WASHINGTON AND LEE
LAW REVIEW

Volume 42 Winter 1985 Number 1

# *Dred Scott* and *Brown v. Board of Education*: A Frances Lewis Law Center Colloquium

## WHAT WAS WRONG WITH *DRED SCOTT*, WHAT'S RIGHT ABOUT *BROWN*†

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No Supreme Court decision has been more consistently reviled than *Dred Scott v. Sandford.*[1] Other decisions have been attacked, even virulently, by both contemporary and later critics; other decisions have been overruled by constitutional amendment or by subsequent Court majorities. But of all the repudiated decisions, *Dred Scott* carries the deepest stigma.

If a proper criterion for evaluating a judicial decision is its success in achieving peaceable resolution of a social dispute, *Dred Scott* was a palpable failure; indeed, its critics then and now have plausibly claimed that the decision played a significant role in precipitating the Civil War.[2] If a proper criterion is its consistency with high ethical values, *Dred Scott* fails even more clearly. Chief Justice Taney's opinion for the Court recited the most explicit racist dogma that appears anywhere, before or since his opinion, in the pages of the United States Reports. In explaining why no black person, whether slave or free, could ever become a citizen of the United States, Taney relied on blacks' historic status "as beings of an inferior order...altogether unfit to associate with the white race...; and so far inferior, that they had no rights which the white man was bound to respect."[3]

Taney did mention the Declaration of Independence whose resounding proclamation of human equality has been a recurrent source of moral tension



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1. 60 U.S. (19 How.) 393 (1857).

2. *See, e.g.*, R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 327 (1949); D. POTTER, THE IMPENDING CRISIS 1848-1861, 291-93 (1976); S. KUTLER, THE *Dred Scott* DECISION: LAW OR POLITICS xvii (1967).

3. 60 U.S. at 407.

for white Americans regarding blacks; but Taney invoked the Declaration only to assert that "it is too clear for dispute, that the enslaved African race were not intended to be included."[4] His reasoning is almost comical:

> [I]f the language, as understood in that day, would embrace [blacks], the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation. Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.[5]

Thus Taney reads an unambiguous racism into the Declaration of Independence in order to acquit the Founding Fathers of the immorality of inconsistency.

As a matter of historic fact, the founders were inconsistent, were aware of their inconsistency and admitted it.[6] Thomas Jefferson, the draftsman of the Declaration, was explicit in this—and not simply in his private journals but in his widely circulated book, *Notes on Virginia*, which he wrote while Governor of Virginia and published while Minister to France.[7] Taney's account of the framers' state of mind was thus wrong; it was, if you will, too black and white.

Taney's account was, however, an accurate depiction of a belief about black status that was widely held and openly avowed among his contemporaries. By 1857, when Taney wrote, the conviction of blacks' innate inferiority and subhuman status had become an article of faith throughout the South. It was the premise on which the dominant apologists argued that black slavery was an inevitable, permanent institution and was, moreover, a "positive good."[8] Until around 1830 no reputable Southerner had been prepared to make this kind of public avowal. Before that time when slavery was publicly justified, it was only as a "necessary evil," always with the implication that sometime, somehow, the institution would be abolished.[9] There was deep hypocrisy in this stance since no political institution was working even remotely toward this prospect (though there were occasional schemes for gradual emancipation and for African colonization that were

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4. *Id.* at 410.

5. *Id.*

6. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 235-46 (1967); D.B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823, 273-84 (1975).

7. Referring to slavery, Jefferson wrote:

> [C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with wrath? Indeed, I tremble for my country when I reflect that God is just: That his justice cannot sleep forever....

T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 163 (1800).

8. G. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND 43-90 (1971).

9. W. L. N. ROSE, SLAVERY AND FREEDOM 22-27 (1982).

privately advanced and even publicly debated in Southern legislatures as late as 1832).[10] But by Taney's time this hypocrisy was ended in the South. And in the North, though there were active abolitionists demanding an immediate end to slavery, popular conviction of blacks' innate inferiority was also widespread.[11] Indeed, de Tocqueville pungently observed in 1835 that emancipated blacks were regarded with greater aversion and subjected to more overt indignities by Northern whites than black slaves were treated in the South; everywhere in America, he noted, blacks were "hardly recognized as sharing the common features of humanity."[12]

Thus a plausible case can be made that though Taney misconstrued the attitudes of the Founding Fathers, and though his views of blacks' status is morally repugnant today, nonetheless he aptly characterized the dominant valuation of blacks in his time—and as a matter of national signification, not simply as a regional spokesman. I want to emphasize this proposition because I believe that, unless we are prepared to admit its force, we cannot adequately evaluate what the Supreme Court did in the *Dred Scott* case. No matter how fervently we now believe that *Dred Scott* was wrongly decided, no matter how firmly the retrospective judgment of history condemns the decision, this condemnation has no adequate jurisprudential force unless we can specify how and why Taney and his fellow judges at that time should have reached a different decision in the case. If there is a constitutional law jurisprudence worthy of the designation, is must consist of more than inviting judges to toss dice toward the prospect of historic vindication. We now condemn *Dred Scott*; but how precisely should Chief Justice Taney have known this beforehand, so that he could have shaped his judicial conduct accordingly?

I do not intend to justify the *Dred Scott* decision. I believe the case was wrongly decided but not because it rested on a view of black people that I find morally repugnant (though it did so rest, and I do so find). The decision was wrong because it followed from an incorrect view of the judicial role in our society, a view that itself is morally untenable. But let me be plain. I am not setting out a hierarchy of immorality by which the degradations inflicted on blacks in our society become somehow less significant than judges' errors in comprehending their proper constitutional role. I mean only to suggest for constitutional lawyers that it is more important to identify standards that can reliably guide the conduct of judges looking toward an uncertain future than to issue general condemnations of the racist attitudes prevalent among earlier judges and the society of which they were part. Put another way, I am content to say that no future judge should act on the racist premises that Taney embraced. But his principle alone is insufficient

10. R. McCOLLEY, SLAVERY AND JEFFERSONIAN VIRGINIA 114-140 (2d ed. 1973); *see* L. BAKER, JOHN MARSHALL: A LIFE IN LAW 723-24 (1974) (describing Virginia legislative debate in 1832).

11. L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860, 15-29, 223-230 (1961); E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 261-300 (1970).

12. A. deTOCQUEVILLE, DEMOCRACY IN AMERICA 314 (J. Mayer & M. Lerner, eds., 1966).

to form a satisfactory guide for future judicial conduct by indicating what precisely was wrong in the Supreme Court's decision in the *Dred Scott* case.

To attain this, it is first necessary to explore the Court's decision in some detail—in effect, to build the strongest possible case for it. If, for this purpose, we step back from instinctive revulsion at the Court's effort to uphold black slavery, I believe we will see how comfortably the Court's opinion satisfies widely held current-day norms of constitutional interpretation, both in application of substantive doctrine and in judicial role conceptions. But—I repeat—I mean to bury *Dred Scott*, not to praise it. When we have seen how readily the decision fits contemporary jurisprudential standards, then we will also see how (and how extensively) these standards must be reworked in order to carry out a successful interment.

