

RETHINKING *DRED SCOTT*: NEW CONTEXT FOR AN OLD CASE

AUSTIN ALLEN*

INTRODUCTION

Almost everyone despises *Dred Scott v. Sandford*.¹ Its holdings that no African American, slave or free, could be a federal citizen and that Congress possessed no authority to limit the expansion of slavery into the federal territories have provoked the ire of commentators for generations. An overwhelming consensus exists among legal scholars that *Dred Scott*, for one reason or another, was an appalling decision—one of the worst ever to be handed down by the Supreme Court. At that point, the consensus ends, and the reasons for the decision’s failings multiply. Justice Thurgood Marshall and Bruce Ackerman, for example, base their criticism on *Dred Scott*’s rejection of black citizenship, a holding that Marshall considers to be tied to flaws in the original Constitution.² Justice Antonin Scalia and

* Assistant Professor of History, University of Houston—Downtown. A portion of this paper was presented at the 2005 meeting of the Society for Historians of the Early American Republic (Philadelphia, Pennsylvania). I would like to thank Jack Balkin, Paul Finkelman, and Sandy Levinson for inviting me to participate in this symposium. Thanks as well to Paul Finkelman, Mark Graber, Calvin Johnson, and Scot Powe for their comments during the discussion of this Paper.

1. 60 U.S. (19 How.) 393 (1857) (holding that no black, free or slave, may be a federal citizen for the purposes of diversity jurisdiction and that Congress possessed no authority to limit the expansion of slavery into the Federal territories), *superseded in part by* U.S. CONST. amends. XIII, XIV.

I say “almost everyone” because tax protestors regularly (and unsuccessfully) invoke *Dred Scott* as an authority exempting them from taxation. Tax protestors on the far Right embrace *Dred Scott* and interpret its citizenship ruling to mean that there are several classes of citizens. Members of the highest class—or “sovereigns”—live under no obligation to follow U.S. law, especially tax laws. See *Anderson v. Commissioner*, 76 T.C.M. (CCH) 89, 92 n.3 (1998) (rejecting the argument that “sovereigns” are exempt from taxation); *Barcroft v. County of Fannin*, 118 S.W.3d 922, 926 (Tex. App. 2003) (rejecting *Dred Scott* as “a historical footnote in our jurisprudence” that is not a reliable authority); see also Susan P. Koniak, *The Chosen People in Our Wilderness*, 95 MICH. L. REV. 1761, 1773, 1779–80 (1997) (reviewing JAMES CORCORAN, *GATHERING STORM: AMERICA’S MILITIA THREAT* (1996) and CATHERINE McNICOL STOCK, *RURAL RADICALS: RIGHTEOUS RAGE IN THE AMERICAN GRAIN* (1996)) (placing this use of *Dred Scott* in the context of Right-wing militia thought).

Such uses of *Dred Scott* do not limit themselves to Right-wing militia members; at least one black nationalist organization has tried to make a similar case for exemption from federal law. See, e.g., *Great Seal Moorish Sci. Temple of America, Inc. v. New Jersey*, No. 05-CV-345, 2005 U.S. Dist. LEXIS 21550, at *2 n.1 (E.D. Pa. 2005).

2. *Dred Scott*, 60 U.S. at 404 (“We think they [black Americans] . . . are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution . . .”); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 63 (1991) (“The very idea that the court could declare that *free* black people were *forever* barred from American citizenship remains, after 130 years, an awful rebuke to our

Robert H. Bork, who find the decision equally deplorable, base their criticism on the ruling that the prohibition against slavery's expansion violated the Fifth Amendment's Due Process Clause, which they contend introduced the illegitimate concept of substantive due process into constitutional law.³ Cass R. Sunstein criticizes the *Dred Scott* Court not so much because it decided issues incorrectly (although he would agree that it did), but rather because it attempted to decide the issues at all, thus circumventing opportunities for a democratic resolution of questions into which it had intervened.⁴ This list could become quite expansive, for *Dred Scott* was a complicated case.

Dred Scott, moreover, evokes a number of important questions. Does the decision's racism stand as the starting benchmark in American law's march toward racial equality,⁵ or does it underscore an endemic racism in American culture that has not yet been adequately remedied?⁶ Was *Dred Scott* an example of judicial overreaching that illegitimately removed conflicts over fundamental values from the democratic process,⁷ or was the decision a legitimate exercise of judicial authority within a constitutionally

Constitution."); Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987) (arguing that the Constitution's central flaw, ultimately expressed in *Dred Scott*, "arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes").

3. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); *Dred Scott*, 60 U.S. at 450 ("[A]n act of Congress which deprives a citizen . . . of his . . . property, merely because he . . . brought his property into a particular Territory . . . could hardly be dignified with the name of due process of law."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) (arguing that the Court "was covered with dishonor and deprived of legitimacy by *Dred Scott*," which "rested upon the concept of 'substantive due process' that the Court praises and employs today"); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990) ("[O]nce it is conceded that a judge may give the due process clause substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law.").

4. Cass R. Sunstein, *The Supreme Court 1995 Term—Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 49 (1996).

5. See, e.g., *Zappa v. Cruz*, 30 F. Supp. 2d 123 (D.P.R. 1998):

It would be folly to deny the chequered past this nation has with respect to the ill-treatment of many minorities. . . . But our nation's conscience has evolved, and, based largely on the efforts and courage of people like Abraham Lincoln, Martin Luther King, and Thurgood Marshall, the law no longer tolerates state-sanctioned discrimination based on racial or ethnic classifications.

Id. at 128 (citations omitted, but citing *Dred Scott*, 60 U.S. (19 How.) 393, among other decisions).

6. See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000); David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1403 (2004).

7. See ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT 60–62* (Sanford Levinson rev., 2d ed. 1994); Robert A. Burt, *What Was Wrong with Dred Scott, What's Right about Brown*, 42 WASH. & LEE L. REV. 1, 19–20 (1985); Sunstein, *supra* note 4, at 48–49.

circumscribed democratic polity?⁸ Does *Dred Scott* represent a precursor of modern-day originalism,⁹ or is it the ancestor of decidedly nonoriginalist rulings¹⁰ like *Lochner v. New York*¹¹ and *Roe v. Wade*?¹² Was *Dred Scott* the result of political partisans capturing the Court,¹³ or was it the product of a systemic failure in constitutional government?¹⁴ Finally, does *Dred Scott* point to a need for a departmental constitutionalism that provides interpretive space to counter malevolent decisions,¹⁵ or was the ruling merely an aberration that does not compromise judicial supremacy?¹⁶

These are difficult questions which legal scholars may not be fully equipped to answer, because historians have not yet provided them with the full context in which *Dred Scott* developed. Historical research has done an admirable job reconstructing the political debates surrounding the decision

8. See AUSTIN ALLEN, ORIGINS OF THE *DRED SCOTT* CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857, at 139–40, 150–59, 179–82 (2006); DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 322–34, 365–66 (1978); Edward S. Corwin, *The Dred Scott Decision in Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 53–59 (1911).

9. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 976 n.47 (1998); Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37 (1993); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1050 (2004); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 12–13 (1998); Jamin B. Raskin, *Roe v. Wade and the Dred Scott Decision: Justice Scalia's Peculiar Analogy in Planned Parenthood v. Casey*, 1 AM. U. J. GENDER & L. 61 (1993).

10. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998–1002 (1992) (Scalia, J., concurring in part and dissenting in part); *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1122–23 (5th Cir. 1997) (Garza, J., concurring) (arguing that *Dred Scott* was the doctrinal forerunner of *Roe v. Wade*); *Gumz v. Morrissette*, 772 F.2d 1395, 1405 (7th Cir. 1985) (Easterbrook, J., concurring) (arguing that *Dred Scott* provided the foundation for all subsequent substantive due process cases); BORK, *supra* note 3, at 32 (arguing that *Lochner* and *Roe* followed logically from *Dred Scott*); William H. Rehnquist, *Observation, The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700–01 (1976) (arguing that *Dred Scott* was a classic nineteenth-century example of the living constitution).

11. 198 U.S. 45 (1905) (ruling that maximum-hours legislation violated the right of contract purportedly protected by the Fourteenth Amendment).

12. 410 U.S. 113 (1973) (ruling that privacy rights protected by the Fourteenth Amendment extended to abortion under certain circumstances).

13. See, e.g., FEHRENBACHER, *supra* note 8, at 3, 340, 363–64, 366, 391–93, 385–403; Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1 (1996); Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487 (2002).

14. See ALLEN, *supra* note 8, at 6–7, 9–12, 69–73, 133–37, 220 (arguing that *Dred Scott* developed out of doctrinal conflicts and internal disputes not reducible to sectional politics); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 17–18 (2006) (arguing that *Dred Scott* was not the product of flawed constitutional interpretations but rather a consequence of constitutional sanction of evil practices).

15. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 100 (1998); Emily Sherwin, *Ducking Dred Scott: A Response to Alexander and Schauer*, 15 CONST. COMMENT. 65 (1998).

16. Larry Alexander & Frederick Shauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1382–83 (1997).

and recovering some of the legal issues at stake, but it has not gone far enough. Scholars know relatively little about what the members of the *Dred Scott* Court thought they were doing in handing down their decision and even less about the particular constraints that shaped the Justices' actions. Without more research into those issues, scholars will have only a partial knowledge of the origins and significance of *Dred Scott* and, consequently, may never develop satisfactory answers for the questions to which the decision is relevant.

This Paper argues that scholars have misunderstood the *Dred Scott* case by overlooking the doctrinal context in which it emerged. The argument that follows has three parts. Part I discusses the leading historical accounts of the case, notably the one developed by Don E. Fehrenbacher. It argues that Fehrenbacher's thesis, despite its considerable strengths, relied too heavily on partisan accounts of the sectional crisis developed by antebellum Republicans and on mid-twentieth-century legal theory. Fehrenbacher's analysis, therefore, neglected the larger doctrinal context in which *Dred Scott* developed. Part II presents an alternative account of *Dred Scott*'s origins and contends that *Dred Scott* emerged from a series of unintended consequences resulting from the Taney Court's efforts to incorporate their Jacksonian vision of governance into constitutional law. The argument here demonstrates how this effort shaped the Court's approach to diversity jurisdiction as well as the Justices' debate over the place of slavery and corporations in constitutional law. In 1857, those factors converged in a manner that made a decision like *Dred Scott* inescapable. Part III discusses the implications that the analysis in Part II holds for constitutional theory, specifically arguments dealing with the problem of judicial sovereignty. This Part argues that, because decisions like *Dred Scott* may be unavoidable, theories hoping that judges will discipline themselves through minimalist interpretation or adherence to a stark distinction between law and politics are insufficient. Cases like *Dred Scott* demand a departmental constitutionalism with ample room for extrajudicial interpretation to challenge malevolent Supreme Court decisions.

I. INTERPRETING *DRED SCOTT* IN HISTORICAL CONTEXT

Among historians, the interpretive framework explaining *Dred Scott* rests on the arguments developed in the 1970s by David M. Potter,¹⁷ Wil-

17. DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 267–96 (Don E. Fehrenbacher ed., 1976) (analyzing *Dred Scott* as part of a larger sectional struggle over values).

liam M. Wiecek,¹⁸ Paul Finkelman,¹⁹ and especially Don E. Fehrenbacher.²⁰ These scholars portrayed *Dred Scott* as a political problem emerging from the conflict over slavery's moral legitimacy that had plagued the United States since its earliest days.²¹ Although the American Revolution had unleashed considerable antislavery sentiment,²² a strong Southern presence among federal officeholders, a rising tide of racism, and a gradual waning of Revolutionary idealism ensured that the Constitution received an interpretation favorable to slaveholding interests.²³ By the early nineteenth century, politicians and judges at the national level had reached an understanding that issues relating to slavery and abolition belonged exclusively to the states and that the federal government's responsibility in the matter began and ended with the protection of slaveholders' property rights.²⁴ Recurring controversies over slavery's expansion into new territories and the rise of a radical and vocal abolitionist movement undermined this understanding and placed Southern officials on the defensive. In the three decades after 1830, these officials staked out increasingly proslavery positions—perhaps to the point of nationalizing²⁵ the South's "peculiar institution"²⁶—and by doing so, they antagonized and alienated many, and ultimately most, of their Northern counterparts. These studies, although grounded in careful analyses of nineteenth-century source material, raised significant questions about the modern United States', and in particular its courts', ability to manage political conflicts stemming from clashes between irreconcilable moral priorities. Indeed, both the strengths and weaknesses of these accounts arise from their ability to explain the origins of

18. William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820–1860*, 65 J. AM. HIST. 34 (1978) (arguing that *Dred Scott* was the culmination of two decades of proslavery rulings).

19. PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981) (placing *Dred Scott* in the context of a judicial civil war).

20. FEHRENBACHER, *supra* note 8 (arguing that *Dred Scott* was both a partisan effort to write Southern political positions into constitutional law and a major step toward judicial supremacy); *see also* Don E. Fehrenbacher, *Roger B. Taney and the Sectional Crisis*, 43 J.S. HIST. 555 (1977) [hereinafter Fehrenbacher, *Sectional Crisis*] (arguing that Taney was a sectional partisan).

21. FEHRENBACHER, *supra* note 8, at 18–19; FINKELMAN, *supra* note 19; POTTER, *supra* note 17, at 41–50 (defining the sectional crisis as a conflict over values).

22. FEHRENBACHER, *supra* note 8, at 16–18; FINKELMAN, *supra* note 19; WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 40–61 (1977); *see also* ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 169–72* (1967).

23. FEHRENBACHER, *supra* note 8, at 36–73.

24. WIECEK, *supra* note 22, at 15–16 (labeling this understanding "the federal consensus").

25. POTTER, *supra* note 17, at 351; Paul Finkelman, *The Nationalization of Slavery: A Counterfactual Approach to the 1860s*, 14 LA. STUD. 213 (1975); Wiecek, *supra* note 18, at 54–57.

26. The phrase is Kenneth Stampp's. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

Dred Scott in the context of antebellum partisan struggle while explaining its subsequent importance in the context of a modern conception of judicial authority.

A. *The Fehrenbacher Thesis*

Of these studies, Fehrenbacher's book *The Dred Scott Case* stands paramount. Since its publication, historians have accepted its central arguments as the standard interpretation of the Court's 1857 decision.²⁷ Fehrenbacher placed *Dred Scott* firmly in the context of partisan struggle over the slavery issue, and portrayed the Court's ruling as a last-ditch effort by a panicked majority of Southern, Democratic Justices to write extreme pro-slavery positions into federal law in order to ward off an increasingly powerful Republican Party. Seizing an opportunity provided by a complex case, Chief Justice Taney, with the support of four of his Southern colleagues and two of his Northern ones, passed on every chance to evade a broad ruling, declared free blacks to be noncitizens, and struck down a major piece of legislation barring slavery's expansion into the federal territories. The arguments sustaining these rulings, however, suffered from distorted logic, fabricated history, unsound doctrine, and, because of their racism, moral bankruptcy. These shortcomings manifested themselves, Fehrenbacher argued, because Taney's opinion was nothing less than "a work of unmitigated partisanship,"²⁸ and the Court's intervention into the sectional crisis was, at bottom, an "unusually bold venture in a desperate struggle for power, rather than . . . an evenhanded effort to resolve that struggle."²⁹

Here lay the continuing significance of *Dred Scott*, for, although most of the issues that produced the case are long dead (with the question of race being an obvious exception), the decision still remains one of the most controversial exercises of judicial review in U.S. history. Fehrenbacher wrote in the wake of the Warren Court's initiation of a "revolution . . . in

27. Reviewers greeted *The Dred Scott Case* as a significant scholarly achievement and emphasized its indispensability to an understanding of the case. See, e.g., Paul Finkelman, *What Did the Dred Scott Case Really Decide?*, 7 REVIEWS AM. HIST. 369, 374 (1979) ("In short, this is history at its finest."); Harold M. Hyman, Book Review, 45 J.S. HIST. 439, 441 (1979) (calling Fehrenbacher's book "a history of a quality too rarely encountered"); Stanley I. Kutler, Book Review, 66 J. AM. HIST. 936, 937 (1980) ("What [Fehrenbacher] deserves most of all is to be read by all American historians."). In subsequent years, the nearly uncritical acceptance of the book's central conclusions by the authors of major historical syntheses has underscored that indispensability. See, e.g., JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 170-80* (1988); KENNETH M. STAMPP, *AMERICA IN 1857: A NATION ON THE BRINK* 83-109 (1990); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 708-15 (2005).

28. FEHRENBACHER, *supra* note 8, at 3.

29. *Id.*

which the Supreme Court undertook to make public policy on a vast scale”³⁰ and through which “judicial activism . . . became the main channel of social change.”³¹ Fehrenbacher’s book gave readers who were sympathetic to the results reached by the Warren Court reason to be wary of its newly asserted authority: judicial sovereignty need not always produce praiseworthy consequences like school desegregation or voter redistricting. Post-Warren Courts have only confirmed Fehrenbacher’s skepticism,³² and their continuing commitment to judicial sovereignty over the past three decades has probably contributed to *The Dred Scott Case*’s staying power as much as anything else.

Fehrenbacher and the other members of his cohort developed a very strong analysis of *Dred Scott*, one that accounted for a substantial majority of the evidence then considered relevant.³³ The interpretation possessed so much explanatory power that the broad outlines of the Fehrenbacher thesis have thus far gone unchallenged. Yet, Fehrenbacher has not escaped criticism. Paul Finkelman rejected his argument that the Constitution was essentially an antislavery document.³⁴ Mark Graber pointed out that the Court’s use of judicial review may not have been as revolutionary as Fehrenbacher, among many others, has assumed. For example, the Court had quietly overturned federal legislation several times between *Marbury* and *Dred Scott*.³⁵ Political scientists and lawyers have contended that Taney’s citizenship ruling had a stronger legal footing than Fehrenbacher acknowledged.³⁶ And numerous other scholars have explored aspects of the case

30. *Id.* at 594.

31. *Id.*

32. See, e.g., Larry D. Kramer, *The Supreme Court 2000 Term—Forward: We the Court*, 115 HARV. L. REV. 4, 14–15 (2001) (arguing that the Rehnquist Court’s assumption of judicial sovereignty represents a radical break with previous assertions of judicial supremacy). But see G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1465–70 (2003) (arguing that the Court’s assertions of judicial supremacy tend to be balanced out by the relatively narrow range of issues over which it has a say).

33. One piece of evidence that Fehrenbacher noted but did not explain was the apparent contradiction between the Court’s refusal to allow African Americans access to diversity jurisdiction even though it allowed corporations to maintain suits in diversity. See Fehrenbacher, *Sectional Crisis*, *supra* note 20, at 562. Unraveling that contradiction opens up a new way of looking at the case. See *infra* text accompanying notes 145–60.

34. Compare FEHRENBACHER, *supra* note 8, at 19–27, with Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188 (Richard Beeman et al. eds., 1987).

35. Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 107 (2000) (“The naked land transfer cases also demonstrate that judicial review of federal law, understood as the judicial power to impose constitutional limits on federal practice, was relatively common practice before the Civil War.”).

36. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 212–71 (1997); GRABER, *supra* note 14, at 47–57; Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087, 1106–07 (1993).

that Fehrenbacher overlooked.³⁷ Few writers, however, have challenged Fehrenbacher's central contentions that *Dred Scott* was primarily an expression of sectional politics³⁸ and an early exercise of judicial sovereignty.³⁹

B. *The Limits of the Fehrenbacher Thesis*

The issues of sectional politics and judicial sovereignty, however, form the precise point at which Fehrenbacher's argument becomes problematic, because the assumptions embedded in his analysis obscure as much as they explain. The concern here is not whether these assumptions are incorrect—no one can seriously deny the importance of sectional politics or the relevance of debates about the nature of judicial authority. Rather, the question centers on the way in which these assumptions influenced perceptions of evidence and helped define what material was significant. To his credit, Fehrenbacher stated his assumptions clearly:

37. See generally ALLEN, *supra* note 8 (arguing that *Dred Scott* emerged out of internal struggles on the Court); Austin Allen, *The Political Economy of Blackness: Citizenship, Corporations, and Race in Dred Scott*, 50 CIV. WAR HIST. 229 (2004) [hereinafter Allen, *Political Economy*] (arguing that *Dred Scott*'s citizenship ruling emerged, in part, to remedy internal conflicts over corporations' ability to access the federal courts); David Skillen Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks, 1776–1810*, 34 AM. J. LEGAL HIST. 381 (1990) (arguing that the declining status of free blacks in Taney's home state influenced his citizenship ruling); Dennis K. Boman, *The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri*, 44 AM. J. LEGAL HIST. 405 (2000) (arguing that the Missouri Supreme Court's ruling emerged as part of a compromise measure in conference); Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713 (1992) (arguing that scholars have misunderstood the doctrinal context in which *Dred Scott* emerged); Stanton D. Krauss, *New Evidence That Dred Scott Was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25 (2004) (arguing exactly what the title says); Magliocca, *supra* note 13 (arguing that *Dred Scott* was an example of a recurrent pattern in which the Supreme Court uses political rulings to strike down rising political movements that challenge the established political order); Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995 (1996) (arguing that comity principles rather than antislavery motivated Justice Curtis in his dissent in *Dred Scott*); Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509 (1997) (arguing that Justice Curtis's dissent in *Dred Scott* contained more nuance than previous scholars have acknowledged); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997) (arguing that Harriet Scott possessed a superior legal case compared to that of her husband but that a legal system structured around male privilege suppressed her story); John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373 (1988) (arguing that the procedures followed by the Court in the writing of opinions ensured that all elements of Taney's opinion constituted the opinion of the Court).

38. But see Allen, *Political Economy*, *supra* note 37 (arguing that *Dred Scott* emerged as a consequence of internal struggles on the Court).

39. But see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 418–31 (1998) (arguing that contemporary critics of *Dred Scott* did not view its shortcomings in the same terms as late-twentieth-century lawyers).

[A]lthough the Dred Scott decision was essentially a vain effort to turn back the clock of civilization and permanently legitimate a “relic of barbarism,” in at least one respect it had a distinctly modern ring. American courts in the late twentieth century are no longer mere constitutional censors of public policies fashioned by other hands. They have also become initiators of social change. Government by judiciary is now, in a sense, democracy’s non-democratic alternative to representative government when the latter bogs down in failure or inaction. . . . The [*Dred Scott*] decision, in fact, provided an early indication of the vast judicial power that could be generated if political issues were converted by definition into constitutional questions.⁴⁰

In this passage, Fehrenbacher linked antebellum politics to modern concerns about judicial review, but in doing so, he introduced two problems. First, his reference to the “relic of barbarism” (a Republican euphemism for the evils of slavery and polygamy) underscored his debt to the powerful, but partial, narratives of sectional conflict developed by partisans in the 1850s. Second, his connection of *Dred Scott* to recent concerns about “government by judiciary” joined a largely ahistorical debate that gives short shrift to the context in which the case emerged. Together, these two assumptions led Fehrenbacher to overlook important bodies of evidence that could have led to a much different account of the decision.

