

## BENJAMIN CURTIS: TOP OF THE LIST

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When did you last hear mention of *Dred Scott*,<sup>1</sup> the case, its many opinions, or the Justices who sat for it, without a near simultaneous use of the words “best” or “worst”? The majority and dissenting opinions of *Dred Scott*, as well as the Justices who wrote them, appear on a range of best and worst lists. Ranking Supreme Court Justices and Supreme Court opinions is no trivial pursuit, and for legal historians and even the Justices themselves, it is a temptation too difficult to resist. In 1928, Charles Evans Hughes, between his terms as Associate and Chief Justice of the Court, published a list of “great” Justices. The following decade, Harvard Law School Dean Roscoe Pound produced his own such list. In 1957, Felix Frankfurter composed a roster of “greats” that, by dint of munificence and lapsed time, contained more names than the Hughes and Pound registers combined.<sup>2</sup> In 1970, Albert Blaustein and Roy Mersky provided a systematic study on the topic, having polled sixty-five legal, history, and political science scholars (seven of them from the University of Texas at Austin), which yielded a catalog of twelve “greats” and fifteen “near greats” among the ninety-six Justices up to that time.<sup>3</sup> Neither Benjamin Curtis nor Roger Taney, the best known of the *Dred Scott* Justices, qualified for Pound’s group of four greats. Curtis, however, was one of Hughes’s eight greats, and both Curtis

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

2. Hughes’s list: Marshall, Story, Curtis, Miller, Field, Bradley, Gray, Brewer. Pound’s list: Marshall, Story, Holmes, Cardozo. Frankfurter’s list: Marshall, W. Johnson, Story, Taney, Curtis, Campbell, Miller, Field, Bradley, Matthews, White, Holmes, Moody, Hughes, Brandeis, Cardozo. (All three listed Justices chronologically.) LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 369 tbl.5-8 (2d ed. 1996).

3. See ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 34–40 (1978); see also WILLIAM D. BADER & ROY M. MERSKY, *THE FIRST ONE HUNDRED EIGHT JUSTICES* 22–27 (2004). Members of the University of Texas faculty who participated in Blaustein and Mersky’s poll: Albert W. Alschuler, Wallace Mendelson, Owen Olpin, George Schatzki, Allen E. Smith, Russell J. Weintraub, and Charles Alan Wright. See BLAUSTEIN & MERSKY, *supra* at 117–18 tbl.4. By 1970, ninety-six Justices had been appointed, and the ninety-seventh, Warren Burger, was confirmed that year. *Id.* at 35–36.

and Taney appeared on Frankfurter's roll of sixteen great Justices.<sup>4</sup> Blaustein and Mersky, on the other hand, categorized Taney as "great" and Curtis as "near great."<sup>5</sup> Bernard Schwartz, the king of list makers, composed a whole book of legal lists in 1997, in which he ranked Taney as the tenth best Justice. He also tallied the ten worst opinions of the Court (with Taney's *Dred Scott* opinion as the very worst), and the ten best dissents (with Curtis's *Dred Scott* dissent as the very best).<sup>6</sup> All of these lists probably provide more entertainment than education.

### I. EARL MALTZ AND "BENJAMIN CURTIS, THE LAST ANGRY MAN"<sup>7</sup>

Without denying the legitimacy of Curtis as a "great" Justice, Earl Maltz describes him as a Justice whose opinion was "distorted by . . . anger."<sup>8</sup> Maltz agrees that the Justice's favorable "reputation is well-deserved," particularly with regards to his famous dissent.<sup>9</sup> Specifically, "Curtis's argument on the issue of slavery in the territories is entirely convincing, and his treatment of the substance of the citizenship issue is nothing short of a *tour de force*."<sup>10</sup> But, when it comes to the constitutionality

4. See EPSTEIN, SEGAL, SPAETH & THOMAS, *supra* note 2, at 369 tbl.5-8.

5. BLAUSTEIN & MERSKY, *supra* note 3, at 37.

6. BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS 20–22, 70–71, 89–90 (1997). Taney, tenth on Schwartz's list of ten best Justices, was "second only to Marshall in laying our constitutional law foundation" including police power limitations of property rights (public over private rights), and the opening of corporate expansion (e.g. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837)). *Id.* at 20–22.

