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Lecture

CONSTRUCTING A CONSTITUTION: "ORIGINAL INTENTION" IN THE SLAVE CASES*

JAMES BOYD WHITE**

The question how our Constitution is to be interpreted is a living one for us today, both in the scholarly and in the political domains. Professors argue about "interpretivism" and "originalism" in law journals, they study hermeneutics and deconstruction to determine whether or not interpretation is possible at all, and if so on what premises, and they struggle to create theories that will tell us both what we do in fact and what we ought to do. Politicians and public figures (including Attorney General Edwin Meese) talk in the newspapers and elsewhere about the authority of the "original intention of the Framers," the plain meaning of language, and the like. On all sides this debate largely proceeds as if the questions were new, but of course they are old. In fact, they go all the way back to the beginning.

The general question I want to ask is: What can we learn, for good or for ill, from the precepts, and even better, from the practices, of others? My goal is not to work out a new "theory" of constitutional interpretation, or of interpretation more generally. Most debates at that level seem to me rather empty or incoherent, for the reason that the activity they seek to describe and regulate—the composition and interpretation of legal texts—is far more rich and complex than any language of theory allows. My thought, rather, is to look at a series of cases in the hope that we might learn something experientially, both about the practices they reflect and about our own expectations, as we find them confirmed or upset, concerning the ways judges ought to behave.

This is the spirit in which I wish to examine the majority opin-

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ions in two cases, *Prigg v. Pennsylvania*¹ and *Dred Scott v. Sandford*.² In both of them the Court accepted, though in somewhat different ways, the general view that the proper way to read the Constitution is to ask what its framers intended. I wish to explore what that view entails, at least in the context of these two cases, and where it can lead. Both of these opinions are what might be called negative rather than positive examples, representing, in my view at least, what we ought not, rather than what we ought, to do; but I think we can learn something both about these cases and about ourselves from our responses to them.

I. METHOD

First, a word about my method, which is what I call "rhetorical," a term I use as a shorthand for a way of reading that focuses, among other things, on what I call the ethical and political significance of a text. My aim is to examine the language of the opinion with a view to asking who the judge makes himself, and his readers, in his writing: who he is as judge, and how he addresses us as citizens and lawyers; how his way of talking to us, and of inviting us in our turn to talk, defines the law in general and the Constitution in particular; and how the conversation it seeks to start, or to continue, defines those relations among individuals and institutions that make up our public world.

My examination will proceed at two levels, which might be called the explicit and the performative. At the explicit level, the Court expresses a restatable view, perhaps directly, perhaps partly by implication, of what the Constitution is, how it ought to be interpreted, and so forth, and we can ask what that view is. But in addition to the articulation, or implication, of views of this sort, the judge in her actual writing performs as a writer and mind in ways that enact her sense of who a judge is, what the Constitution is, how constitutional arguments should proceed, and so forth. These enactments or performances may themselves be analyzed and judged; and they may be found to be either consistent or inconsistent with the judge's explicitly stated views on these matters.

Let me give three brief examples of what I mean. In *McCulloch v. Maryland*³ Chief Justice Marshall describes the Constitution as a kind of testamentary trust, a document created by a mythical figure,

1. 41 U.S. (16 Pet.) 539 (1842).

2. 60 U.S. (19 How.) 393 (1857).

3. 17 U.S. (4 Wheat.) 316 (1819).

“The People of the United States,” who existed at one time and for one purpose only, namely the creation of this document, after which they resolved themselves into the competing political and economic factions that we see around us. Marshall uses this conception of the Constitution to explain, and to justify, the extremely generous way in which he proposes to interpret the language of that instrument; since the Author has departed forever from the world, the text is necessarily dependent upon a powerful interpreter for its effectuation, a role Marshall is happy to claim for himself. But his is not just a claim of power. His image of the Constitution as a trust gives him a language for talking about—for both justifying and limiting—the kind of power he claims, namely that the document should be interpreted as a trust rather than as a legal code, by the principles of equity rather than those of law. That is his theory, and his actual performance can be tested against it; in this case, I think it can be shown to fit quite beautifully with it.⁴ My second and third examples both come from *Olmstead v. United States*,⁵ the famous wiretapping case. Writing for the majority, Chief Justice Taft conceives of the Constitution as a plain set of authoritarian commands, having no larger purposes whatsoever. His own opinion, which itself largely consists of a set of unreasoned orders, is drafted in perfect harmony with this conception. In his famous dissent in that case, Justice Brandeis expresses a completely different view of the Constitution—as a text calling for its own perpetual retranslation into new contexts.⁶ This view of the Constitution defines the role of the judge as a kind of translator, and Brandeis too performs this role beautifully.⁷ In all three instances the opinions have the special kind of force and coherence that arises when different dimensions of meaning work together.

The questions I wish to address, then, are these: First, what explicit conceptions of the Constitution are at work in the opinions by Story and Taney in these two cases? Second, how well do their performances fit with their theories? Third, how should we evaluate these opinions (in both dimensions)? In addressing these questions we shall be working out the consequences of at least one version of the view that the Constitution should be interpreted by reference to the intention of the framers.

4. For further discussion, see J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING*, ch. 9 (1984).

5. 277 U.S. 438 (1928).

6. *Id.* at 473.

7. For further discussion, see White, *Judicial Criticism*, 20 GA. L. REV. 835 (1986).

II. *PRIGG V. PENNSYLVANIA*

Let us begin with the facts of the case, as found by a jury in a special verdict. Margaret Morgan was a slave, held by Margaret Ashmore under the laws of Maryland. She escaped into Pennsylvania in 1832. Five years later, Prigg, a slave-catcher from Maryland working for Ashmore, went to Pennsylvania and obtained a warrant from a Pennsylvania magistrate authorizing Margaret Morgan's arrest by a state constable as a "fugitive from labor." She was then brought before the magistrate, who for reasons we can only surmise refused to have anything further to do with the case. Thereupon Prigg took Margaret Morgan, together with her children, out of Pennsylvania into Maryland and delivered them to Margaret Ashmore. At least one of Margaret Morgan's children had been born in Pennsylvania, more than a year after she started residing there; others had been born in Maryland.

Pennsylvania successfully prosecuted Prigg under a Pennsylvania statute making it a crime to take away any "negro or mulatto" by force, fraud, or seduction with the design of carrying him or her into slavery.⁸ The question before the Supreme Court is whether this Pennsylvania statute is constitutional.

There are three main arguments that it is not: that it directly conflicts with what is usually called the Fugitive Slave Clause of the Constitution;⁹ that it conflicts with a federal statute, the Fugitive Slave Act of 1793;¹⁰ and that it is in any event an impermissible exercise of state power, given either the mere existence of the federal statute, whether or not the state statute conflicts with it or, more strongly, the mere existence of congressional power to act in the field, whether or not it is exercised. On the other side, it can be argued that the Pennsylvania statute does not conflict but actually harmonizes both with the constitutional provision and with the Fugitive Slave Act; that the Fugitive Slave Act itself is of dubious con-

8. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 543 (1842).

9. U.S. CONST. art. IV, § 2, cl. 3. This clause provides:

No person held to Service or Labour in one State under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labour; but shall be delivered up, on Claim of the Party to whom such Service or Labour may be due.

This is traditionally called the Fugitive Slave Clause, but, of course, it makes no mention of slaves or slavery, and an argument can be made that it does not apply to slaves at all but only to indentured servants. See Douglass, *The Constitution of the United States: Is it Proslavery or Antislavery?*, in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467 (P. Foner ed. 1950).

