

THIRTEEN WAYS OF LOOKING AT *DRED SCOTT*

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I know noble accents
And lucid inescapable rhythms;
But I know, too,
That the blackbird is involved
In what I know.

—Wallace Stevens, *Thirteen Ways of Looking at a Blackbird*

INTRODUCTION

Wallace Stevens found in the blackbird an inexhaustible source of different perspectives. One could say the same of *Dred Scott v. Sandford*.¹ A full 150 years after it was handed down, *Dred Scott* still fascinates and bedevils constitutional theorists and political scientists. It is truly a classic case whose meaning seems magically to make itself relevant as new situations and problems arise. No matter how much we think we understand the noble accents and inescapable rhythms of law and political science, we discover that *Dred Scott*, like the blackbird, is involved in what we know. In March of 2006, the two of us, along with Paul Finkelman, organized a conference at the University of Texas to commemorate the upcoming 150th anniversary of the 1857 decision. The more we talked about *Dred Scott*, the more we discovered that it could not easily be buried in the past. It was still with us in countless ways; indeed we found that *Dred Scott* was relevant to almost every important question of contemporary constitutional theory. And so, in this essay, we offer a baker's dozen reasons why *Dred Scott*

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1. 60 U.S. (19 How.) 393 (1857).

continues to deserve a central place in the canon of American constitutional law.²

ONE: THE FACTS OF *DRED SCOTT*

Although law professors like to begin with “the facts” of cases, they usually move all too quickly to abstract propositions of law, leaving behind the cases’ political contexts and human dimensions. As John Noonan has explained, the law often puts “masks” over the faces of the actual litigants.³ In *Debs v. United States*,⁴ for example, Justice Holmes never once refers to Eugene V. Debs by name or identifies him as the important political figure that he was—a man who had run for President four times between 1900 and 1912 (and who would garner close to a million votes for President in the 1920 election, while still in prison).⁵ Not surprisingly, the Supreme Court rarely dwelled on the facts of cases involving slavery. In Justice Story’s majority opinion in *Prigg v. Pennsylvania*,⁶ for example, the reader learns almost nothing about the heartbreaking fate visited upon Margaret Morgan and her children, who were snatched by a bounty hunter in Pennsylvania and dragged across the Maryland border into slavery, even though Morgan had been freed by her original owner and her children were born free.⁷

Roger Taney’s opinion in *Dred Scott*, however, begins with a relatively lengthy “agreed statement of facts,”⁸ from which we can glean a fair amount about the actual people at the heart of the case. We learn that Dred

2. Indeed, a subtext of this article, and of the entire symposium of which it is a part, is to lament the degree to which the case has fallen out of what we have elsewhere called the “pedagogical canon” of constitutional law. Most law school casebooks either ignore the case entirely or offer a very limited treatment. Only PROCESSES OF CONSTITUTIONAL DECISIONMAKING (Paul Brest et al. eds., 5th ed. 2006), which we co-edit, discusses the case at length. Admittedly, there are opportunity costs in doing so; like other choices in canon formation, it means omitting competing cases and materials from a casebook, and it requires teachers to leave out other possible topics in their constitutional law classes in order to find time to present the complex issues raised by *Dred Scott*. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

3. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS *passim* (1976).

4. 249 U.S. 211 (1919).

5. See NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 325 (1982); see also JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004).

6. 41 U.S. (16 Pet.) 539 (1842).

7. See Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 609–12 (1993); Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247, 247–55; see also Argument of Mr. Hambly, of York, (Pa.) in the Case of Edward Prigg v. Pennsylvania, *reprinted in* 1 FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE 121, 128–30 (Paul Finkelman ed., 1988).

8. 60 U.S. (19 How.) 393, 397–98 (1857).

Scott himself, as of 1834, “was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States.”⁹ Dr. Emerson traveled from Missouri to a military post across the Mississippi River in Rock Island, Illinois, and took Scott with him, “[holding] him there as a slave until the month of April or May, 1836.”¹⁰ Dr. Emerson then went back across the Mississippi, traveling north to a military post at Fort Snelling (near present day Minneapolis).¹¹ Again, he took Scott with him and “held the plaintiff in slavery at said Fort Snelling” until 1838.¹²

The statement of facts tells us little about the man Dred Scott himself, but there are fascinating hints in Don E. Fehrenbacher’s masterful study of the case:¹³ Dred was “no more than five feet tall” and probably illiterate. Yet, “a onetime governor of Missouri,” Fehrenbacher tells us, “recall[ed] that ‘Scott was a very much respected Negro,’” and an 1857 article published in a St. Louis newspaper described Scott as “illiterate but not ignorant,” with a “strong common sense” honed in part by the very travels that formed the basis of his claim for freedom.¹⁴ It is also worth noting that *Dred Scott v. Sandford* involved a non-plantation slave and a slaveowner who lived well outside the cotton economy of the Deep South, where the narrative would almost certainly have been even more horrendous.

Most tantalizing is Fehrenbacher’s suggestion that Scott was not merely a pawn in his own case (or his life), but “a stronger spirit, determined to be free.”¹⁵ Still, as Fehrenbacher writes, “he remains a very indistinct figure.”¹⁶ Because Dred Scott, like most slaves, did not leave behind records useful to a future biographer, it is no surprise that the only full-length books that convey his life’s story are written for a juvenile audience.¹⁷

But *Dred Scott v. Sandford* concerns far more than the freedom of a single individual named Dred Scott. It is about the fate of an entire family:

In the year 1835, Harriet, who is named in the second count of the plaintiff’s declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major

9. *Id.* at 397.

10. *Id.*

11. *Id.*

12. *Id.*

13. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 240–41 (1978).

14. *Id.* at 240.

15. *Id.*

16. *Id.*

17. See, e.g., SHELIA P. MOSES, I, DRED SCOTT: A FICTIONAL SLAVE NARRATIVE BASED ON THE LIFE AND LEGAL PRECEDENT OF DRED SCOTT (2005); GWENYTH SWAIN, DRED AND HARRIET SCOTT: A FAMILY’S STRUGGLE FOR FREEDOM (2004).

Taliaferro took said Harriet to said Fort Snelling . . . and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson . . . Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant [John Sandford], as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.¹⁸

Lea Vandervelde and Sandhya Subramanian have tried to reconstruct the details of Harriet Robinson Scott's life,¹⁹ pointing out that Harriet had even better claims to freedom than her husband, Dred.²⁰ Barbara Bennett Woodhouse has done similar research on Dred Scott's daughters, Eliza and Lizzie, who were nineteen and eighteen, respectively, when the case was decided in 1857.²¹

In fact, *Dred Scott v. Sandford* was the second suit the Scott family brought to obtain their freedom. After the first lawsuit was brought in state court, their nominal owner, John Sandford, attacked the Scotts on January 1, 1853.²² He accused them of being "worthless and insolent," whipped them viciously, locked them in a barn, and then proceeded to beat their young daughters.²³ This assault was the basis for the second, federal suit,

18. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 397–98 (1857).

19. See Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

20. *Id.* at 1034–35.

21. See Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669 (2000).

22. *Id.* at 686.

23. *Id.* (citing CHARLES MORROW WILSON, *THE DRED SCOTT DECISION* 21–22 (1973)).

based on diversity jurisdiction, which eventually found its way to the Supreme Court.²⁴

In one respect, the Scotts were truly fortunate: not only were Dred and Harriet allowed to marry, but they were allowed to maintain themselves as an intact family. Hundreds of thousands of slave families were not so lucky. Preservation of slaves' families was at the sole discretion of their sovereign "masters"—who might be creditors seizing slaves as settlements for debts.²⁵ Slaveowners not only had the legal right to "la[y] . . . hands" and "imprison" their slaves as a form of discipline, but also, should they wish, the right to break up a slave's family by selling the members separately.²⁶ Even the relatively spare account of the facts in *Dred Scott* reveals the complexities and the horrors of the master-slave relationship in antebellum America.

TWO: DRED SCOTT, RACE, AND CITIZENSHIP

Taney informs us that Dred and Harriet were both "negro slave[s],"²⁷ as if there were any other kind in the United States by the 1850s. If *Dred Scott* is a case about the institution of slavery, it is even more, perhaps, a case about the constitutional importance of being categorized as "negro." Indeed, chief among the reasons why *Dred Scott* is the most reviled opinion in the history of the *United States Reports* is its abject racism and devotion to white supremacy.

Dred Scott connected four ideas: race, status, citizenship, and community. It connected race to status by arguing that blacks were necessarily and properly of lower status—and that whites should enjoy higher status—because of their respective races; indeed, it assumed that blacks could be enslaved because of their race. It connected race to citizenship by arguing that by virtue of their race blacks could never be citizens. It connected race to community by associating the people of the United States with its citizens,²⁸ so that those who could not be citizens were forever outside the

24. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 396 (1857).

25. See, e.g., THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 96–99 (1996); THOMAS D. RUSSELL, *The Antebellum Courthouse as Creditors' Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation*, 40 AM. J. LEGAL HIST. 331 (1996).

26. See, e.g., THOMAS D. RUSSELL, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161.

27. *Dred Scott*, 60 U.S. (19 How.) at 431.

28. *Id.* at 404 ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.")

political community.²⁹ According to *Dred Scott*, the members of one race “owned” the United States; it was “their” community and “their” country, and all other races were permitted to remain only on its terms.

We continue to be haunted, even 150 years later, by the linkages among race, status, citizenship and community that *Dred Scott* described. The case stands as a perpetual symbol and reminder of what we flee from—assumptions once taken for granted, arguments that were once part of our organic law. Even if one believes that Taney exaggerated in his description of the “constitutive racialism” of the American project,³⁰ one can hardly deny that Taney, a superb advocate who well understood his audience, accurately pointed out the realities of life in America, both North and South, in which blacks were legal inferiors to a dominant white majority. Echoes of these assumptions in *Dred Scott* are still with us whenever we assume that one race is more centrally “American” than others and more clearly and obviously a part of the American people and the American political community.³¹

To whom *does* America belong? Who *are* “We the People” in whose name the Constitution is ordained? For Taney (and, equally important, for a majority of the Court), the answer was that America was a country of white persons who migrated to this continent from Europe. To be sure, he did not believe the continent was devoid of other human beings before European settlement. Some of the most interesting passages in *Dred Scott* acknowledge the existence of American Indians, whose legal fate Taney describes in less dire terms than the fate of blacks.³² But the case is not about American Indians; it is about blacks who were brought against their will from

29. *Id.* (“The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

30. See, e.g., Rogers M. Smith, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 265–69 (1997); see also Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

31. Consider the “quip” delivered by former Virginia Senator George Allen at a campaign appearance in Breaks, Virginia, in which he referred to someone from the campaign staff of his opponent, James Webb, in the following terms: “This fellow here, over here with the yellow shirt, macaca, or whatever his name is. He’s with my opponent. He’s following us around everywhere. And it’s just great . . . Let’s give a welcome to macaca, here. Welcome to America and the real world of Virginia.” Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology: Name Insults Webb Volunteer*, WASH. POST, Aug. 15, 2006, at A1 (internal quotations omitted). There was much controversy over his use of the word macaca, which many interpreted as a racial epithet. Less attention was placed on the assumption that S.R. Sidarth, an American citizen born in Fairfax, Virginia to parents from the Indian subcontinent, was not a “real” American or Virginian by virtue of his physiognomy.

32. See Frederick E. Hoxie, *What Was Taney Thinking? American Indian Citizenship in the Era of Dred Scott*, 82 CHI.-KENT L. REV. 329 (2007).

Africa, who were not considered part of the American people, and who, therefore, were excluded from membership in the American political community. From the time of their first importation into the New World, according to Taney, blacks were universally regarded as “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations.”³³ Perhaps the most fundamental holding of *Dred Scott* is that “blacks” were *not* “African-Americans”—they were persons of African descent who lived in America, but they could never truly be called Americans.

The twin questions that *Dred Scott* posed and answered in 1857—who is an American and to whom does America truly belong—are still with us today, even if we reject Taney’s solution and have, through Section One of the Fourteenth Amendment, firmly overruled *Dred Scott*’s exclusion of blacks from the category of citizens of the United States. After all, it was only in Levinson’s lifetime (he was born in 1941) that Asians not born in the United States became eligible for citizenship. (Asians born in the U.S. were citizens courtesy of the Citizenship Clause of the Fourteenth Amendment.)³⁴ The racist “national-origin” provisions of the 1924 American immigration law were repealed only in 1965, by the Immigration and Naturalization Act,³⁵ with extraordinary consequences for the country’s demographics.