One of Schwartz's lists is especially interesting: Ten Greatest Supreme Court "Might Have Beens." Number five on this list is the opinion written by Justice Samuel Nelson after conference for *Dred Scott*. Schwartz points out, "The conference felt that the issue of citizenship was not properly before them and also took the position that they need not consider the Missouri Compromise because Scott's status was a matter for Missouri law and had already been determined against him by the state's highest court." It was not until after Justice James M. Wayne from Georgia put citizenship on the table that the majority determined to deal with the issue. Supported by five fellow slave-staters, Wayne could later brag to a southern senator that he had "gained a triumph for the southern section of the country . . ." Curtis later recalled that Wayne had wanted to "get rid of the question of slavery in the Territories, by a decision of the Supreme Court." The *New York Herald* editorialized that it was not *Dred Scott* but the Court itself that was on trial. *Id.* at 116–18.

7. Professor Earl M. Maltz is the author of CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 (1990); THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION (2003) [hereinafter MALTZ, FOURTEENTH AMENDMENT]; RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994); and over fifty articles on constitutional law, statutory interpretation, the role of the courts, and legal history. He received his B.A. from Northwestern University, where he was elected to Phi Beta Kappa, and his J.D. cum laude from Harvard. Professor Maltz teaches Constitutional Law, Employment Discrimination, Conflicts of Law, and a seminar on the Supreme Court at Rutgers School of Law (Camden).

8. Earl M. Maltz, *The Last Angry Man: Benjamin Robbins Curtis and the Dred Scott Case*, 82 CHI.-KENT L. REV. 265, 265 (2007).

9. *Id.*

10. *Id.* (footnotes omitted).

of the Missouri Compromise, Maltz contends that Curtis was “quite angry” and essentially lost his way.<sup>11</sup> While he never says as much, the story Maltz presents is of a Justice tripped up by his own conservative anger. The main point of Maltz’s very brief paper is that the traditional view of Benjamin Curtis—a Justice dispassionate in his approach to the law—is incorrect. In order to understand Curtis appropriately, one has to examine the technical aspects of his famous dissent, none of which can be reduced to mere noise.

Maltz informs us that Benjamin Robbins Curtis was a Harvard-educated Massachusetts Whig whose opposition to slavery factored less than his concern for the bond among states.<sup>12</sup> Believing slavery to be clearly wrong, Curtis knew that the peculiar institution of slavery threatened the sanctity of union among the states and that Southern interests should thus be granted substantial leeway.<sup>13</sup> Indeed, in the 1836 case of *Commonwealth v. Aves*,<sup>14</sup> Curtis unsuccessfully argued for the domain of southern slaveholders traveling with their slaves, a position for which abolitionists subsequently vilified him. In 1850, he publicly counseled obedience to the recently passed Fugitive Slave Act,<sup>15</sup> insisting that while slaves had natural rights, Massachusetts bore no responsibility to enforce them.<sup>16</sup> According to Maltz, “living in harmony with the slave states was a dominant theme in Curtis’s thinking,” so much so that the “political upheaval of the mid-1850s had left him a man without a party.”<sup>17</sup> But his increasing political independence, coupled with the strong support of the greatest of all compromisers, Daniel Webster, landed Curtis on the Supreme Court upon the death of fellow New Englander Levi Woodbury. President Fillmore gladly bypassed the opposition of antislavery forces and appointed the forty-two year old as the thirty-second Justice of the Supreme Court in September 1851.<sup>18</sup>

In examining Curtis’s *Dred Scott* dissent, Maltz highlights three central components of the opinion: black citizenship, slavery in the territories, and the constitutionality of the Missouri Compromise.<sup>19</sup> As to the first, black citizenship, Maltz proclaims that Curtis’s opinion—“that national citizenship derived from citizenship in the state in which a person was

11. *Id.*

12. *Id.* at 266.

13. *Id.*

14. 35 Mass. (18 Pick.) 193 (1836).

15. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 168, 13 Stat. 200.

16. Maltz, *supra* note 8, at 267.

17. *Id.* at 267–68.

