"NO BETTER THAN THEY DESERVE:" DREDD SCOTT AND CONSTITUTIONAL DEMOCRACY

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Prominent constitutional designers and theorists reject George Bernard Shaw's aphorism that "democracy is a system insuring that the people are governed no better than they deserve." Constitutional democracy, champions from James Madison to James Fleming insist, does promise government better than the people deserve or at least better than the people would obtain in a simple majoritarian democracy. Devotees point to two central characteristics of constitutional government that they maintain improve democratic performance. First, well designed constitutional institutions foster the election of particularly qualified representatives and promote serious deliberation on the public good. "The aim of every political constitution," Madison wrote, "is . . . first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society . . . ." Second, well crafted constitutional declarations of fundamental values and constitutional limitations on government power foster the societal commitments to human dignity necessary for privileging decisions based on these communal aspirations for justice. Christopher Eisgruber and Fleming insist that both constitutions and theories of constitutional interpretation be subject to a "no gain, no claim" test. "[I]f the Constitution does not help us secure the political goals we would pursue in the Constitution's absence," Eisgruber writes, "then the Constitution's claim to authority fails."

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1. George Bernard Shaw, in CROWN'S BOOK OF POLITICAL QUOTATION: OVER 2,000 LIVELY QUOTES FROM PLATO TO REAGAN 45 (Michael Jackman ed., 1982); see also George Bernard Shaw, Unsourced quote, http://en.wikiquote.org/wiki/George_Bernard_Shaw (replacing "insuring" with "ensuring").
2. See The Federalist No. 10 (James Madison).
4. For the differences between constitutional and pure representative or majoritarian democracies, see Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, American Constitution Interpretation 43-59 (3d ed. 2003).
6. Id.
8. Fleming, supra note 3, at 211; Eisgruber, supra note 7, at 13.
Dred Scott v. Sandford\textsuperscript{10} challenges this romantic\textsuperscript{11} view of constitutional democracy. The Taney Court\textsuperscript{12} in 1857 apparently missed an unparalleled opportunity to improve antebellum\textsuperscript{13} American politics. Instead of building upon those strands in the American constitutional tradition that celebrated equality and freedom, the judicial majority, when holding that former slaves could not become American citizens\textsuperscript{14} and that human bondage could not be prohibited in American territories,\textsuperscript{15} privileged those aspects of the American constitutional tradition that celebrated racism and slavery. At best, Dred Scott left Americans governed no better than they would have been in the absence of judicial review and constitutional limitations on federal power.\textsuperscript{16} Susan B. Anthony exaggerated only slightly when she described that decision as “but the reflection of the spirit and practice of the American people . . . .”\textsuperscript{17} Certainly the Taney Court in 1857 did not promote justice, human dignity, or any other value commonly associated with the virtues of constitutional democracy.

Constitutional commentators of all interpretive persuasions vigorously condemn Dred Scott,\textsuperscript{18} but that decision is particularly disturbing to those who regard constitutional democracy as a means for improving democratic performance. Institutional critics of the Taney Court ruling maintain that the justices should not have interfered with the political status quo. They excoriate

\textsuperscript{10} Dred Scott v. Sandford, 60 U.S. 393 (1856).


\textsuperscript{12} President Andrew Jackson nominated Roger B. Taney as the 5th Chief Justice of the Supreme Court in 1835. He replaced Chief Justice John Marshall who had died after 34½ years of service on the Court. Although he is primarily remembered and criticized for his Dred Scott opinion, Taney is widely considered to have been an excellent Chief Justice who strengthened the Court’s authority of judicial review. In a twist of irony, Taney himself had emancipated his own slaves 30 years before the Dred Scott decision. Henry Abraham, Justices, presidents, and Senators: A History of the U.S. Supreme court Appointments from Washington to Clinton 74-77 (3d ed., 1999).

\textsuperscript{13} “Antebellum” is a Latin word meaning before (ante) the war (bellum). In United States history, Antebellum refers to the period of growing sectionalism leading up to the Civil War, generally held to have begun with the debates leading up to the passage of the Kansas-Nebraska Act of 1854. See Tyler Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850’s, at 18 (1992).

\textsuperscript{14} Dred Scott, 60 U.S. at 407-12.

\textsuperscript{15} Id. at 451-53.

\textsuperscript{16} See Mark A. Graber, Dred Scott and the Problem of Constitutional Evil 30-33 (2006). “Even committed antislavery advocates ruefully admitted that no aspect of Dred Scott was countermajoritarian.” Id. at 33.

\textsuperscript{17} Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 430 (1978) (quoting Susan B. Anthony, Draft of Speech (1861), in Susan B. Anthony Papers (available in the Manuscript Division, Library of Congress)).

Dred Scott for making politics worse, not better. Several insist that decision helped cause the Civil War. Originalist critics tend to reach a similar conclusion by interpreting the Constitution as vesting Congress with the authority to determine whether slavery could have been permitted in the territories. Given that Congress during the 1850s had either repealed the Missouri Compromise entirely or repealed that measure for all territories that slaveholders were making any effort to settle, the originalist attack on Dred Scott implicitly excoriates that decision for only making politics worse. Proponents of "no gain, no claim" demand more from the Supreme Court and the Constitution. In their view, the justices in 1857 should have strengthened the antislavery and equality strands of American constitutionalism and not merely have deferred to legislative judgments for institutional or constitutional reasons. Chief Justice Roger Taney is "justly condemned," Milner Ball declares, "for refusing ... to create with us a future of human flourishing." Sotirios Barber insists, "asking the Court to overrule Dred Scott can be construed as asking the Court to play its part in achieving a constitutional aspiration to rise above conditions responsible for the initial protection of slavery." Dred Scott, as actually decided, challenges the confidence with which these same constitutional theorists maintain that constitutional democracy and judicial review are practices that improve democratic performance.

Pointing out that Dred Scott could have been a vehicle for improving American democratic performance does not advance the cause of constitutional democracy. Proponents insist that practices associated with constitutionalism have certain characteristics that promote better policymaking. Madison insisted that the large republic would have an inherent tendency to "controll[ ] the effects of faction." By "augment[ing] cultural checks with institutional limitations," Walter Murphy agrees, "constitutional democracy offers ... a much better chance" of protecting basic human rights. These basic institutions were in place in 1857 when Dred Scott was decided. Governing institutions were staffed


24. The Federalist No. 10 (James Madison), supra note 5, at 83.

by the processes James Madison insisted would most likely generate virtuous officeholders who would remain virtuous in office.\textsuperscript{26} Judicial review was established,\textsuperscript{27} and elected officials were promoting the federal judiciary as the forum for determining the constitutional status of slavery. The justices on the Supreme Court, when deciding \textit{Dred Scott}, could refer to the Declaration of Independence, which asserts that "all men are created equal,"\textsuperscript{28} the Preamble to the Constitution, which maintains that the Constitution is a means for securing the "Blessings of Liberty,"\textsuperscript{29} the Northwest Ordinance, which prohibited slavery in the northwest territories,\textsuperscript{30} and other texts that constitutional democrats from Abraham Lincoln to Sotirios Barber insist demonstrate a constitutional commitment to placing slavery on a "course of ultimate extinction."\textsuperscript{31} Despite the presence of the institutions, practices, and texts central to constitutional democracy, \textit{Dred Scott} happened. Perhaps that decision was an aberration. Even so, proponents who claim constitutional democracy improves democratic performance must demonstrate that \textit{Dred Scott} was such an aberration, that constitutional democracy is likely to produce more good than evil in the long run.

