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# SLAVERY, THE RULE OF LAW, AND THE CIVIL WAR

George William Van Cleve\*

STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* (Harvard Univ. Press 2010). Pp. 384. Cloth. \$29.95.

EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825-1861* (Univ. Press of Kan. 2009). Pp. 344. Cloth. \$34.95.

EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE* (Univ. Press of Kan. 2010). Pp. 192. Cloth. \$34.95. Paperback. \$17.95.

As the three works of antebellum legal history reviewed here show, the relationship between slavery, the rule of law, and the Civil War is highly complex and, even today, politically freighted. Some sense of the difficulty of the issues can be gleaned from the thought-provoking foreword to *Slavery and The Supreme Court*, which begins by discussing Nazi war criminal Adolf Eichmann, and goes on to suggest that antebellum judges “bore a distinctive responsibility for constitutional evil in antebellum America.”<sup>1</sup> In such a climate of thought, it is to be expected that each of these books uses history to create a moral framework in which to judge the actions of lawyers, judges, and the rule of law itself regarding slavery. This approach follows a long tradition that – even narrowly defined – dates at least from the classic 1975 work of legal historian Robert Cover, which broods in the shadows here.<sup>2</sup> This essay discusses the books and considers what light they shed on the problems of resistance to evil, the rule of law, and the causes of the Civil War.

Two of the books, *Fugitive Slave on Trial*<sup>3</sup> and *Fugitive Justice*,<sup>4</sup> concern the antebellum history of the law of fugitive slavery and its implications on the rule of law and the Civil War. Earl Maltz’s *Fugitive Slave on Trial*, as the author tells us, is really a history of two trials. The first was the 1854 “trial” (by law, a summary proceeding) of the alleged fugitive slave Anthony Burns by federal commissioner Edward Loring in Boston, Massachusetts. The second was the “trial” of Loring who, as a direct result of his

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1. MARK A. GRABER, *Foreword* to EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825-1861* ix, xii (2009).

2. *See, e.g.*, ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (discussing the history of the law of slavery and its relation to natural law, and analyzing the dilemma faced by antislavery judges in enforcing laws to which they were morally opposed).

3. EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE* (2010).

4. STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* (2010).

decision in the Burns case, was removed from his judicial office by the state of Massachusetts and fired from his teaching post at Harvard Law School. Maltz tells the story of both trials well. His accounts are balanced, and he is refreshingly candid and straightforward about his own view of the merits of the Burns case: the decision “was indisputably correct on the facts and almost certainly justified by existing legal precedent.”<sup>5</sup> Thus, Maltz appears to think there is a reasonable case that Loring should not have been removed for his Burns decision.<sup>6</sup>

Maltz’s work places the ideal of fidelity to the rule of law in tension with claims that judges had a duty to resist evil in the case of slavery, especially where the fate of a fugitive was at stake. He thinks the rule of law should prevail here, even in the context of what Mark Graber has perceptively called “constitutional evil.”<sup>7</sup> Maltz effectively rejects Cover’s legal realist argument that where antebellum slavery was concerned, there was no ideal, abstract “rule of law,” but only an outrageous moral evil that judges failed to oppose, laboring under a false consciousness that their role required fidelity to what they deemed to be the rule of law.<sup>8</sup>

Maltz does a good job of explaining his reasoning. He begins with a brief but cogent discussion of the political history of the Fugitive Slave Clause, arguing that “it was the embodiment of a basic premise that underlay the long-term success of any union between the Northern and Southern states. . . . [It] defined the minimum degree of tolerance for Southern institutions that the slave states required of Northern states.”<sup>9</sup> Maltz’s analysis reaches the same result as that reached by many prominent antebellum judges: the right to recover fugitive slaves was part of the cement of the Union, and Northern repudiation of that right endangered the Union because it would sharply heighten sectional tensions. For Maltz, these considerations largely justify Justice Story’s decision in *Prigg v. Pennsylvania* striking down the Pennsylvania “personal liberty” statute because it conflicted with the Fugitive Slave Clause.<sup>10</sup>