18. *Id.*

19. *See id.* at 268–69.

born”—was “a masterpiece of legal craft,” the product of “neutral principles of legal reasoning” that “cannot be characterized as one driven by politics.”<sup>20</sup> On the subject of citizenship, Curtis veered away from the only other *Dred Scott* dissenter, John McLean. Maltz makes the point that the two Justices differed as to political outlook, which influenced their respective opinions as to black citizenship.<sup>21</sup> Curtis was a compromiser stuck in a political no-man’s land, thereby capable at times of what Maltz repeatedly called a “dispassionate view.”<sup>22</sup> McLean, however, made no attempt to hide his more radical antislavery views; indeed, he stressed them quite intentionally and adamantly.<sup>23</sup> I will return to the Justices’ competing political views, and the reality of Curtis’s dispassion, a bit later.

Maltz goes on to claim that the “issue of slavery in the territories presented a much more complex problem for a Justice of Curtis’s political persuasion.”<sup>24</sup> Curtis the conservative, Union-protecting Whig knew that slavery in the territories was an issue that had already proven itself as fodder for sectional strife and certainly preferred that this issue just go away. At the same time, Curtis the compromiser could not tolerate any erosion of comity—the legal root of compromise—as when the Missouri Supreme Court in *Scott v. Emerson* refused to honor the status of Dred Scott in Illinois.<sup>25</sup> Initially, when *Dred Scott* was argued and reargued in 1856, Curtis the conservative gladly joined the majority of Justices who chose not to include the Missouri Compromise as part of the Court’s opinion. From the beginning, Maltz insists, Curtis “clearly believed that the Court should rule in favor of the Scotts.”<sup>26</sup> The problem, however, revolved around jurisdiction: Which state’s laws rendered the Scotts free? Dred could rely on the laws of Illinois, but his wife Harriet’s claim to freedom (like Dred’s second grounds for freedom) was predicated upon her time in Wisconsin territory, thus invoking the Missouri Compromise and the constitutionality of prohibiting slavery in the territories.

Maltz points out that Curtis provided at least one other reason to hold in favor of the Scotts, a reason that had nothing to do with slavery in the territories.<sup>27</sup> This was the marriage of Dred and Harriet. Maltz, like Don

20. *Id.* at 269. The latter two quotes come from an earlier version of Maltz, *supra* note 8, as presented at the symposium held March 31–April 1, 2006 at the University of Texas Law School.

21. *See* Maltz, *supra* note 8, at 268.

22. *Id.* at 265.

23. *See* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 529–64 (1857) (McLean, J., dissenting).

24. Maltz, *supra* note 8, at 269.

25. *See* 15 Mo. 576, 586–87 (1852).

26. Maltz, *supra* note 8, at 269.

27. *Id.* at 270.

Fehrenbacher, maintains that Emerson in fact granted his permission for the Scott marriage in Fort Snelling, Wisconsin.<sup>28</sup> In his dissent, Curtis observed that since slaves could not enter into contracts, Dred and Harriet were either intentionally or effectively emancipated when Emerson consented to their marriage.<sup>29</sup> Curtis suggested that since the conflict of laws doctrine bound states to honor the laws of all other states, Missouri was constitutionally obligated to recognize the Scotts' Wisconsin marriage and effective emancipation.<sup>30</sup> Given that, and especially after Taney and his fellow Southerners on the bench put the Missouri Compromise on the table, Curtis could no longer avoid the issue of constitutionality of the 1820 Compromise. Just the same, Maltz asserts, Curtis "was plainly angry that Taney's opinion had taken on the issue of the constitutionality of restrictions on slavery in the territories" and saw it as a "duty" to respond.<sup>31</sup>

