



Incorrect on Chief Justice Taney

The defense of originalist theory by Justice D. Arthur Kelsey appearing in the August edition (“Bracton’s Warning and Hamilton’s Reassurance”) deserves a lot of praise. It was persuasive and timely. But the judge is incorrect in his criticism of the opinion of Chief Justice Taney in *Scott v Sanford*. His criticism suggests that the Supreme Court’s ruling is based on the political opinions of a majority of the justices rather than on authentic constitutional underpinnings. To fit within that narrative, Justice Kelsey describes Taney and the majority as being “pro-slavery.” The Chief Justice emancipated the cadre of slaves that he inherited from his family and was opposed to slavery on moral and religious grounds. In spite of his personal views, he felt compelled to do exactly as Justice Kelsey argues that all judges should do in connection with constitutional litigation: attempt to determine whether the founding fathers intended to treat African Americans as citizens. This he did in a masterful study of constitutional history. I challenge anyone to read the opinion and point out a logical or intellectual flaw. Justice Kelsey believes that the majority members of Taney’s court “got their politics wrong.” It’s almost as

if we are reading different cases. There is absolutely no hint of political commentary in the opinion, and its conclusions concerning the intent of the founders are all but indisputable. The same goes for the Court’s ruling that Congress had no authority to prohibit the expansion of slavery into new territories. The Constitution very clearly treated political decisions about such questions as what species of property could be legally owned by citizens as being within the competence of the citizens of a state or territory, and not that of the federal government.

Taney was a superb lawyer and a distinguished public servant in several capacities. The modern tendency to treat him and the *Dred Scott* opinion as suffering from “an appalling stench” is unfair and unjustified.

Thomas Dugan
Hilliard, Ohio

Justice Kelsey Responds

I respectfully disagree with Mr. Dugan’s defense of *Dred Scott*.

Instead, I share Professor Amar’s view that Chief Justice Taney’s opinion in *Dred Scott* belongs in the “lowest circle of constitutional Hell.” AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 270 (2012). The opinion was a “preposterous garbling of the Constitution as that document was publicly understood when ratified” and was “harshly criticized on precisely these grounds by notable contemporaries.” *Id.* at 271. One of them, President Abraham Lincoln, openly challenged the reasoning of *Dred Scott* as influenced by “apparent partisan bias” and “based upon assumed historical facts which are not really true.” 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 401 (Roy P. Basler ed., 1953). Justice Scalia agreed,

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