Washington and Lee Law Review

Volume 42 | Issue 1 Article 5

Winter 1-1-1985

The Heart of the Lawyer's Craft

Peter R. Teachout

THE HEART OF THE LAWYER'S CRAFT

PETER R. TEACHOUT*

> There are special arts in discerning as truly as possible what the past has to say to the present. There are even more difficult arts in speaking intelligibly and sensibly to the future. These arts are all at the heart of the lawyer's craft.[1]

Let me begin by saying that there is much in Professor Burt's interesting and provocative paper with which I fundamentally agree. I agree that Taney's opinion reflects "an incorrect view of the judicial role in our society, a view that itself is morally untenable."[2] And I agree that what is wrong with Taney's approach is his attempt to use the decision to cut off any further discussion of the divisive issues of slavery in the federal courts and legislature. Furthermore, I share Professor Burt's views about the importance in our system of creating and maintaining public forums in which argument over potentially divisive issues can be carried on under conditions of mutual respect and equality. Finally, I have no disagreement with the larger institutional wisdom upon which Burt's paper ultimately seems to come to rest, the wisdom reflected in Justice Jackson's comment that "[t]he vice of judicial supremacy ... has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts...."[3] I should hasten to add that, while I agree with this statement as a general proposition, I do not think it offers a formula for disposing of all constitutional cases that raise potentially divisive issues of the magnitude presented in the slavery and desegregation cases. Deciding whether or not to decide such cases, it seems to me, involves much more complex considerations.

Yet in spite of these points of substantial agreement, my deepest sense is that Professor Burt's analysis is fundamentally flawed. It leads, it seems to me, to a formalistic jurisprudence that in the end is simply inadequate to the task he sets for it. Moreover, even to arrive at this point, Burt is forced to elaborate and adopt a very curious view of constitutional jurisprudence. Putting one's finger on exactly what it is that is wrong with Professor Burt's argument is a difficult task, however, because, whatever the problem, it does not seem to take the form of a discrete conceptual error. The problem lies rather in the view he expresses of what the accepted norms of constitutional interpretation are and what the proper role of the Court ought to be. It is a view expressed moreover, not in a neat, tidy, summary statement, but pervasively throughout his argument. Thus, in order to get to the heart of

---

* Professor of Law, Vermont Law School.

1. H. HART & A. SACKS, THE LEGAL PROCESS 124-25 (tent. ed. 1958).

2. Burt, *What Was Wrong With* Dred Scott, *What's Right About* Brown, 42 WASH. & LEE L. REV. 1, 3 (1985).

3. *Id.* at 24-25 (quoting Justice Jackson).

the problem, one has to work backward toward it by pursuing a number of seemingly unrelated strands of his analysis—aspects of his argument that on the surface seem not so much wrong as simply puzzling, yet which cumulatively lead, it seems to me, to a deceptive end.

1. Strange Praise

If there is a problem with Taney's opinion in *Dred Scott*, Burt argues, it is that Taney sought to use the decision in that case to cut off systematically any further discussion in the Congress or the federal courts of the potentially divisive issue of slavery. Taney's opinion was a wrongheaded attempt, according to Burt, " ... to eliminate future occasions for possible contentious interchange between the disputants regarding the specific issue that divided them."[4] In so acting, Burt contends, Taney fundamentally misconceived the judicial role. This assessment, as far as it goes, is one with which I agree. Indeed, I found Burt's analysis of Taney's opinion along these lines both illuminating and helpful. What I find puzzling is what Burt goes on to make of this initial observation.

One might expect Burt to argue that the heart of the problem is Taney's improper use of the vehicle of constitutional decision to achieve blatantly political ends. By undertaking to solve a political question with which the Court was not particularly well equipped to deal (in any case certainly no better equipped than the legislative and executive branches), Taney disregarded—at the nation's peril—important limitations of institutional competence.[5] Moreover, in order to achieve the political result that he felt would be in the best interests of the nation, Taney was forced to disregard almost every precept of sound constitutional interpretation. He had to manipulate the forms and conventions of constitutional construction to achieve his

---

4. *Id.* at 18-19.

5. This is clearly Justice Curtis's view in dissent. As Curtis saw it, Taney based his determination that blacks were not "citizens" under the Constitution on purely political considerations. The exclusion was not compelled by anything in the text of the Constitution itself or by fidelity to the framers' intent. Rather, Taney read into the Constitution the exclusion of blacks from citizenship because he felt that it was politically necessary to do so in order to defuse a potentially explosive situation and in the end perhaps, to help preserve the Union. In a passage that bears our attention, Curtis questions whether this is a proper role for the Court. To read such an exclusion into the Constitution, Curtis argues:

> ... upon reasons purely political, renders its judicial interpretation impossible because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation.... And when ... the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under a government of individual men, who for the time being have a power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined power, we have a Government which is merely an exponent ... of the individual political opinions of the members of this court.

Dred Scott v. Sandford, 60 U.S. 393, 620-21 (1856) (Curtis, J., dissenting).

political ends. Taney's opinion in *Dred Scott*, in other word, can be seen as a textbook example of how not to interpret the Constitution.

Interestingly, Burt not only refuses to adopt this conventional assessment of Taney's performance in *Dred Scott*, but proceeds to make the exact opposite claim. The problem with Taney's opinion, as Burt views it, it not that Taney sought to address and solve a large political question that courts are not particularly well equipped to handle, but that he did not go after the political question explicitly enough. The problem, according to Burt, is that Taney got bogged down in technical problems of constitutional interpretation when what the Court should have done was decide up front whether or not the Union ought to be preserved. Burt is very clear on this point: " ... I believe that the Court decided the wrong question in *Dred Scott*.... The real question [it should have been addressing] was whether the Union should continue...."[6] It is important to appreciate the radical nature of the view of the judicial role that Burt is advocating here. In Burt's constitutional world, it is the Court that is to be charged with the responsibility of deciding whether or not the Union should continue—and on just such open-ended terms. Exactly why the Court, as opposed to some other, more democratically representative institution, should be charged with this awesome responsibility is not made clear.

