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THE COURT'S MOST DREADFUL CASE AND HOW IT CHANGED HISTORY — *Paul Finkelman* — 3

Dred Scott, without doubt, is the most controversial case in the history of the United States Supreme Court. Unlike the controversies that surround other decisions of the Court, the controversy surrounding *Dred Scott* does not turn on *if* the outcome or Chief Justice Taney's analysis was wrong, but rather on *why* the outcome and Chief Justice Taney's analysis were wrong. This article focuses on the political goals Taney attempted to accomplish through his decision in *Dred Scott*. Though there existed reasons for Taney's belief that his decision in *Dred Scott* would once and for all end the political debate over slavery in the territories, his decision ultimately served as a key catalyst in creating the crisis that led to Abraham Lincoln's election, secession, civil war, and, ultimately, the end of slavery.

THIRTEEN WAYS OF LOOKING AT *DRED SCOTT* — *Jack M. Balkin and Sanford Levinson* — 49

Dred Scott v. Sanford is a classic case that is relevant to almost every important question of contemporary constitutional theory.

Dred Scott connected race to social status, to citizenship, and to being a part of the American people. One hundred fifty years later these connections still haunt us; and the twin questions of who is truly American and who America belongs to still roil our national debates.

Dred Scott is a case about threats to national security and whether the Constitution is a suicide pact. It concerns whether the Constitution follows the flag and whether constitutional rights obtain in federally held lands overseas. And it asks whether, as Chief Justice Taney famously said of blacks, there are indeed some people who have no rights we Americans are bound to respect.

Dred Scott remains the most salient example in debates over the legitimacy of substantive due process. It subverts our intuitions about the relative merits of originalism and living constitutionalism. It symbolizes the problem of constitutional evil and the question whether responsibility for great injustices lies in the Constitution itself or in the judges who apply it.

Finally, *Dred Scott* encapsulates the central problems of judicial review in a constitutional democracy. On the one hand, *Dred Scott* raises perennial questions about the judicial role in cases of profound moral and political disagreement, and about judicial responsibility for the backlash and political upheaval that may result from judicial review. On the other hand, the political context of the *Dred Scott* decision suggests that the Supreme Court rarely strays far from the wishes of the dominant national political coalition. It raises the unsettling possibility that, given larger social and political forces, what courts do in highly contested cases is far less important than we imagine.

DRED SCOTT AND THE CRISIS OF 1860 — *Louise Weinberg* — 97

Recent suggestions to the contrary notwithstanding, the *Dred Scott* decision and the controversy over the extension of slavery into the territories were at the very center of the crisis of 1860. This paper fills in the social, political, economic, and legal backgrounds of that crisis in order to clarify the centrality of *Dred Scott* in the election of Abraham Lincoln and to the ensuing destruction of the Union.

RETHINKING *DRED SCOTT*: NEW CONTEXT FOR OLD CASE — *Austin Allen* — 141

Scholars have misunderstood the context in which *Dred Scott* emerged. Leading historical interpretations of the decision have relied too heavily on accounts developed by antebellum Republicans and on mid-twentieth-century legal theory. This article offers an alternative account of *Dred Scott*'s origins and argues that the decision emerged from a series of unintended consequences resulting from the Taney Court's efforts to incorporate a Jacksonian vision of governance into constitutional law. By 1857, this effort had generated tensions that made a sweeping decision like *Dred Scott* nearly unavoidable. The inescapable nature of *Dred Scott* carries implications for constitutional theorists, especially those calling for the Court to adhere to minimalist interpretive strategies or stark distinctions between law and politics, because such theories cannot evade future decisions like *Dred Scott*. A departmental constitutionalism providing ample room for extrajudicial interpretation to challenge malevolent Court decisions, however, may be able to limit the reach of future *Dred Scott*s.