That Taney interjected the Missouri Compromise (which many scholars have criticized as obiter dictum) led many to repudiate the *Dred Scott* decision. In Maltz's rendition, Taney and Curtis held the shared conviction that the Constitution clearly granted diversity jurisdiction to federal courts, but Taney attempted to insulate himself by connecting Scott's (presumed) non-citizenship to the Court's (resultant) lack of jurisdiction.<sup>32</sup> Curtis responded to this threat by citing appellate rules of procedure that prevented arguments not presented in trial.<sup>33</sup> Since Sandford's attorney never argued Scott's citizenship (but only his race), Curtis posited that the Court was barred from connecting citizenship to jurisdiction.<sup>34</sup> Maltz claims Curtis never meant that the Court could not consider citizenship at all, only that he was not persuaded when Scott's lawyer, Montgomery Blair, argued that Sandford waived the jurisdiction issue, preferring to defend on the merits.<sup>35</sup> Conceding that courts of general jurisdiction would have considered the jurisdictional objections waived, Curtis (like Taney) contended that jurisdiction is always before the Supreme Court on its own motion.<sup>36</sup>

On the jurisdictional issue, Maltz professes that Curtis took a narrow view, claiming that consideration of Scott as a slave was inconsistent with

28. *Id.*; DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 412 (1978).

29. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 600–01 (1857) (Curtis, J., dissenting).

30. *See id.* at 598–601.

31. Maltz, *supra* note 8, at 272.

32. *Id.* at 273.

33. *See Dred Scott*, 60 U.S. (19 How.) at 588–89 (Curtis, J., dissenting).

34. *See id.* at 588–90.

35. *See Maltz, supra* note 8, at 274.

36. *See Dred Scott*, 60 U.S. (19 How.) at 567 (Curtis, J., dissenting). On matters of jurisdiction, see generally U.S. CONST. art. III, § 2.

the Court's decisions in *Livingston v. Story*, a diversity action in which the Court held it could not consider jurisdiction in a general answer rather than in a jurisdiction specific plea.<sup>37</sup> Taney, by contrast, looked to the holding of *Capron v. Van Noorden*, which was not a diversity action on its face but a case in which the Court decided to hear jurisdictional objections on appeal even though those objections were not raised in trial.<sup>38</sup>

As Maltz sees it, “[n]either case was precisely on point,” despite their apparent similarities to *Dred Scott*.<sup>39</sup> *Livingston* had sustainable diversity (in *Dred Scott* diversity was sufficiently developed); *Van Noorden* did not rely on resolution of fact (in *Dred Scott* the facts were uncontested). And yet, the procedural questions raised by both *Livingston* and *Van Noorden* were, Maltz insists, “irrelevant to the larger question of whether Taney’s discussion of the Missouri Compromise should be characterized as non-binding dictum.”<sup>40</sup> The bottom line, as Maltz expresses it, “depends on the structure of the opinion rather than on the soundness of the analysis in the opinion.”<sup>41</sup> Perhaps most illustrative of Maltz’s point, Justices Catron and McLean determined that the writ of error did not provide for a consideration of jurisdiction, yet neither Justice maintained that the interpretations of Taney or Curtis (both concluding that the Court had authority to determine jurisdiction) were dictum.<sup>42</sup>

Just as Catron and McLean resisted the charge of dictum on Taney’s and Curtis’s conclusions regarding jurisdiction, Maltz claims that Curtis should have been equally open-minded as to Taney’s treatment of the Missouri compromise. Maltz believes that, while Taney may have been “rash, or even intemperate,” he was “most assuredly not extrajudicial,” and Maltz goes on to contend that someone of Curtis’s obvious technical proficiency should have known as much.<sup>43</sup> Given that “his judgment was [likely] distorted by the heat of the controversy, Curtis reached for an untenable argument in his effort to discredit Taney.”<sup>44</sup> Maltz concludes that, however laudable his doctrinal arguments relating to citizenship, Curtis’s attack on Taney was predicated upon political convictions that left him “willing to

37. See *Dred Scott*, 60 U.S. (19 How.) at 589–90 (Curtis, J., dissenting) (discussing *Livingston v. Story*, 36 U.S. (11 Pet.) 351 (1937)).

38. See *id.* at 401–02 (opinion of the Court) (relying on *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804)).

39. Maltz, *supra* note 8, at 274.

40. *Id.* at 275.

