DESPERATELY DUCKING SLAVERY: *DRED SCOTT* AND CONTEMPORARY CONSTITUTIONAL THEORY

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Contemporary constitutional theory rests on three premises. *Brown v. Board of Education* was correct, *Lochner v. New York* was wrong, and *Dred Scott v. Sandford* was also wrong. A few intrepid souls question whether *Brown* was correctly decided (although they would not have the Supreme Court overrule that decision).[1] Some proponents of law and economics favor reviving the freedom of contract and the *Lochner* decision.[2] No one, however, wishes to rethink the universal condemnation of *Dred Scott*.[3] "American legal and constitutional scholars," *The Oxford Companion to the Supreme Court* states, "consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court."[4] David Currie's encyclopedic *The Constitution in the Supreme Court* maintains that the decision was "bad policy," "bad judicial politics" and "bad law."[5] Commentators across the political spectrum describe *Dred Scott* as "the worst constitutional decision of the nineteenth century,"[6] "the worst atrocity in the

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1. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 117-33, 412-13 (Harvard U. Press, 1977); Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* 259-62, 380 n.52 (Basic Books, Inc., 1986).

2. Bernard H. Siegan, *Economic Liberties and the Constitution* 110-21, 318-31 (U. of Chicago Press, 1980). See also, Douglas Ginsburg, *Delegation Running Riot*, 1995 Regulation 83, 84.

3. Carl Swisher is the only prominent constitutional commentator in the second half of the twentieth century to give *Dred Scott* a somewhat sympathetic reading. See Carl Brent Swisher, *Roger B. Taney* 502-23 (Archon Books, 1961).

4. Walter Ehrlich, *Scott v. Sandford* in Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* 761 (Oxford U. Press, 1992).

5. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*, at 264 (U. of Chicago Press, 1985).

6. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 28 (The Free Press, 1990).

Supreme Court's history,"[7] "the most disastrous opinion the Supreme Court has ever issued,"[8] "the most odious action ever taken by a branch of the federal government,"[9] a "ghastly error,"[10] a "tragic failure to follow the terms of the Constitution,"[11] "a gross abuse of trust,"[12] "a lie before God,"[13] and "judicial review at its worst."[14] In the words of former Chief Justice Charles Evans Hughes, the *Dred Scott* decision was a "self-inflicted [wound]" that almost destroyed the Supreme Court.[15]

This agreement that *Dred Scott* was a "public calamity"[16] masks a deeper disagreement over exactly what was wrong with the Supreme Court's decision. Each school of contemporary constitutional thought claims *Dred Scott* embarrasses rival theories. Proponents of judicial restraint maintain that Chief Justice Roger Taney's opinion demonstrates the evils that result when federal justices prevent the elected branches of government from resolving major social disputes. Originalists maintain that the Taney opinion demonstrates the evils that result when constitutional authorities fail to be tethered by precedent or the original meaning of the constitution. Aspirational theorists maintain that the Taney opinion demonstrates the evils that result when constitutional authorities are too tethered by precedent or the original meaning of the constitution. Virtually every commentator who condemns *Dred Scott* insists that Taney could not have reached that decision's proslavery and racist conclusions had he understood or adhered to the correct theory of the judicial function in constitutional cases. Following Robert Cover's analysis of fugitive slave cases, leading members of all schools of contemporary

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7. Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 Const. Comm. 37, 41 (1993).

8. Robert G. McCloskey, *The American Supreme Court* 62 (revised by Sanford Levinson) (U. of Chicago Press, 2d ed. 1994).

9. Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* 44 (Rowman & Littlefield, 1986).

10. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 41 (Harper & Row, 1970).

11. William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 Vand. L. Rev. 1343, 1348 (1987).

12. Edward S. Corwin, *The* Dred Scott *Case in the Light of Contemporary Legal Doctrines*, in Richard Loss, ed., 2 *The Judiciary, Corwin on the Constitution*, 313 (Cornell U. Press, 1987).

13. Frederick Douglass, 3 *The Frederick Douglass Papers: Series One: Speeches, Debates, and Interviews, 1855-63* at 147 (Yale U. Press, 1985).

14. Malcolm M. Feeley and Samuel Krislov, *Constitutional Law* 34 (Scott, Foresman and Company, 2d ed. 1990).

15. Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* 50 (Columbia U. Press, 1928).

16. Id. at 50.

constitutional thought suggest that many Supreme Court justices who protected slavery and declared free blacks to be non-citizens supported those evils because they "shared a jurisprudence that fostered imprecise thinking about the nature of the choices available."[17]

These contemporary uses of the *Dred Scott* decision to discredit rival theories are fruitless. No prominent approach to the judicial function compels any result in that case. Both the denial of congressional power over slavery in the territories and the claim that former slaves could not be American citizens can be supported (and opposed) by jurists sincerely committed to institutional, historical and aspirational theories. The majority opinions in *Dred Scott* used many different constitutional arguments to reach their immoral conclusions and the dissents in that case similarly relied on various constitutional logics. For these reasons, the standard analogies between *Dred Scott* and controversial twentieth century judicial opinions fail. A proper appreciation of the flaws in the *Dred Scott* majority opinions does not privilege any side to debates over whether *Roe v. Wade* and other contemporary exercises of the judicial power are constitutionally legitimate.

The argument laid out below is that *Dred Scott* is constitutionally *plausible* in any contemporary constitutional rhetoric, not that the result in that case follows logically from institutional, historical, or aspirational understandings of the judicial function in constitutional cases. Part I briefly discusses what the *Dred Scott* Court decided, the criticisms of that decision, and their contemporary implications. Part II explains why these criticisms are inadequate and demonstrates how a judge committed to any contemporary theory of judicial review could have supported or opposed the holding in *Dred Scott*. Part III explains why efforts to use slavery to bash rival theories of constitutional interpretation are fruitless. All theories of contemporary constitutional interpretation are vulnerable to unique pro-slavery outcomes, circumstances in which that theory might compel a more pro-slavery result than rival theories.

This revisionist account of *Dred Scott* is less designed to rehabilitate the Taney Court than to expose the result orientation of all schools of contemporary constitutional thought. Constitutional theorists ritually proclaim adherence to the distinction be-

17. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 257 (Yale U. Press, 1975). See Ronald Dworkin, *The Law of the Slave Catchers*, Times Literary Supplement, 1437 (Dec. 5, 1975).

tween constitutionality and justice,[18] but few academic lawyers highlight the constitutional evils that they believe would result should judges adopt the "correct" theory of the judicial function in constitutional cases. Controversial cases in leading studies consistently come out "right," as "right" is defined by the theorist's political commitments. Conservative constitutional commentators insist that principled justices would sustain bans on abortion and strike down affirmative action policies; their liberal peers insist that principled justices would strike down bans on abortion and sustain affirmative action policies.[19] Libertarians would have justices strike down bans on abortion and affirmative action policies;[20] democrats would have justices sustain both measures.[21] When a contemporary consensus exists on the just policy, constitutional commentators of all political persuasions agree that the policy is also constitutionally mandated. No prominent theorist admits that *Dred Scott* might have been a legitimate exercise of judicial review, and no prominent theorist would have the judiciary overrule *Brown v. Board of Education.* Originalists who claim that constitutional theory should be indifferent to results nevertheless go to great, probably implausible, lengths to demonstrate that the persons responsible for the equal protection clause intended to forbid racially segregated schools.[22]

This consensus that *Dred Scott* was wrong (and *Brown* was right) inhibits serious discussion of constitutional evils. As long as the constitution is interpreted as requiring or at least permitting those policies a given commentator thinks just, no pressing

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18. See Bork, *The Tempting of America* at 264 (cited in note 6); Alexander M. Bickel, *The Morality of Consent* 123 (Yale U. Press, 1975); Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 14-16, 22 (Harvard U. Press, 1991); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 10-11 (Harvard U. Press, 1996).

19. Compare Bork, *The Tempting of America* at 107-116, 359-61 (cited in note 6) with Cass R. Sunstein, *The Partial Constitution* 149-50, 270-85, 331-32 (Harvard U. Press, 1993).

20. See Richard A. Posner, *Sex and Reason* (Harvard U. Press, 1992); Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, in Philip B. Kurland, ed., *1974 Supreme Court Review* (U. of Chicago Press, 1975).

21. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 170-72 (Harvard U. Press, 1980); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973).

22. See Bork, *The Tempting of America* at 76, 82-83 (cited in note 6); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). For critiques of this position, see Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse*, in Ian Shapiro, ed., *NOMOS XL: Integrity and Conscience* (New York U. Press, 1997) (forthcoming) (copy on file with author); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995).

political reason exists for examining the constitution's authority. That examination would seem more urgent had contemporary feminists concluded that the Fourteenth Amendment protects fetal life or contemporary evangelicals concluded that the constitution does require a wall of separation between church and state. Such citizens might wonder why Americans should honor a constitution that mandates such obvious injustices. William Lloyd Garrison, after all, publicly burned the constitution when he concluded that the constitution protected slavery.[23] By highlighting the plausible constitutional arguments in favor of the result in *Dred Scott*, I hope to begin a better discussion among constitutional commentators as to the original constitution's imperfections and the reasons for adhering even to a constitution that might sanction evil results.

I. THE *DRED SCOTT* DECISION

Dred Scott was a Missouri slave who went with his master, John Emerson, to a free state (Illinois) and a free territory (Minnesota) before he "voluntarily" returned with Emerson to Missouri.[24] On April 6, 1846, Scott and his wife Harriet sued their putative owner, claiming that their time spent on free soil made them free persons. Although their suit was successful in the trial court, that judgment was reversed by the state supreme court, which held that, as a matter of Missouri law, slave status reattached whenever a slave voluntarily reentered a slave state from a free state or territory. Immediately following that defeat, Scott and his family brought a similar suit in federal court. The final result was no different. Their claims were rejected by the local Circuit Court and the United States Supreme Court sustained that rejection by a 7-2 vote, Justices Curtis and McLean dissenting.[25]

The precise holding of *Dred Scott* has never been entirely clear. All nine justices wrote opinions and the seven justices in the majority gave different reasons for rejecting Scott's appeal. Conventionally, the case stands for the two central propositions in Chief Justice Taney's opinion: 1) no black could be a citizen of

23. *The Meeting at Framingham*, The Liberator 106 (July 7, 1854). See Walter M. Merrill, *Against Wind and Tide: A Biography of Wm. Lloyd Garrison* 268 (Harvard U. Press, 1963).

24. For a detailed account of the facts in *Dred Scott*, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 397-99 (1856); Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 239-49 (Oxford U. Press, 1978).

25. For a detailed account of the procedural history of *Dred Scott*, see Fehrenbacher, *The Dred Scott Case* at 250-83 (cited in note 24).

the United States;[26] and 2) slavery could not be constitutionally prohibited in American territories.[27] This interpretation of *Dred Scott* may not be entirely correct. Only three other justices explicitly endorsed Taney's analysis of black citizenship.[28] Moreover, some commentators argue that Taney's analysis of congressional power over slavery in the territories was *obiter dictum* because his initial ruling on black citizenship meant that the court had no jurisdiction to hear the merits of Dred Scott's appeal.[29] Still, Taney's opinion was without apparent objection designated as the opinion of the Court,[30] and debate over *Dred Scott* has concentrated on the flaws in Taney's discussion of black citizenship and slavery in the territories.

Taney's claims about black citizenship and slavery in the territories have been criticized for three distinct and inconsistent failings. One line of criticism claims that *Dred Scott* rests on a mistaken theory of the proper role of judicial institutions in a democratic society. Robert McCloskey, Alexander Bickel, Lino Graglia, Cass Sunstein and other proponents of judicial restraint maintain that the Supreme Court should not have made any authoritative attempt, even one based on the constitution, to resolve the constitutional controversy over the status of slavery in the territories.[31] The other two criticisms claim that *Dred Scott* rests on a mistaken theory of constitutional interpretation. Rob-

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26. Strictly speaking, the Taney Court ruling was limited to the proposition that "a negro, whose ancestors were imported into this country, and sold as slaves" could not become an American citizen. See *Dred Scott*, 60 U.S. (19 How.) at 403, 419.

27. See Fehrenbacher, *The Dred Scott Case* at 2 (cited in note 24). Taney's opinion also ruled that the Supreme Court should apply Missouri law when determining whether slave status reattached to Scott after he returned to Missouri from a free state or a free territory. *Dred Scott*, 60 U.S. (19 How.) at 452. Justice Nelson's concurring opinion was devoted exclusively to this choice of law question. Id. at 457-69 (Nelson, J., concurring).

28. *Dred Scott*, 60 U.S. (19 How.) at 475-82 (Daniel, J., concurring); id. at 454 (Wayne, J., concurring); id. at 469 (Grier, J., concurring). The other justices in the majority, Justices Campbell, Catron, and Nelson, did not believe the citizenship issue was properly before the Court. Id. at 458 (Nelson, J., concurring); id. at 493 (Campbell, J., concurring); id. at 518 (Catron, J., concurring).

29. See, i.e., Laurence H. Tribe, *American Constitutional Law* 549 (Foundation Press, 2d ed. 1988); Fehrenbacher, *The Dred Scott Case* at 439 (cited in note 24) (noting other contemporaneous claims of "obiter").

30. *Dred Scott*, 60 U.S. (19 How.) at 399. For lengthy analyses concluding that five justices supported Taney's claims on both the procedure and substance of the citizenship issue, see John S. Vishneski III, *What the Court Decided in* Dred Scott v. Sandford, 32 Am. J. Legal Hist. 373 (1988); Fehrenbacher, *The Dred Scott Case* at 2, 325-34 (cited in note 24).

31. McCloskey, *American Supreme Court* at 60-62 (cited in note 8); Bickel, *The Morality of Consent* 36-37 (cited in note 18); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 Stan. L. Rev. 1019, 1036 (1992); Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 49 (1996); Robert A. Burt, *What was Wrong with* Dred Scott, *What's Right about* Brown, 42 Wash. & Lee L. Rev. 1, 3, 19-20 (1985); Wil-

ert Bork, David Currie, Don Fehrenbacher and other historicists condemn the Taney opinion for relying on personal notions of justice instead of on the specific norms set down by the constitutional framers and previous judicial precedents.[32] Thurgood Marshall, Sotirios Barber, Christopher Eisgruber and other aspirationalists, in contrast, condemn the Taney opinion for not tempering the specific policies set out by the constitutional framers and past judicial precedents with more general notions of constitutional and human right.[33]

The commentators who make these criticisms are not primarily interesting in beating dead justices. By demonstrating that *Dred Scott* was the product of an erroneous conception of constitutional interpretation or of the judicial function, each school of contemporary constitutional thought hopes to discredit rival theories and the modern judicial opinions they believe rely on those theories. Fehrenbacher worries that commentators who support the Warren Court's expansion of individual liberties "have yet to comprehend the full meaning . . . of the *Dred Scott* decision."[34] Lea VanderVelde and Sandhya Subramanian, by comparison, think that "*Dred Scott* deprived modern commentators of an opportunity . . . to recognize a new kind of freedom—a freedom of family continuity, cohesion, autonomy, and privacy."[35] The real target of historical and institutional critiques of *Dred Scott* is typically *Roe v. Wade*, a decision which many proponents of judicial restraint and originalism claim repeats Taney's most salient errors. "Who says *Roe*," Robert Bork

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liam H. Rehnquist, *The Supreme Court: How It Was, How It Is* 313 (William Morrow and Company, 1987).