## I.

In 1834, John Emerson, a United States Army surgeon, was transferred from Missouri to Illinois.[13] He took along his slave, Dred Scott, notwithstanding that Illinois law prohibited slavery. Two years later Emerson was again transferred into what was then the Wisconsin Territory (and is now the state of Minnesota); Emerson again took Scott, though by the Missouri Compromise of 1820, Congress had forbidden slavery there. After several years Emerson sent Scott back to Missouri, a slave state. In 1846, Scott brought suit in a Missouri state court against Emerson's widow, claiming that his residence first in a free state and then in a free territory had effected his emancipation. Missouri legal precedent firmly supported Scott's contention and a state jury held for him. Mrs. Emerson appealed, however, and in 1852 the Missouri Supreme Court (by a two-to-one vote) overruled its precedent and refused to give comity to the Illinois or federal law. The majority explained their repudiation of precedent thus:

> Times are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.[14]

The spectre of heightened sectional conflict thus appeared on the very face of the record in the *Dred Scott* case.

Scott did not, however, directly appeal this state ruling to the Supreme Court—an appeal that would almost certainly have been fruitless in light of its recent decision mandating deference to state court choice of law rulings in such disputes.[15] Scott's attorneys decided instead to initiate, in effect, a

13. The factual background of the *Dred Scott* case is related in POTTER, *supra* note 2, at 267-69.

14. Scott v. Emerson, 15 Mo. Rep. 576, 586 (1852).

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

new proceeding in federal court. This jurisdictional move had become plausible because Mrs. Emerson had by then moved from Missouri and had transformed control of Scott to her brother, John Sanford, who lived in New York; Scott could thus sue Sanford in federal court under the diversity of citizenship clause in article III. In 1854 the federal court agreed that it had jurisdiction because of the parties' diverse citizenship, but ruled on the merits that Scott was still a slave;[16] Scott appealed to the Supreme Court. (One indisputable error committed by the Supreme Court in the case was its misspelling of Sanford's name in the United States Reports;[17] whatever the subsequent reception of *Dred Scott v. Sandford* in our jurisprudence, this error at least has been habitually repeated.)

If the Supreme Court had been intent on avoiding a broad or novel ruling in the case, there were many ways to do so. One particularly plausible route for this purpose would have been to rely on the relationship between the initial state court ruling and the subsequent federal court proceeding, and simply to apply the Supreme Court's prior holding requiring deference to the state court choice of law. This was indeed the initial impulse of a majority of the Justices; an opinion was prepared by Justice Nelson holding to this ground.[18] Ultimately, however, the other Justices abandoned this narrow ruling; when the case was finally decided on March 6, 1857, Justice Nelson filed this opinion but only for himself.[19] The others reached the momentous issues for which the case became notorious.

Every Justice on the Court wrote in the case—a fact that itself starkly symbolized the heightened fractiousness since the days when John Marshall had been regularly able to muster unanimity at least among his brethren if not in the country at large. Chief Justice Taney's opinion was styled the opinion of the Court though he spoke for a clear majority of six Justices only in holding (over two dissents) that Congress lacked constitutional authority to enact the Missouri Compromise of 1820 prohibiting slavery in the territories.[20] Taney also ruled that Scott could not sue in federal court because blacks, whether slave or free, were not citizens under the Constitution. Only four other Justices addressed this issue, two concurring with Taney and two dissenting; thus on this ground the Court's vote was three to two.[21] Nonetheless, Taney's opinion was popularly viewed as dispositive on the questions both of Scott's citizenship and of the constitutionality of the Missouri Compromise, and it is his opinion that most rewards close scrutiny.

First, the citizenship question. Historians examining the precedents have concluded that Taney was wrong and that Justice Curtis's dissent was an

16. *See* 60 U.S. at 400-01.

17. KUTLER, *supra* note 2, at xi n.3.

18. POTTER, *supra* note 2, at 272-73.

19. 60 U.S. at 457.

20. The six Justices in the majority were Taney, Wayne, Daniel, Grier, Catron and Campbell; the dissenters were McLean and Curtis. See the careful tally set out by George Ticknor Curtis, Justice Curtis' younger brother, reprinted in KUTLER, *supra* note 2, at 101-03.

21. The three were Taney, Wayne and Daniel, with McLean and Curtis dissenting.

22. POTTER, *supra* note 2, at 275; D. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE *Dred Scott* CASE IN HISTORICAL PERSPECTIVE 191-99 (1981).

accurate and devastating rebuttal of Taney's claim that blacks generally were excluded from citizenship when the Constitution was framed.[22] The historical record is indeed clear that blacks had then been fully enfranchised citizens in some Northern states. But this rebuttal misses the central thrust of Taney's argument—an argument that he tried to buttress with a patently erroneous historical gloss (a shoddy rhetorical technique that he was neither the first nor the last Supreme Court Justice to invoke).[23] Taney's central point was that, notwithstanding the apparent assumption in the Constitution that state and federal citizenship were the same, there was nonetheless a difference between the two statuses, and that state citizenship did not necessarily carry federal citizenship with it. Taney's explicit concern was that if state and federal citizenship were unitary, then a Northern state's action in giving citizenship to a black person would override legislative restrictions that Southern states had imposed on all blacks coming within their territorial jurisdiction. Thus, Taney observed, how could a Southern state enforce its laws against public speech or assembly by all blacks, slave or free, if Northern blacks could freely enter the South cloaked in the constitutional protection of federal citizenship?[24]

This argument presupposed that the Constitution directly vested in individuals, as citizens of the United States, specific rights against the states. The Supreme Court had not previously held this. The Court had ruled in 1833 that the Bill of Rights only restricted Congress, not the states;[25] but there was prior support, most notably in an 1823 circuit opinion by Justice Washington, for Taney's premise that the privileges and immunities clause in article IV, section 2, created federal citizenship rights that could be asserted against states.[26]

The fourteenth amendment did not overrule Taney's opinion on this score. The first sentence of section 1 did reject Taney's claim that blacks were not citizens of the United States; but the second sentence endorsed his premise that this citizenship as such implied fundamental rights for individuals, specific "privileges and immunities of citizens of the United State," that could be enforced against states.[27] The sponsors of the amendment did not credit Taney for this premise, though they repeatedly asserted in the congressional debates that they were not creating a novel constitutional doctrine in this provision but were instead simply reiterating Justice Washington's earlier construction of the privileges and immunities clause in article IV.[28]

This continuity in constitutional interpretation between Taney and the framers of the fourteenth amendment indicates that Taney's construction of

23. *See* Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 (criticizing "law-office" history in Supreme Court opinions).

24. 60 U.S. at 422-25.

25. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

26. Corfield v. Coryell, 4 Wash. CC., Fed. Case No. 3,230 (Cir. Ct. E.D. Pa. 1823).

27. U.S. CONST. amend. XIV, § 1.

28. *See* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Howard); *id.* at 1034, 2642 (statement of Representative Bingham); *see also* Burt, Miranda *and Title II: A Morganatic Marriage,* 1969 SUP. CT. REV. 81, 85-86, 90-91.

federal citizenship rights would not appear fanciful to his contemporaries and, because it was not fanciful, this construction could threaten precisely the Southern laws that Taney identified in his opinion—*if*, that is, blacks were considered citizens of the United States for purposes of article IV.

