THE LAST ANGRY MAN: BENJAMIN ROBBINS CURTIS AND THE *DRED SCOTT* CASE

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Of all the attorneys and judges who participated in the long and tortured litigation over the status of Dred Scott and his family, the performance of Justice Benjamin Robbins Curtis is the most lavishly praised by most modern commentators. In part, this high esteem reflects a strong commitment to the substantive view that Congress had the power to prohibit slavery in the territories. But, unlike his fellow dissenter John McLean, Curtis is also widely seen as taking a dispassionate view of the issues presented in *Dred Scott v. Sandford* and as skillfully bringing to bear distinctively legal principles to reach his conclusions in the case. Thus, for example, Carl B. Swisher describes Curtis's opinion in *Dred Scott* as "outstanding" and asserts that "the opinion was written out of the warp and woof of the law . . . ."[1]

In many respects, this reputation is well-deserved. Curtis's argument on the issue of slavery in the territories[2] is entirely convincing, and his treatment of the substance of the citizenship issue[3] is nothing short of a *tour de force*. By contrast, a quite different picture emerges when one considers his approach to some of the other issues presented by *Dred Scott*. Here, the opinion reveals a Curtis who is quite angry with the Southern Justices for their decision to reach the issue of the constitutionality of the Missouri Compromise and whose analysis appears to have been distorted by this anger.

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1. 5 CARL B. SWISHER, THE TANEY PERIOD 1836–64, at 630 (Paul A. Freund ed., 1974). For similar assessments, see, for example, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 414 (1978); STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM (2005); Earl M. Maltz, *The Unlikely Hero of* Dred Scott*: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995 (1996).

2. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 604–28 (1857) (Curtis, J., dissenting).

3. *Id.* at 571-88. These opinions are discussed in detail in FEHRENBACHER, *supra* note 1, at 410–14; STREICHLER, *supra* note 1, at 119–50; and Maltz, *supra* note 1.

Curtis was born on November 4, 1809, in Watertown, Massachusetts.[4] He was educated at Harvard University and Harvard Law School, where he studied under Joseph Story. After briefly practicing in Northfield, Massachusetts, where he was admitted to the bar in September 1834, Curtis associated himself with Charles Pelham Curtis, a distant relative who had an established practice in Boston. Except for his interlude on the Supreme Court, Curtis remained in private practice in Boston until his death.

Like other orthodox Massachusetts Whigs, Curtis believed that slavery was wrong. However, for Curtis—like other conservative Whigs, such as Daniel Webster—opposition to slavery was always subordinate to his concern for the maintenance of an appropriate relationship among the states of the Union. Curtis's private correspondence reflected his understanding that disputes over slavery represented a clear threat to this relationship.[5] His awareness of this threat is also related in his advocacy of a set of closely-related legal and political doctrines designed to ease tensions between free states and slave states. In the legal context, Curtis argued that issues of slavery should not be treated differently than other questions of status; politically, he contended that the northern states should recognize the importance of slavery to the interests of the South and give those interests substantial consideration in slavery-related policy decisions.

As early as 1836, Curtis showed a willingness to defend what he saw as the legitimate interests of slave owners, arguing unsuccessfully in *Commonwealth v. Aves*[6] that, under state law, a Louisiana slave owner should retain dominion over a slave voluntarily brought into Massachusetts on a temporary sojourn.[7] However, prior to his appointment to the Court, Curtis's most important public pronouncement about slavery came in a November 1850 speech counseling obedience to the newly-strengthened Fugitive Slave Act.[8] The speech argued that the state of Massachusetts and its citizens were bound to respect the Act by virtue of the state's decision to accept the constitutional compact, which included the Fugitive Slave

4. Details of Curtis's life can be found in A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. (Benjamin R. Curtis ed., 1879) [hereinafter CURTIS]; STREICHLER, *supra* note 1; and Maltz, *supra* note 1, at 1996–2001. The following four paragraphs come from my previous article about Curtis. *See* Maltz, *supra* note 1, at 1996-2001.

5. *See* Letter from Benjamin R. Curtis to George Ticknor (Aug. 23, 1835), *in* 1 CURTIS, *supra* note 4, at 71–72; Letter from Benjamin R. Curtis to George Ticknor (Jan. 14, 1838), *in* 1 CURTIS, *supra* note 4, at 79–80.

6. 35 Mass. (18 Pick.) 193 (1836).

