II. *DRED SCOTT* AND INTERNATIONAL LAW

The legal equivalent to Fitzhugh's outlandish and inflammatory defense of slavery was, of course, the U.S. Supreme Court's judgment in *Dred Scott v. Sandford*.[70] Not only was *Dred Scott* the crucial U.S. judicial decision about slavery, but the Supreme Court decision was itself a cause of the Civil War. *Dred Scott* inflamed passions in both the North and the South, and thus contributed mightily to the sectional animosities that led to the armed conflict.

Dred Scott is one of the most important decisions of the U.S. Supreme Court, as well as the most criticized. In an introductory paragraph to his illuminating article about modern views on *Dred Scott*, Professor Mark A. Graber summarized the universal condemnation of the Supreme Court's handling of the case:

> "American legal and constitutional scholars," *The Oxford Companion to the Supreme Court* states, "consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court." David Currie's encyclopedic *The Constitution in the Supreme Court* maintains that the decision was "bad policy," "bad judicial politics" and "bad law." Commentators across the political spectrum describe *Dred Scott* as "the worst constitutional decision of the nineteenth century," "the worst atrocity in the Supreme Court's history," "the most disastrous opinion the Supreme Court has ever issued," "the most odious action ever taken by a branch of the federal government," a "ghastly error," a "tragic failure to follow the terms of the Constitution," "a gross abuse of trust," "a lie before God," and "judicial review at its worst." In the words of former Chief Justice Charles Evans Hughes, the *Dred Scott* decision was a "self inflicted [wound] that almost destroyed the Supreme Court."[71]

While not rebutting any of this well-deserved criticism,[72] let us

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

71. Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271-72 (1997) (citations omitted).

72. Sometimes the modern response to *Dred Scott* is virtual, probably embarrassed, silence. For example, in the more than one thousand pages of text in Professor Erwin Chemerinsky's constitutional law hornbook, *Dred Scott* appears just twice and each time as a single sentence: first as an example of a case overturned by a constitutional amendment, and

focus here on a little-appreciated aspect of *Dred Scott*. The judgment is an excellent example of how international law discourse had become a legal commonplace in the United States by the middle years of the Nineteenth Century. All but the two briefest opinions of the nine Supreme Court judges relied at least in part on international law arguments, addressing a variety of legal issues in conflicting ways. Whatever the fairness of the *New York Tribune*'s contemporaneous repudiation of *Dred Scott* as having "just so much moral weight as . . . the judgment of those congregated in any Washington bar-room,"[73] the opinions were carefully wrought legal arguments. The judgment is long, about 240 pages of closely reasoned opinions from nine Justices. Eerily, some of *Dred Scott* still echoes in American international law arguments today, almost 150 years later.

The facts of the case are set out by the reporter and in several opinions. Dred Scott was held as a slave in Missouri by Dr. John Emerson, an Army doctor. In 1834, Scott moved with his master to Rock Island in the free state of Illinois and then in 1836 to Fort Snelling in U.S. territory in part of the 1803 Louisiana Purchase from France, in what later became Minnesota. Here, slavery had been abolished by the 1820 Missouri Compromise. Also, in 1836 Scott married Harriet, a slave brought to Fort Snelling by Major Taliaferro, who had sold her to Dr. Emerson. Returning with Harriet and Dr. Emerson to Missouri in 1838, Scott sued in Missouri state court in 1846 for his freedom and that of his family (Harriet and their two children, Eliza and Lizzie), succeeding at the trial court in 1850, but losing an appeal before the Missouri Supreme Court in 1854.

In 1853 Dr. Emerson's widow, as part of the settlement of her husband's estate, sold Dred Scott and his family to her brother, John A. Sanford (misspelled as Sandford by the court), a citizen of New York. Scott then brought suit in 1854 in the U.S. Circuit Court in Missouri "to assert the title of himself and his family to freedom." Sanford asserted that the courts had no jurisdiction in the diversity of the case, because although he, Sanford, was a citizen of New York, Scott was not, as alleged, a citizen of Missouri, since he was "a negro of African descent: his ancestors were of pure African blood, and who were brought into this country and sold as negro slaves."[74]

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second in his discussion of "The Impact of *Marbury v. Madison*," when he notes that *Dred Scott*—this "infamous case"—was the first post-*Marbury* declaration of the unconstitutionality of a federal statute. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND PRACTICE 12, 43–44 (1997).

