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Dred Scott and the Political Question Doctrine

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DRED SCOTT AND THE POLITICAL QUESTION DOCTRINE

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During one of his debates with presidential rival John Kerry, President George W. Bush was asked what he would look for in a Supreme Court of the United States Justice; he announced that he would insist on a candidate who supports his view that *Dred Scott v. Sandford* was wrongly decided.[1] This litmus was not likely to whittle down the pool of potential nominees in the twenty-first century, but Bush's invocation of the decision is telling. Aside from *Roe v. Wade*,[2] *Dred Scott* is perhaps the only case that could have been cited with any assurance that the general audience would know the reference.[3] Unlike *Roe*, there is no divided opinion on *Dred Scott*—it is universally reviled.[4]

Dred Scott has been a focal point for criticism of this nation's sad history of recognizing slavery. Chief Justice Roger B. Taney's words have resonated louder and longer than those of Abraham Lincoln, John C. Calhoun, William Grayson, George Fitzhugh, or a number of public figures who also embraced the racist

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[1] George W. Bush, U.S. President, John F. Kerry, U.S. Senator, Democratic Presidential Nominee, The Second Bush-Kerry Presidential Debate (Oct. 8, 2004), *available at* http://www.debates.org/pages/trans2004c_p.html.

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[4] Liberals as well as conservatives have criticized the *Roe* decision. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985). The result in the *Roe* decision, however, has wide popular support. *See, e.g.*, Will Lester, *Poll: Americans Want* Roe v. Wade *Upheld*, L.A. TIMES, Nov. 29, 2004 (citing "poll conducted for the [American Press] by Ipsos-Public Affairs"), *available at* http://www.latimes.com/news/nationworld/politics/wire/sns-ap-supreme-court-ap-poll,1,3633613.story?coll=sns-ap-politics-headlines&ctrack=1&cset=true.

presumptions in the *Dred Scott* opinion.[5] At first glance, it is not at all clear why this case has attracted this sort of attention.

Nothing about the relief sought by the slave in the case suggested that the Supreme Court's decision would be a significant marker in the sad history of the law's support of human ownership. As a number of slaves had done in the Antebellum Era, Dred Scott claimed that his master's temporary domicile in a jurisdiction forbidding slavery had liberated him.[6] Dred Scott's master had taken him into part of the Upper Louisiana Territory, which is modern day Minnesota, in which Congress had forbidden slavery by the terms of the Missouri Compromise of 1820.[7] Dred Scott, like several other slaves bringing emancipation suits in the nineteenth century, had been brought back to a slaveholding jurisdiction and there sued for his freedom in a state court.[8] Southern courts had been fairly receptive to such claims early in the nineteenth century.[9] As sectional antagonism grew, however, these courts were increasingly deciding that slaves taken to free jurisdictions reverted to a condition of slavery upon their return to a slaveholding jurisdiction.[10]

Missouri, the state in which Dred Scott was enslaved, was a classic example. Up until the time Dred Scott brought his claim for

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[5] *See* JOHN C. CALHOUN, LIFE OF JOHN C. CALHOUN 63-64 (N.Y., Harper & Brothers 1843); WILLIAM J. GRAYSON, *The Hireling and the Slave*, *in* THE HIRELING AND THE SLAVE, CHIROCA AND OTHER POEMS 21-75 (Mnemosyne Publ'g Co. 1969) (1856); GEORGE FITZHUGH, CANNIBALS ALL! OR SLAVES WITHOUT MASTERS 199-202 (C. Vann Woodward ed., Belknap Press of Harvard Univ. Press 1960) (1857); THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT 188-233 (Harold Holzer ed., 1993) (debate at Charleston, Sept. 18, 1858).

[6] *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 87-89 (1975).

[7] DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 244 (1978). *See also Dred Scott*, 60 U.S. at 397-98.

[8] *See* Scott v. Emerson, 15 Mo. 576, 582 (1852); *see also* FEHRENBACHER, *supra* note 7, at 249-50.

[9] FEHRENBACHER, *supra* note 7, at 54-55.