10. Fugitive Slave Act, ch. 7, § 3, 1 Stat. 302, 302-05 (1793) (repealed 1850).

stitutionality; and that in any event the existence of congressional power in this field, or even the exercise of such power, ought not invalidate state legislation unless there is an actual conflict between the provisions of state and federal law.

A.

As a way of working into this case, I would like us to imagine that we are modern lawyers thinking about how we would argue it on each side.

Let us begin with the constitutional provision, which reads as follows:

No person held to Service or Labour in one State under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour; but shall be delivered up, on Claim of the Party to whom such Service or Labour may be due.¹¹

Is the Pennsylvania statute that prohibits the removal of “negroes or mulattoes” by force, fraud, or seduction inconsistent with this language? There are at least two rather obvious arguments that it is not.

The first is that the aim of the clause is simply to make it plain that the free states cannot constitutionally adopt a rule of law that automatically frees the escaped slave the moment he or she sets foot on their soil. This was in fact the rule of *Somerset's Case*,¹² decided in England not long before the adoption of the Constitution, which held that the presence of a slave on English soil released him instantly and automatically from the status of slavery. It would make sense that the southern states would insist upon a repudiation of this part of the common law. But Pennsylvania in this statute is not attempting to free all slaves who enter the state, and the statute should therefore be held constitutional.

Such a reading makes good enough sense of the first section of the provision: “No person held to Service or Labour in one State under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein be discharged from such Service or Labour.” But the Constitution goes on to say that the slave shall “be delivered up, on Claim of the Party to whom such Service or Labour may be due,” and this seems to go well beyond a

11. U.S. CONST. art. IV, § 2, cl. 3.

12. 99 Eng. Rep. 499 (K.B. 1772).

repudiation of *Somerset's Case* and to impose on the state an affirmative obligation of return.

But how is this language to be read? It is not clear upon whom the "claim" is to be made, or by whom the fugitive is to be "delivered up," or, even more important, how the essential facts upon which the duty arises shall be established, namely that the person whose liberty is in issue was in fact "held to service or labor" in another state, that he "escaped" into the state where he is found, and that the party claiming him is one "to whom such service or labor is due." But unless all Blacks in the free states, whether themselves free or not, are to be subject to kidnapping by slave-catchers, there has to be some regular process to determine whether the duties that the Constitution creates actually exist in the particular case. From the structure of the provision, then, reinforced by its use of the procedural words "claim" and "delivery," it easily can be argued that this provision contemplates a judicial or quasi-judicial proceeding at which the essential facts shall be adjudicated.

What does this mean for the Pennsylvania statute? This statute prohibits kidnapping and does so as part of a scheme requiring adjudication of such claims. It can be seen, therefore, not to conflict but to harmonize with the constitutional provision. This is the second, and far more powerful, argument for the statute's constitutional validity.

But would such an interpretation leave the southern states completely at the mercy of the free states, and therefore be an intolerable reading of the language both as a practical and as a theoretical matter? Would it, in other words, effectively permit the northern states to adopt the rule of *Somerset's Case*, against which the provision explicitly seems to be aimed? The answer I think is no, and for two reasons: first, it may well be that Congress could pass effectuating legislation, including provision for federal judicial implementation; second, even in the absence of such legislation, or of the capacity to pass it, the failure of the state judiciary to enforce the rights of the out-of-state owner, upon claim being made, could, by legislation if necessary, be made grounds for federal question jurisdiction on appeal and thus for direct federal judicial protection of those rights.

B.

Let us turn next to the Fugitive Slave Act of 1793. It provided in essence that when a slave escaped to another state the owner or agent might seize or arrest the slave, whenever found, and take him before a federal or state court. Upon proof to the satisfaction of the

judge that the person so arrested was in fact the slave of the person claiming him, it would be the duty of the court to give a certificate to that effect, which would constitute sufficient warrant for removing the slave back to the state from which he had escaped.

How does this statute bear upon the *Prigg* case? In the first place, it is not plain that the Constitution authorizes any federal legislation of this character at all, and if the federal statute is unconstitutional, it obviously leaves the state statute untouched. The Constitution does not in explicit terms authorize any such legislation nor is the Fugitive Slave Clause one of those provisions to which the "necessary and proper" clause applies. On the other hand, it makes sense to assume that there should be some federal protection of the rights established here, and the route of appeal to the federal courts, suggested above, is cumbersome and somewhat inept. It is not unreasonable, on balance, to read the provision as authorizing legislation on the subject;¹³ and the statute the Congress enacted seems to effectuate the purposes we have attributed to the Clause, namely the protection both of southern masters and of free northern Blacks.

But even if the statute is valid, the Pennsylvania statute seems to harmonize rather than conflict with it. The federal statute requires the owner or the owner's agent to go to court, as the Pennsylvania statute does too, and it delegates the method of proof to the judge, leaving it open to state determination, and thus seems to contemplate ancillary state legislation. The Pennsylvania statute prohibiting kidnapping, and requiring adjudication, can thus be seen to supplement the Act, not to frustrate it. In such a case there is no conflict between the Pennsylvania statute and any federal law, and no need for the doctrines of preemption or preclusion either, for the state law directly furthers federal policy.

Something like this is, in outline, the structure of the argument that a modern constitutional lawyer would most likely generate from these materials. I offer it not as a complete analysis of these questions, by any means, but as a definition by performance, however sketchy, of our own sense of how legal argument proceeds, and what it entails.¹⁴ This is how we lawyers think, or so I claim; and I want to

13. Perhaps this is too strong. After all, sections 1 and 3 of article IV of the Constitution explicitly empower Congress to pass effectuating legislation. The absence of such provisions in sections 2 and 4 (guaranteeing a republican form of government) might reasonably be read as significant omissions.

14. With this sketch compare the lengthy summary of the arguments actually made in *Prigg*, 60 U.S. (16 Pet.) at 543-608.

use this definition of our own expectations as a way of looking at what we see when we read the opinion by Justice Story.

C.

What kind of argument does Justice Story engage in here, on what issues, by what methods? What is his understanding of the Constitution and of his role under it? Who to him are the states, white citizens, and Blacks, slave and free? How does his mode of thought and argument compare with what we ourselves would naturally do?

What is to me most striking about this opinion is that in it there is a deep tension between the sort of argument I have sketched out above and argument of a very different kind indeed. The topics I discuss are mentioned, and one or two of them—the constitutionality of the Fugitive Slave Act, for example—are developed at length. But upon close reading they are erased or short-circuited by the force of another mode of thought entirely, which it will be my next object to define.

After a brief statement of the facts—itsself of interest because it is so clotted with legalisms as to distance both judge and reader from the human reality of which it speaks—Story moves directly to the Fugitive Slave Clause of the Constitution. How is it to be interpreted? In a single sentence he pierces to a single ground of judgment:

Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude.¹⁵

It cannot be doubted, he says, that this provision, so interpreted, “constitutes a fundamental article, without the adoption of which the Union could not have been formed.”¹⁶ The right of the owner, Story says, must be exactly the same in the state to which the slave escapes as in the owner’s home state. If this be so, then all the incidents to that right must attach also; the owner must in particular have, as a matter of constitutional law, the rights to seize and to repossess the slave which the local laws of the owner’s state provide.

Out of this language in the Constitution Story thus creates an affirmative right in every slaveholder to recapture, with force if nec-

15. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611 (1842).

16. *Id.*

essary, the owner's runaway slave in any state of the Union. This is a constitutional right with which no state may in any respect interfere. Story explains:

Upon this ground, we have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent, this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.¹⁷

It follows that the Pennsylvania statute flatly prohibiting such seizures is unconstitutional. Although much else is said in the opinion, none of it is essential to the holding. This is the heart of the case.