Not everyone takes pride in the new version of the American mosaic. Harvard Professor Samuel P. Huntington is probably the most prominent academic to suggest that “America”—or at least his version of our national identity—is under a potentially fatal assault from the increasing immigration, and subsequent naturalization, of relatively unassimilated Hispanics, particularly from Mexico.³⁶ Former presidential candidate Pat Buchanan’s recent book *State of Emergency: The Third World Invasion and Conquest of America* makes the claim even more explicit: “America faces an existential crisis. If we do not get control of our borders, by 2050 Americans of European descent will be a minority in the nation their ancestors created

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

34. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). It is worth noting that the otherwise staunchly anti-racist John Marshall Harlan joined Chief Justice Fuller’s dissent. In his great dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896), Harlan had referred to the Chinese as “a race so different from our own that we do not permit those belonging to it to become citizens . . .” *Id.* at 561. He assumed that, unlike African Americans, persons from China, including children born in the United States to Chinese immigrants, could not successfully be assimilated into the American social order.

35. Immigration and Nationalization Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

36. See SAMUEL P. HUNTINGTON, WHO ARE WE: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2005).

and built. No nation has ever undergone so radical a demographic transformation and survived.”³⁷

Part of the debate involves who should be naturalized. Another aspect concerns the extent to which citizenship itself is the key determinant of enjoyment of basic constitutional rights. Does citizenship mark the boundaries of the American political community, as Taney thought, or is it more extensive, so that there are some people who are not legally marked as “citizens” but who nevertheless are part of what might be termed the American *constitutional* community and who enjoy basic rights protected by the Constitution?³⁸

Dred Scott used citizenship as the central dividing line between those who possess basic rights and those who did not. Because blacks could not be citizens, they enjoyed “none of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States.”³⁹ It was for this reason that Alexander Bickel cited *Dred Scott* (negatively) as an example of American law’s continued emphasis on citizenship as the prerequisite for key legal rights.⁴⁰ Bickel, himself a European refugee, was suspicious of using citizenship—with its nationalist overtones—as a gatekeeper for whether people could possess basic rights and liberties against the state; he preferred the more apolitical (and less nationalist) criterion of personhood.⁴¹ Although many parts of the Constitution do grant rights to “persons” rather than citizens—the Equal Protection Clause and the Due Process Clause are obvious examples—many other parts of the constitutional text make citizenship a prerequisite for certain kinds of rights, including, most obviously, the ability to hold elected office in the national government.⁴²

Why did Taney link citizenship to race, and both to the enjoyment of basic rights? Taney was clearly upset by the possibility that if blacks were

37. PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* 11–12 (2006).

38. See *Dred Scott*, 60 U.S. (19 How.) at 420. Taney did not deny that Congress could make blacks citizens; he argued only that it had chosen not to do so, which was evidence of who was part of “We the People.” *Id.* at 419–20 (“But the language of the law above quoted, shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.”). For further discussion of how citizenship and the constitutional community may be defined, see T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); Sanford Levinson, *Shards of Citizenship, Shards of Sovereignty: On the Continued Usefulness of an Old Vocabulary*, 21 CONST. COMMENT. 601 (2004) (reviewing ALEINIKOFF, *supra*).

39. *Dred Scott*, 60 U.S. (19 How.) at 404.

40. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 40 (1975).

41. *Id.*

42. See U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); *id.* art. 1, § 3, cl. 3 (Senate); *id.* art. II, § 1, cl. 4 (President).

citizens of the United States, they would have the right to travel to other states, including Southern states, and, under Article IV, Section 2, would enjoy the privileges and immunities of citizens in those states. The notion of free blacks traveling to slave states and perhaps having the rights to criticize slavery and, even more ominously, to keep and bear arms, was, in Taney's view—and the view of many others in the slaveocracy—simply unthinkable. Because these rights came with citizenship, Taney argued, blacks could never be citizens. To be sure, Taney conceded, states could treat blacks as citizens and voluntarily give them the same rights as white citizens enjoyed, but states had no power to make blacks *American* citizens.⁴³

Taney's argument is dubious on a number of grounds, as Justice Curtis's dissent pointed out.⁴⁴ Under the antebellum Constitution states might not be able to discriminate against outsiders because they were citizens of other states. But nothing prevented states from discriminating against both insiders and outsiders alike because of their race. A black man who traveled to Alabama might find that he had the same rights to speak and carry weapons as every other black man in Alabama, which is to say, none at all. Nevertheless, Taney's argument was premised on the idea that if a person was a member of the political community and a citizen (which Taney linked together), he or she deserved a robust complement of rights that came with citizenship. This idea, ironically, was shared by many Republicans who helped draft the Fourteenth Amendment; they assumed that Article IV, Section 2 created a full complement of rights belonging to "citizens of the several states."⁴⁵ Although the federal government might have lacked the authority to enforce these rights (granting such authority, after all, was the purpose of the Fourteenth Amendment), they were nonetheless rights that came with American citizenship.

Taney's assumptions about the close linkages between rights and citizenship hold only in some respects today. Resident aliens enjoy many of the same benefits as citizens, including rights to many social services, although they do not have the right to vote.⁴⁶ (Conversely, it is worth noting that in Taney's time, women were citizens and not only did they not have the right to vote, but the common law of the time stripped them of most of

43. *Dred Scott*, 60 U.S. (19 How.) at 405–06.

44. *See, e.g., id.* at 575 (Curtis, J., dissenting).

45. *See, e.g.,* AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 67–71 (1988).

46. *See, e.g.,* *Bernal v. Fainter*, 467 U.S. 216 (1984); *Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971); *see also* Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545 (1989).

their rights upon entering into marriage.⁴⁷) The Fourteenth Amendment's Equal Protection and Due Process Clauses extend their protections to "persons" rather than to "citizens." Nevertheless, the federal government has considerable power to change the benefits available to even resident aliens, and aliens who are visiting have even fewer rights.⁴⁸ Citizenship matters today, but in different ways than Taney imagined.

THREE: ARE THERE PEOPLE WITH NO RIGHTS THAT "WE" ARE BOUND TO RESPECT?

If *Dred Scott*'s most notorious holding is that blacks cannot become citizens, its most notorious single passage is Taney's declaration that "[Negroes were] 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 . . .*"⁴⁹ Taney emphatically rejects the idea of natural rights, articulated most famously in the Declaration of Independence, that all human beings are endowed with inalienable rights of life, liberty, and the pursuit of happiness. (The Declaration, of course, says "men" rather than "human beings."⁵⁰) Abridging these rights without the consent of the right-holder is a grave moral and political wrong; indeed, the Declaration claims, it justifies revolution itself. Taney was not oblivious to these claims. He offers a chilling discussion of the Declaration, asserting that it could not possibly mean that blacks are persons with inalienable rights, for then the honorable men who signed it, including its slaveholding author, Thomas Jefferson, would be hypocrites.⁵¹

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distin-

47. See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982); WILLIAM BLACKSTONE, 1 *COMMENTARIES* *430; HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000). And, ironically, in many states aliens who had declared an intention to become citizens *could* vote. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 344-45 (1978); KIRK H. PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 113-34 (1918).

48. See *Zadvydas v. Davis*, 533 U.S. 678 (2001) (applying the federal Due Process Clause to deportable aliens); *Matthews v. Diaz*, 426 U.S. 67 (1976) (applying rational basis test to federal laws discriminating against aliens).

49. 60 U.S. (19 How.) at 407 (emphasis added).

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

51. See *Dred Scott*, 60 U.S. (19 How.) at 409-10.

guished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.⁵²

For Taney the charge of intellectual hypocrisy was a far greater libel than suggesting that the Framers viewed blacks as sub-human.⁵³ In a chain of inference that can only be described as Orwellian, he reasons that since the Framers could not have been hypocrites, their language could not have been meant to include blacks. In fact, understood in their proper context, he argues, the words of the Declaration are “conclusive” proof that blacks could never be part of the American people.⁵⁴ And because blacks were beyond the scope of the Declaration’s theory of legitimate government, they simply had no rights which the white man was bound to respect. Taney’s bold claims seem shocking today. But should they be? How seriously do we take the Declaration, and in what ways do we still parse it—or regard its language as merely aspirational or metaphorical—in order to avoid the charge of moral and intellectual hypocrisy? Even to this day, after all the successes of the civil rights movement and the advancements of American democracy, we must still ask whether it is consistent with American constitutionalism to treat any individuals or groups as if they have no rights that the rest of us, white or not, are “bound to respect.”

Until the Court’s 1996 decision in *Romer v. Evans*,⁵⁵ one might have feared that the expression applied to gays and lesbians. No one—at least publicly—suggested stripping gays and lesbians of American citizenship or

52. *Id.* at 410.

53. Presumably, in 1857 arguments like Peter Singer’s that even animals have rights were not well known. See generally PETER SINGER, ANIMAL LIBERATION (1975).

54. *Dred Scott*, 60 U.S. (19 How.) at 409.

55. 517 U.S. 620 (1996).

denying them the vote; in this respect, gays fared better than Mormons in the late nineteenth century.⁵⁶ Still, had two votes switched in *Romer*, it would have been possible to argue that, as a practical matter, the state could refuse to supply basic legal protections to gays and lesbians in order to manifest social disapproval of their status and their presumed activities.

Instead, a six-person majority, led by a Reagan appointee, Anthony Kennedy, refused to allow Colorado to impose second-class citizenship. Many have wondered about the rationale behind *Romer*, which did not fit easily into existing doctrinal categories.⁵⁷ But Kennedy's reasoning harked back to the ideas of the framers of the Fourteenth Amendment: their rejection of the premises of *Dred Scott*, and, in particular, their abhorrence of "class legislation," laws that unfairly singled out a particular group for special burdens and special punishments. The framers of the Fourteenth Amendment viewed the Black Codes immediately after the Civil War as an attempt to return slavery by other methods and by another name.⁵⁸ To them, stripping people of their basic common-law rights was the most obvious example of "class legislation." The declaration that one group of people had no rights worth respecting—*Dred Scott*'s paradigmatic claim—was, in their eyes, the paradigmatic denial of equal citizenship.

Seven years later, Justice Kennedy authored the opinion in *Lawrence v. Texas*,⁵⁹ which struck down remaining laws that made criminals of those who engaged in what Justice White in *Bowers v. Hardwick*⁶⁰ labeled "homosexual sodomy." Once again, Kennedy argued that these criminal penalties made gays outlaws, and denied them the basic dignities of persons and citizens in the United States. Even if one believes that full realization of the promise of the Fourteenth Amendment requires more than this, the echoes of *Dred Scott*—and the Fourteenth Amendment's rejection of *Dred Scott*—are present in the continuing debates over the reach of *Romer* and *Lawrence*.

We get closer to understanding Taney's logic when we think about the obligations we owe to suspected enemies of the state, and, in particular, how we should conduct what the Bush Administration terms the "global war on terror." Surely the most dramatic example involves the Administra-

56. Cf. *Davis v. Beason*, 133 U.S. 333 (1890) (depriving believers in "celestial marriage" of their right to vote).

57. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 218 (1996); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

58. See NELSON, *supra* note 45, at 42–44.

59. 539 U.S. 558 (2003).

60. 478 U.S. 186 (1986).

tion's assertions of authority in a famous Office of Legal Counsel (OLC) memo to engage in torture—or “cruel, inhuman, and degrading” methods of interrogation—on those persons the President deems, often by fiat, potential enemies of the country.⁶¹ Torture, almost by definition, requires treating another person as if he or she has no rights that the interrogator is “bound to respect.” Indeed, the essence of torture may lie not so much in the precise methods used as in the arbitrary relationship of power between the interrogator and the subject. The torturer conveys to the person being interrogated that there are indeed no limits at all on what the torturer can do if the prisoner fails to cooperate.⁶² Making clear in advance that there are some things that an interrogator may not do is precisely to inform the person that he or she is a fully human, rights-bearing person, and that he or she does have at least some rights that even the interrogator is bound to respect.

