DRED AGAIN: ORIGINALISM'S FORGOTTEN PAST

*Christopher L. Eisgruber**

I. *DRED* AGAIN?

Justice Scalia closes his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1] by announcing the Dorian Gray Theory of Constitutional Jurisprudence.[2] Scalia observes that Roger Taney's portrait at Harvard looks downcast, even gloomy. The Justice has an explanation: "those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind."[3] The jurisprudential sins of judges are, apparently, visited on their portraits.[4] Scalia's story has a moral: the *Casey* majority should fear for its portraits, because *Casey* is, simply put, *Dred* Again.[5]

I am no art critic, and would not dare to challenge Scalia's

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* Assistant Professor of Law, New York University. I gratefully acknowledge helpful comments on previous drafts from Richard Bernstein, Lea Brilmayer, Norman Dorsen, Sam Estreicher, Larry Kramer, Lori Martin, William E. Nelson, Burt Neuborne and participants in the New York University Law and History Colloquium. Errors that remain are solely my responsibility.

This research was supported by a generous grant from the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law.

1. — U.S. —, 112 S. Ct. 2791, 60 U.S.L.W. 4795 (1992).

2. Oscar Wilde, *The Picture of Dorian Gray* (Penguin, 1985).

3. 112 S. Ct. at 2885, 60 U.S.L.W. at 4842. Scalia's reference is to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The official report of the case misspelled the defendant's last name, Sanford. Don E. Fehrenbacher, *The Dred Scott Case, Its Significance in American Law and Politics* 2 n.* (Oxford U. Press, 1978). In this essay, I will use "Sanford" when referring to the defendant and "*Sandford*" when referring to the case.

4. Scalia imagines a causal mechanism less fantastic than Wilde's. Compare *Casey*, 112 S. Ct. at 2885, 60 U.S.L.W. at 4842 (Scalia, J., dissenting) (portrait painted *after* blameworthy acts reveals their effects upon the actor) with Wilde, *The Picture of Dorian Gray* 118-91 (cited in note 2) (portrait painted *before* blameworthy acts reveals their effects upon the actor).

5. Scalia says that the Taney of *Scott v. Sandford*, like the *Casey* plurality, had thought that his opinion called a divided nation to " 'accept[ ] a common mandate rooted in the Constitution,' " and the Justices do "neither [themselves] nor the country any good by remaining" arbiters of the abortion controversy. *Casey*, 112 S. Ct. at 2885, 60 U.S.L.W. at 4842 (Scalia, J. dissenting), quoting *Casey*, 112 S. Ct. at 2815, 60 U.S.L.W. at 4804 (opinion of Justices Kennedy, O'Connor, and Souter).

interpretation of Taney's portrait. Nor am I inclined to contest Scalia's theory of Taney's psyche, or his praise for the "lustre" of Taney's pre-*Scott* record (although Taney's "dual federalism"[6] wins no plaudits in this corner). I care enough about the Constitution, however, to contest Justice Scalia's mistaken comparison of *Casey* and *Scott*. While I doubt that the "Dorian Gray Theory of Constitutional Jurisprudence" will attract many adherents, the "*Dred* Again" theory is getting enough air time that it makes sense to debunk some popular myths about *Scott*.

The "*Dred Again*" theory goes like this:

> '[*Scott*] was at least possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.' . . . . *Lochner* and *Roe* have, therefore, a very ugly common ancestor. But once it is conceded that a judge may give the due process clause substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law. . . . . Who says *Roe* must say *Lochner* and *Scott*.[7]

That is Judge Robert Bork's statement of the theory.[8] His conclusion is, of course, a blatant non-sequitur.[9] Nevertheless, although most proponents of the "*Dred* Again" theory phrase their claims more modestly than he does, Bork is only one among many scholars and jurists to make similar claims about *Roe* and *Scott*. The first sentence in the quoted passage comes from Professor David Currie.[10] Professor Michael McConnell has made a "*Dred* Again" argument roughly parallel to Bork's.[11] This theory is, moreover, the premise for Justice Scalia's warning to his colleagues about the fate of their images.[12]

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6. See, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 15-16 (1950) (describing Taney's use of state power as an independent limit on national power).

7. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990) ("*The Tempting of America*").

8. Bork alluded to the argument recently in the *New York Times*. Robert H. Bork, *Again, A Struggle for the Soul of the Court*, N.Y. Times, July 8, 1992, at A19, col. 2.

9. It would be like saying that because *Barnes v. Glen Theatre, Inc.*, 501 U.S. —, 111 S. Ct. 2456, 59 U.S.L.W. 4745 (1991) (the nude dancing case) refused to uphold a free speech claim, and *Debs v. United States*, 249 U.S. 211 (1919) (subversive speech case) refused to uphold a free speech claim, who says *Barnes* must say *Debs*. Or that because George Bush is a Republican, and David Duke is a Republican, who says Bush must say Duke.

10. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 271 (U. of Chi. Press, 1985) ("*The Constitution in the Supreme Court*").

11. Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 Chi.-Kent L. Rev. 89, 101 (1988).

12. See, e.g., *Casey*, 60 U.S.L.W. at 4837 (quoting from the *Scott* dissent); id. at 4841 (quoting Currie's comparison of *Roe* and *Scott*); and id. at 4842 (the *Casey* plurality calls to mind Taney's post-*Scott* gloom).

Scalia's invocation of *Scott* rests in part upon a feature of *Casey* not related to interpreta-

About the non-sequitur, I have little to say. I could show at length that any theory of constitutional interpretation (for example, originalism) can be manipulated to fit the prejudices of a willful judge. I could then add that a perverse application of a theory is not a reason to reject the theory.[13] But these arguments are obvious. No intellectual purpose would be served by pushing the point.

What disturbs me is the mistaken picture of *Scott v. Sandford* implicit in the "*Dred* Again" theory. That picture describes a battle between, on the one hand, a "fundamental values/substantive due process" jurisprudence (Taney, confident of his lustre and not yet rendered gloomy by discovery of his mistake)[14] and, on the other

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tion of the Due Process Clause: Scalia takes issue with the plurality's assertion that the Court in *Roe* was "asked" to "call[ ] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." 112 S. Ct. at 2885, 60 U.S.L.W. at 4804. There is some reason to believe that in *Scott* the Justices had a similar view about their ability to end controversy. See, e.g., Robert G. McCloskey, *The American Supreme Court* 96 (of Taney's errors, the "first and greatest had been to imagine that a flaming political issue could be quenched by calling it a 'legal' issue and deciding it judicially"); Fehrenbacher, *The Dred Scott Case* at 306 (cited in note 3) (the Justices wrote broadly in *Scott* because they thought that by "acting boldly, the Court might be able to dispose of a dangerous public issue and perhaps save the nation from disaster.").

Yet, Scalia could not have censured the *Casey* plurality so harshly had he respected the plurality's claim that its "mandate" was "rooted in the Constitution." It is one thing to say that the plurality is wrong about the Court's capacity to end controversy, and another to say that the controversy is reminiscent of *Scott*'s aftermath. There is good reason, for example, to believe that the Court was too confident about its ability to end the national controversy about integrated schools. See, e.g., Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 Col. L. Rev. 1867, 1928-30 (1991) (Warren, Frankfurter, and other Justices overestimated the Court's ability to achieve gradual, short-term desegregation); see also *Cooper v. Aaron*, 358 U.S. 1, 24-25 (1958) (Frankfurter, J., concurring) (exhorting state officials not to resist " 'the supreme Law of the Land,' . . . as declared by the organ of our Government for ascertaining it," but instead to help insure that "local habits and feelings will yield, gradually . . ., to law and education"). Nevertheless, it would be bizarre to suggest that *Brown v. Board of Education*, 347 U.S. 483 (1954) (segregated schools are unconstitutional), was another *Scott v. Sandford*.

Scalia's critique thus depends upon the assertion that the plurality's view on the merits, as well as its view of the judiciary's role in the constitutional order, is wrong in ways that recall Taney's errors in *Scott*. See, e.g., Edward S. Corwin, *The Dred Scott Decision In the Light of Contemporary Legal Doctrines*, 17 Am. Hist. Rev. 52, 68 (1911) (defending the *Scott* Court's authority to reach the constitutionality of the Missouri Compromise, but condemning the Court for disposing of the issue irresponsibly). Perhaps Scalia is relying on a belief that abortion and slavery are comparable moral evils. Scalia does not, however, profess such a belief in *Casey*. The only connection he draws between the merits of *Scott* and the merits of *Casey* is his claim that *Scott* is the fountain of substantive due process.