73. DON FEHRENBACHER, SLAVERY, LAW AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 4 (1981).

74. *Dred Scott*, 60 U.S. (19 How.) at 396–400.

Turning to the nine judges in *Dred Scott*, one begins, of course, with the Opinion of the Court, famously rendered by the Chief Justice, Roger Taney (1777-1864).[75] Taney, a Maryland native and the Court's first Catholic member, was a staunch Jacksonian Democrat who had served as Andrew Jackson's Attorney General and later as interim Secretary of the Treasury.[76] Taney's opinion was probably the most inflammatory of all nine, not only because it was styled "the opinion" of the Court, but because it seemed to go out of its way to scold the North. It thereby undermined the position of moderate northern Democrats like Senator Stephen Douglas and empowered more radical Republicans like future President Abraham Lincoln.[77]

Taney began by identifying what in his opinion were the case's "two leading questions:"

> 1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties?
>
> 2. If it had jurisdiction, is the judgment it has given erroneous or not?[78]

International law arguments appeared twice in Taney's opinion, first with respect to the nature of a state and whether or not African Americans could ever be U.S. citizens with access to federal courts, and second with respect to the relationships, if any, that international law should have on the law of the United States, specifically the constitutionality of the 1820 Missouri Compromise that, *inter alia*, forbade slavery in much of the Louisiana Territory bought from Napoleon in 1803. Taney's opinion was inflammatory in both respects. His analysis of the jurisdictional issue was shockingly bold:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution

75. *Id.* at 399–454.

76. Paul Finkelman, *Taney, Roger Brooke*, *in* THE OXFORD COMPANION TO AMERICAN LAW 783, 783–84 (2002).

77. As to the relative importance of Taney's opinion, *The American Law Register* in its report of the case summarized the facts and proceedings and devoted ten pages to Taney, but only half a page in total to the opinions of the other judges. 7 THE AMERICAN LAW REGISTER 321, 323–34 (1859).

78. *Dred Scott*, 60 U.S. (19 How.) at 400.

> of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[79]

Taney quickly moved into an international legal analysis of states and nations as he distinguished the "situation of this [Black] population" from "that of the Indian race."[80]

> [A]lthough [the Indians] were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws . . . . These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white . . . . [The Indians] may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.[81]

In addition to distinguishing African Americans from Indians and asserting a historical account that was directly and persuasively refuted by dissenting Justices McLean and Curtis, Chief Justice Taney argued that Blacks never were and never could be U.S. citizens. He felt that when the U.S. Constitution was drafted:

> [T]he legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.
>
> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of

79. *Id.* at 403.

80. *Id.*

81. *Id.* at 403–04.

> the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.
>
> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit . . . .
>
> And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.[82]

Arguing that this opinion was generally shared throughout the thirteen American states at the end of the Eighteenth Century,[83] Taney concluded this first part of his decision:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . . Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently . . . the Circuit Court had no jurisdiction of the case, and . . . the judgment on the plea in abatement is erroneous.[84]

82. *Id.* at 407–08.

83. *Id.* at 408–26.

84. *Id.* at 426–27.

The second part of Chief Justice Taney's opinion was just as unnecessarily inflammatory as the first: it held the Missouri Compromise unconstitutional, the first and only such finding of the unconstitutionality of an act of Congress since Chief Justice Marshall's famous holding in *Marbury v. Madison*, fifty-four years before.[85] Here is how Chief Justice Taney set forth the issue:

> The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this point of inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.[86]

After examining the history of the acquisition and the government of the territory by Congress,[87] Taney turned to Article IV, Section 2(2) of the Constitution, giving Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[88] Taney argued that, nevertheless, Congress had no right "to prohibit a citizen of the United States from taking any property which he lawfully held into a Territory of the United States,"[89] and that, moreover, "the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government . . . [but is] regulated and plainly defined by the Constitution itself."[90] Looking at the prohibition of the Constitution,

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because

85. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

86. *Dred Scott*, 60 U.S. (19 How.) at 432.