What is Story's method of constitutional interpretation here? Instead of looking to the language of the text, as I have suggested we would do, and seeing what range of meanings can be given to its terms, and how they fit with the general aims of that text, and with other related ones, Story pierces the text for the intention that he says underlies it and declares that this intention is its meaning. For him language is not the source of meaning, nor does it give it shape; meaning lies in the wish or aim or motive of the author.

In this instance Story finds that intention in entities called the southern states, who, he says, would not have entered the Union had this provision not been included and had it not meant what he now claims it to mean, namely the creation of a right of recaption, guaranteed by the United States Constitution, running through all the states, free and slave. Story thus interprets the text not according to its language, but according to what he thought the motives and desires of its signatories were. Of course, he may be entirely right that "the southern states"—assuming that it makes sense to talk about such an entity, or set of entities, as if they had motives and wishes—would not have acquiesced in the Constitution had this language not been included, and that they would be pleased by the construction he gives it. But that is not to say that this construction of this language is correct.¹⁸

17. *Id.* at 612.

18. I put aside for the moment the familiar argument that there can, in the nature of things, be no unitary intent of the framers to look to, both because it is unclear who should count as framers—the drafters? the voters? those who have refrained from amending?—and what should count as intent: one's motives for acquiescing in the lan-

It may help us to think about what Story's method means if we ask how his position could in its own terms possibly be met: by a competing analysis of the actual or probable wishes and opinions of the southern representatives at the constitutional convention, or of the southern spokesmen for—or against—the Constitution in their ratification debates, or of ordinary white southerners? By similar inquiry into the thoughts and desires of the northerners? The inquiry in every case would be into the motives, desires, and expectations of those who are gone, internal phenomena regarded as historical facts, not into the meaning of the words they uttered as their way of saying what they meant. The argument would be purely factual in kind; it could not contain the kind of attention to language, to public purpose and balance and harmony, that the sort of argument sketched out above—a legal argument—naturally entails. In this sense the effect of Story's method is to destroy even the possibility of the kind of reasoning we think of as legal.

Consider, for example, what happens in Story's opinion to the word "discharge" in the constitutional provision that says that no fugitive shall be "discharged" by any state law or regulation from his service or labor. Story reads it this way: "any state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, pro tanto, a discharge of the slave therefrom."¹⁹ The Pennsylvania statute requiring adjudication of the claim is therefore, in Story's view, a "discharge" of it.

But this is an impossible diction, in which the distinctions between "interrupt," "limit," "delay," "postpone," and "discharge" are all erased. The meaning of language is destroyed and with it the authority of those practices of argument—of interpretation and composition—that are the center of the law. Instead of a testamentary trust, as Marshall defined it, to be construed as an instrument meant to constitute a national community, the Constitution according to Story is the expression or, perhaps more accurately, an act simply of the will.

guage? One's hope or desire, or one's expectation, as to how the language will in fact be read?

Where, as here and as often, there is an element of compromise, the question of intent is muddied still further, for the "framers" have opposing motives and hopes, and perhaps opposing expectations too. For further discussion, see J.B. WHITE, *HERACLES'* Bow 81-82, 100-02 (1985).

19. 41 U.S. (16 Pet.) at 612.

D.

Why did Story think this way in this case? In many respects, after all, he was a most sophisticated legal interpreter, capable of thinking about interpretation in complex and general ways.²⁰ Among his views, however, was the doctrine that constitutional powers granted the federal government should be construed not so much by careful reading of the language but by reference to the basic "ends" for which the powers were given. And in many cases, as in the present one, he was eager to reach out on behalf of the federal government to claim that its powers were exclusive, invalidating state lawmaking even of a kind that was harmonious with national policies, whether these were expressed in the Constitution itself or in congressional legislation.²¹ One way to read *Prigg*, then, is to say that Story is applying to the Fugitive Slave Clause the kind of reading that he elsewhere recommends for interpreting the powers granted the federal government, that is to say a most generous reading in light of the main end of the provision.

But what is that end? To say that the end was the universalization of the slaveowner's rights is to beg the question. There were northerners, and white southerners too, who deeply opposed slavery; the document was obviously a compromise and an uncertain one. But the reading Story gives the language denies the character of the provision as a compromise and seems to threaten the North with universal slavery: if the Constitution protects the owner's rights to the runaway slave, why does it not protect the owner's rights to the slave the owner carries into the free state as well? If so, of course, there would in practice no longer be such a thing as a free state.

Story's method of interpreting the Fugitive Slave Clause of the

20. This is revealed especially in J. STORY, *Rules of Interpretation of the Constitution*, in 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 397-457 (1858).

Compare the brief section of Blackstone's *Commentaries* that treats interpretation of legislation. The object is to discover the "intention" of the legislature through the "signs" the legislature has used: its words, read in the context of their enactment and in light of the wisdom or folly of their effect, given what we know of the general purposes of the act in question. The reader is to move in order from words to context to effect to reason, going on to the next step only when uncertainty forces him to do so. W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 59 (W. Lewis ed. 1898). On the special meaning of the word "intention" in the 18th century legal discourse, see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-900 (1985).

21. Story did this on behalf of the national legislature through the doctrines of preemption and preclusion, and on behalf of the judiciary directly. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 12-13 (1842). This is his version of judicial nationalism, built on Marshall's but going beyond it.

Constitution is to look through its language for the intention that lies behind it, an intention he sees on the one side as insistence that maximum protection be given to southern slaveowning interests, and on the other as acquiescence in this claim. For him it seems that there has to be an intention lying behind the words and a single, dominating intention at that. His is a universe in which claims to power are absolute and unyielding. Thus, in his interpretation of national powers he normally sees the existence of a federal power, whether exercised or not, as inconsistent with the existence of a simultaneous state power. There cannot be harmony; there must be mastery. In the relation between the national and the state governments, the mastery lies in the former; in the relation between the southern and northern states, as expressed in the Fugitive Slave Clause, mastery lies with the South.

This way of reading legal texts is inconsistent with the fundamental idea of law on at least two counts: first, as we think of it, law is a way of creating a world that accommodates opposing interests and claims, a world in which distinct voices can be heard. The Fugitive Slave Clause seems in fact to be framed upon exactly that principle, offering neither the South nor the North everything they might want, but creating a text tolerable to both, with the open questions to be resolved by future interpretation. Story's method of interpretation is incompatible with this conception of law, for it erases the language of the text and with it all attempts to build a more coherent and complex world upon that basis. This means that the arts of legal interpretation and composition that would naturally be employed in the way I suggested in the beginning of my talk—in this case with the most likely result of finding the Pennsylvania statute constitutional—are erased too. If you think of the law as in large measure what we do as lawyers, there is no room in Story's universe for the law, for the arts of construction and argument by which and in which we live.

Second, Story's method eliminates the aspirational or idealizing element that is essential to what we think of as law: it reduces talk about what "ought to be" to talk about what "is," or what "was," thus reducing aspiration to mere will. The ultimate question for him is not what result makes best sense of the instrument, but what the South wanted. This is to destroy an important ground of authority upon which law rests: the authority that derives not from the power of the person who makes the law but from the character of the law that is made, from the kind of conversation by which it is to become real in the world. Instead of participating in an argumenta-

tive or discoursing community that struggles with the questions, what kind of world ought we to have, what ought the authoritative language mean, we are offered a world in which the only question is what someone wanted. The vice of this opinion is worse than authoritarianism: it is to destroy authority.

E.

