

IS THE CONSTITUTION OF 1787 A WHITE SUPREMACIST DOCUMENT? AGAINST ESSENTIALISM IN CONSTITUTIONAL INTERPRETATION

David S. Schwartz*

ABSTRACT

A curious convergence is emerging in legal academia around the conclusion that the 1787 Constitution is a white supremacist document. Although most originalists would deny that contention, their methodology strongly favors, if it does not compel, an agreement with progressive, “neo-Garrisonian” scholars that the Constitution of 1787 is indeed a white supremacist document. Both the neo-Garrisonian and originalist elements of this implicit convergence stem from their “essentialism” in Constitutional interpretation: the idea that the Constitution or its terms or provisions carry a uniquely and objectively correct meaning, invariant over time, and independent of our evolving normative commitments.

This Article argues that essentialism is a mistaken approach to constitutional interpretation. Contrasting Chief Justice Roger Taney’s lead opinion in *Dred Scott*, holding that Black people cannot be “citizens” of the United States, with Frederick Douglass’s Glasgow Speech, arguing that the Constitution is not a pro-slavery document, this Article argues that these two texts embody not simply a clash of conclusions, but also a clash of approaches to understanding what the Constitution is. Taney’s opinion is archetypally originalist and essentialist; Douglass’s speech, widely misunderstood as an essentialist, textualist argument, is in fact a powerful anti-essentialist argument that the Constitution of 1787 was an invitation to struggle over the questions of slavery and white supremacy. The Article further disputes the widely accepted neo-Garrisonian claim that originalism and living constitutionalism both fail the *Dred Scott* “test.” While living constitutionalism, with its embrace of evolving moral values, would *today* reject *Dred Scott*, Taney’s originalist opinion adheres to the tenets of the intentionalist and public meaning strands of originalism and meets present-day professional standards of originalist scholarship. Thus, while living constitutionalism can, originalism cannot disown *Dred Scott*.

* Frederick W. & Vi Miller Professor of Law, and Vilas Distinguished Achievement Professor, University of Wisconsin Law School. Copyright © 2024 by David S. Schwartz. I am grateful for the feedback I received on an earlier draft of this Article from Franciska Coleman, Mark Graber, Sanford Levinson, John Mikhail, Heinz Klug, Lawrence Solum, Franita Tolson, and the other participants in the March 2022 Discussion Group on Constitutionalism at the University of Maryland Francis King Carey School of Law in March 2022. I am also grateful to Nicholas Surprise for his invaluable research assistance.

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INTRODUCTION

In his Glasgow Speech in March 1860, Frederick Douglass posed the question: is the Constitution pro-slavery or anti-slavery?¹ Douglass famously rejected the interpretation spearheaded by his former mentor, the abolitionist William Lloyd Garrison, that the Constitution of 1787 was indeed a pro-slavery "covenant with death" and "agreement with hell."² But in today's culture wars, the question has taken on a new and pointed resonance, in a slightly altered and expanded form: "is the Constitution of 1787 a white-supremacist document?" This question was notoriously answered in the affirmative in *Dred Scott v. Sandford*, whose most notorious holding was that Black people could never be citizens of the United States.³ How we answer this question goes a long way toward telling us whether the unamended 1787 Constitution is yet another monument to our racist past that should be pulled down.

In legal academia, we can see the beginnings of a curious convergence around the conclusion that the Constitution of 1787 is indeed a white supremacist document. The idea is gaining currency among progressive legal historians whose work

¹ Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 380–90 (Philip S. Foner ed., 1999).

² See, e.g., Paul Finkelman, *Garrison's Constitution: The Covenant with Death and How It Was Made*, 32 PROLOGUE MAG., no. 4, Winter 2000, at 1, <https://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1> [<https://perma.cc/8C3Q-LVT4>].

³ 60 U.S. 393, 404–06 (1857).

aims at straightforwardly confronting our racist past. Legal historian Gregory Ablavsky, for example, asserts in the pages of the *Yale Law Journal* that “constitutional law’s subsequent nationalism, racism, and imperialism were all present at the creation.”⁴ Constitutional scholar Kermit Roosevelt III makes a compelling argument that the 1787 Constitution has these same qualities, and that our national founding narrative should therefore be based on the Constitution of 1868–1870, ushered in by the Reconstruction Amendments.⁵ These recent scholars and numerous others⁶ are building on earlier scholarship that is aptly characterized as “neo-Garrisonian,” a coinage intended to identify modern constitutional scholars who affirm Garrison’s characterization of the 1787 Constitution.⁷ These scholars increasingly emphasize the Reconstruction Amendments as a “Second Founding” that supplies the source of our core constitutional values.⁸

The other side of this convergence is supplied by originalism. Few if any originalists would openly agree that the 1787 Constitution is white supremacist; indeed, the handful of originalists who have written about *Dred Scott* have vigorously

⁴ Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012, 1083, 1083 n.386 (2015).

⁵ KERMIT ROOSEVELT III, *THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA’S STORY* 166–67 (2022).

⁶ See, e.g., Brandon Hasbrouck, *The Antiracist Constitution*, 102 *B.U. L. REV.* 87, 87 (2022) (arguing that the Constitution has been interpreted to serve white supremacy); Sandra L. Rierson, *From Dred Scott to Anchor Babies: White Supremacy and the Contemporary Assault on Birthright Citizenship*, 38 *GEO. IMMIGR. L.J.* 1, 3 (2023) (the concept of citizenship “has been undermined from the start by a pervasive national belief in white supremacy”). For a contrasting view, implying that the 1787 Constitution incorporated competing positions on issues of race and citizenship, see Rogers M. Smith, *The Reconstruction Amendments, American Constitutional Development, and the Quest for Equal Citizenship*, 2 *J. AM. CONST. HIST.* 625 (2024).

⁷ Though convenient, the term “neo-Garrisonian” is somewhat reductive, and my use of it should not be understood to criticize the contributions of these and other constitutional historians whose well-supported and penetrating research directly confronts the racist elements of the United States’ past. For articles using and possibly inventing the term, see William M. Wiecek, *The Emergence of Equality As A Constitutional Value: The First Century*, 82 *CHI.-KENT L. REV.* 233, 239 n.32 (2007), and Michael P. Zuckert, *Legality and Legitimacy in Dred Scott: The Crisis of the Incomplete Constitution*, 82 *CHI.-KENT L. REV.* 291, 291 (2007).

⁸ See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2020); see also Press Release, Nat’l Const. Ctr., Civil War and Reconstruction Exhibit to Have Permanent Home at National Constitution Center, Beginning May 9, 2019 (Jan. 31, 2019), <https://constitutioncenter.org/about/press-room/press-releases/civil-war-and-reconstruction-exhibit-to-have-permanent-home-at-national-constitution-center-beginning-may-9-2019> [<https://perma.cc/LA3R-MHM7>] (describing exhibit which “will explore constitutional debates at the heart of the Second Founding”); The Second Founding?: The Significance of Reconstruction in Constitutional History, Law, and Politics, Conference at Tulane Law School (Mar. 15, 2024).

sought to disown it.⁹ But, as I will try to show, the methodology of originalism precludes originalists from ruling out the neo-Garrisonian understanding of the Constitution as its original meaning.

Focusing on the citizenship question addressed in *Dred Scott*—whether Black people are “citizens of the United States” under the 1787 Constitution—this Article argues that we are not prisoners of our past in the way that neo-Garrisonian scholars imply and the methodology of originalism dictates; we can confront the racism, nationalism, and imperialism in U.S. history without having to concede that the Constitution of 1787 was a white supremacist document. More specifically, both the neo-Garrisonian and originalist elements of this implicit convergence around “the white supremacist Constitution” share a fundamental error. Both are based on “essentialism” in Constitutional interpretation: the idea that the Constitution or its terms or provisions carry a uniquely and objectively correct meaning, invariant over time, and independent of our evolving normative commitments.

In Part I of this Article, I set out the terms of this argument, identifying the essentialism in both neo-Garrisonian and originalist scholarship. Part II takes a fresh look at the long-running debate over how to make sense of *Dred Scott*. I recast the debate as between Chief Justice Roger Taney’s lead opinion and Frederick Douglass’s Glasgow Speech. These two texts embody not simply a clash of conclusions, as has been commonly assumed, but also a clash of approaches to understanding what the Constitution is. Taney’s opinion is archetypally originalist and essentialist: it assumes that the Constitution has a single, fixed meaning, unalterable except by formal amendment, and immune to evolving moral norms. Douglass’s speech has been widely misunderstood as essentialist as well: as a textualist argument that the Constitution *is* anti-slavery. But Douglas understood what most participants in the “Garrisonian” debates have not: to ask “whether the Constitution *is* pro-slavery or

⁹ See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U.L. REV. 857, 905 (2009) (“[O]riginalism clearly would have foreclosed *Dred Scott*”); Harry V. Jaffa, *Dred Scott Revisited*, 31 HARV. J.L. & PUB. POL’Y 197, 200, 203 (2008) (arguing “Taney’s approach in *Dred Scott*, however, was counterfeit originalism” that “invented a proslavery Founding and a proslavery jurisprudence of original intent”); Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 985 (1987) (“But ‘the jurisprudence of original intention’ cannot be understood as sympathetic with the *Dred Scott* reasoning, if we regard the ‘original intention’ of the Constitution to be the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it.”); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31–32 (1989) (using *Dred Scott* as an anti-canonical case to flog living constitutionalist supporters of *Roe* and substantive due process). For an unusually nuanced appraisal of *Dred Scott* by an originalist, claiming that Taney was wrong but taking no position on the Constitution’s original meaning, see Randy E. Barnett, *Was the Constitution Pro-Slavery?*, BALKINIZATION BLOG (Jan. 23, 2023), <https://balkin.blogspot.com/2023/01/was-constitution-pro-slavery.html> [<https://perma.cc/P7SQ-L72X>].

anti-slavery” is the wrong question. Douglass’s speech, as I will show, is a powerful statement against essentialism, and a powerful argument that the Constitution of 1787 was an invitation to struggle over the questions of slavery and white supremacy.

In Part III, I challenge the widely accepted claim of one of the leading neo-Garrisonian scholars, Mark Graber, that all interpretive modalities fail the *Dred Scott* “test.” Graber has persuasively shown that both originalism and living constitutionalism would have produced the same result in *Dred Scott* in 1857. But as I will argue, the more appropriate test is to ask whether these dueling approaches to constitutional interpretation would produce the same result *today*. I argue that while living constitutionalism, with its embrace of evolving moral values, would reject *Dred Scott*, the methodology of originalism would not. I show that Taney’s originalist opinion adheres to the tenets of the intentionalist and public meaning strands of originalism, and further that—contrary to the conventional belief—his historical analysis meets present-day professional standards of originalist scholarship, including Taney’s handling of the applicable burden of proof. While living constitutionalism can, originalism cannot disown *Dred Scott*.

