

# AN “UNINTENDED CONSEQUENCE”: *DRED SCOTT* REINTERPRETED

Sam Erman\*

ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857. By *Austin Allen*. Athens and London: University of Georgia Press. 2006. Pp. x, 274. Cloth, \$59.95; paper, \$22.95.

## INTRODUCTION

Austin Allen’s<sup>1</sup> monograph marks the 150th anniversary of the decision in *Dred Scott v. Sandford*<sup>2</sup> with a revisionist interpretation of that oft-examined case. Many scholars have portrayed the case as a proslavery decision that fanned sectional fires. After all, the Court held that blacks were not U.S. citizens and that Congress was impotent to bar slavery in U.S. territories. Allen, by contrast, understands the case primarily as a judicial attempt to rationalize federal commerce and slavery jurisprudences. Part I argues that this ambitious reinterpretation enriches, but does not topple, existing *Dred Scott* historiography. In the case of the Court’s citizenship ruling, Allen’s understanding of *Dred Scott* depends on a legal model of U.S. citizenship. While Part II commends the historicity of this approach, it criticizes Allen for overstating the independence of law from extrajudicial pressures and thereby understating the significance of the *Dred Scott* citizenship holding.

### I. *DRED SCOTT* AS A “LEGAL PROBLEM”: A TANGLED WEB

Although much has been written on *Dred Scott*, Allen contends that the most important dynamics of the case have been overlooked. His predecessors have tended to portray the *Dred Scott* decision as an abuse of judicial power, “a failure of partisan justices to steer their court away from contentious political and social issues that it was not equipped to solve.”<sup>3</sup> In doing so, scholars missed the extent to and manner in which the case presented a “legal problem” (p. 221). According to Allen, the Justices of the Taney

---

\* Ph.D. candidate (American Culture), J.D. May 2007, University of Michigan. I would like to thank Professors Susanna Blumenthal, Daniel Ernst, Jesse Hoffnung-Garskof, Martha Jones, Richard Primus, and Rebecca Scott, as well as Rabia Belt and Julia Lee. Thank you also to the *Michigan Law Review*. There, Matthew Maddox, Jim Driscoll-MacEachron, Sara Ackerman, Craig Chosiad, Adrienne Fowler, and Darren Kinkead provided diligent, excellent editing and proofreading; Audrey Braccio, Meghann Dunlap, Marla Dunn, Anderson Green, Jason Hickey, Zoe Levine, Charles Maule, Brad Moore, Dan Rathbun, Colin Reingold, Brent Steele, Sara Thorson, and Joel Visser checked citations carefully and thoroughly. For the quotation in the title, see p. 6.

1. Assistant Professor of History, University of Houston-Downtown.
2. 60 U.S. (19 How.) 393 (1857).
3. P. 3 & 230 n.8.

Court shared commitments to relatively stable doctrines and professional methodologies. When the *Dred Scott* case reached the Taney Court, long-standing tensions between commerce and slavery jurisprudences made the outcome all but inevitable.<sup>4</sup>

Understanding the “legal problem” of *Dred Scott*, Allen explains, means seeing Jacksonian law as an interdependent web of doctrinal nodes in which “various strands of doctrine interacted with one another and became intertwined.”<sup>5</sup> No one line of cases formed a coherent, self-contained doctrine.<sup>6</sup> Instead, when judges decided cases in one area, they responded to—and drove developments in—others.<sup>7</sup> This normal course of legal events produced cross-doctrinal patterns of legal change.<sup>8</sup>

Within this context, Allen argues, the assumptions and commitments that judges brought to their decision making constituted a driving force behind change in the legal system.<sup>9</sup> For most Justices on the Court between

4. Pp. 3–6 & 230 n.9 (citing, among other works, WALTER EHRLICH, *THEY HAVE NO RIGHTS: DRED SCOTT’S STRUGGLE FOR FREEDOM* (1979) and DON E. FEHRENBACHER, *THE DRED SCOTT CASE* (1978)). As Allen explains, historians such as Ehrlich and Fehrenbacher revised early-twentieth-century accounts of a Civil War caused by overreaching antislavery judges. P. 3. These accounts, in turn, revised postbellum histories that had blamed the Civil War on Southern Justices. Pp. 2–3.

