Dred Scott as a Centrist Decision

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Common claims that Dred Scott demonstrates how the judicial tendency to follow principles to extreme conclusions inhibits legislative bargaining are perverse. Close examination of American constitutional politics during the 1850s reveals that the Taney Court occupied the political center while the elected branches of government were more prone to domination by sectional extremists. The only sectional compromises moderates in the elected branches of government were able to secure were statutory provisions facilitating judicial review of contested slavery issues. Dred Scott was a consequence of these legislative bargains aimed at preserving union. Initial results confirmed the wisdom of a judicial resolution. The Civil War came about largely because extremists in the elected branches of the national government were able to undo the accommodation secured by centrist Justices.

INTRODUCTION

I. DRED SCOTT AS POLITICAL EXTREMISM

II. WHO WON?

III. DRED SCOTT AS COMPROMISE

A. The Decision to Decide as Compromise

B. Dred Scott as a Compromise

IV. THE REASONS WHY

A. Slavery in the Territories

B. Polarized Politics, Centrist Justices

1. Article I and Legislative Extremism

2. Article III and Judicial Moderation

CONCLUSION: TO THE PRESENT
INTRODUCTION

Constitutional commentators believe elected officials are far more likely than Justices to accommodate rival political interests on the most contested issues of the day. The Supreme Court, Earl Warren declared, is not the place where one "take[s] half a loaf where a whole loaf could not be obtained."\(^1\) Armed with life tenure, Justices may do what they believe is constitutionally right in circumstances where elected officials must compromise. Herbert Wechsler articulates this consensus belief when he declared that while "principles are largely instrumental as they are employed in politics . . . the main constituent of the judicial process is precisely that it must be genuinely principled."\(^2\) The Supreme Court, Henry Hart agrees, "is predestined . . . by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative human function of discerning afresh . . . durable principles of constitutional law."\(^3\)

This judicial capacity to take uncompromising stands on principle is both celebrated and criticized. Ronald Dworkin regards the Supreme Court as a "forum of principle,"\(^4\) capable of infusing American politics with an aspiration for justice. "While other political institutions have pandered to the American people's baser selves," Christopher Eisgruber writes, "the Court has frequently had backbone enough to stand up for the people's values."\(^5\) Scholars who call for a reduced judicial role fear that active judicial intervention in the name of constitutional principle inhibits vital political accommodations. Even when courts reach the "just result," Cass Sunstein observes, judicial decisions declaring laws unconstitutional may "hinder social deliberation, learning, compromise and moral evolution over time."\(^6\) Some social science literature suggests adjudication polarizes politics. Charles Franklin and Liane Kosaki provide reasons for thinking legislative bargaining breaks down when adjudication offers groups the possibility of realizing their cherished

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policies in pristine form. Judicial winners are less inclined to yield after Supreme Court decisions declare their constitutional vision the law of the land. Judicial losers suffer the indignity of what they believe is the procedural insult of illegitimate judicial activism added to their substantive policy injury.

_Dred Scott v. Sandford_ is Exhibit A for the view that the judicial tendency to follow principles to extreme conclusions inhibits legislative bargaining. Proponents of judicial restraint consistently invoke that ruling to illustrate the dubious results they believe occur whenever Justices attempt to settle those major policy disputes that in our system should be resolved by the elected branches of government. Justice Robert Jackson proffered the most frequently cited instance of this institutional critique when he claimed that, by declaring the Missouri Compromise unconstitutional, the Supreme Court foreclosed any "hope that American forbearance and statesmanship would prove equal to finding some compromise between the angry forces [ . . . ] being aroused by the slave issue."

Horrific consequences are commonly attributed to that judicial intervention. Lino Graglia maintains, "the _Dred Scott_ decision, . . . by denying national political power to deal with the slavery issue, seemed to make the Civil War inevitable." "_Dred Scott_ helped precipitate secession," Jenna Bednar and William N. Eskridge, Jr., agree, "[b]y discrediting a previous congressional compromise[; . . . ] [by] destabiliz[ing] efforts to mediate the slavery and antislavery states; [and] by forcing the slavery issue back to the top of the national agenda . . . [which] fractured the Democratic Party and contributed to the election of Lincoln as president."

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8. See id. at 767.
9. See id. at 768.
10. 60 U.S. 393 (1857).
These common claims are perverse. Close examination of American constitutional politics during the 1850s, as Part II of this Article suggests, demonstrates that the Taney Court occupied the political center, while the elected branches of government were more prone to domination by sectional extremists. At a time when southern fireeaters and antislavery northerners were overrepresented in the legislative and executive branches of the national government, the federal judiciary was staffed by southern unionists and northern doughfaces. Part III points out that the only sectional compromises that moderate members of the elected branches of government were able to secure were statutory provisions facilitating judicial review of contested slavery issues. Dred Scott was a consequence of these legislative bargains aimed at preserving union. Initial results confirmed the wisdom of a judicial resolution. The Taney Court decision in the spring and summer of 1857 was strengthening those political forces most committed to peaceably preventing secession. The Civil War came about largely because extremists in the elected branches of the national government were able to undo the accommodation secured by centrist Justices.

Part IV explains how legislative extremism and judicial centrist during the 1850s were rooted in the constitutional rules for staffing the federal government. Abraham Lincoln could be elected President in 1860 under the rules laid down in Article II of the Constitution, but he probably could not have been successfully appointed to the Supreme Court at that time had the slave states remained in the Union under the rules laid down in Article III. The electoral college and the constitutional requirement that national legislators be elected locally facilitated sectionalism between southern and northern politicians. Southern politicians running for national office competed over who best protected slavery. Northern politicians after 1850 frequently competed over who could best prevent slavery from decision triggered a political firestorm, hurt the prospects for a compromise solution, and undermined the prestige of the Court.”).

14. See infra notes 158–251 and accompanying text.
The constitutional process for selecting Justices privileged national moderates. Federal Justices were appointed by the president, who faced a more national electorate than national legislators, and were confirmed by a Senate majority. Border states during the 1850s had far more influence over who sat on the federal bench than over who controlled the House of Representatives or White House.

Finally, the Conclusion details how the same factors that fostered judicial centrism and legislative extremism in antebellum America are present in contemporary American politics. American electoral politics is increasingly characterized by polarized parties and a federal judiciary that adopts more moderate constitutional understandings. Political scientists regularly observe that “the parties generally are becoming more cohesive, more partisan, more polarized, and moving toward the ideological extremes.” A central theme of contemporary legal commentary is “The Center Holds.” Nevertheless, constitutional theory continues to assume interest-driven legislators will adopt more centrist positions than Justices who decide cases on the basis of constitutional principle. By highlighting the constitutional centrism of the Taney Court, this Article may better help Americans recognize that contemporary judicial centrism is deeply rooted in the structure of constitutional institutions and is not a generational aberration.

I. DRED SCOTT AS POLITICAL EXTREMISM

Dred Scott is criticized on virtually every ground for which judicial decisions are criticized. The Taney Court’s ruling that freed slaves were not American citizens and that slavery could not be banned in American territories is savaged for deciding issues not necessary to resolve the dispute before the Court, for failing to

19. See infra notes 163–64 and accompanying text.
20. See infra notes 201–17 and accompanying text.
24. See supra notes 4–6 and accompanying text.
consider the original meaning of the Constitution, for remaining too tethered to the original meaning of the Constitution, for failing to adhere to the plain meaning of the Constitution, and for ignoring distinctive legal issues that Mrs. Harriett Scott might have raised. A brief survey of the appropriate journals will no doubt reveal a scholarly consensus that Taney's penmanship in Dred Scott is the worst ever exhibited in a judicial opinion.

The most persistent criticism of Dred Scott is that judicial institutions lack and should lack the power necessary to resolve those controversies that divide the body politic. Don Fehrenbacher's magisterial study of that case concludes, "[T]he Dred Scott decision ... remains the most striking instance of the Supreme Court's attempting to play the role of deus ex machina in a setting of national crisis." Robert McCloskey asserts, the Taney Court erred by

COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO TERRITORIES, CARRYING SLAVERY ALONG WITH IT 10 (1857) (describing the unnecessary dicta used by the Supreme Court in the Dred Scott decision); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 549 (2d ed. 1988) (same); see also HORACE GRAY & JOHN LOWELL, A LEGAL REVIEW OF THE CASE OF DRED SCOTT, AS DECIDED BY THE SUPREME COURT OF THE UNITED STATES 11-12, 26 (1857), reprinted in THE DRED SCOTT CASE: THREE VOLUMES IN ONE (1991) (claiming that the rulings on black citizenship and slavery in the territories were both "obiter").


29. SEIDMAN & TUSHNET, supra note 12, at 180.


31. FEHRENBACHER, supra note 26, at 5.
"imagin[ing] that a flaming political issue could be quenched by calling it a ‘legal’ issue and deciding it judicially." The great fundamental decisions that determine the course of society," his influential The American Supreme Court states, "must ultimately be made by society itself." Contemporary commentators agree. Cass Sunstein declares, "we should understand Dred Scott to suggest that . . . the Supreme Court should avoid political thickets [and] . . . leave Great Questions to politics."34

These critics charge Dred Scott with two related flaws. Instead of seeking a compromise position, the Supreme Court gave total victory to southern extremists. Robert Burt condemns the Dred Scott majority for making no effort to reach a result that might have satisfied all reasonable persons in both the North and South: "[B]y awarding total victory to one side and, concomitantly, by inflicting total defeat on the other," he asserts, "the Northern whites who opposed territorial slavery were effectively enslaved by their defeat at the hands of Southern whites." Mark Brandon claims, "Dred Scott gave proslavers in the South more than they might ever have dared hope for." Other scholars insist that judicial compromise is inevitably obstructed when Justices intervene in hot political struggles. Legal rhetoric, in this view, is a poor means for securing accommodation between rival interests. Alexander Bickel describes Dred Scott as "a futile and misguided effort, by way of a legalism . . . , to resolve the controversy over the spread of slavery." Taney "can be faulted," Keith Whittington agrees, "for attempting to impose a resolution on an issue best decided elsewhere." By resolving a matter on (erroneous) constitutional principle, the Justices prevented more centrist institutions for reaching a politically acceptable

33. MCCLOSKEY, supra note 32, at 60.
36. BRANDON, supra note 11, at 116.
37. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 36–37 (1975); see also ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 193 (1992) (claiming that “inflated expectations . . . led the Court to issue blustering commands that only provoked heightened disobedience and ignited more violence”).
compromise. Eskridge regards the case as a "melodramatic example" of how judicial efforts to resolve national issues "undermine[] the ability of the political system to achieve a compromised equilibrium."\textsuperscript{39} Louis Michael Seidman declares that the "ill-conceived effort to settle the slavery issue in \textit{Dred Scott}" is an "important historical example[] of how the effort to entrench a settlement can itself be destabilizing."\textsuperscript{40}

Remarkably, no critic who condemns \textit{Dred Scott} for inhibiting political compromise provides an alternative policy prescription for preserving the sectional peace. Many commentators insist the Civil War was inevitable.\textsuperscript{41} If so, neither elected officials nor unelected Justices had the capacity to forestall secession. Other commentators emphasize how the Kansas-Nebraska Act and the fight over the Lecompton Constitution\textsuperscript{42} destabilized the antebellum constitutional order.\textsuperscript{43} Such analyses suggest that decisions made by elected officials were at least as responsible for inhibiting compromise as decisions made by Justices. If so, then the Taney Court behaved no worse than any other antebellum governing institution. Much evidence suggests that \textit{Dred Scott} had broader bisectional support and a greater stabilizing impact on American politics than any legislative or executive decision made during the tumultuous 1850s. \textit{Dred Scott} is better criticized, if subject to criticism, for the accommodation antebellum politicians would accept than the alleged judicial failure to accommodate antebellum politicians.

