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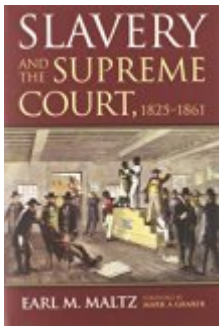

Earl M. Maltz. *Slavery and the Supreme Court, 1825-1861.* Lawrence: University Press of Kansas, 2009. 362 pp. $34.95, cloth, ISBN 978-0-7006-1666-4.

Reviewed by Helen Knowles

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Commissioned by Christopher R. Waldrep (San Francisco State University)

In 1839, writing in the *Philanthropist*, the antislavery newspaper that he edited, Gamaliel Bailey opined that the "political leaders in the free states, be taught to look at home and consult the claims of liberty, not the demands of slavery."[1] In 1847, in a work in which he expressed his complete opposition to any attempts to interpret the U.S. Constitution as anything other than a "covenant with death, and an agreement with hell" (the standard Garrisonian label for the document), Wendell Phillips wrote of the "ugly reality" that was the judiciary's "pro-slavery" readings of the Constitution.[2] We frequently think of the 1857 decision in *Dred Scott* v. *Sandford* as epitomizing the "constitutional evil" (to use Mark A. Graber's term from his *Dred Scott and the Problem of Constitutional Evil* [2006]) of the U.S. Supreme Court's slavery cases. In the pages of *Slavery and the Supreme Court*, Earl M. Maltz, professor of law at Rutgers University-Camden, reminds us of the other, oftentimes less famous but equally problematic slavery-related decisions reached by the members of the nation's highest court. These are decisions with which neither Bailey nor Phillips, both devoted abolitionists, were happy, because they made the "ugly reality" clear. All too often the "claims of liberty" succumbed to "demands of slavery."

Maltz has made a valiant effort to accomplish a difficult task--namely, to write a manageable, one-volume treatment of these Supreme Court decisions, a treatment that seeks to explain, analyze, and interpret not only the complex legal issues raised by the cases, but also the political thickets within which the justices worked. Ultimately, though, this reader was left with one fundamental question about the finished product--for whom was it written?

The book contains a high number of chapters (approximately three hundred pages split between twenty-seven chapters). Several of these are no more than a few pages long. This creates the impression (whether misleading or not) that Maltz was ultimately far more interested in educating the reader about some of the "big" deci-

sions at the expense of those that have, ironically, received less scholarly treatment. This is unfortunate because it has the effect of accentuating the fact that the book does not cover any new territory. Maltz has drawn heavily on secondary sources, many of which are already classic treatments of the politics and law of the time period or detailed studies of specific cases. For those who are familiar with the literature about the Supreme Court and slavery, ***Slavery and the Supreme Court*** will be of limited use.

This is not to say, however, that Maltz's book does not contain any refreshing elements. After all, it explicitly rejects the currently dominant academic approach to analyses of slavery-related jurisprudence (what Maltz calls the "neoabolitionist perspective"). Most prominently associated with the writings of Paul Finkelman, this perspective places great emphasis on the pro-slavery nature of the Constitution.[3] The outcomes of the cases discussed by Maltz are evidence of this nature (upon this point, even the more "radical" abolitionists [such as Lysander Spooner] who held firm to the belief that slavery was unconstitutional would agree, because their arguments were primarily normative--hence the criticism, by Phillips and others, that they were ignoring the "ugly reality" in favor of more utopian, natural rights-based theories).[4] Consequently, the "neoabolitionists" make a very valid point when they produce analyses of the Constitution, and court decisions interpreting that document, that highlight the shameful moral chasm separating (for example) the theoretical "blessings of liberty" of which the preamble speaks, and decisions such as ***Prigg*** v. ***Pennsylvania*** (1842) and ***Dred Scott***.

Maltz encourages us to look beyond the "neoabolitionist perspective," because it holds the justices to an unrealistically high, aspirational, and antislavery standard. Adopting this perspective inevitably leads to the conclusion that a pro-slavery decision was just that, pro-slavery. It is, in Maltz's words, an approach that "vastly oversimplified the complexities of the issues facing the Court in the slavery cases." Continuing, he says: "As a matter of political and constitutional morality, radical antislavery theory ignored the fact that the Southern states had joined the Union on the implicit understanding that they would be equal partners with their Northern counterparts, and that Northerners would not work to undermine the basic institutions of Southern society" (p. xix). While Maltz makes a valid point about the susceptibility of some of the "neoabolitionists" to a charge of making oversimplified arguments, it is important to note that not ***all*** members of this group can be accused of this analytical weakness. To be fair, Maltz does not say that there is only one type of "neoabolitionist"; however, the above quoted passage might leave the reader with this impression, and also cause some confusion. For example, the passage is preceded by references to the works of Finkelman and the late Don Fehrenbacher. By any reasonable frame of reference, neither Finkelman nor Fehrenbacher should be placed in the same category as those abolitionists (who wrote primarily in the 1840s and 1850s) that we would normally label as "radical antislavery theorists."

