Justice Curtis's Dissent in the *Dred Scott* Case: An Interpretive Study

By Stuart A. Streichler*

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Introduction

The *Dred Scott* decision[1] was one of the most significant, and disastrous, in the history of the Supreme Court.[2] Purporting to write the opinion of the Court,[3] Chief Justice Roger B. Taney ruled that no black, whether slave or free, could ever be a citizen of the United

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* Assistant Professor of Political Science, University of Miami; Ph.D. 1995, Johns Hopkins University; J.D. 1982, University of Michigan Law School; B.S. 1978, Bowling Green State University. An earlier version of this Article was presented at the 1994 Annual Meeting of the Law and Society Association in Phoenix, Arizona. I am indebted to J. Woodford Howard, Jr. for his insights, generosity, and helpful criticism. I would also like to thank Hendrik Hartog, Timothy S. Huebner, Lili Levi, and especially Marilys Nepomechie for their thoughtful comments, and Bianca Roig for her research assistance.

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

2. As Carl Swisher put it, *Dred Scott* "has gone down in history as a major disaster, degrading the Court and the Constitution and precipitating the Civil War." Carl B. Swisher, 5 The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period, 1836-64, at 631 (Paul A. Freund ed., 1974).

3. *See Scott*, 60 U.S. at 400. Whether Taney's views actually commanded a majority is a matter in dispute. In his review of the case, Horace Gray, later appointed Chief Justice, concluded that Taney "speaks only for himself and Mr. Justice Wayne, and that each of the other justices defines his own position." Horace Gray & John Lowell, *The Case of Dred Scott*, 20 Monthly L. Rep. 61, 67 (1857). However, Don Fehrenbacher concluded that "none of the major rulings in Taney's opinion can be pushed aside as unauthoritative." Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 333 (1978); *see also* John S. Vishneski III, *What the Court Decided in* Dred Scott v. Sandford, 32 Am. J. Legal Hist. 373, 386-90 (1988) (arguing that evidence from the Court's deliberative process shows that Taney had a majority for each point in his decision).

States.[4] In Taney's view, blacks were not members of the American political community or of "the people of the United States."[5] He also declared the Missouri Compromise, which had excluded slavery from territories north of the latitude 36° 30', unconstitutional.[6] For the first time since *Marbury v. Madison*,[7] the Court had exercised the power of judicial review over an Act of Congress.

All nine Justices filed opinions in *Dred Scott*; only John McLean and Benjamin R. Curtis dissented.[8] In his dissenting opinion, Justice Curtis argued that Congress had plenary power to regulate slavery in the territories.[9] Contesting Taney's claims about citizenship, Curtis argued that blacks were "in every sense part of the people of the United States."[10] He pointed out that blacks were citizens with voting rights in at least five states when the Constitution was adopted.[11] They had the power to vote on ratifying the Constitution, Curtis suggested, and, on that basis, he argued that it was "not true" that "the Constitution was made exclusively by the white race."[12] Nor, he added, was it "made exclusively for the white race."[13]

Justice Curtis's opinion had a singular effect on contemporary debate. While Justice McLean also dissented, the antislavery press and the Republican Party looked mainly to Curtis's opinion for support.[14] Abraham Lincoln reportedly carried Curtis's opinion "as a vade mecum" in his debates with Senator Stephen A. Douglas.[15] The press, disposed to personalize and at times oversimplify, seized on the case

4. In support of that opinion, Taney asserted that, at the founding of the United States, blacks were regarded as having "no rights which the white man was bound to respect." *Scott*, 60 U.S. at 406.

5. *Id.* at 403-04.

6. *See id.* at 452. To be precise, the Court examined one part of the Missouri Compromise. *See* Act of March 6, 1820, ch. 22, § 8, 3 Stat. 545, 548 (1820).

7. 5 U.S. (1 Cranch) 137 (1803).

8. *See Scott*, 60 U.S. at 393, 529 (McLean, J., dissenting); *id.* at 564 (Curtis, J., dissenting).

9. *See id.* at 614-24 (Curtis, J., dissenting).

10. *Id.* at 582.

11. *Id.* at 572-73.

12. *Id.* at 582.

13. *Id.*

14. Curtis was neither abolitionist nor Republican.

15. 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 354 (Benjamin R. Curtis ed., 1879) [hereinafter MEMOIR OF BENJAMIN ROBBINS CURTIS]. A few months after the *Dred Scott* decision, Abraham Lincoln, foreshadowing a line of thought that would reach maturity in the Gettysburg Address, relied on Curtis's argument to show that blacks were "part of the people who made, and for whom was made," the Declaration of Independence and the Constitution. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 403 (Roy P. Basler ed., 1953); *see* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 130-33 (1992).

as a battle between two protagonists, Taney and Curtis.[16] By "common consent of the profession and the public" (according to a Boston legal journal), Taney's reasoning was no match for Curtis's.[17] As the *New York Tribune* put it, Curtis "ground up the very bones of the Chief Justice's argument."[18]

While the *Dred Scott* case has been the subject of extensive commentary over the years, scholars have by and large refrained from in-depth inquiry into Curtis's dissent.[19] His opinion, ranked among the "great dissents" in the Court's history,[20] deserves further attention for several reasons. First, Curtis's opinion contains the most comprehensive statement from the highest court to that date showing why blacks were members of the American political community. Second, it is difficult, if not impossible, to understand Taney's opinion without reading it against Curtis's dissent since Taney formulated many of his arguments in response to Curtis.[21] Third, Curtis's arguments illustrate the possibilities and limitations of the antebellum Constitution, as he tried to formulate legal solutions to some of the most intractable problems posed by slavery. Fourth, in the area of constitutional the-

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Curtis "shows this with so much particularity as to leave no doubt of its truth," Lincoln said. Lincoln, *supra*.

16. Even though each Justice filed an opinion in the case, a popular reprint of the decision contained the opinions of Taney and Curtis in their entirety, while summarizing the others. Published by the *New York Tribune*, it was available for twenty-five cents and reprinted over the next four years. *See* SWISHER, *supra* note 2, at 641.

17. Gray & Lowell, *supra* note 3, at 115.

18. N.Y. TRIB., Mar. 10, 1857. Whipping up opposition to the decision immediately after its announcement, the *Tribune* reported that, "while Judge Curtis did not tell his legal chief that he was guilty of falsehood, he did say that his statements would be received with *very great surprise*, and proceeded to demonstrate his gross historical misrepresentations." *Id.*

19. *See, e.g.*, WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM (1979); FEHRENBACHER, *supra* note 3; VINCENT C. HOPKINS, DRED SCOTT'S CASE (1951); KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK 68-109 (1990); THE DRED SCOTT DECISION: LAW OR POLITICS? (Stanley Kutler ed., 1978); Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37 (1993); Robert Meister, *The Logic and Legacy of* Dred Scott: *Marshall, Taney, and the Sublimation of Republican Thought*, 3 STUD. AM. POL. DEV. 205 (1989); Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16 (1953). For some discussion focusing on Curtis's role in the *Dred Scott* case, see Earl M. Maltz, *The Unlikely Hero of* Dred Scott: *Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995 (1996); Kenneth M. Stampp, *Comment on Earl Maltz*, 17 CARDOZO L. REV. 2017 (1996); Richard H. Leach, *Justice Curtis and the* Dred Scott *Case*, 94 ESSEX INST. HIST. COLLECTION 37 (1958).

20. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 36 (1931).

21. *See* Benjamin R. Curtis, *Some Observations on the Above Correspondence*, *in* MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 229.

ory, Curtis's dissenting opinion is illuminating for its methods of constitutional interpretation.

This Article focuses on Justice Curtis's constitutional analysis in *Dred Scott.* Part I explores his argument on black citizenship. Contrary to the limited reading attributed to Curtis on citizenship, this Part argues that his conception of citizenship, though limited in some respects, was potentially far-reaching and that his view of the American political community was fundamentally egalitarian. Part II examines the Justice's position on the territorial question. This Part offers a new explanation of Curtis's argument by showing that he relied mainly on constitutional structure to justify broad powers in Congress over slavery in the territories.

I. Citizenship, Race, and the Uses of History

In the 1830s, Dred Scott, a slave from Missouri (a slave state), accompanied his owner, John Emerson, to Illinois (a free state) and to the northern reaches of the Louisiana Purchase (free territory under the Missouri Compromise). Having returned to St. Louis after several years, Scott sued for his freedom in the Missouri state courts,[22] on the grounds that he was emancipated after residing on free soil. Lengthy proceedings resulted in a jury verdict for Scott. His victory was short-lived, however, as the Missouri Supreme Court reversed on appeal.[23] Overruling precedent which favored Scott's position,[24] the court declared that Missouri was not obligated to respect the laws of free jurisdictions prohibiting slavery.[25]

Dred Scott's attorneys then brought his case to the federal circuit court. With the new forum came an important change in defendants. Emerson had died in 1843; his widow nominally defended in the state courts. Her brother, John Sanford, took charge of the defense in the federal courts.[26] With Sanford's involvement, a new and critical fact emerged. Sanford, formerly of St. Louis, had moved to New York. This paved the way for Scott to sue in the federal courts under the

22. Missouri, along with some other slave states, expressly permitted freedom suits. *See* FEHRENBACHER, *supra* note 3, at 251.

23. *See* Scott v. Emerson, 15 Mo. 576 (1852).

24. *See* Rachael v. Walker, 4 Mo. 350 (1836).

25. *See Scott*, 15 Mo. at 584-86.

26. Exactly why Sanford became involved in the case remains unclear. He may have owned Scott by this time or simply served as his sister's agent. *See* FEHRENBACHER, *supra* note 3, at 270-74. Sanford's name was misspelled in the court records as "Sandford." *See* EHRLICH, *supra* note 19, at 192.

