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**LAW AND POLITICS RECONSIDERED:
A NEW CONSTITUTIONAL HISTORY OF *DRED SCOTT***

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Law and Politics Reconsidered: A New Constitutional History of *Dred Scott*

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Abstract:

*This essay synthesizes recent writing on the constitutional history of slavery, featuring Mark Graber's *Dred Scott and the Problem of Constitutional Evil* (2006). It offers a historical and legal analysis of *Dred Scott* that attempts to clarify the roles of both law and politics in controversial judicial decisions. It joins Graber in rehabilitating Chief Justice Taney's *Dred Scott* opinion as a plausible implementation of a Constitution that was born in slavery and grew only more suffused with slavery over time. It integrates much recent writing on the social, political, and constitutional history of slavery to develop the context in which the *Dred Scott* opinions must be read. And it finds that Justice Curtis's celebrated dissent amounted to an unjudicial manipulation of the law, not the judicial masterpiece of historiographical lore, although driven by the higher purpose of striking at the political hegemony of the slaveholding class.*

*This essay is an unabridged version of a shorter work that is forthcoming in *Law and Social Inquiry* (Summer 2009).*

INTRODUCTION

What makes a judicial opinion specially political? Do we just know it when we see it? In a time when no legal scholar believes that adjudication, especially at the Supreme Court, can be apolitical, is it worthwhile or even possible to identify those opinions that are specially “political”? These questions are raised for me by recent scholarship that attempts to rehabilitate the Court’s judgment and reasoning in the famously political *Dred Scott* decision, the 1857 case that denied Congress authority to prevent the expansion of slavery, denied black Americans citizenship simply by virtue of their descent from slaves, and perhaps helped to bring on the Civil War. Although the decision is deeply offensive now, and was so even in 1857 to many Americans, I agree with the general thrust of the revisionist work on this case and, in this essay, mean to go a step further. I will argue that, in fact, Chief Justice Taney’s opinion represented an effort to vindicate law as an alternative to violence, whereas Justice Curtis’s celebrated dissent evinced a lawless--though perhaps admirable--determination to put the South in its place.

For a good while now, judges and scholars have unanimously condemned Chief Justice Taney’s opinion as inexcusably partisan. In doing so, and in criticizing other opinions as excessively political, scholars of the judicial process have evinced a need to understand how the judicial mode of governance relates to the legislative, executive, and administrative modes and to principles of popular governance more generally. Especially in the politically charged arena of constitutional review, scholars have sought to understand how different public actors interact to establish the meaning of the Constitution (Keck 2007; Whittington 2007; Whittington 1999; Leonard 2002; Leonard 2001; Ackerman 1991; Kramer 2004; Graber forthcoming). And in some cases that means that we want to know when the judiciary has exercised (or usurped) authority plausibly claimed by some other institution or process.

Treatments of this question, though, often end up condemning the Supreme Court for rendering this or that “political” decision, without adequately explaining what makes the decision *more* political than so many others.¹ Historians often ask whether a particular judicial decision was genuinely driven by law or by politics. But the literature offers no standard for judging a judicial opinion excessively political unless we just measure the degree of offense the opinion gives to our own political beliefs.

By this measure, the 1857 case of *Dred Scott* was about as political a case as one could imagine, and it has only gotten more political over time as the nation has become more widely averse not only to slavery but to the unabashed racism of the opinion. In that case, a mostly Southern majority of the Court entered the sectional controversy that had been threatening the existence of the Union with increasing intensity for several decades. As the nation’s politics boiled with conflicts over the right (or not) of slaveholders to carry slaves into the nation’s western territories, the Court confronted Harriet and Dred Scott’s legal claim that they had each gained their freedom by their extended residence in free territory. Dred Scott had accompanied his master to his military postings in Illinois and then in the Wisconsin Territory. In Wisconsin, he met Harriet, also a slave who had accompanied her master to his military posting. With their

¹ Thus, behaviorist political scientists, who have shown statistically that the Supreme Court makes its decisions “politically,” have advanced understanding in only limited ways. The behaviorists have done valuable work in lending a degree of rigor to any number of interesting questions about the Court. But on the questions about whether Supreme Court decisions are governed by law or by the judges’ personal and political “attitudes,” it seems to me that the behaviorists and their opponents do not actually disagree in very important ways. It is a truism at this point that decisions of the Supreme Court, which exists largely to take on the most controversial and legally indeterminate cases, are determined in many cases and in significant part by some underlying values of the justices, though the behaviorists have valuably quantified this point. But legal scholars insist that it is also true that the justices consult much more than their own values; that the precise shape and outcome of judicial decisions also depends in significant degree on the legal materials available and the imperatives of judicial method and legal argument. What neither side has done particularly well is to attempt a sophisticated statement of *how much politics* there is in this or that opinion and *how much law*. A new essay by Brian Tamanaha (forthcoming) reviews the literature, raises this “how much” question, and debunks the myth that judges have widely bought into the mechanical, formalistic models of their work. For prominent exponents of behaviorism, see Segal and Spaeth (2002). Their critics include Michael Gerhardt (2003) and Mark Graber (forthcoming).

masters' permission, the two married before eventually returning to Missouri. Later suing for their freedom in Missouri state court, the Scotts appeared to have an excellent chance of winning under Missouri state law, since courts there had commonly accepted that a slaveholder's extended removal of a slave to a free state resulted in permanent emancipation, effective even in Missouri by virtue of comity. But in the Scotts' case, the state's supreme court declined to continue such extensions of comity amid Northern attacks on slavery. It held instead that the Scotts remained in bondage. Rather than appeal the state court's judgment to the federal Supreme Court (since clear precedent effectively blocked that route), the Scotts tried launching a new suit in federal court. The federal judge determined that the Scotts were eligible to sue in federal court, because if free they would count as citizens of Missouri for purposes of Article III of the Constitution; as citizens, they might use the federal forum to sue their owner, who was at that time a citizen of a different state. Ultimately, though, the Scotts lost the federal action on the merits in the trial court.

Appealing that loss to the Supreme Court, the Scotts presented, or at least opened the door to, two issues: whether native-born Americans descended from African American slaves could count as citizens under the Constitution; and whether the Missouri Compromise, which had long formally barred slavery from a huge swath of territory, exceeded Congress's authority. It is worth remembering that this expansive territory from which slavery had ostensibly been excluded, north and west of Missouri, had gotten little attention from American settlers before the 1850s and had in fact harbored de facto slavery openly--witness the Scotts' own experience in Wisconsin (VanderVelde and Subramanian 1997, 1048-50). Thus, for all its alleged sacredness as a Union-saving compromise, the Missouri Compromise had had little operative consequence in the actual territory it purportedly governed. Moreover, once meaningful

settlement was in the offing, the Missouri Compromise was repealed (in the Kansas-Nebraska Act of 1854), and the formal right to carry slaves into this huge territory was restored over the fervent opposition of much (but not nearly all) of the North. Shortly after this restoration, Chief Justice Taney held in *Scott*² both that native-born African Americans occupied so pervasively subordinate a position in American society that practically none of them could ever constitutionally count as citizens and that Congress had never had the power to exclude slavery from the territory at issue. The territorial ruling, especially, appeared to large parts of the North as an outrageous judicial manipulation of the Constitution.

The Court's holdings were highly political both in the sense that they took sides on some issues that were actively under debate in the political world and in the court-specific sense that they rested on premises that no mechanical reasoning or neutral principles could simply confirm or refute. Like every judicial opinion, Taney's was constructed from a combination of closely disciplined elements of legal reasoning and relatively undisciplined judgments about both factual and legal questions for which the available materials offered no clear answers. When Taney chose to defend and write into law some of the slaveholding states' most controversial claims, he earned himself the charge that he had dragged the Court down from its elevated station and converted it into the merely political agent of the proslavery South. This charge was trumpeted across the North by the Republicans of 1857 and again by a virtually complete scholarly consensus at least since Don Fehrenbacher's monumental 1978 monograph, *The Dred Scott*

² From here on, I'll refer to the case as *Scott*, rather than *Dred Scott*, both because the fate of the entire Scott family--Harriet, Dred, and their daughters--was at issue and because Dred's own facts were probably not adequate to raise all the legal issues in the case; facts peculiar to members of his family were necessary for that. In particular, Dred resided for a time in Illinois before going to the Wisconsin Territory, thus arguably rendering his time in the area governed by the Missouri Compromise superfluous: either he had already gained his freedom in Illinois or he was not going to gain it at all. Harriet Scott, on the other hand, arguably could rely only on her residence in the Wisconsin Territory as the basis for her claim to freedom, thus potentially raising the question of the constitutionality of the Missouri Compromise. For other variations on this theme, see VanderVelde and Subramanian (1997).

Case.

The modern condemnations rest on some premises that I share: that, political as judging must often or always be, there is something distinctive and meaningful about the activities of judges relative to those of legislators and executive officers³; and that a narrative of any important episode in judicial history rightly embraces the question whether the judges' actions represented recognizably judicial action or, alternatively, encroachment on the authority of other actors and institutions.

I propose that there is a workable standard, consistent with these premises, for determining when judges have stepped outside the bounds of judicial action. This standard probably renders *Bush v. Gore* (2000) and *Marbury v. Madison* (1803) largely outside those bounds and, for example, *Lochner v. New York* (1905) and *Scott* (mostly) well within. I do not think the standard I suggest will surprise anybody, but I do hope that the application of it in this essay will contribute to a less political history of judicial politics. I suggest that it makes little sense to deem judges excessively political when they resolve controversial cases by relying on their personal judgments as to the meaning of indeterminate legal materials, however much one may disagree with those judgments. It is fair enough to call that a political activity, but that is what judges are generally required to do, so it can hardly be thought unjudicial. It does, however, make sense to deem unjudicial--not just political but unjudicial--those judges who demonstrably seize on a case for purposes other than the need to decide the case at hand or the need to provide guidance for lower courts going forward. I think this standard does and should accommodate a judge's discretionary choice among available paths to get to a final judgment, even when that choice seems driven by a silent ambition to influence policy beyond the case itself; the standard

³ I find the recent essay by Thomas Keck (2007) especially clear and useful. Also see Graber (forthcoming).

does not mandate minimalist judging. I also think the standard does and should accommodate some measure of dictum, reasonably related to the well-considered issues in the case and meant to guide lower courts in cases likely to emerge.⁴ But the standard would render unjudicial any indulgence in dictum that is rendered with the evident ambition to influence or control public deliberations rather than provide effective guidance for lower courts. The spirit of the judicial role is that, whatever the particulars of the instant case, the greater goal is not the making of policy but the perpetuation of the authority of law.

Finally, as a corollary to the above principles, it seems clear that the most unjudicial conduct of a court lies in the deployment of a “legal” principle or argument for one case only, with none of the discipline that comes from the knowledge that the reasoning must be adhered to in other similar cases. Such judicial behavior is the *ne plus ultra* of the more common (but harder to demonstrate) judicial practice of applying legal principles inconsistently from case to case. Such behavior demonstrates the court’s determination simply to conclude a public question rather than to implement and perpetuate the authority of law. To justify a final judgment by reference to a “law” that the judge is not willing to treat as a law, applicable to more than one specially selected case, has to be understood as the very worst kind of dictum; the judgment is an *ipse dixit* and the opinion a mere polemic.

By my standards, then, it is usually futile to label an opinion political in the sense of being illegitimate or unjudicial. Nonetheless, there are some clear examples in American judicial history. For a simple but egregious example of dictum, consider Chief Justice John Marshall’s use of the *Marbury* case in 1803 to lecture Madison and Jefferson on their executive obligations.

⁴ Some might insist that judges act illegitimately any time they say more than is necessary to decide the case, but it seems obvious to me that courts often extend their opinions to guide lower courts on questions clearly related to the one at hand and likely to arise in short order. That may seem a violation of the judge’s formal role, but such pragmatic guidance hardly seems a usurpation in any meaningful sense.

The case famously raised the question whether the Supreme Court had the authority to order President Jefferson or Secretary of State Madison to deliver some judicial commissions. The commissions had been signed by the previous president but never delivered by the then-secretary of state (who had been, of course, John Marshall himself). Since Marshall concluded that the Court lacked that authority, it is very hard to see anything judicial in his extending the opinion to argue that Jefferson and Madison nevertheless had an obligation to deliver the commissions. Coming at a moment of extraordinary constitutional and political tension between Marshall's Federalist Party and Jefferson's newly ascendant Republican Party, it constituted a bold intervention in a public controversy without any accompanying prospect of guiding lower courts,⁵ let alone explaining the judgment in the case (Ackerman 2005). In contrast, the opinion's controversial invalidation of a section of the Judiciary Act may have been political in the usual sense and possibly even motivated by unjudicial purposes, but that holding and argument were hardly unjudicial.⁶

Even worse, the per curiam opinion in *Bush v. Gore* (2000), which I think is understood to have been the work of Justice Kennedy, seems to me as unjudicial a Supreme Court opinion as any I have encountered. That view rests not so much on the unlikelihood that Justice Kennedy honestly favored some of the constitutional doctrines by which he justified his choosing of a president, nor on the weakness of those arguments or on the necessarily political character of the Court's choice in taking a case that it had every right (but no obligation) to take. It rests instead on Kennedy's attempt to strip the opinion of all judicial character by prospectively confining it to

⁵ In theory, Marbury might have been able to go to a lower federal court to seek mandamus, but I have never seen anyone suggest that Marshall's dictum was actually offered as guidance to lower courts likely to encounter petitions for mandamus against the president and/or secretary of state.

⁶ See Bruce Ackerman (2005) for the latest scholarly word on Marshall and *Marbury*. Ackerman paints Marshall--rightly, I think--as a profoundly political animal with few scruples about using his office in unjudicial ways.

its facts: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities” (109).⁷ Of course, most problems before the Supreme Court present many complexities, but that never leads the Court to declare its reasoning unavailable as law for the future. In attempting to strip his own opinion of all precedential value from the moment of its publication, he deprived it of the very thing that might have made it judicial, even as every opinion in that case had some unavoidably political character.⁸ In doing so, he was no longer deciding a judicial case, no longer seeking to vindicate law so much as arrogating to the Court the authority to settle a public controversy.

The standard I am proposing accommodates the truth that all judging has some unavoidably political components. It embraces as “judicial” the great majority of Supreme Court opinions, from those that are driven almost mechanically by reference to precedent and/or statutory language to those that rest on highly indeterminate legal sources, and so take on a more overtly political character. At the same time, the standard reflects the American conviction that, even in comparatively political cases, it is imperative that judicial politics remain judicial and that judges limit themselves to deciding the cases in front of them and guiding lower courts. Even though those functions must be understood realistically to leave the judges substantial discretion to affect broader political debates, a careful adherence to the professional norms of

⁷ Whether this language actually is meant to eliminate the opinion’s precedential value has been a matter of some debate not only among scholars but in a continuing way in the lower courts, all of which is concisely summed up and the merits of the question evaluated by Chad Flanders (2007). The reasons why Justice Kennedy would have so undermined his own opinion probably rest in the unlikelihood that he would apply the *Bush* principles more broadly in election cases--perhaps also in the unlikelihood, as Richard Pildes (2004, 48-49) points out, that they even could be applied without unmanageable administrative expense.

⁸ It is true that other courts do related sorts of ad hoc justice all the time. See, for example, the relatively informal justice that often gets dispensed by trial courts and by appeals courts that choose not to publish many of their opinions. Perhaps that behavior is unjudicial, too, or perhaps not. But I think the precise questions raised by those practices are meaningfully different from those raised by controversial Supreme Court opinions.

judging is assumed to be central to the preservation of law.