This paper suggests that \textit{Dred Scott} was more a consequence of the constitutional text, institutions, and practices than an historical accident best explained by the perverse idiosyncrasies of a few Supreme Court justices. Part I\textsuperscript{32} details how constitutional constructivists who followed the interpretive strategies championed by constitutional democrats\textsuperscript{33} would almost certainly conclude that Americans in 1857 were constitutionally committed to a "slaveholding republic."\textsuperscript{34} Such constitutional constructivists would recognize that those execrable constitutional commitments were rooted in, though not compelled by, constitutional commitments made in 1789. Part II\textsuperscript{35} discusses how constitutional institutions in 1857 generated elected officials that lacked the

\textsuperscript{26} See The Federalist No. 57 (James Madison), supra note 5, at 350-51.
\textsuperscript{28} The Declaration of Independence para. 2 (U.S. 1776).
\textsuperscript{29} U.S. Const. pmbl.
\textsuperscript{31} See Abraham Lincoln, Speech at Cincinnati, Ohio (Sept. 17, 1859), in 3 The Collected Works of Abraham Lincoln 1858-1860, at 454-55 (Roy P. Basler ed., 1953); Lincoln, Speech at Leavenworth, Kansas (Dec. 5, 1859), supra, at 502; Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), supra, at 542-43; Barber, supra note 23, at 118.
\textsuperscript{32} See infra pp. 594-604.
\textsuperscript{33} See Fleming, supra note 3, at 61-85.
\textsuperscript{34} The expression "slaveholding republic" is taken from Don E. Fehrenbacher, The Slaveholding Republic: An Account of the United States Government's Relations to Slavery (Ward M. McAfee ed., 2001).
\textsuperscript{35} See infra pp. 604-15.
virtue and motivation necessary to promote emancipation, while practically
guaranteeing that most justices on the Supreme Court would be more committed
to providing additional constitutional accommodations for slavery than to the
ultimate extinction of human bondage and racial equality. In fact, Abraham
Lincoln’s election in 1860 was the result of a constitutional malfunction. The
constitution functioned as designed in *Dred Scott*. Part III provides some
reasons for thinking that constitutional democracy is no more likely to improve
democratic performance in 2007 than in 1857. The institutional foundations of
*Dred Scott* remain vibrant, and these foundations help explain why judicial
review of federal statutes has had no tendency over the past two-hundred years
to promote the best in American constitutionalism.

American constitutional politics during the nineteenth century, the following
pages suggest, cast doubt on whether the Constitution, constitutionalism and
constitutional democracy have the wonderful capacities commonly attributed to
them. The Constitution of 1787 did not commit Americans to the ultimate
extinction of slavery, the constitutional process for staffing governmental
institutions did not yield a class of politicians more prone to act on what was
best in the American constitutional tradition, and the Supreme Court was not a
forum of principle dedicated to encouraging Americans to realize their best
constitutional aspirations. Worse, contemporary constitutional institutions share
common features with the antebellum constitutional institutions responsible for
*Dred Scott*. As a result, constitutional democracy may be no more likely to
improve democratic performance during the twenty-first century than during the
first seventy-five years of constitutional existence.

36. See infra pp. 615-19.
I. PERFECTING THE CONSTITUTION OF THE SLAVEHOLDING REPUBLIC

Proponents of constitutional democracy insist that the Constitution of the United States should be interpreted consistently with "the substantive political theory that best fits and justifies our constitutional document and underlying constitutional order."38 This method of textual exegesis does not require constitutional decisionmakers to discover a master principle that accounts for all previous constitutional rulings and social practices. Justification may trump fit in particular instances, as long as the substantive political theory accounts for a fair degree of past practice. "No theory can count as an adequate justification of institutional history unless it provides a good fit with that history," Ronald Dworkin declares, "but if two or more theories each provide an adequate fit, on that test, then the theory among these that is morally the strongest provides the best justification, even though it exposes more decisions as mistakes than another."39 As persons and as a society, Americans may not always have the moral fiber or virtue necessary to live up to our highest constitutional aspirations. Our constitutional "aspirations" may conflict with our "immediate wants and aversions."40 Some compromises of principle may be necessary when drafting a constitution.41 Others may prove necessary when implementing constitutional principles.42 Nevertheless, leading constitutional democrats insist, constitutions establish a hierarchy of values. Constitutional interpretation is the process of identifying the correct ordering of constitutional values and providing guidelines for ensuring that, to the extent politically feasible, constitutional decisions are based on the highest constitutional norms.43 Regarding "constitutional interpretation," Walter Murphy states:

[Its two missions are to transform into a systematic unity the possibly conflicting clauses of the constitutional document(s), as well the prescriptions of the broader constitutional tradition; and, . . . to distill from that unity a mutually consistent set of jurisprudential values and principles, ranked in importance, that fit the developing political system.44

Fleming illustrates how this interpretive process takes place when he seeks to elucidate the central constitutional values that best justify and fit contemporary constitutional practice. He asks readers to "imagine . . . a constitutional archaeologist who digs up . . . bones and shards of a constitutional

41. See id.; see also Fleming, supra note 3, at 219.
44. Id. at 706.
culture."^{45} The artifacts uncovered in 2007 include "the liberty of conscience and freedom of thought," the freedoms of "expressive association and intimate association," "the right to marry," "the right to decide whether to bear or beget children," and "the right to exercise dominion over one's body."^{46} Fleming then contends that this constitutional archaeologist or, more accurately, anthropologist would attempt to fit those artifacts into a unified whole. "A constitutional archaeologist," he writes, "would accept these bones as stipulated features (or fixed points) of a skeleton that [he or she has] a responsibility to construct."^{47} In his view, constitutional commitments to "deliberative democracy" and "deliberative autonomy" are the master values that bring coherence to an otherwise disparate set of norms. The constructive archaeologist/anthropologist, Fleming declares, "[w]ould comprehend that all of these bones constitute rights that reserve to persons the power to deliberate about and decide how to live their own lives."^{48} Persons committed to perfecting the American constitutional order, therefore, should be prepared to recognize other rights that foster deliberative democracy and deliberative autonomy. As Fleming concludes, "fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution."^{49}

Fidelity to the Constitution at the time Dred Scott was decided would likely require a commitment to principles far more venal than deliberative democracy and deliberative autonomy. Archaeologists on a "Constitution of 1857" dig would find numerous relics that could be used to construct a slaveholding republic and a treasure trove of shards that fit a commitment to white supremacy. They would excavate hardly any artifacts indicating an aspiration for a free, multiracial polity. The "Constitution of 1789" dig would yield more ambiguous findings. Nevertheless, only archaeologists strongly predisposed to emancipation and racial equality would construct such a regime out of the materials available when the Constitution was ratified. Persons constructing the antebellum Constitution who did not care whether slavery "was voted down or voted up"^{50} would not find themselves constitutionally compelled or even constitutionally tempted to place human bondage "in [the] course of ultimate extinction."^{51}

45. Fleming, supra note 3, at 92.
46. Id.
47. Id. at 93.
48. Id.
49. Id. at 227.
A. Perfecting the Constitution of 1857

Constitutional archaeologists/anthropologists would uncover different bones and shards from those Fleming found when exploring American constitutional commitments at the time *Dred Scott* was decided. If they followed Fleming’s approach to constitutional excavation, their dig site would be the U.S. Reports with an emphasis on more recently decided cases. A modicum of spade work would quickly generate several discoveries. The people of that culture believed that states had the power to enslave persons of color who voluntarily entered their jurisdiction, whatever the status of those persons in their previous state of domicile. States in that regime had the power to forbid free persons of color from entering their jurisdiction, even when those free persons of color were citizens of other states. The right of a slaveholder to recover a fugitive slave in that polity was more important than the right of a free citizen of color to peacefully reside in states where slavery was illegal. Congressional power over commerce did not entail congressional power to regulate the domestic slave trade. Such constitutional protections for slavery as the Fugitive Slave Clause were interpreted generously because they were “so vital to the preservation of the[] domestic interests and institutions,” of the slave states “that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.” These commitments, the numerous findings would confirm, were endorsed by justices from both major parties and from all sections of the United States.

