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LEGALITY AND LEGITIMACY IN *DRED SCOTT*: THE CRISIS OF THE INCOMPLETE CONSTITUTION

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INTRODUCTION

The best approach to the *Dred Scott* case,[1] in my opinion, is via the idea of the "incomplete Constitution": although the antebellum Constitution was "incomplete" in three different dimensions, I am going to focus here on only one of them, that which centers on the place of slavery in the constitutional order.[2] The argument is that that incompleteness proved to be problematic for the constitutional order and led to a variety of efforts to alleviate the pressure it produced. The variety of opinions in the case are best seen, it is suggested, as variants of the efforts to release the pressure by overcoming the tension between legitimacy and legality that was built into the original constitutional order.

I. SLAVERY AND THE CONSTITUTION

This is not the place to rehearse in detail the various debates over the Founders and slavery that have roiled academic and political waters since the mid-twentieth century. Suffice it to say that the main antagonists have been plausibly called Neo-Garrisonians[3] and Neo-Lincolnians.[4] The de-

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

2. For a discussion of the other dimensions of incompleteness as they relate to *Dred Scott*, see Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 PUBLIUS 69, 69–77 (1992).

3. The literature has become quite immense. Probably the two leading Neo-Garrisonian statements are William M. Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 167 (Leonard W. Levy & Dennis J. Mahoney eds., 1987), and PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–36 (2d ed. 2001).

4. Leading Neo-Lincolnian statements include William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81 (1972); Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 214 (Robert H. Horwitz ed., 1977); THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 14–36 (1997).

bates between them concern two issues in the main. First, how favorable was the Constitution toward slavery? How much aid did it give, to what degree did it endorse and take the institution to its bosom? The second issue concerns the motives upon which the Founding generation acted. The Neo-Garrisonians answer the first set of questions rather straightforwardly: the Constitution was very favorable to the institution of slavery and gave it a great deal of life-sustaining aid.[5] The Neo-Lincolnians, however, while conceding that the Constitution did indeed make some accommodations to slavery, deny that these were nearly as substantial as the Neo-Garrisonians claim.[6] The Neo-Garrisonians answer the second set of questions by arguing that the Founders were moved by the same complex of motives that led to the establishment and flourishing of the institution in the first place: greed of various sorts, racism, Christian triumphalism, and moral indifference being the chief items in their list.[7] The Neo-Lincolnians tend to find a greater distinction between the political leaders who sponsored the Constitution and the run-of-the-mill slaveholders who clung to the institution of slavery. Thus, the Neo-Lincolnians emphasize the place of slavery in the constitutional order as due primarily to the press of necessity: without concessions to slavery, the Union would not have been possible. The Neo-Lincolnians frequently point to the expectation—or hope—among the Founders, that the process of abolition in the states, begun during and after the Revolution, would continue until the blight of slavery had been removed from the land.[8]

The scholarly debates on slavery can be very heated. The topic is so controversial, in fact, that partisans of the different positions cannot even agree on how many parts of the Constitution are relevant to slavery. One Neo-Garrisonian identified twelve pro-slavery clauses and six others that indirectly were supportive of slavery in the Constitution;[9] another found no less than ten.[10] Neo-Lincolnians find far fewer: the three-fifths formula for representation and direct taxation,[11] the Slave Trade Clause,[12] and the Fugitive Slave Clause.[13] It would take a paper of its own to sort out even this threshold issue. For present purposes, it will have to suffice to state in

5. *See, e.g.*, FINKELMAN, *supra* note 3, at 10.

6. *See* Storing, *supra* note 4, at 221–26.

7. *See* FINKELMAN, *supra* note 3, at 10–36 (discussing the motivations for compromises made during the Constitutional Convention).

8. Storing, *supra* note 4, at 218–21.

9. *See* FINKELMAN, *supra* note 3, at 6–10.

10. *See* Wiecek, *supra* note 3, at 179–82.

11. U.S. CONST. art. I, § 2, cl. 3.

12. *Id.* art. I, § 9, cl. 1.

13. *Id.* art. IV, § 2, cl. 3.

shorthand form my reservations about both sides of the debate so that I can then briefly supply my thesis on the place of slavery in the Constitution, as needed for addressing *Dred Scott* as part of the "crisis of the incomplete Constitution."

On the preliminary question of how many parts of the Constitution bear on slavery, we need to make a distinction similar to one Paul Finkelman makes, but different in an important way as well. Finkelman distinguishes between constitutional provisions that directly concern (and support) slavery, and those that are indirectly about (and support) slavery.[14] I would supplement that classification by distinguishing between provisions that would most likely have been in the Constitution even if there had been not one slave on the entire North American continent, and those that owe their presence to the "peculiar institution." Thus a provision like the Insurrection Clause[15] would almost certainly have been in the Constitution, no matter what, while the Fugitive Slave Clause, of course, would not have been.[16]

All of Finkelman's "indirect aids," and practically pro-slavery clauses, are of the "it would have been there anyway" sort. To remove from the list of slavery-upholding provisions so many items does not destroy his main point, of course. A provision like the Insurrection Clause may well have been there no matter what, and therefore in no reasonable way can it be said to have had protection of slavery as its sole cause. Nonetheless, protection of slavery was indeed one of its anticipated effects. Many generally "neutral provisions" may prove to be protective of slavery, but this true observation proves perhaps too much: the Constitution as a whole, if successful in providing peace, security, stability, and prosperity, would tend to provide support for any and all practices and institutions that were part of the established status quo within the states. Thus, we could increase Finkelman's tally substantially if we used the test of aid and support, especially support in practice. To state the point another way, to say that various provisions of the Constitution might aid slavery (indirectly) does not establish that aiding slavery was the aim or the expected long-term consequence of the constitutional order. It would be perfectly compatible with Finkelman's "indirect aids" for the Founders to have aimed and expected to see slavery undone in the medium-range future. A more nuanced account is

14. *See* FINKELMAN, *supra* note 3, at 6–8.

15. U.S. CONST. art. I, § 8, cl. 15.

16. *See* THE FEDERALIST NO. 43, at 241–44 (James Madison) (E.H. Scott ed., 1894) (explaining Madison's view of the purpose of the would-be Insurrection Clause).

needed of the constitutional provisions regarding slavery, but this is not the place for it.[17]

The Neo-Garrisonians also do not credit sufficiently a feature of the Constitution that the original Garrisonians were criticized for ignoring: the refusal of the text's drafters to include the word slavery in it, as something they considered blamable and a blemish that they hoped could be removed. The account of motives given by the Neo-Garrisonians comports too little with the embarrassed circumlocutionism of the constitutional text.[18]

The Neo-Lincolnians also overstate their position. As one of the Neo-Garrisonians has pointed out, the Founders more easily accepted slavery-supporting provisions like the Fugitive Slave Clause than they needed to.[19] Nobody threatened to leave the Union if that clause had not been included. Nobody stood up to make impassioned speeches against the moral and political propriety of adding a provision to the Constitution imposing a duty on non-slaveholders to retrieve escaping slaves. Although there were some impassioned speeches against the institution itself at the Constitutional Convention, it nonetheless remains the case that the delegates accepted several clauses recognizing, and to some measure furthering, the institution. Perhaps even more significantly, nobody stood up to demand that the Constitution contain provisions prohibiting, or empowering Congress to prohibit, slavery in the states. The Neo-Lincolnians are surely correct to note much distaste, even repugnance, for slavery, but their case for concessions under duress is not compelling.

As a first step toward understanding the meaning of the slavery provisions in the Constitution, we must step back from the very understandable temptation to be judgmental, either to blame, or to praise, or at least to excuse the Founders; the desire to judge has rather clearly driven the thinking of both parties to this debate. In order to escape excessive moralism, we need to ascend to a somewhat more general level than the specific constitutional clauses and instead take our bearings from the two largest facts about slavery in the Constitution: the aforementioned failure even to contemplate a power in the United States government to deal with slavery in the states, and the other aforementioned fact that the words "slave" and "slavery" nowhere appear, replaced with awkward circumlocutions at every possible

17. The best account, heretofore, in my opinion, is DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 15–47 (2001).

18. It is not the case that the Neo-Garrisonians entirely ignore this capital fact about the Constitution's text, but they do tend to minimize its significance. *See* FINKELMAN, *supra* note 3, at 6, 34; Wiecek, *supra* note 3, at 178.

19. *See* FINKELMAN, *supra* note 3, at 34–35.

place. The existence of slavery was accepted but not endorsed. It was accepted as an institution of the states that chose to have it, as the specific constitutional clauses dealing with it made clear. The Fugitive Slave Clause very carefully and deliberately described the slaves as "[p]erson[s] held to Service or Labour in one State, under the Laws thereof . . . ."[20] The Slave Trade Clause spoke of this trade as involving "such Persons as any of the States now existing shall think proper to admit . . . ."[21] States that had slavery were not for that reason considered unsuitable partners for union, but the Constitution is very careful not to endorse or make the institution its own. The text does not support Taney's view that the Constitution explicitly recognizes and affirms slavery or Finkelman's view that it was "a pro-slavery compact,"[22] but neither does it declare war on slavery or commit to ending the practice.

To understand the constitutional settlement, we need to look at it with the eyes of 1787, and not those of 1857 or 2007. The first and central point is this: in making the Constitution the Framers were making a federation, that is, in Montesquieu's terms, a "society of societies," a union of otherwise independent political units.[23] Establishing the internal ordering of the members was not one of the accepted purposes of such unions and hardly anyone in 1787 thought that was at issue in making the Constitution. No one (or hardly anyone—Madison was something of an exception) thought that the Union or the Constitutional Convention had the power, the right, or the responsibility to settle the nature of the internal ordering of the member states. That, in itself, made the largest facts about the constitutional settlement regarding slavery nearly inevitable.

