Introduction

REHABILITATING *DRED SCOTT*

J. P. Morgan demanded that his attorneys make only those legal arguments that advanced his causes. When informed by counsel that his business plans violated federal law, Morgan bluntly replied: "I don't . . . want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do."[1] Morgan's example seems to inspire contemporary constitutional rhetoric. Constitutional theorists of all political persuasions often display less interest in determining what is constitutional than in making arguments that they believe will help the social movements they favor achieve desired ends constitutionally. My claim that the result in *Dred Scott v. Sandford*[2] ***may*** have been constitutionally correct – and that Stephen Douglas understood the antebellum constitutional order better than Abraham Lincoln – is likely to startle, puzzle, and probably offend readers reared on a steady diet of constitutional advocacy. No decent person living at the dawn of the twenty-first century supports the proslavery and racist policies that Douglas and Chief Justice Roger Taney championed. Nevertheless, important normative, historical, and constitutional reasons exist for rehabilitating the *Dred Scott* decision.

Dred Scott and this book are about the problem of constitutional evil. The problem of constitutional evil concerns the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil. People pledge allegiance to constitutions they acknowledge are saturated with evil when they perceive compelling reasons to cooperate politically with the purveyors of injustice. Some Americans at the constitutional convention thought

[1] Ida M. Tarbell, *The Life of Elbert H. Gary: The Story of Steel* (Appleton: New York, 1925), p. 81.
[2] 60 U.S. 393 (1857).

slavery a "nefarious institution." Others regarded slavery as "justified by the example of all the world."[3] I believe the death penalty to be barbaric, discrimination against homosexuality to be bigotry, and the level of inequality in the United States to be outrageous. My neighbors claim that justice demands murderers be executed, that homosexuality is an abomination, and that economic redistribution is theft. The problem of constitutional evil is about why, how, and whether we form and sustain political communities despite these deep disagreements.

Constitutionalism, in this work, mediates the controversies that arise among citizens who hold clashing political aspirations. In regimes wracked with problems of constitutional evil, political actors must negotiate and renegotiate constitutional meanings with rivals whose positions they find morally abhorrent. The challenge of creating and preserving political relationships among people who hold conflicting conceptions of justice requires that compromises be forged in every dimension of political life. Bargaining occurs over constitutional rules, the structure of constitutional politics, and the practices for resolving constitutional silences and ambiguities. "Constitution perfecting theory,"[4] "justice-seeking constitutionalism,"[5] and other approaches that treat constitutional language primarily as pure expressions of agreed-upon normative aspirations play little role in this endeavor. The constitutional task is better described as finding settlements that everyone perceives as "not bad enough" to justify secession and civil war than as making the Constitution "the best it can be"[6] from some contestable normative perspective.

Much contemporary constitutional theory attempts vainly to adjudicate constitutional disputes. Practitioners employ some combination of textual, doctrinal, historical, and philosophical analysis to determine which party to a political conflict is constitutionally right. Deeply rooted constitutional evils, however, are immune to standard interpretive treatments. Past compromises cannot persuasively be confined to a few discrete constitutional rules. Previous accommodations typically provide champions of an alleged injustice with resources for fashioning reasonable legal arguments that interpret remaining constitutional ambiguities in their favor as well as the political

[3] Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2 (Yale University Press: New Haven, 1937), pp. 221 (Gouverneur Morris), 371 (Charles Pinckney).

[4] James E. Fleming, "Constructing the Substantive Constitution," 72 *Texas Law Review*, 211, 213 (1993).

[5] Christopher L. Eisgruber and Lawrence G. Sager, "Good Constitutions and Bad Choices," *Constitutional Stupidities, Constitutional Tragedies* (ed. William N. Eskridge and Sanford V. Levinson) (New York University Press: New York, 1998), p. 147.

[6] Ronald Dworkin, *Law's Empire* (Harvard University Press: Cambridge, 1986), p. 379.

power to ensure that such arguments are at least partly incorporated in any future official constitutional settlement. Past accommodations may also be understood as expressing the more general constitutional aspiration that disputes over the justice of a particular practice should not jeopardize national unity – that all constitutional controversies should be settled in ways satisfactory to both proponents and opponents of the contested practice.