52. See Fleming, supra note 3, at 269 n.17.
53. Strader v. Graham, 51 U.S. 82, 93-94 (1851) (Taney, J.) (“There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky...and the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of [Kentucky], and could not be influenced by the laws of Ohio.”).
54. Moore v. Illinois, 55 U.S. 13, 18 (1852) (Grier, J.) (“In the exercise of [its]... police power, a State has a right to make it a penal offence to introduce paupers, criminals, or fugitive slaves, within their borders... Some [] States, coterminous with those who tolerate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals.”).
55. Prigg v. Pennsylvania, 41 U.S. 539, 612 (1842) (Story, J.) (stating that there is an “unqualified right on the part of the owner of the slave [to capture a fugitive], which no state law or regulation can in any way qualify, regulate, control, or restrain”)
56. Smith v. Turner, 48 U.S. 283, 426 (1849) (Catron, J.) (“[W]hen Congress shall legislate... to make paupers, vagabonds, suspected persons, and fugitives from justice subjects of admission into the United States, I do not doubt it will be found and declared, should it ever become a matter for judicial decision, that such persons are not within the regulating power which the United States have [sic] over commerce.”)
57. U.S. Const. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).
58. Prigg, 41 U.S. at 611.
59. See Fehrenbacher, supra note 34, at 239-40.
Constitutional archaeologists and anthropologists would likely reach several conclusions from these artifacts about the culture's more general constitutional commitments. The most important is that the legal maxim, "in favorem libertatis," had little place in American constitutionalism. Lord Mansfield's famous dictum in *Somerset v. Stewart* was cited in only one Supreme Court opinion, and then as a presumption which in the case before the Court was overcome by the Fugitive Slave Clause. "Lord Mansfield has said some very pretty things (in the Case of Somerset)," Justice Robert Grier declared on circuit, "[b]ut they will perhaps be found . . . to be classed with rhetorical flourishes rather than legal dogmas." The investigation into American constitutional commitments would further reveal that persons of color did not enjoy the privileges and immunities of most American citizens. Persons who may be barred from all states, may be enslaved at the will of any state, and who may be seized from their state of residence without a right of trial in that state can hardly be deemed equal citizens of that state. Finally, Justice Story's interpretation of the Fugitive Slave Clause in *Prigg* would likely be regarded as rooted in the more general constitutional principle that all textual protections for slavery should be broadly construed, particularly when the beneficiaries of alternative interpretations were enslaved Africans or free persons of color.

Constitutional archaeologists and anthropologists who expanded their focus beyond Supreme Court opinions would uncover more anti-slavery materials. They would find judges offering variations on "in favorem libertatis" in lower federal and state courts. They would learn that substantial resistance to the fugitive slave acts took the form of personal liberty laws, state judicial declarations that the national government had no power to pass fugitive slave acts, and private efforts to free accused fugitives that sometimes enjoyed passive

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61. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 510 (K.B.) ("The state of slavery is . . . so odious, that nothing can be suffered to support it, but positive law."). This case involved Charles Stewart, Esq., who brought with him from Jamaica to England his slave, James Somerset. Upon reaching English soil, Somerset left Stewart and refused to serve him. Stewart recaptured Somerset and detained him on board a ship until he was to return to Jamaica. In granting Somerset’s writ of habeas corpus, Lord Mansfield commented that the recapture of Somerset was “[s]o high an act of dominion [that it] must be recognized by the law of the country where it is used.” As such, English law did not support Stewart’s right and Somerset was released. Id.


64. See *Prigg*, 41 U.S. at 608-27.

65. See United States v. La Jeune Eugenie, 26 F. Cas. 832, 845-46 (D. Mass. 1821) (No. 15550) (declaring that the slave trade violates the law of nations, Christian principles, and the eternal maxims of social justice); Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134 (1806) (declaring that the burden of proving the slavery status of an undocumented person in custody depends on that person’s racial appearance).
Despite frequent pleas from slave state representatives, neither the federal government nor the free states prohibited speech that advocated emancipation. Slaveholding efforts to prevent Congress from debating petitions urging emancipation were abandoned within a decade. Congress outlawed the international slave trade in 1807, as soon as constitutionally permitted. These practices, constructed into a larger whole, suggest a culture ambivalent about slavery, willing to keep open the possibility of an antislavery future.

Persons digging at the "Constitution of 1857" site, however, would discover far more bones and shards evincing a societal commitment to slavery. They would recognize that Congress had consistently permitted slavery in some territories, and excluded it only in territories that slaveholders thought were inhospitable to human bondage. When prominent slaveholders changed their minds about the possibility of introducing slavery into those regions, the prohibition on slavery was removed. The Compromise of 1850 refused to extend the ban on human bondage in territories north of the Missouri Compromise line to lands acquired from Mexico during the Mexican War; in 1854, that prohibition was explicitly repealed for both the Kansas and Nebraska territories. The Attorney General of the United States in 1855 concluded that Congress could not prohibit slavery in American territories, as did the platform of the victorious Democratic Party the next year. American expansionism after 1820 was fueled by a desire for additional land for slaveholders. The United States annexed Texas and fought a war with Mexico largely for the purpose of acquiring southern territories, but President Polk reached compromises with England on American territorial claims in the Pacific Northwest rather than engage in the bellicose activities necessary to acquire free territories. Abolitionists may have been permitted to speak legally, but the federal post-office would not deliver their newspapers in slave states and prominent persons

68. Id. at 175-81.
72. See Eminent Domain of the States - Equality of the States, 7 Op. Att'y Gen. 571, 576 (1855) (stating that Congress may not impose on the municipal power of new states);
73. See Democratic Platform of 1856, 1 National Party Platforms 25 (Donald Bruce Johnson ed., 1956).
74. Fehrenbacher, supra note 34, at 267.
75. Curtis, supra note 67, at 155-58. Despite understanding that he had no legal authority to exclude the delivery of newspapers, Postmaster General Amos Kendall refused to deliver abolitionist literature, stating "[w]e owe an obligation to the laws, but a higher one to the
in free states did not suffer legal consequences when they organized mobs that destroyed abolitionists' printing presses and murdered antislavery leaders.  

Excavations of antebellum American sites would yield a treasure trove of white supremacist policies, while generating only isolated shards suggesting any national commitment to a multiracial society. Numerous Attorneys General of the United States maintained that free persons of color were not American citizens and Jacksonian presidents consistently denied such persons basic citizenship rights. An increasing number of free states prohibited free persons of color from residing in their jurisdictions and denied existing residents of color fundamental rights of citizenship. Congress had recently strengthened the Fugitive Slave Act, barring alleged fugitives from testifying at their rendition hearings and providing financial rewards to magistrates who found that the person of color before them was a fugitive slave. The federal court system before Dred Scott was structured in ways which guaranteed that a majority of the justices on the Supreme Court would hail from slave states. Congress, aware of this judicial bias, repeatedly passed measures declaring that the Supreme Court was the institution responsible for settling constitutional issues associated with slavery and race in the United States.

Dred Scott from this perspective is the decision that perfected a "herrenvolk" democracy and slaveholding republic. The tenor of previous judicial rulings and official policies from fugitive slaves to residency requirements consistently limited citizenship to white persons. The Taney Court ruling on this matter merely made explicit what had been implicit in judicial precedent and explicit in executive action. American public policy on slavery, while a bit more ambiguous, had been tilting southward for two generations. "Over the decades," Don Fehrenbacher details, "the federal government had effectively become a proslavery instrument by means of multiple little decisions and unconscious

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76. Id. at 216-40; One such anti-slavery leader was a Presbyterian clergyman named Elijah P. Lovejoy. Originally from Albion, Maine, Lovejoy established himself in St. Louis and began printing an abolitionist newspaper called the Aton Observer. While defending against the destruction of his printing press by an angry mob for the fourth time, Lovejoy was killed. Id. at 219-227.


78. Id. at 32.

79. Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463-64 (repealed 1864) (authorizing federal marshals and federal troops to aid in the capture of fugitive slaves).


81. See, e.g., Kansas-Nebraska Act, ch. 59, §§ 9, 27, 10 Stat. 277, 280, 287 (1854); Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 450; Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 453, 455-56.

82. Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 551-50 n.25 (1997) ("[I]t thus seems correct to call the 'dominant political ideology' of the Jacksonians a 'Herrenvolk egalitarianism' promising equality among whites and the dominance of whites over blacks and Native Americans . . ..")
The Taney Court decision that slavery could not be prohibited in any territory was hardly compelled by the immediate past judicial and legislative precedents. Nevertheless, given the recent repeal of the Missouri Compromise, that ruling was far more consistent with the constitutional order of 1857 than Republican claims that Congress had the right and duty to prohibit human bondage in all territories.