41. *Id.*

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

43. Maltz, *supra* note 8, at 275–76.

44. *Id.* at 276.

twist doctrine in order to vindicate those beliefs.”<sup>45</sup> Maltz leaves the reader with “a moral of the story,” namely that we cannot expect that “even our most capable jurists will come to more reasoned decisions than other government decision makers.”<sup>46</sup>

## II. DON'T SWEAT THE SMALL STUFF

Earl Maltz, like Benjamin Curtis, has a sophisticated and technical approach to the law. As he did in his excellent book, *The Fourteenth Amendment and the Law of the Constitution*, Maltz very usefully measures the “late-nineteenth-century Court against the principles of distinctively legal analysis rather than Republican ideology.”<sup>47</sup> The challenge when writing legal history, of course, is to address the technical abilities of both historians and lawyers, something Maltz does better in his books than in his paper, particularly when dealing with complicated procedural matters (as pertaining to the jurisdiction debate, for example). Yet, because Maltz has written elsewhere about citizenship in *Dred Scott*, the subject gets short shrift this time around.<sup>48</sup> However, Curtis had much to say about citizenship, and of all the Justices, he came closest to defining what it meant, promoting a rather elastic notion in which blacks who had been denied the right to vote were not necessarily or automatically disqualified.<sup>49</sup> Curtis also advocated a reading of the Constitution that held out both hope and promise for change and progress. At one juncture, he opined, “though . . . I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitution[] . . . decisive evidence of citizenship.”<sup>50</sup> He went on to assert “in five of the thirteen original States, colored persons possessed the elective franchise” at the Founding, thus “it is not true, in point of fact, that the Constitution was made exclusively by the white race.”<sup>51</sup>

Sticking with the small stuff for another moment, Maltz’s paper has one or two easily repaired hiccups, like domiciling John McLean in Pennsylvania rather than Ohio. The paper would also benefit from a round of clarifications or elaborations. For example, Maltz never elucidates his sug-

45. *Id.*

46. *Id.*

47. MALTZ, *FOURTEENTH AMENDMENT*, *supra* note 7, at viii.

48. See Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 *CARDOZO L. REV.* 1995 (1996).

49. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 582–83 (1857) (Curtis, J., dissenting).

50. *Id.* at 581.

51. *Id.* at 582.

gestion that Curtis's argument relating to the Scott marriage was "doctrinally suspect."<sup>52</sup> He simply mentions the argument's political facility for a conservative Justice *reluctant* to fuel sectional strife by opining on the constitutionality issue yet *eager* to free the Scotts.<sup>53</sup> Nor does Maltz explain why Curtis "clearly believed that the Court should rule in favor of the Scotts."<sup>54</sup> The bigger concern with Maltz's paper, however, relates to the title, or theme, namely, Curtis and his supposed "anger."

### III. JUST HOW ANGRY WAS CURTIS, REALLY?

While Maltz's paper is understandably focused on the *Dred Scott* dissent, his theme conjures the words of Horace, the Latin poet and son of an ex-slave, who wrote, "Anger is a short madness."<sup>55</sup> As stated above, Maltz insists that when it came to the constitutionality of the Missouri Compromise, Curtis lost his way and was "plainly angry."<sup>56</sup> Early in his paper, Maltz states, "[T]he 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."<sup>57</sup> That observation contrasts sharply with the more traditional view; take Fehrenbacher for example, who suggested that, as it relates to the constitutionality of the Missouri Compromise restriction, "both McLean and Curtis assumed the Republican position of interpreting the territory clause broadly," and that "Curtis, in particular, probed the weakness of this argument with an irony that was all the more effective because of its judicial coolness."<sup>58</sup> Maltz never informs the reader as to how Curtis's judgment suffered by his anger or what mistakes he made.

But was Curtis angry? Maltz portrays Curtis as legally principled and dispassionate on the citizenship issue, but politically engaged and angry as to the Missouri Compromise. Curtis's opinion, says Maltz, "that national citizenship depended on the law of the state in which the person was born cannot be characterized as one driven by politics."<sup>59</sup> Maltz says Justice McLean, on the other hand, was politically motivated on the issue of citi-

52. Maltz, *supra* note 8, at 271.

53. *Id.*

54. *Id.* at 269.

55. Horace, Epistles, book 1, epistle 2, reprinted in HORACE FOR ENGLISH READERS 269 (E.C. Wickham trans., Oxford Univ. Press 1930).

56. Maltz, *supra* note 8, at 272.

57. *Id.* at 265.

