and respected, we will also recognize that judges cannot simply will themselves to pursue only good law. As Graber suggests, we might think about how to channel judges' basic motivations in ways that foster the kind of judging we prefer. In any event, evaluation of judges' behavior will be most meaningful if it starts with a realistic conception of the bases for their choices.

Dred Scott and the Problem of Constitutional Evil.

By Mark A. Graber. New York: Cambridge University Press, 2006. 276p. $40.00.
DOI: 10.1017/S1537592707071046

— Lawrence Baum, *Ohio State University*

Scott v. Sandford (1857), the *Dred Scott* decision, is the consensus choice as the worst decision in the Supreme Court's history. Legal scholar David Currie summarized the conventional view: *Dred Scott* was "bad law," "bad policy," and "bad judicial politics" (cited in *Judges,* p. 15). In this conventional view, Chief Justice Roger Taney's opinion for the Court misinterpreted the Constitution, and it took the morally indefensible position of disallowing citizenship and the rights of citizens for slaves and their descendants. The decision was also a political blunder: The Court intervened in the slavery issue in an effort to resolve it and prevent war, but instead inflamed passions and made war more likely.

Mark Graber quotes Currie's judgment in *Dred Scott and the Problem of Constitutional Evil,* but he questions the conventional view. Graber is a provocative scholar, and in this book he takes some very provocative positions. Evil as slavery was, he argues that the *Dred Scott* decision was not as clearly mistaken as most scholars think. And before the book is over, he has asked readers to consider whether a vote for the racist also-ran John Bell in the 1860 presidential election might have been preferable to a vote for the sainted Abraham Lincoln.

Graber's scholarship reflects the perspective of historical institutionalism as applied to law and courts. This book is written most directly for constitutional theorists and students of political development. My own perspective on the courts and my substantive interests are quite different from Graber's, and scholars whose work is closer to his are better qualified to evaluate the empirical and normative claims that he makes here. But the distance between Graber's concerns and my own allows me to consider the relevance of his book for scholars who are not part of his primary audience.

More than anything else, I want to emphasize that relevance: This book merits the attention of political scientists with a wide range of substantive interests and theoretical orientations. Graber writes about *Dred Scott,* slavery, and the Civil War, important enough in themselves. But he also uses this episode in American constitutional history to raise broad questions about law, politics, and public policy, and a brief review can convey only a small part of what he contributes to our thinking about those issues.

"The problem of constitutional evil," Graber writes, "concerns the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil" (p. 1). The evil of slavery was woven into the Constitution that the Supreme Court interpreted in *Scott v. Sandford.* Graber asks to what extent people in this and other situations should accept evil as the price of creating and maintaining political communities.

The author begins his analysis of *Dred Scott* by assessing it as an interpretation of the Constitution. He concludes that by any theory of interpretation, the Court's decision was as defensible as the position of the justices who dissented. He goes on to assess the decision in other terms. His analysis of constitutional politics emphasizes what he sees as the intent of the Framers to force bisectional negotiation over slavery by giving both the North and the South an effective veto in national government. In his analysis of constitutional authority, Graber argues that the Constitution can be seen as a relational contract in which the parties work out compromises over time.

Graber's ultimate argument is practical or consequentialist. This argument is most fully developed in the final chapter on the 1860 election. The choice between Lincoln and Bell is like other choices "between candidates committed to pursuing constitutional justice and candidates committed to preserving the constitutional peace" (p. 241). The pursuit of justice may exact an enormous price: The Civil War produced massive carnage, and in the author's assessment, it was hardly certain that the North would win and that Lincoln's choice would end slavery rather than entrenching it. Here, he generalizes far beyond *Dred Scott.* In other situations as well, he argues, it might be preferable to accommodate what we consider to be evils in the short run as the price of peace or even political civility, and accommodation ultimately may be the best means to eliminate those evils.

The book is an impressive work of scholarship. Graber supports his analysis of *Dred Scott* and the controversy over slavery with evidence from a wide array of primary and secondary sources, and he musters that evidence very effectively in making incisive arguments. As a result, he is likely to convince readers that a proper assessment of *Dred Scott* is more complicated than the conventional view has it. And even if readers continue to cast their retrospective votes for Lincoln, they may see the choices in the 1860 election in a different light. More broadly, the author's argument shows the need to rethink other choices that voters and political leaders have faced, and continue to face, in conflicts over constitutional values. He makes a strong case that we should wrestle with the question he raises about how much we should accommodate constitutional evil.