Diversity-of-Citizenship Clause, which extends jurisdiction to cases "between Citizens of different States."[27]

Accordingly, Scott alleged that he was a citizen of Missouri and that Sanford was a citizen of New York.[28] Sanford's responsive pleading, called a plea in abatement, denied jurisdiction. Rather than dispute Scott's citizenship on the basis of his status as a slave, Sanford stated that Scott lacked citizenship "because he is a Negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves."[29] Scott's attorneys responded that these facts did not deprive Scott of citizenship.[30]

The federal judge, Robert Wells, ruled that Scott was a citizen, at least for the purposes of bringing this lawsuit. Judge Wells reasoned that residence and legal capacity to own property were sufficient indicia of citizenship to establish diversity jurisdiction under Article III. If Scott were free, he would have met these qualifications. Having taken jurisdiction of the case, Judge Wells applied the Missouri Supreme Court's recent ruling against Scott and instructed the jury accordingly.[31] The jury returned a verdict for Sanford.[32]

Scott's attorneys then brought the case to the United States Supreme Court. After hearing argument in February 1856, the Justices divided as to whether the Court, at that point in the litigation, could properly entertain the jurisdictional issue raised by Sanford's plea in abatement. In the belief that the Court could consider the plea, Justice Curtis sided with Chief Justice Taney and two other Justices who later joined Taney's opinion (Justices James M. Wayne and Peter V. Daniel). Four other Justices (McLean, John A. Campbell, Robert C. Grier, and John Catron) took the opposite view.[33] The re-

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27. U.S. CONST. art. III, § 2.

28. *See* Declaration at 3, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *in* United States Supreme Court Transcripts of Records (Dec. Term 1856) [hereinafter Supreme Court Transcripts].

29. Plea in Abatement at 5-6, *Scott*, 60 U.S. 393, *in* Supreme Court Transcripts, *supra* note 28.

30. Demurrer to Plea at 6, *Scott*, 60 U.S. 393, *in* Supreme Court Transcripts, *supra* note 28.

31. Wells charged the jury: "[U]pon the facts in this case, the law is with the defendant." *Scott*, 60 U.S. at 596 (Curtis, J., dissenting).

32. Chief Justice Taney suggested that the lower court at that point should have dismissed the case on grounds that the court lacked jurisdiction. *See id.* at 454 (Taney, C.J.); FEHRENBACHER, *supra* note 3, at 277-80.

33. *See* Remarks of Justice Campbell on the Death of Justice Curtis, 87 U.S. (20 Wall.) x-xi (1875); Letter from John A. Campbell to Samuel Tyler (Nov. 24, 1870), *in* S. TYLER, MEMOIR OF ROGER BROOKE TANEY, LL.D. 382-84 (1872) [hereinafter MEMOIR OF ROGER BROOKE TANEY].

maining Justice, Samuel Nelson, tentatively sided with the first group, then requested reargument.[34] The Court directed the attorneys to argue whether the Justices could inquire into the plea in abatement and, assuming so, whether Dred Scott was a citizen entitled to file the lawsuit.[35] At that point, the Justices had decided to sidestep the question whether the Missouri Compromise was constitutional.[36]

After the case was reargued the next term, Nelson joined those Justices who decided that the plea in abatement was not reviewable, and he received the assignment of writing the majority opinion. With less than one month remaining in the term, Justice Nelson was preparing a limited opinion avoiding the controversial issues of citizenship and the territories.[37] However, at a conference in February (with Nelson absent), a majority of Justices agreed to Justice Wayne's motion to reassign the opinion to Taney.[38] The precise reason for this change has never been entirely clear; most likely, Nelson's opinion never commanded a solid majority.[39]

In this way, a technical question of pleading brought the question of black citizenship before the nation's highest tribunal. The question of black citizenship was potentially explosive. To say that blacks were citizens called into question the racist assumptions that enabled slave states to treat blacks as property.[40] To the antebellum mind, citizenship was abstractly linked to both the possession of rights and partici-

34. *See* Remarks of Justice Campbell on the Death of Justice Curtis, 87 U.S. at x-xi; Letter from John A. Campbell to Samuel Tyler (Nov. 24, 1870), *in* MEMOIR OF ROGER BROOKE TANEY, *supra* note 33, at 383; Letter from Samuel Nelson to Samuel Tyler (May 13, 1871), *in* MEMOIR OF ROGER BROOKE TANEY, *supra* note 33, at 385.

35. Dred Scott v. Sandford Appellate Case File, File No. 3,230 (National Archives, Washington, D.C.); [Vol. Q] Minutes of the Supreme Court of the United States, May 12, 1856, at 8413-14 (National Archives, Washington, D.C.).

36. Curtis informed his uncle: "The Court will not decide the question of the Missouri Compromise—a majority of the judges being of the opinion that it is not necessary to do so. (This is confidential.)" Letter from Benjamin R. Curtis to George Ticknor (April 8, 1856), *in* MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 180.

37. Justice Nelson would have held that "it will not be necessary to pass upon" the jurisdictional question and that Dred Scott's status raised a question under Missouri law already determined by its courts. *Scott*, 60 U.S. at 458-59 (Nelson, J.). Justice Nelson published his draft majority opinion "unchanged as a concurring opinion." FEHRENBACHER, *supra* note 3, at 669; *see also* HOPKINS, *supra* note 19, at 55.

38. *See* FEHRENBACHER, *supra* note 3, at 309; Letter from John A. Campbell to Samuel Tyler (Nov. 24, 1870), *in* MEMOIR OF ROGER BROOKE TANEY, *supra* note 33, at 384; Letter from Samuel Nelson to Samuel Tyler (May 13, 1871), *in* MEMOIR OF ROGER BROOKE TANEY, *supra* note 33, at 385.

39. *See* FEHRENBACHER, *supra* note 3, at 310.

40. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 312 (1978).

pation in government.[41] However, with racial discrimination pervasive in the decade before the Civil War, the general practice in the North was to exclude free blacks from voting, even if they were considered citizens.[42] The question remained as to exactly what other rights a free black could claim as a citizen. Southerners were particularly concerned over the implications of the Constitution's Privileges and Immunities Clause, which provided that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[43] The position of free blacks was further complicated by the federal system in which persons possessed state and national citizenship. In the years preceding *Dred Scott*, increasingly sharp divisions emerged. While the Georgia state legislature, to take one example, resolved that it would "never recognize" free blacks as U.S. citizens,[44] abolitionists broadly defined the rights of national citizenship to include protection by the federal government of an individual's "personal security, personal liberty, and private property."[45]

Although the Framers used the term "citizen" in several constitutional provisions,[46] they left several large questions unanswered: Who qualifies as a citizen of the United States? What rights are associated with national citizenship? What is the relationship between national citizenship and state citizenship? None of these questions had to be addressed in *Dred Scott*. To be precise, the jurisdictional question raised for diversity purposes was whether Scott was a citizen of the state of Missouri. Like Judge Wells, the Supreme Court could have limited its inquiry to decide whether Scott was a citizen for the purpose of bringing a federal lawsuit under diversity of citizenship.[47]

Neither Taney nor Curtis showed any reluctance in addressing the issues of citizenship in the broadest terms. In their hands, the case was greatly enlarged to include questions about the qualifications for

41. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 24-27 (1988); FEHRENBACHER, *supra* note 3, at 64-65.

42. *See* KETTNER, *supra* note 40, at 323.

43. U.S. CONST. art. IV, § 2.

44. 3 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 18 (Helen Tunnicliff Catterall ed., 1936).

45. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 87 (1849); *see* JACOBUS TENBROEK, EQUAL UNDER LAW 94-113 (1951).

46. *See, e.g.*, U.S. CONST. art. IV, § 2 (privileges and immunities); *id.* art. II, § 1 (qualifications for President).

47. *Cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586 (1839) (considering corporations as citizens for diversity jurisdiction, but not for other purposes); Louisville, Cincinnati, and Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844); *see* R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 133 (1968); FEHRENBACHER, *supra* note ????, at 356.

United States citizenship, membership in the political community, and the rights of citizenship. To unravel Curtis's approach to these questions, his opinion must be read in the specific context of his debate with Taney. Conversely, the Chief Justice's opinion should be read against Curtis's. Both seemed eager to impress their views of black citizenship on the public.[48] Each was affected by the other's interpretive choices, rhetorical strategies, and evidence. In fact, after the Justices read their opinions from the bench, Taney responded to Curtis by adding to his opinion "upwards of eighteen pages," by Curtis's estimate.[49] "No one can read them," Curtis said, "without perceiving that they are in reply to my opinion."[50]

Taney's argument was essentially intentionalist: Blacks could not be U.S. citizens because the Framers never intended to grant them

48. Curtis's role in the Court's internal deliberations is difficult to pin down. Some evidence indicates that the Justice was eager to state his views on the issues of citizenship and the territories. To begin with, the question arises as to why Curtis joined the most extreme proslavery Justices (i.e., Taney, Wayne, and Daniel) in voting that the Court could review the plea of abatement, though, in his dissenting opinion, Curtis carefully explained why the plea was reviewable as a matter of law. *See Scott,* 60 U.S. at 566 (Curtis, J., dissenting). Two contemporaneous accounts of the Justices' conferences point to Curtis and McLean as the catalysts for the enlarged decision. Justice Catron privately informed President-elect James Buchanan that the dissenters had "forced up" the territorial issue. *See* Letter from John Catron to James Buchanan (Feb. 19, 1857), *reprinted in* Philip Auchampaugh, *James Buchanan, the Court, and the* Dred Scott *Case*, 9 TENN. HIST. MAG. 231, 236 (1926). Justice Grier gave a similar account, though he singled out McLean. *See* Letter from Robert Grier to James Buchanan (February 23, 1857), *in* Papers of James Buchanan (on file with the Historical Society of Pennsylvania). Fehrenbacher discounted this explanation on the view that the dissenters had nothing to gain; yet it is difficult to dismiss completely because both Grier and Catron independently pointed to the dissenters. *See* FEHRENBACHER, *supra* note 3, at 310; Paul Finkelman, *What Did the Dred Scott Case Really Decide?*, 7 REVS. AM. HIST. 369, 373-74 (1979). The alternative explanation for the enlarged decision focuses on Justice Wayne, reflecting the dissatisfaction of the Court's Southern members. *See* FEHRENBACHER, *supra* note 3, at 311. Possibly McLean, more than Curtis, made some statements which opened the door for Wayne to move the other Justices in the direction which they were predisposed to take.

49. *See* Benjamin R. Curtis, *Some Observations on the Above Correspondence*, *in* MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 229.