58. FEHRENBACHER, *supra* note 28, at 409.

59. This quote comes from an earlier version of Maltz, *supra* note 8, as presented at the symposium held March 31–April 1, 2006 at the University of Texas Law School.

zenship, using it as “a convenient vehicle to appeal to Radical Republicans.”<sup>60</sup> So, why was Curtis able to maintain his composure on citizenship and not on the constitutionality of the Compromise? And might Curtis’s “dispassionate,” “neutral principles of legal reasoning,” have actually been a passionately political attempt to maintain the peace between North and South? That McLean favored racial justice seems no more political than Curtis supporting national harmony.

At one point in his paper, Maltz states that Curtis’s anger was “in many respects entirely understandable” since, after all, Southern Justices could have found against the Scotts without opining on the Missouri Compromise, and the very idea of settling the long-standing debate about slavery in the territories by judicial decision “can only be seen as a product of extreme judicial hubris.”<sup>61</sup> Not only did Curtis resent the politics of Taney’s decision, he refused to stomach the extrajudicial character of it.

In fact, as Maltz observes, “. . . *Curtis 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.’”<sup>62</sup> Clearly, there was plenty of anger to go around. The notion that Taney was actually the angry Justice is consistent with the conclusion of Stuart Streichler, Curtis’s only non-family biographer, who claimed, “Curtis’s charge of judicial overreaching had rankled the chief justice.”<sup>63</sup> Paul Finkelman also, in his book on the *Dred Scott* case, characterized Taney as “a seething, angry, uncompromising supporter of the South and slavery . . .”<sup>64</sup> Curtis strove for compromise, but the proslavery Justices—five in total, all from slaveholding families—wanted confrontation and final resolution regarding slavery in the territories and black rights.<sup>65</sup> It is of course possible that any of several antebellum Justices qualified for the “angry man” moniker.

60. Maltz, *supra* note 8, at 268.

61. *Id.* at 273.

62. *Id.* at 272–73 (emphasis added).

63. STUART STREICHLER, *JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM* 146 (2005).

64. PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* 29 (1997). It is important to note that the Southern Justices had their work cut out for them. If they ruled that blacks could not be citizens, the case was over, and the territories issue would remain unresolved. To rule the Missouri Compromise unconstitutional, on the other hand, they would have had to acknowledge jurisdiction (only possible if Scott were free and/or a citizen), thus confirming black rights.

65. The *Dred Scott* case may well have yielded a compromise. Justice Samuel Nelson drafted an opinion that was intended to be the “opinion of the Court” in which the precedent of *Strader v. Graham*, 51 U.S. (10 How.) 82 (1850), that every state had total authority to decide the status of all its residents, would have been adopted. *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993*, at 143–44 (Clare Cushman ed., 1993) [hereinafter *SUPREME COURT JUSTICES*].

As to Curtis's anger, however, there are one or two other key matters to consider. Maltz never even mentions due process in his paper, a topic he addressed to great effect in his book on the Fourteenth Amendment. Taney's introduction of due process in the majority opinion for *Dred Scott* is historic. As Stuart Streichler observed in his wonderfully clear and cogent intellectual history of Curtis's legal legacy, published just last year, "[I]t is easy to overlook the quiet evolution in due process that occurred in the Civil War era."<sup>66</sup> Streichler uncovered a seminal twist toward substantive due process when Curtis delivered the opinion in *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856), which imbued due process with a "superconstitutional" status by connecting it to Magna Carta's "law of the land" and rendering it an appropriate ground for judicial review of legislation.<sup>67</sup> By Streichler's account, Curtis essentially invented substantive due process one year before Taney stretched the Fifth Amendment in *Dred Scott* to invalidate the Missouri Compromise, thus giving Curtis cause to resent Taney for misappropriating this novel notion of judicial exertion. But Taney had begun to think in terms of substantive due process even earlier, as evidenced by *Bloomer v. McQuewan*, an 1852 case regarding patent rights. In *Bloomer*, the Chief Justice offered in dictum that "Congress legislated on the principle decided by this court in *Evans v. Eaton* . . . [a]nd any other construction would make the legislation of Congress, on these various special laws, inconsistent with itself," such that "the power of Congress to pass it would be open to serious objections" and "certainly could not be regarded as due process of law."<sup>68</sup> Although the two Justices were simultaneously expanding upon due process in the 1850s, it is unlikely Curtis approved of Taney's use of the concept in *Dred Scott*.