However, after 1850 that view was anathema to Massachusetts abolitionists, who believed that it was immoral even to serve as a federal commissioner in a fugitive slave case. Many of these abolitionists believed that the evil of the Fugitive Slave law and its inconsistency with “higher law” relieved them and fugitives of any obligation of obedience to it, and even authorized forcible resistance to protect and rescue fugitives. This view had profound effects on their moral judgments. From his pulpit, one abolitionist leader, Reverend Theodore Parker, charged Commissioner Loring with “murder” for the violent death of one of Burns’s jailers during a mob riot that unsuccessfully attempted to free Burns while he awaited trial before Loring.<sup>11</sup> As a Massachusetts legislative committee report supporting Loring’s removal put it, “[t]he people . . . look on it as sinful and criminal to volunteer [to enforce the Fugitive Slave

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5. MALTZ, *supra* note 3, at 2.

6. *See id.* at 157-58.

7. *See* MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

8. *See* COVER, *supra* note 2, at 1, 6-7, 197-200. Although Cover’s work focuses particularly on judges with “antislavery” views, its analysis can be generally applied.

9. MALTZ, *supra* note 3, at 6.

10. *Prigg v. Pennsylvania*, 41 U.S. 539, 673 (1842).

11. MALTZ, *supra* note 3, at 69.

Act].”<sup>12</sup> In such circumstances, the principal argument made by Loring’s defenders — that Loring’s removal would compromise judicial independence — was swept aside. Judges were the people’s agents, it was argued, and could not be suffered to act in ways that offended their moral sensibilities.

Steven Lubet’s book, *Fugitive Justice*, creates quite a different moral framework than Maltz’s text. It centers on three fugitive slavery-related cases: the 1851 treason prosecution of Castner Hanway stemming from the violent Christiana, Pennsylvania encounter between fugitive slaves and their citizen supporters on the one hand, and federal marshals and slaveholders on the other; the 1854 Burns case; and the 1859 prosecutions against Simeon Bushnell and Charles Langston, both accused of helping a fugitive escape from slaveholders and federal officials in the Western Reserve. Lubet argues that these “tumultuous trials . . . contributed greatly to the growing discord between the free and slave states.”<sup>13</sup> He contends that they strengthened the antislavery movement in the North, but “outraged public opinion in the South . . . [T]he reluctance of Northerners to comply with the Fugitive Slave Act was frequently cited as a grievance justifying secession.”<sup>14</sup> Lubet claims that these cases show “the inability of American legal and political institutions to come to grips with slavery short of civil war,”<sup>15</sup> and asks, “[h]ow could something so evil be treated so routinely by such otherwise fair-minded men?”<sup>16</sup>

Lubet begins with a brief history of slavery and the Constitution in which he asserts that “[t]he perpetuation of slavery had been the great moral failing of the American Revolution of 1776.”<sup>17</sup> He argues that Northerners seeking sectional harmony at the 1787 Convention essentially allowed slave states to overreach with respect to fugitive slavery, and that the “newly won ‘right to recover slaves,’ . . . would eventually turn slavery into an irresolvable political problem that pitted state against state.”<sup>18</sup> He continues by analyzing the progression of the case law on fugitive slavery through *Prigg v. Pennsylvania*, which he claims had “startling” implications, because it “suddenly vested [slave catchers] with extraterritorial rights, essentially allowing them to impose southern laws on northern states.”<sup>19</sup> The Supreme Court continued to stand firmly on “the slaveholders’ side” in its 1847 decision in *Jones v. Van Zandt*,<sup>20</sup> rejecting Samuel Chase’s effort to incorporate natural law considerations into the constitutional law debate over fugitive slavery.<sup>21</sup> Lubet also offers a brief analysis of the Compromise of 1850. He asserts that its most prominent feature was draconian amendments to the Fugitive Slave Act of 1793 that one-sidedly favored slaveholders. This is a strikingly different account of the legal history of fugitive slavery than the one Maltz provides.