Not surprisingly, the official position of the United States has been that it does not engage in torture, and the Administration withdrew the OLC Torture Memo in the face of public criticism.⁶³ Recently, however, President Bush confirmed that the United States had for several years held unlawful combatants in secret prisons run by the CIA.⁶⁴ These men were held incommunicado with no legal process or oversight, and subjected to an “alternative set of procedures” whose nature the President refused to disclose in the interests of national security.⁶⁵ University of Toronto legal theorist David Dyzenhaus has referred to the legal—or perhaps the better word is “alegal”—“black holes” created by the Administration's legal ar-

61. See Jay S. Bybee, Assistant Attorney Gen., Memorandum for Alberto Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>; see also MARK DANNER, TORTURE AND TRUTH 115 (2004) (reprinting the OLC memo).

62. See David Sussman, *What's Wrong with Torture*, 33 PHIL. & PUB. AFFS. 1, 5–8 (2005).

63. See Daniel Levin, Assistant Attorney Gen., Memorandum Opinion for the Deputy Attorney General (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

64. Press Release, White House Office of the Press Sec'y, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

65. *Id.* (One of these tactics appears to be “waterboarding,” where subjects are strapped down and made to believe they are drowning in order to force them to talk.) While the President has repeatedly refused to use the word “torture” to describe this “alternative set of procedures,” many scholars and pundits within the United States have been quite open in contending that the United States should sometimes employ torture when it is in the national interest. *E.g.*, Charles Krauthammer, *The Truth about Torture: It's time to be honest about doing terrible things*, WKLY. STANDARD, Dec. 5, 2005, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>; see also Alan M. Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 257 (Sanford Levinson ed., 2006)(same); Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/01/22/ED5329.DTL>.

guments.⁶⁶ Although these positions are always claimed to formally comply with law, in practice they withdraw many of the basic legal protections we generally associate with the rule of law.

The idea of people with no rights worth respecting also emerges in the legal debates over the fate of detainees at Guantanamo Bay, Cuba. The Bush Administration regards these detainees as supremely dangerous individuals, what members of the Bush Administration have called “the worst of the worst”;⁶⁷ other reports suggest that many of the people detained there posed no threat to the United States and had been swept up by bounty hunters and delivered to the United States, who dumped them at Guantanamo Bay.⁶⁸ The President has argued that he could treat detainees however he liked as soon as he labeled them unlawful “enemy combatants,” and that neither the Bill of Rights nor habeas corpus nor the provisions of the Geneva Convention applied to them.⁶⁹ These detainees were, in this sense, people who had no rights that the Bush Administration was bound to respect, although the Administration insisted that all of the people held in the secret CIA prisons were subjected to “safe, legal, and effective” alternative techniques, and that the persons held at Guantanamo Bay were always treated “humanely.”⁷⁰ A series of press reports and human rights commission findings, alas, suggested otherwise.⁷¹

66. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 196–219 (2006).

67. For example, Rear Admiral John D. Stufflebeem, speaking at the Pentagon on January 28, 2002, said of Afghan detainees, “The number of detainees will continue to fluctuate as the interrogations continue of those that are being detained by the Afghans. . . . They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others.” Linda D. Kozaryn, *U.S. Gains Custody of More Detainees*, AM. FORCES INFO. SERVICE, Jan. 28, 2002, http://www.defenselink.mil/news/Jan2002/n01282002_200201284.html (internal quotations omitted). The term has also been attributed to former Secretary of Defense Donald Rumsfeld. See, e.g., Eric Umansky, *Who Are the Prisoners at Gitmo?*, COLUM. JOURNALISM REV., Sept.–Oct. 2006, <http://www.cjr.org/issues/2006/5/Umanskyb.asp>.

68. See, e.g., U.N. Econ. & Soc. Council, Comm. on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶¶ 22–25, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) [hereinafter U.N. Report on Guantanamo Bay]; MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA *passim* (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf; Corine Hegland, *Who Is at Guantanamo Bay*, NAT’L J., Feb. 4, 2006, at 33; Dahlia Lithwick, *Invisible Men*, SLATE, Feb. 16, 2006, <http://www.slate.com/id/2136422/>.

69. See, e.g., Marty Lederman, *GTMO: Where Was the Law? Whither the UCMJ?*, BALKINIZATION, June 14, 2005, <http://balkin.blogspot.com/2005/06/gtmo-where-was-law-whither-ucmj.html>. The Supreme Court held that the Guantanamo Bay detainees had the right to habeas corpus in *Rasul v. Bush*, 542 U.S. 466 (2004). The Administration responded by pressing first for the Detainee Treatment Act of 2005, which sharply limited judicial review, and later the Military Commissions Act of 2006, which eliminated the writ.

70. See, e.g., Press Release, White House Office of the Press Sec’y, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.

71. See, e.g., U.N. Report on Guantanamo Bay, *supra* note 68.

In three cases—*Hamdi v. Rumsfeld*,⁷² *Rasul v. Bush*,⁷³ and *Hamdan v. Rumsfeld*⁷⁴—the Supreme Court sharply rejected the Administration’s most extravagant reading of its own powers, which would have given it *carte blanche* to detain indefinitely, and without access to legal proceedings, anyone that it decided was an unlawful enemy combatant. The last of this trio of cases, *Hamdan*, held that the provisions of Common Article 3—which require minimum standards of fairness for trying enemy combatants and prohibit “cruel treatment and torture,” “humiliating and degrading treatment,” and “outrages upon personal dignity”—created judicially enforceable rights against the Administration.⁷⁵ In particular, *Hamdan* held that the Geneva Conventions prohibited the Administration’s proposal for trials that would allow convictions based on secret evidence.⁷⁶ The logic of the case also suggested that if U.S. forces violated Common Article 3’s prohibitions on cruel and degrading treatment, they might face potential liability under the 1996 War Crimes Act.⁷⁷ This came as a shock to the Administration, whose Attorney General, Alberto Gonzalez, had previously dismissed portions of the Geneva Conventions as outmoded and “quaint.”⁷⁸

But it would be a serious mistake to assume that the legal obligations toward detainees—both those guilty and innocent of acts of aggression toward the United States—were fully settled by the Supreme Court. Even after the trio of decisions, detainees enjoyed only limited guarantees of due process to determine their status as enemy soldiers, let alone whether they had committed the acts they are accused of. More importantly, these decisions were hardly the last word. At the repeated urgings of President Bush, the United States Congress, to its disgrace, passed the Military Commission Act of 2006, which effectively overrules several aspects of the *Hamdan* decision and withdraws a considerable number of legal protections from detainees.⁷⁹ The new act defines enemy combatants broadly to include literally anyone that the Secretary of Defense says is an enemy combatant (a definition, which, in theory, could even include American citizens).⁸⁰ It severely limits the ability of designated alien “enemy combatants” to con-

72. 542 U.S. 507 (2004).

73. 542 U.S. 466.

74. 126 S. Ct. 2749 (2006).

75. *See id.* at 2795–97.

76. *Id.* at 2797–99.

77. 18 U.S.C. § 2441 (2000).

78. Alberto R. Gonzales, Attorney Gen., Memorandum for the President (Jan. 25, 2002), *available at* <http://www.msnbc.msn.com/id/4999148/site/newsweek/>.

79. *See* Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10 U.S.C.).

80. *See id.* § 3, 120 Stat. at 2601.

test their imprisonment or their possible mistreatment in the courts.⁸¹ In particular, it strips the courts of their power to entertain habeas petitions by detainees who claim they are being illegally held.⁸² Furthermore, although the bill does not withdraw the United States from the Geneva Conventions, it declares that no individual has a right to enforce them in the courts.⁸³ It restricts the criminal provisions of the War Crimes Act to a limited set of grave breaches of Common Article 3, a category which may or may not include the so-called alternative sets of procedures the United States used on detainees in its secret prisons.⁸⁴ Finally, it retroactively immunizes U.S. personnel from various acts committed against detainees before its enactment that might have violated the War Crimes Act.⁸⁵

In light of the Bush Administration's repeated assertions of executive authority to deal with detainees, and particularly in light of the new Military Commissions Act, which offers Congressional approval to many of the Administration's policies, it remains all too relevant to ask ourselves whether our legal culture continues to recognize a category of persons who have "no rights" that the state is "bound to respect." To the extent that that is so, our outrage at Taney's formula comes only from the fact that he linked this status with race, rather than from his suggestion that the state has (and should have) complete and utter power over a certain group of hapless human beings.

FOUR: *DRED SCOTT* AND WHETHER THE CONSTITUTION IS A "SUICIDE PACT"

A familiar defense of sacrificing civil liberties and rule-of-law values to protect national security—and one that we have heard increasingly in the wake of the September 11th attacks—is that the Constitution is not a suicide pact. Indeed, Senator John Sununu of New Hampshire defended the new Military Commissions Act and its suspension of habeas corpus on precisely this ground.⁸⁶ Judge Richard Posner, in a recent book appropriately titled *Not a Suicide Pact*, offers his characteristically unsentimental cost-benefit analysis in favor of limiting various civil liberties in light of

81. See *id.* § 7, 120 Stat. at 2635–36; *id.* § 9, 120 Stat. at 2636–37.

82. *Id.* § 7, 120 Stat. at 2636.

83. *Id.* § 5(a), 120 Stat. at 2631.

84. *Id.* § 6(b)(1), 120 Stat. at 2633.

85. *Id.* § 6(b)(2), 120 Stat. at 2635.

86. Gail Russell Chaddock, *In the Fog of War on Terror, Some Rules Set*, CHRISTIAN SCI. MONITOR, Oct. 2, 2006, <http://www.csmonitor.com/2006/1002/p01s02-usfp.html>.

the threat of terrorism and other dangers posed to the United States.⁸⁷ The locus classicus of the phrase is the conclusion to Justice Robert Jackson's dissenting opinion in the 1949 case *Terminiello v. Chicago*:⁸⁸ "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." Far less often cited in this context, but just as appropriate, would be John Marshall's statement in *McCulloch v. Maryland* that ours is a "constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."⁸⁹ No doubt defenders of the Military Commissions Act could say that centuries-old traditions of habeas corpus must be "adapted" to meet the contemporary—and, one fears, never ending—"crisis."⁹⁰

One of the most interesting features of Jackson's famous slogan is that it purports to be a conversation stopper: after all, few people would respond that yes, all things considered, in fact the Constitution *is* a suicide pact! The problem, however, is that one can make this argument in favor of almost any relaxation of rule of law or civil liberties protection in the time of emergency. It is worth noting that the decision that generated the famous phrase in Jackson's dissent is one of the cornerstones of contemporary First Amendment jurisprudence. The case involved Father Arthur Terminiello, a rabble-raising priest who was arrested while delivering a hate-filled, anti-Semitic speech before a raucous audience in Chicago (with equally turbulent opponents protesting vigorously outside).⁹¹ The Supreme Court reversed Terminiello's conviction for breach of the peace, because the jury had been instructed that they could convict if they believed that the defendant had "stirred people to anger, invited public dispute, or brought about a condition of unrest."⁹² A rule like this, the majority thought, surely violated the First Amendment's guarantees of freedom of speech.⁹³ Yet it was this very ruling, Jackson insisted, that risked hurtling the country toward suicide—a claim that, in hindsight, seems both hyperbolic and shortsighted.⁹⁴

87. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

88. 337 U.S. 1, 37 (1949).

89. 17 U.S. (4 Wheat.) 316, 415 (1819).

90. See generally Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006).

91. *Terminiello*, 337 U.S. at 2–3; see also *id.* at 14–23 (Jackson, J., dissenting).

92. *Id.* at 5 (majority opinion).

93. See *id.* at 4–6.

94. It is also worth noting that Jackson was far more skeptical about assertions of emergency in his famous *Youngstown* concurrence, in which he warned that justifying presidential power under the guise of emergency might lead to dictatorial powers. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646–55 (1952) (Jackson, J., concurring).