87. *Id.* at 432–36.

88. *Id.* at 436.

89. *Id.* at 446.

90. *Id.* at 449.

> he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the [Fifth Amendment's] due process of law.[91]

At this point, Taney referred to but denied the potency of the law of nations:

> It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.
>
> But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other . . . . And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognises the right of property of the master in a slave and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to him the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.[92]

Hence, Taney moved to his second controversial holding:

> [I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United

91. *Id.* at 450.

92. *Id.* at 451.

> States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.[93]

The lengthy opinion of the Chief Justice, fifty-five pages long, is followed by one of the two brief opinions in *Dred Scott*, that of Mr. Justice James Wayne (1790–1867), a Princeton graduate and loyal Jacksonian Democrat from Georgia.[94] It is a little over two pages long, has no reference to international law, and states that Taney's "opinion of the court has my unqualified assent."[95]

The third opinion, by Mr. Justice Samuel Nelson (1792–1873), though only twelve pages long, is significant because it represents a different juristic way to approach the facts of the case and yet still find for Sanford.[96] Nelson, a New York Democrat, had tried but failed to act as a moderating force between, on the one hand, the five southern Democratic justices led by Taney, and, on the other, the two northern dissenters, John McLean, a Republican, and Benjamin Curtis, a Whig.[97] Nelson's opinion carefully avoided venturing a view on the possibility of African Americans ever being U.S. citizens or evaluating the constitutionality of the Missouri Compromise, the two decisive but explosive issues for Taney. Rather, Nelson relied heavily on private international law, what we sometimes in the United States call conflict of laws, simply to decide that Missouri had the right to apply its own law of slavery to the case. Nelson set out his version of the case thus:

> The question upon the merits, in general terms, is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such a residence and return to the slave State, such residence in the free State works an emancipation.[98]

93. *Id.* at 452.

94. *Id.* at 454–56 (Wayne, J., concurring).

95. *Id.* at 456.

96. *Id.* at 457–69 (Nelson, J., concurring).

97. STANLEY KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? xi (1967).

98. *Dred Scott*, 60 U.S. (19 How.) at 458-59 (Nelson, J., concurring).

Nelson treated the question as one of private international law:

> Our opinion is, that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri [which had decided in its Supreme Court that Scott remained a slave]—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal Courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the state is supreme over the subject of slavery within its jurisdiction.[99]

Nelson enunciated a classical territorial theory of private international law, characteristic of U.S. judges throughout the Nineteenth Century:

> Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.[100]

Nelson relied heavily on authorities from private international law. Story was cited, for example, for the proposition "that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories."[101] Ulrich Huberus (1635–1694), the Dutch scholar famous for his contributions to the modern theory of comity,[102] was refuted insofar as he argued that "personal

99. *Id.* at 459.

100. *Id.* at 460.

101. *Id.*

102. *See id.* at 461; Kurt. H. Nadelmann, *Introduction* to Hessell E. Yntema, *The Comity*

qualities . . . accompany the person wherever he goes,"[103] among other things, because "this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law," citing to Story, Kent, and William Burge (1787–1849), a then popular English jurist on private international law.[104]

And, as the reach of the law of Illinois is limited, so is the law of the United States: "Congress possesses no power to regulate or abolish slavery within the States . . . ."[105] Nelson saw no reasonable argument to the contrary:

> The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State; and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one Government have no force within the limits of another, or extra-territorially, except from the consent of the latter.[106]

Then follows the fourth opinion in the majority, the brief one of Mr. Justice Robert Grier (1794-1870).[107] Grier, a Pennsylvanian and graduate of Dickinson College, was, like Nelson, a northern Democrat, and, "subject to the usual cross-pressures of party and section," tended to be "if not pro-slavery, at least anti-antislavery."[108] In only two paragraphs, Grier stated that he concurred in the jurisdictional analysis of Mr. Justice Nelson and, perhaps a little oddly and unnecessarily, with the Chief Justice on the unconstitutionality of the Missouri Compromise and the inability of Dred Scott to sue as a citizen of Missouri.[109]

Of all the seven opinions in the majority, it is the fifth opinion, that of Mr. Justice Peter Daniel (1784-1860), that is the most vehement in its unabashed defense of slavery. Justice Daniel, a

Doctrine, 65 MICH. L. REV. 1, 2 (1966).