Of course this construction of article IV was not directly at stake in *Dred Scott*; the immediate question was whether Scott and Sanford were "Citizens of different States" for purposes of article III federal court jurisdiction. Taney could have held that blacks were citizens for this purpose without necessarily foreclosing a later, different construction of federal citizenship under article IV. Taney was not, however, writing a narrow opinion in *Dred Scott*. for this purpose Justice Nelson's opinion would have sufficed: but not for Taney; not for five other Justices; not in 1857. Taney and his concurring brethren were writing to save the Union from the "dark and fell spirit in relation to slavery" that palpably threatened, as the Missouri Supreme Court had put it, "the overthrow and destruction of our government."[29] Taney meant to reassure the South that its continued adherence to the Union would not mean that it was disabled from protecting its institution of slavery.[30]

Whatever the historic inaccuracies of Taney's claim that blacks were not considered citizens when the Constitution was written, he was on solid ground in claiming that the framers did not expect the Constitution to interfere with Southern states' formal authority or practical capacity to protect slavery.[31] The framers did not clearly anticipate the draconian measures that the South would later find necessary. The predominant view in 1787, among most of the delegates (South and North) at the Constitutional Convention, was that state policies toward slavery were becoming less restrictive; generous manumission statutes were becoming the norm throughout the South and hope seemed at least plausible for complete emancipation at some distant time, perhaps assisted by a national prohibition of slave importation that would fall within Congress's powers after 1808.[32]

This benign expectation proved false. Beginning in the 1820s and gathering force thereafter—partly in response to increased stridency among Northern abolitionists after 1830—Southern states enacted the prohibitions on speech and assembly that Taney cited as well as rigid restrictions on manumission and laws virtually forcing free blacks to leave the South.[33] Well

29. Emerson, 15 Mo. Rep. at 586.

30. FEHRENBACHER, *supra* note 22, at 287-88 (Taney's wish to reassure South).

31. D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 207-47 (1979 ed.).

32. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 503-05 (1969 ed., Norton Library) (remarks of various delegates to the Constitutional Convention) (hereinafter cited as NOTES OF DEBATES). In his NOTES ON THE STATE OF VIRGINIA, Jefferson had observed:

> I think a change already perceptible, since the origin of the present revolution. The spirit of the master is abating, that of the slave rising from the dust, his condition mollifying, the way I hope preparing ... for a total emancipation ... with the consent of the masters....

JEFFERSON, *supra* note 7, at 163; *see also* ROBINSON, *supra* note 31, at 225-28.

33. E. FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 40-42 (1980); ROSE, *supra* note 9, at 26-27.

before 1857, the South was racked by conjunctive fears of slave revolts, Northern abolitionist assault, and increasing electoral vulnerability in national political institutions.[34] The context of sectional relations had dramatically changed between 1787 and 1857.

Thus, when Taney set out to interpret the word "citizen" in the constitutional document, it was not at all implausible for him to conclude that the framers in 1787 had not asked themselves whether blacks would be included in that word—and certainly had not asked with regard to the unanticipated context of 1857. Given the care the framers took generally in the Constitution to protect Southern slavery from any potentially hostile exercise of national power, it was more than plausible to conclude, as Taney did, that the framers would have withheld federal citizenship from all blacks if the consequence of that bestowal would be to invalidate laws the South viewed as necessary to the preservation of black slavery. Justice Curtis's dissenting argument, based on the state citizenship status of blacks in 1787, was a mechanistic use of history without an adequate appreciation for full context which can make old words truly intelligible to new readers.

Taney's second major argument in his opinion, that Congress had no constitutional authority to prohibit slavery in the territories, was more vulnerable to historical refutation. Unlike the black citizenship question, successive Congresses from the first days of the Republic had construed the Constitution to provide precisely the authority that Taney denied. Indeed, the Continental Congress, acting under the Articles of Confederation, had banned slavery from the Northwest Territory in 1787, at the very moment when the Constitution was being drafted in Philadelphia;[35] and congressional authority for this action was repeatedly affirmed, from the reenactment of the Northwest Ordinance by the first Congress in 1789.[36] Thus it is difficult, as a matter of historical exegesis, to exclude authority to ban territorial slavery from the words of article IV, section 3: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...."[37]

Nonetheless, Taney struggled forward. His argument had three steps. The first seems strained almost to the point of silliness: that the general language of article IV was intended only to apply to territories actually or imminently belonging to the federal government when the Constitution was ratified and not to any later-acquired property.[38] Taney could cite no contemporary witness among the draftsmen or ratifying conventions for this penurious construction; his only support is the semantic difference between the congressional authority given by article I, section 8, to "exercise exclusive Legislation in all Cases whatsoever" for the District of Columbia as the seat

34. POTTER, *supra* note 2, at 451-55; Davis, *The Emergence of Immediatism in British and American Antislavery Thought, in* ANTEBELLUM REFORM 150-51 (D.B. Davis, ed., 1967).

35. ROBINSON, *supra* note 31, at 378-82; *see* S. LYND, CLASS CONFLICT, SLAVERY AND THE UNITED STATES CONSTITUTION 185-213 (1967) (slavery prohibition in 1787 Ordinance part of compromise with South in framing Constitution).

36. POTTER, *supra* note 2, at 54-55.

37. U.S. CONST. art. IV, § 3, cl. 2.

38. 60 U.S. at 436.

of government, and the supposedly less expansive power for the Territories, to "make all needful Rules and Regulations."[39]

This semantic argument was only the first step, however. Taney's second step is more interesting. He argued that congressional authority regarding territorial slavery must be limited because Congress was not authorized to create permanent "colonies...to be ruled and governed at its own pleasure;" the Constitution instead intended that all territories would ultimately become states, and all new states must enter the Union "upon an equal footing with the other States."[40] This meant for Taney that each new state must have unrestricted authority, as the old states had, to decide for itself whether to accept or prohibit slavery within its jurisdiction. But here Taney saw a dilemma. If Congress could forbid territorial slavery, then the die would be irrevocably cast for the new state ultimately arising from that territory; no one holding slaves would have settled there, all the settlers would have a vested interest in excluding slave labor, and they would move at once to embed this policy in the new state constitution or laws.[41] Thus, Taney reasoned, in order to ensure that new states would be free to decide the slavery issue for themselves, Congress must be barred from deciding the issue for the territories.

This is the underlying rationale that justified for Taney his strained construction of the congressional power in article IV to "make all needful rules and regulations" for the territories. He was arguing, in effect, that the question whether new states would permit or forbid slavery had assumed such overwhelming significance for the nation that the question could not be controlled by these spare words of article IV, written in a different era when the draftsmen could not see how the entire success of their nationalizing enterprise might hinge on the interpretation of these words. Taney thus restricted the application of these words to the special circumstances regarding territorial slavery as the draftsmen would have known them in 1787—restricted them, as he put it, to "a known and particular Territory, and to meet a present emergency" that the framers had directly before them.[42] If Taney's verbal gyrations to this end seem unconvincing, his underlying conception of his interpretative enterprise seems nonetheless in the spirit of his immediate predecessor's much-cited dictum, "we must never forget that it is *a constitution* we are expounding."[43]

There was, however, a further conceptual problem with the underlying sense of Taney's position; he addressed this problem with the third step of his argument. The problem was this: Granted that congressional exclusion of slavery from the territories would ensure that the new states would also forbid slavery, nonetheless permitting territorial slavery was not a neutral position. Permitting territorial slavery could effectively guarantee that a slave

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39. *Id.* at 440.
40. *Id.* at 446-47.
41. FONER, *supra* note 11, at 28.
42. 60 U.S. at 432.
43. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

state would ultimately emerge; many Northerners at least so believed.[44] This belief was based on a conviction that slave labor had an unfair advantage over free labor and that the former would inevitably drive out the latter; admitting any slaves to a territory would thus necessarily exclude free labor and the territory would become a slave state. This was the ground on which the politically more potent "free soil" advocates of the North in effect joined with abolitionists to amass the numerical force that brought Lincoln to the Presidency.[45] The free soil advocates did not oppose slavery where it had already taken hold but opposed the extension of slavery in the territories which, so the argument went, would inevitably destroy free labor everywhere.