What of *Scott*, then, so often condemned as the ultimate in unjudicial judging? Can we fairly say that the justices in the majority behaved as judges? Or, to the contrary, must we conclude that they somehow sullied their offices more than all those other courts that joined in the continuance of slavery before the Civil War? The judgment of recent decades has been virtually unanimous that the *Scott* majority did obviously, flagrantly, and unforgivably depart from its authorized role to pursue a proslavery agenda by whatever unscrupulous means it thought might work. In particular, Don Fehrenbacher (1978) thought it important to devote dozens of pages to establishing the claim that Taney's opinion was a document of "unmitigated partisanship" rather than a legitimately judicial opinion (3). And it is not hard to find scholars who refer to the case almost reflexively as "transparently partisan" (Simon 2006, 125) or as the "worst atrocity" in the history of the Court (Eisgruber 1993, 41).⁹

⁹ Here is some historiography of the *Scott* case: Since Fehrenbacher's declaration that Taney's opinion amounted to pure partisanship, few have disagreed. I don't mean here to discuss what I'll call the political historiography of the case, the writing that assesses the case's impact on the popular politics of the sectional crisis as of March, 1857. As far as possible, I mean to discuss only scholars' conclusions as to the causes of the *Scott* opinions and thus the case's place (or not) in legal history; that is, whether *Scott* is best understood, in its time, as a product of political undermining of the judicial process or, on the other hand, a product of the judicial process itself, a reflection of the law's preexisting principles and tendencies as of 1857, given the preceding decades of judicial support for slaveholding rights under the Constitution.

Unfortunately, the years since Fehrenbacher's 1978 opus saw little sustained historical writing on this question until very recently. Scholarly reviews of Fehrenbacher at the time tended to be highly supportive of his claims. Although Paul Finkelman offered some corrections on a few matters, he found Fehrenbacher's arguments, including his thrashing of Taney, almost "invariably sound" (Finkelman 1979, 374). Harold Hyman's review devoted most of his energy to a celebration of Fehrenbacher's condemnation of Taney's opinion, praising Fehrenbacher for shouldering the historian's alleged "responsibility to serve as a moral critic" (Hyman 1979, 439-441). And, in the *Stanford Law Review*, Gary Simson offered some defenses of some of Taney's reasoning but, at bottom, embraced Fehrenbacher's claim that Taney's opinion was marked by "innumerable misrepresentations of law and fact" (Simson 1980, 884).

More recent writing (Austin and Graber aside, of course) has tended in the same direction. Christopher Eisgruber called the case the Court's "worst atrocity" (Eisgruber 1993, 41). And Louise Weinberg finished her argument for the historical importance of the case by declaring that "History has not forgiven the Taney Court for *Dred Scott*, and it never should." (Weinberg 2007, 139) Keith Whittington has taken a more measured tone and criticized Taney less for any legal distortions than for

Quite a surprise, therefore, awaits when one goes back to the Taney and Curtis opinions

his ambition to settle a question better left to the politicians, but he also implicitly embraced the general consensus about the opinion: “*Dred Scott* has been universally denounced as a terrible mistake by the Court. Chief Justice Hughes [in 1928] labeled it a ‘self-inflicted wound’ and a ‘public calamity.’ Robert McCloskey [in 1962] regarded it as ‘the most disastrous opinion the Supreme Court has ever issued.’ Alexander Bickel [in 1970] called it ‘a ghastly error,’ and his protege Robert Bork [in 1990] consider[ed] it ‘the worst constitutional decision of the nineteenth century’” (Whittington 2001, 366). All of this despite the fact that the weight of professional historical opinion discounts the impact of the case on the coming of the war or even the election of Lincoln (Whittington 2001, 380, citing Fehrenbacher, Graber, and Stamp).

Even historians who demonstrate a full understanding of the pervasive effects of slavery on antebellum institutions find themselves suddenly jumping on the bandwagon when reading Taney’s opinion. Thus Hyman and Wiecek produced an accomplished constitutional history of Jacksonian America, often revealing the profound influence of slavery on the Constitution and its history, only to deem Taney’s opinion specially indefensible (Hyman and Wiecek 1982, 180-89). To me, these authors could more naturally have read Taney’s opinion as the climax of long-standing legal and constitutional tendencies in the Jacksonian and antebellum years, not as a special corruption of the law. Like Hyman and Wiecek, Michael Zuckert explains how deeply slavery infected the Constitution and its history and constrained what judges could do, but he too concludes that “we must judge” the majority justices for taking “the least defensible” course (Zuckert 2007, 328). Similarly, James Simon’s recent treatment of Taney and Lincoln offers a remarkably fair portrait of Taney as a powerful legal mind and a consistent thinker, trapped in the dilemmas of slave society, only to suddenly condemn his *Scott* opinion as “transparently partisan” (Simon 2006, 125). Earl Maltz’s recent book on *Scott* similarly manages to deliver very fair mini-biographies of the Justices that ventilate the Southern constitutional perspective only to conclude with a condemnation of Taney for his “judicial hubris” and his “fundamental misunderstanding of the appropriate role of the Supreme Court in the American political system” (Maltz, 2007a, 156). As the main text will show, it’s not that I disagree that there was an element of judicial hubris in Taney’s opinion, but I think these accusations ignore the much greater defects in Curtis’s opinion.

Until recently, I had classed Paul Finkelman with this last group, because his teaching book on *Scott* leaves the usual impression that there is nothing good to be said about Taney’s performance as a judge in that case (Finkelman 1997). But he has recently been dropping hints that Taney may have decided the case in a legally correct—or at least defensible—manner, given the nature of the original Constitution and the slaveholding society it served (Finkelman 2007, 4-5). Sanford Levinson evinced a similar ambivalence, perhaps, when in a single article he referred to Taney’s “egregious opinion” in *Scott* but then raised the question—without answering it—whether Taney might actually have been “right.” Given “the basic decision in 1787 to enter a union with slaveholders” and to bear the “consequences for every aspect of American constitutional doctrine,” he suggests the plausibility of the claim that racism was then “a fundamental value” (Levinson 1993, 1089, 1092, 1104-1108). Another example of openness to the possible rightness of Taney’s opinion, though a somewhat odd one, appears in Bruce Ackerman’s *We the People* (1991). Ackerman did not develop this point about *Scott*, only tossing out the suggestion that *Scott* might have been rightly decided in its time, because he wanted to make a larger point about the need to revisit the *Lochner* case and an even larger point about long term constitutional transformations. In any case, I think scholars of *Scott* should take to heart what Ackerman said about *Lochner*, which I adapt here for *Scott*: “We can begin to look upon the [southern-leaning] judges as judges, not pariahs, whose decisions differ from modern case law largely because *the Constitution they were interpreting was importantly different from the transformed Constitution left to us by the [Reconstruction Amendments]*” (Ackerman 1991, 66).

to evaluate them carefully, especially in light of recent scholarship by historians, political scientists, and legal scholars. Resting on a general recognition that racism and slavery were the order of that historical day (Levinson 1993), these recent works range from aggressively revisionist accounts of *Scott* by Mark Graber and Austin Allen to much broader-gauged forays into the socioconstitutional history of slavery like those of William Freehling (2007; 1990), Lacy Ford (2008), John Craig Hammond (2007), David Lightner (2006), Earl Maltz (2007a), Matthew Mason (2006), James Simon (2006), Eva Wolf (2006), Michael Zuckert (2007), and others. Part I of this essay, then, will synthesize this body of recent writing to redraw the big picture of *Scott*'s place in legal-historical scholarship--to reconstitute the constitutional history of *Scott*. All the works I draw on help to reopen a window on *Scott* as something other than a usurpation by partisan judges.

Graber's *Dred Scott and the Problem of Constitutional Evil* (2006), in particular, is a tour de force in its vindication of the insights of the constitutional politics school of political science. His book does miss the mark with respect to its grander claims about "constitutional evil," and, for my purposes, it pays too little attention to the principal opinions themselves. Graber decisively debunks many of the careless condemnations of Taney and the reflexive praise for Curtis that predominates in the literature. But he does not go far enough for a legal scholar or a legal historian in explicating why Taney and Curtis wrote as they did and whether either or both of them truly abandoned the judicial role to exploit their positions for unjudicial purposes. Still, Graber's work and a wave of recent historical literature give us the necessary preconditions for rereading the *Scott* opinions. This larger body of scholarship can be read to deepen the targeted revisionism of Graber and of the somewhat less successful, though still valuable, Allen book (2006). This broader literature elucidates the degree to which racism and slavery clung not just to

specific clauses of the Constitution but to the Constitution's divergent *social and political histories* in the North and South. These works broaden and clarify the context within which *Scott* must be understood, restore real interest in the case as an important artifact of legal as well as political history, and fruitfully reopen the perennial puzzle of the law-politics relationship.

Part II of this essay builds on this historiographical foundation to do a detailed reexamination of both Taney's majority opinion in *Scott* and Curtis's dissent. Taney's opinion has been so thoroughly reviled and Curtis's dissent so honored, almost hallowed,¹⁰ that they have become shorthand for judicial decadence, on the one hand, and judicial probity, on the other. It may come as a great shock, then, to discover that Curtis's opinion turns out not just to be political--as the constitutional politics school reminds us every opinion is--but to verge on the unjudicial. Close attention to the precise arguments made by Curtis--especially his attempt to undermine the authority of the Missouri Supreme Court--reveals a judge who perhaps no longer cared to be bound by the rules of judicial argument. As for Taney, his opinion, too, was unavoidably political, but in only one brief instance can I see that he crossed the line to unjudicial behavior, whereas some of his most widely condemned claims--especially his argument for a due process right to bring slaves to the territories--turn out to be far more sophisticated and far more judicial than his critics have recognized. A close examination of the opinions¹¹ in this famously political case will help us see why they were written as they were and where legitimately judicial politics ends and unjudicial usurpation begins.

¹⁰ Most recently, see Maltz (2007b, 265, note 1).

¹¹ Space precludes analyzing all of the *Scott* opinions, so I have chosen only Taney's and Curtis's, the ones I take to be the most important. Justice McLean's anti-Southern opinion has perhaps been even more celebrated than Curtis's for its firmer antislavery tone, but it has also been widely thought much more political and much less accomplished as a *legal* rejoinder to Taney and the others in the majority (Maltz 2007a, 129-39).

I. THE EMERGING HISTORIOGRAPHY OF SLAVERY AND THE CONSTITUTION: FROM THE PHILADELPHIA CONVENTION TO *SCOTT*

Graber and *Scott* Revisionism

Over the last few years, a fresh body of historical writing has addressed the development of the Constitution and slavery between 1787 and the Civil War. The most starkly revisionist of these writings are Mark Graber's *Dred Scott and the Problem of Constitutional Evil* and Austin Allen's *Origins of the Dred Scott Case*, both published in 2006. Each of these reframes familiar events in stimulating ways, but Graber's is the more successful historical work and should be the foundation of *Scott* studies for the foreseeable future.

To understand Graber's contribution, it is valuable to start with a brief appreciation and critique of the doctrine-centered account of his co-revisionist, Allen. Allen argues that the sectional crisis that supposedly preoccupied the nation in the 1850s was actually just one of two main sources of the Court's decision. The origins of the *Dred Scott* case, for Allen, lay just as much in Jacksonian jurisprudence, a collection of doctrinal tensions that had developed through two decades of Taney Court decisions. The relevant Jacksonian jurisprudence comprised not just the Court's slave cases but equally its sometimes chaotic cases on diversity jurisdiction, the commerce clause, the contracts clause, state police powers, and other cases touching the relationship between the national and state governments.

The problem is that, although Allen's book offers a number of important insights, it does not, in the end, adequately connect its problematic version of Jacksonian jurisprudence to the *Scott* opinions as written. Allen offers little evidence that the justices actually saw the connections among the several categories of cases that he discusses. One just cannot tell from the

evidence presented whether the justices were thinking about slavery when discussing, for example, the constitutionality of state liquor regulation, or corporate citizenship in diversity cases, or federal exclusivity under the commerce clause.

Moreover, when coming to *Scott*, Allen slips into some excessive claims. It is hard to credit his suggestion that *Scott* can be explained, even in part, by the justices' supposed professional obligation to resolve all outstanding doctrinal tensions in the case law, heedless of the real world implications of such a course. He verges on claiming that the *Scott* majority worried only about doctrinal messiness and not about the precise state of the sectional crisis in 1857. Quoting David Potter's suggestion that, as intense as the political crisis was, it did not constantly distract people from their personal and professional affairs, he then argues that that observation "may apply to the Taney Court as well" (Allen 2006, 136). He explains, "By 1857, internal debates taking place among the justices had effectively boxed in the court to such an extent that its rulings in *Dred Scott* appeared both unavoidable and absolutely necessary" (136). By this, Allen refers not just to debates in the slavery cases but to doctrinal difficulties in a wide range of cases that "had simply destroyed any possible mechanism the court could have had to evade the case's controversial aspects" (136). Especially, he suggests that the continuing dissatisfaction of a three-justice minority on the question of corporate citizenship in diversity cases somehow created the necessity that the majority "break" that minority's "challenge" (136). Nothing adequately addresses the simple argument that the justices actually were national politicians in a very important sense, not just average people going about their affairs, and that the justices could indeed have avoided many of the controversial questions in the case with little doctrinal sweat. That is, Allen has not adequately incorporated a basic insight of the constitutional politics school.

Still, Allen's close readings of the *Scott* opinions provide a number of valuable correctives to the current orthodoxy. Allen is especially strong in his evaluation of Taney and Curtis on the question of the Scotts' citizenship and thus their eligibility to sue in federal court.

To read Allen's book, then, is to be reminded that an internal doctrinal history is bound to be too limited. The *Scott* case was, of course, deeply political. But that does not mean that the *Scott* majority was a partisan caucus. The core function of the Court--its paradigmatically judicial function--is to decide cases and to perpetuate the authority of law, not to set policy or dictate to the other branches. At the same time, of course, all commentators recognize that judicial decision making in a case like *Scott* is a mix of law and politics. In this context, the key question to ask is whether there was something about the judges' inescapably political judgments that rendered the majority's action unjudicial, a mere partisan polemic.

If an internal doctrinal history can never be enough to account for a case like *Scott*, then what is needed is something more like the approach of the constitutional politics scholars, among whom Mark Graber is a major figure. Like Allen, Graber seeks to rehabilitate the *Scott* Court, but his 2006 book takes a very different route. Although he has plenty to say about doctrine, he is more concerned with situating the Court in the larger politics of the Constitution. This approach has been employed by a number of political scientists, historians, and legal scholars in recent years to show that an effective understanding of American constitutionalism must fully appreciate the courts' complicated interactions with political institutions of all kinds (Fisher and Devins 1992; Whittington 2007, 1999; Leonard 2002, 2001; Kramer 2004). These institutions might include branches and agencies of government, political parties, unions, business organizations, special interests of various kinds, as well as popular movements and the electorate as such. Writers in this area identify significantly political aspects of the courts and substantial

influence running from the so-called political branches to the courts. But they also see meaningful legal limits on what courts do, influence running back from the courts to the political branches, and great salience for legalistic and constitutional thinking on important political questions even outside the courts. Graber approaches *Scott*, then, as a problem in the development of a broad constitutional politics after 1787. There is little determinate in the specifically judicial doctrine that constitutional politics generates. In Graber's account, Taney's and Curtis's doctrinal efforts in *Scott* appear about equally judicial because they are about equally well grounded in the necessarily political development of the Constitution.

