

The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions

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The Supreme Court's decision in *Dred Scott v. Sandford* is widely regarded as among the worst decisions it has ever made. In addition to embracing reviled substantive values, the decision deeply wounded the Court's status and authority. By embracing a theory of judicial supremacy that held that the Court alone could resolve all important constitutional disputes, however, the Court had been gradually moving toward such a debacle. An important Jeffersonian tradition criticized the Court for encouraging political actors to forego their own constitutional responsibilities. The dissenting opinion of Justice Benjamin Curtis suggested a more appropriate course for the Court, one that carved out a clear place for the exercise of judicial review but that recognized an important sphere of constitutional politics outside the judiciary.

"The Court has rushed into politics voluntarily, and without other purpose than to subserve the cause of Slavery. They were not called, in the discharge of their duties, to say a word about the subject. . . . They consented with unseemly haste to dabble in the dirty waters of political corruption."¹

In the final years before the Civil War, Congress extended an invitation to the Supreme Court. Congress invited the Court to decide a constitutional question that it was unwilling to decide itself: whether the federal government had the power to prohibit slavery in the territories. The territorial question was more explicitly sectional and more closely linked to slavery than had been earlier questions of federal power over economic development; and the rise of the abolitionist movement and the Southern fire-eater reaction had made the slavery question itself a much more volatile issue than it had been even a few years earlier (Freehling 1990; Potter 1976). Both major parties desperately hoped to avoid taking a firm stance on the expansion of slavery into the territories, a silence that was rapidly being exploited by emerging antislavery parties. In this politically inhospitable climate, Congress attempted to pass the issue off to the federal judiciary, inviting the Court to make some firm declaration that would allow elected politicians to dodge the issue and keep clean hands with their electorates. In the case of *Dred Scott*, Chief Justice Roger Taney and a majority of his brethren disastrously accepted that invitation. Only Associate Justice

¹ Anonymous, "The Decision of the Supreme Court," *New York Daily News*, 10 March 1857, p. 6.

Benjamin Curtis declined it and laid out the argument that some constitutional questions were best left unanswered by the Court.

Taney took the path of judicial supremacy, and his choice has been widely denounced ever since. This article points out the road not taken, the path carved out toward the end of Curtis's dissenting opinion in the *Dred Scott* case. *Dred Scott* has been universally denounced as a terrible mistake by the Court. Chief Justice Hughes (1928, 50) labeled it a "self-inflicted wound" and a "public calamity." Robert McCloskey (1994, 62) regarded it as "the most disastrous opinion the Supreme Court has ever issued." Alexander Bickel (1970, 41) called it "a ghastly error," and his protégé Robert Bork (1990, 28) considers it "the worst constitutional decision of the nineteenth century." Given the evident political morass that the Court so blithely leapt into with *Dred Scott*, many modern commentators have favored a more Bickelian strategy. The Court should have exercised the "passive virtues" and issued a modest and narrow ruling firmly grounded in precedent and avoiding the divisive political implications of the case, as Justice Samuel Nelson largely did in his concurrence (Bickel 1970, 36–37; Bork 1990, 28–34; Fehrenbacher 1978, 1–7; McCloskey 1994, 60–62; Rehnquist 1987, 313; Sunstein 1999, 36–37). Some have suggested that the Court should have leaned the other way and issued a strong antislavery ruling, though historically implausible and politically perhaps more dangerous (Eisgruber 1993; Jacobsohn 1986, 8; Marshall 1987, 4).

Although Curtis was highly critical of Taney's majority opinion, his response to the territorial question was neither Bickelian nor aspirational. Instead he insisted that the Court was foremost a forum of law and that the law could not answer every question. The territorial problem was a matter of principle, and Curtis argued that such issues of principle were best decided in the political arena. Curtis neither denied the reality of constitutional principles nor wavered from the judicial duty to apply the law, but he would not allow politicians to dodge their own responsibilities to render constitutional decisions. In doing so, Curtis did not advocate either a passive or a "minimal" Court (Sunstein 1999, 3–23). He did not intend for the Court to be generally restrained or to simply wait for a different case before returning to the slavery issue. The justice fully expected appropriately judicial questions to be resolved by the judiciary and was willing to support an active judiciary even in the face of political hostility. Curtis's distinctive contribution was to emphasize that genuinely constitutional questions could be resolved, even if the Court was obliged to leave them undecided.

Contemporary commentators maintain that constitutionalism is largely exhausted by constitutional law. This claim has its origins in John Marshall's celebrated opinion in *McCulloch v. Maryland*, which maintained both that the only constitutional issue associated with the Bank of the United States was whether Congress had the constitutional power to incorporate a bank and that the Supreme Court had the final authority to make that decision of constitutional law. Jeffersonian opponents of broad federal powers challenged Marshall's implicit

claim that constitutional questions could be reduced to questions of constitutional law. In their view, whether a bank was necessary or proper also involved questions of constitutional ethos inappropriate for judicial resolution. These differences were replayed in the infamous *Dred Scott* case. Both the majority opinion and Justice McLean's dissent maintained that the only constitutional issue raised by the status of slavery in the territories was one of constitutional law: Did Congress have the power to ban slavery in the territories? Justice Curtis, however, suggested an alternative. While he believed that constitutional law permitted Congress to ban slavery in the territories, he believed that the matter had significant nonlegal constitutional dimensions that were entrusted to the legislature. His opinion provides intriguing support for the view that the Constitution must not only be interpreted to identify the proper powers of government but also constructed to realize the proper principles of politics. This view points us toward an appreciation of constitutional politics and the possibilities of extrajudicial debate over constitutional principles, with a concurrent caution against the Court's foreclosing such debates through its own overly aggressive actions (Whittington 1999b, 196–212).

The institutional question of who should decide fundamental disputes over political principle should be as important to constitutional theory as the interpretive question of what the right answer should be in such hard constitutional cases (Waldron 1999). Unlike modern advocates of a more universal judicial restraint, Curtis did not primarily emphasize the democratic credentials of the legislature. Rather, his emphasis was on the nature of the question and resources available to answer it. Though involving important matters of political principle, the territory issue was a political question about which the Constitution did not provide adequate guidance for the courts. Given how the question would have to be answered, it was an issue best resolved in the political arena.

This article is divided into four parts. Taney's assumption in *Dred Scott* that the Court had a special obligation to resolve all constitutional disputes had been prefigured in earlier cases. The paper begins with a brief reconsideration of John Marshall's opinion in *McCulloch*, with its careful claims of judicial power and his influential reading of the division between constitutionalism and policy. *McCulloch* provoked a significant response, examined in the second section, from the Jeffersonians, who incompletely but importantly objected to Marshall's assertion of judicial supremacy. The final sections focus on the congressional invitation to the Court and the different responses to that invitation by Taney and Curtis, with a particular emphasis on Curtis's understanding of the limits of the judicial function in articulating constitutional meaning. In reaching the Marshallian conclusion that Congress possessed broad discretionary powers in this area, the Curtis dissent is notable for making a place for principled debates over fundamental political questions outside the courts. This emphasis on the constitutional responsibility of legislators to make decisions on principle distinguishes Curtis from many current constitutional theorists (e.g., Dworkin 1985) as well as from his fellow justices.

John Marshall's Thin Constitution and the Judicial Duty

"We Must Never Forget, That It Is *A Constitution We Are Expounding*" (*McCulloch v. Maryland* 1819, 407).

