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Coming to Terms with *Dred Scott*: A Response to Daniel A. Farber

Paul Finkelman*

- I. INTRODUCTION
- II. THE LEGITIMACY OF THE *TANEY* OPINION AND THE DECISION-
MAKING PROCESS
- III. DID *DRED SCOTT* CAUSE THE CIVIL WAR?
- IV. WAS THE CASE WRONGLY DECIDED?
- V. WAS THE JURISDICTIONAL ISSUE CORRECTLY DECIDED?
- VI. DID THE COURT OVERREACH IN STRIKING DOWN THE MISSOURI
COMPROMISE?
- VII. WHY DO WE HATE *DRED SCOTT*?

I. INTRODUCTION

How does one argue against the proposition that *Dred Scott* is the Court's worst opinion? No one today likes the opinion or the result. Almost everyone agrees it is a *bad* opinion. Chief Justice Taney's "Opinion of the Court" contains racist language, bizarre legal analysis, and tendentious arguments.¹ The narrow result—that Dred Scott was still a slave—seems so wrong and unfair, and violates all modern notions of justice. Worse yet are Chief Justice Taney's larger holdings—that the Constitution protected slavery, that Congress could not prohibit slavery in the territories, and that blacks, even if free, could never be citizens of the United States. Popular historians or non-reflective legal scholars would like to claim it *caused* the Civil War. Professor Farber is so incensed by the opinion that he would like to blame Chief Justice Taney for all the deaths in the Civil War—some

* President William McKinley Distinguished Professor of Law and Public Policy, Albany Law School. This article is a response to Daniel A. Farber's *A Fatal Loss of Balance: Dred Scott Revisited* and part of *Pepperdine Law Review's* April 1, 2011 *Supreme Mistakes* symposium, exploring the most maligned decisions in Supreme Court history. Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13 (2011).

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

625,000—and then just for good measure raise the death total by nearly twenty five percent, to an astounding 800,000.²

Professor Farber is of course a great advocate. He makes his arguments, marshals his evidence to support his claim, exaggerates what the other side says, and charges forward. I was astonished, for example, to learn from his paper that I am now one of those who want to “rehabilitate” Chief Justice Taney and his opinion.³ There is a huge difference between “rehabilitating” the opinion of the Chief Justice, and suggesting, as I did in a recent article,⁴ that some aspects of the opinion were at least reasonable and that the outcome—that Scott remained a slave and could not sue in diversity—was probably legally correct.

So let me start by making it clear, I have no love for the opinion or for Taney. On this issue I can safely take an oath like those of the McCarthy era: I am not now, nor have I ever been a fan of Taney or the decision and I have never tried to rehabilitate either. I stand foursquare with Senator Charles Sumner “that the name of Taney is to be hooted down the page of history.”⁵ Those scholars who like Taney the most—such as Carl Swisher⁶ and Felix Frankfurter⁷—always wanted people to believe that *Dred Scott* was an aberration and that their Taney—the real Taney—was not such a bad fellow. This is nonsense. Chief Justice Taney was thoroughly racist and thoroughly pro-slavery. For most of his adult life he opposed any rights for free blacks,⁸ and his jurisprudence almost always supported slavery.⁹ As President Andrew Jackson’s attorney general, Taney argued that blacks could never be citizens of the United States and thus were not entitled to passports and other rights of citizenship.¹⁰ He of course repeated these conclusions in *Dred Scott*. Taney’s *Dred Scott* opinion was the apex of his

2. Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 15 (2011). Farber uses this number in the penultimate paragraph of his introduction and also used it in his oral presentation at this symposium.

3. *See id.* at 14.

4. Paul Finkelman, *Was Dred Scott Correctly Decided? An “Expert Report” for the Defendant*, 12 LEWIS & CLARK L. REV. 1219 (2008).

5. *Bust of Chief Justice Taney*, CONG. GLOBE, 38TH CONG., 2D SESS. 1012 (1865), reprinted in PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* 221, 222 (1997).

6. *See generally* CARL BRENT SWISHER, *ROGER B. TANEY* (1935).

7. *See generally* FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* (1937); *see also* *United States v. Int’l Union of United Auto., Aircraft, & Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 590–91 (1957) (framing *Dred Scott* as one of “the rare occasions when the Court . . . has departed from its own practice”).

8. *But cf.* Timothy S. Huebner, *Roger B. Taney and the Slavery Issue: Looking Beyond—and Before—Dred Scott*, 97 J. AM. HIST. 17 (2010) (arguing that early in his life Taney was not pro-slavery or hostile to free blacks).

9. *See generally* Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000).

10. SWISHER, *supra* note 6, at 154.

thought, not a wrong turn taken late in life. During the Civil War Taney did everything in his power to undermine President Lincoln and the war effort. He was so opposed to black freedom that he started drafting an opinion on the unconstitutionality of the Emancipation Proclamation, even though no case on the issue was before him. Taney was probably the staunchest ally the South had in Washington. He never committed treason, as defined by the Constitution, only because his jurisprudence and his attempts to weaken Lincoln could not technically be considered “overt acts,”¹¹ but his rulings surely gave great aid and comfort to the enemy,¹² and had they been carried out would have severely undermined the war effort.

But, when thinking about *Dred Scott*, the issue is not how do we “rehabilitate” the opinion. The goal of scholarship here is to understand the opinion, place it in the context of its own time, and explain its enduring significance. After that, we may praise or damn it, and rehabilitate it or condemn it.

Farber argues that *Dred Scott* was illegitimately decided and that Taney overreached in his attempt to solve the problem of slavery in the territories in a single opinion.¹³ Tied to this we must also interrogate the claim implied by Farber, and made by others, that somehow *Dred Scott* caused the Civil War. The answers to these questions will not be found in a law professor’s narrow analysis of the structure of the opinion.

II. THE LEGITIMACY OF THE TANEY OPINION AND THE DECISION-MAKING PROCESS

Professor Farber attacks the legitimacy of the *Dred Scott* opinion on a number of levels. He complains that Taney’s originalism is inappropriate, that the outcome is “predetermined” and thus the opinion is illegitimate, and that the decision is wrong—the worst in our history to fit with the theme of this symposium—in part because it is tainted by the outsider correspondence of James Buchanan.¹⁴ None of these critiques are very powerful in the end.

11. U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

12. See, e.g., *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (opinion issued as a Circuit Justice); see also *The Prize Cases*, 67 U.S. (2 Black) 635, 682–99 (1863) (Nelson, J., dissenting) (Chief Justice Taney joined this dissent).

13. Farber, *supra* note 2, at 13.

14. *Id.* at 20.

For a serious legal historian, the approach to *Dred Scott* cannot be an unsophisticated analysis, such as Professor Farber's comment that comparing Taney's originalism to the entire methodology of originalism is like trying to understand vegetarianism by noting that Hitler practiced it.¹⁵ Such arguments may score points in a public talk, but they entirely miss the point of scholarly analysis. Hitler's eating practices had nothing to do with either the theory of vegetarianism or the politics of his regime.¹⁶ Originalism, however, was very much a part of the jurisprudence—and the pro-slavery jurisprudence—of nineteenth century jurists like Taney and Joseph Story. Both vigorously applied a jurisprudence of originalism to bolster slavery. In *Prigg v. Pennsylvania* Justice Story argued that the Fugitive Slave Clause was a fundamental compromise at the Constitutional Convention and that without it the Constitution would never have been accepted by the delegates or ratified.¹⁷ The history of the Convention shows that this is utterly incorrect,¹⁸ and in fact it contradicts Story's earlier assertions in his magisterial *Commentaries on the Constitution of the United States*¹⁹ that the clause was a minor part of the convention and a "gift" the northern delegates gave the Southerners.²⁰ Story may not have been a very good historian, but that is true of almost every Justice who has ever used an originalist approach.²¹ In *Dred Scott* Taney may in fact have been a far better originalist than Story was in *Prigg* or than most modern Justices are today. His research into colonial and early national law is impressive, especially when we remember that it was done without modern libraries (much less electronic searching) and also without law clerks. He applied his historical analysis with vigor—perhaps a little too much vigor—but also with some sophistication. Despite Farber's comments, *Dred Scott* is in fact

15. *Id.* at 45.