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12. *Id.* at 126.

13. LUBET, *supra* note 4, at 1.

14. *Id.* at 2.

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 11.

18. *Id.* at 14.

19. *Id.* at 32.

20. *Jones v. Van Zandt*, 46 U.S. 215 (1847).

21. LUBET, *supra* note 4, at 36.

Lubet does an excellent job of vividly telling the stories of the three major cases he considers. He looks carefully at the trial strategies employed by both sides in each case, and considers the reasons for the behavior of the parties and judges. He suspects that either or both sides in fugitive slave cases may have used perjured or otherwise unreliable evidence that they probably knew was flawed. In his view, abolitionist attorneys thought that the “higher law” would justify their efforts to stretch facts, while prosecutors seeking to bring members of mobs to justice for violent actions were willing to stretch facts or law as needed to obtain convictions. Lubet paints a legal framework in which laws violating due process were the basis for trials where the parties were engaged in lawless conduct — almost a form of trial by combat — justified by moral claims. There is no rule of law present in fugitive slave cases, Lubet contends, and little justice either.

Lubet’s discussion of the Burns case offers a sharp contrast to Maltz’s account. Lubet thinks that Burns was “unquestionably” the slave of Richard Suttles, the claimant, so there was no mistake about Burns’s identity.<sup>22</sup> However, he thinks that commissioner Loring could have freed Burns if he had wanted to, because testimony had created a factual conflict about whether Burns was properly identified. He attacks a key Loring evidence ruling against Burns as “terribly unfair,” although it “may have been a correct reading of the law at the time,” and says that historian Paul Finkelman was correct that Loring was interested in observing the form but not the substance of justice.<sup>23</sup> Lubet seems to think that Loring’s judicial duty was to subvert the fugitive slave laws where possible; he applauds Burns’s attorney Richard Dana’s subsequent argument that Loring could have ruled differently and that, given natural law, he should have done so.<sup>24</sup> This is quite similar to Cover’s general argument in *Justice Accused*.<sup>25</sup>

Lubet gives useful attention to the divergent views of antislavery forces, courts, and federal officials regarding claims that fugitive slavery cases should be decided according to a “higher law.” In this respect, his work complements the broader perspective on these issues provided by historian Elizabeth Varon’s perceptive book, *Disunion*.<sup>26</sup> He cites federal officials and judges who uniformly believed that failure to follow positive law would lead to anarchy, mob rule, and civil war; and to this list he might have added Abraham Lincoln, who had reached this conclusion by 1838.<sup>27</sup> Lubet thinks that antislavery forces rationalized their actions both in- and out-of-court, including armed violence, assisting fugitive and witness escapes, and the presentation of flawed evidence, on the basis of a “higher law” that condemned the immorality of fugitive slave laws (and slavery itself).<sup>28</sup> Unlike some of Lubet’s lawyer and non-lawyer

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22. *Id.* at 181, 202.

23. *Id.* at 184.

24. *Id.* at 213, 220.

25. See COVER, *supra* note 2.

26. ELIZABETH R. VARON, *DISUNION! THE COMING OF THE AMERICAN CIVIL WAR, 1789-1859* (2008).

27. See ABRAHAM LINCOLN, *Address Before the Young Men’s Lyceum of Springfield, Illinois, January 27, 1838*, in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 108-15 (Roy P. Basler ed., 1953).