The invitation that politicians extended to the Court had been solicited decades earlier when the Court asserted a preeminent place for the judiciary in construing constitutional meaning. In the 1803 *Marbury* case (180), the Court had begun modestly enough by arguing that it too was obliged to interpret and follow the requirements of the Constitution in the course of conducting its duties, and thus possessed a power of judicial review.² By 1819, Chief Justice John Marshall was willing to take a bolder stance in the *McCulloch* case when faced with two governments acting on conflicting understandings of the Constitution. In the course of dealing with the issues raised by *McCulloch*, Marshall developed a stronger argument for viewing the Court as the special guardian of the Constitution. If the Constitution is primarily a type of law, then it not only becomes relevant to the Court, but the Court has a particular institutional responsibility for authoritatively articulating constitutional meaning to which other political actors should defer.

Because the Court accepted the federal law at issue in *McCulloch*, and recognized a broad area of legislative discretion to make national policy in the process, it is sometimes regarded as a step back from *Marbury* and judicial supremacy. *McCulloch* can be seen as an application of a Thayerian "clear mistake rule," in which the Court refused on "a doubtful question" to overturn a national law that was not a "bold and plain usurpation" (Bickel 1970, 37; *McCulloch v. Maryland* 1819, 401, 402). Some have likewise advocated a "*McCulloch* standard" that calls for "judicial deference to the plausible interpretive acts of Congress" (Engel 1999, 118). But as Thayer (1893, 151) himself admitted, Marshall did not shy away from rendering a constitutional decision in *McCulloch*. Marshall left "determinations of facts and degree" to Congress in order to keep the Court from making "policy determinations bearing on the wisdom of legislation" (Clinton 1989, 195; Cox 1987, 82). In doing so, however, he insisted that the Constitution "remains subject to authoritative *judicial* exposition" (Snowiss 1990, 171). The context of *McCulloch* focused Marshall's discussion on the range of legislative discretion over the instruments of policy,

²Some have argued that *Marbury* asserts merely that the Court can strike down laws that impinge on the judicial power (e.g., Clinton 1989). The more traditional view is that *Marbury* established a general authority for the Court to examine government actions for their consistency with the Constitution. My position falls between these two views, contending that *Marbury* made "the suggestion of a judicial authority to say what the law of the Constitution is" and strove to distinguish law and politics, but did not claim that the Court was either the ultimate or exclusive constitutional interpreter (Snowiss 1990, 173). Consistent with more political approaches to the question, I also claim that the scope of judicial power developed in stages over time (Graber 1999). While *Marbury* claimed that the Court could act on its own interpretations of the Constitution, it was not until *McCulloch* that the Court positioned itself as the authoritative interpreter of the Constitution.

but he still insisted that Congress could not alter the principles and purposes of the Constitution, as the Court understood them (Campbell 1991; Gillman 1994). Moreover, in siding with Congress against the states on the substantive constitutional question, the Marshall Court positioned itself as the ultimate arbiter of constitutional meaning and decisively took a stand on one of the most hotly contested issues of the early national period. What is most notable for present purposes, however, is not the degree of deference shown by the *McCulloch* Court to congressional policy making, but the way in which Marshall justified that deference by conceptually and institutionally separating choices about policy from judgments about constitutional principle.

The National Bank had been the subject of periodic political conflagrations, and *McCulloch* was the product of lingering local resentment of the Bank. At the national level, the Jeffersonians had largely accepted the necessity of the Bank, at least for the short term, and its constitutionality was no longer strenuously debated. At the state level, however, interest was more consistent with ideology, and the *McCulloch* lawsuit was sparked by efforts by the government of Maryland to drive the Bank out of the state through the imposition of punitive taxes (Hammond 1957, 251–62; Warren 1926, 1: 505–07). By siding with the national government over the state, Marshall muted criticism of the substance of his decision and made effective resistance to the ruling unlikely, while advancing his own relatively expansive understandings of national power.

Rather than ignoring this background, Marshall began his opinion by situating the Court within the context of this ongoing political controversy and using it as a justification for supporting the judicial power. Marshall noted the gravity of a case that pits “a sovereign State” against the “legislature of the Union” and that requires an investigation into the “most interesting and vital parts” of the Constitution affecting the “great operations of the government.” In terms that foreshadow those employed by Taney nearly four decades later, however, Marshall asserted the appropriateness, even the necessity, of such issues being decided by the Supreme Court. Although “no tribunal can approach such a question without a deep sense of its importance,” Marshall argued that the issue must be decided and must be “decided peacefully.” Without judicial action, uncertainty as to the boundaries of federal power would be a continuing “source of hostile legislation,” incapable of clear resolution (*McCulloch v. Maryland* 1819, 400). Marshall was particularly concerned with the possibility of competing governmental institutions clashing over constitutional principles, as he made clear in a series of anonymous newspaper essays defending his decision. The achievement of the Constitution was to solve the disabilities that arose in the Confederation from the “want of a common umpire” between the governments. The Supreme Court was an impartial arbiter that could stand outside divisive social conflicts and impose a neutral resolution. Judges are the agents of the people, and “their paramount interest is the public prosperity” (Gunther 1969, 212). If the Bank issue were to be decided peacefully, “by this tribunal alone can the decision be made. On the Supreme Court of the United States has

the constitution of our country devolved this important duty” (*McCulloch v. Maryland* 1819, 401). Indeed, “if we were now making, instead of controversy, a constitution, where else could this important duty of deciding questions which grow out of the constitution, and the laws of the union, be safely and wisely placed” (Gunther 1969, 208)? Rather than allowing constitutional disputes to fester in the political arena, they should be shifted to the courts for their wise disposition.³

Having begun with this strong claim for judicial supremacy, however, Marshall also sought to muster the support of the other branches to his aid and to emphasize the political consensus that had formed behind the constitutionality of the Bank. That constitutionality could “scarcely be considered as an open question” given the extensive history of government support for it. Moreover, Marshall maintained, the judiciary ought to be cautious before a “doubtful question, one on which human reason may pause” (Gunther 1969, 401). In this context, Marshall admitted that the Bank “did not steal upon an unsuspecting legislature,” but “its principle” had been extensively debated. Congress had already “deliberately established by legislative acts” a distinct “exposition of the constitution” (Gunther 1969, 402). Politically, these debates were particularly important because they allowed Marshall to uphold the Bank without fear of reprisal while creating a space for him to develop expansive claims on behalf of national and judicial authority (Graber 1999, 37–39). By “deferring” to federal law in the Bank case, Marshall could make the Court into an important constitutional actor. The Court did not deny that other political institutions could deliberate on constitutional meaning. Indeed, the problem for Marshall was that there were entirely too many institutions engaged in constitutional debate. The difficulty was not a lack of concern with principle, but the multiplication of clashing principles without order. His narrative is of “a Hobbesian world of political conflict . . . and in this world only the judiciary can secure peace” (LaRue 1995, 72). If the judiciary could not be the *exclusive* interpreter of the Constitution, it should be the ultimate one.

Marshall’s substantive discussion of the case progressively de-emphasized the principled possibilities of legislative deliberation. In his examination of congressional authority to incorporate a bank, Marshall sought to sharply distinguish between the realm of constitutional law to be decided by the judiciary and the realm of pragmatic policy to be decided by the legislature. For Marshall, the Constitution was about defining the boundaries of political power. The identification of those boundaries was a fairly formal, legal, and politically neutral process, and the chief justice defined the judicial task as one of specifying and patrolling those boundaries (Meister 1989, 221–25; White 1991, 566–67). Politicians could continue to debate issues such as the Bank, but Marshall

³In this context of a contested state law, Marshall emphasized the value of a national judiciary that could resolve divisive issues. In addressing national laws, however, the Court was more likely to align itself with the political consensus. See also Graber 1998.

hoped to drain such disagreements of constitutional significance. For the sake of the stability of the constitutional order, disputes over constitutional principles were best resolved in the courts.