From this point on, moreover, things get "curiouser and curiouser." For some reason, Burt goes out of his way to insist that Taney's opinion, considered as a piece of judicial craftsmanship, measures up extremely well against accepted norms of constitutional interpretation. Taney's opinion, we are informed, "satisfies widely held current-day norms of constitutional interpretation";[7] it "readily ... fits contemporary jurisprudential standards";[8] it compares favorably with "constitutional interpretations proferred by the most highly regarded Supreme Court Justices before and since."[9] Indeed, Burt goes so far as to claim that he cannot find "jurisprudential fault" in Taney's "substantive interpretation of the Constitution."[10] For anyone familiar with Taney's opinion these statements are deeply puzzling,for it is generally regarded as a thoroughly bad opinion from the standpoint of judicial craftsmanship. Nonetheless, these statements in their own way are deeply revealing. The light they shed, however, is not so much on Taney's opinion as on Burt's own curious view of constitutional jurisprudence.

We can begin to piece that view together by considering the terms of praise Burt uses in his defense of Taney's opinion. First, Burt argues that Taney's opinion is "coherent."[11] Even if one were to concede that Taney's

---

6. Burt, *supra* note 2, at 17.
7. *Id.* at 3-4.
8. *Id.* at 4.
9. *Id.* at 11.
10. *Id.*

opinion is marked by internal coherence, however, that still leaves the question of whether the coherence is an appropriate one. What becomes clear upon further analysis is that the coherence of the opinion derives almost entirely from Taney's singleminded pursuit of the political end of cutting off further discussion of the slavery issue in the affected federal forums. What supplies the internal consistency, in other words, is the consistent manipulation and abuse of the conventions of interpretation[12] to achieve that political end. This is not the kind of craftsmanship, I take it, that we want to hold up before our students as a model of sound constitutional construction.

Second, Burt describes Taney's opinion as "ingenious."[13] But upon examination that term of praise also appears to refer to Taney's cleverness in manipulating the forms to achieve a desired political result. In fact, it is only if we are prepared to attribute to the framers, speciously and erroneously, a general solicitude for the institution of slavery[14] that Taney's opinion even makes any sense. Third, Burt insists at several points that the arguments Taney makes, or at least the positions that he takes, are "plausible."[15] But it is difficult to see what that proves, even if true. As far as I am aware, there is no accepted norm of constitutional interpretation that equates *plausible* argument with *sound* constitutional construction.

The interesting question then becomes what exactly is it Burt sees in Taney's opinion that leads him to conclude that it satisfies accepted norms of constitutional interpretation. Clearly, Burt does not claim that Taney's

---

11. *Id.*

12. Burt elsewhere describes Taney's opinion as one characterized by "historical inaccuracies," (*id.* at 8), "shoddy rhetorical technique," (*id.* at 6), "verbal gyrations," (*id.* at 10), "argument strained to the point of silliness," (*id.* at 9), and views that are "morally repugnant," (*id.*).

13. *Id.* at 11.

14. Burt seems prepared to attribute such a general solicitude for the institution of slavery to the framers. *Id.* at 8. ("Given the care the framers took generally in the Constitution to protect Southern slavery from any potentially hostile exercise of national power ... "). A more accurate statement would be that the framers were solicitous of doing what was necessary—up to a point—to secure ratification of the Constitution. It is significant in this respect what they did *not* accede to. The political concessions that were made did not take the form of a general endorsement of the institution of slavery; to the extent protections were afforded slaveowners they were clearly circumscribed. Thus, clear limitations were imposed on the period during which further importation of slaves would be permitted, and the terms of the fugitive slave clause were explicitly limited to the context of return of a runaway slave. If any intent can be fairly derived from the text and the deliberations at the Convention, in other words, it was an intent *to contain*, not to encourage the spread of, the "peculiar institution."

15. *E.g., id.* (it was "more than plausible to conclude, as Taney did, that the framers would have withheld federal citizenship from all blacks . . ."); *id.* at 10 ("[T]here was some plausibility" to Taney's argument that, if preference must be given to slavery or free labor under the Constitution, slavery should prevail); *id.* at 10-11 (reference to "the coherence and plausibility of [Taney's] use of constitutional text"). A similar normative standard seems to be involved in Burt's assertion that "a plausible case can be made that, though Taney misconstrued the attitudes of the Founding Fathers, and though his views of blacks' status is morally repugnant today, nonetheless he aptly characterized the dominant valuation of blacks in his time...." *Id.* at 3.

opinion offers an exemplary model of the prudential practice of deciding difficult constitutional cases on the narrowest possible grounds.[16] Nor does he seem to want to defend the opinion on the ground that it represents a model of historical accuracy.[17] Is it because Taney's opinion represents a "principled decision" in the best tradition of constitutional jurisprudence? Is it one of those classic opinions that carves out of inherited constitutional traditions an inspired vision of human possibilities? No, Burt does not seem to want to defend it on those grounds. Nor does he seem to want to claim that it contributes to the development of an ethically sound body of constitutional jurisprudence, a body of jurisprudence that is reasonable and just.[18] What then, one is led to wonder, is left? While this does not exhaust the list of critical standards by which contemporary jurisprudence might judge Taney's performance in *Dred Scott*, it touches most of the major bases. Exactly what is it Burt is referring to when he insists that Taney's performance deserves high grades?

