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CONSTITUTIONAL MYTH-MAKING: LESSONS FROM THE *DRED SCOTT* CASE

BY CASS R. SUNSTEIN*

"[O]pinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime the minds of the members were changing, and much was to be gained by a yielding and accommodating spirit . . . [N]o man felt himself obliged to retain his opinion any longer than he was satisfied of their propriety and truth, and was open to the force of argument."

—James Madison

"The spirit of liberty [is that spirit which] is not too sure that it is right."

—Learned Hand

My topics in this lecture are the myths that the *Dred Scott* case created, the myths that Americans have created about it, and the true lessons of the case for three of the great constitutional issues of the current era: affirmative action, homosexuality, and the right to die.

THE CONTINUING RELEVANCE OF *DRED SCOTT*

The *Dred Scott* case was probably the most important case in the history of the Supreme Court of the United States. Indeed, it was probably the most important constitutional case in the history of any nation and any court. But most of us have little if any sense of what it means or was even about. Even within the legal culture, the case is taught infrequently in constitutional law courses; outside of the legal culture, the case is pretty well forgotten, or at most a footnote in discussions of the Civil War.

We should note right at the outset some of the many remarkable facts about the case.

- *Dred Scott* was the first Supreme Court case

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since *Marbury v. Madison* invalidating a federal law. Since Marbury created judicial review in the context of a denial of jurisdiction, *Dred Scott* might plausibly be said to be the first real exercise of the power of judicial review.

- *Dred Scott* was the first great effort by the Court to take an issue of political morality out of politics. In that sense, it is the great ancestor of many New Deal and Warren Court cases.
- *Dred Scott* was the birthplace of the controversial idea of "substantive due process," used in *Roe v. Wade*, in many important cases endangering the regulatory/welfare state, and in the recent cases involving the "right to die."
- *Dred Scott* was one of the first great cases unambiguously using the "intent of the framers" and in that sense it was the great precursor of the method of Justice Scalia and Judge Bork.

Three Myths

Let me now identify the great myths involving *Dred Scott*. The first and perhaps most important one was created by the *Dred Scott* case itself: The myth is that the original Constitution protected, supported, and entrenched slavery. On this view, the Constitution was emphatically pro-slavery. As a legal matter, this is a myth in the simple sense that it is false: The Constitution does not support or entrench slavery.[1] But many people think the myth is true; in fact Justice Thurgood Marshall, in his remarks about the bicentennial, basically agreed with the *Dred Scott* Court.

The second myth comes from the conventional American "reading" of *Dred Scott*. According to that reading, Chief Justice Taney was a morally obtuse person heading a morally obtuse Court that it took a Civil War to overturn. This is a different kind of myth. It is not exactly false. But it is hardly the full story; it leaves enormous gaps. An adequate understanding of *Dred Scott* lies elsewhere. It has a great deal to do with the appropriate role of the Supreme Court in American government. It has to do with how a democratic citizenry governs itself.

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[1] Of course the Constitution did not abolish slavery. In fact it recognized the existence of the institution of slavery, but without endorsing or entrenching it. See below.

The third myth is a revisionist reading of the case, coming from Justice Scalia and others critical of the Warren Court. Here is myth #3: *Dred Scott* was wrong because the Court abandoned the "intentions of the framers" in favor of its own conception of social policy. On this view, *Dred Scott* was wrong because it was politics rather than law, and it was politics rather than law because it abandoned the Constitution, understood as a historical document. This myth has more than a kernel of truth in it, for *Dred Scott* cannot be said to have been an accurate reading of the original understanding of the framers. But myth #3 qualifies as a myth because *Dred Scott* was very much and very self-consciously an "originalist" opinion, that is, it purported to draw nearly all of its support from the views of the framers:

"It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted."[2]

To replace these myths, I suggest that the defect of *Dred Scott* lay largely in the Court's effort to resolve, once and for all time, an issue that was splitting the nation on political and moral grounds. More particularly, we should understand *Dred Scott* to suggest that in general and if it possibly can,[3] the Supreme Court should avoid political thickets. It should leave Great Questions to politics. This is because the Court may answer those questions incorrectly, and because it may well make things worse even if it answers correctly.

What I will suggest is that the Court should—as the *Dred Scott* Court did not—proceed casuistically, and this in two different ways. First, it should generally decide cases rather than set down broad rules. Second, it should try to avoid issues of basic principle and instead attempt to reach incompletely theorized agreements on particular cases.[4] By this term I

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[2] 60 US at 405.

[3] These two qualifications are important. See below.

[4] I describe these ideas in more detail in Cass R. Sunstein, Legal Reasoning and Political Conflict (1996).

mean concrete judgments on which people can converge from diverse foundations. In this way the Court can both model and promote a crucial goal of a liberal political system: to make it possible for people to agree when agreement is necessary, and to make it unnecessary for people to agree when agreement is impossible.