\textsuperscript{39} William N. Eskridge, Jr., \textit{Public Law From the Bottom Up}, 97 W. VA. L. REV. 141, 166 (1994); see also Sunstein, supra note 34, at 76 ("[I]t is ludicrous to suppose that nine lawyers in Washington could lay this issue to rest by appeal to the Constitution. It is hubristic for nine lawyers charged with interpreting the Constitution to think they know the right answer for the nation as a whole.").

\textsuperscript{40} LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 96 (2001).


\textsuperscript{42} For a discussion of the Kansas-Nebraska Act and Lecompton Constitution, see infra notes 107–12.

II. WHO WON?

*Dred Scott* did not “award[] total victory” to the South and “inflict total defeat” on the North. The Taney Court decision was a far greater victory for the centrist Democratic party than for those southern extremists who regarded the reigning Jacksonian majority as insufficiently mindful of slavery interests. The judicial ruling that freed slaves and their descendants could not become American citizens was celebrated by most politicians in the free and slave states. The judicial ruling that slavery could not be banned in American territories enjoyed near unanimous support throughout the South and was endorsed by most prominent northern Democrats. *Dred Scott* was certainly not “more than” southern extremists “might ever have dared hope for.” Many southerners believed slavery would survive only if Congress revived the international slave trade or acquired additional southern territories. The right to bring slaves into northern territories thought inhospitable to slavery was considered more a point of honor than a political necessity.

*Dred Scott* held that the policies favored by the national Jacksonian coalition were constitutionally correct. “[O]ne full year before the *Dred Scott* decision,” Fehrenbacher points out, “its most important conclusion had already been reached by Democratic leaders of both sections.” The slavery and citizenship prongs of the Taney Court’s ruling were anticipated in the middle 1850s by opinions issued by the Attorney General of the United States. The Taney Court’s conclusion that Congress could not ban slavery in the territories mirrored the victorious Democratic Party’s platform of 1856. Both President Buchanan and his Attorney General, Jeremiah Black, vigorously endorsed the most southern understanding of *Dred Scott*, one that required territories to take

45. See infra notes 51–54 and accompanying text.
46. See infra notes 59–67 and accompanying text.
47. See infra notes 53–54 and accompanying text.
48. See BRANDON, supra note 11, at 16.
49. See infra notes 68–70 and accompanying text.
50. See infra notes 71–72 and accompanying text.
51. FEHRENBACHER, supra note 26, at 196.
affirmative steps to protect slave holdings.\textsuperscript{54}

Antislavery advocates ruefully admitted that \textit{Dred Scott} announced principles that had broad national support. “Judge Taney’s decision, infamous as it is,” Susan B. Anthony acknowledged, “is but the reflection of the spirit and practice of the American people, North as well as South.”\textsuperscript{55} Republicans on the campaign trail consistently tied the Taney Court to the reigning Democratic electoral majority.\textsuperscript{56} Lincoln in his debates with Douglas charged that the Supreme Court’s ruling was the product of a conspiracy between Jacksonian presidents, Jacksonians in the elected branch of government, and Jacksonians on the federal bench.\textsuperscript{57} He regarded the Taney Court as merely following the most recent voting returns. “[T]he \textit{Dred Scott} decision,” Lincoln observed, “would never have been made in its present form if that party that made it had not been sustained previously by the elections.”\textsuperscript{58}

The Taney Court ruling on black citizenship captured the dominant “herrenvolk egalitarianism” of the middle nineteenth century.\textsuperscript{59} Slavery was local, but racism in antebellum America was national. “[I]n the United States,” Tocqueville observed, “the prejudice which repels the Negroes seems to increase in proportion as they are emancipated.”\textsuperscript{60} Fehrenbacher declares, “[t]he \textit{Dred Scott} decision, as it applied to free Negroes, had a majoritarian ring that transcended sectional lines.”\textsuperscript{61} Equality, Jacksonians in both the free and slave states agreed, was equality for white males. Persons of color were regarded as biologically inferior, perhaps even a different species.\textsuperscript{62} “[A] national poll,” Rogers Smith concurs, “would have


\textsuperscript{55} \textit{FEHRENBACHER, supra note 26, at 430.}

\textsuperscript{56} \textit{See infra note 57-58 and accompanying text.}


\textsuperscript{59} \textit{See ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY} 551, n.25 (1997); \textit{see also infra notes 60-62 and accompanying text.}

\textsuperscript{60} 1 \textit{ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 360} (Phillips Bradley ed., 1945).

\textsuperscript{61} \textit{FEHRENBACHER, supra note 26, at 430.}

shown that a majority of [white males] approved of the *Dred Scott* decision and its racist vision of American citizenship.\(^{63}\)

Mainstream Republicans, who shared the racial prejudices of the time, were reluctant to criticize Taney's ruling on black citizenship. Abraham Lincoln during his debates with Stephen Douglas made clear that he "never ha[d] complained especially of the *Dred Scott* decision because if held that a negro could not be a citizen."\(^{64}\) Lincoln opposed making free blacks citizens of Illinois.\(^{65}\) He had previously condemned Van Buren Democrats for permitting limited black suffrage in New York.\(^{66}\) William Seward, Lincoln's main party rival for the presidential nomination in 1860, regarded members of "[t]he African race" as "being incapable of . . . assimilation and absorption," to "be regarded as accidental, if not disturbing political forces."\(^{67}\)

Southerners vigorously supported the judicial decision that slavery could not be banned in American territories, but they did not regard *Dred Scott* as a panacea for the major threats to the slave states. During the years before the Civil War, southern expansion was the main goal of those committed to preserving southern political power. "I want Cuba, . . . Tamaulipas, Potosi, and one or two other Mexican States," Senator Albert Brown of Mississippi thundered, "and I want them all for the same reason—for the planting or spreading of slavery."\(^{68}\) Jefferson Davis declared such acquisitions were vital means for "increas[ing] the number of slaveholding constituencies."\(^{69}\) Many southern extremists sought to revive the international slave trade. "It takes people to make States," Alexander Stephens pointed out, "and it requires people of the African race to make slave States."\(^{70}\) Judicial permission to bring

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63. SMITH, supra note 59, at 271; see HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 380 (1959) ("The overwhelming opinion of white Americans before the Civil War was that Negroes were not fit to exercise the privileges of citizenship."); LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 at vii–viii, 30–31 (1961).
64. 3 LINCOLN, supra note 58, at 298–99.
65. Id.
69. FEHRENBACKER, supra note 68, at 131 (quoting Jefferson Davis).
70. HENRY CLEVELAND, ALEXANDER H. STEPHENS IN PUBLIC AND PRIVATE 646 (1866).
slaves into existing American territories was expected to do very little for the expansion of slavery in practice. Many slaveholders thought the remaining Northwest Territories inhospitable to their peculiar institution. 71 "The whole controversy over the Territories," cooler heads began claiming, "related to an imaginary negro in an impossible place." 72

Many conservative northern politicians, perceiving stakes in the debate over slavery in existing territories to be lower than most antislavery advocates contended, regarded Dred Scott as a victory against extremists rather as inflicting total defeat on their section. Free state Jacksonian newspapers endorsed the judicial decision giving slaveholders rights in the territories. The New Hampshire Patriot declared, "resistance to that decision is ... resistance to the constitution—to the government—to the Union itself." 73 Other northern Democrats hailed Dred Scott as a "political boon," that "fully and completely vindicated and sustained the Democratic party." 74 Northern doughfaces were pleased that the Justices had "at a single blow, shiver[ed] the anti-slavery platform of the late great northern Republican party into atoms." The official newspaper of the Buchanan administration celebrated the "salutary influence" of the Taney Court's ruling, predicting that slavery would "cease to be a dangerous element in our political contests." 75

These northern reactions demonstrate that the Dred Scott decision, if not perfectly centrist, was more than satisfactory to political moderates in both the North and South. Overwhelming majorities in both sections believed that former slaves should not be treated as American citizens. 76 The right to bring slavery into the territories was central to the platform of the last remaining national

71. FEHRENBACKHER, supra note 68, at 271.
73. FEHRENBACKHER, supra note 26, at 418 (quoting the N. H. PATRIOT 3, Mar. 18, 1857); see also SMITH, supra note 59, at 199 ("That decision briefly fulfilled the actual dreams of most Democrats, who wanted a nation unequivocally committed to slavery, white supremacy, and states' rights."); CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 311–12 (1926) (quoting Democratic papers in the North that were supportive of the decision).
74. MORRISON, supra note 41, at 193 (quoting NASHVILLE UNION & AM., Mar. 15, 1857).
75. FEHRENBACKHER, supra note 26, at 419–20 (quoting the UNION WASH., Mar. 6, 11, 12, 1857).
76. See supra notes 59–67 and accompanying text.
party competing for political supremacy. The Taney Court ruling was probably not quite consistent with the preferences of the median voter in 1856 (popular sovereignty earns that honor). Nevertheless, \textit{Dred Scott} was certainly acceptable to enough northerners to ensure continued rule by the bisectional majority necessary to preserve union. The judicial decision was both an adequate compromise and a product of the only successful compromises political moderates were able to reach during the 1850s.

III. \textit{DRED SCOTT} AS COMPROMISE

\textit{Dred Scott} was the direct result of “the last great territorial compromises of the antebellum era.”\textsuperscript{77} Elected officials during the 1850s were able to reach political agreements on sectional issues only when legislation included provisions facilitating judicial decisions on the status of slavery in the territories.\textsuperscript{78} The actual decision the Supreme Court reached proved a successful compromise until Buchanan demanded that Kansas be admitted as a slave state.\textsuperscript{79} The decisions most responsible for the Civil War, the passage of the Kansas-Nebraska Act, the submission of the Lecompton Constitution, and the demand that the 1860 Democratic national convention endorse territorial slave codes, were all made without judicial participation.