The only way to answer that question is to consider the specific claims that Burt makes in the course of his argument. A primary example is Burt's contention that, although Curtis may win hands down from the standpoint of historical accuracy,[19] Taney's approach is more sound because—and here we come to a very revealing moment in Burt's analysis—*it is more consistent with "the dominant valuation of blacks in [Taney's] time...."*[20] This I find a very curious statement—particularly for what it implies about what is and what is not sound constitutional interpretation. First, I am simply puzzled about why it is the Court's role and responsibility under the Constitution to give expression to invidious views of an oppressed minority, even if those views are widespread—even if they represent, in Burt's terms, the "dominant valuation" of a vast majority of the public at a particular moment in time. Burt simply seems to assume that that is what a Court should do, but I

16. *Id.* at 5 ("If the Supreme Court had been intent on avoiding a broad or novel ruling in the case, there were many ways to do so"); *id.* at 6 ("Taney could have held that blacks were citizens for [diversity purposes] without necessarily foreclosing a later, different construction of federal citizenship under article IV. But Taney was not writing a narrow opinion in *Dred Scott* ... Taney meant to reassure the South ... ").

17. *Id.* at 3 (Taney "misconstrued the attitudes of the Founding Fathers"); *id.* at 8 (Taney's opinion is characterized by "historical inaccuracies"); *id.* at 2 (Taney is wrong in his "account of the framers' state of mind").

18. The idea that judicial decisions should be measured against such a norm has ancient roots in our system. A particularly thoughtful and comprehensive treatment of the view that all legal performances ought to be held to a "just and reasonable" standard can be found in H. HART & A. SACKS, *supra* note 1.

19. Burt, *supra* note 2, at 5 ("Historians ... have concluded that Taney was wrong and that Justice Curtis's dissent was an accurate and devastating rebuttal of Taney's claim that blacks generally were excluded from citizenship when the Constitution was framed".)

20. *Id.* at 2-3. The same view seems to be implicit in Burt's insistence upon the relevance, for purposes of constitutional interpretation, of the fact that in the North and in the South, the settled "conviction of blacks' innate inferiority was ... widespread." *Id.* at 3.

know of no accepted norm of constitutional interpretation that would sanction such a practice.

More importantly, the dichotomy that Burt establishes here—between what is "historically accurate" on the one hand and what constitutes "sound" constitutional interpretation on the other—is only one manifestation of a disintegrative approach to constitutional interpretation that is reflected elsewhere in Burt's paper. The same impulse underlies, for example, Burt's insistence that we should keep the question of what is ethically sound (or "morally repugnant") separate from the question of whether or not Taney's approach represents sound constitutionalism.[21] It is also reflected in his insistence that our estimate of whether or not Taney's opinion was "prudential" should have no bearing on our judgment as to whether it was sound from a "technical" standpoint.[22] We see it reflected as well in Burt's suggestion that an opinion characterized by "historical inaccuracies," "shoddy rhetorical technique," "verbal gyrations," "argument strained to the point of silliness," and views that are "morally repugnant,"[23] could at the same time epitomize the spirit of Marshall's "dictum"[24] that "we must never forget it is a *constitution* we are expounding."[25] Indeed, it is a reflection of the same spirit that this fundamental institutional wisdom to which Marshall gives expression is reduced here to the technical status of "dictum."

One consequence of this disintegrative approach to constitutional jurisprudence is that we end up in a world in which all those things that in fact make the difference between good and bad constitutionalism—consistency with principle and tradition, ethical soundness, prudentiality—are reduced to secondary importance or rendered utterly irrelevant. In Burt's constitutional world the Court's primary obligation, apparently, is to give expression to whatever the "dominant valuation" of the public is on any particular issue at any particular point in time. In such a world, the paradigm for the ideal Supreme Court Justice becomes not the statesman but the pollster. This leads one to wonder why we need a Court at all, since one would think that elected politicians would be just as good as Supreme Court Justices at counting noses.

Burt's insistence that Taney's opinion measures up to accepted norms of constitutional interpretation has, in other words, the perverse effect of radically contracting what is meant by such norms. They are transformed into a pinched and shrivelled version of what they traditionally have been understood to be. We find ourselves in a world where manipulation of accepted forms of constitutional interpretation to achieve a desired political result can be described as "ingenious"; where it is no longer possible to distinguish between great principles on the one hand and the specific terms

21. *See id.* at 3.
22. *See id.* at 8.
23. *See supra* note 12.
24. Burt, *supra* note 2, at 9.
25. *Id.* (quoting Justice Marshall).

of political compromise on the other; where thoughtful expression has somehow become disconnected from the substance of thought; where there is in effect no past and no future, only the "dominant valuation" of the present. It is a world where the key terms upon which our constitutional culture is founded—terms like "liberty," "equality," "justice," "fairness," "accurancy," "prudence," and other terms of substantive ethical expectation—have effectively ceased to operate. Those terms refer to matters of mere personal or political preference, Burt seems to suggest, and thus have little or nothing to do with whether or not Taney's opinion meets accepted standards of constitutional interpretation.

2. A World Without Vision

It is possible to gain further insight into what Burt is up to by examining in some detail his treatment of the "fugitive slave clause" problem. The mere existence of this clause in the Constitution, Burt seems to argue, creates an internal "contradition" from which there is no principled way out.[26] Faced with such an unyielding contradiction, the only acceptable course for the Court is to refuse to decide and return the issue for resolution in some other public forum or forums. In the following discussion, I will try to suggest briefly why I find this analysis inadequate.