[10] COVER, *supra* note 6, at 121. *But see* FEHRENBACHER, *supra* note 7, at 55-61 (taking issue with the conclusion by various historians that the South, prior to *Dred Scott*, rejected freedom for those domiciled in free states or territories).

emancipation in a Missouri state court, Missouri courts had consistently held that when slaves were domiciled in free jurisdictions, they were emancipated even if their masters returned with their former slaves to the state of Missouri.[11] The Missouri trial court in which Dred Scott filed suit followed Missouri law and declared that his master's sojourn into the Upper Louisiana Territory had liberated him.[12] The Supreme Court of Missouri, on appeal, overruled existing Missouri law and held that slaves taken to a free jurisdiction reverted to the status of slaves when returned to slaveholding states.[13]

The case became unusual at this point only because Dred Scott then filed a claim for his freedom in federal court.[14] He claimed that the federal court had jurisdiction because, while his master was a citizen of Missouri, his emancipation made him a citizen of a different state or territory.[15] But in the federal court, he merely raised the same claim that he had presented unsuccessfully to the Missouri trial court—that he was emancipated upon his master's domicile in a free territory.[16]

The Supreme Court's decision to leave Dred Scott in a state of bondage is, similarly, no reason history should find the case remarkable. The decision of the Supreme Court of Missouri and the decisions of other Southern courts, holding that sojourning slaves revert to a condition of bondage upon return to a slave state, have been largely ignored except by historians of the Antebellum Era.[17] Few, if any citizens (or even law professors), who cite *Dred Scott* as the worst decision of the Supreme Court of the United States could name even a single decision by a Southern court holding that slaves brought back from free territories returned to a

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[11] *See, e.g.*, Vincent v. Duncan, 2 Mo. 214, 217 (1830); Winny v. Whitesides, 1 Mo. 472, 476 (1824); FEHRENBACHER, *supra* note 7, at 252-57; PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 20-21 (1997).

[12] *See Emerson*, 15 Mo. at 582.

[13] *Id.* at 592.

[14] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 400 (1857).

[15] *Id.* at 431-32.

[16] *See id.* at 400, 431-32; *Emerson*, 15 Mo. at 582.

[17] Obviously historians of this era have thoroughly explored this topic. *See, e.g.*, COVER, *supra* note 6, at 93; FEHRENBACHER, *supra* note 7, at 252-57.

condition of slavery; yet these decisions were numerous.[18] Based solely on the circumstances of their lives that led them into court, the name Dred Scott should be no more familiar than Mahoney, Pattinson, or Denison.[19]

It was surely the Supreme Court's reasoning, not its disposition, which led to the decision's infamy. The premises supporting the Court's decision—one procedural, one substantive—were not, however, out of the mainstream of American legal thought in the mid-nineteenth century. Procedurally, the Court concluded that free blacks were not entitled to bring suit in federal court because they were not citizens of any state or territory—at least not as the term "citizen" was meant by the Federal Constitution.[20] Substantively, the Court reasoned that Dred Scott could not claim he was free because he had been domiciled in a free territory; he could not have been domiciled in a free territory because the Missouri Compromise unconstitutionally prohibited slavery in the Missouri Territory.[21] Congress lacked the power to prohibit slavery in the territories, and thus Dred Scott could not claim that his master's domicile in the Upper Louisiana Territory emancipated him, according to the Court.[22]

Consider first Chief Justice Taney's procedural basis for the decision. It was certainly not outrageous to claim, in 1857, that free blacks were not citizens of states within the meaning of the Constitution. In fact, the weight of the authority suggested that free

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[18] *See, e.g.*, Strader v. Graham, 46 Ky. (7 B. Mon.) 633 (1847), 1847 WL 88, at *3 (Ky. Ct. App. Oct. 4, 1847); Conart v. Guesnard, 5 La. Ann. 696 (1850), 1850 WL 4061, at *1 (La. Nov. 1850); Liza v. Puissant, 7 La. Ann. 80 (1852), 1852 WL 3552, at *4 (La. Feb. 1852). Fehrenbacher noted that "[e]xcept in Missouri, as a result of the Dred Scott case, there appears to have been no decision of a southern appellate court that denied a suit for freedom in a clear-cut case of permanent residence on free soil." FEHRENBACHER, *supra* note 7, at 60.