16. One might of course argue that the analogy that Farber dismisses may be useful in showing that it is possible to be a vegetarian (and presumably respect the lives of animals) while at the same time condoning harming human beings. Thus, the hypocrisy of Hitler's vegetarianism while creating a regime that perpetrated mass murder and wholesale extermination of people might carry over to modern animal rights extremists who commit acts of terrorism against scientists by blowing up cars or firebombing homes and research facilities, while claiming they respect the lives of animals, or anti-choice terrorists, who claim to be "pro-life" while murdering doctors and nurses and planting bombs that indiscriminately kill bystanders. On violent animal rights activists see *Ashmore v. Regents of the University of California* (Case No.: 2:10-CV-09050) (this case is currently pending in the Central District of California).

17. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842).

18. See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 259–63.

19. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 676–77 (Da Capo Press, reprint 1970) (1833).

20. See Finkelman, *supra* note 18, at 264.

21. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989).

a clear example of originalism in action, and his methodology is not nearly as unsophisticated as Farber would like it to be.

Taney argues from an originalist perspective that slavery is protected by the Constitution, at least in part because the nation was founded by slaveholders who were intent on protecting their most important economic and social interest. Similarly, he argues that blacks could not be citizens of the United States because at the Founding they were universally treated as politically powerless, degraded persons, who were “so far inferior, that they had no rights which the white man was bound to respect.”²² These arguments are not inconsistent with a sophisticated approach to originalism. We may not like Taney’s conclusions and we may cringe at the deep racism of his rhetoric. We can condemn him for this unnecessarily cruel and offensive language. But that does not mean his originalism is totally off the mark. On the contrary, many serious historians have demonstrated that slavery was a central issue of the American Founding and that the Constitutional Convention bent over backwards to protect slavery in a number of ways.²³ Moreover, in Taney’s own time many sophisticated highly educated abolitionists, such as Wendell Phillips and William Lloyd Garrison, read the history of the Founding and the original intent of the Framers exactly the same way that Taney did. Garrison and Phillips advocated that Northerners secede from the pro-slavery Union precisely because the Constitution protected slavery and oppressed blacks.

It makes no sense to complain, as Farber does, that Taney’s opinion “suggests, if nothing else, a determination to reach a predetermined conclusion at any price.”²⁴ After all, isn’t this true for virtually *every* opinion that *every* judge writes? Does Professor Farber believe, or did the late David Currie whom he quoted believe, that when a Justice sits down to write an opinion he or she does not know where the opinion will lead, or what the holding will be? When Chief Justice John Marshall sat down to

22. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

23. See generally DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823* (1975); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981) [hereinafter FINKELMAN, *AN IMPERFECT UNION*]; PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (2d ed. 2001); DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820* (1971); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2010); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (1977).

24. Farber, *supra* note 2, at 14 (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 263–72 (1985)).

write *Marbury*²⁵ was he involved in an inner debate with himself over how the case would come out? When Chief Justice Earl Warren wrote *Brown*²⁶ did he wonder if he would uphold segregation, and only as he wrote the opinion did he convince himself otherwise? Surely no one believes such things. Does Professor Farber think that constitutional law decisions are the result of the Justice looking into the sky for the brooding omnipresence of the law,²⁷ and then pulling down the right decisions to match the facts of the case? I doubt it.

In trying to understand the importance of *Dred Scott*, it makes no sense to attack the opinion merely because a famous citizen, who held no political office at the time, communicated directly with members of the Court and lobbied one Justice on how to vote. Farber condemns James Buchanan for his letters to Justices Catron and Grier before the decision of the Court was announced. He says it “represents perhaps the greatest example of Executive intrusion into the Court’s deliberations in U.S. history.”²⁸ He asserts it is “an extraordinary case of presidential intrusion into the judicial process. . . .”²⁹ Whether this is true or not is unclear. At the outset, it is worth noting that at the time of this “intervention” Buchanan was in fact *not* the nation’s chief executive, but only the President-elect. Thus, it is not technically an “executive intrusion.” But, this minor point of chronology aside, we might ask, how did Buchanan’s correspondence with Justices John Catron and Robert Grier actually affect the case?

As Farber notes, in late January Buchanan contacted his old friend, the Jacksonian Democrat from Tennessee, Justice John Catron, to find out when the decision would be announced.³⁰ Buchanan was writing his inaugural address—to be given in March—and he wanted to know what to say about the pressing issue of slavery in the territories. Buchanan wanted to know if the decision would be announced before his March inauguration so he could comment on the case.³¹ This was a political ploy that in the end backfired, because by endorsing the opinion before it was announced, Buchanan only opened himself up to criticism of colluding with Chief Justice Taney. But, Buchanan’s political maneuverings, and how they affected the politics of the late 1850s, cannot be used as a reason for supporting or condemning Taney’s opinion in *Dred Scott*.

25. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

26. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

27. As Justice Oliver Wendell Holmes Jr. wrote “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

28. Farber, *supra* note 2, at 39.

29. *Id.* at 15.

30. *Id.* at 40.

31. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 307, 311–12 (1978) (discussing the Buchanan correspondence).

We can condemn Buchanan for the impropriety of asking what the outcome would be. But, his asking surely did not delegitimize the decision, or even affect the decision. It could only affect his administration. Surprisingly, Catron replied to Buchanan, which was of course a violation of judicial ethics, although not perhaps as great a violation then as it is today. More surprisingly, Catron asked Buchanan to discuss the case with another member of the Court, Justice Robert Grier.³² Like Buchanan, Grier was a Pennsylvania Democrat. At this point in the court's deliberations, Taney was going to write the "Opinion of the Court" and the other four Southerners on the Court had agreed to endorse it, although in the end each would write his own concurring opinion. Two Northerners, John McLean and Benjamin R. Curtis, were going to dissent. Justice Samuel Nelson of New York was planning to write an opinion concurring in the result—that Dred Scott was still a slave—but either rejecting or ignoring all of Taney's holdings on black citizenship, the constitutionality of the Missouri Compromise, and the power of Congress to regulate slavery in the territories.

Catron was concerned that no Northerners were willing to sign on to Taney's opinion. Thus, he asked Buchanan to try to persuade Grier to join Taney's opinion. Thus, the "executive intrusion" that Farber condemns did not emanate from the "executive" (or actually the executive-elect). Nor did it come from Chief Justice Taney. Rather, it came from the staunch Unionist Catron.³³

Justice Catron's tactics and James Buchanan's willingness to participate in those tactics may seem unethical today, but this sort of behavior was not clearly unethical at the time. Indeed, recent scholarship suggests that contact between Justices and politicians, lawyers, litigants, and members of the public were not uncommon at this time.³⁴ In 1846, Justice McLean discussed a pending case with Salmon P. Chase, who was an attorney in the case.³⁵ In 1853, Justice Curtis discussed ongoing litigation involving foreign affairs with the Secretary of State.³⁶ In 1856, Justice Nelson told a lawyer he

32. *Id.* at 311.