The question of what to make of the "fugitive slave" requirements of article IV, section 3, is one of the central problems of constitutional interpretation presented in *Dred Scott*. Essentially, there are three basic alternatives. First, one could maintain that the existence of the clause in the Constitution evinces a general solicitude on the part of the framers for the institution of slavery. Under such an approach, the Court would view the clause as a general directive to protect the institution of slavery from threatening developments, and that protection would extend to contexts other than those involving the return of a runaway slave. Taney's opinion aligns itself with this reading, and Burt himself at one point seems to endorse this view.[27] Both seem prepared to argue that the framers' solicitude for the institution was so great that, should a conflict arise between free labor and slavery in the territories, the preferred reading of the Constitution would be one that would give slavery the nod. This might be called the "general solicitude" approach.

The second approach is to take the position that the mere existence of the fugitive slave clause in the Constitution creates an internal contradition that, in effect, renders the document neutral on the issue of slavery. Under this approach, the Court would be precluded from taking any steps that might tend either to contain or to encourage the spread of slavery. Thus, if the Court found itself confronted with the prospect of a decision that might tip the balance in one direction or the other, it should simply refuse to decide. The Court should, in effect, throw up its hands and simply turn the

26. *See id.* at 11-12.
27. *Id.* at 8.

question back over for debate in the political arena. This second approach—the "contradiction-neutralizing" approach—is the one that Burt primarily is advocating here. It represents the keystone, as it were, of his larger thesis.

A third alternative would be to recognize that the fugitive slave clause creates an internal contradiction of sorts in the Constitution, but to refuse to treat that as the end of the matter. The Court would still have the responsibility of passing judgment on how that contradiction should be regarded in light of fundamental principles embodied in both the Constitution itself and our constitutional traditions more generally. The lines of this approach would not be vastly different from those pursued by Justice Curtis in his dissent. Curtis regarded slavery as an "anamoly" in our system[28] and as "contrary to natural right."[29] This did not mean that the Court was free to disregard the fugitive slave clause, but it did mean that that clause could be viewed for what it actually was—not the embodiment of fundamental principles but the reflection of a political compromise felt necessary by the framers to maximize the possibilities of ratification. To see the institution of slavery as fundamentally inconsistent with the great principles underlying our constitutional tradition, and the fugitive slave clause as the reflection of a reluctantly granted political concession, has extremely important consequences for the way the clause is to be read. It means that the Court should give it the narrowest possible operative effect, that is, as applying only to the situation where the return of a runaway slave is involved. This third alternative might be regarded as the "containment" approach, since it is primarily responsive to the framers' manifest intent to contain the spread of slavery to the extent possible.[30]

It is important to see in this regard that the materials out of which Justice Curtis forged his opinion were not simply those of a personal moral code, but rather the primary materials of our constitutional tradition.[31]

---

28. Dred Scott, 60 U.S. at 626 (Curtis, J., dissenting).

29. *Id.* at 624 (Curtis, J., dissenting).

30. *See supra* note 14. Charnwood puts it this way in his famous biography of Lincoln:

> The men who had made the Union had, as Lincoln contended, ... been true to principle in their dealing with slavery. "They yielded to slavery," he insists, "what the necessity of the case required, and they yielded nothing more." It was, as we know, impossible for them in federating America, however much they might hope to inspire the new nation with just ideas, to take the power of legislating as to slavery within each existing State out of the hands of that State. Such power as they actually possessed of striking at slavery they used, as we have seen and as Lincoln recounted in detail, with all promptitude and almost to its fullest extent. They reasonably believed, though wrongly, that the natural tendency of opinion throughout the now freed Colonies with principles of freedom in the air would work steadily towards emancipation. "The fathers," Lincoln could fairly say, "placed slavery, where the public mind could rest in the belief that it was in the course of ultimate extinction." The task for statesmen now was "to put slavery back where the fathers placed it."

G. CHARNWOOD, ABRAHAM LINCOLN 124 (1916).

31. In doing so, Curtis does not confine himself to the text of the Constitution itself, but draws upon the larger constitutional traditions that the document embodies. For example, in rejecting the contention that the due process clause protects the slaveholders' property in slaves

Indeed, he makes clear his own view that it would be inappropriate to base a constitutional decision on "reasons purely political" or individual "theoretical opinions" unrelated to the great traditions of Anglo-American constitutionalism.[32] The vice with Taney's approach, as Curtis saw it, was that Taney did precisely that.

One difficulty with Burt's analysis is that he simply adopts the second alternative identified above—the "contradiction-neutralizing" approach—without ever explaining why that approach should be preferred over the others. Moreover, in order to embrace that second alternative, Burt is forced to read into the Constitution a solicitude for slavery on the part of the framers that in fact never existed. Even worse, he is forced to read out of the Constitution those great substantive ethical principles upon which our constitutional system is founded—or at least to reduce them to a par with the politically pragmatic terms of the fugitive slave clause. Burt leads us into a world, in other words, where it is no longer possible to distinguish between fundamental principles on the one hand and the pragmatic terms of a political concession on the other, between the stuff out of which constitutional traditions are made and the mean product of a political deal. Everything becomes blurred. When we lose our capacity to make discriminating judgments of this kind, we have lost something very important: the capacity for discriminating ethical judgment upon which the continued vitality of our constitutional culture depends.

This leads to a startling observation. The "Constitution" we encounter in Burt's paper, it appears upon closer examination, does not seem to embody substantive ethical principles at all; it expresses no substantive vision of society or of human possibilities. There is virtually no reference to the great traditions of liberty, equality, and individual dignity upon which our constitutional culture is founded. Burt's "Constitution" is in these respects strangely silent. What is most striking about the character of the constitutional culture we encounter in Burt's paper, in other words, is how little substance it has.

Given such a "Constitution," of course, it is perfectly logical to come out insisting, as Burt seems to, that there is no principled difference between a pro-slavery and an anti-slavery decision in *Dred Scott*; that questions of slavery and racism are for the most part matters of mere personal or political preference about which the Constitution itself has nothing to say; and that therefore what the Court should do is simply declare neutrality, decide not to decide, and leave the issue to be resolved in the political arena.