All this shows up in the kind of argument Story himself engages in and thus allows to lawyers in the future. His opinion has the surface form of legal argument—as I said, the appropriate topics are mentioned—but, in fact, it turns upon a single judgment, undefended and represented as factual, about what the framers, in this case the South, wanted. How are we to read this opinion as a set of directions to future argument, then? It seems to tell us to engage in the appearance of legal argument, interpretive and institutional in character, but to expect to win or lose on the basis of unarticulated or barely articulated assumptions of fact (or value); that is, to engage in a kind of hypocrisy ourselves and to expect it from our judges.

This has a modern ring, for in our own era many people have wanted to say that legal argument about precedent and doctrine, about policy and institutions, is epiphenomenal, that what really counts is unexpressed in this discourse, and that law, as we think of it, is therefore a sham or a charade. But the consequence of this view, popular though it may be, is nothing less than the destruction of law itself,²² for on such terms what we think of as legal conversation is impossible.

Let me illustrate this point with a further comment about *Prigg*. Suppose we think of its meaning not in the terms I have suggested but solely in terms of its practical effects on the freedom of fugitive slaves. While the interpretation of the Fugitive Slave Clause given above is drastically one-sided, Story went on to hold that the mere existence of congressional power to legislate on the matter invalidated any state statute in the field, whether or not there was a conflict between it and any federal provision. This, as I have said, is an application of Story's own developed view in favor of the powers of the centralized government. The consequence here is surprisingly antislavery, for Story's view would invalidate not only statutes such as that in Pennsylvania, which aim to protect the slave, but also stat-

22. For a lovely development of this theme, see J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).

utes in aid of the owner and the owner's agent. Under this opinion it seems that the entire burden of pursuing fugitive slaves would fall upon the federal government, whose resources, especially judicial resources, were then extremely limited. Despite its powerfully pro-slavery surface, then, Story's opinion could be read as having, or even as intended to have, a powerful antislavery effect. Both Justice Story and his son in later years spoke of the opinion rather proudly in such terms, and recent scholarship has to some extent borne out this view of its consequences.²³

But what are we to think of this kind of claim on behalf of this opinion? It is really just the other side of Justice Story's "legal realism": as in the interpretation of the Constitution the only thing that matters is the wishes of the signatories (or some of them), and not their language, so in drafting, reading, or judging a judicial opinion, our concern should not be with what it says, or what the language means, but with what we estimate the practical effects of the document to be. In both respects, the method of Story, and of Story's heirs, is antilegal, destroying the whole world of meaning created by legal interpretation and composition.

Finally, there is in *Prigg* a paradox that we shall see emerge again in *Dred Scott*, that as the judge tries to turn away from the language to the "reality" that lies behind it, he finds himself attending not to a reality at all but to a fictive creation of his own mind, of his own time; in this case the image of the united southern states insisting upon this language, meaning it to be read as Story has read it, while the united northern states acquiesce. This is an impossibly simplistic view of the event, and of the language; but it is often the case that the desire for the "real" is a desire for one's own image of things, not for the complex and uncertain body of evidence that actually exists.

III. THE *DRED SCOTT* CASE

In turning now to the enormously rich text presented by the *Dred Scott* case, I shall focus only on the opinion of Chief Justice Taney and of that indeed on only one aspect, the method by which the Constitution is interpreted in light of the intention of the framers.

This case made two explosive holdings: first, that no descendant of African slaves could, as a matter of constitutional law, ever be a citizen of the United States. In this case the particular conse-

23. See Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979).

quence of this rule was that the plaintiff, Dred Scott, could not invoke the diversity jurisdiction of the courts of the United States, which Taney interpreted as a privilege of national, not state, citizenship. The second holding—the first invalidation of a federal statute since *Marbury v. Madison*²⁴—was that the Missouri Compromise of 1820, by which slavery was excluded from the territories to the north of 36°, 30', was unconstitutional.²⁵

I shall focus upon the Court's treatment of the first question, whether former African slaves or their descendants can become citizens of the United States. In reaching a negative answer, Taney's opinion rests almost entirely upon a construction of the "intention of the framers"; it has to, for there is no language in the Constitution itself upon which such an argument can rest. My question of Taney, as of Story, is how, in making this construction, Taney defines himself as a judge, the Supreme Court as an institution, his audience as lawyers, the public as citizens, and the kind of conversation among these various actors that is the law.

A.

Just as Story's opinion was split between two forms of thought and argument, which I have called the "legal" and the "intentional," so Taney's opinion in *Dred Scott* is split by an analogous tension. One difference between the opinions, however, is the way in which what I have called the "legal" mode of argument is presented. In *Prigg* the legal topics are presented but simultaneously undercut by the true ground of decision, which is Story's conclusory attribution of an "intention" to the framers. In *Dred Scott* this kind of legal argument is rendered explicit in quite an impressive way, at the outset, then undercut, not simultaneously, but after the fact.

Taney's version of "legal argument" is developed in the first three-and-a-half pages of the opinion, which are important for the impression they give of his mind and attitudes, for the kind of claim they correspondingly make for his authority, and ultimately for the meaning of the opinion as a whole. These pages analyze what Taney presents as a technical lawyer's issue, whether the question of

24. 5 U.S. (1 Cranch) 137 (1803).

25. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857). Only slightly less dramatic were two other holdings: that territorial governments could not exclude slavery until the moment of statehood and that the effect of a slave's residence in a free state was to be determined by the law of the state to which the slave was returned. *Id.* On this case generally, see D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

jurisdiction over the subject matter, upon which the defendant relies, is properly before the Supreme Court.

This case was a suit by Dred Scott for his freedom, brought in the federal court in Missouri. The defendant answered the complaint with a plea in abatement, claiming that owing to his African ancestry the plaintiff was not a citizen of the state of Missouri and that, therefore, there was no diversity of citizenship as required for federal jurisdiction. The plaintiff's response to this plea was to demur, thus putting it in issue. The trial court ruled for the plaintiff, holding that he was a citizen and that diversity jurisdiction existed. At that stage the defendant elected not to suffer judgment and appeal but to make further pleadings in bar, that is, on the merits of the case. Issue was joined on these questions, resulting in verdict and judgment for the defendant, from which the plaintiff appealed. The defendant then sought to support the judgment in his favor not only on the merits but on the earlier-asserted jurisdictional ground. Dred Scott argued that the defendant had waived this jurisdictional point by his further pleadings: if the defendant wished to preserve it, he should have accepted the judgment on that ground and appealed.

Scott's argument lacks immediate attraction for us—it seems awfully technical, and this is not how modern pleading works—but this was the era of common-law pleading, a system that worked by a series of binding elections made on one side or the other until issue was joined on a single matter of fact or law that would determine the case. Waivers of the sort that Scott alleged were built into the system. Since the federal courts in this era applied state procedural law, the question was presumably one of Missouri law, and there would seem to be little ground for argument with the lower court's judgment that the jurisdictional claim was out of the case.

Taney holds, however, that jurisdiction is still in issue. His reason is not that the trial court misread Missouri law, or that such elections are normally not binding in federal courts, but that the special character of the courts of the United States, as courts of limited jurisdiction, requires this result with respect to jurisdictional claims. In an ordinary state court of general jurisdiction no jurisdictional averment is necessary on the part of the plaintiff. If the defendant objects to jurisdiction, he must plead specially to that effect, and unless the facts upon which he relies are found by the jury or admitted by the plaintiff, the jurisdiction cannot be attacked on appeal. But federal courts have limited jurisdiction: plaintiffs must affirmatively allege in their pleadings that the actions they bring are within

the jurisdiction of the court, and if they fail to do so they are subject to demurrer. In the present case, therefore, the plaintiff must aver and show that he is a citizen of Missouri. The jurisdictional defect, if there is one, cannot be waived by one of the parties, because the court has its own interest in not exceeding its proper authority. Here the defendant expressly raised the question of jurisdiction; by demurring, the plaintiff conceded the facts upon which the defendant's argument rests, which are not otherwise contradicted in the record. The question whether the lower court had subject matter jurisdiction is thus not lost by the defendant's alleged waiver, but is properly before the Supreme Court.