These claims have a set of implications for contemporary questions. I deal with three such questions here: affirmative action, the right to die, and homosexuality. My unifying theme is that the Court should generally adopt strategies that promote rather than undermine democratic reflect and debate. I suggest, first and in some ways foremost, that courts should not invalidate affirmative action. The court of appeals' recent decision in the University of Texas case was hubristic in the same sense as *Dred Scott*—an effort, with insufficient constitutional warrant, to remove a big issue of principle from politics. The attack on affirmative action is a legitimate and in some ways salutary part of political debate; as a legal phenomenon it reflects a form of judicial hubris. At most, the Court should invalidate the most irrational and extreme affirmative action programs, and in that way attempt to promote and to inform democratic deliberation on the underlying issues.

With the right to die, things are a bit different; here the problem is that the relevant laws are old and based on perhaps anachronistic assumptions, and hence the basic issue has not been subject to democratic debate. I suggest that the Court should proceed cautiously, incrementally, on a fact-specific basis. Instead of vindicating a broad "right to privacy," courts might say—if they are to play any role at all—that intrusions on individual liberty may not be based on old laws rooted in different circumstances and perhaps anachronistic values, and that any such intrusions must be supported by more recent acts of political deliberation. For the right to die, the best approach lies in a form of self-conscious dialogue between courts and legislatures.

In some ways the question of discrimination on grounds of sexual orientation is the hardest—at least if one believes, as I do,[5] that such discrimination is generally unacceptable under constitutional princi-

[5] I acknowledge that this is an unconventional view and I do not attempt to defend this belief here.

ples as they are appropriately understood. I will suggest a form of incrementalism in support of a constitutional attack on discrimination against homosexuals. Even if courts believe that the attack is plausible on its merits, they should hesitate before entering this "political thicket." They should follow President Lincoln, not Chief Justice Taney.

Dred Scott: Dramatis Personae

Every myth is filled with people, usually people of high drama. This is certainly true of the *Dred Scott* story. Let me tell you something about the people behind the *Dred Scott* case.

Who was Dred Scott? We lack have full answers. It appears that he was born in about 1799—around the ratification of the Bill of Rights—and that he was quite short, about five feet tall. His real name may have been Sam. The only picture of Dred Scott, taken in 1856, shows him in his mid-fifties. After interviewing Scott in 1857, a St. Louis newspaper said that Scott was "illiterate but not ignorant" and that he had a strong common sense sharpened by his many travels. There is reason to believe that Scott provided initiative for his case. Immediately before the suit was filed, Scott tried to buy his freedom from his owner, Mrs. Emerson. She declined. The *Dred Scott* case followed.

Since childhood Scott lived in Virginia with Peter Blow and his wife Elizabeth. The Blows moved from Virginia to Alabama and then, in 1830, left with seven children (including Taylor, whose name you should remember) and six slaves for St. Louis. This was not a good place for the family. Peter Blow's business venture, the Jefferson Hotel, did poorly; Elizabeth Blow died in 1831; Peter died a year later.

After Peter Blow's death, one Dr. John Emerson bought one of his slaves, and in 1833 took that slave, Dred Scott, into service at Fort Armstrong, in Illinois. Illinois was a nonslave state, and this was important. Scott lived for an extended period in a state that outlawed slavery, raising a key question in his case: Was he thereby freed? This became a key question in the case.

In 1838 Emerson took Scott for a second sojourn into Fort Snelling, near what is now known as St. Paul, Minnesota. Thus Scott, held as a slave in the

free state of Illinois for more than two years, was living in a territory in which slavery was banned by the Missouri Compromise. There Scott met Harriet Robinson, a slave about twenty years old; Harriet was sold to Emerson and the two were married, a marriage that lasted until his death in 1858. Four children were born to them; the two sons died as infants, but two daughters (Eliza, born in 1838, and Lizzie, born in 1847) survived and became parties to the *Dred Scott* case. Scott stayed with Emerson until Emerson's death in 1943.

John Sanford, Emerson's brother-in-law, was an executor of the will. Dred Scott was apparently in the service of Mrs. Emerson's brother in law, Captain Bainbridge, from 1643 to 1846. On April 6, 1846, Dred and Harriet Scott brought suit against Irene Emerson. They alleged assault and false imprisonment. Dred and Harriet complained that Emerson had beaten him and imprisoned him. And they claimed that there were free.

(It is worth noting at this point that Dred Scott remained friends with the Blow family long after the death of Peter and Elizabeth. The Blows and their in-laws were principal supporters during the lawsuits between 1846 and 1857. And we should especially remember Taylor Blow, Dred Scott's benefactor after he was freed and indeed until the day of his death. Interestingly, Taylor Blow was not opposed to slavery in principle. He apparently acted from personal bonds extending back to his childhood.)

These, then, are the people behind the case: Dred, Harriet, Eliza and Lizzie Scott, the plaintiffs; Peter and Blow, original owners; Taylor Blow; Irene Emerson and her brother-in-law, John Sanford. (It should be obvious at this point that a mystery in the *Dred Scott* case is its title: Why was the case styled *Dred Scott v. Sanford?* It could as easily have been called *Harriet Scott v. Emerson.* But as a woman, Harriet Scott was not supposed to be the lead plaintiff in a lawsuit, and the defendant was the executor of the estate rather than the real owner of Scott. But there should be no mistaking the fact that the legal interests of Emerson and Scott were emphatically at stake.)