5. P. 223 & 251 n.7 (drawing the idea from BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 6 (1998)).

6. In slavery jurisprudence, for example, Allen sees a complex judicial commitment characterized by constant “debate and redefinition.” Pp. 75–76 & 251 n.4 (citing with approval THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW* (1996)). Allen here departs from scholars like Don E. Fehrenbacher, see *THE SLAVEHOLDING REPUBLIC* (Ward M. McAfee ed., 2001), and William M. Wiecek, see *Slavery and Abolition before the United States Supreme Court, 1820–1860*, 65 *J. AM. HIST.* 34 (1978), whom he characterizes as having mistakenly portrayed cases involving slavery as “a coherent body of rules.” Pp. 221–22 & 251 n.3.

7. P. 224 & 252 n.12 (noting that clashes between legal actors often produce unintentional legal changes and citing approvingly, for example, S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (1969)). Allen’s treatment of the relationships between corporate and slave laws illustrates the dynamic. In the years before *Dred Scott*, the Supreme Court developed a national law of commerce by recognizing the U.S. citizenship of corporations and thereby facilitating corporate access to federal diversity jurisdiction. Until *Dred Scott* mooted their concerns, several proslavery Justices consistently dissented from this line of cases. Their implicit worry: U.S. blacks would re-purpose this corporate-law jurisprudence to reach federal court or secure U.S. citizenship and thereby undermine legal supports for slavery. See pp. 73–132.

8. Pp. 222–23 (citing CUSHMAN, *supra* note 5). External factors like social, political, economic, or intellectual developments have also produced cross-doctrinal patterns of change, though Allen argues that prior scholars have been too quick to attribute such changes solely to these factors. Pp. 222–23 & 251 n.6 (citing, among others, MORTIN J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977), and WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* (1975)). Allen’s mechanism of legal change does not depend on conscious judicial collaboration; even judges who sought to forestall legal change by “discovering” timeless legal principles contributed to the evolution of law.

9. See p. 224 & 252 n.13; see also p. 225 (citing Theda Skocpol’s work on the role of “officers in a larger state structure,” *PROTECTING SOLDIERS AND MOTHERS* (1992); *STATES AND SOCIAL REVOLUTIONS* (1979)); *supra* note 7 and accompanying text. Allen elaborates: “‘History is difficult,’ Milsom cautions, ‘because people never state their assumptions or describe the framework in which their lives are led.’ In this respect, the Taney Court’s members differed little from Milsom’s medieval subjects.” P. 224 (quoting S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 1 (1976)).

1837 and 1857, these assumptions and commitments encompassed such Jacksonian principles and professional norms of legal reasoning as deference to state legislatures, insistence that individuals meet their market obligations, and adherence to precedent and common-law terminology.<sup>10</sup>

To trace the mechanics by which judges applied these abstract commitments in particular cases, Allen examines all published and draft Taney Court opinions, as well as the papers of the Court and its Justices (pp. 5, 224). The Taney Court, he concludes, created and then sought to resolve a modified “slaveholders’ dilemma,” aiming to find a basis consistent with its principles and norms that would justify both the expansive federal power necessary to promote a uniform federal law of commerce and its declarations of impotence to review local decisions concerning slavery.<sup>11</sup> Before 1857, progress on one front produced setbacks on the other.<sup>12</sup>

In *Dred Scott*, the Court sought to articulate a ground on which it could succeed on both fronts.<sup>13</sup> In doing so, it built on two cases. In *Strader v. Graham*,<sup>14</sup> the Court had sharply limited federal jurisdiction over commerce and slavery questions in appeals from state courts.<sup>15</sup> In *Louisville, Cincinnati, & Charleston Railroad Company v. Letson*,<sup>16</sup> it had permitted corporations to access diversity jurisdiction (p. 127). By holding that blacks were not U.S. citizens in *Dred Scott*, the Court barred them from diversity jurisdiction (p. 160). The result effectively left blacks to state remedies