Taney, in effect, addressed this problem with the third step of his argument: that if a choice must inevitably be made between giving preference to the system of free labor or slave labor, then slavery must prevail because of its specially protected status under the Constitution. As offensive as this proposition now appears, and as galling as it was to many of Taney's contemporaries, there was some plausibility to this argument. Taney rested it on two textual grounds: the fifth amendment, restricting Congress' authority toward deprivations of property, and the fugitive slave clause in article IV, section 2, recognizing—as Taney put it—"the right of property of the master in a slave."[46] Indeed, Taney continued, the fugitive slave clause did more than recognize this right; this recognition was "coupled with the duty of guarding and protecting the owner in his rights" to slave property.[47] Thus did slavery have a specially protected status in the Constitution—a status which not only barred Congress but, Taney elaborated, also barred the territorial governments from prohibiting slavery since they had only derivative powers from Congress.[48]

This last step in Taney's argument exposes the weakness of all of it; but that weakness is not so much in the force of his logic or in the coherence and plausibility of his use of constitutional text. The flaw is in the role that Taney saw for his Court in resolving the question of constitutional principle presented by the *Dred Scott* case. In this last step, holding that the Constitution regarded slaves as property and committed Congress to protect masters' property rights as such, Taney gave a definitive answer to a question that the framers did not resolve.

Taney's error was not that the framers gave a different answer so that the document contradicted him. It was instead that the document contradicted itself on this question. Taney is clearly correct that the fugitive slave

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44. FONER, *supra* note 11, at 55-62.

45. *See id.* at 103-225 (identifying varying "radical," "moderate" and "conservative" attitudes toward slavery among Northern electorate that ultimately coalesced in Lincoln's victory).

46. 60 U.S. at 451.

47. *Id.* at 452.

48. *Id.* at 451.

clause recognized masters' property rights to slaves. And yet the Constitution nowhere says this explicitly. Indeed, the word "slave" never appears as such in the document. This omission was not a casual oversight. It was a calculated choice by the framers. There were many provisions in the Constitution that dealt with an obviously protected the institution of slavery.[49] But the word was never used because, as James Madison stated in the convention debates, it would be "wrong to admit in the Constitution the idea that there could be property in men."[50]

Taney was thus wrong, though at the same time he was also right, that the Constitution acknowledged property rights in slaves. As in his initial discussion of the citizenship status of blacks and the meaning of equality in the Declaration of Independence, Taney had grabbed hold of an inconsistency, and not a small one—a contradiction at the moral center of the American enterprise. And, as with the black citizenship issue, Taney opted for one side of the contradiction to forge an answer to the question that the framers were not able to answer for themselves.

We cannot deduce from this proposition that the two dissenting Justices in *Dred Scott* were correct and that Taney and his majority were wrong, that the Constitution vested federal citizenship in blacks and authority in Congress to prohibit territorial slavery. All we can say is that both Taney and the dissenters were wrong, and that the Constitution properly understood did not answer the question, at least in the context in which that question presented itself in 1857. This conclusion does not mean that either Taney or the dissenters were necessarily wrong in answering this question. This conclusion does mean, however, that any answer to the constitutional question would necessarily be constructed from bits and pieces, from shards of the vessel. On this score, Taney's interpretive effort seems plausible, coherent, and even ingenious—certainly when measured against constitutional interpretations proffered by the most highly regarded Supreme Court Justices before and since.

The jurisprudential fault I find in Taney's *Dred Scott* decision is not in the substantive interpretation of the Constitution, not in the answer to the question posed by the case. The fault I find is in the Court's decision to answer the question as posed, in its decision to decide. But this decision, we will see, fits quite comfortably within the currently dominant conception of the Supreme Court's proper role in our society. And this is what makes it so truly difficult, in the context of our contemporary norms of constitutional law, to say precisely what was wrong with *Dred Scott*.

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49. *See generally* ROBINSON, *supra* note 31, at 168-247 (discussing constitutional provisions regarding slave importation, fugitive slaves and enumeration of slaves for purposes of electoral representation and taxation).

50. NOTES OF DEBATES, *supra* note 32, at 532.

II.

From the moment the Court first spoke in *Dred Scott*, it was criticized for addressing the constitutionality of the Missouri Compromise. Justice Curtis, in his dissent, charged that the court had "transcend[ed] the limits of [its] authority" in reaching this question, because its initial holding that Dred Scott was not a citizen, and therefore could not sue in federal courts, had wholly disposed of the case.[51] As a technical proposition, however, Justice Curtis's charge does not hold. Chief Justice Taney clearly articulated an adequate jurisdictional justification for reaching the Missouri Compromise question. Having first concluded that no black, slave or free, was a citizen of the United States for purposes of federal diversity jurisdiction, Taney then set out to show that even if he were wrong in concluding that Scott lacked citizenship on this ground, there was nonetheless another basis for holding that Scott lacked citizenship. If Scott were still a slave, Taney said, then it would be clear that he was not a citizen of Missouri, which he alleged as the basis for his jurisdictional diversity claim; and if, Taney continued, the Missouri Compromise forbidding territorial slavery were invalid, then Scott would have no basis for alleging his freedom; he would still be a slave and barred from federal court on this ground.[52]

There are prudential grounds for criticizing Taney's decision to reach the Missouri Compromise issue, grounds of judicial tact, but the technical basis for Taney's position is unassailable and Curtis's charge is wrong. Taney did not go beyond deciding the question that Scott lacked citizenship for federal court diversity jurisdiction; he simply stated alternative grounds to reach this same conclusion. Nonetheless, this technical criticism of *Dred Scott* quickly attained acceptance as a truism. In 1911 it was effectively rebutted in a notable article by Edward Corwin;[53] but he criticism has persisted.[54]

David Potter has suggested an intriguing explanation for this resistant technical error by *Dred Scott* critics. The charge that Taney had violated the Court's own clear-cut jurisprudential rules was, Potter said, "a psychological godsend"[55] to the critics because they could both condemn the *Dred Scott* decision, which they detested, and yet affirm the sanctity of the Supreme Court, which they continued to revere. Potter thus points to the central irony arising from the *Dred Scott* decision. Though the Court's decision was anathema to antislavery forces in the North, and though its contemporaries (as well as subsequent observers) believed that the decision played some significant role in precipitating the Civil War by polarizing the ideological opposition of North and South, nonetheless the Supreme Court emerged

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51. 60 U.S. at 589.

52. *Id.* at 427.

53. Corwin, *The* Dred Scott *Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52 (1911).

54. POTTER, *supra* note 2, at 283; KUTLER, *supra* note 2, at xiv.

55. POTTER, *supra* note 2, at 284.

form the Civil War with an extraordinary vote of confidence in the addition of the Fourteenth Amendment to the Constitution.[56]

By 1868, of course, the Court's personnel had dramatically changed; Taney had died and Lincoln had appointed five members, a majority of the Court. Nonetheless it is at least curious that the antislavery Republicans who had been burnt by *Dred Scott*, who had been directly subjected to the politically uncontrollable force of the Court's authority, and who were now in firm control of the national political institutions—it is a least curious that these men should frame the most substantial grant of judicial power that appears anywhere in the Constitution. The fourteenth amendment in effect ratified the claim of judicial supremacy over Congress and the states in interpreting the Constitution;[57] it provided a more explicit, self-consciously intended grant of this judicial authority than John Marshall had available for his patchwork argument in *Marbury v. Madison*.[58] This is, then, a considerable irony (echoed, as we will see later, by the fact that a majority of the Court that decided *Brown v. Board of Education*[59] in 1954—the most expansive invocation of judicial authority in our history—had been appointed by Franklin Roosevelt with an avowed mission to dismantle the regime of Rule by the Judiciary).