Dred Scott: The Law

Now let us turn to the legal issues in the case. Scott noted that the state constitution of Illinois abolished

slavery and that the Missouri Compromise banned slavery in the Louisiana territory. Hence Scott claimed that he was made a free man by virtue of his sustained stays in those places. Sanford responded that Scott was not free, because his former owner had a continuing property interest in him—that is what slavery meant—and because the federal government could not deprive an owner of property without due process of law. In any case, Sanford claimed that Scott could not sue in federal court, since Scott was not a citizen of Missouri, or indeed of any state.

The largest question in the case was whether Dred Scott was still a slave. That case in turn raised three principal issues.

First: Could Scott sue in federal court? If he was a citizen of Missouri, suing a citizen of New York, he could indeed sue under the diversity of citizenship provision of the federal Constitution, which gives federal courts jurisdiction over disputes between people domiciled in different states; otherwise not.

Second: Was the Missouri Compromise constitutional?

Third: What was the effect on Scott's status in Missouri of the transportation of Scott into non-slave states?

The Supreme Court decided the case in 1857, a year in which the United States was profoundly split because of the issue of slavery. There can be no doubt that the Court attempted to take that issue "out of politics"—a point to which I will return.

Was Dred Scott A Citizen?

Justice Taney's opinion held first that Scott was not a citizen of Missouri. Therefore the federal courts had no jurisdiction over the case.

This was a complex issue. There is no definition of the term "citizen" for purposes of diversity jurisdiction. Perhaps we should say that whether Scott is a citizen of Missouri depends on Missouri law. Perhaps the question whether Scott is a citizen of Missouri depends on whether Scott was still a slave. No one argued that slaves qualified as citizens.

But Justice Taney went very much further than this. He did not rely on Missouri law. Instead he argued very broadly that no person descended from an American slave could ever be a citizen for consti-

tutional purposes. Under the constitution, "they are not included . . . under the word citizen and can therefore claim none of the rights and privileges of citizens. . . " It is here that Taney could not rely on constitutional text, which was ambiguous, but resorted explicitly and self-consciously to an understanding of original intentions. Thus he wrote:

"On the contrary, [descendants of Africans] were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."

As I have said, this was one of the first self-consciously "originalist" opinions from the Supreme Court. On this issue, the Court spoke for its understanding of what the framers believed. (We cannot indict a method on the ground that it has been misapplied. All I mean to suggest is that it is worth noting that the Court was attempting to speak for history and couched its decision explicitly in historical terms.)

Was the Missouri Compromise Constitutional?

At first glance, the Court's jurisdictional conclusion should have been the end of the matter. If Scott was not a citizen of Missouri, the federal courts had no authority to hear Scott's complaint, and the case should have been at an end, at least for Chief Justice Taney.

But the Court went on to consider the huge question whether Scott remained a slave after living in Illinois and the Louisiana Territory. The Court said that he did. But why? This question is much harder to answer.

Perhaps Missouri law governed the question whether Scott, a resident there, was still a slave. Four justices so concluded. This idea is not implausible, and for those justices, there was no reason to speak to the constitutional validity of the Missouri Compromise. But three of them did so anyhow. Thus a total of six justices concluded that Scott was still a slave because the Missouri Compromise was unconstitutional. Why was this so?

Chief Justice Taney offered several arguments. First, he said that Congress' authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

States" did not extend to territories not owned in 1789. By itself this should have been sufficient, but perhaps it did not seem plausible even to Chief Justice Taney, so he offered a second point. Thus he said that slavery was constitutionally sacrosanct, so that even if Congress had authority over new territories, it could not ban slavery there. "[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution." But this too was an adventurous conclusion. Thus Justice Taney added a third point, to the effect that Congress' power over the territories could not collide with other constitutional limitations. Congress could not, for example, eliminate freedom of speech in the territories. And this point was decisive for the question at hand. A law that deprives someone of property because he has brought it into a particular place "could hardly be dignified with the name of due process of law."

This was an exceptionally important moment in American law. It was the birthplace of the idea of "substantive due process," the idea used in the Lochner era cases, in *Roe v. Wade*, and in many of the most controversial decisions in the Court's history.

Why was this a new idea? On its face, the due process clause appears to give people a right to a hearing to contest factual findings, and Sanford sought much more than that. Does the due process clause give courts authority to strike down legislation as unreasonable or as substantively unjust? Before *Dred Scott*, the Supreme Court had not suggested that it did. The suggestion was textually awkward, to say the least. The due process clause seems to speak of procedure, not of substance.

Even if the due process clause is understood to have a substantive dimension, there is a big problem with the Court's argument. International law had long held that a master who voluntarily takes a slave into free territory therefore relinquishes his property interest in the slave. So long as the territory is known to be a free one, this is not a "taking" of property. If California says that people may not own lions, and if a citizen from Arizona takes a lion into California, there is no constitutional problem if the lion is removed and even freed. Even on Justice Taney's assumptions, his argument was remarkably brisk and unconvincing. I return to this point below.