A. The Decision to Decide as Compromise

\textit{Dred Scott} was “undertaken only upon explicit invitation of Congress” and the President.\textsuperscript{80} Unable to reach agreements in legislative and executive fora, prominent Jacksonians (and moderate Whigs) in all regions of the country during the late 1840s and early 1850s publicly declared that the federal judiciary was the institution responsible for determining the extent to which slavery could be regulated in the territories.\textsuperscript{81} President James K. Polk, Stephen Douglas, Jefferson Davis and Henry Clay were among the numerous antebellum political leaders who urged Congress “to leave the

\textsuperscript{77} Whittington, supra note 38, at 378.
\textsuperscript{78} See infra note 84 and accompanying text.
\textsuperscript{79} See infra notes 101–12 and accompanying text.
\textsuperscript{80} Wallace Mendelson, \textit{Dred Scott's Case—Reconsidered}, 38 MINN. L. REV. 16, 16 (1953). For detailed accounts of legislative efforts to have the judiciary resolve contested issues over slavery, see FERHRENBACKER, supra note 26, at 152–208 and Mark A. Graber, \textit{The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary}, 7 STUD. AM. POL. DEV. 35, 46–50 (1993).
\textsuperscript{81} See infra notes 82–94 and accompanying text.
question of slavery or no slavery to be decided by the only competent authority that can definitely settle it forever, the authority of the Supreme Court." President-elect James Buchanan's inaugural address in 1857 declared that the status of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States." Lest jurisdictional problems bar judicial review, Congress after the Mexican War routinely inserted measures facilitating judicial action on any question concerning the status of slavery in the territories. Dissenting voices were limited to abolitionists and antislavery advocates, who correctly predicted that the southern dominated judiciary would hand down decisions consistent with southern understandings of slavery and race.

Northern Democrats, the alleged "victims" of Dred Scott, applauded the Taney Court's decision to issue a broad ruling. "If the case had been disposed of in that way [on narrow grounds]," Stephen Douglas declared three months after the judicial decision had been handed down, "who can doubt . . . the character of the denunciations which would have been hurled upon the devoted heads of those illustrious judges, with much more plausibility and show of fairness than they are now for having decided the case . . . upon its merits?"

82. CONG. GLOBE, 31st Cong., 1 Sess. 1155 (1850) (speech of Sen. Henry Clay); see James K. Polk, Fourth Annual Message, 4 MESSAGES AND PAPERS, supra note 54, at 642; CONG. GLOBE, 31st Cong., 1 Sess. App. 154 (1850) (speech of Sen. Jefferson Davis); CONG. GLOBE, 34th Cong., 1 Sess. App. 797 (1856) (speech of Sen. Steven Douglas); see also CONG. GLOBE, 33rd Cong., 1 Sess. App. 232 (1854) (speech of Sen. Andrew P. Butler) (asserting that he had originally intended not to take part in this debate); CONG. GLOBE, 31st Cong., 1 Sess. App. 95 (1850) (speech of Sen. Samuel Phelps) (stating that the Supreme Court provides a "peaceful tribunal" to solve these types of controversies). Leading Know-Nothings also insisted that the federal judiciary could best resolve conflicts over slavery. See ANBINDER, supra note 43, at 207. Even Abraham Lincoln may have claimed that the "Supreme Court of the United States is the tribunal to decide such questions." 2 LINCOLN, supra note 57, at 355.

83. James Buchanan, Inaugural Address, in 5 MESSAGES AND PAPERS, supra note 54, at 431.

84. See Act of May 30, 1854, ch. 59, §§ 8, 27, 10 Stat. 277, 280, 287 (repealed in part 1933) (enacting identical provisions for the territories of Nebraska and Kansas once again giving the United States Supreme Court jurisdiction over all cases involving title to slaves); Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 449–50 (repealed in part 1933) (establishing a judiciary for the territory of New Mexico and directing that all cases involving title to slaves be decided by the United States Supreme Court regardless of the amount in controversy); Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 453, 455–56 (repealed in part 1933) (directing that all cases involving title to slaves in the territory of Utah be decided by the United States Supreme Court).


87. Id. (alterations in original) (quoting REMARKS OF THE HON. STEPHEN A.
Douglas and other free state Jacksonians never criticized *Dred Scott* for "aligning the judiciary with the pro-slavery forces." That charge was made by Abraham Lincoln and other Republicans, the national minority in 1857, and was done so to persuade northerners that free state Democrats were in the thralls of the slavepower. Northern Jacksonians wanted the Court to decide *Dred Scott*, endorsed the resulting judicial decision, and continued calling for judicial decisions on the most controversial issues of the day. After Lecompton supposedly made clear that *Dred Scott* undermined popular sovereignty, northern Jacksonians overwhelmingly supported a resolution that the Supreme Court determine whether the federal government was constitutionally obligated to establish slave codes in the territories.

**B. Dred Scott as a Compromise**

The Supreme Court responded to legislative compromises foisting responsibility for sectional issues on that tribunal by reaching a sectionally satisfactory accommodation. Judicial rulings recognizing a constitutional right to bring slaves into the territories enjoyed enough support to maintain the antebellum constitutional order. *Dred Scott* did aggravate some tensions responsible for the Civil War. Antislavery advocates in the North were outraged by what they feared was a conspiracy to make slavery a national institution.

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**NOTES**


89. *See supra* note 58 and accompanying text (explaining *Dred Scott* in terms of electoral politics and observing that Stephen Douglas and the Democrats felt obliged to honor the *Dred Scott* decision while simultaneously adopting policies that flew in the face of other pronouncements by the Court).

90. *See supra* notes 80–83; *infra* note 92 and accompanying text.


93. *See Fehrenbacher, supra* note 26, at 562 (noting that *Dred Scott* "contributed heavily to the general accumulation of sectional animosity that made some kind of national crisis increasingly difficult to avoid."); Potter, *supra* note 32, at 291.

Southerners were offended by northern refusals to accept that judicial ruling.\textsuperscript{95} Still, the historical evidence suggests that \textit{Dred Scott} did not further destabilize, and may have temporarily preserved, the antebellum political regime.\textsuperscript{96} The decisions most responsible for the Civil War were made by those political actors whom institutionalist dogma entrusts with the authority to reach compromises on divisive political issues.

Compromise in 1857 meant an accommodation that enabled the Democratic party to maintain its majority status.\textsuperscript{97} With the national Jacksonian party gaining enough free state votes in 1856 to maintain control over the national government, the Supreme Court in 1857 could forestall secession by decisions that lacked any appeal to existing Republicans as long as those judicial decisions did not create new Republicans. Given the fundamental differences in the constitutional and political goals that divided northern Republicans from Southern disunionists, no institution could have fashioned a slavery compromise that would have satisfied all Americans (even if persons of color are not counted as Americans).\textsuperscript{98} Southern disunionists were actively weaning their electorate from that Jacksonian coalition to pave the way for secession.\textsuperscript{99} Northern Republicans were more interested in putting slavery on the road to


\textsuperscript{95}. \textit{FEHRENBACKER, supra} note 26, at 450, 562.

\textsuperscript{96}. \textit{See infra} notes 97–100 and accompanying text.

\textsuperscript{97}. Disputes over slavery had already finished off the Whigs as a national political party and prevented the Know-Nothings from developing any cross-sectional coalitions. \textit{See ANBINDER, supra} note 43, at 18, 100–01; \textit{POTTER, supra} note 32, at 254.

\textsuperscript{98}. Burt may insist that the Court must accommodate all parties to political controversies, \textit{see supra} notes 35 and 37 and accompanying text, but he does not explain how this could have been done in 1857. Suggestions that the Court should have simply kept the channels of debate over slavery open, \textit{Burt, supra} note 35, at 19, beg the question. One division between North and South was the extent to which antislavery agitation should be suppressed or punished by the states and federal government. \textit{See Michael Kent Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37, 89 NW. U. L. REV. 785, 813–17 (1995); Michael Kent Curtis, The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment, 68 CHI.-KENT L. REV. 1113, 1131–33, 1151–59 (1993).}

extinction than in preserving the union. Whether Dred Scott was a reasonable compromise must be judged in light of that decision's impact on the national party committed to a peaceful Union, and not on reactions from partisans committed to either secession or a set of policies that risked secession.

*Dred Scott* had no immediate baneful influence on the body politic. "Taney's opinion," Kenneth Stampp's meticulous study of American politics in 1857 concludes, "however provocative, produced no concrete results." Dred Scott did not weaken the capacity of the Democratic Party to serve as the vehicle for statesmen interested in compromising the slavery issue. The decision did not sap Democratic strength in any region of the country or immediately increase enmity between northern and southern Jacksonians. Fehrenbacher observes that "reaction to the *Dred Scott* decision does not appear to have produced any significant gains for the free Negro community or any significant number of new adherents for the Republican party."

"The Republican attack on the case," Michael Morrison declares, "had the effect of uniting the Democracy behind the Court." Stephen Douglas made no enemies in the South when, during the spring of 1857, he proclaimed that territories retained the practical power to exclude slavery by not passing pro-slavery legislation. Jefferson Davis endorsed that view of territorial power over slavery during that summer. Speaking in Maine, the future President of the Confederacy declared:

> If the inhabitants of any territory should refuse to enact such laws and police regulations as would give security to their property or to his, it would be rendered more or less valueless, in proportion to the difficulty of holding it without such protection.... [I]t would follow that the owner would be practically debarred by the circumstances of the case, from taking slave property into a territory where the sense of the inhabitants was opposed to its introduction. So much for the oft repeated fallacy of forcing slavery upon any community.

Davis in the first half of 1857 favored new southern territories, not

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102. FEHRENBACKER, *supra* note 26, at 437.
103. MORRISON, *supra* note 41, at 189.
territorial slave codes for territories without slaves.106

Voting returns suggest *Dred Scott* improved Democratic electoral prospects in the North. Jacksonians had suffered massive defections in the 1854 congressional and 1856 presidential elections as a result of the Kansas-Nebraska Act.107 Democrats regained some legislative seats in 1856 that had been lost in 1854. This legislative trend continued in the immediate wake of *Dred Scott*. Northern Democrats in state elections held during the spring and fall of 1857 "polled an increased percentage of the popular vote in every state which held an election."108 Major gains were made in Massachusetts, New York, Pennsylvania, Ohio, and Wisconsin.109 Fehrenbacher finds "no evidence that *Dred Scott* manufactured votes for Republicans anywhere." “[I]t is difficult,” he concludes, “to escape the impression that the decision, if it helped anyone, helped the Democrats.”110

The event that "brought on a genuine uprising of northern rank-and-file Democrats" and ruined the party of accommodation was President Buchanan's decision in the late fall of 1857 to demand that Kansas be admitted as a slave state.111 Led by Stephen Douglas, northern Democrats who accepted the *Dred Scott* decision bitterly attacked the fraudulent proslavery Lecompton Constitution. The resulting struggle between the Buchanan administration and anti-Lecompton Democrats destroyed the fragile union between northern and southern Jacksonians, severely weakened Democratic party strength in the North, and paved the way for Lincoln's victory in 1860.112 *Dred Scott* played a role in the destruction of the Democratic party, but the role seems largely pretextual.

