OVERCOMING DRED: A COUNTERFACTUAL ANALYSIS

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I. INTRODUCTION

Could anything have been done about *Dred Scott*[1] in its own day, in a Supreme Court remade by Abraham Lincoln? That is, was *Dred Scott* vulnerable to overrule, even in its own day, even in advance of the Thirteenth and Fourteenth Amendments? Would the power of then-existing constitutional theory have been sufficient to support overcoming *Dred*? If the answer is yes, we would have the key to the essential wrongness of *Dred Scott*, quite apart from the usual critiques of Chief Justice Roger Taney's opinion.

Analysis of this question is best performed in a counterfactual setting. By stripping away the aftermath of the election of 1860, the South's secession and the Civil War, and by examining a Lincoln Supreme Court's likely options as rationally perceivable by voters in 1860, we can isolate for consideration the constitutional vulnerabilities of *Dred Scott* in the context of the national predicament at the time. We can examine the Court's plausible alternatives, with some freedom from involuntary anachronism and presentism.

We can reasonably assume that voters in 1860 were anticipating that the South would abide the election and accept Lincoln's presidency, in the ordinary peaceable way the Constitu-

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1. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (Taney, C.J.).

tion provides that Americans undergo a transfer of power. Voters would anticipate that the South, through the Democratic Party, would retain effective control of the Senate after the election, as, in fact, it did. Nobody in 1860 could have predicted the Confiscation Acts of 1861 and 1862,[2] the Emancipation Proclamation of 1863,[3] or the Thirteenth Amendment of 1865.[4] So we can clear all these events from our thinking and conduct our inquiry as if they never occurred. In order to focus more precisely on overruling *Dred Scott*, we will eliminate related possibilities, such as the possibility of the Court's sustaining an act of Congress providing for a compensated emancipation. Still, we could not advance the inquiry if we took the Court as it was in 1860. The "Chase Court," a ten-Justice Court with its full complement of five Lincoln appointees, was complete only in 1864, and lacked a Lincoln-appointed majority. Let us hypothesize, then, for purposes of this analysis, a Chase Court with a majority comprised of Lincoln appointees, coming into being early in the 1860s, and prepared to overrule *Dred Scott* at the earliest opportunity.

What can we gain from setting up this wholly counterfactual inquiry, apart from the sheer intellectual fun of it? I have said that with this inquiry we will be able to identify and articulate the essential constitutional critique of *Dred Scott*, uncovering, among *Dred Scott*'s manifold wrongnesses, its core constitutional infirmity. More specifically, we will also discover the true ground on which to assess the constitutionality of the Missouri Compromise, struck down in *Dred Scott*—and indeed, all of the old territorial "compromise" statutes. We will find that *Dred Scott* was constitutionally infirm within the constitutional understandings of its own time and therefore might have been overruled then. The Court arguably could have done this even if an overruling of *Dred Scott* would have been greeted with the kind of disregard we have come to associate with the modern school prayer cases, or with *Worcester v. Georgia*.[5] We will also begin to

2. *See* Act to Confiscate Property Used for Insurrectionary Purposes, ch. 60, 12 Stat. 319 § 1 (Aug. 6, 1861) (providing for confiscation of fugitive slaves of rebel owners, the slaves to be declared lawful prize in any federal district court sitting in admiralty); An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589, 589-91, §§ 5, 7, 9 (July 17, 1862) (providing for confiscation of all property of disloyal persons, including their slaves, in effect emancipating slaves that ran away to the Union armies).

3. Proclamation No. 17 (Jan. 1, 1863), republished, 12 Stat. 1268 (1863).

4. U.S. CONST. amend. XIII (1865) (abolishing slavery in the United States and its territories).

5. 31 U.S. (6 Pet.) 515 (1832) (removing from state legislative authority the Indian

see why the necessary analysis was not evoked, not considered, not developed, not argued at the time, even by counsel in *Dred Scott*, even by *Dred Scott*'s dissenting Justices. But we shall also see very good reasons for the silence of that generation. Among the surprises our exploration has in store for us, we will come to see, along with the benefits of overruling *Dred Scott*, the very real difficulties that stood in the way at the time, and the ironies that would have accompanied any such overruling.

II. THE POLITICAL SIGNIFICANCE OF *DRED SCOTT*

It is not always understood to what extent *Dred Scott* was at the heart of the election of 1860 and the crisis that followed. In a recent symposium on *Dred Scott*, I argued the centrality of the case to those events.[6] In making that claim I did not mean to be understood as saying that *Dred Scott* was the only issue in the election of Abraham Lincoln, or, as is often said, that *Dred Scott* caused the Civil War. But it was a central issue in the election, and at the eye of the sectional storm as the War came on.

I need only recount the main lines of that argument here. In the 1850s, the sectional conflict over slavery was coming to a head. With the Kansas-Nebraska Act of 1854,[7] Congress opened the West to slavery, for the first time providing the option of slavery to all territories, North as well as South of the old Missouri Compromise line.[8] The status of the Western territories—slave or free—would thenceforth be determined by vote of the people of those territories. This was the beguiling theory of so-called "popular sovereignty." But in the wake of the Kansas-Nebraska Act, "Bleeding Kansas" became the stage of a veritable rehearsal for the Civil War. And the Whig party, the party of compromise, collapsed with the North-South[9] coalition that had

tribes, specifically the Cherokee tribe in Georgia, and placing them under the exclusive oversight of the nation). This is the case of which President Jackson is said to have remarked, "John Marshall has made his decision; now let him enforce it."

6. Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007).

7. Act of May 30, 1854, ch. 59, 10 Stat. 277.

8. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545. The line was drawn at 36°-30' of latitude. Slavery was prohibited in territory north of the line, except for Missouri.

9. Throughout this paper, for convenience I sometimes ignore distinctions not important to my argument among and within sections of the country. I use such customary terms as "the South," and "Southerners" to refer to white leaders, thinkers, or prevailing white opinion in slave states. "The North" generally means "not the South," and includes, e.g., the old Northwest Territory, the northerly sections of the old Louisiana Territory, and the Far West.

sustained it. On both sides, increasing anger and extremism in politics was exceeded only by the anger and extremism of the press.

Historians generally agree that this conflict was not about slavery simply, or about slavery in the South, but about slavery in the territories. It is also understood that the dispute was not about competing labor systems for the territories, but rather was a scramble for territory itself. Moreover, the scramble for territory was not a struggle for land, but rather for national political power.[10] In my earlier paper I traced the economic, political, and social roots of this power struggle.

In 1857, in *Dred Scott*, through a reactionary blunder of monstrous proportions, the Taney Court attempted to put an end to the conflict by coming down squarely on one side, endowing slave-owners with a fundamental *constitutional* right of property in their slaves. The Court held that Congress could not establish free territory, since to do so would destroy the property rights of slave-owners traveling or settling there.

Chief Justice Taney found these substantive property rights in the Due Process Clause of the Fifth Amendment.[11] This sacralization of slave property, depending as it did on the Constitution, necessarily stripped Congress of authority to reach a fresh political compromise of the issue tearing the country apart. With *Dred Scott*, Congress lost its power of abolition. Yet the Union had been able to survive until then largely because Congress could prohibit slavery in some territories as the price of permitting slavery in others. James Madison thought that no blame should attach to Congress in seeking to avoid disunion by this means.[12] This sort of compromise had characterized the whole course of legislation governing the territories from which new states would be added to the Union. This was the bargain struck over and over, from the Northwest Ordinance of 1787,[13]

10. This was understood at the time. See, e.g., the respected Irish economist, JOHN E. CAIRNES, THE SLAVE POWER: ITS CHARACTER, CAREER, AND PROBABLE DESIGNS (2003) (1863), at 104 ("The desire to obtain fresh territory for the creation of slave states, with a view to influence in the Senate, has carried the South in its career of aggression far beyond the range which its mere industrial necessities would have prescribed.").

11. *Dred Scott*, 60 U.S. at 450; U.S. CONST. amend. V (1791) ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

12. Letter from James Madison to Robert Walsh (Nov. 20, 1819), *in* IX THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1910), at 1; Letter from James Madison to James Monroe (Feb. 23, 1820), *ibid.*, at 23.

13. Act of July 13, 1787, An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, ch. 8, 1 Stat. 50, 51 (abolishing slavery in

and the Missouri Compromise of 1820,[14] through the Compromise of 1850,[15] to the Kansas-Nebraska Act of 1854.[16] In declaring the Missouri Compromise unconstitutional,[17] however, *Dred Scott,* in effect, rendered *all* these old compromises unconstitutional. Congress could only *permit* slavery, never *prohibit* it.[18] With an obtuseness that still baffles the reader, the *Dred Scott* Court thought to pacify the South by denying Congress power to pacify the rest of the country. The Court imagined it could contain the conflict by denying Congress the power to contain it.

Let me pause briefly to acknowledge that a purist reader might characterize the Court's ruling on the limits of the power of Congress under the Fifth Amendment as mere obiter dictum, casually offered only in passing.[19] In this view, *Dred Scott* simply held that there could be no federal diversity jurisdiction in the case, Scott being black, and therefore, according to Chief Justice Taney, incapable of citizenship. But to suppose that *Dred Scott* was about jurisdiction would be about as helpful as supposing that *Marbury v. Madison* was about jurisdiction.[20] The issue roil-

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the old Northwest Territory; tacitly isolating slavery in the South).

14. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545 (dealing with the Louisiana Purchase; closing to slavery territory north of 36°-30' of latitude, except for Missouri; opening to slavery Missouri and territory to the south of the Compromise line).

15. Act of Sept. 9, 1850, ch. 49, 9 Stat. 446; Act of Sept. 9, 1850, ch. 51, 9 Stat. 453. The Compromise of 1850 brought California into the Union directly as a free state without regard to the Compromise line, but opened the New Mexico and Utah territories to the option of slavery. Later, as part of the Compromise, Congress also enacted a new, more draconian fugitive slave law. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (amending the Fugitive Slave Act of 1793), *repealed,* Act of June 28, 1864, ch. 166, 13 Stat. 200. As part of the Compromise of 1850, Congress also prohibited the slave trade in the District of Columbia. Act of Sept. 20, 1850, ch. 63, 9 Stat. 467.

16. Act of May 30, 1854, ch. 59, 10 Stat. 277. With the Kansas-Nebraska Act, Congress abandoned responsibility for determining the status, slave or free, of the remaining territories, relegating that responsibility instead to the affected populations.

17. The Missouri Compromise line had been repealed, in effect, by the Kansas-Nebraska Act's provision of so-called "popular sovereignty." What the *Dred Scott* Court struck down was the Missouri Compromise as it stood at the time of Scott's sojourn on free territory.

18. Even the Kansas-Nebraska Act's expedient of "popular sovereignty" was specifically ruled unconstitutional in *Dred Scott:* "And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them." *Dred Scott,* 60 U.S. at 451.

19. This is a commonplace view. Commentators point out that Chief Justice Taney devoted too little space to the due process argument to justify a reading of the case beyond its jurisdictional holding. *See, e.g.,* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978), at 352; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process,* 16 CONST. COMMENT. 315, 318 (1999).