I. ORIGINALISM AS ESSENTIALISM

A. Essentialism

“Essentialism” has various usages emanating from a single core meaning. “As a philosophical stance, essentialism can be defined as the belief that a type of person or thing has a true, intrinsic, and invariant nature . . . that is constant over time”¹⁰ In modern legal discourse, “essentialism” has most frequently been used in feminist and critical race theory in reference to its application to groups of people, to mean, for example, “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”¹¹ But as applied to ideas, as opposed to groups of people, essentialism “relies on understanding arguments as purely one thing or another.”¹²

I am using the term “essentialism” in a particular way, in reference to the interpretation of constitutional terms or provisions. Essentialism in constitutional interpretation has two salient characteristics of relevance here. First, by presupposing that the object in question—the Constitution—has a timeless and unchanging nature, it is impervious to change based on circumstance, and in particular, to evolving moral norms. The normative values relevant to constitutional interpretation, according to

¹⁰ Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 936 (1995).

¹¹ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

¹² Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 54 (2003).

originalists, inhere in the document and are permanently fixed in time. Originalism's opposition to, and disdain for, "living constitutionalism" makes this clear.¹³

Second, essentialism assumes that the object under consideration has a "true" nature or essence. In the terms of constitutional interpretation, this means that there is a uniquely correct interpretation of the Constitution and its various provisions. And—taken together with the first postulate—the uniquely correct interpretation of the Constitution is invariant across time.

Essentialist approaches to constitutional interpretation tend to present constitutional questions in Manichean terms, often—as here—as questions of the Constitution's either/or essence: the 1787 Constitution *is* either pro-slavery or anti-slavery; it *is* either white supremacist or racially egalitarian; or the term "citizen" in the 1787 Constitution *is* either "whites only" or racially inclusive.

My argument against essentialism is that we are not forced to choose between such Manichean alternatives. Lest the meaning of "we" be challenged as question-begging, let me be clear that it includes constitutional interpreters of whatever position, including judges. It might be objected that judges must always embrace the Manichaeism supposedly implicit in the structure of litigation and its either/or presentation of issues. But judges have numerous devices to avoid Manichean resolutions, particularly of questions at the same level of abstraction as the racial nature of the Constitution. Judges can always make case- or issue-specific rulings that leave the broader, more abstract questions of the Constitution's "essence" ambiguous or otherwise unresolved; they can decide issues on narrower grounds than ones that require defining the Constitution's "essence"; or they can avoid merits decisions by resorting to technical doctrines such as jurisdiction, justiciability, or appellate procedure. The question of Black citizenship that Roger Taney attempted to settle in *Dred Scott* exemplifies this: it is notorious that Taney did not have to address the citizenship question at all.¹⁴

Like the great majority of substantive questions of constitutional meaning, the word "citizen" as applied to the question of Black citizenship—the element most directly involved in the question of the 1787 Constitution's purported white supremacy—was left contestable by the Framers.¹⁵ Such questions of constitutional

¹³ See, e.g., Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (arguing that the two interpretive approaches are opposed); Justice Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way*, Address to the Woodrow Wilson International Center for Scholars in Washington, D.C. (Mar. 14, 2005), https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf [<https://perma.cc/7PD7-EJTN>] (deriding living constitutionalism interpretations as "distortions").

¹⁴ See, e.g., Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 34 (2007) ("[T]he Court did not avoid controversy, because the proslavery Justices wanted a decision that would deal with the constitutionality of the Missouri Compromise and the rights of free blacks. In essence. . . these Justices sought confrontation rather than compromise.").

¹⁵ See Smith, *supra* note 6, at 689–93.

meaning present what Edward Corwin called “an invitation to struggle.”¹⁶ This struggle plays out in the various arenas of constitutional resolution: adjudication, constitutional politics, governance—and time.

B. Neo-Garrisonianism

Neo-Garrisonian scholarship represents a third wave of Civil War era historiography. The “Dunning School” Civil War era historiography that emerged in the early 1900s had for decades served as an academic apologia for Jim Crow, with histories sympathetic to southern “lost cause” Civil War mythology and derisive of Reconstruction, viewing it as corrupt and dictatorial and viewing freedpeople as incapable of political participation. A second wave of scholarship that gained traction in the 1970s overturned the Dunning School orthodoxy, correcting the numerous and profound errors of Dunning and his adherents. A cardinal tenet of this anti-Dunning-School scholarship was the idea that *Dred Scott* was crucially and blatantly wrong and a betrayal of the true meaning of the 1787 Constitution.¹⁷ This remains the conventional view today.

Neo-Garrisonian scholarship, the third wave, emerged as a partial corrective to the second-wave, anti-Dunning School historiography. One of the first and best forays into serious neo-Garrisonian legal scholarship was the revisionist interpretation of *Dred Scott* in the work of Mark Graber. In a series of articles and a book, Graber persuasively argued that Chief Justice Roger Taney’s decision expressed the mainstream opinion of at least a powerful plurality of the people of the United States.¹⁸ According to Graber and other neo-Garrisonians, the white supremacy underlying Taney’s decision was already implicit in the constitutional order. The Taney Court merely expressed it in *Dred Scott*, and not even for the first time.¹⁹ So

¹⁶ EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 200 (1940) (arguing that the separation of powers between Congress and the president “is an invitation to struggle for the privilege of directing American foreign policy”). Corwin used this phrase in a different constitutional context than interpretation per se. I am grateful to John Mikhail for suggesting the applicability of this quotation to constitutional interpretive controversies more generally.

¹⁷ See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 559–60 (1978); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 214 (1988).

¹⁸ See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 30–32 (2006) [hereinafter GRABER, *DRED SCOTT*]; Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C. L. REV. 1229, 1237–38 (2005); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 280–82 (1997) [hereinafter GRABER, *Desperately Ducking Slavery*]; see also Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 72–73, 76–78 (2007) [hereinafter Balkin & Levinson, *Thirteen Ways*] (embracing Graber’s argument).

¹⁹ See, e.g., GRABER, *DRED SCOTT*, *supra* note 18, at 30–33, 39, 79–80. Taney Court cases asserting the states’ indefeasible right to exclude “vagrants, paupers” and other “undesirable”

Dred Scott's citizenship holding and the argumentation supporting it did not newly or uniquely remake the Constitution into a white-supremacist one.

Neo-Garrisonianism is thus essentialist insofar as it regards the 1787 Constitution as, in its essence, a white supremacist document. But its essentialism goes only so far, because neo-Garrisonianism is not in fact a theory of constitutional meaning. Neo-Garrisonians such as Graber do not say that the 1787 Constitution must be, or should be, given a white-supremacist interpretation whenever that can be done consistently with the Reconstruction Amendments. Characterizing the political order of 1787 or 1857 as fundamentally white supremacist is a characterization summarizing a historical inquiry: it is an interpretation of *the constitutional order*—how the Constitution of 1787 was understood and applied. It is not a characterization of the essence of the Constitution *as a text to be interpreted*. Neo-Garrisonian scholarship is essentialist only to the occasional extent that neo-Garrisonian scholars present their conclusions about the constitutional order in overstated or totalizing forms.

In short, essentialism is not essential to most of the many valuable historical studies investigating the racism in our constitutional history. Originalism, on the other hand, is different.

C. Originalism

Originalism is an essentialist type of interpretive theory. Indeed, it is quintessentially essentialist. Its animating principle is that the Constitution, in most of its provisions, has a discernable, fixed meaning that is constant over time. Its meaning is immune from changing normative commitments. Advocates of originalism make this the key selling point of the theory.²⁰

The essentialist nature of originalism can be clearly seen in two commonplaces in originalist literature. One is the express or implied assertion that there is “an originalist answer” to most constitutional questions.²¹ The other is the casual attitude

people—such as free Black people—began with the first constitutional decision in Taney's chief justiceship, *Mayor of New York v. Miln*, 36 U.S. 102, 142 (1837). That case held that the state's police power to exclude undesirable immigrants was “complete, unqualified, and exclusive.” *Id.* at 139; *see, e.g.*, *The Passenger Cases*, 48 U.S. 283, 457 (1849) (Grier, J., concurring) (reaffirming “the right of any State, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders”). *See generally* DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* 96–99 (2019) (describing the Taney Court's commitment to states' rights to regulate race).

²⁰ *See, e.g.*, sources cited *supra* note 13.

²¹ As Justice Scalia told a Harvard Law School audience, “[i]n most cases, the originalist answer is entirely clear.” HLS News Staff, *In Inaugural Vaughan Lecture, Scalia Defends the “Methodology of Originalism,”* HARV. L. SCH.: HARV. L. TODAY (Oct. 3, 2008), <https://hls.harvard.edu/today/in-inaugural-vaughan-lecture-scalia-defends-the-methodology-of-originalism/> [https://perma.cc/U96N-UK5Z]; Michael Ramsey, *The Supreme Court's 2020 Term:*

of many originalists toward historical rigor, at least when responding to charges that their arguments lack historical rigor. Originalist wags have asserted that “law office history” is to be preferred, in legal argument, over “history department law.”²² Gary Lawson reassures his originalist colleagues, “No History, No Certainty, No Legitimacy . . . *No Problem* . . .”²³ The serious argument underlying these witticisms is that lawyers and judges are doing law, not history. Lawyers must reach conclusions; judges must decide cases. Accordingly, neither has the luxury to indulge in the indeterminacy that results from close and accurate inquiry into thick and messy historical realities.²⁴ Good history (i.e., accurate, well-informed, and thorough historical investigation) is bad law, this argument suggests, if it fails to generate a determinate “originalist” answer. Conversely, bad history is a perfectly acceptable basis for constitutional adjudication (“no problem!”) if it generates a determinate originalist answer.

This superficially attractive argument is based on a flawed premise. Judges must decide constitutional cases, yes. But the premise that that decision must turn on a definitive historical conclusion is false. Other interpretive theories do not make historical analysis determinative; it is originalism that claims that historical inquiry is determinative. It is thus singularly strange that many serious originalists laugh off any suggestion that their historical inquiries must be done well or accurately. It is more than strange: it is post-truth.