13. Without speculating upon Taney's motives, I note that Bork describes Taney as a "Southern partisan" looking for a chance to "make his resentments and his adherence to the cause of the slave states into constitutional law." Bork, *The Tempting of America* at 29 (cited in note 7).

14. See, e.g., Bork, *The Tempting of America* at 30 (cited in note 7) (Taney's opinion is blameworthy because its use of substantive due process "is as blatant a distortion of the original understanding of the Constitution as one can find"); id. at 209 (listing *Scott* among "manifestations of the natural law"). See also McConnell, 64 Chi.-Kent L. Rev. at 89, 101 (cited in note 11) (Taney apparently concluded "that the prohibition of slavery is in violation

hand, a "positivist/original intent/process-means-process" jurisprudence (both dissenters, perhaps, but especially Curtis[15]). "*Dred* Again" next draws a line from Taney to Blackmun, and another from Curtis to Rehnquist, Scalia and Bork.

That account of *Scott v. Sandford* contains blunders which, to anyone who has read the opinion carefully, are as obvious as Bork's non-sequitur. Almost nobody, however, has read *Scott*, much less carefully. Perhaps that's an excusable omission. The case covers about 250 pages of the United States Reports,[16] and much of it is balderdash.[17] Nearly all of it is complicated: the case is a snarl of jurisdictional, choice of law, and substantive issues.[18] The complications become headier because they require the reader to remember that axiomatic propositions of modern jurisprudence do not apply.[19] Add to that the case's lack of doctrinal significance, and one can see why so few constitutional law teachers include it in

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of natural right," and so authored the first Supreme Court decision "to take the view that a statute can be unconstitutional because it violates unenumerated rights").

15. See, e.g., Bork, *The Tempting of America* at 33 (cited in note 7) ("Justice Benjamin Curtis of Massachusetts dissented in *Dred Scott*, destroyed Taney's reasoning, and rested his own conclusions upon the original understanding of those who made the Constitution."). See also McConnell, 64 Chi-Kent L. Rev. at 101-02 (cited in note 11) (Curtis's dissent was a rebuke to unenumerated rights jurisprudence).

16. All nine Justices wrote opinions. Although the official reporter captions Taney's opinion as the "opinion of the court," *Scott*, 60 U.S. (19 How.) at 399, it is maddeningly difficult to count which Justices joined which propositions, or to construct a "holding" for the case. See, e.g., Fehrenbacher, *The Dred Scott Case* at 324, 404 (cited in note 3) (proposing a "box score" for the case).

17. Justice Daniel's opinion, for example, includes a pompous discussion of Roman slavery, 60 U.S. (19 How.) at 477-80 (concurring opinion), purporting to shed some light on the relationship between emancipation and citizenship in the United States. See Theodore D. Woolsey, *Opinion of Judge Daniel in the Case of Dred Scott*, 15 New Englander 345 (1857) (criticizing Daniel's interpretation of Roman law). Cf. Fehrenbacher, *The Dred Scott Case* at 400 (cited in note 3) ("Daniel's extremism revealed itself most clearly in the intemperateness of his language, which impugned the motives, intelligence, and patriotism of persons supporting congressional power over slavery in the territories.").

18. For example, Scott claimed that he had become free because his master, John Emerson, had voluntarily taken Scott with him into the Northwest territories to Fort Snelling in Minnesota, where slavery was prohibited by federal statute, and Illinois, where slavery was prohibited by state law. Scott and Emerson returned to Missouri before Scott sued for freedom. The Court thus confronted a difficult choice-of-law problem: which jurisdiction's law (Missouri's, Illinois's, or federal law) governed Scott's status after his return to Missouri? See *Strader v. Graham*, 51 U.S. (10 How.) 82, 94 (1850) (when a person makes a claim to freedom predicated upon prior entry into a free state, the claim is governed by the law of the state in which the person is resident). For further investigation of these complexities, see Currie, *The Constitution in the Supreme Court* at 267-68 n.240 (cited in note 10); Fehrenbacher, *The Dred Scott Case* at 260-62, 385-88 (cited in note 3).

19. For example, it is *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), not *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that governs the federal court's interpretation of state law, and the Fourteenth Amendment is not around to describe the relationship between personhood and citizenship for native-born Americans.

their syllabi.[20] *Scott v. Sandford* is not only the most unjust decision the Supreme Court ever rendered, it is also among the longest, the murkiest and the most obsolete.

Nevertheless, on one point I concur with Justice Scalia and the other "*Dred* Again" theorists: we must not forget the worst atrocity in the Supreme Court's history, for we can ill afford a repetition of the error. For that reason, the mistakes in the "*Dred* Again" account of *Scott* matter in a way that Judge Bork's non-sequitur does not. In light of its length, few will find time to wade through *Scott* in search of its lessons. So I offer here a brief summary of the corrections needed to restore the picture blurred by the "*Dred* Again" theory.

I begin by briefing the case, and then state five observations about its jurisprudential significance. The picture that emerges does not threaten the *Casey* or *Roe* majorities, but instead carries a warning for their critics. What separated Taney from the *Scott* dissenters was not his recourse to fundamental values (for he made none), nor his rejection of originalism (for he embraced it). What separated Taney from the dissenters was his indifference to justice.

II. READ AGAIN

At a general level, *Scott* is easy to summarize.[21] Scott was held as a slave in Missouri. Scott's master, John Emerson, voluntarily took Scott to, among other places, the Northwest Territories, where slavery was prohibited by congressional enactment (specifically, the Missouri Compromise). Scott and Emerson eventually returned to Missouri.[22] Scott claimed thereafter that he had been emancipated by, among other things, operation of the Missouri Compromise.[23] The Supreme Court disagreed. Taney's opinion included an argument that the Missouri Compromise was unconstitutional because the federal government lacked authority to regulate slavery in the territories.[24] The Due Process Clause of the Fifth Amendment fig-

20. One leading casebook, for example, mentions *Scott* only twice, once in connection with Lincoln's opposition to it and once to name it as the source of substantive due process. Gerald Gunther, *Constitutional Law* 23, 445 (Foundation Press, 11th ed. 1985). No substantial excerpt from the case appears anywhere in the book.

21. Readers familiar with the facts, procedural posture, and holding of *Dred Scott* should skip this subsection. On the other hand, those who desire a more complete description should consult Fehrenbacher, *The Dred Scott Case* at 239-448 (cited in note 3), or the abridged version of that book, Donald G. Fehrenbacher, *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective* 121-243 (Oxford U. Press, 1981), which offer detailed and readable accounts of the case.

22. *Scott*, 60 U.S. (19 How.) at 397-98.

23. Id. at 432.

24. Id. at 452.

ured in the portion of Taney's opinion devoted to the Missouri Compromise: Taney implied that it deprived slaveholders who entered the Territories of their property without due process of law.[25]

That's simple enough. Matters become much more complicated when one introduces the procedural posture of the case, and attends to the "other things" and "other places" mentioned above—which one must do to discover the jurisprudential foundations for Taney's conclusions. I will introduce some of those complications as they become relevant.

One complication bears immediate notice, however. It pertains to jurisdiction. The case is a state law action brought in federal court: Scott claimed, in essence, that he had been battered and imprisoned,[26] and Sanford claimed a right to batter and imprison on the ground that Scott was his slave.[27] Federal jurisdiction depended upon whether the suit fit under the Diversity Clause, which authorizes the federal courts to decide cases "between Citizens of different States."[28] Sanford, a citizen of New York,[29] contested Scott's status as a "Citizen" of Missouri, contending that people descended from slaves could never be citizens, whether or not they were free.[30] The result was a kind of double-dip into the question of Scott's freedom: he apparently had to be free to invoke the jurisdiction of the federal courts, and he had to be free to win on the merits under Missouri law. On the other hand, even if Scott were free, he might not be a Citizen capable of invoking diversity jurisdiction.