7. Curtis's argument in *Aves* is reproduced in The Case of the Slave Med., *in* 2 CURTIS, *supra* note 4, at 69–92.

8. *See* Benjamin R. Curtis, Address to the Participants of the Constitutional Meeting at Faneuil Hall (Nov. 26, 1850), *in* 1 CURTIS, *supra* note 4, at 123–36.

Clause. In addition, Curtis made two points that, taken together, summarized his general position on the issues of fugitive slaves. First, he contended that Massachusetts owed no obligation to escaped slaves.

> With the rights of [fugitive slaves] I firmly believe Massachusetts has nothing to do. It is enough for us that they have no right to be *here*. Our peace and safety they have no right to invade; whether they come as fugitives, and, being here, act as rebels against our law, or whether they come as armed invaders. Whatever natural rights they have, and I admit those natural rights to their fullest extent, *this* is not the *soil* on which to vindicate them.[9]

In addition, Curtis emphasized the need to seek accommodation with the slave states—a need which he viewed as deriving as much from geography as the existence of the Union.

> [W]ithout an obligation to restore fugitives from service, Constitution or no Constitution, . . . we could not expect to live in peace with the slave-holding States.
>
> You may break up the Constitution and the Union to-morrow; . . . you may do it in any conceivable or inconceivable way; you may draw the geographical line between slave-holding and non-slave-holding *anywhere*; but when we shall have settled down, they will have their institutions, and we shall have ours. One is as much a fact as the other. One engages the interests and feelings and passions of men as much as the other. And how long can we live in peace, side by side, without some provision by compact, to meet this case? Not one year.[10]

This speech clearly reflected that the importance of living in harmony with the slave states was a dominant theme in Curtis's thinking. Not surprisingly, when the local federal marshals sought a formal legal opinion vindicating the constitutionality of the Fugitive Slave Act, Curtis was the man whom they asked to produce the opinion.[11]

His rejection of antislavery dogma served Curtis well when Levi Woodbury died on March 4, 1851, creating a vacancy on the Supreme Court. By custom, Woodbury was to be replaced by a New Englander. President Millard Fillmore sought a person who would "combine a vigorous constitution with high moral and intellectual qualifications, a good judicial mind, and such age as gives a prospect of long service."[12] Moreover, as a strong supporter of the Compromise of 1850, Fillmore was unlikely to choose a nominee from the radical antislavery wing of his party.

9. *Id.* at 136.

10. *Id.* at 134.

11. *See* Benjamin R. Curtis, *The Constiutionality of the Fugitive Slave Law*, BOSTON DAILY ADVERTISER, Nov. 19, 1850, at 2.

12. Letter from Millard Fillmore to Daniel Webster (Sept. 10, 1851), *in* 1 CURTIS, *supra* note 4, at 155.

The forty-two year old Curtis thus became a logical choice. With the strong endorsement of Daniel Webster, Curtis was given a recess appointment on September 22, 1851, and was subsequently confirmed by the Senate over the objections of the radical antislavery forces.

Curtis's opinion in *Dred Scott* reflected a complex interaction between the political philosophy of a conservative Massachusetts Whig and a strong commitment to the basic principles of distinctively legal discourse. The influence of the latter is particularly apparent in his analysis of the jurisdictional issues in the case. Curtis began by brushing aside the claim that the defendants could not raise the jurisdictional objection on appeal because they had successfully defended on the merits after the trial court had ruled against them on the jurisdictional issue. Noting that, unlike common law courts, the jurisdiction of the federal courts was limited by the Constitution itself, he relied on "the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted."[13]

Curtis then turned to the substance of the jurisdictional objection—the claim that Dred Scott and his family could not invoke the diversity jurisdiction of the federal courts because they were not citizens. Curtis was thus much better positioned than his colleagues to make a dispassionate analysis of the citizenship issue. The political upheaval of the mid-1850s had left him a man without a party. As a Cotton Whig, he could have no love for a Republican party that focused on the issue of slavery and derided the Southern states. At the same time, unlike, for example, Justices Samuel Nelson of New York and Robert Grier of Pennsylvania, Curtis was not politically aligned with the governing elites of the South.

By the mid-1850s, the idea that free blacks could be citizens was anathema to both Southern political leaders generally and Northern Democrats such as Nelson and Grier. The Southern defense of slavery depended on the premise that African-Americans were inherently inferior, and the ideology of Northern Democrats was hardly less racist. Conversely, John McLean of Pennsylvania—the only Republican on the Court—may well have seen the endorsement of citizenship for free blacks as a convenient vehicle to appeal to Radical Republicans who were suspicious of his quest for the Republican presidential nomination.