What do these two commonplaces of originalism have to do with essentialism? It is that there is “an originalist answer” to most constitutional questions; that history, however messy, contradictory, or uncertain, somehow usually gives rise to a correct answer that is timeless and certain. The “correct” answer is not subject to changing normative values, or the product of balancing costs against benefits.

Cases of Originalist Interest, UNIV. SAN DIEGO SCH. L. CTR. STUDY CONST. ORIGINALISM: ORIGINALISM BLOG (Oct. 7, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/10/the-supreme-courts-2020-term-cases-of-originalist-interestmichael-ramsey.html> [<https://perma.cc/W9NW-WFAN>] (“*Torres v. Madrid* . . . poses a simple question that ought to have a simple originalist answer . . .”); Evan D. Bernick, *Are the Indian Canons Illegitimate? A Textualist-Originalist Answer for Justice Alito*, UNIV. SAN DIEGO SCH. L. CTR. STUDY CONST. ORIGINALISM: ORIGINALISM BLOG (Mar. 28, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/03/are-the-indian-canons-illegitimate-a-textualist-originalist-answer-for-justice-alitoevan-d-bernick.html> [<https://perma.cc/W88J-B47S>].

²² Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 534, 539 (1998) (reviewing JACK N. RAKOVE, *ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996)); accord Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012); Mike Rappaport, *Historians and Originalists*, UNIV. SAN DIEGO SCH. L. CTR. STUDY CONST. ORIGINALISM: ORIGINALISM BLOG (Aug. 21, 2013), <https://originalismblog.typepad.com/the-originalism-blog/2013/08/historians-and-originalists-mike-rappaport.html> [<https://perma.cc/R6M8-XABQ>].

²³ Lawson, *supra* note 22, at 1551 (emphasis added).

²⁴ But see Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 368–71 (2020) (criticizing this line of argument).

There is thus a crucial difference between the neo-Garrisonian and originalist forms of essentialism. Neo-Garrisonianism is not an interpretive theory, but an historical characterization which may, but need not, carry interpretive consequences. Originalism is an interpretive theory. While neo-Garrisonianism uses “the Constitution” as a proxy for “the constitutional order”—the set of understandings and applications operationalizing the Constitution at a particular time—originalists use the constitutional order as a proxy for “the Constitution.” According to originalists, what people understood the Constitution to mean, or what they intended it to mean, in the particular historical context in which the Constitution (or a particular amendment) was written or ratified, binds us today.

II. *DRED SCOTT*, CITIZENSHIP, AND WHITE SUPREMACY: *TANEY V. DOUGLASS*

The *Dred Scott* decision infamously decided that African Americans could never be citizens of the United States.²⁵ At first glance, *Dred Scott* and Douglass’s Glasgow speech do not confront one another directly, because they pose slightly different questions: in *Dred Scott*, whether “citizen” is a racially exclusive term referring only to white persons of European descent, and in the Glasgow Speech, whether the Constitution is pro-slavery or not. But the questions are plainly intertwined, and both are a proxy for the broader question of whether the 1787 Constitution is a white supremacist document. In reaching their opposing conclusions, Taney and Douglass exemplify opposing approaches to constitutional interpretation: Taney, an essentialist and originalist approach, and Douglass an anti-essentialist one.

A. *Citizenship and Originalism in Taney’s Opinion*

In *Dred Scott v. Sandford*, the plaintiff Dred Scott sued for his freedom on the claim that his putative owner had brought him to reside in free U.S. territory and a free state, which should have dissolved his slave status.²⁶ The citizenship holding in *Dred Scott* stems from the question of whether the federal courts had jurisdiction to

²⁵ *Dred Scott v. Sandford*, 60 U.S. 393, 404–06 (1856). The case decided one other significant constitutional question: that the Missouri Compromise of 1820 was unconstitutional. It was that element of *Dred Scott* that aroused such strong opposition among those who joined the emerging Republican party; the citizenship holding was relatively uncontroversial in 1857. See GRABER, *DRED SCOTT*, *supra* note 18, at 30–33, 39, 79–80. The Missouri Compromise holding was based on two rationales: that it exceeded the powers of Congress to bar slavery in federal territories acquired after ratification of the Constitution, *see Dred Scott*, 60 U.S. at 432–49, and that it violated the Fifth Amendment’s Due Process Clause to prohibit the possession of slave property in federal territories. *See id.* at 449–52.

²⁶ 60 U.S. at 398.

hear Scott's claim at all. The only basis for hearing Scott's case was diversity of citizenship, which grants federal jurisdiction over suits "between citizens of different States."²⁷ But while Scott, according to Chief Justice Taney, could in theory become a citizen of a state for that state's internal purposes, neither he nor any other Black person could be a constitutional "citizen"—neither a United States citizen nor even a state citizen for any interstate purpose provided in the Constitution.²⁸ Although state laws and constitutions could determine state citizenship for state purposes, the meaning of state citizenship for federal constitutional purposes—whether in the Article III Diversity of Citizenship Clause or Article IV's Privileges and Immunities Clause—was a question of federal constitutional law.²⁹ Crucially, for Taney, this excluded Black state citizens from being regarded as among the "Citizens of each State" who are "entitled to all Privileges and Immunities of Citizens in the several States."³⁰ Taney made no bones about the underlying reason. Were it otherwise, the Privileges and Immunities Clause

would give to persons of the negro race, who were recognised 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 punished³¹

If they were constitutional "citizens," free Black people could thereby travel to slave states and exercise "full liberty of speech in public and in private upon all subjects upon which its own citizens might speak," "hold public meetings upon political affairs," and even "keep and carry arms wherever they went."³² This would "inevitably produc[e] discontent and insubordination" among both free and enslaved Black people, "endangering the peace and safety of the State."³³

These pragmatic policy consequences are almost certainly what motivated Taney to go out of his way to decide the citizenship question. Yet Taney expressly

²⁷ *Id.* at 402.

²⁸ *See id.* at 404–06.

²⁹ In this respect, Taney's argument is analogous to the argument for the Independent State Legislature (ISL) Theory, which was recently popular among many originalists. The ISL Theory argued that "state legislature" had a federalized meaning for constitutional purposes that was independent of the state's own constitutions. *See, e.g.,* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 41 (2022).

³⁰ *See Dred Scott*, 60 U.S. at 416–18; U.S. CONST. art. IV, § 2, cl. 1.

³¹ *Dred Scott*, 60 U.S. at 417.

³² *Id.*

³³ *Id.*

disclaimed the right as a judge to rely on these policy consequences as the ground of an interpretive ruling. “It is not the province of the court to decide upon the justice or injustice, the policy or impolicy,” of the Constitution’s citizenship provisions, Taney asserted, but rather to interpret the Constitution “according to its *true intent and meaning when it was adopted*.”³⁴ He thus reframed this policy question in these originalist terms, emphasizing the two core principles that unite all the different forms of originalism: “fixation” and “constraint.” The meaning of the Constitution is “fixed” at the founding and “constrains” or binds present-day interpreters.³⁵

Writing nearly a century and a-half before the emergence of modern “public meaning” originalism, Taney spoke in the dual registers of what we now know as original intentions and original public meaning: the Constitution’s “true intent *and meaning* when it was adopted.”³⁶ Taney did not distinguish between what the drafters intended “citizen” to mean and what the word would have meant to the ratifiers, but he can be forgiven for this imprecision, writing as he did before the emergence of the intentionalist/public meaning split within originalism.³⁷

As an intentionalist, Taney adamantly denied “that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were *intended* to bear *when the instrument was framed and adopted*.”³⁸ In an original public meaning vein, Taney argued that a facially underdetermined phrase in the Constitution—“citizen of the United States”—could be rendered determinate by context: a move that public meaning originalists call “contextual enrichment.”³⁹ Thus, Taney relied heavily on “the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted.”⁴⁰ The question turned on whether the word “citizen” in the Constitution meant white people of European descent, or extended to people of other races, in particular those forcibly imported from Africa and their descendants. Taney adopted the originalist frame by placing dispositive reliance on what he took “citizen” to mean to the Framers and ratifiers—not what it may have come to mean since then.

³⁴ *Id.* at 405 (emphasis added).

³⁵ See, e.g., Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–57 (2013) (arguing that all bona fide originalists agree on the two principles of “fixation” and “constraint”).

³⁶ *Dred Scott*, 60 U.S. at 405 (emphasis added).

³⁷ See Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 603–07, 609 (2004) (describing shift from “old originalism” and framers’ intentions to “new originalism” and “public meaning” in the 1990s and early 2000s).

³⁸ *Dred Scott*, 60 U.S. at 426 (emphasis added).

³⁹ *Id.* at 405; see, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1983–84 (2021).

⁴⁰ *Dred Scott*, 60 U.S. at 407.

Taney's conclusion that Black people could not be constitutional "citizens" rested on three intertwined arguments, each of which fits standard originalist methodology of contextual enrichment. First, because Black people were a "degraded" race brought to America involuntarily as property and denied citizenship in most states even when freed from slavery or born free, the word "citizen" could not include them.⁴¹ The implication of this argument is that the concept of "citizen," as that word was used and understood at the founding, implicitly included the notion of a fundamental equality of human capacity and status that prevailing beliefs ascribed to white people and denied to Black people. Second, the slave owners among the Framers would have been hypocrites (or worse) had they been willing to enslave members of a race entitled to "life, liberty, and the pursuit of happiness" under the Declaration of Independence or entitled to citizenship in the Constitution.⁴² As they were not hypocrites, they could not have believed that the meaning of the word "citizen" included Black people or intended to include Black people as constitutional citizens. Third, "it cannot be believed that the large slaveholding States regarded [Black people] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State."⁴³ That is to say, the ratifiers in those states necessarily assumed that the word "citizen" excluded Black people. If the word had had a racially inclusive or agnostic meaning, they would not have ratified the Constitution.

All three of these arguments are "contextual enrichment" arguments, deriving an original public meaning from the understandings and assumptions that determine how speakers at the time would have understood the meaning of "citizen." The second argument also suggests an intentionalist frame. The arguments thus fit comfortably within originalist methodology, even if originalists would be uncomfortable with their conclusions. Whether originalists can dismiss Taney's argument as incorrect or "bad" originalism remains to be seen: I discuss that question below.⁴⁴

B. Douglass's Glasgow Speech

Dred Scott was the capstone of two decades of Taney Court jurisprudence construing the 1787 Constitution as a pro-slavery, white-supremacist document.⁴⁵ But to join issue with this interpretation, we must consider Frederick Douglass's famous address in Glasgow, Scotland, in January 1860.⁴⁶ Douglass posed the question:

⁴¹ *Id.* at 409.