28. In some cases, Lubet seems to share their views, though to what extent is uncertain. He says that the 1851 Christiana rioters, who fought an armed battle with federal officials and slaveholders, “should more accurately be called,” in his words, “resistance fighters.” LUBET, *supra* note 4, at 8. He praises alleged abettor of the armed fugitives “Hanway’s admirable assertion that [in the Christiana battle] the ‘colored people had a

protagonists, several of the judges who rejected such “higher law” claims against the Fugitive Slave Act condemned the law but understood the necessity of accepting punishment as the price of legitimate civil disobedience against immoral laws.<sup>29</sup> In our republic, judges are not intended to serve either as priests or prophets, and we should be thankful for this.

Lubet’s broader historical argument that controversy over fugitive slavery had a particularly important role in causing the Civil War is insupportable.<sup>30</sup> The Civil War was fought over the continuing spread of slavery, with which fugitive slavery had little to do. Fugitive slavery was an irritant to the marginal members of the slave-state coalition, and resistance to federal fugitive slave laws became an important symbol of the North’s unwillingness to let slavery continue as an institution. In the 1850s, the slave states were about to lose irreversibly political control of the federal government, and that entailed losing control over issues of far greater moment to them than the loss of a few thousand slaves per year in a population of nearly four million slaves. As the course of negotiations over the Crittenden Compromise after the 1860 election shows, issues such as the extension of the Missouri Compromise line to California were far more influential in the onset of war than southern fury over Northern nullification of the Fugitive Slave Act. Fugitive slavery was a symbol to the South of what the North would do with unchallengeable control of the federal government, not a significant cause of war in and of itself.

Earl Maltz’s book, *Slavery and the Supreme Court*, is a useful survey for general readers of the legal history of slavery during the antebellum period. It includes generally useful summaries of aspects of the period’s political history.<sup>31</sup> Maltz takes a realistic view of the Supreme Court’s role in the politics of slavery before the Civil War. He recognizes that the Court’s slavery decisions had a marginal effect on the evolution of slavery as a political problem and argues that in its decisions before 1850, the Court sought to assist the nation’s political leadership in avoiding sectional tensions.

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right to defend themselves.” *Id.* at 124. He lauds defense lawyers in the Western Reserve case for their “new and daring legal strategy of civil disobedience” that “challenged the moral legitimacy of the Fugitive Slave Act and called upon the judge and jury to defy the law itself,” saying that “they deserve great credit for exploring such a radical approach to the trial” that “justified the rescue [by mob force] itself.” *Id.* at 271. At other times, he seems critical of such justifications (kidnapping charges in related case were “trumped up”). *Id.* at 314.

29. LUBET, *supra* note 4, at 217-18, 310-11.

30. Lubet claims that despite Southern outrage, in reality the fugitive slave laws were generally enforced, with only an “occasional requirement of extended judicial proceedings.” *Id.* at 8, 24-25. Since “extended proceedings” could cost far more than the average value of a slave, as they quite probably did in the Burns case, every slaveholder had to consider whether he might have to incur such costs. The estimated federal costs of rendition in the Burns case alone were in range of \$1,000,000 in today’s dollars; without such help, court action might well have been pointless. See LONG ROAD TO JUSTICE: THE AFRICAN AMERICAN EXPERIENCE IN THE MASSACHUSETTS COURTS, <http://www.masshist.org/longroad/01slavery/burns.htm> (last visited Sept. 30, 2011) (listing the cost of Burns’s rendition at \$40,000 in 1854); MEASURING WORTH, <http://www.measuringworth.com/> (last visited July 23, 2011) (for current value calculation). The *New York Times* concluded in 1859 that “‘right or wrong, the North will not suffer its [the Fugitive Slave Act’s] operation within its borders. . . . [Slaveholders think] the expense, trouble, odium, and risk of such endeavors far outweigh the pecuniary value of the property.’” EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825-1861* 285 (2009).

31. These will sometimes benefit from supplementation. Compare DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* 253-95 (Ward M. McAfee ed., 2001), with MALTZ, *supra* note 3, at 119-35.