32. Bork, *The Tempting of America* at 28-34 (cited in note 6); Currie, *The Constitution* at 264-73 (cited in note 5); Fehrenbacher, *The Dred Scott Case* at 559 (cited in note 24); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 Chi.-Kent. L. Rev. 89, 101 (1988); Reynolds, 40 Vand. L. Rev. at 1348 (cited in note 11); Corwin, Dred Scott *Case* at 307-13 (cited in note 12); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 998, 1003 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

33. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 4 (1987); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 Vand. L. Rev. 1337, 1340 (1987); see Sotirios A. Barber, *Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*, 64 Chi.-Kent L. Rev. 111, 126-27 (1988); Eisgruber, 10 Const. Comm. at 41, 47-49, 56-57, 61-62 (cited in note 7); Jacobsohn, *The Supreme Court* at 8 (cited in note 9); Dworkin, *Slave Catchers* at 437 (cited in note 17).

34. Fehrenbacher, *The Dred Scott Case* at 595 (cited in note 24).

35. Lea VanderVelde and Sandhya Subramanian, *Mrs. Dred Scott*, 106 Yale L.J. 1033, 1036 (1997).

proclaims, "must say . . . *Scott*."[36] Aspirational theorists, in response, charge contemporary opponents of liberal judicial policymaking with using the same originalist methods that Taney used in *Dred Scott*. Christopher Eisgruber suggests that such prominent opponents of *Roe* as Bork and Justice Antonin Scalia "adhere . . . to a professional credo that mimics Taney's indifference to injustice."[37]

Why contemporary scholars think analogies to *Dred Scott* undermine competing constitutional theories is not entirely clear. No one worries that a justice committed to the wrong theory of constitutional interpretation or the judicial function might presently conclude that *Dred Scott* remains good law. The Thirteenth Amendment clearly abolished slavery and the Fourteenth Amendment declares all persons born in the United States to be citizens of the United States. Proof that a particular constitutional theory would have performed better than its rivals when applied to antebellum slavery cases, therefore, seems no more relevant to contemporary constitutional debates than proof that some other constitutional theory would have performed better than its rivals when applied to the constitutions of ancient Babylon or medieval France. Studies of dead constitutions or dead constitutional provisions do serve as useful reminders that different constitutional theories perform differently depending on the constitutional text, constitutional history and constitutional interpreters. American constitutionalists, however, are primarily interested in the theory that performs best with respect to the present American Constitution, and performance with respect to other constitutions does not seem that relevant to this inquiry. The enthusiasm that proponents of gender equality display for originalism, for example, probably depends on whether they are interpreting the Fourteenth Amendment (whose framers did not intend to prohibit laws discriminating against women)[38] or a state constitution which includes an Equal Rights Amendment ratified

36. Bork, *The Tempting of America* at 32 (cited in note 6); see McConnell, 64 Chi.-Kent. L. Rev. at 101 (cited in note 32); *Casey*, 114 S. Ct. at 998 (Scalia, J., concurring in the judgment in part and dissenting in part).

37. Eisgruber, 10 Const. Comm. at 64 (cited in note 7). See VanderVelde and Subramanian, 106 Yale L.J. at 1119 (cited in note 35); Barber, 64 Chi.-Kent L. Rev. at 126 (cited in note 33); Marshall, 101 Harv. L. Rev. at 5 (cited in note 33). See also Sunstein, 110 Harv. L. Rev. at 11 (cited in note 31). But see Eisgruber, 10 Const. Comm. at 63 (cited in note 7) ("[s]earching for Taney's heir . . . amount[s] to a witch hunt, not responsible academic criticism").

38. See Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality*, 7 Const. Comm. 251, 266-82 (1990).

at the peak of feminist influence in the legislature and community.

Still, good reasons explain why *Dred Scott* matters very much to contemporary constitutional theorists. The Constitution derives its present authority, in part, from beliefs that the persons responsible for the original text were particularly wise and virtuous. Challenges to the integrity of the framers, therefore, also challenge the integrity of the Constitution.[39] "The historian who questions Jefferson," Paul Finkelman points out, "implicitly questions America."[40] Given how vulnerable the framers seem on slavery, constitutional theorists help validate the Constitution of 1787 as a document still worthy of authoritative status by minimizing the extent to which the original Constitution accommodated that peculiar institution. By demonstrating that the influence of slavery on the original Constitution was confined to a very limited set of protections, contemporary constitutionalists also make plausible claims that the surgeries of 1865 and 1868 successfully removed all traces of that constitutional wart from the body politic. No present constitutional institution, practice or right, in this view, was originally rooted even in part on the need to provide more security for human bondage or white supremacy.

Debates over which constitutional theory was responsible for *Dred Scott* also remain relevant at present because, although the constitutional rules governing slavery have changed, no Article V amendment has altered the basic constitutional institutions and practices in place when Taney's infamous ruling was handed down. These fundamental continuities suggest that general theories of judicial responsibility in constitutional cases may function today in much the same way they functioned 140 years ago. Thus, the institutional and interpretive practices responsible for the result in *Dred Scott* may, when adopted in the late twentieth century, result in judicial decisions that sanction other evils not specifically mandated by the words of the Constitution. If, for example, the judicial effort in 1857 to resolve a major political crisis caused the American political system to malfunction, then,

39. Charles Beard, for example, thought that once Americans realized that the constitution resulted from a struggle among different interests, they would more thoroughly investigate whether the Constitution of 1787 served their interests. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States,* liii (The Free Press, 1986).

40. Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 143 (M.E. Sharpe, 1996). See Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson,* in Peter S. Onuf, ed., *Jeffersonian Legacies* 395 (U. Press of Virginia, 1993).

barring substantial change in the structure of governing institutions, a judiciary that in 1997 engaged in the same practice would likely risk the same untoward consequences.

These concerns may explain why contemporary commentators feel obliged to demonstrate that while *Dred Scott* could not have happened on their watch, that decision was a reasonable application of some rival approach to the judicial function. Institutionalists seek to privilege their family of theories by insisting that *Dred Scott* and *Dred Scott*-type evils will be avoided only when courts ordinarily defer to the elected branches of government. Historicists respond that such evils will be avoided only when courts adhere to the wise policies endorsed by the framers. Aspirationalists reply that evil results will be avoided only when justices are guided by the framers' worthy ambitions. Unfortunately, no constitutional theory can keep its promise to do no constitutional evil, either in *Dred Scott* or in other areas of law.

II. CRITIQUING THE CRITIQUES

The central problem with all critiques of *Dred Scott* is simple: judicial writings typically rely on a wide variety of interpretive techniques[41] and that decision is no exception. One can find reasonable institutional, historical and aspirational arguments in both the majority opinions and in the dissents. For this reason, no member of the Taney Court should be regarded as the hidden demon or patron saint of any particular late twentieth century school of constitutional thought. The majority opinions do have their fair share of dubious assertions (as do the dissents), but a plausible case can be made in any constitutional language that before the passage of the Civil War Amendments descendants of American slaves could not be United States citizens and slavery could not be prohibited in American territories. Thus, to the extent that interpretive principles are judged by the results they yield in practice, *Dred Scott* does not help Americans choose between competing constitutional theories. No contemporary approach to the judicial function in constitutional cases is immune to proslavery results in the particular fact situation presented by *Dred Scott* or, for that matter, in the broader context provided by the American law of slavery.

Critics of *Dred Scott* have been particularly derelict in acknowledging the extent to which Taney's constitutional claims

41. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 93-94 (Oxford U. Press, 1982).

were well within the mainstream of antebellum constitutional thought. The judicial denial of black citizenship reflected beliefs held by the overwhelming majority of antebellum American jurists. Virtually every state court that ruled on black citizenship before 1857 concluded for reasons similar to those advanced in the *Dred Scott* majority opinion that free persons of color were not state or American citizens.[42] Four Attorneys General of the United States had previously rejected black citizenship[43] and their view was endorsed by the leading northern treatise on juris-

42. *Leech v. Cooley*, 14 Miss. (6 Smedes & Marshall) 93, 99 (Miss. 1846); *Bryan v. Walton*, 14 Ga. 185, 198-207 (1853); *Cooper and Worsham v. The Mayor and Aldermen of Savannah*, 4 Ga. 68 (1848); *State v. Morris*, 2 Harr. 537 (Del. 1837); *White v. Tax Collector*, 3 Rich. 136 (S.C. 1846); *Hobbs and Others v. Fogg*, 6 Watts 553, 556-59 (Pa. 1837); *Amy v. Smith*, 11 Ken. 326, 333-34 (1822); *The People v. Hall*, 4 Cal. 399, 404-05 (1854); *Pendleton v. The State*, 6 Ark. 509, 511-12 (1846); *Aldridge v. The Commonwealth*, 2 Va. Cas. 447, 449 (1824); *Heirs of Jacob Bryan v. Dennis, Mary, and Others*, 4 Fla. 445, 454 (1852); *Benton v. Williams*, 1 Dallam's Decisions 496, 497 (Tex. 1843). See also *Cory et al. v. Carter*, 48 Ind. 327, 338-42 (1874) (finding that free blacks were not considered to be citizens of Indiana before the Civil War); *Stoner v. State*, 4 Mo. 614, 616 (1837) (possibly rejecting black citizenship). The Chief Justice of Connecticut ruled that free blacks were not citizens in a constitutional sense, *Crandall v. The State*, 10 Conn. 339, 345-47 (1834), though a later Connecticut opinion maintained that his view was not shared by the rest of his brethren. *Opinion of the Judges of the Supreme Court*, 32 Conn. 565, 565-66 (1865). The Supreme Court of North Carolina in 1838 did claim that "slaves manumitted here become free-men—and therefore if born within North Carolina are citizens of North Carolina." *State v. Manuel*, 20 N.C. 20, 25 (1838). Six years later that court significantly narrowed *Manuel* and held that "free people of color" were "a separate and distinct class" and "cannot be considered as citizens in the largest sense of the term." *State v. Newsom*, 27 N.C. 250, 252, 254 (1844). Louisiana law is unclear. A majority opinion in 1860 concluded that "[t]he African race are strangers to our Constitution." *The African Methodist Episcopal Church v. City of New Orleans*, 15 La. Ann. 441, 443 (1860). A concurring opinion maintained that "[f]ree persons of color are regarded as persons under our law." *African Methodist Episcopal Church*, 15 La. Ann. at 445 (Merrick, C.J., concurring). The weight of Louisiana cases seems to support the latter view. See *State v. Harrison*, 11 La. Ann. 722, 724 (1856) ("in the eye of the Louisiana law, there is, (with the exception of political rights of certain social privileges, and the obligations of jury and militia service) all the difference between a free man of color and a slave, that there is between a white man and a slave"); *State v. Levy and Dreyfous*, 5 La. Ann. 64 (1850). See also, *Walsh v. Lallande*, 25 La. Ann. 188, 189 (1873) (claiming that free blacks were considered citizens before the Civil War). The Supreme Court of Massachusetts was the only bench that before *Dred Scott* clearly indicated that free blacks were state citizens, and that tribunal did so in an opinion which sustained segregated schools in Boston. *Roberts v. City of Boston*, 59 Mass. 198, 206 (1849).

43. Caleb Cushing, *Right of Expatriation*, 8 Op. Atty. Gen. 139 (1856); John MacPherson Berrien, *Validity of South Carolina Police Bill*, 2 Op. Atty. Gen. 426 (1831); Swisher, *Taney* at 154 (cited in note 3) (discussing a memo Taney wrote in 1832); William Wirt, *Rights of Free Virginia Negroes*, 1 Op. Atty. Gen. 506 (1821). Attorney General Hugh Legare did rule in 1843 that free persons of color were among the citizens eligible to purchase land under federal law. Legare reached this conclusion, however, because he "conceive[d] the purpose of the lawgiver to be only to exclude *aliens*, . . . men born and living under the *ligeance* of a foreign power—from the enjoyment of the contemplated privileges." Hugh S. Legare, *Pre-emption Rights of Colored Persons*, 4 Op. Atty. Gen., 147, 147 (1843). Legare explicitly refused to consider whether free blacks were citizens in a political sense. 4 Op. Atty. Gen. at 147.

prudence, James Kent's *Commentaries on American Law*.[44] Even John Marshall may have claimed that persons of color were constitutionally barred from becoming American citizens.[45] Taney's claim that the federal government had no power to bar slavery in the territories did not enjoy nearly this degree of support. Nevertheless, the general principles advanced in the *Dred Scott* majority opinions concerning the constitutional limits on federal power in the territories and the rights protected by the due process clause better reflect the main lines of antebellum jurisprudence than those advanced by many prominent contemporary critics of *Dred Scott*. Once one concedes, as Lincoln and other influential opponents of slavery did, that American citizens had the right to bring their property into American territories, the historical and aspirational status of the *Dred Scott* decision becomes far more complicated than modern scholars realize.

A. The Institutional Critique

Institutional critics of *Dred Scott* regard judicial review as "a deviant institution in a democratic society." The judiciary is "a countermajoritarian force" in our system of government, Alexander Bickel and other proponents of judicial restraint insist, because "when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."[46] This "countermajoritarian" label, however, does not fit *Dred Scott*. The Court's rulings on black citizenship and congressional power over slavery in the territories were consistent with the policy preferences of "the prevailing majority" before the Civil War. Indeed, "the prevailing [legislative] majority" in antebellum America did everything possible to secure a judicial ruling on the constitutional status of any ban on slavery in the territories. Had the Court decided *Dred Scott* on narrow grounds, that ruling would have "thwart[ed] the will of the representatives of the actual people of the here and now."[47]

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44. James Kent, 2 *Commentaries on American Law* 282 (William Kent, 8th ed. 1854). ("[N]egroes or other slaves, born within and under the allegiance of the United States are natural born subjects, but not citizens").

45. Senator James Scott of Pennsylvania in 1871 claimed that Marshall endorsed a manuscript which denied black citizenship. Cong. Globe, 42nd Cong., 1 Sess., 576 (1871). The director of the Marshall Papers, however, does not know whether the letter in question actually exists. Phone conversation with Dr. Charles Hobson, February 6, 1997.

46. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 128, 16 (Bobbs-Merrill Company, Inc.).