Taney began his opinion with a lengthy argument upholding Sanford's jurisdictional plea.[31] Taney held that nobody of African descent could ever become a citizen within the meaning of the diversity clause, concluding along the way that African-Americans were not among the "people" referred to by the Constitution.[32] After deciding that the Court lacked jurisdiction, however, Taney went on to consider whether Congress had authority to prohibit slavery in the territories.[33] This combination of rulings generated a long-running debate about whether Taney's pronouncements on the Missouri Compromise were dicta.[34] That debate has no bearing

25. Id. at 450. Taney never did more than imply the inconsistency between due process and the Missouri Compromise. See infra note 76.

26. Id. at 396.

27. Id. at 397.

28. U.S. Const., Art. III, Sec. 2, Para. 1.

29. *Scott*, 60 U.S. (19 How.) at 564 (Curtis, J., dissenting).

30. Id. at 396-97.

31. Id. at 399-430.

32. Id. at 404-05, 411, 426-27.

33. Id. at 430-54.

34. For discussion of the debate, see David M. Potter, *The Impending Crisis: 1848-*

upon our topic here. What will matter greatly is the nature of Taney's arguments about jurisdiction (they are originalist) and the relation between those arguments and his interpretation of the due process clause (the latter depends upon the former).

III. READ RIGHT

My first observation, which I owe to a recent article by Justice Stevens,[35] is that *Scott* and *Casey* derive from different textual sources. Stevens points out that *Roe*, *Griswold* and a variety of other cases were decided under the Liberty Clause: the portion of the Fourteenth and Fifth Amendments guaranteeing that no person will be deprived of *liberty* without due process of law. *Scott v. Sandford* was not decided under this clause. It was decided under the Property Clause of the Fifth Amendment: the portion guaranteeing that no person will be deprived of *property* without due process of law.

For some, this difference won't be enough to sustain a textual distinction. After all, liberty and property stand next to one another in a list ("life, liberty, or property"). The Liberty and Property Clauses share the words preceding ("No person shall . . . be deprived of . . .," or "nor shall any State deprive any person of . . .") and following ("without due process of law") the list. Does the difference matter? A powerful argument says that it does.

Liberty is different from property because the definition of liberty flows from human nature and our ideals, not from historical accidents like thefts, feoffments and statutes (including, for purposes of *Scott*, the slave laws). Justice Stevens put the point crisply in *Meachum v. Fano*, when he dissented from the majority's claim that a liberty interest must either "originate in the Constitution" or have "its roots in state law."[36] Stevens said,

> law . . . . is not the source of liberty, and surely not the exclusive source.
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> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred

1861 281-86 (Harper & Row, 1976) ("*Impending Crisis*"). See also Corwin, 17 Am. Hist. Rev. at 52, 53-58 (cited in note 12) (contending that Taney's discussion of the Missouri Compromise was an alternative ground for his jurisdictional theory, not an exploration of the merits, and so was within the Court's authority).

35. John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 20 (1992).

36. *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) (quoting the majority opinion, id. at 226).

> by specific laws or regulations.[37]

Stevens wasn't the first to suggest that view. His opinion deliberately echoes the Declaration of Independence, which names "life, liberty, and the pursuit of happiness" as "unalienable rights." The Constitution's Due Process Clause, which (unlike the Declaration) treats both natural and positive rights, substitutes "property" for the "pursuit of happiness." Even during the heyday of natural law thought in American jurisprudence, some theorists recognized that the boundaries of property rights depended largely on positive declaration. Joseph Story, for example, finished a survey of theories about natural law and property rights by saying,

> Whatever right a man may have to property, it does not follow, that he has a right to transfer that right to another, or to transmit it, at his decease, to his children, or heirs. The nature and extent of his ownership; the modes in which he may dispose of it; the course of descent, and distribution of it upon his death; and the remedies for the redress of any violation of it, are, in great measure, if not altogether, the result of the positive institutions of society.[38]

Story, of course, spoke the now out-moded language of natural law, and some today may find uncomfortable even the Declaration's references to a "Creator." One need not use natural rights rhetoric, however, to express the basic point: property depends for its definition upon legislatures in a way that liberty does not.

The contingent character of property rights is the best reason to respect the Constitution's distinction between liberty and property when determining whether the due process clause protects substantive as well as procedural rights. If, however, the "*Dred* Again" theorists were to reject this argument, they would have to explore others. Institutional considerations, for example, provide another ground for respecting the distinction between liberty and property. For the last fifty years, the Court has drawn a line between economic regulations and other laws, holding that the judiciary has no business closely scrutinizing the former.[39] Insofar as this distinction depends upon the belief that economic rights are relatively unimportant, it has taken some hard knocks in recent years from

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37. Id.

38. Story, *Natural Law*, in Francis Lieber, ed., 9 *Encyclopedia Americana* 150, 156 (Desilver, Thomas & Co., 1836). For a more extended discussion of Story's views about property and natural law, see Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. Chi. L. Rev. 273, 317-19 (1988).

39. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963), *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

critics like Stephen Macedo.[40] Many readers may agree with Macedo that "[o]ur occupations often shape our identities as deeply as what we read or take in through the media, as deeply as the intimate choices we make."[41] Yet even those who share Macedo's views about the importance of economic liberties might nevertheless believe that considerations of institutional competence leave the Court poorly positioned to protect economic rights: one might, for example, think that in a complex market economy it is harder for judges (given their training and resources) to assess the impact of economic regulations on economic liberties than it is for them to assess the impact of moral regulations on personal privacy.[42] Those who accept such institutional arguments will find in them a reason to read the due process clause in a way that treats liberty and property differently.[43]

In any event, the "*Dred* Again" theorists must offer a reasoned response to Stevens' textual argument. They cannot dismiss the distinction between liberty and property by saying, as Bork recently did, that "[n]either word has any substantive meaning other than what the Court chooses to give it."[44] That position is inconsistent not only with Bork's own professed textualism,[45] but also with the premises of the "*Dred* Again" argument. The argument turns in part upon the claim that *Scott* and *Roe* flow from the same set of words. They don't.

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40. See Steven Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 183-202 (Oxford U. Press, 1990) (criticizing the "constitutional double standard" that distinguishes property rights from, e.g., privacy rights).

41. Id. at 198.

42. Justice Douglas was inclined to use grounds of this sort to justify the Court's refusal to review economic legislation. Compare *Doe v. Bolton*, 410 U.S. 179, 212 n.4 (1973) (the Court does not engage in substantive due process when protecting abortion rights because it does not implicate "legislation governing a business enterprise") with *Kahn v. Shevin*, 416 U.S. 351, 356 n.10 (1974) (the Court would reinstate substantive due process if it used the Equal Protection Clause to scrutinize the empirical foundation for a Florida tax break favoring women).

43. Of course, the Court's deference to economic legislation responded to a series of cases premised upon the Liberty Clause, not the Property Clause. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). These cases present a problem for people who believe that the Court's institutional competence supplies a ground for respecting the distinction between liberty and property, but who reject the notion that property depends upon positive declaration in a way that liberty does not. One solution would be to claim that the Court erred by conceptualizing the claims in these cases as liberty claims rather than property claims.

44. Robert H. Bork, *Again, a Struggle for the Soul of the Court*, N.Y. Times, July 8, 1992, at A19, col. 2.

45. See, e.g., id. ("The inescapable fact is that the Constitution contains not one word that can be tortured into the slightest relevance to abortion, one way or the other"); Bork, *The Tempting of America* at 145 (cited in note 7) ("the judge is to interpret what is in the text, and not something else").

My second observation is that Roger Taney was an originalist. His opinion in *Scott v. Sandford* is a riot of originalism. The heart of his argument is a lengthy description of racist behavior at the time the Constitution was drafted, all of which he uses to argue that African-Americans are neither "people" nor "citizens" under the Constitution.[46] Taney describes his method this way:

> If any of [the Constitution's] provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . . it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[47]

Here is a credo to warm the hearts of originalists![48] In service of this ideal, Taney collected a variety of evidence. He traced the export of pro-slavery attitudes from England to the colonies.[49] He surveyed the various state statutes assigning African-Americans to an "inferior and subject condition,"[50] and claimed that "no example . . . can be found of [the] admission [of any free African-American] to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force."[51] He said that the slave states would never have consented to the Constitution if it fostered the possibility that their property might be confused with persons.[52] Most importantly, Taney maintained

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46. *Scott*, 60 U.S. (19 How.) at 404-05.