The bitter debates over Kansas inspired the Southern demand

106. See supra note 69 and accompanying text.
107. See FONER, supra note 94, at 155–68 ("Taking the North as a whole, the ex-Democratic portion of the Republican vote in 1856 may have been as much as 25 percent."); id. at 165; POTTER, supra note 32, at 239 (noting that the number of Northern Democrats after 1854 dropped from 91 to 25).
108. FEHRENBACHER, supra note 26, at 565–66 (showing a "consistent pattern of Democratic gains in 1857"); STAMPP, supra note 101, at 238. This rally may have begun during the 1856 election when Northern Democrats regained almost half the congressional seats lost in 1854. See POTTER, supra note 32, at 239.
110. FEHRENBACHER, supra note 26, at 566.
111. STAMPP, supra note 101, at 330; see FEHRENBACHER, supra note 26, at 468, 563; HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT: 1835–1875 at 167–68 (1982); MORRISON, supra note 41, at 189–90; POTTER, supra note 32, at 393.
112. See FEHRENBACHER, supra note 26, at 566 ("[T]he Lecompton struggle was the primary influence in the final triumph of Republicanism."); STAMPP, supra note 101, at 309–16, 322–24; 329–30.
for territorial slave codes that caused the Jacksonian split at their national convention in 1860. 113 Before Douglas broke with the South on Kansas, leading slave state spokespersons publicly agreed that territories had no affirmative obligation to protect slavery. 114 The Buchanan Administration newspaper in the immediate wake of Dred Scott described the Douglas position as "lucid . . . vigorous . . . and powerful." 115 Southerners demanded a territorial slave code only after Douglas refused to support the admission of Kansas as a slave state, not after Douglas first declared that territories could effectively exclude slavery by not passing a slave code. 116 Fehrenbacher correctly notes that while "[h]istorians have often said that the Freeport doctrine made Douglas unacceptable in the South, . . . it would be more accurate to turn the statement around and say that Douglas made the Freeport doctrine unacceptable in the South." 117 Douglas did not improve his standing in the South by promising to support slave codes when judicially obligated to do so. 118 Southern rejection of this proposal to have the judiciary mediate this section dispute, given the likely favorable judicial decision, suggests slave state hostility to Douglas in 1860 stemmed almost entirely from his opposition to Lecompton, not from his interpretation of Dred Scott.

In sharp contrast to contemporary commentators who think Dred Scott made compromise over slavery nearly impossible, many Republicans living at that time thought that had Buchanan compromised and allowed a fair election in Kansas on the Lecompton Constitution, he and the Taney Court would have destroyed the nascent Republican party, ensuring Democratic electoral hegemony for the foreseeable future. 119 Lincoln was quite concerned that Republicans would support Douglas for the Senate in 1858, despite the latter's defense of Dred Scott, as a reward for successfully opposing the Buchanan administration on Lecompton. 120 Prominent eastern Republicans were making significant overtures to Douglas in 1858. Lincoln used Dred Scott in the debates less to convert Democrats into Republicans than to remind Republicans why

113. See infra notes 116–17 and accompanying text.
114. See supra notes 104–05 and accompanying text.
115. MORRISON, supra note 41, at 195.
117. FEHRENBACHER, supra note 26, at 501.
118. See CONG. GLOBE, 35th Cong., 2d Sess. 1257–58 (1859).
Douglas was unacceptable.121

The dramatically different impact Dred Scott and Lecompton had on Democratic party unity confounds institutionalist assertions that judicial review prevents elected officials from reaching socially acceptable compromises on contentious political issues. The decisions that destroyed the Jacksonian coalition and then the nation were made by a Jacksonian president, Jacksonians in the national legislature, and Jacksonian party activists, not by Jacksonian Justices. Elected officials in the years immediately before the Civil War were unable to reach any agreement securing national unity that did not require eventual mediation by the Supreme Court. Left to their devices, nonjudicial actors proved unable to compromise. The destructive debates over Kansas took place entirely within the elected and legislative branches of government. The destructive debates over whether the Constitution obligated the federal government to pass territorial slave codes took place in the Democratic senatorial caucus and during the Democratic National Convention.

Judicial review provided the only possibility of compromise before the Civil War. Elected officials passed the Compromise of 1850 and the Kansas-Nebraska Act after agreeing that the federal judiciary should resolve contested constitutional issues. Eliminate judicial review, and the compromises that maintained union in the immediate wake of the Mexican War could not have been reached. Northern and border state moderates most committed to maintaining union continued to rely on the possibility of judicial review in 1860. Prominent northern Democrats, Stephen Douglas assured the South, would accept territorial slave codes should those measures be explicitly mandated by a Supreme Court decision. Reverdy Johnson, the conservative Maryland Democrat who successfully argued the Dred Scott case, urged all party members "to acquiesce in the judgment of that high tribunal, whatever that shall be."122 The Democratic party was destroyed when southerners demanded that northern elected officials vote for territorial slave codes, and would


122. REVERDY JOHNSON, REMARKS ON POPULAR SOVEREIGNTY, AS MAINTAINED AND DENIED RESPECTIVELY BY JUDGE DOUGLAS AND ATTORNEY-GENERAL BLACK 36-37 (1859); see Democratic Platform of 1860, in NATIONAL PARTY PLATFORMS, 1840-1956, supra note 53, at 30-31.
not allow that dispute to be mediated by the federal judiciary.

IV. THE REASONS WHY

The Taney Court's capacity to help unite and strengthen centrist political forces in the United States was rooted in the changing nature of territorial issues and more permanent features of the federal judiciary. Most members of the Taney Court did not consciously seek the middle ground. Justice Grier and maybe Justice Nelson aside, no Justice seems to have abandoned his notion of constitutional right in order to resolve slavery issues in the way most likely to accommodate those political actors crucial to the continued maintenance of the Union. The compromise lay partly in territorial settlement patterns that made the central holding of *Dred Scott* increasingly irrelevant to crucial free state voters, partly in the belief that a judicial decision might gain more support than an identical legislative decision, but mostly in the centrist character of the Justices making the decision. Taney Court decisions on slavery issues consistently appealed to sectional moderates largely because the Taney Court was dominated by sectional moderates.

A. Slavery in the Territories

Support for judicial decisions protecting slavery in the territories proved a concession free state Democrats could make to the South without losing party strength in vital midwestern states. Jacksonians during the 1850s attempted to preserve union by decoupling the status of slavery in territories from the status of slavery in the states formed out of those territories. Stephen Douglas defended this political strategy by insisting that, contrary to inherited wisdom, midwestern slave territories would not become midwestern slave states. As such, northerners could acquiesce to southern demands

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123. Grier does appear to have joined the *Dred Scott* majority, in part, because he thought having a Northern Justice support the result would make that decision more acceptable to that region. See FEHRENBACHER, supra note 26, at 311–12 (quoting Letter from Grier to Buchanan, February 23, 1857). Nelson refused to discuss the larger issues discussed by the other Justices. *Dred Scott v. Sandford*, 60 U.S. 393, 457–69 (1857) (Nelson, J., concurring) (deciding only that Missouri law determined whether slavery status reattached once Dred Scott voluntarily returned to Missouri).

124. STEPHEN ARNOLD DOUGLAS, LETTERS OF STEVEN A. DOUGLAS 182, 289 (Robert W. Johannsen ed., 1961); see JAFFA, supra note 63, at 64 (“Allowing the people to do as they pleased was not understood by Douglas to be a policy of indifference, of voting slavery up or down; it meant voting slavery down.”); ROBERT W. JOHANNSEN, THE FRONTIER, THE UNION AND STEPHEN A. DOUGLAS 194 (1989). Henry Clay and Daniel Webster similarly maintained that slavery would not thrive in territories west of Texas.
that slavery be allowed in what would eventually become free states. The initial results were politically disastrous. Free state Democrats barely survived the Kansas-Nebraska Act, which opened formerly free regions to slaveholders. Territorial developments during the 1850s, however, explain why a party almost destroyed by the legislative decision in 1854 to repeal a ban on slavery in territories north of the Missouri Compromise line could accept with some grace the judicial decision three years later requiring slavery in all American territories.

The parties to political debates over the status of slavery in the territories were primarily concerned with the eventual status of slavery in the states fashioned from those territories. Northerners of all political persuasions wanted free territories because they wanted free states. Additional free states facilitated northern control of the national government and prevented free white labor from competing against slave black labor. William Freehling notes, "calling slave labor detrimental to increased labor" was "the most lethal argument against slavery in labor-starved, development-crazed America." Governor Alexander Randall of Wisconsin spoke for most northerners when he insisted, "[f]ree labor languishes and becomes degrading when put in competition with slave labor."

Antebellum Americans perceived a close connection between territorial and state policy. "To opponents and defenders of slavery alike," Arthur Bestor points out, "it seemed clear that the first decisions made in the territories would be the determining ones." His seminal study highlights the extent to which citizens from both the free and slave states were convinced that "[l]ong before a state attained full standing, its social system could have been irrevocably


125. See CONG. GLOBE, 35th Cong., 1st Sess. 521 (1858) (speech of William H. Seward) ("We are fighting for a majority of free states"); FONER, supra note 94, at 58, 222, 236; PARKE GODWIN, POLITICAL ESSAYS 286 (1856).

126. FREEHLING, supra note 99, at 203. Id. at 148 ("If black slaves were allowed to spread, areas of white men's egalitarianism would further shrink: that was the political fire ignited in the North"); see also FONER, supra note 94, at 11–72 (examining the Republican view of the importance of free labor in contrast with Southern slavery).

