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DRED SCOTT V. *SANDFORD* IN OUR POLITICAL IMAGINATION: THE ANTI-CANON AS A RHETORICAL DEVICE

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INTRODUCTION

What ought to be the place of *Dred Scott v. Sandford*[1] in the study of the American Constitution? Conventional wisdom dictates that *Dred Scott* is a case study in how not to dispose of constitutional questions. The undeniable racism and the apparent political recklessness of the decision are regularly assailed by critics. There is, however, a growing body of literature suggesting that we are too eager to denigrate the work of the Taney Court.

Increasingly, there is acknowledgement that an impartial reading of the constitutional politics of 1857 may have yielded precisely the sort of racism we find in *Dred Scott*. The second critique, however, that even if it was constitutionally correct, *Dred Scott* was a predictable political disaster, remains in-tact. According to this line of thinking, it was the Court's decision in *Dred Scott*, declaring the Compromise of 1850 unconstitutional, that made political compromise over slavery impossible and set the country on the path to the Civil War. This critique, though persuasively rebutted by Don E. Fehrenbacher's classic study of the case, remains a popular one among observers of the Court.[2]

How do we explain this? What drives the insistence that *Dred Scott* was fatally wrong, in the presence of compelling evidence to the contrary? What do we gain by that insistence? And if we are wrong, what do we lose? What might an examination of Dred Scott as good law teach us about antebellum and subsequent periods of constitutional development?

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[1] 60 U.S. 393

[2] *The Dred Scott Case: Its Significance in American Law and Politics: Its Significance in American Law and Politics*. Oxford University Press, 1978.

CONSTITUTIONAL CANON AS NARRATIVE

A brief survey of academic assessments of *Dred Scott* v. *Sandford* uncovers assertions that it was “a ghastly error,” [3] “a tragic failure,” [4] “a gross abuse of trust,” [5] and “an abomination.”[6] A survey of prominent scholars, however, also provides some reasonable defenses. Among them are acknowledgements that Chief Justice Taney’s most offensive claims were within the mainstream of antebellum political thought,[7] that they were consistent with contemporary views,[8] that the Court’s ruling flowed logically from established legal traditions,[9] and that the Constitution in 1857 was “contradictory” on the issue of black citizenship.[10]

However, scholars who have argued that *Dred Scott* was not as wrong as we might think have tended to stop well short of suggesting that it was right. Those few who offer some positive reading do so on fairly limited grounds. Either they make the observation that *Dred Scott* accurately (and appropriately?) reflected the racism of its time, or they welcome the decision’s influence in ushering the nation toward the war that would eventually emancipate the enslaved portion of its population. The first of these defenses is arguably not a vindication of constitutional right, but rather an excuse of perceived moral wrong. The second defense is generally based on the perception that *Dred Scott* was *so* wrong, it forced the country into a winner-take-all war that happened to turn out alright. Unfortunately, each of these defenses leaves in-tact a constitutional narrative advanced by those who insist that *Dred Scott* was the worst mistake the Supreme Court ever made.

In studying and teaching the American Constitution, legal scholars have established categories of Supreme Court cases. Broadly speaking, some cases are a part of the canon of

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[3] Bickel, Alexander. *The Supreme Court and the Idea of Progress.* Yale University Press, 1978. See p. 41.
[4] Reynolds, William Bradford. “Another View: Our Magnificent Constitution.” *Vanderbilt Law Review.* Number 40 (1987), p. 1348.
[5] Corwin, Edward S. “The *Dred Scott* Decision, in the Light of Contemporary Legal Doctrines.” *The American Historical Review.* Volume 17, Number 1 (1911), p. 68.
[6] Sunstein, p. 86.
[7] Graber, Mark A. “Desperately Ducking Slavery: *Dred Scott* and Contemporary Constitutional Theory”. *Constitutional Comment.* Volume 14 (1997), p. 281.
[8] Whittington, Keith E. "The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions." *The Journal of Politics*. Volume 63, Number 2 (2001), p. 380.