Graber does leave decision makers with a daunting task. If voters and leaders want to follow his lead, they must calculate the consequences of their choices for the state of the political system. These calculations are especially difficult for judges, because the effects of their choices are so heavily contingent on the responses of other policymakers. That difficulty merits some consideration.

In the study of judicial behavior within political science, the dominant conception of the Supreme Court was long one in which justices simply vote for what they see as good policy. In the past 15 years, that conception has largely been supplanted by one in which justices act strategically to advance their preferred policies. Those strategic justices take into account how the responses of other people to their choices will affect collective outcomes within and beyond the Court. Lurking beneath the surface of this conception is a normative premise: A policy-oriented justice is assumed to be strategic because nonstrategic behavior would be pointless, even irrational. From this perspective it would have been a mistake for antislavery justices in 1857 to vote reflexively in favor of Dred Scott's freedom. Rather, they should have calculated which position would do the most to bring about the elimination of slavery. Graber also (if implicitly) asks justices to think strategically, but with a somewhat different object: They should take into account the consequences of their prospective choices for the political system as a whole.

Such calculations are complicated. Even predictions about the short-term effects of judicial choices can be quite uncertain. A justice would find it far more difficult to predict the long-term consequences of a prospective decision on a contentious national issue. In the long run, did *Roe v. Wade* advance the cause of those who favor legalized abortion? Should the Court have demanded immediate school desegregation rather than "all deliberate speed"? A justice who wanted to decide *Roe* or the second phase of *Brown v. Board of Education* on the basis of the answers to those questions could not make confident judgments about them.

The task that a strategic justice faced in *Scott v. Sandford* was even more difficult. It appears that at least some justices in the majority did act strategically in an effort to defuse the controversy over slavery, but their efforts turned out to be unsuccessful and perhaps counterproductive. Nor are the effects of other possible decisions in *Dred Scott* at all clear. Under the circumstances, a justice who recognized the complex causal chain from decision to consequences in *Dred Scott* might have chosen to ignore consequences altogether, on the ground that any choice based on strategic considerations was as likely to cause harm as it was to produce a good result. From this perspective, it could be argued, one element of the conventional view was right: When the effects of the Court's possible actions were so uncertain, the best course for an antislavery justice might have been simply to take an antislavery position.

Graber's message is not just to Supreme Court justices, but officials in the other branches can also make serious miscalculations about the consequences of their choices. This reality should be taken into account, but it does not detract from the force of the author's argument about the considerations that decision makers should take into account. Voters and policymakers must make choices, and Graber introduces a needed complication into our thinking about some important prospective and retrospective choices. The dilemma that he poses about accommodation of constitutional evil remains relevant today, and its relevance does not depend on whether we agree with his critique of the conventional view of *Scott v. Sandford.* Both those who make decisions about constitutional issues and scholars who evaluate those decisions can learn a good deal from this extraordinary book.

Response to Lawrence Baum's review of *Dred Scott and the Problem of Constitutional Evil*

DOI: 10.1017/S1537592707071058

— Mark Graber

I am grateful to Professor Baum for his very generous review of *Dred Scott and the Problem of Constitutional Evil.* I am also grateful that Baum in his review and his response to mine highlights the normative significance of his research on judicial audiences. *Dred Scott v. Sanford* may have been wrongly decided, Baum suggests, because antislavery justices, not being able to predict the actual impact of their decision, should simply have freed Dred Scott as a matter of simple justice. In fact, all five southern justices in *Dred Scott v. Sanford* did simple justice by their light. More important, however, Baum is now self-consciously exploring central questions of American constitutionalism.

Questions concerning how governing institutions may be structured to achieve desired public purposes have animated political science scholarship since the "new science of politics" championed by *The Federalist Papers.* Madison famously insisted that well-designed constitutions provide officeholders with the incentives necessary to foster rights protection and the pursuit of public goods. Whether constitutional arrangements have functioned as the framers anticipated has inspired scholars as diverse as John C. Calhoun and Robert Dahl. Baum's work belongs in this tradition. His study demonstrates that Supreme Court justices at present lack the incentives to pursue aggressively what they believe is good law or what they believe is good policy. His emphasis on the judicial need for public approval, in fact, is quite similar to the framing recognition of fame and popularity as spurs to political action. Although ostensibly located in an entirely different scholarly tradition, *Dred Scott v. Sanford* highlights similar problems with constitutional institutions as originally designed. A constitutional system that staffed the national government with officials elected entirely by local constituencies, Part II of