The Bank case raised that problem in the particular context of the necessary and proper clause, which Marshall regarded as merely making explicit what is essential to any government, namely that “the powers given to the government imply the ordinary means of execution” (*McCulloch v. Maryland* 1819, 409). In examining the significance of the necessary and proper clause to the constitutional scheme, Marshall posed two sharp and related dichotomies—between a grant of authority and its exercise and between law and policy. These distinctions had the effect not only of broadening the scope of federal powers under the Constitution, but also of cementing judicial supremacy in construing constitutional meaning. The Constitution was fundamentally concerned with providing legal grants of authority, and it had little to say about how that authority might be exercised. The Constitution’s “nature . . . requires, that only its great outlines should be marked, its important objects designated” (*McCulloch v. Maryland* 1819, 407). There is a fundamental difference in kind between a listing of the “great objects” of government and the specification of the means to be employed in pursuing those objects. The former is an appropriately constitutional task, the division of political responsibilities and the specification of fundamental principles, but the latter is fundamentally a legislative task, the making of policy in fulfillment of those responsibilities.

The Constitution’s function is to specify political authority, and the Court’s role is to enforce those specified boundaries. The legislative selection of the best means to achieve its goals is essentially utilitarian and of no concern to either the Constitution or the Court. Legislative choices may be ineffective or inefficient, but legislators are specifically chosen by the people to make those judgments. The primary dispute between Marshall and the advocates for the state of Maryland was over the word “necessary” and whether it should be viewed as including all available means or only those that are essential to achieving the posited end. Marshall read the necessary and proper clause as delegating all means “appropriate” or “plainly adapted” to achieving given ends. The legislature only may not “under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should such a decision come before it, to say that such an act was not the law of the land” (*McCulloch v. Maryland* 1819, 423).

By this point in the opinion, the legislative task had been transformed into providing factual policy judgments, not principled constitutional judgments. “All those who have been concerned in the administration of our finances” had by now established that the Bank “is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations.” This factual assessment “is not now a subject of controversy” and the “universal conviction” of the legislature now supported “the utility of this measure” (*McCulloch v. Maryland*

1819, 422). Congress merely chose how best to “execute” the powers laid down by the Constitution, as interpreted by the Court. “To undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative grounds” (*McCulloch v. Maryland* 1819, 423).

As a legal directive, Marshall’s reformulation of the necessary and proper clause makes sense. The “appropriate means” standard sets out a fairly clear boundary for legislative action, which the judiciary could then monitor for incursions. The Court would interpret the Constitution’s “great objects,” but it would not investigate the broader propriety of legislative actions. Marshall carefully withdrew the Court from policy decisions, but at the same time he absolved policy makers of final responsibility for constitutional judgments.

The Jeffersonians could not come up with a better legal rule than Marshall did, but their objection to Marshall’s decision was real. Marshall was right when he complained that his critics seemed largely to object to his rhetoric, while refraining from declaring the Bank unconstitutional and being seemingly incapable of formulating a more restricted doctrine than the one he offered in *McCulloch* (Gunther 1969, 161–77). Their problem was not with Marshall’s unwillingness to strike down the Bank—they too had reached an accommodation with that institution. Their problem was with Marshall’s exposition of constitutional meaning and his portrayal as a positive good a Bank that the Jeffersonians found to be a necessary evil. As Marshall wrote to a fellow justice, his critics seemed to want him to decide the case but without explaining his reasons (Gunther 1969, 12–13). In explaining his reasons for upholding the Bank, and in identifying his explanation with the true meaning of the Constitution, Marshall had reduced the Constitution to a legal rule. The Jeffersonians had lost something in the Court’s translation of the constitutional text, but Marshall left them no room to recognize what that something was.

The Jeffersonian Constitution Outside the Court

“The Judiciary of the United States is the Subtle Corps of Sappers and Miners” (Jefferson 1905, 15: 297).

As long as the Jeffersonians, and their heirs, had the political support to act on their own constitutional sensibilities, they were able to resist Marshall’s siren song of judicial supremacy. The Jeffersonians disagreed with *McCulloch*’s substantive rendering of the necessary and proper clause. They also resisted Marshall’s emphasis on the Constitution as a formal, legal structure, but they never developed a coherent alternative understanding of the nature of the Constitution that could make sense of that resistance. In their political activities, however, the Jeffersonians and their heirs were as concerned with constitutional ethics as with constitutional rules. To the Jeffersonians, the Bank may have been necessary, but it could not be regarded as proper and it could not stand as a model for how the federal government’s constitutional powers should

be understood. For Marshall, the Bank was the very exemplar of what the new federal government could achieve. Through the Bank, the Federalists and their successors had leveraged a once highly controversial understanding of federal constitutional powers into the accepted baseline. The Bank really did not need Marshall. Even a Jeffersonian Court would not have imagined striking down the Bank, and Marshall took glee in pointing out the justices appointed by Jefferson who joined his unanimous opinion in *McCulloch* (Gunther 1969, 81–82). Marshall made a great constitutional case and established a firm constitutional principle out of what was for the Jeffersonians an unfortunate compromise, an anomaly within their preferred constitutional order. Despite the twentieth-century elevation of *McCulloch* to canonical status, the Democrats of the early nineteenth century continued to treat it as an exception to be ignored (Gunther 1969, 19).

For most Jeffersonians, the *McCulloch* decision was more dangerous for what it meant for later controversies than for what it meant for the Bank. The Marshall Court had proven quite willing to strike down state actions as violations of the Constitution, but the Bank case suggested it would not be so willing to lean the other way and aggressively defend the states against federal encroachment. More important was the effect Marshall's argument might have on future officeholders. The Jeffersonians recognized the educative function of the Court and worried that Marshall could seduce future political actors into aggrandizing their own power. Marshall's decision removed the possibility of the judicial veto. His opinion threatened to alter dominant political understandings.

The institutional threat posed by the Court should be distinguished from the concern that the Court through its opinions was undermining the public understanding of constitutional constraints. Madison complained that Marshall had interwoven a "general and abstract doctrine" with his particular consideration of the case at hand and doubted that the meaning of the Constitution "so far it depends on judicial interpretation" should emerge from "a previous and abstract comment on the subject." More substantively, the Court's opinion tended "to break down the landmarks intended by a specification of the powers of Congress" (Warren 1926, 1: 517). Jefferson (1892–99, 10: 140) denied to the Court the right "of exclusively explaining the Constitution." Madison (1900–10, 9: 59) had long had even less faith than Jefferson in the power of the Court to check Congress, and he wrote to Virginia judge Spencer Roane that nothing but "sound arguments & conciliatory expostulations addressed both to Congress & to their Constituents" could keep Congress within its constitutional bounds. Fortunately, "there is as yet no evidence" that the Court's opinions "express either the opinions of Congress or those of their Constituents." Madison remained certain that "if convinced of" the dangers inherent in Marshall's logic, then Congress would "abstain from the exercise of Powers claimed for them by the Court." Ultimately, Madison (9: 62) was far more concerned with the "steady course of practice" than with the Court's rulings, but his concern was with how Marshall's arguments might influence that practice. Similarly,

Roane began his newspaper critique of *McCulloch* by admitting that “however guarded our constitution may be, we must submit to particular infractions of it” (Gunther 1969, 111). Marshall’s sin was to supply a “*general* declaration” by which the “limits imposed on the general government, by the constitution, are stricken off” (112). Political actors could distinguish the exception from the rule of constitutional practice, but because the Court’s constitutional law could recognize no exceptions, the exception became the rule.