[9]Corwin, p.58-63.
[10] Burt, Robert A. "What Was Wrong with Dred Scott, What's Right About Brown." *Washington & Lee Law Review* 42 (1985), p.11.

constitutional law, and others are a part of the anti-canon. Canonical cases are those which any legitimate theory of constitutional law must affirm; anti-canonical cases are those whose holdings any legitimate theory of constitutional law must reject.[11] For this reason, a number of constitutional theorists have undertaken the work of buttressing the shaky constitutional ground on which *Brown v. Board of the Education*[12] was decided.[13] And, as noted, there is no shortage of work dedicated to explaining precisely how the Court erred in deciding *Dred Scott.*

Of course, one could argue that some cases are in fact clearly wrong, while others are obviously right. Many have argued that the very purpose of a written Constitution is to establish unambiguous legal limits and entitlements. A well-functioning Constitution would necessarily, in that case, invite uncontroversial determinations of right and wrong. We might then say that *Brown* is heralded because it is an obviously correct interpretation of the principle of Equal Protection. *Dred Scott,* on the other hand, would be condemned because it is an obviously erroneous reading of an equally important principle at an even more critical moment in American political development.

These are not trivial possibilities. They rest on the logic that some things are simply true, while others are simply untrue. Either Equal Protection bars state-mandated segregation, or it does not. Either the federal government was empowered to regulate slavery in the territories, or it was not. While not every constitutional question will lend itself to such neat disposition, it is not unreasonable to expect that the questions to which the Constitution is addressed will sometimes present themselves before the Court. In those cases, we should not be surprised to find the Court universally heralded for a job well done, or universally condemned for an error.

Unfortunately, membership in the canon (or the anti-canon) is not simply a matter of constitutional correctness. Observations on the literary canon and a growing number of observations on the constitutional canon confirm that ethical and cultural value judgments play a

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[11] For a short discussion of these definitions, see Balkin, Jack M. "Wrong the Day It Was Decided: Lochner and Constitutional Historicism." *BUL Rev.* 85 (2005): 681-682.
[12] 347 U.S. 483
[13] See, for example, Burt, Robert A. "What Was Wrong with Dred Scott, What's Right About Brown." *Washington & Lee Law Review* 42 (1985); also Green, Jamal "The Anticanon." *Harvard Law Review.* Volume 125, Number 2 (December 2011); as well as Bickel, Alexander. *The Least Dangerous Branch.* Second Edition. New Haven: Yale University Press, 1986.

considerable role in the composition of canons across fields. Simply put, the identification of a canon is a form of self-identification. It is way of saying who we are, and who we are not. In the case of the American constitutional canon, and of *Dred Scott* v. *Sandford* in particular, it is a way of saying who we want to be, and who we do not want to have been. It is a kind of social and cultural credit-claiming that may have little to do with constitutional or historical "truth."

Thus *Brown,* as the quintessential canonical case, serves as confirmation of the racial egalitarianism that is a foundational element of American political identity. *Dred Scott*, in contrast, is a damning exposition of the racial hierarchy that was enacted at the Founding and that persisted throughout the antebellum period. Disavowal of that decision, however it is articulated, is less an evaluation of its doctrinal correctness than a refusal to identify with an objectionable set of constitutional values. The constitutional canon, like those in other fields, is personal. And while we can expect that there will be those uncontroversial cases on whose correctness or error we can generally agree, we should not be surprised at the presence of cases whose political value is determined primarily by how we feel about them, rather than how well they perform as constitutional law. We ought to expect such cases.

But what is to be done with them when we encounter them? The American constitutional canon, as a way of telling stories about who we want believe we are, is not without consequences. Jack Balkin and Sanford Levinson summarize the function of "canonical narratives" as follows:

> *Every society has a set of stock stories about itself, which are constantly retold and eventually take on a mythic status. These stories explain to the members of that society who they are and what values they hold most dear. These stock stories are both descriptive and prescriptive: they not only frame our sense of what has happened and how events will unfold in the future, but also explain how those events should unfold.*[14]

To this definition, I would add that canonical narratives are sometimes aspirational. Beliefs about correctness or incorrectness of constitutional cases are not only evaluations of what the constitutional culture is or should be. In some instances, they are statements of what we believe that culture is becoming or will inevitably become. They are a way of claiming credit for constitutional facts not yet in evidence. A passage from Abraham Lincoln's response to *Dred*

[14] "The Canons of Constitutional Law."*Harvard Law Review* (1998): 963-1024.