127. FONER, supra note 94, at 57 (quoting Alexander W. Randall). For an antislavery argument that highlighted the baneful influence of slave labor on free white labor, see HENRY RUFFNER, AN ADDRESS TO THE PEOPLE OF WEST VIRGINIA (1847); see also JESSE BURTON HARRISON, REVIEW OF THE SLAVE QUESTION 10 (1833) ("Where slave labour prevails, it is scarcely practicable for free labour to co-exist with it to any great extent.").

fixed by decisions irrevocably made." 129 Lincoln asserted, "[t]he first few may get slavery IN, and the subsequent many cannot easily get it OUT." 130 "[T]he character of the Territories," Preston King agreed, "will certainly determine the character of the State." 131

Antislavery fears about slave territories were warranted during the first half of the nineteenth century. Every territory that allowed slavery became a slave state. 132 Illinois almost became a slave state despite the Northwest Ordinance. 133 Both Illinois senators consistently took southern positions during the Missouri controversy. 134 More than forty percent of state voters in 1824 supported a referendum that would legalize human bondage. 135 "[O]nly law," William Freehling concludes, "stopped slavery from entering midwestern latitudes." 136 These past practices and close calls gave most northerners good reason to believe that, by permitting slavery in Kansas and other territories, the Kansas-Nebraska Act practically guaranteed that those regions would maintain human bondage upon admission to the Union. 137 Lincoln in 1855 thought it an "already settled question" that Kansas would join the Union as a slave state. 138

Developments immediately after the Kansas-Nebraska Act challenged this axiom of American territorial politics, apparently confirming Stephen Douglas's repeated assertions that popular sovereignty was the least controversial means for obtaining free states. 139 By the time Dred Scott was decided, a majority of Kansans were committed to banning slavery upon admission to the Union. 140 Most southerners in the spring of 1857 had conceded that Kansas was

129. Id.
130. 3 LINCOLN, supra note 58, at 268.
131. MORRISON, supra note 41, at 150 (quoting Preston King); see id. at 109–11.
133. See MOORE, supra note 132, at 53.
134. See id.
135. See ONUF, supra note 132, at 130.
136. See FREEHLING, supra note 99, at 139.
137. See BRANDON, supra note 11, at 128; 2 LINCOLN, supra note 57, at 321; see POTTER, supra note 32, at 159–61.
138. Id.
139. See supra note 124 and accompanying text.
140. See POTTER, supra note 32, at 302.
likely to join the Union as a free state.\textsuperscript{141} Slavery was not taking hold in Nebraska or in other territories where that practice was permitted by legislation or judicial decree.\textsuperscript{142} Slavery was legal in the New Mexico and Utah territories, but no more than one hundred slaves were found in both jurisdictions.\textsuperscript{143} Slavery may not have reached its natural limits by the 1850s,\textsuperscript{144} but assertions that slavery necessarily flourished where not forbidden no longer seemed self-evident to all northern voters. Many free state Democrats now insisted, "slavery must certainly give way to the rapidly accumulating population and force of white labor."\textsuperscript{145} Other northerners agreed, claiming "freedom can forever outrun slavery," and "emigration from the free states is an infinitely more easy [sic] and rapid process than emigration from slave states."\textsuperscript{146}

The increased strength of free soil interests in territories where slavery was nominally permitted influenced free state voting decisions during the years between Kansas-Nebraska and Lecompton. Democrats abandoned the party of Douglas in 1854 when they believed making Kansas a slave territory guaranteed that Kansas would be a slave state.\textsuperscript{147} They began returning when many perceived that Kansas would become a free state despite being a slave territory.\textsuperscript{148} Voting returns in 1856 and 1857 suggest crucial swing voters in the free states, when confident that present slave territories would become future free states, tolerated southern demands that slavery be allowed in western possessions.\textsuperscript{149} Even Republicans upon taking power in 1860 expressed little interest in regulating human bondage in territories where that institution was not thriving.\textsuperscript{150} Some even endorsed popular sovereignty where that policy was known to privilege antislavery policies.\textsuperscript{151}

Lecompton was an abomination to Democrats who tolerated \textit{Dred Scott}. Northerners could not accept southern demands that

\begin{flushleft}
\textsuperscript{141} Id. \\
\textsuperscript{142} See FEHRENBACKER, \textit{supra} note 26, at 175–77. \\
\textsuperscript{143} Id. \\
\textsuperscript{144} See JAFFA, \textit{supra} note 63, at 299, 392–93; MORRISON, \textit{supra} note 41, at 112–13. \\
\textsuperscript{145} MORRISON, \textit{supra} note 41, at 123. \\
\textsuperscript{146} Id. at 153. \\
\textsuperscript{147} See \textit{supra} note 107 and accompanying text. \\
\textsuperscript{148} See \textit{supra} notes 108–10 and accompanying text. \\
\textsuperscript{149} See STAMPP, \textit{supra} note 101, at 202–04. \\
\textsuperscript{150} FEHRENBACKER, \textit{supra} note 26, at 245 (noting that the Republican platform in 1860 did not advocate abolition). \\
\textsuperscript{151} FEHRENBACKER, \textit{supra} note 26, at 548; JOHANSEN, \textit{supra} note 124, at 27–28, 32, 123–24; see JAFFA, \textit{supra} note 63, at 401 ("Lincoln always pointed out that there was no need to \textit{abolish} slavery in the territories; his aim was to keep it \textit{out}.").
\end{flushleft}
Kansas become a slave state despite what seemed to be the presence of a clear antislavery majority. Having a slave territory become a slave state undercut Jacksonian justifications for the Kansas-Nebraska Act. Allowing a pro-slavery minority to dictate policy violated even more fundamental Jacksonian commitments to local majoritarianism. Democrats could concede Kansas statehood, Stephen Douglas and his political allies realized, only at the cost of becoming the permanent minority party in the North. Fighting Lecompton, the Little Giant and others knew, was "the only course that could save the Northern Democracy from annihilation at the next election." Southern demands that free state Jacksonians vote to admit Kansas and later support slave codes in the territories would "keep the North everlasting in the chains of Black Republicanism." Whatever one thinks of *Dred Scott* as an example of judicial statesmanship, that alleged political miscalculation was dwarfed by legislative and executive blunders committed during the 1850s. The Kansas-Nebraska Act is regarded as "the most monstrous and fatal of all political errors," rivaled only by President Buchanan's effort to pass the Lecompton Constitution. Both proposals did far more than the entire corpus of judicial decisions to destroy the Democratic party and bring about the Civil War. No contemporary constitutional theorist, however, claims Kansas-Nebraska or Lecompton demonstrates that the elected branches of government are not institutionally capable of resolving hotly disputed issues. Rather, a steady torrent of criticism imagines that the extremists who dominated the electoral branches of government would somehow have forged a better and more durable compromise than the centrists who controlled the Taney Court.

**B. Polarized Politics, Centrist Justices**

The Taney Court's superior capacity to fashion tolerable sectional compromises was rooted in the constitutional rules for staffing national institutions. Article I of the United States Constitution practically guaranteed that Congress during the 1850s...
would be the worst imaginable site for securing a broad-based agreement on slavery policies. When public opinion on any bitterly contested issue is geographically concentrated, an institution whose entire membership is elected by local constituencies is unlikely to easily find a middle ground. The institution most likely to fashion a workable compromise is one whose members are selected by a national political process that favors political moderates. Article III practically guaranteed the Taney Court would be that centrist institution.

1. Article I and Legislative Extremism

Relying entirely on local elections for staffing the national legislature was a recipe for extremism in antebellum America. Localities are inevitably more homogenous than the national community. This was particularly true of the United States before the Civil War. "Colonial America was the scene of the most extraordinary diversity of opinion," Leonard Levy notes, "but every community . . . tended to be a tight little island clutching its own respective orthodoxy." Little changed over the next century. As a result, the combination of "lumpy" public opinion and local elections created a political system in which politicians competed for public office by pledging unswerving allegiance to their community's distinctive values. On such issues as temperance, where candidates seeking national majorities might have temporized, candidates in the United States tended to be militant "wets" or "drys."

Article I similarly privileged politicians who took uncompromising stands on slavery. Candidates for Congress in both the free and slave states appealed to voters by pledging to secure sectional interests. As one commentator observed in 1860, "it is easy in the North to gain power by denouncing slavery's existence in the South, and as easy in the South to win favor by denouncing its

northern opponents.” Taking advantage of the Constitution’s electoral rules, “extremists, North and South, together constituted a majority in Congress.” Individual extremists may have represented the majority in their districts, but single-membered districts inflated their numbers in the House of Representatives with respect to the general population. The approximately forty percent of Americans who voted for Stephen Douglas or John Bell in 1860 could be fairly represented in Congress only if they were majorities in forty percent of all congressional districts. When sixty percent of the voters in most southern congressional districts favored aggressively expanding slavery and sixty percent of the voters in most northern congressional districts favored placing slavery “on the path of ultimate extinction,” the legislative power of the sizeable bloc of centrist voters was substantially diminished.

Constitutional rules frequently facilitated the election of free state congressmen who held more extreme antislavery views than the average voter in their state or district. The constitutional requirement that state legislatures choose senators enabled free soil minorities who held the balance of power in many northern states to trade votes on all local issues with the major party that supported their preferred Senate candidate. This bargain was quite attractive. Most state legislators were more concerned with local matters than national politics. Free state politicians never confronted an equally committed proslavery minority that would withdraw from any coalition that made deals with freesoilers. Salmon Chase, Charles Sumner, and Benjamin Wade were among the antislavery advocates who gained national office through such arrangements. Similar considerations influenced House elections in the North. When single-issue anti-slavery advocates held the balance of power in a congressional district, one or both parties frequently increased their antislavery advocacy in order to gain majorities for their economic programs.

Article I also created pressures for increasing sectionalism in southern elections. Antebellum slave state politicians gained office

163. MORRISON, supra note 41, at 1.
164. Id. at 125; see id. at 271.
165. 3 LINCOLN, supra note 58, at 18.
166. See infra notes 168–70 and accompanying text.
167. Id.
169. Id. at 167–69.
by "identifying their party with the South" and "portray[ing] their political enemy . . . as less than fully alert in protecting the treasure of southern liberty." 170 George Troup observes how slave state parties spent their energies "cutting one another's throats in the controversy as to which of the two belongs the higher degree of abolitionism." 171 When one party introduced a new proslavery demand, all southern politicians were under great pressure to support and extend that demand. "Any suggestion of trimming by a party or of less than all-out effort would cause terrible political damage," William Cooper declares, "because the party would find itself in the dock accused of violating its compact with the South, of failing to protect vigorously and at all costs southern interests." 172 Cooper's study of the constitutional politics of slavery notes how "Calhounite pressures of the Democrats to satisfy their demands on sectional issues inevitably resulted in democratic pressure on Whigs to equal the Democratic performance." 173 Unless they could be tainted with secession, 174 southern politicians almost never lost elections by making too extreme a defense of slavery.