There is a cultural explanation for this irony and for the persistent effort of *Dred Scott* critics to condemn the decision while praising the Court as an institution (to hate the sin but love the sinner, as it were). *Dred Scott* may have proven the Supreme Court's unreliability as a wise guide, as a moral arbiter, for a troubled nation. But the role of guide and arbiter was needed and there was no other institutional candidate for it. Henry Adams testified to this imperative in his *Education*, recalling his own attitude in 1870, little more than a decade away from the wounds inflicted by *Dred Scott*:

> Although, step by step, he [Adams] had been driven, like the rest of the world, to admit that American society had outgrown most of

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56. The House Committee's initial draft of the fourteenth amendment provided a direct grant of authority only to Congress to "make laws" securing "equal protection" and other guarantees against hostile state legislation; this draft was found unacceptable because of fears about the political complexion of future Congresses. *See* Burt, *supra* note 28, at 92-93. The amendment was changed to its present form to assure that the judiciary would protect its purposes against future Congresses. *See id.*

57. While the history of judicial review properly goes back to *Marbury v. Madison*, and beyond, the Court's performance from 1864 to 1873 marked a significant deviation. The sheer volume alone is different. But more important was the political and public acceptance of this judicial function as a standard for measuring the legitimacy of power. *Marbury v. Madison* and *Dred Scott* occasioned bitter disagreements over the role of the judiciary. But while dissatisfaction occasionally existed with the *results* of the Chase Court's decisions, there were few who called into question the *idea* of exercising this judicial role.

S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 125 (1968) (emphasis in original).

58. 5 U.S. (1 Cranch) 137 (1803).

59. 347 U.S. 483 (19754).

> its institutions, he still clung to the Supreme Court, much as a churchman clings to his bishops, because they are his only symbol of unity; his last rag of Right.[60]

This clinging faith was the imperative that led the Supreme Court in 1857 to decide the constitutionality of the Missouri Compromise. On the Court itself, Justice Wayne gave most direct voice to this faith in his brief concurring opinion:

> [T]he Court neither sought nor made [this] case.... [W]e have only discharged our duty...as the framers of the Constitution meant the judiciary to [do].... The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.[61]

Wayne thus clearly revealed his underlying assumption that an authoritative proclamation by the Supreme Court would effectively resolve this deeply divisive question, would somehow create unity from discord by waving the Constitution, the "rag of Right."

Wayne's espousal of this assumption, of course, had an institutionally self-serving aspect. But he was not alone in this assumption. President Buchanan had spoken to the same effect in his inaugural address, just two days before the Supreme Court issued its decision. The status of slavery in the territories, he said, was

> ...a judicial question which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be....[62]

Buchanan's statement also had a self-serving quality, since it is likely that he had advance knowledge of the Court's intended disposition of the case and was quite cheerful as a personal matter in exhorting submission to it.[63] But Buchanan also had distinguished company in his avowal that the issue of territorial slavery "legitimately belongs" to the Court. This was also the considered judgment of the Congress—a judgment that had been recently embodied in legislation. Indeed, the proposition that this issue should be authoritatively resolved by the Supreme Court was, after 1846, the only position regarding territorial slavery that could find the concurrence of a majority in Congress.

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60. H. ADAMS, THE EDUCATION OF HENRY ADAMS 277 (Modern Library ed. 1931).

61. 60 U.S. at 454-55.

62. J. Buchanan, *Inaugural Address*, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2962 (J.D. Richardson ed. 1903).

63. Mendelson, *Dred Scott's Case—Reconsidered,*, 38 MINN. L. REV 16, 24 n.36 (1953).

1846 was the year the House of Representatives approved the Wilmot Proviso, specifying that slavery would be prohibited from any territory acquired from Mexico in the then-pending warfare.[64] The Proviso was not accepted in the Senate, but its House approval nonetheless marked the first significant repudiation in our national politics of the terms of the Missouri Compromise of 1820, because the Proviso ignored the Compromise's geographic demarcation of slave and free territories.

After four years of legislative stalemate regarding both the admission of new states and the organization of new territories, the Congress enacted a series of measures collectively known as the Compromise of 1850.[65] Two new territories, Utah and New Mexico, were organized with no specific provision made in either regarding slavery. Instead, the Congress seemingly delegated regulatory authority to the new territorial legislatures; but, at the same time, the Congress refused to decide what regulatory authority it could constitutionally delegate. By an artfully drawn provision, the Congress said only that the territorial legislative power "shall extend to all rightful subjects of legislation consistent with the Constitution of the United States."[66] Then, in subsequent provisions, direct appeals were authorized on the slavery question from the highest territorial court to the Supreme Court and jurisdictional amounts were abolished in such appeals.[67]

In 1854 Congress enacted the Kansas-Nebraska Act, explicity repealing the Missouri Compromise and instead enacting as a general proposition the evasive formula of 1850 regarding the slavery issue in the territories.[68] As one Senator observed, the Congress had enacted a lawsuit, not a law.[69] It had repealed the Missouri Compromise and had replaced it with an appeal to the Supreme Court.

As it happened, Dred Scott's lawsuit, which found its way to the Supreme Court in 1856, did not come by this congressionally prescribed route. Indeed, the Supreme Court's invalidation of the Missouri Compromise in *Dred Scott* was in a practical sense redundant, since the Congress had repealed that act in 1854. But the issue was properly presented to the Court in a technical sense, since Scott claimed that rights had vested in him when that act was in force. Furthermore, beyond technicalities, the political branches were patently asking the Court to answer questions about the constitutionality of the Missouri Compromise that they were unable to resolve. As two of the Justices explained fifteen years later, in retrospective reflections on the Court's decision to decide *Dred Scott*, "the Court would not fulfill public expectation or discharge its duties by maintaining silence upon these questions."[70]

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64. POTTER, *supra* note 2, at 21-23.
65. *Id.* at 112-14.
66. The Texas and New Mexico Act, 9 Stat. 446 (1850); The Utah Act, 9 Stat. 453 (1850).
67. *See supra* note 66.
68. The Kansas-Nebraska Act, 10 Stat. 227 (1854).
69. Mendelson, *supra* note 63, at 20 n.21 (quoting Senator Corwin).
70. *Id.* at 27 n.53.

The Court thus fatefully undertook to decide questions that neither their contemporaries in Congress nor their antecedents in the Constitutional Convention had been prepared to resolve. This fact alone should have given some pause even to men supremely confident of their reasoning and rhetorical powers. But though this cautionary impulse is relevant, it is an incomplete basis for criticizing the Court's decision to decide. In retrospect, the Court's action may appear hubristic and impolitic. But in prospect, the times seemed desperate, communal peace seemed endangered, and the Constitution seemed applicable for resolution of the social questions at issue. Here is the nub of our contemporary problem in evaluating the *Dred Scott* case: The times often seem desperate; communal peace is frequently at stake in hotly litigated issues; the Constitution seems plausibly applicable to almost anything. What then should the Court have done?

I believe the Court should have answered the underlying question presented to it by the *Dred Scott* case. But the specific answers provided by the Court were wrong. I do not mean that the Court should necessarily have given different answers to the questions regarding the constitutionality of the Missouri Compromise or the citizenship status of blacks—though I do believe that if the Court chose to answer these questions, they were obliged to give different answers. More fundamentally, however, I believe the Court answered the wrong questions in the case. To be sure, the Missouri Compromise and citizenship-status questions were presented and they were important; but they were not the central question posed by the case and they should have been answered, if at all, only after the Court had understood and answered the central question.