The speeches Abraham Lincoln made when running for the Senate and White House buttress claims that Americans in the years immediately before Dred Scott were constitutionally committed to a “slaveholding republic.” Lincoln, as is well known, repeatedly insisted that the framers believed slavery had been “placed on a course of ultimate extinction.” When defending that claim, he relied almost exclusively on official actions taken and decisions made during the eighteenth century and, to a lesser extent, the Missouri Compromise. His famous address at Cooper Union, for example, discusses policies adopted in 1784, 1787, 1789, 1798, 1804, and 1819-20. Nowhere in that speech or in any other did Lincoln point to an official action taken or a policy adopted in the next thirty years that evinced a similar constitutional commitment to emancipation. In fact, he largely conceded that Dred Scott perfected the Jacksonian Constitution of 1828-1860. “[T]he Dred Scott decision,” Lincoln observed, “never would have been made in its previous form if that party that made it had not been sustained previously by the elections.”

B. Perfecting the Constitution of 1789

Constitutional archaeologists/anthropologists attempting to construct original constitutional principles are confronted by a remarkable lack of evidence. The Constitution of 1789 neither contains an explicit commitment to emancipation nor an explicit commitment to slavery. Indeed, the constitutional text never explicitly mentions human bondage. The Constitution also contains no explicit law on the specific issues raised by Dred Scott. The Constitution framed in Philadelphia neither includes a clause plainly detailing the qualifications for citizenship nor a clause plainly authorizing Congress to acquire and govern new territory west of the Mississippi River. The framers explicitly vested Congress with the power “[t]o exercise exclusive Legislation in all cases when governing the District of Columbia.”

83. Fehrenbacher, supra note 34, at 291.
84. See supra notes 31, 51.
85. Lincoln, Address at Cooper Institute, New York (Feb. 27, 1860), supra note 31, at 523-30.
86. See id.
88. See U.S. Const.
89. See id.
90. U.S. Const. art. I, § 8, cl. 17.
comparison, merely provides Congress with the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” The significance of this different language is obscure. The Due Process Clause of the Fifth Amendment could be interpreted as prohibiting enslavement as a deprivation of liberty or emancipation as a deprivation of property. The Preamble to the Constitution speaks of “establish[ing] Justice” and “secur[ing] the Blessings of Liberty,” but limits these ends “to ourselves and our Posterity.”

Abraham Lincoln was correct to note the strong anti-slavery sentiment among the framers. By the late 1780s, most American elites believed that human bondage was wrong and hoped that the practice would eventually be abandoned. George Washington spoke for most slaveholders when he asserted, “there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of [slavery] . . . .” Jefferson insisted that the passage in the Declaration of Independence asserting “all men are created equal” and “are endowed by their Creator with certain inalienable rights” referred to persons of color as well as to his white contemporaries. When the Constitution was ratified, most northern states had either abolished slavery or were considering legislation that would immediately or over time abolish slavery in their jurisdictions. States in the middle and upper south had passed laws facilitating voluntary manumission, a process some thought would eventually lead to broader anti-slavery measures.

Still, archaeologists/anthropologists constructing constitutional commitments in 1789 would unearth contrary bones and shards that did not comfortably fit the antislavery hypothesis. Eighteenth century Americans who believed that “all persons are created equal,” archaeologists would learn, did not

91. U.S. Const. art. IV, § 3, cl. 2.
93. Dred Scott, 60 U.S. at 450.
94. U.S. Const. pmb.
95. Letter from George Washington to Robert Morris (Apr. 12, 1786), reprinted in George Washington: A Collection 319 (W.B. Allen ed., 1988). Washington goes on to say that “there is only one proper and effectual mode by which [the abolition of slavery] can be accomplished, and that is by Legislative authority . . . .” Id.
96. The Declaration of Independence para 2 (U.S. 1776).
97. See Thomas Jefferson, Notes on the State of Virginia, Query XVIII: Manners (1781), reprinted in The Portable Thomas Jefferson 215 (Merrill D. Peterson ed., 1975) (“[C]an the liberties of a nation be thought to secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?”).
98. See Arthur Zilversmit, The First Emancipation: The Abolition of Slavery in the North (1967) (discussing the progression of abolition throughout the northern states beginning with the Quakers in the 1750’s through the enactment of gradual abolition in New Jersey in 1804).
99. See Peter Kolchin, American Slavery 1619-1867, at 77-78 (1993); Manumission, or the act of freeing slaves, could be accomplished either by an act of law or by private individual. Id. at 77-78, 89-90.
believe that all persons had the right to be equal citizens of the United States. "Nothing is more certainly written in the book of fate," Jefferson wrote, "than that these people are to be free; nor is it less certain that the two races, equally free, cannot live in the same government."100 James Galloway at the North Carolina ratification asserted that "[i]t is impossible for us to be happy, if, after manumission, they are to stay among us."101 Abstract antislavery rhetoric did not pervade the entire Republic in 1789. Slaveholders from Virginia and North Carolina may have conceded that slavery was a moral wrong, but such confessions never issued from Georgia and South Carolina slaveholders. The Pinkneys and Rutledges102 of the world insisted that slavery was a positive good and that, over time, Americans would become more constitutionally committed to human bondage. Rawlins Lowndes of South Carolina insisted that the slave "trade could be justified on the principles of religion, humanity and justice; for certainly to translate a set of human beings from a bad country to a better, was fulfilling every part of those principles."103

Most important, crucial constitutional institutions were designed for the purpose of empowering Virginia slaveholders, or at least for ensuring that the national government could not interfere with slavery without substantial southern consent.104 If southwestward population trends continued as the framers expected, southern moderates would control crucial national institutions. Virginians would control the House of Representatives, the framers believed, because a majority of the population would likely hail from the slaveholding states and southern representation would be augmented by the Three-fifths Clause. George Mason and other delegations to the framing convention expected that "the Southern & Western population should predominate . . . in a few years . . . ."105 The President would most likely be a slaveholder because representation in Congress determined the number of electoral votes cast in presidential elections. Slave state representatives demanded the electoral college

100. Thomas Jefferson, The Autobiography of Thomas Jefferson (1821), reprinted in The Life and Selected Writings of Thomas Jefferson 51 (Adrienne Koch & William Peden eds., 1944); See also Letter from Thomas Jefferson to Jared Sparks Monticello (Feb. 4, 1824), in 12 The Works of Thomas Jefferson 335 (Paul Leicester Ford ed., 1905) (suggesting that in order to "make [] some retribution for the long course of injuries we have been committing on their population," slaves should be "provide[d] an asylum to which we can, by degrees, send the whole of that population from among us, and establish them under our patronage and protection, as a separate, free and independent people, in some country and climate friendly to human life and happiness").


103. South Carolina House of Representatives, supra note 102, at 167; See Graber, supra note 16, at 110.

104. The material in this paragraph summarizes Graber, supra note 16, at 101-06.

to ensure the "influence in the election on the score of Negroes."\textsuperscript{106} Federal justices would support slaveholding claims because the President elected by slaveholding votes would, with the advice and consent of the more free state dominated Senate, appoint federal justices. Removing the President from the judicial appointment process, Madison asserted, would "throw the appointments entirely into the hands of ye Northern States . . . ."\textsuperscript{107}

The most likely conclusion constitutional archaeologist/anthropologists would draw from the artifacts excavated from the "Constitution of 1789" dig site is that the persons responsible for the Constitution left developmental paths open at the time of the ratification; the Constitution of the United States contained no master principle likely to compel or privilege either human bondage or emancipation. Given the structure of constitutional institutions, a good case can be made that the fundamental constitutional commitment was neither proslavery nor antislavery, but that public policy on slavery should enjoy substantial support in both the free and slave states, with particular emphasis on Virginia. Abraham Lincoln's constitutional vision was consistent with one possible developmental path. Most framers expected that antislavery trends would continue; they believed that Virginians would become even more antislavery over time. The constitutional powers of the national government were sufficiently vague to make plausible constitutional claims that a future coalition of Virginians and representatives from the free states could pass legislation that would place slavery in the United States on "the course of ultimate extinction." On the other hand, Roger Taney's United States was also consistent with a developmental path left open at the time of ratification. South Carolinians thought antislavery trends would crest, that Virginians would continue insisting that Congress not interfere with slavery. Slaveholding Virginians in charge of the national government could easily interpret ambiguous constitutional provisions consistently with their proslavery, white supremacist notions. Which developmental path Americans would take was for the future to determine without substantial aid from framing commitments to either human bondage or freedom. The Constitution would influence the direction of American slavery politics, according to its original design, more by influencing the character of constitutional decisionmakers than by fashioning a more antislavery citizenry or by legally compelling persons to promote emancipation.