Sectionalism fed on sectionalism. As southern politicians bid to demonstrate they were the best protectors of slavery, the risk always existed that conversation would turn from policies fairly easy for northern majorities to stomach (gag rules) to policies far more controversial in the North (abandonment of the Missouri Compromise). Free state politicians willing to accommodate slave state politicians instantly became electorally vulnerable. "[N]orthern Whigs," Cooper notes, "had constantly denounced northern Democrats for bowing to southern demands." 175 The louder the cry of "Slavepower" from the North, the more southern parties competed over which coalition was most committed to human bondage. 176 The more provocative the demand generated by the politics of slavery in


172. COOPER, LIBERTY AND SLAVERY, supra note 170, at 183; see also id. at 222 ("[T]he politics of slavery guaranteed the political destruction of any violator."); COOPER, THE SOUTH, supra note 170, at 112 (noting that "the politics of slavery destroyed those judged faithless").


175. COOPER, THE SOUTH, supra note 170, at 281.

176. COOPER, LIBERTY AND SLAVERY, supra note 170, at 183.
the South, the more northern politicians competed to prove their independence from the slave power.\textsuperscript{177} Border state representatives aside, the Constitution placed few politicians seeking elective office in positions where they could resist sectional pressures.

Constitutional federalism further exacerbated sectional tensions. Not being responsible to national constituencies, state and local officials frequently adopted policies that strained relationships among national elites interested in compromise.\textsuperscript{178} Representatives in national coalitions passed strict fugitive slave laws and condemned filibustering in central America.\textsuperscript{179} State officials passed personal liberty laws in the North and supported private efforts to secure new slave territories in the South.\textsuperscript{180} Federal Justices confirmed by national majorities were far more accommodating on fugitive slave issues than state justices who owed their positions to local officials or electorates.\textsuperscript{181} Had national majorities the sole power to determine fugitive slave policy, this sectional irritant would have been substantially alleviated.

Article I helped transform the Kansas-Nebraska Act from a debate between Democrats and Whigs to an imbroglio between the North and South.\textsuperscript{182} The crucial turning point in the Congressional debate occurred when Senator Thomas Dixon from Kentucky proposed amending the original bill to make the repeal of the Missouri Compromise Bill explicit.\textsuperscript{183} Dixon did so because he was a politically vulnerable Whig from a state increasingly inclined to support Jacksonians.\textsuperscript{184} Southern Democrats, not wanting to be

\textsuperscript{177} See infra notes 187--91 and accompanying text.
\textsuperscript{178} Id.
\textsuperscript{179} See generally Gavin B. Henderson, Southern Designs on Cuba, 1854--1857 and Some European Opinions, 5 J. S. Hist. 371, 373--74 (1939) (discussing the strong Southern influence in the United States’ efforts to acquire Cuba and resistance to this acquisition by northerners and the British).
\textsuperscript{181} Compare Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 617--22 (1842) (sustaining the Fugitive Slave Act of 1793) and Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229--30 (1847) (same) with Jack v. Martin, 14 Wend. 507, 526 (N.Y. 1835) (declaring unconstitutional the Fugitive Slave Act of 1793) and In re Booth and Rycraft, 3 Wis. 157, 211 (1855) (declaring unconstitutional the Fugitive Slave Act of 1850).
\textsuperscript{183} See COOPER, THE SOUTH, supra note 170, at 349--51.
\textsuperscript{184} See id. at 349--50 (stating that Dixon prepared the amendment due to his concern for the continued existence of slavery in the South).
outbid in the politics of slavery, made that demand their own. Freesoilers, wishing to make inroads into the northern electorate, responded with an "Appeal to Independent Democrats," denouncing the Kansas bill as a sellout to the slavepower. Northern Whigs, in order to prevent defections to freesoil coalitions, began attacking Kansas-Nebraska as a southern rather than a Jacksonian measure. Slave state Whigs initially inclined to oppose Kansas-Nebraska as another ill-fated Democratic effort at expansion could not politically withhold support once opposition was tainted with abolitionism. Increased southern Whig support for Kansas-Nebraska further increased northern perceptions that the bill was motivated by the slavepower. As northern Whigs increased anti-southern rhetoric, southern Whigs became even more vulnerable to charges that they were allied with a party bent on destroying the South. By the final debates, what began as a normal partisan struggle had evolved into a sectional crisis.

Hardly any elected politician in 1854 could resist the electoral incentives to make sectional appeals. Southerners debating Kansas-Nebraska competed to determine who better protected slavery. Northerners debating Kansas-Nebraska competed to determine who was in thrall to the slavepower. Few national legislators worried about the average national citizen. No Congressman had to gain popular national majorities to retain office and few had constituencies whose opinions mirrored national sentiment. Had officials in at least one elected branch of the national government been obliged to appeal to a national constituency for reelection, far more representatives would have had incentives to treat Kansas-Nebraska as a dispute between Whigs and Jacksonians over westward expansion than a dispute between the North and South over slavery.

The constitutional politics of slavery similarly aggravated conflict over Kansas statehood. Slave state Democrats could not risk

185. See id. at 346.
186. HOLT, supra note 182, at 908.
187. Id.
189. Id. at 203–04.
190. See COOPER, LIBERTY AND SLAVERY, supra note 170, at 241–47, 357–63, 373; CRAVEN, supra note 188, at 205; HOLT, supra note 182, at 908–09.
191. See supra notes 184–86 and accompanying text.
192. See supra notes 187–88, 190 and accompanying text.
193. See supra notes 184–91 and accompanying text.
194. See supra notes 184–92 and accompanying text.
bisectionalism after annihilating the Whigs. During the late 1850s, "every political group opposed to the Democrats slashed at the dominant party with the politics of slavery."\(^{195}\) Democrats responded as they always had, by accusing their rivals of "betraying the interests of the South," and "snip[ing] at the Democrats rather than join[ing] forces to present a united front to the new, determined enemy."\(^{196}\) Slaveholders in this electoral environment who thought the Lecompton Constitution fraudulent or the long term prospects for slavery in Kansas dubious could not politically afford to compromise. "[S]hould the southern Democrats allow a new slave state to slip through their grasp," Cooper points out, "they would hand their opponents a golden political issue."\(^{197}\) Charles Conrad, a moderate southern Whig, noted that "the clamor that has been raised" in favor of Kansas prevented "even ... those who were originally opposed to it" from making "any attempt to repeal it."\(^{198}\) Many Democrats from the northwest were as electorally vulnerable. Voting for Kansas statehood conceded the next election to Republicans. "We could never recover from it," the Jacksonian editor of the *Chicago Times* informed Stephen Douglas.\(^{199}\) A constitution that mandated sectional elections, in short, compelled most politicians facing tough choices in 1857 to err on the side of sectionalism.

2. Article III and Judicial Moderation

In sharp contrast to candidates for the national legislature, persons seeking federal judicial office are best off having ambivalent, unknown or centrist views on the hotly contested constitutional issues of the day.\(^{200}\) Supreme Court Justices are nominated by the President, the only elected official in the national government chosen by a national electorate. Judicial nominees must then be confirmed by a Senate composed of two representatives from each state. Successful nominees during times of sectional strife need strong bisectional support, strong bipartisan support, or near unanimous support from politically moderate senators. Persons with known militant views on such issues as abortion or slavery need not apply, unless their faction has supermajoritarian control of the national government or their

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195. Cooper, Liberty and Slavery, *supra* note 170, at 258; see Cooper, The South, *supra* note 170, at 374 (describing the backlash against the Democrats).
197. *Id.* at 260.
200. *See infra* notes 202–18 and accompanying text.
vote is not likely to be decisive on any crucial issue.

This structural bias toward moderation helps explain the remarkable centrism of Taney Court Justices. The tribunal that decided *Dred Scott* was dominated by southern unionists and conservative northerners.\(^201\) Presidents after the Mexican War scrutinized potential nominees to ensure they would enjoy bisectional support.\(^202\) They were largely successful in securing a federal bench relatively immune from sectional allegiances. Only one member of the *Dred Scott* Court, Justice Peter Daniel, is fairly characterized as a southern extremist.\(^203\) Justice John Campbell was a reluctant secessionist.\(^204\) Justices John Catron and James Wayne were the two highest-ranking national officials from seceding states who did not resign their positions after secession.\(^205\) Justices Robert Grier and Samuel Nelson were conservative northern Democrats.\(^206\) Chief Justice Taney was a conservative border-state Democrat.\(^207\) Justice Benjamin Curtis was a Cotton Whig who, after 1857, sided more often with Democrats than Republicans.\(^208\) Justice John McLean was a conservative Republican.\(^209\)

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201. *See infra* notes 204–15 and accompanying text.


207. *See generally* CARL BRENT SWISHER, ROGER B. TANEY (1961) (noting that the Maryland native, while not an advocate of slavery, believed that Southern culture was worth preserving and favored a political compromise that avoided the subjugation or secession of the South).


The Taney Court was a bastion of moderation, particularly when compared to the national legislature. Of the nine Justices on the Supreme Court, only one, Daniel, identified with southern fireeaters and only one, McLean, identified with the antislavery movement. This was a far lower percentage of sectional extremists than found in the antebellum Congress. If all members of the national government in 1857 were divided into quintiles on the basis of opinions about slavery, a five person judicial majority composed of Wayne, Catron, Curtis, Nelson and Grier would belong in the middle quintile. Two Justices, Taney and Campbell, are best placed at the more moderate end of the less extreme pro-slavery quintile. One, McLean, is best placed in the middle of the less extreme antislavery quintile. Daniel aside, the two most extreme quintiles would be populated exclusively by those elected officials whom institutional theory expects could have reached a compromise on slavery had the Supreme Court not interfered.

The national institution staffed by the greatest percentage of political moderates was also the national institution whose decision rules most privilege the center. Judicial rules vest far more power in the median Justice than legislative practices vest in the median representative. The separation of powers requires moderates to gain simple majorities in the House of Representatives, the Senate, and the presidency (or supermajorities in the first two) to pass legislation. Internal legislative rules further hinder majority coalitions. The Supreme Court eschews practices analogous to the committee system, the open debate rule in the Senate, and the presidential veto. Votes are taken one case, often one issue, at a time. Justices do not trade votes, gaining support for some proposals by sacrificing other constitutional values. With rare exception, these decision rules empower median Justices on all issues before the Court. A Justice in that enviable position need not bargain with extremists. Justice Lewis Powell, the median Justice during the 1970s, "rarely negotiated over opinions, in part because his position at the Court's center meant that

210. See 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 318 (1926).
211. Id. at 71.
212. See supra notes 163–65 and accompanying text.
214. See generally MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) (introducing social choice theory to explain how constitutional law is made and detailing how Supreme Court decisions transform judicial preferences into constitutional doctrine).
his colleagues had to move to meet him...."\textsuperscript{215}

The judicial decision rules that vested virtually all judicial power in the median Justices guaranteed that Justices Catron, Grier, Wayne, Curtis and Nelson effectively controlled any decision the Supreme Court made on slavery. Northern Republicans and southern disunionists in the antebellum Congress could wield weapons against border state accommodationists not possessed by their counterparts in the judiciary. Justice Daniel could not filibuster against, and Chief Justice Taney could not veto, anti-slavery rulings. Justice McLean did not chair a subcommittee that might forestall more proslavery decisions. Justices Daniel and McLean could not trade votes so as to forge an alliance of the judicial extremes against the judicial middle. If three or four of the five centrist Justices on the Taney Court reached a common position on any sectional issue, they had the power to ensure that agreement became the constitutional law of the land.