It might appear to you at this point that the Court had a narrow route to resolution of the case. Perhaps a free slave could be deemed a citizen for purposes of jurisdiction. And perhaps the Court need not have assessed the constitutionality of the Missouri Compromise. Perhaps the crucial issue in the case was whether Missouri had to recognize any change in Scott's status from his visit into free areas. If Missouri did not have to recognize that change, the case was over. And if Scott's stay in Illinois produced a change in status that Missouri had to respect, the case was over as well.

In fact the justices initially concluded that they would not decide the largest issues in the case and that they would conclude very simply that under Missouri law, Scott was still a slave. If that was so, the case could be resolved simply and without broad pronouncements. But shortly after his election, President Buchanan wrote to one of the justices with the suggestion that it was important "to destroy the dangerous slavery agitation and thus restore peace to our distracted country." A variety of factors moved Justice Wayne to insist that the Court should deal with the two key issues—the status of the Missouri compromise and the status of freed blacks as citizens—on which the justices originally decided to remain silent. Five justices eventually agreed; all were from slave states.

Justice Wayne later told a Southern Senator that he had "gained a triumph for the Southern section of the country, by persuading the chief justice that the court could put an end to all further agitation on the subject of slavery in the territories." Here is the obvious punch line: For palpable political reasons, the Court was persuaded to speak to all of the key questions. Its obvious goal was to solve, once and for all time, the great moral and political crisis that slavery had created for the United States of America.

DRED SCOTT: JUDICIAL HUBRIS

Now we are in a position to explore the question: What was wrong with the *Dred Scott* opinion? Let us divide potential answers into two categories: institutional and substantive. The substantive answers have to do with the best reading of the Constitution.

The institutional answers have to do with the appropriate role of the Supreme Court in American government. The two are related, but it is both useful and important to try to separate them.

Begin with issues of substance. The Court was not just reckless but simply wrong to say what it did with respect to the status of freed slaves. There was no basis for the Court's conclusion that freed slaves could not count as citizens. In fact some freed slaves participated in the ratification of the Constitution itself; and freed slaves were allowed to vote in at least five of the colonies. The Constitution does not suggest that free citizens do not stand on the same ground as everybody else.

In fact the text of the Constitution—its infamous three-fifths clause—itself undermines the Court's conclusion. If slaves count for three-fifths of a human being for perhaps of apportioning representatives (a provision recognizes without endorsing slavery, and that itself creates an incentive to eliminate slavery), then freed slaves count as 100% human beings for those purposes. Hence the Constitution expressly distinguishes not between African and non-African descendants, but between slaves and free persons, whether African or not. This part of the constitutional text was not mentioned in *Dred Scott*, but it argues strongly the other way.

More generally, the Constitution does nothing to entrench slavery. It recognizes the existence of the institution but does little more than that.[6] Certainly some of the Constitution's framers believed that slavery was acceptable or desirable (though consider slaveholder Jefferson's suggestion that "I tremble for my country" when contemplat-

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[6] More particularly, there are three relevant provisions. (1) Article I section 9 prevents Congress from prohibiting the slave trade until 1808. This is hardly an endorsement of slavery. It gives slave states a relatively short period in which to import slaves, and then lets Congress do as it wishes. (2) Article IV section 3 requires nonslave states to return fugitive slaves to their owners. This provision is extremely limited; it does not say anything about the obligations of states to respect slave-owners who voluntarily come, with their slaves, into nonslave states. (3) The so-called three-fifths clause, Article I, section 2, says that representatives and direct taxes shall be apportioned by adding to the whole number of free persons "three fifths of all other persons." This provision is designed for purposes of allocating representatives and direct taxes. As not, it creates an incentive to free slaves, by giving slave states more political power if they become nonslave states. It certainly does not reflect any judgments that slaves are just 2/3 of "people."

ing that God is just). Maybe a majority of them thought so. But they did not put that judgment in the Constitution itself. There was no reason to think that freed slaves should not qualify as citizens for constitutional purposes.

The Court's decision with respect to the Missouri Compromise was also both reckless and wrong. On its face, congressional power over the territories is extremely broad. It is absurd to say that that power was limited to existing territories. To be sure, that power cannot be used to violate the Constitution itself; Congress could not outlaw political dissent within the territories. On this score the *Dred Scott* Court was correct. But contrary to the Court's suggestion, the Constitution does not distinctly and expressly affirm the property rights of slaveowners. It recognizes, somewhat obliquely, the institution of slavery. But it did not endorse that institution. Indeed it forbids Congress from outlawing the slave trade before 1808, a provision that is hardly a ringing endorsement of the institution of slavery. And as I have said, the use of substantive due process—even if there is such thing—was unsupportable because there is no "taking" of property when one state gives people notice that certain goods (guns, bombs) are not allowed there.

So much for constitutional substance. I think the institutional issues are more important, more subtle, and of more enduring relevance. There are two points here.

First: The Court reached out to answer numerous questions not requiring a judicial answer in the case at hand. Once it found that Scott was not a citizen, the case was at an end. The Court lacked jurisdiction. Or it could have said very modestly, and without pronouncing on the Missouri Compromise or the citizenship question, that Missouri law controlled Scott's status as a citizen in Missouri. There are good reasons for the old idea that courts should decide only those issues necessary to the resolution of the case at hand. This idea minimizes the role of judges in the constitutional regime and allows room for democratic deliberation and debate. Amazingly, the *Dred Scott* Court took the opposite approach; it decided every issue raised by the case, regardless of whether the decision was necessary to settle Scott's complaint.