20. *Cf.* Louise Weinberg, *Our Marbury,* 89 VA. L. REV. 1235, 1296, 1341 (2003). The jurisdictional ruling in *Dred Scott* was all nonsense, of course. Chief Justice Taney

ing the country, which the Court had undertaken to settle, was not about the availability of federal courts to black persons, but was about the extension of slavery into the remaining territories of the United States.

Of course, *Dred Scott* was deeply satisfying to Southerners. After *Dred Scott*, neither Congress nor its delegate, a territorial legislature, could constitutionally prohibit slavery in the particular territory.[21] And, just as the Fifth Amendment protected slave property from deprivation by Congress, it might even protect slave property from deprivation by a *state*, notwithstanding the Fifth Amendment's inapplicability to the states. The original thirteen colonies came into being as "states" when the nation did, in 1776. But the newer states were creatures of Congress, as were the territories from which they emerged, and thus might be held to be Congress's delegates too. Abraham Lincoln feared that with just one more case the Court would strip the states of power to abolish slavery within their own borders.[22] True, this last possibility was unlikely. The states created by Congress generally were assumed, under the applicable statutes, to enjoy "equal footing" with the original thirteen states,[23] and therefore to have the same power to opt for or against slavery, once statehood was achieved, as the original thirteen possessed. And the Fifth Amendment, as interpreted in *Dred Scott*, would obviously protect slave property from deprivation by *Congress* in a state as well as in a territory, whether that state were one of the original thirteen or not.

The trouble, to Southern leaders, was that *Dred Scott* appeared to be threatened. Not by constitutional amendment—the South was protected against constitutional amendments. With equal representation in the Senate, Southern states could always

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seemed to read the statutory grant of diversity jurisdiction as if it required federal rather than state citizenship, compounding confusion by ruling that federal citizenship was a condition of access to federal courts. But there are no prominent heads of federal jurisdiction that require U.S. citizenship. Perhaps to overcome this objection, Taney argued that access to federal courts was a "privilege or immunity" of national citizenship. But at the time the only privileges and immunities in the Constitution were privileges of state, not national, citizenship. U.S. CONST. art IV, §1.

21. For Taney's language, *see supra* note 18, *Dred Scott*, 60 U.S. at 451.

22. Abraham Lincoln, Speech Delivered at Springfield, Illinois ["A House Divided"] (Jun. 16, 1858), *in* ABRAHAM LINCOLN, COMPLETE WORKS (in two volumes) (John G. Nicolay & John Hay eds., 1902) (1894), vol. I, at 241, 244 ("Put this and that together, and we have another nice little niche, which we may, ere long, see filled with another Supreme Court decision declaring that the Constitution of the United States does not permit a State to exclude slavery from its limits.").

23. *See, e.g.*, Missouri Compromise of 1820, § 1 (Missouri Enabling Acts) (Mar. 6, 1820). ch. 22, 3 Stat. 545 (providing for "equal footing" for the new state of Missouri).

block a constitutional amendment; the supermajorities required for constitutional amendments by Article V could be achieved by no anti-South coalition. Even after the election of 1860, the Democrats, who had lost the House of Representatives in 1858, still retained control of the Senate in the lame-duck 36th Congress,[24] as it almost always had since 1789. And the South "had" the Supreme Court.

But Southerners feared devastating developments from another source. During the celebrated 1858 debates between Lincoln and Stephen A. Douglas, when the two were contending for a seat in the Senate, Douglas made a remark at Freeport, Illinois,[25] a remark that was undermining Southern confidence in *Dred Scott*. Building on the much-quoted language in *Somerset's Case*, in which Lord Mansfield had declared, "Slavery is so odious that nothing can support it but positive law,"[26] Douglas took the position that a territory could defeat *Dred Scott* simply by failing to enact law creating, supporting, and enforcing rights of property in slaves.[27]

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24. In the Senate, in the lame-duck 36th Congress, 2d Session, after the admission of Kansas as the 34th state on January 29, 1861, 68 seats were available. The Democrats had 38 of these. (The Republicans had 26, the American Party two, and the two Kansas seats were not yet filled.) The Democrats might have retained control even of the post-secession Senate in the 37th Congress, had their Senators remained in Washington in sufficient numbers to defeat the admission of Kansas in the previous Congress. In the Senate in the 37th Congress, first convened July 4, 1861, there were 31 Republicans (including the two from Kansas) plus three Unionists; the remaining 34 seats were held by Democrats or were vacant, the vacancies in seats abandoned by Southerners. In the House, in the lame duck 36th Congress, 2d Session, the Democrats, having lost control in 1858, could outvote the Republicans only if they could achieve coalition with other non-Republican parties. (The house had 116 Republicans, and 122 in all other parties.) Here, the South's absence during the vote to admit Kansas did not clearly hurt the South; Kansas was admitted with only one representative. In the 37th Congress, the Republicans were a plurality in the House, but in coalition with the Unionists had a clear majority. The House was still apportioned under the old census of 1850, and 239 seats were available. Republicans and Unionists of various factions held 140 seats, leaving only 99 for all other parties. KENNETH C. MARTIS, HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS (1989); KENNETH C. MARTIS, HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS (1982). For recent discussion of the changing composition of Congress as secessionists cleared out, and the resultant strains on Congress, see John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025 (2006). *See*, for the work and radicalization of the 37th Congress in the absence of Southern members, David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131 (2006).

25. Stephen A. Douglas, Reply to Lincoln in the Freeport Debate (Aug. 27, 1858), *in* THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 (Paul M. Angle ed., 1991) (1958), at 152 ("[S]lavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations . . .").

26. Somerset v. Stewart, 98 Eng. Rep. 499 (KB 1772).

27. Douglas, Reply to Lincoln, *supra* note 25.

Southern leaders were determined to shore up *Dred Scott* against Douglas's "Freeport Doctrine," and to extend more explicitly the protection of *Dred Scott* over the entire nation as well as the territories. At the convention of the Democratic party in Charleston in 1860, Southern "Fire-Eaters" confrontationally called for a plank in the party platform demanding that Congress enact a nationwide slave code.[28] The convention's rejection of this extremist demand broke up the fragile old North-South Democratic coalition on the spot. Delegates from eight Southern states bolted the convention. This split in the Democratic Party, perversely, made a Republican victory in 1860 almost inevitable.[29]

Southerners also feared a more direct challenge to *Dred Scott*. If Abraham Lincoln, the candidate of the new Republican Party, won the forthcoming election, he might well be able to transform the Supreme Court, and get *Dred Scott* overruled. After all, Andrew Jackson, that hero of the South, had transformed the Court. Jackson had nominated five Justices, including Chief Justice Roger Taney,[30] and three of them were still serving on the Court that decided *Dred Scott*.[31] To be sure, a Jackson appointee, Justice McLean, dissented in *Dred Scott*. Nevertheless, it was felt that Jackson had succeeded in completing the anti-Federalist work of his predecessors, and had created the Taney Court. With *Dred Scott*, the South-leaning, pro-slavery propensities of the Taney Court were only just becoming fully apparent. Now this new man, Abraham Lincoln, this dark-horse presidential candidate, this "black Republican," was adamantly opposing

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28. This faction achieved its aims in the platform produced at the June 11, 1860, convention of the Democratic Party's Deep South [Breckinridge] faction in Richmond, Va. See NATIONAL PARTY PLATFORMS 1840-1968 (Kirk H. Porter & Donald B. Johnson, eds. 1972), at 31, paras. 2, 3.

29. For a chronology of the events leading to what became a three-way split in the Democratic Party in 1860, *see* Weinberg, *Dred Scott*, *supra* note 6, at 122-33.

30. In 1833, in his notorious war on the Bank of the United States, Jackson appointed Roger Taney, at the time his Attorney General, as Secretary of the Treasury to replace Secretary William J. Duane, who replaced Secretary Louis McLane, neither of whom would carry out Jackson's imbecile order to remove the federal deposits from the Bank. Alone in Jackson's cabinet, only Taney was willing to carry out the order. Jackson's attempt to reward Taney with an Associate Justiceship on the Supreme Court was rebuffed by an outraged Senate, but after the death of John Marshall and a Democratic Party sweep in the election of 1836, Jackson, though a lame duck, was able to put Taney into the Chief Justiceship. See ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR (1967). For a contemporaneous account, see T. F. GORDON, THE WAR ON THE BANK OF THE UNITED STATES (1834).

31. Still serving in 1857 were Chief Justice Roger Taney and Justices John McLean and James M. Wayne. Jackson's other appointees, Justices Henry Baldwin and Philip P. Barbour, died in the 1840s.

the further territorial spread of slavery, and inveighing against *Dred Scott* at every opportunity.

Lincoln was outraged by *Dred Scott*. In his bid for the Senate, in his celebrated debates with Stephen A. Douglas, Lincoln must have seemed to be running not so much against Douglas as against *Dred Scott*.[32] His attacks on the case continued after his loss to Douglas. Lincoln attacked *Dred Scott* in his great speech at Cooper Union.[33] As presidential candidate he was still running against *Dred Scott*; Lincoln ran on a Republican Party platform opposing *Dred Scott* in not one, but *four* planks.[34] He was still attacking the case after the election, insisting in his First Inaugural Address that *Dred Scott* was only an ordinary litigation between private parties, and that, although binding between the parties, the Supreme Court's judgment in a private dispute should not be allowed to set national policy—that no public official should feel bound by such a judgment.[35] It was, precisely, to oppose the spread of slavery into the more northerly territories, a possibility opened up for the first time in the Kansas-Nebraska Act of 1854, that Lincoln had come out of political retirement. It was in the same interest that Lincoln's party—the new Republican Party—had come together.[36] Southerners could reasonably fear the kind of Supreme Court Justices such a President would appoint. As Stephen A. Douglas argued, "Mr. Lincoln intimates that there is another mode by which he can reverse the *Dred Scott* decision. How is that? Why, he is going to appeal to the people to elect a President who will appoint judges who will reverse the *Dred Scott* decision."[37]

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32. *See* COMPLETE LINCOLN-DOUGLAS DEBATES, *supra* note 25, at 4-7, 28-29, 36-37, 70, 77-79, 120, 128-29, 217-18, 309-11, 333, 335, 337-38, 394.

33. *See* Lincoln, Address at Cooper Institute, New York (Feb. 20, 1860), *in* I COMPLETE WORKS, *supra* note 22, at 599, 600-07.

34. *See* Republican Platform of 1860, para. 2, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 32 (calling attention to the language of the Declaration of Independence that "all men are created equal"); para. 5 (deploring "the intervention of Congress and of the Federal Courts of the extreme pretensions of a purely local interest . . . ."); para. 7 (denouncing "the new dogma that the Constitution . . . carries slavery into any or all of the territories of the United States" as "a dangerous political heresy"); para. 8 (declaring the determination of Republicans to oppose the Taney Court's interpretation of the Due Process Clause of the Fifth Amendment).

35. Lincoln, First Inaugural Address (Mar. 4, 1861), *in* II COMPLETE WORKS, *supra* note 22, at 5.

36. In the election of 1856, the Republican party fielded its first presidential the election of 1856, candidate, John C. Fremont of California, a soldier, inventor, explorer, and a bit of a character. The party slogan was "Free soil, free men, Fremont."