As a member of the political establishment in Massachusetts, one of the few states in which free blacks had full civil and political rights in the 1850s, Curtis quite likely also believed that citizenship should not be re-

13. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 567 (1857) (Curtis, J., dissenting) (citation omitted).

stricted by race. Nonetheless, as we have already seen, the need to protect African-Americans from mistreatment was not a high priority for him. Against this background, good-faith adherence to the conventions of legal analysis was clearly paramount in his analysis of whether free blacks were citizens for purposes of diversity jurisdiction. Indeed, Curtis's opinion on this point[14] is a masterpiece of legal craft. After carefully parsing the relevant authorities, he argued that national citizenship derived from citizenship in the state in which a person was born, and that free blacks had in fact been citizens of some states at the time that the Constitution was drafted. Moreover, he noted that, by its terms, the jurisdictional objection that had been raised in the lower court did not exclude the possibility that Dred Scott had been born free in a state in which he would have been viewed as a citizen. Thus, Curtis concluded that the lower court had properly proceeded to the merits.

The issue of slavery in the territories presented a much more complex problem for a Justice of Curtis's political persuasion. On one hand, Curtis was no doubt appalled by the Missouri Supreme Court's decision in *Scott v. Emerson*,[15] which denied comity to the laws of Illinois on the question of the status of Dred Scott and his family. But on the other, he must have recognized from the beginning that the case threatened to exacerbate the sectional tensions that Curtis and like-minded Whigs sought so diligently to dampen. In particular, Curtis must have feared the potential consequences of a detailed discussion of the constitutionality of the Missouri Compromise by the Court.

Against this background, Curtis himself faced a complicated dilemma. From the beginning, he clearly believed that the Court should rule in favor of the Scotts. However, in order to prevail, the erstwhile slaves were required to show that they had resided in a jurisdiction in which they would have been declared free by law. Dred Scott himself could have relied solely on the law of the state of Illinois; by contrast, the only apparent basis for the claim of his wife, Harriet, was her time in the Wisconsin Territory, where slavery was prohibited by the Missouri Compromise. Absent some legal legerdemain, a ruling in Harriet's favor thus required a holding that the prohibition on slavery in the territories was constitutional.

Curtis was plainly aware of the implications of a decision to explicitly address the constitutionality of restrictions on slavery in the territories. At the same time, in his opinion he argued that, once he had dismissed the jurisdictional objection as without merit, he was "obliged to consider the

14. *See id.* at 571–88.

15. 15 Mo. 576 (1852).

question whether [the] judgment on the merits of the case should stand or be reversed."[16] At the end of his opinion, he reiterated this contention in the strongest terms. Curtis first observed almost ruefully that "I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass . . . ."[17] He then declared,

> These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view that I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my view of my duty.[18]

Taken at face value, these assertions might suggest that Curtis would have believed it his "duty" to discuss the issue of slavery in the territories, even if the majority opinion had rested on narrower grounds. As such, the language might well be seen as providing inferential support for the view that he felt the need to respond. Curtis was a catalyst for the decision of the Southern Justices to address the constitutionality of the Missouri Compromise in *Dred Scott*.[19] However, other portions of the dissenting opinion hint that Curtis may have considered other possibilities as well.

In the course of the dissent, Curtis made one argument in favor of the Scotts that did *not* require a holding that slavery *per se* was illegal in either Illinois or the Wisconsin Territory. Noting that both Emerson Eliza's former master had consented to the formal marriage between Dred and Harriet at Fort Snelling, Curtis reasoned that (1) since slaves were by definition incapable of entering into contracts, consent to such a marriage emancipated both Dred and Eliza, much as a devise of property had been held to emancipate a slave; (2) under general principles of conflict of laws, Missouri was in general required to recognize the validity of a marriage that was valid where celebrated; and (3) by reattaching the status of slavery to Dred and Harriet, Missouri had unconstitutionally impaired the obligation of the marriage contract by vitiating its effectiveness.[20]

To the extent that it relied on the claim that Missouri was constitutionally required to recognize the validity of the Wisconsin marriage, this

16. *Dred Scott*, 60 U.S. (19 How.) at 590 (Curtis, J., dissenting).

17. *Id.* at 633.

18. *Id.*

19. The evidence supporting this view is discussed and assessed in WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM 127–29 (1979), and FEHRENBACHER, *supra* note 1, at 308–11.