For Graber, once one understands constitutional law's indeterminate and pragmatic qualities and thus its persistent dependence on a more general constitutional politics, *Scott* becomes just a dramatic example of the typical processes of constitutional adjudication. The Constitution that the Court routinely confronts does not represent a fixed, substantive principle (e.g., liberty) but a mechanism for compromising even the most deeply held principles of a pluralist society. The Court thus resolves cases under the authority of both the indeterminate constitutional text that anchors society's most important settlements and the imperatives of constitutional politics that adjust those settlements through time. Nothing unjudicial about that, he suggests. These decisions, of course, have political qualities, but they have legal qualities too. And it is these recognizably legal qualities that entitle them to a kind of authority, a *judicial* authority, that plays a special role in tempering conflicts among groups that hold incompatible values (slaveholders and Free-Soilers then, pro-choice and pro-life activists now, for example). Thanks to the judiciary as such, American history is marked more by repeated peaceful submission to the latest evolution of the constitutional settlement and less by secession, civil

violence, or even crude majoritarianism.¹²

Of course, *Scott* conspicuously failed to have this pacifying effect, and perhaps Graber's chief objective is to show why it might have been best for all concerned to bow to its authority rather than resorting to violence. Thus, Graber (2006) moves beyond his impressive rehistoricization of *Scott* to attempt an even grander point about "constitutional evil." He suggests that Taney's opinion might actually have been the *right* decision--not so much doctrinally as politically. That is, Taney might have been right to suppose that, however evil slavery was, the practical price of attempting to eliminate it through federal action--in dead soldiers and any number of other consequences of a civil war that might have entrenched rather than eliminated slavery--was even greater. Or, as Graber writes on the final pages of the book, it might have been better to vote for the "peace" candidate John Bell in 1860 rather than for the champion of "justice," as Graber imagines Lincoln, because, as a general matter, "just causes are better realized by persuasion than by force" (253).

The logic of the argument is that constitutions exist to create political structures and dynamics by which society's inevitable "evils" are rendered sufficiently tolerable that political disagreement does not constantly devolve into violence. On one level, nothing could be more obvious: a constitution, written or otherwise, substitutes a widely embraced structure of politics and law for the violence that would otherwise settle large-scale disagreements. On another level, it is empty: this truism about constitutions tells us nothing about whether any particular "evil" or, more usefully, any particular clash of values, represents the sort of disagreement that politics and law can rightly compromise and resolve, or, alternatively, the rare kind that is worth fighting and

¹² Cf. Leonard (2007) which analyzes Oliver Wendell Holmes Jr.'s account of criminal law and explicates that Civil War veteran's view of law as profoundly political and partial, yet profoundly necessary to preserve "civilization" (i.e., peace) as against the violence pregnant in more overtly political modes of policymaking.

dying over. Had Graber taken on the daunting challenge of proving empirically that the continued accommodation of slavery would have been somehow better than the stout resistance that finally contributed to the horrific Civil War, then his meditations on “constitutional evil” would have been more compelling. As is, they only muddy his achievement--to which I now return--in developing a brilliant history of constitutional politics that might rehabilitate the reviled Taney.

The Constitutional Politics of Slavery, 1787-1857

Beyond Graber’s pointed *Scott* revisionism, there lies a valuable collection of recent studies of the politico-constitutional status of slavery between 1787 and 1861. These histories make clear how completely the celebrated Constitution incorporated a commitment to slavery, both in 1787 and more importantly in its evolution across succeeding decades. Together with Graber, they point to a new and genuinely historical accounting of *Scott*.

One implication of this work is that, as Graber argues, the Founders simply had no clearly agreed settlement in mind for most of the particular questions that would come up in *Scott*. The goals of the Constitution had much more to do with setting up governmental institutions and a political process than with establishing precise, substantive rules of constitutional law. The Constitution offered a foundation for an ongoing constitutional politics, a document of frequently indeterminate rules that would have to be refined through practice. And it would not take long for politicians to establish the predominance of evolving practice in establishing the meaning of the Constitution.¹³

¹³ This point is well established by David Currie’s (2005) nearly comprehensive treatment of the period’s constitutional debates in his *Constitution in Congress* series. Although Currie asserts that everyone at the time was an “originalist,” in fact practically all his evidence demonstrates contemporaries’ belief that it was evolving practice that most often fixed constitutional meaning.

The initial, rough understanding on the question of slavery in 1787, according to Graber, was simply that the institution would never be abolished without the consent of the slaveholding states. Although he offers little direct evidence of such an agreement, it is uncontroversial to note that the Constitution accommodated slavery in a number of ways, the fugitive slave and three-fifths clauses being the most obvious and decisive, and that only the most marginal figures in American public life ever thought that the national government was empowered to abolish slavery in the states. Lacy Ford (2008) argues similarly that difficult negotiations in Philadelphia on particular issues like the international slave trade rested on an “unwritten constitutional understanding” (98). That understanding comprised both Southern agreement that slavery was a “problem”—an unfortunate institution that the South must eventually leave behind—and Northern agreement “to allow the political leaders of the states most involved with slavery to guide its future course” (98). This understanding that the South would find a way to emancipate itself from slavery rested on pure hope and crossed fingers, since no one had a realistic plan for ending slavery. Still, such an agreement might reasonably inform the constitutional interpretations made by subsequent actors, judicial or otherwise, in particular cases like *Scott*, even as it could hardly provide clear, mechanical answers. Only subsequent constitutional history, in and out of court, could provide real resolution.

For these and other reasons, then, it seems clear that more than one interpretation of the constitutional settlement might prove plausible. It was fair for some to characterize the Constitution as a guarantee to the slave states that slavery would remain their problem, never a liability for them in national politics. As suggested above, though, it was also widely imagined at the Founding that slavery might wither away on its own. Thus the Constitution’s arguably reluctant accommodations of the institution did not necessarily mean that the national

government could not move against slavery in any way. Many in 1787 might have anticipated the achievement of an emancipated future partly through national authority to limit slavery's geographic reach so as to encourage its withering. But any such hopeful types would also have had to reckon with the clear probability that slavery would expand in the near term and even that such expansion would be demanded as a matter of right (Hammond 2007). At the Convention, George Mason recognized that, "The Western people are already calling out for slaves for their new lands," thus making slave expansion inevitable, in his eyes, if the international slave trade were not promptly closed (Ford 2008, 98). The conflicts in *Scott* were well foreshadowed by the facts already on the ground in 1787 or shortly thereafter, and it seems impossible to say that the writers and ratifiers of the Constitution came to any clear agreement about how that conflict should be resolved.

Moreover, it was not only the South that was involved in entrenching slavery in the face of wishful emancipationist rhetoric. Already in 1787 and increasingly in the nineteenth century, Southern slavery was deeply interwoven with the economies and thus the collective lives of many communities outside the South and the national community itself. These communities were already on a capitalist trajectory that, as it happened, rested on Southern slavery. As Adam Rothman (2005) writes, "Forced labor did not merely precede transnational capitalist networks of commodity exchange. It was also enmeshed in those networks as they proliferated around the world in the nineteenth century" (223). Slavery was not just recognized in the Constitution and practiced in the South, but its effects pervaded the society for which that Constitution was made. Thus, whatever constitutional material an opponent of slavery might have cited to justify limitations on the institution, any realistic observer had to anticipate an indefinite future for slavery both on the ground and in the Constitution.

The point, then, is that a diversity of Founding-era views hovered about the Constitution's slave texts, including some strongly grounded views that the slave states would retain control over slavery's destiny. As Graber argues, that generation certainly did not contemplate the precise facts that emerged by the end of the War of 1812 and that would condition American politics all the way to the Civil War: a majority North threatening a firmly proslavery South with abolition and political oblivion (Graber 2006, 91-114; Mason 2006, 28-31). And fantasies of a peaceful path to a slave-free society never really stood up to the reality that the world's only popular government would for the foreseeable future remain a "slaveholding republic" (Fehrenbacher and McAfee 2001).

This general picture is not really much different in the end from Fehrenbacher's 1978 sketch of the Founding. His *Scott* tome drew out the Constitution's ambiguities, its obfuscations, and the inadequate attention paid to the problem of slavery by the Framers. And he developed the critical importance of post-Founding history for giving real meaning to the incomplete settlement of 1787-1789 (Fehrenbacher 1978, chapters 1 and 2; Fehrenbacher and McAfee 2001). Others do the same. David Lightner (2006), for example, offers some reinforcement for this general position in his argument that the Founders never confronted the question of whether the commerce clause might give Congress power to abolish or hinder the interstate slave trade (chapter 2). In fact, that question was never really resolved but remained a constitutional issue negotiated in court and in the political arena for the rest of the antebellum years (Lightner 2006).

In Graber's summation, then, the years after 1787 brought a growing recognition of the slave states' right to a kind of sectional equality in the Union, an equality that implied firm protection for slavery against any national effort to abolish the institution, even as the dream of gradual withering persisted with equal strength. Any number of recent works on the period agree

that the ambiguities of 1787 persisted for a good while. A relatively fluid set of regional and sectional alignments only yielded a strong North-South sectionalism after a generation of slavery's expansion through the southwest, the War of 1812, and especially in the course of the Missouri crisis of 1819-1821 (Onuf 1983; Rothman 2005; Lightner 2006; Mason 2006; Hammond 2007).¹⁴ The Northwest Ordinance of 1787, enacted under the Articles of Confederation and reaffirmed early in the new Congress, barred slavery from a huge territory with broad Southern support. This Southern acceptance of a federal limitation on slavery's expansion reflected, in part, the slave states' self-interest in preventing the northwest from competing in the production of staple crops and, in part, the separate desire to support expansion of the republic (Onuf 1983, 169-71; Freehling 1990, 138). Of course, such expansionism soon produced the Southwest Ordinance of 1790, which contemplated a vast territory open to slavery. The Fugitive Slave Act of 1793 reaffirmed slaveholders' rights to their human property, and the Louisiana Purchase of 1803 added more slave territory. On the other hand, the international slave trade was abolished at the first opportunity, although again with substantial Southern support, not against Southern resistance. Then the Missouri controversy of 1819-1821 unleashed a far more aggressively antislavery North than had previously revealed itself. At the same time, a number of Southerners, including James Madison himself, now denied that the Constitution authorized Congress to close any of the nation's territories to slaveholding, despite the precedent of the Northwest Ordinance (Hammond 2007, chs. 4, 8; Mason 2006, 197-204; Fehrenbacher 1978, 110).

In Graber's account, approval of the Missouri Compromise became possible only when enough Southerners decided to "waive" their claimed constitutional right of equal access to all

¹⁴ And even then it is clear that other regional and sectional rivalries were as important as the one between the slave states and the free for some years to come. See Daniel Feller (1984) on the public lands in the 1820s and 1830s, and James Roger Sharp (1970) on the banking question in the 1830s.

territories in return for the admission of Missouri and an implicit recognition of Southern equality (Graber 2006, 125). Moreover, John Craig Hammond (2007) argues that the Southern readiness to waive this “right” was motivated in part by a conviction that the ban on slaveholders would never actually be enforced--that when the territories were actually settled and readied for organization, the status of slavery in those areas would be addressed afresh. Of course, this prediction was fully borne out by the Kansas-Nebraska Act, the 1854 congressional repeal of the ban on slavery in these territories (161-68). Thus, only through the rocky enactment of the Missouri Compromise did it become clear that there existed a North and a South in a durable competition; that this competition had turned to the South’s disadvantage with the permanent, unexpected shift of population dominance northward; but that the South was ready to insist that the spare language of the Constitution must imply a permanent guarantee of the constitutional equality of slaveholders’ rights in the nation’s territories.

The North as a whole would never embrace this Southern principle. Harboring some strong Southern sympathizers, it mostly nurtured various theories of how the Constitution might allow the North to keep slavery at arm’s length, perhaps leading ultimately to abolition but mainly preserving the North’s right to pursue its own interests without having to confront the despised and feared institution too directly. For the next forty years, the nation’s constitutional politics constantly readjusted the compromise between Southern demands for sectional equality and Northern insistence that the Constitution did not require it to accommodate slaveholders at every turn. Recognizing its firm status as the minority section of the Union after 1820, the South began to insist on institutional mechanisms to preserve slave-state equality. Anything less would fatally impair the essential property rights of citizens of the slave states and the fundamentals of those states’ social, economic, and political structures. In 1787, the three-fifths clause and

perhaps the fugitive slave clause had seemed adequate to the job. Even with the Northwest Ordinance standing as a conspicuous exception, Southerners constructed a narrative of slaveholders' "rights" out of the reality of slavery's persistent expansion from the Founding through the Missouri crisis (Hammond 2007). But now protection of such rights seemed to require new mechanisms, such as equality of representation in the Senate. Many Southerners denied that slavery could be excluded from the territories, but, failing Northern acceptance of that principle, at least they insisted that new states enter the Union in pairs. The South would thereby retain half the Senate seats and veto power over any serious legislative incursion on Southern rights (Graber 2006, 137-53).

In just a few years' time, however, protection for the South would come to depend less on this balance rule and more on the emergence of national party organizations. When the national Democratic Party emerged in the 1830s as a permanent institution, it evinced a commitment in all regions of the country to the protection of Southern slavery, including some ill-defined scope for geographical expansion. The South had gained what would be its most important weapon right through the 1850s, and that was only sharpened in combat with the Whig Party, which itself defended slavery as often as it attacked it (144-48).

Through the early 1850s, the constitutional politics of slavery largely vindicated Southern principles--but never comfortably. For example, starting in the 1830s, the House of Representatives for years maintained a gag rule that prevented acknowledgement of even the existence of antislavery petitions addressed to the House, lest the least respect be paid to the enemies of the South's essential institution. While that policy provoked some heated opposition, the real test of Southern power came in the 1840s as sentiment for territorial expansion heated up. The Democratic Party was then compelled to consider the precise scope of its commitment to

Southern rights as it contemplated the seizure from Mexico of Texas, California, and most of the land in between. The necessity of executing a slavery policy in these territories brought out sectional stresses in both parties, but especially the dominant Democrats. David Wilmot and other Northern Democrats in the House had already detected a growing, pro-Southern imbalance of power in the party, beginning at least as early as the South's refusal to permit renomination of former president Martin Van Buren in 1844. Faced with the concrete problem of governing new territories, Wilmot introduced his famous 1846 Proviso, which would have banned slavery from any territory acquired in the Mexican War (Freehling 1990, 458-59).

This challenge to the South opened intermittent sectional wars within the parties that would last until secession itself. But throughout those years, the main force that delayed secession was the persistence of the Democratic Party as a nationalizing force. In territorial crisis after territorial crisis, that party managed to satisfy its sectional wings just well enough to hold together. By the early 1850s, the Whigs were moribund, but the Democrats had managed to survive the Compromise of 1850, which formally opened the new territories of the Mexican Cession to slavery, and the repeal of the Missouri Compromise in the Kansas-Nebraska Act of 1854. All of this history uneasily protected the South from serious inroads on slavery. As importantly, it preserved the South's belief that, though it had become the minority section, it retained such constitutional status and leverage that it could continue to defend its equal "rights" even if abolitionism seemed always at the doorstep (Graber 2006, 148-59; Holt 1978; Leonard 2002, 252-66).