37. Stephen A. Douglas, Speech at Springfield, Illinois (July 17, 1858), *in* COMPLETE LINCOLN-DOUGLAS DEBATES, *supra* note 25, at 43, 57; *cf.* Abraham Lincoln, Speech in Reply to Senator Douglas, delivered at Chicago (July 10, 1858), *in* I

The election of 1860, then, was to some extent a referendum on *Dred Scott*. It is tempting to liken the case to *Roe v. Wade* in our own time. But *Dred Scott* was about deep power politics, and the controversy with which it dealt divided the country geographically. Polarizing as *Roe* has seemed, it will not lead to war between the states.

On the other hand, we need to remember that an overruling of *Dred Scott* would not resolve the sectional conflict. Depending on the ground of decision, an overruling of *Dred Scott* might permit courts to apply a rule of liberty once more to so-called "sojourners"—slaves that had been taken voluntarily into free territory and had sojourned there for a time.[38] However, the evidence of the *Dred Scott* controversy itself is that few Southern courts might remain willing to avail themselves of the opportunity,[39] and the question arose infrequently in Northern courts. At best, depending on the ground of decision, an overruling of *Dred Scott* might restore power to Congress to try to reach some new political "compromise" between North and South on the burning issue of slavery in the territories. Yet it seems unlikely that any fresh compromise could be had. The chance of compromise was over by the time of the election of 1860, although some who understood the seriousness of the crisis but failed to understand the futility of the effort still struggled to find some *modus vivendi*. With Southern Democrats demanding national legal protection for slavery,[40] and the Republicans opposing the extension of slavery into the territories under any circumstances, the conflict had indeed become "irrepressible,"[41] or, more precisely, irreconcilable. All last-minute efforts at compromise were fail-

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COMPLETE WORKS, *supra* note 22, at 247.

38. *See infra* note 69 and accompanying text.

39. *See* Scott v. Emerson, 15 Mo. 576 (1852) (in earlier litigation by Scott in the Missouri state courts, reversing the judgment of the trial court, which had followed the rule of liberty, "once free, always free"—the rule until then applied in Missouri and other Southern states; declaring that Missouri would no longer extend comity to the laws of free states or territories); cf. *Dred Scott*, 60 U.S. at 560-61 (McLean, J., dissenting) (referring to the rule "once free, and always free" as a rule in the courts of Maryland, a border slave state, while erroneously supposing that the rule of liberty was the law in no Southern court).

40. See Democratic Platform [Breckinridge Faction], para. 2, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 31 ("[I]t is the duty of the Federal Government, in all its departments, to protect, when necessary, the rights of persons and property in the Territories, and wherever else its constitutional authority extends.").

41. William Henry Seward, Speech, The Irrepressible Conflict (Oct. 25, 1858), *in* IV THE WORKS OF WILLIAM H. SEWARD 1853-84 (George E. Baker ed., 1855), at 289, 292, echoing Lincoln in his "A House Divided" speech, *in* I COMPLETE WORKS, *supra* note 22, at 240.

ing. "Entertain no proposition for a compromise," Lincoln admonished a Republican member of Congress, "in regard to the extension of slavery. The instant you do, they have us under again; all our labor is lost, and sooner or later must be done over. . . . The tug has to come and better now than later."[42]

Southerners not given to complex constitutional analysis might well have feared an overruling of *Dred Scott* should Lincoln win, whatever difficulties in accomplishing an overruling our own analysis will reveal. The fear would have been real enough. Had the South remained in the Union to witness an overruling of *Dred Scott*, the balm administered to Southerners by *Dred Scott*—the moral force of constitutional protection—would have been scrubbed away. The acute wounds of moral opprobrium inevitably would have become much harder for Southerners to bear. Congress's power over the status of the territories would be restored, whether or not Congress chose to exercise it. Worst of all, Southerners would have believed that, stripped of power to groom enough new slave states for admission to the Union, the South would be left without sufficient strength to extricate itself from its continuing loss of political muscle in Congress. This, with the fact of a Lincoln victory itself, would have suggested to Southern leaders a permanent loss of the presidency; more, it would have meant to them the end of the Southern ascendancy—an invitation to secede from the Union.

III. NARROWING THE QUESTION

As it fell out, Lincoln was never able to create a Supreme Court majority, despite the ten-Justice Court afforded him by Congress. All together he had the naming of four Associate Justices,[43] and, eventually, a new Chief Justice, his Secretary of the Treasury, Samuel P. Chase. With the war going badly and his administration under fire, Lincoln chose Associate Justices who were moderately conservative Union men—including the Democrat, Stephen J. Field—not at all the extremists the South had feared. But in advance of the election these moderate appointments could not have been predicted.

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42. Reply to a Letter from William Kellogg, M.C., Asking Advice (Dec. 11, 1860), *in* I COMPLETE WORKS, *supra* note 22, at 658.

43. Lincoln named Associate Justices Noah H. Swayne, Samuel F. Miller, David Davis, and, to fill the new tenth seat Congress gave him, Stephen J. Field, a Democrat. All were strong Unionists.

In advance of the election, what might pro-slavery voters fear, and anti-slavery voters hope, that a Lincoln Supreme Court would do about *Dred Scott?* What were the general understandings at the time? Even if voters could anticipate that Lincoln's Supreme Court would build its jurisprudence conservatively on the jurisprudence of its predecessors, as indeed it did,[44] they could hardly assume that, if given an opportunity to narrow or overrule *Dred Scott*, Justices selected by Abraham Lincoln would decline the chance. What were the options open to a future Supreme Court fashioned by Abraham Lincoln?

A Lincoln Court might be expected to confront, if not slavery, then at least the *Dred Scott* case, and to overrule it. The Court might be faced with a case, for example, brought on behalf of a slave taken voluntarily into territory free under one of the old compromises, and, on her return to the South, suing for freedom in the courts of the domiciliary state, relying on the act of Congress effecting the relevant compromise—thus directly challenging *Dred Scott.* The Supreme Court would have jurisdiction to review the judgment below on writ of error, since, whichever way the judgment went in the court below, the petitioner challenging that judgment would be relying on federal law[45]—the plaintiff below on the act of Congress, the defendant on the Fifth Amendment.

But on what rationale could the Court overrule *Dred Scott*? We can say unequivocally at the outset that in the 1860s, in a case overruling *Dred Scott*, our hypothetical Supreme Court would have to confront the Fifth Amendment holding at the heart of *Dred Scott.* That is because the Fifth Amendment would continue to stand in the way of congressional power revived on any other ground. For this reason, such features of the case as, for example, Chief Justice Taney's racism, can furnish only buttressing arguments. Such arguments can address *Dred Scott*'s holdings on jurisdiction and citizenship. But they cannot address the key sectional dispute over the territorial extension of slavery and over the power of Congress to deal with it.

The Fifth Amendment, then, would have to be reinterpreted. But an acute problem presents itself immediately. Any such shattering of *Dred Scott*'s protection for slavery would not only stifle the South's hopes for new slave territory, but also re-

44. *See e.g.*, Mark Graber, *The Jacksonian Origins of Chase Court Activism*, 1 J. S. CT. HIST. 17 (2000) (with statistics).

45. First Judiciary Act of 1789, § 25, 1 Stat 73.

store the old feared inchoate power of Congress or the courts to abolish slavery in the nation some day. Would not the overrule of *Dred Scott* trigger the very secession that, in our hypothetical, has not occurred, with the same danger that the border states would go as well? We cannot proceed to our inquiry if this serious political consideration bars the way at the outset. And so we must assume that our hypothetical Supreme Court would not let this political consideration stand in its way, any more than consideration of serious political consequences stood in the Court's way in deciding *Dred Scott*.

We can proceed then to the possibility of the Court's overruling *Dred Scott* with a reinterpretation of the Fifth Amendment. But on what theory? It is a most interesting inquiry. No constitutional theory seemed to present itself in the antebellum period. I offer a theory shortly,[46] one apparently glimpsed at the time and even asserted with some frequency, but—for understandable reasons—not put forward in any fully developed way.

In thinking about the possible options available to a hypothetical Lincoln Court in dealing with *Dred Scott*, there seem to be three possibilities worth discussing.

IV. ONE THEORY: "SUBSTANTIVE DUE PROCESS"

When critics of *Dred Scott* concern themselves with the Fifth Amendment issue, at least ever since Edward Corwin's progressive-era critique of the case,[47] they tend to focus on *Dred Scott*'s "substantive due process" reasoning, either to deplore or defend it on abstract theoretical grounds, sometimes concealing a political intention.[48] In theory, our hypothetical Supreme Court in the 1860s might take the path of reinterpreting the Due Process Clause as purely procedural—as incapable of vindicating substantive rights.

I would suggest that there are two main understandings of "substantive due process" today, as I glean them from tradition, cases, and commentary. The first understanding is that a law vio-

46. See *infra* Part VI.

47. Edward S. Corwin, *The Dred Scott Decision in Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 53-59 (1911).

48. *See* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 73-76 (2007) (arguing that Roger Taney's substantive due process was both traditional and, as applied, wrong); Paul Finkelman, Scott v. Sandford: *The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 10-11 (2007) (arguing that in view of valued unenumerated rights emerging in the wake of *Lochner*, criticism of *Dred Scott*'s substantive due process is wearing thin).

lates the Due Process Clause of either the Fifth or Fourteenth Amendments when it trenches on a "fundamental right"—that is, a right enumerated in the Bill of Rights, or an unenumerated right so important that no amount of notice or hearing, post-deprivation or pre-deprivation, can insulate the violation from strict judicial review. The second substantive due process theory posits that a law allegedly injurious to the interests of the plaintiff may be so arbitrary, irrational, confiscatory, or discriminatory as not to be law at all—not law that can be applied *as the process that is due.*[49] This entitles the plaintiff to meaningful judicial review. In this latter understanding, I would suggest that *substance is transformed into procedure.* In such cases, law is deemed so unreasonable as to be unworthy of application within the adjudicatory process. Fairness in adjudication requires reasonable law. The thinking is that reasonable law is part of the process that is due.

It is not clear to me which of these two approaches was Chief Justice Taney's in *Dred Scott.* On the one hand, he was concerned with vested rights in property. On the other, he was concerned with an arbitrary and discriminatory confiscation:

> And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[50]

Critics of substantive due process insist, reasonably if literalistically, that process refers to procedure, not substance. They therefore regard substantive due process as an oxymoron in any context. They have not considered the above-described interesting phenomenon of substance transformed into procedure.

As for the "fundamental rights" strand of substantive due process, critics of the concept tend to argue, apparently to satisfy personal political preferences, that substantive due process is judicial lawmaking at its most activist, allowing an uncontrollable judiciary to create rights where the Constitution does not. This

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49. For the closely related argument that due process is a limit on law chosen through a method disregardful of the content and policy of the chosen law, *see* Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1634-70 (2005); Louise Weinberg, *Back to the Future: The New General Common Law*, *in* Symposium, 35 J. MAR. L. & COMM. 523 (2004); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440-88 (1982).