47. Id.

Dred Scott is often depicted as a victory for the most extreme proslavery fanatics in the United States,[48] but that decision by and large merely proclaimed that the policies advanced by the dominant Jacksonian coalition were constitutionally correct. Both the slavery and citizenship prongs of the Taney Court's ruling had recently been articulated by the Attorney General of the United States, and President Buchanan's third annual message vigorously endorsed the most southern interpretation of the *Dred Scott* opinions.[49] The Taney Court's conclusion that Congress could not ban slavery in the territories mirrored the victorious Democratic Party's platform of 1856, a platform which stated that "under the Constitution" the federal government was obligated to follow the policy of "non-interference . . . with Slavery in State and Territory."[50] Democratic party platforms did not discuss black citizenship, but Democrats in power consistently treated free blacks as something less than full citizens. Taney as Attorney General explicitly declared in 1832 that descendants of free blacks could not become American citizens, and this policy was generally adopted by later Jacksonians in the executive branch of the national government.[51] Exceptions were occasionally made, but when Democratic officials explicitly considered

48. See, e.g., Burt, 42 Wash. & Lee L. Rev. at 19-20 (cited in note 31).

49. Caleb Cushing, *Eminent Domain of the States—Equality of the States*, 7 Op. Atty. Gen. 571 (1855) (Missouri Compromise unconstitutional); Cushing, 8 Op. Atty. Gen. at 139 (cited in note 43); James Buchanan, *Third Annual Message* in James D. Richardson, ed., 5 *A Compilation of the Messages and Papers of the Presidents* 554-55 (Government Printing Office, 1897). Franklin Pierce in his last annual message to Congress also denied federal power to prohibit slavery in the territories. Franklin Pierce, *Fourth Annual Message*, in Richardson, ed., 5 *Messages and Papers* 400-04.

50. *Democratic Platform of 1856*, in Donald Bruce Johnson, ed., *National Party Platforms: Volume 1, 1840-1956* at 25 (U. of Illinois Press, 1956).

51. Swisher, *Taney* at 154 (cited in note 3); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* 292 (Oxford U. Press, 1970); William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* at 164-65 (Cornell U. Press, 1977).

Justice William Johnson and the Monroe Administration did object to a South Carolina law imprisoning any free black sailor whose ship was docked in a state port, but they did so primarily because they regarded such commercial measures as the exclusive preserve of the federal government. *Elkison v. Deliesseline*, 8 Fed. Cas. 493, 494-96 (C.C.D.S.C. 1823); William Wirt, *Validity of South Carolina Police Bill*, 1 Op. Atty. Gen. 659 (1824); John Quincy Adams to Stratford Canning, June 17, 1823, quoted in *Free Colored Seaman—Majority and Minority Reports*, H.R. Report, 27 Cong., 3 Sess., No. 80 (1843). That federal policy was overruled by Jackson's first Attorney General, John MacPherson Berrien. John MacPherson Berrien, *Validity of South Carolina Police Bill*, 2 Op. Atty. Gen. 426 (1831). A House Committee in 1843 concluded that similar laws imprisoning free seamen of color violated the privileges and immunities clause of Article IV. *Free Colored Seaman*, 2-4, but that report was never acted upon.

the question, they almost always ruled that free blacks were not eligible for citizenship.[52]

Virtually every community in antebellum America shared this hostile attitude toward black residents. Free black males were routinely denied rights typically identified with citizenship, and these political practices played a significant role in Taney's argument that slaves and their descendants could not become American citizens.[53] Eric Foner notes that "racial prejudice was all but universal in antebellum northern society." "Only five states, all in New England," he observes, "allowed the black man equal suffrage, and there he was confined to menial occupations and subjected to constant discrimination." Moreover, Foner adds, "[i]n the West, Negroes were often excluded from public schools, and four states—Indiana, Illinois, Iowa, and Oregon, even barred them entering their territory."[54] Even mainstream Republicans were reluctant to criticize Taney's ruling on black citizenship. Abraham Lincoln during his debates with Stephen Douglas took pains to make clear that he "never ha[d] complained *especially* of the *Dred Scott* decision because it held that a negro could not be a citizen," and announced that he opposed making free blacks citizens of Illinois.[55] Republican legislators in New York and Ohio who in the wake of *Dred Scott* did make a show of support for black citizenship were almost immediately voted out of office.[56] As the fate of those representatives who did challenge the unrelenting racism of Jacksonian political practice illustrates, Taney and his fellow justices did not impose a ju-

52. Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* at 31-32, 53-56 (U. of Chicago Press, 1961).

53. *Dred Scott*, 60 U.S. (19 How.) at 407-16. The Curtis dissent, by comparison, merely pointed to a few isolated practices which suggested that in 1787 or 1857 some blacks might have been American citizens. *Id.* at 573-76 (Curtis, J., dissenting). Of course, Curtis did not believe he had to demonstrate that most Americans thought free blacks were citizens of the United States. *Id.* at 571 (Curtis, J., dissenting) (claiming that the issue before that court was "whether *any* person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States" [emphasis added]). The point is simply that even the dissents in *Dred Scott* implicitly recognized that the Taney Court's ruling on black citizenship, while perhaps constitutionally wrong, could not be described as countermajoritarian.

54. Foner, *Free Soil* at 261 (cited in note 51). See Alexis De Tocqueville, in Phillips Bradley, ed., 1 *Democracy in America* 373-74, 382-83, 390 (Vintage Books, 1945); Litwack, *North of Slavery* at vii-viii, 3-112 (cited in note 52).

55. Abraham Lincoln, *Seventh and Last Debate With Stephan Douglas at Alton, Illinois*, in Lincoln, 3 *The Collected Works of Abraham Lincoln*, 283, 289-99, Roy P. Basler, ed., (Rutgers U. Press, 1953); Lincoln, *Fourth Debate With Stephen A. Douglas at Charleston, Illinois*, in id. at 145, 179; see Fehrenbacher, *The Dred Scott Case* at 436-37, 439 (cited in note 24); David Herbert Donald, *Lincoln* 200 (Simon & Schuster, 1995); Litwack, *North of Slavery* at 62-63 (cited in note 52).

56. Fehrenbacher, *The Dred Scott Case* at 432-36 (cited in note 24).

dicial solution to the question of black citizenship on a hostile Congress or nation. Rather, Fehrenbacher observes, "the *Dred Scott* decision, as it applied to free Negroes, had a majoritarian ring that transcended sectional lines."[57]

Indeed, Democrats from all regions of the country were frequently effusive in their praise for the Court's handiwork on all the issues decided in *Dred Scott*. Southern Democrats, not surprisingly, asserted that "[t]he decision is right and the argument unanswerable;" their northern brethren agreed that "resistance to that decision is . . . resistance to the constitution—to the government—to the Union itself."[58] Both Southern and Northern Democrats were particularly pleased that the justices had "at a single blow, shiver[ed] the anti-slavery platform of the late great Northern Republican party into atoms." The official newspaper of the Buchanan administration praised the "salutary influence" of the Taney Court's ruling and predicted that slavery would "cease to be a dangerous element in our political contests."[59] Committed antislavery advocates ruefully admitted that *Dred Scott* was not countermajoritarian. "Judge Taney's decision, infamous as it is," Susan B. Anthony acknowledged, "is but the reflection of the spirit and practice of the American people, North as well as South."[60] Lincoln similarly recognized that the Taney Court was merely following the most recent voting returns. "[T]he *Dred Scott* decision," he observed, "never would have been made in its present form if the party that made it had not been sustained previously by the elections."[61]

Institutional theorists are clearly wrong when they maintain that "with the intrusion of the Court into the slavery issue, many felt that any compromise over slavery was now impossible."[62] History indicates that, rather than the decision that foreclosed compromise, *Dred Scott* was the direct result of the settlement that forces committed to compromise on slavery issues reached during the years immediately before the Civil War. The Democrats were the party of accommodation in 1857, and by the early

57. Id. at 430.

58. Id. at 418-19 (quoting the Louisville *Democrat*, March 8, 1857, and the New Hampshire *Patriot*, March 18, 1857). See Fehrenbacher, *The Dred Scott Case* at 427-28 (cited in note 24); Charles Warren, 2 *The Supreme Court in United States History: 1836-1918* at 312-15 (Little, Brown, and Co., 1947).

59. Fehrenbacher, *The Dred Scott Case* at 419-20 (cited in note 24) (quoting the New York *Herald*, March 8, 1857, and the Washington *Union*, March 6, 11, 12, 1857).

60. Id. at 430 (quoting Susan B. Anthony).

61. Lincoln, *Fifth Debate With Stephen A. Douglas, at Galesburg, Illinois*, in Lincoln, *Collected Works* 207, 232 (cited in note 55).

62. Ehrlich, *Scott v. Sandford* 761 (cited in note 4).

1850s leading members of that coalition had agreed among themselves that the Supreme Court should resolve whether territorial governments had the right to promote or forbid slavery. Prominent Jacksonians (and moderate Whigs) in all regions of the country publicly declared that the federal judiciary was the institution responsible for determining the extent to which slavery could be regulated in the territories. President James K. Polk, Stephen Douglas, Jefferson Davis and Henry Clay were among the numerous antebellum political leaders who urged Congress "to leave the question of slavery or no slavery to be declared by the only competent authority that can definitely settle it forever, the authority of the Supreme Court."[63] President-elect James Buchanan's inaugural address in 1857 explicitly declared that the status of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States."[64] Lest jurisdictional problems bar judicial review, Congress after the Mexican War routinely inserted measures facilitating judicial action on any question concerning the status of slavery in the territories.[65] *Dred Scott*, in other words, was "undertaken only upon the explicit invitation of Congress" and the President.[66]

These political pressures influenced several justices in the *Dred Scott* majority. Justice Wayne thought that "the peace and harmony of the country required the settlement" of the status of slavery in the territories "by judicial decision." Justice Campbell maintained that "the Court would not fulfil public expectation or discharge its duties by maintaining silence upon [that] question."[67] Northern Democrats, the alleged "victims"[68] of *Dred Scott*, applauded the Taney Court's decision to issue a broad ruling. "If the case had been disposed of [on narrow grounds]," Ste-

63. Cong. Globe, 31st Cong., 1 Sess., 1154-55 (speech of Henry Clay). See James K. Polk, *Fourth Annual Message*, in 4 *Messages and Papers*, 642; Cong. Globe, 31st Cong., 1 Sess., App., 154 (speech of Jefferson Davis); Cong. Globe, 34th Cong., 1 Sess., App., 797 (speech of Steven Douglas).

64. James Buchanan, *Inaugural Address* in Richardson, ed., 5 *Messages and Papers* at 431 (cited in note 49).

65. 9 Stat. 450 (1850); 9 Stat. 455-456 (1850); 10 Stat. 280, 287 (1854).

66. Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 Minn. L. Rev. 16, 16 (1953). For detailed accounts of legislative efforts to have the judiciary resolve contested issues over slavery, see Fehrenbacher, *The Dred Scott Case* at 152-208 (cited in note 24); Mendelson, 38 Minn. L. Rev. at 16; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, in 7 *Studies in American Political Development* 35, 46-50 (1993).

67. *Dred Scott* at 455 (Wayne, J., concurring); Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D.* 384 (John Murphy & Co., 1872) (quoting J.A. Campbell to Samuel Tyler, Nov. 24, 1870).

68. Bernard Schwartz, *A History of the Supreme Court* 124 (Oxford U. Press, 1993).

phen Douglas declared three months after the judicial decision had been handed down, "who can doubt . . . the character of the denunciations which would have been hurled upon the devoted heads of those illustrious judges, with much more plausibility and show of fairness than they are now denounced for having decided the case . . . upon its merits?"[69]

Douglas praised the Taney Court because, unlike contemporary institutionalists, he correctly recognized that most antebellum Americans, indeed most antebellum northerners, could accept, if not endorse, a judicial ruling denying legislative power to regulate slavery in the territories. No one denies that *Dred Scott* played some role in aggravating the controversies responsible for the Civil War. Antislavery advocates in the North were outraged by what they feared was a conspiracy to make slavery a national institution;[70] southerners were offended by northern refusals to accept the judicial ruling.[71] Still, the historical evidence suggests that *Dred Scott* had none of the baneful consequences commonly attributed to that case. The decisions most responsible for the Civil War were made by those political actors institutionalist dogma entrusts with the authority to compromise divisive political issues.

Kenneth Stampp's meticulous study of American politics in 1857 concludes that the Supreme Court's decision in *Dred Scott* had no immediate influence on the body politic. "Taney's opinion," he states, "however provocative, produced no concrete results."[72] The cause of union in 1857 depended on the continued vitality of the Democratic party as the vehicle for statesmen interested in compromising the slavery issue, and *Dred Scott* did not weaken Democratic unity or strength. Indeed, the decision at first united Democrats, who shared a common hostility to free blacks and to federal regulation of slavery in the territories. After suffering massive defections between 1854 and 1856 as a result of the Kansas-Nebraska Act,[73] northern Democrats in state

69. Id. (quoting Stephen Douglas).

70. See Lincoln, 2 *Collected Works* at 452-453, 461-67, 521-23, 525-26, 539-40, 550-53 (cited in note 55); Abraham Lincoln in Robert W. Johannsen, ed., *The Lincoln-Douglas Debates of 1858* at 56-67, 82-85, 110-14, 229-34 (Oxford U. Press, 1965); Lincoln, 3 *Collected Works* at 78, 89-90, 95, 99-101, 349, 368-69, 424-30, 443-44, 484, 548-50, 553 (cited in note 55); Lincoln, 4 *Collected Works* at 29 (cited in note 55). See also Foner, *Free Soil* at 97-98, 101 (cited in note 51); Fehrenbacher, *The Dred Scott Case* at 437-38, 451-53, 457, 464, 487-88, 493 (cited in note 24).

71. Fehrenbacher, *The Dred Scott Case* at 450, 562 (cited in note 24).

72. Kenneth M. Stampp, *America in 1857: A Nation on the Brink* 109 (Oxford U. Press, 1990). See Fehrenbacher, *The Dred Scott Case* at 437, 449 (cited in note 24).

73. See Foner, *Free Soil* at 155-68, especially, 165 (cited in note 51).

elections held during the spring and fall following the *Dred Scott* decision recovered many offices previously held by Republicans.[74] Fehrenbacher's study of those voting returns finds "no evidence that *Dred Scott* manufactured votes for Republicans anywhere." "[I]t is difficult," he concludes, "to escape the impression that the decision, if it helped anyone, helped the Democrats."[75]

The event that "brought on a genuine uprising of northern rank-and-file Democrats" and ruined the party of accommodation was President Buchanan's decision in the late fall of 1857 to demand that Kansas be admitted as a slave state.[76] Led by Stephen Douglas, northern Democrats who had accepted the *Dred Scott* decision bitterly attacked the fraudulent proslavery Lecompton constitution. The resulting struggle between the Buchanan administration and anti-Lecompton Democrats destroyed the fragile union between northern and southern Jacksonians, severely weakened Democratic party strength in the North, and paved the way for the Lincoln victory in 1860.[77] In sharp contrast to contemporary commentators who think that the *Dred Scott* decision in the winter of 1857 made compromise over slavery nearly impossible, many Republicans living at that time thought that had Buchanan compromised and allowed a fair election in Kansas on the Lecompton constitution, he would have destroyed the nascent Republican party and ensured Democratic electoral hegemony for the foreseeable future.[78] Lincoln, in particular, was quite concerned that Republicans might support Douglas for the Senate in 1858 despite the latter's defense of *Dred Scott* because the Little Giant had successfully opposed the Buchanan administration on Lecompton.[79] Indeed, Lincoln may have used *Dred Scott* in the debates less to convert Democrats

74. See Stampp, *America in 1857* at 102-04, 109 (cited in note 72); Fehrenbacher, *The Dred Scott Case* at 565-66 (cited in note 24).