⁴² *Id.* at 410. If Black people were within the meaning of "all men are created equal," then slave-owning "would have been utterly and flagrantly inconsistent with the principles . . . asserted" by slave-owning signers of the Declaration. *See id.*

⁴³ *Id.* at 416.

⁴⁴ *See infra* Sections III.C.2, 3.

⁴⁵ *See* sources cited *supra* note 19.

⁴⁶ *See* DOUGLASS, *supra* note 1, at 380.

Is the Constitution pro-slavery or anti-slavery?⁴⁷ In the speech, Douglass contemptuously ignores the *Dred Scott* decision, alluding to it only obliquely when he asserts that the Constitution's Preamble begins "we the people," and not "we the citizens."⁴⁸ But Douglass's discussion implicitly extends to the closely related questions, whether "citizen" is whites-only, or racially inclusive, and whether the Constitution is white supremacist or racially egalitarian. The textual answers to all these questions run on the same lines. The crucial point is to understand that, despite the Manichaean framing of his question, and the seemingly strict textualism of his analysis, Douglass's Glasgow Speech is not essentialist. To be sure, the speech resoundingly affirms Douglass's break with the Garrisonians, who asserted that the Constitution was a pro-slavery "bargain with hell."⁴⁹ But Douglass rejects not only that conclusion, but also the essentialism that underlies it, and indeed the essentialism with which the question is framed.

Douglass begins in a textualist vein by rejecting references to the secret Convention debates and purported intentions of the Framers that were not manifested in the words of the Constitution.⁵⁰ There, the words "slave" and "slavery" do not appear.⁵¹ Douglass then looks, "one by one," at the constitutional provisions that purportedly sustain the arguments of "the human fleshmongers of America" that the Constitution is pro-slavery.⁵² The Three-Fifths Clause, far from empowering the slave states, penalizes them by excluding from the basis of representation two-fifths of "all other persons."⁵³ Therefore, "[a] black man in a free State is worth . . . two-fifths more than a black man in a slave State."⁵⁴ The twenty-year moratorium on banning the international slave trade was not a pro-slavery provision, Douglass argues, but rather a message to the slave-importing states that the slave trade, "which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union."⁵⁵ That provision "looked to the abolition of slavery rather than to its perpetuity," and with the slave trade having been banned by Congress, the moratorium is "a dead letter" that "now binds no man's conscience."⁵⁶ The Guaranty

⁴⁷ See *id.*

⁴⁸ *Id.* at 387. Nevertheless, the Glasgow speech repeats several of the interpretive arguments Douglass had made in earlier work, such as his "The Dred Scott Decision" speech delivered before the American Anti-Slavery Society on May 14, 1857. See *id.* at 344, 353–54; see also Mariah Zeisberg, Frederick Douglass, Citizen Interpreter 22–26 (Aug. 22, 2012) (unpublished manuscript) (available at SSRN), <https://ssrn.com/abstract=1583683> [<https://perma.cc/9CRG-Y5KM>] (describing Douglass's early-1850s adoption of anti-slavery interpretations of Fugitive Slave and Three-Fifths clauses).

⁴⁹ See DOUGLASS, *supra* note 1, at 380–81.

⁵⁰ See *id.* at 381.

⁵¹ See *id.* at 387–88.

⁵² *Id.* at 383–84.

⁵³ See *id.*

⁵⁴ *Id.* at 384.

⁵⁵ *Id.*

⁵⁶ *Id.*

Clause was not in its plain terms a provision for putting down slave insurrections, Douglass next argued.⁵⁷ But even if so construed, it authorized the abolition of slavery if the federal government deemed that abolition was the best way to preserve security from slave insurrections.⁵⁸ Lastly, the so-called “Fugitive Slave Provision” said nothing about slaves, whereas “persons . . . bound to serve and labour” could only mean indentured servants, because they had the capacity to enter into contracts to bind themselves to service or labor, whereas slaves—as involuntary property—did not.⁵⁹

Of course, all of these provisions are textually ambiguous at best. Implicitly addressing that, Douglass went outside the literal text of the Constitution and pointed to well-established interpretive principles that favored construing those ambiguities against slavery. “Where a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose,” Douglass argued, “we must in all cases adopt that which makes it accomplish an innocent purpose.”⁶⁰ Moreover, Douglass suggested, the preamble of the Constitution offers crucial interpretive guidance.⁶¹ The objects stated in the preamble—union, defence, welfare, tranquility, justice, and liberty—are all adverse to slavery.⁶² And the Preamble begins:

“[W]e the people”; not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheel-barrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established.⁶³

In sum, Douglass argues that the text of the Constitution is good, but has been misapplied by bad interpreters and bad governments: “The Constitution may be right, the Government wrong,” Douglass writes. “If the Government has been governed by mean, sordid, and wicked passions, it does not follow that the Constitution is mean, sordid, and wicked.”⁶⁴

Douglass’s speech poses the question in Manichean terms and argues forcefully for the anti-slavery interpretation. It is therefore understandable that the Glasgow Speech is widely assumed to answer the question in essentialist terms: that the

⁵⁷ See *id.* at 384–85.

⁵⁸ See *id.*

⁵⁹ See *id.* at 385–86.

⁶⁰ *Id.* at 387.

⁶¹ See *id.*

⁶² See *id.*

⁶³ *Id.*

⁶⁴ See *id.* at 388.

Constitution *is* anti-slavery. Law students and sophisticates alike take Douglass's assertion at face value, and from that premise, they dismiss his arguments as too clever by half and "off the wall."⁶⁵ One can point to tensions or contradictions in Douglass's speech: he claims that the Three-Fifths Clause does not refer to slaves, yet he then says that it penalizes the slave states. He suggests that the Constitution is clear, yet he acknowledges ambiguity when talking about several provisions. He criticizes slavery advocates for going outside the Constitution's literal text, and then does so himself. He relies heavily on the Preamble, which is conventionally viewed as having no legal effect, not even as an interpretive guide.⁶⁶

All these criticisms miss the point: Douglass did not intend for his arguments to be taken at face value.⁶⁷ The Glasgow Speech is a brilliant exercise in Socratic irony—adopting a pretended naïveté to make a subtle but decisive point. Here, Douglass purported to adopt a simplistic textualism, entirely innocent of historical context and current pragmatic consensus. But Douglass knew how the Constitution had been authoritatively interpreted and conventionally understood, and he was not so simple-minded as to believe that strict textualism could by itself overcome an entrenched contrary consensus. What appears on the surface to be a naïve textualism, is in fact a profound recognition that where the Constitution speaks obliquely or ambiguously, it invites contestation. Such struggle can be political rather than juridical, and is not seriously hampered by parchment barriers. Douglass was showing that the parchment barrier on this critical issue, a parchment barrier assumed to make abolition unconstitutional, was actually much thinner than had been supposed.

Douglass's Glasgow speech, then, was not an "off the wall" textual case for abolition, but a road map for a new constitutional politics. Douglass's point was not that the text of the Constitution "*is*" anti-slavery, but that it did not plainly support slavery or stand as an obstacle to its abolition. The key to the speech comes in Douglass's

⁶⁵ See, e.g., Balkin & Levinson, *Thirteen Ways*, *supra* note 18, at 78 ("The dissenting views of abolitionists like Lysander Spooner and Frederick Douglass, who insisted that the Constitution was actually hostile to slavery, were widely regarded as unsound examples of special pleading, or, in today's parlance, as 'off the wall.'" (footnotes omitted)). For a review and critique of the literature misconstruing Douglass's constitutional interpretation as textualist or originalist, see generally Zeisberg, *supra* note 48.

⁶⁶ See David S. Schwartz, *Reconsidering the Constitution's Preamble: The Words That Made Us U.S.*, 37 CONST. COMMENT. 55, 56, 60–61 (2022).

⁶⁷ Mariah Zeisberg offers a similar critique of interpretations of Douglass's anti-slavery constitutional arguments that "treat Douglass as a textualist" by taking his arguments at face value or reading them as "naïve textualist formalism." Zeisberg, *supra* note 48, at 25, 31 (quoting Charles W. Mills, *Whose Fourth of July? Frederick Douglass and "Original Intent,"* in FREDERICK DOUGLASS: A CRITICAL READER 100, 115 (Bill E. Lawson & Frank M. Kirkland eds., 1999)). But whereas Zeisberg reads Douglass's "hyperliteralism" as "a deeply intelligent strategy of resistance" to a clear, fixed, and pro-slavery public meaning, see *id.* at 25, I view it differently: as an exhortation, masked by Socratic irony, to adopt a linguistically permissible, evolving public meaning.

peroration. “[I]f there is once a will in the people of America to abolish slavery, there is no word, no syllable in the Constitution to forbid that result.”⁶⁸ The Constitutional Convention’s refusal to clearly “admit . . . that there could be property in men”⁶⁹ created an opening, a strategic ambiguity that offered an invitation to struggle. The slaveocracy had won the early rounds of this struggle. But, Douglass suggested, that was about to change. By January 1860, Douglass and other savvy political observers could see that the split in the Democratic party over the Lecompton Constitution in “Bloody Kansas” had created an opportunity for an antislavery party to win control of the government for the first time in U.S. history.⁷⁰ Douglass concluded:

If slaveholders have ruled the American Government for the last fifty years, let the anti-slavery men rule the nation for the next fifty years. . . . [N]ow let the freemen of the North, who have the power in their own hands, and who can make the American Government just what they think fit, resolve to blot out for ever the foul and haggard crime [of slavery]⁷¹

III. ORIGINALISM AND THE *DRED SCOTT* “TEST”

Dred Scott is by longstanding consensus a crucial judicial error, and its firmly entrenched place in our constitutional “anti-canon” means that it must teach us some important, negative lesson about our constitutional order.⁷² But the consensus has been far less clear about what *Dred Scott* teaches, and the *Dred Scott* literature is filled with entries trying to discern the lesson.

In his cutting-edge, neo-Garrisonian research, Graber not only showed that the *Dred Scott* decision was consistent with preponderant, or plurality views about race and citizenship; he also challenged the conventional wisdom that *Dred Scott* could teach us something about bad constitutional interpretation. A standard form of argument maintains, quite reasonably, that an interpretive approach can be “tested” by its capacity to support canonical Supreme Court decisions and to reject infamous, anti-canonical ones.⁷³ *Dred Scott* has certainly been used in this way.⁷⁴ For many,

⁶⁸ DOUGLASS, *supra* note 1, at 388.