The most obvious argument to underscore Curtis's anger, however, which Maltz very curiously fails to even mention, is his resignation from the bench. The list of Justices who have resigned from office, as opposed to retired, includes fourteen Associates and two Chiefs.<sup>69</sup> Six of the first

66. STREICHLER, *supra* note 63, at 98.

67. *See id.* at 98–101; *see also* *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). Substantive Due Process was more fully developed two decades later. In the *Slaughter-House Cases*, the Supreme Court upheld a Louisiana state law granting monopoly rights, thus rejecting the plaintiffs' (butchers) due process claim that their "right to labor" had been violated. *See* 83 U.S. (16 Wall.) 36 (1873). The Court chose not to use due process in a substantive fashion. In 1877, however, the majority in *Munn v. Illinois*, found that economic regulations could indeed result in a dispossession of private property without due process. *See* 94 U.S. 113 (1877).

68. 55 U.S. (14 How.) 539, 553 (1852). I am indebted to Mark Graber for bringing this case to my attention.

69. *See* BADER & MERSKY, *supra* note 3, at 76–81. The two Chief Justices to resign were John Jay, in 1795, and Oliver Ellsworth, in 1799. The southern Democrat John Campbell of Alabama left to

twelve Justices resigned. Six more Justices resigned in the twentieth century, the last (and perhaps most exciting) being Abe Fortas who resigned in a hurry in 1969.<sup>70</sup> But between Gabriel Duvall in 1835 and Charles Evans Hughes in 1916, there were only three resignations from the Court. John Campbell of Alabama resigned days after Fort Sumter to join the Confederacy (unlike his fellow Southerner on the Court, Nathan Clifford, who condemned secession as “wicked heresy”); and David Davis, who responded to the allure of public office when the Illinois legislature elected him to the Senate in 1877.<sup>71</sup> Benjamin Robbins Curtis, on the other hand, the one-time “slave-catcher” judge, expressed his outrage at the Court’s *Dred Scott* majority decision and his personal frustration with Taney, by resigning in September 1857.<sup>72</sup> A resignation of this nature, following such a public spat between Justices, represented a first (and only) in the history of the Supreme Court.

Streichler<sup>73</sup> devoted one of the three sections of his chapter on *Dred Scott* to Curtis’s resignation. The reason for Curtis’s resignation has long been debated. Was his resignation a principled repudiation of the majority in *Dred Scott*? Did he leave because of the furious and vituperative communications he had with Taney? Or was it that the Justice was dissatisfied with his rather meager \$6,000 annual salary, which his brother and biographer George Ticknor Curtis called the “controlling” factor?<sup>74</sup> The answer is complicated by the fact that Curtis pulled his punches on the way out. Furthermore, there is no evidence to suggest he contemplated resignation prior to the *Dred Scott* decision. Streichler concluded that “Curtis resigned on grounds of principle.”<sup>75</sup> If so, this realization, in combination with the fact that he was the only Supreme Court Justice to ever resign in that fashion,

join the Confederacy in 1861, and David Davis resigned in 1877. And, of course, Benjamin Curtis resigned out of protest to *Dred Scott* in 1857.

70. *Id.* Fortas resigned amidst threats of impeachment, and public condemnation, weeks after *Life* magazine revealed that Fortas had accepted a possible bribe from an indicted stock manipulator, Louis Wolfson. See BRUCE ALLEN MURPHY, *FORTAS: THE RISE & RUIN OF A SUPREME COURT JUSTICE 196–200, 207–09, 545–77* (1988).

71. On John Campbell’s resignation on April 26, 1861, see *SUPREME COURT JUSTICES*, *supra* note 65, at 163. On Nathan Clifford, see *id.* at 169. On David Davis’s resignation, see 7 CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864–88*, at 498 (1987).