47. Id. at 426.

48. One can, for example, hear echoes of Taney's language in Robert Bork's:

> Statutes, we agree, may be changed by amendment or repeal. The Constitution may be changed by amendment pursuant to the procedures set out in article V. It is a necessary implication of the prescribed procedures that neither statute nor Constitution should be changed by judges. Though that has been done often enough, it is in no sense proper.
>
> What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment. Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.

Bork, *The Tempting of America* at 143-44 (cited in note 7).

49. *Scott*, 60 U.S. (19 How.) at 408.

50. Id. at 416. See id. at 408-09, 412-16 for survey of various state statutes.

51. Id. at 418.

52. Id. at 416.

that the Framer's words should be measured by the Framer's actions, rather than by their aspirations:

> the men who framed [the Declaration of Independence] were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race . . . . They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.[53]

An originalism more contemptuous of fundamental values is scarcely imaginable. Taney found no cause for concern in the possibility that originalist interpretation would make the Constitution unjust,[54] and he also refused to assume that the Framers wanted their constitutional principles to transcend the shortcomings of their own conduct. Had Taney adopted such an assumption, it would have favored construing the Framers' intention, and hence the Constitution, in a way consistent with justice. Instead, Taney made exactly the opposite assumption. He premised his interpretation on the assumption that the Framers could not have intended the Constitution to incorporate a standard of conduct higher than the one they met.

Taney went further. He hinted that the Constitution was founded upon opinions that, in light of new understandings, appeared unjust: "[i]t is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution . . . was framed and adopted."[55] For Taney, in sum, there was no reason to assume that the Framers' intentions were just; no cause to interpret their intentions to make them as just as possible; and some ground for believing that their intentions were in fact unjust.

To what extent was originalism responsible for Taney's conclu-

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53. Id. at 410.

54. Id. at 426 ("If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended . . ."). The full passage is quoted at text accompanying note 47, supra.

55. Id. at 407.

sions in *Scott*? Taney's execution of his originalist strategy was clearly deficient by originalism's own standards. About that, there is no doubt. Taney's claim that no free blacks were citizens of any State when the Constitution was drafted was flatly wrong, as Justice Curtis pointed out.[56] Taney's review of the historical record was filled with errors.[57] But so what? Originalism does not cease to be originalism when done badly. People who recommend originalism do so knowing that it, like any other approach, will have incompetent as well as competent disciples. Indeed, if originalism is a particularly difficult strategy to carry out (because, for example, the historical record is ambiguous), so that poor originalist arguments dominate good ones, that might be a reason to discount originalism's value as an interpretive strategy. In any event, if Taney was not disingenuous—if, in other words, his result actually depended upon the reasoning he displayed in his opinion—then his errors are evidence of how originalism can contribute to injustice.[58]

Moreover, Taney's originalist argument doesn't depend upon those of his claims easily falsified by historical evidence of the kind Curtis offered. All Taney needed was the claim that the Framers formed the United States government on "the white basis"[59] because some of them approved of slavery and the rest either were racist or believed that a permanently racist Union was better than no Union. That claim is not easily refuted.[60] Indeed, many people today accept Taney's reading of the Framer's intentions.[61]

One can, of course, compile evidence that cuts against Taney's view of the Framers. Justice Curtis expressed the conviction that such evidence would prove persuasive.[62] Herbert Storing, among

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56. Id. at 572-75 (dissenting opinion).

57. See, e.g., Fehrenbacher, *The Dred Scott Case* at 340-64 (cited in note 3).

58. Of course, Taney might have been lying: he might have invoked originalist arguments, knowing them to be wrong, in order to cover up an illegitimate conclusion that he reached on other grounds. Even if that were so, it would not excuse originalism entirely: if Taney fabricated his originalism as a disguise, he must have believed that originalism provided an especially fertile set of arguments to legitimate illegitimate conclusions. Moreover, characterizing Taney's opinion as a lie would obviously excuse substantive due process from blame for *Scott* to exactly the same extent that it excuses originalism.

59. The phrase belongs to Stephen Douglas, who endorsed and defended Taney's vision of the Founding. See Paul M. Angle, *The Complete Lincoln-Douglas Debates of 1858* 65 (U. of Chi. Press, 1958) ("*Debates of 1858*").

60. At least one commentator thought Taney's erroneousness uncontroversial, however. See Corwin, 17 Am. Hist. Rev. at 67 (cited in note 12) ("Curtis's theory, it can hardly be doubted, was that of the framers of the Constitution"). Corwin does not identify his evidence.

61. See the discussion of contemporary views in Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic* ("*Slavery and Moral Foundations*"), in Robert H. Horwitz, ed., *The Moral Foundations of the American Republic* 214-17 (U. Press of Virginia, 2d ed. 1979) ("*Moral Foundations*").

62. Curtis wrote:

others, carried out the project Justice Curtis anticipated.[63] The success of any such project may depend, however, upon whether interpreters are willing to adopt the attitude recommended by Justice McLean in dissent. McLean wrote that he preferred "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."[64] Other interpretations are possible, but McLean's formulation appears to insist that we should interpret the Framers' intentions in the way most consistent with justice. McLean recommended an interpretive posture that respected the Framers not by—as Taney would have it—lowering their aspirations to fit their conduct, but by recognizing that the Framers may have had aspirations (and incorporated them into the Constitution) without living up to them.

We may draw two conclusions from our examination of Taney's originalism. First, Taney, unlike either McLean or Curtis, embraced an originalism indifferent to the justice or injustice of the Framers' intentions. Taney may in fact have been the original originalist of this sort.[65] Second, Taney's version of originalism was essential to the result he reached.

Taney thus relied upon a method that anticipated the "*Dred* Again" theory's own disdain for fundamental values jurisprudence. Of course, nothing in the "*Dred* Again" argument prevents its adherents from espousing a version of positivism milder than Taney's.[66] We shall see, however, that some of the "*Dred* Again"

> My own opinion is, that a calm comparison of [the Declaration's] assertions of universal abstract truths, and of [the Framers'] individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory.

Scott, 60 U.S. (19 How.) at 574-75 (Curtis, J., dissenting).

63. Storing, *Slavery and Moral Foundations*, in Horwitz, ed., *Moral Foundations* at 217-33 (cited in note 61).

64. *Scott*, 60 U.S. (19 How.) at 537 (McLean, J., dissenting). Justice Curtis's argument bears a similar stripe insofar as it urges that the Framers be treated as statesman, who accommodate circumstances but do not yield to them.

65. See, e.g., William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237, 1237-38 (1986) (" 'intentionalism' . . . can be traced back at least to the 1857 case of *Scott v. Sandford* "). See also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 945-47 (1985) (describing a transformation in originalism during the years preceding the Civil War).

66. At least one has adopted such a milder version. See McConnell, 64 Chi.-Kent L. Rev. at 100 n.56 (cited in note 11) (disavowing "a narrow version of originalism, under which

jurists have come dangerously close to replicating Taney's indifference to justice.[67]

My third observation is that Taney's originalism—not his substantive interpretation of the Due Process Clause—was chiefly responsible for *Scott's* most notorious conclusions. After encountering the "*Dred* Again" comparisons between *Scott* and *Roe*, one might expect to find that *Scott*, like *Roe*, centered upon an argument about "due process of law." Not so. Taney's originalist argument about citizenship and personhood consumed forty-four percent of his opinion.[68] The upshot of Taney's analysis was that the Court had no jurisdiction under the Diversity Clause.[69] That conclusion, predicated on originalist reasoning and independent of the Due Process Clause, would have sufficed as a ground for dismissing Scott's suit.

Taney followed his originalist discussion of citizenship with more originalist argument (equally unconvincing and almost as long) about the Territories Clause.[70] The Due Process Clause rates a two-sentence mention. It occurs on the fifty-first page of Taney's opinion. Here are the sentences, together with the ones that precede and follow them:

> These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. 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

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the meaning of a constitutional provision is determined by reference to the specific practices accepted at the time of ratification"); Michael W. McConnell, *On Reading the Constitution*, 73 Cornell L. Rev. 359 (1988) (criticizing such narrow views of originalism).