50. *Id.* Taney insisted that there "is not one historical fact, nor one principle of constitutional law, or common law, or chancery law, or statute law, in the printed opinion, which was not distinctly announced and maintained from the bench." Letter from Roger B. Taney to Benjamin R. Curtis (June 11, 1857), *in* MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 221. Taney conceded, however, that he had added "proofs and authorities to maintain the truth of the historical facts and the principles of law asserted by the court in the opinion delivered from the bench." *Id.* at 222. Curtis did not let that pass without noting that Taney's historical facts and principles of law "may embrace a wide field of examination and argument." Letter from Benjamin R. Curtis to Roger B. Taney (June 16, 1857), *in* MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 228.

citizenship.[51] When the Constitution was adopted, Taney insisted, blacks were "considered a subordinate and inferior class of beings, who had been subjugated by the dominant race."[52] As evidence, the Chief Justice produced a brief historical survey of the "state of public opinion" towards blacks.[53] Throughout the eighteenth century, Taney suggested, Europeans regarded blacks "as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations."[54] Nowhere was this attitude "more firmly fixed" than in England and the colonies, Taney said.[55] He cited colonial laws prohibiting intermarriage to prove, in his words, that "a perpetual and impassable barrier was intended to be erected between [the races]."[56]

Racism at the founding was the central premise of Taney's argument. On that basis, he narrowly interpreted the broad language of the Declaration of Independence as well as the Constitution. Conceding that the statement that all men are created equal "would seem to embrace the whole human family," Taney suggested that the authors of the Declaration "knew" that this language "would not, in any part of the civilized world, be supposed to embrace the negro race."[57] Likewise, when the Framers referred to the "people of the United States," Taney said, they needed no explicit reference to whites only because the phrase was "so well understood" to exclude blacks.[58]

Chief Justice Taney combined this historical argument with a fixed and intentionalist mode of constitutional interpretation. The Constitution, he said, speaks "not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers."[59] Even if public opinion towards blacks changed, the Court could not "give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted."[60] The effect of this line of argument was to exclude blacks from citizenship forever.

Appealing to contemporary racist views, Taney's judicial strategy established the grounds of decision as if they permitted no accommodation between extreme positions. Don Fehrenbacher described Ta-

51. *See Scott*, 60 U.S. at 404.
52. *Id.* at 404-05.
53. *Id.* at 407.
54. *Id.*
55. *Id.* at 407-08.
56. *Id.* at 409.
57. *Id.* at 410.
58. *Id.* at 411.
59. *Id.* at 426.
60. *Id.*

ney's aim as removing the middle ground, with blacks having "equal rights with white men in *all* respects or in *none*."[61] If blacks were citizens, Taney reasoned, "they would be entitled to all . . . privileges and immunities";[62] as noncitizens, blacks could "claim none of the rights and privileges" of citizenship.[63] Following this strategy, Taney framed the issue in the broadest terms:

> [C]an 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 of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?[64]

At stake was the basic character of the American political community.[65] Taney equated citizens with the "'people of the United States,'" the sovereign political body, "who hold the power and conduct the Government through their representatives."[66] To show that blacks were "inferior and subject" rather than equal members of the political community, the Chief Justice cited several examples where states excluded blacks from participating in the government. Only one state (Maine), he said, allowed blacks to "participate equally with the whites in the exercise of civil and political rights."[67] He pointed to New Hampshire's all-white militia to show that blacks were not "permitted to share in one of the highest duties of the citizen," and as such were not considered "among its people."[68]

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61. FEHRENBACHER, *supra* note 3, at 355. Taney's fundamental purpose, Fehrenbacher wrote, "was to exclude Negroes from all rights guaranteed in the Constitution, including several that were more crucial to southern security than the right to maintain a civil suit in a federal court." *Id.*

62. *Scott,* 60 U.S. at 423.

63. *Id.* at 404.

64. *Id.* at 403.

65. Taney had privately expressed a similar view of the political community while serving as United States Attorney General in 1832. Taney stated:

> The African race has never been regarded as a portion of the people of this country and have never been considered as members of the body politic. In our most solemn and public acts where we speak of our people or our citizens they are never intended to be included and this is so well understood that it has not been deemed necessary to qualify general principles for stipulations made in general terms in cases where it is evident they were not intended to be embraced.

HOPKINS, *supra* note 19, at 100.

66. *Scott,* 60 U.S. at 404.

67. *Id.* at 416.

68. *Id.* at 415. After offering the denial of voting rights as evidence that blacks were not citizens, Taney turned around to say that, if states granted blacks voting rights, that would not make them citizens. *See id.* at 422. Taney also noted, without explanation, that

Having determined that several states denied blacks the rights of citizenship, it followed for Taney that the states did not intend to grant them constitutional rights under the national government.[69] Blacks were "not even in the minds of the framers" when they were defining constitutional rights, he insisted.[70] It made no difference to Taney whether blacks were "emancipated or not." Free blacks "remained subject to their [white] authority" as much as slaves.[71] Along with slaves, free blacks were the objects of "the deepest degradation," Taney said.[72] In this way, Taney concluded that blacks had no constitutional rights whatsoever.

Operating in the same historical arena, Justice Curtis developed a radically different conception of American citizenship. To begin with, Curtis defined the issue before the Court as "whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States."[73] His affirmative answer was based largely on an historical inquiry into who qualified for citizenship when the Constitution was adopted. Both the question and the answer responded directly to Taney's intentionalism. Curtis indicated some sensitivity to other approaches,[74] but history was useful to him because of the evidence he was able to adduce.

Before the Federal Constitution was adopted, Curtis pointed out, five states recognized blacks as citizens—New Hampshire, Massachusetts, New York, New Jersey, and North Carolina.[75] Holding the view that the right to vote was "decisive evidence of citizenship," Curtis also noted that free blacks were eligible to vote in these states. Blacks who "had the other necessary qualifications," Curtis said, "possessed the franchise of electors on equal terms with other citizens."[76]

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certain groups (e.g., women and minors) qualified for citizenship without having voting rights. *See id.*

69. *See id.* at 416.

70. *Id.* at 412.

71. FEHRENBACHER, *supra* note 3, at 343. This was "one of the fundamental assumptions underlying Taney's argument." *Id.* at 405. In Taney's view, granting free blacks rights of citizenship would necessarily undermine the system of slavery.

72. *Scott*, 60 U.S. at 409.

73. *Id.* at 571 (Curtis, J., dissenting).

74. As Curtis said, this was "[o]ne mode of approaching this question." *Id.* at 572.

75. As authority for this point, Curtis cited the North Carolina Supreme Court and the state constitutions of the other four states. *See id.* at 573-74.

76. *Id.* at 573. He noted, for example, that "color or descent" was not a qualification for the franchise in New Hampshire, and that New York, "making no discrimination between free colored persons and others," extended voting rights to all male inhabitants. *Id.* at 574. Curtis quoted the North Carolina Supreme Court to show that, in that state, "free persons, without regard to color, claimed and exercised the franchise." *Id.* at 573-74.

Curtis linked this historical record to the Federal Constitution through Article II, which refers to "a Citizen of the United States, at the time of the Adoption of the Constitution."[77] Curtis interpreted this language to mean that the Constitution "necessarily refer[red] to citizenship under the Government which existed prior to and at the time of such adoption."[78] Looking to the nature of that government as "a confederacy of the several states," Curtis concluded that the "citizens of the several States were citizens of the United States under the Confederation."[79] It followed for Curtis that blacks who were citizens in the five states were also U.S. citizens at the time of the adoption of the Constitution. According to Curtis's logic, they retained their standing as citizens unless the Constitution expressly divested them of their citizenship. "I can find nothing in the Constitution," Curtis stated, "which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption."[80]

Significantly, Curtis used the evidence of black citizenship in the five states to argue that blacks were members of the political community that formed the national government. He said, "[I]t is not true, in point of fact, that the Constitution was made exclusively by the white race."[81] Blacks had "the power to act" on ratification in the five states, and they were "included in the body of 'the people of the United States,'" Curtis said. "It would be strange," the Justice added, "if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established."[82] Thus, by their action of consent, blacks would be expected to reap the benefits as members of the political community they helped to create.

Curtis contested Taney's historical account on various grounds. Curtis denied the relevance of the general state of public opinion in light of several state constitutions that granted blacks the right to vote.[83] He also questioned the conclusions Taney had drawn from public opinion during the founding. Of the authors of the Declaration

77. U.S. CONST. art. II, § 1, cl. 5.

78. *Scott*, 60 U.S. at 572 (Curtis, J., dissenting).

79. Curtis further explained that the Confederation was a government of limited powers, with no delegated power over citizenship. *See id.*

80. *Id.* at 576.

81. *Id.* at 582.

82. *Id.* at 576.

83. *See id.* at 575.

of Independence, Curtis said that "it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts."[84] Curtis produced persuasive evidence from the debates over the Articles of Confederation. The Articles provided that "the free inhabitants of each of the States, paupers, vagabonds, and fugitives from justice, excepted, should be entitled to all the privileges and immunities of free citizens in the several States."[85] Taney had argued that the phrase "'free inhabitants' . . . did not include the African race, whether free or not."[86] Curtis explained that the delegates explicitly rejected a proposal to amend the language to say "free white inhabitants."[87] In a nutshell, Curtis tried to distance the political documents of the founding from the state of opinion in that period.

There were two main limiting factors in Curtis's theory of citizenship. First, he rejected the idea that all native-born free persons were automatically U.S. citizens.[88] In his judgment, it was "left to each State to determine what free persons, born within its limits, shall be citizens of such State, and *thereby* be citizens of the United States."[89] In other words, for Curtis, U.S. citizenship depended upon state citizenship. To reach that conclusion, Curtis dismissed the idea that the text of the Constitution identified which native-born persons were U.S. citizens,[90] and he contended that Congress was not empowered to confer U.S. citizenship on native-born persons.[91]

Curtis's scheme led to some curious results. For one thing, a native-born person's claim to U.S. citizenship was conclusively determined by his state of birth.[92] Thus, for example, a black person born in Alabama in 1857 could not become a U.S. citizen after moving to Massachusetts (nor could a white person born in Alabama who did not qualify for citizenship under that state's law).[93] Then, too, nothing

84. *Id.*
85. *Id.* at 418 (Taney, C.J.).
86. *Id.*
87. *Id.* at 575 (Curtis, J., dissenting).
88. *Id.* at 577-82.
89. *Id.* at 577.
90. *Id.*
91. Among other things, Curtis noted that the power to naturalize aliens was expressly granted, implying the absence of any congressional power to make native-born persons U.S. citizens. *See id.* at 579.
92. Curtis suggested that actual cases be evaluated by applying "principles of good faith." *Id.* at 586. This hints at some equitable allowances, but Curtis did not clarify this. *Id.*
93. *Id.*

in the Federal Constitution, in Curtis's view, prevented every state from disqualifying free blacks from citizenship. Left in the hands of the states, the prospects for blacks were dim in 1857. Slave states showed no inclination to grant citizenship to blacks, and, by then, most free states which recognized blacks as citizens denied them various rights.[94] Of the five states Curtis had cited in his argument, at least three had withdrawn rights from blacks since the Constitution was adopted. As the Justice noted, North Carolina and New Jersey no longer permitted blacks the vote, and New York imposed different voting qualifications for blacks than for whites.[95] While Curtis expressed concern over congressional power to determine who qualified for citizenship because the national legislature could "create privileged classes within the States,"[96] he seemed oblivious to the consequences of the states doing that.