Although he criticized Taney for adopting a pro-Southern interpretation of the sectional crisis,⁴¹ Fehrenbacher himself proved quite partial to the account of events put forth by Republicans, who like Southern partisans, were deeply interested in the outcome of the conflict. Few current historians would question that Republicans’ moral objections to slavery were legitimate, but their arguments against the institution and the Democratic Party, which so staunchly supported it, remained tightly linked to the electoral realities of the late antebellum North. In the 1850s, Republicans faced an uncertain political environment in which a number of organizations competed to become the Democrats’ major opposition. New waves of immigration had left the Northern electorate deeply divided along ethnic lines, and the Republicans thus developed arguments designed to outmaneuver the nativist Know-Nothing (or American) Party. Republicans both downplayed ethnic divisions by emphasizing a domineering slaveocracy as a common threat to the North,⁴² and accommodated them by distancing

40. FEHRENBACHER, *supra* note 8, at 5–6 (footnote omitted).

41. Fehrenbacher, *Sectional Crisis*, *supra* note 20 (providing the most concise statement of this criticism).

42. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 226–60* (1970).

their movement from Catholic immigrants rather than all immigrants.⁴³ In this fashion, Republicans alienated only Southerners, whom they did not need if they could secure a majority of Northern voters, and the Irish, who would most likely vote for Democrats anyway.⁴⁴

Republicans also attracted alienated Democrats who were bolting their party over its unrelenting concessions to proslavery expansion. They did so by relegating abolitionists, along with calls for racial equality, to the margins of their movement⁴⁵ and by adopting arguments developed by disaffected Democrats that the Union had come under the control of a slave power conspiracy.⁴⁶ For Republicans, therefore, all of the major political events of the 1850s required an explanation centered on the Democratic Party's effort to expand slavery at all costs and at every turn. When the Court handed down *Dred Scott*, Republicans merely interpreted it in the light of their developing narrative.⁴⁷ Because they would rather not defend against charges that they were enemies of law and order, they shied away from substantive analysis of the case in favor of arguments over whether the Court should have decided it in the first place and whether its major assertions constituted dictum.⁴⁸ The net effect of this strategy was that Republicans had little inclination to explain *Dred Scott* in any other terms besides those of sectional conflict. Fehrenbacher, although he devoted more attention to the decision's substantive arguments than any historian before him, did not break with this tradition, and his account, at bottom, represented an updated version of the Republicans' point of view.

Fehrenbacher's interest in the debates surrounding judicial sovereignty, ironically perhaps, also discouraged an exploration of the specific context in which *Dred Scott* emerged. The questions constitutional theorists ask in these debates are significant: Is judicial review legitimate? If so, then how does one reconcile this countermajoritarian practice with American democratic traditions? What sort of issues are appropriate for judicial resolution? Is the Supreme Court the final arbiter of constitutional meaning? If not, then where does one draw the line between the interpretive authority of the various branches of government, and how does one resolve conflicts

43. See William E. Gienapp, *Nativism and the Creation of a Republican Majority in the North Before the Civil War*, 72 J. AM. HIST. 529 (1985).

44. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 148–76 (1995) (discussing the relationship between Irish immigrants and the Democratic Party).

45. James Brewer Stewart, *Reconsidering the Abolitionists in an Age of Fundamentalist Politics*, 26 J. EARLY REPUBLIC 1, 21–22 (2006).

46. See JONATHAN H. EARLE, *JACKSONIAN ANTISLAVERY AND THE POLITICS OF FREE SOIL, 1824–1854* (2004) (providing the best account to date of the Democratic side of antislavery).

47. See POTTER, *supra* note 17, at 287–90.

48. *Id.* at 283–86.

among these branches? The problem for historians in these debates stems from constitutional theory's (general) insensitivity to historical context.⁴⁹ Legal scholars see little problem setting *Dred Scott* next to a case like *Brown v. Board of Education*⁵⁰ and discussing how the Court behaved correctly in the latter and wrongly in the former.⁵¹ This juxtaposition surely has its merits, but it tends to take both decisions out of context by failing to take into account the radically different sets of constraints that the Taney Court faced compared to that of the Post-New Deal Warren Court. The trouble for historians dealing with modern constitutional theory—which, one must admit, is enticing—comes from the tendency to read twentieth-century assumptions concerning judicial power back into the nineteenth century.

Fehrenbacher's analysis of *Dred Scott's* long-term significance fell prey to this error. His discussion of the decision's relationship to emerging notions of judicial sovereignty rested on an implicit plotline that began with *Hayburn's Case*,⁵² continued through a relative handful of antebellum cases ending with *Dred Scott*, and then finished with the major rulings of the Warren Court.⁵³ But, there is a bit of an analytical leap on this last step. The body of scholarship from which Fehrenbacher derived this plotline was produced by scholars interested primarily in post-Fourteenth Amendment jurisprudence, which, eventually but radically, transformed the nature of constitutional law and involved issues of which the Taney Court could not have been cognizant and uses of judicial authority with which the Court would not have been familiar.⁵⁴ Certainly, the rise of judicial sovereignty was (and still is) an important issue, but the story really does not offer

49. This is a sweeping generalization. There are some very historically astute lawyers doing great work. Bruce Ackerman, G. Edward White, and Barry Friedman leap to mind.

50. 347 U.S. 483 (1954) (holding that racially segregated educational institutions were inherently unequal).

51. See, e.g., Ralph F. Bischoff, *One Hundred Years of Court Decisions: Dred Scott After a Century*, 6 J. PUB. L. 411 (1957); Burt, *supra* note 7.

52. 2 U.S. (2 Dall.) 409 (1792) (refusing to carry out duties not judicial in nature).

53. See FEHRENBACHER, *supra* note 8, at 209–35, 593–95.

54. Fehrenbacher, for example, relied heavily on the work of Charles Grove Haines, who sought to explain the emergence of an aggressive judiciary in the second half of the nineteenth century and who linked this development to the Fourteenth Amendment. See CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 23 (2d ed., 1959). Fehrenbacher also drew upon works debating the legitimacy of judicial review in the wake of the New Deal and *Brown v. Board of Education*, 347 U.S. 483 (1954). See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 34–55 (1960) (arguing, on philosophical rather than historical grounds, that the legitimacy of the constitutional system rests on judicial review); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 29–31 (1962) (arguing, again on philosophical grounds, that judicial review cannot, by itself, serve a legitimating function). Each of these works, especially the latter two, rest on assumptions about the role of the judiciary that would have been alien to the members of the Taney Court.

much insight into what the members of the Taney Court thought they were doing or how they understood the limits and reach of their authority.

Answers to those questions lay not in the relationship among the relatively small number of great cases that make up what J.M. Balkin and Sanford Levinson term the constitutional canon,⁵⁵ but rather in the hundreds (for the Taney Court) of minor cases that the Justices heard day in and day out that shaped their perceptions of the issues, defined their disagreements, and created the context in which important cases emerged. Fehrenbacher's interpretive model, however, discouraged an exploration of these issues. His reliance on the Republicans' narrative of events kept him relentlessly focused on the sectional crisis, which they rightly considered important, at the expense of other issues that may well have been relevant. Additionally his adherence to mid-twentieth-century constitutional theory provided a framework that defined *Dred Scott's* relationship to other major cases for him. From such a perspective, no benefit could arise from delving deeply into a pile of largely inconsequential Supreme Court rulings. Any account of *Dred Scott* that does not do so, however, fails to provide a fully contextualized analysis of the decision.

II. RECONTEXTUALIZING *DRED SCOTT*

Neither modern constitutional theory nor antebellum Republicans offer satisfactory explanations of the origins and significance of *Dred Scott*. A properly contextualized understanding of the decision must begin with a reappraisal of the Taney Court, which scholars have generally depicted in two ways. One group of studies presents the Court as an institution that practiced judicial self-restraint and promoted capitalist economic development. These accounts focus on cases like *Luther v. Borden*⁵⁶ in which the Court deferred to other branches when confronted with a "political question" and *Charles River Bridge*,⁵⁷ which allowed states to create competing franchises even if that competition would effectively destroy older corporations. From this perspective, *Dred Scott* appears as a regrettable aberration.⁵⁸ The other branch of studies places *Dred Scott* at the center of Taney Court jurisprudence. These accounts portray the Court as an unrestrained

55. Balkin & Levinson, *supra* note 9, at 963.

56. 48 U.S. (7 How.) 1 (1849) (refusing to determine which of two competing Rhode Island constitutions was legitimate).

57. Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

58. See, e.g., McCLOSKEY, *supra* note 7, at 63 (arguing that the Court in *Dred Scott* squandered an image of judicial self-restraint that it had spent decades building); see also Wiecek, *supra* note 18, at 34–35 (discussing other examples of this trend and providing citations).

defender of slavery. Cases like *Prigg v. Pennsylvania*,⁵⁹ which upheld the Fugitive Slave Law of 1793,⁶⁰ and *Groves v. Slaughter*⁶¹ in which the Justices stated firmly, but gratuitously, that slavery represented a matter of exclusive local control, exemplified this tendency.⁶²

Elements of both approaches contain merit, but scholars have tended to pursue only one of these lines of inquiry at a time. Thus, Felix Frankfurter⁶³ and Stanley Kutler⁶⁴ have produced informative studies on the economic side of the Court's activity, while Fehrenbacher⁶⁵ and Finkelman⁶⁶ have dug deeply into the Court's relationship to slavery. A number of writers—Carl Brent Swisher,⁶⁷ Harold Hyman,⁶⁸ William Wiecek,⁶⁹ and, most recently, Timothy Huebner⁷⁰—have insisted that understanding the Taney Court requires analysis of both aspects of its work. Even so, these accounts likewise maintain the partition between the two subjects, and scholars have not yet explored the way in which the Court perceived connections between slavery and economic development.⁷¹ That oversight is unfortunate, for *Dred Scott* emerged precisely where these two issues intersected in the Court's larger jurisprudential framework.⁷²

59. 41 U.S. (16 Pet.) 539 (1842).

60. Fugitive Slave Law of 1793, ch. 7, §§ 3–4, 1 Stat. 302, 302–05.

61. 40 U.S. (15 Pet.) 449 (1841) (holding a contract for the slaves in Mississippi to be valid despite a state constitutional provision to the contrary).

62. *Id.* at 503–17 (Taney, C.J., McLean, & Baldwin, JJ., concurring separately) (Story, Thompson, Wayne, & McKinley, JJ., concurring in part) (showing every member of the Court to be signed on to this position, in one form or another, despite the silence of the official opinion on the subject); see also Wiecek, *supra* note 18, at 51–53.

63. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937).

64. STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971).

65. FEHRENBACHER, *supra* note 8.

66. FINKELMAN, *supra* note 19; Paul Finkelman, "Hooted Down the Page of History": *Reconsidering the Greatness of Chief Justice Taney*, 1994 J. SUP. CT. HIST. 83; Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247.

67. 5 CARL B. SWISHER, *THE TANEY PERIOD 1836–1864* (Paul A. Freund ed., 1974).

68. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875* (1982).

69. *Id.*; WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 56–81 (1988).

70. TIMOTHY S. HUEBNER, *THE TANEY COURT: JUSTICES, RULINGS, AND LEGACY* (2003).

71. I have argued elsewhere that this problem afflicts American legal history generally. Allen, *Political Economy*, *supra* note 37, at 259–60.

72. The interpretation of *Dred Scott* put forth in this section represents a skeletal sketch of the argument presented in my new book, *Origins of the Dred Scott Case*. Readers in search of more evidence to support the positions advanced here should consult that work.

A. *The Parameters of Taney Court Jurisprudence*

The Taney Court was, in some ways, the product of the cross-class and cross-sectional political movement that generated the Democratic Party. By the early 1840s, seven of the Court's nine members owed their positions, in part, to their loyalty to either President Andrew Jackson or his successor and protégé Martin Van Buren, and the Justices' participation in the defining debates of the 1820s and 1830s decisively shaped the Court's jurisprudence.⁷³ Antebellum Democrats considered their alliance to be a movement of "the people" (that is, white males without elite pretension) against the would-be aristocrats represented by the Whigs.⁷⁴ Members of the Taney Court participated in this movement by insisting that the people, both collectively and individually, behave as sovereigns and govern themselves.