⁶⁹ James Madison, *Notes on the Constitutional Convention* (Aug. 25, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 408, 417 (Max Farrand ed., 1911) (“Mr. Madison thought it wrong to admit in the Constitution the idea that there could be property in men.”).

⁷⁰ See, e.g., MCPHERSON, *supra* note 17, at 213–14.

⁷¹ DOUGLASS, *supra* note 1, at 389–90.

⁷² Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381, 382 (2011); see Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998) [hereinafter Balkin & Levinson, *Canons*].

⁷³ Balkin & Levinson, *Canons*, *supra* note 72, at 1018–20; Greene, *supra* note 72, at 380, 386–87; see Graber, *Desperately Ducking Slavery*, *supra* note 18, at 271–72.

⁷⁴ See Graber, *Desperately Ducking Slavery*, *supra* note 18, at 272 (“Each school of contemporary constitutional thought claims *Dred Scott* embarrasses rival theories.”); J.M.

Dred Scott is a test of originalism, because Taney's opinion was decidedly originalist.⁷⁵ But a second element of Graber's neo-Garrisonian thesis maintains that the result in *Dred Scott* would have been supported by any plausible interpretive modality. That, Graber argues, undermines the claim that Taney's opinion discredits originalism or any other theory of constitutional interpretation.

A. The Graber Thesis

Mark Graber's thesis, though at one time provocative revisionism, is well on its way to becoming conventional.⁷⁶ Graber's most disturbing conclusions are unassailable. Roger Taney, Graber demonstrates, did not commit the most serious forms of judicial misconduct. Taney did not plainly distort any particular constitutional language or demonstrate infidelity to any prevailing constitutional norm at the time. While he violated the racial equality norm that emerged a century later, it is questionable to condemn judges for being persons of their time; Taney's effort to subordinate what were then fringe views of racial equality to a prevailing norm of preserving a union with slavery could find support in Joseph Story's respected and

Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1710–11 (1997); Greene, *supra* note 72, at 406–12.

⁷⁵ See, e.g., Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 *CONST. COMMENT.* 37, 46, 48 (1993) (arguing Taney's opinion "is a riot of originalism" and is "evidence of how originalism can contribute to injustice"); Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of the Revolution and Chief Taney's Originalism in Dred Scott*, 24 *J. CONST. L.* 676, 680 (2022) ("Taney based this position on an aggressive originalism."); Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 *CHI.-KENT L. REV.* 393, 422 (2007) ("Chief Justice Taney's approach to the question of citizenship was one of strict originalism."); Hon. Sol Wachtler, *Dred Scott: A Nightmare for the Originalists*, 22 *TOURO L. REV.* 575, 593–99 (2006) (concluding that *Dred Scott* was the "product of originalism").

⁷⁶ See Allen Mendenhall, *Haunted by History's Ghostly Gaps: A Literary Critique of the Dred Scott Decision and Its Historical Treatments*, 1 *GEO. J.L. & MOD. CRITICAL RACE PERSP.* 259, 265, 265 n.33 (2009) (identifying Graber's thesis as controversial). For scholars embracing (or anticipating) Graber's view, either expressly or implicitly, see, for example, ROOSEVELT, *supra* note 5, at 118 ("*Dred Scott* . . . is not an aberrational product of 'bad apple' Supreme Court justices. It is the natural consequence of the pro-slavery tilt of the Founders' Constitution."); Julie Novkov, Book Review, 42 *L. & SOC'Y REV.* 685, 685 (2008) (reviewing MARK GRABER, *DRED SCOTT*, *supra* note 18) ("Graber upends the competing logics, demonstrating that institutional, historical, and aspirational approaches can all plausibly support Chief Justice Roger Taney's side in the case."); Jared A. Goldstein, *The Klan's Constitution*, 9.2 *ALA. C.R. & C.L. L. REV.* 285, 306–07 (2018); Greene, *supra* note 72, at 408–12; Balkin & Levinson, *Thirteen Ways*, *supra* note 18, at 71–72; Austin Allen, *Rethinking Dred Scott: New Context for an Old Case*, 82 *CHI.-KENT L. REV.* 141, 169 (2007); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in all the Wrong Places*, 54 *DRAKE L. REV.* 795, 798 (2006); Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 *HAMLINE L. REV.* 1, 1–4 (1996).

highly conventional *Commentaries on the Constitution*.⁷⁷ Taney's opinion conformed even to many of today's process norms of judicial interpretation, and his decision could have been supported by any of the modalities of constitutional interpretation we recognize today. As Graber sadly concludes, "[n]o prominent theory could have promised perfectly just outcomes during the 1850s . . . *Dred Scott* is an evil decision because slavery and white supremacy are evil practices, and not because some flaw existed in the interpretive modalities adopted by the Taney Court."⁷⁸

There can be little dispute that the Constitution of 1787 encompassed a compromise with the "constitutional evil" of slavery. A constitution that embeds a compromise with evil, Graber convincingly argues, offers no means to compel judges or other interpreters to overcome that evil (short of amendment, anyway), and does not even encourage them to do so.⁷⁹ Graber reaches the depressing conclusion that *Dred Scott*, however deplorable we find it today, is a fairly straightforward reflection of its time. With strong historical support, Graber maintains that the citizenship holding was consistent with majority views about the purported racial inferiority of Black people. To be sure, *Dred Scott* was reviled in its time by a significant plurality of the public—mostly, supporters of the Republican Party. But it was not reviled, primarily, for its racism in deciding the citizenship question. The mainstream objection to *Dred Scott* was its decision on the territorial question—its failure to preserve the territories for free white labor. And even Taney's resolution of that issue was not beyond the pale of constitutional politics, supported as it was by a different, substantial plurality of the public. The *Dred Scott* majority must therefore, the Graber thesis suggests, be acquitted of the most serious charges against it, and only convicted, if at all, on counts that are much less anti-canonical. Taney and his concurring brethren are guilty of judicial hubris or overreach in thinking that the Supreme Court could settle a politically divisive controversy—in that case, over slavery in the territories. That charge puts *Dred Scott* in company with such cases as *Planned Parenthood v. Casey* and even with the dissent in *NFIB v. Sebelius*. Taney is also guilty of deciding an issue unnecessarily. The citizenship ruling was unrelated to, and unnecessary to decide the more pressing territorial question; at the same time, since the citizenship ruling purportedly eliminated federal jurisdiction to reach the merits question of slavery in the territories, it was improper to decide both. But that produces a very tepid criticism of *Dred Scott* compared with the charge of betraying the Constitution to embed white supremacy.

⁷⁷ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 677 (1833) (stating that, as the price of union, it "forms no just subject of complaint" that "many sacrifices of opinion and feeling are to be found made by the Eastern and Middle states to the peculiar interests of the south").

⁷⁸ Graber, *Desperately Ducking Slavery*, *supra* note 18, at 317–18; see GRABER, *DRED SCOTT*, *supra* note 18, at 83–85.

⁷⁹ GRABER, *DRED SCOTT*, *supra* note 18, at 85–86.

In sum, the Graber thesis suggests that we cannot criticize *Dred Scott* as “wrong from the day it was decided”—to quote Chief Justice Roberts’s epitaph on *Korematsu*,⁸⁰ the third, along with *Plessy v. Ferguson*, of the most anti-canonical race cases. And the Graber thesis concludes that we can’t use *Dred Scott* to discredit any interpretive theory. *Dred Scott*, in this view, is only a cause to lament constitutional evil and our racist past.

But this abject conclusion is overstated. Examining whether an interpretive approach shows that *Dred Scott* was “wrong from the day it was decided” is not the only valid test of interpretive approaches, and perhaps not even the best one. It is perhaps a valid test of originalism and any other theory that fixes meaning at some point in the past. But the virtue of living constitutionalism is precisely its capacity for change, its embrace of evolving moral values. We should therefore ask, in addition and perhaps instead, whether the various interpretive approaches would produce different outcomes in the *Dred Scott* case, using the available substantive legal materials of 1857—most importantly, the 1787 Constitution, prior to the Reconstruction amendments—were it decided *today*.

Most interpretive approaches find significant normative value in some measure of continuity with the founding. For originalism, it is the foundation for the entire interpretive edifice. It is therefore a fair and important question whether originalists today might replicate Taney’s decision in *Dred Scott* if they put the Reconstruction Amendments aside—whether, in other words, originalism understands the 1787 Constitution as white supremacist—or can guarantee that it is not. After all, as the neo-Garrisonian critique contends, it is only by today’s moral judgments that we can condemn *Dred Scott*. And an interpretive theory that *can* condemn *Dred Scott today* offers a significant, perhaps decisive, advantage over one that can’t.

It is commonplace to assert that *Dred Scott* is rejected by the living Constitution. Its placement in the anti-canon of Supreme Court decisions confirms that. What has been less well understood is why originalism must own *Dred Scott*—a point that critics of originalism have simply taken for granted and that originalists vehemently, and incorrectly, deny.

B. Taney’s Choice of Originalism

It is true, as Graber has shown, that any constitutional modality, including living constitutionalism, could and almost certainly would have produced the same result in *Dred Scott* in 1857. The nation was not moving in a progressive direction on race in the run-up to the Civil War. The living Constitution was probably more white supremacist in 1857, at least overtly, than it was even in 1787. While the emerging Republican Party opposed the territorial extension of slavery, it acknowledged the

⁸⁰ *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (“*Korematsu* was gravely wrong the day it was decided . . .”).

constitutional entrenchment of slavery in the states where it existed.⁸¹ Few questioned the right of states like Illinois to prohibit free Black people from taking up residence there.⁸² The Republican platform said nothing about racial equality, while Stephen A. Douglas, who would be the northern Democratic presidential candidate in 1860, spoke for a significant body of public opinion when he repeatedly asserted in his 1858 Senate campaign that the government of the United States was a government for white people.⁸³

Yet, originalism fails the revised *Dred Scott* test. Originalism, by its nature, must produce the same answer at any period. Living constitutionalism need not. It is free to adopt—indeed, is based on adopting—the constitutional morality of its time. Originalism is not. The original meaning of the 1787 Constitution should be the same in 1857 as in 2024, at least absent new historical research that dramatically alters our understanding of history. Though living constitutionalism was white supremacist in 1857, the fact remains that Taney chose to argue in an originalist mode. That fact is significant; we have to consider why he chose to do so.