20. *See Dred Scott*, 60 U.S. (19 How.) at 599–601 (Curtis, J., dissenting).

analysis was doctrinally suspect. Nonetheless, the argument was perfectly suited to the political purposes of a conservative Whig who wished to avoid further exacerbation of the sectional conflict. On one hand, the argument supported the freedom of Dred Scott and his family; on the other, it could have allowed Curtis to avoid discussing the explosive issue of the constitutionality of the Missouri Compromise. Moreover, since the Missouri Supreme Court had not discussed this argument in *Scott v. Emerson*, Curtis could claim that his refusal to recognize the authority of the state court decision was limited to cases where new arguments had been made in the parallel federal proceeding.[21] By circumscribing his arguments in this way, Curtis could have defended his position on the Scotts' status without unduly roiling the political waters.

However, the success of this strategy depended not only on the actions of Curtis himself, but also on the approaches taken by the other Justices in *Dred Scott*. A political firestorm could be avoided only if most or all of the members of the Court chose to rest their decisions on similarly narrow grounds. If, on the other hand, the other Justices chose to address the constitutionality of the Missouri Compromise, then Curtis's personal decision would have little effect on the decision's impact on the political situation.

Against this background, Curtis could only have been pleased by the early phases of the Court's deliberations in *Dred Scott*. When the case was first argued in early 1856, most of the Justices determined that a discussion of the Missouri Compromise should not be included in the opinion of the Court. Instead, those Justices who believed that the Court should hold that Dred Scott and his family were not free were content to rest on the view that they were bound by the prior holding of the Missouri Supreme Court in *Scott v. Emerson*.[22] These Justices were initially of the same view after the case was reargued in late 1856.[23]

The situation changed dramatically in February 1857. On the motion of Justice James Moore Wayne of Georgia, the five Southern Justices unanimously decided to address the issue of the Missouri Compromise.[24] They were ultimately joined by Justice Robert C. Grier of Pennsylvania.[25] The main opinion was prepared by Chief Justice Roger Brooke Taney.[26] Like Curtis, Taney began by addressing the question of whether the Court

21. *See id.* at 604.

22. *See* EHRLICH, *supra* note 19, at 98–108; FEHRENBACHER, *supra* note 1, at 289–90.

23. *See* EHRLICH, *supra* note 19, at 126–27; FEHRENBACHER, *supra* note 1, at 307–08.

24. The conference at which this decision was taken is described in EHRLICH, *supra* note 19, at 127–31, and in FEHRENBACHER, *supra* note 1, at 308–09.

25. *See* EHRLICH, *supra* note 19, at 131–32; FEHRENBACHER, *supra* note 1, at 312.

26. *See Dred Scott*, 60 U.S. (19 How.) 393.

could consider the jurisdictional issue, and he determined that the matter was properly before the Court.[27] However, after reviewing the historical record, Taney concluded that descendants of slaves could not be citizens for purposes of diversity jurisdiction, and that the lower court should have dismissed the case for that reason.[28]

This conclusion alone was sufficient to resolve the case that was before the Court. Nonetheless, Taney proceeded to directly address the status of the Scotts, focusing primarily on the question of the constitutionality of the Missouri Compromise, noting that this issue "chiefly occupied the attention of the counsel on both sides in the argument"[29] and asserting that

> it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record . . . and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy, and the point has been relied on by either side, and argued before the court.[30]

Taney then argued that the Scotts remained slaves, in part because the Missouri Compromise was unconstitutional, and that the Scotts could not invoke the diversity jurisdiction of the federal courts for that reason.[31]

Once Taney and the other Southern Justices decided to address the constitutionality of the Missouri Compromise in their opinions, all hope of putting *Dred Scott* behind the Court without aggravating political tensions evaporated. Whatever position was taken by Curtis, the decision was destined to become a significant flashpoint in the sectional conflict. At that point, Curtis would have seen no advantage in refraining from addressing the constitutionality of restrictions on slavery in the territories. Indeed, Curtis might well have deemed it his "duty" to respond to Taney's arguments on this point.