The second limiting factor in Curtis's theory had to do with the authority of the states to define the rights of black citizens. The Justice began with the idea that the states were responsible for determining "[w]hat civil rights shall be enjoyed by its citizens," as well as "whether all shall enjoy the same."[97] In Curtis's view, a state also had substantial authority to determine what rights a citizen from another state could claim within its borders. As he construed the Privileges and Immunities Clause, a state's discriminatory allocation of rights among its own citizens applied against out-of-state citizens, who, "in common with the native-born citizens of that State, must have the qualifications prescribed by [state] law for enjoyment of such privileges."[98] Curtis suggested that state definitions were controlling for rights such as voting, holding office, conveying property, or transacting business.[99] If a state granted these rights to its citizens without qualification, then out-of-state citizens could also claim those rights in that state.[100] On the other hand, if, for example, a state stipulated that only whites possessed a particular right, then citizens from other states had to be white to exercise that right in that state.[101] In short, Curtis

94. KETTNER, *supra* note 40, at 314-23.

95. *See Scott*, 60 U.S. at 573-74 (Curtis, J., dissenting).

96. *Id.* at 577.

97. *Id.* at 583.

98. *Id.* In this, Justice Curtis followed the prevailing antebellum interpretation. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 35 (New York, William Kent, 7th ed. 1851).

99. *Scott*, 60 U.S. at 583 (Curtis, J., dissenting).

100. *Id.* at 584.

101. *Id.* at 583.

deferred to the states to define who qualified for citizenship and what rights citizens possessed.

Based on the limitations of Curtis's analysis, modern scholars have reached the following conclusions: Curtis's arguments on citizenship were "racially conservative and of limited scope," seemingly "enlightened" only in comparison with Taney's opinion;[102] Curtis "defended a form of citizenship that was, in substance, largely hollow";[103] the Justice's opinion "reflected a vision of comity that was equally applicable to both proslavery and antislavery decisions by the state and federal governments";[104] his interpretation of the Privileges and Immunities Clause was "arguably less liberal" than Taney's.[105] These assessments underestimate the significance of other features of Curtis's theory of citizenship.

For one thing, Curtis explicitly rejected the existence of a federal constitutional requirement grounding citizenship in racial distinction. By his account, nothing in the Constitution excluded blacks from citizenship. "[C]olor," he argued, "was not a necessary qualification of citizenship" for the Framers,[106] and he bolstered that conclusion by citing actions taken by the federal government since the founding. For instance, Curtis pointed to several treaties which had granted citizenship to "large bodies of Mexican and North American Indians as well as free colored inhabitants of Louisiana."[107] The Justice, applying the legal doctrine of *jus soli*, in which citizenship is acquired by birthplace, dismissed the alternative of *jus sanquinis*, by which citizenship is acquired by descent.[108] That cut to the heart of the matter, as "African descent" did not disqualify blacks from U.S. citizenship, to Curtis's way of thinking.[109]

Curtis's mode of analysis evinced a concern for establishing foundational principles. As the Justice read history to construct a constitutional rule of citizenship without any race-based distinction, he made a special point to insulate the question of whether blacks could qualify for citizenship from the actions taken by the states after the Constitution was adopted. Of the retrogressive changes made by some states,

102. FEHRENBACHER, *supra* note 3, at 407.

103. WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 25 (1996).

104. Maltz, *supra* note 19, at 1996.

105. Meister, *supra* note 19, at 238.

106. *Scott*, 60 U.S. at 587 (Curtis, J., dissenting).

107. *Id.*

108. *Id. at* 576-77.

109. *See id.* at 571.

he said, they "can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed; and colored in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons."[110] In Curtis's view, such changes were inconsequential to the question at hand and to the overall principle he articulated. Whether blacks could qualify for U.S. citizenship was not subject to ongoing determination. By fixing the time for determination as the particular historical moment when the Constitution was adopted, Curtis bootstrapped the laws of the most progressive states at that time into constitutional principle.

One cannot discount the significance of a statement from a member of the highest court that blacks were members of the American political community. In his opinion, Taney, denying that blacks were members of that political community,[111] tapped into contemporary racist assessments that blacks were incapable of reason and independent thinking.[112] By implication, Curtis repudiated this rationale for excluding blacks from political participation. By suggesting that blacks voted on ratifying the Constitution, Curtis placed blacks at this key moment in American constitutional history—sharing power with whites in forming the new government.

Seen in context, Curtis's approach to the rights of citizenship represents an effort to secure the middle ground in response to Chief Justice Taney. In 1857, few whites subscribed to the view that blacks should have equal rights in all respects. Taney exploited that fact by suggesting that blacks, to be citizens, must possess "all" rights of citizenship.[113] Justice Curtis countered with an open-ended test of the rights and qualifications of citizenship. He said that "citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error."[114]

It is easy to dismiss Curtis's approach by today's standards, when a fair definition of citizenship incorporates some combination of legal, political, civil, economic, and social rights. If his conception of citizen-

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110. *Id.* at 574.

111. *See id.* at 404 (Taney, C.J.).

112. *See* Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. Am. Hist. 435, 444 (1994); *see also* Pendleton v. State, 6 Ark. 509, 512 (1846) (asserting that the Constitution "was the work of the white race" and that blacks differed from whites in intellectual capacity).

113. *Scott*, 60 U.S. at 403.

114. *Id.* at 583 (Curtis, J., dissenting).

ship is subject to criticism for its apparent emptiness, it had the virtue of flexibility. For example, had voting rights been the sine qua non of citizenship, several groups of persons (including free blacks in most states and women) would have been disqualified from citizenship. In this period, whites supporting black suffrage remained a minority. Even after the Civil War, the Fourteenth Amendment accorded blacks equality in civil rights without mandating equality in voting rights.[115] Thus, Curtis declared the right to vote "decisive evidence of citizenship" and one of its "chiefest attributes," yet he did not "think the enjoyment of the elective franchise essential to citizenship."[116]

The immediate context of *Dred Scott* suggested at least one right enjoyed by free black citizens under Curtis's theory: access to the federal courts. This opened a range of possibilities, although Curtis did not spell them out. At a minimum, blacks who were citizens of states could avail themselves of the federal courts to protect their rights in diversity cases.[117] By itself, this right to seek private law remedies was potentially significant. For example, having the right to enforce contracts in federal court could open opportunities to participate in the market, one measure of freedom in this day.[118] Moreover, under the doctrine of *Swift v. Tyson*,[119] federal courts sitting in diversity cases were free to determine the substantive rule of law, contrary to the interpretation of state courts.[120] Besides diversity cases, there is no reason to suppose, from Curtis's opinion, any obstacle blocking black citizens from litigating whenever federal court jurisdiction permitted.

115. *See* JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 5 (1990). As the war drew to a close, the most generous proposal on voting rights agreeable to Congress's Reconstruction Committee was to grant the franchise to those blacks who had performed military service. *See* HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR 296 (1969).

116. *Scott*, 60 U.S. at 581 (Curtis, J., dissenting).

117. Curtis interpreted pleading rules to favor plaintiffs. He placed the burden of proof squarely on the defendant who claimed that the court lacked jurisdiction. *See id.* at 567. Curtis insisted that the defendant would have to plead with "utmost certainty and precision," *id.* at 569, and that the courts would not draw inferences beyond the pleadings, *see id.* at 567.

118. *See* Foner, *supra* note 112, at 446.

119. 41 U.S. (16 Pet.) 1 (1842).

120. This was accomplished by an artful interpretation of the Judiciary Act of 1789, which provided that "the laws of the several states" shall be "regarded as rules of decision" in common law trials in federal courts. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73 (1789). The Supreme Court interpreted "laws of the several states" to mean laws dealing with local matters, not "questions of general commercial law." *Swift*, 41 U.S. at 19. After the Civil War, the rule in *Swift* produced anomalous results, with litigants shopping for the forum (state or federal) which best served their interests. The Supreme Court overturned *Swift* in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

They could raise issues "arising under" the Constitution,[121] bringing lawsuits under the Privileges and Immunities Clause, among other things.[122]

Blacks having access to the federal courts created the potential for throwing a constitutional wrench in the system of slavery, in ways Curtis may not have intended. For instance, the Fugitive Slave Act of 1850 established summary hearing procedures for the rendition of fugitive slaves.[123] Under the Act, the slaveowner was entitled to a hearing at which the fugitive slave was expressly prohibited from testifying.[124] However, a black claiming citizenship could have demanded a jury trial and asserted other constitutional rights to override the Act's procedures. While Curtis did not intimate any position on this issue in his dissent,[125] Dred Scott's attorneys had privately acknowledged the possibility.[126]

By looking to the states as the locus of authority for defining and qualifying the rights of their citizens, Curtis did not relieve the federal courts of responsibility in determining the privileges and immunities of citizenship. He thought that the Privileges and Immunities Clause raised particularly difficult issues which were appropriately resolved on a case-by-case basis in the courts. Writing for the Supreme Court in the 1855 Term (while *Dred Scott* was pending), Justice Curtis declined to offer an abstract definition of privileges in that constitutional provision.[127] As he suggested, "It is safer, and more in accordance

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121. U.S. CONST. art. III, § 1.

122. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1641, at 508 (1833).

123. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850). The statute stated: "In no trial or hearing under this Act shall the testimony of such alleged fugitive be admitted as evidence." *Id.*

124. *Id.*

125. In 1850, Curtis defended the Fugitive Slave Act as constitutional. Characterizing the "sole purpose of this law" as extradition, he articulated the arguably naive assumption that "justice would be done under the laws of the State to which the fugitive should be restored." Benjamin Robbins Curtis, *Opinion of Benjamin R. Curtis*, BOSTON DAILY ADVERTISER, Nov. 19, 1850, at 2. He later acknowledged that the Act's provisions were excessive. In 1861, Curtis called for softening of the "harsh" provisions of the Fugitive Slave Act. *See* Benjamin R. Curtis, Speech (Feb. 5, 1861), *in* MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 345.

126. *See* FEHRENBACHER, *supra* note 3, at 278-79.

127. Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1856). In this case, Curtis held that there was no violation of the Privileges and Immunities Clause when Louisiana denied a nonresident widow rights in community property. *Id.* Curtis construed the pertinent state law to show that Louisiana did not discriminate between in-state and out-of-state citizens. *See id.* at 592-93. In his opinion, Curtis ruled that the community property rights attached by the state law of contracts, "wholly irrespective of the citizenship of the parties to those contracts." *Id.* at 593.

with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein."[128] One can imagine Curtis having black citizenship in mind when he added, "[E]specially is this true, when we are dealing with so broad a provision, involving matters of great delicacy and importance, but which are of such a character, that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief."[129]

With the federal courts defining and enforcing privileges and immunities on a case-by-case basis, Curtis laid the foundation for future development. Federal case law had not settled the meaning and scope of the Privileges and Immunities Clause.[130] Curtis did not clarify how far he was willing to scrutinize state law under this provision.[131] Nor did he identify what privileges were covered, saying only they "belong to citizenship."[132] However, he gestured to the Privileges and Immunities Clause as the source for protecting rights at the center of debate such as the right to travel.[133] Curtis recounted the controversy surrounding the admission of Missouri as a state. When the proposed Missouri Constitution included a provision to "prevent free negroes and mulattoes from coming to and settling in the State," Congress ad-

128. *Id.*

129. *Id.*

130. In 1823, Justice Bushrod Washington interpreted the Privileges and Immunities Clause to protect only those rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230). Justice Washington suggested several categories of such rights: "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." *Id.* He also included the "right of a citizen of one state to pass through, or reside in any other state," along with the right to sue and to own property. *Id.* at 551-52. Justice Washington decided that the right in question, gathering oysters, was not protected by the Privileges and Immunities Clause. *See id.*; *cf.* Smith v. Maryland, 59 U.S. (18 How.) 71, 75 (1855) (per Curtis, J.) (finding the question of whether the "liberty of taking oysters" was protected under the Privileges and Immunities Clause not necessary for decision where state law prohibited the use of various devices to catch oysters in order to protect fisheries). *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY 22, 31-32 (1977). *See also* John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1398 (1992).

131. Justice Curtis evidently contemplated that if a state restricted citizenship to whites but did not clearly restrict certain rights to whites only, black citizens from other states could claim those rights there. The Justice stated: "If one of the States will not deny to any of its citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State." *Scott*, 60 U.S. at 584 (Curtis, J., dissenting); *see* Maltz, *supra* note 19, at 2011.

132. *Scott*, 60 U.S. at 583 (Curtis, J., dissenting).

133. *Id.* at 588.

mitted Missouri on the "fundamental condition" that its constitution never be construed to deprive any citizen "of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States."[134] Curtis was also aware that the rights of free blacks had been put into question when Southern states detained free black seamen while their ships were in port.[135] Interestingly, Curtis, while a Boston lawyer, joined a petition asking Congress to "render effectual in their behalf the privileges of citizenship secured by the constitution."[136]

When taken as a snapshot in 1857, Curtis's theory of citizenship was limiting—states determined whether blacks were citizens, and free black citizens from one state were subject to discriminatory practices in other states. In an effort to rebut Chief Justice Taney, Curtis walked a tightrope. In essence, he attempted to preserve the federal system of government in which substantial authority resided in the states while marking out a path by which blacks could assert their rights as citizens in the federal courts. The practical difficulty in his scheme mirrored the underlying illogic of a republican government which sanctioned the practice of slavery, and his choice to defer to states reflected the nature of antebellum constitutionalism.

Considered in the long term, Curtis's principles were suggestive. As a fundamental principle of constitutional law, blacks were members of the American political community. At least some free blacks enjoyed access to the federal courts. Along with state authority over qualifications for citizenship, Curtis recognized a potentially expansive role for the federal judiciary in defining and enforcing the rights of citizenship.

II. Congress's Powers, the Territories, and Constitutional Structure

In retrospect, the issue of black citizenship, embodying basic questions of race and political community, appears more consequential than the question of slavery in the territories. Today, it is difficult to capture the intense feelings generated by the territorial question in

134. *Id.*

135. *See* SWISHER, *supra* note 2, at 378-79; James O. Horton, *Weevils in the Wheat: Free Blacks and the Constitution, 1787-1860*, 8 THIS CONSTITUTION 4 (1985). Federal courts determined that these laws were unconstitutional, but the practice continued. *See* Elkison v. Deliesseline, 8 F. Cas. 493, 495-96 (C.C.D.S.C. 1823) (No. 4,366) (declaring unconstitutional South Carolina Seamen's Act under the Commerce Clause and treaty).

136. Petition to Congress (1842) (on file with the Massachusetts Historical Society).

the decade before the Civil War. Curtis described the country's mood: It seemed to many "not only the paramount, but almost the only, national question worthy of any consideration . . . of such stupendous magnitude that the national existence must be staked on it."[137] This issue became important due to the subjective beliefs, on both sides, that "slavery required expansion to survive" and that limiting slavery to existing slave states "would kill it."[138] With the Republican conviction that the survival of free society also depended upon expansion, the territories became the symbolic battleground for the ideological struggle between the sections.[139]

All of this was reduced to a deceptively simple constitutional issue concerning the scope of Congress's powers, which became, in the words of one historian, the "narrow channel" through which the whole controversy over slavery passed.[140] Though the question of slavery in the territories had been present since the founding, it was not until the 1840s that the territorial question became thoroughly constitutionalized.[141] Without debating the constitutional question, the First Congress adopted the Northwest Ordinance, which disal-

137. MEMOIR OF BENJAMIN ROBBINS CURTIS, *supra* note 15, at 343.

138. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 311-12 (1970). As David Donald suggested, the reasons for this belief are "obscure," but "virtually every Southern spokesman believed that slavery must expand or die." DAVID DONALD, LIBERTY AND UNION 57 (1978). Historians have identified various possible factors for this view, including the idea that Southern agriculture wasted the soil and required continuing outward movement. *See id.* at 56. In any event, Northerners accepted the same view. In his debates with Senator Stephen A. Douglas, Lincoln stated: "I believe if we could arrest the spread [of slavery], and place it where Washington, and Jefferson, and Madison placed it, it *would* be in the course of ultimate extinction, and the public mind *would*, as for eighty years past, believe that it was in the course of ultimate extinction." 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 15, at 18. Senator Charles Sumner of Massachusetts remarked that slavery confined to the existing slave states would die "as a poisoned rat dies of rage in its hole." DONALD, *supra* at 58.

139. *See* FONER, *supra* note 138, at 311-12; Arthur Bestor, *The American Civil War as a Constitutional Crisis, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 230 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

140. As Arthur Bestor said:

> Thanks to the structure of the American constitutional system itself, the abstruse issue of slavery in the territories was required to carry the burden of well-nigh all the emotional drives, well-nigh all the political and economic tensions, and well-nigh all the moral perplexities that resulted from the existence in the United States of an archaic system of labor and an intolerable policy of racial subjugation.

Bestor, *supra* note 139, at 234.

141. *See* FEHRENBACHER, *supra* note 3, at 136-37, 146.

lowed slavery in the territory north of the Ohio River.[142] The Missouri Compromise of 1820 banned slavery "forever" from the area of the Louisiana Purchase north of the 36° 30' parallel, with the exception of Missouri, which was admitted to the Union as a slave state.[143] For territories south of that line, Congress permitted settlers to determine the matter for themselves.[144] Constitutional concerns over congressional power, though raised by some legislators, "never became a matter of critical importance."[145]

With the acquisition of over one million square miles in new territory from 1845 to 1853, Congress confronted the territorial issue anew.[146] Some, like James Buchanan, advocated extending the 36° 30' parallel to the west coast.[147] Instead, political pressures eventually led to the repeal of the Missouri Compromise 36° 30' restriction.[148] With the annexation of Texas and war with Mexico, antislavery thinkers found reason to doubt the soundness of dividing free soil from slave at 36° 30'. In 1846, a Pennsylvania congressman introduced legislation to exclude slavery from territories acquired from Mexico.[149] This proposal, called the Wilmot Proviso, never passed; however, it served to crystallize Southern views on the territories. The opposition, led by Senator John C. Calhoun, relied more extensively on constitutional arguments to deny Congress's power to prohibit slavery in any territory.[150] In the Compromise of 1850, Congress allowed slavery in land

142. *See id.* at 80-81, 83. The Congress operating under the Articles of Confederation adopted the Northwest Ordinance originally, and the First Congress ratified it. The territory included the area of the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. *Id.*

143. Act of March 6, 1820, ch. 22, § 8, 3 Stat. 545, 548 (1820); *see* DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 55 (1976). The first crisis over Missouri concerned the admission of Missouri as a state and the organization of new territory in the area of the Arkansas River. *See* FEHRENBACHER, *supra* note 3, at 101. A New York congressman tried to restrict slavery in the state of Missouri by prohibiting "the further introduction of slavery" there. *Id.* at 103. Following a series of legislative maneuvers, Congress admitted Missouri as a slave state, admitted Maine as a free state, and adopted the 36° 30' restriction. *See id.* at 105; *see also* GLOVER MOORE, THE MISSOURI CONTROVERSY 1819-1821, at 99-118 (1953).

144. *See* FEHRENBACHER, *supra* note 3, at 137-38.

145. *Id.* at 109.

146. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 129 (1982).