The Framers were ambivalent about slavery. A critical mass of Framers were ashamed to admit in the Constitution “that there might be property in man,” and many believed, as Lincoln argued, that the institution was on the path to “ultimate extinction.”⁸⁴ Taney might have acknowledged this. And he then might easily have dismissed these views, by arguing in a living constitutionalist vein: that, whatever the Framers and ratifiers thought about slavery, by 1857 it was deeply entrenched

⁸¹ Even in 1860, the Republican Party platform, while “deny[ing] the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States,” nevertheless reaffirmed “the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively.” *Republican Party Platform of 1860*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1860> [<https://perma.cc/C9M8-ZZ8Z>] (last visited Sept. 25, 2024) (announced at the Convention on May 17, 1860).

⁸² See LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES* 62 (1961).

⁸³ See, e.g., *Republican Party Platform of 1860*, *supra* note 81; GRABER, *DRED SCOTT*, *supra* note 18, at 80; Stephen A. Douglas, U.S. Senator, First Debate With Abraham Lincoln: Ottawa, Illinois (Aug. 21, 1858) (transcript available in *First Debate: Ottawa, Illinois*, NAT’L PARK SERV.: LINCOLN HOME NAT’L HISTORIC SITE (Apr. 15, 2015), <https://www.nps.gov/liho/learn/historyculture/debate1.htm> [<https://perma.cc/ZT7L-75PN>]) (“I believe this Government was made on the white basis. . . . I believe it was made by white men for the benefit of white men and their posterity forever, and I am in favor of confining citizenship to white men . . .”).

⁸⁴ See Madison, *supra* note 69, at 417 and accompanying text; Abraham Lincoln, Speech at Jonesboro, Illinois, Sept. 15, 1858, in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 116, 117 (Roy P. Basler, ed., 1953) (“I say in the way our fathers originally left the slavery question, the institution was in the course of ultimate extinction . . .”); SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* 2–4, 22 (2018).

by judicial precedents and reliance interests; that protecting it had become a sine qua non of preserving the union, the Constitution's ultimate purpose; and that allowing free Black citizens to travel in slave states would pose an intolerable threat to security and union.⁸⁵ These policy and consequentialist arguments have a place in living constitutionalism, but not in originalist interpretation.⁸⁶

To be sure, there has always been rhetorical appeal in enlisting the Framers on one's side in any constitutional argument, and that was undoubtedly a significant element in Taney's motivation to adopt an originalist mode.⁸⁷ But there was a far more compelling reason for Taney to choose originalism: A living Constitution would be subject to change. Thus, Taney asserted, it was "altogether inadmissible" to permit

any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, [to] induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.⁸⁸

Taney was clearly not thinking about the present—racial egalitarianism was a marginal view in 1857, and may or may not have been on the rise. Rather, he was thinking about the future: Taney apparently perceived racial egalitarianism as a growing threat. More importantly, Taney was well aware in 1857 of the growing strength of the anti-slavery Republican party. It is originalism, not other theories or modalities of constitutional interpretation, that deems past meaning to be fixed and binding. It is probable that Taney understood that winning the originalist case for a pro-slavery, white-supremacist Constitution offered the best chance of resisting foreseeable political change.⁸⁹ Resistance to evolving morality is originalism's foremost claimed normative virtue.

⁸⁵ Cf. STORY, *supra* note 77, at 677 (conceding that acceptance of slavery was the price of union).

⁸⁶ Originalists do argue in these latter modalities when engaging in "constitutional construction," but they do not do so in "constitutional interpretation," and it is the latter which is the defining element of their theory. See Solum, *Constitutional Construction*, *supra* note 35, at 469–73 (distinguishing interpretation from the "construction zone"). Critics have observed that once originalists shift to "construction," their methodology is essentially no different from non-originalist modes. See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 749–76 (2011).

⁸⁷ Cf. Robert E. Mensel, *Originalism and Ancestor Worship in the Post-Heroic Era: The Dred Scott Opinions*, 17 WIDENER L.J. 29, 33 (2007) (arguing that Taney's originalism was motivated by apocalyptic ancestor worship).

⁸⁸ *Dred Scott v. Sandford*, 60 U.S. 393, 426 (1856).

⁸⁹ Cf. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 575–77 (2002) (arguing that *Dred Scott* was intended to "preempt" a shift in constitutional politics over slavery).

C. Can Originalism Disown Dred Scott?

Faced with Taney's embrace of originalism, present-day originalists have four grounds to disown *Dred Scott*'s white supremacist holding on Black citizenship. One is to concede that Taney got matters right—that the original Constitution was pro-slavery and fundamentally white supremacist—but that that racial injustice was corrected by the Reconstruction Amendments. A second is to say that Taney practiced “bad originalism”—he chose a valid methodology but applied it incorrectly. A third is to claim that new historical research has dramatically altered our understanding of the founding era from what it was in Taney's day, and that, as a result, the 1787 Constitution was not white supremacist after all. And a fourth is to claim that the original meaning of “citizenship” is indeterminate and resort to the “construction zone.”

None of these answers are satisfactory. To be sure, any skilled originalist could come up with plausible arguments that the original meaning of the word “citizen” is racially inclusive or is agnostic on the race of those who could be citizens within the meaning of the Constitution. My argument is that originalism cannot produce a more definitive candidate for the original meaning of “citizen” than Taney's white supremacist definition, and can therefore not disown Taney's originalist answer to the citizenship question.

1. The Reconstruction Amendments

The Reconstruction Amendments appear at first blush to be a handy escape for originalism. Whatever the original public meaning of the Constitution on slavery and race, an originalist might argue, that meaning was superseded by the original public meaning of the Thirteenth, Fourteenth, and Fifteenth amendments.

But originalism can't be let off so easily. The Reconstruction Amendments simply recast the question of original meaning from the racism prevalent in 1787 to the racism prevalent in 1868. If the original meaning of the 1787 Constitution was “we the white people,” it is far from clear that the original public meaning of the Reconstruction Amendments was to expunge white supremacy from the Constitution, and thus bring non-whites into what today we mean by full equality. To be sure, the birthright citizenship clause of the Fourteenth Amendment overruled *Dred Scott*'s citizenship holding, but none of the Reconstruction Amendments necessarily ruled out second-class citizenship for non-whites.

Originalists who assert that the original meaning of the Fourteenth Amendment was to purge racial inequality completely from the constitutional order—going all the way back to Michael McConnell's much-criticized historical argument that the original public meaning of the Equal Protection Clause barred segregated public schools—have to ignore a huge swath of contrary evidence and ignore the predominant understanding of the Fourteenth Amendment at its framing and for many

decades thereafter.⁹⁰ Throughout the late nineteenth century, eight of nine Supreme Court Justices believed that the Equal Protection Clause did not guarantee “social” equality.⁹¹ So viewed, the Constitution protected private race discrimination in employment, private race discrimination in the serving of customers, segregated public facilities, and prohibitions of interracial marriage.⁹² Social segregation was primarily enforced in the private sector, yet the Supreme Court has never said that the Equal Protection Clause prohibits race discrimination in the private sector, or even that Congress’s power to enforce the equal protection guarantee extends to the power to prohibit private-sector race discrimination.⁹³ Nineteenth- and early twentieth-century interpreters viewed abolition of slavery, formal equality “before the law,” and voting rights as fully compatible with the enforced social and practical inferiority of non-whites.⁹⁴

An originalist argument that the Reconstruction Amendments eliminated white supremacy lock, stock, and barrel necessarily engages in loose construction. If “equal protection” is not tethered to its nineteenth century “public meaning,” but is instead floated to heights of generality broad enough to accommodate the more expansive understandings of later eras, originalism constrains no more *or differently* than living constitutionalism.

Originalists will at times distinguish the original “meaning” of constitutional text from what has been called “original expected applications.”⁹⁵ They might argue

⁹⁰ See Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 VA. L. REV. 947, 953 (1995). But see Michael J. Klarman, Response, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (refuting McConnell’s argument). There has been a great deal of important originalist scholarship on the Reconstruction Amendments in recent years. None of it, however, alters the fundamental historical facts that the U.S. constitutional order, for many decades, understood those amendments as permitting second class citizenship for non-whites.

⁹¹ See *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883); *Plessy v. Ferguson*, 163 U.S. 537, 548–50 (1896).

⁹² See *The Civil Rights Cases*, 109 U.S. at 24–25; *Plessy*, 163 U.S. at 548–50. Both were 8–1 decisions, with Justice John Marshall Harlan as the lone dissenter.

⁹³ “The landmark 1964 Civil Rights Act is constitutional, not because of Congress’s power to enforce ‘the equal protection of the laws,’ but because Congress has the power to regulate the sale of a barbecue sandwich.” SCHWARTZ, *supra* note 19, at 234; see *The Civil Rights Cases*, 109 U.S. at 24–25; *United States v. Morrison*, 529 U.S. 598, 602, 621–22 (2000) (reaffirming “state action” requirement of the *Civil Rights Cases*); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964) (upholding the 1964 Civil Rights Act under the Commerce Clause, while declining to overrule the *Civil Rights Cases*).

⁹⁴ See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 70–74 (2011). Compare, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 308–10 (1879) (upholding right of Black citizens to sit on juries), with *Plessy*, 163 U.S. at 544 (Fourteenth Amendment “could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality”).

⁹⁵ See Lawrence Solum, *Original Expected Applications Redux*, BALKINIZATION BLOG

this way: although the public that ratified the Fourteenth Amendment *expected* the Equal Protection Clause to be *applied* in a manner that would allow segregation, the *meaning* of “equal protection” was always full racial equality. There is undoubtedly a meaningful distinction between meaning and expected applications. But this type of argument, pushed this far, is merely an easy way for originalists to eliminate any original meaning that would prove embarrassing today. Again, such a move breaks down the distinction between public meaning originalism and living constitutionalism, and the difficulties of this originalist move have been amply explored by others.⁹⁶

Moreover, originalism is a strong contributing factor to the need for the Reconstruction Amendments in the first place. Slavery might have been abolished by legislation in the absence of a fundamentally originalist conviction that abolition legislation was unconstitutional before ratification of the Thirteenth Amendment.⁹⁷ Douglass argued that slavery could have been abolished, because the words of the Constitution did not forbid slavery’s abolition. Taney and his colleagues, seeing the rising strength of the anti-slavery party, could discern the capacity of living-constitution arguments to destabilize slavery. This undoubtedly made an originalist argument for a pro-slavery, white supremacist Constitution more attractive, if not essential.

In any case, reliance on the Reconstruction Amendments to spare originalism from its association with *Dred Scott* in essence concedes that Taney’s opinion was correct and that the 1787 Constitution is a white supremacist document. Would originalists really want to do this?