10. Pp. 12–21, 37, 60, 224–26. Again drawing on Cushman, Allen argues that Supreme Court Justices, who were appointed partly for their legal ability and who convinced colleagues with legal arguments, tended both to view the world in terms of professional discourses and to value the jurisprudential frameworks that they had created. Pp. 225–26 & 252 n.16. Though legal changes remained common, Justices sought to discover how detailed laws applied to particular situations, an approach that could limit outcomes. Pp. 45–50. The Justices of the Taney Court did not seize the “power to ‘make law’ in the sense assumed by modern lawyers such as [Mark] Tushnet.” P. 61 (citing *Swift v. Tyson Exhumed*, 79 YALE L.J. 284 (1969)). Rather, they promoted social stability through adherence to formalities, an approach that drew both from Southern-planter honor culture and Northern middle-class advocacy of self-governance. Pp. 43–44. Thus while Horwitz, *supra* note 8, at 134, attributes economic motives to Taney Court laxness concerning diversity jurisdiction in cases involving corporations, Allen sees an “effort to . . . impose order on a union perceived to be increasingly chaotic.” P. 50.

11. P. 222 (quoting EUGENE D. GENOVESE, *THE SLAVEHOLDERS’ DILEMMA* (1992)).

12. For an example, see *supra* note 7.

13. Although an extensive literature exists on the antebellum transformations in U.S. law as they involved economic matters, little of that literature has addressed slavery in more than a cursory fashion. P. 223. Those works that have done so have “centered on cases that directly involved both slaves and the market.” P. 223. *But see* p. 223 n.10 (“Studies of the Commerce Clause constitute an exception to this trend.”).

14. 51 U.S. (10 How.) 82 (1851) (dismissing for want of jurisdiction an appeal from the Kentucky Court of Appeals holding that slaves who had traveled to Ohio and returned to Kentucky remained slaves under Kentucky law).

15. Pp. 92–95.

16. 43 U.S. (2 How.) 497 (1844) (deciding diversity of citizenship with reference to the state where a corporation-defendant was chartered and exercised its power, not with reference to the citizenship of its members).

while permitting corporations to retain access to diversity jurisdiction and a concomitant federal law of commerce.<sup>17</sup>

But in the territories, federal law sometimes purported to determine who was a slave.<sup>18</sup> Thus by merely holding that blacks were not U.S. citizens, the Taney Court could not fully reconcile assertions of federal power over commerce with denials of such power with respect to slavery (pp. 178–79, 182–83). Allen understands the second *Dred Scott* holding—that Congress was powerless to bar slavery in U.S. territories—as eliminating this anomaly by pushing the issue of slavery in the territories into local courts (pp. 186–94, 216–19). That holding vested legislative power over territorial slavery with territorial legislatures and, Allen contends, may have been a step toward creating an integrated “union” of U.S. state and territorial “concurrent sovereignties.”<sup>19</sup>

Allen desires that his monograph not merely supplement *Dred Scott* histories but supplant many of them. He “refuses to [join prior scholars and] accept the primacy” of extrajudicial influences such as “sectional partisanship” in the *Dred Scott* decision (pp. 6–7). The legal dynamics at work, Allen explains, “converged in such a way that a sweeping decision such as *Dred Scott* appeared not only unavoidable but absolutely necessary” (p. 6). Acknowledging that two Justices dissented, he argues that the weakness of their efforts reinforces his conclusion.<sup>20</sup>

Allen hangs his ambitious claim—that the assumptions, doctrines, and institution of the Taney Court together were the primary causes of its holding—on a slender reed: primary sources that largely concern intrajudicial dynamics. Still, this shortfall does not detract from his accomplishment. As he set out to do, Allen “contribute[s] a considerably more textured analysis of *Dred Scott* than previous scholars have offered” (p. 228).

## II. IN SEARCH OF CITIZENSHIP

*Dred Scott* may be the most important case on U.S. citizenship in our constitutional tradition. Certainly it was so at the time that it was decided. The decision announced a distinction between U.S. citizenship and U.S.

---

17. Though PAUL FINKELMAN, *AN IMPERFECT UNION* (1981), and HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* (1959), have argued that it remained possible that the Court would extend further protections to slavery in free states, Allen finds no “judicially persuasive case for the nationalization of slavery.” P. 215.