Scott illustrates the difference. On the contradiction inherent in the pronouncement that “all men are created equal,” Lincoln argues:

> *[The Founders] defined with tolerable distinctness, in what respects they did consider all men created equal - equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.”* This they said, and this meant. *They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them… They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all…* (Emphasis mine.)[15]

Here Lincoln is making two important rhetorical moves. First, he acknowledges that his conception of the Declaration of Independence is not descriptive of constitutional politics in the era. To claim otherwise would be an “obvious untruth.” However, it is also not purely prescriptive. While he certainly offers a vision of how the racial politics of the United States should unfold, he represents that vision not as a new and laudable political commitment, but as the continuation of an egalitarianism with deep roots in American political culture. For Lincoln, whose project is to distance himself from the racial radicalism of which he has been accused, this is an essential rhetorical move. He need not advance claims to new rights and entitlements. It suffices to assert his commitment to (what he argues are) longstanding, if neglected, American political commitments. The practice of rhetorically locating one’s preferred policy position within an established political tradition is certainly not new and has been widely remarked upon.

The second rhetorical move is the critical one. Faced with a climate of racial violence that contradicts the ideological commitment on which his argument rests, Lincoln argues that those commitments are nonetheless quite real. Their failure to reflect the world in which they are articulated does nothing to lessen their reality. They are aspirational. For Lincoln, we are what we would like to be.

That identification with racial egalitarianism coexists, in the same speech, with a call to colonize emancipated blacks in Liberia, as “the only perfect preventive of amalgamation” of the races. The equality of all men notwithstanding, Lincoln, like Stephen Douglas, is “horrified at

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[15] Speech at Springfield, Illinois, June 26, 1857

the thought of the mixing blood by the white and black races." Recognizing the difficulty of his solution, he nonetheless insists, "when there is a will there is a way."

Here we see illustrated one of the principle dangers of aspirational narratives: the ease with which they absorb contradictions. If Lincoln's constitutionalism were descriptive, he would ostensibly be bound by the concrete circumstances in which he finds himself advancing the liberal position. Indeed, Lincoln's rejection of Chief Justice Taney's descriptive rendering of constitutional law is based on a particular deviation from an observed set of facts. Where Taney argues that the political status of the Negro was rising on the eve of *Dred Scott,* Lincoln demonstrates that the rights of free blacks were being constrained over time.[16] That incongruence is sufficient to dismiss whatever conclusions proceeded from it.

Likewise, if Lincoln's project were prescriptive, it might oblige him to a particular set of policy commitments. Of course, it might be argued that the rhetoric in Lincoln's defense of the Declaration is a kind of prescription. It is certainly possible that "as fast as circumstances permit" is the "with all deliberate speed" of the antebellum era. In that case, it would clearly be a prescription for subsequent lawmaking. However, the context in which Lincoln is speaking suggests otherwise. The language of the Warren Court is generally translated to mean "as quickly as is possible," as a means of exerting pressure on elites who would have preferred some time indefinitely far off. Lincoln, on the other hand, offers "as fast as circumstances should permit" as a buffer against "now." His rhetorical project is a principled maintenance of an objectionable status quo, rather than a rejection of it.

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[16] On the subject of black's declining legal status, Lincoln observes: "In these the Chief Justice does not directly assert, but plainly assumes, as a fact, that the public estimate of the black man is more favorable now than it was in the days of the Revolution. This assumption is a mistake. In some trifling particulars, the condition of that race has been ameliorated; but, as a whole, in this country, the change between then and now is decidedly the other way; and their ultimate destiny has never appeared so hopeless as in the last three or four years. In two of the five States-New Jersey and North Carolina-that then gave the free negro the right of voting, the right has since been taken away; and in a third-New York-it has been greatly abridged; while it has not been extended, so far as I know, to a single additional State, though the number of the States has more than doubled. In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures. In those days, by common consent, the spread of the black man's bondage to new countries was prohibited; but now, Congress decides that it will not continue the prohibition, and the Supreme Court decides that it could not if it would."