103. *Dred Scott*, 60 U.S. (19 How.) at 461 (Nelson, J., concurring).

104. *Id.* at 462.

105. *Id.* at 464.

106. *Id.*

107. *Id.* at 469 (Grier, J., concurring).

108. FEHRENBACHER, *supra* note 73, at 119.

109. *Dred Scott*, 60 U.S. (19 How.) at 469 (Grier, J., concurring).

property,"[131] Catron felt that "the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress," and hence, "that the act of 1820, known as the Missouri compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire equality of rights, privileges, and immunities."[132]

Turning now to the first of the two dissents, Mr. Justice John McLean (1785–1861), an Ohio Democrat turned Free Soiler with Republican presidential ambitions, leaned heavily on international law.[133] McLean easily dismissed the notion that African Americans could not be citizens for the purposes of the jurisdiction of the federal courts:

> In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognised them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.[134]

Turning to the international legality of slavery, McLean began by showing how little modern international law supported the institution:

131. *Id.*

132. *Id.* at 528–29. Catron's consideration of the 1803 Louisiana Territory treaty prompted Mr. Justice Curtis's famous "last in time" rejoinder, which we look at below, proposing the equal status of treaties and statutes under the Constitution's Supremacy Clause. Another notable aspect of the Catron opinion is that it seems to qualify the modern observation that "[b]efore the mid-twentieth century, there was little focus [in American law] on the status of individual constitutional rights as against the treaty power." Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2002 (2003).

133. *Dred Scott*, 60 U.S. (19 How.) at 529–64 (McLean, J., dissenting).

134. *Id.* at 533.

> The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation. (Grotius, lib. 2, chap. 15, 5, 1; lib. 10, chap. 10, 2, 1; Wicqueposts Ambassador, lib. 1, p. 418; 4 Martin, 385; Case of the Creole in the House of Lords, 1842; 1 Phillimore on International Law, 316, 335.)
>
> There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master.[135]

The international limitations on slavery were confirmed, in McLean's opinion, by the decisions of the U.S. and English courts, "fully recognised in Somersett's case, which was decided before the American Revolution,"[136] and hence part of American common law. McLean relied upon the judgment of Lord Mansfield in *Somerset*, quoting the following passage verbatim:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, are erased from the memory. It is so odious, that nothing can be suffered to support it but positive law.[137]

McLean had quite a different view of America's constitutional history than that of the majority justices, seeing it in a historical and international context:

> [W]e know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

135. *Id.* at 534.

136. *Id.* (citations omitted).

137. *Id.* at 535.

> I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground.[138]

Besides constitutional history, McLean relied on religious authority: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."[139]

McLean argued that Dred Scott's residence in Illinois and the Louisiana Territory had legally freed him and his family:

> When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri, in 1838, they were free . . . the residence of a master with his slave in the State of Illinois, or in the Territory north of Missouri, where slavery was prohibited by the act called the Missouri compromise, would manumit the slave as effectually as if he had executed a deed of emancipation.[140]

McLean then followed Blackstone's traditional rule and saw the law of nations as part of the law of Missouri:

> In 1816, the common law, by statute, was made a part of the law of Missouri; and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions. It will require the same exercise of power to abolish the common law, as to introduce it. International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules, adapted to the exigencies of human society; it is in fact an international morality, adapted to the best interests of nations. And in regard to the States of this Union, on the subject of slavery, it is

138. *Id.* at 537.

139. *Id.* at 550.

140. *Id.* at 554–55.