In controlling the government, the Jeffersonians and their heirs had plenty of opportunities to act on their constitutional understandings. Despite the appointment of several Democratic justices to the Court, Jefferson (1892–99, 10: 140) thought that even “yet the leaven of the old mass seems to assimilate to itself the new . . . [and] we find the judiciary on every occasion, still driving us into consolidation.” Although he thought the judiciary was ever acting “like gravity” to pull the other branches into a corruption of constitutional principles, he thought that the public recollection of “first principles” would at least provide a “temporary check” even “if the gangrene is to prevail at last” (10: 189, 188). In addition to the many private pamphlets, newspaper editorials, and legislative reports produced by the Jeffersonians in support of their vision of appropriate federal powers, President James Monroe wrote a lengthy examination of the constitutionality of federal funding of road construction in support of his veto of a bill to repair the Cumberland Road. From the beginning of his administration, Monroe considered “it a duty to express the opinion that the United States does not possess the power in question,” though he favored passage of an amendment to rectify that inconvenience (Richardson 1897, 2: 143). Monroe’s primary concern was internal improvements, not the Bank, but his argument was Jeffersonian orthodoxy and implicitly rejected Marshall’s understanding of federal powers articulated just three years before.

Similarly, the Jacksonians continued to reject Marshall’s reasoning in *McCulloch* and acted on a more narrow understanding of federal powers. In doing so, Jacksonian legislators and presidents recognized their own obligation not only to consider the utility of new policies, but also their appropriateness within the larger constitutional scheme. Most famously, President Andrew Jackson was faced with the same case as Marshall, the incorporation of a national bank, but chose to veto the Bank that Marshall had endorsed. Regardless of the future of the judicial doctrine, Jackson believed that the president, at least, should not adhere to Marshall’s nationalistic reasoning.⁴ From an institutional perspective, even “if the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government.” The justices had no authority over the president, but could “have only

⁴The Court itself did not build on the *McCulloch* precedent during these years. Given the political rejection of expansive federal powers, there were few opportunities for the Court to reconsider the case. There was some contemporary belief that the Taney Court would have been willing to overturn *McCulloch* (Peterson 1987, 306).

such influence as the force of their reasoning may deserve” (Richardson 1897, 3: 1145).⁵

Jackson’s substantive reading of the case was somewhat subtler, however. Jackson did not think it was necessary to directly challenge Marshall’s decision in *McCulloch*, but in order to avoid that substantive conflict, the president had to seriously alter Marshall’s larger constitutional model. Where Marshall sought to create clear boundaries between a framework of constitutional authority and the realm of legislative discretion, Jackson sought to reintegrate the two. It turned out that the president did not regard issues of “sound policy” and constitutionality as distinct questions, but rather thought the former could determine the latter. Jackson noted that Marshall refrained from inquiring “into the degree of necessity” of the Bank, which “would be to pass the line which circumscribes the judicial department and to tread on legislative ground” (Richardson 1897, 3: 1146). Marshall clearly meant to conclude that the Constitution had delegated such policy decisions to the legislature. Such questions were beyond judicial cognizance because they were beyond constitutional cognizance, decisions that the constitutional framers wisely had refrained from making.

Jackson, by contrast, took the distinction as an institutional one, rather than as a constitutional one. Marshall portrayed the Constitution as creating permanent bright lines of principle. Jackson understood the Constitution also to be a variable source of substantive guidance. In the abstract a bank may be constitutional, but “it is the province of the Legislature to determine whether this or that particular power” is actually necessary and proper to the realization of governmental purposes, and “from that decision there is no appeal to the courts of justice.” Policymakers must examine the particular features of the bank in order to determine whether they are “*necessary and proper*” to its public functions “and therefore constitutional, or *unnecessary and improper*, and therefore unconstitutional.” The “degree of necessity” ceased to be a purely political decision within the plenary powers of the legislature, but became a constitutional decision of great note, although one inappropriate for judicial determination (Richardson 1897, 3: 1146). The veto message was largely written by future Chief Justice Roger Taney (Swisher 1936, 194–200). Although Taney disagreed with Marshall’s *McCulloch* decision, in the context of the political action he thoroughly undermined Marshall’s constitutional logic without explicitly rejecting the Court’s basic ruling.⁶

⁵Daniel Webster did believe that *McCulloch* covered “the whole ground” and was controlling. He insisted that “the final decision of constitutional questions belonged to the supreme judicial tribunal.” Once the Court had ruled on the Bank issue, the president had no right to “set up his own private judgment against its constitutional interpretation.” Legislators had discretion only over whether the Bank was “inexpedient or impolitic” (*Congressional Debates* 1832, 22, 8: 1231, 1232, 1234).

⁶Taney would later create an explicit “political questions” doctrine on the Court and undercut the federal judiciary’s mandatory jurisdiction (Clinton 1986; *Luther v. Borden* 1849). In doing so, Taney did not explicitly challenge the constitutional framework articulated by Marshall, but he recognized a more substantial set of constitutional responsibilities on the part of the political branches than Marshall ever had. See also Whittington 1996, 19–22.

Subsequent presidents reinforced this relatively narrow reading of federal authority. Democratic presidents used their inaugurals and annual messages to profess their understanding of the constitutional limitations. These addresses were intended to be educative as presidents sought to establish and reinforce correct constitutional principles (Tulis 1987, 25–94). They were also pledges. They served as adjuncts to the presidential constitutional oath, public recognition of their own constitutional responsibilities and commitments to be vigilant against the constitutional violations of others. The former Democrat John Tyler vetoed a bank bill produced by his own party, being unable to convince himself that the bill “was a necessary means or one demanded by propriety to execute those powers” (Richardson 1897, 4: 64). In vetoing a slightly reworked bill a month later, Tyler emphasized the constitutional responsibilities imposed on elected officials. Having written the Constitution, “their fixed and fundamental law,” the “whole people of the United States . . . prescribe [it] to the public functionaries, their mere trustees and servants” (4: 68). Tyler noted that there was “no guard, no guaranty of preservation, protection, and defense” of constitutional principles other than through their “religious” observance by public officers. The presidential duty was to guard the will of the whole people against an “infraction by a majority in Congress” (4: 69). His successor, James Polk, detailed his understanding of those constitutional principles in his veto of an internal improvements bill. Polk ignored *McCulloch* and instead quoted Madison on the limited nature of the necessary and proper clause. The utility of a measure for fulfilling an enumerated end was not enough; the power must be “*necessary and proper*,” by which Polk meant “without which such principal power can not be carried into effect.” But the president defended this interpretation of the Constitution less by its textual necessity, than by its political consequence. A broader legislative authority had to be rejected because it “tends imperceptibly to a consolidation of power in a Government intended by its framers to be thus limited in its authority.” Polk offered a political rule of thumb rather than a judicial legal rule, contending that “all the functionaries of the Federal Government should abstain from the exercise of all questionable or doubtful powers,” with a “safer and wiser” course being to appeal to the states and people for a constitutional amendment (Richardson 1897, 4: 462).⁷ Where Marshall as chief justice was concerned to secure the broad area of discretion for the federal government so that it might act in future unforeseen crises, Polk as president was concerned with the constitutional propriety of particular government actions and their long-term effect on constitutional structures.

The greatest Jeffersonian concern with Marshall’s reasoning in *McCulloch* was with its implicit separation of policy and constitutional principle and its

⁷Later Democratic presidents likewise vetoed legislation on the basis of this narrow understanding of federal powers—e.g., Franklin Pierce (Richardson 1897, 5: 247) (insane asylum), (5: 256) (internal improvements), (5: 386) (internal improvements); James Buchanan (Richardson 1897, 5: 543) (agriculture colleges), (5: 601) (internal improvements), (5: 608) (land grants).

elevation of the judiciary to a special role in the articulation of constitutional meaning. The Marshall Court's understanding of the Constitution was quite different from that of the Democrats, both substantively and structurally. Substantively, Marshall supported a broad grant of authority to the national government, a sweeping authority that the Jeffersonians could not reconcile with their understanding of a limited government of enumerated powers. Structurally, Marshall cast the Constitution as a formal framework within which the government exercised power. The framework itself was fixed, and it was the judicial function to define and enforce its boundaries. The Jeffersonians rejected both Marshall's formality and his institutional claims. By subsuming constitutional meaning broadly within its own judicial function, the Jeffersonians thought Marshall had stripped the Constitution of its substantive political meaning. Marshall eliminated questions of propriety from constitutional inquiries, with the result that government officials were encouraged to think in terms of minimal constraints on their power rather than in terms of their own obligations to uphold the constitutional order. Marshall created a scheme in which government officials are constitutional subjects rather than constitutional actors. To his critics, this was self-defeating in the long-term.⁸

The Taney Court's Political Foray

"This is certainly a Very Serious Question . . . and it is Our Duty to Meet it and Decide it"
(*Dred Scott v. Sandford* 1856, 403).