Unable (or unwilling?) to claim either descriptive or prescriptive narratives of American egalitarianism, Lincoln falls back on the aspirational narrative. American constitutional law in 1857 is not what he would have it be. Nor can it, in the foreseeable future, be remade in that image. It is still possible, though, to leverage the rhetorical and ideological commitments of the Declaration of Independence. By laying claim to *who we intend to be*, irrespective of who we are, Lincoln establishes a compelling logical asymmetry. The equality of all men, as an aspiration, is an effective rhetorical weapon against the further institution of pro-slavery constitutional values. It is not rational that one's aspirations and one's pursuits should be directly at odds. Aspirational egalitarianism is not, however, an effective basis on which to dismantle existing racial hierarchies. The persistence of those hierarchies in the present is entirely consistent with an aspirational commitment to racial egalitarianism in the future.

Thus Lincoln's assertion of American egalitarianism survives by absorbing the observations that most directly contradict it. In truth, it is difficult to imagine the kind of evidence that would effectively refute an aspirational narrative. Once an ideological commitment has been professed, and the improbability of acting on that commitment has been admitted and absorbed, what ground remains to disprove the commitment?

It should be noted that aspirational narratives are not only employed in defense of the status quo. They may also be employed as a means of pursuing a course of action. This is how Frederick Douglass engages America's constitutional commitments in a speech in Glasgow, Scotland in 1860. Responding to William Lloyd Garrison's charge that the Constitution of 1787 sanctioned slavery,[17] Douglass sets out to demonstrate that "the written paper itself" lent no support to slavery, and might readily have provided for its abolition.

That Douglass bases his reading of constitutional meaning exclusively on the text itself is significant. Garrison's charge of constitutional evil is supported by the contents of James Madison's *Notes of Debates in the Federal Convention of 1787*. For Garrison, the Constitution had not been diverted to pro-slavery ends; it had, when it was written, been directed at them.

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[17] I have not located the exact speech to which Douglass is responding, but in a speech on the Constitution and the Union, December 29, 1832, Garrison declares: "There is much declamation about the sacredness of the compact which was formed between the free and slave states, on the adoption of the Constitution. A sacred compact, forsooth! We pronounce it the most bloody and heaven-daring arrangement ever made by men for the continuance and protection of a system of the most atrocious villainy [*sic*] ever exhibited on earth."

Madison's *Notes* confirmed the framing of certain provisions in response to the interests and concerns of slaveholders. It would have been difficult, admitting the *Notes* into consideration, to deny the charge that the Constitution included protections for slavery.

And so Douglass makes his first rhetorical move in excluding the *Notes.* This move, while obviously biased, is well-defended. Douglass argues that it was the text of the Constitution, "not the secret motives, and dishonest intentions" of the Framers, that was ratified. Of course, this is not completely true. The Framers, returning to their home states, proceeded to interpret and explain "the secret motives" and likely effects of the document they had produced. Those explanations, and the debates that ensued, were an integral part of the ratification processes in the states.[18] Nonetheless, Douglass is correct to point out that privileging the "intentions" of the Framers over the text itself is likely to lead to "endless confusion and mischiefs."

The second rhetorical move on which Douglass' argument depends is less defensible. In attacking Garrison's summary of the pro-slavery clauses of the Constitution, Douglass retreats to the observation that the Constitution does not actually contain direct references to slavery. Specifically,

> *It so happens that no such words as "African slave trade," no such words as "slave insurrections," are anywhere used in that instrument. These are the words of [Garrison], and not the words of the Constitution of the United States.*

And later, with reference to the three-fifths clause:

> *Let us grant, for the sake of the argument, that the first of these provisions, referring to the basis of representation and taxation, does refer to slaves. We are not compelled to make that admission, for it might fairly apply to aliens — persons living in the country, but not naturalized.*

And finally, in interpreting the clause:

> *It is a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation. A black man in a free State is worth just two-fifths more than a black man in a slave State, as a basis of political power under the Constitution. Therefore, instead of encouraging slavery, the Constitution encourages freedom by giving an increase of "two-fifths" of political power to free over slave States.*

[18] Missing Citation

At this point Douglass' project becomes clear. As it is unlikely that he means to defend the actual constitutional politics of the antebellum United States, it must be concluded that his is an aspirational reading of those politics. For Douglass, notwithstanding his claims to the contrary, what matters is not what the text of the Constitution clearly means, but what it might advantageously be interpreted to mean.[19] In theory, any meaning that can be uncovered can be enforced. And so, if the three-fifths clause can be read as an expressed constitutional preference for freedom over slavery, the rhetorical and political power of that preference can be pressed into service in pursuing that end.