---

anywhere in the nation, Curtis argues:

> It must be remembered that [the due process clause] is not peculiar to the Constitution of the United States; it was borrowed from *Magna Charta*; was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter ...

60 U.S. at 626-27 (Curtis, J., dissenting). Curtis reads the Declaration of Independence in the same generous way, as the embodiment of "great truths" and "great natural rights." *Id.* at 575.

32. *Id.* at 620 (Curtis, J., dissenting); see *supra* note 3.

We have heard this voice before. It is Douglas's voice in the Lincoln-Douglas debates.[33] Douglas's position in those debates, it will be recalled, was that our constitutional traditions have nothing to say about slavery or equality of the races. These are matters of mere personal or political preference which each individual and each state ought to be allowed to resolve for itself. What our Constitution is about, Douglas argued, is the great principle of self-determination—nothing less but also nothing more. It expresses no substantive ethical vision beyond this. The constitutional culture to which it gives expression has no particular vision, no ethical character, other than that which it may be given by the floating fashions of personal and political preference. Douglas's "Constitution," in other words, like Burt's, embodies no substantive vision of human possibilities.

If Douglas's voice represents one option for constitutional self-definition, Lincoln's represents another. To Lincoln, making sense out of the Constitution meant struggling to give substantive content to the ideas of liberty and equality and individual dignity which, as he saw it, our constitutional traditions embodied. To be sure, Lincoln does not complete the job; indeed, his struggle to give content to the idea of equality is sometimes awkward, and at times even contradictory. But the crucial difference between Lincoln and Douglas is that Lincoln saw the struggle itself as a central responsibility. His own individual struggle in the debates was, in a sense, only part of an ongoing cultural struggle to carve out of our inherited traditions a constantly renewed sense of what our civilization is all about. It is fascinating and instructive to watch Lincoln's performance in this respect, as he forges out of inherited constitutional traditions the beginnings of a new vision of what equality means and ought to mean in our society. In essence, Lincoln takes upon himself the responsibility that the Court itself neglected in *Dred Scott*: the responsibility of trustee for the perpetuation and improvement of our constitutional culture. Nor is it insignificant that his effort took this particular form: the struggle to redefine the terms in which the public debate over slavery and equality and liberty should be carried on.[34]

The trustee model of constitutional jurisprudence represented by Lincoln's position in the Lincoln-Douglas debates is one that Burt seems to reject. Burt's view, as I understand it, is that, in politically divisive cases of the sort involved here, the appropriate course for the Court is to refuse to decide. The Court should, in essence, dump the controversy back into the

---

33. *See* THE LINCOLN-DOUGLAS DEBATES OF 1858 (R. Johannsen ed. 1965) (reproducing Lincoln-Douglas Debate).

34. For a fascinating treatment of the dynamic of reciprocity that exists between language, character, and culture, see J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984). The way we use words, Professor White insists, ultimately defines our constitutional character. *Id.* He shows how the creative redefinition of key terms of value in a culture can serve to reconstitute culture itself in more vital and enuring terms. *Id.* The sort of creative "literary" activity in which Lincoln engages here, in other words, is the essence of a vital constitutionalism. White's book is reviewed in Teachout, *Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture,* ___ MICH. L. REV. ___ (1985).

public lap, without seeking to influence the way in which the unresolved issues are addressed in the political arena. The all-important consideration is to keep the conversation going; the terms in which the conversation is to be conducted is not the Court's business—indeed, it is something about which the Court cannot have much to say since Burt's "Constitution" is apparently silent when it comes to matters of substantive ethical vision.

In my view, such an approach ignores perhaps the most important role the Court can play in such a politically divisive situation. I do not take the position, I want to make clear, that the Court should reach out to decide every aspect of every issue with which it finds itself confronted. Indeed, I condemn Taney for trying to do just that in *Dred Scott*, and by the same measure respect Curtis's approach, which would have had the effect of returning some aspects of the problem for resolution in the political processes. Where I disagree with Professor Burt in this particular instance is over what the Court's responsibilities should be when it returns some aspects of a divisive constitutional controversy for further resolution in the political processes or in the lower federal courts. In such cases, it seems to me, the Court has an affirmative responsibility to provide as much guidance as possible to those who will be left to deal with the issues about "how to think about" them from the standpoint of constitutional principle and tradition. For the Court simply to say that it has encountered an "internal contradiction" and thus has no views on the matter is, in my view, inadequate.

---

35. Curtis's opinion is not a perfect one in this respect, but it has three great strengths: (1) It proceeds from the view that slavery is an anomaly in our system; that it is an institution in many respects fundamentally incompatible with our constitutional traditions and, more generally, with a social order based on principles of legality. This starting point establishes an important initial ethical momentum. It means that Curtis approaches the task of constitutional interpretation by asking the right question: whether there is anything in the text or history of the Constitution that would clearly preclude recognition of congressional authority to regulate slavery in the territories or clearly prohibit treating free blacks as "citizens." Taney, it should be noted, starts at the other end: by asking whether there is anything in that history that might in any way support a ruling that blacks were not "citizens" and that Congress had no power to regulate territorial slavery. To the extent the evidence is not conclusive, the question one asks initially determines in large part the outcome.
(2) Curtis insists upon approaching the issue from the vantage of the "great truths" and "fundamental principles" embodied in our constitutional traditions. His opinion, in that sense, represents a principled—rather than narrowly utilitarian—approach to the underlying issues.
(3) At the same time, Curtis's opinion is a very craftsmanlike opinion in all the conventional respects—in the regard he shows for attention to detail, for limitations of institutional competence, for historical accuracy, for the technical aspects of pleading and procedure, and for the consistency of the ultimate decision with substantive ethical expectations of fairness and reasonableness. On the whole, Curtis's opinion could be viewed, with a couple of exceptions, as a textbook illustration of how to derive constitutional meaning from text, from evidence as to the framers' intent, from considerations of institutional competence, from history, and from contemporaneous and intervening official practices. In this last regard, it should be noted, Curtis's approach to the derivation of constitutional meaning from contemporaneous and intervening official practices (*see* 60 U.S. at 616 (Curtis, J., dissenting)) is to this day regarded as the classic statement of this particular technique of constitutional construction.

