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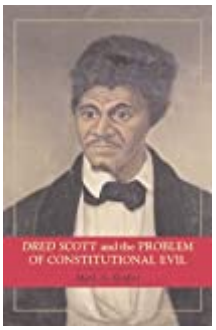

Mark A. Graber. *Dred Scott and the Problem of Constitutional Evil.* New York: Cambridge University Press, 2006. xiii + 264 pp. $40.00 (cloth), ISBN 978-0-521-86165-6.

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The Original Evil of the U.S. Constitution

Mark A. Graber has written a brilliant book that is flawed in a way that only a brilliant book can be. It consists of a provocative introduction, three long essays (essentially law review articles), and a short coda, all taking *Dred Scott v. Sandford* (1857) as a jumping-off point for reflections about constitutional interpretation and politics. The first essay criticizes constitutional theorists who misuse the case. The second defends Chief Justice Roger Taney's ruling as consistent with the vision of the framers. The third criticizes Abraham Lincoln's constitutionalism as inconsistent with the vision of the framers. The coda, verging on the bizarre, urges contemporary Americans to treat our own constitutional disputes as if we were voting for John Bell over Abraham Lincoln in 1860.

Although readers of H-Law are unlikely to need reminding, the 1857 ruling in the *Dred Scott* case was twofold: that African Americans could not become citizens of the United States and that Congress could not ban slavery in the territories (or delegate that power to territorial legislatures). African Americans could not be citizens because there was a consensus among the founders that "they had no rights which the white man is bound to respect." Congress could not ban slavery in the territories because slaves were "property" and therefore protected by the due process clause of the Fifth Amendment ("an act of Congress which deprives a citizen ... of his ... property, merely because he ... brought his property into a particular Territory of the United States ... could hardly be dignified with the name of due process of law").

Graber is a political scientist and constitutional lawyer; I am a historian. While political scientists and historians are both intended audiences for this book, it is aimed most of all at the lawyers. Graber wants to persuade lawyers, judges, and legal theorists that "constitutional evil" is a real, even inherent, problem of political life that cannot be evaded or defined away–but that also cannot be confronted without risking cataclysmic violence. He presents this understanding of constitutional evil as an originalist basis for future constitutional interpretation by making a historical argument that the framers designed the Constitution around it, and a normative argument that the framers were right, that their solution remains the only hope for peace in an ideologically polarized society. The problem of constitutional evil exists when there is basic disagreement in a society about what counts as evil. For the framers, this disagreement was about slavery. For the United States today, Graber's main example is abortion, where the evil is either abortion or public control over women's bodies. In other societies, such disagreements usually arise from di-

verse ethno-religious commitments.

Because fundamental disagreements of this kind cannot be fully reconciled, constitutional politics should consist of efforts to maneuver around their disruptive impact through–and this is where the argument turns bizarre–generous accommodations to the perpetrators of evil, such as political rules permitting them to veto anything they think will threaten their capacity to continue to perpetrate evil. There is no saying "no" to evil when it is backed by powerful interests, unless we are willing to kill 620,000 young men (in an 1860 population of 31.4 million; in a population of 300 million today it would be 6 million)–most of them not perpetrators of the evil. More to the point, Graber maintains, the framers of the Constitution instructed Americans *never* to say "no" to slavery–unless and until "crucial elites" in the South were willing to go along. A vote for Bell was faithful to this constitutional injunction. A vote for Lincoln was not.

Graber may be wrong in these conclusions (as I think that he is), but he earns the right to make claims on this scale through the rigorous scholarship and relentless logic of the essays that precede them. Thus, while we may be tempted to dismiss his challenges to conventional wisdom as merely perverse (of course Lincoln was right! of course the North had to say "no" to slavery eventually, and if not in 1860 then when!), *Dred Scott and the Problem of Constitutional Evil* actually does compel the reader to question a self-righteousness that can seem to come cheaply 150 years after the fact. "Adversaries for the remainder of human history will have the capacity to inflict catastrophic damage on each other whenever they are unable to resolve disputes over justice peaceably," Graber reminds us (pp. 253-254). No preference for justice over peace can slide past the reality that, today, this position carries risks of annihilation.

The first of Graber's three long essays attacks the "dangerous illusion" (p. 6) that the proslavery decision in *Dred Scott* was simply bad judging. This illusion has been fostered by a wide range of legal theorists, prominent scholars on both the left and right, who argue that a proper understanding of Taney's "error" validates their legal theories and discredits rival theories. Such arguments are "fruitless" (p. 17) because any theory of judging could lead to proslavery results. Graber categorizes the theories as institutional, historical, and aspirational. Institutional critiques condemn *Dred Scott* as anti-majoritarian activism, a futile intervention by unelected justices in a dispute that belonged in a Congress better able to forge compromises. The historical critique, the weakest of the three, asserts that Taney was wrong about the original intent of the framers: African Americans could be U.S. citizens and Congress could ban slavery in the territories. The aspirational critique holds that a principled decision would have favored freedom, regardless of precedent, constitutional text, or proslavery original intent.

