

The Supremacists

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From chapter thirteen, "How Judicial Supremacy Began"

The Constitution limits the jurisdiction of the federal courts to "cases and controversies." Federal courts are not supposed to give advisory opinions about issues that are not before them as a case or controversy. Dred Scott is a good example of the Court trying to decide issues that were not necessary to its decision, and the Court ended up causing gross injustices. Abraham Lincoln refused to accept that the Supreme Court could set public policy, and he endured much criticism for attacking the Dred Scott decision. But Lincoln was absolutely correct in identifying not only the intrinsic wrongness of the decision, but also its terrible consequences in upsetting our form of government.

In his First Inaugural Address (March 4, 1861), Lincoln admitted that the Supreme Court decision was personally binding on plaintiff Dred Scott, but Lincoln expressed the hope that its "evil effect" would be "limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases." In other words, Lincoln accepted judicial review as binding in the case, but he rejected judicial supremacy—the notion that the Supreme Court was supreme in creating new laws for the nation—because that would abolish self-government and submit us to the rule of judges. Lincoln identified the evil of judicial supremacy: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Lincoln defied the Dred Scott opinion by issuing passports to blacks and otherwise treating them as citizens, and he signed legislation to place limits on slavery in the Western territories. The Dred Scott decision exacerbated the conflict over efforts to restrict slavery and pushed our country toward a terrible war to correct the injustice wrought by the power-grabbing Supreme Court.

Unfortunately, later generations forgot the principles of our Constitution that Lincoln so clearly understood. It's time we listened to his wisdom.

Anyone who thinks that we need judicial supremacy to protect the rights of minorities must accept that judicial supremacists gave us the injustice of the Dred Scott decision. Anyone who thinks we need judicial supremacists to protect civil rights should remember George Washington's warning that we should permit the Constitution to be amended only in the way that the Constitution provides: "Let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."