Obsessive searches for "correct" answers to past and present contested questions of constitutional law are politically futile, even when possible jurisprudentially. Powerful social groups are unlikely to accept any constitutional arrangement, clear or ambiguous, that they believe undermines their vital interests and fundamental values. Constitutions settle political conflicts successfully in the short run by providing pre-existing answers to contested political questions. They successfully settle political conflicts in the long run by creating a constitutional politics that consistently resolves contested questions of constitutional law in ways that most crucial political actors find acceptable.

These ongoing struggles over constitutional meaning highlight how problems of constitutional evil are not simply about whether persons should respect explicit constitutional provisions that accommodate practices they believe unjust. Political orders in divided societies survive only when opposing factions compromise when constitutions are created and when they are interpreted. The price of constitutional cooperation and union is a willingness to abide by clear constitutional rules protecting evil that were laid down in the past and a willingness to make additional concessions to evil when resolving constitutional ambiguities and silences in the present. The problem of constitutional evil, in short, is primarily the problem of when and whether citizens should accommodate more injustice than constitutionally necessary by providing protections for heinous practices not clearly mandated by the constitutional text or history.

Slavery and *Dred Scott* present the stark reality of constitutional evil. Antebellum Americans did not have the luxury of peacefully affirming a constitution that all agreed was fundamentally hostile to human bondage. In order to form a "more perfect union" with slaveholders, citizens in the late eighteenth century fashioned a constitution that plainly compelled some injustices and was silent or ambiguous on other questions of fundamental rights. The constitutional relationships thus forged could survive only as long as a bisectional consensus was required to resolve all constitutional questions not settled in 1787. This commitment to bisectionalism meant that crucial (not all) political elites in both the free and slave states had to approve all constitutional settlements on slavery issues. Human bondage

under these conditions could be eradicated quickly only by civil war, not by judicial decree or the election of an antislavery coalition. Given these bleak alternatives, *Dred Scott* challenges persons committed to human freedom to determine whether antislavery Northerners should have provided more accommodations for slavery than were constitutionally strictly necessary or risked the enormous destruction of life and property that preceded Lincoln's "new birth of freedom."

Theories of constitutional ***interpretation*** cannot successfully eradicate constitutional evil. When political controversies have long excited a constitutional community, the central legal claims of all prominent participants will be well grounded in institutional, historical, aspirational, or other constitutional logics. *Dred Scott* highlights the ways in which previous political accommodations provide all parties to subsequent constitutional disputes with legal justifications for their updated positions. From ratification until the Civil War, constitutional compromises accommodating slavery generated numerous precedents and principles that supported both racist and more egalitarian answers to contested constitutional questions. Heirs to an ambiguous and ambivalent constitutional text and tradition, proslavery and antislavery advocates before the Civil War relied heavily on half-truths about previous constitutional bargains that ignored the equal historical validity of rival assertions. As Part I details, although Chief Justice Taney and his judicial allies did not write flawless opinions, their conclusion that slavery could not be banned in the territories and that former slaves could not be American citizens was constitutionally as plausible as the contrary views detailed in the dissents to *Dred Scott*. Careful historical analysis belies the standard institutional, historical, and aspirational criticisms of that decision. The majority opinions in *Dred Scott*, while flawed, are consistent with claimed judicial obligations to respect the majority will, to follow the rules laid down by constitutional framers and previous precedents, or to be guided by fundamental constitutional values.

Ordinary constitutional ***politics*** cannot successfully eradicate constitutional evil. Constitutional bargains in divided societies typically guarantee proponents of alleged injustices the political power necessary to influence how political and constitutional issues that arise after ratification will be settled. The American experience with slavery illustrates the crucial role that power-sharing arrangements play in creating and sustaining constitutional regimes whose members dispute fundamental political norms. Part II develops the argument that the primary protections for human bondage in the original constitution were political institutions constructed to ensure a united South (and North) the representation necessary to veto any national

measure deemed injurious to sectional interests. Confident that population was moving southwestward, the persons responsible for the Constitution assumed that representation by population, the electoral college, and the three-fifths clause would ensure Southern control over the House of Representatives, the presidency, and the federal judiciary. A detailed examination of constitutional politics in Jacksonian America reveals that the antebellum regime disintegrated when an unexpected northwestward population explosion undermined these power-sharing arrangements. The ensuing constitutional breakdown was ironically facilitated by the very constitutional practices originally designed to promote compromise. Americans elected an antislavery president in 1860 only because the electoral college, originally designed to magnify slaveholding influence on elections, inflated Republican popular support by more than 50 percent. Responding to the collapse of bisectionalism, slaveholders preferred secession to a polity where slavery would be no more protected than a free-state majority thought constitutionally necessary.