67. See text accompanying notes 111-12, infra.

68. I am relying on Fehrenbacher's calculations. See Fehrenbacher, *The Dred Scott Case* at 337-40 (cited in note 3).

69. *Scott*, 60 U.S. (19 How.) at 427 ("the court is of opinion . . . that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous").

70. Art. IV, Sec. 3, Para. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Taney argued that this clause did not authorize Congress to govern the Northwest Territory. He then argued that such a power was conferred by implication in the clause dealing with admission of new states to the Union. Art. IV, Sec. 3, Para. 1 ("New States may be admitted by the Congress into this Union"). See Fehrenbacher, *The Dred Scott Case* at 367-76, 381-82 (cited in note 3) (summarizing and critiquing Taney's argument).

> who had committed no offence against the laws, could hardly be dignified with the name of due process of law.
>
> So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law.[71]

Taney's opinion is thus not in any sense *about* the Due Process Clause. He did not articulate a theory of the Due Process Clause, in the way that he articulated, and endorsed, an originalist view of constitutional interpretation. There remains, however, an important question: is Taney's substantive interpretation of the Due Process Clause either necessary or sufficient to support his conclusions? If the answer were yes, that would certainly count as a ground for claiming that *Scott* was a "substantive due process" case, whatever else it might be. But the answer is no.

Taney's substantive interpretation of the clause obviously was not necessary to his conclusion that the federal courts could grant Scott no relief. Taney had already reached that conclusion on jurisdictional grounds. The due process argument might nevertheless have been necessary to Taney's conclusions in another respect. Taney's jurisdictional ruling was not principally responsible for the political shockwaves that followed *Scott v. Sandford*.[72] The waves resulted instead from his conclusion that Congress had no power to prohibit slavery in the territories. Taney's discussion of due process was addressed to that topic: Taney implied that the Missouri Compromise, because it prohibited slavery in some federal territories, unconstitutionally deprived slaveholders of their property when they entered that territory.[73] If Taney's substantive interpretation of "due process of law" was necessary to Taney's judgment on the

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71. *Scott*, 60 U.S. (19 How.) at 450.

72. "Taney's ruling against Negro citizenship carried nothing like the same emotional charge as his ruling against the Missouri Compromise restriction." Fehrenbacher, *The Dred Scott Case* at 429 (cited in note 3). The public reaction obviously resulted from the racism of the era. See id. at 428-29 (comparing reaction in the white and African-American communities). Taney's opinion still would have deserved its title as the worst ever produced had he stopped after finishing his Diversity Clause argument. Cf. text accompanying notes 97-104, infra (describing Lincoln's criticism of Taney's interpretation of the Declaration of Independence).

73. I say "implied" because, as Donald Fehrenbacher points out, "in spite of a general impression to the contrary, Taney never did specifically declare the Missouri Compromise restriction to be a violation of the Fifth Amendment." Fehrenbacher, *The Dred Scott Case* at 382 (cited in note 3). Taney said only that Congress could not deprive citizens of property merely because they had brought their property into a federal territory. Taney did not say that the Missouri Compromise displayed this defect, although one may fairly draw that inference from his argument. Fehrenbacher concludes that "Taney's contribution to the development of substantive due process was therefore meager and somewhat obscure." Id.

Missouri Compromise, we could at least say that it was necessary to one of his more notorious conclusions.

The Property Clause argument appears, however, to have been no more than one among multiple grounds for Taney's conclusion that the Missouri Compromise was unconstitutional. Taney embedded the due process argument in a lengthy discussion about whether the Constitution delegated Congress any power to regulate slavery in the Territories. Although Taney left this argument in order to make his reference to the Due Process Clause, later sentences appear to resume the arguments construing congressional power narrowly. Taney's position is anything but clear, but he apparently concluded that Congress had no constitutional authority to regulate slavery in the territories.[74] If that is correct, then the argument that the Property Clause precluded Congress from banning slavery was superfluous, because Taney found that the Constitution did not delegate to Congress the power to regulate slavery.

Nevertheless, Taney's argument to the effect that Congress lacked authority to regulate slavery in the territories is muddled. One might accordingly say that he needed the substantive interpretation of the Due Process Clause in order to conclude that Congress could not prohibit slavery in the territories.[75] That is not my view, but reasonable people may differ about the point.[76]

When we turn from the argument's necessity to its sufficiency, we can answer with more confidence. Taney's interpretation of the Due Process Clause as a source of substantive rights is not sufficient to defeat Scott's claim or to invalidate the Missouri Compromise. The reason is important: Taney's interpretation of "property" rested upon his originalist denial that African-Americans were persons within the meaning of the Constitution.

Sotirios Barber has made this point clearly:

> [One need not be] opposed to the abstract proposition that Congress should respect the property rights of persons who move

74. *Scott*, 60 U.S. (19 How.) at 452.

75. See, e.g., the dissent of Justice Curtis, id. at 623 (the majority's arguments find no constitutional limit upon Congressional discretion with respect to Territorial government "save those positive prohibitions to legislate, which are found in the Constitution").

76. Fehrenbacher asks whether Taney intended to rest *Scott* on the Due Process Clause, and answers in the following way:

> If so, it is strange that he should have been so unexplicit about it. For, in spite of a general impression to the contrary, Taney never did specifically declare the Missouri Compromise restriction to be a violation of the Fifth Amendment. He did not even say in his conclusion that it was "forbidden" by the Constitution. Instead, he merely held that it was "not warranted by the Constitution," thus ending on a vague note of strict construction.

Fehrenbacher, *The Dred Scott Case* at 382 (cited in note 3).

> from one place to another. What is regrettable in *Dred Scott* is the additional proposition that Congress has a duty fully to respect property in human beings. That Congress should respect property is one proposition; that the law either has or can legitimately make human beings ordinary pieces of property is quite another. Everything in *Dred Scott* turns on Taney's affirmative answer to the latter, an answer he pretended to believe was a clear mandate of the American founding.[77]

A substantive interpretation of the Due Process Clause, in other words, gets Taney nowhere until coupled with an obnoxious conception of property, which recognizes property in persons. As Barber points out, Taney derived that conception of property from an originalist argument. Indeed, we can readily appreciate how Taney's argument about citizenship provided a foundation for the theory of property he needed: having already decided that the Constitution contemplated African-Americans only as property and not as people protected by the Constitution, Taney could affirm that the Constitution recognized no reason for treating African-American slaves differently from other property. That is exactly the path he pursued.

Shortly after his two-sentence reference to due process, Taney devoted two paragraphs to defending a positivist theory of property rights.[78] Although he acknowledged that international law distinguished slavery from other forms of property, Taney refused to recognize this distinction when construing the Constitution.[79] He referred to "an earlier part" of his opinion, which had concluded that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."[80] Taney was not so kind as to supply a *supra* cite to the passage he had in mind. The only plausible candidate is a discussion of the Importation and Fugitive Slave Clauses, a discussion contained within Taney's interpretation of citizenship.[81]

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77. Sotirios A. Barber, *Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*, 64 Chi-Kent L. Rev. 111, 126-27 (1988).

78. *Scott*, 60 U.S. (19 How.) at 451.

79. Taney premised his refusal on legal positivism:

> it must be borne in mind that there is no law of nations standing between the people of the United States and their Government . . . . The powers of the Government, and the rights of citizen under it, are positive and practical regulations plainly written down. . . . 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 . . . has a right to draw such a distinction . . . .

Id. at 451.

80. Id.

81. Id. at 410-12. This passage is the only one in which Taney used a textual argument to justify his claim that African-Americans were property. In the course of the passage, Taney said that "[t]he unhappy black race were . . . never thought of or spoken of except as

The passage follows immediately after Taney's interpretive axiom, quoted earlier, making the Framers' intentions dependent upon their conduct. Taney's originalism is the crucial basis for his interpretation of the two clauses, and thus also for his assertion that the "the right of property in a slave is distinctly and expressly affirmed" by means of two provisions which speak only of persons and never mention slavery or, for that matter, property.[82] Taney thus owed his construction of the Property Clause to originalism, and perhaps to his endorsement of an originalism indifferent to justice.