147. Buchanan served as Secretary of State for President James Polk. *See* HYMAN & WIECEK, *supra* note 146, at 130.

148. *See* Bestor, *supra* note 139, at 224; DONALD, *supra* note 138, at 140.

149. The proposal was racist, and designed to keep the territories white only. *See* HYMAN & WIECEK, *supra* note 146, at 127-29.

150. Senator John C. Calhoun argued that the territories were the common property of the states and that Congress acted as the agent for the states. Further, he insisted that the

taken from Mexico north of the 36° 30' line.[151] Applying the principle of territorial sovereignty (i.e., let the settlers decide), the Kansas-Nebraska Act of 1854 repealed the Missouri Compromise restriction. This Act allowed slavery in some of the Louisiana Purchase territories north of the 36° 30' parallel, namely Kansas and Nebraska.[152]

When John Sanford's attorneys appeared before the Supreme Court in the *Dred Scott* case, they recast their arguments as an explicit constitutional challenge to Congress's powers.[153] The principal constitutional provision bearing on this issue was the Territories Clause, which provided that "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."[154] As the historian Arthur Bestor said, while this constitutional directive "seems clear enough," it left some room for debate.[155] For instance, there were divergent views over whether the national legislature had powers to govern the territories comparable to a state's police powers[156] or whether Congress was merely a caretaker preparing territories for admission as states.[157]

Against this background, Justice Curtis and Chief Justice Taney offered competing constitutional arguments on the scope of Congress's powers. Taney had a difficult position to establish. This may account for scholars' consensus that his discussion was "tortuous,"[158] "rambling,"[159] and "labored."[160] In the end, it is difficult to discern

government had the constitutional obligation to protect the property rights of slaveowners in the territories. *See id.* at 136.

151. Act of Sept. 9, 1850, ch. 49, 9 Stat. 446 (1850); Act of Sept. 9, 1850, ch. 51, 9 Stat. 453 (1850). Congress opened the New Mexico and Utah territories to slavery, admitted California as a free state, abolished the slave trade in the District of Columbia, and enacted the Fugitive Slave bill. *See* Act of Sept. 9, 1850, ch. 51, 9 Stat. 453 (1850); Act of Sept. 20, 1850, ch. 63, 9 Stat. 467 (1850); Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850).

152. Act of May 30, 1854, ch. 59, 10 Stat. 277 (1854). Slavery was still excluded from the Minnesota Territory and the northern territories extending to the Pacific Northwest. *See* FEHRENBACHER, *supra* note 3, at 185-86

153. *See* FEHRENBACHER, *supra* note 3, at 288. Their position was significant not so much for attacking legislation which had been partially repealed, but rather for putting into question the principle of congressional authority over the territories.

154. U.S. CONST. art. IV, § 3.

155. *See* Bestor, *supra* note 139, at 229. In his First Inaugural Address, President Lincoln said that the Constitution did not "expressly" answer the question whether Congress may prohibit, or must permit, slavery in the territories. *See* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 15, at 267.

156. *See* Bestor, *supra* note 139, at 229.

157. *See id.*

158. HYMAN & WIECEK, *supra* note 146, at 184.

159. FEHRENBACHER, *supra* note 3, at 367.

160. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 175 (1988).

from Taney's opinion his precise reasons for ruling the Missouri Compromise restriction unconstitutional.[161] Nevertheless, his argument can be reduced to some basic points which furnish a useful background to Curtis's dissent.

To begin, Taney gave the Territories Clause a constrictive textual interpretation. He claimed that its reference to "the Territory" applied only to land possessed or claimed by the national government in 1789.[162] The reference to "other Property," in Taney's view, meant personalty, not land.[163] Based on this reading, whatever powers were granted did not pertain to the Louisiana Purchase, the area in dispute in *Dred Scott*.[164] Taney also sought to limit the meaning of the phrase "rules and regulations." The Chief Justice construed those words to refer to "particular specified power" (e.g., "to establish an uniform rule of naturalization") in contrast with "supreme power of legislation" (e.g., authority to "exercise exclusive legislation" over the capital district).[165]

Having rendered the Territories Clause practically meaningless as a lasting source of authority, Taney closed off another possible avenue for congressional power over the territories, that of broad implied powers. Starting from the general proposition that the powers of the national government were "enumerated and restricted,"[166] Taney denied Congress implied powers to prohibit slavery in the territories, though, by roundabout logic, he conceded that Congress had implied powers to organize territorial governments.[167] Sanford's attorneys had advanced a similar argument: Congress's power to "institute temporary governments" was not express but implied; the power to regulate slavery in the territories was not implied because it "can not be necessary or proper to the institution of territorial government."[168]

161. *See* FEHRENBACHER, *supra* note 3, at 384.

162. *See Scott*, 60 U.S. at 432. Taney defined "the territory of the United States" to include the territory "then in existence" when the Constitution was adopted and "known or claimed as the territory of the United States," which included land to be ceded by North Carolina and Georgia. *Id.* at 436.

163. *Id.* at 437.

164. *See* FEHRENBACHER, *supra* note 3, at 370.

165. *Scott*, 60 U.S. at 437, 440.

166. They were "delegated," "enumerated and restricted," Taney emphasized. *Id.* at 446, 448. He insisted that there was "no express regulation in the Constitution defining the power which the general government may exercise over the person or property of a citizen in a Territory." *Id.* at 447.

167. *See id.* at 448. Taney said that these organizational powers were "undoubtedly necessary." *Id.*

168. Representing Sanford, Senator Henry S. Geyer did not deny that Congress had the power "to institute municipal governments for the territory within the United States."

Taney located an implied power in Congress to acquire territory from the constitutional provision on admission of new states, which in turn gave Congress implied, but limited, powers to govern the territories.[169] Though Taney's argument is not perfectly clear, he apparently derived limits to Congress's governing powers from his conception of the limited purpose of territorial acquisition, to prepare the territories for admission as states.[170]

Taney supplemented these ideas with a revisionist history of the Northwest Ordinance. The historic First Congress banned slavery in the Northwest Territory when it re-enacted the Ordinance, originally adopted by the Confederation Congress. Taney minimized the significance of this action. Construing the Confederation Congress "as little more than a congress of ambassadors, authorized to represent separate nations," the Chief Justice considered its original adoption as a legitimate exercise of the collective powers of the states.[171] Dismissing the re-enactment, Taney suggested that the First Congress regarded the issue "already determined" by the states.[172]

Finally, Taney indicated that the Missouri Compromise infringed upon a slaveowner's property rights protected by the Constitution. Starting with the idea that citizens did not forfeit their constitutional rights in the territories, Taney suggested that express constitutional prohibitions (such as free speech under the First Amendment) apply in the territories. He called these "rights of person."[173] Classifying slaves as property, Taney indicated that "rights of property" were "placed on the same ground by the fifth amendment" with these rights of person.[174] He pointed to the Due Process Clause, which provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law."[175] Taney suggested that the Missouri Compromise contravened the Due Process Clause when he stated:

Case for Defendant in Error at 10, 12, *Scott*, 60 U.S. 393, *in* 1 United States Supreme Court File Copies of Briefs (1856) [hereinafter File Copies of Briefs]. He argued that "the power is raised only by implication." *Id.* at 10.

169. *See Scott*, 60 U.S. at 448. "New States may be admitted by the Congress into this Union." U.S. CONST. art. IV, § 3, cl. 1.

170. On this point, Taney restated the Southern common property doctrine: Congress served as "trustee" with territories held "for their [(the people of the several States')] common and equal benefit." *Scott*, 60 U.S. at 448.

171. *Id.* at 434.

172. *Id.* at 439.

173. *Id.* at 450.

174. *Id.*

175. U.S. CONST. amend. V.

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because 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 name of due process of law.[176]

As Don Fehrenbacher suggested, Taney never did "specifically declare the Missouri Compromise Restriction to be a violation of the Fifth Amendment,"[177] and the precise grounds of his decision were unclear.[178] The result was unmistakable, however. The Chief Justice invalidated the Missouri Compromise restriction.[179] Under Taney's decision, every slaveholder carried the legal protections of his slave state with him when traveling in the territories, and Congress was powerless to designate any territory as free. In effect, Chief Justice Taney nationalized slavery throughout the territories.[180]

Justice Curtis voted to sustain the Missouri Compromise in the belief that Congress had plenary power over slavery in the territories. He argued that the Territories Clause expressly granted Congress power to govern the territories. In his view, Congress had discretion to decide how to govern the territories; with minimal judicial scrutiny, legislation regulating slavery in the territories raised political questions to be resolved by the electoral process, not the Court.[181]

Curtis responded directly to Taney with a contrary textual interpretation[182] and a different historical account.[183] Underlying the dis-

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176. *Scott*, 60 U.S. at 449-50.

177. FEHRENBACHER, *supra* note 3, at 382.

178. *See Scott*, 60 U.S. at 450.

179. *See id.* at 452.

180. Regarding Dred Scott's stay in the free state of Illinois, Taney essentially ruled the Missouri Supreme Court's decision binding, so that the laws of the slave state governed. *See id.* at 452-54. For the intricacies on this point, see FEHRENBACHER, *supra* note 3, at 382-83. Justice Nelson suggested that the question remained open whether free states could block slaveowners in transit through free states from taking their slaves with them. *See Scott*, 60 U.S. at 468 (Nelson, J.).

181. *Scott*, 60 U.S. at 604-28 (Curtis, J., dissenting).

182. Taney had said that the Constitution "usually employed" the words "rules and regulations" to refer to "some particular specified power which it means to confer on the Government, and not, as we have seen, when granting general powers of legislation." *Id.* at 440 (Taney, C.J.). Curtis equated "rules and regulations" with laws, and he pointed to the "great system of municipal laws" enacted under the Commerce Clause, which granted Congress power to "regulate" commerce. *Id.* at 614 (Curtis, J., dissenting). Also, Curtis suggested that "the territory" was not limited to land contemplated in 1789 but also included "other similar subjects which might afterwards be acquired." *See id.* at 611.