Theories of constitutional ***authority*** cannot successfully eradicate constitutional evil. The compromises that make constitutionalism possible in divided societies generate principles and precedents that may be invoked to support claims that compromise is the only legitimate means for settling constitutional controversies. As explored in Part III, Lincoln's attempts to justify the Republican Party's power to ban slavery in the territories were beset with the constitutional problems that confront all efforts to impose unilateral solutions on long-standing political disputes. The compromises that made American constitutionalism possible support slaveholding assertions that the Constitution was committed to bisectionalism: the view that constitutional settlements were legitimate only when endorsed by crucial elites in both the slave and free states. Antebellum Americans, Part III contends, lived in a consensus democracy. Their constitutional relationships could be maintained only when contested questions about slavery were settled in ways that enabled citizens from all sections of the United States to continue benefiting from constitutional cooperation.

Part IV revisits the election of 1860 as a vehicle for examining the tension between maintaining the constitutional peace and achieving constitutional justice. Virtually all contemporary constitutionalists vote for Abraham Lincoln, the candidate who promised to accommodate no more evil than constitutionally necessary. A good constitutional case can be made for John Bell, a candidate who promised bisectional solutions to contested constitutional questions. By seeking to maintain the union and avoid war with foreign nations, Bell hoped to preserve the conditions under which slavery ***might*** have been abandoned peacefully. Given the destructive capacities of

modern weapons, present-day constitutional theorists have an even more pressing duty to explore whether constitutional peace should ever be sacrificed in the name of constitutional justice.

By erroneously presenting *Dred Scott* as an obvious constitutional mistake and ignoring the bloody consequences of Lincoln's election, constitutional theorists foster the dangerous illusion that the problems of constitutional evil that have plagued American constitutionalism from its inception could have been avoided had the Supreme Court interpreted the Constitution more justly. The American Constitution was a compromise between antislavery and proslavery forces. The continued existence of that constitutional regime depended on the continued satisfaction of each side with that constitutional bargain. When asking how much slavery the antebellum Constitution permitted, antislavery constitutional theorists in 1857 could not simply consult their constitutional aspirations; they had to consider how much slavery they would tolerate as the price for enjoying the continued benefits of their constitutional union.

Slavery is no longer a constitutional evil, but the legacy of *Dred Scott* remains. All political orders struggle with the problems of institutional design, political development, and constitutional evil that structured the antebellum American regime. A constitutionalism obsessed with constitutional law too often ignores how constitutional founders entrench political interests and values by designing institutions that privilege particular policies and political actors. A constitutionalism obsessed with originalism too often ignores how political changes inevitably frustrate the visions of constitutional designers. A constitutionalism obsessed with justice too often ignores how constitutions function best by creating the conditions under which political order can be preserved, enabling ordinary politics to be concerned with justice.

The American experience with slavery highlights the crucial role that constitutional institutions play in determining what legal definitions of government powers and individual rights are authoritative at a given time. Constitutional procedures bias political outcomes, advantaging some political interests and handicapping others. The electoral college in 1800 augmented slaveholding power but magnified the influence of free-state parties in 1860. Today, the Senate bestows more federal funds on the Rocky Mountain states than would have been the case had representatives to that branch of Congress been apportioned by population.[7] How constitutional silences and ambiguities are interpreted depends largely on who staffs the institutions responsible for settling constitutional controversies. Antebellum Americans

[7] See Frances E. Lee and Bruce I. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (University of Chicago Press: Chicago, 1999).

understood that governing institutions controlled by slaveholders protected human bondage more effectively than proslavery legal rules. At the dawn of the twenty-first century, many national judiciaries provide more protection for property and abortion rights than do national legislatures because the former are staffed by legal elites who are more inclined than the general public to favor property and abortion rights.[8] Parchment limits on government, both American and comparative constitutional history teach, are of little significance in the absence of political institutions capable of respecting those limits.