Although they never rejected the federal government's supremacy within its sphere⁷⁵ (or the incident power of review⁷⁶), the Justices worked diligently to maximize the people's ability to rule themselves through their legislatures. This agenda manifested itself in public law through the qualification of particular Marshall Court precedents,⁷⁷ an adherence to the strict construction of statutory and constitutional language,⁷⁸ and a refusal to

73. See HUEBNER, *supra* note 70, at 32–42, 51–80.

74. See JOHN ASHWORTH, "AGRARIANS" & "ARISTOCRATS": PARTY POLITICAL IDEOLOGY IN THE UNITED STATES, 1837–1846, at 73–86 (1983); 1 JOHN ASHWORTH, *SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC: COMMERCE AND COMPROMISE, 1820–1850*, at 289–302 (1995); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846*, at 119–22 (1991); see also Daniel Feller, *A Brother in Arms: Benjamin Tappan and the Antislavery Democracy*, 88 J. AM. HIST. 48 (2001) (arguing that antislavery Democrats swallowed their objections to the institution in a common, cross-sectional struggle against aristocracy).

75. See, e.g., *Dobbins v. Comm'rs of Erie County*, 41 U.S. (16 Pet.) 435 (1842) (holding on grounds of federal supremacy that states may not tax the salaries of federal officials), *enforcing McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding on grounds of federal supremacy that a state may not tax the Bank of the U.S.).

76. See Graber, *supra* note 35 (providing the best account of the antebellum Court's use of judicial review).

77. Compare, e.g., *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 544–48 (1837) (holding that corporate charters must be interpreted strictly against the grantees), with *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 650–54 (1819) (holding that legislative alterations of private corporate charters violate the Obligation of Contracts clause). See also U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

78. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857) (arguing that the Constitution spoke in 1857 "in the same words . . . with the same meaning and intent with which it spoke when it came from the hands of its framers . . ."); *United States v. Briggs*, 50 U.S. (9 How.) 351, 354–55 (1850) (upholding a conviction for the removal of trees from public land on grounds that the enacting clause of the relevant statute applied to all trees rather than the limited types stated in the act's title), *enforcing Act of Mar. 2, 1831, ch. 66, § 1, 4 Stat. 472, 472* (captioned "An Act to provide for the punishment of offences committed in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes").

extrapolate legislative intent from textual silences or ambiguities.⁷⁹ In so doing, the Justices limited the reach of constitutional barriers on state power that they believed their predecessors had imposed too stringently. Strict construction, moreover, ensured that the Court would follow legislatively and constitutionally expressed popular will to the letter, even if that stance occasionally produced unintended consequences.⁸⁰ And the Justices' unwillingness to extrapolate meaning from ambiguous texts underscored their sense that such interpretive strategies would be law-making activities that usurped legislative authority.⁸¹ These elements came together to form an essentially amoral public law framework in which the Court deferred to legislatures on all questions concerning what Chief Justice Taney described as the "expediency and moral tendency" of statutory law.⁸²

In its private law cases, however, the Court pursued a starkly different strategy designed to force individual litigants to uphold their commercial obligations. Just as the Justices' deferential stance toward legislatures sought to make the people govern themselves collectively (by stating their intentions clearly in statutory language), the Court's coercion of the litigants before it demanded that individuals govern themselves, their affairs, and their subordinates in a way suited to a member of the sovereignty. Taney Court Justices applied common law doctrines in a strict, rule-oriented fashion that compelled unsuccessful litigants to maintain commitments that had become burdensome,⁸³ or even destructive,⁸⁴ and the Courts' members exhibited little patience for parties that failed to exercise their rights until the last minute.⁸⁵ The Court's regime of self-government

79. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 594 (1839) (Taney, C.J.) (refusing to declare whether Alabama's explicit policy of limiting the number of banks chartered within the state also barred the operation of out-of-state banks).

80. See *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856) (holding that an Ohio constitutional provision altering the tax rates for banking corporations violated the Obligation of Contracts Clause); ALLEN, *supra* note 8, at 109–14 (discussing the unintended, and pro-corporation, consequences of the Taney Court's Obligation of Contracts Clause decisions).

81. See *Bank of Augusta*, 38 U.S. (13 Pet.) at 594 ("It would hardly be respectful to a state for this Court to forestall its decision, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savour more of legislation than of judicial interpretation.")

82. *Brewer's Lessee v. Blougher*, 39 U.S. (14 Pet.) 178, 198 (1840); see also ALLEN, *supra* note 8, at 13–30, 98–115 (providing a more elaborate discussion of and documentation for the summary in the text accompanying *supra* notes 18–27).

83. See, e.g., *Baker v. Nachtrieb*, 60 U.S. (19 How.) 126 (1856) (upholding a contract conveying all possessions to a religious community); *Goesele v. Bimeler*, 55 U.S. (14 How.) 589 (1853) (upholding a different contract conveying all possessions to a religious community).

84. See *Bodley v. Goodrich*, 48 U.S. (7 How.) 276 (1849) (rejecting a land claim necessary to a company's survival, because it had not secured the consent of all of its creditors).

85. See, e.g., *Maxwell v. Kennedy*, 49 U.S. (8 How.) 210 (1850) (rejecting a creditor's claim to a debt, because he and the administrators of his estate waited over forty years to collect and showed no due diligence in the meantime).

also imposed responsibility for the actions of employees upon the litigants that came before the bench. Thus, the Court required merchants to pay for the errors made by their clerks⁸⁶ and held railroad companies to be negligent when they employed drivers that would not follow instructions.⁸⁷ In these cases, the Justices adhered to a market-oriented morality and used legal rules instrumentally to achieve their policy goals—an approach that ran counter to the amoral stance and refusal to extrapolate policy that characterized their public law rulings.

These two positions, however, never came into conflict because *Swift v. Tyson*⁸⁸ functioned as a partition between them. *Swift*, as legal scholars well know, created a federal common law of commerce that assumed considerable importance after the Civil War.⁸⁹ But what *Swift* ultimately became is of no concern here, for the decision's significance for the Taney Court lay in its assertion that, under the Judiciary Act of 1789,⁹⁰ judicial decisions did not constitute law.⁹¹ "They are, at most," wrote Justice Joseph Story, "only evidence of what the laws are; and are not of themselves laws."⁹² One cannot understate the importance of this formulation to Justice Story's colleagues, because a different definition would raise ideological difficulties. As I have written elsewhere, "[t]reating court rulings as law in effect endowed courts with a legislative authority and conferred on judges the elite role of guiding and ruling the social order,"⁹³ a role that the Taney Court had flatly repudiated. Placing judicial decisions outside the definition of law, however, permitted courts to "reexamine[], reverse[], and qualify[]"⁹⁴ decisions as the need arose, and that definition thus permitted the Taney Court to pursue aggressively a policy-oriented common law agenda while simultaneously presenting itself as an institution that merely applied, and certainly did not make, law. Over the next decade and a half,

86. See *Bend v. Hoyt*, 38 U.S. (8 Pet.) 263, 266–67 (1839).

87. See *Phila. & Reading R.R. v. Derby*, 55 U.S. (14 How.) 468, 487 (1853).

88. 41 U.S. (16 Pet.) 1 (1842) (holding that a preexisting debt constituted valid consideration to make one a bona fide holder of a negotiable instrument).

89. See 1 TONY ALLAN FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY* 110–12, 119 n.60 (1979); EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 59–86 (1992).

90. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 ("That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.").

91. *Swift*, 41 U.S. (16 Pet.) at 18.

92. *Id.*

93. ALLEN, *supra* note 8, at 59.

94. *Swift*, 41 U.S. (16 Pet.) at 18.

the *Swift* doctrine transformed the Court's practice in diversity jurisdiction—the area in which the vast majority of its common law cases arose—as the Justices steadily expanded the doctrine's reach. Indeed, by the mid-1850s, the Court had stated firmly that it was not bound, in cases of diverse citizenship, to follow state decisions with which it disagreed.⁹⁵ That stance carried momentous implications when lawyers for the family of Dred and Harriet Scott sought to exploit it for the advantage of their clients.⁹⁶

B. *Slavery, Corporations, and the Taney Court*

The importance of the Scott family's litigation strategy becomes clear in the context of the Taney Court's internal debates concerning the place of slavery and corporations within its members' understanding of constitutional law. In principle, the Justices considered slavery to be a matter of exclusively local control. As Chief Justice Taney stated in his concurring opinion in *Groves v. Slaughter*, “[T]he action of the several states upon this subject, cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States.”⁹⁷ His opinion, at least as it extended to the Commerce Clause,⁹⁸ featured the explicit assent of four of his seven then-sitting colleagues, including the author of the majority opinion.⁹⁹ The other two Justices agreed as well, although their reasoning differed starkly both from Chief Justice Taney and from each other.¹⁰⁰ In practice, the issue proved far more complicated, since the Constitution's Fugitive Slave Clause ensured that slavery was, to some extent, a national issue.¹⁰¹ Court members, moreover, faced serious difficulties determining the precise boundaries between federal commerce power and state police power, and

95. See, e.g., *Pease v. Peck*, 59 U.S. (18 How.) 595 (1856) (refusing to follow the Michigan Supreme Court's construction of a state statute because it broke with what the U.S. Supreme Court considered to be settled interpretation).

96. See Dean, *supra* note 37; see also VanderVelde & Subramanian, *supra* note 37, at 1060–78 (emphasizing, among other things, that Dred Scott's struggle for freedom represented part of a family's struggle for freedom).

97. *Groves v. Slaughter*, 40 U.S. (15 How.) 449, 508 (1841).

98. U.S. CONST. art. I, § 8, cl. 3.

99. See *Groves*, 40 U.S. (15 How.) at 510 (Story, Thompson, Wayne, & McKinley, JJ., concurring).

100. See *id.* at 503–08 (McLean, J., concurring) (taking an antislavery position); *id.* at 510–17 (Baldwin, J., concurring) (taking an extreme proslavery position).

101. U.S. CONST. art. IV, § 2, cl. 3, reads,

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

the insertion of questions involving slavery only made the issue more difficult.

During the 1840s, the Justices split into two shifting coalitions as they struggled with federal power over fugitive slaves in *Prigg* and the extent of federal commerce power in the *License Cases*¹⁰² and the *Passenger Cases*.¹⁰³ A minority of Justices, with Chief Justice Taney in the lead, asserted that in all instances involving slavery, an inherent state power of self-preservation trumped any federal constitutional provision.¹⁰⁴ The Justices in the majority, led initially by Justice Story and later by Justice John McLean, flatly rejected that argument. So in *Prigg*, the Court held that federal power over fugitive slaves was exclusive and that the states could legitimately neither weaken nor strengthen federal fugitive slave laws.¹⁰⁵ Likewise, in the *Passenger Cases*, the Court ruled, in a rather chaotic fashion,¹⁰⁶ that states possessed no authority to limit the influx of healthy immigrants into their jurisdictions,¹⁰⁷ a position that Taney believed prevented slave states from preserving their social institutions by barring the entry of migrant free blacks.¹⁰⁸

These debates, by the later 1840s, had become decidedly unproductive; the Court had become deeply fragmented, and the Justices were writing increasingly abstract opinions to distinguish themselves even from those colleagues with whom they agreed.¹⁰⁹ In the 1850s, the Court worked out a compromise that ended the debate among a majority of its members.¹¹⁰ Their arguments over the extent of the Commerce Clause ended when the Justices agreed to handle the issue on a case-by-case basis rather than through broad statements of principle,¹¹¹ and *Strader v. Graham*¹¹²

102. *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504 (1847) (holding that state licensing laws designed to bar the sale of alcohol were valid exercises of the police power).

103. *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283 (1849) (holding that state taxes levied on healthy immigrants violated the Constitution's Commerce Clause).

104. ALLEN, *supra* note 8, at 80–81.

105. 41 U.S. (16 Pet.) 539, 617–18 (1842).

106. 48 U.S. (7 How.) at 283 (“Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States.”).

107. *See* 48 U.S. (7 How.) 283.

108. *See id.* at 466–68 (Taney, C.J., dissenting).