[19] *See* COVER, *supra* note 6, at 87-93.

[20] *Dred Scott*, 60 U.S. at 424-27.

[21] *Id.* at 431-54 (specifically at 452).

[22] *Id.* at 452-54.

blacks were not citizens.[23] As Mark Graber has demonstrated, "Virtually every state court that ruled on black citizenship before 1857 concluded for reasons similar to those advanced in the *Dred Scott* majority opinion that free persons of color were not state or American citizens."[24]

The Supreme Court's language in this section of the opinion is most often cited by those adding another layer to the criticisms heaped upon this opinion. Even the racist language Chief Justice Taney used to support his conclusion about black citizenship, though deplorable, is unremarkable by mid-nineteenth century standards. Taney concluded that the status of free blacks at the time the Constitution was adopted determined whether a free black man could be a citizen in 1857.[25] At the time of the Constitution's drafting, Taney concluded that blacks

> had for more than a century before been regarded as 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

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[23] *See, e.g.*, Crandall v. State, 10 Conn. 339 (1834) (discussing the belief that a free black man was not a citizen); State v. Claiborne, 19 Tenn. 331 (1838) (explaining that a black man, although considered free, was not a citizen).

[24] Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 281 (1997). This view was not limited to decisions of Southern courts. *See* ANNE FARROW, JOEL LANG & JENIFER FRANK, COMPLICITY: HOW THE NORTH PROMOTED, PROLONGED, AND PROFITED FROM SLAVERY 156-63 (2005) (specifically at 160-63) (describing decisions of Northern courts denying that blacks were citizens). Nor was the position limited to judges, or even ardently proslavery politicians. Thomas Jefferson, whose words in the Declaration of Independence that "all men are created equal" provided the strongest endorsement of racial equality in the eighteenth century, seemed to conclude that free blacks were not citizens of the United States. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For example, in the Louisiana Purchase, Jefferson prepared two amendments to the Constitution, one of which read, "Louisiana as ceded by France to the U.S. is made a part of the U.S. Its white inhabitants shall be citizens, and stand, as to their rights & obligations, on the same footing with other citizens of the U.S. in analogous situations." 4 DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 316 (1970) (describing correspondence between Jefferson and James Madison).

[25] *Dred Scott*, 60 U.S. at 406-27 (specifically at 426-27).

> bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[26]

Compare this universally condemned language with contemporary discussions of race. The Lincoln-Douglas debates are regarded by many to be the high-water mark of political discourse in the United States, and of course, Lincoln, the Great Emancipator, forced America to fundamentally reconsider the status of African Americans in the United States.[27] During the course of these famous debates, Lincoln described blacks as being part of an inferior race using language that is virtually indistinguishable from Taney's.

> I will say then, that I am not nor ever have been in favor of bringing about in any way, the social and political equality of the white and black races . . . , that I am not, nor ever have been in favor of making voters of the negroes, or jurors, or qualifying them to hold office, or having them to marry with white people. I will say in addition, that there is a physical difference between the white and black races, which I suppose, will forever forbid the two races living together upon terms of social and political equality, and inasmuch, as they cannot so live, while they do remain together, there must be the position of superior and inferior, that I as much as any other man am in favor of the superior position being assigned to the white man.[28]

Taney's conclusion about black citizenship, in fact, drew very little contemporary criticism, likely because neither the conclusion itself nor the racist justification for it was outside mainstream thought in the mid-nineteenth century.[29]

Even though this relatively uncontroversial procedural position (uncontroversial, of course, only by contemporary

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[26] *Dred Scott*, 60 U.S. at 407.

[27] *See* 2 CHAMP CLARK, MY QUARTER CENTURY OF AMERICAN POLITICS 348 (1920) (contending that "[p]erhaps debating on this continent reached the high-water mark in the series of joint discussions betwixt Lincoln and Douglas").

[28] THE LINCOLN-DOUGLAS DEBATES, *supra* note 5, at 189.