\section*{II. Institutional Performance}

Antebellum constitutional institutions did not privilege the more antislavery and egalitarian strands of the American constitutional tradition. Contrary to framing expectations, the rules for staffing the national government did not yield

\textsuperscript{107} Id. at 81.
distinguished representatives who were more inclined and motivated than average citizens to pursue justice. The commitment to a governing class with distinctive capacities for virtue was largely abandoned shortly after ratification. The constitutional process for electing the members of the national legislature privileged sectional extremists. The primary moderating and organizing forces in politics by the 1840s had become national parties which championed accommodation or silence on slavery issues. The federal judiciary was the one national institution that at the time Dred Scott was decided was functioning consistently with the original expectations of the framers and the constitutional theories championed by constitutional democrats. The justices were fairly learned and distinguished. Judicial review was fairly well established. Federal law, however, structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states. Those justices, while tending to be more moderate on sectional issues than many slave state representatives in Congress, were far more inclined to identify with the accommodationist and racist strands of American constitutionalism than with the antislavery and egalitarian strands of that political order. Products of a constitutional order that generated a governing class with no commitment to emancipation, offered that governing class no incentives for emancipating slaves, and provided that governing class with no clear law compelling emancipation, the judicial majority in Dred Scott not surprisingly championed the racist values at the heart of the Constitution of 1857.

A. Institutional Malfunctions

The persons responsible for the Constitution insisted that well designed constitutions improved democratic (they would say republican) performance by improving the quality of democratic decision-makers and improving the quality of democratic deliberation. The extended republic, James Madison believed, facilitated both. Federalist 10 maintains that political leaders elected in large election districts are likely to be more virtuous than those elected by smaller

112. See Abraham, supra note 12, at 71-93.
113. Id.
115. Id.
116. See Abraham, supra note 12, at 71-93.
constituencies.\textsuperscript{117} Expanded constituencies would “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”\textsuperscript{118} Extended republics would also prevent factions from forming and combining, thus promoting policy-making aimed at the common good.\textsuperscript{119} “Extend the sphere,” Madison famously declared, “and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”\textsuperscript{120} Stephen Elkin relies on similar Publian notions when he insists that well designed constitutions enable elites to take a longer and larger view of their interests. Properly structured institutions, he states, “provide strong and regular incentives for lawmaking to give concrete meaning to the public interest.”\textsuperscript{121}

This elitist vision of a constitutional republic was decisively rejected during the years between ratification and \textit{Dred Scott}. Constitutional forms proved weak reeds for holding back democratic tides. Gordon Wood observes how “a new generation of Democratic Americans was no longer interested in the revolutionaries’ dream of building a classical republic of elitist virtue out of the inherited materials of the Old World.”\textsuperscript{122} The democratic wave that the Constitution sought to break\textsuperscript{123} swamped institutions designed to be bastions for aristocratic virtues. The Senate was transformed from an American House of Lords into an institution little different from the more plebian House of Representatives.\textsuperscript{124} The President was transformed from a figure above the fray to a party leader who claimed to be the best representative of ordinary people.\textsuperscript{125} The very word “democracy” was transformed from a term of opprobrium to a popular phrase. Federalists in 1789 took great pains to distinguish their desired

\begin{footnotesize}
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\item \textsuperscript{117} See The Federalist No. 10 (James Madison), supra note 5, at 77-84.
\item \textsuperscript{118} Id. at 82.
\item \textsuperscript{119} Id. at 83.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Elkin, supra note 108, at 5.
\item \textsuperscript{122} Wood, supra note 109, at 369; See Bruce Ackerman, We the People: Foundations 70 (1991) ("[T]his neat system did not survive the Founding generation.").
\item \textsuperscript{123} See Wood, supra note 109, at 254-55; See generally Stanley Elkins & Eric McKitrick, The Age of Federalism: The Early American Republic, 1788-1800 (1993).
\item \textsuperscript{124} See Elaine K. Swift, The Making of an American Senate: Reconstitutive Change in Congress, 1787-1841, at 104 (2002) (stating "[b]etween 1809 and 1829 . . . the Senate cultivated strong bonds with the people and distanced itself from state legislatures," and through "its new closeness to the people and greater legislative proactivity, it came to be more like the House.").
\item \textsuperscript{125} See Skowronek, supra note 111, at 54 (describing the changing relationship between the President and the rest of the federal government and stating that during this time period "[i]nterparty conflict was the premier organizing principle in governmental operations, and the presidents acted politically as unabashed representatives of their party organization").
\end{itemize}
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constitutional republic from a democracy.126 Jacksonians after 1828 proudly called themselves “Democrats,”127 The heart of their democratic political vision was a commitment to staff government offices with ordinary people. “We have an abiding confidence in the virtue, intelligence, and full capacity for self-government, of the great mass of our people -- our industrious, honest, manly, intelligent millions of freemen,”128 the Jacksonian Democratic Review declared. Andrew Jackson maintained that the “duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance.”129

Constitutional rules for staffing the national legislature privileged sectional extremists rather than virtuous statesmen committed to placing slavery on a course of ultimate extinction.130 The best strategy for gaining national office in many local single-member districts was a demonstration of one’s firm commitment to securing sectional interests. “[I]t is easy in the North to gain power by denouncing slavery’s existence in the South,” commentators observed, “and as easy in the South to win favor by denouncing its northern opponents.”131 With the exception of the 1850 national election, southern candidates gained national office by convincing voters they could better protect slavery than their opponents.132 After the Mexican War, many northern elections became contests over which candidate could better denounce the slave power. These constitutional practices did generate northern representatives who, on average, were probably more antislavery than the average northern voter.133 The same constitutional practices, however, generated southern representatives who, on average, were more proslavery than the average southern voter.134 The moderate southerners who might have mitigated proslavery zealotry in their region were practically disenfranchised by constitutional arrangements. More than 40% of

126. See The federalist No. 10 (James Madison), supra note 5, at 81-84.
127. Morton Horwitz & Orlando do Campo, When and How the Supreme Court Found Democracy – A Computer Study, 4 QLR 1, 26 (1994) (“After Jackson’s electoral victory in 1828, the triumphant Jacksonians began to be informally referred to as Democrats – a change in name that arose mostly . . . to differentiate themselves from the Adams wing of the party” known as the “administrative Republicans.” (citing Frank R. Kent, The Democratic Party: A History 23 (1928)).
130. For an elaboration on the themes of this paragraph, see Graber, supra note 16, at 161-63.
132. Id.; But see Don E. Fehrenbacher, Sectional Crisis and Southern Constitutionalism, at xv (1989) (stating that “the extraordinary amount of scholarly attention” paid to party politics of the 1850s has resulted in an “emphasis on ethnocultural factors and somewhat diminish[ed] the importance of the slavery issue as a primary cause of the political upheaval”).
134. Id.
all slave state voters during the 1856 election supported a candidate committed to a free Kansas, but Millard Fillmore won no electoral votes south of Maryland. As a result of these electoral arrangements, when elected officials sought to appease the south, they typically were forced to appease the most militant proponents of slavery.

National political parties were the primary institutional means for mitigating the constitutional tendencies toward extremism. Scorned by the framers, such institutions began to develop in the Second Congress, in part through the efforts of the formerly anti-party stalwart, James Madison. By the 1840s, national electoral politics was structured by a competition between the Jacksonian Democrats and Whigs. Both coalitions celebrated partisanship, insisting that the framers had opposed sectional parties, but not parties per se. "When men are governed by a common principle," the Albany Argus asserted,

[W]hich is fully indulged and equally operative in all parts of the country, the agency of party conduces to the public good. But the political opinions of some men, when actuated by feelings of a sectional character are directly the reverse. What is party in the one case, is faction in the other.

National parties mitigated constitutional tendencies toward extremism by promoting accommodation on slavery or by refusing to present voters with clear choices on sectional issues. Both Democratic and Whig party leaders believed that "national parties and slavery agitation were mutually exclusive." Jacksonians guaranteed that their candidates would be sensitive to slavery issues by requiring a two-thirds vote in their presidential convention. Whigs nominated either slaveholders or candidates who hailed from the slave states. Neither the Whig nor Democratic Party platform contained any provision promoting emancipation or racial equality. Both party platforms in 1852 endorsed the Compromise of 1850 and condemned any further agitation of the slavery issue.