Maltz also attempts to demonstrate that on many occasions before *Dred Scott*,<sup>32</sup> Justices were motivated by “neutral principles” in making decisions about the law of slavery. In particular, he seeks to show that the basis of such decisions often relied upon the Justices’ views about issues such as federalism or the need for a “workable accommodation” between the sections.<sup>33</sup> Before *Dred Scott*, most Justices agreed to avoid divisive slavery questions unless it was absolutely essential to address them in order to reach a decision. His account of cases such as *Prigg v. Pennsylvania* takes issue with the work of “neoabolitionists,” including historians Paul Finkelman and the late Don E. Fehrenbacher.<sup>34</sup> Maltz defends the Court’s 1842 decision in *Prigg* as an example of such a “workable accommodation” approach based on the views that the Constitution was intended to treat states as equals and that “Northerners would not work to undermine the basic institutions of Southern society” despite the fact that he thinks it failed to reduce sectional tensions or permit enforcement of the law.<sup>35</sup> He argues that a sea change in the Justices’ attitudes occurred only after the election of 1856, when proslavery Justices united around an effort to “enshrine proslavery orthodoxy in the fabric of constitutional law.”<sup>36</sup> Maltz thinks this failed attempt showed the limits of the Court’s power to influence the direction of political change where a large part of the public preferred a different policy.

Maltz’s account of the Court’s major slavery cases is clear and fair-minded. His efforts to demonstrate that considerations other than slavery played a significant part in the Justices’ decision-making are often plausible, though one might disagree with the force of his analysis in particular cases. Maltz’s most interesting case analysis is his lengthy treatment of *Dred Scott v. Sandford*, which occupies more than sixty pages.<sup>37</sup> He thinks that the Court’s decision to address the constitutionality of the Missouri Compromise in this case was a misguided effort to restore sectional harmony by resolving the dispute over slavery in the territories.<sup>38</sup> He attacks the Taney decision on the merits, but defends it from a procedural perspective as not being dictum.<sup>39</sup> Maltz’s opinion that Justice Curtis’s treatment of the legal history of the two major issues — black citizenship and the constitutionality of the Missouri Compromise — is “unanswerable” is debatable, as readers of work by Mark Graber and Gerald Leonard will know.<sup>40</sup> This is an area where serious readers will want to dig much deeper.

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32. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

33. MALTZ, *supra* note 3, at xix.

34. For an example of one of Fehrenbacher’s classic account’s, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978). For another one of his important works, see DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT TO THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (Ward M. McAfee ed., 2001).

35. MALTZ, *supra* note 3, at xix, 301.

36. *Id.* at xxi.

37. *Id.* at 210-78.

38. *See id.* at 244.

39. *Id.* at 264.

40. *See* GRABER, *supra* note 7; Gerald Leonard, *Law and Politics Reconsidered: A New Constitutional History of Dred Scott*, 34 *LAW & SOC. INQUIRY* 747 (2009) (characterizing Justice Curtis’s dissent as “an unjudicial manipulation of the law . . . for the higher purpose of striking at the political hegemony of the slaveholding class”).

Maltz criticizes Justice Curtis's *Dred Scott* dissenting opinion on several grounds.<sup>41</sup> However, he is mistaken, I think, to conclude that Justice Curtis's "extraordinarily intemperate language" inviting Northerners to disregard the Court majority's decision on the Missouri compromise issue was historically significant.<sup>42</sup> Lincoln and other Northern politicians were entirely ready to do that without Curtis's help. They could succeed only because the Supreme Court already lacked cross-sectional credibility on slavery extension issues, and this, in turn, was merely a reflection of the Court's limited political influence over slavery since at least the time of the Missouri Compromise.