109. In the *License Cases*, for example, every justice agreed on the result (limiting the sale of alcohol fell within the purview of state police power), but six justices wrote a total of nine separate opinions—Catron wrote two, and McLean wrote three. *See* 46 U.S. (5 How.) 504, 505 (1847).

110. The two exceptions were Justices McLean and Daniel. *See* ALLEN, *supra* note 8, at 32–33, 94.

111. *See Cooley v. Bd. of Wardens*, 53 U.S. (7 How.) 299 (1852) (holding that, barring a federal statute to the contrary, state piloting laws did not violate the Commerce Clause); ALLEN, *supra* note 8, at 26–27, 94–95 (placing *Cooley* in the context of the Court's larger debates over slavery and the Commerce Clause).

112. 51 U.S. (10 How.) 82 (1851).

briefly put to rest disputes over slavery. *Strader*, which held that questions concerning the possible freedom of enslaved persons engaged in interstate transit fell outside of federal jurisdiction,¹¹³ allowed Chief Justice Taney to reassert a modified version of the argument he made in *Groves*. “Every State,” he wrote, “has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory”¹¹⁴ At this point, his position seemed identical to the one his colleagues had rejected throughout the 1840s, but he then qualified his statement in a manner that took into account his colleagues’ reservations: “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.”¹¹⁵ With this argument, Chief Justice Taney admitted the restrictions on state power recognized in *Prigg* and the *Passenger Cases*, placed himself squarely in the Court’s majority, and, for the first time, managed to speak for the Court in a slavery case.¹¹⁶ His strategy effectively forced all but a small number of questions involving slavery into state courts,¹¹⁷ and the maneuver would transform the way in which the Court debated the issue in the future.

Between *Strader* and *Dred Scott*, the Justices discussed their concerns about slavery in the context of corporate law, especially in a dispute about corporations’ access to diversity jurisdiction. This debate emerged in part because the strategy announced in *Strader* applied most clearly to cases coming out of state courts—over which the Judiciary Act of 1789 had conferred a relatively narrow scope of review.¹¹⁸ Whether the decision applied

113. *Id.* at 96–97.

114. *Id.* at 93.

115. *Id.*

116. ALLEN, *supra* note 8, at 92–93. Antislavery critics argued that this passage indicated a move toward the nationalization of slavery. See JAMES G. BIRNEY, EXAMINATION OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF STRADER, GORMAN AND ARMSTRONG VS. CHRISTOPHER GRAHAM, DELIVERED AT ITS DECEMBER TERM, 1850, at 42 (1852). A number of important historians have been sympathetic to this argument. See FEHRENBACHER, *supra* note 8, at 260–62; FINKELMAN, *supra* note 19, at 271–74; Wiecek, *supra* note 18, at 53–54.

117. ALLEN, *supra* note 8, at 93.

118. Here are the highlights:

[A] final judgment . . . in the highest court . . . of a State . . . , where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such

to cases initiated in the federal courts, where the Supreme Court possessed much more flexibility both by statute¹¹⁹ and under *Swift*,¹²⁰ remained an open question. Unintended consequences arising from the Court's Obligation of Contracts doctrine, which served as the Justices' primary tool for regulating corporations, also fueled this debate.

One of the Taney Court's first actions when it came together in 1837 was to reduce the amount of protection the Marshall Court had extended to corporations whose charters represented contracts that, under the limitations on state power listed in Article I, Section 10 of the Constitution, lay beyond the reach of legislative authority.¹²¹ Chief Justice Taney and most of his colleagues, both concerned about the implications of this policy for economic development¹²² and worried that unchecked corporate power could serve as a foundation for would-be aristocrats,¹²³ reacted against the Marshall Court formulation in *Charles River Bridge*.¹²⁴ Although it would continue to recognize corporate charters' entitlement to protection under the Obligation of Contracts Clause, the Court would strictly construe their language and permit no privilege, even a reasonable one, to "pass[] by implication."¹²⁵ Such a policy fell squarely within the larger pattern of Taney Court jurisprudence, for just as they did in statutory law, its members refused to extrapolate legislative intent from ambiguous wording and textual silences. If state legislatures wished corporations to have a certain privilege, then the Court demanded that the legislatures grant it in explicit terms. And they did.

In the process, state legislatures created a completely different set of problems for the Court. Ohio, for example, pursued a policy in the 1840s that stimulated its banking industry by granting charters featuring low and

as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (footnotes omitted).

119. *Id.* § 22, 1 Stat. at 84–85 (limiting entitlement to writs of error only by establishing minimums for amounts in dispute and setting time periods in which the writ must be brought).

120. *See supra* text accompanying notes 88–96.

121. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); ALLEN, *supra* note 8, at 100–03 (discussing the origins and significance of *Dartmouth*).

122. This is, of course, the standard interpretation of *Charles River Bridge*. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 130–39 (1977); KUTLER, *supra* note 64, at 3–5.

123. This is my reading of the case. ALLEN, *supra* note 8, at 103.

124. Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (rejecting a toll bridge company's reasonable argument that its charter implicitly precluded the construction by a competing firm of a contiguous, and ultimately toll-free, bridge).

125. *Id.* at 546.

unalterable tax rates.¹²⁶ A few years later, the state changed its policy by statute and then by constitutional provision.¹²⁷ Neither strategy worked. A fragmented and unenthusiastic Taney Court majority struck down Ohio's new policy, declaring it to be a violation of the Obligation of Contracts Clause.¹²⁸ The Court's action mortified three of its Southern members—Justices John A. Campbell, the newest member and a recent advocate of secession;¹²⁹ Peter V. Daniel, the Court's most doctrinaire states'-rights theorist;¹³⁰ and John Catron, a member of the nationalist coalition in the debates of the 1840s and the most moderate of the three Southerners.¹³¹ These Justices formed a faction outwardly committed to repudiating the Court's Obligation of Contracts doctrine because of the doctrine's support for quasi-aristocratic corporate power and insensitivity toward state rights. In his dissent in *Dodge v. Woolsey*,¹³² which dealt with the Ohio constitutional provision, Justice Campbell stressed that the Court had inserted itself "between these corporations and the government and people of Ohio, to which they owe their existence . . ." ¹³³ His colleagues' actions did nothing but empower a "caste" of elites to look "habitually" past the states toward the federal government, which would "maintain them in the enjoyment of their special privileges and exemptions."¹³⁴ Justice Daniel wrote in another Ohio case¹³⁵ that the Court's Obligation of Contracts rulings constituted a "suicidal doctrine."¹³⁶ In the same case, Catron dismissed *Charles River Bridge*'s handling of constitutionally protected corporate charters as "illusory and nearly useless,"¹³⁷ and he, along with Daniel,¹³⁸ called for a com-

126. ALLEN, *supra* note 8, at 111.

127. OHIO CONST. art. XIII, § 4 (adopted in 1851); *see also* STEPHEN E. MAIZLISH, *THE TRIUMPH OF SECTIONALISM: THE TRANSFORMATION OF OHIO POLITICS, 1844–1856*, at 40–52, 163–65 (1983) (discussing the politics at play in Ohio).

128. *See Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856) (voiding the constitutional provision); *Piqua Branch of the State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1854) (striking down the statute).

129. *See* JOHN A. CAMPBELL, *THE RIGHTS OF THE SLAVE STATES* 43–44 (1851) (advocating secession); *see also* HUEBNER, *supra* note 70, at 91–96 (providing a brief biography of Justice Campbell).

130. *See* ALLEN, *supra* note 8, at 33 (discussing Justice Daniel's role on the Court); HUEBNER, *supra* note 70, at 75–80 (providing a brief biography of Justice Daniel).

131. *See* ALLEN, *supra* note 8, at 84–94 (discussing Catron's maneuvers in the debates of the 1840s); HUEBNER, *supra* note 70, at 66–72 (providing a brief biography of Justice Catron).

132. *Dodge*, 59 U.S. (18 How.) at 362 (Campbell, J., dissenting).

133. *Id.* at 373.

134. *Id.*

135. *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416 (1854) (rejecting contractual status for the grant at issue).

136. *Id.* at 443 (Daniel, J.) ("I never can believe in that . . . suicidal doctrine, which confers upon one legislature, the . . . limited agents of the sovereign people, the power . . . to bind forever and irrevocably their creator . . . to consequences however mischievous or destructive.")

137. *Id.* at 442 (Catron, J.).

138. *Id.* at 443 (Daniel, J.).

plete repudiation of the Court's corporate law doctrine.¹³⁹ A majority of Justices held together against these criticisms, but they remained fragmented—at one point so heavily that no Justice could speak for the Court.¹⁴⁰

These divisions cut so deeply because the Ohio cases on their face dealt with very serious issues. Repudiating state laws and especially constitutional provisions was no trivial matter. But the Southern faction repeatedly raised another concern: the corporations, specifically the one in *Dodge*, had used diversity jurisdiction to access the federal courts, which then unforgivingly applied the Obligation of Contracts Clause against the State.¹⁴¹ The Supreme Court had allowed such access since 1844, when it ruled that the act of granting a corporate charter effectively created a state citizen.¹⁴² Under the Constitution, such citizens possessed the right to sue in diversity.¹⁴³ Nearly ten years passed before any Justice raised an objection. In 1853, however, Justice Daniel asserted, in a dissent, that corporations, because they were artificial persons, could not be citizens and therefore could not maintain a suit in diversity.¹⁴⁴ A year later, both Justices Catron¹⁴⁵ and Campbell¹⁴⁶ expressed their opposition. Again, the majority held together, defending its position on grounds of *stare decisis*.¹⁴⁷

The response left the members of the Southern faction dissatisfied, most likely because their concerns extended to the possible analogies litigants could draw from corporate citizenship. Although its members never

139. *Id.* at 442 (Catron, J.).

140. *Id.* at 416 (reporter's notes) ("There being no opinion of the court, as such, in this case, the reporter can only state the laws of Ohio which were drawn into question.").

141. ALLEN, *supra* note 8, at 117.

142. *Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844) ("[A] corporation created . . . in a particular state, is . . . a person, although an artificial person, . . . capable of being treated as a citizen of that state . . .").

143. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . .").

144. *Rundle v. Del. & Raritan Canal Co.*, 55 U.S. (14 How.) 80, 100–01 (1853) (Daniel, J., dissenting).

145. *See N. Ind. R.R. v. Mich. Cent. R.R.*, 56 U.S. (15 How.) 233, 249 (1854) (Catron, J., dissenting) ("I view this assumption of citizenship for a corporation as a mere evasion of the limits prescribed to the United States courts by the Constitution.").

146. *See Marshall v. Balt. & Ohio R.R.*, 57 U.S. (16 How.) 314, 353 (1854) (Campbell, J., dissenting).

The word "citizen," in American constitutions, state and federal, had a clear, distinct, and recognized meaning, understood by the common sense, and interpreted accordingly by this court through a series of adjudications.

The court has contradicted that interpretation, and applied to it rules of construction which will undermine every limitation in the Constitution, if universally adopted. A single instance of the kind awakens apprehension, for it is regarded as a link in a chain of repetitions.

147. *See id.* at 325 (majority opinion).

stated so explicitly, the faction's fears probably centered on free blacks' ability to use similar reasoning to challenge the institution of slavery and its related structure of racial subordination. Free black litigants could plausibly argue that their recognition as citizens in some states secured them access to the federal courts through diversity jurisdiction¹⁴⁸ and possibly to protection under the Constitution's Privileges and Immunities Clause.¹⁴⁹ Although there is no smoking gun here, there is evidence that points in this direction. To begin, this debate involved an area where the Court's latest major statement on slavery, *Strader v. Graham*, probably did not apply, and consequently, the Justices might find denying the Court's jurisdiction to be difficult.¹⁵⁰

The Justices' understanding of citizenship law further complicated matters, for it as yet offered no principled way to distinguish between corporate and free black litigants. Both became citizens by recognition in a particular state,¹⁵¹ and possession of state citizenship granted federal citizenship,¹⁵² which brought various protections like that conferred by the Privileges and Immunities Clause. Only at this point did corporations become conceptually distinguishable. Corporations did not receive the benefit of such constitutional provisions, but only because their charters, and not their status as citizens, defined the scope of their rights.¹⁵³ Free blacks, being natural persons, had no charters and therefore nothing, perhaps, stood between them and a bundle of rights that the Justices believed to be relatively sweeping.¹⁵⁴ The Supreme Court's aggressive application of the

148. Fehrenbacher criticized Taney for, among other things, not making this connection in *Dred Scott*. See Fehrenbacher, *Sectional Crisis*, *supra* note 20, at 562.