135. See HOLT, supra note 74, at 914-15.
138. See HOLT, supra note 71, at 119-21.
141. GRABER, supra note 16, at 148.
142. Id.
143. Democratic Platform of 1852, supra note 73, at 17; Whig Platform of 1852, supra note 73, at 21; See Graber, supra note 16, at 148.
Constitutional institutions at the time *Dred Scott* was decided were staffed by ordinary citizens, privileged sectional extremists, and facilitated the rise of national parties dedicated to avoiding sectional issues proved poor vehicles for promoting emancipation or racial equality. Congress could rarely act effectively on slavery concerns because southern "fire-eaters" and their doughface supporters had the power to prevent any antislavery measure from becoming law (and antislavery advocates were often able to block legislation deemed too proslavery). Presidents preferred not taking clear stands on slavery because their power depended on accommodating both proslavery and antislavery activists. So constructed, the electoral branches of the national government in 1857 had a far greater capacity to be stalemated on sectional issues than to promote emancipation or any other value associated with constitutional democracy. The best elected officials could do during the late 1840s and early 1850s was to promote the Supreme Court, the one national institution still largely functioning consistently with its original design, as the branch of government responsible for settling the constitutional status of slavery.

**B. The Supreme Court**

The federal judiciary was the one national institution that largely resisted the democratizing imperative in antebellum America. The Supreme Court, Wood observes, in the Jacksonian Era became increasingly regarded as "the only governing institution that came close to resembling an umpire, standing above the marketplace of competing interests and rendering impartial and disinterested decisions." While more radical reformers scorned aristocrats in robes, most Americans by the 1840s celebrated the judicial virtues championed by contemporary constitutional democrats. In the decade before *Dred Scott* was decided, Charles Warren observes, "the Court may be said to have reached its height in the confidence of the people of the country." William Seward, an antislavery Whig, spoke in 1851 of "the high regard which, in common with the

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144. "Fire-eaters" were the most vociferous proponents of slavery and southern nationalism in antebellum America. See Michael Kent Curtis, John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause," 36 Akron L. Rev. 617, 626-29 (2003).

145. "Doughface" was a term used for "a northern ally of the South." Paul Finkelman, Affirmative Action for the Master Class: The Creation of the Proslavery Constitution, 32 Akron L. Rev. 423, 463 n.218 (1999).


147. See Skowronek, supra note 111, at 181-96.

148. See Graber, supra note 146, at 47-51.

149. Wood, supra note 109, at 325.

150. See id. at 323.

151. Id. at 325.

whole American people,” he “entertain[ed]” for Chief Justice Taney “as the head of the Judicial Department.”

Contemporary constitutional scholars believe this praise was well deserved. The federal bench, in their view, was staffed by those jurists most likely to be able to identify and act on cherished American constitutional commitments. Leading justices on the Taney Court had distinguished careers in law and politics before joining the bench. Justices Benjamin Curtis and John Campbell, in particular, were leaders of the northern and southern bar, respectively. The craftsmanship of Taney Court opinions on the contracts and commerce clause is generally praised. Henry Abraham credits that tribunal with solidifying the Court’s “position as the logical, ultimate, and fair-minded arbiter of the Constitution.” Commentators willing to discount Dred Scott maintain that Chief Justice Taney was among the greatest Supreme Court justices in American history.

The majority of justices on the antebellum Supreme Court, as the framers expected, were citizens of slave states. Both long-serving Chief Justices had hailed from the south as did most of the associated justices. Five of the nine members of the Court in 1857 were southerners. The political foundations of this southern majority, however, differed from original expectations. The persons responsible for the Constitution of 1789 assumed that slave states would control the federal judiciary because the electoral college privileged the election of a southern president, that president was responsible for appointing the federal justices, and, as the most populous region in the country, the south would be entitled to at least its fair share of judicial representation. The Court that decided Dred Scott had a southern majority because Jacksonians in the executive and legislative branches of the government passed legislation placing five of the

153. Id.
154. See Abraham, supra note 12, at 77 (stating that “history and most experts have justly accorded [Taney] the mark of judicial greatness”).
155. Taney himself was, among other achievements, the U.S. Attorney General prior to taking a seat on the high Court. Abraham, supra note 12, at 74.
156. Abraham, supra note 12, at 82-84; Justice Campbell had no former judicial experience prior to sitting on the Supreme Court, but his reputation as a leading lawyer in Alabama and six personal appearances in front of the Court’s December 1851 Term prompted his appointment. Warren, supra 152, at 245 (citing Henry G. Connor, John Archibald Campbell (1920)); Justice Curtis was known as a skillful attorney who was once referred to as “the first lawyer of America” by the Massachusetts Law Quarterly. Abraham, supra note 12, at 82 (quoting 1 Massachusetts Law Quarterly 192-94 (1915) (emphasis in original)).
157. Abraham, supra note 12, at 72. See also Robert Saunders, Jr., John Archibald Campbell: Southern Moderate, 1811-1889, at 105-23 (1997) (noting that the Taney Court’s decision in Dred Scott overshadows its voluminous work in the area of contracts and commerce).
158. Abraham, supra note 12, at 76.
159. Other than that, Mrs. Lincoln!
160. Abraham, supra note 12, at 75-76.
161. Fehrenbacher, supra note 132, at 46.
162. See supra pp. 603-04 and notes 104-07.
nine federal circuit court districts entirely within the slave states, and presidents who depended on southern votes ensured that one representative from each federal circuit district sat on the Supreme Court.\textsuperscript{163}

These southern justices, as the framers and constitutional democrats might have hoped, were far more moderate on sectional issues than were their peers. Justice Peter Daniel of Virginia was the only member of the Taney Court who identified with southern “fire-eaters.”\textsuperscript{164} Justices John Campbell of Alabama and James Wayne of Georgia on circuit vigorously condemned the international slave trade, interpreting the constitution as vesting the federal government with substantial power to prevent that human commerce.\textsuperscript{165} Campbell vigorously opposed secession.\textsuperscript{166} He reluctantly resigned his judicial office when Alabama left the Union, but remained in Washington in efforts to reach a last minute compromise.\textsuperscript{167} Justice John Catron opposed secession and refused to resign his judicial office when Tennessee joined the Confederacy.\textsuperscript{168} Wayne was the only federal official from the Deep South who remained in office during the Civil War.\textsuperscript{169}

The same constitutional practices that generated southern justices more moderate on slavery issues than slave state elected officials and citizens, however, generated northern justices less antislavery than free state elected officials and citizens. Two-fifths of all voters and a majority of northern voters in 1860 cast their ballot for an antislavery candidate, but evidence suggests that only 1 of the 9 justices on the Supreme Court and 1 of the 4 from the north favored Lincoln. Justice Robert Grier of Pennsylvania and Samuel Nelson of New York were doughfaces who supported southern pretensions on slavery.\textsuperscript{170} Justice Benjamin Curtis of Massachusetts was a white supremacist, who while

\textsuperscript{163} Howard Gillman, How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891, 96 Am. Pol. Sci. Rev. 511, 514 (2002) (“[T)o ensure the protection of Southern regional interests . . . the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court.”).

\textsuperscript{164} See John P. Frank, Justice Daniel Dissenting: A Biography of Peter V. Daniel (1964).

\textsuperscript{165} See United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15329) (opinion delivered by then-Circuit Justice Campbell); Charge to Grand Jury, 30 F. Cas. 1026 (C.C.D. Ga. 1859) (No. 18269A) (opinion delivered by then-Circuit Justice Wayne).

\textsuperscript{166} Saunders, supra note 157, at 138-45 (outlining a series of letters wherein Campbell called for calm among southerners and believed that talk of secession only brought discredit to the South).

\textsuperscript{167} Id. at 140-51.


\textsuperscript{169} Alexander A. Lawrence, James Moore Wayne: Southern Unionist 180-83 (1943).