72. *SUPREME COURT JUSTICES*, *supra* note 65, at 159. Once the Court adjourned in March 1857, Curtis filed his dissent with the Court clerk and also sent it to a Boston newspaper. Taney revised his opinion to incorporate Curtis’s various objections to the case, after which weeks of bitter correspondence ensued. The rift between the two Justices became publicly ugly.

73. Maltz and Streichler reference one another’s work.

74. STREICHLER, *supra* note 63, at 148.

75. *Id.* Though it is tempting to accept Streichler’s assessment, it seems more likely that Curtis’s brother had it right and the Justice resigned for pecuniary reasons.

would suggest Justice Curtis may indeed have been the last and only angry man.

But anger, however principled, has its clearly ugly side. Many contemporaries felt betrayed when the Justice chose not to persevere in troubled times.<sup>76</sup> Still others, like Charles Francis Adams, thought it painfully ironic that Curtis should appear “to posterity as a champion of principles, for his opposition to which he obtained his seat on the bench.”<sup>77</sup>

#### IV. ONE LAST OBSERVATION, NOT RELATED TO ANGRY JUSTICES

Allow me one last observation, relating to the previously mentioned differences between Curtis and McLean. As noted above, six of the first twelve Supreme Court Justices resigned.<sup>78</sup> That is an indicator of the perceived unimportance of the position by comparison to today. Addressing that same point from another angle, consider this. Not only did the two *Dred Scott* dissenters differ as to political outlook, as Maltz observes, they also differed as to political ambition, further revealing the place of the Supreme Court in antebellum American government. Curtis came to the Supreme Court as a respected lawyer and legal reformer, McLean as a career politician.<sup>79</sup> In his *Dred Scott* dissent, McLean underscored antislavery as part of his bid for the Republican nomination for president. McLean, like Salmon Chase after him, saw the Supreme Court as a springboard to the executive branch, a position both McLean and Chase labored for their entire lives. The notion of a lifetime commitment to the Court, to say nothing of the supremacy of that Court, had yet to be fully established at the time of the Civil War. I argue elsewhere that the power and influence of the antebellum Supreme Court, as suggested by the *Dred Scott* decision, is too often exaggerated.<sup>80</sup> Yes, Lincoln and the Radical Republicans were fearful of what the Court, in light of *Dred Scott*, might do. But, in 1857, most

76. *See id.* at 149.

77. *Id.* (internal quotations omitted).

78. *See* BADER & MERSKY, *supra* note 3, at 76–77.

79. Curtis practiced law in Boston. He served one term in the Massachusetts legislature where he devoted all his energies to legal reform. After proposing a commission for judicial reform, Curtis was named chairman and spearheaded a more efficient code of court procedure. McLean served as one of six Ohioans in the House of Representatives from 1812–16. He ran for the Senate in 1822, was commissioner of General Land Office, and aspired for the presidency his whole life. According to the Supreme Court Historical Society biography of McLean, “his political activities while on the high bench are perhaps unparalleled in history of the Court. McLean carried on successive flirtations for the presidential nomination with several political parties . . . .” SUPREME COURT JUSTICES, *supra* note 65, at 103.

80. I make this argument in my Yale University Ph.D. dissertation, provisionally entitled “Lincoln’s Justices: The Supreme Court from *Dred Scott* to the Civil Rights Cases.” The dissertation is currently a work in progress.

Americans were not concerned about whether blacks could be citizens. And, as most of us know, Congress had already essentially overturned the Missouri Compromise with the Kansas-Nebraska Act.<sup>81</sup> With the Reconstruction amendments, however, Americans reversed the *Dred Scott* decision, thus confirming that Congress had the authority to eliminate slavery (not just in the territories, but altogether), blacks could be citizens, and blacks had rights whites were obligated to respect. Around the time Benjamin Curtis resigned from the bench, the image and power of the Court waned rather substantially from whatever status it achieved under Chiefs Marshall and Taney. The eventual supremacy of the Court would soon unfold, a supremacy precipitated by America's need to assimilate citizens like Dred Scott.<sup>82</sup>

81. Act of May 30, 1854, ch. 59, 10 Stat. 277 (organizing the territories of Nebraska and Kansas).

82. In actuality, Dred Scott died in September 1858, nine months after the Blows purchased his freedom. FEHRENBACHER, *supra* note 28, at 568.