The constitutional solution (or non-solution) became more than nearly inevitable when the particular innovations effected by the Americans are factored into their deed of forming a federation. Their Constitution was not a mere reprise of traditional federalism. As is well known, the Americans revolutionized the principles of federal design by relating the government of the Union directly to its individual human citizens and not merely to its member governments as had been the dominant federal practice in the past. That meant that the government of the Union intruded far more deeply into the internal life of the member states than any historic federation had ever

20. U.S. CONST. art. IV, § 2, cl. 3.

21. U.S. CONST. art. I, § 9, cl. 1.

22. FINKELMAN, *supra* note 3, at 34; *see also id.* at 6, 82.

23. *See* 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS bk. IX, ch. 1, at 126 (Thomas Nugent trans., 3d ed. 1758); THE FEDERALIST NO. 9, at 51–52 (Alexander Hamilton) (E.H. Scott ed., 1894).

done.[24] A condition for that unprecedented degree of union intrusion, however, was a very clear line of demarcation between matters of concern to the government of the Union and matters of concern to the states. The vehicle by which this was accomplished was, of course, the enumerated powers. The principle behind the enumeration was the general idea characteristic of traditional federalism: matters of internal governance are, with a few exceptions, not matters of concern for the government of the Union.

The American order was innovative also in committing itself to a republicanism that reinforced the commitment to the internal autonomy of the states. Republicanism meant, at a minimum, self-government. Each unit should be a self-governing entity, which means that in matters concerning itself, other political units should not be making decisions for it. Thus the commitments to *federal* union and to republicanism converged to guarantee that matters like slavery would be, as a matter of course, regarded as state institutions, largely outside the purview of the government of the Union.

The Constitution thus accepted slavery as an institution of some of the member states. That status for slavery was, of course, not strictly speaking inevitable. There was always the option not to have a union, or to have smaller, "partial" unions. But given the Founders' decision to have an inclusive federal union of republics, the broad outcome was as inevitable as anything in the sphere of human affairs can be.

Nevertheless, we must qualify the description of the constitutional order as one that accepted slavery only as an institution of (some of) the member states. Slavery was not, in fact, left merely as an internal member state matter. In at least the three universally noted places in the Constitution, national account was taken of the institution. Slavery may be a state institution, but there were some matters where it spilled over into the Union, and constitutional provision was made for it. That provision was more readily forthcoming than the Neo-Lincolnians admit, but less pro-slavery than the Neo-Garrisonians assert.

Take the Fugitive Slave Clause. To have the kind of union the Americans sought—a huge free-trade area—meant having open borders between the states, and therefore a porousness that makes slave escape much easier than it would be with closed borders. If the member states can have slavery internally, then, it was thought, their being members of the Union should

24. For an account of the new federalism, see Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 3, at 132; Michael P. Zuckert, *Toward a Theory of Corrective Federalism: The United States Constitution, Federalism, and Rights*, *in* FEDERALISM AND RIGHTS 75 (Ellis Katz & G. Alan Tarr eds., 1996).

not be something that directly undermines what they have. Moreover, one should attempt to avoid, so far as possible, obvious sources of friction between member states. If slaves could escape with relative ease into free states across open borders, then there surely will be frictions among the states. Thus the Convention had no difficulty accommodating the slave states on the matter of fugitives, even though the slave states did not press very hard for this accommodation.

Given the nature of the union the Founders were establishing, the Fugitive Slave Clause made sense, especially since it is by no means clear the drafters of the Constitution meant Congress to have power to enforce this clause. It appears in Article IV, an article that deals with relations among the states themselves. The best reading of the Clause in context sees in it an affirmation of the legal inability of some states to free fugitives who escape into their territory from other states, together with a duty to "deliver up" such fugitives on application by the owner. Neither the identity of the parties to do the "delivering up" nor the character of the duty to do so is specified, but it is not likely that Congress was to do the "delivering up."[25] The Fugitive Slave Clause is not a constitutional endorsement of slavery beyond the already noted constitutional principle that the state republics were free within the Union to order themselves internally, including free to have slavery.

The Fugitive Slave Clause is a logical corollary of the basic decision to have a union that included slave-holding elements. If blame is to be laid, it is that decision that is blamable, rather than the decision to include the Fugitive Slave Clause. As the Neo-Garrisonians themselves notice, but do not always appreciate the significance of, the Clause's drafters went far out of their way to emphasize that slavery was a state institution under state law and that the accommodation of it was a matter of comity among states, as the placement of the Clause in Article IV shows. It was not, to repeat, a constitutional "endorsement of slavery" any further than the prior and determinative decision to have a union with slave states was. Contrary to the thrust of Neo-Lincolnian thinking, however, the Clause did represent a degree of toleration toward the institution.

Or, consider the Insurrection Clause, which provides a Congressional power for "calling forth the Militia to . . . suppress insurrections . . . ."[26] This clause would have been in the Constitution whether there was slavery in America or not, for the uses of federal forces to suppress domestic insurrections was widely believed to be one of the "advantages of union." So,

25. *See* FINKELMAN, *supra* note 3, at 82.

26. U.S. CONST. art. I, § 8, cl. 15.

Alexander Hamilton in *Federalist No. 9* cites Montesquieu and "the most approved writers on the subjects of politics"[27] as supporters of this idea. One cannot say (or imply), as some do, that this clause was specially put in the Constitution to protect slavery, but one must also notice that no exception was made for slave insurrections. It was widely understood at the time that this clause might indeed be used to suppress slave uprisings, but this too is a corollary of the decision to have a union of the sort they made. It implied toleration, and aid of a certain kind, but not endorsement.

The Constitution thus accepts slavery, as a *fact* characterizing some of the member units, and makes an accommodation to that fact so far as there are spill-over effects into the Union. It is *at most* a stance of neutrality toward an institution some members had, but others did not. The other crucial fact—the unwillingness even to speak the name of the practice and to make sure it is identified entirely as a practice of some of the states—points to a distinct lack of neutrality. If the Constitution were truly neutral it would show no aversion to naming the institution. The circumlocutory character of all references to slavery indicates clearly enough that there was something illegitimate about it in the eyes of the drafters of the text.

Moreover, the constitutional provisions regarding slavery must be viewed against the backdrop of so much of the rest of the political climate of the day. The colonies, acting together to declare their independence, had expressed a theory of legitimacy, which nearly all members of that generation understood to be contrary to the institution of slavery. Thus, William Wiecek, one of the leading Neo-Garrisonians, speaks of "the widespread and heartfelt opposition to slavery expressed by so many of the Framers." He endorses as "doubtless correct" the tendency of Neo-Lincolnian historians "in ascribing some degree of antislavery sentiment to most of them."[28] Nearly all the new states adopted constitutions reaffirming those same principles of legitimacy. During the Founding era, many of the new states acted on the perceived incompatibility between the received principles of legitimacy and slavery, and moved to abolish the practice. In the states which did not do so, there were strong threads of sentiment to follow the example of the others. Of course, getting rid of slavery was much easier and much less costly in some states, where there were few slaves and the institution was not very significant, than it was in others where the opposite conditions prevailed. Where slavery was retained, the most common defense was the plea of necessity, not the plea that slavery was inherently right or legitimate.

27. THE FEDERALIST NO. 9, *supra* note 23, at 50.

28. Wiecek, *supra* note 3, at 178.

I rehearse these familiar facts in order to propose a formula for the place of slavery in the Constitution that is neither Neo-Garrisonian nor Neo-Lincolnian. Within the constitutional order slavery was legal but not legitimate. It was legal within the member states and to a degree within the Constitution itself where it spilled over the borders of the member states and impinged on the Union. It was not legitimate, because the Founding generation accepted a theory of political right that was incompatible with the justness of slavery. They had made a revolution in the name of freedom, and had established governments dedicated to liberty. The principle of legitimacy they accepted did not penetrate or inform the entire political system; it was in this sense an "incomplete constitution." My point is not to say that the Constitution gave no aid to slavery as an institution. My point is not even to deny that the Framers willingly gave such aid and did so without much of a fight. More than we, their political descendants, might like, they tolerated the institution; nonetheless, nothing they did was incompatible with the hopes, which Neo-Lincolnians discern, that the institution would ultimately pass away. The Constitution is not what later apologists like John C. Calhoun and Alexander Stephens would advocate—a system meant to be built permanently on the institution of slavery, an institution considered the foundation or cornerstone of civilization. My point is a relatively narrow, but I think important one: the Constitution did indeed give slavery a place, several places in the established legality, but the institution remained outside the broader consensus on the basic principles of legitimacy upon which the Constitution was erected.

II. COPING WITH THE INCOMPLETE CONSTITUTION

It is problematic for any political-legal system to exist with the kind of disparity between legality and legitimacy that marked the American order. Any political community experiencing such a disparity is subject to great pressures to bring legitimacy and legality into greater harmony with each other. As Lincoln said, "A house divided against itself cannot stand."[29] The antebellum period was indeed deeply marked by the tensions resulting from that disparity, and over time it proved harder and harder to endure.

Three responses to this disparity arose, and, as they interacted with each other, the rift became ever greater and more intense. One response was to attempt to remake legality so as to cohere with legitimacy. Such was the approach of, for example, the various sorts of abolitionists. A second

29. Abraham Lincoln, A House Divided: Speech Delivered at Springfield, Illinois, At the Close of the Republican State Convention (June 16, 1858), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372 (Roy P. Basler ed., 1946).

response was to remake legitimacy to match the otherwise anomalous legality of slavery. Such were the efforts of men like John C. Calhoun, Alexander Stephens, and the entire slavery-as-a-positive-good school. Finally, there were efforts to creatively maintain the tension so as to persevere in the original (defective and incomplete, but established) constitutional order. Many quite disparate political and legal leaders followed this path, Joseph Story and Abraham Lincoln being two of the chief among them.