75. Fehrenbacher, *The Dred Scott Case* at 566 (cited in note 24).

76. Stampp, *America in 1857* at 330 (cited in note 72); Fehrenbacher, *The Dred Scott Case* at 468, 563 (cited in note 24).

77. See Stampp, *America in 1857* at 309-16, 322-24, 329-30 (cited in note 72); Fehrenbacher, *The Dred Scott Case* at 566 (cited in note 24).

78. Stampp, *America in 1857* at 309-10 (cited in note 72). But see id. at 330-31 (claiming that "removing the Kansas question from national politics . . . would not have assured a lasting settlement of the sectional conflict").

79. See Lincoln, 2 *Collected Works* at 443-44, 446-51, 455-57, 459, 467-69, 497-98, 509-11 (cited in note 55); Foner, *Free Soil* at 132 (cited in note 51); Fehrenbacher, *The Dred Scott Case* at 486 (cited in note 24).

than to remind his partisans why Douglas was unacceptable to them.[80]

The dramatically different impacts that *Dred Scott* and Lecompton had on Democratic party unity confound institutionalist assertions that justices are less capable than elected officials of reaching socially acceptable compromises on contentious political issues. Judicial responses to slavery during the 1850s facilitated Democratic unity; the decisions which destroyed that coalition and then the nation were made by the President and his legislative supporters. Indeed, *Dred Scott* was so successful a political compromise from a northern perspective that Stephen Douglas and his political allies called on all parties to subsequent debates over slavery in the territories to again agree to facilitate and abide by future judicial rulings on that subject. Prominent Northern Democrats, Douglas assured the south, would accept territorial slave codes should those measures be explicitly mandated by a Supreme Court decision.[81] To be sure, Grier and maybe Nelson aside, no Taney Court justice attempted to resolve slavery issues in the way most likely to accommodate those political actors crucial to the continued maintenance of the Union.[82] Nevertheless, perhaps by a lucky accident, the actual decision handed down by the Court seems the best compromise available in 1857. Support for judicial decisions protecting slavery in the territories was the last concession that Northern Democrats could make to the South without losing their party strength in crucial midwestern states.

Compromise in 1857 meant compromise that would enable the Democratic party to maintain its majority status. Southern disunionists were actively weaning their electorate from that Jacksonian coalition in order to prepare the way for secession.[83] Northern Republicans were more interested in putting slavery on

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80. See Lincoln, *Debates* at 56-67, 83-85 (cited in note 70). See also Fehrenbacher, *The Dred Scott Case* at 487-88 (cited in note 24).

81. *Democratic Platform of 1860* in Donald Bruce Johnson and Kirk H. Porter, eds., *National Party Platforms* at 30-31 (cited in note 50). See Fehrenbacher, *The Dred Scott Case* at 517, 534, 537-38 (cited in note 24).

82. Grier does appear to have joined the *Dred Scott* majority, in part, because he thought having a Northern justice support the result would make that decision more acceptable to that region. See Fehrenbacher, *The Dred Scott Case* at 311-12 (cited in note 24) (quoting Grier to Buchanan, February 23, 1857). Nelson simply refused to discuss the larger issues discussed by the other justices. See footnote 27 above.

83. See William W. Freehling, 1 *Road to Disunion: Secessionists at Bay, 1776-1854* at 4-5, 316-19, 337-38, 357, 479-86, 490, 519-35 (Oxford U. Press, 1990). For southern threats to secede if demands were not met, see John C. Calhoun, 4 *The Works of John C. Calhoun* 576 (D. Appleton and Company, Richard K. Cralle, ed., 1856).

the road to extinction than in preserving the union.[84] Given the fundamental differences in the constitutional and political goals that divided Northern Republicans from Southern disunionists, no institution could have fashioned a slavery compromise that would have satisfied all Americans (even if persons of color are not counted as Americans).[85] Hence, whether *Dred Scott* was a reasonable compromise must be judged in light of that decision's impact on those forces committed to peaceful Union, and not on the reactions from partisans committed either to secession or to a set of policies that would risk secession.

Judged by this standard, *Dred Scott* seems a successful compromise. Northern Democrats did not think every sentence of the majority opinions correct as a matter of constitutional logic, but they were willing to adhere to the Court's explicit ruling and even promised in advance to support any future ruling providing protection for slavery in the territories. This position proved politically astute as Democrats in the wake of *Dred Scott* began regaining the votes necessary to assure their continued control of national politics. That a party almost destroyed by the legislative decision in 1854 to repeal a ban on slavery in territories north of the Missouri Compromise line was not adversely affected by the judicial decision three years later requiring slavery in those territories may seem puzzling. Several features of American politics during the late 1850s, however, may explain why Northern Democrats were more easily able to digest *Dred Scott* than the Kansas-Nebraska Act.

Political debates over the status of slavery in the territories were really concerned with the eventual status of slavery in the states that would be fashioned from those territories. Northerners of all political persuasions sought to promote additional free states both because additional free states would facili-

84. See, i.e., Lincoln, 3 *Collected Works* at 454-55, 502, 542-43 (cited in note 55); Cong. Globe, 31st Cong., 1 Sess., App., 479 (speech of Salmon Chase); Foner, *Free Soil* at 138-44, 219-225 (cited in note 51).

85. Suggestions that the Court should have simply kept the channels of debate over slavery open, Burt, 42 Wash. & Lee L. Rev. at 19 (cited in note 31), beg the question. One division between North and South was the extent to which antislavery agitation should be suppressed or punished by the states and federal government. See Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book,* The Impending Crisis: *Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi.-Kent L. Rev. 1113 (1993); Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995).

tate northern control of the national government[86] and because they believed free white labor could not compete with slave black labor. As William Freehling notes, "calling slave labor detrimental to increased labor" was "the most lethal argument against slavery in labor-starved, development-crazed America."[87] Governor Alexander Randall of Wisconsin spoke for most northerners when he insisted that "[f]ree labor languishes and becomes degrading when put in competition with slave labor . . . ."[88]

Although the status of slavery in future states was the overriding concern of most antebellum Americans, debate focused on the status of slavery in the territories because all parties perceived a close connection between territorial and state policy. "To opponents and defenders of slavery alike," Arthur Bestor points out, "it seemed clear that the first decisions made in the territories would be the determining ones." Antebellum Americans, he notes, feared that, "[l]ong before a state attained full standing, its social system could have been irrevocably fixed by decisions already made." Lincoln asserted that "[t]he first few may get slavery IN, and the subsequent many cannot easily get it OUT." Another antislavery advocate observed that "if we are wrong on the subject of slavery, it can never be righted."[89]

These fears seemed warranted during the first half of the nineteenth century. Every territory which allowed slavery had become a slave state. Illinois almost became a slave state despite the Northwest Ordinance. More than forty percent of state voters in 1824 supported a referendum which would have led to the legalization of human bondage. "[O]nly law," Freehling con-

86. See Cong. Globe, 35th Cong., 1 Sess., 521 (speech of William H. Seward) ("[w]e are fighting for a majority of free states"); Parke Godwin, *Political Essays* 286 (Dix, Edwards & Co., 1856); Foner, *Free Soil* at 58, 222, 236 (cited in note 51).

87. Freehling, *Road to Disunion* at 203 (cited in note 83). See Foner, *Free Soil* at 11-72 (cited in note 51); Alison Goodyear Freehling, *Drift Toward Dissolution: The Virginia Slavery Debate of 1831-1832* at 145-47, 174-77, 211, 222-23, 243-45 (Louisiana State U. Press, 1982).

88. Foner, *Free Soil* at 57 (cited in note 51) (quoting Alexander W. Randall). For an antislavery argument that highlighted the baneful influence of slave labor on free white labor, see Henry Ruffner, *Address to the People of West Virginia* (R.C. Noel, 1847). See also, Jesse Burton Harrison, *Review of the Slave Question* 10 (T.W. White, 1833).

89. Arthur Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860*, J. of the Ill. St. Hist. Soc. 117, 150 (1961); Lincoln, 2 *Collected Works* at 268 (cited in note 55); Foner, *Free Soil* at 55 (cited in note 51) (quoting General James Nye). See Lincoln, *Debates* at 147 ("[i]t takes not only law but the *enforcement* of law to keep [slavery] out. That is the history of this country upon the subject") (cited in note 70); Lincoln, 3 *Collected Works* at 483, 485-86, 499 (cited in note 55); Foner, *Free Soil* at 54, 56 (cited in note 51); Parke Godwin, *Political Essays* at 286-89 (cited in note 86).

cludes, "stopped slavery from entering midwestern latitudes."[90] Hence, when the Kansas-Nebraska law was enacted, most northerners had good reason to believe that, by permitting slavery in Kansas and other territories, Congress had ensured that those regions would maintain that institution upon admission to the Union. Lincoln in 1855 thought it an "already settled question" that Kansas would join the Union as a slave state.[91]

Developments after the Kansas-Nebraska Act challenged this axiom of American territorial politics. By the time *Dred Scott* was decided, the majority of Kansans seemed committed to banning slavery upon admission to the Union. Moreover, slavery was not taking hold in Nebraska and in other territories where that practice was permitted by legislation or judicial decree. Slavery was legal in the New Mexico and Utah territories, but there do not seem to have been more than 100 slaves in both jurisdictions.[92] "The whole controversy over the Territories," cooler heads were recognizing by 1860, "related to an imaginary negro in an impossible place."[93]

The apparent strength of free soil interests in territories where slavery was nominally permitted seems responsible for a shift in the priorities of many Northern Democrats during the years between Kansas-Nebraska and *Dred Scott.* Whether slavery was legal in the territory of Kansas became less vital an issue to persons who were becoming more confident that slavery would shortly be illegal in the state of Kansas. Once the issue of slavery at statehood was practically divorced from the issue of slavery in the territorial stage, a sufficient number of northerners could accept southern demands that slavery be allowed in the territories to maintain the hegemony of the Democrats in national politics. Even Republicans upon taking power in 1860 expressed little interest in regulating human bondage in territories where that institution was not thriving.[94] Lecompton was an abomination to Democrats who tolerated *Dred Scott* because northerners could not accept southern demands that Kansas be-

90. Freehling, *Road to Disunion* at 139 (cited in note 83). See Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* 123-30 (Indiana U. Press, 1987); Finkelman, *Slavery* at 36, 77-78 (cited in note 40); Lincoln, 2 *Collected Works* 276-77 (cited in note 55); Lincoln, 3 *Collected Works* 437, 454-57, 466-68 (cited in note 55). For southern concerns that no territory where slavery was banned would become a slave state, see Cong. Globe, 36th Cong., 1 Sess,. App., 77 (speech of James Green).

91. Lincoln, 2 *Collected Works* at 321 (cited in note 55).

92. Fehrenbacher, *The Dred Scott Case* at 175-77 (cited in note 24).

93. James G. Blaine, 1 *Twenty Years of Congress: From Lincoln to Garfield* 272 (Henry Bill Publishing Co., 1884).

94. Fehrenbacher, *The Dred Scott Case* at 548 (cited in note 24).

come a slave state despite what seemed to be the presence of a clear antislavery majority. Democrats could concede this issue, Stephen Douglas and his political allies realized, only at the cost of becoming the permanent minority party in the North. Fighting Lecompton, the Little Giant and others knew, was "the only course that could save the Northern Democracy from annihilation at the next election."[95]

Popular support for the Court as an institution also helped *Dred Scott* unite the Democratic party. Contemporary students of public law observe that judicial decisions often provide sufficient cover for political actors who cannot advocate certain policies directly.[96] Just as many politicians who would not vote to repeal bans on abortion have nevertheless insisted that the Supreme Court's decision in *Roe v. Wade* be obeyed,[97] so Northern Democrats who might not have been able to vote for measures repealing the Missouri Compromise or making slavery legal in all territories could nevertheless support a Supreme Court decision to that effect. Northern Democrats could not tolerate a fraudulent slave state under any circumstances. They could, however, support southern pretensions in the territories as long as they could do so indirectly by supporting a judicial decision rather than by expressing direct support for the policy. Thus, bald institutional assertions to the contrary, *Dred Scott* may not only have been the best compromise available in 1857, but the federal judiciary may have been the only institution capable of reaching that accommodation.

B. The Historical Critique

Claims that *Dred Scott* would have been decided otherwise had Taney and his fellow justices adopted historicist methods of constitutional interpretation are belied by the *Dred Scott* opinions and constitutional history. Taney and his fellow justices explicitly declared that their arguments were faithful to the original intentions of the framers and to judicial precedent. Much historical evidence supports the Taney Court's conclusion that freed slaves could not become American citizens and that Congress had no power to ban slavery in the territories. Significant problems exist with important historical claims made in the ma-

95. Id. at 466 (quoting C. Goody to Douglas, December 20, 1857), 464-67, 511.

96. Graber, *Nonmajoritarian Difficulty* at 42-43 (cited in note 66); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 33-36 (U. of Chicago Press, 1991).

97. Graber, *Nonmajoritarian Difficulty* at 56-59 (cited in note 66).

jority opinions, but the Curtis and McLean dissents also relied on historically questionable propositions. At the very least, contemporary commentators ought to hesitate before damning on originalist grounds judicial opinions that cite chapter and verse a letter written by James Madison, which clearly supports the justices' most significant conclusion.

On the surface, the opinion of the Court in *Dred Scott* seems "a riot of originalism."[98] Taney's crucial interpretive passage declared that the Constitution "must be construed now as it was understood at the time of its adoption." The Constitution, Taney wrote, "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."[99] The three justices who wrote lengthy opinions supporting the holding of *Dred Scott* similarly relied on originalist premises and discussed the Constitution's history at length. Justice Campbell concluded that a congressional right to ban slavery in the territories "is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratification of the Federal Constitution." Justice Daniel's opinion quoted extensively from a letter James Madison wrote in 1819 which asserted that the framers had not vested Congress with any power to regulate slavery in the territories.[100] These affirmations of historicism seem to have been made in good faith. Some rhetoric in the majority opinions is forced and historically dubious, but on the whole, Taney, Daniel, Catron, and Campbell presented a reasonable interpretation of the original Constitution and subsequent legal developments.