33. See the correspondence between Catron and Buchanan in Philip Auchampaugh, *James Buchanan, the Court and the Dred Scott Case*, TENNESSEE HISTORICAL MAGAZINE, Jan. 1926, at 231 (including letters from Catron to Buchanan on February 6, 1857, February 10, 1857, and February 23, 1857, as well as letters from Buchanan); see also 10 THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE 105–13 (John Bassett Moore ed., 1910).

34. Rachel A. Shelden, *The Taney Court and the Problem of Judicial Ethics in the Nineteenth Century* 2 (Nov. 2011) (unpublished paper presented at the American Society for Legal History Annual Meeting, Atlanta, GA) (on file with the *Pepperdine Law Review*).

35. *Id.* at 4.

36. *Id.*

had won his case before the Court announced its decision.³⁷ And while Grier and Catron were talking to Buchanan about the Dred Scott case, Curtis was telling his correspondents about the Court's deliberations. Prominent advocates before the Court—such as John Y. Mason, William H. Seward, Reverdy Johnson, and Edwin Stanton—often socialized with members of the Court and discussed pending litigation.³⁸ Buchanan's correspondence was clearly within the realm of common practice at the time, although his pre-endorsement of the outcome in his inaugural address stepped over the line of normal behavior.

Nor can this appearance of impropriety, as Farber puts it, really be an argument against the logic of the decision. Surely it cannot be considered unethical for a citizen to weigh in with a Justice on how a case should be decided. Citizens have that right; it is the Justices who are supposed to maintain a sense of judicial propriety and ignore what outsiders say. But, we know that is not always the case. Was there "impropriety" in the summer of 1919 when Professor Zachariah Chafee lobbied Justice Holmes on the meaning of free speech³⁹ after his anti-libertarian decision in *Schenck v. United States*?⁴⁰ Chafee's lobbying led Holmes to substantially revise the "clear and present danger" doctrine just eight months later in *Abrams v. United States*.⁴¹ Is Holmes's brilliant and highly regarded *Abrams* dissent less impressive and somehow tainted because a famous law professor lobbied him to change his jurisprudence? After the Court's outrageously oppressive opinion in *Minersville School District v. Gobitis*,⁴² numerous law professors wrote scathing articles condemning the case, and just three years later Justices William O. Douglas and Hugo Black reversed themselves,⁴³ in part because of the "pressure" of academic criticism. Was this improper, and is Justice Robert Jackson's brilliant opinion in *West Virginia Board of Education v. Barnette*, overturning *Gobitis*, somehow tainted by this history? Is the logic of the Second Legal Tender case⁴⁴ suspect because President Grant purposefully appointed Joseph Bradley and William Strong to the bench because Grant knew they would reverse the First Legal Tender

37. *Id.*

38. *Id.* at 9–12.

39. See Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24, 26–27 (1971).

40. *Schenck v. United States*, 249 U.S. 47 (1919).

41. *Abrams v. United States*, 250 U.S. 616 (1919). For a history of this case see RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987).

42. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

43. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

44. *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871) (the Second Legal Tender case).

case,⁴⁵ and uphold the Legal Tender Act? Charles Evans Hughes, who had been on the Court and would later return as Chief Justice, thought the decision was one of the Court's "self-inflicted wounds"⁴⁶ because the Court reversed itself within a year of the first decision. But, however much this undermined the credibility of the Court, even Hughes did not believe the final decision—upholding the use of paper currency during the Civil War—was incorrect.⁴⁷

The answer to all of these questions is of course a resounding no. So similarly, we cannot attack the substance of the decision merely because President-elect Buchanan corresponded with Justices Grier and Catron. It is further worth noting that Buchanan's correspondence had virtually no effect on the outcome of the case. As I have just noted, Grier already agreed with the result—that Dred Scott would remain a slave—before Buchanan wrote to him. Grier was simply planning to sign on to the concurring opinion of Justice Samuel Nelson, a New Yorker, who also concluded that Dred Scott would remain a slave. Catron, who was from Tennessee, wanted Grier to sign on to Taney's opinion which already had a five vote majority, so that it would have at least one Northerner supporting it. This maneuvering, and Buchanan's participation in it, had no effect on Taney's Opinion of the Court or on Dred Scott's fate. Finally, we should remember that Grier's concurring opinion was pretty much meaningless, announcing in one sentence that he agreed with Justice Nelson's concurrence and in a short paragraph concurring with Chief Justice Taney,⁴⁸ even though in fact, Nelson and Taney disagreed on the fundamental question of how to decide the case.

After the decision was announced, Republicans, such as Abraham Lincoln and William Henry Seward, alleged that the decision was part of a conspiracy between, among others, Taney and Buchanan, and that before Buchanan gave his inaugural address Taney told him what the opinion, then still unannounced, would contain. The Buchanan-Catron-Grier correspondence shows that Lincoln and Seward were correct in alleging that Buchanan knew the result before it was announced, even if they were wrong about Taney being the Justice who compromised the Court's integrity and secrecy. Had the Republicans known about these letters, as scholars do

45. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870) (the First Legal Tender case).

46. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS, AND ACHIEVEMENTS; AN INTERPRETATION* 50–52 (Garden City Publ'g Co. 1936) (1928). He also stated that *Dred Scott* was one of these cases. *Id.* at 50.

47. *See id.* at 51–52.

48. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 469 (1857) (Grier, J., concurring).

today, they would have been useful campaign tools in 1858 and 1860, but it is unlikely that they would have substantially changed the nation's politics.

Farber also makes an argument that Taney was somehow playing politics to support Buchanan in his intra-party conflict with Stephen A. Douglas over the Lecompton constitution in Kansas.⁴⁹ The only problem with this analysis is that the Lecompton constitution was not written until September 1857, which was six months *after* the *Dred Scott* decision was announced.⁵⁰ Moreover, the controversy over the Lecompton constitution did not emerge until the fall of 1857, well after Buchanan was in office.⁵¹ Buchanan and Douglas were rivals in 1856, but the break between them did not come until early December 1857, when Douglas “stormed into the White House to confront Buchanan on the ‘trickery and juggling’ of this Lecompton constitution.”⁵² Indeed, as late as October, the governor of the Kansas Territory, Robert J. Walker, believed that Buchanan would not support the Lecompton constitution because it was “a vile fraud, a bare counterfeit.”⁵³ The break between Douglas and Buchanan, in late 1857 and early 1858, was over the Senator’s opposition to Lecompton because it was “fraudulent.”⁵⁴ Douglas opposed the Lecompton constitution not because it supported slavery—Douglas repeatedly asserted that he did not care if slavery was voted up or down—but because the fraud and rigged elections attached to it made a mockery of popular sovereignty. None of these issues had anything to do with Taney’s opinion in *Dred Scott*.⁵⁵

Thus, Taney’s opinion cannot be seen as the Chief Justice siding with one Democrat—Buchanan—in an intraparty dispute with another Democrat—Douglas—because in March 1857, the dispute did not exist. Douglas, like Buchanan, accepted the legitimacy of Taney’s major point—that Congress could not ban slavery in the territories. That was the essence of Douglas’s position that the issue of slavery in the territories should be decided by popular sovereignty. Other than the fraud tied to the Lecompton constitution, the only dispute between Buchanan and Douglas was when popular sovereignty could constitutionally take effect. Douglas wanted the territorial legislatures to decide the issue, while Taney agreed with Buchanan that a ban on slavery could only happen at the time of statehood.⁵⁶ Farber

49. Farber, *supra* note 2, at 41.

50. See FRANCIS H. HELLER, *THE KANSAS STATE CONSTITUTION: A REFERENCE GUIDE* 2 (1992).

51. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 165–69* (1988).

52. *Id.* at 166.