A proper treatment of the theme of "coping with the incomplete Constitution" would require a more or less thorough survey of the various ways in which the three chief "solutions" were developed, but that is beyond the scope of our symposium. A shorter path through the topic is, however, perfectly compatible with the symposium, for discernible in the amazing multiplicity of opinions in our Supreme Court case are representatives of all three positions and therefore an indication of the dynamic at work. Not merely does *Dred Scott* neatly illuminate the chief efforts to resolve or reinstantiate the original constitutional incompleteness, but viewing the case in the context of antebellum efforts to cope with the incomplete Constitution also supplies the best entrée to understanding the case itself.

Of the three possible ways of dealing with the legality-legitimacy tension, the most widely endorsed in *Dred Scott*, by far, was the legality-over-legitimacy strategy. Seven of the nine Justices, including Chief Justice Taney, adhered to one or another version of this position. Only one stood at or near the opposite pole: Justice McLean. Only one made a full-bodied attempt to creatively maintain the tension: Justice Curtis. Two of those whom I classify as "legality over legitimacy" men, Justices Nelson and Catron, might, however, be mistaken for adherents of one of the other two possible positions. It seems appropriate, then, to begin with them.

A. Legality over Legitimacy: Nelson and Catron

Justice Nelson might appear at first as a representative of the "sustain the tension" approach, for he and the two dissenters were the only Justices not to find the restrictions on slavery in the Missouri Compromise unconstitutional.[30] That finding of unconstitutionality was a register of the embrace by the six Justices who joined in that judgment of a redefinition of the principles of legitimacy to harmonize with the legality of slavery, as I will demonstrate below. That is to say, the six-Justice majority resolved the tension by simply rejecting the principles of legitimacy that had stood against the institution of slavery. By not going that far, Nelson's position

30. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 457–69 (1857) (Nelson, J., dissenting).

would seem to have maintained the tension in that he did not explicitly reject the old legitimacy.

One might be tempted to say the same of Justice Catron. He was one of the six who found the Missouri restrictions on slavery to be beyond the powers of Congress, but he reached that position via a unique argument.[31] Alone among the Justices in the majority, he granted that the Territories and the Admission of New States Clauses[32] supplied general authority for Congress to govern the territories. He relied on the history of the adoption of the Constitution, and the well-established exercise of such powers by Congress to make his case. "More than sixty years have passed away since Congress has exercised power to govern the Territories . . . and it is now too late to call that power into question."[33] He had himself, moreover, served as a judge in the Territories, enforcing the laws Congress had made, and, he admitted, he could not at this late date "agree that he had been all the while acting in mistake, and as an usurper."[34]

Congress had general legislative powers in the territories—and yet, according to Catron, the Missouri Compromise restrictions were illegitimate and unconstitutional. To reach that conclusion, he deployed two lines of argument. Unlike any other Justice, he placed great weight on the terms of the treaty by which the United States acquired the Louisiana Territory from France in 1803.[35] The third article of the treaty provided that

> [t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible . . . to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.[36]

Catron took that article to establish the right of residents of the Louisiana Territory to retain or possess slaves anywhere in the vast territory ceded by France. The treaty granted that right and Congress had no power to override the treaty provision.[37]

31. *Id.* at 528–29 (Catron, J., dissenting).

32. U.S. CONST. art. IV, § 3, cl. 1 (New States Clause); *id.* cl. 2 (Territories Clause).

33. *Dred Scott*, 60 U.S. (19 How.) at 523 (Catron, J., dissenting).

34. *Id.*

35. Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

36. *Id.* art. III, 8 Stat. at 202, *quoted in Dred Scott*, 60 U.S. (19 How.) at 524 (Catron, J., dissenting).

37. Catron's was a very dubious interpretation of the relation between treaty provision and Congressional power. For Curtis's rebuttal, see *Dred Scott*, 60 U.S. (19 How.) at 626–27 (Curtis, J., dissenting); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 402 (1978).

Had he stopped there, it would be tempting to place Catron along with Nelson as a Justice who failed to go along with the legality-over-legitimacy option, for this point, in conjunction with Catron's broad reading of congressional power to govern the territory, does not commit him to anything that necessarily rejects the old legitimacy. But Catron did not stop there—he went on to endorse the Calhounian doctrine of the nature of the Union, according to which Congress's power over the territories was limited by far more than the terms of the treaty with France.[38] (Of that theory we will hear more anon.) It is, nonetheless, a matter of wonderment why Catron put so much weight on the specifics of the French treaty when he reached the same conclusion by a far more general, more sweeping, and less idiosyncratic route. Perhaps he thought that reliance on a treaty accepted by a special majority of the states, as represented in the Senate, would have more rhetorical appeal in the North than the Calhounian theory that was the other pillar of his argument.

Nelson, no more than Catron, belongs in the "sustain the tension" camp. The best case for placing him there derives from his failure to accept any theory of the nature of the regime that committed him to overturning the old legitimacy. But, it must be noted, he very carefully avoided endorsing or even mentioning the old principles either. Instead, he relentlessly sought an approach to the case that would allow him to remain neutral, neither endorsing nor rejecting the old legitimacy. Despite his dogged attempt to appear more moderate than the others in the majority, in fact he does belong with those who resolve the tension by affirming legality over legitimacy, or rather, by redefining legitimacy. His approach is not the same as Taney's or the other Justices' in the majority. It is tempting to say that his approach to the case is the judicial equivalent of the Lewis Cass-Stephen Douglas popular sovereignty doctrine, a doctrine which does belong in the legality-over-legitimacy class.

Nelson, however, presents himself as closest to Justice Story, whose name he invokes frequently and whose words he quotes at some length. Story clearly belongs in the "sustain the tension" camp, and so by attaching himself to Story, Nelson would seem to be opting for that camp himself. Nonetheless, the differences between Story and Nelson are as much or more revealing than the genuine similarities between them.

Nelson looks to Story because he aims to treat the *Dred Scott* case solely as a matter of conflict of laws, and Story "wrote the book," so to

38. *See* FEHRENBACHER, *supra* note 37, at 403.

speak, on conflict of laws.[39] Nelson's view is simple and straightforward. Every nation is sovereign and likewise each state of the Union is sovereign, so far as it has not delegated some of its sovereignty to the Union. Sovereign nations make laws for themselves; these laws determine the status of persons and property within their territorial bounds. No sovereign may legislate for another—that is what sovereignty means. No laws have of their own force extraterritorial application. However, "[n]ations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognise and administer the laws of other countries."[40] Thus nations and states normally recognize the legal status of persons as determined in their home jurisdictions, and honor relations of property similarly defined. Yet, Nelson insists, these recognitions are "purely from comity, and not from any absolute or paramount obligation."[41] It is, in other words, purely a voluntary matter, and each nation is free to determine the degree, if any, to which it will recognize legal determinations and the force of laws prevalent in other sovereign units. "[E]ach nation judges for itself[] and is never bound, even upon the ground of comity, to recognise them, if prejudicial to her own interests."[42]

These principles of legal relations between nations apply to the states of the Union on matters that remain within their sovereign disposition. States are forbidden by the Constitution from refusing to recognize the servile status of fugitive slaves who have escaped into their territory. They are otherwise free to recognize the status of slavery as they choose. Thus the states where slavery exists uniformly recognize that status as established in other jurisdictions, but the free states refuse to do so. The state of Illinois, for example, refuses to have slaves, and no master may of right take his slaves into Illinois, unless, perhaps, in order to transit through the state. Scott, having been taken into Illinois for a period of two years, would not be a slave in Illinois, for Illinois need not recognize the extraterritorial force of Missouri law. By the same token, if Scott returns to Missouri, his free status under Illinois law has no more extraterritorial force than Missouri law had. Either state is free, of course, under its conception of the public good, to recognize the status acquired elsewhere. Nelson grudgingly notices that Missouri courts in the past do seem to have accepted the extraterritorial force of the law of freedom, but they need not do so. The state is

39. *See id.* at 390; PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 13 (1981).

40. *Dred Scott*, 60 U.S. (19 How.) at 460 (Nelson, J., concurring) (citing JOSEPH STORY COMMENTARIES ON THE CONFLICT OF LAWS (1865)).

41. *Id.* at 460.

42. *Id.*

the sole judge of what determinations by other states it will or will not accept. Missouri has now decided that Scott has not acquired freedom in Illinois that it will recognize. He was and is again a slave in Missouri.[43]

The laws of one nation have as much extraterritorial force as those of another—none except what the forum nation accepts. Nelson's chief ideas then are these: sovereignty, voluntary consent to recognize laws of others, and perfect symmetry. By this I mean that the substance or content of the laws has nothing to do with their force elsewhere. No kind of law has a natural priority, or a natural claim on acceptance. Thus the Illinois law of freedom is perfectly equal and symmetrical with the Missouri law of slavery. Sovereignty, then, is the juridic fact of facts in Nelson's legal cosmos.[44]

Nelson treats the congressional law forbidding slavery in the Wisconsin territory to which Dr. Emerson had taken Scott as perfectly equivalent to the law in Illinois forbidding slavery. It has the force it has within its jurisdiction, but no more than Missouri wishes to grant it within Missouri. His treatment of congressional law as parallel to Illinois and Missouri law underscores the degree to which the doctrine of sovereignty drives his opinion: the reigning sovereign within any jurisdiction has full power to determine status of persons and property. It is this strong affirmation of sovereignty as the central principle that leads him to settle the case without openly or clearly endorsing another (unfree) principle of legitimacy as Taney and his cosigners do.[45] It is also this that associates Nelson's position with Stephen Douglas's, for it is the juridic equivalent of Douglas's popular sovereignty doctrine.