18. See, e.g., *Missouri Compromise*, ch. 22, § 8, 3 Stat. 545, 548 (1820).

19. P. 194; see also pp. 186–94, 216–19. Allen’s analysis leads him to question the conventional wisdom that Taney’s majority opinion “undercut the popular-sovereignty position on the territorial question.” P. 192 & 248 n.36.

20. Pp. 169–70, 194–201; see also pp. 30, 34–35 (explaining that dissents often “embodied little disagreement with the court’s larger agenda” and that the Taney Court was characterized by a “loose cohesion among a majority of justices flanked by individual dissenters unwilling or unable to articulate persuasive alternatives”).

nationality—since reversed by the Fourteenth Amendment<sup>21</sup>—and presumed that numerous rights and civic belonging attached to U.S. citizenship.<sup>22</sup>

In examining how the Court reached this decision, Allen engages with a booming scholarly literature on the history of U.S. citizenship. Much of this scholarship focuses on citizenship as a nexus between the thoughts and actions of individuals and the thoughts and actions of those individuals’ government representatives. Allen, by contrast, focuses on intrajudicial dynamics. He emphasizes the web of cases upon which Taney drew—to the relative exclusion of a broader web weaving together popular and official conceptions of citizenship. Thus while he recognizes the understudied “legal problem” of *Dred Scott*, his approach is cramped, overlooking U.S. citizenship as a concept with a life beyond the judiciary as well as within it.

Recent scholarship has shown U.S. citizenship to be a promising but difficult topic. Because citizenship defined reciprocal relationships between individuals and the state, it provides scholars a window into interactions between social or cultural dynamics and political or legal ones.<sup>23</sup> Yet it is a window that has changed over time. Just as people drew upon, responded to, and invested in the status of citizenship, they also negotiated, disputed, and altered its meaning and nature.<sup>24</sup>

Allen cabins this tension by focusing on judicial decisions, treating U.S. citizenship as a relatively stable legal term that changed only slowly.<sup>25</sup> Troublingly, the approach produces inconsistent results. In Allen’s hands, it leads to the conclusion that existing doctrine forced Taney to rule in *Dred Scott* that blacks were not U.S. citizens. The antebellum Privileges and Immunities Clause, he argues, guaranteed U.S. citizens many rights, some of which the Founders presumed some free U.S. blacks would not enjoy (pp. 119–21, 166–69, 176).

21. U.S. CONST. amend. XIV, § 1. Christina Duffy Burnett argues that *Gonzales v. Williams*, 192 U.S. 1 (1904), reintroduced the status of the non-citizen U.S. national into the U.S. constitutional system. *Empire and the Transformation of Citizenship*, in COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE (Alfred W. McCoy & Francisco A. Scarano eds., forthcoming); cf. Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898–1905*, 27 J. AM. ETHNIC HISTORY (forthcoming Summer 2008) (emphasizing the ambiguity of the *Gonzales* Court’s decision).

22. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 411 (1857).

23. William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in THE DEMOCRATIC EXPERIMENT 85 (Meg Jacobs et al. eds., 2003); see also, e.g., FREDERICK COOPER ET AL., BEYOND SLAVERY (2000).

24. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP (1991)

25. Other scholars avoid this tension by treating U.S. citizenship as an ahistorical or theoretical category that can serve as a baseline for cross-temporal comparison. This approach understates the extent to which citizenship was a slippery term, varying across locales, occasioning disputes, and shifting shape over time. But the approach has helped scholars recover less-studied historical concepts of citizenship that resemble concepts that exist today. See ROGERS M. SMITH, CIVIC IDEALS (1997); cf. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1998); Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 LAW & HIST. REV. 583 (2001); Gerald J. Postema, *Introduction: The Sins of Segregation*, 16 LAW & PHIL. 221 (1997).

