Wrongfully ‘Established and Maintained’: A Census of Congress’s Sins Against Geography

Peter J. Aschenbrenner, Purdue University

Available at: https://works.bepress.com/peter_aschenbrenner/112/
Wrongfully ‘Established and Maintained’: A Census of Congress’s Sins Against Geography [2 OCL 565]

Peter J. Aschenbrenner
Department of History, Purdue University
paschenb@purdue.edu

Abstract.
Taney, C.J. opined, for a majority of the Supreme Court, that Congress lacked the power to establish and maintain colonies as a system by which nascent states were groomed by Congress to join an expanding union. Dred Scott v. Sandford, 60 U.S. 393 (1857). Did Congress wrongfully acquire half a continent? And what was the state of the union as of the Dred Scott decision?

Key Words: Territories. States. Dred Scott

A. Introduction. The story of America’s expansion, east to west, may be retold with the narrative hook supplied by Chief Justice Roger B. Taney. “There is certainly no power given by the Constitution to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its pleasure . . . .” 60 U.S. 393, 446 (1857).

The decision was read from the bench on March 6, 1857. Dred Scott launched the Supreme Court’s war on geography. Six hundred thousand war dead, millions of lives uprooted in the following eight years may be blamed on Roger B. Taney and his brother justices. This article is the first in a series whose object is to explain the enormous scale of the legal errors committed by the majority justices in Dred Scott.

It wasn’t cheap to get it wrong, speaking only of the ink that flowed. The Supreme Court devoted 113,002 words to Dred Scott’s quest to live in American freedom with his family. Taney penned 43,871 words. In comparison A Tale of Two Cities (1859) tipped the scales at 136,302 words.

B. “All Needful Rules and Regulations.” Taney’s reasoning, in the tranche of his opinion to which OCL devotes its attention in this article, is based on this Article IV, Section 3, Clause 2.

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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

OCL takes this clause as point of departure for its exploration of the mathematical logic of new state-making.

The Table 565A annexed hereto shows the state ‘stats’ count as of the beginning of the year 1857. The United States consisted of thirty-one states; minus the original thirteen, that leaves eighteen states in the expanded union; that is, eighteen states whose existence was stained by the ‘colony’ system.

Two states were formed from other states (=Kentucky, Maine) and two were formed from Republics (=Vermont, Texas), leaving fourteen states in the union formed from nascent states. Thus, what Taney’s grievance reduces to is this; Congress expanded the union more than the original thirteen states by operating a ‘colony’ system which had produced, as of 1857, a thirty-one state union.

Taney could also surmise that sixteen more future states qualified (through the colony system) as states-in-waiting, ready to emerge from nascent states into admitted states. The reader now can’t avoid the backwards glance that renders North Dakota a future state in these counting exercises, even though, as of 1857 it isn’t anything other than real estate embraced in the Nebraska and Minnesota Territories.

(In another article, Congress’s Cursus Honorum: From Treaty to Territory, 2 OCL 569, OCL tracks the future [from any given point in time from 1783 to 1960] by reference to the geographical units of Taney’s colony system as they existed at that point in time.)

To forecast OCL’s argument: several points-of-no return had already come and gone in the seventy years and counting since the Philadelphia Convention: two of the most important:
• More states joined the Union through admission than ratification.
  and:
• More northern nascent states then existed (in inventory) than southern nascent states; indeed as of 1857 there were no future southern states in inventory.

C. IDEAS (LIKE A NATION) THAT ARE TOO DARN BIG. This is probably the time to point out the other most remarkable error in reasoning. If African-Americans had no legal rights, then there was no point in any court wasting its time on hearing what they (or their lawyers) had to say. Taney’s infamous ruling that African-Americans “had no rights which the white man was bound to respect … “ [at 408] should have made any judge’s job easier.

If this was the court’s holding, then no black man could sue a white man. But white men could sue other white men and institutions of government were free to stake out views (and take action thereon) on grounds other than what Taney might suppose were good for the white race.

This, then, was the beginning of Taney’s problem. The two pieces of the opinion’s legal machinery clatter against one another. In saying black people had no rights Taney took an easy road but didn’t follow through on his reasoning.

In saying that Congress operated a system of colonies, Taney took the lazy road, by failing to describe the features of this system before holding some or all of its machinery unconstitutional. If he seriously believed that the opinion would stop the colony system which held sixteen states-in-inventory, none of them likely to support the south’s regional agenda, then Taney had a lot of history to grapple with.

Some perspective is needed: from 1783 through 1898 Congress (and this included the Confederation Congress under the old USCA) acquired real estate which later joined the union. So that’s 115 years of acquiring and organizing real estate in gross for the purpose of new state-making.

From 1796 to 1960 Congress admitted states from these territories to the union. So that’s 164 years of turning acquired real estate into states-of-the-union.