That Nelson's position is distant from that of his apparent hero, Joseph Story, is fairly easy to demonstrate. We might consider Story's opinion for the Court in the well-known *Amistad* case.[46] The case was a suit under a series of treaties between Spain and the United States that provided that

> all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers on the high seas, shall be brought into some port of either state, and shall be delivered into the custody of the officers of that port, in order to be . . . restored entire to the true proprietor . . . .[47]

In this case the "merchandise" was a group of alleged slaves who had rebelled on board the ship, killed many of their captors, and attempted to

43. *Id.* at 460–65; *see also* FEHRENBACHER, *supra* note 37, at 390–91.
44. *See* FEHRENBACHER, *supra* note 37, at 391.
45. *See id.* at 390.
46. United States v. The Amistad, 40 U.S. (19 Pet.) 518 (1841).
47. *Id.* at 568–69 (internal quotations omitted).

force the remaining whites on the ship to sail them back to Africa, whence they had originally come. Thus the so-called pirates were the selfsame alleged slaves who were also the "merchandise."

The attorney for the alleged slaves had made a very strong argument of the legitimacy-over-legality type, claiming that the treaty in question could not possibly apply to these persons, for human beings are by nature not "merchandise," and if some nations (e.g. Spain) were so inclined to consider them, the United States was not, indeed could not, be among them.[48] The United States, he argued, had been founded under the terms of the philosophy of the Declaration of Independence and that philosophy affirmed human equality and liberty. A nation "so conceived and so dedicated" did not have the power to enter into a treaty which treated human beings as mere merchandise, that is, which violated the Founding principles of the nation so thoroughly.[49]

Justice Story refuses this track. Law, both international and national, recognizes slavery and, thus, the possibility that human beings may indeed be merchandise; since the laws recognize slavery, the United States may indeed have entered into a treaty to return this species of property to its owner. Story is a judge; his duty is to the law as it is, and he thus refuses to allow legitimacy to trump or negate legality.[50]

However, this is not to say that legitimacy plays no role in his opinion. The Attorney General of the United States, intervening on behalf of the Spanish claimants, argued that positive law alone settled the case. The treaty could and did include a provision for return of slave property and the Cuban government had certified that the claimed individuals were indeed legally slaves. Even though there was evidence that there was fraud involved in the case, the proper Cuban official had certified them as slaves, and that should be the end of the story as far as an American court is concerned. American obligations under the treaty are to be settled by the positive legal determination in Cuba.[51]

Story refuses this track as well. The allegations of fraud do matter, he argues, despite the Cuban documents, which the Attorney General argued the Court had no right to look behind. The Court must take account of the fraud because "the United States are bound to respect [the] rights [of the kidnapped Africans] as much as those of Spanish subjects."[52] Like the

48. *See id.* at 550–51 (argument for appellees).

49. *Id.* The phrase "so conceived and so dedicated" is, of course, Abraham Lincoln's. *See* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

50. *See The Amistad*, 40 U.S. (19 Pet.) at 593 (majority opinion).

51. *See id.* at 568, 576, 585–86 (argument for appellants).

52. *Id.* at 595 (majority opinion).

Dred Scott case itself, this is a matter of "the conflict of rights" and such conflicts "must be decided upon the eternal principles of justice and international law."[53] This is even more necessary in a case like this one, for here "human life and human liberty are in issue; and constitute the very essence of the controversy."[54] Story voices a strong presumption in favor of liberty. He finds room for the principles of legitimacy and natural right; these do not override the law, even when it is contrary to liberty, but they do provide guidance for the interpretation and application of the law. In this case that guidance worked for freedom. It will not do so in every case. Story was prepared to return the alleged slaves to their "owners" if a valid legal case could be made to show that they were indeed slaves. Story is attempting to "live the tension," not resolve it.

The difference between Story and Nelson should now be clear. Although Nelson attempts to rest on the authority of Story's jurisprudence, he lets go of what had been a crucial part of Story's approach—the affirmation, often subtle, of the principles of legitimacy. Story, unlike Nelson, is not neutral between slavery and freedom and does not see a perfect symmetry between slave law and free law. Although Nelson may appear more alive to the tension than the other majority Justices, the contrast to Story's apparently similar approach reveals very nicely that his position is better understood as a reinterpretation of legitimacy to make it accord better with the legality of slavery. His reinterpretation elevates the doctrine of sovereignty and sovereign choice to the peak: the American regime as Nelson construes it is one where sovereign authority is all. The sovereign or semi-sovereign units may decide whatever they will about slavery and there is little constitutional and no natural principle which sets a fundamental limit on what they may decide. The Constitution does set some limits—the Fugitive Slave Clause forbids states from freeing escaped slaves. Nelson also hints at the end of his opinion that the Privileges and Immunities Clause may set some limitations on what the states may do regarding sojourning or temporarily resident slaves within their territory. The qualifications of state sovereignty that he recognizes all favor slavery, but he never goes so far as to suggest that the rights of slavery overcome the rights of sovereignty as the Southern Justices do.[55]

53. *Id.*
54. *Id.* at 596.
55. *See* FEHRENBACHER, *supra* note 37, 392–93 (discussing Nelson's pro-slavery bias).

B. *Legitimacy and Legality: Curtis*

Justice Curtis, despite his strong conclusion in Scott's favor, presents a genuine effort to sustain the tension and thus, in a general way, is more in accord with the original character of the Constitution than any of the Justices in the majority. This is not to say that Curtis is a simple and straightforward "originalist," however. Despite the fact that he makes a very eloquent statement on behalf of orginalism, his impressive opinion in the case is far more creative than the theory of originalism allows.[56] Despite the fact that he also makes a very eloquent argument about the impropriety of resting judicial decisions on an appeal to general principles of political right, he does in fact do that very thing to a large degree.[57] His opinion is governed at nearly every stage by his effort to follow his mentor, Justice Story, in creatively reading the Constitution so as to maintain the incompleteness, that is, to sustain the tension between legitimacy and legality. It is that effort that leads to, and helps make good sense of, some of the otherwise puzzling features of his opinion, features which have led some, like Fehrenbacher, to criticize his argument as "racially conservative and of limited scope."[58]

Of the two dissenters, I focus first on Curtis's opinion, in part because McLean's opinion is noticeably more radical than Curtis's. Where Curtis attempts to maintain the tension, McLean is quietly but well on his way toward the legitimacy-trumps-legality position. He does not get all the way there, as some of the more constitutionally venturesome of the abolitionists did, but he lays the groundwork for a far more Legitimist reading of the Constitution than Curtis's or even than his own. He is also not as subtle or analytically sharp as Curtis, but he is extraordinarily sensitive to the political and legal difficulty posed by the Constitution's incompleteness on slavery, and he makes some very powerful moves toward "completing" it by emphasizing the principles of legitimacy.

One of the truly impressive strengths of the Curtis opinion is his extremely clear perception of the tension between legitimacy and legality and of the various paths towards resolving (or living with) the tension that had appeared by 1857. Towards the end of this opinion he cites three views about the powers of Congress respecting slavery in the territories. The three represent variants of the alternatives we have been discussing.

56. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 572 (Curtis, J., dissenting).

57. *See id.* at 620–21.

58. FEHRENBACHER, *supra* note 37, at 407; *see also* STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM 127–30 (2005).

"One is, that though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it . . . ."[59] This is the theory of many of the Republicans and, as we shall see, of Justice McLean as well. This "view," Curtis says, does not rest on any particular clause of the Constitution, but rather on "general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right."[60] This first position, as stated, is clearly an example of legitimacy trumping legality.

Curtis identifies as another view that slavery "can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery . . . ."[61] This view "is drawn from considerations equally general [as the first], concerning the right of self-government, and the nature of the political institutions which have been established by the people of the United States."[62] This second "view" is clearly the view promoted by Stephen Douglas. It is a version of the legality-trumps-legitimacy position, for it involves a redefinition of the basic principles of legitimacy away from natural rights, equality, and consent to popular sovereignty. That redefinition resolves the tension between legitimacy and legality, for the new principle of legitimacy is as equally compatible with a slave society as with a free one. As we have seen, Justice Nelson comes close but not quite to this position.

Curtis identifies yet a third "view" of Congress's powers in relation to slavery in the Territories: "that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property."[63] Like the others, he finds that this too rests on "general considerations," not specific constitutional provisions:

> [It] is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens; and, inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States.[64]

59. *Dred Scott*, 60 U.S. (19 How.) at 620 (Curtis, J., dissenting).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

Curtis is here describing the theory of union developed first by John C. Calhoun and then appealed to by all the Justices in the majority except Nelson. It too is a legality-trumps-legitimacy position, for it posits a theory of legitimacy which is in full accord with the legal institution of slavery and which indeed goes much farther than the Cass-Douglas-Nelson sovereignty doctrine, in that it establishes the primary of slavery over freedom.

It would be instructive to see Curtis's reply to these three "views," but he dismisses them all. Constitutional interpretation is about specific constitutional texts, not "general principles" of morality and politics—or so he says. In effect, he is saying that all eight of his fellow Justices, including McLean, have done their job incorrectly, for they have all appealed to one or another of these general theories in order to come to their decision; judges should merely apply the law.[65]

Curtis can tell himself that that is what he is doing, for he is doing his best to "live the tension," which is indeed what the Constitution embodies. Nonetheless, living the tension does imply appeal to "general principles" of morality and politics, for the tension contains as one of its elements a conception of the principles of legitimacy of the system. Curtis disregards his own appeal to these principles, for the general principles he appeals to are, he believes, embodied in the law as it is. Nonetheless, he is driven to a far more creative interpretation than his thematic statements would lead one to suspect.