50. *Dred Scott*, 60 U.S. at 450.

fretting over new rights puts the critics of substantive due process in the uncomfortable, indeed un-American, position of insisting that the Bill of Rights places a ceiling upon, rather than a floor beneath, constitutional rights. Their view is contrary to James Madison's view, and contrary to the explicit rule of construction given in the Ninth Amendment, that the enumeration of rights is not to be read as an exclusion of unenumerated rights. This consideration might create a difficulty for a Court seeking to overrule *Dred Scott* in reaction to its substantive due process reasoning.

Even if objections to unenumerated rights were consonant with basic constitutional understandings, such objections would suffer from their concentration in twentieth century controversies. The whole line of argument gives off too potent a whiff of the struggles of the century just past to permit its confident projection onto the jurisprudence of the antebellum period.[51] As everybody knows, in the last quarter of the twentieth century "substantive due process" was the bugaboo of social conservatives outraged by *Roe v. Wade*.[52] They liked to tar *Roe* with the *Dred Scott* brush. In the previous wave of such criticisms, in the 1930s, substantive due process was the whipping-boy of the left. The unacceptable case in those pre-*Roe* days was *Lochner*,[53] the bad old case stripping the states of power, under the Due Process Clause of the Fourteenth Amendment, to improve the conditions of labor. Today's conservatives often liken *Roe* to *Lochner* as well as to *Dred*, to demonstrate the awfulness of *Roe*.[54] In view of the fount of rights that *Lochner* was to become, today's liberals are increasingly rallying to *Lochner*'s defense.[55]

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51. *Cf.* James Ely, *The Oxymoron Reconsidered*, *supra* note 19, at 319 (arguing that substantive due process was not distinguished from procedural due process in the antebellum period and that to criticize antebellum substantive due process on grounds found today would be anachronistic).

52. 410 U.S. 959 (1973) (finding a constitutional right to abortion in the first trimester of pregnancy, and a modified such right in the second). Women's abortion rights and government powers over them have evolved since *Roe* and are subject to a different analysis. *See* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

53. Lochner v. New York, 198 U.S. 45 (1905) (under the Due Process Clause of the Fourteenth Amendment, striking down New York State's maximum 10-hour day for bakers, on the theory that the regulation impermissibly deprived both employees and employers of the "liberty of contract" without due process of law).

54. *See e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990), at 44.

55. *See supra* note 48. *Cf.* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (relying on *Lochner*; recognizing familial, contractual, and other unenumerated rights of substantive due process); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1130 n.77 (2001) (arguing that *Lochner* was correct about

This kind of political sparring over substantive due process was not a significant feature of constitutional theory in the 1860s or in the antebellum period. Even if we could, or would, strip the Due Process Clause of all substantive meaning today, we cannot say that most antebellum lawyers who thought *Dred Scott* a bad thing, thought it a bad thing because of its substantive due process reasoning. Neither Justice Curtis nor Justice McLean, dissenting in *Dred Scott*, had any quarrel with Taney's substantive due process theory as such, respectively arguing only that no due process deprivation occurs when property is transported to a place at which such property is not recognized in law.[56]

Nevertheless, it must be acknowledged that the procedural view of the Due Process Clause would become the apparent view of the Chase Court in its closing days in 1873, in *The Slaughter-House* Cases.[57] The discussion of the meaning of due process in *Slaughter-House*, however, was negligible, and the Court did not squarely come out and say that the Clause was limited to procedure. It simply rejected one substantive due process reading on the facts of that case. Moreover, three of Lincoln's Justices dissented in *Slaughter-House*, and each agreed with a "fundamental rights" theory of the Fourteenth Amendment, although, concededly, they relied on the Privileges and Immunities Clause rather than the Due Process Clause.[58] But it seems unlikely, on the evidence of *Slaughter-House*, that our

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an individual right to contract, certainly as to one's labor, as the Thirteenth Amendment makes clear; adding that the fault of *Lochner* lay in its fatuity in not understanding the effect on a contract of unequal bargaining power). See to similar effect, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed., 2000), at 1371 (faulting *Lochner* for insensitivity to unequal bargaining power; stopping short of recognizing the positive constitutional value of "liberty of contract").

56. *Dred Scott*, 60 U.S. at 533-34 (McLean, J., dissenting); *id.* at 626-27 (Curtis, J., dissenting); Balkin & Levinson, *Thirteen Ways*, *supra* note 48.

57. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) (1873) (holding that the reference to "citizens of the United States" in the Privileges and Immunities Clause of the Fourteenth Amendment is fatal to applying that Clause to the civil rights of citizens of a state; that civil rights must remain the province of the state because the Fourteenth Amendment could not have been intended to reverse settled understandings of the respective powers of the states and nation over civil rights within a state; and that the Equal Protection Clause is largely limited to claims by black persons.)

58. The three Lincoln appointees dissenting in *Slaughter-House* were Chief Justice Chase and Justices Swayne and Field. Chase and Swayne joined Field's dissent. Chase was too ill to submit a separate opinion, but Swayne did so. Swayne's opinion made a footnote reference to Bushrod Washington's oft-cited list of Article IV privileges and immunities of state citizenship in Corfield v. Coryell. *Slaughter-House*, 83 U.S. at 128. Field's dissent argued that the Fourteenth Amendment extends the Article IV privileges and immunities of state citizenship to all United States citizens within the state as well as those outside the state coming into it. *Id.* at 95-96 (Field, J., dissenting). Justice Bradley, who also dissented, was a Grant appointee.

idealized Chase Court would have considered overruling *Dred Scott* on a "procedure only" reading of the Fifth Amendment's Due Process Clause. This remains so even though Justice Davis joined Justice Miller's opinion for the *Slaughter-House* Court—both of them Lincoln appointees.

The real significance of *Slaughter-House*, ironically, is that it is *responsible* for today's substantive due process. After *Slaughter-House*'s demolition of the Privileges and Immunities Clause of the Fourteenth Amendment as a repository of fundamental rights against the states, our rights against the states—the Bill of Rights, and our unenumerated rights—had nowhere else to go. Virtually all of our constitutional rights against state and local government have had to be lodged in the Fourteenth Amendment's Due Process Clause. But for *Slaughter-House*, all of our fundamental rights as against the states would be comfortably ensconced in the Privileges and Immunities Clause of the Fourteenth Amendment. So we know in hindsight that an overruling of *Dred Scott* on grounds rejecting substantive due process could not have been built on any *lasting* foundation. The very longevity of *Slaughter-House's* hollow Privileges and Immunities Clause renders substantive due process a practical necessity, if the enumerated rights, or any other fundamental rights, are to be protected against abridgement by local government.

In our time, certainly, it is too late to impute a thoroughgoing illegitimacy to substantive due process. The Due Process Clause of the Fourteenth Amendment now "incorporates" virtually every substantive right in the Bill of Rights.[59] Chief Justice Rehnquist, in his day, attempted with incomplete success to confine the Due Process Clause of the Fourteenth Amendment to procedural faults only, when a bare deprivation is alleged.[60] But he did not attempt to do so when an incorporated substantive

59. Two enumerated procedural rights remain "unincorporated"-the Fifth Amendment right to indictment by grand jury, and the Seventh Amendment right to civil trial by jury. The substantive Second Amendment "right to keep and bear Arms" remains unincorporated as well, as does the Third Amendment right, now in desuetude, against quartering of soldiers. Acknowledged unenumerated rights are equally operative under the Due Process Clauses of either the Fifth or Fourteenth Amendments.

60. *Compare, e.g.*, Zinermon v. Burch, 494 U.S. 113 (1990) (holding, over a dissent joined by Chief Justice Rehnquist, that procedural due process was not accorded, where the plaintiff had been involuntarily committed to a mental institution without a pre-commitment hearing as required by local law, notwithstanding the availability of a post-deprivation remedy in tort), *with* Daniels v. Williams, 474 U.S. 327 (1986) (Rehnquist, C.J.) (holding that when government negligence may be remedied by a post-occurrence action in tort, the tort is not a violation of the Due Process Clause).

right was at issue, or even when an implied "fundamental right" was at issue,[61] as in cases under *Roe v. Wade*.

Dred Scott was and remains our worst case, not because Chief Justice Taney's substantive due process reasoning was oxymoronic, but because *Dred Scott* stripped Congress of power, laying the country open to slavery and preventing Congress from doing anything about it—preventing Congress from compromising the dispute that was drawing the country into the catastrophe of civil war. A critique of substantive due process could hardly do the whole job of overruling *Dred Scott*. A Court seeking to overrule *Dred Scott* would need to confront *Dred Scott*'s Fifth Amendment with much heavier guns.

V. ANOTHER THEORY: THE CONSTITUTIONAL MEANING OF "PROPERTY"

A better basis for an overruling of *Dred Scott* might have been presented by a redefinition of the word "property" in the Due Process Clause of the Fifth Amendment. Of course, the Supreme Court could not bind the states to its view of property as a matter of state law. Even in those days when the Court generally was not bound to follow state case law where it applied,[62] the states were certainly not bound to follow the Supreme Court's lead as to matters of state law.[63] But the Court could authoritatively redefine "property" as that word is used in the Fifth Amendment.

In his 1858 debates with Douglas, Lincoln said that Chief Justice Taney's essential mistake of constitutional interpretation in *Dred Scott* lay in the assertion that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."[64]

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61. *Cf. Daniels*, 474 U.S. at 336 (Stevens, J., concurring in the judgment) (pointing out that there are three different kinds of Fourteenth Amendment due process: First, "incorporating" rights enumerated in the Bill of Rights; second, incorporating unenumerated rights and rights to be free of arbitrary law; and, third, protecting under the bare Due Process Clause rights to fair procedures).

62. *Cf.* Swift v. Tyson, 41 U.S. 1 (1842), *overruled*, Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

63. *Erie*, 304 U.S. at 74 (Brandeis, J.) (noting the persistence of state courts in applying their own laws on questions of common law). Brandeis's observation points up the fact that the common law available in federal courts under *Swift* had never been federalized, and thus was not the "supreme" law of the land. It simply represented an independent judgment of what state law ought to be, and as such was not binding on the state judges.

64. Abraham Lincoln, Reply in the Galesburg Joint Debate (Oct. 7, 1858), *in* I COMPLETE WORKS, *supra* note 22, at 437, 445.

Lincoln firmly contradicted any such assertion as "not true in fact."[65] A strong Lincoln Court might well reinterpret the meaning of the word "property" in the Due Process Clause of the Fifth Amendment. There is a brief passage in *Aves' Case*[66] that suggests the possibility of such a reinterpretation. *Aves' Case* is a celebrated Massachusetts opinion by Chief Justice Shaw, influential for the seminal distinction it drew, crucial to antebellum thought, between fugitives escaping from slave territory and slaves voluntarily brought into free territory. Fugitives were to be rendered up to their masters under the Fugitive Slave Clause[67]—part of the sacred constitutional bargain.[68] Even slaves brought voluntarily into a free state were to be rendered up, if they were only in transit there. But those brought voluntarily into a free state, *sojourning* there for a period of time, were not within the terms of the sacred bargain. "Sojourners" could become free.[69] In the course of discovering this distinction, through a prolonged struggle, Chief Justice Shaw briefly, in passing, suggested the more fundamental point that there could be no property in human beings. Here is Lemuel Shaw wrestling with this insight:

> But it is not speaking with strict accuracy to say, that a property can be acquired in human beings, by local laws. Each state may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them; as, for instance, that they may be bought and sold, delivered, attached, levied

65. *Id.* at 446.