Slave Society and the Constitution

As is generally the case with work in the "constitutional politics" school, the preceding

account of constitutional development goes beyond the courts to the political arena, but only gestures at the social history that must underlie any political history of the Constitution. The sources of constitutional meaning and doctrine, however, are even broader and deeper than a short political history of the period, including this one, can demonstrate. But a look at the insightful work of William Freehling and others on the development of Southern principles helps explain not only the political but the social underpinnings of constitutional development. Freehling's new volume (2007) of his *Road to Disunion* joins his first volume (1990) in ruthlessly uncovering the social pathologies of a "democratic" slaveholding society, connecting those pathologies to sectional politics, and using that context to illuminate the nature of the *Scott* majority. Other recent writing, too, sustains Freehling's perspective and provides the critical reader with further reason to question the picture of Taney as the leader of a partisan caucus.

In Freehling's account, the fundamental and active humanity of the enslaved is so objectively inconsistent with their status as property as to undermine their masters' declared commitment to democracy. This unsurprising point, though, must be connected to the equally true point that Southern slaveholders and nonslaveholders alike honestly venerated notions of political equality and civil liberty and believed them applicable to a much larger swath of the population--the nonenslaved white men--than practically any society before. The ambition both to sustain a genuinely democratic society among white men and to deny even the first hints of liberty and democracy to a large part of the total population may have seemed achievable in the abstract, but in practice, of course, it proved impossible. That was because the enslavement of humans, unlike the ownership of all sorts of other chattels, created the ever-present threat of bloody insurrection and a consequent web of suspicion and duplicity.

There was the ever-present reality of duplicity on the part of the not-yet-revolting slaves,

a duplicity that the slaveholders alternately denied and feared. There was the self-deception on the part of the “democratic” and ostensibly benevolent owners, who actually and necessarily focused much of their energy on sustaining systems of coercion. There was the suspicion among the slaveholders that their nonslaveholding neighbors did not fully endorse their property rights in human beings and would not maintain the society-wide discipline necessary to prevent insurrection. Finally, even slaveholders themselves often harbored doubts about the justifiability of an institution that they relied on and profited from but also feared, with no clear way of shedding the institution (so they universally insisted) and no comfortable way of holding on to it. Nearly always, the profitability of slavery overcame both their moral scruples and the widespread anxiety that followed each of the many insurrections that actually occurred. But those uprisings lay on a continuum with the daily evidence of the duplicity at the foundation of the slaveholding republics. Together, they stoked the fear that antislavery sentiment among whites would slip out, become uncontained, make its way to the always revolt-ready enslaved, and open the door to the insurrection that all expected (Freehling 2007, 1994; Ford 2008).

If all this were not enough, Northern pressure intensified Southern combustibility. Thus, even if (as was the case) some Southerners were prepared to discuss ways to ameliorate the institution and inch toward abolition, the presence of an antislavery majority (or even minority) in the North got in the way. Lacy Ford (2008) offers the example of William Cabell Rives, who carried the tradition of earnest but futile regret about slavery far into the age of Southern-rights extremism: “As late as 1857, Rives believed that slavery would gradually disappear ‘under the influence of a humane and enlightened public opinion’ in the South if, and only if, ‘national agitation’ of the issue ‘could be made to cease’” (121). The antislavery Northerners in the imagination of the South were not just the small minority of avowed “abolitionists.” They

included as well the large numbers that seemed merely to tolerate slavery in the Union rather than embracing slaveholding rights as the equal of all other property rights. Exhibit A on this score was the Wilmot Proviso of 1846. As noted above, this proposal would have barred slavery from the Mexican Cession and seemed to threaten a permanent end to the expansion of the South's essential institution. Critically, the Proviso was introduced not by declared abolitionists but by Democratic regulars, the indispensable bulwark of Southern rights in the North¹⁵ (Freehling 1990, 458-62; Maltz 2007a, 42-45, 81-82; Leonard 2002, 253-54).

Southern Democrats reacted with stunned surprise when their Northern brothers thus declared Southern inferiority. As Earl Maltz (2007a) reports, the Van Burenite regular Democrat Peter Daniel, who would become the most extreme Southerner on the *Scott* Court, appeared a moderate and trusting voice until the Wilmot Proviso, which, he wrote to Van Buren, "declares to me that I am not regarded as an equal" (82). Similarly, Alabama's John Archibald Campbell, a highly regarded lawyer writing years before his nomination to the Court, articulated the Southern conviction that "slavery is the central point about which Southern society is formed. It was so understood at the formation of the Constitution.... We must have an organization of the territory that admits us as equals" (84). The same story can be told of Chief Justice Taney. As James Simon (2006) argues, Taney held pretty consistent views of slavery. As firmly racist as most of his contemporaries, he nevertheless detested slavery and emancipated and supported the slaves he had inherited. He defended the rights of antislavery speakers--as long as the speaker stopped short of "disturb[ing] the peace and order of society" (11)--in his courtroom defense of an antislavery minister in 1819. A few years later, as attorney general, he argued with perfect

¹⁵ Imagine as well the Southern Democratic horror when Martin Van Buren himself, the man who practically invented transsectional Democratic organization with no moral qualms about slavery, bolted the party and accepted the "abolitionist" Free Soil nomination in 1848. He did so not because he had any sympathy for abolitionists, but as a way of resisting Southern engrossment of power within the Democratic Party (Maltz 2007a; Freehling 1990; Leonard 2002).

consistency that African Americans were nevertheless ineligible for citizenship. His all too common racism well accommodated both the wrongness of slavery and a refusal to see African Americans as members of Taney's own constitutional family. Widely praised as one of the great chief justices for his work before *Scott*, Taney in the 1840s took a constitutional position that was fully consistent with his long held beliefs. He

bristled at the condescending attitude of northern politicians toward the South and their assumption that they were morally superior to southerners. And he was steadfast in his belief that the framers had made a binding constitutional pact between the North and South that entitled the states to determine for themselves whether slavery would live or die. (94-95)

Notwithstanding the crucial importance of the Wilmot Proviso in giving new salience to sectional tensions generally, none of the main Southern arguments and sentiment of the 1840s was fundamentally new. John Craig Hammond (2007) makes clear that all the central arguments were already in place in many Southern minds by the time of the Missouri Compromise in 1820: that the Constitution explicitly recognized property rights in slaves, that slavery could not be prohibited anywhere except by the consent of the affected political community, that the Northwest Ordinance was a usurpation, that slaveholding was a "right" everywhere in the United States but where a full-fledged state government had prohibited it, and that therefore the Missouri Compromise could never be enforced (161-68). Similarly, Matthew Mason (2006) develops the evidence that even before the Missouri crisis, Southern society lived with a constant and well-founded fear of insurrection just below the surface of daily life, a fear that underlay the Southern readiness to treat every Northern move to restrict slaveholding as an invitation to insurrection and as an unconstitutional step in the direction of "universal emancipation" (also see Ford 2008; Wolf 2006).

Thus did Northerners persistently provoke Southern intransigence on slavery questions

simply by insisting on what they thought was a fair territorial policy, especially in light of the manifest immorality of slavery. Thus did Southerners--even those who shared something of that opposition to slavery in the abstract--recoil at the North's persistent intimations of Southern inferiority as long as slavery survived. More than this, Northerners inspired a constant ratcheting up of political orthodoxy inside the South, gradually increasing the number of Southerners who felt compelled to defend slavery as a positive good. As the Democratic and Whig Parties competed with each other to prove their reliability on slavery, public discourse suggested that anything less than a full bore defense of slavery might be a step toward the entire society's suicide.

The result was a society of boiling internal contradictions that increasingly suppressed free speech in the name of democracy. In the Southern mind, slavery grew more and more fundamental to southern civilization. Increasingly, a controlling culture emerged that ruled out public talk of abolition and demanded close scrutiny of every national measure that might touch slavery. To allow free speech on the subject of abolition was ostensibly to risk the self-immolation of Southern society. To allow the national government to relegate one set of states to inequality violated basic principles of democracy.

All of this internal tension was intensified even further by the condition of the border states. Here, Freehling (2007) tells us, slavery seemed always on the verge of disintegration through some combination of runaways to an intrusive North, emancipations, domestic political challenge by the large nonslaveholding majority, and the steady selling of slaves southward. All of this created the prospect that slavery would become ever more narrowly isolated in a small minority of states and thus increasingly at the mercy of the antislavery majority in the nation. In this condition, each instance of condemnation and condescension from the North provoked

another episode in “a touchy civilization’s enraged spree of self-justification” (17).

It is essential to recognize that Southern society was, of course, not democratic by modern standards, no matter how persistently Southerners declared their commitment to democratic values. Although the North, too, was far from democratic by modern standards--given its disfranchisement of most of its adult population, its pervasive subordination of African Americans, and many other defects--even many Southerners recognized that slavery was a problem for a “democratic” society. But to Southerners, the more important point was that slavery had to be recognized as *their* problem. At a visceral level, they understood the Constitution as protection from outsiders who might “solve” their problems at the price of economic devastation, race war, and subordination of the white South to the white North.

Scott in the Stream of Constitutional History

Against this background, the *Scott* case comes to look quite different from its usual portrayal. It becomes no longer an aggressive move by proslavery diehards but a fierce bid by Southern moderates to preserve the Union. Moreover, it becomes preeminently a defense of law just when law most matters: when a majority is poised to destabilize an entire society, heedless of the consequences that only a targeted minority will have to bear. These justices and the segments of Southern opinion they reflected were not in the extremist, secessionist camp, but ranged from the nonslaveholding border state man, Taney, to those who were more deeply enmeshed in slave society but filled with the common doubts about the slave system (Freehling 2007, 110-13). Only Justice Daniel exhibited extremist tendencies and only after the Wilmot Proviso (Maltz 2007a, 78-83). Most of the Southern justices shared the extremists’ insistence on the full equality of the Southern states, slavery and all. But, unlike the extremists, they seem to

have harbored a range of doubts about slavery itself (Freehling 2007). Generally devoted to the Union, they continued to insist that the profound problems created by the enslavement of human beings could only be dealt with by the South in its own way. And the South could do that only if the law of the Constitution guaranteed the South's security against those with no direct stake in Southern society.

This security must imply a firm recognition of Southern rights to both slavery and equality within the Union, rights that at that level of abstraction were readily identifiable with the Constitution of 1787. At that same level of abstraction, the Southern justices could understand the competing interest of the North in maintaining its slave-free version of democratic society. But the devil was in particular cases, including court cases like *Scott*, for which the original Constitution supplied no clear directive (Zuckert 2007). And, while such cases were bound to be influenced by the justices' preexisting partialities, recent writing indicates that the Southern justices were not pursuing anything so crude as a proslavery agenda. Rather, the Southern majority on the Court sought to resist the intrusions of an increasingly "abolitionist" North, to reassure Southerners that they remained equals in the American democracy, to equip moderates to resist extremists in the name of Union, and even to keep alive the hope that the South might ameliorate the institution of slavery and--perhaps only for the dreamers--one day find a peaceful road to abolition.

By 1857 the Southern moderate position indeed constituted a "partisan" view of the Constitution, but so did every position. The Southern moderate view accommodated a heinous institution, but it recognized that the sin lay originally in the Constitution itself and in innumerable prior decisions, each of which rested on the irreversible social history of slavery. It was a view that sought to avoid other towering evils: the failure of the democratic experiment

and a horrific civil war. It was also a view that had plenty of legal foundation. As “political” as every justice’s motivations were, certainly including the motivation to secure the South some breathing room and autonomy, it was also true that these motivations were readily translatable into constitutional rights: where do Court-declared rights come from but readings of the constitutional text within the context of the federated politics that the Constitution engendered? If the question was whether Sanford retained a right of ownership in the Scotts, and if that question rested on the meaning of Article III, the territories clause, the new states clause, the due process clause, the privileges and immunities clause, and the broader underlying theories and purposes of the Constitution, where was the answer to that legal question to be found? The ambiguities of those provisions certainly had to be resolved in part by some realistic assessment of how such a Constitution might actually achieve its purposes, unavoidably taking into account both its adopters’ suppositions and its subsequent history right through to 1857.

And yet the “moderation” of these mostly Unionist judges was expressed with a ferocity that has not helped them win a sympathetic audience among historians or other scholars. Taney earned no Northern friends by insisting that the slavery ban in the Missouri Compromise “could hardly be dignified with the name of due process of law” (*Scott*, 450). The ferocity, though, was natural enough. It was the ferocity of moderates who encountered what they took to be treasonous views that were spreading rapidly through the North. Still, the moderates’ indignant rhetoric only encouraged Northerners in their inability to distinguish a Southern moderate from a Southern “ultra,” since both sorts of Southerner seemed to insist on such protection for slavery as to sacrifice Northern equality and civil liberty.

Of course, some will object to the whole notion that a few decades of self-interested and partisan *politics* could legitimately be said to have altered what might count as genuinely *legal*

arguments in the Supreme Court. And they might point to Taney's own strategy in *Scott* of emphasizing his originalism, the supposedly unchanging quality of constitutional meaning through which he defended the legal character of his opinion (Eisgruber 1993). It is necessary, therefore, to turn finally to the *Scott* opinions themselves. The foregoing history of slavery and the Constitution outside the courts will provide the necessary context for close doctrinal analysis of Taney's and Curtis's efforts. And that analysis will illuminate the difference between judging and unjudicial usurpation at the moment when the justices faced their greatest temptation to cross that line.

II. THE OPINIONS

The objective of this second part is to take advantage of what I hope is the reader's enhanced openness to rethinking the principal opinions in *Scott*. I have argued with Graber and others that the history of constitutional politics to 1857 left the South with a very plausible expectation that its interests might properly be vindicated in a court of law. At the same time, Northerners held a corresponding expectation that a slavery-*limiting* position might properly be vindicated in a case like *Scott*. These expectations were put to the test when two of the country's best-reputed legal minds attempted to resolve judicially some of the great constitutional questions of the day. Did Taney, often remembered as one of the last defenders of slavery, really abandon his judicial role to crassly promote sectional interest at the expense of the Constitution? Did Curtis, a favorite of modern adherents of a postracist Constitution,¹⁶ really respond with a masterwork of legal craftsmanship? Perhaps, from their different perspectives, each man sought

¹⁶ It is well known that Justice John McLean was far more deeply and consistently opposed to slavery than was Curtis and lacked the latter's full-on racism, but Curtis is generally thought the superior judicial craftsman and thus, in *some* respects, the greater hero in *Scott*.

only to judge in good faith, to sustain the power of law as an agent of peace in a time of looming violence. I conclude that, in the end, neither managed to wholly avoid the temptation to reach beyond the judicial role. Contrary to entrenched orthodoxy, however, it would appear that Taney devoted himself most thoroughly to vindicating the law, while Curtis may well be the one who succumbed to unjudicial temptation, abandoning the constraints of law and thus risking violence--for better or worse at this climactic juncture in the history of slavery--to resist the ascendancy of Southern slaveholders (if not really to oppose slavery itself).

To reach this conclusion, it is necessary to combine the larger history above with a close reading of the justices' language. Judicial practice distinctively combines authoritative texts with historically situated moral, cultural, and policy judgments to construct the law, a law that must be recognizably directed at the resolution of discrete parties' controversies, even as it exercises a clear, even deliberate, but highly indeterminate influence on public policy and political debate. When the Court does its work well, judicially but never apolitically, it has the potential--as Graber urges--to nudge the nation toward peaceful resolution of otherwise dangerous conflicts.

It seems clear in retrospect that the Court was in no position to save the nation from Civil War in *Scott*. It seems equally clear that the *Scott* decision was much less a cause of the Civil War than a "channel" through which the causal currents flowed (Fehrenbacher 1978, 3-4). Try as they might, the *Scott* justices had little hope of controlling so momentous a constitutional controversy. But, while *Scott* remains an important part of the *political* narrative of the 1850s, it also stands as an important episode in American *legal* history. In context, the evidence of the opinions suggests that Taney largely adhered to the law and to the judicial role, albeit under a racist, slavery-accommodating Constitution. Curtis, on the other hand, chose to be on the right side of history--or at least to resist the slaveholding aristocracy--by writing what he wished the

law was rather than what he could show it to be. I come to that conclusion by analyzing several major aspects of the Taney and Curtis opinions, the last and most important of which is the difference between Taney's treatment of the *Strader* precedent in *Scott* and Curtis's failure to deal at all with that important case.