In any event, Curtis was plainly angry that Taney's opinion had taken on the issue of the constitutionality of restrictions on slavery in the territories. Noting that the discussion of the Missouri Compromise came only after Taney had concluded that the Scotts were not citizens because they were descendants of slaves, Curtis complained that "[a] great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached."[32] In addition, Curtis

27. *See id.* at 401–03.
28. *See id.* at 403–27.
29. *Id.* at 429.
30. *Id.*
31. *See id.* at 431–54.
32. *Id.* at 590 (Curtis, J., dissenting).

infuriated Taney by asserting that he did not hold the Court's opinion on the constitutionality of the Missouri Compromise binding because it was "expressed on a question not legitimately before it."[33]

Curtis's evident dismay at Taney's decision to discuss the constitutionality of the Missouri Compromise is in many respects entirely understandable. Even assuming that the Southern Justices had determined to adjudicate the merits of the Scotts' claims, they could have based their decision entirely on non-constitutional grounds. The notion (to which Taney apparently ascribed) that the political dispute over slavery in the territories could be definitively resolved in favor of the South by a judicial decision can only be seen as a product of extreme judicial hubris. Instead, as Curtis himself purportedly warned his colleagues in conference, such a decision could only exacerbate the sectional tensions that plagued the nation in 1857.[34]

However, the claim that the opinion was not binding because the issue was not before the Court swept more broadly. The gravamen of the argument was that Taney lacked authority to consider *any* argument regarding the question of whether the Scotts, in fact, had obtained their freedom, including arguments based solely on the common law. Some commentators have suggested that this latter claim was based on the contention that Taney's discussion of the constitutionality of the Missouri Compromise was obiter dictum on its face.[35] However, Taney had attempted to insulate himself against such an argument by concluding ultimately that, because Scott remained a slave, he could not be a citizen, and that, for that reason, the federal courts lacked diversity jurisdiction over his claim.[36] Taney thus connected the discussion of the Missouri Compromise to the resolution of an issue that clearly was necessary to the resolution of the case. Curtis, however, countered by citing the rule of appellate procedure that prevented the parties from relying on arguments that had not been raised in the trial court. Curtis observed that "when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record, to see whether those averments are true, except so far as they are put in issue by a plea to the jurisdiction."[37] Noting that Sandford's attorneys had argued that Scott lacked jurisdiction only because Scott was an African-American—not because Scott was a slave—Curtis concluded that, for this reason, the Court

33. *Id.* (citation omitted).
34. *See* EHRLICH, *supra* note 19, at 128.
35. *See, e.g.*, *id.* at 166.
36. *See Dred Scott*, 60 U.S. at 427–30.
37. *Id.* at 589 (Curtis, J., dissenting).

was barred from considering Scott's status in connection with the jurisdictional issue and that, *therefore*, the discussion of the Scotts' status in Taney's opinion was dictum.[38]

Curtis's attitude toward this question was quite different from that which informed his analysis of the more general question of whether the Court could legitimately consider the issue of the Scotts' citizenship at all. Arguing for the Scotts, Montgomery Blair had argued that the Court lacked authority to adjudicate this question because Sandford had waived his jurisdictional objection by defending on the merits. A disparate group of Justices found this argument persuasive. Curtis, however, disagreed. While conceding that courts of general jurisdiction would have concluded that the jurisdictional objection was waived, Curtis (like Taney) argued that the rule should be different in diversity cases because the jurisdiction of the federal courts was limited by the Constitution.[39]

By contrast, in his criticism of Taney, he took a narrower view of the Court's jurisdiction to consider specific issues. Curtis contended that, in the jurisdictional context, consideration of whether Scott was a slave was inconsistent with the Court's decisions in *Livingston v. Story*[40] and its progeny.[41] Taney, on the other hand, relied upon the holding of *Capron v. Van Noorden*[42] to support his position.[43] Neither case was precisely on point. *Livingston* was a diversity action in which the defendant was a Louisiana resident and the plaintiff asserted New York citizenship in his complaint. The defendant did not challenge this allegation in a plea in abatement; instead, at a late stage in the litigation, as part of a general answer (that is, a response directed to the merits), the defendant complained that the trial court lacked jurisdiction because the plaintiff was in fact a citizen of Louisiana. The Supreme Court held that the courts could not consider such an allegation when it was raised in a general answer rather than a specific plea challenging jurisdiction.[44] In *Van Noorden*, on the other hand, the complaint on its face had not alleged the facts necessary to support diversity jurisdiction. The defendant failed to raise a jurisdictional objection in the trial court. The Court held that it should nonetheless consider the jurisdic-

38. *See id.* at 588–90.
39. *See id.* at 565–67.
40. 36 U.S. (11 Pet.) 351 (1837).
41. *See Dred Scott*, 60 U.S. (19 How.) at 589–90 (Curtis, J., dissenting).
42. 6 U.S. (2 Cranch) 126 (1804).
43. *See Dred Scott*, 60 U.S. (19 How.) at 430.
44. *Livingston*, 36 U.S. (11 Pet.) at 352.

tional objections on appeal and even raise such objections on its own motion if the parties failed to do so.[45]

The posture of *Dred Scott* bore similarities to both *Livingston* and *Van Noorden*. Like *Livingston*, on its face, the complaint in *Dred Scott* included allegations sufficient to support diversity jurisdiction. By contrast, unlike *Livingston* (and like *Van Noorden*) Taney's analysis did not rely on the resolution of a factual dispute. Instead, his analysis was based upon the undisputed facts to which the parties had agreed. Thus, on this point, neither Taney nor Curtis could be said to clearly have the better of the argument.