53. *Id.* at 165.

54. *Id.* at 166.

55. See *id.* at 162–69.

56. James Buchanan, Inaugural Address (Mar. 4, 1857), in 10 *THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE* 105–06 (John Bassett Moore ed., 1910).

says this means Taney was siding with Buchanan against Douglas. But, had Taney reached the opposite conclusion—that the territorial legislature could ban slavery through popular sovereignty—then Farber or someone else would argue that Taney was impermissibly siding with Douglas against Buchanan. Whatever Taney said would have supported one set of political players or another. But this does not prove that Taney reached the conclusions he did because he favored one faction among the Democrats rather than the other.

Thus, when we look at Farber’s arguments about the illegitimacy of the decision, they turn out to be not very impressive. Originalism was not an unheard of interpretive tool, and Taney’s massive historical analysis of the rights of blacks at the Founding was an impressive marshaling of evidence. We might disagree with Taney’s conclusions. As an historian I would argue he should have been more nuanced in his use of history. But, neither his analysis nor his conclusions that most of the Founders did not contemplate black citizenship were embarrassing or obviously wrong. Clearly most of the Southerners at the Convention did not imagine blacks serving in Congress, arguing cases before the Supreme Court, becoming officers in the Army, or serving on federal juries. The earliest Congresses, in which a significant number of Founders served, banned blacks from serving in militia in the Militia Act of 1792⁵⁷ and banned them from becoming citizens in the first Naturalization Act.⁵⁸ This illustrates that a majority of political leaders of the Founding generation did not see blacks as citizens, even though free blacks voted on the same basis as whites in about half the states when the Constitution was ratified.⁵⁹ Taney’s argument that the Constitution protected slavery was not novel, and it was not incorrect. As for Buchanan’s correspondence with Catron and Grier, it had no meaningful effect on the outcome of the case, although it did taint Buchanan’s own inaugural address. But, that is an issue of politics, not jurisprudence.

III. DID *DRED SCOTT* CAUSE THE CIVIL WAR?

The idea that a Supreme Court decision caused the Civil War seems patently silly. The Civil War resulted from secession. And *Dred Scott* was

57. Militia Act of 1792, ch. 33, 1 Stat. 271 (1792).

58. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790). See also Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 521–22 (1998) (discussing Congress’s first Naturalization Act).

59. In 1787 free blacks could vote in Massachusetts, New Hampshire, New York, New Jersey, Pennsylvania, and North Carolina. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 573–74 (1857) (Curtis, J., dissenting); *Hobbs v. Foggs*, 6 Watts 553, 560 (Pa. 1837).

surely not the cause of secession. Secessionists and southern nationalists⁶⁰ loved the decision. There is not, as far as I can tell, a single complaint about *Dred Scott* in any of the southern declarations explaining secession. Had the North seceded, we could argue that *Dred Scott* was a factor, since it was so unpopular in the North. But, no Southerners were pushed out of the Union by *Dred Scott*, which they loved.

The southern states claimed they were leaving the Union because they had been denied meaningful access to the federal territories. The southern states made these arguments despite the Court's decision opening all of the federal territories to slavery and the Court's emphatic assertion that Southerners had a constitutional right to take slaves into the territories.⁶¹ The seceding states argued that Northerners had effectively prevented them from enjoying the rights *Dred Scott* gave them. Whether these assertions are true or not is irrelevant; clearly southern leaders believed them to be true, or at least believed that these claims were rhetorically useful to gain popular support for secession. Furthermore, in their secession documents the southern states point to the fact that Republicans and Lincoln had promised to prevent the spread of slavery into the territories. In other words, *Dred Scott* did not cause secession; rather, it was the Republican refusal to accept the legitimacy of *Dred Scott* that helped lead to secession. Southerners left the Union not because they disliked Taney's decision, but because a majority of Northerners refused to accept it. This is not the fault of Taney or the Court.

A number of seceding states also complained that their citizens could not travel into the North with their slaves. Southerners argued that the Northern states were unconstitutionally denying their rights as U.S. citizens under the Commerce Clause,⁶² the Full Faith and Credit Clause,⁶³ and the Privileges and Immunities Clause.⁶⁴ These complaints were based on cases and statutes across the North which led to freedom for any slave voluntarily brought into a free state by his or her master.⁶⁵ The decision in *Dred Scott* gave Southerners two reasons to hope that the Court would soon side with them on this issue.

Scott's master—the army physician Captain John Emerson—had taken him to the free state of Illinois.⁶⁶ Had Scott sued for freedom in Illinois he might have won his liberty in the state court. Similarly, he might have won his liberty in a court in the Wisconsin Territory when Dr. Emerson was

60. This is a term used for Southerners who wanted to create a separate southern nation, and not for Southerners who were "nationalists" in favor retaining a unified United States.

61. *Dred Scott*, 60 U.S. (19 How.) at 451–52.

62. U.S. CONST. art. I, § 8, cl. 3.

63. U.S. CONST. art. IV, § 1.

64. U.S. CONST. art. IV, § 2, cl. 1.

65. See generally FINKELMAN, AN IMPERFECT UNION, *supra* note 23.

66. *Dred Scott*, 60 U.S. (19 How.) at 397.

stationed at Fort Snelling. However, he failed to make a claim in either place, and did not assert his right to freedom based on residence in a free jurisdiction until he had been taken back to Missouri. The trial court in Missouri upheld his claim to freedom in 1850, based on state precedents dating from just after Missouri became a state.⁶⁷ However, two years later, in a blatantly political decision, the Missouri Supreme Court reversed the trial court in Dred Scott's case, rejected its older precedents, and declared that it would no longer emancipate slaves who had lived in free jurisdictions.⁶⁸ When Scott was transferred to the late Dr. Emerson's brother-in-law, John F.A. Sanford,⁶⁹ Scott was able to revive his case in federal court, because Sanford lived in New York. Thus, Scott sued in diversity, claiming he was a free citizen of Missouri, being illegally deprived of his liberty by a citizen of New York.⁷⁰

Assuming that the Court had jurisdiction in this case, and that Scott could sue in diversity,⁷¹ a different Supreme Court could have legitimately held that Scott gained his freedom when Dr. Emerson took him to Illinois, and that once free he was always free. A different set of Justices might have asserted that Scott had an equitable claim to freedom because he had in fact been free since the early 1830s, and that the Supreme Court had the power and the obligation to enforce this claim. Except for the issue of jurisdiction, this would have been a plausible and constitutionally legitimate outcome to the case. But, the Taney Court took the opposite view, on two separate grounds. Taney and five of his brethren believed that Scott could not sue in diversity and thus there was no jurisdiction to hear the case.⁷² Justice

67. See *Winy v. Whitesides*, 1 Mo. 472 (1824) (holding that a slaveholder lost her right to her slave by residing in Illinois). This case is discussed in FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 217–23.

68. *Scott v. Emerson*, 15 Mo. 576 (1852). This case is discussed in FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 222–28.

69. The case name is *Dred Scott v. Sandford* because the Supreme Court clerk misspelled the defendant's name. The defendant, John F.A. Sanford, actually spelled his name with only one "d" and not two. FEHRENBACHER, THE DRED SCOTT CASE, *supra* note 31, at 2.

70. *Dred Scott*, 60 U.S. (19 How.) at 400.

71. It seems clear that free blacks were never "citizens" of Missouri before the Civil War, and thus, Scott's claim of diversity jurisdiction was problematic. I have argued elsewhere that it is impossible to argue that, even if free, Scott was a citizen of Missouri. See Finkelman, *supra* note 4, at 1219–52.