But when other scholars have characterized or emphasized U.S. citizenship as a legal term, they have differed from Allen, reaching such conclusions as: (1) antebellum U.S. doctrine supported three distinct characterizations of U.S. citizenship,<sup>26</sup> (2) Allen's interpretation is the least plausible of these alternatives,<sup>27</sup> (3) citizenship at the time was primarily characterized by ambiguity,<sup>28</sup> and (4) relatively few rights attached to U.S. citizenship before *Dred Scott*.<sup>29</sup> The majority and dissenting *Dred Scott* opinions reflect these disagreements, differing on whether free blacks held U.S. citizenship and whether many or few rights attached to the status.

These differing judgments about the content and distribution of U.S. citizenship—each partly culled from judicial records—most likely indicate that multiple strands of popular thought on citizenship had all found homes among U.S. jurists by 1857.<sup>30</sup> Throughout the nineteenth century, “legal communities,” including the U.S. Supreme Court, declined to clarify the distribution of U.S. citizenship or the content that the Privileges and Immunities Clause attached to it (pp. 122–23). Those outside these “legal communities” did not share this reticence. Many in the United States believed that married women—unquestionably U.S. citizens—and free blacks ought not to enjoy robust political or civil rights.<sup>31</sup> Slavery, some argued, depended on it. Many—and often the same—people also saw democracy in the balance, believing that “citizenship was abstractly linked to both the possession of rights and participation in government.”<sup>32</sup> Following the French Revolution, the notion that all residents in a polity ought to be citizens—perhaps even to share equally in such rights and governance—also circulated throughout the Atlantic World.<sup>33</sup>

---

26. FEHRENBACHER, *supra* note 4, at 64–73, 294–297. Fehrenbacher and other scholars who focus on U.S. citizenship as a legal term do not always focus as tightly on doctrine as Allen.

27. *Id.*

28. *Id.*; JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870* (1978).

29. Novak, *supra* note 23.

30. On the importance of citizenship in U.S. popular thought in the half century before *Dred Scott*, see CARYN COSSÉ BELL, *REVOLUTION, ROMANTICISM, AND THE AFRO-CREOLE PROTEST TRADITION IN LOUISIANA 1718–1868* (1997), which examines the free, antebellum New Orleanians of color who placed U.S. citizenship at the core of their claims and senses of self. The difference in emphases concerning the importance of national citizenship in Bell's and Novak's works results from Novak's relative de-emphasis on citizenship ideas—a driving force of Bell's narrative.

31. *See id.*; KERBER, *supra* note 25; LEON F. LITWACK, *NORTH OF SLAVERY* (1961); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 103 *AM. HIST. REV.* 1440 (1998).

32. Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 *HASTINGS CONST. L.Q.* 509, 514–15 (1997).

33. Citizenship concepts with roots in the French and Haitian Revolutions had held great currency in Louisianan popular thought for decades prior to *Dred Scott*. BELL, *supra* note 30. In 1857, U.S. residents would not have had to look far beyond U.S. borders for other current and historical examples of broadly distributed national citizenships to which often attached civil and political rights. *See* LAURENT DUBOIS, *A COLONY OF CITIZENS* (2004) (Guadeloupe); THOMAS C. HOLT, *THE PROBLEM OF FREEDOM* (1992) (Jamaica); C.L.R. JAMES, *THE BLACK JACOBINS* (1923) (Haiti); Myriam Cottias, *Gender and Republican Citizenship in the French West Indies, 1848–1945*,

Such concepts of U.S. citizenship mattered because people not thought of as legal actors—including Dred Scott and his wife—brought claims against, altered, and were shaped by legal institutions. In the antebellum United States, strictures of law found their way into many corners of people’s lives. People also made their way into all areas of law, drawing on concepts with which they were familiar and on their intimacy with legal limits to bring claims that shaped legal categories and practices.<sup>34</sup> Specifically, antebellum U.S. citizenship took shape as people deployed conceptions of citizenship to make claims and as these claims led to collisions between and negotiations over the underlying meanings of citizenship.<sup>35</sup> Consequently, interactions like the *Dred Scott* suit, where both the content and distribution of U.S. citizenship were contested, are potentially very revealing.<sup>36</sup>