Although we may not recognize it today, *Dred Scott* is also a case about preserving order in time of emergency. In 1857 Roger Taney correctly saw that the United States was enmeshed in a fundamental “crisis.” The legitimacy of slavery was not the cause of the crisis, for even Republicans like Abraham Lincoln conceded that slavery was legal in the states that recognized it.⁹⁵ Rather, the country was riven by whether slavery would be allowed in the vast new American territories that resulted from the Louisiana Purchase and other ventures in nineteenth-century American expansionism. The wrong answer to this question might well portend the suicide of the American republic. In fact, many politicians—particularly in the majority Democratic Party—looked to the Court to resolve the crisis and remove the dispute over slavery in the territories from a political system that seemed increasingly unequipped to deal with it.⁹⁶

The danger of national dissolution was a recurrent trope in antebellum American constitutional decision making; it can even be found in the first paragraph of *McCulloch v. Maryland* where John Marshall explains why the Supreme Court must take up the question of the constitutionality of the Bank of the United States: “[I]t must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature On the Supreme Court of the United States has the constitution of our country devolved this important duty”⁹⁷ The same idea is certainly present in Joseph Story’s 1842 decision in *Prigg v. Pennsylvania*,⁹⁸ in which he argues that preservation of a Union with slaveholders requires recognition of a right to self-help to recapture of fugitive slaves and an implied power (and even duty) in Congress to pass the egregious Fugitive Slave Act of 1793. Like Marshall and Story, Taney saw his decision in *Dred Scott* in the gravest possible terms.

If the twin claims of necessity and national security justify today’s conclusion that suspected terrorists and unlawful combatants have no rights that we are bound to respect, why couldn’t (and shouldn’t) Taney avail himself of the same arguments? From the standpoint of 1857, Taney could easily have concluded that giving *Dred Scott* his freedom and recognition as an American citizen would have risked fatal damage to an existing legal

95. See, e.g., Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), available at http://douglassarchives.org/linc_a73.htm (“I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”).

96. See especially MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 35, 44–45 (2006).

97. 17 U.S. (4 Wheat.) 316, 400–01 (1819).

98. 41 U.S. (16 Pet.) 539 (1842).

and political system predicated on a very different set of beliefs. And although the Court might have disposed of the issues without reaching the constitutional questions, it was unable to generate a clear majority without addressing them.⁹⁹ Today many people believe that *Dred Scott* hastened the Civil War, although, as we shall discuss later, this is by no means clear—it may actually have delayed it by several years. Certainly in 1857, it was far easier to assume that freeing Dred Scott would have hastened secession, civil war, and the destruction of the nation. Given the political crises brewing in 1857, it is hard to see why Taney could not have justified his decision on the grounds that the Constitution is not a suicide pact.

But of course, that is part of the point: the argument that the Constitution is not a suicide pact is available whenever the country faces what politicians regard as either crisis or emergency. And it is available in situations where we, in hindsight, would regard the calculus justifying the limitation of civil liberties as deeply mistaken, or even unduly swayed by unreasoning fear and irrational prejudice. Consider what has been widely regarded as the most shameful transgression of constitutional norms during World War II, namely, the United States government's internment of approximately 110,000 Japanese American citizens and Japanese resident aliens in detention camps.¹⁰⁰ The Japanese American citizens were held because of their national origin; the resident aliens were held because they were not American citizens. Congress later apologized for the concentration camps and, with the approval of the Reagan Administration, voted for \$20,000 in reparations to each living victim of the detention.¹⁰¹ One nevertheless might have defended *Korematsu v. United States* early in the war—when it was by no means clear that America would prevail against the Japanese—on the ground that the Constitution is not a suicide pact. Indeed, Levinson recalls attending a conference at the University of Chicago Law School, where he heard former Attorney General Edwin Meese, who served in the Reagan Administration during the debate over reparations, state that an apology is not equal to a concession that the detention was actually unlawful. Nor, Meese insisted, did an apology mean that it was unconstitutional for the

99. The *Dred Scott* opinion was initially given to Justice Nelson, who sought to write a decision based on *Strader v. Graham*'s choice-of-law rule, but jurisdictional and procedural questions muddled the issues before the Court, making a decision on non-constitutional grounds more difficult. Eventually, the Justices in the *Dred Scott* majority agreed that Taney should write the majority opinion and Nelson's draft became a concurrence. See DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 163–67 (1981).

100. See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

101. See RACE, RIGHTS, AND REPARATION: LAW OF THE JAPANESE AMERICAN INTERNMENT 390 (Eric K. Yamamoto et al. eds., 2001); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 935 (2004).

President to decide, in conjunction with his military and civilian advisors, that national security required such drastic measures.

Whether or not American citizens today could lawfully be subjected to *Korematsu*-like indignities, the question remains all too open with regard to non-citizens. In the months immediately after 9/11, the Justice Department rounded up thousands of Muslim immigrants from Middle Eastern countries and held them incommunicado for long periods of time, either on material witness warrants or for immigration violations.¹⁰² A federal district judge in Brooklyn recently dismissed, on national security grounds, a suit brought by a Canadian national against the United States for having been “rendered” to Syria, where he was brutally tortured, after being detained at the JFK Airport while in transit back to Canada.¹⁰³ That his life was substantially ruined as a result of clear American misconduct¹⁰⁴ seemed not to matter to the judge, the former Dean of Brooklyn Law School, any more than the actual lives of Dred Scott and his family seemed to matter to the Supreme Court. Extreme measures are still acceptable so long as we can invoke the mantra that the Constitution is not a suicide pact. Perhaps Taney’s mistake wasn’t that he failed to free Dred Scott, but that he wasn’t so eloquent in describing the stakes as Robert Jackson, one of the finest writers ever to serve on the Supreme Court. Or perhaps it was that, in hindsight, we no longer believe that his actions were justified by emergency, a conclusion that, alas, we have all too often reached later on after civil liberties have been sacrificed at the altar of national security.

FIVE: *DRED SCOTT*, ORIGINALISM, AND THE LIVING CONSTITUTION

Dred Scott is a remarkable decision for anyone interested in theories of constitutional interpretation. Almost every current theory of interpretation is implicated by the various opinions in the case. For example, Taney justified his holding that blacks are not citizens on the basis of the original understanding of the Framers. As he explained,

102. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS *passim* (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>.

103. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

104. See 2 ARAR COMMISSION, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 491–92 (2006), available at http://www.ararcommission.ca/eng/Vol_II_English.pdf. In any event, such “rendering” is clearly illegal under Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prevents “rendering” where there is a likelihood of torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

. . . .

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.¹⁰⁵

Today originalist scholars distinguish between the original intentions of the authors and the original public meaning assigned by initial readers of the document's text.¹⁰⁶ Taney made both arguments—he claimed that the Framers did not intend to include blacks, and he also claimed that the word “citizen” at the time of the Founding was not generally understood to encompass blacks. Citizenship meant being a member of the political community, and blacks were not generally thought to be members of that community.¹⁰⁷ Not only did Taney embrace several varieties of originalism, he also appears to have rejected any notion of what we would today

105. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405, 426 (1857).

106. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 100 (2004) (arguing for original public meaning); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (describing shift from original intention to original public meaning). There is, of course, a respected argument that whenever audiences attempt to “interpret” a text, they are necessarily engaged in trying to discern the intentions of an author or authors. See Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651 (2005).

107. See *Dred Scott*, 60 U.S. (19 How.) at 409–12.

call a “living constitution,” one that adapts to changing times and concerns. “[T]he words of the Constitution,” Taney insisted, cannot be given “a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.”¹⁰⁸ By “liberal” Taney presumably meant “free” or “magnanimous,” rather than left wing, but his point was clear: If the Framers who wrote the Constitution embedded racist principles in its language, those principles are our principles, and we may not alter them simply because we now find them inconvenient or unjust. The whole point of having a constitution is to bind ourselves to the original understanding, so that we do not stray from what “We the People” originally adopted.

Taney gave no indication that he viewed the 1787 Constitution as imperfect or unjust, but such a conclusion would be beside the point: if people want a better Constitution they should use the amendment procedures of Article V rather than rely on judges to “update” the Constitution according to current understandings of propriety. Contemporary originalists would not disagree, although they might not want to be lumped together with Roger Taney and the defense of the slaveocracy. Instead, as we shall see, originalists tend to focus on a different part of *Dred Scott* as the particular object of their scorn—the passage that struck down the Missouri Compromise under the Fifth Amendment’s Due Process Clause.

It is tempting to regard *Dred Scott* as an example of what one of us has called “bad originalism.”¹⁰⁹ Taney’s argument is “bad originalism” because although he sanctimoniously stated that only he was faithful to the original understanding, he misapplied the historical record. As Justice Curtis pointed out in his dissent, blacks were citizens in several states before the Revolution and even voted in some states.¹¹⁰ What makes Taney’s argument bad originalism is not that it invokes original intentions or original understanding, but that it does so incorrectly and anachronistically. From our vantage point, it is quite easy to view Taney’s opinion as motivated primarily by his desire to promote the proslavery views of 1857 rather than as a good-faith exercise in constitutional fidelity to the 1787 Constitution. Today’s originalists, who insist that fidelity to the original understanding of the words of the Constitution is the legitimate source of constitutional interpretation,¹¹¹ are eager to join in the denunciation of Taney as being a

108. *Id.* at 426.

109. See generally Jack M. Balkin, *Bad Originalism*, BALKINIZATION, May 14, 2005, <http://balkin.blogspot.com/2005/05/bad-originalism.html>.

110. *Dred Scott*, 60 U.S. (19 How.) at 572–76 (Curtis, J., dissenting).

111. See, e.g., BARNETT, *supra* note 106, at 89.

very bad model of their favorite method. They are happy to embrace Justice Curtis's dissenting opinion, which demonstrates to most readers' satisfaction that the historical record was less clear than Taney described it.

The charge of "bad originalism" has two different aspects. On the one hand, it accuses would-be originalists, whether Taney or some contemporary devotees of that method, of using the trope of originalism to enforce contemporary political views in the guise of fidelity to the Constitution. Rather than constraining judges, "bad originalism" allows judges to sanctimoniously insist that only they are being faithful to the Constitution, while those who reject their methodology are unfaithful and even lawless. On the other hand, the charge of "bad originalism" means that Taney got the history wrong. Had Taney been more scrupulous in his historical inquiries—that is, if he had been a "good originalist"—*Dred Scott* would have come out in a more palatable way. From this perspective, the problem that *Dred Scott* reveals is not originalism itself, but (some of) the people who have invoked it.

But that only leads to a second question: suppose, in fact, that the historical materials suggest that Taney's view had considerable weight? Paul Finkelman, who is probably our leading student of the law of American slavery, has argued that Taney, albeit overreaching, was substantially correct in his assessment of the original understanding of the 1787 Constitution.¹¹² More recently, Mark Graber, one of the country's foremost experts on the *Dred Scott* opinion, has shown how arguments from original intention, original understanding, and original meaning can easily support Taney's overall position, even if they do not precisely vindicate every one of his arguments.¹¹³ If Finkelman and Graber are correct that a "good originalist"—that is, one who correctly understood the proper historical context of the 1787 Constitution—might reach a position very much like Taney's, then must originalists change their views about *Dred Scott* and concede that the Court's conclusion was correct, at least as of 1857? To be sure, an originalist might note that the Reconstruction Amendments overturned *Dred Scott*, creating what Abraham Lincoln called "a new birth of freedom." But *Dred Scott* is generally not viewed as an example of what was wrong with the 1787 Constitution, which is still revered to this day,

112. See, e.g., Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 *HAMLIN L. REV.* 1 (1996); PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (1997) [hereinafter FINKELMAN, *BRIEF HISTORY*]. For a discussion of why the Constitution was pro-slavery, see PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 3–36 (2d ed. 2001); Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUM.* 413 (2001).

113. GRABER, *supra* note 96, at 4, *passim*.

particularly by originalists. Rather, it serves as a symbol of what is wrong with judges who abuse their positions by interpreting the Constitution according to their personal and political predilections. But if *Dred Scott* is consistent with the original understanding, the fault lies not with renegade judges, but with the defective work of the Framers.

To be sure, one might argue that “originalism” does *not* mean that we should necessarily be bound either by the original intentions of adopters who are long dead or even by the expectations of the generation that produced the text. A different version of originalism would focus on the original meaning of the text and its underlying principles and aspirations. It would distinguish between original public meaning of the words of the text and their original expected concrete application.¹¹⁴ That version of originalism, however, has much in common with a belief in a living Constitution, rejected by both Taney and many of today’s originalists.