His most general principle is the proposition that slavery is merely a municipal institution, requiring actual positive law at every stage to establish and support it. Put more positively, his general principle holds that all men are born free and equal and can be removed from that condition only by positive law. In the absence of a positive law of slavery, men persist in or revert to their natural freedom.[66]

This core principle distinguishes Curtis's position from the apparently similar-sounding position of Nelson. For Curtis, the default position is freedom; freedom is prior to bondage. For Nelson, there is, in effect, no default position, and laws of freedom and laws of bondage are simply symmetrical and equal. It is this difference that leads to their different outcomes in the case and especially to the differences in the way they treat the issue of the effect on Scott of his residence in a free territory and his return to Missouri.

Curtis believes (or says) that he is doing nothing but explicating the plain constitutional text, because he believes that the core principle to which he appeals is embodied in the Constitution itself, and not just in the

65. *See id.* at 619–21.
66. *Id.* at 624.

political culture and philosophy that produced the Constitution. He has a bevy of cases (state and federal) to cite that endorse his principle, but his chief reliance is on Story's opinion in *Prigg*,[67] which establishes to Curtis's satisfaction that the Fugitive Slave Clause itself endorses his principle.[68] It is an irony that this clause, itself the source of the deepest involvement by the government of the U.S. in the business of slavery in the states, is also the clause that most definitively embeds in the Constitution the doctrine of the primacy of natural liberty and equality.

Curtis's opposition or even hostility to judicial reliance on "general principles" does not imply any hesitation on his part about the meaning or the truth of the philosophy of natural liberty and equality as expressed in the Declaration of Independence. Taney had insisted that the Declaration must not have meant to those who drafted and adopted it what it seems to mean on its face. How else to account for the practices of slavery and racial discrimination prevalent at the Founding? It is in response to that set of claims by Taney that Curtis provides his most explicit statement of the abstract principles of political right.

> I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of *these assertions of universal abstract truths*, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, *nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts.*[69]

The generation that made the Constitution thus believed in and embodied in their text the great, universalistic truths of the Declaration. Given his conviction that that is the case, Curtis sees no need to appeal to those truths over the head, so to speak, of the constitutional text. However that may be, he uses his core general principle with extremely powerful effect throughout his opinion. Among other things, he uses the notion that slavery is purely a product of municipal law to mount the most analytically sophisticated analysis of the various kinds of relations between law and slavery

67. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

68. *See Dred Scott*, 60 U.S. (19 How.) at 624 (Curtis, J., dissenting).

69. *Id.* at 574–75 (emphases added).

that appears anywhere in the case, and perhaps anywhere in the antebellum era.

Law, he shows, can take up any one of three different stances toward slavery.

1. The municipal law can establish slavery, which, not being a natural relation, is defined solely by the terms set out in the law. Thus, the law might limit the rights of the master over the life of the slave—or it might not. In any case, the specific rights and limitations to the relationship are those defined in the positive law.[70]
2. Law may also, at the other extreme, absolutely forbid slavery. Such laws not only fail to establish the relationship, but they dissolve any master-slave bonds that come within their purview. (Exception may be made in the law for transient masters and slave.)[71]
3. Finally, law may be silent on the subject, in which case the bond does not exist within the jurisdiction. While not in terms forbidding slavery, the absence of slave law fails to provide the necessary condition for the existence of slavery and, in principle, casts the protection of its laws on any who are attempted to be coerced in a manner characteristic of slavery. So, a master attempting to corporally discipline his slave would be amenable to laws protecting against assault.[72]

The second and the third legal arrangements produce very similar results within the jurisdictions possessing those arrangements, although a state forbidding slavery may have more provisions for actively and aggressively preventing anything like the master-slave relation from existing in practice. Most significantly, however, at least for the *Dred Scott* case itself, the chief difference concerns the effects of a return to a slave jurisdiction. Although he does not quite say it, Curtis seems to be of the view that the mere absence of positive slave law does not have as lasting or as much extraterritorial effect on the master-slave bond as does the positive prohibition, which "dissolves" the bond. Curtis just might go along with Nelson's approach to this issue when a slave returns to a slave jurisdiction from one with no slave law. It is not perfectly clear that this is so, however, for Curtis does not canvass that situation very fully. It is not necessary that he do so in this case, for he points out that the Scotts were affected by laws of the positive prohibition (i.e., dissolving) sort, in both Illinois and at Fort Snelling. Having chastised the Court's majority for taking up issues not ger-

70. *Id.* at 624–25.
71. *See id.* at 625.
72. *See id.*

mane to the case, Curtis is careful to restrict himself to discussions necessary to settle the case before him.

He uses his analysis of the different sorts of relations law can bear toward slavery in the first instance to establish that the Scotts have a right to their freedom. Dred's freedom could have rested on his residence in Illinois, but Harriett's and that of the Scott children depended on the validity of the law forbidding slavery in the U.S. territories to which they had been taken.[73] Thus, at least part of his analysis of the effects of free law is hypothetical, depending on the further question of whether the Missouri Compromise restriction on slavery is valid or not.

Curtis's analysis of the effects of the law on the Scotts, of the effects of their return to Missouri, of the authority of the decision of the Missouri Supreme Court denying them their freedom, and finally of the constitutionality of the Missouri Compromise itself are all complex, because they are all informed by his attempt to "live the tension," that is, to give due weight both to the principles of legitimacy within the constitutional order (the principles of the Declaration) and to the legality that recognizes slavery in the constitutional order.

His core principle—that slavery is merely a creature of municipal law—already contains within itself the tension of which we have been speaking. As opposed to the doctrine favored by the abolitionists, he concedes that positive law can indeed establish slavery and that courts are obliged to give effect to such laws, despite the default position of natural rights, natural freedom, and equality, which his core principle also affirms.[74]

In attempting to give effect to the tension, he endorses several things that a more natural-liberty-oriented jurist, like Justice McLean, would be inclined to resist. First and perhaps foremost, he affirms the perfect and complete legal right of the states to establish slavery in whatever form they choose.[75] Second, he affirms that Missouri could refuse to recognize the new status of freedom that the Scotts gained at Fort Snelling.[76] Every sovereign unit is empowered to establish the status of persons and property within its territory. The State of Missouri is within its rights to overrule the rule of international law that the laws most recently affecting the status of persons should be honored in other jurisdictions. However, given the fact that the prohibitory laws of Illinois and Wisconsin Territory have defini-

73. *See id.* at 596–600.
74. *See id.* at 624.
75. *See id.* at 585–86.
76. *See id.* at 599–600.

tively worked a change in the status of the Scotts, Missouri must establish its dissent from the usual practice of international law by a very definite and explicit action. It must pass a statute denying the application of the rule. It is not enough for the courts of Missouri to announce a new rule contrary to the common law incorporation of the standard rule of international law.

Curtis has affirmed the liberty of the Scotts, but he has done so in a very conservative way, for he has announced to all the slave states how they can legally reimpose slavery on those who return to their states after being freed by federal or state prohibitions of slavery. The possibility of a return to slavery, if the state has an explicit provision for that, follows ineluctably from Curtis's strong commitment to living, rather than dissolving, the tension. In this, he is again very much like Justice Story.

Curtis's treatment of the constitutionality of the Missouri Compromise also bears the marks of his "sustain the incompleteness" approach. He takes what appears to be a very straightforward textual approach to the issue of congressional authority to govern the territories and of the power to prohibit slavery in them. Article IV, Section 3 supplies the power to make "all needful rules and regulation" for the territories, and, having rebutted the majority's view that this clause does not say what it seems to say and what American leaders from 1787 forward had taken it to say, Curtis asks whether there is any reason why the power to deal with slavery would be an exception to this apparently plenary power.[77] He can find none; he produces an impressive analysis of the Due Process Clause, on which Taney had partially relied, and shows that a prohibition of slavery in the territories is no violation of this clause. That analysis depends entirely on his earlier enunciation of the core principle that slavery is nothing but a creature of positive law and that, conversely, freedom is the natural or original human condition. Laws prohibiting slavery of the sort that exist in the territories cannot be deprivations of property without due process of law, for, among other reasons, slavery can exist only by positive law and the failure to supply such a law is no violation of right.[78]

Given this strong affirmation of the natural rights doctrine, and his identification of the Due Process Clause with the Magna Charta, his equally strong affirmation of the power of Congress to establish slavery in the territories as well as to forbid it may be something of a surprise. Although the prohibition of slavery is no deprivation of property, the establishment of slavery by Congress would appear to be a deprivation of

77. *Id.* at 614–15.
78. *Id.* at 624–27.

liberty, for liberty is the default possession of all human beings. Curtis fails to consider this due process objection, pressed at the time by abolitionists and free soilers, on his way to affirming the power of Congress to pass both halves of the Missouri Compromise—that is, the prohibition in one part of the territories and the allowance of slavery in the other. In other words, his treatment of the territories issue is a good indication of the degree to which his opinion is driven by his resolve to find a way to "live the tension." As he develops it, the tension is the affirmation of the principles of the Declaration as the fundamentals of legitimacy and political right, together with the right of sovereign units to overrule those principles when done very explicitly. When not done explicitly enough, the principles of legitimacy create a presumption in favor of liberty. That is the only way to account for the anomalous American situation of legal slavery in the states, together with the principles of the Declaration. As applied to the territories this principle must mean that the government of the territories (ultimately Congress) has the same power to deny natural liberty that the states have. Thus, Curtis develops a doctrine that invites a return to the system of dividing the territories between free and slave that had prevailed until the agitation on behalf of the Wilmot Proviso changed the political dynamics, and the Kansas-Nebraska Act overturned the old policy.