There are, of course, a number of audiences that might well benefit from Maltz's volume, and for the same reasons that its appeal to law and slavery scholars might be quite limited. For example, those in search of material to assign in relevant history and politics courses might welcome the publication of a single-volume discussion of the Supreme Court's slavery cases. Additionally, one can easily imagine classroom debates (undergraduate and graduate) that would be enhanced by a challenge to the prevailing scholarly approaches. Unfortunately, the classroom utility of ***Slavery and the Supreme Court*** is likely to be limited. Maltz has made a concerted, and sometimes successful, effort to situate his legal analysis of the Supreme Court's decisions within the broader historical and political contexts. However, much of

the book is devoted to extensive discussions of legal doctrine, and such works generally only succeed in the undergraduate classroom if they adequately define and explain legal complexities (arguments and terminology) using language accessible to the average student. Sadly, many undergraduates will likely find several aspects of Maltz's doctrinal analysis unnecessarily confusing.

For example, in chapter 6 we are told about the "dormant Commerce Clause" (p. 71). We are not, however, told what it is. Specialists in the field will understand this term, but many of their students will not. To be sure, classroom discussions provide their professors with opportunities to explain such terms, but the educational value to the student will inevitably diminish if he or she struggles to overcome terminology frustrations in order to understand the author's arguments. What about the index? Unfortunately, the reader who looks to the index for clarification or assistance will be disappointed because the first reference is to the "Dormant Commerce Clause" (note the use of the uppercase "D" in "Dormant") on page 82, at the very end of chapter 6. Similarly, we learn that *Groves* v. *Slaughter* (1841) "began as a prosaic diversity action," and that in *Jack* v. *Martin* (1834) the fugitive slave Jack sought "to obtain a writ of *de homine replegiando*--personal replevin" (pp. 74, 91). Maltz does not, however, translate these terms into plain English. These might seem like trivial complaints; yet, when pondering the intended audience(s) for this book, such observations become very important.

I do not wish, however, to finish this review where I started--with a critical inquiry about the readers for whom Maltz believed he was writing. Rather, I wish to offer one observation--more cautionary than anything else--that came to mind when I read chapter 13, in which Maltz provides us with an interesting commentary about the roles that Salmon P. Chase and William H. Seward played in the litigation that resulted in the U.S. Supreme Court's 1847 decision in *Jones* v. *Van Zandt*. That Chase will be lionized in this chapter is evident from the first paragraph: "In the late 1840s and early 1850s, antislavery Northerners continued to mount constitutional challenges to the statutes that were designed to facilitate the recovery of fugitive slaves. The legal theories on which they relied were developed largely by Salmon P. Chase of Ohio, a Democrat who was one of the most prominent leaders of the radical wing of the antislavery movement. Chase's efforts on behalf of escaped slaves and those who aided them had earned him the nickname 'Attorney General of Fugitive Slaves'" (p. 155). To be sure, the legal briefs that Chase prepared for *Van Zandt* (note that he did not actually argue the case when it reached the Supreme Court) were widely circulated within the antislavery community. And yes, Chase's legal views were highly regarded. However, when one compares his constitutional analyses to the other prominent theories of interpretation that legal abolitionists were circulating at this time, it is problematic to label them as "radical." Of course, "radical" is a comparative term, and when laid next to some of the most "conservative" antislavery constitutionalism writings, Chase's *Van Zandt* briefs do look "radical." However, Maltz does not tell us who he had in mind when he crafted the aforementioned description of Chase.Although the arguments to support it could have been developed in more detail, the most important thing about the U.S. Supreme Court that Maltz wishes us to take away from his book appears (at least, from the perspective of its conclusion) to be that Alexander Hamilton was correct--the judiciary is the "least dangerous" branch of the government. For all the damaging (human, political, legal, and social) consequences of the justices' decisions about slavery, the true meaning and import of those decisions "was ultimately determined by the actions taken by the other political institutions" (p. 302) wielding the power of "either the sword or the purse" (*Federalist* 78).

To conclude my impressions of ***Slavery and the Supreme Court***, I will turn to Sherlock Holmes. The fictional detective was correct when he observed: "The law is what we live with. Justice is sometimes harder to achieve."[5] In writing this book, Professor Maltz sought to impart the wisdom of this quotation; the result leads me to conclude that he embarked on a scholarly quest that was, itself, very "hard to achieve."

Notes

[1]. Gamaliel Bailey, quoted in Stanley Harrold, ***Gamaliel Bailey and Antislavery Union*** (Kent: Kent State University Press, 1986), 30.

[2]. Wendell Phillips, ***Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery: Reprinted from The Anti-Slavery Standard, With Additions*** (1847; repr., New York: Arno Press and The New York Times 1969), 3.

[3]. For example, see Paul Finkelman, "Affirmative Action for the Master Class: The Creation of the Proslavery Constitution," ***Akron Law Review*** 32 (1999): 423-470; and Paul Finkelman, ***Slavery and the Founders: Race and Liberty in the Age of Jefferson***, 2nd ed. (Armonk: M. E. Sharpe, 2001).

[4]. For analysis of Spooner's legal theories, and the dialogue in which he engaged with Phillips, see Helen J. Knowles, "The Constitution and Slavery: A Special Relationship," ***Slavery and Abolition*** 28 (2007): 309-328; and Helen J. Knowles, "Securing the 'Blessings of Liberty' for All: Lysander Spooner's Originalism," ***NYU Journal of Law & Liberty*** 5 (2010): 34-62.

[5]. Television adaptation of Arthur Conan Doyle, "The Red Circle," Granada Television, March 28, 1994.

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[3]. Mark A. Graber, ***Dred Scott and the Problem of Constitutional Evil*** (Cambridge: Cambridge University Press, 2006).

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