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

150. See *supra* text accompanying notes 118–20.

151. Because states effectively recognized (or not) free blacks' citizenships, the bundle of rights secured by citizenship varied starkly across jurisdictions and over time. See SMITH, *supra* note 36, at 255–58 (discussing state courts' efforts to reconcile free blacks' declining status within their understanding of citizenship law); Allen, *Political Economy*, *supra* note 37, at 250–51 (discussing the nature of free black state citizenship); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986) (arguing that recognition of free blacks' rights in the North waxed, waned, and waxed again).

152. ALLEN, *supra* note 8, at 122–25 (discussing the widely held assumption across all three branches of government concerning the primacy of state citizenship); FEHRENBACHER, *supra* note 8, at 71 ("Although certain abolitionist theorists had developed a doctrine of paramount national citizenship, the general tendency was to regard state citizenship as primary, with United States citizenship deriving from it.").

153. ALLEN, *supra* note 8, at 131.

154. Antebellum interpretations of the Privileges and Immunities Clause ranged widely. See *Douglas v. Stephens*, 1 Del. Ch. 465 (1821) (presenting two starkly contrasting views of the Clause); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life after Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000) (discussing an even wider range of views in extra-judicial debates). Taney Court Justices, not surprisingly, opted for an interpretation on the

Obligations of Contracts Clause in cases of diverse citizenship only added to their apprehension, and the actual appearance of litigants pursuing freedom claims in the same jurisdictional pathway¹⁵⁵ certainly did not ease their fears. The Southern faction therefore demanded that the Court bar all “quasi-citizens”—persons, whether natural or artificial, that did not enjoy “the same rights and faculties, and sustain the same obligations, political, social, and moral” in common with other citizens¹⁵⁶—from access to diversity jurisdiction. And its members expressed their willingness to challenge the very foundation of the Court’s corporate law doctrine if their colleagues failed to act.

C. *The Emergence of Dred Scott*

Dred Scott played out against the backdrop of these debates, and the form the decision took—especially Chief Justice Taney’s apparent ramblings¹⁵⁷—owed a great deal to its emergence at the intersection of the Court’s corporate and slave law doctrines. According to an agreed state-

narrow end of the spectrum developed by Justice Bushrod Washington, one of their Marshall Court predecessors. ALLEN, *supra* note 8, at 119–21; *see also* *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Although relatively narrow when placed alongside other views, Washington’s interpretation was still expansive:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”

Id. at 551–52 (quoting Articles of Confederation, art. IV (U.S. 1781)).

155. FEHRENBACHER, *supra* note 8, at 278–79 (discussing the possible implications for the Scott family that might have followed from a pursuit of diversity jurisdiction).

156. *Rundle v. Del. & Raritan Canal Co.*, 55 U.S. (14 How.) 80, 101 (1853) (Daniel, J., dissenting).

157. *See* FEHRENBACHER, *supra* note 8, at 347; SMITH, *supra* note 36, at 268.

ment of facts submitted by counsel,¹⁵⁸ Dr. John Emerson acquired Dred Scott to accompany Emerson on his tour of duty as a military surgeon. Between 1834 and 1838, Emerson and Scott resided in a post in Illinois and then at Fort Snelling (in present day Minnesota), which fell in a portion of the federal territory covered by the antislavery provision of the Missouri Compromise.¹⁵⁹ While at Fort Snelling, Dred met and married his wife, Harriet, and they produced two surviving children, one of whom was born in free territory.¹⁶⁰ In 1838, the Scott family returned to Missouri, and shortly before the suit began, Emerson sold the Scott family to John F.A. Sandford, a citizen of New York, against whom the family brought an action for wrongful imprisonment.¹⁶¹

Actually, the Scotts had been litigating for some time before Sandford entered the picture. They had initially brought suit against Irene Emerson, the late John Emerson's wife, in the 1840s, and they prevailed in the trial court.¹⁶² But the state supreme court, for reasons that are beyond the scope of this paper,¹⁶³ reversed the ruling and issued a proslavery manifesto that overturned thirty years worth of case law that strongly favored the freedom claims of enslaved persons who had spent time in free territory.¹⁶⁴ At this point, the Scott family, claiming citizenship in Missouri, took advantage of their new owner's status as a citizen of New York and initiated a new case in federal diversity jurisdiction.¹⁶⁵ The case then worked its way to the U.S. Supreme Court, and as it did so, became freighted with political significance, specifically because it involved the antislavery provision of the Missouri Compromise. *Dred Scott v. Sandford*, in fact, provided the Taney

158. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 397–98 (1857). The statement was oversimplified. See FEHRENBACHER, *supra* note 8, at 242–49 (providing a full account of Scott's travels); VanderVelde & Subramanian, *supra* note 37, at 1040–59 (arguing that Harriet Scott's fact situation was both different and stronger than the factual account in the case). For the sake of simplicity, the argument in this Paper will adhere to the facts as stated in the case. *But see* ALLEN, *supra* note 8, at 141–43 (providing a fuller account of the facts of the case).

159. *See Dred Scott*, 60 U.S. (19 How.) at 397; Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548.

160. *Dred Scott*, 60 U.S. (19 How.) at 397–98.

161. *Id.* at 398.

162. *See* WALTER EHRLICH, *THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM* 41–46 (1979) (providing the best account of the trial-level proceedings).

163. There is some disagreement as to why the Missouri Supreme Court acted the way it did. Compare FEHRENBACHER, *supra* note 8, at 262 (arguing that *Dred Scott* was a rejection of a liberal policy toward slave transit), and FINKELMAN, *supra* note 19, at 217–28 (arguing that, until *Dred Scott*, Missouri policy on slave transit favored liberty over slavery), with ALLEN, *supra* note 8, at 143–48 (arguing that Missouri's case law rested on certain expectations of behavior from post-emancipation states).

164. *See Scott v. Emerson*, 15 Mo. 576 (1852).

165. *See generally* Walter Ehrlich, *Was the Dred Scott Case Valid?* 55 J. AM. HIST. 256 (1968) (arguing that Sandford may not have owned Scott). *But see* FEHRENBACHER, *supra* note 8, at 272–74 (arguing that Sandford probably did own the Scotts).

Court with an opportunity to rule on Congress's power to limit the expansion of slavery and to insert itself into the central political issue of the 1850s.

At first, the Justices resolved to evade the larger questions by using *Strader* as justification for dismissing the case. The Court would argue that questions concerning the Scotts' status properly belonged to the state courts, which had already found them to be enslaved.¹⁶⁶ And here the case would end, most likely, without controversy. That did not happen. Part of the reason for this turn of events undoubtedly stemmed from the immense political pressure the Justices felt to intervene. Some members had strong personal feelings about the constitutionality of the Missouri Compromise.¹⁶⁷ Congress, for years, had been writing legislation designed to get the Court to settle the issue.¹⁶⁸ Members of the other branches pushed their agendas privately as well.¹⁶⁹ Political explanations, however, do not tell the whole story, for the Court also faced considerable internal stress from its faction of Southern Justices who were deeply concerned about the appearance of a case like *Dred Scott*. Such explanations also fail to account for the vulnerable spot in which the Court found itself as a consequence of the Scotts' litigation strategy.¹⁷⁰

Counsel for the Scott family used tactics designed explicitly to evade *Strader*, and they did so by suing in diversity and invoking *Swift v. Tyson*.¹⁷¹ Missouri's ruling concerning the Scotts' status, they argued, "so far from being conclusive . . . is of no weight at all, beyond what is due to the research, reason and authority which the opinion . . . displays, or which may be due to the character of the court which pronounces it."¹⁷² Their strategy worked because *Swift*, in the years since its appearance, had silently undermined the Court's ability to evade issues that emerged in diversity jurisdiction. Since 1842, the Court had extended *Swift* enough to permit the Justices to follow their own judgments in the construction of insurance contracts,¹⁷³ wills,¹⁷⁴ and even state statutes.¹⁷⁵ All of the Justices, al-

166. Justice Samuel Nelson took this position in his concurring opinion in *Dred Scott*. See 60 U.S. (19 How.) at 457-69 (Nelson, J., concurring).

167. See ALLEN, *supra* note 8, at 185-86 (discussing Justices Daniel, McLean, and Campbell's views on the Missouri Compromise).

168. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 45-50 (1993).

169. See FEHRENBACHER, *supra* note 8, at 306-08.

170. See Dean, *supra* note 37.

171. 41 U.S. (16 Pet.) 1 (1842).

172. Argument of Montgomery Blair, of counsel for Plaintiff in Error at 18, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

173. See *Carpenter v. Providence Wash. Ins. Co.*, 41 U.S. (16 Pet.) 495 (1842).

174. See *Lane v. Vick*, 44 U.S. (3 How.) 464 (1845).

though not always agreeing on specifics, approved of this trend.¹⁷⁶ In 1855, even Justice Daniel invoked the *Swift* doctrine to ignore a state statute.¹⁷⁷ Armed with this knowledge, Justice John McLean—who along with Justice Benjamin R. Curtis, dissented in *Dred Scott*—dismissed the Court’s strategy to rely on *Strader* as nothing more than a policy choice that was out of step with current Court rulings.¹⁷⁸ Justice McLean’s colleagues also found the strategy dissatisfying, and they opted for a broad ruling to be written by Chief Justice Taney. That decision would make the *Dred Scott* case a synonym for infamy.

The major components of the Chief Justice’s ruling—the denial of black federal citizenship and the striking down of the Missouri Compromise’s antislavery provision—have been well covered by scholars and need not be discussed here in any great detail.¹⁷⁹ Yet the major features of those components, like the pattern of events that led to the adoption of a broad ruling, remain tightly linked to the larger structure of Taney Court jurisprudence and the internal debates it generated. Chief Justice Taney, for example, wrote his citizenship ruling in a manner that responded to the Southern faction’s critique of corporate access to diversity jurisdiction. His solution, in short, was the development of an explicitly anti-black vision of federal citizenship.¹⁸⁰ The history of enslavement and subsequent oppression of African Americans, he argued implicitly, made them categorically different from other quasi-citizens and singled them out for restrictions (like the denial of federal citizenship and access to diversity jurisdiction) that need not apply to other quasi-citizens such as women, Native Americans, Mexicans, and corporations.¹⁸¹ His strategy worked; the Southern faction fell apart in the terms immediately following *Dred Scott*.¹⁸²

Chief Justice Taney’s handling of the territorial question also drew on the larger structure of his Court’s jurisprudence. Unlike most other situa-

175. See *Pease v. Peck*, 59 U.S. (18 How.) 595 (1856).

176. ALLEN, *supra* note 8, at 155–57.

177. See *Watson v. Tarpley*, 59 U.S. (18 How.) 517 (1856).

178. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 563–64 (1857) (McLean, J., dissenting); see also ALLEN, *supra* note 8, at 157–58 (discussing the significance of Justice McLean’s argument).

179. See generally ALLEN, *supra* note 8, at 160–202; FEHRENBACHER, *supra* note 8, at 322–414.

180. ALLEN, *supra* note 8, at 161–69.

181. Chief Justice Taney’s *Dred Scott* opinion explicitly exempted women, 60 U.S. (19 How.) at 422, and Native Americans, *id.* at 403–04. The Court had recognized former inhabitants of Mexico as U.S. citizens in 1855. *United States v. Ritchie*, 58 U.S. (17 How.) 525 (1855); cf. *Guadalupe T. Luna, On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 U. MIAMI L. REV. 691 (1999) (arguing that this recognition did not provide any tangible benefit). I have made the case for *Dred Scott*’s relevance to corporate law. See Allen, *Political Economy*, *supra* note 37 (making the case bluntly); ALLEN, *supra* note 8, at 107–32, 160–69, 208–10 (making a more nuanced case).