Nevertheless, one should not assume that *Dred Scott* demonstrates the comparative merits of living constitutionalism. Quite the contrary: Mark Graber’s important book on *Dred Scott* shows not only that the various forms of originalism support the result in the case, but that *all* contemporary approaches to constitutional interpretation can be used to justify Taney’s decision. If the test of a theory of constitutional interpretation is that it rules out *Dred Scott*, then no extant theory passes it. And that includes living constitutionalism.

If living constitutionalism stands for the proposition that each generation must determine what the Constitution means for itself, building on the work of previous generations, and that interpretations of the Constitution must evolve to meet the problems of the times, it is fairly easy to see how a living constitutionalist living in 1857 could agree with Taney’s result, even if Taney himself disdained the idea of an evolving, living Constitution. Many of the Framers opposed slavery and even many of those who supported it believed that slavery would eventually fade from the American polity. These hopes were belied by nineteenth-century economic, social, and political developments. Living constitutionalist defenders of slaveocracy could argue that the rise of a successful agricultural industry in the South—and the entire nation’s dependence on agricultural exports—meant that the Constitution had to be interpreted in line with changing economic realities. That meant protecting investments in slaves for Southerners who

114. See Jack M. Balkin, *Abortion and Original Meaning*, (Yale Law Sch. Pub. Law & Legal Theory, Working Paper No. 119, 2006), available at <http://ssrn.com/abstract=925558>; Jack M. Balkin, *Original Meaning and Original Application*, BALKINIZATION, June 23, 2005, <http://balkin.blogspot.com/2005/06/original-meaning-and-original.html>.

wished to settle in the federal territories and generally appeasing slaveholders in order to maintain the Union.

SIX: *DRED SCOTT* AND “SUBSTANTIVE DUE PROCESS”

Dred Scott's holding that blacks cannot be citizens is not the only one that later generations—including originalists—have complained about. Justice Taney also held that Congress could not, through the Missouri Compromise, ban slavery in the territories north of the Compromise line, because the federal government must abide by constitutional civil liberties guarantees in the territories it controls. Thus, Taney argued,

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.¹¹⁵

Today many people regard this passage as the birth of “substantive due process” in Supreme Court jurisprudence. That is important because the idea of substantive due process emerges during the *Lochner* period, and once again after 1965 with *Griswold v. Connecticut*,¹¹⁶ *Eisenstadt v. Baird*,¹¹⁷ and *Roe v. Wade*.¹¹⁸ Pro-life advocates often denounce *Dred Scott* for invoking substantive due process—a concept at odds, they insist, with the words of the text—in order to protect the right to own slaves. In the 2004 election debates, President Bush signaled his kinship with pro-life forces when he announced that if elected, he would not appoint judges who

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

116. 381 U.S. 479 (1965).

117. 405 U.S. 438 (1972).

118. 410 U.S. 113 (1973).

legislated from the bench, the sort of judges, he insisted, who decided *Dred Scott*.¹¹⁹ Although Bush spoke of *Dred Scott v. Sandford*, many assumed that he really meant *Roe v. Wade*.

However, when Taney invoked the Due Process Clause, he was advertising to a very different idea than today's substantive due process decisions like *Griswold* or *Roe v. Wade*—the idea that the government could not destroy vested rights of property through legislation.¹²⁰ Taney insisted that when slaveholders moved their property from slave jurisdictions to free territories, they could not lose their rights in their slaves; otherwise the federal government would have destroyed their vested property rights (and given them to the slave), thus taking from *A* and giving to *B*.

The notion that governments could not destroy vested rights or take from *A* and give to *B* was well understood at the Founding and goes back to the Magna Charta and its guarantee that property could not be taken except according to the "law of the land."¹²¹ Justice Chase, in the well-known 1798 case *Calder v. Bull*,¹²² appeared to suggest that no government denominated "republican" could allow invasions of vested rights that would transfer property from *A* to *B*.¹²³ This principle, Justice Story later explained in *Wilkinson v. Leland*,¹²⁴ was so basic that it bound governments even if they didn't have a due process or law of the land clause.¹²⁵

What is perhaps most ironic about our present-day condemnation of *Dred Scott* as substantive due process is that Justice Curtis's dissent agreed with the vested-rights doctrine. He merely insisted that it did not apply when a person took his property from one jurisdiction to another.¹²⁶ Curtis pointed out that no vested rights were destroyed when a person traveled to a jurisdiction that did not recognize a particular form of property.¹²⁷ People did not take their property law with them when they went from place to

119. Second Bush-Kerry Presidential Debate (Oct. 8, 2004), available at <http://www.debates.org/pages/trans2004c.html>; Timothy Noah, *Why Bush Opposes Dred Scott*, SLATE, Oct. 11, 2004, <http://www.slate.com/id/2108083/>.

120. See Jack M. Balkin, *Dred Scott and Kelo*, BALKINIZATION, Aug. 11, 2005, <http://balkin.blogspot.com/2005/08/dred-scott-and-kelo.html>; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999).

121. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). Before that, several state courts invoked the notion. See Ely, *supra* note 120, at 337–38.

122. 3 U.S. (3 Dall.) 386 (1798).

123. See *id.* at 387.

124. 27 U.S. (2 Pet.) 627 (1829).

125. *Id.* at 658 ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.").

126. 60 U.S. (19 How.) 393, 626–28 (1857) (Curtis, J., dissenting).

127. *Id.* at 627.

place. If Taney's argument was correct, then slaveholders would be able to keep their slaves even when they went into free states like Illinois. Thus, in Curtis's view the majority opinion was not the creation of a novel (and unsound) doctrine of "substantive due process" as we might imagine it today. Rather, Curtis saw Taney's opinion as a *misapplication* of a concept familiar at the Founding—that legislatures could not destroy vested rights or take rights from *A* and give them to *B*.

Curtis's rejoinder to Taney is not foolproof: Illinois's right to be a free state (and therefore to refuse to recognize slavery—so long as it returned fugitive slaves) did not necessarily imply that Congress itself could adopt whatever policy it wished for the territories. If one believed (as Taney and Catron did) that Congress was under a fiduciary duty to hold federal lands in trust for equal settlement by all American citizens, slaveowners and non-slaveowners alike, then the federal government's failure to provide for protection of slave property would have been tantamount to stripping property rights at the border, which would be like taking from *A* and giving to *B*. But this merely suggests that Taney's due process argument rested on an antecedent argument about fair treatment and equality between citizens in the territories.

When we talk about substantive due process today, we think of the government's ability to control reproduction, family structure, and intimate relationships, issues quite distant from the vested-rights doctrine to which both Taney and Curtis adhered. In fact, the source of these rights should probably not be the Fifth Amendment's Due Process Clause, but the Fourteenth Amendment's Privileges or Immunities Clause—which makes no reference to process. However, this clause was, quite improperly, made a dead letter in the 1873 *Slaughter-House Cases*.¹²⁸ As a result, the Due Process Clause—which concerns fairness of process and the protection of vested rights—was later called upon to do work for which it was not originally designed.

But however historically inaccurate, the invocation of *Dred Scott* as poster child for the evils of substantive due process continues; first, because Taney did indeed refer to the Due Process Clause to defend vested rights in slavery, and second, because identifying anything with *Dred Scott* is the surest way to delegitimize it.¹²⁹ Nevertheless, Taney's basic principle—that governments may not destroy vested property rights of *A*'s and

128. See 83 U.S. (16 Wall.) 36 (1873).

129. Paul Finkelman notes that almost all twentieth-century citations to *Dred Scott* are in dissents denouncing the majority opinion by comparing it to *Dred Scott*. See FINKELMAN, BRIEF HISTORY, *supra* note 112, at 5–6 & n.6.

give them to *B*—retains strong support in American culture. Consider for example the outcry over the Supreme Court’s 2005 decision in *Kelo v. City of New London*,¹³⁰ which most specialists regarded as an easy case under existing caselaw.¹³¹ The petitioners who were threatened with the loss of their family homes (even with compensation) argued that it was unfair and unjust for the city of New London to wrest land from innocent citizens simply because private businesses could ostensibly make a higher and better use of the property by tearing down the homes and developing the land. The Constitution, the petitioners argued, forbade taking from *A* and giving to *B*. Indeed, Taney’s argument in *Dred Scott* was even stronger—for in the *Kelo* case the homeowners were promised compensation, while in *Dred Scott*, Dred Scott’s master would have gotten nothing at all if Scott and his family had been set free.¹³²

SEVEN: *DRED SCOTT* AND CONSTITUTIONAL EVIL: DOES THE FAULT LIE IN THE JUDGES OR IN THE CONSTITUTION ITSELF?

Part of the constitutional canon is actually an “anti-canon”—a collection of negative precedents and judicial decisions that tell us how judges should *not* decide cases, what the Constitution does *not* mean, and what we as Americans do *not* stand for.¹³³ *Dred Scott* is the key example in this anti-canon. Because we do not want to identify ourselves or our Constitution with its racism, *Dred Scott* not only must be reviled, but also it must have been wrongly decided as a matter of law. It must be an example of how judges should not do their jobs. That is one reason why we keep *Dred Scott* in our memory as a ready example of judicial perfidy—because it allows us to state forcefully who we are not. Our confidence in that conclusion today, however, was reached through a long process of struggle, and it does not reflect the America in which *Dred Scott* was actually decided. That was an America in which many lawyers and politicians assumed the natural superiority of whites and the natural inferiority of non-whites—in which it was generally assumed that America was a white man’s republic. (We use the term “man” advisedly.) *Dred Scott* is safer to remember as a

130. 545 U.S. 469 (2005).

131. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

132. One might recall in this context that Abraham Lincoln supported *compensated* emancipation at least well into 1863, even after the Emancipation Proclamation, and the explicit bar of such compensation in Section Four of the Fourteenth Amendment might be understood as implicit recognition that the Proclamation raised significant problems under the unreformed pre-1868 Constitution.

133. See Balkin & Levinson, *supra* note 2, at 1018–19; see also Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 243–45 (1998) (explaining that the “anti-canon” is “the set of texts that are important but normatively disapproved”).

caricature of injustice that we have long since left behind. It is more troubling to think of it as reflecting aspects of our constitutional heritage whose effects are still with us today.

A central fact of antebellum America was that slavery was legal property, protected with the force of law like any other species of private property, and indeed given special protection by the Fugitive Slave Clause of Article IV. In this respect, it is worth noting that Justice Curtis, the principal dissenter in *Dred Scott*, fiercely criticized Abraham Lincoln when Lincoln asserted broad presidential powers to interfere with slave property during the ensuing Civil War.¹³⁴ Curtis vigorously objected to the Emancipation Proclamation, which required no proof at all that any particular slaveowner was in any way disloyal to the Union (beyond having the bad luck to live in a state that had attempted to secede). In the midst of a war for national survival that the North repeatedly feared it might lose, Curtis's objections fell largely on deaf ears. One newspaper that supported the Proclamation was typical, announcing matter of factly, "Nobody pretends that this act is constitutional, and nobody cares whether it is or not."¹³⁵ Yet if Curtis was right and the Emancipation Proclamation was unconstitutional, what does that say, not merely about Lincoln, who violated his oath of office, but about the Constitution that prevented Lincoln from freeing the slaves?

William Lloyd Garrison famously termed the United States Constitution a "covenant with Death and agreement with Hell."¹³⁶ As such, he suggested, no honorable person could agree to be a judge, because honest enforcement of the Constitution would indeed require hellish, albeit legally "correct," rulings. Most patriotic Americans are loath to agree with Garrison. They are more likely to find comfort in Calvin Coolidge's statement that "[t]o live under the American Constitution is the greatest political privilege that was ever accorded to the human race,"¹³⁷ and many would agree with William Ewart Gladstone's extravagant description of the Con-

134. See Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What The Answer Is?*, 2001 U. ILL. L. REV. 1135, 1144–45.

135. Benjamin Robbins Curtis, *Executive Power*, reprinted in 1 UNION PAMPHLETS OF THE CIVIL WAR 1861–1865, at 450, 470 (Frank Freidel ed., 1967), quoted in PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 2, at 226–28.