[29] *See* FEHRENBACHER, *supra* note 7, at 430-31.

standards) would have precluded Dred Scott's suit for his freedom, Chief Justice Taney went on to address the merits of the case. He concluded that as the terms of the Missouri Compromise unconstitutionally prohibited slavery in the territories above the 36°30' parallel, this territory was not free territory. Dred Scott thus could not claim that he was liberated as a result of having been domiciled in a free territory.[30] The Missouri Compromise of 1820, one of several compromises between the North and South, had forbidden slavery in the territories north of the 36°30' parallel, and later in 1854, the Kansas-Nebraska Act permitted states to enter the Union as free or slave states on the basis of popular sovereignty.[31] Congress did not have the authority, Taney asserted, to forbid slavery in the territories, and therefore the premise of Dred Scott's argument in support of his freedom was invalid.[32] In 1857, this conclusion was controversial, though Taney's position was still not out of the mainstream of American political and legal thought.

The Missouri Compromise was obviously no ordinary piece of legislation. It had reduced the number of territories that could enter the Union as slave states.[33] Chief Justice Taney's opinion therefore had the potential of substantially altering the balance of federal power that the compromise had maintained between Northern and Southern states.[34] The compromise held together an increasingly fragile Union of half-slave and half-free states.[35] Nevertheless, the

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[30] *Dred Scott*, 60 U.S. at 406-07.

[31] Missouri Compromise of 1820, ch. 22, § 8, 3 Stat. 545 (1820); Kansas-Nebraska Act of 1854, ch. 59, § 14, 10 Stat. 277 (1854). *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 459-552, 804-35 (1999) (examining the enactment process of the Missouri Compromise and the Kansas-Nebraska Act, respectively).

[32] *Dred Scott*, 60 U.S. at 432-52 (specifically at 451-52).

[33] *See* Missouri Compromise § 8.

[34] *See* HANNIS TAYLOR, THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION: AN HISTORICAL TREATISE 290 (Fred B. Rothman & Co. 1998) (1911) (describing the Missouri Compromise as preserving the practice of admitting one slaveholding state for each free state admitted prior to 1820).

[35] *See* FEHRENBACHER, *supra* note 7, at 101-13.

Democratic Party platform of 1856 maintained that Congress was without authority to forbid slavery in the territories.[36]

Disrupting the balance of slaveholding and free states might well qualify *Dred Scott* as one of the worst political decisions rendered by the Supreme Court. However, that hardly qualifies it as the worst legal decision particularly when this legal position was held by one of the major political parties at the time—indeed, the only political party that maintained strong support in both the North and South into the 1860 election.[37] And more importantly, the Court's declaration that the Missouri Compromise was unconstitutional does not explain why the Court's decision has become a focal point of our very understandable loathing of our nation's sad history of human bondage.

Each of Chief Justice Taney's premises, however, ultimately rested upon a conclusion that was neither universally accepted, nor previously considered. Taney justified his procedural and substantive premises on the claim that the Constitution protected slaveholders' interests and the institution of slavery from any sort of interference from the federal government.[38] Stated another way, Taney concluded that the Framers of the Constitution made a slaveholder's interest in his property a fundamental right, an interest that knew no limitation other than Congress' right to prohibit the international slave trade after 1808. Taney concluded that the protection of slavery was not a necessary compromise of Northern and Southern interests, but rather was a fundamental value upon which this nation was founded.[39] He alone was capable of making this definitive pronouncement about the Constitution and in so doing has rightly suffered the ire of history.

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[36] B. A. HINSDALE, THE AMERICAN GOVERNMENT NATIONAL AND STATE 359 (4th ed., Am. Book Co. 1905) (1891).

[37] *See* David Liep, Atlas of U.S. Presidential Elections, 1860 Presidential Election Results, *available at* http://www.uselectionatlas.org/Results/national.php?off=0&year=1860 (last visited Nov. 27, 2007); *id.* 1865 Presidential Election Results, *available at* http://uselectionatlas.org/RESULTS/national.php?off=0&year=1856 (last visited Nov. 27, 2007).

[38] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449-52 (1857).