> eminently fitted for a rule of action, subject to the Federal Constitution. "The laws of nations are but the natural rights of man applied to nations." (Vattel.)[141]

Given the incorporation of the law of nations in the common law of Missouri, and given the international legal right of a slave to go free in free territory, McLean's concluded:

> If the common law have the force of a statutory enactment in Missouri, it is clear, as it seems to me, that a slave who, by a residence in Illinois in the service of his master, becomes entitled to his freedom, cannot again be reduced to slavery by returning him to his former domicile in a slave State.[142]

Then followed a rebuttal of Catron's argument about the effect of the 1803 French treaty selling the Louisiana Territory to the United States, an issue more thoroughly and famously refuted by Mr. Justice Curtis below. For his part, Mr. Justice McLean wrote:

> It is supposed by some, that the third article in the treaty of cession of Louisiana to this country, by France, in 1803, may have some bearing on this question. The article referred to provides, "that the inhabitants of the ceded territory shall be incorporated into the Union, and enjoy all the advantages of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess."
>
> As slavery existed in Louisiana at the time of the cession, it is supposed this is a guaranty that there should be no change in its condition.
>
> The answer to this is, in the first place, that such a subject does not belong to the treaty-making power; and any such arrangement would have been nugatory. And, in the second place, by no admissible construction can the guaranty be carried further than the protection of property in slaves at that time in the ceded territory. And this has been complied with. The organization of the slave States of Louisiana, Missouri, and Arkansas, embraced every slave in Louisiana at

141. *Id.* at 556–57.

142. *Id.* at 557.

> the time of the cession. This removes every ground of objection under the treaty. There is therefore no pretence, growing out of the treaty, that any part of the territory of Louisiana, as ceded, beyond the organized States, is slave territory.[143]

Finally, McLean dissented on grounds based upon principles of private international law:

> The law, where a contract is made and is to be executed, governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois, and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible that such an act is not a matter for adjudication in any slave State where the master may take him? Does not the master assent to the law, when he places himself under it in a free State?
>
> The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery, the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.[144]

The last and longest of all nine opinions is the dissent of Mr. Justice Benjamin Curtis (1809--1874),[145] a Harvard-educated Massachusetts lawyer. Importantly, Curtis, a Whig, directly contradicted Chief Justice Taney's and Justice Daniel's historical and legal assertions that African Americans had never been and could never be citizens of the States or of the United States under the

143. *Id.*

144. *Id.* at 558.

145. *Dred Scott*, 60 U.S. (19 How.) at 564–633 (Curtis, J., dissenting).

Constitution for purposes of the diversity jurisdiction of the federal courts:

> To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens either of the States under the Confederation, at the time of the adoption of the Constitution.
>
> Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.[146]

A large part of Justice Curtis's dissent is then devoted to the status of free African Americans at the time of the Revolution and the making of the Constitution and to a legal analysis of the Constitution.[147] Since "in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established," the Constitution was not "made exclusively by the white race" but also for "free colored persons" for the benefit of, as the Constitution says, "themselves and their posterity."[148] Accordingly on this issue, he concluded "[t]hat as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States" with "the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides."[149]

Curtis then addressed the duty of Missouri to recognize the new status of Dred Scott as a free man.[150] It is in this discussion that Justice Curtis turned in great detail to international law:

146. *Id.* at 572–73.

147. *Id.* at 573–88.

148. *Id.* at 582.

149. *Id.* at 588.

150. *Id.* at 588-604.

> The inquiry to be made on this part of the case is, therefore, whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the *status* of a slave, by foreign law.
>
> I have not heard it suggested there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. (1 Ter. Laws, 436). And the common law, as Blackstone says, (4 Com., 67,) adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.
>
> I know of no sufficient warrant for declaring that any rule of international law, concerning the recognition, in that State, of a change of *status*, wrought by an extra-territorial law, has been displaced or varied by the will of the State of Missouri.[151]

Curtis then asked "what the rules of international law prescribe concerning the change of *status* of the plaintiff wrought by the law of the Territory of Wisconsin" and "whether the operation of the laws of the Territory of Wisconsin upon the *status* of the plaintiff was or was not such an operation as these principles of international law require other States to recognise and allow effect to."[152] In this part of his dissent, Curtis concluded:

> *First.* The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the *status* of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.
>
> *Second.* The laws of the United States, constitutionally enacted, which operated directly on and changed the *status* of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the *status* of the slave, and it is in

151. *Id.* at 595.