What the Court should be saying in such cases is something like this: We have gone as far as we can go. Now it is your responsibility to carry on the process of constituting a nation. In doing so, you should be particularly mindful of the great principles that underlie our constitutional traditions. We cannot tell you how to dispose finally of the issues that we have turned back over to you, but we can suggest how those issues ought to be regarded. We are engaged, as it were, in the shared endeavor of carving out of inherited traditions a vision of human possibilities only imperfectly expressed by the framers themselves. Here is our best wisdom as to how that endeavor should be approached. And so on.

Exactly what form that wisdom would take in a particular case it is not my purpose to pursue here. Suffice it to say, in the *Dred Scott* situation, I think Curtis's dissenting opinion would have provided Congress and the lower courts with helpful guidance.[35] I do not want to be taken as suggesting that, in seeking to define the terms along which disagreement should proceed, the Court's task would be an easy one. It would call upon all those special and difficult arts that lie "at the heart of the lawyer's craft."[36] Indeed, I would anticipate considerable differences within the Court as to how to think about those fundamental principles that underlie our constitutional traditions and considerable disagreement over what to make of them in a particular situation. What is crucial, in my view, is that the Court engage in such an endeavor—and do so not only with regard to the issues it decides, but with regard to those it ultimately turns over to others to decide. The most I can do here is suggest in general terms the spirit in which such an endeavor might be undertaken.

3. Terms of Enslavement

We have not yet come, however, to what I consider to be the most difficult and troubling aspect of Burt's paper: Burt's argument that a disposition of the issues in *Dred Scott* along the lines of Justice Curtis's dissent would have led to the unprincipled "enslavement" of the Southern slaveholding whites. With all due respect, I simply cannot understand this argument. I cannot understand it in the first place because Curtis's disposition would not have led—as Taney's did—to constitutional foreclosure of further debate in Congress over the issue of slavery in the territories. In fact, a disposition along the lines suggested by Curtis would have been perfectly consistent with the normative standard that Burt himself seems to be advocating. If, as Burt maintains, the ultimate desideratum of constitutional jurisprudence in cases like these is a disposition that will create or leave open "public forums where [the] disputants [can] confront and debate one another on the basis of an underlying premise of equality,"[37] it is unclear to me why Curtis's proposed approach would not have satisfied that goal. Curtis did

36. *See* H. HART & A. SACKS, *supra* note 1, at 124-25.

37. Burt, *supra* note 2, at 22.

not take the view, after all, that the Constitution itself precluded Congress from authorizing slavery in the territories. Thus, to suggest that Curtis's approach would have led to "enslavement" of the Southern whites does not seem to make sense *even in Burt's own terms.*

But there is something even more troubling about this part of Burt's discussion, and it has to do with the use to which he seeks to put the term "enslavement." I question whether the enslavement metaphor is a very apt or helpful way to characterize the status of the losing side in a constitutional battle—even if that side regards its defeat as a bitter pill to swallow, or, in Burt's terms, as "excessive and intolerable."[38] "Enslavement" is a powerful term in our language, but when it is used the way in which Burt uses it here, it loses, it seems to me, much of its ethical impact and meaning. The problem in part is that courts in our system are confronted almost daily with cases in which groups and individuals press conflicting claims they consider to be of life-and-death importance. Inevitably, there will be winners and losers. Frequently the losing side comes away feeling, at least in the short term, that it has been dealt an intolerable blow. Yet to characterize that condition as "enslavement," and once having invoked that metaphor, to derive from it the imperative that the Court should refuse (or should have refused) to decide the case, seems to me to be both unwise and unmanageable. For example, the police are arguably "enslaved" by a constitutional decision restricting their freedom to use illegally obtained evidence. And one can easily imagine how the owner of a shopping mall or company town might feel "enslaved" by a court decision restricting his ability to prohibit free speech on his own "private property." But the fact that that characterization is available in such cases does not mean that it is the most helpful one; nor does it support the propriety in such cases of judicial refusal to decide. "Enslavement" is just too strong a term to describe fairly the status of the losing side of a Supreme Court decision.[39] One gets the sense that Burt is trying to make a metaphor do work here that ought to be done by analysis based on substantive principle and constitutional tradition.

What is ultimately most troubling, however, is the perverse relationship that is established in the course of Burt's argument between "slavery" (the brutal real world institution) and "enslavement" (the metaphorical description of a hard-to-take loss in the Supreme Court). In Burt's paper we find ourselves in a world in which the metaphorically-described condition of losing a constitutional case becomes somehow much more terrible—much more intolerable and offensive from a constitutional standpoint—than the brutal reality of slavery itself.

How we are brought to such a point is something of a mystery, but it seems to involve at least two basic thrusts. First, Burt somehow manages to eliminate whatever negative charge one might expect to attach to slavery in

38. *Id* at 20.