As long as the prominent constitutional disputes tended to reinforce the existing political structure, elected officials were willing to deliberate on constitutional meaning. Although the Democratic party contained the strongest pro-slavery element and the Whig party had periodically served as a vehicle for antislavery agitation, both parties had tried to finesse the slavery issue, especially in relation to the territories. As sentiment at both extremes on the issue grew more intense, however, strategies of avoidance and compromise became less politically viable. In order to preserve their existing organizations, leaders of both parties sought to shift final resolution of the slavery issue into some other forum where national political leaders would not have to take a position.

The favored compromise was to shift the decision to the territorial legislatures and to the federal judiciary in the hope of compartmentalizing the dispute, moving it away from national electoral politics and removing the fuel from the political fires of both the Northern abolitionists and the Southern fire-eaters. The Democrats had gradually become more sympathetic to an in-

⁸Madison (1900–10, 9: 327–333, 24–25) usefully distinguished between a “constitutional usurpation” and a “constitutional abuse.” The latter was equally damaging to the national health, although it only involved a misuse of government powers that were otherwise, at least arguably, legitimate. Territorial exclusions and protective tariffs may be abusive violations of constitutional principle but arguably are legitimately within congressional authority. The Sedition Act, on the other hand, was a usurpation of a power clearly withheld from federal authority.

creasingly Jacksonian federal judiciary, and by the late 1840s the Court was widely held in high regard (Warren 1926, 2: 206). The 1848 compromise plan introduced by Whig senator John Clayton for organizing the California and New Mexico territories was silent on the issue of slavery, leaving its future to depend “on the Constitution, as the same should be expounded by the [territorial] judges, with a right to appeal to the Supreme Court of the United States.” Clayton recommended his measure as allowing Congress to “avoid the decision of this distracting question, leaving it to be settled by the silent operation of the Constitution itself” (*Congressional Globe* 1848, 30, 18: 1002). Although Clayton’s bill was defeated in the antislavery-leaning House, his proposal became the basis of the last great territorial compromises of the antebellum era.⁹ The Compromise of 1850 adopted the policy of “popular sovereignty,” or congressional nonintervention, in leaving the adoption of territorial slave codes to the eventual territorial governments. Senator Henry Clay defended the Compromise by arguing that the “bill leaves in full force the paramount authority of the Constitution. . . . Now what ought to be done more satisfactory to both sides of the question . . . [than] to leave the question of slavery or no slavery to be decided by the only competent authority that can definitely settle it forever, the authority of the Supreme Court of the United States” (*Cong. Globe* 1850, 31, 21: 1155). A few Northerners in particular proposed “clarifying amendments” that would legislatively determine the issue, arguing with Senator Roger Baldwin of Connecticut that “the people demand a law, a rule for their conduct clear and intelligible. They do not ask us to give them a Delphic response” (*Cong. Globe* 1850, 31, 21: 1146). But Senator Albert Brown gave the eventual Southern view, noting that “if Congress will refrain from intimating an opinion, I am willing that the Supreme Court shall decide it” (*Cong. Globe* 1854, app. 232). As Senator Thomas Corwin wryly noted of the original plan, Congress had enacted a lawsuit, not a law (Mendelson 1953, 20). But it was a lawsuit that at least initially, had a great deal of support from across the political spectrum, from Abraham Lincoln (1953–55, 2: 354–355) to Jefferson Davis (*Cong. Globe* 1850, 31, app. 154).

Although the *Dred Scott* case did not arise through the provisions of these acts, it offered the Court a vehicle for providing the constitutional answer that Congress had preferred to dodge. Several members of the Taney Court were anxious to settle the issue and, in the process, end the growing abolitionist threat to the established party system (Auchampaugh 1929; Fehrenbacher 1978, 308–14).¹⁰ Moreover, the 1856 presidential election of Democrat James Buchanan was taken by some, including the president and the president-elect, as a

⁹For discussions of the legislative deferral to the judiciary on the issue of slavery in the territories, see Fehrenbacher 1978, 11–235; Graber 1993, 46–50; Mendelson 1953.

¹⁰It should be noted, however, that dissenting Justice John McLean is often, though controversially, thought to have initiated the broader discussion of slavery in the territories in the *Dred Scott* case, reflecting his own antislavery sentiments and desire for a Republican presidential nomination.

mandate for the pro-slavery position (Friedman 1998, 415–16; Graber 1997, 282–87; Mendelson 1953, 24). Throwing the combined prestige of the Supreme Court and the presidency behind the constitutional protection of slavery in the territories promised to undercut support for the Republican insurgency and stabilize national politics.

In both public and private, the justices embraced the view that it was the judicial duty to resolve this issue and echoed the earlier arguments of John Marshall on behalf of the judicial duty to end political conflicts over fundamental principles. The chief justice himself emphasized that the Constitution was a legal document, marking out the powers of the various branches and governments, and the “path of duty” of the Court was to enforce that higher law. Taney readily blended the rules by which “any tribunal” must interpret the Constitution with the specifically “judicial character of this Court,” which was “not created by the Constitution” to reflect popular opinion or ideals of justice (*Dred Scott v. Sandford* 1856, 426). Likewise, Justice James Wayne emphasized that in deciding the case the justices had “only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be.” In Wayne’s view, the case involved “constitutional principles of the highest importance,” such “that the peace and harmony of the country required the settlement of them by judicial decision” (*Dred Scott v. Sandford* 1856, 454). Justice John Catron urged President Buchanan to use almost identical language in his inaugural address, reinforcing that the issue “*must* ultimately be decided by the Supreme Court” (Auchampaugh 1929, 236).

Although Taney’s most notorious rhetoric was employed in his discussion of black citizenship, the greatest controversy at the time arose from Taney’s holding that the federal government could not prohibit slavery in the territories.¹¹ Additionally, it was the territory issue that drove the decision and created its larger ramifications. The *Dred Scott* case was a highly complicated one, producing several lengthy opinions ranging over a large number of tangled issues (Fehrenbacher 1978, 239–414). In essence, Scott sued for freedom in federal courts based on a diversity of citizenship claim, arguing that he was a citizen of Missouri and Sanford a citizen of New York.¹² He claimed his freedom based on the time he spent in the free state of Illinois and the free territory established by the Missouri Compromise. Both the jurisdictional and the substantive claim called upon the Court to determine whether “the descendant of slaves” could become a constitutionally recognized citizen, whether by birth or putative emancipation. In the process of answering in the negative, the Court overturned the Missouri Compromise, ruling that Congress did not have the power

¹¹ The citizenship arguments did provoke a substantial reaction from the Northern black community, however (McDorman 1997; Moore 1996, 37–65).

¹² Sanford’s name was misspelled in the court records. As was commonly the case, Scott brought a trespass suit against Sanford, against which proof of a master-slave relationship would be a sufficient defense.

to prohibit slavery in the territories. The slaveholding states had an equal right to make use of the federal territories as had the free states, and the federal government could not discriminate against Southern “property.”