Problems caused by the failure of constitutional institutions to perform as expected have haunted American constitutionalism for more than two centuries. Unforeseen political and social changes continually wreak havoc with constitutional orders. Constitutional institutions broke down during the first decades of American national life.[9] The succeeding Jacksonian political order collapsed when crucial assumptions underlying the slavery compromises were falsified. The "Fourteenth Amendment's Constitution"[10] lasted but eight years.[11] During the Progressive Era, industrialization destroyed the original vision of a classless politics.[12] Unfortunately, the difficulties of passing formal constitutional amendments, combined with a tradition of constitutional obeisance that compels political actors to deny any allegation of constitutional flaw,[13] compound these failings. Americans too often propose restoring Madisonian institutions in their pristine form as solutions for political problems caused by flaws in Madisonian political science.

Problems of constitutional evil continue to challenge constitutional projects. Both newly formed constitutional regimes and ongoing constitutional enterprises must accommodate practices that numerous citizens find venal.

[8] See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press: Cambridge, 2004).

[9] See Gordon S. Wood, *The Radicalism of the American Revolution: How a Revolution Transformed a Monarchial Society into a Democratic One Unlike Any That Had Ever Existed* (Knopf: New York, 1992); Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (Oxford University Press: New York, 1993); James Roger Sharp, *American Politics in the Early Republic: The New Nation in Crisis* (Yale University Press: New Haven, 1993); Elaine K. Swift, *The Making of an American Senate: Reconstitutive Change in Congress, 1787–1841* (University of Michigan Press: Ann Arbor, 1996); Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press: Princeton, 1996).

[10] See Christopher L. Eisgruber, "The Fourteenth Amendment's Constitution," 69 *University of Southern California Law Review,* 47 (1995).

[11] See Mark A. Graber, "The Constitution as a Whole: A Partial Political Science Perspective," 33 *University of Richmond Law Review,* 343, 368–71 (1999).

[12] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Duke University Press: Durham, 1993).

[13] Stephen M. Griffin, "The Nominee is … Article V," *Constitutional Stupidities,* p. 51 (noting how these practices require most constitutional changes to take place "off the books").

Because all constitutions remain compromises as long as citizens cannot agree on the qualities of the good society, most persons are likely to think their present constitution provides too much or too little protection for state and local interests, property, privacy, religion, racial equality, and other civil liberties or rights. When considering how much evil they would interpret their constitution as permitting, members of all constitutional communities must consult their constitutional aspirations and consider how much evil they will tolerate as the price for enjoying the continued benefits of constitutional union.

Dred Scott was wrong and Lincoln right only if insufficient reasons existed in 1861 for antislavery Americans to maintain a constitutional relationship with slaveholders. Both constitutionality and morality may support that conclusion. Many reasons advanced in 1787 for putting up with what appeared to be a dying practice were no longer valid by the middle of the nineteenth century. Fear of foreign invasion had lessened. Abolition by 1850 required positive government action, which the original Constitution abjured. Slaveholders no longer tolerated arguments that slavery was wrong. Nevertheless, the better case may be that debate over human bondage was sufficiently robust to justify the additional free-state accommodations necessary to preserve union. *Dred Scott* was wrong and Lincoln right only if John Brown was correct when he insisted that slavery was sufficiently evil to warrant political actions that "purge[d] this land in blood."[14]

THE PROBLEM OF CONSTITUTIONAL EVIL

Problems of constitutional evil arise in large, diverse polities. The constitutions of political orders where "one person's notion of justice is often perceived as manifest injustice by someone else"[15] contain provisions many people believe inefficient, stupid, or evil.[16] Government enjoys too much power to abridge some rights and too little power to protect others. Some

[14] See Stephen B. Oates, *To Purge This Land with Blood: A Biography of John Brown* (Harper & Row: New York, 1970), especially p. 351 (quoting John Brown).

[15] Sanford Levinson, *Constitutional Faith* (Princeton University Press: Princeton, 1989), p. 72.

[16] The Constitution's most prominent ***supporters*** believed that the final product was marred by these defects. Madison favored proportional representation in both houses of Congress and thought that the final constitution did not adequately limit state power to violate individual rights. Farrand, 1 *Records,* pp. 36–7, 164. See also "Madison Resolution: June 8, 1789," *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (ed. Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford) (Johns Hopkins University Press: Baltimore, 1991), p. 11. Near the end of the constitutional convention, Hamilton asserted that he "meant to support the plan to be recommended [only] as better than nothing": Farrand, 2 *Records,* p. 524.

fundamental rights are missing from the national charter altogether. Other enumerated rights license socially reprehensible behavior. Providing uncontroversial examples of these constitutional infirmities is impossible. The crux of the problem of constitutional evil is that citizens do not agree on what practices are constitutionally evil. Constitutional provisions that everyone thinks evil (or stupid) are rejected by constitutional framers, formally abandoned by a textual amendment, or informally abandoned by some practice that may or may not constitute an amendment.[17] Alleged constitutional imperfections are ratified, maintained, or proposed only when many people regard those constitutional provisions or interpretations as necessary evils or positive goods.