39. This is so unless, of course, the real world consequence is tantamount to physical enslavement, as when, for instance, a prisoner loses an appeal.

traditional constitutional analysis. He does so essentially by a two-step process: he argues, first, that the "moral repugnance" we feel for the institution has no bearing on our constitutional judgment, and second, that in any case the existence of the fugitive slave clause in the Constitution effectively neutralizes the document on the issue of slavery. By the time Burt is done, slavery is no longer a term of darkness and reproach in our constitutional language; it is a neutral term. It is no different from oil or tobacco or the Dallas Cowboys or anything else in which Southern whites might have a special interest—except that in this case slavery is graced by the halo of special protection in the fugitive slave clause. In Burt's paper we get absolutely no sense of the destructiveness of the institution, of its fundamental incompatibility with a social order based on principles of legality.[40] By invoking the ethically charged metaphor of "enslavement," Burt is able to give to the condition of defeat in a Supreme Court battle a constitutional weight and stature that is arguably all out of proportion to the reality. He attaches to that condition an artificially inflated ethical significance. It is through such analytic sleight of hand that the metaphorical condition of defeat in the Supreme Court is made to seem as if it exerts a weightier claim upon us than the condition of actual slavery.

Adopting Burt's approach leads, it seems to me, to the embrace of a constitutional culture that is ethically unsound. The only possible excuse for doing so would be the unavailability of any principled alternative. Burt argues that there was no such alternative, but I think it is pretty clear that he is wrong. Curtis's dissent suggests one way out: to regard slavery as an anomoly, as an institution fundamentally at odds with the principles and traditions of both our constitutional and our common law systems. Pursuing such an opening would not have required, after all, clearing major new ground. Even Southern judges regarded slavery as a destructive anomoly within our system of free institutions,[41] and their opinions provided ample material out of which a constitutional opinion condemning the institution, while preserving the narrow exception for return of runaway slaves, could have been forged. Moreover Southern slave statutes bore ample testimony to the fundamental incompatibility of the institution of slavery with our

---

40. *Cf.* J. WHITE, THE LEGAL IMAGINATION 469-70 (1973):

> A legal system of the kind we can recognize and work with has at its heart certain fundamental principles, ideals, and values which are utterly inconsistent with the premises of slavery. The law as we know it is not a neutral tool for the expression of the will of the powerful but an actual force for justice in the world. This is demonstrated by the fact that as a slave system is more fully expressed the law, either it becomes less and less a slave system or the more obvious it is that the 'legal' system bears little resemblance to any we know, that it is no system of law at all. Either the rights of slaves as people are recognized ... or the hypocrisy of any claim to principle is exposed for what it is.

Id.

41. *See, e.g.*, State v. Mann, 13 N.C. 263 (1828); State v. Jones, 2 Miss. (1 Walker) 83 (1820). Both opinions are reprinted in J. WHITE, *supra* note 40, at 447-454.

common law and constitutional traditions.[42] One would not have had to go outside already available legal and constitutional materials, in other words, to condemn slavery as an anomolous and destructive force in our constitutional culture.

But slavery is not to be so regarded in the world of Burt's constitutionalism. In the end, indeed, the actual institution of slavery is far less offensive from a constitutional standpoint than the metaphorical enslavement that Southern slaveholding whites would presumably have suffered had the Court adopted the approach taken by Curtis in dissent. When we reach this point in Burt's argument, it seems to me, words begin to lose their meaning. We find ourselves in a topsy-turvy world in which whatever mischief might have been done by treating free blacks as "citizens" for diversity purposes is regarded as an unprincipled and intolerable enslavement, while the brutal reality of slavery itself is a neutral something about which the Constitution has nothing to say. When we reach this point, our Constitution itself appears to us, not as the embodiment of a vision of a culture of which we can be justly proud, but as the distorted image of such a vision as it might be reflected in a funhouse mirror.

If "enslavement" really is the problem then it is critically important not to let a metaphor blind us to the reality. And the reality is that whites in the Southern slaveholding states were themselves prisoners of the "peculiar institution," much less free to do what they wanted and to realize their own possibilities than they would have been otherwise. This is not something made up but a hard reality reflected transparently in the public records of the slaveholding states and in Southern judicial opinions and statutes.[43] If this is true, then the most accurate way to characterize the long-term

---

42. Consider, for example, the following restrictions on the freedom of white slaveholders and other free whites in the Alabama Slave Code of 1843:

> Sec. 8. And to prevent the inconveniences arising from the meeting of slaves: Be it enacted, That if any master, mistress, or overseer of a family shall knowingly permit or suffer any slave not belonging to him or her, to be and remain in or about his or her house or kitchen, or upon his or her plantation, above four hours at any one time ... he or she ... shall forfeit and pay ten dollars for every such offense.
>
> Sec. 10. If any white person ... shall at any time be found in company with slaves, at any unlawful meeting, such person ... shall forfeit and pay twenty dollars for every such offense....
>
> Sec. 16. ... [T]he master or owner, who shall permit his slaves to keep dogs contrary to this law, shall forfeit and pay the sum of five dollars for each dog so kept....
>
> Sec. 24. Any person or persons, who shall attempt to teach any free person of color, or slave, to spell, read, or write shall ... be fined in a sum not less than two hundred and fifty dollars....

A DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN FEBRUARY, 1843 (Clay authorized ed. 1843), *reprinted in* J. WHITE, *supra* note 40, at 439-43. The Alabama Code further required mandatory slave patrol duty of every male owner of slaves. *See id.* The general impression created by these statutory provisions is not that of a free and open society but of a garrison state.

43. *See supra* notes 41-42.

consequence of adopting the approach taken in Curtis's opinion—or for that matter any other opinion that would have contributed to the ultimate demise of slavery—would be not as enslavement but as liberation: of whites as well as blacks.

4. Conditions of Equality

I wish I could say that although I think Professor Burt is wrong about "what was wrong with *Dred Scott*," I think he is right about "what's right with *Brown*," but regretfully I cannot. It is not that I want to question here the wisdom or prudence of the Court's disposition of the segregation issue in *Brown I & II*, rather it is that I am not at all convinced that Burt makes his case that *Brown* satisfies his own definition of a sound disposition.