182. ALLEN, *supra* note 8, at 208–10.

tions involving significant constitutional provisions, the Court lacked a sweeping Marshall Court statement on the meaning of the clause conferring congressional power over the territories.¹⁸³ The Court, in fact, had little case law at all on the subject,¹⁸⁴ and Chief Justice Taney developed a broad ruling that sought to locate a place for the territories within the jurisprudential framework developed by him and his colleagues.¹⁸⁵ That framework, of course, envisioned a federal government with strictly limited powers that curbed the amount of discretion it possessed when legislating for the territories (among other matters).¹⁸⁶ Those limits barred Congress from prohibiting slavery in the territories.¹⁸⁷ Chief Justice Taney's intervention into the territorial question generated a great deal of scorn from critics.¹⁸⁸ In hindsight, a narrow ruling may have been a more appropriate response to the *Dred Scott* case. Taney Court Justices did not have the advantage of hindsight, but they did have a coherent understanding of their Court's authority and its appropriate uses (at least on a technical level). They also had a case before them in a jurisdictional area that both gave them considerable flexibility and rendered difficult any effort to evade the decision. They were also a Court that had become bitterly divided over the question of quasi-citizens' access to diversity jurisdiction, and the case before them offered the Justices a way to break the impasse. Moreover, they faced some political pressure. In short, a case like *Dred Scott* was probably unavoidable.

183. *American Insurance Co. v. Canter* does not count as a major Marshall Court statement on the meaning of the Constitution's Needful Rules Clause. See U.S. CONST. art IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) ("In legislating, for [the territories], Congress exercises the combined powers of the general, and of a state government."). In *Dred Scott*, Chief Justice Taney construed *Canter* narrowly, arguing that the Clause applied only to the organization of territorial courts (the specific issue that Marshall was addressing). *Dred Scott*, 60 U.S. (19 How.) at 444–46. Justice McLean contended that Marshall recognized a general grant of authority over the territories. *Id.* at 541 (McLean, J., dissenting). Fehrenbacher concurred with this position. FEHRENBACHER, *supra* note 8, at 373. I have argued that Marshall's opinion was too ambiguous to sustain either argument. ALLEN, *supra* note 8, at 198. Marshall's statement on the Needful Rules Clause stands in stark contrast to his statements on other clauses found in the document. Compare *Canter*, 26 U.S. (1 Pet.) 511, with, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (construing the Commerce Clause), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (construing the Obligations of Contract Clause).

184. ALLEN, *supra* note 8, at 182–86.

185. *Id.* at 186–94.

186. See *id.* at 21–30 (discussing the Taney Court's understanding of federal power).

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

188. See generally FEHRENBACHER, *supra* note 8, at 417–48 (discussing the contemporary criticism of the Court).

III. *DRED SCOTT* AND JUDICIAL SOVEREIGNTY

The argument that *Dred Scott* was unavoidable raises significant issues. Much of contemporary constitutional theory asserts that the adoption of a proper interpretive stance would eliminate the appearance of future *Dred Scotts*.¹⁸⁹ Although few theorists would admit that their position could lead to such a decision,¹⁹⁰ Mark Graber has argued persuasively that every major school of constitutional theory could in fact do so.¹⁹¹ The certainty that there will be other cases like *Dred Scott* requires a consideration of how to respond to them.¹⁹² This matter demands confronting whether the Supreme Court is the final authority on constitutional interpretation or whether the other branches have a say on the Constitution's meaning.

Debates over the merits of judicial sovereignty and departmentalism (as the two positions are currently termed) go back to the immediate aftermath of *Dred Scott*. State courts in Ohio¹⁹³ and Maine¹⁹⁴ debated whether the decision bound them. Members of both courts reached different conclusions.¹⁹⁵ In their famous contest for a seat in the U.S. Senate, Abraham Lincoln and Stephen Douglas struggled with the issue.¹⁹⁶ The debate con-

189. See Balkin & Levinson, *supra* note 9, at 1019 (arguing that one must “explain why *Dred Scott* . . . is bad constitutional law . . . or she is out of the game”); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 272 (1997) (arguing that “[v]irtually every commentator who condemns *Dred Scott* insists that Taney could not have reached that decision’s proslavery and racist conclusions had he understood or adhered to the correct theory of the judicial function in constitutional cases”).

190. Cf. ACKERMAN, *supra* note 2, at 79 (arguing, and finding “sobering,” that his theory of dualist democracy might indeed lead to a case like *Dred Scott*).

191. Graber, *supra* note 189, at 273 (arguing that “*Dred Scott* is constitutionally plausible in any contemporary constitutional rhetoric”).

192. One may say “certainty” because *Dred Scott* is merely the first (and one of the most prominent) in a line of cases considered wrongly decided and oppressive. There have been enough, according to J.M. Balkin and Sanford Levinson, to make up an anti-canon of constitutional law. Balkin & Levinson, *supra* note 9, at 1018–19. Uncontroversial examples on the list would include, in addition to *Dred Scott*, *Plessy v. Ferguson*, *Lochner v. New York*, *Buck v. Bell*, and *Korematsu v. United States*. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the removal and internment of Japanese Americans during the Second World War); *Buck v. Bell*, 274 U.S. 200 (1927) (upholding the forced sterilization of persons with mental disabilities); *Lochner v. New York*, 198 U.S. 45 (1905) (ruling that maximum-hours legislation violated the right of contract protected by the Fourteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding interstate travel for racially segregated railway cars).

193. *Anderson v. Poindexter*, 6 Ohio St. 622 (1856).

194. Opinion of the Justices of the Supreme Judicial Court, 44 Me. 505 (1857).

195. In Ohio, a majority of the Court believed that, at least on the issue of slave transit, *Dred Scott* did not bind them. See *Anderson*, 6 Ohio St. at 631–32. Chief Justice Bartley disagreed, arguing that the decision bound them as much as did the U.S. Supreme Court’s rulings on the state’s banking laws. *Id.* at 722–24 (Bartley, C.J.); see also *Opinion*, 44 Me. at 550, 591 (showing two contrasting views on the issue).

196. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM 1829–1861*, at 201–09 (2005) (providing a recent overview of the issue).

tinues to this day. Some scholars contend that cases like *Dred Scott* should not be followed;¹⁹⁷ others maintain that such decisions, however opprobrious, must be followed, although the other branches should work to overturn them.¹⁹⁸ A few contend that legal theorists would do better to dismiss *Dred Scott* as an aberration and embrace judicial supremacy.¹⁹⁹ Whatever merits it may have, such an argument does little to address the significant concerns raised by an unchecked judiciary. *Dred Scott*, in fact, underscores the need for a departmental constitutionalism because the Supreme Court, or at least the Taney Court, becomes too mired in short-sighted, internal debates to claim status as the final arbiter of constitutional meaning. “If war is too serious to be entrusted to the military,” William Wiecek wrote, “at times the American constitution is too serious to be relinquished to the judges.”²⁰⁰

Fehrenbacher thus correctly emphasized the problem of judicial sovereignty, but his account, because it focused so exclusively on the Court’s role as a political actor, left significant issues unresolved. Consequently, constitutional theorists influenced by Fehrenbacher’s interpretation have not fully addressed the problem *Dred Scott* presents. In an argument advocating a minimalist approach to constitutional interpretation, for example, Cass R. Sunstein contends that a case like *Dred Scott* presented a classic example of a situation appropriate for a narrow ruling. The issues involved sat at the core of a raging democratic debate, and there was a strong possibility that the Court could decide incorrectly and make mistakes that would be difficult to remedy.²⁰¹ Instead, of course, “the Court decided every issue that it was possible to decide”²⁰² and proved Sunstein’s point “that judicial efforts to resolve large questions of political morality may well be futile.”²⁰³ Sunstein is probably correct on the larger point, but from the perspective of this Paper, avoiding a maximal ruling may not have been possible. *Dred Scott* emerged in the context of long-running internal debates that both made the formulation of a narrow ruling exceedingly difficult and raised issues among the Justices that required sweeping rulings for

197. See, e.g., Devins & Fisher, *supra* note 15, at 99 (referring to *Dred Scott* as “a heinous decision that demands disobedience”).

198. See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1433 n.54 (1999) (arguing that other branches may refuse to follow only cases that clearly and egregiously violate the Constitution and that *Dred Scott* did not meet that standard).

199. Alexander & Shauer, *supra* note 16, at 1382–83 (discussing *Dred Scott* as a counter example to their argument that the American legal system needs an authoritative interpreter to settle disputes).

200. Wiecek, *supra* note 18, at 59.

201. Sunstein, *supra* note 4, at 32.

202. *Id.* at 49.

203. *Id.*

resolution. Those issues arose from the unintended consequences of previous rulings. Thus, the Ohio banking cases that shaped the course of *Dred Scott* developed as a response to the Court's effort to scale back the scope of rulings handed down by the Marshall Court.²⁰⁴ Supreme Court Justices may well be always/already trapped by the constraints of their jurisprudence, and broad rulings dealing with questions of morality are probably inevitable, whatever the consequences for everybody else.

Another approach to the problem of judicial sovereignty argues that the Court should admit that it is not the final arbiter of constitutional meaning and recognize that the other branches of government have a wide range of interpretive discretion on constitutional questions.²⁰⁵ Both Larry D. Kramer and G. Edward White demonstrate that the Taney Court recognized such discretion.²⁰⁶ Its members saw a sharp distinction between political questions and legal ones,²⁰⁷ and they managed to strike a balance between judicial supremacy and departmental discretion.²⁰⁸ White and Kramer both conclude that *Dred Scott* breached this understanding of the Court's own authority,²⁰⁹ although the latter, noting Lincoln's relatively guarded critique of judicial supremacy,²¹⁰ seems a bit less sure than the former.²¹¹ Kramer's uncertainty is justified, for *Dred Scott* in fact fell on the Court's side of its understanding of the distinction between law and politics.

For the Taney Court, the test determining whether a particular question was "political" did not center on whether the issue involved was controversial and the subject of democratic debate. Rather, the matter turned on whether the question embraced the discretionary use of constitutionally recognized power by other departments of the government. *Luther v. Borden*²¹² provided a classic example. Litigants in that case asked the Court to choose which of two competing Rhode Island constitutions was legitimate. The Court refused, arguing that the selection of a constitution, which would effectively define what rights state citizens would enjoy, involved discre-

204. See *supra* text accompanying notes 117–55.

205. See, e.g., Keith E. Whittington, *The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions*, 63 J. POL. 365 (2001).

206. Kramer, *supra* note 32, at 114–17; White, *supra* note 32, at 1491–1506.

207. See Kramer, *supra* note 32, at 114–15 (discussing Justice Story's expansive version of the political question doctrine); see also ALLEN, *supra* note 8, at 15–21 (discussing the Taney Court's expansive version of the political question doctrine).

208. See White, *supra* note 32, at 1491–1506.

209. Kramer, *supra* note 32, at 116; White, *supra* note 32, at 1509.

210. "Though controversial at the time, Lincoln's critique of judicial supremacy was actually quite guarded, as he hedged his departmentalism in various ways and on all sides." Kramer, *supra* note 32, at 116.