Maltz also criticizes Justice Curtis for his unwillingness to accept as binding the Missouri Supreme Court decision in *Scott v. Emerson*;<sup>43</sup> this seems anachronistic. Had Curtis done that and followed the United States Supreme Court's decision in *Strader v. Graham*,<sup>44</sup> this would have rendered *his* opinion on the constitutionality of the Missouri Compromise dictum, politically isolating Justice McLean. *Dred Scott* would then have lost on the merits even under Curtis's analysis.<sup>45</sup> In retrospect, both sides in *Dred Scott* erred politically in thinking that the Court could lay the controversy over slavery extension to rest on constitutional grounds, either by giving authority over it to Congress as Curtis did *or* by denying Congress that power as Taney did. Congress had similarly erred in thinking the issue could be laid to rest by an "evasive truce" in the Compromise of 1850.<sup>46</sup> The slavery extension struggle was destined to overflow permanently the banks of the constitutional river.

This brings us to the underlying flaw in much of antebellum legal history on slavery: the assumption that, at least where slavery extension was concerned, in a misty golden past there was a workable rule of law or constitutional bargain, and that it broke down before the Civil War (in *Dred Scott*, for example) because lawyers and judges failed to do their job of protecting the rule of law against rising sectional political fervor. This assumption is sharply at odds with the history of slavery in the early Republic. In a federal republic such as ours, the rule of law requires an agreed-on final arbiter for legal disputes and agreement on what authority is possessed by states versus that possessed by the federal government. The Founders did not create a clear rule of law where slavery extension was concerned, because they could not have agreed on one. This was not a "moral failing" of the Revolution; it was an inevitable finesse required to build a federal republican government strong enough to govern a continent in the face of sectional divisions over slavery. The Missouri Compromise demonstrated that after 1820 in any event, on the critical issue of slavery extension there was no workable rule of law.<sup>47</sup>

Instead, in resolving the Missouri controversy, the sections created a political

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41. MALTZ, *supra* note 3, at 263-66.

42. *Id.* at 263-265.

43. *Scott v. Emerson*, 15 Mo. 576 (1852); MALTZ, *supra* note 3, at 263.

44. *Strader v. Graham*, 51 U.S. 82 (1850).

45. *Id.* *Strader's* holding applied to both state and federal law.

46. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 664 (2005).

47. GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* 225-67 (2010).



compact over slavery which maintained a tenuous sectional balance of power for several decades, assisted by leaders' ability to form cross-sectional coalitions on other issues and the division of newly acquired national territory between free and slave states. What the slavery cases analyzed by Maltz demonstrate is the Supreme Court's ability to operate at the margins of this sectional compact where slavery intersected with issues of wide concern, such as uniformity in commercial law rules. However, the Court's one particularly significant effort to intervene in the growing sectional dispute over extension was predictably an abject failure because it had lacked the political authority and legitimacy to bind the contesting parties on that issue for decades, no matter what it decided. Consequently, the slavery decisions of the Supreme Court are not a major part of the story of how the Civil War came to pass.

Antebellum historians should see the federal law of slavery for what it was in that period — a peripheral influence on a far broader political and socioeconomic controversy that, from the Revolution forward, had the potential to shatter the nation's foundations.<sup>48</sup> Like the Missouri controversy, the Civil War was primarily a sectional war between predominantly racist whites over political sovereignty and territorial dominance during westward expansion that necessarily implicated slavery for socioeconomic reasons; it was not principally a morally-driven struggle on either side. Slaves and free blacks were its belated and incidental beneficiaries.<sup>49</sup> To understand that controversy and to derive the proper historical lessons from the War itself, it is essential that Americans not content themselves with reaching back anachronistically using today's moral standards to condemn those who acted in reliance on and in support of earlier constitutional decisions that we find morally reprehensible today. It is the coming of the War that we still need to understand more fully, a task that extends far beyond depicting the limited role antebellum law played in that deadly and tragic story.

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48. For examples of such an approach, see WILENTZ, *supra* note 46, and Graber's attention to constitutional constraints on political adjustment in his *Dred Scott* analysis, GRABER, *supra* note 7.

49. See VAN CLEVE, *supra* note 48.