Burt's basic position, as I understand it, is that in cases like *Dred Scott* and *Brown* the most appropriate disposition would be for the Court, first, to refuse to decide the central issue and, second, to return the issue for resolution in an alternative public forum where the disputants can "confront and debate one another on the basis of an underlying premise of equality."[44] If this is Burt's position, then I have trouble with his contention that *Brown* was right because it left both sides free to continue the conversation, while *Dred Scott* was wrong because it cut off any further conversation. The problem with this argument, in my view, is that it begs the crucial question of what the conversation is to be about. Just as surely as *Dred Scott* served to cut off any further conversation in the relevant public forums about the slavery-related issues raised by that case, the *Brown* decision foreclosed any further conversation in the same public forums about the issue the segregationists most wanted to talk about: the constitutional *legitimacy* of state separate-but-equal practices in public education. To be sure, both sides remained free to talk about *remedial strategies* for eliminating legally mandated segregation, but after *Brown*, the Court made clear that the constitutionality of de jure segregation in the public schools was no longer a legitimate topic of conversation in either the lower courts or in the legislatures.

However one cuts it, this is not treating both sides equally. The very essence of inequality—as the Melian Dialogue in Thucydides' *History of the Peloponnesian War*[45] so powerfully brings home[46]—is when one side can dictate what the conversation will be about and the other side has no effective choice but to go along. Let me hasten to add that I think what the Court did in *Brown*, in cutting off any further discussion about the constitutionality of legally mandated segregation in public education, was perfectly right. What I am objecting to here rather is the suggestion that, because both sides were free after *Brown* to discuss appropriate remedial strategies, there was

---

44. Burt, *supra* note 2, at 22.

45. THUCYDIDES, THE PELOPONNESIAN WAR, Bk. 5, §§ 84-116.

46. For an illuminating discussion of the themes of equality and reciprocity Thucydides' History and their reflection in the Melian Dialogue, see J. WHITE, *supra* note 34, at 59-92.

no losing side. There was, and to the losing side the defeat was perceived as "excessive and intolerable."

5. Conclusion

These then, in summary, are the major differences that divide us. Professor Burt views Taney's opinion as fairly satisfying accepted norms of constitutional interpretation. I view it as an aberration—as a textbook example of how not to interpret the Constitution. From start to finish the one consistency in Taney's opinion is his consistent manipulation of the conventions of constitutional interpretation to achieve what he viewed as the desired political result. The consequence is bad history, bad textual construction, bad statesmanship, and bad constitutional law.

Professor Burt takes the position that, although we may find Taney's view of blacks to be "morally repugnant", that has no bearing on whether or not Taney's constitutionalism is sound. There is a radical separation in Professor Burt's world, in other words, between the ethical soundness of an opinion and its soundness as a matter of constitutional law. I cannot so divide the world. In my view, it is neither possible nor responsible to treat the racist aspects of Taney's opinion as somehow unrelated to the question of whether his constitutionalism is sound.

Professor Burt argues that a decision along the lines of Curtis's dissenting opinion would have led to an unprincipled "enslavement" of the white Southern slaveholding population. I disagree. First, I think the term is not very helpfully descriptive of the likely consequences of such a decision—particularly so in light of the fact that both sides would have been perfectly free to continue the conversation about territorial slavery in the federal legislature. Second, I think Burt is trying to make the metaphor of enslavement do work here that it should not be expected to do. In any case, I would be reluctant to characterize the consequence of a decision along the lines of Curtis's dissent as unprincipled "enslavement." The indisputable fact is that whites in the slave states were themselves prisoners of "the peculiar institution," less free than they otherwise would have been, and any decision that contributed to the ultimate demise of slavery could be characterized equally accurately as a liberating one.

Finally, in my view there is a certain question-begging aspect to Burt's claim that *Brown* can be distinguished from *Dred Scott* on the ground that *Brown* opened up possibilities for continued public conversation while *Dred Scott* eliminated them. Such a claim ignores the crucial question of what the continued conversation is to be about. Admittedly, the losing side in *Brown* was invited to participate in a continued conversation about *strategies* for desegregation, but, by the same token, it was constitutionally precluded from carrying on further conversation about the one topic the segregationists most wanted to talk about: the underlying *legitimacy* of state mandated separate-but-equal practices in the public schools.

Underlying these points of disagreement are fundamentally different views about what constitutes sound constitutional interpretation and what

the role of the Court should be in our system. I fully agree that there are some issues of great constitutional significance that the Court should refuse to decide, although in my view, these issues primarily fall in the traditional "political question" category and involve struggles for turf between the legislative and executive branches that can safely be left to resolution in the political arena. I disagree, however, that the Court should refuse to decide cases, like *Dred Scott* and *Brown*, that raise fundamental questions of liberty and equality. Decision of such cases, it seems to me, is an inescapable responsibility of the Court.

It may be, of course, that some aspects of such cases can appropriately be left to resolution in the legislative arena or in the lower federal courts, but even in such situations I think the Court has an affirmative responsibility to define the terms along which disagreement should proceed in the alternative forums. Because Burt's "Constitution" apparently expresses no substantive vision of society or of human possibilities, the only role left for the Court in cases of the sort we have been considering is to dump the question, higgledy-piggledy, back in the public lap. I think this would be an abdication of responsibility. Underlying our Constitution are complex ethical traditions that can be traced in their origins back far beyond the framing and adoption of the constitutional document itself. The Court's responsibility, as I see it, is to make something of those traditions in every case that comes before it for decision—to forge out of them a constantly renewed vision of what our culture is all about. It is a responsibility no less urgent when, for one reason or another, the Court determines to return aspects of a constitutional decision for discussion and resolution in other public forums.