Second and foremost: The nation was in the midst of an extraordinary deep and wide debate about one of the central moral issues of the time. It

is ludicrous to suppose that nine lawyers in Washington could lay this issue to rest by appeal to the Constitution. It is hubristic for nine lawyers charged with interpreting the Constitution to think that they know the right answer for the nation as a whole. In such cases the likelihood of error is very high, and the likelihood of success—a final resolution for a heterogeneous nation—is low even if there is no error. The Court should have proceeded with greatest caution unless it found the Constitution unambiguous on the point or unless it thought the moral principle so urgent and so plausibly constitutional in character as to require judicial endorsement. Neither of these could be said in *Dred Scott*. The Court should have decided the case narrowly by asking about the status of Missouri law.

Lincoln and Judicial Institutions

I want to say a word now about the nation's reaction to *Dred Scott*, and about the appropriate attitude of citizens and public officials to Supreme Court decisions. My basic point is this: The Supreme Court has the last word on cases that it decides. But interpretation of the Constitution is emphatically not only a judicial activity. Constitutional interpretation is for others as well. The Supreme Court is supreme but only in a limited way. It does not preclude constitutional complaints by others seeking change. Certainly this is so when issues of constitutional law are also issues of basic political principle. In such cases it is especially important to insist—as have Presidents Jefferson, Roosevelt, and Reagan, among others—that the Supreme Court has no monopoly on constitutional interpretation.

Consider in this regard Abraham Lincoln's words: "if this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias and in accordance with legal public expectation, and with the steady practice of the departments throughout out history, and had been in no part, based on assumed historical facts, which are not really true or, if wanting in some of these, had been affirmed and reaffirmed, it might be factious, even revolutionary, to not acquiesce in it. But when we find it wanting in all these claims to public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite

established a settled doctrine for the country." And in 1858 Lincoln said: "If I were in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."

Lincoln's simplest and most dramatic statement on the topic echoed the theme of democratic deliberation and a shared role in constitutional interpretation: "The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal."

In this light we might see the Court as having a dialogic relation with others engaged in political and moral deliberation, and others thinking about the meaning of the Constitution. The *Dred Scott* Court fostered no such dialogue. In fact its whole goal was preclusive. But it is predictable in such circumstances that the Court will fail and that voices will be loudly raised against it. This is certainly so for the most invasive decisions in the Court's history—*Dred Scott*, *Lochner v. New York*, *Roe v. Wade*, *Buckley v. Valeo*. What the Court ought to do, generally and to the extent that it can, is act as a participant in democratic deliberation, not as the unique "forum of principle" in American government.

It will not have escaped notice that this is an argument for a degree of judicial statesmanship.[7] It is an argument that there is no mechanism to determine the Constitution's meaning; that meaning is a function of judgment; and that judgment, rightly exercised, involves both substantive issues and institutional constraints.

Lessons Drawn and Applied: Affirmative Action, Homosexuality, the Right to Die

In General

I have said that *Dred Scott* was a blunder and an abuse because it purported to resolve many more issues than were before the Court, and in that way to

[7] It is emphatically not an argument for Bork-style "originalism." See Sunstein, *Legal Reasoning and Political Conflict* (1996).

resolve issues of high principle that are fundamentally for the public, not for the judiciary. I mean, then, to approve of judicial casuistry. Let us take *Dred Scott* to suggest the following points. First, courts should generally not set forth broad theories of the good or the right; they should try to bracket those issues and leave them for other places. Second, they should, to the extent possible and in general, decide cases by reference to modest, low-level rationales on which diverse people can agree.

We might say that in constitutional cases, courts should adopt incompletely theorized agreements, and in that way to economize on moral disagreement. This is perfectly familiar in ordinary life—families, workplaces, and much more. We can imagine many settings in which people who disagree on large abstractions can agree on particular cases. Certainly this is often true for a faculty; it is true too for a polity. In doing this, courts can lower the costs of decision and also the costs of error. And they can accomplish one of the most important goals of a well-functioning deliberative democracy, to promote necessary agreement while minimizing the problems created by fundamental disagreement.

Judicial casuistry has another feature. When they are in the midst of a political thicket, courts should not decide more cases than have been placed before them. That is, they should, generally and to the extent possible, decide cases with close reference to the particular issues presented. This strategy decreases the cost of decision, and decreased costs are a significant gain. This strategy also allows large scope for democratic self-governance. It does this because it can trigger public debate, and signal the existence of issues of high principle, without at the same time foreclosing fresh thinking or disallowing the democratic public from resolving the foundational issues as it chooses.

Affirmative Action

Now let us try to apply these thoughts to some contemporary issues. The nation is in the midst of a large debate over color-conscious programs, and many people have vigorously urged the Supreme Court to foreclose such programs, whether deemed "affirmative action" or something else. And there are passages in Supreme Court decisions that read roughly like this: "In the Civil War, the nation

decided on a principle of color-blindness. Whether this is a desirable or wise principle is not for us to say. But the issue has been foreclosed by our heritage."