The central question was both obvious to all the Justices and misunderstood by them. The central question was whether the Union would remain intact in the face of a deeply divisive national dispute. Put another, more prosaic way, the litigants (and those disputants whom they also represented) in effect asked whether, in view of the intense conflicts between them, it was necessary or even possible for them to remain members of the same political community. The Justices of course knew that this question hovered at the edge of all the pleadings in the case. But they acted as if the question were already settled—as if the continued existence of a political community was an agreed premise among the parties not requiring and even unfit for any questioning.

By assuming rather than deliberating the answer to this basic question, the Justices may have thought they were resolving to continue the communal relationship, to preserve the Union. But they were wrong in this. Because they did not think about the necessary preconditions for a continued political union between deeply antagonistic parties, the Court took steps that were inconsistent with those preconditions. In saying this, I do not contend that the Court could have saved the Union if it had acted differently; there is no way to know this, and many reasons to think that disunion and warfare were inevitable by 1857.[71] I do contend that the Court's action favored

71. *See* POTTER, *supra* note 2, at 27-50 (discussing underlying causes of Civil War).

disunion and warfare *in principle*, even though its action may have had limited practical significance in bringing this result, and even though contrary action by the Court might not have averted this result.

Stated abstractly, I believe that the Court decided the wrong questions in *Dred Scott*, that the real question at issue was not understood by the Court, and that the Court gave the wrong answer (as well as an unintended answer) to this real question. The real question was whether the Union should continue and the Court, without realizing it, answered that in principle the Union should be dissolved.

Put thus baldly, these are paradoxical conclusions. The paradox may be resolved, however—or at least become clearer—by comparing *Dred Scott* to the Supreme Court's decision in *Brown v. Board of Education*. In my view, *Brown* both addressed this central question and answered it correctly. To demonstrate this, and to show how *Brown* both resembles and differs from *Dred Scott*, is to identify what was right with one and wrong with the other.

## III.

The two cases are almost a century apart. The first endorsed the oppression of blacks while the second embraced their liberation. But in their invocation of and justification for judicial authority there are significant similarities between *Dred Scott* and *Brown v. Board of Education*.

The doctrinal basis for both decisions, first of all, has the same kind of historical vulnerability. The Court was more honest in *Brown* than in *Dred Scott* about admitting its inability to find support in the framers' original intention. But even *Brown* stated only that the historical sources were "at best,...inconclusive"[72] without clearly acknowledging that at worst, those sources contradicted the Court's ruling. The same Congress that approved the fourteenth amendment, after all, established an explicitly segregated school system for the District of Columbia. Segregated public education, moreover, was established in many Northern states when the amendment was adopted, though none of the framers or ratifiers suggested that the amendment invalidated that practice.[73] (Indeed, in 1896 when the Supreme Court upheld the "separate but equal" public accommodations law in *Plessy v. Ferguson*, it relied on an 1850 Massachusetts decision, written by the redoubtable Chief Justice Shaw, approving racially segregated public schools.)[74] The invocation of constitutional doctrine in *Brown* is thus at least as vulnerable to historic refutation as Taney's reading of black-citizenship status or congressional authority in the territories.

Both decisions can also be justified by a frequently invoked canon of constitutional interpretation. But it is the same justification for both cases: John Marshall's sweeping directive for judges to interpret the Constitution

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72. 347 U.S. 483, 489 (1954).

73. *See* LITWACK, *supra* note 11, at 113-152 (discussing racially "separate and unequal" education in antebellum Northern states).

74. 163 U.S. 537, 544 (1896) (citing *Roberts v. City of Boston*, 5 Cush. 198 (1850)).

to facilitate its adaptation to changing times.[75] The relevance of this justification points to another shared similarity and vulnerability of the decisions: that both rested on the judges' reading of the dominant moral conviction of their time. For *Dred Scott* that morality spoke explicitly of property rights and implicitly of popular disdain for blacks; for *Brown*, equality was the spoken norm, while popular distaste for Southern white brutality toward blacks was the unspoken message.[76]

But though the Justices in both cases appealed to widely shared contemporary attitudes, and accordingly hoped for popular acquiescence, there was, nonetheless, no clear evidence of this support where it might have been expected—that is, among popularly elected officials. In both cases, numerous state legislative enactments were clearly hostile to the Court's ruling and the national government was stalemated, unable or unwilling to take any position on the issue. Indeed, in both cases, the very fact of congressional stalemate was construed by some as a justification for Court intervention. (Justice Jackson thus observed during oral argument in *Brown*, "I suppose that realistically the reason this case is here is that action couldn't be obtained from Congress.")[77]

But though congressional stalemate might ordinarily prompt considerable judicial diffidence, there was one added similarity between *Brown* and *Dred Scott* that pressed the Justices toward action: the threat of civil warfare hanging over the litigated issues. None of the Justices in *Brown* were as open in acknowledging their concerns on this score as was Justice Wayne in *Dred Scott*. But there was surely equivalent concern for "the peace and harmony of the country" and hope that this could be assured by "the settlement of (the deeply divisive dispute) by judicial decision."[78]

Finally, in both cases the judicial decision was met by a firestorm of protest, an increased polarization of publicly expressed attitudes among the disputants, and regional, popularly approved overt resistance to judicial authority.[79] Here, however, the similarities between the two cases end. *Dred Scott* was repudiated by constitutional amendment and is now universally reviled; *Brown* was ultimately ratified by popular opinion and national legislative support and is now almost universally praised as an exercise of judicial authority. This ultimate difference may serve for some as an adequate

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75. Marshall's dictum was the basis for Alexander Bickel's conclusion that if the fourteenth amendment had been an ordinary statute, it could not be read to prohibit school segregation in light of the circumstances surrounding its enactment, but that as a constitutional provision such reading would be permissible. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59, 62 (1955).

76. *See* G. MYRDAL, AN AMERICAN DILEMMA, THE NEGRO PROBLEM AND MODERN DEMOCRACY 44-49 (1944) (discussing Northern white attitudes toward blacks and Southern white racial policies).

77. 22 U.S.L.W. 3161 (1953).

78. 60 U.S. at 454-55.

79. *See* POTTER, *supra* note 2, at 286, 294-95 (regarding Northern resistance to *Dred Scott* and parallels with *Brown*); B. MUSE, TEN YEARS OF PRELUDE (1964) (regarding Southern resistance to *Brown*).

distinction between the two cases, but not for me. To claim the vindication of history works well only in retrospect; it gives no guidance for action in confronting an uncertain future.

There is, however, another difference between the two cases that I find dispositive. In both cases, the Court saw itself addressing profoundly divided disputants with apparently irreconcilable claims; in both cases, the Court conceived its role as preserving a communal bond, a political union, between these antagonists; but in *Dred Scott* the Court chose means toward this goal that the Court in *Brown* pointedly rejected.

In *Dred Scott* the Court sought virtually to eliminate future occasions for possible contentious interchange between the disputants regarding the specific issue that divided them. Taney's opinion rigorously pursued this goal in three specific ways: by denying any congressional authority over territorial slavery, thus removing the issue from possible deliberation in the national legislature; by denying such authority to the territorial legislatures on the ground that they had only derivative powers from Congress, thus effectively shutting off any local deliberative process until statehood status had already been attained; and by closing off any possible access of blacks to federal courts, where aspects of the territorial slavery issue at least might have been publicly focussed in the litigative process. The Court thus defined the territorial slavery issue as an exclusively "private" question, not only in its insistence that public institutions were obliged unquestioningly to honor the "private rights" of masters in their slave property but also, and more fundamentally, in its ruling that no public issue was posed—that is, nothing was properly the subject of public deliberation as such—regarding the status of territorial slavery.