This territorial holding undermined both the “popular sovereignty” stance of the Northern Democrats and Whigs and the core goal of the Republican party—to secure the territories for free, white labor. The problem was most acute for the Republicans, however, and they severely denounced the decision (Friedman 1998, 413–31; Warren 1926, 2: 278–319). Chief among those complaints was the charge that the Court had entangled itself in politics. Republican newspapers denounced Taney’s opinion as a “stump speech embodied into a judicial opinion,” with “no more authority than the conversations of the judges held in the street” (Friedman 1998, 427 n382). The Court was said to have “abdicated its just function and descended into the political arena” (427 n383). Many, including Lincoln (1953–55, 2: 465–66), found evidence in the Court’s decision that it was part of a larger “slave-power conspiracy,” and “the justices of the Supreme Court and the leading members of the new administration are parties to it” (428 n384). Although it is unlikely that the Court’s decision was a significant factor in causing the Civil War or even Lincoln’s election (Fehrenbacher 1978, 417–595; Graber 1997, 286–193; Stamp 1990, 100–109), there can be little question that it cost the Court dearly in public prestige and trust among the ascendant Republicans.

In rendering its decision, the Taney Court was doing more than following its reading of the election returns. It was also building on Marshall’s legacy. In *Dred Scott*, the Taney Court, along with others, embraced the view that the Court was the ultimate interpreter of the Constitution. The Constitution was what the Court said it was, not because the text was infinitely malleable but because it was the judicial function to declare authoritative meanings. The judiciary was a “neutral arbiter” charged with patrolling the boundaries of governmental authority, and the Taney Court did not hesitate to search for clear lines of authority over slavery in the territories. The results of that search that Taney offered were plausible and, indeed, were consistent with popular views that had been advocated for several years. What the Court attempted to add, however, was its authority as the final interpreter of constitutional meaning. It sought to close off future debate, and Republicans complained precisely for that reason. The Court had reduced the Constitution to a set of legal rules, though in this case it identified one substantive interest that the document was specifically designed to protect, slavery.¹³ As in the Bank case, the Court was called upon to draw lines around government authority, and although in this case the legislation at issue fell outside those lines, the lines themselves were just as firm and formal as when Marshall drew them. Like Marshall, Taney was willing to recognize the legislature’s right to make assessments of the practical

¹³Or to put it differently, property. Both politicians and justices had long recognized the centrality of property rights as a substantive value in the constitutional scheme. See also Graber 2000; Nedelsky 1990.

utility of different policies. It was for the Court alone, however, to render final judgment as to the content of constitutional principles, even when the text itself seemed indeterminate.

The Alternative Approach of Justice Curtis

“Thus a Great Misfortune Befell the Supreme Court of the United States” (Curtis 1879, 1: 198).

Justice Curtis’s dissent is of interest for a variety of reasons, not least for his discussion of black citizenship and its antislavery implications (Maltz 1996; Streichler 1997). My interest here, however, is in his largely ignored discussion of the territories and, specifically, in his recognition that there were constitutional principles at stake in the issue that the Court could not adequately reach. As have later commentators, Curtis complained that Taney had stretched to reach results that were not necessary to deciding the case. But he also expressed discomfort with Taney’s effort to reduce the territory issue to a set of fixed rules. The virtue of Curtis’s opinion lies not only in his careful refutation of Taney’s citizenship argument, but also in his surprisingly Jeffersonian suggestion that political actors bore responsibility for working through the principles at stake for themselves and that the judiciary could not spare them that responsibility. In attempting to resolve those political issues, the Court had both overstepped its institutional bounds and corrupted the constitutional order. As his brother later wrote in his memoir of Curtis (1879, 1: 208), it was the “office of statesmen and not of judges” to “discover or to weigh the means by which” to resolve the slavery issue and “promote the peace and harmony of the country.”

In examining the federal government’s power in the territories, Curtis found that the Constitution provides a broad grant. Curtis focused on the Constitution’s delegation to Congress of the authority to “make all needful Rules and Regulations respecting the Territory.” Like Marshall’s reading of the necessary and proper clause, Curtis viewed this as a broad grant of legislative discretion for dealing with future contingencies. Somewhat surprisingly, however, Curtis never cited Marshall’s decision in *McCulloch* as elaborating an analogous section of the Constitution.¹⁴ Moreover, the manner in which Curtis pursued his analysis is strikingly different from the path of Marshall’s argument. Curtis’s argument was both more restrained than Marshall’s and more cognizant of the political force of constitutional principles and the legislative role in completing the constitutional project.

¹⁴In his dissent, McLean did cite *McCulloch* to support the broad discretionary power of Congress in the territories. McLean, however, reemphasized that the legislative means must be “appropriate to the attainment of the constitutional object” and not “contrary to its spirit.” But his point was more limited than it seems, for he was only concerned to refute the charge that a Marshallian federal government would have “unlimited discretion” in the territories to the point of being able to “make white men slaves.” He did not doubt that Congress could, for example, bar “slaves or free colored persons” from the territories on the grounds that they would “lessen the value of the public lands” or otherwise damage the “public interest.” *Dred Scott v. Sandford* 1856, 542–43.

The interpretive method adopted by Curtis in construing the territorial powers was both clear and modest, focusing on the “language, the history, [and] the subject-matter of this article” (*Dred Scott v. Sandford* 1856, 612). Like Taney’s much maligned opinion, Curtis’s argument was essentially an originalist one, though he pursued several types of evidence in his search for the intent of the founders. Significantly, Curtis’s opinion was the very model of “clause-bound” interpretation. His discussion of framing intent was carefully restricted, concerned merely with identifying the intended meaning of the needful rules clause of Article IV. In analyzing the clause, Curtis made use of four kinds of evidence: textual language, founding debates, factual context of the founding, and the “practical construction” of the first Congress. In contrast to Taney’s opinion, Curtis contended that “rules and regulations” were broad and legislative terms. In the context of a grant of authority to a legislature, “rules and regulations” did not carry a narrow meaning but rather referred to a power to make “needful laws.” Moreover, the term “regulation” was used in a variety of contexts in the Constitution, several of which delegate broad powers to legislate. Although Congress was always prohibited from engaging in certain actions, such as establishing churches, the needful rules clause was itself unqualified. The adjective “needful” only imposed the most minimal constraints of germaneness on congressional power, for “undoubtedly the question of 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” (*Dred Scott v. Sandford* 1856, 614). The text specifically said Congress had the power to make “*all*” necessary rules, and Curtis expressed bafflement at the “assertion [that] though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery.” The “clear, plain, and natural signification” of the “words employed in this clause” was authoritative, unless there was equally clear evidence to contradict them (*Dred Scott v. Sandford* 1856, 615).

Curtis’s use of historical evidence was similarly limited. Marshall’s *McCulloch* opinion, of course, offered a sweeping tale of the nation’s founding, emphasizing its popular origins and enduring achievement. Marshall’s history was an epic saga, mythic in design and purpose (LaRue 1995, 70–92). Curtis, by contrast, used history in a relatively restrained fashion, simply to place the language of the needful rules clause in a purposive context. Curtis’s historical evidence was used to render the clause even more concrete, written to address a specific problem; Marshall’s history was employed to lever open the necessary and proper clause, detaching it from any particular historical problem and situating it as the vehicle for a growing nation. Curtis was much less concerned with what the Constitution is (a framework for a living government) than with what this particular clause means. Although Curtis noted that “they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation,” his point was simply that the territories

clause embraced future territories to be acquired in addition to the territories already ceded to the United States by the time of the Constitution's drafting (*Dred Scott v. Sandford* 1856, 611). Curtis's historical discussion revolved around the demonstration that the founders had a specific problem of territorial governance in mind when drafting the needful rules clause and that they intended to empower Congress to fulfill the public trust it had entered into in accepting the territories (*Dred Scott v. Sandford*, 610–11).