Popular support for the Supreme Court provides a final reason why the federal judiciary in 1857 and at present has unique capacities to promote political compromise. Judicial decisions often provide cover for political actors who cannot advocate certain policies directly.\textsuperscript{216} Just as many politicians who do not vote to repeal bans on abortion nevertheless insist that the Supreme Court's decision in \textit{Roe v. Wade}\textsuperscript{217} be obeyed,\textsuperscript{218} so Northern Democrats who might not have been able to vote for measures repealing the Missouri Compromise or making slavery legal in all territories nevertheless proclaimed \textit{Dred Scott} to be good law.\textsuperscript{219} Northern Democrats could accept southern pretensions in the territories as long as they could do so indirectly by pointing to a judicial decision rather than by expressing personal support for slavery. Legislative deference to the judiciary was a compromise that enabled slave states to gain desired policies without requiring their free state allies to vote for those measures.

Structured by staffing and decision rules that favor political moderates, the Taney Court was a forum of compromise. The Justices from 1837 until 1857 consistently found the political center on issues of national importance. Judicial rulings on the commerce

\textsuperscript{217} 410 U.S. 113, 153 (1973).
\textsuperscript{218} Graber, supra note 80, at 56-59.
\textsuperscript{219} See supra notes 54, 73-74 and accompanying text.
clause and the contracts clause regularly took "a middle—and generally popular—ground." When faced with competing constitutional claims that, in the absence of federal regulation, states either had no power or absolute freedom to regulate interstate commerce, the judicial majority in 1851 creatively concluded that states could regulate interstate commerce in the absence of federal legislation on matters of more local concern, but not on matters of more national concern. The Taney Court refused to use the contracts clause to police state regulation as aggressively as most Whigs wished, and refused to abandon contract clause scrutiny as more radical Jacksonians desired.

On the issues that most clearly divided the radicals from centrists within each section of the United States, Taney Court Justices aggressively championed accommodation. Northern moderates tolerated judicial decisions protecting southern rights in the territories and they insisted that the Fugitive Slave Acts of 1793 and 1850 be strictly enforced. The Supreme Court during the 1840s and 1850s declared unconstitutional bans on slavery in the territories and sustained federal power to pass fugitive slave laws. Justices Grier, Curtis, and Nelson on circuit distinguished themselves defending national power to recapture fugitive slaves. Southern moderates opposed secession and they insisted that federal laws banning the international slave trade be strictly enforced. Although these issues did not come before the Supreme Court during the 1840s and 1850s, the Justices from the slave states on that tribunal consistently sided

220. McCloskey, supra note 32, at 58. McCloskey discussed the non-sectional rulings of the Taney Court under the sub-heading "The Court's Policy of Moderation," and the first sentence in that section declared, "[t]he theme of the adjustment process . . . was compromise." Id. at 56.


225. See infra notes 227–28 and accompanying text.
with southern unionists against more extreme factions. Justices Campbell, Wayne and Catron opposed secession. Justices Campbell and Wayne on circuit defended national power to ban the importation of slaves. Their opinions in these cases mirrored those issued by northern Justices in fugitive slave cases. The same principles northern judicial moderates invoked when justifying broad federal power to return fugitive slaves, southern judicial moderates invoked when justifying broad federal power to prevent the importation of foreign slaves.

Justice Joseph Story's infamous opinion in *Prigg v. Pennsylvania* stressed the importance of sectional accommodation to the persons responsible for the constitution. The fugitive slave clause, he wrote, was a "compromise of opposing interests and opinions" that was "so vital to the preservation of [slave state] domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed." Vital constitutional interests called forth broad federal powers. Rejecting claims that Article IV merely imposed obligations on state governments, Story insisted, "[i]f... the Constitution guarantees the right,... the [national] government is clothed with the appropriate authority and functions to enforce it." This enforcement power was substantial. The national legislature could employ "all the modes of attaining" an efficient rendition process "which Congress, in their discretion,... [claims is] expedient or proper." In language that recalls John Marshall's opinion in *McCulloch v. Maryland*, Story declared, "[Congress] may prescribe the mode and extent in which [federal power] shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guarantee to the right" to recapture fugitive slaves.

This broad federal power trumped any claim of state prerogative or sovereignty. Story ruled that no local rule could "in any way

226. *See supra* notes 204–05 and accompanying text.
227. *See United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J.); Charge to Grand Jury, 30 F. Cas. 1026 (C.C.D. Ga. 1859) (No. 18,269a) (Wayne, J.). Taney, Catron, and Daniel, when riding circuit, did not confront constitutional questions about the federal power to ban the international slave trade.
228. 41 U.S. (16 Pet.) 539 (1842).
229. *Id. at* 610–11.
230. *Id. at* 615.
231. *Id. at* 617.
qualify, regulate, control, or restrain” a slaveholder seeking to recapture a runaway.\textsuperscript{234} All northern personal liberty laws were unconstitutional, no matter how minor the interference with the rendition process or how necessary to prevent the enslavement of free persons of color. Story put antislavery advocates on notice that federal courts would void “any state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of his slave.”\textsuperscript{235}

Justices Campbell and Wayne made nearly identical arguments when sustaining federal laws criminalizing the international slave trade. Campbell in \textit{United States v. Haun}\textsuperscript{236} began as Story did in \textit{Prigg}, by emphasizing sectional accommodations reached in 1787. “The power of congress to pass laws to prohibit the importation of Africans,” he wrote, “forms one of the compromises on which the constitution rests.”\textsuperscript{237} Both southern Justices insisted on the need for broad federal power to secure that constitutional concession. Wayne’s opinion defended legislation imposing the death penalty for any person serving on a ship engaged in the slave trade.\textsuperscript{238} “The power of congress to suppress the slave trade, by passing all laws necessary and proper for that purpose,” he insisted, “is not questioned by any one at all conversant with the constitution and constitutional history of the United States.”\textsuperscript{239} Campbell championed an even broader construction of the federal power when sustaining Congressional power to punish those who knowing purchased illegally imported slaves.\textsuperscript{240} He firmly rejected claims that “the power of congress is limited to a cognizance of the acts of the importer.”\textsuperscript{241} Such a view was inconsistent with the “power of congress to provide for the seizure and removal of persons coming to the country illegally and without their consent.”\textsuperscript{242} The “necessary and proper” clause, Campbell stated, demonstrated that “[t]he constitution has not left the power of the federal government to employ the means requisite to fulfill its obligations, and to execute its authority to cavil or question.”\textsuperscript{243} Campbell further maintained that the power to ban the
international slave trade could be derived from both the commerce clause and "the power to define and punish offences against the law of nations." As such, he concluded, "the suppression of the slave trade... belongs to the jurisdiction of congress as a part of that foreign intercourse of the Union which is submitted to its exclusive control."

State rights had to give way whenever Congress acted under its power to regulate foreign commerce or prevent violations of the laws of nations. Justice Campbell maintained that national laws "are not dependent upon the state governments for ancillary legislation, nor can they be obstructed by their inaction or opposition." He concluded with a Marshallean flourish. "No more striking illustration of the force and accuracy of this opinion of the supreme court [in *McCulloch v. Maryland*] can be adduced," he declared:

[T]han might be afforded by the concession that the power of congress over the slave trade terminates after the introduction and sale of the Africans in the states. The slave trade might be as a matter of fact reopened, by the neglect or refusal of a state to enact or enforce prohibitory laws for it can hardly be supposed that every port and inlet of the United States will always be properly guarded, so as to prevent their introduction and sale.

These opinions by the southern members of the Taney Court defending broad federal power to prohibit the international slave trade place in a different light analogous opinions by the northern members of the Taney Court defending broad federal power over the rendition of fugitive slaves. *Prigg* and related decisions are constantly reviled for protecting human bondage far more than was constitutionally necessary. The same constitutional logics that justified upholding federal fugitive slave laws, however, were also used to sustain federal efforts to eradicate the importation of foreign slaves. No evidence exists of an explicit understanding between federal Justices. Nevertheless, had *Prigg* been decided differently, southern Justices on the Taney Court might have had stronger

244. *Id.* at 231.
245. *Id.*
246. *Id.*
248. *Haun*, 26 F. Cas. at 232.
precedential or political reasons for deciding such cases as *Haun* differently. Given the relative number of slaves involved, a good case can be made that the judicial commitment to broad federal power over both fugitive and imported slaves alleviated far more human suffering than would have been the case had the Justices adopted a more narrow interpretation of congressional authority.

*Prigg* and *Haun* read in conjunction suggest that the political center during the 1850s was occupied by Americans who supported broad federal power to return fugitive slaves and suppress the international slave trade. These political moderates were willing to support a judicial ban on legislation prohibiting slavery in any American territory, but they opposed secession. Electoral institutions had difficulty reaching and sustaining these compromises. National legislators were depended upon local constituencies, who frequently favored more sectional positions. State legislators had no need to bargain with legislators who hailed from other sections. The federal judiciary, the only national institution whose staffing and decisions rules empowered political moderates, was the only national institution whose members consistently championed every policy favored by antebellum political moderates.

That *Dred Scott* and *Prigg* championed centrist policies hardly justifies those judicial rulings. The difference between laws requiring the rendition of fugitive slaves and laws prohibiting the international slave trade is that the former violate and the latter protect basic human rights. What is wrong with *Dred Scott* is what is wrong with slavery and racism. Antebellum Americans may be justly condemned for being willing to accept a political compromise based on gross racial discrimination and even grosser violations of fundamental human liberties.

Contemporary commitments to human freedom and racial liberalism better explain attacks on *Dred Scott* than institutionalist concerns with national unity. One suspects when contemporary commentators condemn Taney Court rulings for inhibiting some other legislative accommodation, what they really mean is that *Dred Scott* is wrong for forestalling the possibility of a more antislavery

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legislative compromise. The problem with this analysis is that no judicial decision or legislative decree that struck a serious blow at slavery was likely to preserve union in the late 1850s. Not by writ, but by power would the slaves be freed. The practical choice when Lincoln was elected president was between a permanent union with slaveholders or civil war. *Dred Scott* is wrong only if slavery were sufficiently evil to warrant political actions that would “purge this land in blood.”