2. Bad Originalism

Few if any originalists would likely concede that the original meaning of the Constitution of 1787 embedded white supremacy, even with the saving grace of the Reconstruction Amendments. The resulting dead hand problem would be overwhelming to the theory: if the Constitution of 1787 is so utterly at odds with today’s constitutional morality, the normative appeal of originalism vanishes. In order for originalists to disown *Dred Scott*, therefore, they must argue that Taney applied the correct methodology incorrectly. He engaged in “bad originalism.”⁹⁸

(Jan. 27, 2023), <https://balkin.blogspot.com/2023/01/original-expected-applications-redux.html> [<https://perma.cc/3PBV-NAC8>]; Colby, *supra* note 86, at 730, 730 n.99.

⁹⁶ See, e.g., Klarman, *supra* note 90; Colby, *supra* note 86, at 749–76.

⁹⁷ See DAVID L. LIGHTNER, *SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR* 91–112 (2006).

⁹⁸ See Mike Rappaport, *A Fatal Loss of Balance: Dred Scott Revisited*, UNIV. SAN DIEGO SCH. L. CTR. STUDY CONST. ORIGINALISM: ORIGINALISM BLOG (Mar. 30, 2011), <https://originalismblog.typepad.com/the-originalism-blog/2011/03/a-fatal-loss-of-balance-dred-scott-revisitedmike-rappaport.html> [<https://perma.cc/4XFJ-9LUT>] (“Taney’s was clearly bad originalism. In fact, the best argument against Taney’s opinion is that it was not the original meaning.”); Barnett, *supra* note 9.

But how exactly was Taney's originalism bad? Notwithstanding the conclusory assertions of a handful of originalists seeking to distance originalism from *Dred Scott*,⁹⁹ it seems likely that Taney got his originalism right. Or if not plainly right, Taney's *Dred Scott* opinion at least conformed to present-day professional standards of "applied originalism"—the application of public meaning originalism to particular interpretive questions.¹⁰⁰ This does not—I repeat—*does not* reflect a correct interpretation of the 1787 Constitution, but rather reflects the flawed nature of originalism itself.

As we have seen, Taney approached the question of Black citizenship as an originalist. He made the question turn on the original meaning of "citizen" in the Constitution—whether as intended by the Framers or understood by the ratifying public. Because there was no direct evidence, he engaged in what originalist scholars call "contextual enrichment," by making inferential arguments about what "citizen" meant to the Framers and ratifiers based on their interests, motivations, and indirectly related utterances. To this extent at least, Taney's approach conforms to originalist methodology. Present-day originalist scholars frequently make broad arguments based on textually non-obvious meanings packed into single words or short phrases in the Constitution.¹⁰¹

Originalists cannot thus disown Taney's opinion on methodological grounds. Instead, they must argue that he got his historical facts wrong: that the dissenting Justices McLean and Curtis were right and Taney was wrong on the history of Black citizenship. It is true that conventional historians, who are eager to condemn *Dred Scott*, typically make this assertion.¹⁰² Don Fehrenbacher's highly influential 1978 book, *The Dred Scott Case*, which quickly became the standard account among historians, called Taney's opinion an "extraordinary cumulation of error, inconsistency, and misrepresentation" and "a gross perversion of the facts."¹⁰³

⁹⁹ See sources cited *supra* notes 9 and 98.

¹⁰⁰ See, e.g., Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CON LAW NOW 235, 248 (2018) (using "applied originalism" in this way).

¹⁰¹ See, e.g., MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* (2020) (arguing that the phrase "executive power" in the Constitution incorporates a suite of British royal prerogative powers); Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 841–42 (2020) (arguing that "state" had previously unrecognized meaning incorporating international law theory). For criticisms of such originalist claims, see Martin S. Flaherty, *Peerless History, Meaningless Origins*, 1 J. AM. CONST. HIST. 670, 692 (2023) (questioning such "eureka" originalist insights based on clever decoding to discover an interpretation that was purportedly hiding in plain sight); Andrew Kent, *Executive Power, the Royal Prerogative, and the Founders' Presidency*, 2 J. AM. CONST. HIST. 403 (2024) (criticizing McConnell's claim).

¹⁰² See, e.g., MCPHERSON, *supra* note 17, at 174–75 (arguing that Taney's historical conclusion "was false, as Curtis and McLean pointed out").

¹⁰³ FEHRENBACHER, *supra* note 17, at 349, 559. For Fehrenbacher's influence on the

But the historians' attack on Taney's account of Black citizenship may reflect a misconception about how those facts should be applied to produce a legal conclusion. Taney was not "grossly perverting" historical facts in asserting that Black people were widely regarded as inferior in 1787; that they were either denied citizenship in most states, or at most granted second-class citizenship; and that, where they were deemed citizens, it was by legislative grace rather than birthright. The worst that could be said for Taney's historical account was that he overstated these facts as if there were no exceptions. Of course there were exceptions, as the dissent emphasized: five of the original thirteen states allowed Black men to vote (albeit with racially discriminatory property qualifications in most cases) and to participate in the Constitution's ratification process.¹⁰⁴ But these exceptions arguably "proved the rule."

Taney and the dissenters (and the historian-critics of *Dred Scott*) pass like two ships in the night because they implicitly apply differing burdens of proof to their respective arguments. For the dissenting Justices Curtis and McLean, the burden of proof was on the majority to disprove Black citizenship by something like "beyond a reasonable doubt." Therefore, to the dissenters—and their later historian adherents—any non-trivial set of founding-era opinions or practices recognizing Black citizenship should have defeated Taney's conclusion.¹⁰⁵ For Taney, however, the burden of proof on his argument was something like "preponderance of the evidence" or even the lower, plurality-based standard known as "best explanation."¹⁰⁶ These standards ask, in essence, "what would a majority (or plurality) of relevant people in 1787 have said or understood in answer to the question of Black citizenship?" It is clear from the Taney and Curtis opinions, and the historical record more generally, that Black citizenship was the exception rather than the rule in the United States. If we were forced to pick a single correct meaning between two alternatives—constitutional "citizenship" means whites only or "citizenship" includes free Black people—the whites-only answer is "better" in the sense of "consistent with the views of more people."

conventional account, and other scholars expressing similar views, see Allen, *supra* note 76, at 145–48. See also MCPHERSON, *supra* note 17, at 173–74 (relying entirely on Fehrenbacher).

¹⁰⁴ See *Dred Scott v. Sandford*, 60 U.S. 393, 576, 582 (Curtis, J., dissenting).

¹⁰⁵ See *id.* at 572 (Curtis, J., dissenting) (finding it necessary only "[t]o determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States").

¹⁰⁶ The "best explanation" standard (which exists in philosophy and legal theory, but not in law) holds that a claim is proven when the evidence better supports it than any of two or more competing claims. The best explanation is sustained by a "plurality" rather than preponderance of the probative value of the existing evidence. See David S. Schwartz & Elliot Sober, *The Conjunction Problem and the Logic of Jury Findings*, 59 WM. & MARY L. REV. 619, 642–43, 648–49 (2017). For discussions of the "best explanation" standard as applied to originalist claims, see Solum, *supra* note 39, at 2013 n.176; Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 1003–04 (2024).

This methodological approach is entirely consistent with the practice of today's applied originalists. Most originalist scholars today would be delighted to have as much evidentiary support for their conclusions as Taney had. As originalist scholar Prakash puts it, "[o]riginalism simply does not rest on a theory of definite meanings; it only requires an ability to determine which of several possible meanings better reflects the most natural reading of the word or phrase when the text was ratified."¹⁰⁷ It is hard to deny that whites only "better reflect[ed] the most natural reading" of "citizen" as understood by a plurality of relevant interpreters in 1787.

Prakash's "better" implies something like a "best explanation" standard of proof for originalist arguments. But, consistent with their ideological commitment to the predominance of determinate original meanings, applied originalists tend to hold their conclusions to even lower evidentiary thresholds than this.¹⁰⁸ In practice, many originalists tend to apply something more akin to a "substantial evidence" standard, in which a rigorous weighing of contrary evidence is not required.¹⁰⁹ One can even find instances of originalists applying the lowest burden of proof known in law—the "some evidence" standard, which "is satisfied" if "there is *any* evidence in the record that could support the conclusion reached."¹¹⁰ Thus, in an example cited by Richard Fallon, Justice Thomas argued that the Equal Protection Clause definitively barred segregated schools as a matter of original meaning; Thomas's evidence consisted of a single 1868 Iowa Supreme Court case to that effect.¹¹¹ As Fallon put it mildly, Thomas did not consider "evidence that might be adduced on the other side."¹¹²

In this light, it would be exceedingly difficult to say that Taney, who marshalled a fair amount of evidence in support of his citizenship conclusion, failed to meet contemporary professional standards of originalist inquiry. This in turn makes it difficult to say that Taney engaged in bad originalism. He conscientiously made the two analytical moves made by present-day public meaning originalists when they

¹⁰⁷ Prakash, *supra* note 22, at 535.

¹⁰⁸ See Flaherty, *supra* note 101, at 690–702 (making this argument); see also GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 120 (2017) (acknowledging that his fellow originalists generally fail "to identify the operative standard of proof").

¹⁰⁹ See *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) ("[T]he threshold for such evidentiary sufficiency is not high. Substantial evidence . . . means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal quotations omitted)). For an example, see Bellia & Clark, *supra* note 101, at 838–39, together with David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CON. HIST. 629, 657 (2023) (presenting contrary evidence unaddressed by Bellia & Clark).

¹¹⁰ *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455–56 (1985) (emphasis added); *accord Meeks v. McBride*, 81 F.3d 717, 719 (7th Cir. 1996) (the "some evidence" standard is satisfied if the "decision . . . has some factual basis").

¹¹¹ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 327 (2013) (Thomas, J., concurring).

¹¹² See Richard H. Fallon Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1462 (2021).

attempt to apply their methodology to specific issues. First, he assumed that the relevant constitutional language *had to have* a unique meaning. Second, he resolved evidentiary conflicts by choosing the predominant candidate for this supposed unique meaning. Because one candidate appeared better, there was no need for Taney to discuss “irreducible ambiguity,” a concept that applied originalists recognize in theory but prefer not to apply in practice.¹¹³ All the while, Taney—like present-day originalists—ignored the likelihood that there was *no* original meaning: that the question was an invitation to struggle through constitutional politics rather than definitive and definitional judicial decision.