So much for Taney. My fourth observation is that the *Scott* dissents invoked fundamental values jurisprudence to rebuke Taney for his interpretation of the Due Process Clause. The "*Dred* Again" school paints the dissenters quite differently, treating them—and especially Justice Curtis—as glorious knights of positivism. Members of the "*Dred* Again" school claim to be the true heirs of these jurists.

If the "*Dred* Again" school's rendering were a fair one, we would expect the *Scott* dissents to include something like the modern positivist criticism of substantive due process. That criticism maintains either that the Due Process Clause by its terms limits its protection to procedural rights, or that the Framers never intended, as a matter of historical fact, that the Clause would encompass substantive elements. The criticism accepts such textual and historical arguments as dispositive evidence against a substantive reading of either the Property Clause or the Liberty Clause.[83]

Justice Curtis's dissent does indeed contain an argument of this sort. He wrote:

> Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.
>
> It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it

property, and when the claims of the owner or the profit of the trader were supposed to need protection," id. at 410; that in the Importation Clause, "the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution," id. at 411; and that the Fugitive Slave Clause pledged "to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure." Id.

82. Compare id. at 451 ("the right of property in a slave is distinctly and expressly affirmed in the Constitution") with id. at 624 (Curtis, J., dissenting) (one may infer from the Fugitive Slave Clause that the Constitution treats slavery as unfounded in common law and inconsistent with natural law) and Angle, *Debates of 1858* at 385 (cited in note 59) (Lincoln's argument that constitutional language manifests "that the fathers of the government expected and intended the institution of slavery to come to an end").

83. Both arguments appear in quick succession in Bork, *The Tempting of America* at 32 (cited in note 7).

> was borrowed from *Magna Charta*; was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.[84]

Curtis then surveyed a variety of state laws depriving slaveholders of their rights over slaves. He pointed out that nobody had ever objected to these laws on the ground that they were inconsistent with Magna Charta.

This looks a great deal like a pure originalist argument. Curtis's argument collected evidence that, in the years preceding the Founding, nobody challenged statutes prohibiting slavery on the ground that these statutes were inconsistent with Magna Charta. From this evidence, he inferred that the Framers believed Magna Charta permitted whatever deprivations such statutes effected. His argument maintained that, because the Constitution borrows the language of the Due Process Clause from Magna Charta, the Framers probably believed that statutes consistent with Magna Charta were likewise consistent with the Due Process Clause. The pure originalist argument would then conclude that these beliefs about the Clause's application were dispositive.

We must, however, distinguish the pure originalist argument from Curtis's because Curtis never quite closed the loop in *Scott*. He did not say, for example, that the Due Process Clause could not have an application different from that of Magna Charta, nor did he say that the constructions the Framers put on Magna Charta were dispositive as to its meaning.[85] Indeed, he expressly skirted the latter question by saying, "I think I may at least say, if the Congress

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84. *Scott*, 60 U.S. (19 How.) at 626-27 (Curtis, J., dissenting).

85. Curtis did sometimes use intentionalist rhetoric. See, e.g., id. at 625 ("Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws . . . and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein?"). The idea of intention is, however, not doing much work here: Curtis is imputing to the Framers, and thereby to the Constitution, the view that it would be more "rational" to hold.

On the other hand, Curtis had used more forceful language when construing the Due Process Clause in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855). There, Curtis had said that the "words, 'due process of law,' were undoubtedly intended to have the same meaning as the words, 'by the law of the land' in *Magna Charta*." Id. at 276. Curtis continued:

> To what principles . . . are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provi-

did then violate *Magna Charta* by the ordinance, no one discovered that violation."[86] Curtis thus implicitly demanded that Taney explain why so many reasonable and intelligent people were mistaken about *Magna Charta*'s application. It would, of course, be reasonable to ask that question even if the mistakes made by those people were not in any way binding upon the future.

Moreover, Curtis did not say that the Due Process Clause protected no substantive rights, nor did he make a favorite argument of positivists today, namely, that the inclusion of the word "process" in the Due Process Clause rules out, as a simple textual matter, the possibility that the Clause protects substantive liberties. Still, if the passage now under discussion were the whole of Curtis's answer to Taney's due process argument, then I would have to concede that "*Dred* Again's" picture renders Curtis more faithfully than it does Taney. The passage at least provides some basis for designating Curtis a "positivist/originalist/process-means-process" Justice. But the reference to Magna Charta is not the whole story.

Here is the way Curtis began his attack on Taney's Property Clause argument:

> I will now proceed to examine the question, whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.
>
> Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on this subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a *status* created by municipal law. In Prigg v. Pennsylvania, (10 Pet., 611,) this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws."[87]

Property in slaves is different from other property because slavery is "contrary to natural right." Curtis went on to conclude that, for

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> sions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England . . . .

Id. at 275-76. One might observe in connection with these passages that *Murray's Lessee* involved a procedural issue, and so did not compel Curtis to consider whether the Clause might have substantive applications. Nor does insisting upon English practice as a source of the Clause's meaning rule out recourse to other sources in appropriate circumstances. Nevertheless, there is no gainsaying that Curtis's comments in *Murray's Lessee* "close the loop" of the positivist argument to a greater extent than do his arguments in *Scott*.

86. *Scott*, 60 U.S. (19 How.) at 627.

87. Id. at 624.

this reason, it would be unreasonable to construe the Constitution to protect these property rights when the slaveholder allowed the slave to leave the jurisdiction that had created the rights.[88]

In light of the astonishing claims made by "*Dred* Again" theorists, the obvious bears mention: this is an argument about natural rights. Curtis claimed that the Fugitive Slave Clause incorporated a distinction between natural and positive rights, and he claimed that one must appreciate that distinction to understand the word "property" in the Due Process Clause. Today we would probably frame the argument in terms of fundamental values or simple justice, but the point would be the same. To understand the constitutional text, one must study justice.

This is Curtis's first and most extended argument against Taney's substantive reading of the Property Clause. It is also McLean's only argument against that reading.[89] Nevertheless, Curtis's second argument has clear originalist overtones, and it would be silly to claim that his first natural rights argument was more important simply because he put it first, or because he gave it more text. On the other hand, it would be even sillier to claim that only Curtis's second, originalist argument mattered. For that reason, we can say at least this: fundamental values jurisprudence deserves some credit for the *Scott* dissents (including Justice Curtis's dissent).

We must consider one final piece of evidence before we can judge "*Dred* Again's" rendering of Curtis. The "*Dred* Again" theorists are fond of quoting Curtis's summary of his own method, which they take to be a repudiation of even responsible forms of fundamental values jurisprudence. Here is what Curtis said:

> To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide on political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of

88. Id. at 625-26.
89. Id. at 547-50 (dissenting opinion).

> individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[90]

We should not be surprised that positivists would warm to this passage, with its embrace of "strict interpretation" and "fixed rules;" its condemnation of "political reasons" and "theoretical opinions;" and its warning that other modes of interpretation allow wanton judges to hide "what the Constitution is" under "their own views of what it ought to mean." But we should be careful. Before conceding that Curtis was—in the methodology he professed, if not in the method he employed—a precursor to today's "*Dred* Again" theorists, we should examine an ambiguity in his statement. What did Curtis mean when he referred to "the fixed rules which govern the interpretation of laws"?

As G. Edward White has shown, antebellum constitutional theory embraced some rather controversial, and substantive, precepts under the heading, "rules of interpretation."[91] Curtis added the requirement that these rules be "fixed." Nothing in his opinion enables us to be certain about how Curtis understood this phrase.[92] There is, however, an interesting possibility consistent with what Curtis said in *Scott*. Curtis might have considered a rule of interpretation to be fixed if it enjoyed the consent of the legal community. We have already seen him refer to one such rule, a rule which, he said, was "agreed by all writers on the subject." The rule is that "[s]lavery, being contrary to natural right, is created only by municipal law."[93] Taney had recognized the existence of a long-

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90. Id. at 620-21. Curtis offered this passage after noting that counsel for both sides had neglected the text when arguing the constitutionality of the Missouri Compromise: "No particular clause of the Constitution has been referred to at the bar in support of either of these views." Id. at 620.