\textsuperscript{170} See Frank Otto Gatell, Samuel Nelson, in 2 The Justices of the United States Supreme Court 1789-1978: Their Lives and Major Opinions 407-20 (Leon Friedman & Fred L. Israel eds., 1980); Frank Otto Gatell, Robert C. Grier, supra, at 434-45; see also Ex parte Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7259); Von Metre v. Mitchell, 28 F. Cas. 1036 (C.C. W.D. Pa. 1853) (No. 16865); Charge to Grand Jury, 30 F. Cas. 1013 (C.C.N.D. NY 1851) (No. 18262); Charge to Grand Jury, 30 F. Cas. 1007 (C.C.S.D. NY 1851) (No. 18261).
believing Congress had the power to ban slavery in the territories,\(^{171}\) favored strict enforcement of the Fugitive Slave Act,\(^{172}\) vigorously opposed black citizenship,\(^{173}\) and would later attack the constitutionality of the Emancipation Proclamation.\(^{174}\) Justice John McLean of Ohio was the only member of the Court which decided *Dred Scott* who had any sympathy with the antislavery movement.\(^{175}\)

This judicial tendency toward moderation was a consequence of the interaction between the constitutional rules for staffing the federal judiciary and Jacksonian constitutional politics. The Constitution commands that justices be nominated by the president and confirmed by the Senate.\(^{176}\) Jacksonian presidents during the decades immediately before *Dred Scott* were required to appease both northern and southern constituencies when exercising that executive power. This governing imperative, in practice, favored southern judicial nominees less proslavery than their slave state peers and northern judicial nominees less antislavery than their free state peers. Judicial nominees identified with sectional extremists were unlikely to win confirmation. Both antislavery Senators and proslavery Senators were sufficiently powerful to prevent persons too strongly committed to human bondage or emancipation from taking seats on the Supreme Bench.\(^{177}\) As sectional tensions heightened, judicial nominees became increasingly moderate. The two sectional extremists on the tribunal that decided *Dred Scott*, Justices Daniel and McLean, were nominated and confirmed before the Mexican War.\(^{178}\) The two justices appointed after the Compromise of 1850 were a northern Cotton Whig who had recently denounced opposition to the Fugitive Slave Act\(^{179}\) and a southern conservative who opposed the Mexican War and hoped slavery would die of natural causes.\(^{180}\)

The constitutional rules for staffing the Supreme Court explain why the Taney Court majority, when adjudicating *Dred Scott*, did not seek to strengthen the weakening antislavery and egalitarian strands of the American constitutional tradition. Constitutional politics before the Civil War, as constitutional

\(^{171}\) *Dred Scott*, 60 U.S. at 623 (Curtis, J., dissenting).

\(^{172}\) See Charge to Grand Jury, 30 F. Cas. 983 (C.C.D. Mass. 1854) (No. 18250); United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15815).

\(^{173}\) George Ticknor Curtis, 2 Memoir of Benjamin Robbins Curtis, LL.D. 136 (Benjamin R. Curtis ed., 1879).

\(^{174}\) Curtis, supra note 173, at 306-55.

\(^{175}\) See Francis P. Weisenburger, The Life of John McLean: A Politician on the United States Supreme Court (1971).

\(^{176}\) U.S. Const. art II, § 2, cl. 2.

\(^{177}\) Graber, supra note 16, at 36-37.

\(^{178}\) Justice McLean’s tenure on the Court began in 1830 after his appointment by President Jackson. Justice Daniel was confirmed for the Court in 1842, appointed by President Van Buren. Abraham, supra note 161, at 378. For a list of statistical data of the Justices of the Supreme Court, including their years of service, Presidents who appointed them and states from which they hailed. See Abraham, supra note 12, at 377-81.

\(^{179}\) Id. at 82-83 (Justice Benjamin Robbins Curtis).

\(^{180}\) Saunders, supra note 157, at 57, 62-63 (Justice John Archibald Campbell).
democrats maintain, did generate distinguished Supreme Court justices who could decide cases on the basis of enduring constitutional values being given too short a shift in the electoral process. The value that justices appointed during the 1840s and 1850s were inclined to support was the constitutional commitment to preventing slavery from disrupting the national union.\textsuperscript{181} Southern justices could interpret constitutional power to prohibit the international slave trade more broadly than many slave state officials because they were not electorally accountable to slaveholding voters. Northern justices could interpret constitutional power over fugitive slaves more broadly and constitutional power over slavery in the territories more narrowly than many free state officials because they were not electorally accountable to antislavery voters. Constitutional democracy in \textit{Dred Scott}, this evidence suggests, functioned almost according to plan. The problem from the perspective of contemporary constitutional democrats was that the Supreme Court was better structured to secure the clear constitutional commitment to appeasing the moderate south than the more ambiguous constitutional commitment to emancipation and human freedom.

President Buchanan made two judicial nominations after \textit{Dred Scott} that highlight how the institutions most associated with constitutional democracy were more likely to promote national union than emancipation. Nathan Clifford and Jeremiah Black were the sort of highly respected statespersons and lawyers constitutional democrats believed particularly likely to act on constitutional principle.\textsuperscript{182} Clifford was "an able lawyer and legal scholar" who had served with distinction in both the executive and legislative branches of the national government.\textsuperscript{183} Black was one of the best known lawyers in the United States.\textsuperscript{184} Neither Clifford nor Black, however, had any devotion to emancipation or racial equality. Clifford was on record before his nomination as supporting the \textit{Dred Scott} decision.\textsuperscript{185} Black had previously published a broadside defending the most pro-southern interpretation of \textit{Dred Scott}.\textsuperscript{186} Had the Civil War not intervened, both would have helped the Taney Court perfect the Constitution of the slaveholding republic.

\textsuperscript{181} See Graber, supra note 16, at 223 (suggesting that the basis of this constitutional commitment was a relational contract theory, which asserts that the Constitution was essentially a compromise to maintain the political relationship between people who disagreed about slavery and should have been interpreted to best maintain those relationships).

\textsuperscript{182} Abraham, supra note 12, at 85-86.

\textsuperscript{183} Id. at 85.

\textsuperscript{184} Id. at 86; see generally Mary Black Clayton, Reminiscences of Jeremiah Sullivan Black (1887);

\textsuperscript{185} Philip Greely Clifford, Nathan Clifford: Democrat 271-73 (1922).

C. The Constitutional Contribution to Antislavery

The Constitution of the United States did make one major contribution to the antislavery movement. Article II enabled Abraham Lincoln to gain the presidency with only 40% of the popular vote.\(^{187}\) By rewarding candidates with geographically compact supporters, the electoral college fostered the development of sectional parties while reducing the influence of parties and candidates that enjoyed diffuse support throughout the United States.\(^{188}\) Whether Republicans or another antislavery party with the same percentage of the ballots cast in 1860 could have gained control of the presidency under any other electoral scheme presently adopted by a democratic country is doubtful. Lincoln could begin the process of putting slavery on the course of ultimate extinction only because the Constitution did not permit the fictitious median voter, who in 1860 probably favored John Bell and Stephen Douglas, to dictate the presidential election. Neither Bell nor Douglas, if elected, would have tinkered substantially with the Dred Scott status quo.\(^{189}\) The difference between them primarily would be over whether the United States should continue expanding southwards and northwards.\(^{190}\)

Ironically, the one constitutional practice that before the Civil War privileged emancipation was originally designed to privilege slaveholding and is abhorred by many contemporary constitutional democrats. The persons responsible for the Constitution believed that the electoral college, combined with the Three-fifths Clause, would strongly augment slave state influence on presidential selection.\(^{191}\) They also expected that the virtuous members of the electoral college would exercise independent judgment when evaluating presidential candidates.\(^{192}\) They never anticipated that Article II would dramatically inflate the strength of sectional candidates at the expense of national moderates. Prominent constitutional thinkers presently regard the electoral college as a constitutional stupidity, a product of unsavory constitutional compromises that malfunctioned a decade after ratification, and a practice inconsistent with the constitutional commitment to majority rule.\(^{193}\) Professor Sanford Levinson and others insist that the constitutional rules for electing the president are “an undemocratic and perverse part of the American

\(^{187}\) U.S. Const. art. II, § 1, cl. 2, 3 (electoral college).

\(^{188}\) The themes in this paragraph are more fully developed in Graber, supra note 16, at 161, 165-67.

\(^{189}\) See id. at 240.

\(^{190}\) See supra pp. 602-04 and notes 101-106.