72. The vote count here is complicated. The four Associate Justices from the South (Wayne, Daniel, Campbell, and Catron) all explicitly endorsed Taney's conclusions on black citizenship. See *Dred Scott*, 60 U.S. (19 How.) at 454–56 (Wayne, J., concurring); *id.* at 469–93 (Daniel, J., concurring); *id.* at 493–518 (Campbell, J., concurring); *id.* at 518–29 (Catron, J., concurring). Nelson (of New York) denied the Court had jurisdiction on other grounds, and thus concurred with Taney on the outcome of the case—that Dred Scott was still a slave—but not on black citizenship or congressional power over the territories. See *id.* at 457–69 (Nelson, J., separate opinion). Grier (of

Nelson, with Grier concurring, ignored the jurisdictional question on black citizenship, and simply held that under the existing precedent of *Strader v. Graham*,⁷³ the Supreme Court could not question Missouri's determination of Scott's status.⁷⁴ Through either theory, Southerners gained a huge jurisprudential victory.

The Taney position meant that no black—slave or free—could ever sue in a federal court in diversity, and that except for a small number of cases coming out of the District of Columbia, the territories, or admiralty jurisdiction, it would be impossible for a black to ever assert a freedom claim in a federal court. Under Taney's opinion there would be no more freedom suits by people like Dred Scott brought into a federal court.

Justice Samuel Nelson's opinion was helpful to the South in two other ways. By relying on the earlier holding in *Strader*, Nelson and Grier reaffirmed that the Supreme Court would not force the slave states to give full faith and credit to free-state decisions, statutes, and constitutional provisions emancipating visiting slaves. This was a big victory for Southerners.

Equally helpful to the South was the last paragraph of Justice Nelson's concurring opinion.⁷⁵ Nelson was from New York, which since 1841 had taken a very firm position of emancipating any slave brought within its borders.⁷⁶ Nelson was surely aware of the *Lemmon* case,⁷⁷ then making its way through the New York courts.⁷⁸ That case involved Jonathan and Juliet Lemmon, who in 1852 were moving from Virginia to Texas.⁷⁹ The best route was to take a steamboat to New York City, spend three nights there, and then take another boat that would travel directly to New Orleans.⁸⁰ Indeed, this was the only way to sail directly from the east coast to New Orleans. In New York City the Lemmons were hauled into court for locking up their slaves, which the trial court referred to as eight "colored persons."⁸¹ The eight slaves were then freed and quickly went north to become colored Canadians.⁸² An appeal to New York's intermediate court was pending

Pennsylvania) explicitly concurred with both Nelson and Taney, which was logically impossible, so presumably he agreed with Taney on the citizenship question. *See id.* at 469 (Grier, J., concurring).

73. *Strader v. Graham*, 51 U.S. (10 How.) 82 (1850). This case is discussed in FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 271–78.

74. *Dred Scott*, 60 U.S. (19 How.) at 452–54 (Nelson, J., separate opinion) (discussing *Strader*).

75. *Id.* at 468–69.

76. *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 131–36.

77. *Lemmon v. People*, 20 N.Y. 562 (1860).

78. *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 296–97.

79. *Lemmon*, 20 N.Y. at 566.

80. *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 296–97.

81. *People ex rel. Napoleon v. Lemmon*, 7 N.Y. Super. Ct. (5 Sand.) 681, 706 (1852). *See also* FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 297.

82. FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 297.

when *Dred Scott* was decided.⁸³ Everyone involved assumed the case would eventually reach the U.S. Supreme Court and test the right of the free states to emancipate slaves in transit. In their secession documents a number of states mentioned this issue as a reason for secession.⁸⁴ But, the complaints of the secessionists on this issue were not a result of *Dred Scott*. Indeed, at the end of his opinion, Justice Nelson strongly implied that when the *Lemmon* case or some similar case reached the Court, the Justices would support the slave owners. Thus, Nelson wrote:

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.⁸⁵

This analysis makes clear that *Dred Scott* had absolutely nothing to do with secession, unless one makes the argument that *Dred Scott* caused secession because without it Lincoln would have never become a nationally known candidate and thus been elected president. It is true that Lincoln rose to prominence attacking the decision, but that hardly makes Taney's decision among the worst in our jurisprudence.

IV. WAS THE CASE WRONGLY DECIDED?

Professor White argues that one measure of a "Supreme Mistake" is that the outcome is "pernicious."⁸⁶ In every other case discussed in this symposium the "prosecutor" argues that the final holding of the case—the outcome—was wrong and should have come out the other way. But, this is not truly the case here. It is hard to argue that *Dred Scott* was wrongly

83. The appeal from the trial court would be decided in December 1857. See *Lemmon v. People ex rel. Napoleon*, 26 Barb. 270 (N.Y. Gen. Term. 1857), *aff'd sub nom*, *Lemmon v. People*, 20 N.Y. 562 (1860).

84. By this time New York's highest court had affirmed the original decision, emancipating the slaves. See *Lemmon*, 20 N.Y. at 632; see also FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 296–332.

85. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 468 (1857) (Nelson, J., separate opinion).

86. G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197, 198 (2011).

decided. As I will sketch out below, it is truly difficult to determine how the Court could have reached any other conclusion. Even Professor Farber admits that the outcome—that Dred Scott remained a slave—is not particularly outrageous.⁸⁷ Farber seems to be simply arguing that the Court should have reached this result on other grounds. In hindsight it is clear that that would have been the most prudent way to act. But, as I will outline below, Chief Justice Taney and his brethren believed that Taney’s sweeping opinion would not only be accepted by most Americans, but that it was a judicious and economical way of ending the divisive debate over slavery in the territories.

Initially the Court was going to decide the case on very narrow grounds, based on *Strader v. Graham*.⁸⁸ *Strader* was a suit between a slave owner (Graham) and the owner of a steamboat (Strader).⁸⁹ The steamboat had taken three of Graham’s slaves to Ohio, and they then escaped to Canada.⁹⁰ Graham sued under a Kentucky law for the value of the lost slaves, and the appeals of this case first reached Kentucky’s highest court in 1844.⁹¹ Strader argued that the slaves had previously been allowed to go to Indiana and Ohio where they worked as musicians, and thus they were free.⁹² If this were true, then Strader had not harmed Graham because the three blacks were not actually his slaves. The Kentucky Court of Appeals held that the status of the three slaves was not at issue, and that even if they had been allowed to visit the North, they remained slaves when they returned to Kentucky.⁹³ If the slaves themselves had sued in Kentucky they might have won, because, since 1820,⁹⁴ Kentucky courts had been freeing slaves who had lived or worked in the free states.⁹⁵ But, in *Strader* the Kentucky court was not willing to rule on their freedom while they were not before the courts, and thus Strader was held liable for the value of Graham’s slaves.⁹⁶

Strader appealed to the U.S. Supreme Court where he again lost. In *Strader v. Graham* the Court effectively held that the states were free to decide the status of all people before their courts.⁹⁷ Since the Kentucky

87. Farber, *supra* note 2, at 163.

88. *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851).

89. *Id.* at 83.

90. *Id.*

91. *Graham v. Strader*, 44 Ky. (5 B. Mon.) 173 (1844).

92. *Id.* at 174–75. See also *Strader*, 51 U.S. (10 How.) at 93, 97.

93. *Graham*, 44 Ky. (5 B. Mon.) at 183–84.

94. See *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467 (1820); FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 192.

95. As late as 1853, Kentucky would uphold the freedom of slaves taken to the North for a number of months. See *Ferry v. Street*, 53 Ky. (14 B. Mon.) 355 (1853); FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 201–05.

96. *Graham*, 44 Ky. (5 B. Mon.) at 187.