The severe constitutional stupidities and evils that result from these compromises pervade every aspect of constitutionalism. Citizens who dispute basic regime questions engage in political struggles across all constitutional terrains. The framing debates over federal–state relations influenced the structure of the national government, the powers given to the national government, the Bill of Rights, and the fundamental principles underlying the Constitution. Parties to controversies over fundamental constitutional values may win small victories, but the more common outcomes are further compromises and vague provisions capable of being interpreted as supporting conflicting values.

Constitutional accommodations for evil beget constitutional accommodations for evil. Past compromises generate legal and political support for subsequent constitutional decisions mandating injustice. Congressional decisions after the Civil War that weakened the language in the Fourteenth and Fifteenth Amendments provided legal grounds for justifying judicial decisions sustaining Jim Crow. The Compromise of 1876, by fully incorporating former Confederate states in the Union, allowed Southern white supremacists to influence the interpretation of ambiguities in the post–Civil War Constitution.

These and related constitutional compromises are the means by which persons who share civic space agree to cooperate despite disagreeing over fundamental political principles. The various compromises reached in 1787 enabled Americans with diverse beliefs to form a state strong enough to forestall foreign invasion. Later constitutional compromises over the tariff enabled Jacksonian Democrats to promote bisectional cooperation on Native

[17] See William N. Eskridge, Jr., and Sanford Levinson, "Introduction: Constitutional Conversations," *Constitutional Stupidities,* p. 6. For debates over what constitutes an amendment, see Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press: Princeton, 1995).

American removal, national banking, and expansion. Successful constitutional bargains and renegotiations preserve the peace and may indirectly reduce constitutional evil. The persons responsible for the American Constitution preferred government by "reflection and choice" to government by "accident and force" because they had more faith in republican institutions than military arms as vehicles for realizing justice in the long run.[18] Ongoing cooperation exposes proponents of an alleged evil to normatively superior practices. If persons have some tendency to recognize and act on better theories of justice, then agreements that form and preserve constitutional unions may be the best means for achieving a better political order over time.

Modern constitutional commentaries ritually proclaim the theoretical possibility of constitutional evil. Felix Frankfurter insisted that the "great enemy of liberalism" was making "constitutionality synonymous with wisdom."[19] His numerous followers play variations on that litany. "A neutral and durable principle may be a thing of beauty and a joy forever," John Hart Ely noted, "[b]ut if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[20] Constitutional commentators committed to this distinction between constitutionality and justice insist that constitutional authorities disdain mere outcomes. Robert Bork asserts: "Legal reasoning ... is rooted in a concern for legitimate process rather than preferred results."[21]

Despite these professed commitments to the distinction between constitutionality and justice, few constitutional theorists highlight any particular constitutional evil they believe contemporary constitutional authorities must maintain. Some prominent scholars, when asked to give an example of a constitutional tragedy, conclude that "[t]he range of permissible constitutional arguments now extends so far that a few workable ones are

[18] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New American Library: New York, 1961), p. 33.

[19] *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 670 (1943) (Frankfurter, dissenting). See *Dennis v. United States,* 341 U.S. 494, 556 (1951) (Frankfurter, concurring).

[20] John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 *Yale Law Journal*, 920, 949 (1973). See Alexander M. Bickel, *The Morality of Consent* (Yale University Press: New Haven, 1975), p. 26; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press: Cambridge, 1996), pp. 10–11; Cass R. Sunstein, *The Partial Constitution* (Harvard University Press: Cambridge, 1993), pp. 7–8; Fleming, "Constructing the Substantive Constitution," pp. 218, 280, 290, 302; Sotirios Barber, *On What the Constitution Means* (Johns Hopkins University Press: Baltimore, 1984), pp. 45, 61–2, 75.