The actions of the first Congress were also used to support a general and discretionary power over the territories and, specifically, in relation to the slavery issue. The Confederation Congress had organized the ceded territories through the original Northwest Ordinance, which prohibited the introduction of slavery. The first Congress convened under the Constitution readopted the Ordinance with only trivial alterations, establishing the principle that slavery would not be admitted into the northern territories, later embedded in the Missouri Compromise. Curtis turned to this history as a "practical construction, nearly contemporaneous with the adoption of the Constitution," and recognized by doctrine as relevant in interpreting the text "in doubtful cases" (*Dred Scott v. Sandford* 1856, 616). In considering the authority of this early legislation, Curtis emphasized that the legislation represented the considered judgment "of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention," and of the president, who was also "President of that Convention" (*Dred Scott v. Sandford* 1856, 617). Similarly, the terms of the subsequent North Carolina cession, which barred congressional emancipation, "shows that it was then understood [that] Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory" (*Dred Scott v. Sandford* 1856, 618). Such acts were significant not because Congress has the power to alter the fixed requirements of the Constitution, but because they demonstrated the general understanding of the meaning of this clause at the time of the founding.¹⁵

In considering the various alternative interpretations of the clause, Curtis highlighted the caution that the judiciary must exercise not to alter the Constitution. His emphasis was institutional and focused on the responsibilities of the judiciary and its standards of interpretation, not on the particular value of the needful rules clause or the power Congress exercised under it. Curtis was specific about the evidence he would need before adopting the advocated interpretation, suggesting that "if it can be shown, by anything in the Constitution itself . . . or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Consti-

¹⁵"If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to" (*Dred Scott v. Sandford* 1856, 619).

tution . . . I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution.” But given the plain text of the Constitution, Curtis warned that “I must find something more than theoretical reasoning to induce me to say it did not mean all.” Although such “theoretical reasoning” might be politically compelling, to alter the plain meaning of “the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations” (*Dred Scott v. Sandford* 1856, 621). The type of principles offered by advocates for either side may be sufficient to sway Congress on how it should exercise its powers, but the “question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument” (*Dred Scott v. Sandford* 1856, 620).

Curtis offered no arguments on the substantive need to allow Congress broad powers to act for the public good or for a broad delegation of policy-making authority so that the Constitution might survive various crises that might emerge. Instead, his argument was interpretive. What the Constitution gave, the Court could not take away—in this case, the power of legislative choice. Moreover, in construing the Constitution, the scope of the judicial investigation was specific and narrow. Curtis was particularly concerned that “political reasons have not the requisite certainty to afford rules of juridical interpretation.” They are both contested and ambiguous, varying with time and circumstances. They provide prudential guidance, not fixed rules. Curtis favored “a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws”; otherwise, judges have the “power to declare what the Constitution is, according to their own view of what it ought to mean” (*Dred Scott v. Sandford* 1856, 621). This was not simply a call for judicial deference, but a call for adherence to a specific judicial function of legal interpretation.

Curtis did more than narrow the judicial role, however. He formally recognized the existence of and need for basic political principles to be acted on in nonjudicial arenas. Curtis elaborated on the political role in three parts. First, he noted the exclusive congressional role in determining what constituted “needful” rules and regulations for the territories. The territorial issue raised an interesting twist on the necessity question, however, for the issue was not a purely instrumental one of economic development and revenue collection as in the Bank case, but also a deeply political one of creating new republican governments. The territories were not just land holdings; they were the transitional stage toward statehood. Curtis did not doubt that Congress had the power to create territorial governments, both to more effectively secure property rights during settlement and as part of the tutelage in self-government. The territories created a problem of governance, and this was a political matter beyond scope of the judiciary to intervene (*Dred Scott v. Sandford* 1856, 614–15; *Luther v. Borden* 1849).

Curtis's more substantial consideration of these issues came in his discussion of the competing views of federal powers in the territories. Curtis identified "three different and competing views" in this regard: abolition, popular sovereignty, and equal access. The justice was not dismissive of the seriousness of any of these three views, though he was amazed that "no particular clause of the Constitution has been referred to at the bar in support of either of these views." For Curtis, the absence of a specific textual hook for these considerations was a great disability, at least for their adoption by the Court as a binding rule on Congress. Curtis went out of his way to note that "with the weight of either of these considerations, when presented to Congress to influence its actions, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation" (*Dred Scott v. Sandford* 1856, 620). His connection here of these considerations to the "needful" qualification on congressional power is interesting. Curtis did not suggest that these considerations might convert the needful qualifier into a firmer constitutional rule or legal constraint on the legislative power, akin to defining "necessary" as "essential" rather than as "convenient." Rather, he suggested that needful has a thicker meaning than mere utility. What is needful is not determined solely along the instrumental dimension considered in *McCulloch*, but is also determined by the weighing of normative principles. Those additional factors in determining the constitutional content of needful rules, however, are not properly subject to judicial investigation.

Curtis took time to explain the apparent constitutional basis for the three alternatives presented to the Court. Although he found none of them sufficiently tied to a specific clause to guide the judicial decision, he did accept the principled nature of these arguments. Curtis seemed concerned by the "generality" of the arguments being made, complaining that one "seems to be rested upon general considerations" and another "is drawn from considerations equally general." The arguments were clearly constitutional for all that. In Bobbitt's (1982, 74–119; Harris 1993, 148–62) terms, they were, as characterized by Curtis, essentially structural and ethical. The antislavery position depended on the relationship of slavery "to republican government, [and] its inconsistency with the Declaration of Independence and with natural right." The nonintervention view is drawn from "the right of self-government, and the nature of the political institutions which have been established by the people of the United States." The pro-slavery view relied on "the equal right of all citizens to go with their property upon the public domain" and the illegitimacy of "an unjust discrimination between citizens of different States" (*Dred Scott v. Sandford* 1856, 620). Curtis recognized that the relationship between these claims and constitutional commitments was real. He merely denied that their implications were sufficiently clear to justify judicial rulings and the imposition of the judiciary's ethical preferences on the polity.

Curtis concluded this part of his opinion by noting relevant judicial precedent. Curtis presented these cases more as instructive analogies than as direct

precedent. He noted that “there have been eminent instances in this court closely analogous to this one, in which such an attempt to introduce an exception, not found in the Constitution itself, has failed of success” (*Dred Scott v. Sandford* 1856, 621). His examples are illuminating, reinforcing his discussion of the nature of the judicial power as much as of his conclusion about congressional power. The first case concerned federal taxation in the District of Columbia, given the absence of congressional representation of its residents (*Loughborough v. Blake* 1820). Curtis found the principle at stake in the case compelling, admitting that “it would not be easy to fix on any political truth, better established or more fully admitted in this country, than that taxation and representation must exist together.” He found that principle to be at the core of the American Revolution and of the American constitutional system, but “however true and important this maxim may be, it is not necessarily of universal application.” The sovereign people were clear in the scope of congressional authority over the district, and “this court, interpreting that language” was unwilling to create an implicit exception in the text (*Dred Scott v. Sandford* 1856, 621). The application of the constitutional principle was a matter of political determination. Taxation without representation was a “principle” and a “maxim,” but it was not a “rule.” The second example concerned the Jeffersonian embargo (*Gibbons v. Ogden* 1824; *United States v. Marigold* 1850). In that instance, Curtis found the textual nature of the issue more legally compelling than its structural aspect. Although the embargo also operated to the detriment “almost exclusively to citizens of a few States,” Curtis thought “something much more stringent, as a ground for legal judgment, was relied on—that the power to regulate commerce did not include the power to annihilate commerce” (*Dred Scott v. Sandford* 1856, 622). Even so, these considerations were inadequate to determine the judicial interpretation of congressional powers. The constitutional concern was real, but legal interpretation of a broad grant of authority to Congress could not address itself to that concern.