This is an argument of a familiar and appealing kind. Sensitive to the peculiar character of federal courts, and to procedural issues more generally, these pages could almost serve as a model of the kind of legal reasoning taught at good American law schools a generation ago. We are comfortable with, and can readily admire, this kind of thought. This is an American constitutional lawyer talking, we feel, with all that that means.

What does that mean? How do these pages define Chief Justice Taney, the Court of which he is a part, the litigants before him, and the various audiences, popular and legal, to which the text is addressed? How, that is, do they work rhetorically?

The essential claim performed by this sort of argument is that this Court is a court of reason, one that will proceed by the canons of logic and clarity, even those of elegance. Its judgment will be shaped by institutional and lawyerly understandings. The claim that the Court's power will be shaped by reason, and reason of a complex and neutral kind, has a political meaning too: it is at once a recognition of external authority—of the larger world in which the Court occupies its defined place—and a promise of equality, for both of the litigants will have their interests determined by the same intellectual process. The Court has power, but power shaped by reason and limited by it; the litigants and the public stand before the Court as parties equally entitled to have their cases adjudicated by neutral standards.

There is a sense in which this part of the opinion establishes a highly respectful relationship with its reader, for the commitment to reason is necessarily a commitment as well to the process of argument and discussion by which the reasoning can be tested, a process in which the reader is a participant. This opinion rests not only upon the political authority of the Chief Justice, but upon the propriety and coherence of his reasoning. The audience is thus ad-

dressed as a fellow reasoner, as one who can check the intellectual processes by which the Court reaches its result, and approve or disapprove them. In these ways the voice of this opinion recognizes the limits of its own authority.

The fundamental promise made here, then, is that this is a government of laws, not of men, and law is defined as reason, with the evenhandedness and equality not only among litigants, but between the Court and its audience, that that implies. As for Dred Scott, he is a litigant in this system, one whose claims will be considered, and accepted or rejected, on the merits.

B.

The promise of these opening pages is immediately betrayed by what follows. To read Taney's statement of the question before him, in the context he has established, is a stunning shock:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.²⁶

The first and most obvious source of shock is Taney's use of racial terms. Where does this language come from and how is its use justified or explained? Who, in the world of legal reasoning he has just created, would ever think this way? Here Taney speaks not in constitutional categories, but in social ones, and by what warrant does he do this? To put it slightly differently, how is the question he states a constitutional one at all, since it is not cast in constitutional terms? For nowhere in the Constitution is race mentioned, nor does it list other categories of human beings, some who can become citizens, others who cannot, to which racial categories might be assimilated. There is, in fact, no language in the Constitution (as it then existed) that suggests that any constitutional question could be cast in racial terms at all.

Formally speaking, of course, this language has its origin in the plea made by the defendant below, which claimed that Afro-Americans could not become citizens. But the normal practice when a party makes a claim cast in extra-legal terms is either to disregard it

26. 60 U.S. (19 How.) at 403.

or to recast it, so far as possible, in legal terms. (Suppose, for example, that the defendant had argued that a short person or a blind person could not become a citizen. Would the Supreme Court have accepted that as its question?) To accept the terms of the defendant's question is by that very act to make the categories it uses legal ones. Thus for Taney to state the question as he does is to go a very long way indeed towards answering it. And the fact that it is an extra-constitutional question makes it less surprising than otherwise might be the case that it will receive, as it does, an extra-constitutional answer.

The second defect with Taney's statement of the question is its lumping all rights of "citizenship" together, as if they were necessarily indivisible. While Dred Scott would doubtless have liked to have all the rights of white citizens, he was arguing for only one, the right to sue in federal court on diversity grounds, and one could imagine that right as not necessarily entailing all others. But without discussion Taney claims otherwise, not by accident but, as I shall show below, as part of a rhetorical strategy close to the center of his opinion.

In the next paragraph of the opinion Taney meets the needs created by his use of racial language, and his unitary view of citizenship, by developing the ideology of race upon which the case will ultimately turn. He explains his racial terminology by saying that he is talking about "that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves."²⁷ He will later tell us that this means all members of what he calls the "African race," because, he explains, none of them emigrated voluntarily (a matter as to which he cannot possibly know the truth).²⁸ Even more significantly, he here assumes—indeed he makes it a matter of constitutional law—that any "descendant" of a member of the African "race" is to be regarded as a member of that "race," irrespective of the fact that the person may be "descended from" members of other "races" as well.

This premise—perhaps in some form it is central to all racism—is worth special attention because it is one that the racism of our present society shares. Why is the child born of a "Black" mother and a "white" father, or vice versa, to be considered "Black" rather than "white"? Every child in America must have wondered about this simple question. The answer does not lie in the nature of things

27. *Id.*

28. *Id.* at 411.

but in our culture and our feelings, in the patterns of fear and desire that find expression in our ideologies of race. After all, "race" is not a natural but a cultural category.²⁹ "Race" may seem natural to one raised in a racist culture, to be as obvious a "fact" as exists in the world, but in truth—as Malcolm X, for example, discovered on his pilgrimage to Mecca, and as others have learned elsewhere—it is created and maintained solely by social and cultural conventions.

These conventions of racial categorization purport to rest on "factual" judgments of "difference" and "superiority"—superior looks, intelligence, wisdom—but are in fact ultimately rooted in desire, the desire to be a member of one group that dominates another. That is where the satisfaction comes: I may be ugly, but I belong to the beautiful race; I may be stupid, but members of my clan are smarter than members of your clan; and so on.

But the use of racial categories is attended by a fear as well—a sense of weakness deriving from the recognition that the lines between the "races," so seemingly fixed, are in fact permeable. This is the recognition that William Faulkner brings his white characters to face again and again, and to them it is unbearable.³⁰

The determination that one characteristic shall outweigh all others is essential to all racist ideologies, to all sense of racial superiority, yet its effect is to empower the Other. The racial fiction must be maintained at all costs; otherwise the simple truth, that we are all people, all one species, and that "race" itself is not a natural category—that it literally makes no sense—would be revealed, and the whole edifice tumble to the ground. Taney's paragraph commits him and his reader to the wholly false (but deeply American) view that Blacks are all one thing, whites all another, a view that leads naturally to his other position that "all" the rights of citizenship must belong to one group, none to the other. In this Taney claims all legal power for the "whites," but in doing so grants enormous natural power to the "Blacks," whom he fears so greatly.

The next paragraph continues the development of this ideology

29. On the relation between biological and sociological race, see *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) (summary of argument reported at 55 U.S.L.W. 3579 (1987)); C. KOTTAK, *ANTHROPOLOGY: THE EXPLORATION OF HUMAN DIVERSITY*, ch. 3 (3d ed. 1982); *RACE AND CLASS IN RURAL BRAZIL* (C. Wagley 2d ed. 1972); M. HARRIS, *PATTERNS OF RACE IN THE AMERICAS* (1964)). If you are doubtful, ask yourself this: for what reason would a person wish to affirm that "races" exist as a matter of "natural fact"?