66. Commonwealth v. Aves, 35 Mass. 193, 219 (1836) (Shaw, C.J.). See LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957), at 84.

67. U.S. CONST. art. 4, § 2, cl. 3. *See* Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1997); Louise Weinberg, *Methodological Interventions and the Slavery Cases: Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1342-59 (1997) (recounting the struggle in the courts over fugitive slaves).

68. It is sometimes remarked that the South would never have joined the Union had not the Constitution embodied a sacred bargain guaranteeing Southern state signatories' rights to their existing labor systems. The Fugitive Slave Clause was a prominent feature of the sacred bargain. Interestingly, at least one Northern judge reasoned, to the contrary, that the *North* would not have signed the Constitution had it imagined that it could be invaded by bounty hunters, and its own free black citizens kidnapped and sent into chattel slavery. In re Booth, 3 Wis. 13, 72 (1854) (Crawford, J., dissenting).

69. For the antebellum interstate conflict over the freedom *vel non* of non-fugitive slaves, see Louise Weinberg, *Of Theory and Theodicy: The Problem of Immoral Law*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD (Symeon Symeonides ed., 2002), at 473-99; PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981); ROBERT M. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975); Weinberg, *Methodological Interventions*, *supra* note 67, at 1316.

> upon, that trespass will lie for an injury done to them, or trover for converting them. But it would be a perversion of terms to say, that such local laws do in fact make them personal property generally. . . .[70]

A similar uneasiness with the chattel aspect of slavery is echoed, also in passing, in Salmon P. Chase's brief in the *Birney* case in Ohio.[71] Chase wrote, "I maintain that the relation of owner and property, as existing between person and person, has, or can have, no existence in this state. . . ."

On some such thinking, a Lincoln Supreme Court might overrule *Dred Scott*—by redefining the category of "property" as incapable of attaching to human beings for purposes of the Due Process Clause. The question was raised in argument in *Dred Scott*.[72] Yet in *Dred Scott*, only Justice McLean, dissenting, seems to have had a doubt about property in human chattel, and he expressed this quite casually, without developing the argument: "But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man."[73]

True, the Founders owned slaves themselves, a fact on which Chief Justice Taney relied in *Dred Scott*. Taney suggested that the Founders could not, without hypocrisy, own slaves while thinking it wrong.[74] *Dred Scott*'s originalism on this point is among Taney's least edifying tropes. Justice McLean, dissenting, responded,

> I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground.[75]

Chief Justice Taney's kind of originalism would fasten upon us the sins of the fathers, stripping them, and with them the Con-

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70. *Aves' Case*, 35 Mass. at 216.

71. Birney v. State, 8 Ohio 230, 231 (1837) (brief of Salmon P. Chase).

72. *Dred Scott*, 60 U.S. at 451 ("[I]t seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. . . .").

73. *Dred Scott*, 60 U.S. at 537.

74. *Id.* at 410.

75. *Id.* at 537.

stitution, of their ideals and aspirations. It would take from us that legacy. A Lincoln appointee might prefer to gauge the Framers' aspirations from the Declaration of Independence, as Lincoln liked to do, rather than from the exigent compromises to which the Framers submitted in Philadelphia in 1787. But a Lincoln Court could not pretend that the Constitution did not *recognize* slavery, even though, as Lincoln argued at Cooper Union, the Constitution did not "expressly" affirm slavery.[76] The Constitution does not establish property in slaves, but it variously recognizes the existence of slavery and makes accommodations to slavery. Paul Finkelman has discussed these at length in various of his writings.[77] Slaves were to count as fractions of persons for the purposes of both taxation and representation.[78] Fugitive slaves were to be returned.[79] The slave trade was not to be prohibited before 1808.[80] It also seems relevant that the Senate consists of two representatives from each state, large or small, without possibility of amendment,[81] an arrangement enabling a Southern majority to block an appointment to the federal judiciary. Furthermore, the supermajorities that the logic of the Constitution required for the amendment process[82] ensured that the South would enjoy a permanent veto over proposed amendments to the Constitution. While neither provision was merely an obeisance to the concerns of the slave South, Southern delegates to the Constitutional Convention could return to the South claiming them as victories.

In providing that no person shall be deprived of life, liberty, or property without due process of law, the Fifth Amendment is understood to mean at a minimum that before federal authorities can execute, imprison, or fine anyone, before a federal court can impose a sentence or assess damages or issue an injunction, due process first requires notice, trial, and judgment. And in

76. *Cf.* Lincoln, Address at Cooper Union, New York (Feb. 27, 1860), *in* I COMPLETE WORKS, *supra* note 22, at 599.

77. *See, e.g.*, PAUL FINKELMAN, SLAVERY AND THE FOUNDERS, RACE AND LIBERTY IN THE AGE OF JEFFERSON (2d ed., 2001).

78. U.S. CONST. art. I, § 2, cl. 3. ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

79. U.S. CONST. art. IV, § 2, cl. 3.

80. U.S. CONST. art. I, § 9, cl. 1.

81. U.S. CONST. art I, § 3 (providing for equal state representation in the Senate); art. V (providing for constitutional amendments, except that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

82. U.S. CONST. art. V.

1860 it is fair to say not only that most Americans, North and South, would have thought the Due Process Clause to be purely "procedural" in this sense, but also that most Americans, North and South, would have understood the "property" protected by the Clause to include slave property. Many today still believe that it did. Recently David Currie, for example, has termed "fatuous" the argument in the 37th Congress, as it prepared to abolish slavery in the capital, that there could be no property in human beings, because that argument was "contradicted by decades of history in the District of Columbia and centuries of it elsewhere."[83]

Southerners took the argument further. They also argued that the Fifth Amendment protected slave-owners' "liberty" as well as their "property." This was a liberty to take their slaves with them into the territories, free of federal interference. They sometimes argued that the concept of "due process" included the concept of "equality" as well.[84] In this view, due process required the nation to give equal respect to Southern as to Northern property rights, to slave as to other property, and to Southerners' as well as Northerners' rights to travel to, or settle in, a United States territory—with their "property." As Chief Justice Taney put this in *Dred Scott*,

> And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.[85]

Actually, if there is such a right it is very qualified. There is no Fifth Amendment right, or any other right, to take property

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83. Currie, *The Civil War Congress*, *supra* note 24, at 1149.

84. *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Fifth Amendment's Due Process Clause incorporates the concept of "equal protection" as found in the Fourteenth Amendment). The notion that due process requires evenhandedness, of course, is very old.

85. *Dred Scott*, 60 U.S. at 451. *See* Democratic [Breckinridge Faction] Platform, para. 1, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 31 ("[T]he Government of a Territory organized by an act of Congress is provisional and temporary, and during its existence all citizens of the United States have an equal right to settle with their property in the Territory, without their rights, either of person or property, being destroyed or impaired by Congressional or Territorial legislation.").

of any kind into a territory or even a state, absolutely free of federal interference. The nation rather obviously must have the power, whenever the national interest so requires, to confiscate suspect articles of property anywhere in the country—in these security-conscious times a feature of life annoying to every frequent flier. Congress possesses the national powers, whatever they may be, everywhere in the nation, as well as on land within its exclusive control, like the territories, or Washington, D.C., or a post office. The power of Congress is clearer in the territories, where it is unconstrained by considerations of federalism, and clearest in the capital, where the Constitution uses its strongest terms of legislative power.[86] Congress is the local as well as the national legislature for the territories of the United States,[87] although it may provide for a separate local territorial legislature. And Congress can certainly require the confiscation of contraband found in a territory organized under the laws of the United States. Chief Justice Taney's supposed unabridgeable right to take one's property into United States territory is and was imaginary.

One can expect to see this most easily, of course, in situations in which national power is at its maximum. Although wartime abolition in the District of Columbia was with modest "compensation,"[88] the national power physically and completely to *confiscate* slave property, *anywhere*, as well as to prohibit slavery in the territories, seems to have been well understood, at least as a power of the military in the Civil War period. Consider that Union commanders, after first punctiliously sending runaway slaves back to their plantations and farms, began, under the influence of the Confiscation Acts,[89] to designate runaway slaves as "contraband." Slaves were walking away from slavery wherever Union armies appeared, and could not be shooed away as they doggedly trudged along in the rear. The designation of slaves as "contraband of war" legitimized the army's "confiscation" of slave "property."

But it is also true that national power over property is always exercised in the teeth of American respect for property. Private property has always had a sacrosanct quality in this

86. U.S. CONST. art. I, §8, cl. 17.

87. Amer. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (Marshall, C.J.).

88. Act of Apr. 16, 1862, ch. 54, 12 Stat. 376 (abolishing slavery in the District of Columbia, setting the rate of compensation at $300.00 per slave).

89. *See* Confiscation Acts, *supra* note 2; SILVANA R. SIDDALI, FROM PROPERTY TO PERSON: SLAVERY AND THE CONFISCATION ACTS 1861-1862 (2005), at 37-54.

country. Typically, private property is protected by state law, and, as Chief Justice Taney pointed out in *Dred Scott*, it is protected from arbitrary forfeiture to the national government. Property in slaves was specifically a matter for state governance, as affirmed in 1850 in Chief Justice Taney's opinion in the case of *Strader v. Graham*.[90] Reading quotidian antebellum cases, we are confronted with an overwhelming universal respect for rights in property. Property rights could stand in the way of slaves' petitions for freedom in Northern courts as well as Southern.[91]

Justice McLean, dissenting in *Dred Scott*, was constrained to acknowledge the deference due to the—spurious, as we know—right to travel unimpeded with one's property. "It is said the Territories are common property of the States," McLean wrote, "and that every man has a right to go there with his property. This is not controverted."[92] A substantial unwarranted concession lies in those few words.

Of course even if our hypothetical Supreme Court were to reinterpret the word "property" in the Fifth Amendment so as not to include property in persons, this could not free the slaves. At best, by its example such a reinterpretation could discourage state laws and customs, North and South, embodying the concept of chattel slavery. Such a ruling would revive the power of judges to free "sojourners" in territory in which Congress had abolished slavery, because it would have revived the power of Congress to create free territory. The immediate effect in law of overruling *Dred Scott* on this ground would be to restore Congress's power to prohibit slavery in the territories, and thus to revive "compromise" legislation deligitimized by *Dred Scott*. It might seem especially important that overruling *Dred Scott* on this ground would re-empower Congress to reach some fresh compromise of the territories issue. But in our hypothetical 1860s, as in 1860 actually, the South would not have stood for a new prohibition of slavery anywhere, and would have had sufficient Democratic strength in the Senate to block any such new compromise.[93] Any difference it might have made, in our hypothetical, that the South would no longer be buoyed by *Dred*

90. 51 U.S. 82 (1850) (Taney, C.J.) (holding no federal question raised by a judgment determining slave status *vel non*; that is exclusively a question of state law).

91. *See, e.g.*, In re Williams, 29 F. Cas. 1334, 1341 (E.D. Pa. 1839) (noting the clash between the claims of humanity and the claims of property; ultimately ruling against rendition of the alleged fugitive slave).