Or it might be said, as a court of appeals recently did, that equal protection clause has come to be understood to embody a principle of race neutrality that is violated by all affirmative action programs, including those in the educational system. Thus in its remarkable decision striking down an affirmative action plan for the University of Texas Law School, the court of appeals said that race-consciousness was acceptable only to remedy identified acts of past discrimination. Thus public universities must proceed on a race-neutral basis. (Through Title VI, this view may extend to private universities as well.)

In this form, a court opinion outlawing affirmative action is closely analogous to *Dred Scott*, and defective—abusive, overreaching—for the same reason. It would be an amazing act of hubris. In one form, a supposed past historical judgment, itself not clearly embodied in the constitutional text,[8] is used to foreclose democratic experimentation. (Recall *Dred Scott* on citizenship and the Missouri Compromise.) In another form, a general principle ("color-blindness") is announced to foreclose such experimentation even though the principle covers a wide range of situations, some of which seem to draw the principle in some doubt (as where race is a minor factor used alongside many other minor factors). We might compare the narrower, fact-intensive, casuistical approaches characteristic of Justice Powell in the *Bakke* case and on occasion Justice O'Connor.

My simple proposition is this: There are many kinds of affirmative action programs. The nation has embarked on a large-scale debate about such programs. That debate raises issues of both morality and fact. Ultimately the place of affirmative action programs should be decided democratically, not judicially.

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[8] There is no evidence that the equal protection clause was intended to stop affirmative action, and considerable evidence to the contrary. In fact those who ratified the fourteenth amendment engaged in race-conscious remedial programs. It would be most refreshing if some of the originalist justices on the Court, who tend to oppose affirmative action on constitutional grounds, would invoke some historical support for their views (it is hard to find any), or would say that although they personally do not like affirmative action, the history forbids them from invalidating it on constitutional grounds. I am indebted to David Strauss for this thought.

There is no sufficiently clear constitutional commitment to color blindness to justify judicial intrusion.

Of course this is not to say that affirmative action programs are always good. Some of them are very bad. In any case they are extraordinarily diverse. Their validity depends on the details. And in these circumstances, courts should be attentive to the details. They should proceed modestly and casuistically.

We are now in a position to discuss the possible catalytic role of the Supreme Court insofar as that role bears on the affirmative action debate. Suppose that it is agreed that the issue of affirmative action should be decided democratically rather than judicially—but suppose too that institutions are operating in such a way as to ensure that many public decisions are taken in an unaccountable way and are not really a product of democratic judgments. This is a plausible description of affirmative action programs between the period, say, 1975 and 1990. A meandering, casuistical, rule-free path may well be a salutary way of signaling the existence of large questions of policy and principle, at least with constitutional dimensions, when those questions would otherwise receive far less attention than they deserve. Hence the participants in Supreme Court cases have become familiar "characters" in the national debate, helping to frame discussion: Bakke, Weber, Johnson, minority construction contractors, and others.

In fact the Court has mostly acted in this way. Some of the justices have undoubtedly been aware of the difficulty and variousness of the affirmative action problem and have chosen a casuistical approach for this reason. The Court's decisions have been among the factors that have kept affirmative action in the public eye and helped focus the public on issues of principle and policy. This is the best that can be said for the Court's rule-free path. When it confronts the admissions policy of the University of Texas, the Court should continue in this way, looking closely at the details, and avoiding broad pronouncements. But what I want to emphasize here is that it would be a democratic disaster if the Court, *Dred Scott*-style, were to foreclose further democratic debate in the name of the "color-blindness" principle.

The Right to Die

We are in the midst of a constitutional attack on

laws that forbid state-assisted suicide. The right-to-die debate is along one dimension significantly different from the debate over affirmative action. Here the relevant laws have been on the books for a long time, and they have not, as a general rule, been revisited by recently elected officials.

Do such laws invade a constitutional "right to privacy"? Many people and some courts think so. Invoking the authority of *Roe v. Wade*, such people say that the government cannot legitimately interfere with self-regarding choices about what to do "with their bodies," and that therefore the choice is for the individual, not for the state. Several courts have recently gone in this direction.

Thus stated, the argument for a constitutional right to die raises many questions and many doubts. Substantive due process does not deserve wide acceptance. For reasons I have suggested, it is textually awkward, to say the least. Moreover, the conditions in which a right to die might be asserted are widely variable. Perhaps some people choosing death would be confused or myopic. Perhaps some doctors would overbear their patients; perhaps some families could not entirely be trusted. In view of the complexity of the underlying issues of value and fact—our now-familiar theme—courts should be extremely reluctant to try to resolve this issue through judicial declaration. They lack the fact-finding expertise and policymaking competence. Thus recent court decisions announcing a large-scale "right to die" are another version of the *Hopwood* case; they are modest reruns of *Dred Scott* itself.