1. Citizenship

Commentators have universally condemned Taney's claim that "neither the class of persons who had been imported as slaves, nor their descendants" could be citizens of the United States.[101] Conventional wisdom maintains that the dissents in

98. Eisgruber, 10 Const. Comm. at 46 (cited in note 7).

99. *Dred Scott*, 60 U.S. (19 How.) at 426. See Roger Brooke Taney, *Memoir of Roger Brooke Taney, LL.D.* 602 (Samuel Tyler, ed. John Murphy & Co., 1872). In Taney's view, the critics of his opinion were the parties guilty of "act[ing] upon the principle that the end will justify the means." Id. at 608.

100. *Dred Scott*, 60 U.S. (19 How.) at 512 (opinion of Campbell, J.); id. at 491-92 (opinion of Daniel, J.) (quoting Madison to Robert Walsh, Nov. 27, 1819). See id. at 502-07, 510-12 (opinion of Campbell, J.); 521-22, 526 (opinion of Catron, J.).

101. Id. at 407.

Dred Scott devastated this proposition by pointing out that some blacks voted in 1787, and hence must have been citizens of the states where they resided.[102] Eager to demonstrate the mendacity of the Court's opinion, historians fail to discuss Taney's rebuttal of that criticism. As the Chief Justice pointed out, the franchise in many jurisdictions was not restricted to citizens. "A person," Taney stated,

> may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States.[103]

Abraham Lincoln, his Attorney General, Edward Bates, and other prominent northerners agreed. "[S]uffrage and eligibility have no necessary connection with citizenship," Bates declared in 1862. In his experience, "the one may, and often does, exist without the other."[104]

Suffrage did not entail citizenship, Taney (and Stephen Douglas in his debates with Lincoln) correctly noted, because even if free blacks had no rights white citizens were obligated to respect, white citizens could at their discretion grant free blacks certain legal privileges.[105] Free blacks, an influential Virginian noted, had "many *legal* rights and privileges in Virginia, but no *constitutional* ones."[106] Many framers maintained that the basic rights free blacks enjoyed as human beings did not entitle them to the distinctive rights of Americans. As Herbert Storing notes, "to concede the Negro's right to freedom is not to concede his right to U.S. citizenship."[107] Jefferson, for example, firmly be-

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102. Id. at 531, 533, 537 (McLean, J., dissenting), 572-76, 581-82 (Curtis, J., dissenting). See also, Fehrenbacher, *The Dred Scott Case* at 406-07 (cited in note 24).

103. *Dred Scott*, 60 U.S. (19 How.) at 422, 405. See also, James H. Kettner, *The Development of American Citizenship, 1608-1870* at 121 (U. of North Carolina Press, 1978) (noting the prevalence of alien voting before the American Revolution).

104. Edward Bates, *Citizenship*, 10 Op. Atty. Gen. 382, 408 (1962). See Lincoln, 2 *Collected Works* at 355 (cited in note 55); Caleb Cushing, *Relation of Indians to Citizenship*, 7 Op. Atty. Gen. 746 (1856).

105. *Dred Scott*, 60 U.S. (19 How.) at 405, 412-13, 426; Douglas, *Debates* at 33, 46-48, 128-29, 216, 299-300 (cited in note 70). See *Leech v. Cooley*, 14 Miss. (6 Smedes & Marshall) 93, 99 (Miss. 1846); *Heirn v. Bridault*, 37 Miss. 209, 224 (1859); *Hardcastle Ads. Porcher*, 1 Harper 495, 498-99 (S. Ct. App. 1826).

106. Freehling, *Drift Toward Dissolution* at 180 (cited in note 87) (quoting William Henry Brodnax).

107. Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, in Robert A. Goldwin and Art Kaufman, eds., *Slavery and Its Consequences: The Constitution, Equality, and Race* 59 (American Enterprise Institute for Public Policy Research,

lieved that black and white persons were created equal, but could not inhabit the same civic space.[108] These common distinctions between human, statutory, and citizenship rights explain why Taney and others did not regard the mere existence of free blacks with certain statutory liberties as warranting a judicial decision declaring Dred Scott an American. The citizenship issue before the justices depended on whether the liberties persons of color enjoyed in 1787 and afterwards were best conceptualized as the rights of citizens or mere exercises of communal grace.

Once the question is phrased this way, the claim that slaves and their descendants could not become United States citizens seems more compelling. As Taney demonstrated, the severe legal disabilities free blacks suffered in every region of the United States at the time of ratification and afterwards indicated that no community considered black residents to be equal citizens.[109] Taney observed, for example, that in New Hampshire, the most antislavery state in the Union at the time of ratification, only "free white citizens" could be "enrolled in the militia of the State." In his opinion, the reason "the African race, born in the State [were] not permitted to share in one of the highest duties of the citizen" was "obvious:" "[h]e forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."[110] Moreover, northern states may have granted free blacks rights only because persons of color were too few in number to be of any consequence. "Mark Anthony," during the Massachusetts ratification debates opposed incorporating more antislavery provisions into the constitution because "great numbers of slaves becoming citizens, might be burdensome and dangerous to the Public." For this reason, perhaps, the New York legislature in 1785 combined a proposal to emancipate slaves with a measure to disenfranchise free blacks.[111]

Claims that the disabilities suffered by women (universally recognized as citizens) were analogous to those of free blacks[112]

1988). See Lincoln, 3 *Collected Works* at 328 (cited in note 55); St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of it in the State of Virginia* 86-87 (Printed for Mathew Carey, 1796).

108. See Storing, *Slavery* at 50-51, 58 (cited in note 107); see also notes 202-04, below, and the relevant text.

109. *Dred Scott*, 60 U.S. (19 How.) at 412-16.

110. Id. at 415.

111. Mark Anthony, *Boston Independent Chronicle*, January 10, 1788, in John Kaminski, ed., *A Necessary Evil?: Slavery and the Debate Over the Constitution* 83 (Madison House, 1995); *Objections of the Council of Revision of the Gradual Abolition Bill*, March 21, 1785, in Kaminski, ed., *A Necessary Evil?* at 31.

112. See *Dred Scott*, 60 U.S. (19 How.) at 583 (Curtis, J., dissenting); Fehrenbacher, *The Dred Scott Case* at 343 (cited in note 24).

fail to grasp the fundamental difference in the perceived status of these groups. Although women lacked basic political rights, republican theory at the founding maintained that females were virtually and adequately represented by the males in their family. "It is true," the Kentucky Supreme Court noted in an opinion denying black citizenship,

> that females and infants do not personally possess those rights and privileges [of citizenship], in any state in the Union; but they are generally dependent upon adult males, through whom they enjoy the benefits of those rights and privileges; and it is a rule of common law, as well as of common sense, that females and infants should, in this respect, partake of the quality of those adult males who belong to the same class and condition in society.[113]

In sharp contrast to infants and women, no claim was made that anyone virtually represented free blacks. Moreover, the prevalent doctrine of separate spheres assigned women important civic duties in private life, namely the bearing and rearing of offspring. As Rogers Smith has noted, women "lack[ed] any power to participate politically themselves, but [were] charged with conveying political morality to children in the domestic sphere."[114] By comparison, persons of color had no distinct civic responsibilities that might explain their legal disabilities. Free blacks were denied the opportunity to exercise most civic duties because they were thought unfit to be citizens, not because they were regarded as having some special contribution to make to the polity that was inconsistent with their exercising basic political rights.[115]

Taney was wrong both when he asserted that free blacks had "*never* been regarded as a part of the people or citizens of the State," and when he referred to "the public opinion and laws which *universally* prevailed in the Colonies when the Declaration of Independence was framed, and when the Constitution was adopted" (emphasis added).[116] The Curtis dissent presented much evidence that some black residents of northern states were treated as citizens after the Revolution, and a Massachusetts court decision in 1783 apparently affirmed the citizenship of free blacks in that commonwealth.[117] Still, the issue before the Taney

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113. *Amy v. Smith*, 11 Ken. 326, 333-34 (1822).

114. Rogers M. Smith, *'One United People': Second-Class Female Citizenship and the American Quest for Community*, 1 Yale J.L. & Hum. 229, 255 (1989).

115. See *Dred Scott*, 60 U.S. (19 How.) at 416.

116. Id. at 412; Taney, *Memoir* at 602 (cited in note 99).

117. *Dred Scott*, 60 U.S. (19 How.) at 572-76 (Curtis, J., dissenting); Kettner, *American Citizenship* at 315 (cited in note 103) (discussing *Commonwealth v. Jennison*). See

Court did not depend on whether any free blacks were state citizens before 1787, but on whether the persons responsible for the Constitution were aware of and intended to sanction black citizenship. If the average ratifier of the Constitution thought, perhaps erroneously, that free blacks were everywhere in the United States regarded as unfit for citizenship, then the mere existence of a few black citizens in 1787 could not change the original understanding of the Constitution. The *Dred Scott* holding on black citizenship is sound if, as Taney noted in 1858, "[t]he few persons who, in certain localities, have endeavored to obliterate the line of division, and to amalgamate the races, are hardly sufficient in number or in weight of character to be noticed as an exception to the overwhelming current [or even majority] of public opinion and feeling upon this subject."[118]

The framers did not clearly define the status of free blacks. Some historians claim that Chief Justice Taney's analysis of black citizenship "was a fair description of the constitutional world of 1787 at both the federal and the state levels."[119] Certainly, most southern framers agreed with Charles Pinckney's claim that in 1787 "there did not then exist such a thing in the Union as a black or colored citizen."[120] The famous passage in Virginia's Declaration of Rights, "all men are by nature equally free and independent, and have certain inherent rights," was followed by a proviso, "of which when they enter into a state of society," that was commonly understood as excluding persons of color from the liberties enjoyed by Virginia citizens.[121] Paul Finkelman makes a different argument, claiming that "there was no single 'intention' of the framers of the 1787 Constitution" on the question of black citizenship. "[T]he framers and ratifiers from the two sections," he suggests, "intended opposite meanings when they endorsed the new Constitution."[122] If this is the case, then an originalist would have to conclude that no party to the dispute

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also John Lowell and Horace Gray, *A Legal Review of the Case of Dred Scott, as Decided by the Supreme Court of the United States*, 15-16 (Crosby, Nichols, and Company, 1857).

118. Taney, *Memoir* at 601 (cited in note 99).

119. William M. Wiecek, *"The Blessings of Liberty": Slavery in the American Constitutional Order* in Goldwin and Kaufman, eds., *Slavery and Its Consequences* at 28 (cited in note 107).

120. Annals of Congress, 16th Cong., 2 Sess., 1134 (speech by Charles Pinckney).

121. A.E. Dick Howard, 1 *Commentaries on the Constitution of Virginia* 62 (U. Press of Virginia, 1974). See *Aldridge v. The Commonwealth*, 4 Vir. (2 Va. Cas.) 447, 449 (1824).

122. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. Pitt. L. Rev. 349, 392, 385. See Kettner, *American Citizenship* at 231-32 (cited in note 103). For Northern framers who assumed that free blacks were citizens, see Anthony, *Boston Independent Chronicle* at 83 (cited in note 111); *Mas-*

over the citizenship status of former slaves had the better of the historical argument in *Dred Scott.*

James Kettner aptly summarized the central problem with both the Taney opinion and Curtis dissent when he notes that "[f]ree [n]egroes appeared to occupy a middle ground in terms of the rights they were allowed to claim in practice, a status that could not be described in the traditional language of slave, alien, or citizen."[123] Forced to fit free blacks into one of these traditional categories, both Curtis and Taney had to suppress part of the historical record. Curtis was on strong ground when he noted that, contrary to Taney's assertions, some states had explicitly declared free blacks to be citizens. Nevertheless, in order to explain away the disabilities that free blacks suffered, Curtis took the position that "naked citizenship" conferred no rights whatsoever.[124] This conclusion is flatly inconsistent with the American law of citizenship at the time.[125] Taney's claim that free blacks were best regarded as "subjects,"[126] by comparison, seems a more accurate, if still imperfect, description of the actual legal status persons of color enjoyed at most times and places in antebellum America.

The limited federal case law on citizenship existing at the time *Dred Scott* was decided also supports the Taney Court's conclusion. No previous case explicitly discussed who was eligible for American citizenship, but the Court in *Moore v. Illinois* did indicate that states had the power to prohibit liberated slaves from entering their territory.[127] This decision seems to imply that such persons were not constitutional citizens. It is difficult to imagine how the citizens of each state would be entitled to "the privileges and immunities of the citizens of the several states" were states entitled to bar some citizens entirely.[128] Should previous executive and state court opinions count as valid precedents, the historical support for the Taney Court's ruling on citizenship becomes overwhelming. As noted above, virtually

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sachusetts Ratification Convention Debates, in Kaminski, ed., *A Necessary Evil?* at 87 (cited in note 111) (quoting Thomas Dawes).

123. Kettner, *American Citizenship* at 319 (cited in note 103).

124. *Dred Scott*, 60 U.S. (19 How.) at 583-84 (Curtis, J., dissenting). For a similar claim, see Bates, *Citizenship*, 10 Op. Atty. Gen. at 382 (cited in note 104).

125. See Kettner, *American Citizenship* at 235, 260, 311-12, 319 (cited in note 103).

126. Taney, *Memoir* at 605-06 (cited in note 99). See *Shaw v. Brown*, 35 Miss. 246, 315 (1858); Kent, 2 *Commentaries* at 282 (cited in note 44).

127. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1852).

128. The *Moore* opinion also indicated that states could bar paupers. See id. at 18. Paupers, however, could qualify for entry by becoming self-sufficient. Persons of color, by comparison, could never possess the qualities necessary for citizenship. See *Amy*, 11 Ken. at 333-34.

every state court and United States Attorney General who considered the issue before 1857 concluded that free blacks were not citizens.[129] Lincoln could offer no response in their sixth debate when Douglas asserted "(w)hat court or judge ever held that a negro was a citizen?" "The State courts had decided that question over and over again," Douglas continued, "and the *Dred Scott* decision on that point only affirmed what every court in the land knew to be the law."[130]

Taney and Daniel also presented an historical argument that supports the more modest claim that slaves freed after 1787 could not be or become United States citizens no matter what their status was in state law. The naturalization power granted to Congress in Article I, Section 8, both justices declared, was exclusive. In their view, persons who were not citizens of the United States in 1787 or descended from such citizens could become United States citizens only pursuant to an act of Congress. Thus, the Chief Justice and his associate from Virginia maintained that masters could not create American citizens by freeing their slaves, and states could not create American citizens by granting state citizenship to free blacks.[131]

This interpretation of Article I, Section 8 has strong historical support. Alexander Hamilton in *Federalist* 32 stated that the naturalization power was exclusive, and subsequent Supreme Court decisions adopted his position.[132] Even Justices Curtis and McLean conceded that states could not grant American citizenship to foreign-born aliens.[133] Without citing any historical evidence, however, the dissenters maintained that the naturalization power did not encompass persons born on American soil. "[T]he Constitution," Curtis asserted, "has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth."[134] McLean maintained that native-born slaves

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129. See notes 42-43, above.