\(^{191}\) See The Federalist No. 68 (Alexander Hamilton), supra note 5, at 412.

system of government that ill serves the United States." One of the worse features of the American constitutional order, these observations suggest, may have helped trigger the first clear expression of a constitutional commitment to racial equality and emancipation.

III. DRED SCOTT AS NORMAL CONSTITUTIONAL POLITICS

Dred Scott was not an aberration. Just as the Constitution of 1789 failed to generate a powerful social commitment to emancipation for more than seventy years, the Constitution of 1868, for another seventy years, failed to generate a powerful social commitment to racial equality. The Fourteenth Amendment declares that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws," but Americans regarded that provision as permitting white supremacy, pervasive Jim Crow, and massive disenfranchisement. The First and Fifth Sections of the Fourteenth Amendment provided weak parchment barriers against lynching. The American commitment to eradicating racism after World War II was as much a consequence of the Cold War as a renewed dedication to constitutional principle, and many commentators believe that this commitment began waning during the late 1960s. Substantial debate exists as to whether Supreme Court decisions interpreting the Equal Protection Clause as permitting or forbidding affirmative action programs best promote justice.

The problematic relationship between constitutional aspirations and political practice transcends race. Throughout American history, fundamental

194. Levinson, supra note 193, at 82; Amar, supra note 193, at 15.
198. See Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy 6-12 (2000) (discussing how the Cold War required the United States to address Civil Rights in order to project a more positive image of democracy to the rest of the world).
200. See, e.g., Gruetter v. Bollinger, 539 U.S. 306, 344 (2003) ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").
201. See, e.g., Gratz v. Bollinger, 539 U.S. 244, 275 (2003) ("[T]he University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, [therefore] the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.").
constitutional values have been ignored as much as they have inspired. Studies proposing interpretive strategies that will make the Constitution "the best it can be," are published on a regular basis, but those same studies typically criticize Supreme Court justices and other governing officials for consistently not acting on what the author regards as the highest constitutional aspirations. Whatever potential these aspirations have for improving the quality of democratic decision-making in the United States, the evidence suggests, has not been realized in practice. Herbert Wechsler's famous "neutral principles" lecture failed to identify one instance when the Supreme Court correctly declared unconstitutional a major piece of federal or state legislation.

Many constitutional practices that failed to improve the quality of democratic decision-makers and the quality of democratic deliberation before the Civil War remain in place and have no more ameliorative influence on American politics at present. The deferential politics expected to promote republican virtue has not been resurrected. Contemporary candidates for elected office appear on MTV and eschew broccoli in efforts to convince voters that they are average American citizens who share the values of average American citizens. The constitutional rules for citizenship continue to promote extremism, often in defense of values only marginally less heinous than slaveholding. Article I's requirement that all members of the national legislature be elected by local constituencies explains why southern candidates in the 1850s competed over who was most committed to human bondage and why southern candidates in the 1950s competed over who was most committed to white supremacy. Economic inequality in the United States may be partly a consequence of constitutional processes that enable affluent citizens to gain tax policies opposed by most Americans. Then as now, political parties stand ready to discipline candidates and office holders otherwise inclined toward the independent judgment admired by the framers. "Political party affiliation," Daryl Levinson observes, "seems to be a much more important variable in predicting the behavior of members of Congress vis-à-vis the President than the fact that these members work in the legislative branch." The extent to which party influence

203. Ronald Dworkin, Law's Empire 53 (1986) ("[A]ll interpretation strives to make an object the best it can be... and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success.").
204. Id. at 271-75.
206. U.S. Const. art I.
207. See Klarman, supra note 196, at 385-442.
is waning is caused by the lack of money, not a renewed appreciation for the best persons holding public office.\footnote{210}

The Supreme Court has historically failed to provide more protection for values associated with constitutional democracy than the national legislature.\footnote{211} A consensus presently exists that \textit{Bolling v. Sharpe} \footnote{212} was the first decision in which the justices protected a fundamental constitutional right being infringed by national majorities.\footnote{213} By comparison, most liberal and conservative scholars now think numerous Supreme Court cases handed down before 1954 striking down federal laws were wrongly decided, that Congress in these instances was more committed to constitutional principle than the Supreme Court. These erroneous decisions include \textit{Hepburn v. Griswold},\footnote{214} \textit{Pollock v. Farmers' Loan & Trust Co.},\footnote{215} the \textit{Civil Rights Cases},\footnote{216} \textit{United States v. E.C. Knight Co.},\footnote{217} \textit{Adair v. United States},\footnote{218} \textit{Butler v. United States},\footnote{219} and \textit{Carter v. Carter Coal Co.} Even if correct as a matter of technical law, none of these decisions protect rights or practices celebrated by contemporary constitutional democrats. The Supreme Court's record when declaring state laws unconstitutional is more complicated and controversial. No present consensus exists on whether such decisions as \textit{Mapp v. Ohio}\footnote{221} and \textit{Roe v. Wade}\footnote{222} foster or inhibit protections for

211. For a different argument, reaching a similar conclusion, see Rebecca E. Zietow, Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights (2006).
212. \textit{Bolling v. Sharpe}, 347 U.S. 497, 500 (1954) (holding that Congress could not segregate school children in the District of Columbia because the principles of equal protection are applicable to the federal government through the Fifth Amendment).
213. See Alfred Hill, The Political Dimension of Constitutional Adjudication, 63 S. Cal. L. Rev. 1237, 1277 n.153 (1990). Hill acknowledges that the common perception is that Bolling is the first case of its kind, but suggests that cases were not uncommon in which the Court first declared that the Equal Protection Clause is not applicable in a Fifth Amendment case, and then indicated that the result would have been the same if it were. Id. (citing Detroit Bank v. United States, 317 U.S. 325, 337-38 (1943); Steward Mach. Co. v. Davis, 301 U.S. 548, 584-85 (1937); La Belle Iron Works v. United States, 256 U.S. 377, 392-93 (1921); Currin v. Wallace, 306 U.S. 1, 14 (1939); Brushaber v. Union Pac. R.R., 240 U.S. 1, 25 (1916)).
214. \textit{Hepburn v. Griswold}, 75 U.S. 603, 625-626 (1870) (holding that Congress had no power to make paper money legal tender).
215. \textit{Pollock v. Farmers' Loan & Trust Co.}, 158 U.S. 601, 637 (1895) (holding that Congress had no power to pass an income tax).
217. \textit{United States v. E.C. Knight Co.}, 156 U.S. 1, 17 (1895) (holding that Congress had no power to prohibit businesses from monopolizing production).
218. \textit{Adair v. United States}, 208 U.S. 161, 179-180 (1908) (holding that Congress could not prohibit yellow dog contracts).
219. \textit{Butler v. United States}, 297 U.S. 1, 74-75 (1936) (holding that Congress could not regulate agriculture).
221. \textit{Mapp v. Ohio}, 367 U.S. 643, 664-661 (1961) (holding that state courts may not use evidence acquired unconstitutionally in criminal trials).}
fundamental rights. A consensus is emerging, however, that the justices tend to declare state laws unconstitutional only when that ruling is supported by at least some members of the dominant national coalition.\footnote{223} Some research may suggest that the justices will protect rights that many elected officials cannot publicly endorse, though other research suggests that the rights justices are presently protecting are those of the political and financial elite.\footnote{224}

Neither perfection nor depravity is the lot of this world. Both the Constitution of the United States and the Supreme Court have facilitated much good. What \textit{Dred Scott} highlights is how fundamental elements of constitutional democracy are also complicit in much evil. Raising the banner of \textit{Brown v. Board of Education of Topeka}\footnote{225} or, perhaps, \textit{Lawrence v. Texas}\footnote{226} will not redeem constitutional democracy in the absence of more systemic proof that constitutional practices over the long run have more often fostered justice than injustice. Even the worst managed professional sports team, after all, has occasional good seasons, good weeks, and good games.

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\footnotesize{222. Roe v. Wade, 410 U.S. 113, 164-67 (1973) (holding that states may not constitutionally prohibit abortion).}
\footnotesize{224. See Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).}
\footnotesize{225. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954) (holding that states may not segregate students by race in public schools).}
\footnotesize{226. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that states may not prohibit consenting adults from engaging in homosexual sodomy).}
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