30. See, for example, the story of the Sutpen family in W. FAULKNER, *ABSALOM! ABSALOM!* (1951).

in a rather odd way. Taney makes a special point of saying that he is *not* talking about American Indians.

These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different governments which succeeded each other. . . . [I]t has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy.³¹

Why is this paragraph here? The answer is that Taney is engaged in the construction of a mythical world out of which will flow the imperatives that will decide the case. The primary actors in this world are not individuals, or nations, or cities, or institutions, but “races,” and “races” fictively constituted, as they always are, to deny biological facts. For Taney the world—of the framers, and his own world—consists of the white man, the Black man, and the red man, three actors arrayed in hierarchical order, with all power residing in white hands.

This means, as a rhetorical matter, that the “we” constituted in the community of discourse of which Taney and his audience are members, the community of law and Constitution, has already been defined as purely white. To talk this way he must be white and speaking exclusively to whites. This is just another way of saying that citizenship in the world created by this kind of talk is necessarily white too, and that Dred Scott must therefore lose on his claim to speak with “us,” both as a social and as a legal matter. The result of the case is determined by the mythical world in which Taney encloses it.

C.

But Taney does not rest solely on his creation of this mythical universe, in which he has located his reader as among the fortunate few. He appeals to “history” as well—to the intentions of the framers—and to develop this appeal is the purpose of the next, quite long, section of his opinion.

As Taney puts it, the question is whether the “people of the United States,” or the “citizens” thereof, which in his view amount

31. 60 U.S. (19 How.) at 404.

to the same thing, can include persons of African descent. He holds no, on the ground that at the time of the framing of the Constitution persons of African descent were

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 grant to them.³²

There is of course nothing to this effect in the language of the Constitution itself, but for Taney the question is not what the document says but what its "true intent" is, its "meaning when it was adopted." He finds this meaning not in what it says but in the context in which it was composed, the most salient feature of which was the social fact, which he claims was universal, that Blacks were degraded by whites. It is upon this that he bases his claim as to what the framers intended.

This is a developed form of Story's method of interpretation: it pierces the text itself and looks to the context in which it was composed and published, giving to that context a standing equal to, perhaps superior to, that of the language itself. The implicit reason is that the text is purposive or intentional: the object of reading words in a text is only to gain access to the intention of the writer; surely if there are other routes to that intention they should have equal validity; "history" affords such access by revealing the unexpressed, but universally held, views of the authors. The question is not what they said but what they meant. While Story looks to those who negotiated the instrument, Taney looks beyond them to what he calls the polity as a whole. In his view, what the "white" polity "meant," as demonstrated by the consistent pattern of racial degradation, was to be forever dominant over "Blacks."³³ The thrust of his method is to

32. *Id.* at 404-05.

33. There are only two ways in which one can become a citizen of the United States: "by naturalization, which is committed by the Constitution to the Congress; and by birth, but that right can attach only to the class and description of persons who were at the time of the adoption of the Constitution recognized as citizens in the several states." *Id.* at 405-06. None of the states, Taney says, recognized persons of African descent as citizens at that time; therefore none can make them citizens now. *Id.* at 423.

This line of reasoning assumes that the racial category employed by the defendant in his plea was universally accepted by all of the framers of the Constitution, and by all of the members of the body politic who adopted it, with the aim of excluding that class from membership in the polity. The idea is that all of the members of the founding community, who made the government for themselves and for their "posterity," desired to exclude from that community all members of the African "race," whether or not bio-

claim that the fact of past discriminatory and abusive behavior is authority for future discrimination and abuse. At its heart this is an argument familiar to students of fascism: the fact of past degradation is used to justify its present perpetuation.

The degradation upon which Taney relies, he says, was universal and tied to race, not legal status: "No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise."³⁴ The number that had been emancipated "at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as part of the slave population rather than the free."³⁵ The extinction of slavery in the North was not "produced by any change of opinion in relation to this race" but caused by the unsuitability of slave labor to the "climate and productions" of these states.³⁶ Northern states, and before them the colonies, had anti-miscegenation laws³⁷ and provided for the apprehension of wandering Blacks or Indians as vagrants. In New Hampshire the militia was limited to "free white citizens," and "in no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights."³⁸

If this is the case in the North, how much more clear it must be in the South. Indeed, it is obvious that the southern states never would have entered into the Constitution if it were conceivable that

logically part of that posterity. Nothing in the Constitution itself indicates this view or supports it. Taney's argument rests entirely upon a construction of the wishes and desires of those who framed and adopted the Constitution, or what he calls their original "intent."

34. *Id.* at 411.

35. *Id.*

36. *Id.* at 412.

37. [Such statutes are a] faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

Id. at 409.

38. *Id.* at 415-16.

Africans could become citizens, because—on Taney’s view of the matter—if they could, they would be entitled to all the privileges and immunities of citizenship in all the states.³⁹

What about the language in the Declaration of Independence that “all men are created equal”? This cannot possibly be extended to include the enslaved African race, says Taney, for so many of the signatories were slaveholders, and as men of honor cannot have been guilty of such a discrepancy between principle and conduct. As for the Constitution, it explicitly permitted the slave trade until the year 1808 and protected the owner’s rights in fugitive slaves.

* * *

What has Taney done in this section of his opinion? He has first cast the question in racist terms, whether a “Negro” can become a citizen; there being no language in the Constitution to support his position on that point, he has then purported to pierce the Constitution to discover the understandings that lay behind it. These unarticulated assumptions, if universal, are in his view as much a part of the Constitution as if they were written into the text. After all, if it is what everybody thought, why should it matter whether it was written down or just assumed?

Taney’s evidence establishes what no one could have doubted, that Blacks were systematically abused and degraded in the colonies and in the early years of the national government, as well as in the heyday of slavery. What is striking is the inference that Taney wishes to draw from this fact. He wishes to say that the fact of general, though certainly not universal, social degradation becomes a value, and a constitutional one at that. If the framers in fact treated Black people viciously, they must have intended their Constitution to validate such viciousness. This is to destroy, even more dramatically than Story’s opinion in *Prigg*, the essential character of law as aspirational or idealizing. Taney tells us that we can be no better than the worst of what we are. The idea that a community marked

39. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

Id. at 417. His remarks are offered as a *reductio ad absurdum*, appealing to the reader’s own social instincts: any result such as this is utterly unthinkable.

by a particular kind of viciousness might wish to constitute itself in such a way as to transform itself is unimaginable to Taney, and in his opinion he tries to make it unimaginable in the world.

IV. CONCLUSION

My hope in examining these cases has been that we could learn something from them about the implications of the method of constitutional interpretation that they both use, the method begun by Story and developed by Taney. Actually, as we have seen, these Justices do not employ one method, but two, and each opinion is marked by a tension between them. The two methods are what I have called "legal"—by which I mean a traditional examination of the meaning of the language of the authoritative text in the context in which it was issued—and what I have called "intentional," by which I mean piercing the language of the instrument in order to look to the supposed sentiments, motives, wishes, or aims of those who composed it. In each opinion, however, the "intentional" method is plainly dominant, and it is that which I now wish to examine further.

A.