Taney and Curtis on Citizenship

I'll begin with the question of the Scotts' Article III citizenship. On this question, especially, scholars have thought Curtis the very model of a judge and Taney a cynical manipulator of the legal materials. But Austin Allen has it nearly right when he says that, "Curtis's dissent, despite its popularity among historians, represented little more than a failed attempt to produce an antislavery ruling within a hopelessly antiabolitionist legal structure" (Allen 2006, 176). It would be more accurate to call it an "anti-southern" or "anti-slave-power" opinion within a "slavery-protective" legal structure, but I agree with Allen's gist. The question before the Court was whether any native-born person descended from African slaves could qualify as a "citizen" authorized to sue in diversity under Article III. Taney, of course, answered in the negative.

The most common grounds for condemning Taney's rejection of black citizenship are Curtis's proofs that at least some states recognized black voting rights in 1787 (*Scott*, 572-76), thus showing at least that blacks could be state citizens. But it is well known that many aliens possessed voting rights in this period (Keyssar 2000, Graber 2006). Possession of the franchise did not make them citizens. Presumably, the franchise has some significant relationship to citizenship, but it is and was a problematic one. Oddly, even Curtis's fans often don't mention that Curtis did confront this problem in his dissent. Allen, though, does give Curtis that much credit while nevertheless demonstrating the weaknesses in Curtis's imaginative doctrine of

citizenship (Allen 2006, 169-177). Curtis met the issue by combining nativity and the franchise—neither consideration on its own being adequate to prove citizenship. He thus produced a novel rule that nativity in a particular state combined with that state’s choice to grant one the franchise must be taken as proof of one’s status as a state citizen and thus, for Curtis, an Article III “citizen” (*Scott*, 576-83).

Curtis seems to have made this rule up. He did not make it up out of whole cloth, and perhaps it was a reasonable rule. But if it was, that was only because the Constitution had manifestly failed to establish what constituted Article III citizenship (Graber 2006), leaving the question implicitly to be answered by judicial creativity. Curtis argued fairly enough that the Constitution anticipated that some persons would gain citizenship by means of native birth, but not everyone. What further requirements might apply? Curtis asserted there were only four possibilities (*Scott*, 577). But none of his possibilities fully accounted for the racism that underlay much of American constitutional culture in 1787 and 1857 alike. His opinion never considered whether a universally oppressed class of persons, mostly reduced to property in many of the Founding states, might be an unlikely group to come within the category of “citizen.” Curtis moved rapidly to the conclusion that native citizenship was defined exclusively by the states because of the Constitution’s very failure to define citizenship and because of its references to citizens of states in a few spots (contexts where critical questions of interstate relations simply made that usage handy¹⁷) (*Scott*, 579-82). But, when reading a national compact that deliberately and carefully accommodated racist slavery on a massive scale, he should

¹⁷ For example, he pointed to the reference to “citizens of each state” in the Privileges and Immunities Clause as a strong indication that national citizenship was derivative of state citizenship. But I don’t see the argument. That clause is an order to the states not to discriminate against out-of-staters. (See further discussion below.) In that context, it seems pretty natural to speak in terms of citizens of states, even though citizenship itself might be ultimately a matter of federal law. And, in fact, it seems to me difficult to rewrite this ban on discrimination against out-of-state American citizens without referring to the protected as “citizens of each state” or something very like that.

certainly have considered that a firmly racist reading of the word “citizen”¹⁸ was the natural one to most Southerners and many Northerners.¹⁹

Given the indeterminacy of Article III, Taney was at least as well justified in pointing to the pervasive legal degradation of African Americans in every state in the nation, both in 1787 and after (*Scott*, 407-421). On this basis, he concluded that they could not have been contemplated as citizens for any national purpose. For most blacks, of course, the substance of that degradation was enslavement, but even the free were commonly deprived of other central rights, like the right to serve on a jury, the right to serve in a militia, or the right to vote on equal terms with whites. As he strongly implied (*Scott*, 422) and as Graber develops more fully (2006, 51-52), the often similar political disabilities of women and children at the time would have struck nearly everyone as qualitatively different in socioconstitutional meaning from those imposed on blacks regardless of gender and age. The absence of voting rights for women and children did not deprive them of citizenship. And the possession of voting rights by a small minority of African Americans no more made that universally oppressed group eligible for legal citizenship than it did alien voters.

Further, Curtis’s evidence of actual black participation in the ratification of the Constitution was nil. He usefully proved black eligibility to vote in several states, and it certainly seems likely that at least some blacks did actually vote. But Curtis’s actual argument depended only on formal black eligibility and his assumption that this formal and local eligibility

¹⁸ Note also that, while a modern lawyer would likely seize on the ambiguity of the Constitution to conclude that the only legitimate reading must be an anti-racist one, it’s not as if Curtis actually rested his opinion on a rejection of racism. He often expressed an ugly racism of his own (Streichler 2005). He read the Constitution here to defend national power and Northern prerogative against Southern insistence on special rights, but not to embrace abolitionism or opposition to racism.

¹⁹ Martin Van Buren, for example, in his *Inquiry* (1867, 356-58) objected to Taney’s ruling on the Missouri Compromise as a usurpation but expressed agreement with the holding on citizenship. Graber also offers evidence that Curtis’s conclusions on the citizenship question were out of step with public and judicial opinion both North and South (Graber 2006, 28-30).

must have implied national citizenship at the Founding. It is an important failure on his part, then, that he offered no evidence of anyone drawing the inference of black citizenship in this way circa 1787. Nor did he offer any evidence that framers and ratifiers in any state attended to this question in any degree, much less that they understood it to be settled in favor of black citizenship. One natural inference, then, is that a tiny number of African Americans, conceivably none, were recognized by the white majority in a few states as participants in the Founding, even as white America more generally denied them the basic presumptions of equal dignity that one might think essential to citizenship.

Finally, Curtis argued that certain early congressional statutes, despite their racism, seemed to assume the possibility that blacks might be made citizens (*Scott*, 587). This was a worthy argument,²⁰ of course, but it and Curtis's other arguments were readily neutralized by the mass of Taney's evidence of black subordination (*Scott*, 407-421). Nowhere did Curtis squarely confront Taney's claim that constitutionally protected black citizenship would have conflicted with generally held racist assumptions and the requirements of the slaveholding states. Nor did he even list that position among the possibilities that must "embrace the entire subject" in the Constitution (*Scott*, 577).

The point is sharpened, I think, by the following assertion of Curtis's, with which we would all like to agree, but which must have befuddled what southern readers he had: "[T]hat [the Constitution] was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening

²⁰ But not a very strong argument, really, since Taney never claimed that blacks could not be made citizens of the nation, only that African slaves and their descendants could not be made citizens. Thus, responding in the formalistic mode that Curtis used here, one need only point out that the statutes that Curtis relied on, which used phrases like "white male citizen" (implying the possibility that there might be black citizens) could have been phrased that way on the assumption that there might exist black citizens by way of naturalization, even though there could not be citizenship among the emancipated or their descendants.

declaration, that it was ordained and established by the people of the United States, for themselves and their posterity” (*Scott*, 582). For Curtis that unqualified phrase “the people of the United States” assumed a basic, though limited, equality of races. But it is hard to imagine that more than a dwindling minority of Southerners read that phrase Curtis’s way at any time between 1787 and 1857. Nor would Northerners have reliably agreed with him. Senator Stephen A. Douglas, for example, the most prominent Northern Democratic leader of the 1850s, was a frequent exponent of the position that the Constitution was made for the white race only (Johanssen 1973). Since it is standard judicial practice to read specific meanings into general phrases, it hardly does Curtis credit as a judicial craftsman to ignore the plausibility of probably the dominant reading of the constitutional language at the time, insisting that only a reading pregnant with federal jurisdiction for freedom suits could be plausible.

Although I conclude with Allen and Graber that Taney’s opinion makes a much stronger argument than does Curtis’s on the citizenship question, I hesitate to suggest judicial bad faith on the basis of anything in this section of either man’s opinion. Taney simply judged that the most sensible meaning of the word “citizen” in a partly slaveholding and predominantly racist nation would not include African Americans. Curtis responded with a kind of formalism that is often resorted to by judges. But, in this case, such formalism could hardly claim such certainty in the legal sources as might overcome the real history of the nation and its Constitution.

Taney and the Due Process Clause

In the second half of Taney’s opinion, the Chief Justice held that the Missouri Compromise’s exclusion of slavery from a large part of the territories violated property rights protected by the Due Process Clause of the national Constitution. This part of the opinion is

often condemned as, in effect, unjudicial and “partisan” for a variety of different reasons. Commonly, it is assumed to be dictum, since the prior discussion of citizenship had already determined the outcome of the case. Fehrenbacher properly dismissed that argument years ago, accurately observing that this part of the opinion was simply an argument in the alternative on the question of jurisdiction. I’ll have more to say on that below when I get to Curtis’s own accusations on that score. Here, I want to discuss the charge by Fehrenbacher that Taney utterly failed as a judge in his attempt to apply what would come to be called substantive due process (Fehrenbacher 1978, 379-84). Fehrenbacher ridiculed Taney’s allegedly offhand and unelaborated reliance on the Due Process Clause. But I think I can show that Taney’s reasoning was much more elaborate and well founded than Fehrenbacher and others have wanted to allow.

The Surprising Strength of Taney’s Opinion

In the justices’ dispute about congressional power over slavery in the territories, Curtis emphasized that Congress had repeatedly exercised such a power over many decades, beginning with the Northwest Ordinance. Taney, on the other hand, rested on the principle of state equality. Like Curtis, Taney fully embraced substantial governing power for Congress in the territories (though Taney controversially dismissed the territories clause as the source of that power in favor of the new states clause).²¹ The question was whether Congress’s power could

²¹ Taney has often been condemned for his allegedly shoddy history regarding the original meaning of the territories clause. These criticisms have contained a good deal of legitimacy even as they’ve ignored much of the plausibility of some of his arguments. Coming to Taney’s defense, Allen (2006), for example, rightly points out that the courts were not bound by the common (but hardly unanimous) assumption that Congress had power over slavery in the territories. Moreover, there were no judicial cases settling the question. The *American Insurance* case of 1828, written by Chief Justice Marshall, certainly tended to support the claim that the territories clause conferred broad power on Congress over the Florida Territory and thus over pretty much any territory acquired by the United States. But, as quickly as Marshall’s opinion derived the power from the territories clause, he retracted that firm conclusion and declared that the power came *either* from that clause *or* from the inevitable rights of sovereignty over acquired territory. 26 U.S. 511, 542-43. I read this as pretty strong evidence that Marshall personally thought the clause applied to Florida and implicitly would apply to all of the

extend specifically to excluding slave property.

Taney's answer rested on the premise that the citizens of all states had equal rights to enjoy the national territories. Perhaps no one would dispute that principle in the abstract, but how might it apply in this context? To understand Taney's perspective, it is necessary to recall Part I's socioconstitutional portrait of the antebellum South, which emphasized that slavery and

Louisiana Purchase, but that he felt it necessary or wise to leave that question unsettled. (I'm pretty convinced that he did so to accommodate Justice William Johnson, who had decided this same case below and had firmly rested congressional authority on the law of nations. I infer that he would have refused to join Marshall's opinion had it rested on the territories clause. 26 U.S. 511, 515 n.*. Johnson had done a similar thing to Marshall in *Fletcher v. Peck*, refusing to allow Marshall to declare the unanimity of the Court unless Marshall rested the opinion on *either* the contracts clause *or* on Johnson's preferred natural law rather than firmly on the contracts clause itself. For Marshall's compelled equivocation, see *Fletcher v. Peck*, 10 U.S. 87, 139 (1810), and for the Johnson demurral that forced the equivocation, see pp. 143-45.) In any case, Marshall did leave the question unsettled in *American Insurance*, though it is also fair to say that the case was more helpful to Taney's opponents than to him.

More importantly, Taney very plausibly noted that the language of "rules" and "regulations" in the territories clause bore a close resemblance to those constitutional provisions granting *limited*, specified powers. In contrast, that language was *not* very similar to the grant of *plenary* congressional power over the District of Columbia, which granted a power of "exclusive legislation in all cases whatsoever." He thus concluded that the territories clause responded to the specific 1787 challenge of how to manage the western lands then in the process of cession from several states. It applied only to those territories, not the ones subsequently acquired in the Louisiana Purchase. Consequently, the ban on slavery found in the Northwest Ordinance constituted no precedent as to the scope of constitutional authority for other territories. (Allen 2006, 182-89)

Taney's argument is indeed a strong lawyer's argument as far as it goes. Its major weakness is not in his argument about which territories the clause applied to, but in his ignoring the implication that if Congress really did have the authority to regulate and even ban slavery under the territories clause, then it was certainly hard to see why it would not have that authority under the new states clause or under Marshall's conception of the broad sovereign authority that Congress was assumed to possess over territories generally. This failure on Taney's part is not fatal to his argument by any means. As far as I know, no one put this to him, and there might well have been good reason to conclude that the Convention meant for Congress to have power over slavery in the original territories of the western cessions but not thereafter. After all, it was already clear in 1787 that the states collectively meant the new territories to harbor slavery to the south but not to the north; this understanding might fairly be read into the territories clause. But that does not at all mean that there was any understanding that Congress should be able to determine for itself the fate of all territories that might appear in the future. Moreover, had anyone put to Taney an argument that forced him to confront the history of territorial bans on slavery, he could of course simply have said that they were all unconstitutional, and there would have been no judicial precedent, only legislative, to trouble him.

See also Graber (2006, 66-76), who justly argues that, while Taney's argument had some substantial grounding, the best conclusion is that the Framers had no clear intentions regarding territories beyond the western cessions. He insists again that constitutional meaning had to be and was understood to be settled by practice, which, for Graber, means that congressional power over slavery came to rest on a principle of southern consent to any restrictions on slavery.

all its tensions were fundamental to southern society. Thus, for Taney, any responsible reading of the Constitution had to rest on a recognition of the real danger of insurrection, the consequently indispensable autonomy of the slave states on questions touching the future of slavery, and thus the fundamental equality of the slaveholding states, their right not to be discriminated against on federal matters by virtue of their slaveholding. The lesson from Freehling and others is that Southerners took this understanding for granted. Moreover, they took this understanding to be distinctly embraced in the Constitution's embrace of slaveholding rights and protections for the slaveholding states. For Taney, then, it could hardly be more obvious that territorial migrants' slave property must be protected if state equality were to be protected. Any practice to the contrary over the years constituted merely political compromises. Such compromises, he implicitly argued, could not establish a legal principle binding on the judiciary. They might have their due influence, but they could not control the judiciary in a case of first impression.