130. Douglas, *Debates* at 268 (cited in note 70).

131. *Dred Scott*, 60 U.S. (19 How.) at 405-06, 417-20; id. at 481-82 (Daniel, J., concurring). For similar claims, see Cushing, *Relation*, 70 Op. Atty. Gen. at 746 (cited in note 104); Tucker, *A Dissertation on Slavery* at 73 (cited in note 107) ("slaves emancipated may be taken in execution to satisfy any debt contracted by the person emancipating them"); *Heirn v. Bridault*, 37 Miss. 209, 233 (1859) (act of manumission cannot create a state citizen); *Bryan v. Walton*, 14 Ga. 185, 201-02 (1853) (same).

132. Federalist 32 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 199 (New American Library, 1961); *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 585-86 (1847); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817). See *United States v. Villato*, 2 U.S. (2 Dallas) 370, 371-72 (1797).

133. *Dred Scott*, 60 U.S. (19 How.) at 578 (Curtis, J., dissenting), 533 (McLean, J., dissenting).

134. Id. at 581 (Curtis, J., dissenting); see id. at 531 (McLean, J., dissenting).

became United States citizens immediately upon gaining their freedom.[135] Curtis, by comparison, declared that persons born in the United States were United States citizens only if they were recognized as citizens in the state of their birth.[136] No other state or the federal government could grant American citizenship to persons who were not citizens at birth.[137] For all practical purposes, this position entailed that in 1857 no person of color born outside of New England could enjoy any American citizenship right. Thus, the celebrated Curtis dissent seems based entirely on a pleading error. McLean might have been the only dissenter had Sandford merely insisted in the lower federal court that no former slave (or person of color born in Missouri) could acquire American citizenship.

Taney may have been wrong when he insisted that "naturalization" was "confined to persons born in a foreign county."[138] Nevertheless, even if the national government had the power to grant citizenship to former slaves, that power was never exercised before the Civil War. The First Congress, Taney pointed out, "confine[d] the right of becoming citizens '*to aliens being free white persons*'," and that restriction was retained in subsequent legislation.[139] Hence, to the extent that history and precedent supported an exclusive federal naturalization power, no person whose ancestors were American slaves in 1787 could have been an American citizen in 1857.

Daniel and Taney also overreached when they claimed "that the African negro race never have been acknowledged as belonging to the family of nations."[140] Many Americans living in 1787, Jefferson in particular, believed that black persons "were created equal" and were "endowed by their Creator with certain inalienable rights."[141] The denial of black citizenship in *Dred Scott* does not, however, depend on Taney's ahistorical reading of the Declaration of Independence. The Taney/Daniel argument is true to

135. Id. at 531 (McLean, J., dissenting). For a similar defense of birthright citizenship, see Bates, *Citizenship*, 10 Op. Atty. Gen. at 382 (cited in note 104). If the McLean interpretation of birthright citizenship is taken literally, whether a slave became a citizen after manumission depended on whether that slave was born in the United States or imported from abroad.

136. *Dred Scott*, 60 U.S. (19 How.) at 582-86 (Curtis, J., dissenting). See Earl M. Maltz, *The Unlikely Hero of* Dred Scott*: Benjamin Curtis and the Constitutional Law of Slavery*, 17 Cardozo L. Rev. 1995, 2009-11 (1996).

137. *Dred Scott*, 60 U.S. (19 How.) at 585-86 (Curtis, J., dissenting).

138. Id. at 417.

139. Id. at 419, 482 (Daniel, J., concurring).

140. Id. at 475 (Daniel, J., concurring), 404-08 (opinion of the Court).

141. See, e.g., Thomas Jefferson, *Notes on the State of Virginia*, in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* 215 (Penguin Books, 1975).

the framers and subsequent legal developments as long as "the African race [had not] been acknowledged as belonging to the [American] family."[142] This claim that people of different races could not occupy the same civic space was frequently made during the founding era and was accepted by most white Americans during the 1850s.[143] When combined with federal naturalization policies that had always excluded black persons, the persistent strand of white nationalism in American politics provides strong historical support for Taney's claim that Dred Scott could not be or become a citizen of the United States.

2. Slavery in the Territories

The *Dred Scott* majority also made a plausible case that a federal ban on slavery in the territories was inconsistent with the original understanding of the Constitution and subsequent doctrinal developments. Taney, Daniel, Campbell, and Catron derived this constraint on congressional authority from the general constitutional principle that all exercises of legislative power are subject to strict limits. Given the framers' commitment to limited government, these justices reasoned, the Constitution could not have been intended to vest Congress with "supreme and irresponsible power . . . over boundless territories." After surveying at length the founders' hostility to absolutism of any kind, Justice Campbell declared that he sought "in vain for an annunciation that a consolidated power had been inaugurated . . . which had no restriction but the discretion of Congress."[144] The national government, Taney agreed, "cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it."[145]

The justices in the *Dred Scott* majority maintained that federal restrictions on slavery in the territories violated several significant constitutional principles. Constitutional history and precedent, Taney and Campbell asserted, forbade Congress from distinguishing between slaves and other possessions. In their view, although the national government had been given extensive power to protect property, the framers vested Congress with no power to define property. Campbell declared that

142. See Eisgruber, 10 Const. Comm. at 48 (cited in note 7).

143. See Jefferson, *Notes* at 186 (cited in note 141); Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Harvard U. Press, 1981); George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* at 1-164 (Harper & Row, 1971).

144. *Dred Scott*, 60 U.S. (19 How.) at 511, 505 (Campbell, J., concurring).

145. Id. at 449, 447.

"[w]hatever [state] Constitutions and laws validly determine to be property, . . . the Federal Government . . . [had] to recognize to be property."[146] "[T]he Constitution," the Chief Justice similarly wrote, "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." Hence, he continued, "no tribunal acting under the authority of the United States . . . has a right to draw such a distinction, or deny to [slavery] the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."[147]

Laws banning slavery in the territories, Taney, Daniel and Catron insisted, were particularly egregious violations of property rights because such measures unconstitutionally gave one class of citizens the right to the exclusive use of jointly owned American possessions. Territories, Taney asserted, were "acquired by the General Government, as the representative and trustee of the people of the United States, and . . . must therefore be held in that character for their common and equal benefit." Justice Daniel's concurring opinion reached the same conclusion. Congress, he maintained, could not by banning slavery in the territories "bestow upon a portion of the citizens of this nation that which is the common property and privilege of all."[148]

These limits on federal power had a more substantial legal heritage and greater popular support than contemporary historicists admit. The "right to enjoy the territory as equals"[149] was closely related to the more general animus towards class legislation that was central to early American constitutional thinking. As Howard Gillman and others have demonstrated, the framers of the Constitution as well as antebellum jurists believed that "equality . . . ought to be the basis of every law," that government should not pass laws that "subject 'some to peculiar burdens' or grant 'to others peculiar exemptions.'"[150] This notion that unequal laws violated due process was clearly articulated by Daniel Webster in the *Dartmouth College* case and was a staple

146. Id. at 515 (Campbell, J., concurring).

147. Id. at 451.

148. *Dred Scott*, 60 U.S. (19 How.) at 448, 488 (Daniel, J., concurring).

149. Id. at 527 (Catron, J., concurring).

150. Marvin Myers, ed., James Madison, *The Mind of the Founder: Sources of the Political Thought of James Madison* 10-11 (The Bobbs-Merrill Co., Inc., 1973); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 29 (Duke U. Press, 1993).

of Jacksonian era state judicial rhetoric.[151] Long before he sat on the Supreme Court, Justice Catron, in a very influential opinion, defined "the law of the land" as "a general public law, equally binding upon every member of the community."[152] Thus, from the perspective of the Southern Jacksonians on the Supreme Court, laws banning slavery in the territories looked suspiciously like the special privileges that, according to state court precedent and their inherited tradition, violated the first principle of due process.[153] Sidney George Fisher, a leading Philadelphia jurist, endorsed this sentiment in a monograph published shortly after *Dred Scott* was handed down. "[S]hould [Congress] make a distinction between [the Southern people] and the North in regard to the national domain," he declared, "then the great republican principle of equality before the law would be violated."[154] Justice McLean's claim that bans on slavery would encourage persons from free states to populate the territories,[155] probably strengthened the Taney Court's resolve that such policies were unconstitutional instances of partial legislation.

Historicists who claim that Taney's substantive reading of the due process clause is a "momentous sham,"[156] never acknowledge that Abraham Lincoln and his antislavery supporters promulgated similar constitutional "abominations." A strong strand of Northern legal opinion maintained that the Fifth Amendment *required* federal bans on slavery in the territories. "[T]he [due process] clause," Salmon Chase and other prominent abolitionists asserted, "prohibits the General Government from sanctioning slaveholding, and renders the continuance of slavery, as a legal relation, in any place of exclusive national jurisdiction, impossible."[157] The Republican Party Platforms of 1856 and

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151. *Dartmouth College v. Woodward*, 17 U.S. 518, 581 (1819) (argument of Daniel Webster). See *Clapp & Albright v. Administrator of Reynolds*, 2 Tex. Rep. 250, 252 (1847); *Vanzant v. Waddel*, 10 Tenn. (2 Yerg.) 260, 271 (1829) (Catron, J., concurring); *State Bank v. Cooper*, 10 Tenn. (2 Yerg.) 599, 605-07 (1831). For general discussions of class legislation before the Civil War, see Rodney L. Mott, *Due Process of Law* 259-66 (The Bobbs-Merrill Co., 1926); Gillman, *The Constitution Besieged* at 50-55, 59-60 (cited in note 150); Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* 23-29 (Penn. State U. Press, 1996).

152. *Wally's Heir v. Kennedy*, 10 Tenn. (2 Yerg.) 554, 555-56 (1831).

153. See Corwin, Dred Scott *Case* at 306 (cited in note 12).

154. Sidney George Fisher, *The Law of the Territories* 51 (C. Sherman & Son, 1859).

155. *Dred Scott*, 60 U.S. (19 How.) at 543 (McLean, J., dissenting).

156. Bork, *The Tempting of America* at 31-32 (cited in note 6).

157. Samuel Portland Chase and Charles Dexter Cleveland, *Anti-Slavery Addresses of 1844 and 1845* at 86 (Sampson Low, Son, and Marston, 1867). See also id. at 17, 101; William Goodell, *Our National Charters* 74-76 (Goodell, 1861); *Liberty Party Platform of 1844*, in Johnson, ed., *National Party Platforms* at 5 (cited in note 50); Theodore Dwight Weld, *The Power of Congress over the District of Columbia* 40 (J.F. Trow, 1838).

1860 explicitly declared that the federal government could not establish slavery in the territories because that policy would deprive enslaved blacks of their liberty without due process of law.[158] Other abolitionists found similar substantive prohibitions on slavery in the privileges and immunities clause and the guarantee clause of Article IV.[159] Indeed, as William Wiecek notes, "the foundation of radical constitutionalism was . . . an emphasis on the legally binding force of natural law,"[160] rather than an appeal to the specific policies intended by the framers. Chase was one of many abolitionists who believed that because "[s]lavery is . . . contrary to natural right. . . . The right to hold a man as a slave . . . is a right which, in its own nature, can have no existence beyond the territorial limits of the state which sanctions it."[161]

Unlike contemporary historicists, influential antebellum critics of *Dred Scott* agreed that Americans had an unenumerated constitutional right to bring their property into the territories. Because "the Territories are common property of the States," Justice McLean declared in his dissent, "every man has a right to go there with his property."[162] McLean disputed Taney's conclusion only because the former maintained that "a slave is not a mere chattel."[163] Following abolitionist logic, McLean refused to regard "a slave [as] property beyond the operation of the local law which makes him such."[164] Abraham Lincoln offered a similar analysis of federal power in the territories. "[T]he slaveholder [would have] the same [political] right to take his negroes to Kansas that a freeman has to take his hogs or his horses," he informed his fellow citizens, "if negroes were property in the same sense that hogs and horses are."[165] As late as 1901, Supreme Court opinions treated the Lincoln/McLean position as good constitutional law. Justice Homer Billings Brown in *Downes v. Bidwell* declared that "[i]f . . . slaves [were] indistin-

158. *Republican Platform of 1856*, in Johnson, ed., *National Party Platforms* at 27 (cited in note 50); *Republican Platform of 1860*, in Johnson, ed., *National Party Platforms* at 32 (cited in note 50).

159. See also, Lysander Spooner, *The Unconstitutionality of Slavery* 105-114 (Burt Franklin, reprinted 1965, originally published 1860); William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* at 268-71 (Cornell U. Press, 1977).

160. Wiecek, *Antislavery Constitutionalism* at 259 (cited in note 159).

161. Salmon Portland Chase, *Speech of Salmon P. Chase, in the Case of the Colored Woman, Matilda* 8 (Pugh & Dodd, Printers, 1837). See Spooner, *Unconstitutionality of Slavery* at 7-10, 14, 17-18, 36-38, 43-44, 59-60, 62-63 (cited in note 159).

162. *Dred Scott*, 60 U.S. (19 How.) at 549 (McLean, J., dissenting).

163. Id. at 550.

164. Id. at 549-50 (McLean, J., dissenting).

165. Lincoln, 2 *Collected Works*, 245, 264 (cited in note 55); Cong. Globe, 31st Cong., 1 Sess., App., 479 (speech of Salmon Chase).

guishable from other property, the inference from the *Dred Scott* case is irresistible that Congress had no power to prohibit their introduction into a territory."[166]

McLean, Lincoln and Brown could oppose *Dred Scott* because they relied on what they believed were the Constitution's antislavery aspirations. The Taney Court's opinion was wrong, in their opinion, because that decision violated an unenumerated constitutional right to liberty. Once the general right to take property into the territories is conceded, however, more historically oriented constitutionalists may find little ground for making a unique exception for property in human beings. As a northern federal court noted in another context, "[h]ow is it possible . . . to regard slave property as less effectively secured by the provisions of [the Constitution] than any other property which is recognized as such by the law of the owner's domicil [sic]?"[167]

Most significantly from an originalist perspective, the *Dred Scott* majority could cite the Father of the Constitution in support of their assertion that Congress had no power to ban slavery in the territories. In an 1819 letter quoted at length in Justice Daniel's opinion,[168] Madison informed a correspondent that "[n]othing in the proceedings of the State Conventions" evinced an intention to give Congress "a power over the migration or removal of individuals, whether freemen or slaves, from one State to another, whether new or old." "Had such been the construction," Madison added, the Constitution might not have been ratified. Yet, he noted, "among the objections to the Constitution, and among the numerous amendments to it proposed by the State Conventions, not one of which amendments refers to the [territorial] clause."[169] Madison further observed that political practice from 1787 until 1819 had strengthened the constitutional right to bring slaves into American territories. In language that recalled his objections to John Marshall's opinion in *McCulloch v. Maryland*,[170] Madison declared that the territorial clause merely gave Congress "a power to make the provisions really needful or necessary for the government of settlers." "[T]he interdict of slavery [in the territories]" could hardly be regarded as "among the needful regulations contemplated by the Constitu-

166. *Downes v. Bidwell*, 182 U.S. 244, 274 (1901).

