

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*

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— 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. Sandford* 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. Sandford* 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. Sandford* 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

that work detailed, fostered political extremism rather than consensus solutions to political controversies.

Political science and public law at present must also confront institutional incentives that foster separatism rather than engagement with diverse fields and perspectives. Junior scholars interested in refereed publications and promotion are best advised to appeal to the narrow audience of potential reviewers. Martin Shapiro (“Political Jurisprudence, Public Law, and Post-Consequentialist Ethics: Comment on Professor Barber and Smith,” *Studies in American Political Development* 3(1) [1989]: 88–102) aptly summarized the professional obstacles to constitutionalist research when he noted “the danger that the political scientist who works on forestry will be considered a wonderful political scientist by foresters and a wonderful forester by political scientists” (p. 96). Given that we all want to be considered wonderful political scientists by political scientists, the temptation is to stick with political science, even if that means no one in either political science or forestry studies the politics of for-

estry. Shapiro’s analysis also encourages narrowing focus. Political scientists, after all, who do empirical analysis of the Supreme Court of Maine during the Gilded Age want to be considered wonderful empirical analysts of the Supreme Court of Maine during the Gilded Age by those who do empirical analysis of the Supreme Court of Maine during the Gilded Age. The consequence of these incentive structures may be an academic future structured by field and disciplinary divisions between academic Eloi, whose theories lack empirical foundations, and academic Morlocks, whose empirical studies inform no theoretical debate. As happened in H. G. Wells’s *The Time Machine*, the stronger group will prey on the weaker, not realizing their mutual dependence. Political scientists and members of the public law field cannot escape this fate by adjusting the number of place settings at the separate tables we increasingly occupy. Rather, as encouraged by the book review editor of *Perspectives*, we need to change our dinner partners more often.