183. While Taney suggested that the Northwest Ordinance exceeded Congress's powers, Curtis explained that the Framers, in the belief that the Confederation Congress lacked the power to enact the Ordinance, specifically intended to ensure that the new Congress had powers to govern the territories. *Id.* at 608, 617.

senter's argument was a structural method of constitutional interpretation. Charles L. Black, Jr. defined the structural approach as a "method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."[184] By its nature, structural inference is an abstract method of constitutional reasoning with relationships (e.g., between citizens and their elected representatives or between the federal government and the states) deduced from structures like the "national polity," the "federal union," or "the economic structure of nationhood."[185]

Black identified a number of cases in which the driving force behind the decision was structure, rather than any particular textual provision.[186] *McCulloch v. Maryland*[187] provides a useful example.[188] That case involved Maryland's tax on notes issued by the national bank chartered by Congress. Recognizing broad implied powers in the national legislature, Chief Justice John Marshall upheld Congress's power to incorporate a bank.[189] He relied chiefly on the structures implicit in the "whole instrument" (the "vast mass of incidental powers" which "must" exist) to justify Congress's discretion to adopt "appropriate" means to achieve "legitimate" ends.[190] According to Black, Marshall's discussion of the Necessary and Proper Clause[191] was secondary, prompted by Maryland's restrictive interpretation that Congress's implied powers must be "absolutely necessary."[192] Likewise, in Black's view, Marshall invalidated the state tax on the na-

184. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 8 (1969); *see* PHILIP BOBBITT, CONSTITUTIONAL FATE 74-92 (1982); Vince Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 176, 176-84 (1970); J. Woodford Howard, Jr., *Constitutional Power to Enforce Individual Rights: The Legacy of* McCulloch v. Maryland, 19 THIS CONSTITUTION 5 (1991).

185. BLACK, *supra* note 184, at 10, 20-21. Blasi suggested that Black seemed to use the term "structures and relationships" as a "generic concept rather than two separate phenomena." Blasi, *supra* note 184, at 182.

186. *See* BLACK, *supra* note 184, at 8-31; BOBBITT, *supra* note 184, at 80.

187. 17 U.S. (4 Wheat.) 316 (1819).

188. Philip Bobbitt called *McCulloch* the "most important structural case" in American constitutional law. BOBBITT, *supra* note 184, at 75.

189. *See McCulloch*, 17 U.S. at 424.

190. *Id.* at 406, 421.

191. The Necessary and Proper Clause provides in pertinent part that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

192. *McCulloch*, 17 U.S. at 419; *see also* BLACK, *supra* note 184, at 14; Howard, *supra* note 184, at 7.

tional bank based on his overall view of federal structure, rather than the specific text of the Supremacy Clause.[193]

In *Dred Scott*, Curtis resorted to constitutional structure to counter Taney's limited and arbitrary[194] reading of the Territories Clause. Like Marshall, Curtis looked to structure before examining the particular text involved.[195] As the Justice said, "[T]here is very strong reason to believe, before we examine the Constitution itself," in "the necessity for a competent grant of power to hold, dispose of, and govern territory."[196] The "structural facts"[197] underlying Curtis's argument may be variously described. One possibility is to say that Curtis deduced the relationship between Congress and the territories from the structure of an extended republic,[198] and, on that basis, Curtis concluded that the Territories Clause expressly granted Congress the "power of governing" the territories.[199]

Structural inferences often consist of "deceptively simple logical moves"[200] which may appear obvious once extracted from the judicial opinion. Curtis's argument is no exception. The Justice sketched out the image of an extended republic from the character of the nation and from general powers lodged in the national government.[201] In reconstructing his discussion of "the essential qualities and incidents" involving the territories,[202] the starting point can be found in the nation, conceived with the potential to expand beyond its original boundaries. Curtis put it simply: The Framers had hoped that "the United States might be, what they have now become, a great and powerful nation."[203] With that in mind, Curtis suggested that the Framers invested the national government with powers to engage in war and make treaties, "and thus to acquire territory."[204]

193. *See* BLACK, *supra* note 184, at 15.

194. *See Scott*, 60 U.S. at 611 (Curtis, J., dissenting). Curtis, at least, thought Taney arbitrary. "No reason has been suggested," Curtis noted, "why any reluctance should have been found, by framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of cession." *Id.*

195. *See id.*

196. *Id.* at 608.

197. BOBBITT, *supra* note 184, at 79.

198. The Justice did not use the phrase "the extended republic," but that idea captures the essence of his argument.

199. *Scott*, 60 U.S. at 613 (Curtis, J., dissenting).

200. BOBBITT, *supra* note 184, at 74.

201. *See Scott*, 60 U.S. at 611 (Curtis, J., dissenting); BOBBITT, *supra* note 184, at 80.

202. *Scott*, 60 U.S. at 611 (Curtis, J., dissenting).

203. *Id.*

204. *Id.*

Implicit in Curtis's conception was the relationship between the national legislature and the territories, with Congress having inherent power to make laws for the territories.[205] As a basic principle for Curtis, territories required government and "social order" for the protection of property.[206] To that end, Congress was "granted the indispensably necessary power to institute temporary governments, and to legislate for the inhabitants of the territory." That Congress had that power was so obvious, in Curtis's mind, that it was "left to be deduced from the necessity of the case."[207] Curtis indicated that, in the national interests, territorial governance could not be left to the settlers alone.[208] The unspoken assumption behind Curtis's analysis was that, for republican government to take root in territories acquired, Congress must necessarily be charged with directing territorial government.[209]

Curtis's interpretation of the Territories Clause naturally followed these structural inferences. Taney's construction was, in Curtis's opinion, as "inconsistent with the nature and purposes of the instrument, as it is with its language."[210] The Framers designed the Constitution "to continue indefinitely" as a "frame of government for the people of the United States and their posterity."[211] The language of the Territories Clause, Curtis added, was "broad enough to extend throughout the existence of the Government."[212] Along these lines, Curtis exposed the illogic of Taney's position that the Territories Clause did not expressly authorize Congress to govern the territories but that that power could be implied. As Curtis put it, the "necessity" of some power to govern the territory is concededly "so great, that, in the absence of any express grant, it is strong enough to raise an impli-

205. *See id.* Curtis's structural inference is filtered through an assumption that the Framers shared the same view of the extended republic. He found support for his position in the Northwest Ordinance. As Curtis said, it was widely noted in 1787 that the Confederation Congress lacked the power to govern the territories; accordingly, the Framers sought to place this power clearly in the hands of the new Congress. As he put it, "it must have been apparent, both to the framers of the Constitution and the people of the several States, that the Government provided for could not continue, unless the Constitution should confer on the United States the necessary powers to continue it." *Id.* at 606; *see also id.* at 608 (It "could not have escaped the attention of those who framed or adopted the Constitution; and that if it did not escape their attention, it could not fail to be adequately provided for.").

206. *See id.* at 615.

207. *Id.* at 610.

208. *See id.* at 606.

209. *See id.* at 607, 610.

210. *Id.* at 611.

211. *Id.*

212. *Id.*

cation of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that territory."[213]

Having concluded that the Territories Clause "expressly granted" Congress the power to govern the territories,[214] Justice Curtis moved to the critical point of his argument. To justify Congress's authority to regulate slavery in the territories, Curtis focused on the word "needful" in the Territories Clause.[215] For Curtis, that one word essentially marked the constitutional dividing line between legislative and judicial authority. In the Justice's view, the question whether a law was "needful" was inherently legislative,[216] with judicial scrutiny limited to determine whether the law violates an "express" constitutional prohibition.[217] With that exception, it remained with Congress to judge the scope of its own powers.[218] In Curtis's words: "Undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power."[219]

Curtis found confirmation for his interpretation of the scope of Congress's power in a "long line of legislative and executive precedent."[220] Congress's "practical construction," Curtis said, "may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution." He regarded the re-enactment of the Northwest Ordinance as particularly influential—"an assertion by the first Congress of the power of the

213. *Id.* at 609-10. Curtis continued: "[T]hey who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of the language of the Constitution, manifestly intended to relate to the territory, and to convey to Congress some authority concerning it." *Id.* at 610.

214. *See id.* at 613.

215. *Id.* The Territories Clause provides that "[t]he Congress shall have power to . . . make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

216. *See Scott*, 60 U.S. at 616 (Curtis, J., dissenting). As he put it, "[I]t is necessarily left to the legislative discretion to determine whether a law be needful." *Id.*

217. *See id.* at 614.

218. *See id.* at 615. For example, whether Congress could delegate its legislative powers to territorial governments was "one of those questions which depend on the judgment of Congress." *Id.*

219. *See id.* at 614-15. To rebut the idea that slavery "forms an exception" to legislative discretion, Curtis noted that the Territories Clause empowers Congress to make "all" needful rules, and "where the constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all." *Id.* at 615.

220. *Id.* at 619.

United States to prohibit slavery within this part of the territory." Curtis pointed out that fourteen Framers, including James Madison, were members of that Congress.[221] The Justice then recited over a dozen occasions when Congress exercised power to prohibit, or permit, slavery in the territories.[222]

To meet Taney's reference to the Fifth Amendment's Due Process Clause,[223] Curtis essentially argued that slaves were not a form of property protectible under that constitutional provision. Because he considered slavery "contrary to natural right," the Justice regarded slaves as "property only to the extent and under the conditions fixed by" positive law.[224] As he put it, "the rights, powers, and obligations," of slavery "must be defined, protected, and enforced by such laws."[225] Where Congress had prohibited slavery in the territories, there was no such positive law.[226]

On its face, Curtis's analysis was formally neutral: Congress could permit, as well as prohibit, slavery in the territories.[227] Curtis said that the Court should not consider any of three positions then circulating in the public debate: (1) the abolitionist view that Congress is empowered to prohibit, not allow, slavery in the territories (derived from a conception of the "social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural rights"); (2) the doctrine of territorial sovereignty that the settlers, not Congress, should decide (derived from the "right of self-government"); and (3) the Southern view that Congress cannot exclude slavery from the territories without violating the property rights of slaveholding citizens.[228] For Curtis, the Court had no concern with the "weight" of these general considerations "when presented to Congress to influence its action."[229] They "may be justly entitled to guide or control legislative

221. *See id.* at 617.

222. *See id.* at 618-19.

223. *See id.* at 450 (Taney, C.J.).

224. *See id.* at 625 (Curtis, J., dissenting).

225. *Id.*

226. *See id.* at 624. Curtis reinforced his conclusion that chattel slavery was not protected by the Due Process Clause by an another argument. He pointed out that, if Taney was right, it was strange that "no one discovered" that due process violation until 1857. He noted, for example, that if the Missouri Compromise violated due process, then so did the Northwest Ordinance adopted in 1787. *Id.* at 626-27.