167. *United States ex rel. Wheeler v. Williamson*, 28 Fed. Cas. 686, 693 (1855).

168. *Dred Scott*, 60 U.S. (19 How.) at 491-92 (Daniel, J., concurring).

169. James Madison to Robert Walsh, Nov. 27, 1819, 3 *Letters and Other Writings of James Madison* 150-52 (R. Worthington, 1884).

170. 17 U.S. 316 (1819).

tion," he concluded, "since in none of the territorial governments created by [Congress] is such an interdict found."[171]

Madison's constitutional argument against a ban on slavery in the territories hardly clinches the historical case for *Dred Scott*. Surviving records reveal almost no discussion of the issue during the constitutional convention and subsequent ratification debates.[172] In sharp contrast to Madison, Northern framers living in 1820 maintained that they did intend to vest Congress with the power to ban slavery.[173] Madison also "forgot" that the First Congress had voted almost unanimously to prohibit slavery in the Northwest Territories.[174] This exercise of legislative power played a major role in both *Dred Scott* dissents.[175] Justice Curtis effectively demolished the lame efforts in the majority opinions to explain away the congressional ban on slavery in the Northwest Territories.[176] Finally, Supreme Court precedent seemed clearly on the side of the *Dred Scott* dissents. Chief Justice John Marshall's 1828 ruling in *American Ins. Co. v. Canter* that when "legislating for [the territories], Congress exercises the combined powers of the general, and of a state government"[177] strongly supports the Curtis/McLean position because, as Fehrenbacher

171. Madison to Walsh, in 3 *Letters* at 152-53 (cited in note 169). See also, James Madison to James Monroe, February 23, 1820, in 3 *Letters* at 168 (cited in note 169).

172. John P. Kaminski's compilation of references to slavery during the ratification debates contains only one reference to slavery in the territories. *Pennsylvania Ratifying Convention Debates*, in Kaminski, ed., *A Necessary Evil?* at 137 (cited in note 111) (James Wilson claiming that Congress had power to ban slavery in the territories).

173. *Jay to Elias Boudinot, November 17, 1819*, in Henry P. Johnston, ed., 4 *The Correspondence and Public Papers of John Jay* 430-31 (G.P. Putnam's Sons, 1893); Rufus King, *The Substance of Two Speeches on the Missouri Bill Delivered by Mr. King in the Senate of the United States*, in Charles R. King, ed., 6 *The Life and Correspondence of Rufus King* 690-703 (G.P. Putnam's Sons, 1900).

174. 1 Stat. 50 (1789) (Act to provide for the Government of the Territory Northwest of the river Ohio, Art. VI).

175. See *Dred Scott*, 60 U.S. (19 How.) at 539-40, 547 (McLean, J, dissenting); id. at 617 (Curtis, J., dissenting). See also Lincoln, 3 *Collected Works* at 527-35 (cited in note 55) (discussing founding fathers who endorsed the prohibition of slavery in the Northwest Territories); Fehrenbacher, *The Dred Scott Case* at 370 (cited in note 24). Justice Curtis did agree that the ban on slavery in the Northwest Ordinance was void because Congress under the Articles of Confederation lacked the power to govern the territories. *Dred Scott*, 60 U.S. (19 How.) at 608, 617 (Curtis, J., dissenting). See also id. at 490 (Daniel, J., concurring); id. at 503-04 (Campbell, J., concurring). Madison in *Federalist* 38 also declared that the Northwest Ordinance was passed "without the least color of constitutional authority." Federalist 38 (Madison) in *The Federalist Papers* 231, 239 (Arlington House, 1966).

176. *Dred Scott*, 60 U.S. (19 How.) at 605-33 (Curtis, J., dissenting). See Lowell and Gray, *Legal Review* at 28-30 (cited in note 117).

177. 26 U.S. 511, 546 (1828).

notes, "no one questioned the power of a state to prohibit slavery."[178]

Nevertheless, from an historical perspective, the *Dred Scott* dissents have as many weaknesses as the majority opinions. Neither Curtis nor McLean gave any explanation as to why such states as South Carolina would have consented to a constitutional provision that empowered the national government to ban slavery in all territories. This point is particularly troubling from an originalist perspective because the southern framers alive during the Missouri Crisis of 1819-20 publicly stated that they had not intended to grant that authority to Congress.[179] Moreover, although Curtis criticized methods of constitutional interpretation that replaced "a republican Government, with limited and defined powers," with "a Government which is merely an exponent of the will of Congress,"[180] his method of constitutional interpretation yielded that undesirable result, at least with respect to the territories. Five pages before condemning any method of constitutional interpretation that gave the national legislature unlimited powers, Curtis declared that "[t]here is nothing . . . which qualifies the grant of power" to Congress in the territorial clause. "Regulations must be needful," he stated, "but it is necessarily left to the legislative discretion to determine whether a law be needful."[181]

This broad interpretation of "needful" plays a crucial role in contemporary critiques of *Dred Scott.* The late twentieth-century legal mind regards elected officials as having the power to regulate property in any way that might plausibly be regarded as a rational means to a legitimate government end.[182] Hence, Fehrenbacher and others never doubt that McLean was on solid historical ground when the Ohio justice explicitly cited *McCulloch* for the proposition that Congress was the sole judge of "needful regulations." "[T]he degree of its necessity," both Curtis and McLean insisted, "is a question of legislative discretion, not of judicial cognizance."[183] Many framers, however, sharply

178. Fehrenbacher, *The Dred Scott Case* at 373 (cited in note 24).

179. Madison to Walsh, 3 *Letters* at 150-52 (cited in note 169); Annals of Congress, 16th Cong., 1st Sess. 1312, 1315-22, 1326-27 (Feb., 1820) (statement of Charles Pinckney).

180. *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting).

181. Id. at 616 (Curtis, J., dissenting).

182. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Wickard v. Filburn*, 317 U.S. 111 (1942).

183. *Dred Scott*, 60 U.S. (19 How.) at 542 (McLean, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); id. at 616 (Curtis, J., dissenting) (quoted above); Fehrenbacher, *The Dred Scott Case* at 369 (cited in note 24) (defending a similarly broad view of "all needful rules").

disputed John Marshall's claim that "necessary . . . [means] no more than . . . useful, or essential."[184] Madison, in particular, claimed with respect to *McCulloch* that "it was anticipated . . . by few, if any, of the friends of the Constitution, that a rule of construction would be introduced as broad and pliant as what has occurred."[185] Indeed, *McCulloch* may have survived the Taney Court only because Jacksonian presidents vetoed on constitutional grounds every measure that might have given the justices an opportunity to overrule or narrow Marshall's broad conception of national power.[186] Given the sparse historical record on the original meaning of "necessary" in the Constitution,[187] the more narrow interpretation underlying the Daniel concurrence in *Dred Scott*[188] has as good an historical pedigree as the Hamiltonian interpretation that animated the Curtis and McLean dissents.

Contemporary historicists may also be mistaken when they use the Northwest Ordinance to demonstrate that Congress had the constitutional authority to ban slavery in *all* American territories. Implicit in that Ordinance was an understanding that slavery would be permitted in more southern latitudes.[189] This arrangement was continued by the Missouri Compromise, which essentially divided the Louisiana Purchase between the North

184. *McCulloch*, 17 U.S. (4 Wheat.) at 413.

185. Madison to Roane, 3 *Letters* at 145 (cited in note 169). See Madison, *To the House of Representatives*, in Myers, *Mind of the Founder* at 391, 392 (cited in note 150).

186. No justice in the *Dred Scott* majority ever cited *McCulloch* to support broad federal power. Several Taney Court justices were previously on record as opposed to the Marshall Court's interpretation of "necessary." See Swisher, *Taney* at 194-97 (cited in note 3); *Searight v. Stokes*, 44 U.S. 151, 180-81 (1845) (Daniel, J., dissenting). See also, Merrill D. Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* 306 (Oxford U. Press, 1987) (claiming that the Supreme Court would have declared unconstitutional the bank bill that President Tyler vetoed in 1841).

For presidential vetoes clearly rejecting Marshall's interpretation of "necessary," see James Monroe, *Veto Message* in 2 *Messages and Papers* at 142-43 (cited in note 49) (no power to establish toll roads); Andrew Jackson, *Veto Message* in 2 *Messages and Papers* at 576-91 (cited in note 49) (no power to establish a national bank); John Tyler, *Veto Messages* in 4 *Messages and Papers* at 63-72 (cited in note 49) (no power to incorporate a bank); James K. Polk, *Veto Messages* in 4 *Messages and Papers* at 460-66 (cited in note 49) (no power to construct local improvements); Franklin Pierce, *Veto Messages* in 5 *Messages and Papers* at 247-56 (cited in note 49) (no power to construct hospitals for the insane); James Buchanan, *Veto Messages* in 5 *Messages and Papers* at 543-50 (cited in note 49) (no power over education).

187. See Mark A. Graber, *Unnecessary and Unintelligible*, 12 Const. Comm. 167 (1995).

188. *Dred Scott*, 60 U.S. (19 How.) at 491-92 (Daniel, J., concurring).

189. See Finkelman, *Slavery* at 36 (cited in note 40); Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution* 186, 190-93, 199 (Bobbs-Merrill Co., 1967); Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* at 382-85 (Harcourt Brace Jovanovich, Inc., 1971).

and South.[190] These measures suggested an ongoing arrangement between moderates in both sections of the United States to allocate the territories equally between the North and South. Sidney Fisher offered a variation on this theme when he declared that the Northwest Ordinance and the Missouri Compromise were constitutional only because those measures were secured "with the consent and co-operation of the Southern States."[191]

Fisher's claim that "to exclude the people of the slave States . . ., *without their consent*, would be unequal and opposed to the spirit and intent of the Constitution"[192] may be the most plausible historicist understanding of federal power in the territories. Unlike any opinion in *Dred Scott*, Fisher could explain Southern consent to a document that permitted Congress to pass the Northwest Ordinance and the Missouri Compromise. If Fisher was right, then both Taney and Curtis were wrong. Congress could ban slavery in some territories, but not, as the *Dred Scott* minority suggested, by a simple majority vote. Still, the Taney majority opinion seems much closer than the dissents to this original understanding of the territorial clause. The majority opinions in *Dred Scott* maintained, albeit in a form much more favorable to the south, the principle of equal access to the territories. Indeed, the practical difference between the Fisher thesis and the *Dred Scott* decision did not amount to much after 1850, given Southern intransigence on any future federal ban on slavery in the territories. The Republican party platform and the *Dred Scott* dissents, by comparison, would grant Northern majorities the absolute power to ban slavery in all territories. By so doing, Lincoln, Curtis and McLean abandoned the implicit constitutional restrictions on federal power over slavery that appear to have existed throughout antebellum history.[193]

C. The Aspirational Critique

The flaws in the aspirationalist critique of *Dred Scott*, not surprisingly, mirror the flaws in the historicist critique of that decision. The justices in the *Dred Scott* majority relied at crucial junctures in their arguments on general principles of justice, and the general principles of justice they relied on had strong roots in both the Constitution and the American political tradition. That

190. See Peterson, *Great Triumvirate* at 65 (cited in note 186) (noting that some southerners believed the larger northern territories would not be settled until the distant future); Robinson, *Slavery* at 416 (cited in note 189).

191. Fisher, *Law of the Territories* at 50, 44, 65 (cited in note 154).

192. Id. at 50-52, 63.

193. Id. at 79-80 (claiming the Republican position was unconstitutional).

present-day Americans regard those principles as pernicious is beside the point. Justices who make aspirational arguments will base their rulings on those values that, upon reflection, they think place the constitutional order in its best light.[194] For southern Jacksonian jurists in the mid-nineteenth century, those values included both slavery and white supremacy.

Aspirationalists are clearly wrong when they claim that *Dred Scott* demonstrates the need for justices to temper the framers' intentions and legal precedent with general principles of justice. A plausible historicist case can be made that black persons in 1857 could be or become American citizens and that Congress had the power to ban slavery in the territories. Both dissents in *Dred Scott* made extensive use of originalist and doctrinal arguments, and most contemporary aspirationalists confess that those dissents had the better of the historical argument on several points.[195] Justice McLean offered a detailed history of the territorial clause, the Northwest Ordinance and John Marshall's opinion in *American Ins. Co. v. Canter*[196] to support his claim that Congress had the power to prohibit slavery in American territories.[197] Justice Curtis referred at length to the history of the privileges and immunities clause of Article IV, which he concluded "clear[ly]" demonstrated that "at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were entitled to the privileges and immunities of general citizenship of the United States."[198] Indeed, Curtis seemed to reject aspirational reasoning emphatically. "[G]eneral considerations concerning the social and moral evils of slavery," he bluntly declared, are "reasons purely political" which "render[ ] . . . judicial interpretation impossible—because judicial tribunals . . . cannot decide upon political considerations."[199]

More significantly, a proslavery aspirationalist could easily reach both central holdings of Chief Justice Taney's opinion. Scholars who celebrate "the liberal tradition in the United States" may see slavery and racism as political practices or compromises that are incompatible with broader constitutional prin-

194. See Ronald Dworkin, *Law's Empire* 45-86, 355-99 (Harvard U. Press, 1986).

195. See Eisgruber, 10 Const. Comm. at 48-49 (cited in note 7).

196. 26 U.S. 511 (1828).

197. *Dred Scott*, 60 U.S. (19 How.) at 535-41 (McLean, J., dissenting).

198. Id. at 575-76 (Curtis, J., dissenting).

199. Id. at 620 (Curtis, J., dissenting). For a similar historicist assertion, see Spooner, *Unconstitutionality of Slavery* at 124 (cited in note 159).

ciples,[200] but more recent works indicate that racist and other ascriptive ideologies are as rooted in the American political tradition as liberal, democratic and republican ideals.[201] Racism, in particular, was well grounded in American political thought from the very beginning. Although most framers believed that slavery was wrong and inconsistent with the ideals expressed by the Declaration of Independence,[202] the vast majority of the persons responsible for the Constitution did not think as a matter of political principle or prudence that a multiracial society was desirable. "Nothing is more certainly written in the book of fate," Jefferson asserted, "than that these two people are to be free; nor is it less certain that the two races, equally free, cannot live in the same government."[203] For this reason, moderate antislavery leaders supported schemes that would immediately transport freed slaves to their original homeland, thus ensuring that free blacks and whites would avoid sharing the same civic space. As William Freehling notes, Jefferson and his fellow framers "tie[d] American emancipation to African colonization."[204] "It is impossible for us to be happy," a delegate to the North Carolina ratification debate declared, "if, after manumission, they are to stay among us."[205] A 1775 proposal to free slaves who fought for American independence would secure racial homogeneity by rewarding blacks with land in Canada.[206]

Mainstream emancipation programs after the Revolution were similarly hostile to integration and almost always included mandatory colonization for blacks. Madison admitted "the inadmissibility of emancipation without deportation." Jefferson emphasized the importance of "provid[ing] an asylum to which we

200. See generally Louis Hartz, *The Liberal Tradition in America* (Harcourt, Brace and Co., 1955). See also Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 523-26 (Harper & Brothers Publishers, 1944).