Does this mean that courts should say nothing at all? Perhaps. But there is an alternative, and it bears on the principal difference between the affirmative action controversy and the controversy over the right to die. I think the most promising and ingenious solution, set out by Judge Guido Calebresi, attempts to promote a kind of dialogue between courts and the public. Let us notice first that the relevant laws were enacted long ago. They were designed to prevent people from being accessory to suicide; that was their fundamental purpose. Suicide was considered a genuine crime. But this reason for the statutes no longer holds much weight. Enforcement of those laws has fallen into near-desuetude. In any case these are not really cases of suicide, and the technology has much changed,

making possible forms of euthanasia that would have been unimaginable when the laws were first enacted.

The central point, for those interested in democratic deliberation, is that there has been no recent legislative engagement with the underlying moral and technological issues. In these circumstances, it is appropriate for a court to say that the state has not demonstrated an adequate reason to interfere with a private choice of this kind—unless and until a recent legislature is able to show that there is a sufficiently recent commitment to this effect to support fresh legislation.

Understood in this way, the right to die cases are reminiscent of the Connecticut contraceptives case, *Griswold v. Connecticut*, as I would understand that case in the light of *Dred Scott*. In *Griswold* the Court embarked on the basis of taking large-scale positions on matters of political morality by speaking of a nonexistent constitutional "right of privacy." Instead the Court might have taken a very narrow approach in *Griswold*. It might have said that laws that lack real enforcement, that appear no longer to reflect considered political convictions, cannot be used against private citizens in decisions of this kind on what is predictably and almost inevitably a random basis.

The underlying, time-honored principle—that involving desuetude—has strong democratic foundations. The principle condemning desuetude says that when an old law is practically unenforced because it does not receive sufficient public approval, ordinary citizens are permitted to violate it, and in that way to call democratic attention to the space between the law as popularly conceived and approved and the law as it exists on the books.

An idea of this sort, I suggest, would be a singularly good way of beginning the constitutional debate about the right to die. It would not involve judicial prohibition. It would begin the debate by putting the burden of deliberation on representative bodies accountable to the people.

HOMOSEXUALITY

Now turn to claims that the Constitution forbids discrimination on the basis of sexual orientation. Here plaintiffs' lawyers are invoking a principle of human equality to invalidate democratic outcomes.

Here some people insist that a properly capacious notion of constitutional equality adequately justifies an aggressive judicial role.

I will assert, without defending the point here, that that notion of equality does seem to me to connect very well with the equality principle that underlies the Civil War Amendments. Let us simply assume that this claim is right. We might even assume, at least for purposes of argument, that the rightness of the constitutional claim is very clear, and that the homosexual case is therefore different from cases involving affirmative action and the right to die, which seem in any case difficult. And then—having made things especially hard for ourselves—let us ask about the Court's appropriate role, returning to Abraham Lincoln in the process.

Abraham Lincoln always insisted that slavery was wrong. On the basic principle, Lincoln allowed no compromises. No justification was available for chattel slavery. But on the question of means, Lincoln was quite equivocal—flexible, strategic, open to compromise, aware of doubt. The fact that slavery was wrong did not mean that it had to be eliminated immediately, or that blacks and whites had to be placed immediately on a plane of equality. On Lincoln's view, the feeling of "the great mass of white people" would not permit this result. In his most striking formulation: "Whether this feeling accords with justice and sound argument, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, can not be safely disregarded." What is most striking about this claim is the view that the inconsistency of a "feeling" with justice or sound argument may be irrelevant to the question of what to do at any particular point in time.

On Lincoln's view, efforts to create immediate social change in this especially sensitive area could have disastrous unintended consequences or backfire, even if those efforts were founded on entirely sound principle. It was necessary first to educate people about the reasons for the change. Important interests had to be accommodated or persuaded to come on board. Issues of timing were crucial. Critics had to be heard and respected. For Lincoln, rigidity about the principle would always be combined with caution about the means by which the just outcome would be brought about. For this reason it is a mis-

take to see Lincoln's caution with respect to abolition as indicating uncertainty about the underlying principle. But it is equally mistaken to think that Lincoln's certainty about the principle entailed immediate implementation of racial equality.

The point is highly relevant to constitutional law, especially in the area of social reform. Return to my basic theme: As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint. Suppose, for example, that the ban on same-sex marriage is challenged on equal protection grounds. Even if judges find the challenge plausible in its substance, there is much reason for caution on the part of the courts. An immediate judicial vindication of the principle could well jeopardize important interests. It could galvanize opposition. It could weaken the antidiscrimination movement itself as that movement is operating in democratic arenas. (Compare *Roe v. Wade.*) It could provoke more hostility and even violence against homosexuals. It would certainly jeopardize the authority of the judiciary.

Is it too pragmatic and strategic, too obtusely unprincipled, to suggest that judges should take account of these considerations? I do not believe so. Prudence is not the only virtue; it is certainly not the master virtue; but it is a virtue nonetheless. At a minimum, it seems plausible to suggest that courts should generally use their discretion over their docket in order to limit the timing of relevant intrusions into the political process. It also seems plausible to suggest that courts should be reluctant to vindicate even good principles when the vindication would compromise other interests, at least if those interests include, ultimately, the principles themselves.

In the area of homosexuality, we might make some distinctions. If the Supreme Court of the United States accepted the view that states must authorize same-sex marriages in 1996, or even 1998, we should expect a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of hatred of homosexuals, a constitutional amendment overturning the Court's decision, and much more. Any Court should hesitate in the face of such prospects. It would be far better for the Court to do nothing—or better yet, to start cautiously and to proceed incrementally.