227. *See* Maltz, *supra* note 19, at 2006.

228. *See Scott*, 60 U.S. at 620 (Curtis, J., dissenting).

229. *Id.* at 621.

judgment upon what is a needful regulation."[230] In so doing, Curtis affirmed minimal judicial scrutiny over Congress's choice.[231]

Though Curtis's analysis may appear neutral in form, the implications of his arguments were not neutral in effect. Curtis's opinion contained the ingredients which Southerners feared most—a Congress enjoying broad powers and a Court exercising limited judicial scrutiny over legislative discretion. Curtis's reasoning on the territorial issue was the logical follow-up to *McCulloch*, an opinion which greatly disturbed Southerners.[232] In *McCulloch*,[233] Marshall accepted broad discretion in Congress over selection of means.[234] The question of "degree" concerning the "necessity" of a law, Marshall stated, "is to be discussed in another place," namely Congress.[235] For courts "to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[236] To a remarkable degree, Curtis duplicated Marshall's analysis.

Beyond that, Curtis's opinion evinces his concern over the "magnitude and complexity of the interests involved," the deliberative process in the political arena, and the legislative answer in the form of compromise. Indeed, Justice Curtis began his discussion on the territorial question by challenging the Court's authority to decide it, de-

230. *Id.*

231. Curtis questioned whether the Court could "insert" into the Territories Clause "an exception of the exclusion or allowance of slavery, not found therein." *Id.* at 620. "To allow this to be done with the Constitution," he said, "upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations." *Id.*

232. Kent Newmyer said that *McCulloch* was "the last shoot-out between Marshallian and southern constitutionalism." R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition, in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr. eds., 1988) 117, 132; *see* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 1-21 (Gerald Gunther ed., 1969); Howard, *supra* note 184, at 7. Southerners were concerned over the implications of Marshall's opinion in general and for the practice of slavery in particular. Marshall decided that case while Congress confronted the Missouri question in 1819. *See* FEHRENBACHER, *supra* note 3, at 103-04.

233. Marshall based his interpretation of the Necessary and Proper Clause on the accepted operation of the language "needful rules and regulations," justifying territorial government. *McCulloch*, 17 U.S. at 422. Arguing for Scott, Montgomery Blair had directed the Court's attention to *McCulloch*. *See* Argument of Montgomery Blair for Plaintiff in Error at 31, *Scott*, 60 U.S. 393, *in* File Copies of Briefs, *supra* note 168.

234. Marshall said, if the end is legitimate, then "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421.

235. *Id.* at 423.

236. *Id.* at 421, 423.

claring the Court's decision on congressional power not binding, "an exertion of judicial power" which "transcends the limits of the authority of the court."[237] Given Taney's jurisdictional ruling, Curtis reasoned, the territorial question was not "legitimately before" the Court.[238] "A great question of constitutional law, deeply affecting the peace and welfare of the country is not," Curtis stated, "a fit subject to be thus reached."[239]

Finally, Justice Curtis confronted a delicate conflict of laws problem regarding Dred Scott's claims. The Missouri Supreme Court had previously ruled that, whatever Scott's status in free territory, he was a slave in Missouri.[240] The state court majority, noting its prerogative to determine "how far, in a spirit of comity, it will respect the laws" of other jurisdictions, refused to give effect to federal law banning slavery in the territories.[241] Justice Curtis, viewing the state court's decision as politically motivated[242] and erroneous, argued that it was not binding on the United States Supreme Court.[243] To begin with, Curtis

237. *Scott*, 60 U.S. at 589 (Curtis, J., dissenting).

238. *Id.* at 590. Curtis's assessment fueled Republican complaints that the Court's striking down the Missouri Compromise was obiter dictum. In a technical argument, Taney had linked the territorial question with the jurisdictional issue. He pointed to Dred Scott's bill of exceptions (a statement listing objections to the trial judge's rulings), in which Scott admitted that he was born a slave but claimed freedom by residence on free soil. *See id.* at 427 (Taney, C.J.). Apart from the questions surrounding black citizenship, Taney reasoned that if Scott was not emancipated by residing in free territory, then he could not maintain the suit as a slave. *See id; see also* Edward S. Corwin, *The* Dred Scott *Decision in the Light of Contemporary Legal Doctrines*, *in* 2 CORWIN ON THE CONSTITUTION 302 (Richard Loss ed., 1987) (arguing that it was within the Chief Justice's authority to consider the territorial issue as grounds for the jurisdictional disposition). Curtis believed that there was no justification for going beyond the pleadings once the conclusion of no jurisdiction had been reached. *See Scott*, 60 U.S. at 589 (Curtis, J., dissenting); FEHRENBACHER, *supra* note 3, at 365-66.

239. *Scott*, 60 U.S. at 590 (Curtis, J., dissenting). He justified his own examination based on his view that the lower court had jurisdiction. *Id.*

240. Scott v. Emerson, 15 Mo. 576, 584-86 (1852).

241. *Id.* at 583, 586.

242. The Justice suggested that the state court's decision was based on "political considerations" and its "impressions" of hostile antislavery opinion. *Scott*, 60 U.S. at 594 (Curtis, J., dissenting). Indeed, the Missouri Supreme Court declined to follow its own precedent which recognized slaves who resided in free jurisdictions as free, *see, e.g.*, Rachael v. Walker, 4 Mo. 350 (1836), reasoning:

> Times are not now as they were when the former decisions on the subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government.

Scott, 15 Mo. at 586.

243. Curtis distinguished the law of Missouri from its highest court's pronouncement. *See Scott*, 60 U.S. at 594 (Curtis, J., dissenting). Concluding that there was no applicable

said that the Missouri Compromise had the effect of "absolutely" dissolving the master-slave relationship.[244] Applying what he considered the governing legal principles, Curtis then explained why Scott remained free under Missouri law. Among other things,[245] Justice Curtis focused on Dred Scott's marriage in the territory. As a general rule, a slave could not enter into a legally recognized marriage contract. Curtis turned this rule to his advantage. He said that Scott and his wife entered into their marriage contract in free territory as "absolutely" free persons with the "civil rights and duties" of marriage.[246] By Curtis's logic, if the Missouri courts afterwards regarded the Scotts as slaves, that would invalidate their marriage contract in contravention of the Constitution, which provided that no state impair the obligation of contracts.[247]

In short, from his basic appeal to constitutional structure, Curtis justified Congress's broad powers over the territories. Under his interpretation of the Territories Clause, the scope of legislative authority to regulate slavery in the territories was a question determinable by the national political process.

Missouri statute, the Justice reasoned that the governing law was the common law, which included basic rules of international law. *Id.* at 595. The U.S. Supreme Court was not bound by state court determinations of such "principles of universal jurisprudence," he said, citing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *See Scott*, 60 U.S. at 603 (Curtis, J., dissenting).

244. *Scott*, 60 U.S. at 591-92 (Curtis, J., dissenting). In this, Curtis disputed the Missouri Supreme Court's understanding of the status of slaves taken to free territory. Citing the examples of England and Massachusetts, the Missouri Supreme Court suggested that a slave returning to a slave state after residing in a free jurisdiction had no right to sue for freedom unless the slave had procured a court judgment to that effect in the free jurisdiction. *See Scott*, 15 Mo. at 586. Justice Curtis indicated that free jurisdictions differed in their treatment of slaves brought there. According to his scheme, some, like England and Massachusetts, did not declare the slave free but rather refused to assist the slaveowner in keeping the slave. Others, like Congress in the case of the Missouri Compromise, "absolutely" dissolved the master-slave relationship. *See Scott*, 60 U.S. at 591-92 (Curtis, J., dissenting).

245. Curtis pointed out that Scott's owner served in the U.S. Army while living in federal territory with Dred Scott. To refuse to give effect to the to the Missouri Compromise under these circumstances, Curtis asserted, "would be a denial that the United States could, by laws constitutionally enacted, govern their own servants." *Scott*, 60 U.S. at 598 (Curtis, J., dissenting).

246. *Id.* at 599, 601.

247. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.") Curtis also construed the consent of Scott's owner to the marriage as "an effectual act of emancipation." *See Scott*, 60 U.S. at 600 (Curtis, J., dissenting).

Conclusion

This Article has focused on Justice Curtis's constitutional arguments, which, in this historically important case, addressed broad questions of race, equality, federalism, the judicial role, and the basic character of the American polity. Contrary to the limited reading attributed to Curtis on citizenship, this Article has argued that his nuanced interpretation was both limiting and potentially expansive. On the one hand, Curtis conceded to the states' authority to determine who qualified for citizenship. On the other hand, Curtis's views of the American political community were fundamentally egalitarian: Race was not a qualification for citizenship under the Federal Constitution, and blacks were among the People of the United States. Countering Taney's intentionalist approach, Curtis produced historical evidence that blacks were citizens of five states when the Constitution was adopted. By suggesting that they voted on ratifying the Constitution, Curtis rejected the racist assumption that blacks were incapable of self-government.

In response to Taney's position that blacks, to be citizens, must have equal rights with whites in all respects, Curtis promoted an elastic definition of citizenship. Accordingly, blacks denied voting rights were not disqualified from citizenship under Curtis's view. Although the Justice did not block the states from discriminating against black citizens, he positioned the federal judiciary to take a potentially far-reaching role in enforcing civil rights. As a general principle, black citizens enjoyed access to the federal courts. Curtis purposefully left for future development the scope and meaning of the Privileges and Immunities Clause.

On the highly-charged question of slavery in the territories, Curtis justified Congress's plenary powers. To rebut Taney's proslavery interpretation (denying Congress powers to ban slavery from the territories and protecting a slaveowner's supposed property rights), the dissenter used history, text, and, centrally, constitutional structure. Looking to the character of an extended republic, Curtis located broad powers in the national legislature over federal territory. He interpreted the language of the Territories Clause so that Congress had discretion to determine what regulations were "needful." His position, mixing legislative discretion with minimal judicial scrutiny, was exactly what Southerners found objectionable.

Taken together, Curtis's answers to the questions of citizenship and the territories represent an effort, on the eve of the Civil War, to

reconcile the irreconcilable—the existence of slavery in a republican government.