91. G. Edward White, *The Marshall Court and Cultural Change: 1815-35*, in 3 *History of the Supreme Court of the United States* 114-19 (Macmillan, 1988) (discussing how Joseph Story could describe nineteen propositions "consistent with an ideological perspective" as "rules of interpretation" supplying a "fixed standard" for judicial review).

92. Curtis made reference to "settled rules" in *Murray's Lessee*, 59 U.S. (18 How.) at 283. The settled rules he stated there included, for example, the proposition that "a public agent, who acts pursuant to the command of a legal precept. . . . cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent." Id. Although Curtis gave two paragraphs worth of such rules (unaccompanied by citation), it is difficult to infer from the passage the criteria Curtis used to distinguish "settled rules" from other jurisprudential reasons.

93. See text accompanying note 87. The rule described by Curtis had its most famous articulation in *Somerset's Case*, 20 Howell's State Trials 1, 98 Eng. Rep. 499 (1772), where Lord Mansfield said, "[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons . . . but only [by] positive law. . . . it's so odious, that nothing can be suffered to support it, but positive law." 20 Howell's State Trials at 82, 98 Eng. Rep. at

standing legal rule distinguishing between mere municipal regulations and laws consistent with natural right, but had refused, on originalist grounds,[94] to allow this "fixed rule" to "govern the interpretation" of the Constitution. Curtis's argument about municipal law was a response to Taney's rejection of the distinction. We thus arrive at a hypothesis: in the passage the positivists so admire, Curtis might have meant, *inter alia*, to defend reasonable recourse to natural right against a rampant positivism that rejected any such reference. Indeed, there is a sense in which positivism is a decidedly political doctrine, because it permits a dominant opinion to determine what is law without recourse to any "fixed" standard, such as justice or natural right.

There are a lot of "maybe's" in the argument just completed. Moreover, Curtis's statement has a positivist ring to it. We can, however, make two modest claims about what Curtis said. First, the complexion of Curtis's statement changes when one knows that he issued it in dissent from an originalist opinion. Curtis must have recognized that arguments about original intent, no less than arguments about fundamental values, can be "purely political." Second, Curtis, unlike Taney, never expressed indifference to the possibility that his theory of interpretation would construe the law in a way that made the law unjust. Curtis's theory of constitutional interpretation is thus ambiguous in its positivism. His practice, as we have seen, was unambiguously respectful of fundamental values.

One observation remains. Justice Scalia implies in *Casey* that *Casey* resembles *Scott* because the two will provoke a similar public reaction. Perhaps an examination of extra-judicial sources would show that thoughtful antebellum critics of *Scott* regarded Taney's substantive reading of the Due Process Clause as the essence of his decision, and believed, too, that this reading depended upon a rejec-

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510. For discussion, see Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 16-17, 29 (Yale U. Press, 1975) ("*Justice Accused*").

The concept of "municipal law" itself reflected a number of legal axioms. Blackstone defined "municipal law" as a "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." William Blackstone, 1 *Commentaries on the Laws of England* 44 (Rees Welsh & Co., 1902). He contrasted it with natural law and revealed law, id. at 42-43, 54-55, saying that "no human laws should be suffered to contradict these." Id. at 42.

Joseph Story's use of the term probably fits better with Curtis's. Story distinguished "municipal regulations" from other laws on the ground that they aimed at "private or local convenience" rather than the "public good." Joseph Story, 1 *Commentaries on the Constitution of the United States* at section 421 (Hilliard, Gray, and Co., 1833). Story authored the Court's opinion in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), which Curtis quotes with approval. See text accompanying note 87. I have elsewhere discussed Story's use of natural law in *Prigg*, including his distinction between municipal regulations and other laws. Eisgruber, 55 U. Chi. L. Rev. 273, 280, 322-23 (cited in note 38).

94. *Scott*, 60 U.S. (19 How.) at 451. See text accompanying notes 78-82, supra.

tion of positivism or originalism. If so, that would provide a reason—albeit a rather weak one—for accepting the "*Dred* Again" theory's picture of *Scott*. We could at least say that the public believed Taney had breached judicial duty by improperly construing the phrase "due process of law," even if the pro-slavery effect of his decision proceeded from other errors and even if the *Scott* dissenters did not pursue this point as forcefully as they might have. Does the record allow the "*Dred* Again" theorists to make this claim?

Unlike the previous questions we have taken up, this one requires an examination of the historical record beyond the *Scott* opinions themselves. A brief review of secondary sources suggests that criticism of *Scott* took a different course from the one the "*Dred* Again" theory would have us expect. Many Republicans and abolitionists attacked the decision as political rather than judicial, but based this charge upon the claim that Taney's assessment of the Missouri Compromise was dicta.[95] These critics argued that once Taney had decided that Scott was not a citizen, and so could not sue, Taney lacked jurisdiction to decide the merits of the case. That is indeed a kind of argument against political judging, but it is not the kind that the "*Dred* Again" theorists wish to make. The "*Dred* Again" theorists have an argument about the merits of Taney's ruling, not about his decision to reach the merits.

Of course, the most important antebellum critique of *Scott*, Abraham Lincoln's, did focus upon the merits of Taney's decision. One of Lincoln's principal complaints about the opinion was that it decided that taking a slave "into a United States territory where slavery was prohibited by act of Congress, did not make him free because that act of Congress as they held was unconstitutional."[96] Taney's substantive reading of the Due Process Clause is a component of his attack on the Missouri Compromise. May we conclude that, at least for this eminent critic of *Scott*, the interpretation of "due process" was the core of the decision's turpitude?

Three reasons compel us to say otherwise. First, as we have already seen, Taney's application of the Property Clause to the Missouri Compromise depends upon his originalist claim that property

95. See Potter, *Impending Crisis* at 281 (cited in note 34) ("as the argument against the decision developed, it took the form, above all, of an elaboration of the statement in Justice Curtis's dissent, that in dealing with the constitutionality of the Missouri Compromise, the Court had taken up a question which was not properly before it"); id. at 283 ("The real problem for historians—widely overlooked—is not whether Taney's opinion was dictum, but why the question of dictum has been blown up to such vast proportions and has overshadowed the discussion of all other aspects of the case."). See also Fehrenbacher, *The Dred Scott Case* 417-48 (cited in note 3) (summarizing criticisms); Charles Warren, 3 *The Supreme Court in United States History* 24-40 (Little, Brown, and Co., 1922) (same).

96. Angle, *Debates of 1858* at 377 (cited in note 59).

in persons is, for constitutional purposes, no different from any other kind of property.

Second, Lincoln singled out Taney's originalist conclusions for special censure. According to Lincoln, *Scott* laid the foundation for nationalizing slavery because it declared that "*[t]he right of property in a slave is distinctly and expressly affirmed in the Constitution!*"[97] This proposition is the prerequisite for Taney's application of due process, not a consequence of it. Taney instead plucked the proposition from his originalist theory of citizenship. Lincoln took equally vigorous exception to Taney's orginalist argument excluding African-Americans from the principles of the Declaration of Independence.[98]

Third, Lincoln did not object to *Scott* because it was inconsistent with a positivist respect for democratic processes. On the contrary, he excoriated the decision because it corroded moral principles implicit in the Constitution and explicit in the Declaration of Independence. Lincoln said that "a vast portion of the American people . . . . look upon [slavery] as a vast moral evil."[99] He thought it important that Americans could "prove it as such by the writings of those who gave us the blessings of liberty which we enjoy."[100] The Framers' judgment was evident from the language of the Constitution, which affixed "many clear marks of disapprobation" upon slavery.[101] The most troubling defect in *Scott* was its inconsistency with the principles of the Declaration of Independence.[102] Lincoln urged opposition to *Scott* "because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the states themselves."[103] Lincoln's constitutional interpretation thus was originalist, but his, by contrast to Taney's, was an originalism steeped in justice.[104]

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97. Id. at 308 (quoting *Scott*, 60 U.S. (19 How.) at 451). According to Lincoln, the essence of *Scott* was compressed into the single sentence he quoted. Id.

