in the United States Supreme Court* with sewn self-wrappers. Image: Collection of the Smithsonian National Museum of African American History & Culture.

The Liberty of Black Americans Before the 13th Amendment

Before the Constitution did, how did the Supreme Court protect Black Americans?

BY THOMAS J. SHAW

With racial injustice once more front and center in America, prompting the Black Lives Matter movement, it's essential to revisit the time when the long journey to citizenship for Black Americans began. It wasn't from the start of the republic in 1789 but from 1865, with the successive enacting of the 13th, 14th, and 15th Amendments, which respectively freed all Black Americans from slavery, made them citizens, and provided Black men the right to vote.

Founded on securing “the Blessings of Liberty to ourselves,” the Constitution valued enslaved persons as being worth three-fifths of free persons. Its wording led to the Fugitive Slave Acts of 1793 and 1850, interpreted by the Supreme Court to “manifestly contemplate[s] the existence of a positive, unqualified right... of the owner of the slave.” While the

Constitution would help end the international slave trade, there was no provision to stop domestic slavery.

Without help from the Constitution and with ferocious battles in Congress over the direction of slavery, the Supreme Court was the one entity that could undermine this evil institution. Under its two longest-serving chief justices, John Marshall (1801–1835) and Roger B. Taney (1836–1864), the court had the ability to weaken enslavement.

So how did it, in the six decades before the 13th Amendment, treat enslaved parties seeking their freedom? In 14 cases before the court, it was neither completely open to the claims of enslaved persons nor a rubber stamp for slaveholders. That is, until the *Dred Scott* case.

LIVING IN VIRGINIA

In 1806, the case of *Scott v. Negro London* involved a Virginia statute that freed enslaved persons coming from one of the United States and residing within Virginia for a year, unless the owner took an oath within 60 days of arrival to Virginia not to sell their slaves or bring in recently imported slaves. The owner arrived 11 months after London and took the oath within 60 days of his own arrival. The Supreme Court

ruled this sufficient, reversing the lower court, and denying London his freedom.

In *Mason v. Matilda*, in 1827, Matilda had been enslaved in Virginia for 30 years without proof of any oath being taken. Reversing the circuit court and denying claims that presumptions should be “repelled by the [plaintiff’s] ignorance, impotence, and continued state of duress,” the Supreme Court applied “presumptions from length of time, and continued acquiescence of the party whose rights are implicated” to deny Matilda and her children their freedom.

PROVING FREE STATUS

In 1813, *Mima Queen v. Hepburn* sought freedom for the plaintiff and her child, Louisa. Represented by Star-Spangled Banner lyricist and lawyer Francis Scott Key, who often represented enslaved persons before the Supreme Court, the plaintiff offered three deponents. The first described what he heard his mother say her father had said about Mima’s ancestor, the second what Mima’s ancestor said about her own place of birth, and the third what he heard from others about the importation of Mima’s ancestor.

The Supreme Court rejected these depositions as hearsay. In