Yet focusing only on cases makes realizing this potential difficult. Cases alone, even those with complete trial records, tell us little about the social networks upon which litigants drew in conceptualizing and launching claims.<sup>37</sup> Without such information, it is hard to know how a citizenship concept took shape, why one claim and not another elicited a governmental response, and what allowed a particular litigant to progress.<sup>38</sup> Similarly, without examining the alternatives that claimants rejected before seeking U.S. citizenship, U.S. citizenship can seem inherently desirable.<sup>39</sup>

---

26 SLAVERY AND ABOLITION 233 (2005); see also Hilda Sabato, Review Essay, *On Political Citizenship in Nineteenth-Century Latin America*, 106 AM. HIST. REV. 1290 (2001) (Latin American republics). On the interrelated circum-Atlantic circulations of people, goods, and political concepts, see Rebecca J. Scott, *Public Rights and Private Commerce: A Nineteenth-Century Atlantic Creole Itinerary*, 48 CURRENT ANTHROPOLOGY 237 (2007).

34. See Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9 (1975). Lea VanderVelde and Sandhya Subramanian examine the role that the Scotts played in their litigation in *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997); cf. p. 230 n.13 (commending the VanderVelde and Subramanian piece without critically engaging the work).

35. See Scott, *supra* note 33.

36. See sources cited *supra* notes 23–34 and *infra* notes 37–44; MAE M. NGAI, IMPOSSIBLE SUBJECTS (2004); Laurent Dubois, *An enslaved Enlightenment: rethinking the intellectual history of the French Atlantic*, 31 SOC. HIST. 1 (2006); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

37. Contributing their own investigations to an extensive secondary literature, VanderVelde and Subramanian illustrate the limits that scholars have encountered in trying to reconstruct social histories of *Dred Scott*. VanderVelde & Subramanian, *supra* note 34. Historians have had greater success with *Plessy v. Ferguson*, 163 U.S. 537 (1896). See, e.g., MARK ELLIOTT, COLOR-BLIND JUSTICE (2006); CHARLES A. LOFGREN, THE PLESSY CASE (1987); Joseph Logsdon with Lawrence Powell, *Rodolphe Lucien Desdunes: Forgotten Organizer of the Plessy Protest*, in SUNBELT REVOLUTION 42 (Samuel C. Hyde Jr. ed., 2003).

38. Cf., e.g., Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U. L. REV. 1456 (2001) (illustrating how two postbellum women’s suffrage activists brought separate cases asserting their right to vote under the newly ratified Fourteenth Amendment, neither of which can be understood in isolation from the other).

39. Cf., e.g., William G. McLoughlin, *Experiment in Cherokee Citizenship, 1817–1829*, 33 AM. Q. 3 (1981) (explaining how antebellum Cherokees came to see U.S. citizenship as being opposed to their goal of securing sovereign tribal control over property).

The better approach may be to deemphasize high-profile citizenship cases and to focus instead on the broader array of community–government interactions involving citizenship out of which such cases arose. Judicial opinions, after all, often responded to and influenced concepts and uses of U.S. citizenship that took shape outside the courtroom.<sup>40</sup> People drew upon citizenship to describe events in their lives and aspects of themselves.<sup>41</sup> It played key roles in social organizing and served as a basis for claims against the state.<sup>42</sup> Even federal authorities appealed to citizenship to seek cooperation from and justify coercions of communities.<sup>43</sup> Each such interaction reflected a meaning of U.S. citizenship available to an actor seeking some end in a given context. These concepts and their applications changed over time, a process that cases like *Dred Scott* can help illuminate.<sup>44</sup>

In *Dred Scott*, the Supreme Court changed the posture of federal courts toward claims based on U.S. citizenship. Judicial evasions had previously, perhaps intentionally, facilitated a productive ambiguity concerning the legal meaning of U.S. citizenship. They had balanced the potential of citizenship to exacerbate sectional differences with a conception of citizenship as a repository of national aspirations. The decision in *Dred Scott* shattered this ambiguity.<sup>45</sup> Unwilling to strike down coverture or antiblack laws,<sup>46</sup> the Court chose between exclusive, robust U.S. citizenship and its thin, universal mirror image. Either option—denying citizenship to women and blacks or extending them a citizenship with little content—would have sacrificed some democratic ideal.<sup>47</sup> Taney chose the former, resting a Supreme Court decision “explicitly on considerations of black inferiority” for the first time by explaining that unlike those U.S. citizens who enjoyed less than full

---

40. See, e.g., REBECCA J. SCOTT, *DEGREES OF FREEDOM* (2005) (illuminating such a process in Louisiana); see also Winkler, *supra* note 38; cf. COOPER ET AL., *supra* note 23; DUBOIS, *supra* note 33; Cott, *supra* note 31.