Beyond the three specific ways that it removed the territorial slavery issue from the public agenda, the Court invoked a more general proposition toward this same effect: that this issue should be authoritatively and finally resolved by the Court itself. The Congress had invited the Court to assume this role, to be sure; but an invitation is not necessarily a command performance. The Court seized the opportunity purportedly to save the Union. There may have been a practical miscalculation here by the Court; its decision may in fact have done more to precipitate than to avert civil war. But that is not the basis on which I find fault in the decision. As decided, *Dred Scott* in principle did not and could not save the Union. This is because the decision was inconsistent in democratic principle with a continued political union, a continued communal relationship, between the antagonists.

The Court purported to settle the antagonism by awarding total victory to one side and, concomitantly, by inflicting total defeat on the other. The only political relationship that can follow from this result is the relation of victor and vanquished or, to put the matter in its then-current signification, the relation of master and slave. *Dred Scott* thus did more than find constitutional validation for the enslavement of blacks. For the sake of argument, let us accept the proposition that this racist premise was enshrined

in the Constitution, so that blacks were—as Taney said—not participants in the federal union but merely the properly of some participants. Accept the proposition, moreover, that the enslavement of blacks was not inconsistent—as Taney argued—with the democratic principle of equality on which the Union, the American political community, was founded. Even swallowing these propositions, it cannot follow that democratic principles permit one acknowledged member of the American polity to enslave another. But this is the result embraced by the Supreme Court in *Dred Scott*—that the Northern whites who opposed territorial slavery were effectively enslaved by their defeat at the hands of Southern whites.

This is not to say, however, that a contrary decision by the Court could have averted the enslavement of some whites by others. If the Court in *Dred Scott* had approved congressional power to prohibit territorial slavery (or if the Court had endorsed the theory, pressed earlier by antislavery lawyers, that the Constitution itself forbade territorial slavery[80]), then Southern whites would have been effectively enslaved at the hands of their Northern white brothers. The fact is that the Court in *Dred Scott* was confronted with a dilemma—an intractable dilemma in democratic principle. When one group (or even one person) cannot submit to the will of others without suffering what it (or he) regards as an excessive and intolerable defeat, then that defeat cannot be justified in democratic principle.[81]

Majority rule is insufficient justification for this defeat. The underlying premise of majority rule is the equality of each voter, but if the election results so totally defeat the interests of one voter as he sees it, then his future as an equal member of the polity is in jeopardy.[82] The mere fact that he had been treated equally in the past is no justification for others to inflict this future deprivation, this ineradicable inequality as he sees it, on him. The fact that this one person (or group) construes defeat as intolerable enslavement is, however, no justification for him (or it) to inflict enslaving defeat on antagonists.

This is the dilemma in democratic principle. There is no principled way out of it. There are only practical ways out—warfare in which defeat is involuntarily imposed or a unilateral breaking of communal relations, an involuntarily imposed secession from political union. In these fundamental and diametrically opposed disputes, the only way out consistent with the democratic principle of political equality among members of the same polity is if the antagonists change the terms of their dispute—if, for example, they can find some mutually agreed compromise; or one side can be persuaded to redefine defeat as acceptable, because on reflection it seems only a temporary and ultimately recoupable setback; or because the losing side

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80. W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, 209-13 (1977).

81. I develop this proposition in Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 455-57, 483-85 (1984).

82. *See id.* at 455 n.1 (regarding equality and majority rule).

becomes convinced that its adversaries' defeat would be even more devastating and therefore less justifiable than its own loss.

There are of course many kinds of persuasion. A threat of force is one kind; a demand for obedience based on a claim of unquestionably superior worth or status is another. But neither of these persuasive techniques rests on the democratic premise of mutually acknowledged equality. The only technique that qualifies on this score is an appeal to reason. This is not to invoke reason as narrowly conceived, cool rationality, but reason as a mutually engaged deliberative process in which appeals to powerfully felt emotions—fears, needs, angers, loyalties—play important parts: reason as public conversation. The acknowledged goal of this reasoning process must be persuasion based on respect for mutual equality—a process that must (paradoxically) acknowledge that the very definition of mutual equality is itself a properly disputable subject, even the most basic and most disputable subject, of public conversation.[83]

*Dred Scott* fails on this score. It was an attempt to shut off public conversation which would thereby irrevocably break the bonds of communally acknowledged equal status among disputants—bonds that were already stretched thin by their intensely felt, diametric opposition. On this score, *Brown v. Board of Education* succeeds. Its success was not inevitable as a practical matter, since mutually respectful public conversation among the adversaries was not the immediate or perhaps even the most foreseeable result of the decision.[84] *Brown* was a success in principle. The Court committed itself to facilitating a process of public conversation, of mutually respectful dialogic engagement, between the adversaries. It thereby avoided the error in principle committed by *Dred Scott*.

*Brown* presented the Court with the same dilemma of principle as *Dred Scott*: the disputants were making intensely felt, mutually inconsistent demands, so that victory for one was construed as intolerable defeat for the other.[85] In *Brown*, however, the defeat had already been inflicted on blacks by the institution of race segregation, whereas in *Dred Scott*, neither disputant had yet prevailed in the legislature regarding the status of territorial slavery. Thus, in *Dred Scott*, the Court wrongly undertook to settle a dispute that still raged unresolved among the antagonists, whereas in *Brown*, the Court rightly acted to unsettle a legislative resolution that one disputant found intolerable. This unsettling was all that the Court in fact did in *Brown*.

The Court invalidated segregation laws because, as it correctly observed, these laws violated the democratic principle of equality by inflicting a permanently subordinate status on blacks (marking them, in effect, as

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83. *Id.* at 486-89.

84. MUSE, *supra* note 79; *cf.* MYRDAL, *supra* note 76, at 1011-15 (Gunnar Myrdal's ominous forebodings ten years before *Brown*).

85. This was the basis for Herbert Wechsler's famous critique of *Brown* as unjustified because no "neutral principle" transcended the opposed parties' positions. Wechsler, *Toward Neutral Principle of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). For a critique of this view, see Burt, *supra* note 81, at 463-64, 483.

"permanent losers" in any disputes with whites). But though the Court ruled in principle that blacks and whites were equal, it did not specify the precise meaning of that equality. The Court did not dictate a new resolution for the disputants; by reopening the controversy, it forced the disputants into a process of sustained, direct public confrontation in forging a new resolution.

This was the underlying meaning of *Brown II*,[86] where the Court refused to specify what would constitute an ultimately appropriate resolution of the race segregation dispute and instead remanded this issue for further proceedings in the various federal district courts. The practical effect of this remand was to create visible, orderly public forums where black and white disputants could confront and debate one another on the basis of an underlying premise of equality. Because of blacks' rigorous exclusion from political participation in the South, there was no other such public forum locally or nationally available in 1955.[87] Thus, unlike *Dred Scott*, which cut off all available forums for public conversation, *Brown* created such forums where there had been none.

This same underlying meaning—that the Court would not dictate a resolution to the race segregation dispute but would force the antagonists into direct, sustained public contact to forge their own—was even more evident in the Court's effectively prolonged silence for more than a decade following *Brown II*.[88] During this time the Court broke its silence only to reiterate that Southern whites could not properly resist any public contact with blacks, any possibility of ever acknowledging that blacks and whites equally were members of the same political community. This was the meaning of the Court's response to the "massive resistance" invoked by Governor Faubus of Arkansas[89] and to the specific resistance employed by Prince Edward County, Virginia, in closing its public schools altogether rather than accepting the prospect of any racial integration.[90] But throughout this time, the Court did not say what specific resolution of the race segregation controversy would constitute an adequate acknowledgment of equal communal membership between blacks and whites—for example, whether race integration "in fact" was required or race segregation "by voluntary choice" was permitted and how soon all of these issues must be settled.