92. *Dred Scott*, 60 U.S. at 549.

93. For the tally in the lame duck 36th Congress, see *supra* note 24.

Scott, would seem to be cancelled by the likelihood that the South would have been inflamed by *Dred Scott*'s overrule. Nor in our hypothetical can we blame the South exclusively for the likely impasse. In the past, as we have seen, the power to prohibit slavery was a power Congress was habitually too riven by faction to exercise except, at best, in some territory, and in "balanced" fashion, in some legislated "compromise" which would tacitly permit slavery in some other territory. In December 1860, however, the presidency was in the hands of Abraham Lincoln, a man adamantly opposed to the expansion of slavery into the territories. The enactment of some new "compromise," allowing slavery in some territory as the customary *quid pro quo* for prohibiting it elsewhere, was simply not on the cards.

VI. BETTER THEORY: IF SLAVES WERE "PERSONS"

We have been looking at the constitutional concept of "property." We have seen that, should our hypothetical Supreme Court overrule *Dred Scott* by construing the Fifth Amendment word "property" so as not to include slaves, the consequence would simply be to restore the *status quo ante*, as far as the power of Congress is concerned. In so doing, it would restore the existing "compromises," and so indirectly restore discretion to courts to free "sojourners" in territory Congress had designated as free. From the evidence of the *Dred Scott* litigation itself, however, Southern courts would be much less willing than formerly to free sojourners in any event.[94] What if slaves were to be considered "persons" for purposes of the Due Process Clause? What would be the constitutional consequences of that? I raise this as a separate question because it permits me to sort out the arguments specifically pertaining to it.

We have seen that there was some feeling, at least, among antebellum lawyers and judges, that the concept of "property" ought not, might not, and possibly could not, include human beings. Starting from an assumption that there can be no "property" in human beings—a self-evident proposition with us, however shaky with lawyers then—there emerges a seemingly obvious solution to the problem of finding apparently strong constitutional theory for an overruling of *Dred Scott*. This solution, at least to a modern imagination, might seem no more strained than Chief Justice Taney's analogous position in *Dred*

94. *See Scott v. Emerson*, *supra* note 39.

Scott. But, for reasons that will appear—and these are serious reasons—this solution seems not to have commended itself to lawyers and judges at the time. For some, it seems simply not to have been perceived. When ventured, it seems not to have been developed in any thoughtful way beyond its mere assertion.

The solution, if it was one, was hiding in plain sight. "In plain sight," because political actors adverted to it, as obvious constitutional interpretation, in major statements of principle. "Hiding," because it seems not to have been thought through or developed in any sustained way or relied on with any confidence. It does not seem to have been taken up and discussed much, either in courts or at large. As the basis of a strong attack on *Dred Scott* it might have seemed doubtful, hardly serious, unsound, an ultimately unconvincing way of looking at the constitutional problem. At a deeper level, the difficulties accompanying any such purported solution might well have seemed insurmountable.

Simply put, the proposed solution would count slaves as "persons" for Fifth Amendment purposes. At least in our own thinking, that slaves are "persons" seems a much more natural reading of the Fifth Amendment of 1791 than Chief Justice Taney's. It rests in part on strong textual and contextual foundations in the Constitution of 1789. Slaves are nowhere accounted in the Constitution as "property," but rather, are designated everywhere as "persons." The Due Process Clause of the Fifth Amendment could not be read as protecting "property" in slaves, if it was to be read consistently with the uniform constitutional usage of "persons." The Constitution repeatedly makes explicit this fundamental understanding of slaves exclusively as "persons." Slaves appear as "Persons" in the Three Fifths Clause, providing that for purposes, on the one hand, of representation of population in the House, and, on the other, for apportionment of taxes based on population, only three-fifths of such "Persons," including those "bound to labor," were to be counted.[95] This usage of "Persons" then reappears in the clause denying Congress power to prohibit the slave trade before 1808.[96] And it is "Persons" who are the object of the Fugitive

95. U.S. CONST. art. I, § 2, cl. 3. ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

96. U.S. CONST. art I, § 9, cl. 1 ("The Migration or Importation of such Persons as

Slave Clause,[97] requiring the delivering up of a runaway slave upon the claim of the master (*not* designated as the "owner").[98]

This usage of personhood does not vary. Nowhere in the Constitution are slaves designated as "property." Nowhere in the Constitution are slaves designated as *slaves*. Slavery is neither mentioned in the Constitution of 1789 nor the Bill of Rights of 1791. The Constitution uses fastidious circumlocutions instead. Since, under the Constitution, slaves were always "persons," and never "property," it would seem more natural in reading the Fifth Amendment to the Constitution to adopt this emphatic constitutional usage, which it was never supposed to have been an intention of the Bill of Rights to undo. In this more natural reading of the Fifth Amendment, slaves would remain the same "persons" they are in the Constitution. In view of this striking textual usage, Chief Justice Taney's reading of the constitutional texts begins to seem not only ungrounded but perverse, if only on textual grounds. (As Taney could not know, the word "slavery" first appears in the Constitution in 1865, with the Thirteenth Amendment, abolishing it.[99])

If it can be agreed that, under the Fifth Amendment of 1791, slaves must be accounted "persons," just as they were persons under the Constitution of 1789, then the Due Process Clause *kicks in on their behalf*, and slaves become persons whom the nation may not, without due process of law, deprive of their lives, their liberty, or their property—in this context, property in the fruits of their own labor. And this right to their own lives, liberty and labor is theirs, at least as against federal interference, notwithstanding the absence, in our hypothetical, of the Thirteenth Amendment. *Caveat*: In asserting this I am eliding a good many tough questions. But it is necessary to state the proposition before dealing with its deficiencies, serious as those deficiencies may be.

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any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

97. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

98. It is of some interest that the Fugitive Slave Clause contains no language empowering Congress to enforce it, although Article IV, Clause 1, gave Congress power to legislate for effectuation of the Full Faith and Credit Clause.

99. "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (1865).

It is hard to imagine disagreement today with the casting of slaves as "persons." We have the Reconstruction Amendments, and the civil rights laws. Besides, our moral views have improved. However, we can reasonably suppose, with more than mere presentism, that if this reinterpretation of the Fifth Amendment is sound today, it would at least have had some force then, given the great weight of anti-slavery feeling in the country, not only in 1860 but at the time of the Founding.

One fact concerning the history of the Due Process Clause stands out. From the beginning, when first proposed by James Madison in the House on June 8, 1789, through all the drafts and debates on the Bill of Rights, the language of the Due Process Clause, its language of "persons," "deprivation," "life", "liberty," and "property," remained substantially the same.[100] The 1789 draft of the Fifth Amendment, as first proposed, read, in pertinent part, "No person shall . . . be deprived of his life, liberty, or property, without due process of law."[101] There was no discussion of this wording in either the House or Senate. I do not find intelligible debate on the meaning of either the word "property" or the word "person."

The likeliest explanation of the easy acceptance of the Due Process Clause in the draft of 1789, notwithstanding the prevalence of slavery over much of the young country, is that the words were already traditional boilerplate. The Due Process Clause probably would have conveyed to an observer at the time no more than a traditional expression of the fundamental right of Englishmen, or free men, to trial before punishment, according to the law of the land. Consider that a similar calm reception, notwithstanding slavery, was accorded the language of the Declaration of Independence, that "all men are created equal." Yet by the 1850s, anti-slavery leaders were relying on the Declaration as calling for the abolition of slavery.[102] Just as cultural contradiction forced a change in meaning, over time, in the case of

100. THE COMPLETE BILL OF RIGHTS (Neil H. Cogan ed., 1997), at 265-94; *see also* CREATING THE BILL OF RIGHTS (Helen E. Veit et al. eds., 1991).

101. 1 CONG. REC. (Jun. 8, 1789), at 315.

102. For his part, Lincoln liked to rely on the Declaration of Independence, with its proclamation that all men are created equal. Lincoln would say at Gettysburg that America was dedicated at its birth to that proposition. Speech at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* II COMPLETE WORKS, *supra* note 22, at 439; *see generally* GEORGE P. FLETCHER, "NOR LONG REMEMBER:" OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001); GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1982).

the Declaration, so also it could have done in the case of the Due Process Clause.

It may come as a shock to some readers that a radical reinterpretation of the Fifth Amendment along the lines described was in fact already quite apparent in the antebellum period.[103] In the 1840s there emerged a new political party, the Liberty Party,[104] a precursor of the Republican Party of the mid-1850s. The chief aims of the Liberty Party were to defeat the mainstream big political coalitions, the Whig and Democratic parties, and to delegitimize the statutory "compromises" of the past, which had been engineered by leaders of those parties, since all of the old compromises had authorized slavery to some extent. In the Liberty Party's platforms we find an unambiguous reading of the Due Process Clause of the Fifth Amendment as protecting the life, liberty, and property of persons from national authorization of their enslavement. You see this reading in one of the earliest of all party platforms, the Liberty Party's platform of 1844. A plank in this platform resolves that "the fundamental truths of the Declaration of Independence, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness, was [sic] made the fundamental law of our National Government, by that amendment of the constitution which declares that no persons shall be deprived of life, liberty or property, without due process of law."[105] Thus the Liberty Party was already making a substantive due process argument long before Chief Justice Taney did so in *Dred Scott*—but one working in precisely the opposite direction.

The successor to the Liberty Party, the Free Soil Party, was more overtly concerned with protecting the work and wages of white labor from slave competition.[106] The Free Soilers also limited the scope of their argument to the territories. They argued that, while the Constitution might preserve and protect slavery in the slave states, the Fifth Amendment's protection of personal liberty as against the nation disempowered Congress from permitting slavery in any place under the nation's exclusive control.

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103. *See* Robert R. Russel, *Constitutional Doctrines with Regard to Slavery in the Territories*, 32 J. SO. HIST. 466 (1966).

104. Liberty Party Platform, Campaign of 1844, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 4. The Liberty Party drew its anti-slavery membership from the so-called "Barnburner Democrats" and "Conscience Whigs." *Id.* at 10.

105. Liberty Party Platform of 1844, para. 9, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 5.

106. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).

In their view, because of the exclusivity of national control over the territories, the Fifth Amendment's Due Process Clause protected slaves as "persons" from Congressional deprivation of their liberty in the territories. In the 1848 campaign, the Free Soilers adopted a platform declaring that "our fathers . . . expressly denied to the Federal Government, which they created, all constitutional power to deprive any person of life, liberty, or property, without due legal process."[107]

In the campaign of 1852, this Party, significantly enlarged, called itself the Free Democratic Party. Its platform reiterated that "the Constitution of the United States, . . . expressly denies to the General Government all power to deprive any person of life, liberty, or property, without due process of law. . . ."[108]

The Free Soilers transformed themselves once more in the campaign of 1856 into the American Party, or the "Know-Nothings."[109] They adopted nativist anti-immigration and anti-Catholic policies. These policies were prompted for the most part by the same concern that prompted their anti-slavery policy: the maintenance of work and wages for existing American free labor.

The new Republican Party was an outgrowth and coming together of all of these essentially Northern Whig parties. In the first Republican Party platform, in 1856, we see the same substantive interpretation of the Due Process Clause:

> [Resolved,] That . . . as our Republican fathers, when they had abolished Slavery in all our national territory, ordained that 'no person should be deprived of life, liberty, or property, without due process of law,' it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legisla-

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107. Free Soil Party Platform of 1848, fourth resolution, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 13.