**CONCLUSION: TO THE PRESENT**

Neither *Dred Scott* nor the Taney Court were aberrations. The Supreme Court has frequently exhibited tendencies to take centrist positions during times of political polarization. The Justices on the Fuller, White, and Taft Courts refused to police state laws as aggressively as most conservatives desired, while also refusing to take the “hands off” position favored by most progressives. While “the judges” sometimes “talked . . . as if they were determined to halt the regulatory movement in its tracks,” Robert McCloskey observes, “they ratified many inroads on the free enterprise ideal and sought only to moderate . . . the growth of government.”

Maximum hour laws were constitutional in the mines and factories, but not in bakeries. The federal government was deemed to have power to prevent the interstate shipment of lottery tickets, adulterated eggs, and loose women, but not products of child labor.

The contemporary United States provides a clearer instance of polarized politics and centrist Justices. “Over the past two generations,” Professors H.W. Perry and L.A. Powe observe, “the Democratic Party and Republican Party have come to conceptions of the United States Constitution that are fundamentally different. These “visions,” in turn, “differ from the Constitution as interpreted by the U.S. Supreme Court.” As was the case during the 1850s, the Supreme Court at the beginning of the second Bush administration

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251. These issues are discussed at length in the last section of GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (forthcoming).
260. Perry & Powe, *supra* note 21 (manuscript at 1).
occupies the center of American politics. At a time when the two major parties frequently stake out policy positions on the relative extremes of American politics, the Supreme Court has consistently taken a middle position, more consistent with public opinion. "[I]n a political world where the parties have become more polarized," Perry and Powe point out, "the Court in forging a majority opinion is offering the bipartisanship that the public purports to want but is otherwise so lacking in Washington."  

This combination of electoral extremism and legal centrism is manifested across numerous policy dimensions. Republicans emphasize crime control when discussing the rights of criminal suspects. Democrats focus on due process concerns. While not overruling the landmark decisions of the Warren Court on criminal procedure, the Supreme Court has cut back on those rights in many areas. Judicial majorities demand that petitioners demonstrate a clear error when making Fourth Amendment violations in habeas corpus appeals, but not when making petitioners claim Fifth Amendment violations. Republicans oppose affirmative action. Democrats favor race-conscious measures. The Supreme Court insists that all race-conscious measures meet a strict scrutiny standard, but has watered down that standard so that "strict in theory" no longer means "fatal in fact." Republicans believe that abortion should be banned. Democrats believe that abortion

261. Id. (manuscript at 3).
262. Id. (manuscript at 21–25).
263. Id. (manuscript at 25–29).
265. See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (the exclusion rule laid out in Mapp does not apply to evidence obtained in violation of the Fourth Amendment when used at a parole revocation hearing); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that only persons accused of a crime punishable by a jail sentence have a right to counsel under Gideon); Harris v. New York, 401 U.S. 222, 226 (1971) (evidence obtained in violation of Miranda may be used to impeach a criminal defendant).
268. See Perry & Powe, supra note 21 (manuscript at 39–45).
271. See Perry & Powe, supra 21 (manuscript at 45–52).
should be legal and federally funded.\textsuperscript{272} The Supreme Court has ruled that abortion should be legal,\textsuperscript{273} but that states have no obligation to fund abortions.\textsuperscript{274} The Justices have sustained most regulations on abortion,\textsuperscript{275} short of those that ban abortion or particular abortion techniques.\textsuperscript{276} Republicans support prayer in school and state aid to parochial schools.\textsuperscript{277} Democrats support a high wall between church and state.\textsuperscript{278} The Supreme Court continues to strike down prayer in school,\textsuperscript{279} but has supported vouchers and other laws that permit federal funds to help parochial schools.\textsuperscript{280}

Several political science studies confirm that the contemporary Supreme Court has no tendency to take positions more extreme than the elected branches of the national government. Thomas Marshall finds that "nearly half the modern Court's judicial decisions [are] majoritarian."\textsuperscript{281} In many cases, his research demonstrates, the Justices are far more attuned than legislators to popular sentiment. Burger and early Rehnquist Court Justices consistently "supported nationwide polls rather than a law (or policy) that was inconsistent with public opinion."\textsuperscript{282} William Mishler and Reginald Sheehan agree. Their time series analysis finds that judicial decisions from 1956 to 1989 "were highly responsive to majoritarian opinion."\textsuperscript{283} The judicial tendency to be somewhat more conservative than the general public during the 1980s, they maintain, was a consequence of the even greater countermajoritarian conservative tendencies of the Reagan and first Bush administrations.\textsuperscript{284}

Polarized electoral politics during the mid-nineteenth and late-twentieth century help explain these centrist judicial proclivities. Just as the constitutional politics of the 1850s yielded a federal bench controlled by southern unionists and northern conservatives, so

\begin{thebibliography}{99}
\bibitem{272} Id. (manuscript at 45–52).
\bibitem{275} Casey, 505 U.S. at 879–87, 899–910.
\bibitem{277} See Perry & Powe, supra note 21 (manuscript at 57–65).
\bibitem{278} Id. (manuscript at 65–72).
\bibitem{281} THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 97 (1989).
\bibitem{282} Id.
\bibitem{283} William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 AM. POLI. SCI. REV. 87, 97 (1993).
\bibitem{284} Id. at 97–98.
\end{thebibliography}
constitutional politics for the past generation has generated a court dominated by “country-club Republicans” who wish only to trim the excesses of the Great Society and have little affinity with more religious conservatives.\textsuperscript{285} [A]s the politics of Congress bec[a]me more extreme,” Perry and Powe point out, “ideological non-centrist justices [were] less likely to survive a Congressional vetting.”\textsuperscript{286} Mark Silverstein’s study of the contemporary judicial selection process similarly concludes that “[e]xperienced, competent, noncontroversial jurists . . . may be the best the modern system can offer.”\textsuperscript{287} Extremists need not apply, unless they are replacing a member of the more extreme wing of the Court. Antonin Scalia could replace Warren Burger, largely because Burger’s vote was not critical on any crucial issue that divided Democrats from Republicans.\textsuperscript{288} When President Reagan attempted to replace the moderate conservative Lewis Powell with the more extreme Robert Bork, a political imbroglio broke out. The end result was Bork’s defeat and the successful nomination of the more centrist Anthony Kennedy.\textsuperscript{289}

Whether the federal judiciary will continue playing a moderating role in American politics is an open question. Courts tend to be centrist in times of polarized politics only when neither competing partisan faction is able to establish complete control over all elected branches of the national government. The Supreme Court after 1936 was not a centrist institution partly because Democrats had established sufficient control over the presidency and Senate to ensure a Court committed to working out, rather than trimming, New Deal and Great Society principles.\textsuperscript{290} Whether the 2002 and 2004

\textsuperscript{285} See Mark Tushnet, Taking the Constitution Away from the Courts 148 (1999). See generally Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law (2005) [hereinafter Tushnet, Court Divided] (noting that while a majority of the Court is compromised of Justices holding generally conservative views, only those cases involving economics and fiscal policy have resulted in rulings favorable to the Republican right, while the conservative Justices have splintered in rendering opinions on social issues, leading to an affirmation of abortion rights and a nullification of laws criminalizing homosexual sodomy).

\textsuperscript{286} Perry & Powe, supra note 21 (manuscript at 81).

\textsuperscript{287} Mark Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations 171 (1994).


\textsuperscript{290} For studies documenting the Court’s commitment to New Deal and Great Society principles, see generally Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown (2004) (arguing that President
national elections will give the Republican Party similar control over the national government is unclear. President Bush’s decision to renominate for positions on the federal bench those conservative activists who were successively filibustered during his first term, combined with Republican threats to eliminate filibusters in the judicial confirmation process, indicate that a serious attempt is being made to remake the judiciary in the image of the most conservative wing of the Republican party. The extent to which such efforts can be resisted or are largely political posturing is for the future to determine.

Whether the federal judiciary should play a moderating role during times of political polarization is also an open question. Compromises are not necessarily desirable. Abraham Lincoln thought Dred Scott too high a price for preserving the peace. “I am for no compromise,” he informed William Seward, “which assists or permits the extension of [slavery] on soil owned by the nation.” Pro-life advocates who equate slavery and abortion disdain compromises that sanctity the slaughter of countless unborn lives. Pro-choice advocates have been similarly reluctant to make concessions on abortion. To abandon strict scrutiny for a less protective standard, Kathryn Kolbert informed the Supreme Court during oral argument in Planned Parenthood v. Casey, would be the same as overruling Roe v. Wade.

Nevertheless, constitutions require some compromise both when being created and when being maintained. James Madison observed that “a faultless plan was not to be expected,” given the “variety of interests” represented at the framing convention in Philadelphia.

Franklin D. Roosevelt’s commitment to such principles was demonstrated by Supreme Court appointments; LUCAS A. Powe, Jr., The Warren Court and American Politics (2000) (discussing over 200 case studies and showing how the Warren Court influenced and was influenced by politics).


294. 4 Lincoln, supra note 94, at 183.


George Washington informed correspondents, "[t]he spirit of accommodation was the basis of the present constitution." During constitutional debates over political economy and foreign policy, Washington demanded of his bickering cabinet that there "be liberal allowances, mutual forbearances, and temporising yieldings on all sides." Failure to achieve constitutional compromises may result in substantial harm to the body politic. During the nineteenth century that damage was the most destructive civil war in world history. Polarized politics is presently responsible for sharp reductions of bipartisan cooperation in Congress, gridlock on crucial budgetary issues, and a failure to staff adequately the federal judiciary.

Historically, the Supreme Court has proven the institution best able to play a mediating role during times of polarized politics. While sectional elections and an increased number of politically safe election districts promote legislative extremism, the national process for staffing the federal judiciary provides some counter pressures toward moderation whenever the partisan balance in the country is relatively even. The same life tenure that constitutional theorists proclaim enables Justices to decide on principles when elected officials yield to interest may also enable Justices to fashion compromises that cannot be reached by elected officials whose constituencies are too committed to a particular principle, whether that principle concerns slavery or abortion. Given the present sour political climate in the United States, preserving moderation on the national institution least likely to abandon the political center may be a valuable political task.

300. Id. at 578–79.
302. See Perry & Powe, supra note 21 (manuscript at 81).
303. See supra notes 200–26 and accompanying text.
304. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (2d ed. 1986) (noting that "courts have certain capacities for dealing with matters of principle that legislators and executives do not possess").