136. William Lloyd Garrison, *LIBERATOR*, May 6, 1842, at 3; see also HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* 531 (1998); WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963); JAMES BREWER STEWART, *HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY* 98–99 (1976).

137. Calvin Coolidge, quoted in *World of Quotes*, Constitution Quotes, <http://www.worldofquotes.com/topic/Constitution/index.html> (last visited Feb. 11, 2007).

stitution as “the most wonderful work ever struck off at a given time by the brain and purpose of man.”¹³⁸

Garrisonians—and contemporary neo-Garrisonians—have relatively little difficulty in describing *Dred Scott* as a basically correct reading of the Constitution. In Mark Graber’s term, the problem exposed by *Dred Scott* is “constitutional evil.”¹³⁹ Does our Constitution, correctly interpreted, permit or even require very great evils, so that it truly is a covenant with death and an agreement with hell? To avoid such a conclusion, most people are far more comfortable with blaming judges than the document the judges interpret. If the Constitution permits or reaches unjust results, it is not because of anything contained within it (or omitted from it), but because of “judges on a rampage,” judges who, critics are quite sure, have imposed their petty political preferences in place of the Constitution’s just and honorable provisions.

Blaming judges and politicians as opposed to the Constitution helps preserve our sense of the Constitution as a good and great document. But it almost willfully ignores our Constitution’s many defects.¹⁴⁰ And, in the context of 1857, it ignores the fact that the Constitution was easily and confidently read to protect the legality of slavery and the interests of slaveholders. The dissenting views of abolitionists like Lysander Spooner¹⁴¹ and Frederick Douglass,¹⁴² who insisted that the Constitution was actually hostile to slavery, were widely regarded as unsound examples of special pleading, or, in today’s parlance, as “off the wall.”

To put it mildly, this is no small difference of opinion. It represents a central disagreement between, on the one hand, those who are fundamentally critical of the original Constitution (and, implicitly, the Framers who collaborated with slavery at the very inception of the Union), and, on the other hand, those who wish to celebrate the Constitution (and its framers) and therefore must view the majority in *Dred Scott* as faithless to their oath to uphold what by stipulation is an admirable constitution. For the latter

138. W.E. Gladstone, *quoted in* Constitution Facts, Famous Quotes, http://www.constitutionfacts.com/fun_zone/Famous_quotes.htm (last visited Feb. 11, 2007).

139. See GRABER, *supra* note 96.

140. See *generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (discussing the democratic defects of the Constitution).

141. See LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845), *available at* <http://www.lysanderspooner.org/UnconstitutionalityOfSlaveryContents.htm>. See *generally* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977).

142. See Frederick Douglass, Unconstitutionality of Slavery: Lecture Delivered in Glasgow, Scotland (Mar. 26, 1860), *available at* <http://medicolegal.tripod.com/douglassuos.htm>.

group, *Dred Scott* must be wrong, and wrong the day it was decided, because otherwise the fault would lie in the Constitution and not the judges.

One of us (Levinson) has suggested that most constitutional theorists are almost inevitably addicted to “happy endings” in constitutional interpretation; the best theory, they believe, never forces us to embrace truly evil or unjust consequences.¹⁴³ Indeed, most people would reject out of hand an interpretive approach that regularly and predictably leads to clearly evil and unjust results. Most people, including most theorists, prefer a “comic” approach to the Constitution. There may be a pratfall along the way, but, overall, things work out for the best, and the constitutional project moves ever onward to greater liberty and justice for all. But what if the Constitution is in fact a far more “tragic” document, and our constitutional project requires collaboration with evil for those who would be truly faithful to it? Why should anyone pledge to “support, protect, and defend” *that* Constitution? And why should anyone inculcate in law students feelings of reverence and concomitant commitment to it?¹⁴⁴

Dred Scott is not the only case exemplifying the potential for “constitutional evil,” of course, though it is surely the most important. It is usually far easier for most people—whether ordinary citizens or law professors—to criticize the Court rather than the Constitution itself. The idea of “judges on a rampage” is a familiar element of our standard narratives of American constitutional history, even if different persons will offer conflicting examples of exemplary rampages. Charles Evans Hughes once spoke of the Court’s “self-inflicted wounds,” referring to *Dred Scott*; *Hepburn v. Griswold*,¹⁴⁵ the first of the *Legal Tender Cases*, which struck down the federal government’s power to issue paper money as legal tender; and the *Pollock*¹⁴⁶ case, which invalidated the federal income tax. But the very notion of “self-inflicted wounds” assumes that truly sagacious judges would have been able to avoid shooting themselves (and the Court) in the foot. Had Hughes believed that these three decisions reflected accurate readings of the Constitution and, therefore, the costs of genuine constitutional fidelity, he would have described the problem very differently.

143. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 87 (1988); see also PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 2, at 153 (“Is Constitutional Law a Comedy or a Tragedy?”).

144. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997).

145. 75 U.S. (8 Wall.) 603 (1870).

146. *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895).

The closest Hughes came to facing this choice was *Home Building & Loan Ass'n v. Blaisdell*,¹⁴⁷ in which Minnesota imposed a moratorium on mortgage foreclosures during the Great Depression. Banks challenged the law under the Contracts Clause, whose historical purpose, as the dissent pointed out, was to prevent state governments from altering the rules of banking contracts to favor debtors over creditors, precisely what Minnesota had done here.¹⁴⁸ Faced with a fairly palpable conflict between the original understanding of the Clause and what he felt the situation demanded, Hughes offered the vision of a flexible Constitution, easily adaptable to the crises of the future.

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget, that it is a constitution we are expounding—a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."¹⁴⁹

By imagining the Constitution as flexible in just this way, Chief Justice Hughes and later generations could almost always avoid blaming the Constitution. Instead they could blame the judges, both when they read the Constitution inflexibly, and, equally important, when they read it flexibly in ways that the critic did not like. In short, the contemporary embrace of a Constitution whose application adjusts to the times is the standard way in which we avoid imagining that our Constitution is evil—or even merely inadequate to the goals set out in its Preamble—while we insist that we are always faithful to it. But at the same time, this device simply pushes increased responsibility—and increased vituperation and calumny—on the judges charged with interpreting it.

We do our best to avoid thinking about constitutional evil, but we do not always succeed. The problem that constitutional evil raises is how great a compromise with evil fidelity to the Constitution requires of conscientious government officials, lawyers, and citizens if we are to enjoy the

147. 290 U.S. 398 (1934).

148. *Id.* at 454–63 (Sutherland, J., dissenting).

149. *Id.* at 442–43 (majority opinion) (alteration in original) (citations omitted).

many benefits that come from living under a constitutional democracy. How great a compromise must we make with evil to be faithful to the Constitution and to enjoy the benefits of union? If the Constitution requires only minor injustices, then our ability to pledge faith in it is not greatly disturbed, as long as we have hope and faith that we can eventually amend it to make it conform with what is just. But if the gap between justice and the Constitution is sufficiently great, the problem of constitutional evil is profound. We face the question whether an honorable and decent person, as Garrison suggested, had no choice but to *refuse* obedience to the Constitution (unless, of course, one had been so unwise as to take an oath of office binding one's self to enforcing it—but in that case, of course, a conscientious person might be compelled to resign).

Note that during Taney's own day, as in ours, people disagreed about whose position was evil and whose was just. Abolitionists thought that slavery was an evil; slaveholders thought that abolitionists were insane lunatics who wanted to seize their rightful property and destroy their way of life; and free-soil whites disagreed with both. Each side generally believed that its views were just and correct and that to accept the opposite view would be to compromise with evil. Today, pro-choice and pro-life forces, supporters and opponents of gay rights, those who seek greater presidential power and those who wish to preserve civil liberties, all claim that the other side is seeking to impose great injustices on the country. In a world of irreducible moral disagreement—with new disagreements continually arising to displace older ones now settled by time—we must decide whether the constitutional system is worth the evils it permits (or even requires) and the injustices it leaves unremedied.

Earlier we noted the recurring trope that the Constitution is not a "suicide pact." But what if it requires "moral suicide"—great compromise with evil—to preserve the benefits of a working political union? Obviously, people will disagree about whether a certain policy is evil, bearable, or even admirable. But that is precisely the point. Moral disagreement is a pervasive feature of societies like our own. That means that for at least some of us, and possibly for all of us, in different contexts, the Constitution as it is applied in practice—and not in our imaginary ideal—may require significant compromises with what we regard as profoundly evil. Then we squarely face the question Mark Graber poses in his book *Dred Scott and the Problem of Constitutional Evil*: must we sacrifice justice to obtain peace?

EIGHT: *DRED SCOTT* AND THE “INTERNAL” AND “EXTERNAL”
PERSPECTIVES ON SUPREME COURT DECISION MAKING.

In this essay we provide two different kinds of perspectives on *Dred Scott*: internalist perspectives that explain (or challenge) the logic of the Court’s reasoning, and externalist perspectives that try to explain why the decision came out as it did by pointing to larger features of American political culture that influenced it. As history recedes, the latter features become more obvious and powerful methods for explaining judicial decisions. Today it is obvious to note the role of the slaveocracy and antebellum culture as major determinants of the reasoning and the result in *Dred Scott*. But at the time a case comes down, judges and commentators are likely to focus on “internalist” explanations; that is, why the judges were driven to take positions based on legal logic—what well-schooled lawyers of the day would have regarded as appropriate legal arguments based on existing legal resources.

Because we are so distant from the events of *Dred Scott*, and so distant from our country’s acceptance of slavery, many are likely to find internalist accounts wanting. Surely, they will argue, the key determinants of the opinion were racial prejudice and the country’s economic investment in chattel slavery. But we note that what is true for *Dred Scott* is also true of almost every other opinion. We can look at it from either an external or an internal perspective, and can profitably learn from both approaches.¹⁵⁰ Even cases that seem to be explicable internally can be understood in external terms if we draw the camera back far enough to recognize their historical and political underpinnings; conversely, we will find that cases that seem to be largely determined by external political and historic factors are shaped by their internal logic if we examine them closely enough. What we learn from *Dred Scott*, ultimately, is that although we universally denounce the result today, the influence of internal and external causes may be little different than for opinions that we particularly admire. If *Dred Scott* is a bad opinion, it may not be because the Justices failed to abide by norms of legal craft, as Mark Graber reminds us.¹⁵¹ It may be simply that we have rejected the entire legal and political culture that produced it.

150. See AUSTIN ALLEN, *ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857* (2006), which presents a fascinating—and to most law professors quite unfamiliar—internalist analysis of *Dred Scott* in the context of many other cases involving particularly issues of jurisdiction over corporations.

151. See GRABER, *supra* note 96, at 4, 85–86.

NINE: IS THERE ANYTHING GOOD ABOUT *DRED SCOTT*?

As Exhibit A in the constitutional anti-canon, it is easy enough to find objectionable features in *Dred Scott*. But a remarkable characteristic of even the worst legal arguments is that they are often Janus-faced—they contain ideas that, in other contexts, are entirely reasonable and even admirable. *Dred Scott* is no exception.

Dred Scott contains two key ideas that we might find valuable today. The first is its commitment to the idea of equality, however warped. The second is its hostility to colonialism and imperialism.