THE NEW FICTION: *DRED SCOTT* AND THE LANGUAGE OF JUDICIAL AUTHORITY — *Mark A. Graber* — 177

Claims that the Justices in *Dred Scott* abandoned a tradition of judicial restraint rely on an anachronistic measure for judicial activism. Antebellum Justices asserted that laws were unconstitutional only when restraining state officials. Judicial etiquette, in their opinion, required more circumspection when imposing constitutional limits on a coordinate branch of the national government. Contrary to accepted wisdom, the Justices before the Civil War imposed constitutional limitations on federal power in approximately twenty cases. They did so, however, without explicitly declaring federal legislation unconstitutional. The Justices in some federal cases ignored the plain meaning of federal statutes on the ground that Congress would always be presumed to have intended to act constitutionally, as constitutionality was defined by the Supreme Court. In other cases, Justices determined that the federal government could not constitutionally engage in some activity without determining whether Congress by statute had authorized that activity. These and other techniques were means by which the Supreme Court could announce constitutional limits on the national government while pretending that no constitutional conflict was taking place between national elected officials and federal Justices. The majority and concurring opinions in *Dred Scott* broke with past judicial practice only by explicitly declaring, when limiting federal power, that the national legislature had passed an unconstitutional law. Their actual ruling, if not their language, was consistent with previous cases imposing constitutional limits on the federal government.

DRED SCOTT: TIERED CITIZENSHIP AND TIERED PERSONHOOD — *Henry L. Chambers, Jr.* — 209

The *Dred Scott* Court accepted and perpetuated the notion that our Constitution afforded multiple tiers of citizenship and multiple tiers of personhood through which different groups of citizens and different groups of persons would receive varying sets of rights. Through their language and interpretation, the Reconstruction Amendments largely resolved this issue by providing a formal equality that created a single tier of citizenship and a single tier of personhood. Though, as a formal matter, tiered citizenship and tiered personhood are unacceptable, the issue is not fully resolved as a practical matter. Tiered citizenship and tiered personhood may exist when the exercise of certain citizenship or personhood rights is limited. If the limitation on rights is justified, multiple tiers of citizenship or personhood have not been created; if the limitation is not justified, multiple tiers have been created. After a brief discussion of *Dred Scott* and the Reconstruction Amendments, this essay urges that any restrictions on the exercise of citizenship rights or rights traditionally considered rights of personhood be clearly justified, rather than merely explained. Without the full justification of such restrictions, various laws may appear to reflect a *Dred Scott* mindset that accepts the unjustified provision of differential rights to groups of citizens and persons on the basis of governmental fiat and societal bias, rather than a post–Reconstruction Amendment mindset that guarantees equality.

THE EMERGENCE OF EQUALITY AS A CONSTITUTIONAL VALUE: THE FIRST CENTURY — *William M. Wiecek* — 233

Equality as a constitutional value was unprecedented when it made its appearance in 1868 in the Equal Protection Clause of the Fourteenth Amendment. It reflected antebellum abolitionist ideals adopted hesitantly by Northern Republicans during Reconstruction, but these were incompatible with the expectations of most white Americans of the era, as well as with all previous American experiences. In this sense, equality was a revolutionary constitutional value. The framers of the Fourteenth Amendment intended the Equal Protection Clause and its embedded ideal of interracial equality to reverse the racist dicta of the *Dred Scott* opinion, to validate the Civil Rights Act of 1866, and to empower Congress to suppress counterrevolutionary violence aimed at the freedpeople and Unionists throughout the South. Regrettably, though, the United States Supreme Court betrayed these intentions in a series of restrictive decisions between 1873 and 1905 that had the effect of constitutionalizing the forms of apartheid and servitude that emerged in this era to subordinate African Americans.

THE LAST ANGRY MAN: BENJAMIN ROBBINS CURTIS AND THE *DRED SCOTT* CASE — *Earl M. Maltz* — 265

The dissenting opinion of Justice Benjamin Robbins Curtis in *Dred Scott* has generally received lavish praise from commentators. Curtis is typically praised not only for his substantive conclusions, but also for his seemingly dispassionate analysis of the legal issues presented by the case. In many respects, this praise is well-deserved; Curtis's discussions of the issues of slavery in the territories and citizenship for free blacks are models of legal reasoning. However, a close analysis of other aspects of his opinion reveals that Curtis's analysis was at times distorted by his anger with the actions of Chief Justice Taney and other members of the *Dred Scott* majority.

BENJAMIN CURTIS: TOP OF THE LIST — *R. Owen Williams* — 277

Among the many brave and brilliant dissents from the Supreme Court, few are more historically significant than that of Benjamin Curtis in *Dred Scott v. Sandford*. Earl Maltz insists that the traditional view of Curtis as a dispassionate Justice is incorrect; Curtis is better seen as the "Last Angry Man." This paper considers the famous dissent, the man who wrote it, and the technical analysis Maltz claims as *sine qua non* to a proper understanding of the opinion.