I would like to begin with the question mentioned earlier—how far the actual performance of the writer of each opinion comports with his theory of the Constitution and of judging. As we have seen, Story's opinion can be seen to follow rather closely the implications of its fundamental theory for, at least on one reading, it asks to be judged not by what it says, which is powerfully proslavery, but by what it does, which is to impair the apprehension of slaves. Thus, it "really" is an antislavery decision.⁴⁰ Taney's opinion too seems to comport with its fundamental method, for just as he reduces the Constitution to an act of racist will, his opinion is just such an act. Consider, for example, his claim that all descendants of Africans must be treated as the degraded descendants of slaves, for none of them immigrated voluntarily. He cannot possibly know whether that is true or false. It is perfectly possible, for example, that some Blacks escaped from the Caribbean colonies and found their way to America. His statement is really a way of saying that it doesn't matter if one, or a hundred, or a thousand, people of African origin do not fit his description; he is going to treat them all as if they did.

40. The fact that it ultimately contributed to the passage of the far harsher Fugitive Slave Act of 1850 is a distinct point.

This is an insistence upon a racist generalization, made for the purpose of maintaining domination in the face of what may be the facts, a performance in the text that directly parallels the performance he purports to see in the Constitution itself. And think of what happens to Dred Scott in the course of the opinion: he begins as a litigant, objecting on procedural grounds to the Court's consideration of a jurisdictional question; as such, he is heard and responded to, in a gesture that necessarily accords him dignity and respect. By the end of the opinion, however, he, along with every other slave, is reduced to a piece of property; the function of the law, and of the Constitution, is to protect someone else's rights in him, in this case to the extent of guaranteeing his owner the right to carry him into any territory of the United States without molestation from local regulations. Dred Scott is converted before our eyes from a person into an object. This is a performance of what Taney sees the framers of the Constitution to desire.⁴¹

B.

But what does this add up to as a general matter? Of course these cases are terrible cases, you may say, but what relationship is there between the method they employ and what makes them terrible? Is their result a consequence of the use of the "intentional" method? Or is their use of the method perhaps a sign that something else is wrong? Or is there no relationship between method and consequence at all? Have I been guilty, that is, of attacking the "intentional" method by finding uses of it that are independently dreadful?

I would like to propose at least the outline of an answer to that question. In my view, there is a connection, though not an obvious one, between the "intentional" method and the rest of what is wrong with these cases. I have said that this method tends to reduce questions of law to those of "fact"—an "ought" to "is"—and in doing so to make impossible the fundamental process of law itself: the process by which we establish authoritative texts and interpret them in compositions of our own, and in so doing create a new world of

41. Story foreshadowed this gesture in his extraordinary treatment of Mrs. Morgan's freeborn child: under any view, there is at least a substantial question whether that child is not legally free from recapture by the slave catcher, whether as a matter of Maryland law, Pennsylvania law (which might well be constitutionally held to supersede Maryland law), or of the Constitution itself. While Story mentions the existence of this child in his statement of the facts, he does not address the child's fate at all. The child simply is lumped with the others. *Id.* at 608.

talk and action of a certain kind that in turn affects the other world, the world of motive and social fact, out of which we emerge. To pierce the language for the "intention" that lies behind it is a kind of reductionism that strikes at the heart of what we mean by law.

But how and why is the appeal to intention reductionist? One might think that it was the opposite of that, a way of going behind the surface of mere words to the rich and complex reality that underlies them. This method does not reduce the composer to the text, but honors his or her full complexity, one might say. And attention to the context of an utterance can of course enrich and complicate our understanding of it; in some sense indeed it may be essential to our understanding of it. But this is not what this method proposes: not an enrichment or complication of the text but its erasure, the substitution of "intention" for "meaning." This is to eliminate one level of experience entirely—the textual, the legal—and to do so in favor of a language and a view of life that is for many reasons in other respects inherently simplifying.

The intentional method necessarily assumes, for example, the existence of an actor capable of forming a single intention. This is unrealistic in any case—none of us is in a simple sense "one" person, nor do we ever have "one" intention. We are complex beings with simultaneously diverging impulses and wishes—some conscious, others not; some immediate, others distant—all at varying levels of intensity. The composition of a text, and its publication as authoritative, is an act of resolution whose meaning is to be found in the language we use, in the context we modify, not in some conscious or unconscious instrumental desire. To pierce the language for the intention lying behind it, as if that intention could be discovered, is to deny the complexity and uncertainty of human motivation.

To assume the existence of a masterful and coherent human actor, who knows everything about both his own wishes and the possible circumstances in which these wishes will be significant, is especially unrealistic in interpreting the Constitution, for, as many have observed, it is not even clear who the relevant actors are. Are they the people who drafted the Constitution, those who voted or argued for it in the ratification conventions, those who spoke against it, those, decades later, who have refrained from amending it, or who? And the instrument is by its nature meant to reach circumstances that are not known, and cannot be fully imagined, with respect to which "intent" must be used in a highly attenuated or fictionalized way, if at all. What is more, in actually doing "intentional" reading

it is nearly inescapable that the "intention" will in fact be construed in light of the present case, as though the writers had in mind this case, and others like it, and were committed to a particular view of it, which cannot be the case.⁴² This kind of interpretation thus tends to create not only a single actor but a single intention, and one falsely directed at a particular, future question.

To put this point a slightly different way, I have so far assumed that the "intentional" reading of a text really is not, as it is claimed to be, an interpretation of the text at all, but something else, a reading of the motives or wishes of a designated framer of the text, which are claimed to have greater authority than the text itself. I think, however, as I have claimed elsewhere,⁴³ that this kind of reading can never be a substitute for interpretation but is always an act of interpretation; what is more, it is a mode of interpretation that is invariably invoked in order to evade the difficulties presented by the language that the drafters have given us. In this sense it is inherently simplifying, reductionist, or simply evasive.

The claim of the "intentional" reading is a claim of greater realism, a claim to go behind the words for what "really" lies behind them; but the effect is quite the reverse, to create a fiction even greater than the fiction of the "wise legislator," a kind of mythical history the very description of which is claimed to answer our contemporary questions with automatic and perfect force. This is, in turn, to destroy the only premise upon which the text can operate as a text, namely that we are reasoning people reading language. Ar-

42. Distinguish here the proper use of tradition, where you assume that the text is meant to reach the present case, but do so as a text—that is, through a process of reading and composition. See Krygier, *Law as Tradition*, 5 *LAW & PHIL.* 237 (1980).

43. Of course, I am not denying that the adoption of a Constitution, or the passage of legislation, is in some sense an intentional act. Like almost all human behavior it asks to be interpreted not as random, accidental, or coerced, but as seriously meant. The question is *how* it should be interpreted. My answer is by reading the text in the context of its making. To hope to pierce the text for an intention underlying it, which can then substitute for it, seems to be quite wrong-headed on several grounds, one of them "intentional": the framers chose to express their "intention" not in the words in which the modern interpreter would do it for them, but in their own words. To seek for "intentions" in this way is to substitute one text, of our own imagining, for the real and authorized text actually made by the framers. The substituted text will always be of our own imagining, for (except for simple mistakes) it is simply not the case that behind a written text lies another, in the minds and hearts of people, which represents the published text in purer or more complete form. And if there were such a text, we could not read it. We cannot avoid the difficulties of reading by looking up from the text for a "truer version" of it, because in doing so we will invariably reduce the text to our own vision of reality. Instead, we should treat the text as seriously meant: as if those who wrote it meant it to be read as their statement on the question. For further discussion, see J.B. WHITE, *HERACLES' BOW*, ch. 5 (1985).

gument of this kind will always purport to be factual, about what somebody else intended; in fact, it will be about value, through the disguised creation of ideology.

In what I have called legal interpretation, justice is always our fundamental topic. This opens the talk up to every consideration legitimately bearing on what ought to happen. To attempt to reduce this conversation about what, in the light of our authoritative texts, we ought to do, to one about "what they intended" is in its way as dead as the old attempt to claim that we simply discover what the law "is," as though that could be divorced from what it ought to be. Closing off conversation in this way, in the name of a deliberately created fictional reality, is a radically authoritarian act.