Today we think of *Dred Scott* as the very symbol of inequality, because it treated blacks as an inferior order of humanity. But Taney (and Catron) thought they were upholding equal rights—between Southerners and Northerners. *Dred Scott* held that the Missouri Compromise banning slavery in the northern territories was unconstitutional because the federal government could not subordinate the interests of Southern white slaveholding citizens to those of their Northern compatriots. Whatever else one might say about the Missouri Compromise, it generated a structural inequality at its core: Northerners could bring all of their property into the federal territories to settle them, but Southerners could not. Indeed, they might forfeit most of their wealth if they tried to enter north of the Compromise line. Of course, one might object that slaveholders could sell their slaves and use the proceeds to invest in new businesses north of the Compromise line. But slavery, of course, represented a *culture* as well as a form of wealth; the inability to maintain one's status as a slaveholder and the obligation to hire free labor or, perhaps, choose an entirely new line of work meant, to many, the destruction of a valued way of life. Justice Catron, among others, argued that the Missouri Compromise unfairly discriminated against Southerners. He anticipated Justice Brennan's argument in *Shapiro v. Thompson*¹⁵² over a century later, arguing, in effect, that the Compromise penalized the constitutional right of Southerners to travel into and settle the territories on equal terms. Indeed, *Dred Scott* may be the first "unconstitutional conditions" case—for Catron is arguing that the federal government could not put Southerners to the choice of purchasing cheap federal land or holding their slaves. The Compromise, Catron, argued, was not only coercive; it was discriminatory: "[T]he act of 1820, known as the Missouri compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the re-

152. 394 U.S. 618 (1969).

spective States and their citizens an entire EQUALITY of rights, privileges, and immunities.”¹⁵³

George Fredrickson many years ago applied the term “herrenvolk democracy” to describe the nineteenth-century United States,¹⁵⁴ and Don Fehrenbacher titled his last work *The Slaveholder’s Republic*. *Dred Scott* forces us to confront the extent to which these labels accurately characterize the America in which it was decided. The “slaveholder’s republic” offered a kind of “equality” to all whites (or at least all white male citizens). The *Dred Scott* majority argued that Congress held the federal territories in trust for all U.S. citizens, slaveowners and non-slaveowners alike, and that all citizens should have an equal opportunity to settle them. The Missouri Compromise barred slaveowners from bringing their slaves with them north of 36°30’ latitude, imposing what we today would call a “disparate impact” on Southerners. Thus, *Dred Scott* not only makes an egalitarian argument for slaveholders rights, it also makes what we would today call an “antisubordination” argument. For Catron, the issue was not whether the Compromise was formally equal between Northerners and Southerners (some of whom did not in fact own slaves), but the practical effects and advantages that the law had in creating or perpetuating advantages for one group over another. As noted earlier, slaveholders could renounce their slaves or leave them behind if they wanted to settle in northern territories, but this would mean giving up not only their livelihood, but also their way of life. Consider, for example, a “compromise,” designed to overcome traditional religious conflict, that allowed Protestants to settle anywhere in the United States, but limited Catholics or Jews only to the territories of the upper Midwest.

Today, of course, antisubordination arguments are most likely to be offered by minority groups criticizing the cumulative effect of formally neutral laws that disadvantage them. It is interesting—and ironic—to note that Southern slaveholders made similar claims that they, too, were a disadvantaged and put upon minority in the United States, and they demanded constitutional remedies to prevent this unfair treatment. In its own way, then, *Dred Scott* exemplifies a Court that did indeed take (certain) rights seriously—the rights of slaveholders and the right to equal treatment by the federal government when it dispensed valuable goods like the ability to settle in new federal lands. Today we may be outraged by Catron’s use of

153. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 528–29 (1857) (Catron, J., concurring).

154. GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY*, at xi–xii (1981); GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914*, at 61–70 (1971).

equality arguments to defend the rights of slaveholders. But his argument was by no means frivolous in 1857. Indeed, it followed from the widely held assumption that slavery was a legitimate form of property, at least as legitimate as other forms, and, moreover, specially protected by the Constitution. If slavery was legal and legitimate, then slaveholders too were entitled to what we would now call the “equal protection of the laws.”

A second valuable aspect of *Dred Scott* is little noticed today but was quite important at the turn of the twentieth century. As America became an imperial power following the Spanish-American War, extending its sovereignty to new territories in the Philippines, Puerto Rico, and elsewhere, the question arose whether the Constitution was equally enforceable in these new possessions. In the parlance of the day, this was the question of whether the Constitution followed the flag. The key Supreme Court decision of the time, though sadly neglected today,¹⁵⁵ was *Downes v. Bidwell*, one of the *Insular Cases* of 1901,¹⁵⁶ where *Dred Scott* is extensively cited—without shame—by both sides.

From the perspective of 1901, *Dred Scott* was not a case about racial equality or even citizenship, but rather about Congress’s plenary power to regulate the territories free of effective constitutional limits. Taney’s opinion in *Dred Scott* makes a sustained argument against such powers. Drawing on the memory of America’s struggle with Great Britain, Taney insisted that America was different from Europe. Unlike the Europeans, America would not and could not hold colonies that would never become part of the Union. All federal territories were acquired with the expectation that they would someday be states, and therefore the Constitution—and constitutional rights of person and property—applied to all of them.¹⁵⁷ That is why Taney insisted that the federal government could not destroy vested rights of slaveholders when they brought their slaves to the territories.

Thus, Taney’s opinion in *Dred Scott* held that when the United States government acquires new territory—no matter where in the world—it must protect the rights of at least U.S. citizens who live there.¹⁵⁸ The government’s power to regulate territories was limited by the Bill of Rights and other constitutional guarantees. Although he did not use the term, we could

155. *But see* BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 79–110 (2006).

156. *Downes v. Bidwell*, 182 U.S. 244 (1901). *See generally* Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 121 (Christina Duffy Burnett & Burke Marshall eds., 2001).

157. *Dred Scott*, 60 U.S. (19 How.) at 446–48.

158. *See id.*

regard Taney as an “anti-colonialist,” a central term in turn-of-the-twentieth-century discourse. It was the great dissenter in *Plessy v. Ferguson* and the *Civil Rights Cases*, John Marshall Harlan, who drew on this aspect of Taney’s opinion, just as the pro-imperialist majority made every effort to describe Taney’s views as referring only to slavery—and, therefore, of total irrelevance to the vigorously expansionist United States.

To avoid the force of Taney’s logic, the Supreme Court in the *Insular Cases* created a new distinction between incorporated territories where the Constitution applied fully and unincorporated territories—like the Philippines and Puerto Rico—where only limited or watered down versions of constitutional rights applied.¹⁵⁹ This distinction—and its rejection of *Dred Scott*—is still important today. As the United States became a world power, it occupied military bases around the world, including Guantanamo Bay, Cuba, where, as we noted previously, the government has argued that foreign detainees have no constitutional rights that the United States must respect. In a stunning example of ideological drift, Taney’s arguments that slaveholders retained basic rights when they traveled to territories held by the United States take on a very different meaning in today’s world, in which the United States stores detainees in prisons around the world, hoping to keep them well beyond the reach of American courts—and American constitutional rights. Although Taney’s specific argument sought only to protect the rights of citizens in territory controlled by the federal government, his larger principle—that the Constitution should follow the flag—has far greater reach.

Citing *Dred Scott* as positive authority for anything these days may give people pause, somewhat like citing Nazi medical experiments on Jewish prisoners for the useful information they might contain. The proper response to unmitigated evil, one might argue, is to refuse it even the most minimal affirmative recognition. Perhaps this is correct with regard to Nazi experiments. But is it a fit response to the legal arguments in *Dred Scott*? Or, on the contrary, should we recognize that elements of *Dred Scott* can make valuable contributions to our constitutional discourse even today?

TEN: *DRED SCOTT* AND THE COUNTER-MAJORITARIAN DIFFICULTY

Perhaps the most familiar criticism of *Dred Scott* is that it demonstrates the dangers of courts imposing their political preferences on the nation. This theme was recently repeated by Jeffrey Rosen in a book proclaiming that the Court should never stray very far from the mainstream of

159. See *Downes*, 182 U.S. at 271–81.

American public opinion, and he offered *Dred Scott* as the key example of what happens when courts reject this wisdom.¹⁶⁰ From this perspective, *Dred Scott*'s chief vice is that unelected judges acted contrary to the wishes of a democratically elected majority.

The major problem with this indictment of *Dred Scott* is that it is not true. First, *Dred Scott* was decided by a Court that reflected the dominant political power of its time—the Democratic coalition that sought to support the rights of slaveholders. The Supreme Court served the larger goals of the dominant national coalition as the Court has so often throughout history. Indeed, political scientists have long pointed out that Rosen's advice to the Supreme Court is entirely superfluous.¹⁶¹ The Supreme Court almost never strays too often or too long from the wishes of the national political coalition, and usually works in conjunction with it. The major exceptions, for example, during the early years of the New Deal, are when holdovers from an older coalition have yet to be replaced by a new coalition that has just formed.¹⁶² As we saw in the years after 1937, Franklin Roosevelt quickly replaced eight of the Court's nine members with committed New Dealers, and the Court quickly confirmed its doctrines to support the New Deal vision of the Constitution.

No such transitional period was taking place in 1857. The country was ruled by slaveocrats, and so too was the Court. If one objects to *Dred Scott*, it is because one objects to the dominant institutions of American life, which were committed to the preservation (and extension) of slavery.

Second, it is probably incorrect to view *Dred Scott* as reaching out to snatch an issue away from majorities. Rather, the Court seems to have been doing what it thought the dominant coalition wanted. The dominant forces in Congress had little use for the Missouri Compromise, and indeed, Congress had essentially repealed it in the Kansas-Nebraska Act, opening up slavery to various territories above the Compromise line.¹⁶³ Striking down a repealed 1820 compromise hardly violated the current national majority's wishes.

The result in *Dred Scott* demonstrates, if anything, that courts are usually no better and no worse than the politicians of their time. The decision was, after all, 7–2 in favor of slaveholding interests, and even the two dis-

160. See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 30–37 (2006).

161. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

162. *Id.* at 293.

163. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854); see also FEHRENBACHER, *supra* note 13, at 178–87.

senters, McLean and Curtis, wrote opinions that denied black civil rights.¹⁶⁴ McLean, for example, blithely wrote that “[i]f Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it.”¹⁶⁵ Curtis, who affirmed that blacks could indeed be citizens, nonetheless had a fairly desiccated notion of the actual rights of citizenship: “It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship.”¹⁶⁶ Should states wish to discriminate against their black citizens, that would presumably cause Curtis no difficulties. The real problem was not Taney and his fellow Justices, but the dominant assumptions of antebellum legal culture itself.

ELEVEN: *DRED SCOTT* AS AN EXAMPLE OF “PARTISAN ENTRENCHMENT”

Why did the Court do what the dominant national coalition wanted? The answer is simple: the federal appointment process keeps the Court roughly in line with the constitutional agenda of the appointing party. The nine Justices who sat on the Supreme Court in 1857 were appointed by a total of six different presidents—Andrew Jackson, Martin Van Buren, John Tyler, James Polk, Millard Fillmore, and Franklin Pierce. Four of these Presidents (Jackson, Van Buren, Polk, and Pierce) were Democrats. Two of them (Jackson and Polk) were slaveowners themselves; the other two Northerners (Van Buren and Pierce) collaborated with slaveowners in their judicial appointments as the price for maintaining party (and national) unity. Of their appointees, all were in the majority except the Ohioan John McLean, who represented a Northern version of Jacksonian ideology.

John Tyler was elected on the Whig ticket with William Henry Harrison (whom he succeeded after Harrison’s death). Tyler was, however, primarily a states’-rights-supporting slaveowner. His sole nominee to the Supreme Court, the New Yorker Samuel Nelson, joined the majority of seven who rejected Dred Scott’s claim to freedom (or citizenship). Aside from McLean the only other dissenter was Benjamin Robbins Curtis, a Massachusetts lawyer appointed to the Court by the Whig Millard Fillmore (who, like Tyler, ascended to the presidency through the death of the elected President, Zachary Taylor).

164. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 529–64 (1857) (McLean, J., dissenting); *id.* at 564–633 (Curtis, J., dissenting).

165. *Id.* at 548 (McLean, J., dissenting).

166. *Id.* at 584 (Curtis, J., dissenting) (emphasis added).

This pattern of appointments and subsequent votes on the most important political/legal issue of the time is evidence of what we call “partisan entrenchment”: a ruling political coalition, by winning enough elections (and thus controlling both the presidency and Senate at key times), can place on the bench a majority of Justices who share the winning party’s constitutional vision.¹⁶⁷ That does not mean that Justices self-consciously view themselves as agents of “their” political party. Rather, it is far more likely that they are appointed to the bench in the first place, because they honestly and sincerely believe that the best interpretation of the Constitution is one that happens to square with that of the President who appoints them.¹⁶⁸

Gerard Magliocca has argued that *Dred Scott* represents an almost desperate attempt by an entrenched majority of Democrats and slaveocratic Whigs to fend off what they viewed as a new group fundamentally opposed to the constitutional understandings that had structured American politics and maintained, however fragilely, the Union.¹⁶⁹ That group, of course, was the new Republican Party, which ran its first candidate for the presidency in 1856 on a platform of no extension of slavery into the territories.¹⁷⁰ As it turned out, the Democrats were right. The rise of the Republican Party, which won the Presidency in 1860, did signal the destruction of the old order, but in a way different than they or anyone else had imagined.