97. *Strader*, 51 U.S. (10 How.) at 96–97. See also FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 273.

court decided that the three blacks were slaves, the Supreme Court could not intervene.⁹⁸ The facts of *Strader* were very similar to those in *Dred Scott*. Like Graham's slaves, Scott had lived in two free jurisdictions—Illinois and the Wisconsin Territory (present-day Minnesota)—and he might have sought his freedom in either place. Instead, he returned to Missouri where the state court held him to be a slave. Thus, the Supreme Court initially planned to simply affirm Scott's status, based on Missouri law and the precedent in *Strader*. Had the Court done this almost no one would remember the case, and it would certainly not be considered one of the Court's worst decisions. The Supreme Court in *Strader* simply allowed the states to decide the status of people living in their states. Had the Court followed *Strader*, as the Justices initially planned, the *Dred Scott* outcome would have been exactly the same as Taney's *Strader* opinion. This was the position of Justice Samuel Nelson's separate opinion.⁹⁹

Almost every scholar, including Farber, agrees that Nelson's opinion was legally and constitutionally legitimate and even correct. Even the Republican critics of the opinion had no great problems with the part of Nelson's opinion which held Scott was a slave. Thus, we have the oddity that Professor Farber would like to make *Dred Scott* into a "Supreme Mistake" while admitting that the outcome is probably correct, or that it was at least not unreasonable, and that under the laws and jurisprudence of the time, that outcome was neither pernicious nor outside the realm of constitutional legitimacy. I cannot imagine how a case can be a "Supreme Mistake" if it ends with a correct result.

If *Dred Scott* was wrong—a "Supreme Mistake"—it cannot be because of the narrow result. It must be because Chief Justice Taney's reasoning was supremely wrong, or because, as Farber argues, his opinion was overreaching. The issues here are about Taney's jurisdictional arguments—his arguments about the territories, his arguments about race, and most of all, his assertions that the Constitution was pro-slavery.

V. WAS THE JURISDICTIONAL ISSUE CORRECTLY DECIDED?

Modern Americans are probably most offended by Taney's argument that Dred Scott had no standing to sue because blacks could not be citizens of the United States. This is a complicated question, and one in which Taney probably overstated the case. Taney argued that at the Founding

98. See FINKELMAN, AN IMPERFECT UNION, *supra* note 23, at 272.

99. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 456–69 (1857) (Nelson, J., separate opinion).

almost all blacks in America were slaves, that those few who were free were treated as second-class persons, and that they had “no rights” that whites needed to respect.¹⁰⁰ However, as Justices John McLean and Benjamin R. Curtis noted in dissent, free blacks were allowed to vote in some states at the Founding, and thus were presumably citizens of those states.¹⁰¹ Since federal citizenship derived from state citizenship under the Constitution, then some blacks, however few, must have been citizens of the United States at the Founding. Taney would have been on much stronger ground in asserting that in 1857 (at the time he was writing this opinion) that in some of the Northern states and all of the Southern, free blacks were not citizens of the United States because they were not citizens of the states in which they lived. This was certainly true in Missouri, where free blacks had almost no rights and many disabilities, and thus were surely not citizens. Thus, Taney’s assertion that blacks could never be citizens of the United States is an example of overreaching—although it does not affect the outcome of the case or Dred Scott’s status.

However, it is also abundantly clear that Taney was correct that no blacks were fully equal to whites at the Founding.¹⁰² Even where blacks could vote, they were not equal. They were often barred from public schools, the state monitored their movements, and they were even forced to carry identification showing that they were free. Even in Massachusetts, where blacks could vote on the same basis as white men, there were curfews for free blacks, they were excluded from public schools, excluded from all the state’s colleges, could not marry whites, and faced some differential punishments. Even where blacks voted, it was clear that they only had those rights which the white majority granted them. After 1800, New Jersey, Pennsylvania, North Carolina, and Tennessee completely disfranchised blacks, while New York provided special requirements for black voters that white voters did not have to meet.¹⁰³ Taney may have exaggerated the disabilities of free blacks at the Founding, and surely some blacks were citizens of their states (and thus of the nation), but he did not overstate the case for the vast majority of free blacks in the nation. As the refusal to enfranchise blacks in a number of states at the Founding and the later

100. *Id.* at 404–05 (majority opinion).

101. *Id.* at 572–74 (Curtis, J., dissenting). *See id.* at 529–64 (McLean, J., dissenting).

102. For an overview of the limitations of black rights at the Founding, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986), and Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993).

103. For a general background of the chronology of black rights in the United States during the 1800s, see Finkelman, *supra* note 102. New Jersey disfranchised blacks and women in 1807. Act of Nov. 16, 1807, 1811 N.J. Laws (Bloomfield) 33 (amended 1875). Pennsylvania, Tennessee, and North Carolina disfranchised free blacks in the 1830s through new constitutional provisions. Finkelman, *supra* note 102, at 420; Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 489 (1997); JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790–1860*, at 110–13 (1943).

disfranchisement of blacks show, Taney would have been on stronger ground in simply asserting that for most of the nation—and for the overwhelming majority of blacks who were in fact slaves—during and after the Founding almost all blacks in the new nation were “so far inferior, that they had no rights which the white man was bound to respect.”¹⁰⁴

Taney was also clearly correct about Dred Scott’s citizenship. Scott sued in diversity.¹⁰⁵ That is, he sued in federal court on the theory that he was a citizen of the state of Missouri and that the defendant, John F. A. Sanford, was a citizen of New York.¹⁰⁶ Clearly, however, Dred Scott was emphatically *not* a citizen of Missouri, even *if* he was legally free. Free blacks in Missouri—and in all of the other fourteen slave states—were not citizens of those states.¹⁰⁷ At every turn they were restricted—not merely on the right to vote or hold office. Free blacks in Missouri and other slave states had to pay special taxes, needed special permission to live in the states, were unable to leave the state and return, and were denied access to education—not merely public education, but *any* education. Most of the slave states made it a crime to educate any blacks, slave or free. The slave states prohibited free blacks from entering numerous professions or owning certain kinds of property. Under some circumstances the slave states even prohibited free blacks from legally marrying or raising their own children. Because a marriage is a contract, no slave could ever be legally married, even if the master provided a minister, a judge, or some other official to perform a marriage ceremony. Marriages of slaves had no validity at law, and the parties to slave marriages had no legally enforceable rights. As Thomas R.R. Cobb noted in his authoritative treatise on the law of slavery in 1858, “[t]he inability of the slave to contract extends to the marriage contract.”¹⁰⁸ Thus, a free black man married to a slave woman had

104. *Dred Scott*, 60 U.S. (19 How.) at 407 (majority opinion).

105. *Id.* at 400.

106. *Id.*

107. The literature on the limitations of free blacks in the antebellum South is huge. All the slave states had elaborate codes for the regulation of free blacks. The specific limitations on free blacks in Missouri are set out in Finkelman, *supra* note 4. For the larger literature on the limitations of free blacks in the South, see IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1974); FINKELMAN, *AN IMPERFECT UNION*, *supra* note 23; JOHN HOPE FRANKLIN, *supra* note 103; MICHAEL P. JOHNSON & JAMES L. ROARK, *BLACK MASTERS: A FREE FAMILY OF COLOR IN THE OLD SOUTH* (1984); JUDITH KELLEHER SCHAFFER, *BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846–1862* (2003); and Finkelman, *supra* note 102.

108. 1 THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 242–43 (Univ. of Ga. Press reprint, 1999) (1858). *See id.* at 242–46 (detailing the limitations on slave marriages).

absolutely no control over his children or his wife. His wife's master could sell his children or his wife whenever he wanted. He could also forbid the free black husband from even seeing his slave wife.¹⁰⁹ All marriages involving slaves were marriages in name only, and had no status at law. Thus, Dred Scott's marriage to the slave Harriet had absolutely no legal validity.