[21] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Simon & Schuster: New York, 1990), p. 264. See Hans A. Linde, "Due Process of Lawmaking," 55 *Nebraska Law Review,* 197, 255 (1976); Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," 108 *Harvard Law Review,* 1223, 1302 (1995).

always available in a pinch."[22] Controversial cases in leading studies consistently come out "right," as "right" is defined by the theorist's political commitments.[23] Conservative constitutional commentators insist that principled justices sustain bans on abortion and strike down affirmative action policies; their liberal peers insist that principled justices strike down bans on abortion and sustain affirmative action policies.[24] When a contemporary consensus exists on the just policy, all constitutional commentators agree that the policy is constitutionally mandated. No prominent theorist admits that *Dred Scott* might have been a legitimate exercise of judicial review, nor would any have the judiciary overrule *Brown v. Board of Education*.[25]

This consensus that *Dred Scott* was wrong (and *Brown* was right) inhibits serious discussion of constitutional evils. If every present constitutional ambiguity can be resolved justly and no constitutional provision clearly entrenches practices remotely analogous to slavery, then few pressing political reasons exist for questioning constitutional authority. That inquiry might be more urgent were contemporary feminists to acknowledge that the constitutional case for abortion is contestable or if contemporary evangelicals were to conclude that important elements of the constitutional tradition require a high wall of separation between church and state. Some citizens might

[22] Pamela S. Karlan and Daniel R. Ortiz, "Constitutional Farce," *Constitutional Stupidities*, p. 180. Others responded with a disquisition on the inevitability of constitutional evil, without pointing to a specific evil that constitutional authorities are compelled to accommodate. See e.g. Larry Alexander, "Constitutional Tragedies and Giving Refuge to the Devil," *Constitutional Stupidities*. Only two or three of the seventeen essays in the section ostensibly devoted to constitutional tragedies discuss a specific evil the author believed presently sanctioned by the Constitution of the United States. See Gerard V. Bradley, "The Tragic Case of Capital Punishment," *Constitutional Stupidities* (capital punishment); Earl M. Maltz, "*Brown v. Board of Education*," *Constitutional Stupidities* (segregation); David A. Strauss, "Tragedies under the Common Law Constitution," *Constitutional Stupidities*, pp. 236–7 (precedent obligates justices to sometimes sustain death sentences and sometimes invalidate affirmative action measures).

[23] Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," 94 *Michigan Law Review*, 245, 245 n.4 (1995).

[24] Compare Bork, *Tempting*, pp. 107–16, 359–61, with Sunstein, *The Partial Constitution*, pp. 149–50, 270–85, 331–2. Libertarians would have justices strike down bans on abortion and affirmative action policies. See Richard A. Posner, *Sex and Reason* (Harvard University Press: Cambridge, 1992); Richard A. Posner, "The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities," *1974 Supreme Court Review* (ed. Philip B. Kurland) (University of Chicago Press: Chicago, 1975). Democrats would have justices sustain both measures; see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press: Cambridge, 1980), pp. 170–2; Ely, "The Wages of Crying Wolf."

[25] 374 U.S. 483 (1954). With the exception of Earl Maltz (see note 22), scholars who claim that *Brown* was wrongly decided in 1954 do not favor overruling in 2006. See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard University Press: Cambridge, 1977), pp. 117–33, 412–13; Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Basic Books: New York, 1986), pp. 259–62, 380 n.52.

wonder why they should interpret a constitution that may sanction these evils. William Lloyd Garrison publicly burned the Constitution when he concluded that proslavery arguments had strong constitutional foundations.[26]

SLAVERY AS A CONSTITUTIONAL EVIL

Garrison recognized slavery as the quintessential constitutional evil. The original Constitution failed for numerous reasons to outlaw human bondage. Toleration of slavery was deemed necessary to secure the benefits of a more secure union. Most framers thought that the evil practice of slavery would soon disappear. Many believed states should be free to manage their purely domestic affairs; a few regarded slavery as a positive good. Constitutionalists writing two hundred years later may claim they would have bargained better, but historians generally agree that constitutional agreement would not have occurred had most Southerners perceived a genuine threat to their "peculiar institution."