In a larger sense, however, the question of which Justice had the better of the argument on the procedural issue is irrelevant to the larger question of whether Taney's discussion of the Missouri Compromise should be characterized as nonbinding dictum. The proper characterization of the discussion depends on the structure of the opinion rather than on the soundness of the analysis in the opinion. To illustrate this point, one needs to look no further than the more general jurisdictional discussion in *Dred Scott* itself. As already noted, although both Taney and Curtis concluded that the issue was properly before the Court, the question of whether the jurisdictional issue should even be considered was a matter of some dispute among the Justices. Indeed, although they differed on the merits, both Justices John Catron and John McLean explicitly concluded that the Justices could not properly consider the question of jurisdiction pursuant to the writ of error that brought the case before the Court.[46] Yet neither Catron nor McLean even suggested that the jurisdictional analysis of Taney and Curtis was in any sense dictum for this reason. Instead, all of the Justices understood that, because Taney and Curtis had concluded that the Court had authority to resolve the jurisdictional issue, their legal analysis of that issue was entitled to full precedential value.

The posture of Taney's treatment of the status of Dred Scott is precisely analogous. Taney may have been wrong in concluding that, as a matter of procedural doctrine, the Court could legitimately consider the issue. But, against the background of that conclusion, his substantive analysis of the question was entitled to its full legal effect. The decision to deliver a pronouncement on the constitutionality of the Missouri Compromise might appropriately be characterized as rash, or even intemperate. Nonethe-

45. *See Van Noorden*, 6 U.S. (2 Cranch) at 127.

46. *See Dred Scott*, 60 U.S. (19 How.) at 518–19 (Catron, J., concurring); *id.* at 530–31 (McLean, J., dissenting).

less, even if one considers only Taney's opinion, the pronouncement was most assuredly not extrajudicial in the sense charged by Curtis.

This point emerges even more clearly when Taney's opinion is considered in the context of the other opinions in the case. Of the seven Justices in the majority, only four Justices were willing to explicitly take the view that free blacks could not be citizens of the United States; neither Samuel Nelson nor John Catron were willing to discuss the jurisdictional issue at all,[47] while John Campbell rested his jurisdictional analysis solely on his conclusion that Dred Scott and his family remained slaves because the Missouri Compromise was unconstitutional.[48] Thus, the latter argument was the *only* jurisdictional rationale that commanded the support of a majority of the Justices. Given that Taney purported to be speaking for the Court, discussion of this issue could not be considered extrajudicial in any sense.

Normally, one would have expected an attorney who was as technically proficient as Curtis to have appreciated these points. However, he was clearly intent on striking back at Taney and the other Southern Justices for reaching the issue of slavery in the territories in *Dred Scott*. As a result, whether knowingly or because his judgment was distorted by the heat of the controversy, Curtis reached for an untenable argument in his effort to discredit Taney. Thus, at least on this issue, his opinion clearly reflected the influence of the heated political atmosphere that provided the backdrop for the decision.

Taken as a whole, Curtis's opinion provides a classic example of the interplay between different forces that determine the outcome of constitutional adjudication more generally. On one hand, his analysis of the substance of the citizenship issue clearly reflects the importance of doctrinal arguments in many contexts. Although Curtis may well have preferred a different result in the abstract, his analysis is most plausibly viewed as a good faith application of distinctively legal principles to the citizenship question. At the same time, Curtis's attack on Taney demonstrates the limits of purely doctrinal analysis as an explanation of judicial behavior. When his political beliefs were strongly engaged, even a judge as committed to legal ideology as Curtis was willing to twist doctrine in order to vindicate those beliefs. So, perhaps the moral of the story is that, where deeply-held beliefs are implicated, we have no reason to believe that even our most capable jurists will come to more reasoned decisions than other government decision makers.

47. *See id.* at 458 (Nelson, J., concurring); *id.* at 518–19 (Catron, J., concurring).
48. *See id.* at 493, 517–18 (Campbell, J., concurring).