108. Free Democratic Platform of 1852, para. IV, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 18.

109. The term "Know-Nothings" is said to have originated in the secret club that became a nucleus of the party of that name. The club was reputed to have directed its members, when asked about it, to say, "I know nothing." *See* Michael F. Holt, *The Antimasonic and Know Nothing Parties*, *in* I HISTORY OF UNITED STATES POLITICAL PARTIES (Arthur Schlesinger, Jr. ed., 1973), at 575-620; *but see* TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S (1992) (not offering this hypothesis).

> ture, or of any individuals, to give legal existence to Slavery in any Territory of the United States.[110]

In 1860 Lincoln ran on a Republican platform forcefully reiterating the applicability of the Due Process Clause to persons enslaved, at least in the territories, in language substantially identical to that of the 1856 campaign.[111]

Here, then, is stronger constitutional theory that at first blush well might undergird a case—a case not declaring slavery unconstitutional, but declaring Congress powerless to enable it. The theory that seems to have evaded antebellum anti-slavery lawyers and judges had been available, apparently, all along. The means of attacking *Dred Scott* on constitutional grounds seemingly lay ready to hand.

Yet it is significant that neither Justice McLean nor Justice Curtis, dissenting in *Dred Scott*, were willing to indulge in such thinking. There is no argument, in either opinion, that the Fifth Amendment protects liberty, not slavery. If the reading of the Fifth Amendment proposed here would have been natural in the antebellum period, why did neither of the able dissenters in *Dred Scott* argue it? Why does the argument not occur in any developed fashion in antebellum writings?

The likely reasons are many, and are substantial. Curiously, current commentators have scarcely addressed them. Current commentators, with few exceptions[112] have, like commentators in the antebellum period, avoided raising even the possibility of the proposed rereading of the Due Process Clause, even if only to expose whatever flaws they might find in it. Yet when they do, they tend to make unconvincing arguments. The Takings Clause of the Fifth Amendment seems to have deflected some commentators from the Due Process Clause, entangling them in problems of compensation or reparations.[113] Others, as we have seen,

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110. Republican Platform of 1856, Resolution 2, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 27.

111. Republican Platform of 1860, para. 8, *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 32.

112. *See, e.g.*, Jennifer P. Arlen, *Of Property Rights and the Fifth Amendment*, 33 WM. & MARY L. REV. 299, 317 (1991): "The flaw in Taney's reasoning was his characterization of the slaveholder as a property owner. . . . Only the slaveholder's rights concerned Taney, and he did not question whether Scott had been deprived of his liberty without due process of law."

113. *See, e.g.*, DAVID P. CURRIE, DESCENT INTO THE MAELSTROM: 1829-1861 (2005), at 13; *see also* Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 251-55 (2003).

become bogged down in outdated criticisms of substantive due process. What are the real obstacles to the proposal?

Most obviously, the proposed revised reading of the Fifth Amendment might seem to place the restrictions of the Amendment improperly on private persons instead of upon the national government. If the lives, liberty, or property of slaves were what mattered, it was not the nation that imported, bought, owned, or employed slave labor, or in any other way deprived slaves of life, liberty, or property. It was the *slave-masters* who did.[114] But the Fifth Amendment does not control private conduct.

An answer to this is that, in the old compromises, Congress had implicitly *authorized* slavery. In our own understandings, of course, it is reasonably clear that the "governmental action" requirement of constitutional review is satisfied even if government merely enables private acts that, if public acts, would violate the Constitution. In the twentieth century, the Supreme Court was to hold, in *Reitman v. Mulkey*, that government could not entangle itself in private discrimination, even when the challenged law authorizing private discrimination was approved by referendum.[115] I can recall no *Reitman*-like authority in the antebellum period, but there would seem to have been no definite bar to such reasoning in a Lincoln Supreme Court in the 1860s.

Even so, some modern writers have been perplexed by this class of problems, as John Hart Ely seems to have been, beguiled

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114. *See* John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1159 (2001) (taking the position that government could have no responsibility for slavery in a case challenging an enslavement, since the slave-master was the logical defendant in such a case, not the government). See, analogously, DeShaney v. Winnebago Dep't of Social Serv., 489 U.S. 189 (1989). In that case, a local agency sent a social worker to visit an abused child, Joshua DeShaney, regularly. The social worker repeatedly noted the child's deteriorating condition, but took no action. The Court, by Chief Justice Rehnquist, ruled that the agency could not be held liable under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for Joshua's ultimate vegetative status requiring permanent institutionalization, since his father, not the agency, was the abuser. Note that the *DeShaney* principle does not apply where the plaintiff is injured while in the custody or control of government officials. Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983); Youngberg v. Romeo, 457 U.S. 307 (1982).

115. Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down under the Equal Protection Clause an amendment to California's constitution, approved by referendum, on the ground that the amendment entangled the state in private discriminatory choices: the amendment barred the state from prohibiting anyone from refusing, within her discretion, to sell, lease or rent real property to anyone); Romer v. Evans, 517 U.S. 620 (1996) (striking down under the Equal Protection Clause an amendment to Colorado's constitution, approved by referendum, on the ground that the amendment could be explained only by animus to the affected class; the amendment selectively disqualified sexual preference for the protections of state civil rights law).

by the hypothetical case of judicial review of a particular enslavement. It appeared to Ely that state action would be wanting in such a case, since slaves are obviously deprived of their liberty by their masters, not by government.[116] Professor Ely downplayed the principle of *Shelley v. Kraemer*,[117] limiting it to its own facts, and apparently not reading as relevant the mass of civil cases in which judicial assumptions of jurisdiction or authorizations of attachment in wholly private cases are struck down under the Due Process Clause of the Fourteenth Amendment, or such other wholly private cases as *Times v. Sullivan*,[118] in which it is the action of a court that constitutes the alleged constitutional violation.[119]

It might be argued, with more force, that Congress could not, by mere exception, inaction, and tacit understanding, be held accountable for the establishment of slavery in territory which it merely exempted from abolition. Yet in a larger sense the tacit national permission to a territory to opt for slave status was never innocent. The responsibility of Congress for slavery in slave territories seems clear enough. No reasonably sentient American in 1820 could have believed that the legislated exemption from abolition for territories below the Missouri Compromise line was not an authorization of slavery in those territories. The point of the successive "compromise" acts of Congress was to allow for the establishment of slave territories as the *quid pro quo* for abolition elsewhere. The Compromise of 1850 left open the option, however unlikely of exercise, of slavery in territory that would become New Mexico and Utah. The "popular sovereignty" of the Kansas-Nebraska Act does not escape this analysis. In the Kansas-Nebraska Act of 1854, the very purpose of "popular sovereignty" was to leave open the option of slavery in the designated territory. Congress could not do this without responsibility in fact for facilitating the deprivation of liberty to individuals thereafter held as slaves under the law of that territory. Congress could not compromise away the fundamental rights of individuals. To whatever extent a reinterpretation of

116. Ely, *Interclausal Immunity*, *supra* note 114, at 1199.

117. 334 U.S. 1 (1948) (holding, under the Equal Protection Clause, that state judges may not enforce racially restrictive covenants in actions between private parties).

118. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (under the First Amendment striking down an application of state libel law in an action by a public figure against a newspaper, when actual malice had not been shown).

119. See, e.g., Bush v. Gore, 531 U.S. 98 (2000) (striking down under the Equal Protection Clause a Florida court's order mandating a vote recount using too vague a standard).

the Due Process Clause that would lead us to this conclusion would require an imaginative leap in the 1860s, the leap ought to have been relatively easy for a Court whose recent predecessor had leapt over a natural reading of the Due Process Clause to produce a strained holding disabling to Congress at a time of great national need. Given the Republican Party's principles in the election of 1860, a strong Lincoln Court might well perceive the utter disregard in *Dred Scott* of the personhood, and thus the humanity,[120] of the enslaved population.

What, then, would become the condition of the territories upon an overturning of *Dred Scott* on this ground? All territories of the United States would be *free*, since no act of Congress or its delegates, the territorial legislatures, would be constitutional, if it purported to allow, establish, or maintain slavery.

I pause to note that the territories were the particular concern in *Dred Scott*, and we need not argue that Congress should also be accounted ultimately responsible for slavery in the slave states carved out of slave territory.[121] We need not try to argue that an overturning of *Dred Scott* on the ground proposed would therefore liberate the slaves within those states. We do not need to make that case. But we can be aware that in permitting a territory to be settled by slave-owners, Congress typically would have anticipated that states emerging from that territory would opt for slave status. And those states were understood to be creatures of Congress. Their legislatures, like territorial legislatures, could be accounted Congress's delegates. It might not be too much to say that Congress was responsible in fact for deprivations of the liberty of persons in new slave states. The major argument to the contrary is that new slave states became independent of Congress. Even if Congress was an original cause of slavery in a new slave state, once a state was admitted to the Union the establishment and maintenance of slavery in its own laws would constitute an intervening cause, and an apparently suffi-

120. Humane feelings toward the slaves were not uncommon, and were argued paternalistically in support of slavery. *See* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH (1989) (1956), at 322-30.

121. I refer here to existing slave states that came into being after the original thirteen. Questions concerning future new slave states were moot as a practical matter. After the Compromise of 1850 it was understood that there could be no more new slave states. Southern hopes were focusing on the Caribbean. *See* H.R. Exec. Doc. No. 33-93, at 127 (1854) ["Ostend Manifesto"] (recommending the United States to offer Spain $130 million for Cuba, and, if spurned, to "wrest" Cuba from Spain); *see also* Democratic Platform of 1860 (Breckinridge Faction), *in* NATIONAL PARTY PLATFORMS, *supra* note 28, at 31 (advocating in its second resolution the acquisition of Cuba).

cient one. And we recall that in 1850, in *Strader v. Graham*, the Supreme Court had held that the slave status of persons raised no federal question, but was entirely a matter of state law.[122] In addition, the old compromises generally provided that new states should enter the Union on an "equal footing" with the original thirteen states. It was part of the intention of the "equal footing" clauses to insulate slavery in new slave states from constitutional or legal attack. Just as the original slave states were embraced by the Constitution of 1789, with all its accommodations to slavery, so also would new slave states be. In this way, Congress tried retroactively to bestow upon new slave states not only the constitutional privileges accorded slave-owners, but the constitutional and therefore moral blessing of the Framers. But, as to this last point, a Lincoln Court might hold that Congress should not be permitted, by a verbal ingenuity in ordinary legislation to create an illusion of constitutionality and extend it over a deprivation of liberty in fact. No clever language about "equal footing," the Court might reason, could bar effective judicial review of what could be deemed, in effect, a governmental establishment of slavery. Yet, taken all in all, I find it too much of a strain to conclude that an overruling of *Dred Scott* could be stretched to turn the newer slave states into free territory.