LEGALITY AND LEGITIMACY IN *DRED SCOTT*: THE CRISIS OF THE INCOMPLETE CONSTITUTION — *Michael P. Zuckert* — 291

The original Constitution was incomplete in that it contained a disparity between the principles of legitimacy of the system and the legality of the institution of slavery. Political communities marked by such disharmony are beset with pressures to make the system consistent in one way or another. Such indeed was the fate of the U.S. during the antebellum era. Three typical responses arose: to make legality correspond to legality (by redefining the principles of legitimacy of the system), to make legality conform to legitimacy (by doing away with slavery), or to maintain the tension in ever more creative ways. The *Dred Scott* case represents a late stage of this dynamic process—seven of the Justices chose one or another version of the legality-over-legitimacy strategy, one chose a nascent version of the legitimacy-over-legality position, and only one worked to reaffirm the original constitutional tension between legality and legitimacy.

WHAT WAS TANEY THINKING? AMERICAN INDIAN CITIZENSHIP IN THE ERA OF *DRED SCOTT* — *Frederick E. Hoxie* — 329

Historians have often noted that Chief Justice Taney's decision in *Dred Scott* juxtaposed a denial of African American rights to citizenship with an assertion that Native Americans could obtain that status. Explaining this apparently inconsistent description of two racial minority groups requires an examination of the history of Native American classification in the law prior to 1857. This article argues that political leaders and judges of Taney's generation were committed to the removal of Indian tribes from eastern states and commonly proposed this removal as a choice between migrating west or dissolving tribal governments in order to remain in the East as individuals. The possibility of acquiring state citizenship was therefore an important argument for pro-removal advocates. The Taney decision represents an example of the complex racial and national formulations that characterized the decades immediately prior to the Civil War—a period in which courts and political leaders attempted to define rules for defining "regimes of difference." At a time when there were no national standards of citizenship and little sense that federal authorities could enforce citizenship rights against the actions of states, judges like Taney created distinctions that tried to preserve fundamental democratic principles while defending white privilege. Finally, the article uses Taney's formulation to clarify the arguments of Indian jurists who called for federal recognition of treaty obligations and who defended tribal citizenship as a mark of "civilization" and racial progress.

STAY EAST, YOUNG MAN? MARKET REPERCUSSIONS OF THE *DRED SCOTT* CASE — *Jenny B. Wahl* — 361

The *Dred Scott* decision definitively opened U.S. territories to slavery. This reduced the probability of westward migration for free-soilers, in part because of expected effects on land markets. Although land was an important part of a slaveholder's portfolio, his ability to hold wealth in mobile assets—slaves—meant that he had a different outlook on internal improvements than his Northern brethren, as well as a production process that emphasized relatively abundant labor inputs. Letting slaves into the territories thus led to uncertainty about future land values. This slowed the flow of Northerners west, dragging present land prices downward. In turn, uncertainty about the future profitability of westward expansion affected the value of railroad investments. The downward spiral in stock prices for western railroads heightened risk in capital markets and ultimately led to financial panic. Data on migration, land prices, and railroad stock prices suggest that *Dred Scott* played an important role in generating the tumultuous times of 1857, ultimately leading to the election of Abraham Lincoln.

FOREIGN AUTHORITY, AMERICAN EXCEPTIONALISM, AND THE *DRED SCOTT* CASE — *Sarah H. Cleveland* — 393

One distinctive feature of the *Dred Scott* decision for modern readers is the extent to which the Supreme Court Justices looked to foreign and international law in support of their decisions. The legal status of a slave who entered a free jurisdiction was a question that had been confronted by many courts at home and abroad, and international law had played an important role in American and European adjudication of slavery questions. The Justices therefore were confronted with the strikingly modern question of the extent to which U.S. law embraced, or distinguished itself from, foreign practice. Arguments from foreign and international law emerged with respect to four critical questions before the Court: citizenship, choice of law, congressional power in the territories, and due process. With a few notable exceptions, the Justices agreed that foreign authority was relevant to their decisions, though they disagreed on the choice of particular authorities and their application to the facts of the case. No member of the Court adopted the view that foreign authority was never appropriate to constitutional interpretation. Even Chief Justice Taney, who asserted a stridently exceptionalist position to hold that due process protected slavery, also looked to foreign authority—and badly distorted it—to deny citizenship to free blacks. The article concludes it was not the use of foreign authority that opened the decision to condemnation. While the decision illustrates the complexities of nineteenth-century transnational judicial dialogue, Chief Justice Taney's opinion stands as a warning that a blind refusal to consider foreign authorities can be as fraught with hazards as their indiscriminate use.