[39] *Id.* at 406-18.

Consider first Taney's conclusion that free blacks could not be citizens. Among other reasons, Taney concluded that the institution of slavery itself demonstrated that the Framers did not intend to confer citizenship on free blacks. The Privileges and Immunities Clause of the Constitution would have prevented slaveholding states from maintaining laws unknown in other states; limiting the rights of free blacks to travel freely, to speak publicly, and to bear arms.[40] Slave states therefore, according to Taney, could not have accepted this arrangement as it would have "inevitably produc[ed] discontent and insubordination" by slaves to see free blacks enjoying the liberties of white citizens and would have "endanger[ed] the peace and safety of the State."[41] The Framers, Taney concluded, must have been unwilling to recognize black citizenship because it would have undermined the institution of slavery.[42] The Constitution therefore prevented the federal judiciary from recognizing the citizenship of free blacks in diversity suits. Free blacks certainly had an interest in citizenship—an interest that Taney concluded was denied because of the Framers' interest in protecting slavery from agitation.[43]

Taney's conclusion that Dred Scott could not prevail on his substantive claim similarly rested on his view that the protection the institution of slavery enjoyed under the Constitution prevented interference of any sort from the national legislature. Congress could not prohibit slavery in the territories because the Due Process Clause prevented the deprivation of property.[44] Just as Congress could not restrict the other freedoms constitutionally guaranteed in the territories, it could not restrict slaveholders' rights to possess their property in the territories. The Chief Justice wrote:

> For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of

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[40] *Dred Scott*, 60 U.S. at 405-06.
[41] *Id.* at 417.
[42] *Id.* at 407-09.
[43] *Id.* at 411-12.
[44] *Id.* at 450-51.

> people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.
> . . . .
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> These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care.[45]

Taney rejected the notion, virtually without explanation, that property rights in slaves under the Federal Constitution were different than other types of property rights, real property or chattels, for instance.[46] States had more flexibility to treat slaves as different species of property. Unlike the states that possessed a general police power permitting them to create different rules for different types of property, the federal government possessed only the powers conferred upon it by the Constitution.[47] Even if states could prohibit slavery within their boundaries under the general police power, which was not subject to the limitations of the Due Process Clause in the Federal Constitution,[48] the federal government was not given such leeway. It had no general police power—only the Due Process Clause elucidates the federal government's role in regulating property. And the Due Process Clause prohibited federal interference with property—making no distinctions for human, chattel, or real property—and thus, for the Chief Justice, the federal legislature was prohibited from imposing limitations on the right to own persons.[49]

> The people of the United States have delegated to [the federal government] certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave,

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[45] *Dred Scott*, 60 U.S. at 450.
[46] *Id.*
[47] *Id.*
[48] Barron v. Mayor of Balt., 32 U.S. 243, 250-51 (1833).
[49] *Dred Scott*, 60 U.S. at 452.

> can enlarge the powers of the Government, or take from the citizens the rights they have reserved.[50]

Under this view of the Due Process Clause, Congress lacked a power that could be analogized to zoning, permitting certain uses of property in one territory but not in another.[51] Congress was forbidden even this type of restriction on the peculiar institution of slavery because, according to Taney, the Constitution protected property under the Due Process Clause and made no distinction between human and ordinary property.[52] And the protection of one's property interests—at least the human property under consideration in *Dred Scott*—was free from any congressional restriction. This very extreme view of the protection of slavery under the Due Process Clause gave Congress less power to regulate slavery than any state legislature possessed to prohibit slavery—and indeed less power than a modern city council possesses to prohibit certain uses of property through zoning.

Dred Scott, in sum, could not be a citizen—and Congress could not prohibit slavery in the territories—because the Constitution permitted no interference with the institution of slavery beyond the prohibition of the international slave trade after 1808. The document the Framers gave us does not seem to elevate the institution of slavery to such a fundamental status. The Framers demonstrated much more ambivalence about the protections their document would give to the peculiar institution. The Constitution made references to slavery, but the drafters refused to permit the word "slavery" to appear in the document.[53] Painfully awkward

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[50] *Dred Scott*, 60 U.S. at 451.

