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Slavery and the Supreme Court, 1825-1861

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Review

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Maltz, Earl M. *Slavery and the Supreme Court, 1825-1861.* University Press of Kansas, $34.95 ISBN 978-0-7006-1666-4

Re-assessing the Supreme Court and Slavery

Anyone interested in the Civil War is, by default, interested in slavery. We all can recognize, as did Lincoln, that slavery "somehow was the cause" of the war, even if we disagree as to precisely how. For their part, constitutional historians over the past thirty years have labored to demonstrate just how vital was slavery to the antebellum constitutional order and thus how responsible for the war. Most prominently, William Wiecek and Paul Finkelman have argued that the proslavery nature of the Constitution's compromises with slavery gave rise to a federal government dominated by slaveholders. This dominance stretched to the Supreme Court, where southern and doughface northern justices consistently ruled in favor of slaveholders. Law, no less than politics and Constitution, was the handmaiden of slavery in America.

In his book *Slavery and the Supreme Court*, Earl Maltz terms this the "neoabolitionist" thesis, because it follows some of the interpretive guidelines laid down by radical abolitionists Wendell Phillips and William Lloyd Garrison in the 1840s. It is also, by almost any measure, utterly dominant today in the academy. Yet Earl Maltz sharply disputes it. In this highly readable, useful, and bound-to-be controversial book, Maltz makes the case for a more nuanced interpretation of the Supreme Court's opinions regarding slavery and the Constitution, one that stresses the Court's moderation and obeisance to legal principles while still explaining how such a Court could produce the highly political and sectional ruling that it did in *Dred Scott v. Sanford* (1857).

Although one can learn much about legal doctrine in this book, it is nonetheless not about abstracted legal doctrine. Maltz contextualizes the Supreme Court's jurisprudence in two ways. Throughout each chapter, he

discusses the political context of Supreme Court decisions. He also gives a lucid description of the legal structure within which slavery existed. As such, Maltz begins with the Marshall Court's federalist jurisprudence. Quite famously, Marshall's constitutional nationalism, embodied in decisions such as *McCulloch v. Maryland* (1817) and *Gibbons v Ogden* (1824), had rankled states' rights advocates, who believed that the (then) discredited notions of Alexander Hamilton's federalists were prevailing in the Supreme Court. Maltz downplays this conflict, focusing instead on the Court's softening position towards the end of Marshall's tenure.

Few would dispute Maltz so far. It is his characterization of the period between 1825 and 1842 as one of accommodation on the slavery question that cuts against the grain of contemporary scholarship. Legal history luminaries Barbara Holden-Smith, William Wiecek, and Paul Finkelman have all held that the Court's jurisprudence was proslavery. For evidence, they have focused on the Court's most prominent decision concerning slavery in this period, *Prigg v. Pennsylvania* (1842), which upheld the Fugitive Slave Act of 1793 and struck down Pensylvania's personal liberty law. Against this interpretation, Maltz makes a case for the Court's overall moderation. For instance, in *The Amistad* (1841), the Court's southern wing followed settled principles of law to arrive at an antislavery result. In *Groves v. Slaughter* (1841), the justices consciously avoided the issue of congressional control over the interstate slave trade, thus soothing conflict in what might otherwise have been a stormy case. Regarding *Prigg*, Maltz argues that Joseph Story's opinion of the court was a conscious use of legal principles to forge a path between diverging justices who would use the case to advance sectional agendas. Read this way, *Prigg v. Pennsylvania* was an accommodation in-and-of-itself at the same time that it upheld the spirit of constitutional compromises over slavery.

Despite rising sectional tensions, Maltz contends that the spirit of accommodation held for at least another ten years. The Supreme Court would revisit the problem of fugitive slaves in two more cases, and in both, the Court upheld *Prigg*. In a third case, *Strader v. Graham* (1851), the Supreme Court held that a slave whose owner had voluntarily taken him to free soil was not free if the slave returned voluntarily to his home state. The case would have been a somewhat unremarkable deployment of the principle that status was determined locally (i.e., by the states themselves), except that Chief Justice Roger B. Taney gratuitously attacked the Northwest Ordinance as potentially running afoul of the United States Constitution. While characterizing this decision as largely

moderate in import, Maltz recognizes that Taney's dictum was a shot across the bow of northerners sensitive to the slavery issue. Many interpreted it as a signal that the Supreme Court was preparing to wade into the territorial issues that had plagued the country since the Mexican-American War of 1846.

The territorial issue that mattered most was whether Congress could ban slavery in U.S. territory. Congress had long done so, but almost always by prohibiting slavery in one territory while permitting it in another, most famously in the Missouri Compromise. The Compromise of 1850 had likewise opened up New Mexico territory to the principle of popular sovereignty (the principle that the inhabitants of a territory could have an up-or-down vote as to whether to permit slavery in their midst), while admitting the whole of California as a free state. These compromises had held the peace, to a certain degree, but when Congress repealed the Missouri Compromise and replaced it with the Kansas-Nebraska Act in 1854, sectionalism permanently took hold of American politics.

It took hold of the Supreme Court as well, and Maltz highlights this connection. Although the accommodationist line would hold on the subject of fugitive slaves, the Court ultimately embraced the territorial question wholeheartedly in *Dred Scott v. Sanford*. Maltz's analysis of *Dred Scott* is sophisticated and readable at the same time, and this itself is no small feat. (In)famously, Taney held the Missouri Compromise unconstitutional because it violated the Fifth Amendment (to wit, that slaveholders were unconstitutionally deprived of their property by a law that prohibited slavery north of the 36 30 line). Along the way, Taney also argued that the descendants of slaves could not be considered citizens of the United States, and these two holdings drew considerable fire at the time, notably from Justice Benjamin Robbins Curtis, who dissented forcefully. Maltz characterizes both justices as advancing sectional (and political) interpretations, essentially abandoning any attempt to find an acceptable consensus among the justices.

This, rather than application of the correct legal doctrine, was the Court's failure according to Maltz. While he defends the position reached by Roger B. Taney as credible within the bounds of antebellum jurisprudence, he attacks the Court for overreaching. There were limits to the Court's power, and its failure to recognize these limits put it in an untenable position. Faced with an unmistakably proslavery opinion, many Northerners simply rejected it, arguing that the power to prevent slavery in the territories belonged to Congress to

decide, and not to the Supreme Court.

Maltz's refutation of what he terms the neoabolitionist position will not convince everyone. I suspect that those scholars who disagree with Maltz will reject his accommodationist interpretation of the Supreme Court slavery cases on the grounds that it only proves just how proslavery was the actual Constitution. But this is a weak criticism, if only because it neglects the rich political context of constitutional law that Maltz narrates. The Supreme Court was not an isolated institution. It met in the basement of the House of Representatives, and while the justices heard legal arguments, they were doubtless aware of how volatile were the constitutional issues being debated in the chamber above it. Maltz is correct to draw our attention away from the abstract constitutional issues to the nuance that accompanied the transformation of the Supreme Court from an institution that practiced self-restraint and sought accommodation to one that took a hard line and invited controversy. And those who take issue with him should do so on these terms. *H. Robert Baker is an assistant professor of history at Georgia State University. He is the author of* The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War *(Ohio University Press, 2006) and is currently working on a book about the Supreme Court case of* Prigg v. Pennsylvania.