98. Id. at 380 ("three years ago there never had lived a man who had ventured to . . . [assert that the Declaration of Independence] did not include the negro. I believe the first man who ever said it was Chief Justice Taney in the Dred Scott case, and the next to him was our friend Stephen A. Douglas").

99. Id. at 35 (Lincoln's speech at Chicago, July 10, 1858).

100. Id.

101. Id. at 386 (Lincoln's reply at the Alton debate, October 15, 1858).

102. Id. at 41. See also Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 Chi.-Kent L. Rev. 67, 68-69 (1988) (discussing Lincoln's objections to Taney's reading of the Declaration).

103. Angle, *Debates of 1858* at 333 (cited in note 59).

104. See, e.g., id. at 100-01 (Americans should heed the Framers because "[t]hey erected a beacon to guide their children and their children's children, and the countless myriads who should inhabit the earth in other ages").

To summarize, insofar as Republicans and abolitionists denounced the decision as political, they did so for reasons irrelevant to the merits of Taney's interpretation of the Due Process Clause. Lincoln's criticism of *Scott* emphasized the importance of construing the Constitution in a way consistent with moral principle. We thus arrive at a fifth and final observation: public condemnation of *Scott* appears to have accused Taney of injustice, not infidelity to positivism.

IV. *DRED* NOT

By putting these five points together, we arrive at a picture quite unlike the one presupposed by the "*Dred* Again" argument. *Scott v. Sandford* and *Roe v. Wade* interpret different segments of constitutional text. The crucial question in *Scott* was whether persons can be "property" within the meaning of the Constitution, a question which obviously does not arise in *Roe*. Taney answered that question by means of a dogmatic originalism, which expressly recognized that originalism might lead to unjust results. Taney's application of originalism to the word "property" was the engine of *Scott*'s pro-slavery doctrine. It is therefore wrong to portray Taney's opinion in *Scott* as an example of the risks entailed by fundamental values jurisprudence. Both Curtis and McLean opposed Taney's originalism on grounds that implicated natural law. Curtis's methodological credo is not inconsistent with that approach. It is therefore wrong to depict Curtis or McLean as pure positivists. Finally, we found no evidence to suggest that public condemnation of *Scott* depended upon positivism. On the contrary, the most famous and important critique of the decision, Lincoln's, condemned it in a way that sounds in fundamental values (or simple justice or natural law).

These conclusions should make clear that, even if the "Dorian Gray Theory of Constitutional Jurisprudence" is true, the *Casey* plurality nevertheless need not fear for its portraits. I have already hinted, however, that other portraits might be in jeopardy. Those gladdened by the defense of the *Casey* and *Roe* majorities may notice a tempting opportunity to turn the tables. The restored rendering of *Scott* suggests that Taney's jurisprudence bears the following hallmarks: it is originalist, and it respects property no less than liberty. One might seize upon these features of Taney's jurisprudence to point a finger at originalists who defend property rights. The argument would have us believe that such jurists are giving us *Dred* Again. That would be a bad argument, however. It rests upon the same non-sequitur that the *Dred* Again theory does.

Searching for Taney's heir in this way would amount to a witch hunt, not responsible academic criticism.[105]

Indeed, in spite all of the ink that has been spilled in the battle between originalism and fundamental values, they are in important respects two paths to the same goal. American government aspires to be both democratic and just. To insist that justice and democracy coincide makes heavy but, we may hope, not impossible demands upon the American people. Until evidence forces us to give up the hope for a just democracy, the constitutional enterprise compels us to treat that hope as reasonable.[106] Originalism runs amok when it denies that justice can teach us about the mind of the people; fundamental values jurisprudence goes awry when it denies that the acts of the people may be a guide to justice.[107] I think that Taney made originalism's version of that error, not the fundamental values version, but it does not follow either that originalism caused the mistake, or that fundamental values jurisprudence could not make a similar mistake. That is not to say that differences between the paths pursued by originalism and fundamental values don't matter. The differences matter a great deal when it comes to selecting the best interpretation of the Constitution.[108] But the distinction between originalism and fundamental values matters very little if one cares only about avoiding the worst interpretation of the Constitution—about, in other words, avoiding future *Scott v. Sandford*s.

These observations bring us, however, to a second way in which we might identify Taney's successors. Taney did not simply embrace originalism; he pledged himself to a form of originalism that declared its independence from justice. In doing so, he sepa-

105. Indeed, Bork complains that Senator Simon treated him unfairly by noting a resemblance between Bork's method and Taney's. Bork, *The Tempting of America* at 301 (cited in note 7). One can sympathize both with Senator Simon's impression and Judge Bork's reaction.

106. See Sotirios A. Barber, *Judicial Review and* The Federalist, 55 U. Chi. L. Rev. 836, 845 (1988) ("Publius believes the case for popular government depends on its reconciliation to objective standards.").

107. I explore the themes of this paragraph in two articles: Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. — (1992) (constitutional interpretation is a means for inspiring cultural adherence to constitutional principle); Christopher L. Eisgruber, *Justice and the Text* (forthcoming 1993) (constitutional interpretation is a guide to what justice requires in light of the constraints imposed by American political beliefs).

108. This essay takes no position, for example, about the extent to which judges should abstain from interfering with majoritarian political processes. Questions about the appropriate scope of judicial restraint will be resolved only by choosing the best interpretation of the Constitution, not by mere attempts to avoid the worst interpretation. The problem of selecting the best interpretation will include, among other problems, that of identifying the relative weight due moral and institutional norms. Cf. Cover, *Justice Accused* at 197-238 (cited in note 93) (discussing these problems in connection with American slavery cases).

rated democracy from justice and chose the former.[109] He then used his amoral jurisprudence to render an immoral decision. We can only speculate as to the motives for Taney's choices. There is, however, reason to believe that Taney may have wanted to protect slave institutions. Fehrenbacher has written that Taney's opinion is "not only a statement of southern assumptions and arguments but also an expression of the southern mood—fearful, angry, and defiant—in the late stages of national crisis."[110] If Taney had unjust intentions, he would have had an obvious reason to adopt a jurisprudence indifferent to justice: justice would have been an obstacle to his plans.

Casey's critics certainly have no comparable reason to invite injustice. Some of them adhere, however, to a professional credo that mimics Taney's indifference to injustice. Judge Bork, for example, proudly proclaims early in his book that judges should be concerned with law, not justice, and that they should guard the distinction between the two.[111] Justice Scalia's opinion in *Casey* declares, quite implausibly, that constitutional interpretation depends neither upon reasoned judgment nor upon personal conviction.[112] There is no good reason for originalists to insist, as both Judge Bork and Justice Scalia seem eager to do, that originalist interpretation is not a way of knowing justice.

The surest way to besmirch the image one leaves to posterity is to commit immoral acts. That was Roger Taney's problem, and, for that matter, Dorian Gray's. As I have already said, *Casey*'s critics, unlike Taney, have no reason to bring about the injustice which

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109. The historian David Potter made this point eloquently: "the Dred Scott decision was a failure because the justices followed a narrow legalism which led them into the untenable position of pitting the Constitution against basic American values, although the Constitution in fact derives its strength from its embodiment of American values." Potter, *Impending Crisis* at 292 (cited in note 34).

110. Fehrenbacher, *The Dred Scott Case* at 337 (cited in note 3). See also note 13, supra.

111. Bork, *The Tempting of America* at 6 (cited in note 7).

112. Justice Scalia says that the *Casey* plurality exemplifies "a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls 'reasoned judgment,' . . . which turns out to be nothing but philosophical predilection and moral intuition." 112 S. Ct. at 2886, 60 U.S.L.W. at 4841. Scalia adds:

> As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. *Texts and traditions are facts to study*, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily in making value judgments . . . then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different.

Id. (emphasis added). See also Larry Kramer, *Judicial Asceticism*, 12 Cardozo L. Rev. 1789, 1798 (1991) ("the central theme of Justice Scalia's jurisprudence is that justice is not his business.").

their jurisprudence, no less than Taney's, condones. Sheer human decency,[113] or simple good luck, will likely save them from Taney's fate. Yet, if their portraits do remain untarnished, positivist dogma will deserve none of the credit.

113. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 864 (1989) (endorsing originalism, but "hasten[ing] to confess that in a crunch I may prove a faint-hearted originalist").