152. *Id.* (emphasis added).

> conformity with the rules of international law that this change of *status* should be recognised everywhere.[153]

Curtis then considered the constitutionality of the Missouri Compromise.[154] There might at one time have been doubts "whether the Constitution had conferred on the executive department of the Government of the United States power to acquire territory by a treaty."[155] However,

> [W]hatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different Administrations. Six States, formed on such territory, are now in the Union. Every branch of this Government, during a period of more than fifty years, has participated in these transactions. To question their validity now, is vain. As was said by Mr. Chief Justice Marshall, in the American Insurance Company v. Canter, (1 Peters, 542,) "the Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently, that Government possesses the power of acquiring territory, either by conquest or treaty."[156]

Curtis went on to find support for the power of Congress to legislate in new, as well as original, U.S. territory in the Constitution's Article IV, Section 3: "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[157] He rejected the notion that "all needful Rules and Regulations" did not mean "all" and cited the history of Congress' regulation of slavery in the territories.[158]

But did the Fifth Amendment, protecting persons from the deprivation of "life, liberty, or property, without due process of law," limit the right of Congress to abolish slavery, because slave owners would be deprived of their property in the territories?[159] Curtis began

153. *Id.* at 601 (emphasis added).

154. *Id.* at 605–33.

155. *Id.* at 612.

156. *Id.* at 613.

157. *Id.* at 613–15.

158. *Id.* at 615–24.

159. *Id.* at 624.

his answer by arguing, as did Judge Mansfield in *Somerset*, that "[s]lavery, being contrary to natural right, is created only by municipal law."[160]

> [P]ersons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist . . . ?[161]

Curtis believed that this rule was known to those who drafted and implemented the Constitution:

> Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?
>
> Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist.[162]

Finally, Curtis turned to the Treaty of 1803 ceding Louisiana from France to the United States. Curtis rejected the principle that any treaty could limit the provisions of the U.S. Constitution:

> By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept, with the most scrupulous good faith. But that a treaty with a foreign

160. *Id.*

161. *Id.* at 625.

162. *Id.*

> nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.
>
> The powers of the Government do and must remain unimpaired. The responsibility of the Government to a foreign nation, for the exercise of those powers, is quite another matter. That responsibility is to be met, and justified to the foreign nation, according to the requirements of the rules of public law; but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.[163]

So what is the effect of treaties on U.S. domestic law? Curtis went on to say:

> The second section of the fourth article is, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.[164]

Hence:

> If, therefore, it were admitted that the treaty between the United States and France did . . . exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an act of Congress excluding it was void by force of the treaty. Whether or not a case existed sufficient to justify a refusal to execute such a stipulation, would not be a judicial, but a political and legislative question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not

163. *Id.* at 629.

164. *Id.*

> to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way, has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound. (Foster v. Nicolson [sic] 2 Peters, 314; Garcia v. Lee, 12 Peters, 519).[165]

In any case, Curtis felt the 1803 Treaty "contains no stipulation in any manner affecting the action of the United States respecting the territory in question."[166] Curtis could not see that France would have an interest "in uninhabited territory" beyond "the present State of Missouri [which] was then a wilderness, uninhabited save by savages, whose possessory title had not then been extinguished."[167] Moreover, not only did the United States in law and in fact protect the "individual rights of the then inhabitants of the territory,"[168] but "the stipulation was temporary and ceased to have any effect when the then inhabitants of the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union."[169]

III. SOME POSSIBLE LESSONS

Ever since 1840 and the publication of the second volume of Alexis de Tocqueville's classic exposition of America, *De la Démocratie en Amérique*, it has been argued that the American experience has been and will be "exceptional," essentially different from other democratic peoples.[170] Rereading *Dred Scott*, we recognize that American "exceptionalism" has not always been glorious. It would be well, if painful, for us to remember this. It is hard to say how much any nation will learn from its own history. At least, we can hope not to make too many of the same mistakes as our

165. *Id.* at 630.

166. *Id.*

167. *Id.*

168. *Id.* at 631.

169. *Id.* at 632.