In this way, Douglass' project is similar to Lincoln's. Both men are careful to characterize their proposals as extensions of the Founding tradition. Both are wary of the appearance that they mean to assert new ideals, rather than pursue old ones. But Douglass' project differs from Lincoln's in an important respect. While Lincoln maintains only that the *ideal* of equality has always been a cornerstone of American constitutional politics, Douglass insists that the means of implementing it have always been contained with the Constitution.

Here we have the second great danger of aspirational narratives. What does it mean to insist, as Douglass does, that the Constitution was always anti-slavery? Returning to the principal inquiry of the paper, what does it mean to say that *Dred Scott* v. *Sandford* was wrongly decided? Both positions depend on a denial of the circumstances under which the texts were produced. Both arguments rely on the existence of constitutional ambiguities that they simultaneously exploit and deny. For Douglass, every constitutional euphemism for slavery is an explicit disavowal of it, rather than an embarrassed admission. For critics of *Dred Scott,* the Court is not simply wrong; it is obviously and heinously wrong, suggesting that the misinterpretation of constitutional ambiguity is more to be blamed than the ambiguity itself.

Moving beyond the intellectual inconsistencies, aspirational narratives may have important policy consequences as well. In the case of *Dred Scott,* the politics of the Civil War constitute a revolutionary intervention in constitutional lawmaking. It is impossible to determine

[19] Douglass takes his creative interpretation of the Constitution to the extreme in his discussion of the Fugitive Slave Clause, about which he says: "The plain reading of this provision shows that it applies, and that it can only properly and legally apply, to persons 'bound to service.' Its object plainly is, to secure the fulfillment of contracts for 'service and labour.' It applies to indentured apprentices, and any other persons from whom service and labour may be due. The legal condition of the slave puts him beyond the operation of this provision."

what constitutional negotiations might otherwise have proceeded between North and South in the absence of that event. However, we may draw some reasonable conclusions about the kinds of policies that may have been advanced under different regimes. Specifically, with respect to blacks' rights, Garrison's reading of the Constitution invites very different interventions than does Douglass'. If each man gets precisely what he wants, the former likely accomplishes something akin to what become the Reconstruction Amendments, textual changes that substantially and explicitly remake the meaning of the Constitution with respect to the legal status of blacks in the United States. Douglass, in his defense of the original text, invites less constitutional change than regime change. What Douglass pursues are new ways of wielding old tools. This has been an essential tactic in any number of rights struggles across time and space.[20] But it is not without consequences. There is a limit to the claims that may be advanced when they must be plausibly linked to past doctrine. Douglass almost certainly surpasses the limit of plausibility in pursuing the use of the Constitution of 1787 as proof of America's anti-slavery values.

Finally, aspirational constitutional narratives, inasmuch as they are unrestrained by facts on the ground, will tend to invite poorly directed inquiries into the sources of constitutional conflict. It is telling that the volume of work dissecting the Court's errors in *Dred Scott* outpaces that exploring the inherent impracticability of legal comity between slaveholding and slave-barring states. Our narrative commitments require that we explain away the distance between what the Court ruled and what we know to be true, that the Constitution, *our* Constitution, cannot have meant what the Court said it meant.

And so *Dred Scott* v. *Sandford* is quarantined in the anti-canon of American constitutional law. But how are we to approach it when we encounter it there? It would be unrealistic to suppose that we should simply re-assign it some more esteemed place in the study of the American Constitution. However, it is possible to interrogate its assignment to the anti-canon as a narrative choice. Rather than inquiring how and why the Court erred so egregiously, we might ask what alternative narratives might result from a reading of *Dred Scott* as good law? Even more pointedly, we might explore the different constitutional agendas likely to be pursued

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[20] For an excellent discussion of blacks' effective cooptation of the rhetoric of equality in the United States, see Condit, Celeste Michelle, and John Louis Lucaites. *Crafting Equality: America's Anglo-African Word*. University of Chicago Press, 1993.

by elites who thought the decision was obviously wrong, and those who thought it was essentially correct. Operating with the conviction that the outcome of that case could have been different, it is possible to interrogate that counterfactual in ways that highlight the kind of narrative work that categories like “anti-canon” do in the creation and maintenance of imagined political identities.