The driving force of the commitment to reasserting and extending the tension is visible also in one aspect of Curtis's opinion that has received little notice. He differs from Nelson in denying perfect symmetry or neutrality between slavery and freedom, but he is similar to Nelson in asserting that positive law can just as well establish slavery as recognize natural freedom. He believes that Congress has fairly evenhandedly done both in its policy toward the territories from 1787 until 1854. Slavery was forbidden in the more northerly territories and allowed in the more southerly. Curtis speaks as though Congress established slavery in the southerly parts of the territories, but that was not the case. Contrary to his own analysis of the relation between freedom, slavery, and law, Congress did not establish slavery by positive law; Congress merely forbore from prohibiting it and allowed nature to take its course, that is, allowed slave holders to take their slaves and presumably hold them legally despite the absence of positive slave law. That is to say, federal policy in the territories followed a pattern almost the reverse of the one Curtis affirmed as the normatively and legally correct course: the default position was held to be slavery. Curtis passes over this persistent pattern of legislation, and instead treats the entire pattern of congressional action as though it conformed to his version of living the tension.

Finally, we can also see Curtis's effort to reassert the tension in his treatment of the citizenship issue. His argument here is quite complex. It is complex despite seeming to be quite simple. It seems simple because replying to Taney on the citizenship issue he makes what appears to be the ultimately straightforward argument. Taney had argued that members of the "African race" could never be citizens of the United States, and thus could not sue in federal courts under diversity jurisdiction because citizenship is limited to the descendents of those who were citizens at the time of the Founding and to those who were subsequently naturalized (or their descendants) under act of Congress.[79] Taney pointed out that the Naturalization Act was limited to whites and further claimed that blacks were no part of the people of the United States who made the Constitution.[80] Curtis, of course, granted the point about the naturalization statute, but he denied the other part of Taney's claim. There were free black citizens in at least five states at the time of the Founding and at least some of them were voters and therefore were definitely part of the "people of the United States." As a simple historical matter Curtis is, of course, correct, but his position on citizenship is far more complex than this straight historical argument suggests.

As part of his effort to give effect to the tension at the heart of the constitutional order, Curtis develops a rigorous theoretical distinction between the status of freedom and the status of citizen. Freedom is the natural, the default position. Citizenship is not. Agreeing with Taney to a point, he also accepts a nascent distinction between state and national citizenship. But he minimizes the distinction by maintaining that United States citizens are the citizens of the states.[81] Unlike Taney, he does not accept the notion that states might create their own citizens. The power of naturalization is exclusively a congressional power and the states may not exercise it.[82]

The states may not make citizens of foreigners, but they do have two important powers with regard to citizenship. Native persons, that is, born within a state, are all eligible to become citizens of their state (and thence of the United States), but those so born in the state are not automatically citizens. The state has the power to select among its native born residents for citizenship.[83] Thus, native birth is a necessary, but not sufficient, condition for state citizenship. States are, therefore, free to exclude whatever classes of residents they choose from citizenship. It is this feature of Cur-

79. *Id.* at 406–07 (opinion of the Court).
80. *Id.* at 410–11, 419.
81. *Id.* at 580–81 (Curtis, J., dissenting).
82. *Id.* at 582.
83. *Id.* at 577–82.

tis's argument that Fehrenbacher especially criticizes as "racially conservative." Fehrenbacher is correct to note this as a peculiar doctrine, but he is incorrect to see it as racial in itself. The doctrine applies to all residents of all states, and Curtis was explicit in rejecting color as a requirement of citizenship.[84] But, of course, Curtis undoubtedly has in mind the likelihood that this power will be exercised in a racially discriminatory manner. He thus legitimizes this important kind of discrimination.

The Privileges and Immunities Clause specifies that citizens of a state are due privileges and immunities in all other states.[85] This was one of the great concerns driving Taney's opinion, for he saw that this clause led to situations incompatible with the existence of slavery in the Southern states. Curtis was remarkably sensitive to and even responsive to Taney's concern, for he affirms quite emphatically that United States citizenship is not an all or nothing affair. States may deny classes of their citizens many rights often thought to belong to citizenship, including all political rights and even some civil rights.[86] Again, this part of Curtis's opinion is not very fleshed out, so it is not clear what he considers legitimate for states to deny to their own citizens or just how this relates to the Privileges and Immunities Clause. It is clear, however, that Curtis sees those limitations as ways of responding to Taney's concerns. Curtis is fashioning a constitutional doctrine which allows the Southern states to impose restrictions on free black citizens compatible with what they see to be the requirements of maintaining their system of slavery.

On citizenship, then, Curtis is firm in rejecting Taney's contention that no person of African descent can be a citizen of the United States, but he makes two important concessions to those Taneyesque worries that had led the Chief Justice to his harsh doctrine of citizenship. Taney was acting to render the total constitutional order more consistent with the premier fact that it allowed slavery. Many aspects of the Constitution were, in practice, incompatible with that opening to slavery. Taney was particularly concerned about Article IV's Privileges and Immunities Clause: if all citizens of all states are due full privileges and immunities in any state, then black citizens of non-slave states are due the full rights of citizenship in slave states. Presumably, these rights include normal rights of liberty, speech, and so on, rights which, when exercised by free blacks in slave states, can pose a definite threat to the stability of the institution of slavery.[87] Taney

84. *Id.* at 586–87.

85. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

86. *Dred Scott*, 60 U.S. (19 How.) at 583 (Curtis, J., dissenting).

87. STREICHLER, *supra* note 58, at 132.

aimed to blunt that danger by denying that any black can be the kind of citizen who can claim rights under the Clause.

Curtis does not go that far, but he moves toward finding constitutional accommodation for Taney's worries. We have seen that he affirms two sorts of limitations on citizenship and citizen rights. Citizenship does not follow automatically from free birth within a state. States thus may recognize free status but need not recognize all freemen as citizens. Curtis is no doubt inviting the states to define citizenship in such a way as to minimize the kinds of incompatibilities Taney worries about. Curtis also grants to the states an unspecified power to regulate privileges and immunities so as to further minimize those incompatibilities.

In fashioning such a doctrine, Curtis is being nearly as creative with the Constitution as Taney had been. He is developing new doctrine, but, like Story in *Prigg*, it is innovation in the service of the broad or overall constitutional situation—the tension between legitimacy and legality.[88] The Constitution embodied that tension, to be sure, but its original authors had not worked out all the implications of that tension for all aspects of the constitutional order. Justices like Story and Curtis attempted to apply the basic elements of the tension to areas either imperfectly or inconsistently treated in the Constitution. They refused to give up on the original principles of political right and legitimacy, but also refused to press these principles in a way that undid the accommodation to a contrary legality in the institution of slavery. What they saw to be the ultimate solution to the tension is hard to say, but they saw it as their duty as Justices not to resolve the tension but to find new ways to sustain it.

C. *Toward the Triumph of Legitimacy over Legality: McLean*

Fehrenbacher considers McLean and Curtis to be so close to each other that he treats them together in a composite statement.[89] Up to a point that is valid, but there is at least one very large difference between them and any number of smaller ones. The large difference justifies separate considerations of the two dissenters, for McLean is much closer to the legitimacy-over-legality position than Curtis is.

But, to begin with the important similarities. McLean too considers slavery to be the result of positive law only. He too cites *Prigg* and behind that *Somerset*[90] for his authority on that point.[91] He too finds the basis for

88. For a good assessment of Curtis's "originalism," see *id.* at 6, 139.
89. *See* FEHRENBACHER, *supra* note 37, at 403–14.
90. Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772).
91. *Dred Scott*, 60 U.S. (19 How.) at 534–35 (McLean, J., dissenting).

Congressional legislation in the territories in the Territories Clause of Article IV, Section 3.[92] He has a similar but less nuanced and worked out analysis of the effect of taking slaves into free territory: the absence of the positive law that constitutes the slave relation in effect dissolves the bondage.[93] Emancipation effected by taking a slave into free territory is no deprivation of property; it is in law the same as a voluntary emancipation by the master, for he has freely taken the slave into a jurisdiction where no law exists to sustain his mastership.[94] Whatever the power of Missouri may be, the Missouri courts have misapprehended the situation here, for the Scotts were free persons, and the Missouri action was not a mere recognition of a previous and continuing status of slavery but in fact is a new enslavement of free persons. This is not what Missouri thought it was doing, or what was authorized by Missouri law.[95] Moreover, there is no evidence the Scotts returned voluntarily to Missouri. If they were forced to return, then they, free persons, were in effect kidnapped. This is not legal under any set of laws.[96] It also seems to distinguish their case from the famous English case of *The Slave, Grace*, which held that a voluntary return of a slave from free England to a slave jurisdiction works a reversion to slavery.[97] Not every element of McLean's analysis is identical to Curtis's but the above features are very similar, and most likely Curtis could have endorsed all of them.