Dred Scott, even if free, was certainly not a citizen of Missouri. Thus, Taney was correct that the Court did not have jurisdiction in the case. Dred Scott had no standing to sue. Taney surely overstated the limitations on black citizenship because in a half-dozen or so northern states blacks clearly had state citizenship.¹¹⁰ But, Taney was not entirely wrong in concluding that for most purposes free blacks in the United States were not citizens and had not ever been considered citizens.

There is yet another aspect of the citizenship question. *If* Dred Scott was a citizen, how did he become a citizen? The Naturalization Act of 1790 prohibited the naturalization of blacks.¹¹¹ Dred Scott was born a slave, and clearly no one in 1857 believed that slaves were citizens. So how did Dred Scott become a citizen of Missouri or the United States even if he had gained his freedom by living in Illinois or the Wisconsin Territory? He was not a native-born citizen and he had never been naturalized. There was no legal theory that would have made Dred Scott a citizen in 1854 when he filed suit in federal court. Thus, again, the issue is this: was Taney correct in holding that Dred Scott was not a citizen and thus was unable to sue in federal court? The answer is surely yes.

VI. DID THE COURT OVERREACH IN STRIKING DOWN THE MISSOURI COMPROMISE?

The other major critique of Taney's opinion involved the issues of territorial governance and Taney's holding that Congress could not ban slavery in the territories. I agree completely with Professor Farber that

109. These same circumstances would have applied to free women married to slave men, except that her children would have been free because she was free.

110. In 1860 blacks had the same voting rights as whites in five states: Massachusetts, Vermont, New Hampshire, Maine, and Rhode Island. See Finkelman, *supra* note 102, at 420–21, 425. Blacks with a sufficient amount of property could vote in New York, and blacks could vote in elections involving appropriates for public schools in Michigan. *Id.* at 425 nn.g & i. By 1860, free blacks had held elective or appointive office in Ohio, New York, New Hampshire, Vermont, Massachusetts, and Rhode Island. See Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 174 (1994); Finkelman, *supra* note 102, at 477; see also ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619–1895: FROM THE COLONIAL PERIOD TO THE AGE OF FREDERICK DOUGLASS (Paul Finkelman ed., 2006). At a minimum, blacks were citizens of any states where they could hold office or vote. But, the number of blacks in these states was miniscule in comparison with the four million slaves and quarter of a million free blacks in the South who had almost no legal rights at all.

111. See Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790).

Taney's assertion that Congress lacked a general power to regulate the territories is nonsensical.¹¹² It is poorly reasoned and absurd. It is an embarrassing attempt to make an argument that should never have been made. Even Justice Catron specifically refused to accept it in concurring with the rest of Taney's opinion.¹¹³ It was also an argument that Taney did not really have to make. Taney's narrower argument—that Congress could not ban slavery in the territories—was much stronger.

Taney's argument on slavery in the territories was coherent and reasonable for 1857, even though we find it immoral and offensive today. Taney argued that slaves were property—which everyone on the Court and in Congress agreed was true. He also argued that the Constitution was pro-slavery. Republicans rejected this, as did some abolitionists, like Frederick Douglass. But even most Republicans agreed that Congress had no power to end slavery in the states where it already existed. However, almost all Southerners agreed with Taney that the Constitution was pro-slavery, as did radical abolitionists like William Lloyd Garrison and Wendell Phillips. Many northern conservatives, from Democrats like James Buchanan to former Whigs like Millard Fillmore, agreed that the Constitution obligated the North to protect slave property in a variety of circumstances.¹¹⁴ Taney argued that the Fifth Amendment prohibited the taking of private property without due process of law and just compensation.¹¹⁵ Thus, he argued that a law which took constitutionally protected property away from Southerners merely because they entered a federal territory was not a legitimate law. He wrote:

[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.¹¹⁶

112. Farber, *supra* note 2, at 21.

113. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 383, 519–20 (Catron, J., concurring).

114. See generally PAUL FINKELMAN, MILLARD FILLMORE (2011).

115. *Dred Scott*, 60 U.S. (19 How.) at 450 (majority opinion).

116. *Id.*

If slaves were protected property under the Constitution—as Taney found, as almost every white Southerner believed, as many northern abolitionists reluctantly concluded, as many northern Whigs and Democrats accepted, and as a huge number of modern historians assert—then surely it was a denial of due process for Congress to pass legislation that took such property away from masters without any trial, hearing, or other aspect of due process of law. Even *if* Congress was on firm constitutional ground in banning slavery in the territories, it was unconstitutional to confiscate this property merely for the violation of the territorial boundary.

Dred Scott’s owner took him to a military base in the Wisconsin Territory where slavery was prohibited under the Missouri Compromise.¹¹⁷ The Compromise was absolutely silent on what happened when slaves were brought into the territory. There was no process for determining if there were exceptions to the ban. One can imagine all sorts of ways that slaves might have entered the free territory where some exception might be necessary. One could also certainly imagine that any taking of slave property under the Missouri Compromise required some sort of due process hearing.

Finally, Taney’s decision went to the fundamental unfairness—from the perspective of Southerners—of a ban on slavery. The national territories were collectively owned by all Americans. There was something deeply unfair about telling people in half the nation that they could not settle in the territories with their most valuable and economically productive possessions. Striking down the Missouri Compromise ended that unfairness.

Professor Farber argues that Taney overreached in striking down the Missouri Compromise.¹¹⁸ It was unnecessary for the decision and surely suspect since he had already determined that the Court lacked jurisdiction to hear the case because Dred Scott had no standing to sue. One might, however, view his conclusions on this issue as prudent and legitimate. Taney could have dodged this issue, only to have it come up again in a few more years. Judicial economy, if nothing else, dictated that Taney deal with the territorial issue and remove it from the political debate. Beyond that, Taney’s decision made great political sense at the time. The nation wanted a final answer that would end the divisive and seemingly interminable debate over slavery in the territories. Taney hoped to do this in a way that was entirely consistent with American politics at the time.

In 1820, in the Missouri Compromise, Congress banned slavery in most of the western territories.¹¹⁹ With the exception of the formal organization

117. *Id.* at 394; *see also* Missouri Compromise, ch. 22, 3 Stat. 545 (1820).

118. Farber, *supra* note 2, at 19.

119. Missouri Compromise §§1–8.

of the Oregon Territory in 1848,¹²⁰ the passage of the Missouri Compromise was the *last* time Congress ever limited slavery in the territories until the Civil War. After 1820 Congress annexed Florida and Texas, allowing slavery in both. In 1850 Congress allowed slavery in *all* the new territories acquired from Mexico, except California, which entered the Union as a free state.¹²¹ The status of slavery in California was not dictated by Congress; however, it was consistent with the wishes of the settlers.¹²² In 1854 Congress repealed the Missouri Compromise for all the territory left from the Louisiana Purchase *except* Minnesota, where Dred Scott had lived.¹²³ When the Court heard *Dred Scott*, slavery was legal in every federal territory except Minnesota and the Oregon country (modern day Oregon, Washington, and part of Idaho). These were the only territories that Taney's opinion affected. Congress had already allowed slavery in all of the rest of the West. In 1856 the new Republican party ran a popular national hero, John C. Frémont, for president on a ticket that promised to ban slavery in the territories.¹²⁴ This party lost. Thus, for Taney, the ruling on slavery in the territories simply reaffirmed what Congress had done in 1850 and 1854, and what the electorate had decided in 1856. In this context, was it so outrageous for Taney to conclude that Congress could not ban slavery in the few remaining territories?