Here is how Taney structured his argument. He began by announcing that he would consider "by what provision of the Constitution the present Federal Government...is authorized to acquire territory...and what powers it may exercise therein over the person or property of a citizen of the United States" (*Scott*, 446). He adopted the new states clause²² as the authority for acquiring and, of necessity, governing new territory. Then, he embraced a corollary of that position that would take him to the "common property" doctrine: "Whatever [the General Government] acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the

²² Fehrenbacher could not figure out why Taney went to so much trouble to avoid the territories clause and use the new states clause instead. But Alfred Brophy suggests that Taney wanted a constitutional provision that would readily carry the usual constitutional limitations on national power rather than a provision that could plausibly be argued to give Congress "plenary power"—that is, unchecked, undemocratic, imperial power--over the territories (Brophy 1990, 209).

whole people of the Union in the exercise of the powers specifically granted” (*Scott*, 448). More specifically, the Louisiana Territory had been acquired

for their common and equal benefit; for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union. (448)

To ensure that every acquisition inured to the benefit of all, the national government would have substantial discretion to establish local governments, but in organizing the territory it could not “infring[e] upon the rights of person or rights of property of the citizen who might go there to reside, or for any other lawful purpose. It was acquired by the exercise of this discretion, and it must be held and governed in like manner, until it is fitted to be a State” (449).

So far, the reasoning hardly seems objectionable. The citizenry had equal rights to the territories, and the national government must respect their constitutional rights in those places. The problem arose, of course, when Taney *applied* this doctrine to establish slaveholders’ rights to migrate with their slaves. Declaring without controversy that migrants retained all their rights under the Constitution, Taney began to list some of the obvious rights that the federal government could not infringe. These included rights of speech, religion, peaceable assembly, jury rights, and so on. In short order, Taney came to the due process clause’s protection of both property rights and rights of the person. Then the famous sentence:

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. (450)

In this sentence, he did not explicitly apply this unobjectionable general principle--the protectibility of property under the Constitution (Ely 2008; Graber 2006)--to slavery. Nor did he apply it to any other particular sort of property. Nor did he bother to mention what he could

hardly have failed to know, given his career on the bench: that, of course, property could be regulated or even taken under circumstances that adequately justified the impingement. For Taney, given the common sense of Southern constitutional culture,²³ the application of the clause in these circumstances was too obvious to call for detailed argument. In fact, detailed argument could only have been taken as a sign of doubt. Taney, I surmise, thought it beneath the Court to dignify the proposition that the federal government might prevent a Southerner's bringing the region's most valuable property into the common territories. How could the North not understand that exclusion of slavery would have been just as unthinkable as an exclusion of farm implements? Thus, he introduced the specific application of these unobjectionable principles to slavery with these contemptuous words: "It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States" (*Scott*, 451).

Dismissing what he saw as Curtis's sophistical attempt to inject the law of nations into the case, Taney insisted simply that

if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property. (451)

Moreover, the obvious equality of slave property to every other sort of legally protected property had been confirmed in the Constitution's protections for the international slave trade and especially for the slaveholder's right to regain her or his fugitive property even in free states. Under the Constitution, he thus argued, "The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights" (452). Concluding this section, Taney

²³ And the South thought this a common sense that the North could hardly fail to understand. For evidence of this, see the capsule biographies of the Southern justices in Maltz (2007, 76-91).

declared that, “Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution” (452).

Contrary to the claims of Fehrenbacher, Taney’s due process argument was in fact made at some length and with some care throughout this section of the opinion. Taney deployed a cogent logic--if one began with those assumptions that Southerners thought too fundamental to be questioned: the assumptions of slave-state equality and the centrality of slavery to Southern life (though not any claim to the rightness of slavery).

None of this means that Taney was unambiguously right in his construction of the law at that time. Looking at those same constitutional provisions with a Republican eye, it is easy to observe that the clause on the international slave trade actually seemed a limitation on rights to slave property and reflective of a common Founding expectation that slavery would wither before the march of liberty (Fehrenbacher 1978, 24). Similarly, the Republican Justice McLean, for example, was right to point out that state equality could cut more than one way. From his point of view, the admission of slavery into the territories effectively cut out untold numbers of potential Northern migrants who would justly refuse to subject themselves to life in an antirepublican society (*Scott*, 543).

But what reason do we have for insisting that Taney’s only honest, judicial option was to adopt that Republican position? What was there in a constitution that embraced slavery, both in its text and its history, that would rule out Taney’s version of Southern equality? What in such a constitution would prevent the finding of a slaveholder’s due process right to bring her or his property to the territory, just the same as a Northern migrant might bring her or his most essential property?

The often admired counterargument from Curtis comprised mainly a brief review of prior prohibitions of slave migration and trade, none of which had been thought to implicate due process or its equivalents (626-27). But it is easy to see how Curtis's citations of such precedents could have been viewed as missing the point. The Northwest Ordinance, for example, barring slavery from a huge territory, had been *endorsed* by most slave states, not imposed on them. They had endorsed it in part because the Ordinance might serve the economic interests of slave states (as opposed to rendering them subordinate), in part because the southwest was guaranteed to southern migrants as an equivalent, and in part because there was a near consensus that each state's interest was advanced by adding more states as long as sectional balance was maintained (Freehling 1990, 138; Onuf 1983, 169-71). For Graber, then, the pertinent constitutional rule that underlay the Ordinance's ban on slavery was not that any old congressional majority could ban slavery from any territory, but that it could do so when it had slave-state consent. I would add that what underlay that notion was Taney's principle of state equality, the idea that congressional regulation of property rights in slaves must rest on a foundation of slave-state equality.

These conditions of congressional legislation seemed no longer satisfied in 1857, the first time that the Court had occasion to address the question, regardless of whether they had been in 1787 or 1820. Curtis's reliance on the political deals that created the Northwest Ordinance and the Missouri Compromise manifested an appropriate respect for the constitutional practice of coordinate branches of government. But no one would say that congressional practice had ever been understood as *binding* on the courts in any justiciable case, especially when the premises of a particular constitutional settlement--here, Northern acceptance of Southern slaveholding equality--appeared to be obsolete by the time the Court confronted the issue.

Curtis's other examples of regulation of slave property faced similar difficulties as

precedents. He noted that the laws of many states, slave and free, emancipated slaves who were voluntarily brought into the state to reside. No one cried “due process” in these instances. But, while these laws might have burdened slaveholders’ property rights, they did so in a way that preserved rather than undermined the equality and the autonomy of the states, here protecting their equal powers to regulate their domestic institutions as they liked. Such powers bore no analogy to a putative federal power to subordinate the interests of one half of the states in the common territories. Finally, the ban on the international slave trade might, as Curtis argued, deprive an American citizen of property bought outside the United States and imported within the borders. That ban, however, was again produced with broad slave-state support (Mason 2000) and was never taken as subordinating the interests of the slave states to those of the free.

Given the indeterminacy of the original Constitution itself on the question of slavery in the territories, Taney’s due process claim was hardly unreasonable, let alone unjudicial. Nor, despite my criticisms here, was much of Curtis’s response. He offered a worthy, if not particularly tight, argument by combining the history of exclusion as early as the Northwest Ordinance with the failure of any due process clause to interfere with regulations of slave property before 1857.²⁴ Taney’s resort to strict originalism--a stock piece of judicial disingenuousness in the face of uncertain evidence--did not really help him to answer Curtis, given both the indeterminacy of the text and the adoption of the Northwest Ordinance contemporaneously with the Constitution. Curtis’s argument, in sum, was at least judicially respectable to this point.

But then he went further, abandoning judicially plausible argument and professional detachment to indulge in this embarrassing objection to Taney’s due process claim:

²⁴ But Alfred Brophy (1990, 211-14) has found evidence that Taney’s deployment of the due process clause was not *wholly* without precedent in this respect.

Moreover, if the [due process] right exists, what are its limits, and what are its conditions?... And what law of slavery does [any migrant] take with him to the Territory? If it be said to be those laws respecting slavery which existed in the particular State from which each slave last came, what an anomaly is this? *Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery?* (Scott, 625-26, emphasis added)

Curtis's language has nothing to do with Taney's argument. Taney's defense of a due process right to retain one's property hardly constituted an argument against coherent and pragmatic regulation of that right. Far from claiming that due process prevented any regulation touching slaves in any way or that state equality required the importation of every nuance of diverse states' laws into the territories, he simply rejected a specific sort of deprivation of property: deprivation of the slave property of any migrant who came from a slave state to the territorial "common property." If due process manifestly barred at least some congressional impingements on migrants' property, Taney argued, then those forbidden actions must include Congress's preventing one set of settlers from migrating with their slave property as readily as it would bar the exclusion of others with their plows or wagons. Curtis's argument did not lack its own power in places, but it was as decidedly partial as Taney's, deeply discounting the South's widely held understanding of the essentials of its society and its equality within the Union.

Taney's Opinion and the History of Constitutional Politics

An important moral of this story so far is that the Court must be seen as one actor in a larger constitutional politics, a distinctive actor but one nevertheless inevitably and rightly attentive to the social, economic, and political history that must give shape to constitutional history and constitutional law. So I want to develop the importance of the fact that the Court got the *Scott* case in 1857 rather than some years or decades earlier. The point, though, is not that the Court became *tainted* by politics in the fevered atmosphere of 1857 in a way that it might not

have at another time. Rather, a properly judicial approach to a case cannot help but take account of the history of constitutional politics up to the particular moment of decision. Thus, although neither Taney nor many other judges would come right out and say it, the claim that the 1820 legislation was unconstitutional depended, in important part, on the post-1820 history of constitutional politics. This is one of Graber's main claims and one I mean to reinforce here.

Imagine that a case challenging the Missouri Compromise had come before the Court in, say, 1827, rather than coming to the Court in 1857 as a case of first impression. The 1827 Marshall Court very likely would have sustained the federal ban, perhaps on the basis of that Court's nationalist tendencies, or out of deference to Congress's constitutional judgment, or in recognition that such an important legislative compromise, so recently established, should not be upset by a court. A subsequent Taney Court then would have confronted the Scotts' particular claims within a very different legal situation—one governed by square precedent—and in light of a constitutional history of the intervening decades that would have looked significantly different.

As it was, though, the Court had managed for thirty-seven years never to pronounce on the question of the legislation's constitutionality. The precedents it had to deal with were only the political precedents by which the nation had come widely, though not universally, to assume congressional power to bar slavery from particular territories. But the legitimacy of that congressional power had arguably depended on the South's own acceptance of the Missouri Compromise as a fair enough bargain, not on a clear vindication of congressional power to ban slavery in the territories generally. And the maintenance of that bargain's legitimacy over time arguably rested on the transsectional quality of national politics, anchored by a Democratic Party that effectively preserved the Southern right to veto federal regulations of slavery.

The event that unsettled this arrangement, as I have said, was the introduction and passage in the House of the Wilmot Proviso (Hyman and Wiecek 1982, 115-140; Maltz 2007, ch.4). Introduced in no spirit of compromise and without any expectation of Southern support, the Proviso represented an insistence on sectional equality within their own party by aggrieved northern Democrats. But it was read by many southern Democrats as a slap in the face and an expression of contempt from their erstwhile allies in the fight for democracy. Before this time, restrictions on slavery in the territories had been arguably extra-constitutional, bi-sectional compromises, political arrangements with which courts had little to do in practice or in principle. After Wilmot's action, however, the defenders of the South saw their fate slipping into the hands of an ever more shockingly abolitionist North. The waiver of constitutional rights embodied in the Missouri Compromise had once been compensated by both the admission of a slave state and an understanding, so Graber argues, that Southern consent was essential to any federal regulation of slavery. After Wilmot, that arrangement gradually fell apart.

To the extent that Southerners came to see the evaporation of their power to veto anti-southern legislation, the Missouri Compromise lost its constitutional foundations in their eyes. And all remaining ambiguity disappeared with the emergence of the Republican Party and the declaration of its eloquent leader that, while he would not interfere with slavery in the states, he would nevertheless determinedly put it in a condition where its ultimate elimination might be relied on (Graber 2006, 134; Fehrenbacher 1978, 487). By the mid-1850s, Southerners had every justification for believing that the North was indeed turning genuinely abolitionist, the differences between the abolitionist William Lloyd Garrison and Abraham Lincoln mattering as little to Southerners as the differences between the fire-eater William Lowndes Yancey and Roger Taney mattered to Northerners.

In this context, the *Scott* case came to the Court without any clear precedent, such as my imaginary Marshall Court case, but laden with the obligation that the Court consider the realities of the judicial role in the nation's larger constitutional politics. It could hardly be surprising that a Southern justice, desperate to preserve peace and the Union as against the violent tendencies of secessionists and abolitionists alike, might move to defend the Southern veto as a legal corollary of basic principles of the Constitution. Confronting the legal question at the heart of the crisis for the first time and confronting the substantial indeterminacy of the legal texts, the Taney Court could hardly be unaffected by the constitutional politics of the thirty-seven years since the enactment of the legislation. Nor was the Court likely to be controlled by that politics in any simple, direct way. But within the plausibly judicial range of options created by the conventional legal sources and the constitutional politics surrounding those sources, certainly there was a powerful argument for deeming the Missouri Compromise a violation of slaveholders' due process rights. The Court might adopt a suitably judicial formalism and declare those rights violated *ab initio*. Or it might take the less judicious route of declaring that slaveholders' rights were violated as of, say, the defection of Wilmot or Van Buren or, in any case, sometime before 1857. As written, however, Taney's due process holding, for all the uniqueness and momentousness of its context, stands as fully, imperfectly judicial.

Taney's Unjudicial Moment

And yet, in this section of Taney's opinion, there is one egregious, unjudicial passage. It does not really appear out of place on first consideration and it is a mere two sentences of a 55-page opinion, but in context it represents a highly unjudicial departure by Taney. In the course of arguing that migrants in the territories remained covered by the Bill of Rights, Taney remarked that, "if Congress itself cannot [disregard migrants' constitutional rights]—if it is

beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.” (*Scott*, 451)

This passage was dictum, since there was no claim in the case that any of the Scotts were rendered free by the action of any territorial government. Of course, its status as dictum does not in and of itself render this part of the opinion unjudicial. It could conceivably be harmless dictum or, perhaps, a perfectly responsible extension of the reasoning of the case to guide lower courts. After all, those courts might well encounter *Scott*-like claims involving territorial laws rather than congressional laws. It is also true that the passage appeared before Taney came to the specific application of his argument to the slavery question, and he never returned to the subject of this passage.

None of these defenses of Taney can stand, though, because this passage is actually the only one in the opinion that addresses the question then most starkly threatening the Union. Across the 1840s and 1850s, the Union was held together chiefly by the Democratic Party, the only truly transsectional institution in the nation. But the Democrats spent all of their post-Wilmot existence before the Civil War struggling to find a unifying position on the question of slavery in the territories. The closest they came on this question was the doctrine of popular or territorial sovereignty, adopted and championed by Douglas in the 1850s. This doctrine held that the decision whether to admit slavery to a territory must belong to the residents of that territory. That was a promising principle to some, but in practice it only raised the question of *when* the residents might make that momentous decision. Could the first handful of residents in the territory vote to exclude slavery and thus slaveholders and thus pro-slavery votes? Or must the

residents of a territory wait, uncertain of the ultimate nature of their society, slave or free, until the moment of statehood? The principle of territorial sovereignty was no principle at all unless it could say something about timing that both North and South would accept as equal treatment.

By the time of the *Scott* decision, no such resolution was at hand, and the ill-fated race to control the Territory of Kansas was already underway. Democrat James Buchanan had just assumed the presidency and implied in his inaugural address that the Supreme Court would settle the question of territorial sovereignty imminently in its *Scott* decision. But *that* question was not before the *Scott* Court. The constitutionality of the Missouri Compromise was before the Court, but territorial sovereignty was not. Taney's two sentences quoted above, therefore, strongly implying that a territorial government could not at any stage of things ban slavery from its territory, constituted a flagrantly unjudicial exploitation of a case before the Court. Departing from the questions actually at issue, with hardly a suggestion that lower courts required guidance on a related question, Taney attempted to put the cultural and political weight of the judiciary on one side of a negotiation, however futile, that was still being conducted in the other branches of the government and in the nation's public life. Northern Democrats like Douglas pressed on with the policy of territorial sovereignty despite Taney's dictum, but now with an even bigger hurdle to jump in the race to save the Union.