Returning to the problem of slavery in the territories, there were far more serious difficulties in the way of the proposed overruling of *Dred Scott* than I have mentioned thus far or seen discussed in the literature. A redefinition of slaves as Fifth Amendment "persons," taken for all it was worth, could up-end basic legal and constitutional understandings, and enmesh society in anomalies of governance, logic, and feeling. A retroactive reading of the Fifth Amendment (as prohibiting Congress from authorizing slavery, expressly or impliedly), without more, could not abolish slavery nationwide. It would leave slavery intact, at a minimum in the original thirteen states, and probably in all states in which it existed. But it would void the Fugitive Slave Clause—once the Fifth Amendment was perceived to have amended that Clause—and with it, of course, the Fugitive Slave Act.[123] Federal courts, and indeed the Supreme Court, could not

122. 51 U.S. 82 (1850) (Taney, C.J.).

123. In addition, private parties could not retain the self-executing constitutional "right" of recaption of their fugitive slave "property" under the rule of Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612-13 (1842). That right required no implementation by Congress, but once slaves were adjudged "persons," they would presumably lose their status as "property," and *Prigg* could not stand.

continue to acknowledge master-slave relationships, even within slave states, since the Fifth Amendment controls the conduct of federal judges. Our reinterpretation of the Fifth Amendment would seem to require endowing slaves, even those within the slave states, with all the protections of the Bill of Rights, in any action concerning them, as long as that action fell within one of the heads of federal jurisdiction available at the time—although state judges would remain free to enforce slave law.

And there would remain difficulties of logic. To suppose that the slaves were Fifth Amendment "persons" would have seemed, in the minds of most Americans, at best only a troubling paradox. Although the Fifth Amendment constrains only national power, a right of slaves to any liberty at all would have seemed incompatible with the condition of servitude. It was the sheer illogic of the thing. How could "slaves" have "rights?" It was simply a contradiction in terms. In whatever way the Constitution designated them, they were slaves, and indeed, remained "property" under state law. Almost by definition, slaves could hardly enjoy the rights enumerated in the Bill of Rights. It is only a partial answer to all this that the Due Process Clause protects not slaves, but persons. It is easy enough to say that an authorization by Congress to permit slavery should trigger the Fifth Amendment, not blot it out. It is much harder to imagine a pre-Fourteenth Amendment world in which slaves have federal liberty rights but remain slaves under state law.

The difficulties we have been describing would be erased, or at least set on the path of extinction, even in the absence of the Fourteenth Amendment, by a Supreme Court case overruling *Barron v. Baltimore*, the case in which the Court, by Chief Justice Marshall, held that the Bill of Rights limited only the nation and did not control state governmental acts.[124] State-law property rights, state-law protections of slavery, state responsibility for the condition of servitude, would have been addressable much more readily without *Barron*. So obvious is the desirability of this that our hypothetical Supreme Court might itself see the need, and overturn *Strader* as well as *Barron*, in the same case in which it overrules *Dred Scott*. And yet the very sweepingness of the desirable change is some indication of the political difficulty and practical peril of the project of trying to extricate the country from *Dred Scott*. If the Fifth Amendment became applicable

124. 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.) (holding the Bill of Rights applicable only to the nation, not the states).

to the states, and slaves were held to be not "property" but "persons" within the meaning of the Fifth Amendment, we would have a legal régime substantially the equivalent of a Fourteenth Amendment in which the Bill of Rights was "incorporated." The upshot would be that the nation would have a clarified complete power of abolition of slavery even within the existing states. It may be somewhat soothing to the spirit vexed by the unreality of all this anachronistic progressiveness that we are at least describing the state of the law, more or less, that we finally do have in our own day. But all this would have been so revolutionary in Southern thinking in its time that it might have triggered the same secession that, in our convenient hypothetical the South rejects in 1861, with the same danger that secession might spill over to the border states.

And then there were matters of feeling. There were psychological obstacles to the visibility of the personhood of the slaves or to any understanding of the constitutional import of their personhood. There was a racial presumption of slavery in the South, so that slavery was associated with a black skin. Many Americans then would not have conceded to slaves, and often not even to black freedmen, a personhood capacious enough to have endowed them with even limited membership in the American community. Chief Justice Taney pointed this out at dispiriting length in *Dred Scott*.[125] In those days many Americans could not, with the best will in the world, seriously imagine black persons as entitled to rights, even if it would have been logical to do so, and even if it were conceded on all sides that these were rights only against federal, not state, intrusion, and even if this latter arrangement were not anomalous. Rather, Chief Justice Taney's view, that blacks had no rights which whites were bound to respect, might have seemed to many then far more natural than any proposition to the contrary. Especially convincing to them would have been Taney's outraged and incredulous cry that to grant blacks personhood ("citizenship," in that context,) would have been to grant them a right to "keep and carry arms wherever they went."[126] The proposed reorientation of the Due Process Clause, then, taken all in all, seems too problematic to be developed without great difficulty.

At least we can say that our consideration of the proposed revised view of slaves as "persons" has helped us to see the es-

125. *Dred Scott*, 60 U.S. at 403, 407-17.
126. *Id.* at 416.

sential wrongness of *Dred Scott*. The case's true constitutional infirmity, whatever difficulties may have stood in the way of correcting that infirmity, becomes much clearer to us. We can now see that Chief Justice Taney twisted the Due Process Clause to his pro-slavery purposes, closing his eyes to the Clause's full bearing and more natural reading. Read straightforwardly, the Due Process Clause of the Fifth Amendment protects the freedom of all persons from arbitrary deprivation by the nation of life, liberty, or property. Slavery amounts to a more total deprivation of all these things—life, liberty, and property—than any other that can be imagined, short of death. Chief Justice Taney's holding in *Dred Scott*, then, amounted to a perversion of the better meaning of the Due Process Clause—one that was apparent at the time. If a better reading of the Fifth Amendment was utterly impracticable in the conditions of the time, the *Dred Scott* Court should have rested content with its jurisdictional ruling.

VII. THE IRONIES

Interestingly, an overruling of *Dred Scott* on the ground that the Due Process Clause protected the slaves as "persons" would, even apart from the anomalies and difficulties which I have touched upon, produce a different result from that produced by an overruling of *Dred Scott* on the related ground that slaves were not "property." The redefinition of "property," as we have seen, would strip slave-owners of federal protection in the territories, restoring the *status quo ante*. The redefinition of "persons," however, would have the odd further effect of leaving intact *Dred Scott*'s holding that the Missouri Compromise was unconstitutional.

We are thus confronted, if not with a paradox, then with a perplexing irony. Chief Justice Taney had been *absolutely right*—in a sense—in *Dred Scott*. Taney was *right* that the Missouri Compromise of 1820 was unconstitutional. And, we must add, *all* the old statutory "compromises" had been unconstitutional all along. This was not, as Taney thought, because the Missouri compromise limited the rights of masters to keep slave "property," but rather because in the Missouri Compromise (as in every one of those old enactments), Congress had allowed for slavery. In other words, Congress had tacitly but obviously authorized deprivations of the lives, liberty, and property of "persons." So overruling *Dred Scott* on our proffered ground would have left all the old compromises as unconstitutional as they

were after *Dred Scott*. In the end, then, Congress would remain as powerless under the Fifth Amendment to effect any new peaceful if temporising compromise as it was under *Dred Scott*.

There is a further, supreme irony in all of this. Even assuming the requisite judicial and political will to overrule *Dred Scott*, and even setting to one side the legal and practical difficulties confronting a Supreme Court desirous of doing so, overruling *Dred Scott could not have avoided the Civil War*. In overruling *Dred Scott* on the ground proposed in this essay, the Court, ironically, would have left Congress as powerless as Chief Justice Taney had left it to effect any further compromise of the sectional dispute, even if the country had not, in the acute crisis of 1860, passed the point of compromise. However importantly *Dred Scott* may be presumed to have contributed to the coming of the Civil War, overruling *Dred Scott* could not have averted it. We discover, in this, one of the sad ironies of the American tragedy.

Could you and I, contemplating the story of the compromises of the rights of "persons," compromises formed for the high purpose of preserving the Union, have fallen into the same moral trap as those antebellum Congresses that enacted them? Why did we imagine, why do we still imagine, that diplomacy and compromise are invariably right and good, when they may be only expedient? How could James Madison have said that "no blame should attach?" To the extent that extra-constitutional means are sometimes truly necessary,[127] we had the excuse of our need. The Constitution of 1789 was marred by the same need. Yet to the extent that the Bill of Rights reflects American ideals, the course of compromise with slavery was always as unconstitutional as it was wrong.

VIII. CODA

In the end, of course, it was not the Court, but the Fourteenth Amendment that wrote *finis* to *Dred Scott*. It is true that in 1862 Congress defied *Dred Scott*, outlawing slavery in the territories.[128] But the constitutionality of that act of defiance would remain unclear as long as *Dred Scott* stood. It was the Fourteenth Amendment that overrode *Dred Scott*, and did so in every particular.[129]

127. *See infra* note 129 on the ratification of the Fourteenth Amendment.

128. *See* CURRIE, DESCENT INTO THE MAELSTROM, *supra* note 113, at 1149-50.

129. Ratification of the Fourteenth Amendment by Southern states was largely coerced. Under the first Military Reconstruction Act, Congress ejected defined Southern

In *Dred Scott*, Chief Justice Taney declared that black Americans could never be citizens.[130] But the Fourteenth Amendment endows every person born or naturalized in America with the inestimable treasure of American citizenship.[131]

In *Dred Scott*, Chief Justice Taney asserted that the black man had no rights which the white man was bound to respect.[132] But the Fourteenth Amendment says: Here they are. Those rights include rights to life, liberty, and property, and no state may deprive you of them without due process. They include the privileges and immunities of United States citizenship, that no state may abridge. And they include the right to equal protection of the laws, which no state may deny.[133]

Dred Scott held that Congress had no power to limit the rights of slave-masters.[134] But the Fourteenth Amendment says that Congress shall have power to enforce its terms.[135]

Dred Scott relied on the view in *Strader v. Graham* that a state could choose slave status for itself.[136] But the Fourteenth Amendment imposes national standards on the states, saying, "No state shall."[137] And it made all persons citizens of the state in which they reside.[138]

In *Dred Scott*, Chief Justice Taney insisted that slaves were property.[139] But the Fourteenth Amendment rejects that delusion when it provides that no compensation shall ever be paid by state or nation on account of the loss or emancipation of a slave, and that all debts and obligations on account of such loss shall be void.[140]

There may be other ways of reading the Fourteenth Amendment, but, whatever its other aims, the Fourteenth Amendment—and not the Supreme Court—did, finally, succeed in overcoming *Dred*.

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states and conditioned their readmission upon ratification of the Fourteenth Amendment. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 249 (1867). Cf. Coleman v. Miller, 307 U.S. 433 (1939) (holding the amendment process a nonjusticiable political question).

130. *Dred Scott*, 60 U.S. at 407.
131. U.S. CONST. amend. XIV, § 1.
132. 60 U.S. at 407.
133. U.S. CONST. amend. XIV, § 1.
134. 60 U.S. at 451.
135. U.S. CONST. amend. XIV, § 5.
136. 60 U.S. at 452.
137. U.S. CONST. amend. XIV, § 1.
138. U.S. CONST. amend. XIV, § 1.
139. 60 U.S. at 410 & *passim*.
140. U.S. CONST. amend. XIV, § 4.