The Court spoke to these specifics for the first time in 1968, announcing an end to this tolerance for delay in eliminating "root and branch" all aspects of racially separate public schools.[91] But by 1968 the national political institutions had offered a new answer to the underlying question that the Court had confronted in 1955—whether whites were prepared to acknowledge blacks as equal members of the same community. The answer was provided

86. Brown v. Board of Educ., 349 U.S. 294 (1955).

87. *See* MYRDAL, *supra* note 76, at 474-490 (describing Southern practices excluding blacks from political participation).

88. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 765-66 (10th ed. 1980).

89. Cooper v. Aaron, 358 U.S. 1 (1958).

90. Griffen v. County School Bd., 377 U.S. 218 (1964).

91. Green v. County School Bd., 391 U.S. 430, 438 (1968).

in the Civil Rights Acts of 1964, 1965 and 1968, the passage of each of which required the extraordinary (and, before 1964, unprecedented) amassing of a two-thirds vote in the Senate to override the Southern filibuster.[92] By these legislative acts, Northern whites embraced a communal bond, a political union, with blacks that had not previously been so explicitly acknowledged, or even truly believed, on either side. (This acknowledgment was perhaps most direct in the enactment of the "fair housing" title of the 1968 Act, which proscribed discriminatory practices more prevalent in the North than in the South.)[93]

The question originally posed by *Brown* had thereby been both broadened and transformed: it no longer was simply whether Southern blacks and whites were mutually prepared to acknowledge communal ties; it was now also whether Southern whites would acknowledge continued political union with the North explicitly conditioned on acceptance of the principle of equal communal membership with blacks. The context and meaning of community for Southern whites and blacks, and the ideal of equality in that community, had thus been radically changed for the original antagonists in *Brown*.

The Supreme Court did not, and could not, force this transforming action by Northern whites. It could and did force the issue into stark visibility in national public forums, so that Northern whites could not avoid some explicit action, some response to the question posed by the Court. Now armed with the Northern response in 1968, the Court spoke again to Southern whites—but this time with a more pointed specificity: "Are you now prepared to acknowledge a mutual communal relation with blacks?" This question had been symbolically transformed, moreover, by more than the congressional acts; the Court itself had been changed from the time *Brown* was decided. Thurgood Marshall was then, in 1954, the principal advocate for, as well as a member of, the excluded minority; now, in 1968, he sat as a Justice of the Court.[94]

But Southern whites might still have refused an affirmative answer to the Court's question. If they had done so, the original dilemma of *Brown* would have remained unresolved: the dilemma of achieving a communal bond based on mutually acknowledged equality between diametrically opposed anatagonists. This was the same dilemma, unresolvable as such, that Taney's Court faced in 1857; but it had ignored the dilemma, sought to override it by fiat. A hundred years later, the Court did at least implicitly understand this as a dilemma and it implicitly shaped its response accordingly: to highlight the dilemma as such for the antagonists rather than to obscure it by purporting to award total victory to one of them; and to press them

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92. Thus only seven Senators outside the South voted against closure when it was first invoked in 1964. *See* Burt, *supra* note 81, at 485 n.97.

93. S. LUBELL, WHITE AND BLACK: TEST OF A NATION 140-45 (rev. ed. 1966); Hauser, *Demographic Factors in the Integration of the Negro*, 94 DAEDALUS 847, 850-53 (1965).

94. Justice Marshall was appointed to the Court in 1967; he had been appointed to the Court of Appeals for the Second Circuit by President Kennedy in 1962 and had resigned in 1965 to become Solicitor General at President Johnson's appointment.

toward finding some mutually acceptable escape from this dilemma.

But the Court in *Brown* and subsequent race segregation cases never explicitly drew this lesson to explain its various actions and inactions. There are of course many possible explanations for the Court's silence on this score. One possibility is that the Justices did not conceive their careful course as required (or perhaps even as justified) in principle, but instead saw themselves forced into their adroit gymnastics by a regrettable though unavoidable political reality. Whatever the explanation, the Court never articulated a clearly principled rationale for its cautious, Delphic progression following *Brown I*. Conflicting rationales were, however, at least hinted by Justices Frankfurter and Jackson during oral argument in *Brown*, according to Alexander Bickel's account:

> [T]he perceptive listener...would have heard Mr. Justice Frankfurter probe the enforcement problem, worry about the possible gerrymandering of school districts that were supposedly not constituted on racial lines, and finally say: "Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks." And the listener would have noted persistent indications of Mr. Justice Jackson's feeling that the issue before the Court was better left to the legislature, and that the ideal solution of it from the Court's point of view would be to find a formula for making precisely a sort of "abstract declaration" that would encourage Congress to deal with the problem under the enforcement clause of the Fourteenth Amendment.[95]

Just before his appointment to the Court, Frankfurter had written an appreciative critique of Taney, ranking him "second only to Marshall" in "intellectual power" and "enduring contribution" to constitutional theory,[96] and characterizing his *Dred Scott* opinion as an unaccustomed lapse from "judicial self-restraint."[97] The concerns Frankfurter expressed during oral argument in *Brown* seemed to be an application of this critique. He was eager to protect the public appearance of the Court's potency while his underlying conception of its proper role, as a final authoritative dispute resolver, was essentially similar to Taney's.[98] Immediately before his Court appointment, Jackson had also written about Taney and *Dred Scott*; his critique also seemed to lie beneath his expressed concerns about *Brown*:

> The vice of judicial supremacy...has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts....

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95. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 6 (1978).

96. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 72-73 (1937).

97. *Id.* at 67, 72.

98. Compare Justice Frankfurter's statement, dissenting in the reapportionment case: Disregard of inherent limits in the effective exercise of the Court's "judicial Power"

> [I]n the *Dred Scott* case...the Missouri Compromise itself had ceased to be important. But there was still hope that American forbearance and statesmanship would prove equal to finding some compromise between the angry forces that were being aroused by the slave issue. That hope vanished when the Supreme Court held that the Constitution would allow no compromise about the existence of slavery in the territories.[99]

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The implicit tension between Justices Frankfurter and Jackson was never made explicit in the Court's opinions in *Brown*; a coherent justification for *Brown II*, and an adequate distinction between *Brown* and *Dred Scott*, was never explicitly formulated. By 1968 the Court was not only prepared to abandon the "deliberate speed" formula of *Brown II*, but some Justices at least seemed ready to repudiate that entire enterprise. Justice Black thus indicated, in a 1968 television interview, that the Court had been wrong both as a matter of political judgment and of principle by tolerating delay in *Brown II*.[100] He suggested that Southern whites would have more readily complied with an adamantly stated, authoritative judicial order in 1955. Black's retrospective political judgment may be correct; the practical basis for Frankfurter's counsel of judicial self-restraint thus may not find support in retrospect. But if, as a matter of practical politics, we are prepared to say that the Supreme Court should have acted in *Brown* as the Court acted in *Dred Scott*, then we are left with the task of distinguishing these two decisions in principle. Perhaps there is some better basis than I have found. But in any event, as Justice Jackson observed about *Dred Scott*, "[o]ne such precedent is enough!"[101]

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> not only presages the futility of judicial intervention.... It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feelings must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

99. JACKSON, *supra* note 2, at 321, 327.

100. *Black Believes Warren Phrase Slowed Integration*, N.Y. Times, Dec. 4, 1968, at 1, col. 2.

101. JACKSON, *supra* note 2, at 327.