Graber demolishes all three critiques, in part with careful historical reconstruction and in part by showing uses of the various theories in the Taney opinion and the dissents. Congress could not have compromised over slavery in 1857; legislators literally begged the Supreme Court to intervene. The original intent of the framers was much more pro- than antislavery, despite the Northwest Ordinance, which had banned slavery in one territory but "acquired a strong antislavery gloss" only later (p. 72). "If the persons responsible for the Constitution intended that Congress have the power to ban slavery in every territory, then this was the best-kept secret in American politics during the late 1780s" (p. 72). Antislavery aspirations, finally, were not more obviously aligned than proslavery aspirations with existing views of "justice" in 1857–which is another way of saying that the United States suffered from a real problem of constitutional evil.

The second essay examines the constitutional politics that the framers intended to create and actually did create in articles 1, 2, and 3. Because the framers made erroneous assumptions about the shape of future population growth, their rules led to outcomes diametrically opposed to their intentions. The framers, Graber argues, intended that "bisectional coalitions" would make future decisions about slavery. They expected the North to control the Senate (disproportionate power for the small New England states) and the South to control the House of Representatives and presidency (three-fifths representation of slaves in House apportionments and the electoral college). The judicial appointment process sealed the deal: nominations by pro-South presidents subject to confirmation by a pro-North Senate. The idea was to give both slave states and free states "a practical veto on national policy" (p. 92) in a system that was "exquisitely sensitive to Southern concerns" (p. 101) and would facilitate the domination of policy-making by "moderate" proslavery Southerners, meaning Virginians (p. 114).

I find this bold reinterpretation of the compromises of 1787 to be fully persuasive. Graber is sophisticated about historical arguments and has done his empirical homework. His next step uses two familiar facts to vali-

date the majority opinion in *Dred Scott*: northern population growth swamped the three-fifths rule in the House of Representatives, making the Senate the last bastion of southern power through the balanced admission of new states; and the Jacksonian party system, with both parties competing for southern as well as northern votes, accomplished the proslavery task of keeping abolition off the national agenda. Thus, the parties did what the framers had intended other institutions to do: preserve the need for "bisectional coalitions." By 1857, with the parties dead or dying and the North in a position to dominate all three branches in the near future (California unbalanced the Senate in 1850, with Minnesota and Oregon, but no potential southern states, in the wings), a Supreme Court that was still staffed by Jacksonian partisans was the only "bisectional" institution left. A proslavery ruling in *Dred Scott*, therefore, was faithful to the most fundamental intentions of the framers.

Things become more dicey in the third essay. Having praised Taney for keeping faith with the framers, Graber turns to Lincoln's refusal to do the same. Unwilling to undo the results of an election conducted under the rules the framers had designed (by allowing Southerners to veto Republican policies), Lincoln substituted his own majoritarian vision for the "bisectional coalitions" on which the framers had staked the nation's survival. Graber's critique centers on contract theories of constitutionalism as articulated by Lincoln (primarily in his first inaugural) and by nineteenth-century and modern commentators. No theory of how contracts ought to be interpreted when conditions alter the relative power of parties supports Lincoln's position, since he misconstrued the original contract by claiming that the founders had placed slavery "in the course of ultimate extinction." Yet at this point I began to lose interest. Why should we care about contract interpretation when the issue was fundamentally political: whether to take *any* antislavery steps at the first moment in U.S. history when this became a practical option. The answer, I suspect, lies in Graber's larger challenge to legal theorists (as opposed to historians or political scientists). The essence of this challenge is his insistence, which I find very easy to endorse, that theoretical gestures can never solve important political problems.

Which returns us to Graber's troubling advice to vote for the slaveholding Unionist John Bell in 1860. Historians have traditionally cast Stephen Douglas as the "compromise" candidate in that four-way race, but Graber thinks a Douglas vote was not a sufficient concession to slavery. He is undoubtedly right from the perspective of the secessionist supporters of the fourth candidate (John Breckenridge). He is also right to note that a Union military victory was not preordained–and that even a victory might not have abolished slavery (if, say, McClellan had beaten Lincoln in 1864). But Graber is on weaker ground in comparing our heated disputes about abortion and affirmative action to the slavery conflict. It is not just that these issues lack the same perilous sectional geography. It is that, as serious as they are, they are simply not comparable to the enslavement of 4 million Americans (again, in a total population of 31.4 million–which would be 38 million enslaved Americans today).

Graber warns us that despite all of Lincoln's "moderate" hedging about where he would or would not interfere with slavery, an endorsement of Lincoln's constitutional position ultimately requires an endorsement of John Brown's belief that slavery could be ended only through bloodletting. I agree with Graber, but also with Lincoln and Brown.

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