However, McLean insists that Congress, under its power to govern the territories, is limited in a way that Curtis explicitly rejected: "[T]here is no power in the Constitution by which Congress can make either white or black men slaves. . . . [C]olored persons are made property by the law of the State, and no such power has been given to Congress."[98]

In his quiet way, McLean is making a very strong point. In effect, he too is declaring the Missouri Compromise unconstitutional, but in the opposite way from the Court's majority.[99] Congress has no power to establish slave law in the territories and since slavery requires positive law to exist, there can be no slavery at all in the territories. That history of legislation, according to which slavery was forbidden to the North and allowed to the South of the territories, was a history of constitutional usurpation and con-

92. *Id.* at 540.
93. *Id.* at 548.
94. *Id.* at 548, 553–54.
95. *See id.* at 553–54.
96. *Id.* at 559–60.
97. Rex v. Allan (The Slave, Grace), 2 Hagg. 94, 166 Eng. Rep. 179 (Adm. 1827).
98. *Dred Scott*, 60 U.S. (19 How.) at 542–48 (McLean, J., dissenting).
99. *See* STREICHLER, *supra* note 58, at 120. ("McLean advanced some conclusions that were more favorable to the antislavery movement.").

gressional overreaching. That is to say, McLean endorses one of the positions Curtis maintained broke with the mandate to maintain the tension between legitimacy and legality.

Curtis claimed that this McLean position rested merely on general principles—the doctrines of natural right as expressed in the Declaration of Independence. As much as Curtis endorsed those principles he did not believe they could support judicial decision. But is Curtis correct in his analysis of McLean's opinion? In part, he must be judged to be so. It is an inescapable fact that appeals to such principles of natural justice play a larger explicit role in McLean's opinion than in Curtis's. Even though McLean agrees that positive law can (somehow) create slaves, he still insists that "[a]ll slavery has its origin in power, and is against right."[100] The law may try to declare them such, but "[a] slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."[101] Mclean in effect dares to go where Curtis forbears from going; he draws the conclusion that if slavery is the mere product of municipal law it can never be right, can never be anything but an imposition of naked power. Legitimacy is here hacking away at legality in a far more explicit way than Curtis (or Story) has allowed himself to notice.

Moreover, McLean points out, the slaves are never really and thoroughly treated as chattel. They are held responsible to law in a way that furniture or farm animals never are. That is to say, the slaveholders themselves cannot help but notice that their slaves possess the human qualities of rationality and moral responsibility. The Constitution, too, says McLean, recognizes this fact, for it always refers to the individual held as slaves as "persons," that is, legally responsible beings.[102] From their more or less common theoretical starting point McLean draws different and more hostile conclusions regarding the possibility of slavery. In other words, he reaffirms the idea that positive law can establish slavery, but he leaves no doubt that when it does so, it is merely the force of the community acting. Such law loses all claims to respect as law. Curtis never goes there.

McLean does not, however, rely solely on such general principles in order to deny Congress power to establish or countenance slavery in the territories. He also has a specific constitutional basis for his claim. In governing the territories,

100. *Dred Scott*, 60 U.S. (19 How.) at 538 (McLean, J., dissenting).
101. *Id.* at 550.
102. *Id.* at 537.

> Congress is limited to means appropriate to the attainment of the constitutional object [as specified in Article IV, Section 3]. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end.[103]

McLean's point seems to be that all federal powers are enumerated and all have a particular object in view. Unlike the residual and nearly plenary powers of the states, the federal government's powers are limited by the objects for which those powers exist. The objects of the powers to govern the territories—to distribute public lands and prepare the territories for statehood—do not imply any power to make slaves.

Curtis, in effect, replied to this argument by observing that Congress was granted the power to make "all needful rules and regulations" for the territories, and that the judgment of "needfulness" is solely a matter for Congress.[104] So far as he can tell, Congress may well consider it "needful" to establish slavery in some of the territories. McLean pays little attention to the text which Curtis finds dispositive and that is no doubt why Curtis faults him for relying overmuch on general principle and not enough on text. McLean has more text in hand than Curtis credits, but it is surely true that he is reading that text in light of his general principles, which raise more than serious questions about the validity of maintaining the tension to which Curtis is so dedicated.

A similar relation exists between the arguments the two dissenters make on the question of citizenship. On the surface McLean handles this question similarly to the way Curtis did—both appeal against Taney to the fact that there were free black citizens of the states at the time of the making of the Constitution. But Curtis's doctrine of citizenship has a number of elements that try to accommodate the concerns Taney voiced so strenuously. McLean has none of that. His doctrine of citizenship is much simpler. A citizen of a state is a "freeman" who is resident in a state and native born.[105] Such citizens are due all the rights under the Constitution that accrue to citizens of states, including the right to sue in federal courts under the Diversity Clause and, presumably, the rights inhering in the Privileges and Immunities Clause. McLean thus cloaks free blacks with a more assured citizenship, with much greater claim on constitutional rights, than

103. *Id.* at 542.

104. *Id.* at 614 (Curtis, J., dissenting).

105. *Id.* at 531 (McLean, J., dissenting); *cf.* STREICHLER, *supra* note 58, at 128.

Curtis did. The latter Justice cut back on the claims of citizenship as part of his attempt to sustain the tension in the constitutional order. McLean does no such thing, in large part because he is much less committed to sustaining the tension. For him, legitimacy has gone a very long way toward trumping legality. But it has not gone all the way. He still maintains that positive law establishes something to which he and courts are obliged, even if it is contrary to natural right. The Constitution does not cancel the right of the states to have slavery if they so choose, and it forbids the other states from freeing escapees from slavery who come into their territories. McLean has perhaps moved as far toward the legitimacy-over-legality position as is compatible with his being a Justice. The Court majority, however, has moved very far in the other direction.

D. Legality over Legitimacy: Campbell and Daniel

To clarify, legality over legitimacy means, I hope it will be recalled, the redefinition of legitimacy so as to resolve any tension between it and the practice and existence of slavery. Just as in the broader political world several types of new legitimacy were put forward, so in the smaller judicial world. In the broader world, there were two main alternative types: neutralist doctrine and pro-slavery doctrine. Stephen Douglas's theory of "popular sovereignty" may be taken as paradigmatic of the neutralist approach. As he said often, he "didn't care" whether slavery was voted up or down, just that it be voted on by the relevant community. He was as open to slavery being forbidden as to its being allowed. The pro-slavery version of legitimacy was less neutralist and, in the political context, promoted the idea either that slavery was a positive good; that inequality between the races was the truth about human nature and the proper basis for a civilized society; or that whatever the more ultimate truths may be, constitutional legitimacy required that slavery be favored over freedom, or at least never be penalized, in all actions of the government of the Union. There were many hands at work constructing these new notions of pro-slavery legitimacy, but the name that stands out, of course, is John C. Calhoun.

The narrower judicial world had clear parallels to these intellectual movements outside. As we have already seen, Justice Nelson's emphasis on comity issues was a judicial equivalent to the Douglas neutralist doctrine. The Southern Justices, Campbell, Daniel, and Chief Justice Taney all presented variants on the other, pro-slavery doctrines of legitimacy.

In the broader political world there rather early emerged a shorthand way to distinguish where the different speakers stood on legitimacy and legality. Those who favored legitimacy over legality and those who sought

to live the tension (the latter perhaps the most insistently) appealed to the Declaration of Independence as *the* statement of political right and read it in a universalistic way—as literally asserting "all men" to be "created equal," possessed of "unalienable rights." The advocates of legality over legitimacy, however, did one of two things in their reading of the Declaration. Either they reinterpreted it so as to limit its meaning to whites, persons of European descent, or persons of British descent, as Stephen Douglas did. Or, they launched a full-scale attack on the Declaration, calling it a "self-evident lie" or singling out the abstract, universalistic "truths" of the Declaration as error flowing from the hyper-rationalism of the Enlightenment thinking of the Founding generation. Calhoun, Stephens, and others took this latter approach.

On the Court, too, the Declaration made several prominent appearances. We have already cited its role in the opinions by the dissenters. It takes a much smaller part in the opinions penned by the Justices in the majority, but it makes one of its most notorious appearances in American history in Taney's opinion for the Court. After quoting the opening of the Declaration, Taney comments,

> The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.[106]

Taney wrote the longest, the most thorough, the most supple, the most comprehensive, and the most daring of the legality-over-legitimacy opinions for the Court. As in the passage above, he was clearer than the others in the majority in signaling his movement away from the old legitimacy. Despite those facts, and despite the further fact that his opinion is clearer in revealing the subtle grounds for his conviction that legality must now trump legitimacy, the other two main majority opinions, in part because they are so much simpler, so much less subtle, so much less comprehensive, allow us to see how the new legitimacy operates to shape the outcome more readily than Taney's opinion does. I will therefore focus attention on the Daniel and Campbell opinions in order to bring out in starker form the legality-over-legitimacy position. A complete accounting of the case, of

106. *Dred Scott*, 60 U.S. (19 How.) at 410 (opinion of the Court).

course, requires a comprehensive examination of Taney's opinion as well, but that must be a task for another day.

Justices Campbell and Daniel end up in much the same place: they agree that the Scotts are not free, that the Scotts cannot be citizens of the United States and thus cannot bring this suit; they agree that the Missouri Compromise is unconstitutional.[107] They end up in more or less the same place, but they take different routes to get there. Those different routes present two different versions of the legality-over-legitimacy position. Different as their routes may be, they nonetheless agree on the point of departure as well as the destination. They agree in rejecting the premise-in-chief of the two dissenting opinions, namely, that slavery is such a thing that it can exist only by "municipal law," that is, by the positive law of the jurisdiction where slavery is alleged to exist. The absence of such law, say the dissenters, means there is no slavery; the natural equality and freedom of persons prevail instead. This is a premise the dissenters took over most immediately from Story's opinion in *Prigg*, but behind that lies the famous *Somerset* case, and behind that the natural rights philosophy as expressed in the Declaration.