Was Curtis's Dissent Unjudicial?

In the sections just above, I have tried to vindicate the legal quality of Taney's opinion and, in the process, offered what I think are serious criticisms of Justice Curtis's dissent. But I have so far stopped short of arguing that Curtis's supposed masterpiece should actually be deemed unjudicial. The weaknesses already mentioned, however, are far from the only

vulnerabilities in that opinion. In fact, there are far more important ones that can and should be used to take Curtis's work off its legal pedestal and suggest, therefore, that Curtis's work was driven not so much by a devotion to law and judicial craftsmanship as by a determination to resist Southern power.

I will discuss several of the dissent's flaws and conclude with the most serious: Curtis's evasion of *Strader*, a case of such importance to the *Scott* questions that Curtis's refusal to engage with it finally supports a judgment that the dissent was not just a politicized opinion but one fairly characterized as unjudicial. In saying that, I do not condemn Curtis. Perhaps by 1857, the time for adhering scrupulously to the judicial role was past. Perhaps adhering to that role would only have entrenched the outsized power of the slaveholding interest in American governance (Fehrenbacher and McAfee 2001, Richards 2000). In any case, I do not think that Curtis's opinion can ultimately be explained by positing a desire to vindicate the law as such. Rather, I think it is best explained by Curtis's readiness to consider the larger implications of the case in 1857, larger implications that always have the potential to *inform* the law as such but that Curtis proved unable to *assimilate* to law.

Sua Sponte Inquiry into Jurisdiction

Before getting to *Strader*, it is important to ventilate the other major problems with Curtis's work. The case opened with some rather technical questions of jurisdiction. Curtis rightly addressed these at some length but not with the impartiality one might desire. Sanford had challenged federal jurisdiction in the court below and lost but had not sought review of that question because the final judgment had come out his way. When the Scotts sought review, then, the Court had to determine whether it might review *sua sponte* the lower court's ruling on jurisdiction—that is, the trial court's holding that the Scotts might count as Article III citizens,

eligible to sue in federal court, despite their descent from African slaves. As I read Curtis's analysis of this question, however, it seems clear that he bent the sources out of shape so that he could, first, address the Missouri Compromise questions himself and, second, condemn Taney's attempt to reach that question as well.

In affirming the Court's authority to consider questions of jurisdiction, Curtis used the following language, endorsing *sua sponte* inquiry:

I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea; and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power. (*Scott*, 567)

Taney took a similar position and used it to join Curtis in reviewing the plea in abatement as such, with its question whether any native black American could be an Article III citizen. But Taney used it further to justify consideration of the Missouri Compromise question as well. By treating that question too as a matter of jurisdiction (since a ruling that the Scotts remained slaves and therefore not citizens would doubly deprive the federal courts of Article III jurisdiction) and by affirming the Court's power to entertain such jurisdictional questions *sua sponte*, Taney rendered his holding on the Missouri Compromise just that—holding, not dictum. Curtis did not mind Taney's addressing the citizenship question, but he clearly didn't want Taney addressing the Missouri Compromise at all and so, despite his language quoted above, he was determined to find a way to brand Taney's discussion extrajudicial.

How did he do that? Although he had insisted on federal courts' limiting themselves to their legitimate jurisdiction, even *sua sponte*, he contrived to limit the scope of this principle so that he could label Taney's jurisdictional discussion dictum. *Sua sponte* inquiry into jurisdiction

extended, he said, only to review of an *unappealed plea to the jurisdiction in the trial court*, not to matters of jurisdiction never disputed as such by the parties. He took this position even though the underlying justification for his own jurisdictional inquiry was “the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted” (*Scott*, 567). That principle would imply a *sua sponte* obligation, the one exercised by Taney, to inquire into jurisdiction even beyond the specifics of a plea to the jurisdiction below.

Despite that principle, Curtis clung to his narrower claim and then pointed out (correctly enough) that the plea below did not aver the Scotts’ status as slaves, thus that no party had suggested an absence of jurisdiction on the basis of the Scotts’ slave status. This observation set up Curtis’s later claim that the second half of Taney’s opinion was therefore dictum. To support this move, Curtis read some highly technical precedents aggressively in his own favor (*Scott*, 589-90), readings that Earl Maltz has firmly disputed despite being a fan of Curtis’s opinion (Maltz 2007b), rather than implementing his sensible principle that federal judges must guard against exercising federal power where not authorized by positive law.

Curtis’s disingenuousness is further demonstrated by his subsequent language condemning Taney’s *sua sponte* inquiry:

A great question of constitutional law [the Missouri Compromise question], deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed. (590)

A reasonable enough statement on its face, it would have been at least as well applied against Curtis himself rather than used against Taney. Curtis had many ways of avoiding this “great

question of constitutional law” and no good way to justify reaching it. As I will argue below, a fair engagement with the *Strader* precedent almost certainly would have kept the Missouri Compromise out of the case. Similarly, Curtis could have stuck with his claim that the contracts clause guaranteed the Scotts’ emancipation without getting into the constitutionality of the Missouri Compromise (Maltz 2007b; more on that below). Finally, he could have simply dissented without further opinion, a common enough practice in those days. Moreover, it is critical that he did not say that he was compelled to carry on because Taney had; he was *not* simply answering Taney on a question that Taney should never have injected into the opinion. Rather, his words made clear that he was going on to the Missouri Compromise question no matter what, exploiting his role as a justice to pronounce on a constitutional question then before the country but not necessarily before the Court. At the same time, he denied Taney the right to discuss that same issue, despite Taney’s equally plausible, if equally self-serving, argument that he was merely completing his inquiry into the court’s jurisdiction.

Curtis’s language thus lends weight to the claim that Taney addressed the Missouri Compromise only because Curtis and McLean had made clear that they would.²⁵ No doubt, Taney wanted his opinion to cover all the ground and settle the national question, as did Curtis

²⁵ Scholars of the case have argued for some time about the sequence of events that led to the opinions’ covering the issues they did. Maltz (2007, 106-117) offers a concise, recent account. At one point, all agree, it was the determination of the justices to allow New York’s Justice Nelson to write a more or less minimalist opinion deferring to the authority of the Missouri Supreme Court on a Missouri question. It is clear, though, that there were Northern justices determined to write dissents that would address the Missouri Compromise and Southern justices who badly wanted an opinion that would vindicate Southern rights much more broadly than Nelson’s would have. Did Taney ultimately write because he knew that McLean and Curtis would and could not let them go unanswered? Did Curtis write only when he was sure that the Southerners were certain to write an opinion reaching the Missouri Compromise? The precise dynamics within the Court cannot be nailed down, but I think it is fair to say that Curtis was not simply reacting to a gratuitous provocation from Taney. Rather, both sides had increasingly become convinced that it was in some sense their responsibility to give an authoritative judicial reading of the Constitution in its relations to territorial slavery. Curtis’s opinion was not simply a matter of a dissenter disputing the majority’s illegitimate discussion of the Missouri Compromise. Rather, it was the product of Curtis’s considered decision, for better or worse, to announce in his official capacity his view of the constitutional question regardless of whether the Southerners did.

apparently. But, even if he'd wanted to write more narrowly, he could hardly have sat back and watched Curtis make the anti-Southern case without an answer from the Court, as long as there was a legitimate legal route to the question for him. More to the point, as long as Curtis was determined to go on to the Missouri question, he was hardly in a position to complain that Taney was addressing the question as well. It's difficult to blame him for doing whatever proved necessary to undermine any slavery-entrenching pronouncement from the Court, but such a motivation was, of course, at least as partisan as any motivation of Taney's. As Allen (2006, 181) notes, the weight of scholarly opinion has been that the second half of Taney's opinion was *not* dictum. Yet the charge has been repeated ever since, and even those who know better have failed to take Curtis to task for disingenuously insisting that it was.²⁶

The Privileges and Immunities Clause

Curtis next looked to neutralize the Southern parade of horrors said to lie within the privileges and immunities clause. Southerners claimed that recognition of black citizenship would empower black citizens to enter the slave states and claim dangerous rights of travel, of free speech, of property, even the right to vote and to hold federal and even state offices. To Southerners, it was obvious that such rights for blacks would instantly destroy the racist discipline that preserved the peace. Hardly a racial liberal himself (Streichler 2005), Curtis resisted the argument by painting the privileges and immunities clause as perfectly accommodating to *racist* discrimination; it barred discrimination only against *out-of-state*

²⁶ Fehrenbacher was clearly of the view that Taney's treatment of the Missouri Compromise was not dictum at all, thus disagreeing with Curtis, but he never squarely faced Curtis's deep vulnerability on this score, preferring to portray Curtis's argument as "very impressive" (Fehrenbacher 1978, 330-32, 403-14, quotation at 4). A limited exception is Maltz (2007b, 275-76), who acknowledges that Curtis's position was so untenable that it must be attributed to the "heat of the controversy." Maltz more or less excuses Curtis for this by supposing that he had no desire to address the Missouri Compromise and was angered by Taney's virtually compelling him to. Maltz also thinks that this mistake was just one slip-up in an otherwise sound and eminently judicial opinion (265).

persons as such. Thus each state would remain perfectly free to apply its racist distinctions and discipline to out-of-state blacks just as they applied to in-state blacks, regardless of anyone's status as a citizen (*Scott*, 582-584).

That is a plausible argument on first impression (though deeply racist). But at the time there persisted a widely held and, at least in its more limited form, an almost irresistible view to the contrary. Many believed that the privileges and immunities clause actually did guarantee an undefined but substantial body of basic rights to every American citizen (Smith 1997; Curtis 2000). Without some such core set of rights, what would citizenship even mean? At a minimum, these rights would have included a freedom to travel into any state. Even that minimal right—a right of free blacks to travel through slave states with their freedom and their citizenship (if not their full equality) guaranteed by federal law--was thought to endanger the allegedly indispensable system of racist discipline. The failure of Curtis to acknowledge so serious an implication manifested at least as partisan a view of the law as anything that Taney wrote. (And the thorough-going racism of Curtis's argument makes him hardly more appealing than Taney in this phase of the argument.)

Strader and Comity

While there is no smoking gun in Curtis's dissent quite as clear as those in *Marbury v. Madison* (1803) and *Bush v. Gore* (2000), I think that Curtis's treatment of Missouri's claim to final authority over the status of its inhabitants—regardless of the status of the Missouri Compromise or other foreign law--and especially his evasion of the precedent in *Strader v. Graham* (1850) well justifies the judgment that his opinion was an unjudicial bid to resist the entrenchment of Southern power. *Strader* declared in 1850 that the slave status (or not) of any inhabitant of any state was a question firmly within the control of that state. Curtis believed that

the law of Illinois and/or the Missouri Compromise would have freed the Scotts, but here he had to confront the *Strader* claim that such putative, out-of-state emancipations were irrelevant and without authority once the Scotts were back in Missouri. The Missouri Supreme Court, after all, had explicitly declined to extend comity on the question of slave status in the Scotts' own case. Curtis responded by ignoring *Strader* completely while insisting on the novel proposition that slave status was a matter of general law in the mode of *Swift v. Tyson* (1842)²⁷ rather than forum law.²⁸

Curtis commenced his efforts to avoid *Strader* by artificially separating the question of Missouri's obligation to enforce the Scotts' freedom into two parts. Rather than begin with a clear analysis of the most pertinent federal case law, he took a confusing and useless detour into some legal metaphysics. Thus, he chose first to analyze whether the emancipating laws of Congress and Illinois purported affirmatively to dissolve the slave's status as slave—that is, harbored the extraterritorial ambition “absolutely to dissolve the relation, and terminate the rights

²⁷ Some cases come into federal court under “diversity jurisdiction”; that is, when the opposing parties are from different or “diverse” states and are thus entitled under Article III to be heard in federal court rather than in the courts of the home state of one of the parties, even though no federal law is involved in the case. For some (but not all) categories of diversity cases, *Swift v. Tyson* (1842) held that federal courts would apply “general law”—that is, the federal judges' own notion of appropriate substantive law—even when it differed substantially from the law that the pertinent state court would have applied in the same case. Before Curtis wrote his *Scott* opinion, the Supreme Court had never thought general law applicable to questions of slave status.

²⁸ Note, though, that Curtis never unambiguously answered the question whether he, as a federal judge, conceived himself an enforcer of Missouri state law or of an independently founded general law of personal status. He seemed mostly to insist that the Missouri courts were obliged to recognize the Scotts' freedom as a matter of their own law, since he articulated the chief question at issue in this way: “whether the State of Missouri recognizes and allows the effect of that law of the Territory [the Missouri Compromise law], on the *status* of the slave, on his return within its jurisdiction” (*Scott*, 590, emphasis in original). Still, as I'll note below, there are other indications that he might have recognized the power of the Missouri courts to do as they did. After all, he never suggested that the Court could have overturned the Missouri Supreme Court decision if it had been appealed directly. No one seems to have disputed the notion that the Court would have lacked jurisdiction over such an appeal and thus would have been forced to acknowledge the legitimacy of the Missouri court's ruling. The heart of his argument, then, however obscurely articulated at times, was that the Court nevertheless retained its own authority to disregard Missouri law as announced by the Missouri Supreme Court and instead apply general law in federal diversity jurisdiction.

of the master existing under the law of the country whence the parties came” (*Scott*, 591). If they purported to do so, then, Curtis seemed to believe, Missouri would bear an obligation to embrace the Scotts’ foreign emancipation. Alternatively, if those foreign laws simply refused state support for the owner’s implementation of the slave relation within the jurisdiction, Missouri would not have to treat the returning Scotts as emancipated.

Apparently, Curtis believed that these two ostensibly different kinds of laws would have different consequences for the Scotts. But it is very hard to see why they would. The foreign emancipation amounts to a full emancipation in the foreign jurisdiction (Illinois or the Wisconsin Territory) in either case. Whether the local law declares the freedom of every erstwhile slave who enters the jurisdiction or just declares that its laws will not protect the erstwhile master’s right to enforce obedience, the state carries out an emancipation. But in neither case is there any obvious reason to think that that emancipation has any extraterritorial authority in the forum state (Missouri), except as some law of the forum prescribes. And Curtis never explained why there would be. He simply chose to identify the Missouri Compromise as a statute with extraterritorial ambitions, even as he failed to explain why Congress got to have such ambitions honored (assuming implausibly that those ambitions existed at all) at the expense of Missouri’s authority over the status of its inhabitants. In other words, the question remained, what law obliged Missouri courts to recognize a change in status for the Scotts within the boundaries of Missouri?²⁹

²⁹ Curtis’s effort to demonstrate the existence of a law that would so oblige the Missouri courts was exceedingly tortured and dependent on a disingenuous over-reading of case law. He relied chiefly on the opinion of Henry St. George Tucker in *Betty v. Horton* (Va., 1833), a case where the allegedly important distinction between the two kinds of laws above “is very clearly stated” (*Scott*, 592). In that case, a Massachusetts citizen married into ownership of two slaves in Virginia and removed them to Massachusetts, somewhat later moving permanently to Virginia with the “slaves” in tow. Ultimately deciding the case in favor of emancipation entirely under Virginia statute law, Tucker’s opinion recognized only in dictum that, had a Massachusetts *court* actually declared the slaves free while in

Curtis did pay lip service to Missouri's authority by *positive law* to deny recognition to foreign emancipations, so it was just Missouri's courts that he thought the federal courts could and should order around. But he had a very difficult time explaining why. He deemed it adequate simply to accuse the Missouri Supreme Court of acting on political motivations and then substitute the federal Supreme Court's authority for that of the Missouri Court:

[I]n my opinion, it is not within the province of any judicial tribunal to refuse such recognition [of foreign laws] from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the State should change its own action. To understand and give just effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges. (*Scott*, 594-95)

But even if the Missouri decision was properly characterized as "political," what law authorized the substitution of Justice Curtis's own view of Missouri law?