201. See especially Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 Am. Pol. Sci. Rev. 549 (1993).

202. See Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis On the Intent of a Pro-Slavery Constitution*, 42 Vand. L. Rev. 93, 104 n.64 (1989) (quoting Patrick Henry, George Washington, and Thomas Jefferson); William W. Freehling, *The Founding Fathers and Slavery*, 77 Am. Hist. Rev. 81, 82 (1972).

203. Thomas Jefferson, *Autobiography*, in Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* 51 (Modern Library, 1944).

204. Freehling, 77 Am. Hist. Rev. at 83 (cited in note 202). See William W. Freehling, *The Reintegration of American History: Slavery and the Civil War* 257, 270 (Oxford U. Press, 1994).

205. *North Carolina Ratifying Convention Debates*, in Kaminski, ed., *A Necessary Evil?* at 199 (cited in note 111) (statement of James Galloway).

206. *A Proposal to Free the Slaves*, in Kaminski, ed., *A Necessary Evil?* at 4-5 (cited in note 111). See Jonathan Dickinson Sergeant, *A Plan to Free the Slaves*, in Kaminski, ed., *A Necessary Evil?* at 11 (cited in note 111).

can, by degrees, send the whole of that population from among us."[207] Such efforts to rid the Old Dominion of all persons of color was a central concern of antebellum Virginia politics. The so-called "Virginia 'Antislavery' Debate" of 1831-32, commentators point out, is better labeled "the Virginia Deportation Debate."[208]

Conservative and moderate Republicans also insisted that "colonization [was] the next step after emancipation."[209] "The idea of liberating the slaves and allowing them to remain in the country," Lincoln's confidant Frank Blair declared, "is one that never will be tolerated."[210] Even Republicans who opposed colonization described their coalition as a "white man's party" and proposed to settle the western Territories with "free, white men."[211] The "main impulse" of many Republicans, the *New York Tribune* admitted, "is a desire to secure the new Territories for Free White Labor, with little or no regard for the interests of negroes, free or slave."[212] David Wilmot, the author of the Wilmot Proviso, "would preserve to free white labor a fair country, a rich inheritance, where the sons of toil, of my own race and own color, can live without the disgrace which association with negro slavery brings upon free labor."[213] Historians suggest that Wilmot and several of his allies "may have been more anti-black than John C. Calhoun."[214]

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207. Madison, *Reply to Thomas Dew*, in Myers, ed., *Mind of the Founder* at 421, 423 (cited in note 150); Thomas Jefferson to Jared Sparks, February 4, 1824, in Kaminski, ed., *A Necessary Evil* at 264-67 (cited in note 111). See Ruffner, *Address to the People of West Virginia* at 39-40 (cited in note 88); Harrison, *Review of the Slave Question* at 25, 34-48 (cited in note 88); Tucker, *Dissertation on Slavery* at 94-95 (cited in note 107) (banishment encouraged, but not mandated).

208. Freehling, *Road to Disunion* at 195 (cited in note 83).

209. Curtis, 68 Chi.-Kent L. Rev. at 1125 (cited in note 85).

210. Foner, *Free Soil* at 270 (cited in note 51) (quoting Frank Blair). See Cong. Globe, 36th Cong., 1st sess. 60 (speech of Senator Trumbull); Foner, *Free Soil* at 267-79 (cited in note 51); Litwack, *North of Slavery* at 29, 62-63, 277-78 (cited in note 52). Abraham Lincoln is the best known prominent antislavery advocate who regarded colonization as the proper, if not the only, solution to the potential race problems that would result after emancipation. See, e.g., Lincoln, in 2 *Collected Works* at 131-32, 409 (cited in note 55).

211. Cong. Globe, 34th Cong., 3d Sess., App. 91 (speech of William Cumback); Lyman Trumbull, *Great Speech of Senator Trumbull on the Issues of the Day* 12 (Lost Cause Press, 1966).

212. Foner, *Free Soil* at 61 (cited in note 51) (quoting the New York Tribune, Oct. 15, 1856). See also Lincoln, 2 *Collected Works* at 363 (cited in note 55) ("Have we no interest in the free Territories . . . that they should be kept open for the homes of free white people?"); Lincoln, *Debates* at 315-16 (cited in note 83); Lincoln, 3 *Collected Works* at 437 (cited in note 55) (noting free white man's claim to the new territory).

213. Cong. Globe, 29th Cong., 2d Sess., App. 317 (speech of David Wilmot).

214. Freehling, *Road to Disunion* at 459 (cited in note 83); Litwack, *North of Slavery* at 267-69 (cited in note 52) (noting Stephan Douglas' racism).

Aggressive defenses of human bondage flourished only after the 1820s, but some framers, particularly those from South Carolina, believed that a commercial republic should aspire to slavery. Northern mercantile interests would become more sympathetic to the South's peculiar institution, a contributor to a Columbia newspaper suggested, once New Englanders realized that "[t]he more rice we make, the more business will be for their shipping."[215] By the time *Dred Scott* was decided, homilies to the virtues of slavery were staples in Southern judicial opinions.[216] Members of the Georgia Supreme Court, in particular, made extensive use of aspirational arguments in opinions that limited manumission and the rights of free negroes. Slavery, the judges opined in 1854, "was wisely ordained by a forecast high as heaven above man's, for the good of both races."[217] Three years later, that bench implored "women and old men, and persons of weak and infirm minds, [to] be disabused of the false and unfounded notion that slavery is sinful, and that they will peril their souls if they do not disinherit their offspring by emancipating their slaves!"[218]

The *Dred Scott* opinions articulated these racist aspirations. Black persons, Taney declared, were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[219] Justice Daniel similarly relied on general principles of constitutional justice when he asserted that slavery enjoyed special constitutional status as "the only private property which the Constitution has *specifically recognised* [sic], and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*."[220] Even if Taney actually reached his conclusions in *Dred Scott* by strict adherence to historical

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215. Robert M. Weir, *Slavery and the Structure of the Union*, in Michael Allen Gillespie and Michael Lienesch, eds., *Ratifying the Constitution* 201, 216 (U. Press of Kansas, 1989).

216. See *Mitchell v. Wells*, 37 Miss. 235, 238 (1859); *American Colonization Society v. Gartrell*, 23 Ga. 448, 461-65 (1857); *Vance v. Crawford*, 4 Ga. 445, 459 (1848); *Bryan v. Walton*, 14 Ga. 185, 205-06 (1853).

217. *Cleland v. Waters*, 16 Ga. 496, 514 (1854).

218. *Gartrell*, 23 Ga. at 465. For similar proslavery aspirations, see *Pendleton v. State*, 6 Ark. 509, 511-12 (1846); *Fisher's Negroes v. Dabbs*, 14 Tenn. 119, 125-31 (1834); *Bryan*, 14 Ga. at 205-06; *Vance*, 4 Ga. at 459; *Mitchell*, 37 Miss. at 238.

219. *Dred Scott*, 60 U.S. (19 How.) at 407.

220. Id. at 490 (Daniel, J. concurring). Unlike Taney, Daniel explicitly regarded natural law as a legitimate source for constitutional interpretation. "The natural society of nations," he declared, "cannot subsist unless the natural rights of each be respected." Id. at 483.

methods of constitutional interpretation, no reason exists for thinking that the result would have been different had the Chief Justice relied more heavily on aspirational logic. Although his feelings on slavery, particularly as a young man, were somewhat ambivalent, Taney was throughout his life committed to white rule and southern culture.[221] Indeed, he informed a correspondent that he thought the Court's ruling in *Dred Scott* would promote the interests of both races.[222]

III. THE TYRANNY OF EXAMPLES

Dred Scott is not an example of what is wrong with any conception of the judicial function in constitutional cases. Rather, *Dred Scott* demonstrates how in the wrong hands or in the wrong circumstances all constitutional theories may yield unjust conclusions. The justices in the *Dred Scott* majority relied on institutional, historical and aspirational arguments that, while often strained, were not substantially weaker from a pure craft perspective than the institutional, historical and aspirational arguments made by the dissenters in *Dred Scott*. Taney was able to use these constitutional modalities in his opinion because all forms of constitutional logic are capable of yielding evil results. Institutional arguments yield evil results whenever elected officials and popular majorities support evil laws. Historical arguments yield evil results whenever constitutional framers and ratifiers constitutionalize evil practices. Aspirational arguments yield evil results whenever constitutional framers and ratifiers have evil constitutional values.

In specific cases, of course, some theories perform better than others. *Dred Scott* may be no exception. Perhaps the Taney Court would have reached the just result in that case had the majority relied exclusively on the "right" theory of the judicial role in constitutional cases. Still, contemporary commentators who use *Dred Scott* to highlight how the constitutional theories advanced by their rivals may lead to injustice routinely ignore other issues raised by the American law of slavery where their preferred theory fares worse. All constitutional theories, when

221. See Swisher, *Taney* at 586-88 (cited in note 3); Fehrenbacher, *The Dred Scott Case* at 552-55, 557-61 (cited in note 24).

222. Swisher, *Taney* at 516-18 (cited in note 3) (quoting Taney to Rev. Samuel Nott, August 19, 1857). See Fehrenbacher, *The Dred Scott Case* at 554-55 (cited in note 24) (discussing a long proslavery memorandum that Taney wrote in 1860, but never made public). Justice Wayne also had a lifelong commitment to racial supremacy. See Alexander A. Lawrence, *James Moore Wayne: Southern Unionist* 143 (U. of North Carolina Press, 1943).

applied to the various constitutional controversies of the 1850s, are vulnerable to uniquely evil outcomes, proslavery results that might have been avoided had the justices relied on some other approach to the judicial function.

Institutionalists who advocate judicial deference to elected officials would be inclined to sustain constitutionally dubious proslavery legislation. Consider the Fugitive Slave Acts that Congress passed in 1793 and 1850.[223] Both historical and aspirational theories provide strong grounds for declaring these statutes unconstitutional. An historicist could point out that the language used by the fugitive slave clause[224] and its placement in Article IV rather than Article I of the Constitution (which lists national powers) indicates that the framers vested Congress with no power over fugitive slaves. The fugitive slave clause, in this common view, merely established state obligations.[225] An antislavery aspirationalist would regard the fugitive slave clause as a constitutional contradiction that courts should either ignore or interpret as narrowly as possible.[226] Proponents of judicial restraint, on the other hand, would probably be compelled to sustain the Fugitive Slave Acts because those measures were not clearly unconstitutional. If popular majorities believed that the federal government should assist slave catchers in the rendition process or give slave catchers immunities from hostile state laws, then a judge committed to institutionalism would have to let the people have their way.

Judges committed to historical theories of judicial review might feel obliged to strike down any federal antislavery legislation not limited to the territories or the international slave trade. Consider a federal law that promoted freedom within a state, say a measure requiring states to keep manumission legal (or even a total ban on slavery). Both institutional and aspirational theories provide strong reasons for sustaining such statutes. A proponent of judicial restraint would argue that the court should not second guess whatever slavery policies the people's national representatives thought best. An antislavery aspirationalist would see such

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223. 1 Stat. 302 (1793); 9 Stat. 462 (1850).

224. 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.

U.S. Const., Art. IV, § 2, cl. 3.

225. See Chase, *Speech of Salmon P. Chase* at 17-27 (cited in note 161); Currie, *The Constitution* at 243 (cited in note 5); Finkelman, *Slavery* at 100-02 (cited in note 40).

226. Sotirios A. Barber, *On What the Constitution Means* 199-201 (Johns Hopkins U. Press, 1984).

measures as fulfilling the antislavery aspirations of the constitution. An historicist, however, might be compelled to declare such antislavery measures unconstitutional. At least in 1857, a clear consensus existed that "Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among them."[227]

The vulnerability of aspirational theories to unique proslavery outcomes is more complicated. An antislavery aspirationalist would reach every antislavery result that an institutionalist or historicist would reach, and might sometimes reach antislavery results that could not be obtained by alternative approaches to the judicial function. A proslavery aspirationalist, however, would not only reach every proslavery result that an institutionalist or historicist would reach, but such a judge would sometimes reach proslavery results that could not be obtained by other means. Consider the result of *Dred Scott* had Scott sued for his freedom in Illinois. Both institutional and aspirational theories seem to compel a judicial decision in favor of freedom. An institutionalist would, absent national legislation, defer to Illinois' judgment that slaves became free when voluntarily taken to Illinois. An historicist would defer to the framers' judgment that Illinois have the authority to determine the status of slavery in Illinois. A proslavery aspirationalist, however, could by citing the comity clause[228] or perhaps a more general constitutional right to travel,[229] insist that slaveowners had a right to bring their slaves along when they journeyed or temporarily resided in free states.[230]

Dred Scott and law of slavery confound contemporary constitutional theorists who proclaim that the Constitution is nearly perfect when properly interpreted. All prominent theories of the judicial function in constitutional cases yield proslavery results in the right circumstances. No prominent theory could have promised perfectly just outcomes during the 1850s because American

227. *Dred Scott*, 60 U.S. (19 How.) at 536-37 (McLean, J., dissenting); see also id. at 500 (Campbell, J., concurring). Lincoln, in particular, repeatedly asserted that the federal government had no constitutional power to regulate slavery within states. See Lincoln, 2 *Collected Works* at 230-31, 492 (cited in note 55); Lincoln, *Debates* at 52, 131-32 (cited in note 70); Lincoln, 3 *Collected Works* at 77-78, 96, 327, 329, 334, 402, 404, 435, 439-40, 460 (cited in note 55); Lincoln, 4 *Collected Works* at 5, 162, 258, 263, 270 (cited in note 55).

228. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, § 2, cl. 1.

229. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

230. For one such argument that relied on "fundamental principles" and "natural rights" see Cong. Globe, 35th Cong., 1st Sess., App. 199 (speech of Charles E. Stuart) (quoting the Washington Union, Nov. 11, 1857).

popular majorities supported racist practices, because the framers in 1787 provided some degree of protection for a racist institution, and because many framers had racist aspirations. *Dred Scott* is an evil decision because slavery and white supremacy are evil practices, and not because some flaw existed in the interpretive modalities adopted by the Taney Court. Unfortunately, constitutional commentators who pretend that devotees of their theory would see, say and do no evil never address the central question *Dred Scott* raises. What does a judge or any other person obligated to interpret the Constitution do when their preferred theory of constitutional interpretation yields an evil result?