41. E.g., Cott, *supra* note 31, at 1440 (describing how citizenship resembles marriage because it “confers an identity that may have deep personal and psychological dimensions at the same time that it expresses belonging”); see also COOPER ET AL., *supra* note 23; SCOTT, *supra* note 40; cf., e.g., BELL, *supra* note 30.

42. E.g., COOPER ET AL., *supra* note 23 (observing this phenomenon in postemancipation societies); see also BELL, *supra* note 30; SCOTT, *supra* note 40; Winkler, *supra* note 38.

43. E.g., KERBER, *supra* note 25 (observing that citizenship imposes obligations in addition to extending rights); see also LAURENT DUBOIS, *AVENGERS OF THE NEW WORLD* (2004); Cott, *supra* note 31; Cottias, *supra* note 33; Parker, *supra* note 25.

44. E.g., COOPER ET AL., *supra* note 23; DUBOIS, *supra* note 33; KETTNER, *supra* note 28; PETER SAHLINS, *UNNATURALLY FRENCH* (2004); SCOTT, *supra* note 40; Cott, *supra* note 31; Cottias, *supra* note 33; Novak, *supra* note 23; Sabato, *supra* note 33; cf., e.g., NGAI, *supra* note 36 (describing similar dynamics involving “illegal aliens”). I aim to pull together the approaches outlined in this paragraph in my current research on U.S.-citizenship-based claims involving Puerto Ricans between 1898 and 1917. See Erman, *supra* note 21.

45. Novak, *supra* note 23.

46. For an overview of Supreme Court decisions concerning women and blacks, see, for example, SMITH, *supra* note 25.

47. *Id.* (arguing that mixtures of liberal, republican, and ascriptive changes are typical of the history of U.S. citizenship).

rights—women, American Indians, and corporations—blacks were peculiarly degraded (pp. 162–63).

Here, historiography repeats itself. Allen chides prior scholars for attributing too much importance to sectionalism as an influence on the *Dred Scott* holding, suggesting that they have been “too dependent on the Republicans’ powerful but partisan criticism of the decision” (p. 4). Yet he too can be seduced by his subjects. Having primarily investigated Taney Court records and writings, Allen writes a history of antebellum U.S. citizenship law in which *Dred Scott* is the culmination of two decades of largely intrajudicial dynamics. This Part argues that legal and nonlegal concepts of U.S. citizenship were instead part of the same story and could not always be distinguished.

#### CONCLUSION

Last year marked the 150th anniversary of *Dred Scott*, one of the most complex cases in U.S. history. Perhaps no other decision is so reviled. Yet in its day, Allen argues, *Dred Scott* arose out of doctrines and judicial practices with roots that stretched back decades. Right or wrong, he claims, it was no aberration. As with recent *Lochner v. New York* revisionism, his analysis restores doctrinal and institutional complexity to a case at the heart of the U.S. constitutional canon.<sup>48</sup>

*Dred Scott* is also a foundational case in U.S. citizenship history. Departing from an ambiguous, evasive jurisprudence, Taney’s opinion invented U.S. citizenship as a legal category with substantial content and limited distribution. As Allen shows, one cannot understand this ruling absent doctrinal context. But the ruling also emerged from an intellectual web that spanned far beyond the judiciary. Manipulated by both individuals and the state, U.S. citizenship was a popularly available concept with a legal aspect. These traits placed it at nexuses of social, legal, cultural, and political dynamics, make it a rich topic for historical investigation, and are crucial to understanding Taney’s ruling and its aftermath.

---

48. See, e.g., Gary D. Rowe, *The Legacy of Lochner, Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999) (book review).