Curtis's strongest argument was that the marriage of the Scotts, consented to by their owners and solemnized in free territory, vitiated any attempt to maintain their slave status (*Scott*, 599-601). Curtis claimed that, once the Scotts were freed either by the Missouri Compromise law or by the consent of their owners (as manifested in their endorsement of the marriage), their

Massachusetts, then "national law" would have required the Virginia courts to enforce that ruling. Presumably, he referred to the Full Faith and Credit Clause (FFC) of the Constitution. But, of course, the Scotts had no such adjudication and no claim on the FFC when they sued in Missouri. Tucker had gone on to opine that Virginia courts would have "respect[ed] and follow[ed]" Massachusetts law in this case even without an adjudication if it were shown that Massachusetts law had been interpreted on such facts to emancipate slaves of its own force (and in that sense to be "more operative than the common law"). But he nowhere indicated that that result would have flowed from anything but the Virginia court's exercise of comity as a kind of discretionary equivalent of the FFC's rule for actual adjudications. Nothing in the case supports Curtis's search for a principle that Virginia (in *Betty v. Horton*) or Missouri (in *Scott*) bore some *obligation* to recognize extraterritorial ambitions of free states or territories. Nor does the case even clearly draw the distinction that Curtis relied on between emancipations intended fully to dissolve an individual's slave status and emancipations intended only to deny the owner the assistance of the law domestically. It is possible that that distinction too was in Tucker's mind—there is language that could possibly indicate so—but what he actually wrote about, only in passing and only in what was explicitly acknowledged as dictum, was the relationship between the authority of foreign adjudications via the FFC and the authority of foreign law without an adjudication, presumably via comity.

marriage was protected even in Missouri by “international law”—by which Curtis simply meant principles of law embraced across many jurisdictions--and by the contracts clause of the federal Constitution. And, since slave status was inconsistent with marriage, Missouri could not reassert the slave status of the Scotts. But the same source that Curtis cited for the principle of international law that “a marriage, valid by the law of the place where it was contracted, . . . is valid everywhere” (*Scott*, 599) also noted that there were exceptions to that rule. Curtis did not mention these exceptions, which, taken together, suggested the almost unavoidable principle that recognition of foreign marriages would always face some limits in the public policies of the forum state.³⁰ And it was not for Curtis to tell Missouri what its public policy might have to say about legal recognition of a marriage like the Scotts’.

Perfectly aware of the Missouri court’s explication of its own state law in its own disposition of the Scotts’ claims, Curtis grasped for some means to deny that Court’s authority to articulate law for the Scotts’ circumstances. He thus asserted finally that questions of *slave status* should be treated as matters of general law rather than state law--much as *Swift* treated the law of

³⁰ Joel Prentiss Bishop’s 1856 *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits* did take quite an expansive view of Curtis’s quoted principle but still recognized that incest and polygamy formed recognized exceptions and assumed that mental incapacity would do so as well (Bishop 1856, §§125-30). And Curtis’s sharp but fleeting reference to the *Dartmouth College Case* on the contracts clause issue effectively opened but hardly closed the question of how the contracts clause might apply. Like Bishop’s treatise, the *Dartmouth College* Court had given no thought to the distant question whether the institution of slavery might create exceptions to the general obligation to recognize out-of-state marriages, especially given the Constitution’s substantial accommodation of slavery. No state need recognize within its borders a marriage that violates its public policy in a sufficiently important way, Bishop grudgingly acknowledged. (Earl Maltz agrees that “To the extent that it relied on the claim that Missouri was constitutionally required to recognize the validity of the Wisconsin marriage, [Curtis’s] analysis was doctrinally suspect” (Maltz 2007b, 270-71).) And the *Dartmouth College* Court, of course, focused its energies on questions totally unrelated to whether a state would have been legally and constitutionally required to recognize a marriage between persons whom it would otherwise have considered slaves. Curtis offered the beginnings of a serious argument here, but his utter unwillingness to consider the limits of “international law” and the contracts clause under a Constitution that accommodated slavery and offered states substantial autonomy marked his opinion as highly partial and incomplete. For an extended discussion of the significance (or not) of the Scotts’ marriage, see VanderVelde and Subramanian (1997, 1103-17).

contracts--even though they had never before been so treated by the Court:

[W]e come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the *status* of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State courts, however great respect might be felt for their learning, ability, and impartiality. (See *Swift v. Tyson*, 16 Peters's R., 1; *Carpenter v. The Providence Ins. Co.*, *Ib.*, 495; *Foxcroft v. Mallet*, 4 How., 353; *Rowan v. Runnels*, 5 How., 134.) (*Scott*, 603)

In this passage, he nakedly asserted that “international law” or “universal jurisprudence” authorized the Court’s disregard of Missouri law on questions of slave status. For that conclusion, however, he cited only the four commercial law cases that appear at the end of the block quote above, each of which stood for the general proposition that commercial cases in diversity would be treated as subject to the general law. None addressed slave status in any way. Only the last of these citations, *Rowan v. Runnels*, touched on slavery at all, but it too was about the validity of a contract and could not in any way be taken to hint that slave status was a matter of *general* law.

Such authority as there was ran against Curtis pretty strongly. Cases like *Groves v. Slaughter* (1841)³¹ and *Prigg v. Pennsylvania* (1842)³² were not especially on point but emphasized the local quality of the law of slavery with the exception of fugitive slave cases. More importantly, this was the place to confront *Strader*. *Strader* was the very foundation of

³¹ In *Groves*, the question was whether the federal commerce clause restricted Mississippi’s power to bar sales of slaves into its territory from out of state. Six of the seven participating justices embraced firm state control over apparently everything to do with slavery within the state’s borders.

³² In *Prigg*, the Court confronted the question whether states might legislate the procedures for the return of fugitive slaves. For the Court, Justice Story recited the usual declaration that slavery was “a mere municipal regulation” (*Prigg v. Pennsylvania* 1842, 611) that could not create an obligation outside the state to return a fugitive. Only the Constitution’s fugitive slave clause could positively do that, and he read that clause to place power over fugitive rendition exclusively in the federal government. Although the clause thus federalized one discrete area of slave law, *Prigg* reinforced the notion that each state might have its own law of personal status and bore no obligation to involve itself in that of any other state.

Justice Samuel Nelson's opinion, joined by a majority of the Court, which held that, whatever the effect of foreign laws within their own territories, Missouri was entitled to determine the status of its own inhabitants (*Scott*, 462-65). Taney, too, relied explicitly on *Strader* (453). But Curtis did not even address the case.

Read strictly for its holding, *Strader* did not absolutely exclude the possibility that personal status might prove a matter of general law in *diversity*, since that precise question was not before the Court; it only held that personal status was not a federal question that could create jurisdiction in the Supreme Court on appeal from a *state court*. Read with any sort of good faith, however, *Strader* stood as a clear declaration from the Court that the law of personal status was state law to which federal courts must defer. *Groves*, *Prigg*, and *Strader*, in effect, sought to minimize points of interstate friction on slavery questions by giving every state firm authority over its own inhabitants, except when the national government stepped in to return fugitive slaves. These cases, then, and especially *Strader*, clearly called for federal courts to adhere to state policies when cases came before them. By strong implication, the Court had decided against creating an independent general law of status that might invite the Scotts and others in their position into federal court, in search of foreign judges willing to hear freedom suits and craft a law more to their liking.

Moreover, the *Strader* Court had promulgated these principles of state autonomy without pertinent challenge or qualification from any member of the Court only a few years before. Here is the critical language of *Strader*, which vindicated forum law in a case that turned on whether certain Kentucky slaves had gained their freedom when rented out to work in Ohio:

Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United

States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free on their return. The Court of Appeals [of Kentucky] have determined, that by the laws of the state they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it. (*Strader v. Graham* 1850, 93-94)

In the same opinion, Taney declared without challenge that even the *federal* Northwest Ordinance, were it still the law of Ohio,³³ could have no authority in Kentucky, except such as Kentucky chose to give it: “The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the state of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that state, nor give this court jurisdiction upon the subject” (*Strader*, 94). This remark was not holding perhaps, but it was closely related to the *ratio decidendi* and went unchallenged (because it was obviously correct). And it spoke almost exactly to the *Scott* scenario, with the Northwest Ordinance playing the part of the Missouri Compromise. If *Strader* did not technically rule out the creation of a general law of personal status, it emphatically expressed the convictions of every member of the Court in 1850 that the states retained complete control on questions of slave status, even in the Scotts’ circumstances.

Here was a very steep hill for Curtis to climb, but he did not even acknowledge its existence. Rather than confront the language of *Strader*, he simply asserted the applicability of an international law and a general jurisprudence that would have armed the federal courts to intrude into the slave states’ law of status in unprecedented ways and in deep tension with the *Strader* precedent. Such an unanticipated result could hardly have seemed less political to the

³³ The Ordinance governed Ohio and other states-to-be when they were territories, but lost its legal force when these territories became states. There were those who claimed that the Ordinance’s abolition of slavery in those territories disabled the subsequent states from ever introducing slavery as well, but that argument never cut much ice and was rejected, in dictum but without dissent, by *Strader*.

slave states than the Missouri Supreme Court's adoption of a new rule of comity seemed to Curtis.

If Curtis could not find a way to compel Missouri to recognize foreign emancipations, then he had no basis as a judge for discussing the constitutionality of the Missouri Compromise at all. But he wanted to discuss the constitutionality of the Compromise so that he could defend federal power against assertions of slaveholders' rights. He had to create some law that would allow the Supreme Court to control the Missouri courts on local questions of personal status. To do so, he ignored and defied the unanimous declarations of the *Strader* justices.

Curtis offered no legal basis for treating questions of slave status in the American context as matters of general law on a par with *Swift*'s questions of commercial law. And, as I've argued above, this was far from the only question in the case that Curtis seems to have manipulated. Identifying only one significant manipulation and admitting his abiding admiration for Curtis, Earl Maltz (2007b) nevertheless concludes that, "When his political beliefs were strongly engaged, even a judge as committed to legal ideology as Curtis was willing to twist doctrine in order to vindicate those beliefs" (276). I think it clear that Curtis did quite a bit of doctrine-twisting, climaxing with his willful refusal to respect *Strader* and apply Missouri law to the Scotts.³⁴ As I've further suggested, none of this implies that Curtis deserves condemnation.

Contrary to Graber, I think it likely that the times called for an unjudicial ruling, if that was the

³⁴ There remains the claim that Missouri law itself was on the Scotts' side. That is, even when applying *Strader*, some have argued that the relevant Missouri law was not that in the Missouri Supreme Court's own *Scott* opinion but that in its earlier case law. I've always found that claim a little much, since it effectively denies a state supreme court the authority to adjust its law to changing circumstances or overrule its prior decisions. But, in any case, Curtis did very little with this argument: he quoted the argument of the dissenter in the Missouri court, who of course opposed the majority's new articulation of Missouri law but lost; and he cited without discussion some Supreme Court precedent that said that the Court was not necessarily bound by the most recent state case in determining state law. But he did not discuss these cases or develop the argument, preferring instead to focus on the claim discussed in the main text here.

only way for a person in Curtis's position to draw a line against slaveholder power. But the right thing to do is not necessarily the judicial thing to do.

III. CONCLUSION

His ruminations on "constitutional evil" to one side, Mark Graber's *Dred Scott and the Problem of Constitutional Evil* (2006) is one of the most imaginative and insightful works of constitutional history in recent times. Read critically and synthesized with a fertile collection of other recent work, it repositions *Scott* in a narrative of "the slaveholding republic." In this new narrative, the *Scott* case is one climax of a constitutional history that recognizes the thorough implication of the Constitution in the perpetuation of slavery after 1787, both in the courts and in the social and political practices that worked together to establish constitutional meaning. I have tried to show that a review of these studies and the *Scott* opinions implies that by 1857 there remained little or no scope for a genuinely judicial opinion of the Supreme Court that would emancipate the Scotts. I want to emphasize that I am not saying that it was impossible, only that my review of Curtis's failed effort to do so demonstrates how little scope there was and how desperate the plight of the Constitution had become for those who would resist the South judicially rather than politically. In my judgment, Curtis confronted this predicament by choosing to be on the right side of history rather than adhere to a construction of the law that was true to the available materials.

In some ways, the greatest achievement of Graber's book, one that this essay is meant to vindicate, is its demonstration of the indispensability of a broad-gauged constitutional history, fully encompassing all of the nation's political institutions and dynamics, to any adequate history

of the courts' encounters with the Constitution. My reliance on Freehling and related works is meant to show the benefits of pressing even more broadly into the history of the times, if one wants to understand what courts are up to and up against. After all, the sources of law can never just be formal legal texts; they cannot help but include the governed society's common assumptions--and often actively disputed assumptions--about the essentials of its social dynamics, its economic life, and its peace and safety.

The broader history teaches us, among other things, that racism deeply infected the Constitution and all of American culture, as did slavery. Taney's and Curtis's *Scott* opinions battled over the proper way to implement what both understood as a more or less deeply racist Constitution. If Curtis rejected Taney's assertion that the Constitution was made only for the white race, he nevertheless remained comfortable with the Constitution's accommodation of the pervasive, racist degradation of so many of his fellow Americans. In fact, his opinion embraced a power to deny citizenship--national citizenship as well as state citizenship--merely on the basis of race. And, of course, the Constitution offered substantial protection to racist slavery, at least by means of the fugitive slave clause, which Curtis defended, and the three-fifths clause.³⁵ Oddly, though, Curtis has come down to us as a hero because at the climactic moment of his professional life, he chose to resist the full claims of slaveholder power under this racist Constitution. Because American historians and intellectuals of all stripes now unanimously share values closer to those of Benjamin Curtis--in that one moment, anyway--than to those of Roger Taney, it has proven extraordinarily difficult for them to see the polemical qualities of Curtis's opinion and the judicial craftsmanship in Taney's.

In the second half of this essay, I have offered some technical analysis of the Taney and

³⁵ Curtis's constitutional thinking and pointed racism are given valuable treatment in Streichler (2005).

Curtis opinions in light of the socioconstitutional history laid out in the first half. That analysis largely vindicates the legal quality of Taney's opinion. However much we might criticize Taney for absorbing the slave states' pathologies and reading them into law, he did so largely in proper, judicial fashion under a Constitution that broadly accommodated racist slavery. And he did so in an effort to pit the pacifying authority of law against the appalling violence seemingly threatened by the course of the political branches, by the Northern "abolitionists," and (not least) by his own section's secessionist radicals. It is also true, however, that the substance of Taney's ruling threatened to entrench ever more deeply the national power of the slaveholding class and the geographic reach of slavery itself. This result, apparently, Curtis could not endorse. Where Taney slipped over the line to unjudicial conduct only once and only briefly (though very clearly), Curtis, in my judgment, did so frequently and importantly, rendering his opinion as a whole more a political shot across the bow than a judicial opinion. It remains unclear why Curtis resigned shortly after the case was decided, but, with *Scott* on the books, it seems fitting that he could no longer see himself on the bench.

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