Unlike Marshall, Curtis was careful not to deny the constitutional validity of the principles at stake in these disputes or to arbitrate among them. In confining the judicial role to one of patrolling the boundaries of government authority, Curtis did not suggest that the Court had exhausted the implications of the Constitution or that political issues were essentially instrumental in their concern. The Taney Court, like the Marshall Court, operated in a world of deep disagreement about fundamental constitutional and political principles. The majority of the Taney Court agreed with Marshall in thinking that such political conflicts could and should be defused by the authority of a judicial pronouncement. Justice Curtis was much more skeptical of judicial authority. In his view, it was futile as well as inappropriate for the Court to try to resolve these matters. In his dealings with the fugitive slave law in his native Massachusetts, Curtis had already experienced the inability of the judiciary to cool tempers on the slavery issue (Curtis 1879, 1: 173–75). Constitutional questions decided by the Supreme Court could “bind the consciences of public or private men, only

when the case . . . is one to which the judicial power of the United States extends.” “Instead of promoting the peace and harmony of the country,” the action of the Court “was in reality disastrous to them,” as should have been expected when the Court moved beyond its proper role (Curtis 1879, 1: 207).

In his judicial opinion, Curtis was careful not to preempt any political resolution by casting his inquiry at a higher level of abstraction than he thought necessary to establish the constitutional rule. Like Marshall, Curtis left a wide area for legislative choice. But Curtis did not sharply distinguish between the constitutional and the merely political, and it was harder to ignore the fundamental principle at stake in the slavery issue than it had been in the Bank case. He was willing to discuss only a limited set of issues and consider a specific type of evidence, which he saw as consistent with his judicial role. As a consequence, his opinion would have left many of the issues at stake in the controversy undecided by the Court.

The Curtis dissent suggests an important role for both the Court and the political branches in elaborating the American constitutional order. As Curtis understood, the Court often had to take sides in constitutional disputes. Addressing the fugitive slave controversies, Curtis wrote that he would sustain the judicial power “however odious its exercise may be to a faction, or a party, or even to my native State” (Curtis 1879, 1: 176). After leaving the bench, Curtis became a sharp critic of the government’s actions during the Civil War, writing that Lincoln’s martial law and emancipation proclamations were unconstitutional, in part because they tried to convert the exceptional into a “general system” (Curtis 1879, 1: 314). He likewise denounced Reconstruction as unconstitutional and regretted that the Court ducked the issue (Curtis 1879, 1: 392; Warren 1926, 2: 483). In the *Dred Scott* case itself, Curtis rendered a positive constitutional decision giving Congress discretionary authority over the territories. Faced with an appropriate constitutional issue that could be addressed using traditional legal tools, the Court was obligated to reach a constitutional conclusion. Not all constitutional controversies were amenable to judicial analysis, however. Some controversies that required the evaluation and balancing of fundamental principles and interests were resolved most appropriately in the political branches.

Modern constitutional theorists generally approach *Dred Scott* as an interpretive problem, asking what judicial approach would have provided the “right answers” to all the constitutional questions raised in this case (Graber 1997). From that perspective, Curtis largely shared Taney’s originalist methodology, though he applied it more conservatively and carefully. More important, Curtis’s discussion of the territories raises institutional as well as interpretive questions, as sensitive to the question of who ought to resolve these constitutional disputes as to the question of how they ought to be resolved. This episode emphasizes that the problem of extrajudicial constitutional interpretation does not merely arise after a judicial decision has already been rendered, as in Lincoln’s better known reaction to *Dred Scott*. Extrajudicial constitutional interpretation also provides the initial context in which the judiciary acts. The political

engagement with constitutional structures and values raises different sorts of problems from those raised by the judicial elaboration of constitutional law. Curtis, along with Taney and Marshall, was concerned with identifying what powers the Constitution had distributed to different governmental actors. Curtis expressed greater awareness, however, of the fact that resolving what powers a government official possessed under the Constitution did not settle how those powers should be used. Jeffersonian and Jacksonian politicians had been extremely concerned with that issue, attempting to ensure that they did not subvert important constitutional values in the process of exercising their legitimate constitutional powers. Taney had once similarly argued that the Court should not aggressively limit the discretion of the state governments, which must be trusted to exercise their powers in a constitutionally appropriate fashion (Whittington 1996, 20–22). Faced with growing antislavery sentiment, Taney was no longer willing to extend such trust to the federal government; but Curtis was.

Curtis accepted the Marshallian project of enforcing the Constitution as a set of legally binding rules understandable by the standard canons of interpretation. The Constitution, as the judiciary understood it, was a formal framework dividing authority among different political units and creating space for political action. But Curtis also can be read as suggesting that the Constitution could be more than that. The judiciary's role was to exercise a negative, to monitor the boundaries of government authority for violations. The legislative role, by contrast, was positive, to take actions in pursuit of the public good. The appropriateness of various actions and the visions of the public good at stake could be highly contestable, but the boundaries of government authority should be fixed and clear. The legislature necessarily operated in murkier waters than the judiciary. In that legislative context, constitutional principles could become the basis for positive action, providing guidance for evaluating the appropriateness and goodness of various legislative options. Legislatures needed to make choices, but constitutional considerations could appropriately contribute to those choices. From the ambiguous raw material of text, structure, principle, and interest, Congress had to construct its own authoritative understanding of the nation's constitutional commitments (Whittington 1999a). Consistent with its judicial role, the Court could not perform that task for Congress.

By limiting the judiciary's vision, Curtis hoped to keep the Court out of political controversies. Graber has cogently argued that it was the president's unrelated acceptance of the Lecompton constitution for Kansas that was politically destabilizing, not the *Dred Scott* decision (Graber 1997, 285–93). The *Dred Scott* decision was not immediately destabilizing, however, in part because it could not force the issue.¹⁶ For the moment, Stephen Douglas and his allies could ignore inconsistencies between popular sovereignty and *Dred Scott*, which remained an abstraction. Political crisis came, however, as soon as the

¹⁶The political reaction to the Court has been more intense and direct when judicial decisions are immediately effective (Friedman 1998).

government tried to take positive action on the territory issue. Buchanan faced a situation in which any choice that he made would have excluded the alternatives, fragmenting his electoral coalition. Taney was simply not positioned institutionally to actually make that choice, and thus his decisions could not be as order shattering as the president's. The Court did not pose a better compromise; it just did not have to act on its choices when it denounced the already superceded Missouri Compromise. Once pro-slavery action was taken, however, Taney had implicated the Court in its consequences by aligning the judiciary with the pro-slavery forces.

Taney sought to settle the slavery issue once and for all. The established politicians in Congress preferred not to take a stance on this highly divisive issue that threatened their fragile partisan coalitions, so they extended an invitation to the Court to resolve the issue for them. Taney accepted the invitation, and he can be neither praised nor faulted if his attempt to settle the issue was ineffective. But he can be faulted for attempting to impose a resolution on an issue best decided elsewhere. Curtis's dissent offered a more modest alternative. Curtis could not hope to end the slavery dispute either, but he did not pretend to do so. Instead, he suggested that the judicial function in the constitutional order was limited and that the Court should not seek to be the ultimate constitutional interpreter. The Court could and should leave some questions of principle undecided, for other constitutional actors bore the responsibility for addressing them. As Mendelson (1953, 28) concluded, "the Court's fault, if it may be so described, lay in accepting the buck which Congress and the statesmen had passed, and in failing to anticipate the partisan, political use which its efforts could be made to serve." Curtis would have had the Court avoid making that mistake, not because he happened to be on the right side of history, but because he had a better understanding of the judicial role.

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