STUDENT NOTES

DIVINE INTERVENTION: RE-EXAMINING THE "ACT OF GOD" DEFENSE IN A POST-KATRINA WORLD *Joel Eagle* 459

From the moment of landfall, Hurricane Katrina instantly became synonymous with unprecedented damage, destruction, and loss. The exceptionally intense storm and subsequent flooding in New Orleans and much of the Gulf Coast was quickly deemed one of the worst disasters in United States history. A particularly destructive consequence of Hurricane Katrina has been the environmental effects, in part caused by oil spills and chemical releases from many of the industrial sources concentrated in the Gulf Coast region.

A question that will likely remain in contention for years or even decades to come is who should be liable for the cleanup costs associated with these releases? Congress included an Act of God defense in a number of federal environmental statutes, offering potentially responsible parties an opportunity to avoid severe cleanup expenses. This article examines the scope of the defense from various perspectives—including legislative history, judicial interpretation, and public policy—and concludes that, when faced with the decision, courts should construe the defense narrowly and hold sources liable for the cost of cleanup. By holding these parties strictly liable, cleanups will be efficiently and effectively accomplished, the cost of cleanup will be borne by those most closely related to the releases, and the associated costs will act to deter poor facility maintenance and may even lead to reconsideration of facility placement in the future.

SEARCHING FOR A NEEDLE IN A HAYSTACK: THE CONSTITUTIONALITY OF POLICE DNA DRAGNETS *Sepideh Esmali* 495

DNA dragnets—the mass warrantless DNA testing of individuals whom authorities have neither probable cause nor reasonable suspicion to believe perpetrated a crime, but who merely live or work near a crime scene—have increasingly been used by police departments in a desperate attempt to solve puzzling crimes. The lack of success and the Fourth Amendment constitutional concerns raised by DNA dragnets, however, lead this practice to be suspect. Under the Fourth Amendment, all searches of an individual must be reasonable. The reasonableness of any search typically depends on the government obtaining a warrant prior to the search. While there are well-established exceptions to this rule, DNA dragnets fail to fall within any of these exceptions. In addition, the consent garnered by police from suspects does not render these warrantless and suspicionless searches constitutional, because the consent is not truly voluntary. Law enforcement officials secure consent from DNA dragnetees under coercive conditions where officers threaten individuals with police orders and media scrutiny. Also, DNA dragnets fail to satisfy the Fourth Amendment's reasonableness balancing test, because individuals' interests in keeping their genetic and medical information private far outweighs any governmental concern in solving and preventing crimes. Thus, this Note argues that the use of DNA dragnets in the absence of probable cause and a judicial warrant cannot be upheld as constitutional.

SIGNED GENEREAL RELEASES MAY BE WORTH LESS THAN EMPLOYERS EXPECTED: CIRCUITS SPLIT ON WHETHER FORMER EMPLOYEE CAN SIGN RELEASE, REAP ITS BENEFITS AND SUE FOR FMLA CLAIM *Muniza Bawaney* 525

A circuit split has recently developed regarding the correct interpretation of 29 C.F.R. § 825.220(d), a regulation issued pursuant to the Family and Medical Leave Act of 1993, which states in pertinent part, "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The Fifth Circuit correctly concluded that 29 C.F.R. § 825.220(d) bars only the prospective waiver of substantive rights under the FMLA and does not reach the post-dispute release or settlement of FMLA claims. Subsequently, the Fourth Circuit alternatively concluded that § 825.220(d) prohibits the prospective and retrospective waiver or release of both the substantive and proscriptive FMLA rights, except where prior approval from a court or the Department of Labor is obtained. In its amicus curiae brief, the Department of Labor itself stated that the Fourth Circuit's interpretation of § 825.220(d) was "erroneous," recognizing that the regulation's proper construction bars only the prospective waiver of FMLA rights, not the private settlement of past FMLA claims.

This comment argues that the Fifth Circuit's interpretation of § 825.220(d) is correct based upon the regulation's plain language, legislative history, and public policy considerations. Moreover, the Fifth Circuit's decision leads to a more practical and efficient result for not only employers and employees, but also the courts and the Department of Labor. The Fourth Circuit has recently agreed to a panel rehearing of its earlier decision and should take this opportunity to follow the Fifth Circuit's reasoning and reach the correct result, therefore resolving the circuit split.