211. See *id.* at 116–17.

212. 48 U.S. (7 How.) 1 (1849).

tionary issues into which the federal courts could not inquire.²¹³ Likewise, when Taney served Andrew Jackson as Attorney General, he made the case for the constitutionality of the Second Bank of the United States. Congress's power to tax necessarily implied full discretion over the creation of fiscal agents required to exercise its power. If it decided to create an oppressive banking institution endowed with enough money and power to destroy the Union, Congress could do so, and the federal courts could not stop it.²¹⁴ In *Dred Scott*, Chief Justice Taney recognized that Congress possessed wide discretion over the creation of territorial governments, but he argued that this discretion did not permit Congress to violate the strict exceptions to power contained in the Constitution and Bill of Rights.²¹⁵ Whether Chief Justice Taney made the right call on the constitutionality of the legislation before him is a separate issue, but potential breaches of constitutionally circumscribed limits represented precisely the sort of matters into which the Court believed it could inquire.

The utility of *Dred Scott* for contemporary constitutional theorists may not be that it serves as a reminder to interpret minimally or to maintain a sharp distinction between law and politics. It may simply remind us not to expect too much from courts. *Dred Scott* represents merely one significant example in an ever growing string of cases where the Court demonstrated that it will neither avoid questions it is probably not suited to answer nor provide interpretive room for the other branches of government.²¹⁶

The inability to fully repudiate *Dred Scott* provides further justification for low expectations. Contemporary constitutional scholars ritually repeat *Dred Scott's* status as dead law.²¹⁷ Judges first declared the decision

213. ALLEN, *supra* note 8, at 20.

214. *Id.* at 18–19; *see also* Letter from Roger B. Taney to State Department at 1–2 (June 9, 1832) (on file with the National Archives and Records Administration (miscellaneous letters, record group 59)).

215. ALLEN, *supra* note 8, at 190–91.

216. *See* Kramer, *supra* note 32; cases discussed *supra* note 192. *Bush v. Gore*, which reversed an order of the Florida Supreme Court to recount manually votes cast in certain counties during the 2000 Election, provides a recent example. 531 U.S. 98 (2000). There is currently a debate concerning whether *Bush* will be as damaging to the Court's legitimacy as was *Dred Scott*. Compare Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699 (2002) (arguing yes), with Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) (arguing, in the long run, no; in the short run, maybe), and Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001) (arguing probably not), and John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 780 (2001) (arguing no).

217. *See e.g.*, 1 ACKERMAN, *supra* note 2, at 65 (“[A]bsolutely nothing of present legal significance hangs on whether Chief Justice Taney was right about the status of blacks in 1857.”); Balkin & Levinson, *supra* note 9, at 976 (“... *Dred Scott* is almost completely irrelevant to contemporary constitutional litigation.”).

to be defunct in the 1860s,²¹⁸ and since the 1870s the statement that the Fourteenth Amendment overturned *Dred Scott* has remained a standard refrain in constitutional law.²¹⁹ That statement, however, only applies to the citizenship ruling. As one federal judge wrote in 1900, “While the decision . . . relative to the status of the negro race has been the subject of much criticism, no one has ever questioned that part of the decision which relates to the status of acquired territory.”²²⁰ A year later, the U.S. Supreme Court matter-of-factly invoked *Dred Scott*, arguing that the decision recognized in Congress a general power of legislation over territories acquired by the United States.²²¹ “Surely the law is passionless,” wrote one commentator as he praised the Court.²²² “[T]he *Dred Scott* case was sound in principle. When the tumult of anger and outrage, engendered by the slavery question had passed away, and judges were confronted with the principles announced by that decision, they did not disregard it.”²²³ Nor have judges disregarded it in more recent cases dealing with territories,²²⁴ on questions of diversity jurisdiction,²²⁵ or in discussions of the duality of American citizenship.²²⁶

Lately, judges have cited *Dred Scott* in debates over the meaning of the Second Amendment.²²⁷ In his discussion of the Privileges and Immuni-

218. See *United States v. Rhodes*, 27 F. Cas. 785, 790 (C.C.D. Ky. 1866) (No. 16,151) (asserting that *Dred Scott* decided only “that Scott was a slave”); *Smith v. Moody*, 26 Ind. 299, 304 (1866) (arguing that *Dred Scott* “is now disregarded by every department of the government”).

219. See *Saenz v. Roe*, 526 U.S. 489, 502 n.15 (1999); *Jean v. Nelson*, 472 U.S. 846, 875 (1985); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873); *Zappa v. Cruz*, 30 F. Supp. 2d 123, 128 (D.P.R. 1998); *People ex rel. Hedgman v. Bd. of Registration*, 26 Mich. 51, 53 (1872); *State v. Dearmas*, 841 A.2d 659, 663 (R.I. 2004); *State v. Strauder*, 11 W. Va. 745, 803 (1877).

220. *Ex parte Ortiz*, 100 F. 955, 960 (C.C.D. Minn. 1900) (overstating the case, to be sure).

221. *De Lima v. Bidwell*, 182 U.S. 1, 196–97 (1901); see also *Downes v. Bidwell*, 182 U.S. 244, 274–75 (1901) (arguing that *Dred Scott* did not extend the entire Constitution to the territories, but only particular provisions related to the protection of slavery).

222. Morris M. Cohn, *The Dred Scott Case in the Light of Later Events*, 46 AM. L. REV. 548, 556 (1912).

223. *Id.*

224. See *Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 43 n.34 (1st Cir. 1981); *Nevada ex rel. Nev. State Bd. of Agric. v. United States*, 512 F. Supp. 166, 171 (D. Nev. 1981).

225. See, e.g., *Imperial Ref. Co. v. Wyman*, 38 F. 574, 576–78 (C.C.D. Ohio 1889); *Paglin v. Saztec Int’l, Inc.*, 834 F. Supp. 1201, 1203 (W.D. Mo. 1993); *Tip-Pa-Hans Enters., Inc. v. Atco Elec. Co. (In re Tip-Pa-Hans Enters., Inc.)*, 27 B.R. 780, 783 (W.D. Va. 1983); *Council of Sch. Officers v. Vaughn*, 553 A.2d 1222, 1230 (D.C. 1989).

226. See *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983); *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 241–42 (1946).

227. “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” U.S. CONST. amend. II; see also Akhil Reed Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103 (2002) (providing a brief overview of the debate among legal academics).

ties Clause,²²⁸ Taney argued that its language could not apply to free blacks, because if it did, then they would be, among other things, entitled “to keep and carry arms wherever they went.”²²⁹ Opponents of gun control cite this passage as evidence of the Founders’ recognition of an individual right to bear arms.²³⁰ In 2005, the Second Circuit confronted the issue and remained unconvinced,²³¹ and Oregon’s Supreme Court cited the same passage in a decision holding that barring criminals’ possession of firearms did not violate the right to bear arms secured in the state’s constitution.²³² On the other side, Judge Alex Kozinski of the Ninth Circuit a few years ago chided his colleagues for failing to oppose what he considered to be oppressive antigun laws:

As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.²³³

The persistence of *Dred Scott* as authority, despite its being regularly assailed by both judges and legal academics,²³⁴ is striking. One wonders what lines of doctrine would have developed in the absence of the Fourteenth Amendment.

Dred Scott’s staying power together with the appearance of additional rulings, such as *Plessy v. Ferguson*,²³⁵ *Lochner v. New York*,²³⁶ *Buck v.*

228. U.S. CONST. art. IV, § 2, cl. 1.

229. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

230. See *Bach v. Pataki*, 408 F.3d 75, 90–91 (2d Cir. 2005) (quoting Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989)) (summarizing the anti-gun control position’s use of *Dred Scott*).

231. “This is not the occasion to weigh the import, if any, of Chief Justice Taney’s ruminations. Because we agree with defendants and the district court that New York’s licensing scheme is sufficiently justified, we will assume, without deciding, that entitlement to a New York carry license is a privilege under Article IV.” *Id.* at 91 (citations omitted).

232. *State v. Hirsch*, 114 P.3d 1104, 1126 n.39 (Or. 2005). See generally OR. CONST. art. I, § 27.

233. *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting).

234. See, e.g., *Ex parte Anonymous*, 803 So. 2d 542, 548–49 (Ala. 2001) (Moore, C.J., concurring specially) (“This ruling [*Dred Scott*] was patently incorrect, and many citizens of this Country still suffer the legacy of such a poorly reasoned United States Supreme Court opinion.”); *Lambert v. State*, 984 P.2d 221, 247 (Okla. Crim. App. 1999) (Lumpkin, J.) (arguing that cases like *Dred Scott* “result[] in not only turmoil, but a denigration of the respect of the judicial system and the rule of law”); I ACKERMAN, *supra* note 2, at 63 (calling *Dred Scott* “[f]rom a moral point of view, . . . the single darkest stain upon the Court’s checkered history”); BORK, *supra* note 3, at 28 (arguing that *Dred Scott* “remained unchallenged as the worst in our history until the twentieth century”); Akhil Reed Amar, *The Supreme Court 1999 Term—Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 62 (2000) (referring to *Dred Scott* as “an outlandish reading” of the Constitution); Friedman, *supra* note 39, at 415 (calling *Dred Scott* “the most repugnant and reviled of Supreme Court decisions”); GRABER, *supra* note 14, at 15–17 (providing further examples).

235. 163 U.S. 537 (1896).

236. 198 U.S. 45 (1905).

Bell,²³⁷ or *Korematsu v. United States*,²³⁸ in what Balkin and Levinson have termed the anti-canon of constitutional law,²³⁹ underscores Wiecek's point that the Constitution ought not to be left to judges.²⁴⁰ Successful constitutional governance demands extrajudicial interpretation, and other branches must assert themselves against the Court's claims of supremacy. Andrew Jackson and future Chief Justice Taney engaged in precisely this behavior when they and their allies destroyed the Second Bank of the United States,²⁴¹ whose existence the Court had defended in a classic statement of judicial supremacy.²⁴² Abraham Lincoln, along with the Republican Party, participated in a similar process when they reacted against *Dred Scott*. Although he admitted the decision bound the parties, Lincoln never conceded that it bound the government, and he pledged that Republicans would work to overturn the decision.²⁴³ And they did. In 1866, an Indiana judge reported that every branch of government had repudiated *Dred Scott*:²⁴⁴

Passports are granted to free men of color, of *African* descent, by the executive department. Congress, by its legislation, declares such persons citizens of the *United States*, and passes laws for their protection as such. The Supreme Court, in the face of its own decision, admits to its bar, as attorneys and counsellors at law, persons of *African* descent.²⁴⁵

The Republicans' response to *Dred Scott* illustrates the value of departmental constitutionalism. Courts will do what courts do: settle disputes among litigants, deal with the unintended consequences that arise from that dispute resolution, make the occasional disastrous mistake, and intervene in issues that they probably should leave alone. This was the process that produced *Dred Scott*. If the Court was the final arbiter of constitutional meaning, a case like *Dred Scott* could very well have the effect of shutting down democratic debate and rendering future criticism of settled issues somewhat illegitimate. But the Taney Court's infamous 1857 ruling did not have that effect at all. Instead, it intensified a debate about the vision of

237. 274 U.S. 200 (1927).

238. 323 U.S. 214 (1944).

239. Balkin & Levinson, *supra* note 9, at 1018–19.

240. Wiecek, *supra* note 18, at 59.

241. See ALLEN, *supra* note 8, at 15, 220.

242. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (upholding the constitutionality of the Second Bank of the United States).

243. See ALLEN, *supra* note 8, at 220 (arguing that Taney and Lincoln used similar forms of extrajudicial tactics); Abraham Lincoln, Speech in Sixth Joint Debate with Stephen Douglas (Oct. 13, 1858), in *THE LINCOLN-DOUGLAS DEBATES OF 1858*, at 245, 255 (Robert W. Johannsen ed., 1965); Kramer, *supra* note 32, at 116–17 (discussing Lincoln's critique of judicial supremacy).

244. *Smith v. Moody*, 26 Ind. 299, 304 (1866).

245. *Id.*

governance that lay beneath the decision. As Bruce Ackerman has written, *Dred Scott* forced Americans to confront a serious question: “Was the Jacksonian vision of decentralized slaveholding democracy good enough?”²⁴⁶ By the 1860s, the answer was clearly no, and it was the people, not the courts, who provided that answer.

246. 1 ACKERMAN, *supra* note 2, at 79.