170. The exact phrase is "La situation des Américains est donc entièrement exceptionnelle, et il est à croire qu'aucun peuple démocratique n'y sera jamais placé." ALEXIS DE TOCQUEVILLE, 2 DE LA DÉMOCRATIE EN AMÉRIQUE 49 (Flammarion ed. 1981). A rough English translation might be: "The situation of the Americans is thus entirely exceptional, and it is to be believed that no other democratic people will ever be similarly placed."

predecessors. What ought we modern Americans learn from *Dred Scott* and our "exceptional" international legal experience with our "peculiar institution," American slavery?

In the earliest decades of the American Republic, jurists—Kent and Wheaton—and lawyers and judges—Jefferson, Madison, Hamilton, Jay, Marshall, and Story—were keen to show that the United States was ready to participate in the making and application of international law in good faith as an upstanding full member of international society. But the crisis surrounding American slavery opened up an international legal can of worms for Nineteenth Century American lawyers and judges. International law, alongside the public law of European countries like Britain and France, was turning away from even a cringing embrace of slavery. By the time of *Dred Scott* in 1857, it could well be said that the preponderance of international legal argument condemned slavery, including American slavery, as illegal.

What could Americans then say or do? McLean and Curtis, the two dissenting judges in *Dred Scott*, were, of course, buoyed by the trends in international law. They could and did employ international law arguments to prove that Dred Scott was both a citizen of Missouri and a free man. However, for those making up *Dred Scott's* majority, international law posed a threat to the increasingly internationally unpopular U.S. practice of slavery. Nelson and Campbell approached the international legal hurdle gingerly, arguing from territorial jurisdictional principles of private international law, that, whether morally right or wrong, Missouri pro-slavery law had primacy. Justice Taney, in language echoed by more modern American judges, explicitly rejected applying international legal rules because "the law of nations [could not stand] between the people of the United States and their Government." He relied instead on his assertion that the U.S. Constitution protected the property rights in slaves held by slave masters. Daniel went hatefully further, putting the international law of the time on its head, hoping to prove that international legal principles showed slaves and descendants of slaves could never be part of a social contract establishing a sovereign state. Catron, more plausibly and creatively, argued that America's 1803 treaty with France secured rights for slave owners in the Louisiana Territory protected by the Constitution's Supremacy Clause, a proposition refuted by Curtis.

Professor Detlev Vagts has seen in Justice Curtis's language in *Dred Scott* and in a Curtis judgment on circuit in 1855[171] the

171. Taylor v. Morton, 23 F. Cas. 785 (C.C.D. MASS. 1855), *aff'd on other grounds*, 67

origins of the later-in-time rule now used to settle conflicts between treaties and statutes in U.S. constitutional law.[172] The 1888 *Whitney* case provides the usual statement of the last-in-time rule:

> By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent: the one last in date will control the other, provided, always, the stipulation of the treaty on the subject is self-executing.[173]

Curtis's doctrine may be an unhappy residue of *Dred Scott.* Professor Vagts laments how what was once simply a rule for the courts has been now adopted by the Congress, the President and "influential commentators" as a "final answer and that [accordingly] the binding effect of international law carries little weight."[174] For example, "[t]he commitment of the United States to its treaty obligations has recently been put in question by two persistent histories of treaty violation—the refusal to pay U.S. United Nations dues . . . and the repeated failure to advise alien prisoners of their rights under the Vienna Convention on Consular Relations," thus "jeopardiz[ing] the conduct of our foreign affairs."[175] This may be rather too much American exceptionalism for international law to swallow.

Even more unfortunate, arguments such as those of Taney, Nelson, Daniel, Campbell, and Catron attempting to limit the impact of antislavery opinion in international law and foreign public law foreshadow modern legal expressions of American exceptionalism. The comparisons to assertions of modern American foreign policy exceptionalism are all too plain. As Professor Peter Spiro explains in his article about modern American exceptionalists, "At the center of their thinking stands the edifice of sovereignty. Sovereignty, in this

U.S. (2 Black) 481 (1862).

172. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 314–15 (2001).

173. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

174. Vagts, *supra* note 172, at 313.

175. *Id.*