Seventy years from 1787 – the date of the Northwest Ordinance and the federal convention – puts us at 1857, the date of the Dred Scott decision. So 70/115 and 70/164 puts the ‘colony’ system into a very mature condition. If federal officials have been acting unconstitutionally since the very beginning of time, a bit of predicate effort is required to tease out the features of the system that would be the focus of the Supreme Court’s hostile attention.

True, Taney’s 43K words is novella-length; it’s not like Taney didn’t put in some effort. But we’re speaking of the conduct of every President of the United States since George Washington – to take only one tranche of officialdom – having, on Taney’s analysis, misunderstood how the United States intersected with geography, history, economics (agricultural and financial) and America’s past, present and future. Here’s what Taney struggled with, in OCL’s nutshell: Whatever power states possessed within their borders, why wouldn’t the federal government have the power of a state in any of the territories it acquired and organized?

D. THE STATES OF ORIGINAL SIN. Table 565A shows that fourteen of thirty-one states joined the union in a state of original sin, as of 1857.

Most distressing must have been this factoid. The majority of the states that (attempted to / did in fact) secede from the union were stained with this sin: Florida, Alabama, Mississippi, Louisiana, Tennessee and Arkansas, six of eleven, had been wrongfully governed as “colonies,” by Taney’s reasoning.

As long as new-state making generated southern states, the south was ‘in the race’ by which regions competed to expand via newly minted states-in-gross. When the race was over, the contest was condemned as sin. Cynical, but that’s sure what it looks like.

See Charting the Decline and Fall of Virginia Voting Power, 2 OCL 292, for a more intimate look at one state’s experience with apportionment, the rules of which logic supply the sister machinery by which newly made out-of-region states destroy another region’s voting power, followed by the decline in that region’s power to block laws, to block the proposal of constitutional amendments and finally to block adoption of these amendments.

E. HOW MUCH ATTENTION DID CONGRESS DEVOTE TO THE COLONY SYSTEM? Counting all the years that Congress spent managing its relations with the states under the Constitution – Taney has
no beef here – and comparing the years that Congress spent managing affairs with its colonies – Taney’s grievance – the census yields total years spent on federal state relations at 1,493 years with years spent on relations with federal colonies/territories at 842 years. The grand total for states and territories is 2,335 years.

The percentage computes to 36.06%. The details appear in Table 565A. Eight hundred and forty-two years of Congressional management reflects, year in, year out, session after session, Congressmen and Senators attending to the needs of the colony system.

Of course, to manage the *cursus honorum* in the manner that Taney objected to, Congress was obliged to operate a system of (a) acquiring real estate in gross, (b) organizing it, (c) subdividing it (sometimes multiple times), as well as merging, adding and subtracting from subdivided units, before (c) grooming a nascent state, and (d) admitting it into the union. 2 OCL 569 tables, in narrative, the historical record with the *cursus honorum* featured. Table 565D provides the narrative from a purely step-by-step state-of-admission count of existing and future states, without the analysis supplied in the tables in 2 OCL 569.

F. **Talk about Short-Lived.** What an ephemeral ruling it was. Three states were admitted before *Dred Scott* was handed down (March 6, 1857): Iowa (1846), Wisconsin (1848) and California (1850). After an eight year break in new-state-making Congress went on a tear, adding Minnesota (1858), Oregon (1859), Kansas (1861), West Virginia (1863), and Nevada (1864). These eight states – free states, every one – were joined to the union so rapidly that Congress did not bother getting the consent of the Virginia legislature at Richmond to organizing Virginia’s western counties. Kesavan and Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal. L. Rev. 291 (2002), tell the story of Union connivance at the mocked-up approval of loyalist legislators, presuming to act for the Tidewater.

G. **The Balance of Power.** The balance of power between north and south stood at 19 free states and 11 slave states in the interval 1850 – 1858.

So when Congress added five states immediately after *Dred Scott*, the ratio went to twenty-four and eleven, meaning that two-thirds of the states (if like minded as to organic change) could (at least) launch the process of amending the constitution under the Philadelphia Constitution’s Article Five.

It retrospect it’s hard to see how Congress could have given less respect to the Supreme Court than by admitting states to the union from the inventory of colonies maintained as nascent states.

And it’s hard to see how states of the union – a majority of which were conceived and born in sin —were going to support a revanchist campaign to turn the clock back to a seventeen state union: the Original Thirteen, plus the unstained Vermont, Maine, Kentucky and Texas. The mathematical logic of the federal constitution gives new meaning to the Cervantes’ phrase ‘tilting at windmills.’

H. **Status.** Complete.

I. **Citation Format.** Please cite as 2 Our Constitutional Logic 565 or 2 OCL 565.

J. **Server Location.** This file is maintained on the I/D server.

K. **Last Revised.** This file was last revised on August 8, 2012; it is version 015.

M. **File Format.** The format of this file is MS Word 2010; the format of the associated table is also MS Word 2010.