TWELVE: *DRED SCOTT* AND RESPONSIBILITY FOR THE CIVIL WAR

We come now to the question of war—and in particular, to that specific event of carnage that killed two percent of the entire population of the United States and left the South with losses comparable to the ravages inflicted by World War I on Europe. The most common criticism of *Dred Scott* is that it hastened the coming of the Civil War by fanning the flames of division and secession. But this claim begs two important questions.

167. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

168. See H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 689–94 (2004).

169. See Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 570–72 (2002).

170. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 129–30 (1995).

The first is whether this claim is true. The standard story is that *Dred Scott* precipitated civil war because it unnecessarily reached out to rule on the most volatile single issue then before the American polity—congressional control over the spread of slavery into the territories. By invalidating the (already repealed) Missouri Compromise, the Court, in effect, declared unconstitutional the platform of the newly-formed Republican Party. The Republicans resolutely opposed extension of slavery into the territories even as they promised to recognize the legitimacy of slavery in states where it was already established. All this may be true, but it does not explain why the Court caused the Civil War. Ruling out of bounds the South's most significant political opponent does not explain why the South felt compelled to secede.

A slightly different version of the story is that the Court provoked civil war through an unintended bankshot effect. *Dred Scott* also undermined the claim by Stephen Douglas and other Northern and moderate Southern Democrats that the Constitution required only “popular sovereignty”—that is, the ability of each territorial government, prior to statehood, to decide for itself whether it would permit slavery or not.¹⁷¹

Because Taney in effect validated the views of extreme Southern Democrats that territories *must* welcome slave-owning settlers, the Court destroyed the Democratic coalition that had dominated American politics since Jefferson's day. In the 1860 elections that followed, the Democratic vote was split, allowing Abraham Lincoln to win the electoral college despite not winning a single Southern state.¹⁷² The prospect of Lincoln as President, in turn, led Southerners who were on the fence to conclude that radical calls for secession were now justified. From this perspective, *Dred Scott*'s problem was not backlash but a series of unforeseen consequences, including among other things, the effect that Supreme Court decisions have on existing political coalitions, coupled with the existing structural limitations of the electoral college system for picking Presidents.

If the effects were truly unforeseen, it is hard to blame the Court for having caused them. But suppose, as we suspect, many politicians during this period—including both Lincoln and Douglas—might well have under-

171. See FEHRENBACHER, *supra* note 99, at 258; GRABER, *supra* note 96, at 35. Of course, the ability of territories, when writing their constitutions prior to petitioning for entry to the Union as states, to exercise their sovereignty in favor of slavery was very much limited by the fact that Congress could deny such petitions if it disapproved of the decision. This, after all, is what lay behind the Missouri Compromise and later bitter conflicts over the admission to statehood of Texas and Kansas.

172. See Map of the Presidential Election of 1860, http://teachpol.tcnj.edu/amer_pol_hist/fi/000000bd.htm (last visited Feb. 12, 2007); Atlas of U.S. Presidential Elections, 1860 Presidential Election Results, <http://www.uselectionatlas.org/RESULTS/> (select year 1860) (last visited Feb. 12, 2007).

stood how the ruling might split the Democrats' coalition and throw the White House to the Republicans. How might the Court have avoided these baleful effects? It could not simply validate the Republican platform without creating a backlash from enraged Southern slaveholders. (Indeed, even giving Scott his freedom on a technicality might have had this effect.) The usual answer is that if the Court was determined to return Scott to his former master, it could have rested its decision on an earlier case about conflict of laws, *Strader v. Graham*,¹⁷³ and adopted the holding of the Missouri Supreme Court as dispositive of Scott's status. Dred Scott would have remained a slave, but only because of common law and procedural technicalities rather than constitutional norms. The political status quo would have been preserved.

Austin Allen has recently criticized these assumptions, arguing that they were not available to the Justices because *Dred Scott* was a diversity case brought in the federal courts rather than an appeal from a state court.¹⁷⁴ Whether or not Allen is correct, adherents of a passive or minimalist approach to *Dred Scott* argue that courts should not have interpreted the Constitution to help eradicate slavery or even limit its spread. Like Justice Story in *Prigg v. Pennsylvania*,¹⁷⁵ they would insist that avoiding political upheaval and maintaining the Union are higher values, and that any constitutional decision threatening the Union—whether *Dred Scott* as we know it today or a constitutional decision vindicating the Republican platform—would therefore be fatally suspect.

But that brings us to the second question begged by those who blame *Dred Scott* for bringing on the Civil War. Would it have been preferable to maintain the Union as what Lincoln memorably described as a “house divided,” half-free and half-slave?¹⁷⁶ Lincoln, it should be noted, did not believe it would remain that way for long. Some people think that the eradication of slavery was inevitable. But if so, would it have been better to achieve final emancipation in, say, 1900 or 1925, perhaps with full compensation for the loss of valuable capital assets by slaveholders? If deciding *Dred Scott* some other way would have prevented the Civil War, is that a good thing, given that it would have meant that two or three more genera-

173. 51 U.S. (10 How.) 82 (1851).

174. Austin Allen, *Rethinking Dred Scott: New Context for an Old Case*, 82 CHI.-KENT L. REV. 141 (2007).

175. 41 U.S. (16 Pet.) 539 (1842).

176. Abraham Lincoln, “House Divided” Speech at Springfield, Illinois (June 16, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832–1858, at 426 (1989); Abraham Lincoln, “A House Divided”: Speech at Springfield, Illinois (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953).

tions of blacks would have been born in slavery? Presumably this would have also meant that there would have been no Thirteenth Amendment, no Fourteenth Amendment, and no Fifteenth Amendment, the three cornerstones of equality in our country's Constitution. Is this a bargain that critics of *Dred Scott* really want to make?

Especially if one is a pacifist—and, possibly, even if one is not—one should always prefer peace to war. If *all* wars are in effect “unjust wars,” then one is not sacrificing justice by maintaining what Neville Chamberlain so memorably called “peace in our time,”¹⁷⁷ but rather preferring justice to injustice. If, however, one is *not* a pacifist, then it is no longer so clear that *Dred Scott* was a terrible decision because, by stipulation, it hastened war. For the hastening of war also hastened the emancipation of the slaves and new amendments to the Constitution guaranteeing equality and racial justice. From this perspective, *Dred Scott*'s role in bringing on the Civil War counts in its favor!

However, we might revise the standard criticism of *Dred Scott* in the following way: *Dred Scott* was a bad decision because it made the gap between law and justice greater than it had to be for a significant number of people in the United States. If the gap is relatively small, people can live with it, or they can believe that the gap will get better over time. If the gap is quite large, then people face a more difficult problem. For the constitutional system to be legitimate, people must have faith in the constitutional system and must have a justified hope that things can get better and that their interpretations of the Constitution can come closer to positive law. Things might get better in one of three ways. First, the more just side can win elections, leading to new judicial appointments that can change doctrine or political changes that force a compromise. Second, the Court can make decisions that leave open democratic change through legislation. Third, technological, economic, and demographic changes can make earlier decisions irrelevant or less unjust.

The problem with *Dred Scott* may have been not merely that it made the law more unjust—a judgment that people in 1857 would clearly disagree about—but that it made it more difficult for many people to believe that the law could get more just from their particular perspective. *Dred Scott* made it far more difficult to reach legislative compromise, because it simultaneously outlawed the Republican Party platform and split the governing Democratic Party coalition, which helped elect Abraham Lincoln. Lincoln's election, in turn, pushed the South toward secession. If *Dred*

177. Neville Chamberlain, *Peace in Our Time* (Sept. 30, 1938), available at <http://www.fordham.edu/halsall/mod/1938PEACE.html>.

Scott was a bad example of judicial statesmanship, it was not because the Court reached out to decide an issue unnecessarily, but because it reached out to decide an issue in a way that made peaceful politics impossible. Under this line of criticism, *Dred Scott* was a bad decision if one thinks that war is generally a bad thing, even if it sometimes leads to good things like the abolition of slavery, and if one thinks that keeping the peace—even with slavery intact—is usually more desirable than justice.

The argument that peace is better than justice is, we think, a more plausible version of the familiar criticism leveled at *Dred Scott*. But it too faces considerable difficulties. Even if *Dred Scott* had been decided differently, it is not clear that it would have forestalled the Civil War. A decision refusing to give the South constitutional protection from the Republican Party—and, even more to the point, a decision actually freeing Scott—might have led to civil war more quickly and on terms far less favorable to the North. In 1857 the White House was inhabited by the feckless James Buchanan, who, although he believed secession illegal, read the Constitution to prohibit the national government from actually doing anything about it.¹⁷⁸ With Buchanan at the helm in the early years of the Civil War, the South might well have succeeded in breaking away with slavery intact. So if *Dred Scott* did lead to war by causing Lincoln's election, that is presumably all to the good if one supports the maintenance of the Union and the emancipation of the slaves. To criticize *Dred Scott* on consequentialist grounds, therefore, one has to be certain that the consequences of an alternative decision would, in fact, have been better.

THIRTEEN: *DRED SCOTT* AND THE IMPORTANCE OF COURTS

Asking whether the Court helped bring on the Civil War leads us to a final question: how important are Supreme Court decisions anyway? The consequentialist condemnation of *Dred Scott* presumes that the Supreme Court has considerable influence over the country's direction and ultimate fate. The legal academy for many years used *Brown v. Board of Education*¹⁷⁹—the canonical opposite of *Dred Scott*—to illustrate the good that the Court could do. But University of Chicago Professor Gerald Rosenberg famously argued that *Brown* had far less effect than people imagine.¹⁸⁰ The Court, Rosenberg argued, was generally a “hollow hope” for those seeking

178. See James Buchanan, Fourth Annual Message (Dec. 3, 1860), in GREAT PRESIDENTIAL DECISIONS 215, 228–29 (Richard B. Morris ed., 1966).

179. 347 U.S. 483 (1954).

180. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 107–56 (1991).

important changes or, for that matter, for those relying on the Court to hold back changes supported by the rest of the political system. If courts can do little good without support from larger forces—including social movements and the political branches—does that mean that they can also do relatively little harm as well? Does it mean that the harm they do cause, like the good they do, is mostly symbolic?

The various criticisms of *Dred Scott* we have noted in this essay all tend to elevate the importance of courts. If only the Court hadn't reached out to decide unnecessary issues or respected the will of majorities, things would have gone far better. It is not difficult to see why legal commentators tend to blame *Dred Scott*. If bad Supreme Court decisions can do so much harm, perhaps they can also do much good. At the very least, if courts can do this much harm, what courts do must be particularly important. The more we blame *Dred Scott*, the more we confirm the importance of courts, and, by implication, the work of those who study them.

Yet *Dred Scott* may have been more a symptom of something deeply pathological in American life than a cause of that pathology, and it may be that larger pathology—a republic built around appeasement of slaveholders—that ultimately brought on the payment enacted on Americans in blood and treasure. That, at least, was Lincoln's analysis in his second inaugural address. Slavery, Lincoln argued, was an "offense" that brought its due punishment from a just God. "[I]f God wills that" the Civil War must continue, Lincoln wrote,

until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."¹⁸¹

In his address, Lincoln does not single out the Supreme Court for particular blame for the war, even though he had excoriated *Dred Scott* in the years immediately after the decision. Surveying the wreckage of the country in 1864, he did not focus on Taney or the Justices in the majority or the counter-majoritarian difficulty. He blamed the country and its people, both North and South.

We blame *Dred Scott* today because it is a convenient symbol of what we don't like about our past, rather than the particular cause of those faults. We blame *Dred Scott* because attacking foolish judges in the past is a good way to attack judges we think are foolish in the present. We blame *Dred*

181. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln2.htm>.

Scott because it is easier than blaming the framers of the 1787 Constitution, who produced a political system that ultimately drove American politics into bitterly divided regional factions and made peaceful compromise ever harder.¹⁸² Above all, we blame *Dred Scott* because it is easier than blaming ourselves.

182. See GRABER, *supra* note 96, at 85–86.