As early as the 1840s, members of Congress had been suggesting that the Supreme Court decide the issue of slavery in the territories. This idea began not with a pro-slavery Southerner, but with a moderate northern Democrat, Senator Lewis Cass of Michigan, who represented the most

120. The act establishing the Oregon Territory in 1848 applied the Northwest Ordinance to the territory, and thus by implication banned slavery there. Act of Aug. 14, 1848, 9 Stat. 323. Almost everyone in the nation believed that Oregon was effectively, although not explicitly, covered by the Missouri Compromise, and thus extending the ban on slavery in the Northwest Ordinance was a more or less pro forma implementation of what everyone at the time assumed to be the rule for Oregon. Given the territory's distance from the South—it was further away from the South than any other territory—it is not surprising that Congress did this, even though at the time the South had a majority in the Senate and there was a pro-slavery southern president—James K. Polk—in the White House.

121. For a discussion of the passage of the Compromise of 1850 and its implications for slavery, see FINKELMAN, *supra* note 114, at 101–25.

122. Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 857 (2011).

123. Act of May 30, 1854, ch. 59, 10 Stat. 277.

124. *Republican Party Platform of 1856*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29619#axzz1bZcmd029> (last visited Nov. 11, 2011).

racially progressive state in the Midwest.¹²⁵ By 1857 there was strong support for a constitutional decision that would take the divisive issue off of the political table. Taney accepted the challenge. It may have been a mistake to do so, but it was hardly outrageous.

VII. WHY DO WE HATE *DRED SCOTT*?

So, why do we hate *Dred Scott*? Why is it the most despised case in our constitutional canon? Why does Professor Farber so vigorously argue that it is our worst decision?

I think the answer is that we hate *Dred Scott* because it was in fact far closer to the truth than we want to admit. Taney described the Founding as a period when blacks were considered “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”¹²⁶ We hate the decision because it is embarrassing to remember that we had a pro-slavery constitution. Farber asserts that Taney was reading “his own racism into the Constitution.”¹²⁷ But he was not doing this. The racism was there at the Founding, as well as in 1857. Taney was merely reminding the nation that the Constitution was a slaveholder’s constitution, and that the United States was a slaveholder’s republic. Since 1788, with the exception of John Adams and John Quincy Adams, every president had been a slaveholder or a northern doughface—a northern man with southern principles. With the exception of about five years in the late 1820s and early 1830s, Southerners were a majority on the Supreme Court. Pro-slavery men dominated cabinets and Congress. Blacks had voted in a number of states on the same basis as whites in at the founding and in the 1790s. But in four of those states blacks had lost those rights.¹²⁸ We are uncomfortable admitting that in 1857 the value of slaves in the United States exceeded the value of any other type of private property except real estate. We do not like to admit—we would rather forget—that in the history of the Supreme Court leading up to *Dred Scott*, only two Justices—Gabriel Duvall and John McLean—had ever spoken out in favor of the rights of free blacks

125. See Roy E. Finkenbine, *A Beacon of Liberty on the Great Lakes: Race, Slavery, and the Law in Antebellum Michigan*, in *THE HISTORY OF MICHIGAN LAW* 83 (Paul Finkelman & Martin J. Hershock eds., 2006) (highlighting Michigan’s status as a “beacon of liberty”).

126. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

127. Farber, *supra* note 2, at 31.

128. Blacks had voted in New Jersey, Pennsylvania, and North Carolina at the Founding but later lost that right; in New York blacks voted on an equal basis with whites, but after 1821 the state maintained a property requirement for black voters but not white voters. Blacks voted in Tennessee when it became a state in 1796 but also lost that right in the 1830s. See generally Finkelman, *supra* note 102.

and against slavery in a Supreme Court opinion.¹²⁹ These were always dissents.¹³⁰ Except for a few minor cases, usually involving the interpretation of state law, the Supreme Court had always sided with slavery, not freedom. Even the famous *Amistad* case¹³¹ was not about black freedom, but about the interpretation of a treaty with Spain, and the correct understanding that the Africans on the ship were never legally slaves. We conveniently ignore, as Steven Spielberg did in his movie,¹³² that Justice Joseph Story ordered that the slave cabin boy on the ship be returned to his Cuban master. We forget that Chief Justice Marshall upheld the legality of the African slave trade¹³³ and that Justice Story ruled that the free states had no constitutional right to pass any legislation to protect free blacks from kidnapping or mistaken seizure under the Fugitive Slave Law.¹³⁴

We don't like Taney's opinion because it reflects, far more than we want to admit, the kind of constitution we had and the kind of country we had created. We wish to forget that the Constitution made slavery impregnable from abolition by political means. If nothing else, the requirement that three-quarters of the states ratify any amendment gave the slave states a perpetual guarantee that slavery could never be abolished by the national government. Had eleven slave states never seceded, *to this day* it would be impossible to end slavery by constitutional amendment.¹³⁵

Lincoln effectively attacked *Dred Scott* by arguing that it would lead to a nationalization of slavery: "We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme* Court has made *Illinois* a

129. A number of Justices had attacked the African slave trade in opinions; but, this commerce was easily distinguished from slaveholding itself. See for example, Justice Marshall's assertion in *The Antelope*, that while the African slave trade was "contrary to the law of nature," it was "consistent with the law of nations," and "cannot in itself be piracy." 23 U.S. (10 Wheat.) 66, 96, 120, 122 (1825).

130. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 659–74 (1842) (McLean, J., dissenting); *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 298–99 (1813) (Duvall, J., dissenting). On McLean's antislavery, see Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519 (2009).

131. *The Amistad*, 40 U.S. (15 Pet.) 518 (1841).

132. See *AMISTAD* (Dreamworks SKG 1997).

133. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 66 (1825) ("The African slave trade is contrary to the law of nature, but is not prohibited by the positive law of nations.").

134. See *Prigg*, 41 U.S. (16 Pet.) at 625–26.

135. In 1860 there were fifteen slave states. To outvote them would have required a sixty state union.

slave State.”¹³⁶ This was not unreasonable, given the political winds of the age. Lincoln helped reverse those winds, and rode his critique of *Dred Scott* to the White House. Because we venerate Lincoln—and properly so—we tend to buy his argument that *Dred Scott* was constitutionally wrong. Yet, at most, it constituted overreaching and an idiotic reading of the territories clause that was utterly unnecessary for the outcome or for any of the big constitutional questions that Taney tried to settle.

One final thought. My goal is not to rehabilitate *Dred Scott*, or Chief Justice Taney, but to place *Dred Scott* in its historical and constitutional context. Yet, there may be a silver lining in *Dred Scott* that we should consider. In *Dred Scott*, Chief Justice Taney held that the Constitution and the Bill of Rights applied to all federal jurisdictions—that the Constitution follows the flag. Sadly, the United States Supreme Court failed to follow this idea in the wake of the Spanish-American War. In the *Insular Cases* the Court held that the Constitution did not apply to the newly acquired territories, populated by the “colored people” in Cuba, Puerto Rico, and the Philippines.¹³⁷ Perhaps today, in 2011, it is worth revisiting *Dred Scott* to consider whether the Bill of Rights ought to apply to Guantanamo and other places where the flag flies.

136. Abraham Lincoln, “A House Divided”: Speech at Springfield, Illinois (June 16, 1858), reprinted in THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 467 (Roy P. Basler ed., 2d ed. 1953) (emphasis in the original).

137. For more on the *Insular Cases*, see Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283 (2007). See also Melvin I. Urofsky & Paul Finkelman, 2 A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 591–614 (3d ed. 2011).