[51] *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (holding that zoning does not constitute a taking).

[52] *Dred Scott*, 60 U.S. at 450-52.

[53] *See, e.g.*, WILLIAM I. BOWDITCH, SLAVERY AND THE CONSTITUTION 134 (Boston, Robert F. Wallcut 1849) (observing that James Iredell, a delegate to the federal convention, stated in the North Carolina ratifying convention that "[t]he Northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned" in the Fugitive Slave Clause); WILLIAM CHAUNCEY FOWLER, THE SECTIONAL CONTROVERSY; OR, PASSAGES IN THE POLITICAL HISTORY OF THE UNITED STATES, INCLUDING THE CAUSES OF THE WAR BETWEEN THE SECTIONS 21-22 (N.Y., Charles Scribner 1863)

language was instead chosen to identify slaves. States were entitled to representation based on their free populations plus "three fifths of all other Persons."[54] Congress could not prohibit the "[m]igration or Importation of such Persons as any of the States now existing shall think proper to admit" until 1808.[55] Persons "held to Service or Labour in one State" were not liberated by their escape into another state.[56] Each of these provisions referred to slavery, but a person unfamiliar with the historical context would have no way of knowing that.

If the Framers had intended their document to elevate a slaveholder's property interest to a fundamental right that trumped other constitutional provisions, they surely could have chosen clearer language. The substance of two of the three references to slavery further reflects the Framers' collective moral ambiguity on the issue. Congress could not impose any limitation on the international slave trade until 1808, at which point it could (and did) entirely prohibit it.[57] States were to be represented in the national legislature and taxed based on their free populations plus three-fifths of their slave populations.[58]

Each of these compromises seems to reflect great ambiguity about the Constitution's protection of a slaveholder's property. Everything about the slavery provisions suggested that slaves were a unique form of property. A slaveholder (specifically, a slavetrader) was given an absolute right to bring his property into the nation, but only for a brief window of time at which point he had no such constitutional right whatsoever.[59] The Constitution imposed no sunset provision on any other kind of property interest. And in regarding slaves as three-fifths of a free person for the purposes of taxation and representation, the Constitution does not seem to embrace the notion that slaveholders' interests in their human property were interchangeable with their interests in

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(observing that Madison "was unwilling to use the term *slaves* in the Constitution, or even to suggest the idea that they were property").

[54] U.S. CONST. art. I, § 2.

[55] *Id.* § 9.

[56] *Id.* art. IV, § 2.

[57] *Id.* art. I, § 9, cl. 1.

[58] *Id.* art. I, § 2. art. 3.

[59] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 411 (1857).

ordinary chattels. A state's population of cattle and horses had nothing to do with either taxation or representation. The Constitution's description of slavery can be characterized only as a hodgepodge of competing interests—compromising between slaveholding and nonslaveholding interests.

Yet Chief Justice Taney took this same evidence and concluded that the Constitution protected slaveholders' interests far beyond the Constitution's specific guarantees of the right to import slaves until 1808 and the right to reclaim property under the Fugitive Slave Clause.[60] For Taney, the Constitution implicitly recognized that the slaveholder's interest in his property was a fundamental right—and, as such, the Court was to enforce the right.[61] The Framers, according to Taney, embraced the protection of slavery as one of the principles animating their founding document, and from this principle, the issues presented in Dred Scott's case could be resolved.[62]

The Constitution's slavery provisions do not bear the weight Taney placed on them. They provide specific protections to slaveholders in words that seem inconsistent with a constitutional principle that provided further implicit protections of the peculiar institution. The language of these provisions clearly reflects what they were—political compromises—not specific applications of a broader principle embodied in the text. Taney implicitly rejected the idea that generations after the Framing Era were permitted to engage in the types of political compromises regarding slavery, reflecting a hodgepodge of competing principles, that were embodied in the Constitution itself. As the Constitution absolutely protected the institution of slavery, no role was left for the political branches to decide how to balance the conflicting values of liberty and property.[63]

Taney had, prior to *Dred Scott*, recognized that there were occurrences when the Framers left certain issues to be decided exclusively by the political branches.[64] In *Luther v. Borden*,[65] the