Slavery ambiguously pervaded the antebellum constitutional order. Every government institution was structured with an eye to creating and maintaining a balance of sectional power. The powers various framers favored assigning to the national government depended on whether they believed constitutional majorities would be more inclined to protect or weaken human bondage. Neither the free nor the slave states emerged fully triumphant in 1787. The Constitution drafted in Philadelphia was interpreted as sufficiently proslavery to be ratified in the South and sufficiently antislavery to be ratified in the North. Subsequent developments did not clarify whether the Constitution was essentially proslavery or antislavery. Antebellum Americans cited the Missouri Compromise as demonstrating that Congress had the power to ban slavery in the territories,[27] that slavery in the territories could be banned only with Southern consent,[28] or that the free and slave states had a constitutional obligation to share the territories.[29]

The unforeseen population movements that gave free states the latent power to control the national government prevented the constitutional issues that slavery presented in 1857 from being resolved by reference to the compromises reached in 1787. The framers expected that contested constitutional questions would be settled by the bisectional coalitions they

[26] "The Meeting at Framingham," *The Liberator* (July 7, 1854), p. 106.
[27] See Abraham Lincoln, *The Collected Works of Abraham Lincoln*, vol. 2 (ed. Roy P. Basler) (Rutgers University Press: New Brunswick, 1953), p. 242.
[28] See *Congressional Globe*, 33rd Cong., 1st Sess., App., p. 413 (John Bell).
[29] See George Fisher, *The Law of the Territories* (C. Sherman: Philadelphia, 1859), p. 51.

anticipated would be elected under the rules laid down in Articles I, II, and III. During the 1850s, slaveholders emphasized the original intention that bisectional coalitions would resolve constitutional ambiguities. Antislavery advocates emphasized the original intention that a coalition in control of all branches of the national government would resolve constitutional ambiguities as that coalition thought best. The problem with both views is that the framers never considered how constitutional ambiguities should be resolved when the sectional coalitions elected following the letter of the constitutional rules subverted the bisectional constitutional purposes underlying those rules.

When *Dred Scott* was litigated, Americans were renegotiating the original constitutional bargain in a political environment where forces uninterested in accommodation had the power under the rules laid down in Article V to block any constitutional amendment from being passed. Although all parties to the slavery controversy claimed to be defending the old constitutional order, their real debate was over whether the original constitutional commitment to bisectionalism should be modified or abandoned. The national party leaders who foisted responsibility for slavery on the federal judiciary attempted to maintain bisectionalism by vesting veto power over slavery policies in the only remaining national institution with a Southern majority. In *Dred Scott*, the Supreme Court fostered sectional moderation by replacing the original Constitution's failing political protections for slavery with legally enforceable protections acceptable to Jacksonians in the free and slave states. Republicans spoke the language of constitutional preservation. Their refusal to acknowledge the constitutional commitment to bisectionalism, however, is best conceptualized as a de facto renunciation of the original constitutional understanding that slavery would never be left to the mercy of Northern majorities. Lincoln abandoned the original constitutional hope that conflicts over slavery would not disrupt union. His claim that the persons responsible for the Constitution intended to place slavery "in the course of ultimate extinction"[30] was faulty constitutional history. Taney was more faithful to the original Constitution when he championed policies that could be supported by Jacksonians throughout the nation.

We can understand and evaluate Lincoln's actions only when we acknowledge that *Dred Scott* highlights the possibility of severe conflict between constitutionality and justice. We celebrate Lincoln only by recognizing that in 1861 he chose justice over constitutionality, or at least that he refused to accommodate slavery to the extent necessary to maintain the old constitutional

[30] Lincoln, 3 *Collected Works*, p. 18.

order.[31] The devastation wrought by Union forces starkly demonstrates that the choice between constitutionality and justice rarely amounts to a simple decision between good and evil. Injustices deeply rooted, as slavery was in 1860, can be swiftly eradicated only by actions that kill, maim, and devastate millions of persons, many of whom bear little if any direct responsibility for the evil in question. The greater the evil, the greater the probable cost of abolition and the more likely the failure. No guarantee existed in 1861 that war would free the slaves. We take the problem of constitutional evil seriously only when we stop using *Dred Scott* to advance partisan positions and acknowledge that, in 1860, the alternative to *Dred Scott* was a civil war that – with different battlefield accidents – might have further entrenched and expanded human bondage.

[31] "The mystical cords of Union" cannot legitimate the carnage of 1861–1865; only the abolition of slavery can. See Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Duke University Press: Durham, 1998), p. 60; Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton University Press: Princeton, 1998), p. 186.