The Court might, for example, conclude that the

equal protection clause forbids state constitutional amendments that forbid ordinary democratic processes to outlaw discrimination on the basis of sexual orientation. The Court might say that such amendments, of the sort that has been enacted (and invalidated judicially) in Colorado, do not merely discriminate on the basis of sexual orientation, but also disfavor a defined group in the political process, in a way that involves issues of both animus and political equality. A judicial ruling of this kind would be quite narrow. In fact the Court proceeded very much in this way in its laudable decision in *Romer v. Evans*.

Or the Court might say—as some lower courts have done—that government cannot rationally discriminate against people of homosexual orientation, without showing that those people have engaged in acts that harm any legitimate government interest. Narrow rulings of this sort would allow room for public discussion and debate, before obtaining a centralized national ruling that preempts ordinary political process.

Armed with an understanding of *Dred Scott*, we can go much further. Constitutional law is not only for the courts; it is for all public officials. The original understanding was that deliberation about the Constitution's meaning would be part of the function of the President and legislators as well. The post-Warren Court identification of the Constitution with the decisions of the Supreme Court has badly disserved the traditional American commitment to deliberative democracy. In that system, all officials—not only the judges—have a duty of fidelity to the founding document. And in that system, we should expect that elected officials will have a degree of interpretive independence from the judiciary. We should even expect that they will sometimes fill the institutional gap created by the courts' lack of fact-finding ability and policymaking competence. For this reason, they may conclude that practices are unconstitutional even if the Court would uphold them, or that practices are valid even if the Court would invalidate them. Lincoln is an important example here as well. Often he invoked constitutional principles to challenge chattel slavery, even though the Supreme Court had rejected that reading of the Constitution in the *Dred Scott* case.

CONCLUSION

It is time to conclude. The *Dred Scott* opinion was an abomination, and it was an abomination in two different ways. The first has to do with substantive law: Freed slaves should have qualified as citizens. The Missouri Compromise was a legitimate exercise of legislative authority. The serious question in the case was whether Missouri's view about Scott's status was binding. That was a little question, not a big one, and the Court should have stayed with the little question.

But *Dred Scott* was also an abomination in ways that have to do with institutional role. The Court did not merely decide Dred Scott's case; it managed at once to assert that it lacked jurisdiction and to strike down an act of Congress not directly bearing on the jurisdictional issue—an especially neat trick. The Court purported to make the original intentions of the framers binding, even though those intentions were murky, did not compel the Court's conclusion, and were not in the Constitution itself. Perhaps worst of all, the Court deliberately reached out to decide nationally crucial issues that deserved and would ultimately receive an answer from the people rather than the judiciary.

Thus understood, *Dred Scott* offers many lessons for those interested in the modern Supreme Court. As a general presumption, it argues against efforts to take the great moral issues out of politics. It argues in favor of an approach that sees constitutional interpretation and moral deliberation as tasks for representatives and citizens generally, not just for judges. It suggests that the great issues of political morality—affirmative action, the right to die, homosexual rights—are mostly for political processes, not for courts.

This does not suggest that courts should do nothing. I have argued that in all three areas, courts can perform a catalytic role. Democratic deliberation is not a mere matter of counting noses. The Court can do a great deal of good in promoting more rather than less in the way of both democracy and deliberation. It can do a great deal of bad in producing less rather than more of these things.

This, I suggest, is not a myth. It is the enduring lesson of *Dred Scott*. At least it is the enduring lesson for a Court that has an accommodating spirit, and that is not too sure that it is right.

CODA

I have a coda. It consists of notes about what happened to the people in the case.

John Sanford was insane and institutionalized by the time the decision was announced. He died on May 5, 1857.

Despite the Court's decision, Dred Scott eventually won his freedom, because after the Court rendered its decision Calvin Chaffee, Irene Emerson's new husband, and his new wife took immediate measures to free Dred Scott. Scott lived as a free man—working as a hotel porter—for just a year before his death from tuberculosis in 1858.

Until very recently,[9] history had lost the stories of Harriet Scott, Eliza Scott, Lizzie Scott, and their descendants. We now know that Harriet Scott survived the Civil War and the thirteenth amendment; that Eliza never married and spent much of her life caring for her mother; that Eliza had children and her great-grandson—Dred and Harriet's great-great-grandson—is now living in Missouri.

Dred Scott's grave went unmarked and unnoticed for many decades; but at the centennial of the Dred Scott case, in 1957, a granddaughter of Taylor Blow provided a granite headstone for his grave, where it can now be seen in Calvary Cemetery in St. Louis, Missouri.

President Lincoln signed the Emancipation Proclamation on January 1, 1863. The nation—We the People—ratified the Fourteenth Amendment in 1868, overruling *Dred Scott* through democratic means, with its opening words, "all persons born or naturalized in the United States are citizens of the United States and of the State wherein they reside."

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[9] A valuable discussion is Lea VanderVelde and Sandhya Subramanian, Mrs. Dred Scott (unpublished manuscript 1996).

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