3. New Historical Research

Originalists cannot point to new historical research suggesting that an “originalist answer” to the question of United States citizenship in the 1787 Constitution would today demonstrate that Taney was wrong. We know this because the trend in historiography is going in the opposite direction, as demonstrated by neo-Garrisonian scholarship. Recent, spirited efforts to extol an anti-slavery Constitution of 1787 by present-day “anti-Garrisonian” historians do not show otherwise.¹¹⁴ What these latter efforts tell us is *not* that the 1787 Constitution *is* racially inclusive or anti-slavery. To the extent that this recent scholarship states its conclusions in such essentialist terms, it is less suggestive of truly revisionist knowledge than of a dispute over the burden of proof, a dispute somewhat analogous to that between the majority and dissent in *Dred Scott* itself. Today’s anti-Garrisonians at times can be read to suggest that any significant anti-slavery opinion in 1787 suffices to establish that the Constitution at that time *was* anti-slavery. But this scholarship is better understood to show that, at most, these issues were contested. The results of such contestation left the Constitution’s text ambiguous, an invitation to future contestation.

4. The Construction Zone

Originalism does recognize cases where constitutional text “runs out” or where an “irreducible ambiguity” prevents the interpreter from finding a uniquely dispositive, determinate original meaning.¹¹⁵ Originalists might argue that “contested”

¹¹³ See *infra* Section III.C.4 & note 115 for an explanation of “irreducible ambiguity” in originalism.

¹¹⁴ See, e.g., WILENTZ, *supra* note 84, at 1–5, 22 (claiming that the Constitution was fundamentally anti-slavery). But see Aaron R. Hall, Book Review, 40 J. EARLY REPUB. 388, 391 (2020) (reviewing SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING (2018)) (criticizing Wilentz for “ambitiously reject[ing]” the more limited claim that the Constitution was ambiguous about slavery).

¹¹⁵ See, e.g., Solum, *Constitutional Construction*, *supra* note 35, at 469 (arguing textual determinacy can be undermined by “irreducible ambiguity, vagueness, gaps, and contradictions”); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory*

provisions are simply an instance of such indeterminacy. These indeterminacies move originalist interpretation into the “construction zone,” where the core originalist principles of fixation and constraint dissipate, because the analysis shifts into non-originalist interpretive modes, such as “history and tradition,” constitutional “structure,” cost-benefit balancing, and contemporary moral values.¹¹⁶ An originalist might argue that the meaning of “citizen” in the 1787 Constitution is indeterminate, and that the methodology of the construction zone produces a racially inclusive interpretation.

This is a problematic response. To begin with, originalism threatens to undermine its own theoretical promise if its adherents declare “indeterminacy” and run to the construction zone every time a valid “originalist answer” makes originalism look bad. While originalists have an ongoing internal debate about the size of the construction zone—that is, the number of constitutional provisions whose original meaning is indeterminate, requiring resort to the construction zone¹¹⁷—it is undeniable that the larger the construction zone, the less resolving power originalism has.¹¹⁸ That’s because there is very little daylight between the methodology of the

of Originalism, 107 GEO. L.J. 1, 10 (2018) (“construction” is undertaken “when the text ‘runs out’” (citations omitted)). “Determinacy” refers to a meaning that is both definite and dispositive of the question at hand. A given word or phrase in the Constitution may be determinate for some questions, but not others. For example, the provision in Article II, Section 1 of the Constitution that no person “shall . . . be eligible to that Office [of president] who shall not have attained to the Age of thirty five Years” is determinate that a twenty-nine-year-old is ineligible to run for president in a given election year, but indeterminate as to whether a would-be president must be thirty-five on election day, or inauguration day. Serious constitutional disputes tend to involve such contextual indeterminacies.

¹¹⁶ See, e.g., Solum, *Constitutional Construction*, *supra* note 35, at 537; Coan & Schwartz, *supra* note 106, at 1023–28.

¹¹⁷ Compare Michael Ramsey, *David Schwartz on Originalism and Indeterminacy*, UNIV. SAN DIEGO SCH. L. CTR. STUDY CONST. ORIGINALISM: ORIGINALISM BLOG (Jan. 8, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/01/david-schwartz-on-originalism-and-indeterminacy-michael-ramsey.html> [<https://perma.cc/4TJ3-P6WU>] (denying that “all (or even most) disputed constitutional issues can be settled by application of the original public meaning”), with Mike Rappaport, *Original Methods Originalism Part III: The Minimization of the Construction Zone Thesis*, L. & LIBERTY (June 2, 2017), <https://lawliberty.org/original-methods-originalism-part-iii-the-minimization-of-the-construction-zone-thesis/> [<https://perma.cc/J55G-UJ4N>] (arguing that “the construction zone is quite small, if it exists at all”).

¹¹⁸ See Fallon, *supra* note 112, at 1425–27 (arguing that originalism cannot resolve significant interpretive disputes); Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 521–22 (2011) (“[I]ts claim as to the determinacy of constitutional meaning is the single most consistent distinguishing feature of originalism . . .”). For a recognition of the problem and response, see Solum, *Constitutional Construction*, *supra* note 35, at 524 (“Can originalist constitutional theory embrace the existence of the construction zone and remain true to its core principles? Or does the New Originalism become a form of living constitutionalism?”).

originalist construction zone and the interpretive modalities of living constitutionalism and interpretive pluralism. To the extent that originalists might prioritize “history and tradition” or “liquidation” over evolving moral norms when engaging in constitutional “construction,”¹¹⁹ that only makes it harder for them to disavow *Dred Scott*. “History and tradition” and its cousin, “liquidation,” as the neo-Garrisonians have demonstrated, point strongly toward an interpretation of the 1787 Constitution that protected slavery and a Reconstruction Constitution that permitted Jim Crow. Racial inequality had a nearly 200-year “tradition,” whereas the modern norm of racial equality is not much older than the right to abortion—a right which the Supreme Court recently cast aside as insufficiently rooted in “history and tradition.”¹²⁰

Whatever the size of the “construction zone”—the extent of indeterminate constitutional provisions recognized by originalists—the “construction zone” escape in this instance merely restates the “bad originalism” argument, and encounters the same objections. There is no reason, within the methodology of originalism or the professional standards of its practitioners, for originalists to say definitively that Taney’s methodology or analysis of historical facts was markedly worse than that of any other applied originalist who finds an original meaning determinate. And do originalists want to admit even that there is no determinate answer to the question: “Is the 1787 Constitution a white supremacist document?” It is noteworthy that the handful of originalist disavowals of *Dred Scott* claim—albeit in conclusory fashion—that Taney’s decision clearly violated a determinate original meaning favoring racially inclusive citizenship.¹²¹

D. *Dred Scott and Living Constitutionalism*

Living constitutionalism, unbound by any supposed original meaning of “citizen” in the 1787 Constitution, embraces a racially inclusive understanding of U.S. citizenship, based on present-day moral norms. This proposition is too obvious to require extensive argument. Living constitutionalism made this evolution in the interpretation of the Equal Protection Clause, which was originally understood to protect “separate-but-equal” segregation but which now rejects it.

¹¹⁹ See Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 476 (2023) (arguing that the Court’s use of the “history and tradition test,” though “operating outside an originalist framework” was influenced by “the gravitational force of originalism”).

¹²⁰ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 250 (2022).

¹²¹ See Thomas, *supra* note 9, at 985 (claiming that *Dred Scott* was wrong because the original meaning of the Constitution embodies the equality principle of the Declaration of Independence); Jaffa, *supra* note 9, at 200–03 (continuing along the same thought as Thomas); see also Paulsen, *supra* note 9, at 905 (“[O]riginalism clearly would have foreclosed *Dred Scott* . . .”). But see Barnett, *supra* note 9 (suggesting that original meaning on the slavery question was indeterminate).

An originalist might argue that we cannot assess living constitutionalism independently of the enactment of the Reconstruction Amendments. Would the prevailing view in our constitutional order today maintain a belief in the superiority of the white race in the absence of the Reconstruction Amendments? The worst we can say is that the question is impossible to answer, as can be said about any counterfactual hypothetical. But we need not say the worst. For one thing, there is little reason to believe that the United States would have been immune to the general trend toward racial equality in other nations. More importantly, the racist, Jim Crow-supporting interpretation of the Fourteenth Amendment did in fact predominate for nearly a century, but was eventually overcome by living constitutionalism. We know this. In contrast, if the Constitution was white supremacist in 1787, then originalism would tell us that it must be white supremacist today, *but for* the Reconstruction Amendments. The Reconstruction Amendments may or may not be essential to the living constitution's racial equality norm circa 2024, but they are essential to that norm under originalism.

CONCLUSION: AGAINST ESSENTIALISM

Frederick Douglass's Glasgow Speech is a powerful argument against essentialism in constitutional interpretation. Douglass, with masterful irony, asserted that the latent ambiguity in the importantly contested provisions of the 1787 Constitution are "invitations to struggle" in the arena of constitutional politics. Neo-Garrisonians are mistaken to the extent (though only to the extent) that they might cap their more nuanced research with the flat, essentialist claim that the 1787 Constitution is a white supremacist document. But such occasional overstatement does not invalidate neo-Garrisonian scholarship *per se*, because neo-Garrisonianism is not a theory of constitutional interpretation and does not claim that even its sometimes-essentialist conclusions are binding on constitutional interpretation today.

Originalism is an interpretive theory and does make that claim. How would a public meaning originalist answer *Dred Scott*'s citizenship question without reference to the Reconstruction Amendments, and without engaging in intellectual gerrymandering that would eliminate any daylight between originalism and living constitutionalism? I suggest that originalist interpreter would probably have to reproduce Taney's answer. If there has to be a single original meaning of the word "citizen" in the Constitution of 1787, as originalists normally assume, then the best originalist candidate for that meaning—the "originalist answer"—is whites only. So concluded Roger Taney, using a methodology closely resembling that of originalists today.

By assuming that constitutional provisions have a unique original meaning, originalists marginalize the likelihood of open-ended language that offers an invitation to struggle over substantive constitutional questions, like Black citizenship. While originalists recognize the possibility of textual incompleteness or irreducible ambiguity, they consider these to be marginal, infrequent outcomes. Irreducible

ambiguity is not the same as invitation to struggle, but it is instead a conclusion that arises only by deciding that no candidate for original meaning appears to predominate over any other. By eliminating “invitation to struggle” as a candidate, and considering only white and race-inclusive citizenship, Taney’s argument that whites-only citizenship was a more prevalent understanding among the relevant interpretive community appears to be the “correct” originalist answer.

Living constitutionalism is consistent with viewing the Constitution as an invitation to struggle over many substantive questions. With the *Dred Scott* test reformulated by asking how originalism and living constitutionalism would answer the citizenship question *today*, living constitutionalism passes and originalism fails.