Neither Campbell nor Daniel so much as mentions *Prigg* and both take up *Somerset* only to attempt to limit its application. Daniel, in fact, speaks of *Somerset* with heavy irony meant to undercut the notion that it (and English law in general) is "proud evidence of devotion to freedom." He doubts that, for Britain "has done as much perhaps to extend the reign of slavery as all the world besides . . . ."[108]

The key to Daniel's opinion and to his redefinition of legitimacy is the set of "truths" that he lays down early in his opinion. These truths provide the foundation for all the rest.

> Now, the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other counties anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.[109]

107. *See id.* at 481–83, 489–90 (Daniel, J., concurring); *id.* at 517–18 (Campbell, J., concurring).

108. *Id.* at 485 (Daniel, J., concurring); *see also* FEHRENBACHER, *supra* note 36, at 397–98 (discussing Justice Daniel's and Justice Campbell's uses of English law).

109. *Dred Scott*, 60 U.S. (19 How.) at 475 (Daniel, J., concurring).

The bearing of these "facts" is this: the African peoples are not and never have been part of the system of international law, the principle of which, Daniel will shortly bring out, is the right to equal treatment of all nations, whether large or small, strong or weak.[110] The natives of Africa then are without the protections thrown around legal status by the law of nations. Ordinarily, international law obliges nations to respect and enforce the legal status of individuals as defined by their home state. But Africans, being "nationless," have no defined status that others are obliged to respect. Moreover, all the nations of Europe have considered the Africans "subjects of capture or purchase." That is, the practice of the European nations towards the Africans does not conform to the principle announced by Mansfield, Story, Curtis, and McLean, that slavery can be legitimated only by positive law. The Africans, without protection of international law or, it appears, natural law or natural right, can be and have been enslaved at will. Daniel treats the Africans, in more or less the way Locke treats unowned goods in the state of nature: there is a natural right to take what one needs or wants, and a natural right to property in what one has taken ensues. Positive law may be needed to secure and regulate property, says Locke, but positive law is not needed to ground it, or to originate it. Daniel did not go so far as to say that the Africans are natural slaves, but that they are naturally subject to being made slaves.

This is a "fact" within the universal knowledge of mankind (or at least of Europeans), and it is a "fact" that the American constitutional order recognized and embodied. For one, there existed African slavery in every state of the Union at the time of the Founding. For another, and apparently more significantly, the Constitution recognized property in slaves, as in the Fugitive Slave Clause:

> [T]he same instrument, which imparts to Congress its very existence and its very function, guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation; and, farther, that the only private property which the Constitution has *specifically recognised*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.[111]

Daniel, in other words, reads the Fugitive Slave Clause in such a way as to reverse almost entirely the meaning Story and the *Dred Scott* dissenters had found in it. Not a recognition that slavery depends on positive law,

110. *See id.* at 483–84. Justice Daniel puts much might here on the authority of Vattel.

111. *Id.* at 490.

but a recognition that it does not, that it is a special and specially recognized kind of property, which the Constitution then casts its own protective positive law shield around. As Fehrenbacher puts it, Daniel makes slaves into "super-property."[112] It is an extraordinary argument Daniel is making, the radicality of which is to some degree concealed by the fact that he embeds it in the more familiar Calhounian argument that the federal government is a trustee or agent for the equal and otherwise sovereign states; that the territories belong to the nation so conceived; and so, as the common property of the states, are to be made available, equally and without discrimination, to citizens of all the states with their preferred modes of property.[113]

The common property argument was widely used by partisans of the South to decree the prohibitions of slavery in the territories to be unconstitutional, because Congress had to legislate in a way that honored its obligation to all the states, to their varying systems of municipal law, and to all the citizens of the states. But the implication of Daniel's position goes much further. Racially based slavery is a natural, or near natural, condition, which does not depend on positive law for its existence. Therefore, the absence of positive law does not dissolve the master-slave bond. Daniel seems to recognize the power of actual positive law prohibitions to have the effect of dissolving the master-slave bond within the territorial confines of the jurisdiction, but to have no further effects, certainly none in other jurisdictions. It would seem to follow from Daniel's analysis that the power of England to prohibit slavery, or of a state of the Union to do so, is an appurtenance of the power of a sovereign to define and control legal relations within its confines, but he certainly implies that he has doubts of the justice of their doing so.

The states within the United States would seem to have the same power—whatever its moral status—to prohibit slavery that a fully sovereign nation like France has, but there are reasons to doubt that that is Daniel's real view or that it is the proper implication of his opinion. The positive law of the Constitution recognizes the natural and international law that members of the "African race" may be enslaved at will, that the relation between master and slave does not depend on, but is only aided by, positive law. The Constitution thus prevents Congress from attempting to dissolve that bond by prohibiting slavery in the territories, but it seems also to follow that the states are also constitutionally forbidden to dissolve that naturally and positively affirmed bond. That is to say, Daniel's opinion

112. FEHRENBACHER, *supra* note 37, at 403.
113. *Id.* at 399–400.

does indeed point in the direction Lincoln feared the *Dred Scott* decision as a whole did—toward the nationwide legalization of slavery.

Campbell's opinion is both more moderate and more subtle than Daniel's. It does not imply that the states may not prohibit slavery as Daniel's does, because it depends more essentially on drawing a very firm distinction between the powers of a state and those of the Federal Government. Campbell traces the legislative power of states to their possession of sovereign power, which gives them the right to define the status of person and property within their borders.[114]

The powers of Congress, however, are different. In the first instance, they are enumerated and therefore limited powers. Campbell takes more seriously and gives a more serious analysis to the power of Congress alleged to ground the attempt to prohibit slavery in the territories: Article IV, Section 3's affirmation of a power to make "rules and regulations respecting the territory or other property belonging to the United States."[115] He makes the best argument of any in the majority for why this clause cannot be held to grant a general legislative power, equivalent to the sovereign power of the states, for Congress to exercise in the territories. The power to make "rules and regulations" granted by this clause is a power to act both within existing states and outside them, for the United States possesses property within states. One might, moreover, consider all the United States to be its "territory." But it is clear—and here he is certainly correct—that Congress does not possess sovereign or unlimited power to legislate for and within the states. Therefore, Campbell concludes, Congress cannot be granted, in this very same clause, general legislative or sovereign powers for the territories.[116]

But, of course, this clause does grant Congress some power in the territories. In order to ascertain just what powers, Campbell falls back on the Calhounian common-property argument. The Union is a federal union of equal states, which have different systems of laws and which define differently the status of some portion of their populations. Congress, acting as trustee and agent for the states, must act evenhandedly and, among other things, must take the states' definition of what constitutes property and honor these definitions.[117] Thus, Campbell too breaks with the *Somerset–Prigg* view that slavery only exists where there is positive law. The nature

114. *See Dred Scott*, 60 U.S. (19 How.) at 515 (Campbell, J., concurring).
115. *Id.* at 509.
116. *See id.* at 509–12.
117. *See id.* at 515–16.

of the Union is such that the slave law of the slave states does indeed have extraterritorial force, and Congress has no power to negate that force.

Campbell's position is thus more moderate than Daniel's and also more grounded in a theory of the Constitution, even if a novel and defective theory. The new legitimacy he propounds (actually a version of Calhounianism) breaks with the old legitimacy in two places: First, there is no presumption of freedom, at least within the United States. Like Nelson, he looks to the powers of sovereignty and positive law to define and control the status of all. Second, he propounds the Calhounian theory of the nature of the Union and uses that to read the enumerated powers narrowly and to add special limitations to federal power based on the new theory of union. Although I believe it can be demonstrated that the Calhounian theory of the Union is mistaken, both as to the historical meaning of the Founding act and as an explication of the constitutional legal structure enacted, that too is not a task for this essay.

CONCLUSION

"A house divided against itself cannot stand." That biblical-Lincolnian sentiment seems to capture the dynamic that was at work in American political culture during the antebellum era and which then conquered the Supreme Court in *Dred Scott*. All the Justices, we might say, were acting in a Dworkinian manner, attempting to find the position most consistent with all the elements of law, history, and moral principle. All nine Justices, in one way or another, engaged in creative interpretation, one to reaffirm the original constitutional arrangement (in the broad sense), and the others to resolve the constitutional incompleteness contained in the disparity between legality and legitimacy. They cannot be blamed for being creative with the Constitution—resolving this case would require some sort of creative work, which perforce was also destined to be distorting of something in the Constitution as well. It is, of course, perfectly appropriate to judge the Justices, as most contemporary readers wish to do, especially because we now find the doctrines and views announced by the majority to be morally and politically repellant. It is no accident that *Dred Scott* is pretty uniformly held to be the worst performance in the history of the Court. Even *Lochner* has its defenders, but if *Dred Scott* does, they are keeping a very low profile. Nonetheless, once we see the case in the context of the legality-legitimacy conundrum, once we appreciate the intense pressures that exist in any political community when facing a situation of that sort, once we appreciate how difficult any of the three alternatives was to effectuate, judging the

Justices may seem less suitable than commiserating with them for being caught in this difficult bind.

But at the end of the day, however much understanding the dynamic of legitimacy and legality may quiet one's temptation to judge, we must judge, for much of the country and an overwhelming majority of the Court reacted in the least defensible of the various ways forced upon them. They chose the lesser good—the opening toward slavery in the constitutional order—over the greater good—the "self-evident truths" imperfectly and incompletely contained in the constitutional order. I believe we can say that *Dred Scott* signaled the beginning of the end for the original constitutional order, that it constituted a true crisis of the incomplete Constitution, because it registered the fact, and then attempted to impose that fact on the rest of the country, that the tension between legality and legitimacy could no longer be sustained. Eight of the nine Justices gave up on the tension. They gave up on it in at least three different ways, however, with the result that the divided house, in its effort to overcome the division, only became more thoroughly and comprehensively divided. "And the war came."