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[60] *Dred Scott*, 60 U.S. at 451-52.
[61] *Id.* at 449-51.
[62] *Id.* at 417.
[63] *Id.* at 450.
[64] *See* Luther v. Borden, 48 U.S. 1 (1849).
[65] *Id.*

Taney Court faced a very unusual situation. Two governments—one allegedly created by a constitution ratified by the majority of all male citizens over the age of twenty-one, the other empowered by the original royal charter of Rhode Island which had been in effect since 1663—claimed to be in legitimate control of the State of Rhode Island.[66] A member of the militia of the charter government broke into the home of a supporter of the new constitution and arrested him.[67] The homeowner sued for trespass and contended that, as the Constitution ensures each state "a republican form of government," a federal court was entitled to determine which competing government was legitimately in control of the state.[68]

Though the text of the Constitution did not indicate which branch of government was to enforce the guarantee of a republican form of government, Chief Justice Taney concluded that other provisions of the Constitution revealed that it was the political branches of government, not the Supreme Court, that were to enforce this guarantee.[69] The Court considered how the guarantee would be enforced and concluded that two provisions of the Constitution related to this guarantee. The federal government could refuse to recognize a nonrepublican form of government or could put down the nonrepublican form of government by force.[70] The Court, speaking through Chief Justice Taney, concluded that the federal government recognized state governments by admitting their senators and representatives to Congress, a role that the Constitution leaves to Congress.[71] Similarly, the Constitution vested Congress with the authority to put down rebellions and invasions within states—and Congress had delegated this authority to the President.[72] Provisions other than the clause guaranteeing a republican form of government revealed the Framers' intent to leave to the political branches the question of whether a form of government is republican.

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[66] *Luther*, 48 U.S. at 35-38.
[67] *Id.* at 34.
[68] *Id.* at 34, 42.
[69] *Id.* at 40.
[70] *Id.* at 42-43.
[71] *Id.* at 42.
[72] *Luther*, 48 U.S. at 43-45.

The text of the Constitution's slavery provisions similarly suggests that the principles justifying the continued existence of slavery in the nineteenth century—and the application of those principles—were left to the same sort of process that produced them, political compromise. The Constitution did not provide the Court with the tools to determine which form of government was lawfully instituted in Rhode Island, and its text therefore implicitly left the job to political actors. The Framers ambiguous acceptance—and veiled acknowledgement—of the institution of slavery similarly suggests that no interpretation of the Constitution's text can produce a definite answer on whether the institution of slavery is protected as vigorously under the Constitution as other forms of property. Taney extrapolated a constitutional principle—which he extended to Dred Scott's case—from a collection of specific compromises that appear to have used language that committed the founding document to use more than those specifics.[73]

Perhaps it was Taney's own assessment of his role in the constitutional order in *Luther* that best explains why Taney's words have outlived those of others who took positions supportive of the peculiar institution of slavery. In *Luther*, he recognized that the Constitution left certain tasks to the elected branches of government. Elected officials depend on popular support for tenure in office—decisions by elected officials in a representative democracy are presumed to rest ultimately on public will.[74] Those issues given to the judiciary to resolve were, to the contrary, to be interpretations of law rather than expressions of popular will. As John Marshall stated, "It is emphatically the province and duty of the judicial department to say what the law is."[75] In interpreting the *Constitution*, Chief Justice Taney was necessarily defining the fundamental principles of government enshrined in our founding document. And it was his conclusion that the right to own humans of an inferior race was among the fundamental protections of the document—a protection so broad that it trumped the interest of free persons of color to citizenship and precluded the Congress

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[73] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451-52 (1857).
[74] *Luther*, 48 U.S. at 55.
[75] Marbury v. Madison, 5 U.S. 137, 177 (1803).

from governing territories as legislatures could govern their states. Taney was engaged in a very different task than his political contemporaries who similarly made racist or proslavery statements. Lincoln and Calhoun represented constituencies; Taney explained the values upon which this nation was founded. Lincoln spoke for his generation; Taney spoke for the ages.