The claim of the "realist," then and now—I think of the economist who wishes to reduce us to economic utility-maximizers, of the radical who sees law simply as the expression of class interest, or the psychological realist who sees it as the expression of subconscious needs—is never in favor of a truer grasp of reality, but always in favor of a reductive fiction. This is true because all such views wish to erase the complex reality of the text, and the intellectual, ethical, and political relations embodied in it.

C.

There is another, perhaps more troubling, question about what I have said. This relates not so much to the reconstruction of intention as to the relevance of the context in which a text is produced. Even if we do not think of ourselves as trying to restate, in place of the text, some "intention" of its author, but, as I think lawyers typically do, to arrive at some judgment as to the meaning of the text, is it not true that widely shared understandings that lie behind the text—in these cases understandings about racial relations—properly become relevant to that meaning? After all, in our normal communications we understand that the context is as much a part of the meaning of the text as what is said in it. As a theoretical matter, indeed, the text can be said to derive all of its meaning from its various contexts, into which it can be seen as a kind of intrusion; it says only what needs to be said, leaving the rest untouched.⁴⁴ On this view, whether the authors of the Constitution included some specific reference to the Afro-American people is of no real signifi-

44. See Becker, *The Biography of a Sentence: A Burmese Proverb*, in *TEXT, PLAY AND STORY: THE CONSTRUCTION AND RECONSTRUCTION OF SELF AND SOCIETY* 136 (E. Bruner ed. 1984) (proceedings of the American Ethnological Society).

cance. Meaning can be found as readily in context as in text; the effort of Story and Taney is to establish the context.

However sensible this view may be of ordinary communications—where I leave a shopping list on the refrigerator door, for example, which you rightly read in light of your knowledge of my feelings about rutabagas, say, or Bermuda onions—it has a serious defect in principle as applied to a legal or constitutional text. It denies the possibility that people might wish to use a text to change their context, to constitute an idealized version of themselves in their laws that would alter who they were. This is, in turn, to deny a fundamental characteristic of the law, for at least among us, law is often, and perhaps always, a way of saying that although we are one thing, and our context reflects it, we would like to make ourselves something else. The law is not by its nature merely the expression of a command or a desire, it is a tentative and idealized reconstitution of the community.⁴⁵

On this view, the absence in the Constitution of any talk about race, and the oblique references to slavery, could be read very differently from the way Taney suggests: not as pointing to views so deeply and obviously held that they need not be expressed, but as a deliberate attempt to escape from those views. The enormous gap between the race-free language of the Constitution and the kinds of social facts to which Taney points would then have a shouting significance. Of course, Blacks, slave or free, were systematically degraded, and in ways we could not or would not change overnight; but this fact was inconsistent with our ideals for ourselves, and in writing the Constitution as we did we chose not to perpetuate or confirm those aspects of our lives, but to disapprove them.

Of course, meaning lies partly in context; normally we only say what needs to be said in light of what is already understood. But the

45. When I speak of “aspirations” I do not mean to suggest that all legal texts have aspirations that we should share. The aspiration might be horrible—to perpetuate racial subjugation for example—but it would still be in the sense I mean it an aspiration, a way of trying to make the world and oneself different through the creation of a text, which will be read as the expression not merely of will or feeling but of ideals. Think here of the way *The Federalist Papers* constantly talk about provisions of the Constitution that were arrived at by compromise as if they were based on principle. (For example: representation by states in the Senate, by population in the House.) This is not in my view evasive or dishonest, but a practice essential to what we mean by law. The proper question is not in what principle a provision had its origins—for the framers chose not to rest upon that principle, or upon a statement of it, but to make a text of another kind—but in what principle it can have its life. The place to look for coherence is not in the welter of motives and expectations that lie behind the making of the text, but in the text itself, as it is made and published in a certain context.

law is a special form of speech, a way of constituting ourselves in light of what we think we ought to be. It can be a way of removing ourselves from our context, or at least from a part of it; the method of construction employed by Story and Taney denies that possibility.

In the law we focus on the meaning of a text, read on the understanding that this text is a legal text, and hence an idealizing one. In place of the reductive and purportedly factual inquiry into something that lies behind the text, we must face the difficulties of interpretation and composition, in context and across time. But with them we are by training and practice familiar; it is in those practices indeed that the law itself resides.

In one of his *Rambler* essays, Number 14,⁴⁶ Samuel Johnson addresses the question whether it is right to tax a person with hypocrisy who fails to practice the virtues that he preaches. Johnson denies it: it is the very nature of our experience to be unable to live up to our own conceptions of what we ought to be. The fact that we struggle and fail does not mean that our ideals and our values are empty or hypocritical.⁴⁷ It seems to me that the law is founded upon exactly the understanding Johnson offers us, for it is a way of establishing a conversation about who we ought to become that acknowledges from the outset that we are not that already, and cannot make ourselves that simply by an act of will. What we can do is make the law.

There are legal thinkers—let us call them “pure realists”—who reject this view and regard all legal texts as mere verbiage, epiphenomena; what matters is what is “real,” namely what economic and power relations exist in the world, what different actors want, and what the economic and political effects of various decisions are. The only way to understand the law is to see what its effects are. For such people law talk is essentially empty. The gap between the ideals of the legal system and the realities of the social and political system are naturally pointed to as demonstrating the validity of this approach.

I think that gap can be read differently, for it is essential to the operation of law that the community be able to establish aspirations that are belied by its present conditions. The law is at its heart a way of carrying on a conversation about our desires and feelings and wishes in other terms, a way of translating or converting them into

46. S. JOHNSON, *ESSAYS FROM THE RAMBLER, ADVENTURER, AND IDLER* (1968).

47. *Id.* at 92-93.

the subject of a different kind of discourse altogether. Thus it is in the ordinary lawyer's life that the client comes in, full of rage or a sense of injury, or greed or fear, and the lawyer goes to work, converting these primitive feelings into the material for argument and thought of quite a different kind. That conversion establishes a plane at which we exist collectively, and which becomes, by our acquiescence and participation in the conversation that constitutes it, a reality we inhabit. To look through the language to what lies behind it destroys this reality, which is the law itself.

D.

But suppose I am right, you say, how would it work out in the Slave Cases? Suppose Story and Taney had been "real lawyers," that they had not subverted the processes of law in the ways that they did, how would the results in these cases have been different? If not different, doesn't that prove that it doesn't matter what they say?

This is a difficult question, partly speculative, to which I do not pretend any omniscient answer. But I do think that the reading of the Constitution in a lawyerly way would have led to substantial difficulties, emotional and intellectual, with the results reached in these cases—difficulties which the formulations actually employed by the Justices enabled them, and their readers, to avoid. To focus, for example, upon the circumstances of Mrs. Morgan's freeborn child in a way that recognized that the child was a person, entitled to freedom but needing his or her family, would have been to realize that Mrs. Morgan and indeed her unfree children were people too; a realization, which, if articulated with sufficient clarity, would have tended to erode, not the discourse of law, which it would have exemplified, but that part of it which maintained slavery.

Today we have no slavery, but we do have people suffering greatly, victimized greatly, who in the law and elsewhere are talked about in highly distancing and objectifying ways. Proper attention to the fundamental commitments of legal discourse, by lawyers and judges and others, would I think help us bring our collective attention, however reluctantly, to the circumstances of the successors of Margaret Morgan and her children—of all races—and prepare us to address them with a greater sense of responsiveness and responsibility.